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MONOGRAPH

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Recent Cases Emphasize Need for Reform with Section 19(f) Appeal Bonds in Workers' Compensation Judicial Reviews

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Michelle M. Wahl — *Swanson, Martin & Bell, LLP, Chicago*

Dede K. Zupanci — *HeplerBroom LLC, Edwardsville*

CONTRIBUTORS

Elizabeth K. Barton — *Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., Chicago*

Justin K. Beyer — *Seyfarth Shaw LLP, Chicago*

Brad A. Elward — *Heyl, Royster, Voelker & Allen, P.C., Peoria*

Ryan M. Frierott — *Goldgerg Segalla LLP, Chicago*

Brad W. Keller — *Heyl, Royster, Voelker & Allen, P.C., Peoria*

Troy Radunsky — *Busse, Busse & Grassé, P.C., Chicago*

Gregory J. Rastatter — *Heyl, Royster, Voelker & Allen, P.C., Peoria*

Colleen Tierney Scarola — *McVey & Parsky, LLC, Chicago*

Matthew S. Sims — *Cassiday Schade LLP, Chicago*

J. Matthew Thompson — *Heyl, Royster, Voelker & Allen, P.C., Peoria*

Joshua Turk — *Chicago-Kent College of Law, Chicago*

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Members and other readers are encouraged to submit manuscripts for possible publication in the *IDC Quarterly*, particularly articles of practical use to defense trial attorneys. Manuscripts must be in article form. A copy of the *IDC Quarterly* Stylistic Requirements is available upon request from ***The Illinois Association of Defense Trial Counsel*** office in Rochester, Illinois. No compensation is made for articles published, and no article will be considered that has been submitted simultaneously to another publication or published by any other publication. All articles submitted will be subjected to editing and become the property of the *IDC Quarterly*, unless special arrangements are made.

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THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL • P.O. Box 588 • Rochester, IL 62563-0588
800-232-0169 • 217-498-2649 • FAX 866-230-4415
idc@iadtc.org • www.iadtc.org

SANDRA J. WULF, CAE, IOM, *Executive Director*

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President's Message

Aleen Tiffany
Aleen R. Tiffany, P.C., Crystal Lake

"As we express our gratitude, we must never forget that the highest appreciation is not to utter words, but to live by them."

— John Fitgerald Kennedy

It is hard to imagine, but by the time you read this issue of the *IDC Quarterly* I will have reached the end of my term as president, preparing to join the ranks of IDC past presidents. How fast it has gone . . . but how blessed I have been. I began the year on a difficult personal note, and give heartfelt thanks to my many friends and colleagues in the IDC who helped me move forward in leading the organization through that beginning, into the IDC's 50th year, and through to our 50th anniversary gala celebration. I will never forget, and can never repay, the kindness and support that surrounded me at the Annual Meeting, just six days after I lost one of my biggest supporters, my best friend, and mentor. One of the things I have always appreciated about the IDC—what has truly made dedication to the organization and our causes worthwhile—is great personal relationships. Our commitments and friendships are forged through the hard professional work we have dedicated ourselves to. Indeed, never has that friendship and support been more appreciated, and utilized, than during this year, as I struggled to find balance between my personal and professional lives.

Through that struggle, I gained the greatest appreciation of my IDC friends and family, and realized that not one of us does, or has to, wade through this wonderful, often frustrating, world that is civil litigation on our own. Together, we share new and inventive ideas, develop fantastic plans, and accomplish great feats. It is ironic, perhaps, that during the year I led the organization, I learned the most about it, our members, and what makes us great. We exist and excel because of our dedication—to the cause of civil justice and to each other.

As I sat on a plane recently, returning from the IDC's second Ski & CLE event in Colorado, I reminisced about that dedication and achievement, and how in the 20 years I have been a member, the IDC has advanced while staying true to its core. One enduring thought that strikes me as I consider what we have accomplished, and what remains to be achieved, is that it only could be done together, by dedicated, caring, intelligent people. For it is true that "the achievements of an organization are the results of the combined efforts of each individual."[1] Only in that vein can the IDC's successes over the years be understood, or achieved.

Service in many different capacities over the years has given me the opportunity to be a part of, and witness to, that effort and dedication. Never, though, have I felt more directly involved in or touched by it than in the last 12 months as president. I simply cannot capture here all of the time, talent, and energy that contributes to that "collective effort." But, the following list of accomplishments that IDC volunteers have achieved this last year provides a glimpse:

- Developed and implemented a mentoring program with a reverse mentoring aspect;
- Formed the Construction Law Committee, which quickly made its contributions to the *IDC Quarterly* with a Construction Law column, and furthered the year's legal advances through the Spring Symposium;
- Formulated and advanced the Young Lawyers Training Task Force;
- Participated in and advanced the IDC's media coverage and recognition;
- Comprehensively analyzed and submitted IDC comments on proposed Federal Rules of Civil Practice (2014 Federal Civil Practice Rules Committee);
- Began the formulation and implementation of a joint bar task force to advance and improve the discovery process;
- Coordinated and attended the IDC's second destination CLE, in conjunction with the Texas Association of Defense Counsel (TADC), in Crested Butte, Colorado;
- Coordinated and co-sponsored with The John Marshall Law School and Southern Illinois University Law School "The Life of a First Year Associate"

presentation to 2nd and 3rd year law students;

- Celebrated the holidays with the Spirits of the Season fundraiser that benefited the Armed Forces arm of the Red Cross;
- Organized and hosted the IDC annual Legislative Reception in Springfield, Illinois;
- Wrote, organized, and published four volumes of the IDC's flagship publication, the *IDC Quarterly*;
- Analyzed, wrote, and published the IDC's third annual *Survey of Law*;
- Attended and participated in DRI's Leadership Conference in Chicago, Illinois;
- Attended and participated in the North Central Regional Meeting (DRI) in Fort Myers Beach, Florida;
- Coordinated and held eight other substantive seminars throughout the state;
- Rolled out the IDC's 50th anniversary logo; and
- Completed the long and wildly successful planning for the 50th Anniversary Gala Celebration at Trump Towers (to be held on June 28).

Quite a list it is! And IDC volunteers achieve similar feats every year. Such a list can never do justice to all of the time and talents dedicated by the individuals involved. But, it does help to illustrate what we have to be thankful for. It also shows why every civil defense attorney in the state of Illinois should be a member of this organization. Join one of these efforts and you will know why the IDC has been, and continues to be, great.

> One enduring thought that strikes me as I consider what we have accomplished, and what remains to be achieved, is that it only could be done together, by dedicated, caring, intelligent people.

On a personal level, each accomplishment on that list brings back remarkable memories of hard work, exchange of ideas, collegiality, successes, occasional failures, perseverance, laughter, surprise, appreciation, and friendship. And that list, and those memories, represent what I will miss most as I move on from my service as president: the opportunity to see, and to be inspired by, what I believe is the highest level of talent civil litigation has to offer.

So, thanks to all of you—both close and far—for a wonderful year, a phenomenal learning experience, and the great joy and pride I have felt leading an organization that is second to none in its people, professional expertise, dedication, and camaraderie. I have enjoyed the road we have paved together, and look forward to following wherever it may lead. I encourage all of you to get involved, and to stay involved, in any way that you can. The IDC's opportunities are many and varied; if you have not yet found a path to IDC leadership, call me—I'll make the introductions needed for you to do so!

It is with excitement that I move on to the next phase of my IDC career, and the further advancement of civil justice and the jury system. I already have begun talking with my fellow officers and the IDC Board of Directors about implementing a more formal and regular gathering of past IDC presidents. There is much left to do, and I look forward to gathering to do it. For now though, there is only one thing left to say . . .

Watch out, past presidents—here I come!

[1] Vincent J. Lombardi, Head Coach of the Green Bay Packers (1959–67) and Washington Redskins (1969–70).

Editor's Note

Geoffrey M. Waguespack
Butler Pappas Weihmuller Katz Craig LLP, Chicago

It has been my honor to see this excellent journal into its 24th volume and the IDC's 50th Anniversary. This issue, however, is my last at the helm of the journal, and I am thrilled to finish my term knowing that the great contributors and hard-working editors have provided you another superb piece of work.

This installment of the Monograph is authored by Justin Beyer of the IDC's Tort Law Committee. It provides a practitioner's guide to the complexities of the Consumer Product Safety Act and helps the practitioner to navigate the rules and regulations of the Consumer Product Safety Commission. It also provides suggestions for taking advantage of defenses available to corporations when products claims arise. In the same vein, the Product Liability column written by Brian Benoit and Ryan Frierott explores the extent to which social utility of a product should be considered as a unique factor when conducting a risk-utility analysis regarding a product.

Several submissions in this issue identify areas of the law that require further clarification by the courts or the legislature, and in some instances identify unintended consequences in the current state of the law. For example, the feature article submitted by Colleen Sarcola explores the split between the federal circuits on the issue of whether corporations may assert freedom of religion rights under the First Amendment's Free Exercise Clause, within the context of the requirements that employers provide insurance coverage for contraception methods under the Patient Protection and Affordable Care Act. The feature article authored by Brad Elward makes the case for an amendment to the Illinois Workers' Compensation Act that would allow employers and insurance carriers more leeway in providing appeal bonds to secure judicial review of trial court decisions.

The Workers' Compensation Report by Bradford Peterson considers whether the Illinois Appellate Court, Workers' Compensation Commission Division potentially has expanded the scope of liability for employers where the true cause of the injury was an idiopathic condition of the claimant and the employer has knowledge of that condition. The Health Law Update co-authored by Roger Clayton, Gregory Rastatter, and Matthew Thompson explains the final rules revising the Stark Law and Anti-Kickback Act electronic health records safe harbor provision and identifies how those rules create critical challenges and issues for donation arrangements. And, the Civil Practice column by Edward Grassé and Troy Radunsky expose why the current Illinois pattern jury instructions for construction negligence claims fail to instruct the jury properly as to the necessary level or degree of retained control that is required to impose either vicarious or direct liability under Section 414 of the Restatement (Second) Torts.

Other columns explore interesting and new developments in the law. The Commercial Law column by James Borcia highlights the case of *Jordan v. Jewel Food Stores*, in which Michael Jordan successfully argued that a statement congratulating him on his induction into the Basketball Hall of Fame was just a veiled advertisement for a food store, constituting commercial speech that improperly infringed upon his right of publicity. The Property Insurance Law column by Catherine Cooke discusses the case of *Peabody-Waterside Development, LLC v. Islands of Waterside, LLC*, which held valid a mechanics lien of a contractor that was also a member of the limited liability company against which the lien was asserted.

This issue also hosts several articles that provide great advice for practitioners. Elizabeth Barton's feature article provides sound tips to the young lawyer regarding court appearances, as she shares what she has learned from her interviews with judges and practitioners, as well as the lessons she's learned from her mentor and her personal experiences. The Evidence and Practice Tips column by Joeseph Feehan and Brad Keller illustrates a very concerning example of how the old adage so familiar to criminal defendants that "anything you say, can and will be used against you in a court of law" is just as applicable in civil cases. The Construction Law column by Lindsay Drecoll Brown and Matthew Sims likewise explains why practitioners must take a "use it or lose it" approach to express indemnification claims in the context of construction-related litigation. The Medical Malpractice Update by Dede Zupanci focuses on ensuring the admissibility of demonstrative evidence to aid an expert's testimony during trial. For the appellate lawyer, Scott Howie's Appellate Practice Corner explains how Illinois Supreme Court Rule 302 can

take your case straight to the Illinois Supreme Court.

The Amicus Committee Report submitted by Craig Unrath highlights the IDC's excellent work on behalf of the defense bar in the appellate courts in the cases of *Mackey v. DeFranco* and *Bruns v. City of Centralia*. Beth Bauer's Supreme Court Watch column provides a detailed explanation of the issues on appeal in the *Bruns* case, as well. Notably, this column is Beth's last as the regular columnist for the Supreme Court Watch. I am sure that I speak for both the IDC Board as well as the entire Editorial Board of the *IDC Quarterly* when I say how much Beth's column and hard work have been appreciated over the years. I congratulate her on taking over from me in the position of editor in chief.

In addition to Beth, I would like to thank the members of the Editorial Board for their support, hard-work, and tireless dedication to this publication: Brad Elward, Ed Aucoin, John Watson, and Tara Wiebusch Kuchar. Much gratitude is owed as well to the authors of the regular columns, feature articles, and Monographs, whose talents and thought-provoking work give meaning to this journal. I have been honored by the fact that the members of the IDC Board saw me worthy of being entrusted with the responsibility of seeing the *IDC Quarterly* through the 2013–2014 term.

I must admit that I smiled a bit when I saw that Jim Borcia's Commercial Law column covered a case involving Michael Jordan. It makes it all too easy for me to finish my last issue as editor in chief the way I began my first, with a quotation attributed to the basketball great: "I'm sorry to see it end." Ron Ritchel, The Ultimate Collection of Sports-Quotes, http://sport-quotes.blogse.nl/log/jordan-michael/.

Candidates for the Board of Directors 2014–2015

Six nominations have been received to fill the six vacancies of terms expiring in 2014. In accordance with the Bylaws of the Illinois Association of Defense Trial Counsel, the newly elected directors shall take office in June 2014.

Also according to the Bylaws, the Board of Directors shall be representative of all areas of the State of Illinois, and to this end, two Districts are declared: "Cook County" and for all remaining counties, "Statewide." No more than four of the six directors elected each year shall office within the same District, and regardless of votes cast, only the four persons receiving the most votes may be elected from within the District. No more than two voting members of the combined Executive Committee and Board of Directors shall be partners or associates or otherwise practice together in the same law firm.

The following nominations are listed in the order in which they were received. New directors will be announced at the Annual Meeting on May 30, 2014 (see page 70 for more information on the Annual Meeting and Awards Program).

Biography — Bradley C. Nahrstadt

Bradley C. Nahrstadt is a partner and one of the founding members of *Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.*, a 13-lawyer defense firm located in Chicago, Illinois. He focuses his practice on defending product liability, professional liability, premises liability, and commercial matters in state and federal courts around the country. Brad has been an active member of the Board of Directors of the IDC since 2008. He is a member of the American Law Institute, the Association of Defense Trial Attorneys, the Chicago-Lincoln Inn of Court, the Claims & Litigation Management Alliance, the Defense Research Institute, the Illinois State

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Bar Association, the International Association of Defense Counsel, and the Litigation Counsel of America. He is "AV Preeminent" peer review rated by Martindale-Hubbell, reflecting the highest peer recognition for ethical standards and legal ability.

Statement of Candidacy—Bradley C. Nahrstadt

Since I first became a member of the Board of Directors in 2008, I have dedicated myself to advancing the mission of the IDC. I firmly believe that if you are a defense attorney in this state, you MUST belong to the IDC. To that end, I have personally recruited almost two dozen lawyers to join this great organization, including every member of my firm. I have worked tirelessly to help develop programs designed to educate our members and the judiciary about issues facing the defense bar and have spoken at IDC seminars, written articles for committee newsletters, and authored or co-authored several Monographs. I have served on task forces and have spearheaded the efforts of the IDC to attract more and varied sponsors for the organization's programs and publications. As one of the authors of the 50 Year History of the IDC, I am intimately familiar with the problems and issues that have been of interest to the defense bar over the last half century. We have done much in that timeframe to level the playing field for our clients—there is much left to be done. I am asking for your support to allow me to continue my efforts, on behalf of the IDC, to improve the judicial system and the practice of law for all defense attorneys.

Biography—Patrick W. Stufflebeam

Patrick W. Stufflebeam is a partner at *HeplerBroom LLC* in its Edwardsville, Illinois (Madison County) office. He practices primarily in the areas of toxic tort, premises liability, product liability, and commercial law. Mr. Stufflebeam received his J.D. from Saint Louis University School of Law and his B.A. from Western Illinois University. He is admitted to the bars of Illinois, Missouri, and the United States District Court for the Southern District of Illinois. Mr. Stufflebeam is a Director of the Illinois Association of Defense Trial Counsel. He is also a member of the Madison County Bar Association and DRI.

Statement of Candidacy—Patrick W. Stufflebeam

I am seeking re-election to the Board of Directors of the Illinois Association of Defense Trial Counsel. As defense lawyers, we have many options when it comes to legal organizations. I have always been impressed to find that, no matter what practice area is at issue, the top lawyers in those areas seem to be members of the IDC. This expertise is easily identified in the caliber of speakers at our CLE events and authors in our *Quarterly*. The IDC serves my needs as an Illinois defense lawyer more than any other organization through its high-quality material and the camaraderie of its members. For these reasons, I am happy to have been involved in the IDC in one way or another since 2002 and why I desire to continue serving the IDC as a Director.

I have served on many committees within the IDC, including many events committees and the Tort Committee. I have had the privilege to serve as the Chair of the Fall Conference and Co-Chair of the Spring Symposium. I was also happy to host the IDC's Downstate CLE Series last year in Edwardsville. It is an honor to serve on the committee for the IDC's 50th Anniversary Gala.

Although a downstate lawyer, my practice throughout this state gives me the perspective to address concerns of defense lawyers throughout Illinois. I have been committed to dedicating the time necessary to travel to attend board meetings during my term.

One of the future goals I have for the IDC is continuing to educate our members, especially our younger members, of the incredible opportunities the IDC provides for professional development, writing, and networking.

I ask for your vote to continue my service as a Director of the IDC.

Biography—Nicole D. Milos

Nicole Milos is a partner at the Chicago firm of *Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC*. Her practice focuses on commercial litigation, product liability, professional liability, premises liability, construction litigation, employers' liability, breach of contract claims, insurance coverage claims, and civil appeals. Her practice includes representing product manufacturers and distributors in cases alleging design defects, fraud, and failure to warn theories of liability. She counsels clients in risk management avoidance techniques and has represented multiple parties in alternative dispute resolution proceedings, including mediations.

Nicole serves on the Board of Directors for the Illinois Association of Defense Trial Counsel (IDC). Nicole is the Managing Editor of the *IDC Survey of Law*. She is also the Chair of the Industry Relations Committee. Nicole serves on the IDC's Committee Structure Initiative (CSI) and is a member of the Tort Law Committee. Nicole was a member of the IDC Rule 213 Task Force. This Task Force was created to examine Rule 213 Simultaneous Expert Disclosure Pilot Program implemented in Cook County. Nicole drafted a Position Paper to summarize the programs and arguments in opposition to the implementation of the program. She is a former committee member of the IDC Young Lawyers Division. Ms. Milos previously served as a committee member and presenter for the Young Lawyers Seminar.

A graduate of John Marshall Law School (J.D., 2001) and Saint Mary's College, Notre Dame (B.S., 1998), Nicole is currently completing an L.L.M. degree in Information Technology and Privacy Law at the John Marshall Law School. She was admitted to the Illinois Bar in 2001 and is admitted to practice before the U.S. District Court, Northern District of Illinois, and the U.S. District Court, Northern District of Indiana.

Statement of Candidacy—Nicole D. Milos

I began my tenure with the IDC as a member of the Young Lawyers Division. Through my work with the Young Lawyers, I attended and hosted continuing legal education events, drafted articles for the *IDC Quarterly*, and planned the IDC Holiday Party. I have worked to increase the IDC's impact in the community by coordinating the Winter Clothing Drive, the Toy Drive, and the IDC's participation in the MS Walk. I served on the Planning Committee for the Young Lawyers Division Seminar in February 2010. I have offered continuing legal education classes on trial preparation and litigation tactics.

I have continued to work with the new committee chairs of the Young Lawyers Division. I worked with other IDC Board members as a part of the IDC Committee Structure Initiative Team. Through this experience, we examined the committee structure of the IDC and offered suggestions and initiatives to help improve the IDC's committee involvement. I have served as the managing editor of the *IDC Survey of Law* for three years. I have also maintained my membership in the Tort Law Committee.

The IDC offers its members an unmatched opportunity to enhance their legal career and benefit the legal community. It is important that the IDC increase its impact on the careers of young lawyers and focus on the novel issues raised through the legislature and legal decisions in Illinois. As a Board member, I would like to continue my work to increase membership and involvement within the IDC. My past experience with the IDC demonstrates my commitment to the organization and success in prior endeavors. I would appreciate the opportunity to continue my work with the IDC as a member of the Board.

Biography—William K. McVisk

William K. McVisk is a tier I shareholder of *Johnson & Bell, Ltd.*, in Chicago. He received his B.A. from University of Illinois in 1974 and his J.D., *cum laude*, from Northwestern University School of Law in 1977. Mr. McVisk joined Johnson & Bell in 1995, after being a partner at Peterson & Ross. Mr. McVisk concentrates his practice

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in insurance coverage litigation and medical malpractice defense. He is also General Counsel for the American Board of Medical Specialties.

Mr. McVisk has extensive experience as a defense lawyer. He has tried numerous cases, including medical malpractice cases and insurance coverage cases. He has also been an active participant in the IDC. He has been a member of the Board of Directors since 2008. He served as Chair of the Insurance Law Committee from 1999 to 2003, and is currently Co-Chair of the Legislative Committee. He was the Insurance Law columnist for the *IDC Quarterly* from 2004 to 2006, and Editor in Chief of the *IDC Quarterly* from 2009 to 2010. He has authored or co-authored six Monographs for the *IDC Quarterly*. Mr. McVisk was a moderator at the 2010 Spring Seminar, a panel moderator for the 2007 IDC/SOICA Construction Insurance Symposium, and has given presentations at several IDC symposia. As Chair of the Insurance Law Committee, he was responsible for planning the 2002 Seminar on Construction Defects and Insurance Litigation put on jointly by the IDC and the Insurance School of Chicago. As Co-Chair of the Legislative Committee he coordinated the IDC's efforts to oppose the Settlement Timing Act in 2013, and later authored an article on the implications of the Act for the *IDC Quarterly*.

Mr. McVisk was President of the Illinois Association of Healthcare Attorneys in 2002. He is also an active member of the DRI Insurance Law Committee. He is also a member of the Chicago Bar Association and serves on the Judicial Evaluation Committee.

Mr. McVisk is licensed to practice in Illinois and Indiana and is admitted to practice in the United States District Courts for the Northern and Central Districts of Illinois and the Northern and Southern Districts of Indiana, as well as the United States Courts of Appeal for the Seventh and Tenth Circuits.

Statement of Candidacy—William K. McVisk

It has been a privilege to serve as a member of the IDC Board of Directors during the past three years. During that time, the IDC has continued its strong tradition of offering first-rate seminars and publications, which have helped me and other defense lawyers to better represent their clients and to meet other defense lawyers.

The IDC has remained a strong voice for the defense bar, and I have helped to strengthen that voice. As Co-Chair of the Legislative Committee, I have drafted proposed legislation to submit to the Illinois General Assembly and have helped to lead the IDC's efforts to oppose legislation that would hurt defense lawyers or their clients or would make Illinois judicial procedure less fair. It is important for the IDC to continue these efforts and to work to develop a stronger voice in Springfield.

I also think it is important for the IDC to work to strengthen its educational programs for the defense bar. IDC members are among the best defense lawyers in Illinois, and can offer programs that will attract both lawyers and clients. The market for continuing education has become more competitive, however, so the IDC has to strive to make its programs more innovative and relevant to both defense lawyers and their clients. Current IDC leadership has done a great job in moving in this direction, and I will work to ensure that these efforts continue. I would also look for other opportunities to partner with other defense-oriented organizations, such as SOICA and the Insurance School of Chicago, to make the IDC's programs even more useful to the IDC's membership.

Biography—Joseph G. Feehan

Joseph G. Feehan is from Joliet and is a shareholder in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He earned an undergraduate degree in Business Administration from Illinois State University and his law degree from Northern Illinois University (*cum laude* 1988). Mr. Feehan has spent his entire legal career with *Heyl Royster* and concentrates his practice in all areas of civil litigation and insurance defense, including product liability, trucking/transportation, sexual torts, premises liability, and auto litigation.

In addition to his membership in the IDC, Mr. Feehan is a member of the Peoria County Bar Association, the Defense Research Institute, the Trucking Industry Defense Association, and the National Diocesan Attorneys Association. He is a past-president of the Abraham Lincoln Inn of the American Inn of Court and served as Chairman of the Peoria County Bar Association's Continuing Legal Education Committee from 2008 to 2010.

Mr. Feehan has been a member of the IDC for almost 25 years. He was Chairman of the Young Lawyers Division and has spoken at the Fall Seminar and Spring Seminar on various occasions. Mr. Feehan has authored the Evidence and Practice Tips Column for the *IDC Quarterly* since 2000 and served on the Editorial Board until becoming Editor in Chief in 2006–2007. He has been an active member of the IDC Board of Directors since June 2011. He lives in Peoria with his wife and five children.

Statement of Candidacy—Joseph G. Feehan

I am pleased to be a candidate for the IDC Board of Directors. My introduction to the IDC occurred in 1990 when I had the opportunity to attend the Rookie Seminar. I enjoyed the experience so much that I returned the following year simply to play a role as a witness. I then began to attend IDC seminars and events over the next few years and knew that I wanted to become more involved in this fine organization.

Like any professional organization, the IDC is only as strong as its membership. Over the last 25 years, I have had the opportunity to become increasingly involved in the IDC, which has resulted in the development of many personal friendships and business relationships. I have had the opportunity to meet and work with IDC members throughout the state and have always been impressed by the level of our membership's talent, expertise, and commitment to excellence. As a Board member the last three years, I had the opportunity to personally observe the diligence, creativity, and hard work utilized by the Board in addressing the challenges facing the IDC and our clients.

Over the last three years, I have enjoyed the opportunity to become active on various task forces and committees relating to the Board's goals and vision for the future of the IDC. I welcome the opportunity to remain serving on the Board so that I can participate as the IDC continues its efforts to level the playing field in our judicial system. If elected, I will be honored to continue serving as a member of the IDC Board of Directors.

Biography—Rossana Fernandez

Rossana Fernandez is a very experienced attorney with over 17 years of experience in a variety of areas of law including transportation, construction negligence, automobile, premises, and Federal Employers Liability Act (FELA). Ms. Fernandez is a native Spanish speaker, which has also served her well in representation of many clients.

Ms. Fernandez has served as primary trial counsel for many Fortune 500 Companies. Her extensive litigation experience includes 25 jury trials to verdict, several bench trials, arbitration hearings, and participation in alternative dispute resolution. Her trial experience has earned her a position as Chair Qualified Arbitrator for the Cook County Mandatory Arbitration program.

Ms. Fernandez is an active member of the community and volunteers her time with "Chicago Cares," assisting the growth of the local community; serves as a CPS volunteer speaker and guide for school children interested in a legal career; served as a mentor; and has served as judge for the Push Oratory competition.

Statement of Candidacy—Rossana Fernandez

I have been a member of the IDC for a number of years and am committed to continue the advancement of the organization. I believe that my high level of energy and creative ideas might bring a new perspective and energy to the organization in a different capacity. I have volunteered in the organization of seminars in the past and would like the opportunity to make a higher contribution to the organization.

I have the flexibility necessary to be able to volunteer my time and energy for the IDC and to organize and attend organizational functions. If selected, I would work actively with IDC members, and of course other Board Members, to continue the growth and reputation of the IDC in the courtroom and in the community.

Feature Article

Colleen Tierney Scarola*
McVey & Parsky, LLC, Chicago

Secular, For-Profit Corporations' Ability to Challenge the Constitutionality of the Contraception Mandate

In 2010, Congress passed the Patient Protection and Affordable Care Act ("Affordable Care Act"), 42 U.S.C. § 2000bb-1, which was meant to serve as healthcare reform legislation aimed to provide all Americans with insurance coverage. *Korte v. Sebelius*, 735 F.3d 654, 659 (7th Cir. 2013). The Affordable Care Act includes a provision requiring employers to provide coverage for contraception and sterilization procedures in their employee health care plans at no cost ("contraception mandate"). 45 C.F.R. § 147.130 (2012).

Since its passage, the Affordable Care Act has been the center of legal debate. This article discusses the five federal circuit cases that have received religious challenges to the contraception mandate by private corporation owners and the courts' decisions on extending certain constitutional rights to corporations.

Although certain "religious employers" could be exempted from complying with the contraception mandate, originally only purely religious employers, such as churches and religious orders groups qualified. Specifically, "religious employers" must have met the following criteria for exemption:

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a non-profit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended . . . .

45 C.F.R. § 147.130 (2012), quoted in *Korte*, 735 F.3d at 661. The definition excluded and made ineligible other religious organizations, faith based non-profits, and closely held for-profit businesses managed according to a religious mission or creed.

Consequently, numerous faith-based employers objected to the contraception mandate and their failure to qualify for the exemption. The United States Department of Health and Human Services ("HHS") responded by instituting a one-year "safe harbor" for certain non-profit, faith-based organizations. The definition of the term "religious employer" also was revised to encompass "an organization that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a), quoted in *Korte*, 735 F.3d at 662. Additionally, certain religiously-affiliated non-profits objecting on religious grounds may give notice to their insurance carrier, and the carrier will issue a separate policy with the mandated coverage. *Id.*

Because the revised definition and accommodation do not apply to for-profit organizations with religious objections to the mandate, numerous lawsuits have been initiated by business owners across the United States to challenge the constitutionality of the mandate. These business owners assert that requiring them to provide insurance coverage for certain contraception and sterilization methods violates their rights under the Religious Freedom of Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1.

RFRA was enacted by Congress in 2006 and prohibits the federal government from placing substantial burdens on

About the Author

Colleen Tierney Scarola is an associate at *McVey & Parsky, LLC*. Her practice focuses primarily on insurance coverage, insurance defense, and products liability litigation. Ms. Scarola frequently litigates at the national level, representing Fortune 100 companies and self-insured businesses throughout the country. In recognition of her professional achievements, Ms. Scarola was selected as a Super Lawyers Rising Star for 2011, 2013, and 2014—a designation given to only 2.5% of attorneys in Illinois each year. Ms. Scarola received her *Juris Doctor* from The John Marshall Law School in 2006. As the Vice-President of the Lawyer-to-Lawyer Mentoring Program at The John Marshall Law School, Ms. Scarola mentors new attorneys and coordinates the efforts of the attorneys participating in the program. Ms. Scarola also serves as an adjunct professor at The John Marshall Law School for Lawyering Skills II and Expert Learning.

* **Joshua Turk**, 2L at Chicago-Kent College of Law, contributed to the content of this article. Ms. Scarola gratefully acknowledges his contribution.

a "person's exercise of religion," unless it can demonstrate that applying the burden is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1. The origins of RFRA can be traced back to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888–90 (1990), where the U.S. Supreme Court "held that the First Amendment's Free Exercise Clause does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 418 (2006) (citing *Smith*, 494 U.S. at 888–90). As a result of *Smith*, laws that apply generally to society are constitutional even if they impose a burden upon a person's free exercise of religion. *Smith*, 494 U.S. at 885.

Since RFRA's enactment, the question has arisen as to whether corporations can assert RFRA claims, because RFRA prohibits the government from "substantially burden[ing] a *person's* exercise of religion" without specifying what constitutes "a person." 42 U.S.C. § 2000bb-1 (emphasis added). The starting point for the meaning of "person" is the Dictionary Act, which provides, "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations . . . as well as individuals." 1 U.S.C § 1.

Arguments have been advanced to make the Dictionary Act's definition of "person" inapplicable to RFRA, based on the premise that RFRA's "context indicates otherwise." *See* 1 U.S.C. § 1; 42 U.S.C. § 2000bb-1. "'Context' . . . means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts . . . ." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 199 (1993). RFRA's text appears devoid of any indication that the term "person" excludes corporations. 42 U.S.C. § 2000bb-1. Select congressional acts, however, have been identified to "indicate" that RFRA's definition of "person" excludes corporations, including the National Labor Relations Act, 29 U.S.C. §§ 151–169 (1935), the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000), and Title VII, 42 U.S.C. § 2000e, *et seq.* (1964). *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1130 (10th Cir. 2013).

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Five federal circuits have received religious challenges to the contraception mandate by private corporation owners, and each has approached the issue of applicability of the RFRA differently. In *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health & Human Services*, 724 F.3d 377, 388 (3d Cir. 2013), the U.S. Court of Appeals for the Third Circuit found it unnecessary to "decide whether . . . a corporation is a 'person' under the RFRA." In that case, a corporate employer and five of its owners appealed an order of the district court denying their motion for a preliminary injunction against compliance with the contraception mandate. *Conestoga Wood Specialties Corp.*, 724 F.3d at 380. The plaintiff corporation employed 950 people and was owned solely by a family that followed the Mennonite religion. *Id.* at 381. Pursuant to their religious beliefs, the plaintiffs alleged "that it is immoral and sinful for . . . [them] to intentionally participate in, pay for, facilitate, or otherwise support [contraceptive] drugs." *Id*. at 382 (citing Amend. Complaint ¶ 32). At the time of the litigation, the corporation was providing all contraceptives, as required by the mandate. *Id*.

The Third Circuit first considered whether a for-profit, secular corporation is able to engage in religious exercise under the Free Exercise Clause of the First Amendment and the RFRA. *Id.* at 381. The court rejected the plaintiffs' argument that the corporation was entitled to free exercise rights, stating that "corporations . . . do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." *Conestoga Wood Specialties Corp.*, 724 F.3d at 385 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291

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RFRA was enacted by Congress in 2006 and prohibits the federal government from placing substantial burdens on a "person's exercise of religion," unless it can demonstrate that applying the burden is the least restrictive means of furthering a compelling government interest.

(W.D. Okla. 2012)). The court reasoned that because "a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause . . . a for-profit, secular corporation cannot engage in the exercise of religion." *Id*. at 388. Thus, because the corporation "cannot exercise religion, it cannot assert a RFRA claim." *Id.*

The plaintiffs attempted to establish a connection between free speech rights of for-profit corporations and free exercise rights because the two clauses within the First Amendment establishing those rights are divided by a semi-colon only. *Id*. at 386. The court not only rejected that argument, but also noted that each clause requires a different test to analyze its applicability, and thus each clause is interpreted individually. *Id*. The plaintiffs also argued that the corporation was entitled to free exercise rights under the "passed through" theory. *Id*. The Ninth Circuit developed the "passed-through" theory in a case where a corporation sought "to invoke the Free Exercise Clause on its own behalf." *Conestoga Wood Specialties Corp.*, 724 F.3d at 386 (citing *E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988) (holding that the rights of the corporation's owners are imputed to the corporation, because the corporation is "the instrument through and by which . . . [its owners] express their religious beliefs")). The court rejected the theory, finding that it fails to consider certain corporate principles regarding the different obligations and rights of the entity itself and the shareholders. *Id*. at 387. Because the plaintiffs were not likely to succeed on their free exercise and RFRA claims, the Tenth Circuit affirmed the district court. *Id.* at 389.

The U.S. Court of Appeals for the Sixth Circuit in *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013), joined the Third Circuit in concluding that secular business entities are not protected by the First Amendment or by RFRA. The plaintiffs in that case were two for-profit, secular corporations owned and controlled by members of a family, all of whom were practicing Roman Catholics. *Autocam Corp.*, 730 F.3d at 620. They sought a preliminary injunction to avoid compliance with the contraception mandate. *Id*. The district court denied the relief. *Id.* On appeal, the Sixth Circuit agreed with the government that a corporation is not a "person" capable of "religious exercise" in the sense that RFRA intended. *Id.* at 625. In reaching that conclusion, the court scrutinized RFRA's context and found that Congress's express purpose in enacting RFRA was to restore Free Exercise Clause claims, which were fundamentally personal. *Id.* at 626. The court reasoned that including corporations as "persons," as suggested by the plaintiffs, would lead to significant expansion of the scope of free exercise rights, which Congress did not intend to do. *Autocam Corp.*, 730 F.3d at 626. Therefore, the court affirmed the district court's ruling without reaching the government's arguments that the mandate fails to impose a substantial burden on the businesses or that the mandate can be justified under RFRA's strict scrutiny test. *Id.* at 628.

The U.S. Court of Appeals for the Tenth Circuit reached a different conclusion in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), holding that for-profit corporations can assert RFRA claims. The owners of "two for-profit corporations" asserted claims in that case under the Free Exercise Clause and RFRA because they alleged that the mandate requiring them to provide certain contraceptive coverage to their employees violated their religious beliefs. *Id.* at 1124–25, 1135. The Green family owned "both companies as closely held family businesses and operate[d] them according to a set of Christian principles." *Id*. at 1120. They asserted that the mandate requiring them to provide coverage for the contraceptives to which they morally object burdened their own religious beliefs, and not that it burdened the personal choices of their employees regarding contraceptive use. *Id*. at 1141. Plaintiffs also raised the issue of the two penalty provisions that would be assessed if they fail to comply with the mandate. *Id*. at 1125. First, they could incur a $1.3 million fine for each day of non-compliance. This penalty would amount to $475 million for a year of non-compliance. Second, the plaintiffs could decide not to provide health insurance to their employees, which would cost them $26 million annually. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1125.

Despite the government's attempts to demonstrate that RFRA's context excludes

for-profit corporations, the Tenth Court adhered to the plain meaning of a "person" within RFRA to include both non-profit and for-profit corporations. *Id*. at 1130, 1132. Though the court acknowledged that Congress considered the First Amendment in enacting RFRA, that fact alone was insufficient to support such a delineation between corporation types. *Id*. at 1132.

The court next turned to the issue of Free Exercise rights, as applied to individuals and their related businesses or associations. *Id*. The Tenth Circuit stated that "the Supreme Court has settled that individuals have Free Exercise rights with respect to their for-profit businesses." *Id*. at 1134 (citing *United States v. Lee*, 455 U.S. 252 (1982)). The Tenth Circuit further stated that "individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights." Thus, the court found it logical that free exercise rights should also extend to for-profit corporations. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1135. The court believed that "sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit." *Id*. The Tenth Circuit, however, recognized that future complications could arise with for-profit corporations because, as the court stated, "a large publicly traded corporation [that] tries to assert religious rights under RFRA . . . . would certainly seem to raise difficult questions of how to determine the corporation's sincerity of belief." *Id.* at 1136–37.

The Tenth Circuit also rejected the government's argument that no substantial burden existed for the reason that "[a]n employee's decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer." *Id*. at 1137 (quoting Brief of Appellee at 13). The court found that a substantial burden was exerted upon the plaintiffs because they were forced to choose to either incur the extraordinary penalty costs of non-compliance or to comply and thereby "compromise their religious beliefs." *Id*. at 1141. The court refused to involve itself in the reasonableness of the plaintiffs' choices concerning which contraceptive methods violated their religious beliefs. *Id*.

Lastly, the Tenth Circuit determined that no compelling interest existed for the mandate. *Id.* at 1143. The government advanced two reasons to demonstrate that a compelling interest existed: public health and gender equality. *Id*. The Court found those reasons to be insufficient as the interests were broadly formulated and supported the applicability of government mandates generally. *Id*. (quoting *Gonzales v. O Centro Espirita Beneficiente*, 546 U.S. 418, 431 (2006)).

Likewise, the U.S. Court of Appeals for the D.C. Circuit in *Gilardi v. U.S. Department of Health & Human Services*, 733 F.3d 1208 (D.C. Cir. 2013), held that the contraception mandate substantially burdened the free exercise rights of the plaintiff company owners and remanded the case for further consideration. In that case, Roman Catholic owners of two closely held corporations filed suit asserting that the contraception mandate violated their rights under RFRA, the Free Exercise and Free Speech clauses of the First Amendment, and the Administrative Procedure Act, 5 U.S.C. § 551–559. *Gilardi*, 733 F.3d at 1210. The plaintiffs moved for a preliminary injunction, which was denied by the district court. *Id.* On appeal, the D.C. Circuit first addressed whether the plaintiffs could bring the challenge at all and specifically whether the corporations were capable of religious exercise under RFRA. The court found that there was no basis to conclude that a secular organization can exercise religion. *Id.* at 1212.

Turning to the merits of the RFRA claim, the government argued that any burden on the plaintiffs was too remote and attenuated and that such a burden arises only when an employee purchases a contraceptive or uses contraceptive services. *Id.* at 1217. The court disagreed, finding that the owners are "burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties." *Id.* Finally, the court concluded that the government did not present a compelling interest that was furthered by the least restrictive means. *Gilardi*, 733 F.3d at 1219. The government articulated several "interests," including "safeguarding the public health" to "protecting a woman's compelling interest in autonomy" and promoting gender equality, but failed to demonstrate a connection between those interests and the contraception mandate. *Id.* at 1220. The D.C. Circuit, therefore, held that the plaintiff owners were likely to succeed on the merits of their claim, reversing the district court and remanding for consideration of the other preliminary injunction factors. *Id.* 1224.

In 2013, the U.S. Court of Appeals for the Seventh Circuit weighed in on this issue in the case of *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013). In consolidated cases, the plaintiffs (business owners) appealed the district court's denial of a preliminary injunction against enforcement of the Affordable Care Act. The plaintiffs were two Roman Catholic families and their closely held businesses. These owners asserted that they operated their businesses in conformity with their faith-based convictions, including Catholic moral teaching regarding the sanctity

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of human life and the wrongfulness of abortion, abortifacient drugs, artificial contraception, and sterilization. *Korte*, 735 F.3d at 663–64. Both sets of plaintiffs alleged that the mandate violated their rights under RFRA, the Administrative Procedure Act, and the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment. *Id.* at 664. They moved for a preliminary injunction the day after filing suit, focusing primarily, though not exclusively, on their RFRA claims. *Id.*

In addressing the applicability of RFRA to for-profit corporations, the Seventh Circuit found that the government does accept that religious non-profit entities have religious-exercise rights under RFRA and the Free Exercise Clause. *Id.* at 674. As evidence, the court noted that the contraception mandate exempts a class of religious organizations (churches and their integrated auxiliaries), whether or not they operate in the corporate form. *Id.* (citing 45 C.F.R. § 147.131(a)). The Seventh Circuit, therefore, determined that the plaintiffs' corporations were "persons" within the meaning of RFRA and could assert a claim under RFRA. *Korte*, 735 F.3d at 682.

After making that determination, the court evaluated whether the contraception mandate substantially burdened the plaintiffs' exercise of religion. "Exercise of religion" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A), quoted in *Korte*, 735 F.3d at 682. A law, regulation, or other governmental command substantially burdens religious exercise if it "bears direct, primary, and fundamental responsibility for rendering [a] religious exercise . . . effectively impracticable." *Korte*, 735 F.3d at 682 (citing *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003)). The government asserted that the mandate's burden on religious exercise was insubstantial because an employee's decision to use her insurance coverage to purchase contraception or sterilization services "cannot be attributed to" the plaintiffs. *Id.* at 684. The court rejected that argument, finding that the federal government had placed enormous pressure on the plaintiffs to choose between the moral teachings of their church and saving their businesses. The court noted that the plaintiffs would be obligated to pay $100 per day per employee if they did not include coverage for contraception and sterilization in their employee healthcare plans. *Id.*

Once the plaintiffs established a prima facie case under RFRA, the burden shifted to the government to demonstrate that "the mandate is the least restrictive means of furthering [a] compelling governmental interest." *Id.* at 685 (citing 42 U.S.C. § 2000bb–1(b)). As in the Tenth Circuit case of *Hobby Lobby Stores, Inc.*, the government identified two interests: "public health" and "gender equality." *Id.* The government argued that the contraception mandate furthers those interests by reducing unintended pregnancies, achieving greater parity in healthcare costs, and promoting the autonomy of women both economically and in their reproductive capacities. *Id.* In rejecting this position, the court recognized that the aim of the contraception mandate—to broaden access to free contraception and sterilization so that women might achieve greater control over their reproductive health—is a legitimate governmental interest. *Korte*, 735 F.3d at 686. The court, however, concluded that the government had not satisfied its burden to show that this interest qualifies as an interest of surpassing importance. *Id.* For these reasons, the Seventh Circuit reversed and remanded the case with instructions to enter preliminary injunctions barring enforcement of the contraception mandate against the plaintiffs. *Id.* at 687.

It is important to note that, in these five cases, no challenge was made as to the sincerity of the plaintiffs' religious beliefs or to the theology behind the Roman Catholic, Christian, and Mennonite precepts on contraception. RFRA evaluates the coercive effect of the governmental pressure on the adherent's religious practice and avoids deciding religious questions. *Id.* at 684. Accordingly, even if an issue of sincerity was raised, it would be an inappropriate consideration under RFRA.

The divide in the federal circuits with three ruling in favor of the for-profit organizations suggests that corporations soon may be entitled to the same religious free exercise rights that individuals enjoy under RFRA and the U.S. Constitution. The U.S. Supreme Court has granted certiorari in two of the cases, consolidating *Sebelius v. Hobby Lobby Stores*, 134 S. Ct. 678 (2013), and *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health & Human Services*, 134 S. Ct. 678 (2013). Oral arguments were held on March 25, 2014, and a decision is expected early summer 2014.

Supreme Court Watch

Beth A. Bauer
HeplerBroom LLC, Edwardsville

Can a Plaintiff Bring a Challenge of an Administrative Decision in the County Where the Relevant Agency Is Located When the Hearing Did Not Occur in that County?

***Slepicka v. State of Illinois*, No. 116927, 4th Dist. No. 4-12-1103**

The plaintiff was a resident of the defendant nursing home. The defendant served the plaintiff with a notice of involuntary transfer or discharge alleging nonpayment because the plaintiff failed to pay the full private-pay rate. The plaintiff demanded a hearing and argued that, because she was eligible for and eventually received Medicaid benefits, the defendant should have placed her in and charged her for a Medicaid-certified bed.

On May 24, 2012, a hearing with the Illinois Department of Public Health (DPH) took place at the defendant's facility in Palos Park, Cook County, Illinois. An administrative law judge (ALJ) approved the involuntary discharge. The plaintiff filed for administrative review in the Circuit Court of Sangamon County. The circuit court affirmed DPH's decision without comment or explanation. The plaintiff appealed to the Illinois Appellate Court Fourth District.

The Fourth District held that the only permissible venue for the administrative review was the Circuit Court of Cook County. *Slepicka* ex rel. *Kaminski v. State of Illinois*, 2013 IL App (4d) 121103, ¶ 4. The Fourth District explained that, under Section 3-104 of the Code of Civil Procedure, review of a final administrative decision "'may be commenced in the Circuit Court of any county in which . . . any part of the hearing or proceeding culminating in the decision of the administrative agency was held.'" *Slepicka*, 2013 IL App (4d) 121103, ¶ 24 (quoting 735 ILCS 5/3-104). Although the DPH has an office in Springfield (Sangamon County), the administrative hearing or proceeding took place entirely in Palos Park (Cook County). *Id.* ¶ 31. The Fourth District cited to Black's Law Dictionary and found that to "hold" a hearing or proceeding means to "'convoke'" and "'preside [over]'" a hearing or proceeding. *Id.* ¶ 29 (quoting Black's Law Dictionary 736 (7th ed. 1999)). The Fourth District concluded that "the Department does not hold a hearing or proceeding in [Sangamon County] by retiring to her office there and writing a decision." *Id.* Therefore, the Fourth District vacated the judgment of the Sangamon County circuit court and remanded the case with directions to transfer it to the Cook County circuit court. *Id.* ¶ 42.

In her petition to the Illinois Supreme Court, the plaintiff argues that the Fourth District's definition of "hold" was too narrow. Rather, according to the plaintiff, the correct meaning of the word "hold," as it applies to DPH's final administrative decision, is to adjudge or decide a matter of law. The plaintiff also contends that the meaning of the word "proceeding" in Section 3-104 includes "all steps taken or measures adopted" and therefore includes the final decision emanating from Sangamon County. Finally, the plaintiff notes that the Fourth District's decision is in direct conflict with numerous and long-held rulings setting Sangamon County as proper venue for administrative review of decisions emanating from Sangamon County, regardless of the location of the hearing. See *Webb v. White*, 364 Ill. App. 3d 650, 302 Ill. Dec. 796, 850 N.E. 2d 233 (4th Dist. 2006) (Champaign County); *Hargett v. Civil Serv. Comm'n*, 49 Ill. App. 3d 856, 7 Ill. Dec. 928, 365 N.E. 2d 213 (4th Dist. 1997) (Franklin County).

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About the Author

Beth A. Bauer is a partner of *HeplerBroom LLC*. Ms. Bauer is a litigation attorney with a primary emphasis in the defense of complex, multi-party civil cases and class actions, involving all aspects of consumer fraud, product liability, particularly pharmaceuticals, construction, and insurance litigation. Ms. Bauer also regularly handles appeals and consults with others in the firm on appellate issues. Ms. Bauer is a member of IDC, Illinois Appellate Lawyers Association, DRI, and Christian Legal Society. She has authored the Supreme Court Watch column for *IDC Quarterly* since 2001 and has served on the Editorial Board of that publication since 2009. Ms. Bauer earned her B.A. in Secondary Education and English Literature from Washington University in St. Louis in 1997 and her J.D., *cum laude*, from Saint Louis University School of Law in 2000.

What Is the Proper Way to Apply the Distraction Exception to the Open and Obvious Doctrine?

***Bruns v. City of Centralia, Illinois*, No. 116998, 5th Dist. No. 5-13-0094**

The plaintiff sustained injuries after tripping over a raised section of public sidewalk and sued the defendant City of Centralia (City) for damages. At the time of the injury, the plaintiff was 80 years old and was walking into the Centralia Eye Clinic (Clinic) where she was being treated for various eye problems. The root system of a large tree had caused a portion of the sidewalk to heave. The Clinic previously had contacted the City to report the defective condition and to advise the City that various Clinic customers had tripped because of the raised sidewalk. The City, however, considered the tree to have historic significance and refused to remove it.

The circuit court found that the City owed no duty to the plaintiff and granted the City's motion for summary judgment. The circuit court determined that the sidewalk defect was open and obvious as a matter of law and that the distraction exemption was inapplicable under the facts of the case. The plaintiff appealed to the Illinois Appellate Court Fifth District. The Fifth District reversed and remanded, holding that the distraction exemption was applicable and that the City owed a duty to the plaintiff. *Bruns v. City of Centralia, Illinois*, 2013 IL App (5d) 130094.

The Fifth District held that, for the distraction exemption to apply, the key question is the foreseeability of the likelihood that an individual's attention might be distracted from the open and obvious condition, not the creation of the distraction. *Bruns*, 2013 IL App (5d) 130094, ¶ 11. A municipality is charged with a duty of ordinary care with regard to its property to the extent that intended and permitted users will utilize municipal property in a manner that is reasonably foreseeable. *Id.* ¶ 13. In this case, the Fifth District held that the City could have foreseen that, among other scenarios, an elderly patron of an eye clinic might have her attention focused on the pathway forward to the door and steps of the clinic, as opposed to the path immediately underfoot. *Id.* ¶ 12. The Fifth District clarified that "the focus is on the foreseeability of the injury, and it is of no consequence whether or not a jury will consider plaintiff contributorily negligent for looking toward the entrance of the clinic." *Id*. Therefore, according to the court, whether the City breached its duty of reasonable care to the plaintiff was a question of fact for the jury.

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The City filed a petition for leave to appeal. The City argues that the Fifth District's decision conflicts with the decisions of the Illinois Supreme Court and with decisions of the other divisions of the appellate court. Specifically, the City argues that the Fifth District's decision conflicts with existing precedent in numerous ways.

First, the City argues that the appellate court applied the distraction exception even though the record contains no evidence that the plaintiff was distracted. See *Belluomini v. Stratford Green Condominium Ass'n*, 346 Ill. App. 3d 687, 695 (2d Dist. 2004) (holding that the alleged distraction did not apply "because there was no evidence plaintiff was actually distracted"). Second, the City argues that the appellate court refused to consider that the City did not cause or contribute to the alleged distraction. See *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1029–30 (1st Dist. 2005) (finding that a distraction is not foreseeable if a landowner did not create, contribute to, or was in some way responsible for the distraction that diverted a plaintiff's attention). Third, the City argues that the appellate court refused to consider the fact that the plaintiff's alleged distraction was entirely self-created. See *Sandoval*, 357 Ill. App. 3d at 1030–31 (concluding that self-created distractions are not foreseeable and therefore do not trigger the distraction exception to the open and obvious doctrine). Fourth, the City argues that the appellate court adopted a rule

that a distraction is deemed foreseeable if the court can imagine any distraction occurring in proximity to the condition. See *Park v. Ne. Ill. Reg'l Commuter R.R.*, 2011 IL App (1st) 101283, ¶ 17 (finding that the proper focus is on whether it was foreseeable that the plaintiff was actually distracted by the alleged distraction). Fifth, the City argues that the appellate court ignored longstanding public policy regarding the burden placed on municipalities to keep their sidewalks in reasonably safe condition. But see *Gillock v. City of Springfield*, 268 Ill. App. 3d 455, 457–58 (4th Dist. 1994) (holding that a municipality does not have to keep all sidewalks in perfect conditions at all times because the economic burden would be too great). Sixth, the City argues that the appellate court did not review the plaintiff's alleged distraction from an objective perspective. See *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 86 (1st Dist. 2004) (finding that the test for determining foreseeability in an open and obvious context depends on the objective knowledge of a reasonable person, not on the plaintiff's subjective knowledge). Finally, the City argues that the Fifth District improperly expanded the limited distraction exception so that it now applies in every case where the open and obvious doctrine is at issue.

Do Insurance Agents and Brokers Owe Insureds the Same Duty of Care?

Skaperdas v. Country Casualty Insurance Company,
No. 120986, 4th Dist. No. 4-12-0986

The insured contacted an insurance agent representing the defendant, County Casualty Insurance Co., and asked the insurance agent to add the insured's girlfriend and girlfriend's minor child to his automobile insurance policy. The resulting policy named the insured and "Female, 30-64." The policy failed to name the girlfriend or the child. When the child was seriously injured, County Casualty denied the insurance claim because the policy did not list either the girlfriend or the child as a named insured.

The insured sued Country Casualty and the insurance agent, seeking to recover from the insurance agent for his negligence in procuring the insurance coverage and a declaration of insurance coverage. The circuit court found that, because the insurance agent was an "agent" and not a "broker," he did not owe the plaintiffs a duty of care in procuring insurance coverage for them. The insured appealed.

The Illinois Appellate Court Fourth District, reversed and remanded, holding that Section 2-2201(a) of the Illinois Insurance Placement Liability Act ("Act"), 735 ILCS 5/2-2201 (West 2010), eliminated the common-law distinction between insurance agents and brokers for purposes of duty of care. *Skaperdas v. Country Cas. Ins. Co.*, 2013 IL App (4th) 120986. Section 2-2201(a) of the Act states, "An insurance producer, registered firm, and limited insurance representative shall exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured." Although Section 2-2201 does not define "insurance producer," the Illinois Insurance Code, defines "insurance producer" as "a person required to be licensed under the laws of this State to sell, solicit, or negotiate insurance." 215 ILCS 5/500-10 (West 2002); see also *Skaperdas*, 2013 IL App (4th) 120986, ¶ 21. Therefore, the Fourth District reasoned, "a plain reading of section 2-2201 of the Act combined with section 500-10 of the Illinois Insurance Code, is that any person required to be licensed to sell, solicit, or negotiate insurance [including both insurance brokers and agents] has a duty to exercise ordinary care in procuring insurance." *Skaperdas*, 2013 IL App (4th) 120986, ¶ 23.

The Fourth District further stated that this holding is consistent with the court's ruling in *Country Mutual Insurance Co. v. Carr*, 366 Ill. App. 3d 758 (2006). In *Carr*, the Fourth District held that, pursuant to Section 2-2201, brokers and agents must act with ordinary care in procuring insurance for an insured. The Illinois Supreme Court vacated the *Carr* judgment because Carr's third-party claim was moot. But, because the analysis from the *Carr* case was sound, the Fourth District adopted it. The insurance agent appealed.

The insurance agent argues that Section 2-2201 did not abolish the common law rule that an insurance agent does not owe an insured a duty to procure a type or amount of insurance. Moreover, outside of the *Skaperdas* decision, most recent cases, all of which postdate the enactment of Section 2-2201, hold that insurance agents do not owe a duty to the insured customer, as insurance brokers do. The Illinois Supreme Court vacated the *Carr* decision, which was the entire basis of the Fourth District's opinion; thus, *Carr* is non-binding precedent.

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The insurance agent also claims that, contrary to the Fourth District's assertion, the "insurance producer" definition in the Insurance Code does not provide guidance as to the meaning of "insurance producer" in Section 2-2201. In fact, the definition section of the Insurance Code did not become effective until well after the enactment of Section 2-2201. Additionally, the insurance agent contends that the appellate court's decision is a drastic departure from the intended purpose of Section 2-2201, which is to shield independent brokers from liability and not to expand duties to insurance agents. Likewise, the insurance industry's perspective is that a broker is an intermediary between the insured and the insurer, and an agent represents an insurer under an employment by it. Therefore, only brokers have a duty to the insured.

Finally, the insurance agent argues that if the Fourth District's decision is allowed to stand, it will result in negative consequences. Not only does the ruling violate the public policy that it is the insured's duty to review an insurance policy, to ensure the accuracy of coverage, and to notify the insurer of any discrepancies, but also the Fourth District's interpretation of Section 2-2201 could induce an insured to refrain from verifying the adequacy of insurance coverage acquired.

From the Author

This column is my last as I take over the role of Editor-in-Chief of the *IDC Quarterly*. Thank you to the readers, and I hope you have enjoyed the column and found it helpful. I appreciate the opportunity of writing for the *Quarterly* for over 10 years and am grateful to Jeff Hebrank who suggested I pursue it. Thank you to the Board of Directors for the confidence you bestowed on me to write this column for so long. I look forward to continuing to serve the *Quarterly* readers as the chief editor.

—Beth A. Bauer

Construction Law

Lindsay Drecoll Brown and **Matthew S. Sims**
Cassiday Schade LLP, Chicago

DANGER: *Res Judicata* Ahead Why Construction Contractors Need to Take a "Use It or Lose It" Approach to Express Indemnification, and Other Cautionary Tales Arising from *Camper v. Burnside Construction*

The Illinois appellate court decision, *Camper v. Burnside Construction*, 2013 IL App (1st) 121589, uses the aged doctrine of *res judicata* in a new way: to bar an express indemnification agreement contained within a purchase order for the manufacture and delivery of materials to a construction site. In the wake of *Camper*, contribution claims might need to be accompanied by any express indemnification or breach of contract claims; otherwise, the party seeking contribution could risk forfeiting these other claims if the doctrine of *res judicata* is invoked later. The *Camper* decision provides a blueprint for entities facing indemnification claims to utilize defensive tools at their disposal, including the assertion of the doctrine of *res judicata* and the Anti-Indemnity Act, 740 ILCS 35, *et seq.* (West 2014). This column provides a brief overview of a few of the legal issues arising out of the *Camper* decision that impact the construction industry.

Indemnification Claim Barred by *Res Judicata* after Voluntary Dismissal

It is well-settled that the doctrine of *res judicata* provides that "a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996), quoted in *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). Beyond barring what

About the Authors

Lindsay Drecoll Brown is a senior associate in the Chicago office of *Cassiday Schade LLP*. She concentrates her practice in civil litigation defense, with an emphasis on construction law, professional liability and product liability. Ms. Brown received her J.D., *cum laude*, from Loyola University Chicago School of Law, and her undergraduate degree from Michigan State University, with high honors. She is a member of the Illinois Association of Defense Trial Counsel's Construction Law Committee.

Matthew S. Sims is a senior associate attorney in *Cassiday Schade*'s Chicago Office. He has a broad practice in civil litigation, including areas such as the defense of construction contractors in injury cases, medical liability defense, product liability defense, and commercial litigation. He has extensive experience in risk transfer and indemnification.

was decided in the original action, the doctrine may be invoked to bar additional matters that were never raised, yet "could have been decided." *Hudson*, 228 Ill. 2d at 467. Three essential requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Id.* at 467.

In *Camper*, the plaintiff was injured at a construction site when he fell in a manhole. *Camper*, 2013 IL App (1st) 121589, ¶ 3. The plaintiff filed suit against both the general contractor and the entity that manufactured the manhole, including the concrete sections composing the manhole and related component parts, under theories of products liability and negligence. *Id.* The manhole manufacturer then filed a third-party complaint for contribution against the plaintiff's employer. *Id.* ¶ 4. Of interest, the purchase order that effectuated the sale of the manhole component parts contained indemnification language in favor of the manufacturer and against the employer. *Id.* ¶ 10. Nevertheless, the manufacturer's third-party complaint did not assert a cause of action for express indemnification against the plaintiff's employer. *Id.* ¶ 4.

The plaintiff subsequently settled with the general contractor and the employer, with good-faith findings made by the court and dismissals with prejudice entered. *Camper*, 2013 IL App (1st) 121589, ¶¶ 5, 7. The court did not make any finding that the dismissals were final and appealable under Illinois Supreme Court Rule 304(a). *Id.* ¶ 7. The case continued solely against the manhole manufacturer for a few months, until the plaintiff voluntarily dismissed his lawsuit. *Id.* ¶ 8.

Eleven months later, the plaintiff refiled his case against the manhole components manufacturer, which promptly filed a third-party complaint against the employer for the second time. *Id.* ¶¶ 9–10. In the second lawsuit, the contractor's third-party complaint asserted claims of both contribution *and* (for the first time) express indemnification. *Id.* ¶ 10. The trial court dismissed both third-party actions pursuant to *res judicata*, and the manhole components manufacturer appealed. *Camper*, 2013 IL App (1st) 121589, ¶¶ 19, 21.

The appellate court was asked to examine whether the three elements of *res judicata* were present, such that the manhole components manufacturer's express indemnification action against the employer was preempted. The *Camper* court determined that there had been identity of the parties and that the circuit court rendered a final judgment on the merits when it dismissed the third-party claim for contribution with prejudice. *Id.* ¶ 43. The final requirement of *res judicata* was then addressed. Specifically, does express indemnification have an identity of cause of action with a contribution claim? The *Camper* court answered this question with a resounding yes. *Id.* ¶ 50.

Relying on Illinois's adoption of the "transactional test" espoused by the Illinois Supreme Court in *River Park v. City of Highland Park*, 184 Ill. 2d 290 (1998), the *Camper* court found that both the contribution and the express indemnification claims "arose out of the injuries suffered by Camper when he allegedly fell while working in a sanitary manhole on a construction site." *Camper*, 2013 IL App (1st) 121589, ¶ 50. The *Camper* court noted that the manhole components manufacturer could have raised the indemnification claim in the first action, but rather waited until the action was re-filed to bring for the first time its express indemnification claim. *Id.*

Broadening the Scope of the Anti-Indemnity Act

Contained within the *Camper* decision was not only an extensive discussion of *res judicata*, but also an expansion of the Illinois Construction Contract Indemnification for Negligence Act. 740 ILCS 35/1, *et seq.* (West 2014) ("Anti-Indemnity Act"). The Anti-Indemnity Act provides, in pertinent part:

> With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts *or other work dealing with construction, or for any moving*, demolition or excavation *connected therewith*, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

Id. (emphasis added). Prior to *Camper*, the emphasized portion of the Act had never been interpreted at the appellate level.

In the past, the Act has been applied to prohibit a party from contracting for indemnification of its own negligence by embedding an indemnification provision within a contract *for* construction. See, *e.g., Lavelle v. Dominick's Finer Foods, Inc*., 227 Ill. App. 3d 764, 770 (1st Dist. 1992). In other words, contracts for con-

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struction that shift fault away from the contracting party violate the Act and are unenforceable. *Id.* Contracts only *related* to construction, however, customarily were held to fall outside the purview of the Anti-Indemnity Act, such as contracts pertaining to the delivery of materials to job sites or for advertising secondarily resulting in the erection of scaffolding. E.g., *Winston Network, Inc. v. Indiana H. B. R. Co*., 944 F.2d 1351, 1359 (7th Cir. 1991); *Avalos v. Pulte Home Corp*., No. 04 C 7092, 2006 U.S. Dist. LEXIS 93366, at *12 (N.D. Ill. Dec. 22, 2006). Many construction-related contractors rely upon boilerplate purchase order contract language, requiring purchasers to defend and fully indemnify the related contractor for any and all negligence—even their own. After all, indemnification agreements generally are enforceable in Illinois outside of the context of the Anti-Indemnity Act. *Buenz v. Frontline Transp. Co.*, 227 Ill. 2d 302, 311 (2008).

In contrast to the examples set forth above, the *Camper* court found that the manhole components contractor's manufacture, delivery, and unloading of the manhole at the construction site was sufficient evidence that the manufacturer was involved in "other work dealing with construction" and in "moving . . . connected" with the construction." *Camper*, 2013 IL App (1st) 121589, ¶ 58. As such, the Anti-Indemnity Act was triggered, rendering the express indemnity provision in the purchase order unenforceable. *Id.* This case is the first time a reviewing court in Illinois interpreted and emphasized this particular language of the Anti-Indemnity Act.

[T]he Camper court found that the manhole components contractor's manufacture, delivery, and unloading of the manhole at the construction site was sufficient evidence that the manufacturer was involved in "other work dealing with construction" and in "moving . . . connected" with the construction."

Conclusion

Camper is an important case for the construction industry. The *Camper* court's interpretation of the Anti-Indemnity Act supports the position that self-indemnification language contained within contracts, even if only *connected to* construction, will no longer support a claim for express indemnification. In instances where indemnification is not violative of the Anti-Indemnity Act, the *Camper* decision warns practitioners to seek indemnification promptly where warranted if it is in the best interest of a construction client. After all, failing to identify and utilize an enforceable express indemnification claim could make the difference between your client or some other litigant footing the bill for a claim.

Before filing a contribution claim, attention should be paid to whether any express indemnification or breach of contract claims should be contemporaneously asserted. Practitioners should be prepared to "use it or lose it." Failure to promptly preserve indemnification claims could subject that litigant to an otherwise unnecessary risk of later facing a *res judicata* motion in the event the case is voluntarily dismissed. Defendants typically have no control over whether a trial court will grant a plaintiff's request for voluntary dismissal when there is no potentially dispositive motion pending at the time. *Valdovinos v. Luna-Manalac Med. Ctr.*, 328 Ill. App. 3d 255, 268 (1st Dist. 2002). Further, the voluntary dismissal statute grants plaintiffs the privilege to dismiss their lawsuit, regardless of the circumstances or motive. *Kilpatrick v. First Church of Nazarene*, 177 Ill. App. 3d 83, 88 (4th Dist. 1988). As such, practitioners should consider all potential claims and defenses to be asserted prior to filing counterclaims and third-party actions. Even in unique instances like *Camper*, where the plaintiff sat in the driver's seat and turned the key to invoke *res judicata* (by voluntarily dismissing his claim and creating a final and appealable order), the court will not hesitate to apply *res judicata* to dismiss a claim.

Health Law Update

Roger R. Clayton, Gregory J. Rastatter, and **J. Matthew Thompson**
Heyl, Royster, Voelker & Allen, P.C., Peoria

HHS, OIG, and CMS Issue Final Rule Revising the Stark Law and Anti–Kickback Act EHR Safe Harbor

On December 27, 2013, the Department of Health and Human Services ("HHS"), the Office of Inspector General ("OIG"), and the Centers for Medicare and Medicaid Services ("CMS") issued final rules revising the Stark Law, 42 C.F.R. § 411.357(w) and the Anti-Kickback Act safe harbor, 42 C.F.R. § 1001.952(y). The Stark Law, 42 U.S.C. § 1395nn, and the Anti-Kickback Act, 42 U.S.C. § 1320a-7b, address, *inter alia*, physician conflicts of interest by effectively prohibiting physicians from referring services to other entities, such as hospitals, where the two have a financial relationship. As an exception, donation of electronic health records ("EHR") is permissible as long as parties strictly adhere to the statutory language. The Stark Law and the Anti-Kickback Act safe harbors were established originally in 2006, but were set to expire on December 31, 2013. In the recently issued Final Rules, available at http://federalregister.gov/a/2013-30923 and http://federalregister.gov/a/2013-30924, the OIG and CMS seek to amend regulations protecting arrangements involving the donation of EHR software, which includes related information technology and training services. This article describes several of the key provisions implemented by the Final Rule, but practitioners should be aware that it does not provide an exhaustive review of all the provisions. The Final Rule went into effect on March 27, 2014 and expires December 31, 2021. Medicare and State Health Care Programs: Fraud and Abuse; Electronic Health Records Safe Harbor Under the Anti-Kickback Statute, 78 Fed. Reg. 79,202-01, 79,202 (Dec. 27, 2013) [hereinafter Medicare Programs].

Updates to Donation Rules Originally Published in 2006

Congress has required the Secretary of Health and Human Services ("Secretary") to promulgate regulations setting forth "safe harbors" to the anti-kickback statute. These rules were meant to be evolving to accommodate the changes in practices and technology of the healthcare industry. As a result, OIG originally published safe harbor rules in 2006 that were scheduled to sunset on December 31, 2013. It was therefore necessary to revise them to reflect changes in the industry since 2006.

The most recent changes include: (1) an update of the provision under which EHR software is deemed interoperable; (2) removal of the requirement of electronic prescribing capability from the safe harbor; (3) extension of the sunset date, which is the date by which the safe harbor period is set to expire; (4) a limit to the scope of protected donors to exclude laboratory companies; and (5) clarification of the condition that prohibits a donor from taking action to limit or restrict use, compatibility, or

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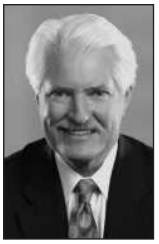
About the Authors



Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice, and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the Illinois Association of Defense Trial Counsel (IDC), the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, president and board member of the Illinois Association of Healthcare Attorneys, and past president and board member of the Illinois Society of Healthcare Risk Management. He co-authored the Chapter on Trials in the IICLE Medical Malpractice Handbook.

Gregory J. Rastatter is an associate in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he is a member of the firm's healthcare practice group. Greg's practice involves representing and advising hospitals on compliance issues, including drafting and analysis of hospital and medical staff bylaws, physician and allied health professional contracts, and other aspects of health law for compliance with state and federal law and Joint Commission standards. He received his undergraduate degree from Bradley University and a law degree from the University of Illinois College of Law in 2003. Greg is a member of the Peoria County Bar Association, the Illinois State Bar Association, and the American Bar Association.

J. Matthew Thompson is an associate in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He practices primarily in the area of general tort defense. He received his B.S. in Accounting from Culver-Stockton College in 2005 and his J.D. *cum laude* from Southern Illinois University School of Law in 2008.

interoperability of the donated items or services. *Id.* This column provides a brief explanation of each of these changes.

Updated Provision under which EHS Software Is Deemed Interoperable

The agencies proposed two modifications to the "deeming provision" in 42 C.F.R. § 1001.952(y)(2) to reflect and to coordinate with recent developments in the Office of the National Coordinator for Health Information Technology ("ONC") certification program. Under 42 C.F.R. § 1001.952(y)(2), EHR safe harbor requires that donated software must be "interoperable," as defined in the note to 42 C.F.R. § 1001.952(y). Currently, software may be deemed interoperable if the software has been certified by a Secretary-approved body no more than 12 months prior to the date that the software is provided to the recipient.

The Final Rule seeks to revise 42 C.F.R. § 1001.952(y)(2) to "state that software is deemed to be interoperable if, on the date it is provided to the recipient, it has been certified by a certifying body authorized by the National Coordinator for Health Information Technology to an edition of the electronic health record certification criteria identified in the then-applicable version of 45 CFR part 170." Medicare Programs, 78 Fed. Reg. at 79,204. The agencies concluded that ONC's expertise allows it to determine the relevant criteria and standards, and therefore the linking was appropriate. 78 Fed. Reg. at 79,204–79,205.

Removal from Safe Harbor of Requirement Related to Electronic Prescribing Capability

Prior to the Final Rule, software must have "contain[ed] electronic prescribing capability, either through an electronic prescribing component or the ability to interface with the recipient's existing electronic prescribing system that meets the applicable standards under Medicare Part D at the time the items and services are provided." 42 C.F.R. § 1001.952(y)(10). The agencies have determined that there is currently enough support for adoption of electronic prescribing technology such that the current rule has become unnecessary. The Final Rule, therefore, eliminates the requirement that EHR software contain electronic prescribing capability to qualify for protection under the safe harbor at 42 C.F.R. § 1001.952(y). Medicare Programs, 78 Fed. Reg. at 79,206.

Extension of the Safe Harbor Date to December 31, 2021

Originally, the proposed extension of the sunset date of the safe harbor period was December 31, 2016. But, in response to comments, the sunset date in the Final Rule was extended to December 31, 2021. Although many comments suggested that the safe harbor be permanent, the agencies disagreed out of concern that a permanent extension would create the risk of inappropriate donations of EHRs. A compromise was reached with an extended date to strike a balance between encouraging the adoption of interoperable EHRs with the risks of misuse. Medicare Programs, 78 Fed. Reg. at 79,206–79,207.

Exclusion of Laboratory Companies as Protected Donors

Although broad safe harbor protection is an important part of furthering the underlying public policy goal of promoting EHRs, the agencies expressed concern regarding misuse of EHRs. There have been many comments to suggest that donations in return for referrals have been a consistent problem as related to laboratory companies. As such, the Final Rule removes laboratory companies from the scope of protected donors under the safe harbor. Medicare Programs, 78 Fed. Reg. at 79,208–79,209.

Clarification of Prohibition against a Donor Taking Action to Limit or Restrict the Use, Compatibility, or Interoperability of Items or Services

In some cases, parties may appear to meet the conditions of the safe harbor, but, in fact, do not because of "data and referral lock-in." Data or referral lock-in occurs when software becomes effectively proprietary, creating prohibitive costs for non-donor providers and suppliers who cannot afford to connect to it. This is a problem because it has the same effect as altering the interoperability of software, albeit through different means. Although the Final Rule does not seek to adopt new requirements or modifications, the agencies expressed limited clarification to better reflect their intent. In essence, each potential violation requires a case-by-case evaluation to determine whether an arrangement between parties is of the prohibited type. Medicare Programs, 78 Fed. Reg. at 79,213.

There are a number of examples of the type of arrangements that would be incompatible with the exception. As a general statement of their intent, the agencies noted that "donations of items or services that have limited or restricted interoperability due to action taken by the donor or by any person on the donor's behalf (which could include the recipient acting on the donor's behalf) would

fail to meet the condition at 42 CFR 1001.952(y)(3).” Medicare Programs, 78 Fed. Reg. at 79,213. This type of arrangement would include, for example, any agreement to inhibit competitors from interfacing or any agreement to create high interface fees to competitors. The agencies intend to consider “any action taken to achieve such a result [as] evidence of intent to violate the anti-kickback statute.” *Id.*

Conclusion

The Final Rule reflects the agencies’ continued recognition of the importance of encouraging the adoption of EHRs. These changes, however, present critical challenges and issues for current donation arrangements. First, labs and lab donation recipients had to terminate donation agreements to comply with the Final Rule before it became effective on March 27, 2014. Second, current donations, which may be protected, are entitled to continue provided they adhere to the new changes. Third, because agencies continue to be highly concerned about improper motives, parties may need to continually evaluate the nature of the donation agreement. Healthcare institutions and providers who engage in programs for donation of electronic health records should take note of the Final Rule to ensure proper compliance.

Feature Article

Elizabeth K. Barton
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., Chicago

To the Young Lawyer: Tips for Court Appearances

It is natural for young lawyers to be intimidated by court appearances. The first time I appeared in court as a new lawyer, I remember thinking to myself, “They sure don’t teach you *this* in law school.” Sure, I went through a course in trial advocacy, was on moot court competitive teams, and even participated in an international arbitration competition. I was given tips about what to say, what to wear, and how to behave generally in a courtroom. Yet, nothing would prepare me for the realization that I, a recent graduate surrounded by much more experienced attorneys (some of whom were admitted to the bar the year I was born), was responsible for representing my client on my own. That realization was empowering and thrilling, but, if I am being completely honest, mostly it was terrifying.

I recently attended a seminar for young lawyers where several panelists were members of the judiciary. Their wisdom and insight struck a chord with me that no matter how comfortable lawyers become in all different courtroom settings, we could always be reminded of a few “golden rules.” I have gathered up the best advice I have received from a variety of sources throughout my comparatively brief legal career. These might be helpful for new lawyers as they embark on their careers, and even for more seasoned lawyers who could use a reminder as they mentor younger attorneys.

Your Reputation Is Everything

The most obvious rule, but one that needs constant reaffirmation, is that your reputation is vital to your career. Consequently, you have to be vigilant about what you say and how you behave. This principle is true whether you are making representations to the court, interacting with court personnel, working with opposing counsel, managing your client, or in any other situation in which a lawyer might find herself. Your words and behavior affect your reputation, your client’s reputation, and the reputation of your employer.

The Honorable Paul Biebel, Jr. is the Presiding Judge of the Criminal Division for the Circuit Court of Cook County. He says, “Assume everything is transparent and you cannot hide anything. Front

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About the Author

Elizabeth K. Barton is an associate with the Chicago office of *Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.*, where she is a member of the firm’s litigation group. Her practice is focused on defending government entities in civil litigation, with a primary emphasis in the defense of Section 1983 allegations of police misconduct. Ms. Barton received her J.D. from The John Marshall Law School and her undergraduate degree from the University of Iowa, with honors. Ms. Barton is a member of the IDC Young Lawyers Division.

your troubles because if you don't, you can bet the other side will." Telephone Interview with Paul Biebel, Jr., Presiding Judge, Circuit Court of Cook County, Criminal Division (Feb. 24, 2014) [hereinafter Telephone Interview with Judge Biebel]. He warns, "Judges have long memories." *Id.*

Cook County Associate Judge Neera Walsh adds that, if you lie, the judge might forgive you, but she will never forget. "The judge needs to trust you, and if you violate that trust even once, your reputation is tarnished." Telephone Interview with Neera Walsh, Associate Judge, Circuit Court of Cook County, Criminal Division (Feb. 21, 2014) [hereinafter Telephone Interview with Judge Walsh].

It comes down to always telling the judge the truth. Be precisely correct in what you say, whether it is discussing a case or relating the facts of your own case. Do not broaden the holding of a case, embellish it, or conceal distinguishing factors. Tell the bad along with the good. Do not fall into the trap of telling the court what you *wish* the case said, or give the judge the facts you would rather have instead of the ones you really do have. You owe the court candid and full disclosure. We all have difficult clients sometimes and we did not create the facts of the cases we are presenting, so all we can do is present them in the best possible light.

As I heard in a seminar, "Your reputation is your most valuable asset both before the court and in your career." James F. Holderman, Judge, United States District Court for the Northern District of Illinois, ISBA Presentation: Tips for Young Lawyers for In Court and Out of Court (Nov. 13, 2013). The bottom line: make an impression, but make it a good one.

You owe the court candid and full disclosure. We all have difficult clients sometimes and we did not create the facts of the cases we are presenting, so all we can do is present them in the best possible light.

Be on Time: Always.

Always be on time is a cardinal rule, and a violation can cost you and your client. Tardiness is rude and disrespectful to the court and to all of the others who are waiting. You are not the only lawyer with deadlines, demanding clients, emails and phone calls to return, and (not to mention) billable hours.

A simple and effective tip from one of my current mentors, Ellen K. Emery, is that when you arrive, look at the call sheet before you sit down and write down the names of the three cases before yours. That way, by the time the clerk is calling your case, you should already be approaching the podium. You should never be one of those people climbing over others when the clerk calls your case, yelling, "Defendant!" She assured me that the court will appreciate your readiness.

Be mindful of the myriad of potential delays, including weather, traffic, security checkpoints, and the elevator, and factor them into your schedule. Anyone who has ever been to the Daley Center in Chicago at 8:50 a.m. on any given weekday can attest to the snail's pace of the elevator banks. Do not risk it. But, if you are late despite your best efforts, simply call the judge's chambers or opposing counsel and let them know. Just do not make it a habit.

By way of example, I had an initial status hearing in the Western Division of the Northern District of Illinois in Rockford at 9:30 a.m. The plaintiff's counsel had called me the night before to ask whether I would be willing to conduct the hearing telephonically, and I had no objection. I never heard back from him that night, so I left Chicago at 6:30 a.m. the next morning, drove 100-plus miles in the rain, construction, and traffic, and made it to court with minutes to spare.

Once I was sitting in the courtroom, I overheard the judge's clerk on the phone and it was obvious to me she was talking to opposing counsel regarding his alleged inability to make it on time due to the weather. I then listened as the clerk told the judge she was skeptical of the story and did not believe the attorney had even left Chicago.

Eventually, the case was called and opposing counsel appeared telephonically. The first question the judge asked was, "Mr. X, are you by a window? Please tell me what you see." The attorney fumbled through an awkward explanation about being at a gas station, so he could not describe where he was. One thing was clear: the judge did not believe his story and scolded him for wasting the court's time. After all, as the court pointed out, I had traveled from Chicago and made it on time, so what exactly was his excuse? Of course, the judge was fair throughout the remainder of the hearing, but I would not want that to be the judge's first impression of me. Would you?

Be Civil, Ethical, and Professional

We all have our good days and bad days at work. The bad days can feel like they will never be outnumbered: you lose a motion, a deponent testifies against your client's position, you have a contentious relationship with opposing counsel who lacks civility and continues to unnecessarily badger you and your client, you have to work all weekend, and the list goes on and on. But through it all, the key is to remain civil, ethical and professional, especially when you appear in court.

Play Fair

Litigation is filled with conflict, emotion, and stress, so it is inevitable that someone will say something to you that is offensive. Ignore it and do not lose sight of your goal of effective representation. Responding in kind only results in collateral damage to your client. Act right when you win, and act right when you lose. Do not use facial objections, like eye rolling or smirking, because the judge certainly will hold it against you. The judge knows you are disappointed when you lose, but expects you to respect her decision and the system. Whichever outcome you experience, be mature and show class.

If you practice in civil litigation, Judge Biebel reminds us that 95% of civil cases settle before trial. So, it can only benefit you to be civil with opposing counsel from the get-go because it is likely you will have to work together to come to an agreement at the end anyway.

Do not seek to embarrass opposing counsel or "go in for the kill." When you are on the receiving end of that behavior, the best way to disarm your opponent is to take the high road because it absolutely drives them crazy. Often, it will throw them into such confusion that their tactics will backfire, and they come out looking unreasonable to the court.

My mentor warns young lawyers, particularly female ones, of the oldest trick in the book: don't let older lawyers interrupt you. Stand up for yourself, but remember, always direct your comments to the court and let the judge referee. It is important to resist the urge to answer your opponent's comments because to the court, it only sounds like bickering. Since the court is the ultimate decision-maker, address the court directly. This way, you will appear to be taking the high road.

Part of playing fair is showing everyone a little grace. Attorneys are bound to make mistakes, including you. When opposing counsel makes and untoward remark, an error in procedure, a misstatement of the law, consider first whether he or she made an honest mistake. To do so requires a level head. Think of how you can address the mistake in a gracious way, while correcting any misimpression that might have resulted. Inevitably, the time will come when you may need a little grace yourself.

You can never go wrong with the old adage "treat others how you want to be treated," because in spite of everything, the legal community is small and what goes around, comes around.

Look the Part

This comment might seem obvious, but dress like a professional. Personally, I never want someone thinking about my clothes instead of listening to what I have to say. My law school companion and current Cook County Assistant State's Attorney, Nancee Hofheimer, thinks it is important to consider your role. Are you a prosecutor? Do you represent a bank? If so, you will want to err on the side of formality. But, even if you are a criminal defense attorney showing up to a bond hearing on Saturday morning, Nancee reminds us that "jeans are never a good idea." Telephone Interview with Nancee A. Hofheimer, Assistant State's Attorney, Cook County State's Attorney's Office (Feb. 10, 2014) [hereinafter Telephone Interview with ASA Hofheimer].

My mentor has advised that if you want to be taken seriously, dress like the "heavy-hitters." She thinks it is just as unprofessional to show up in a red mini-skirt and stiletto heels, as it is to show up in flip-flops and jeans. For men, your "uniform" should be a suit and tie. For women, the choices vary so much that it can be easy to make the wrong judgment call. But it is always best to err on the side of being conservatively dressed.

Last summer, Tennessee Circuit Judge Royce Taylor of Rutherford County issued a memo about female lawyers adhering to the dress code after one female attorney appeared before him in a sleeveless blouse. Judge Taylor wrote, "The unanimous opinion was that the women attorneys were not being held to the same standard as the men. I have advised some women attorneys that a jacket with sleeve below the elbow is appropriate or a professional dress equivalent . . . . Your personal appearance in court is a reflection upon the entire legal profession." Jacob Gershman, *Tennessee Female Attorneys Urged to Wear Less Revealing Outfits*, Wall Street Journal Law Blog (Jun. 13, 2013, 12:19 PM), http://blogs.wsj.com/law/2013/06/13/tennessee-female-attorneys-urged-to-wear-less-revealing-outfits/.

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Be Respectful to Courtroom Staff

Courtroom staff is a wealth of information. Approach the court and chambers staff with respect and a healthy dose of humility because chances are, if you are a new lawyer, the staff knows more than you do. They are experienced, knowledgeable, and have the judge's respect and trust. Show courtroom staff, including bailiffs, judicial assistants, and clerks, the same respect that you show the judge.

Know Your Case

According to Judge Biebel, preparation is key. He says, "You could be the best lawyer in the world, but if you're not prepared that day, well, then you're not a good lawyer that day." Telephone Interview with Judge Biebel, *supra*.

It is our job to be prepared. An early lesson I learned from one of my first mentors, Beth Ekl of The Sotos Law Firm, was that I did not have to be the smartest person there, I just had to be the most prepared. In my few years of practice, I have already learned that I will never be the smartest, the most experienced, or the most eloquent person in the room. But, I believe that knowing your case better than your adversary is the first step to being a successful advocate.

As young lawyers, we are asked to cover "simple" hearings all the time. You might hear from a partner, "It's easy. Just get a briefing schedule." Trust me, no matter how simple the partner tells you it will be, make sure you know the basics and know why you are appearing. You should know these basics about the case: What is the case about? When does discovery close? How much discovery is left? Are there pending motions? What is the legal standard for the motion being presented? And never, ever say, "I don't know. This isn't my case." Judge Biebel agrees, "That's just embarrassing."

Put yourself in the judge's position and consider the number of cases a judge has on her docket. It would be unfair to expect the judge (even with the help of clerks) to research every legal issue or master the facts of every case before her. Therefore, judges depend on lawyers to provide accurate information on the facts and the law, and to be honest and straightforward in their presentations. A good approach is to think, "If I were the judge, what would I want to know?"

Most days, you have less than 30 seconds to get your point across, so really think it through before you step up in front of the court. But, as Ms. Ekl points out, if you take notes to the podium, you must still listen to the court and answer the question the judge is asking you; do not just read off your script. This recommendation goes along with Ms. Emery's advice to "talk it through with the judge." When you are arguing a motion, do not just reargue everything you wrote in your brief. You have to trust the court has read your motion and make sure to know your argument well enough so you can *ad lib* when necessary."

If you are not prepared, however, just let everyone know. Judge Walsh assured me that judges realize things come up, but her advice is to be upfront about it so that something can be worked out. "It's just a matter of valuing and respecting everyone's time," she says. Telephone Interview with Judge Walsh, *supra*.

Never try to fool the judge by answering questions you really do not know the answer to. As I have heard Ms. Ekl say, "No lie is too small. Judges are smart; they will figure it out." Telephone Interview with Elizabeth A. Ekl, Partner, The Sotos Law Firm, P.C. (Feb. 11, 2014). Judges respect when lawyers admit that they do not know the answer, but offer to supplement or research and come back with an answer. In the end, they will appreciate the honesty.

Know Your Judge

Every judge has her own idiosyncrasies that must be accommodated. A young lawyer's ability to be flexible and adapt to judges will go a long way toward improving that lawyer's reputation in the legal community. If possible, ask other lawyers about a judge's pet peeves and unique practices. Taking this step will mean fewer surprises and less anxiety. This step is particularly important for attorneys who practice in front of the same judge every day, like ASA Hofheimer. She focuses on appealing to a certain audience. "When I am assigned to a courtroom, I want to know what makes the judge tick. How do they like things run? What is the level of formality in their courtroom? What arguments are they responsive to?" Telephone Interview with ASA Hofheimer, *supra*.

Even after over a decade of practicing in federal court, Ms. Ekl admits that she still looks up a judge's website before appearing in court to remind her if the judge has any applicable standing orders or unique rules. She advises that it is important to research the judge's prior rulings on a particular issue. If the judge's rulings are favorable to your case, make sure you emphasize why your case is similar. If the rulings are not in your favor, think about how you can convince the judge to distinguish your case or to think about the issue in a different way.

Know the Rules and Follow Them

In most courts, state and federal judges have individual practices and rules of which you must be fully aware. All lawyers should know a jurisdiction's rules of evidence, procedure, and local practice. Consider carrying hard copies of the rulebooks for frequent and easy reference. Better yet, if electronic copies are available and can be placed on your mobile electronic device, use it for easy reference and reassurance. If you cannot find them yourself, call and ask the clerk if there are applicable rules and where they can be found. Check with veteran attorneys about protocols.

Think of it as a pyramid of rules, with the base being the state or federal rules of evidence and procedure, and then narrow your focus. Learn the local rules for the specific district or county. Find out if there are rules for the type of case you have (for example, commercial, mechanics liens, family law, etc.). Finally, does your judge have any standing orders? Find them all, read them, and know them, because the judge will certainly expect you to.

Choose Your Battles

Illinois's revered lawyer, and personal favorite of mine, Abraham Lincoln told young lawyers, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough." Abraham Lincoln, *Untitled Law Lecture circa 1850*, *in* Abraham Lincoln Association, Collected Works of Abraham Lincoln (Roy P. Basler et al. eds. 1953), *available at* http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm.

Do not fight over trivial issues or technicalities. You want to fight the battles that matter for your client and that actually mean something to the overall success of the case. Do not just file a motion because a partner tells you to. If your name is on the document and you are the one standing in front of the judge, be sure it is an argument you want to make and that you have a chance of winning.

Judge Biebel warns, "Don't end up in the middle of the lake (or the ocean) in the fog; come back to shore." Telephone Interview with Judge Biebel, *supra*. He advised me that it is always important to go back to square one and to focus on what really matters to the case, such as the cause of action, elements of the crime, or your defense. In fact, Judge Biebel thinks that sometimes young lawyers can be too combative by filing motions for sanctions, to compel, and for rule to show cause. But, he says this just gets in the way because judges really just want to hear the case. "Judges don't like contentious lawyers," he says. *Id.*

Judges do not want you to waste their time by filing frivolous motions just to prove a point or to demonstrate how smart you think you are. Judges especially want you at least to attempt to work it out before seeking court intervention. Therefore, it is important to show that you have done your part by documenting all of the discussions (or attempts) you had with opposing counsel before seeking judicial intervention. A fast way to lose credibility with the court is when you appear to be engaging in gamesmanship because flooding your opponent with motions means that you are also adding to the court's burden. Lawyers who constantly file motions can seem unreasonable, and after awhile, they become the proverbial boy-who-cried-wolf.

Be True to Yourself

You will hear a number of people, including me, try to give you advice. While it is good to listen to that advice, do not try to become someone whom you are not. You should take that advice and mold it to fit your personality. Build your skills around who you are.

Discover your "lawyering personality" by observing how well-respected attorneys and judges act and speak. Ask them questions and seek their advice. We have a great tradition in the legal profession of sharing ideas, best practices, and (my favorite) war stories. In fact, some of the most valuable feedback ASA Hofheimer has received is just by asking a judge for comments after trial. She says it will make you a better attorney and judges are receptive to this idea. After all, as she reminded me: "Judges were lawyers once too." Telephone Interview with ASA Hofheimer, *supra*.

Ms. Emery agrees that it is important to observe good lawyers in their element. She encourages young lawyers to watch high profile cases when they are happening locally. She remembers as a young lawyer watching trial greats like Gerry Spence and Richard "Racehorse" Haynes. "You'll have to eat the billable time, but it is absolutely invaluable to watch good lawyers try a case." But, she warns never to mimic someone else's style because "you could end up looking pretty stupid." Interview with Ellen K. Emery, Partner, Ancel, Glink, Diamond, Bush, DiCianni and Krafthefer, P.C. (Feb. 15, 2014).

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Be Confident

Transitioning from learning the law to eventually imparting legal advice can seem daunting. Even now, I struggle with convincing myself that I can properly advise my clients, especially because I am often half their age (and look even younger). You might be inexperienced, but you do not have to act that way. I find that it is possible to appear confident, even when you are not.

Find ways to build confidence in your own way. For me, I am most confident when I am thoroughly prepared. I make outlines and notes that will help guide me through an argument or presentation before the court. I practice even the simplest of arguments by talking it through to myself, to my colleagues, and sometimes to non-lawyers, which ensures that I really have a handle on the issues. Even the best lawyers perform this exercise in preparation for oral arguments before the U.S. Supreme Court.

"As a lawyer, you need courage to make decisions and have confidence that you can do a good job," Judge Biebel says. Telephone Interview with Judge Biebel, *supra*.

While some of our skills will not be finely tuned until later in our careers, reminding ourselves as young attorneys what we are expected to do can only make us better lawyers in the end. The ancient Greek philosopher, Anaxagoras, said, "Appearances are a glimpse of the unseen." Peter Carravetta, Preface to the Diaphora: Rhetoric, Allegory, and the Interpretation of Postmodernity 191 (Purdue Research Found. 1991) (quoting Anaxagoras). The court might only have a brief period to judge you, your appearance, or your argument. So, when you are appearing in court, consider these tips and make sure the glimpse you present is your absolute best.

Appellate Practice Corner

Scott L. Howie
Pretzel & Stouffer, Chartered, Chicago

Straight to the Top: Direct Appeals to the Illinois Supreme Court Under Supreme Court Rule 302

The last edition of the Appellate Practice Corner started from the premise that the Illinois Supreme Court accepts very few petitions for discretionary leave to appeal pursuant to Supreme Court Rule 315. *Illinois Supreme Court Rule 316: Review in the Supreme Court Under a Certificate of Importance*, 24 IDC Quarterly no. 1, 2014, at 54. While many appeals are not suitable for further review, the odds are nonetheless daunting even for those that are. With those odds in mind, we examined the role of Supreme Court Rule 316, which empowers the appellate court to issue a certificate of importance that essentially requires the supreme court to review a case that the appellate court has decided. Rule 316 thus offers one way to improve the odds of obtaining review in the supreme court. But it is not the only way. This edition of the Corner examines the avenues available under Supreme Court Rule 302 as additional procedural alternatives to leave to appeal under Rule 315.

Supreme Court Rule 302

Supreme Court Rule 302 identifies two categories of appeals that do not require disposition by the appellate court before being addressed to the supreme court. In some cases, if a final judgment is appealed, the appeal must be made directly to the supreme court. Ill. S. Ct. R. 302(a). In others, an appeal already in the appellate court may be transferred to the supreme court. Ill. S. Ct. R. 302(b). A third subsection of the rule allows the supreme court to summarily dispose of a circuit court judgment finding a state or federal statute unconstitutional, if the procedural requirements for such a finding have not been met. Ill. S. Ct. R. 302(c); Ill. S. Ct. R. 18.

According to the committee comments, Rule 302 reflects the principle that "the Supreme Court should be the forum for the decision of important questions which affect the public interest or are otherwise of importance and general applicability." Ill. S. Ct. R. 302, Committee Comments (rev. Feb. 1, 1984). The separate subsections of the rule express this principle in different ways.

About the Author

Scott L. Howie is a partner at *Pretzel & Stouffer, Chartered*, in Chicago, specializing in posttrial and appellate practice in the state and federal courts. He received his undergraduate degree from Northwestern University in 1989 and his law degree from Chicago-Kent College of Law in 1994. Mr. Howie is a member and past director of the Illinois Appellate Lawyers Association, where he co-chairs the Moot Court Committee.

Mandatory Direct Appeals Under Rule 302(a)

Under Supreme Court Rule 302(a), when a final judgment is appealed in certain kinds of proceedings, the appeal must be taken directly to the supreme court without any appeal to, or proceedings in, the appellate court. Such appeals must be taken directly to the supreme court in proceedings in which state or federal statutes have been found invalid (though for this purpose, invalidity expressly does not include federal preemption of a state statute). Rule 302(a) also requires a direct appeal to the supreme court in any proceeding under Supreme Court Rule 21(d), in which a party seeks to compel compliance with an administrative order of a chief circuit judge.

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Because Rule 302(a) applies only to final judgments, non-final orders or judgments in such proceedings are typically not appealable unless they fall within one of the rules allowing for interlocutory appeals, such as Supreme Court Rules 306, 307, and 308. Each of those rules specifically provides for appeals to the appellate court. Ill. S. Ct. R. 306; Ill. S. Ct. R. 307; Ill. S. Ct. R. 308. As will be seen, however, once such an appeal has reached the appellate court, Rule 302(b) offers a means for transferring it "directly" to the supreme court.

Direct appeals under Supreme Court Rule 304(a) pose a unique jurisdictional dilemma that the supreme court has not thoroughly addressed or conclusively resolved. See Ill. S. Ct. R. 304(a). The court has questioned its Rule 302(a) jurisdiction over appeals from orders made appealable under Rule 304(a). In *In re H.G.*, 197 Ill. 2d 317 (2001), the court expressed concern that Rule 302(a)(1) "does not . . . expressly allow for direct appeal to this court from an interlocutory order declaring a statute unconstitutional." *Id.* at 328 (citing *Trent v. Winningham*, 172 Ill. 2d 420, 424 (1996)). The court emphasized the language of Rule 302(a) calling for direct appeals to the supreme court "'from *final judgments*'" in cases in which state statutes have been held invalid. *Id.* (quoting Rule 302(a)(1) (emphasis added by court)). The court avoided the jurisdictional question, however, by electing on its own motion to allow the direct appeal under Rule 302(b). *Id.* at 328–29.

Despite the court's concern about its jurisdiction in *H.G.*, the language of Rule 304(a) supports the use of Rule 302(a) as the basis for a direct appeal. Rule 304(a) describes the circumstances under which "an appeal may be taken from a *final judgment* as to one or more but fewer than all of the parties or claims"—suggesting that an order made appealable by a Rule 304(a) finding satisfies the Rule 302(a) requirement of a "final judgment." See Ill. S. Ct. R. 304(a) (emphasis added). More recently, the court has identified Rule 302(a) as the basis for its jurisdiction over a direct appeal of an order made appealable under Rule 304(a), without alluding to the jurisdictional concerns it raised in *H.G.* See *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 226 (2010).

Well before a case reaches the appellate stage, a party challenging the constitutionality of a state statute is required to notify the Attorney General when raising such an issue, so as to allow that office an opportunity to intervene in the case and defend the statute's constitutionality. Ill. S. Ct. R. 19(a), (c). Rule 302(a) does not set forth any additional procedural requirements that are unique to direct appeals in the supreme court. Supreme Court Rule 303, however, generally governs appeals from final judgments in civil cases and conspicuously contains no language generally restricting its application to appeals in the appellate court. To the contrary, Rule 303 contains a single specific reference

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to Rule 302(a), concerning a technical requirement for certain notices of appeal under that rule, and does not otherwise suggest any requirements unique to Rule 302(a) appeals. See Ill. S. Ct. R. 303(b)(3). Nor does Rule 303 contain any specific reference to the appellate court, speaking only generally of the "reviewing court"—implying that those materials that ordinarily are filed in the appellate court are to be filed in the supreme court in appeals under Rule 302(a). Similarly, the rules concerning the docketing statement, the record on appeal, and the parties' briefs refer generally to filing those items in the "reviewing court," without specifying either the appellate court or the supreme court. See Ill. S. Ct. R. 312 (docketing statement); Ill. S. Ct. R. 326 (record on appeal); and Ill. S. Ct. R. 343(a), (c) (briefs). An exception is Supreme Court Rule 341(e), which requires 20 copies of each brief to be filed in the supreme court, rather than the nine required in the appellate court—presumably because of the greater number of justices among whom the copies must be distributed in the supreme court. See Ill. S. Ct. R. 341(e).

Permissive "Direct" Appeals Under Rule 302(b)

Similarly to Rule 302(a), Supreme Court Rule 302(b) provides a procedural mechanism for transferring an appeal to the supreme court without an intervening disposition by the appellate court. Unlike Rule 302(a), however, Rule 302(b) requires the initial filing of the notice of appeal in the appellate court, after which the supreme court or one of its justices may order that the appeal be transferred to the supreme court. Rule 302(b) follows the title of Rule 302 in describing such a transfer as being "directly" to the supreme court even despite the initial filing in the appellate court; in this context, "direct" means without decision by the appellate court. Indeed, a disposition on the merits by the appellate court is "an eventuality not contemplated by the transfer mechanism described in Rule 302(b)." *People v. Pawlaczyk*, 189 Ill. 2d 177, 186 (2000).

Similarly to Rule 302(a), Supreme Court Rule 302(b) provides a procedural mechanism for transferring an appeal to the supreme court without an intervening disposition by the appellate court. Unlike Rule 302(a), however, Rule 302(b) requires the initial filing of the notice of appeal in the appellate court, after which the supreme court or one of its justices may order that the appeal be transferred to the supreme court.

While Rule 302(b) applies only after the filing of a notice of appeal to the appellate court, this procedural limitation does not necessarily require a final judgment, and the supreme court has granted direct appeals of properly appealed interlocutory orders. See, *e.g., In re A.A.*, 181 Ill. 2d 32, 34 (1998) (appeal under Rule 306(a)(5) transferred to supreme court under Rule 302(b)); *Dixon Ass'n for Retarded Citizens v. Thompson*, 91 Ill. 2d 518, 522 (1982) (appeal under Rule 307(a)(1) transferred to supreme court under Rule 302(b)); *O'Connor v. A & P Enters.*, 81 Ill. 2d 260, 265 (1980) (appeal under Rule 308 transferred to supreme court under Rule 302(b)). Indeed, since each of these rules requires the filing of a notice of appeal at the same time as the petition or application, there appears to be no procedural reason that a direct appeal could not be requested or granted even as the petition or application is still pending in the appellate court.

While Rule 302(b) generally describes the judicial and clerical roles in transferring an appeal to the supreme court, it offers no guidance to the parties or their counsel in how to go about requesting such a transfer. In cases that have reached the supreme court by way of Rule 302(b), parties have "appl[ied] for a Rule 302(b) transfer," *Pawlaczyk*, 189 Ill. 2d at 186; filed motions for leave to transfer, *Silver Mfg. Co. v. Gen. Box Co.*, 76 Ill. 2d 413, 415 (1979); or "petitioned directly to this court," *Niven v. Siquiera*, 109 Ill. 2d 357, 360 (1985). Neither the rule nor the case law identifies the procedural device to be filed, but the court's reference to the parties' filings in these cases indicate that they were filed in the supreme court itself as extensions of the existing appeals, rather than as original actions. Whatever the device for seeking such a transfer, the rule states no express limitation on who may make the request; there appears to be no reason that an appellee could not do so, or that the supreme court could not do so on its own motion. If no justice of the supreme court can be persuaded to

transfer the case there, it will remain pending in the appellate court.

Rule 302(b) applies to a broader variety of appeals than does Rule 302(a), and is therefore likely to be useful in a greater number of cases. Rather than enumerating specific kinds of proceedings or rulings that are appropriate for appeals directly to the supreme court, Rule 302(b) has a more general scope: "Cases in Which the Public Interest Requires Expeditious Determination," in the words of the rule's subtitle, or appeals "in which the public interest requires prompt adjudication by the Supreme Court," as described in its text. Ill. S. Ct. R. 302(b). Aside from the public interest in a swift resolution, the rule does not suggest any standard for the supreme court to apply in determining whether a particular appeal calls for it to exercise its jurisdiction under Rule 302(b).

There are some clues to a possible standard, however, in what else the rule does not provide. Though it expressly identifies "expeditious determination" and "prompt resolution" as reasons for direct review, Rule 302(b) does not expedite briefing, oral argument, or decision. The court may choose to expedite such things, of course—but the only way in which the rule automatically makes the determination of the case more "expeditious" is by reducing the number of reviewing courts that will dispose of the appeal. A transfer to the supreme court under Rule 302(b) eliminates the usual review by the appellate court, implicitly suggesting that the appellate court need not decide the case because it is bound for the supreme court anyway. This is consistent with the committee comments to Rule 302, which express the view that some questions ought to be resolved by the supreme court.

If proper cases for Rule 302(b) jurisdiction are those that are expected to reach the supreme court, then the criteria for leave to appeal under Supreme Court Rule 315 should play a significant role in determining if a case is suitable for "direct" review. Though neither controlling nor exhaustive, those criteria suggest

> the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

Ill. S. Ct. R. 315(a).

If those criteria are satisfied, and if public interest calls for a prompt adjudication, then Rule 302(b) may be used to accelerate the ultimate resolution of the case. The rule also provides a procedural opportunity that is not available to a party seeking leave to appeal after the appellate court has decided a case. Since it provides that a single justice of the supreme court may order the transfer of the appeal to that court, Rule 302(b) may also be a means of obtaining review in that court without the consent of a majority of justices.

This opportunity might not always be considered an advantage. Depending on the particular case, a party might prefer to obtain a decision in the appellate court. But if the decision of that court is adverse to the party's interests, the sheer numerical odds do not generally favor ordinary leave to appeal under Rule 315. Rule 302(b) offers a potential express route to the supreme court, possibly with the permission of a single justice of that court, and in a suitable case, it is a procedural tool that should not be overlooked.

Conclusion

Any attempt to obtain review in the supreme court involves an argument that the case belongs in that court. Rule 302 gives explicit substance to such arguments, embodying the notion that some appeals not only belong in the supreme court but also need not be decided by the appellate court first. Cases that fit this narrow description are few and far between—but for those that do, Rule 302(a) provides a direct route to the supreme court, and Rule 302(b) can provide an additional opportunity to get there.

Any attempt to obtain review in the supreme court involves an argument that the case belongs in that court. Rule 302 gives explicit substance to such arguments, embodying the notion that some appeals not only belong in the supreme court but also need not be decided by the appellate court first.

Workers' Compensation Report

Bradford J. Peterson
Heyl, Royster, Voelker & Allen, P.C., Urbana

Are All Workplace Stairway Falls Now Compensable In Illinois?

In December of 2013, the Illinois Appellate Court, Workers' Compensation Commission Division, handed down a decision in a case where an employee's fall on a workplace stairway was indisputably due to a prior non-work related knee injury. This decision could substantially expand the scope of an employer's liability for workplace injuries occurring when employees are ascending or descending a stairway.

In *Village of Villa Park v. Illinois Workers' Compensation Commission*, 2013 IL App (2d) 130038WC, the appellate court addressed the issue of whether a village community service officer's back injury "arose out of" and was "in the course of" his employment when the injury resulted from a fall while descending a workplace stairway. Although it was undisputed that the fall occurred due to weakness in the claimant's right knee following a non-work related injury sustained earlier that year, the court found that the claimant was subjected to an increased risk of injury due to the need to ascend and descend the stairway six or more times a day. *Vill. of Villa Park*, 2013 IL App (2d) 130038WC, ¶ 21.

In January of 2007, the claimant injured his right knee when he slipped on a patch of ice at his vacation home in Wisconsin. *Id.* ¶ 6. A subsequent MRI revealed a complex tear to the lateral meniscus. Surgery was scheduled for May 2, 2007. Prior to surgery, the claimant returned to work regular duty and was not under any work restrictions. *Id.*

The claimant continued working as a community service officer for the Village of Villa Park. His duties included handling ordinance complaints, theft reports, non-criminal in-progress calls, accident reports, parking enforcement, police officer back up, and other duties. *Id.* ¶ 2. In the course of his employment, the claimant would use a stairway to travel to the lower level of the building, which contained locker rooms, a briefing room, the lunch area, and a shooting range. The claimant's regular work activities were conducted on the main floor of the building. The claimant testified that, before his shift would begin, he would descend the stairway to the locker room to change into his uniform. Before his shift would begin, the claimant testified that he would traverse the stairway at least two to four times. At the completion of his workday, he would again descend the stairs to again change in the locker room. He would also ascend and descend the stairs to go to the lunch room or to acquire raingear or other equipment needed for his work duties. *Id.* ¶ 5. The appellate court noted that the claimant would traverse the stairs at the police station a minimum of six times per days. *Vill. of Villa Park*, 2013 IL App (2d) 130038WC, ¶ 21.

On April 5, 2007, approximately a month prior to scheduled knee surgery, the claimant was descending the stairway. The stairway consisted of approximately ten stairs, a landing and then an additional ten stairs to the lower level. *Id.* ¶ 4. On the day in question, the claimant attended a briefing on the main level of the police station and was returning to the lower level locker room. He testified that he descended three steps when his right knee "gave out," causing him to fall down approximately seven stairs to the landing below. The claimant sustained injuries to his right knee and low back. *Id.* ¶ 3. Conflicting testimony was offered as to whether the claimant suffered from a limp immediately prior to the fall at issue. *Id.* ¶ 8. The claimant testified that prior to the April 5 fall, he was experiencing pain at a level of one or two out of 10, but after the fall the pain elevated to a pain level of eight or nine. *Id.* ¶ 10.

The claimant attempted to recover for not only injury to his back, but also to his right knee. The claim for the right knee was denied by the arbitrator based upon causal connection. The evidence indicated that the claimant's post-April 5 MRI showed no change from the pre-April 5 MRI. The decision of the arbitrator was affirmed, and that decision was not disturbed by the appellate court.

About the Author

Bradford J. Peterson is a partner in the Urbana office of *Heyl, Royster, Voelker & Allen, P.C.* Brad concentrates his practice in the defense of workers' compensation, construction litigation, auto liability, premises liability, and insurance coverage issues. In recent years, Brad has become a leader in the field on issues of Medicare Set Aside trusts and workers' compensation claims. He has written and spoken frequently on the issue. He was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers' compensation claims, "Medicare, Workers' Compensation and Set Aside Trusts," *Southern Illinois Law Journal* (2002).

Vill. of Villa Park, 2013 IL App (2d) 130038WC, ¶¶ 9–12.

The real issue addressed on appeal was whether the claimant's back injury "arose out of" and "in the course of" his employment, based upon the undisputed testimony that the claimant's right knee "gave out" secondary to the pre-existing condition of the right knee. It was also undisputed that the claimant was not carrying anything at the time of the occurrence, nor was he rushing down the stairs for a work-related reason. Furthermore, there was no evidence that the stairs were defective. *Id*. ¶ 14.

The Illinois Workers' Compensation Commission (the Commission) determined that the claimant's daily, frequent use of the stairs exposed him to a greater risk than the general public, and his use of the stairway at the time of the occurrence was within the scope of the personal comfort doctrine. *Id*. ¶ 13. The circuit court affirmed the Commission's decision. *Id.* ¶ 15.

On appeal, the appellate court found that the Commission's decision was not against the manifest weight of the evidence. The court analyzed whether the injury "arose out of" the employment by noting that there are three categories of risk that an employee may be exposed to: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks, which have no particular employment or personal characteristics. *Id*. ¶ 20. The court acknowledged that a fall associated with a weak knee is a personal risk. The court also noted that an injury arising from such personal risk is not compensable unless the claimant's employment "significantly contributes" to the injury by placing him in a position of greater risk of falling. The court further acknowledged that the risk of falling while traversing stairs is a neutral risk and does not arise out of the employment. An exception, however, exists where the employee is subject to an increased risk on a qualitative or quantitative basis beyond that to which the general public is exposed. *Vill. of Villa Park*, 2013 IL App (2d) 130038WC, ¶ 20.

The appellate court concluded that, on a quantitative basis, the claimant was "continually forced to use the stairway" by his employer for both his personal comfort and to complete work-related activities. *Id*. ¶ 21. The claimant was required to use the stairway a minimum of six times per day and, according to the appellate court, that was sufficient to create exposure to a "common risk" more frequently than that to which the general public was exposed. *Id*. ¶¶ 20–21. It should be noted that the court's reliance on *Illinois Consolidated Telephone Co. v. Industrial Commission*, 314 Ill. App. 3d 347 (5th Dist. 2000), is somewhat misplaced. In the court's opinion, the *Illinois Consolidated Telephone Co.* case is cited for the proposition that increased risk can occur on a quantitative basis. *Vill. of Villa Park*, 2013 IL App (2d) 130038WC, ¶ 20. In *Illinois Consolidated Telephone Co.*, the majority opinion, however, contained no such analysis regarding quantitative increased risk. Rather, a specially concurring opinion by Justice Rakowski raised the issue of quantitative increased risk. *Ill. Consol. Tel. Co.*, 314 Ill. App. 3d at 351, 353 (Rakowski, J., specially concurring).

The court also relied upon evidence that the employer was aware of the claimant's prior knee injury, and this evidence supported an inference that the "Village required the claimant to continuously traverse the stairs in the police station, knowing that he had an injured knee." *Vill. of Villa Park*, 2013 IL App (2d) 130038WC, ¶ 21. Therefore, the use of the stairway a minimum of six times a day where the employer knows of a prior knee injury is evidence, according to the appellate court, that is "more than sufficient to support both the conclusion that the claimant's employment placed him in a position of greater risk of falling, satisfying the exception to the general rule of noncompensability for injuries resulting from a personal risk, and that the frequency with which the claimant was required to traverse the stairs constituted an increased risk on a quantitative basis." *Id*.

The court's analysis in *Village of Villa Park* significantly expands the scope of compensability in cases involving stairway falls that previously would have been thought to be non-compensable. The court's analysis expands the scope of "arising out of," both with regard to "personal risks" and "neutral risks." The court acknowledged that a fall caused by a weak knee is a personal risk, which normally would be non-compensable. *Id*. ¶ 20 (citing *Stapleton v. Indus. Comm'n*, 282 Ill. App. 3d 12, 16 (5th 1996)). The court also acknowledged that a fall traversing stairs is normally a neutral risk that generally does not arise out of the employment. *Id.* (citing *Ill. Consol. Tel. Co.*, 314 Ill. App. 3d at 353).

Regarding personal risk, the court appears to have created a new exception where the employer has knowledge of the claimant's pre-existing condition or weakness. The court specifically noted that "the Village required the claimant to traverse the stairs in the police station, knowing that he had an injured knee." *Id*. ¶ 21. They found that this fact satisfied the exception to the general rule of non-compensability for injuries resulting from a personal risk. As to the neutral

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risk of falling while traversing stairs, the court noted that the "frequency with which the claimant was required to traverse the stairs constituted an increased risk on a quantitative basis from that to which the general public is exposed." *Vill. of Villa Park*, 2013 IL App (2d) 130038WC, ¶ 21.

The appellate court's decision in *Vill. of Villa Park* is likely to greatly increase employer exposure in cases where the true cause of the injury was an idiopathic condition of the claimant. The rationale of the appellate court suggests that, if the employer has knowledge of the weakness or physical condition that causes or contributes to the injury, the claim may be compensable as an exception to the personal risk defense.

Furthermore, now cases could be deemed compensable as an employment risk versus a neutral risk where the employee is required to ascend and descend a stairway six or more times a day. Would such cases be compensable if the employee were only required to traverse the stairway three or four times a day? In *Village of Villa Park*, the claimant testified he was on the third step when his knee gave out and he fell. Are cases now compensable where an employee traverses a stairway consisting of three stairs six or more times a day? What proof is now needed to combat this evidence?

The appellate court's decision should be of great concern to Illinois employers and the workers' compensation defense bar. We can all count on seeing this case cited in cases previously thought to be non-compensable.

Evidence and Practice Tips

Joseph G. Feehan and **Brad W. Keller**
Heyl, Royster, Voelker & Allen, P.C., Peoria

Statement Made in Motion Practice Admissible at Trial

In *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, the Illinois Appellate Court First District held that the trial court did not abuse its discretion in ruling that a statement written in a defendant's reply brief filed in support of a Section 2-619 motion to dismiss was admissible in the subsequent trial and could be read to the jury as an admission. This case serves to provide litigation counsel with some important lessons concerning statements that could be deemed admissions at trial.

Factual and Procedural Background

The *Abruzzo* case arose out of an unfortunate situation that occurred on October 31, 2004. In the early hours of that day, Larry Furio called 9-1-1 after he found his son, Joseph, unresponsive and not breathing. Paramedics from the City of Park Ridge (Park Ridge) were dispatched to the home. Around the time that the paramedics arrived, Joseph sat up and began speaking, even allegedly asking his father what all the people were doing there and saying that he just wanted to go to sleep. What exactly transpired during the paramedics' first trip to the Furio home (including what, if any, assessments were made by the paramedics and what information the paramedics were given) was heavily disputed and became the crux of the case. The paramedics' records indicated that they were at the Furio home for seven minutes before leaving. After they left, Larry Furio continued to check on Joseph until around 3:15 a.m., when he went to sleep. Later that morning, Larry Furio found Joseph unconscious and blue. He again called the paramedics, and Joseph was transported to the hospital. Joseph never regained consciousness. He was later pronounced brain dead and was removed from respirators. *Abruzzo*, 2013 IL App (1st) 122360, ¶¶ 1, 7–8.

Following Joseph Furio's death, the administrator of his estate filed a lawsuit against Park Ridge for wrongful death, survival, and family medical expenses. The estate alleged, in part, that the

About the Authors

Joseph G. Feehan is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he concentrates his practice in commercial litigation, products liability, and personal injury defense. He received his B.S. from Illinois State University and his J.D. *cum laude* from the Northern Illinois University College of Law. Mr. Feehan is a member of the ISBA Tort Law Section Council and is also a member of the Peoria County, Illinois State and American Bar Associations. He can be contacted at jfeehan@hrva.com

Brad W. Keller is an associate in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He practices primarily in the areas of business and commercial litigation and tort litigation. He received his B.A. in Political Science from the University of Illinois in 2007 and his J.D. *magna cum laude* from University of Illinois College of Law in 2010.

paramedics who first reported to the Furio home failed to evaluate or to assess Joseph. The estate further alleged that the paramedics behaved willfully and wantonly in failing to transport Joseph, a nonresponsive patient, to the hospital. *Id.* ¶ 2.

Early in the case, Park Ridge filed a motion to dismiss pursuant to Section 2-619(a)(9) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619(a)(9). In that motion to dismiss, Park Ridge argued that it was immune under sections of the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/6-105, 6-106, that provide absolute immunity to a local public entity for failure to evaluate, diagnose, or prescribe treatment for an illness or physical condition. The estate responded to the motion, and Park Ridge then filed a reply brief in support of the motion. Following argument, the trial court granted Park Ridge's motion, finding that Park Ridge was immune. *Id.* ¶ 3.

Furio's estate appealed the dismissal of its case against Park Ridge to the First District. In *Abruzzo v. City of Park Ridge*, 374 Ill. App. 3d 743 (1st Dist. 2007), *rev'd, Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324 (2008), the First District affirmed the trial court's ruling. Furio's estate sought leave to appeal from the Illinois Supreme Court, which agreed to hear the case.

In *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324 (2008), the Illinois Supreme Court reversed the rulings of the trial and appellate courts. In that decision, the supreme court held that the limited immunity provision in the Emergency Medical Services System Act, 210 ILCS 50/3.150(a) (enacted in 1995), the more specific and recent statute, governed over the more general provisions of the Tort Immunity Act, 745 ILCS 10/6-105, 6-106(a) (enacted in 1965). *Abruzzo*, 231 Ill. 2d at 346.

Following the supreme court's decision in 2008, the case was remanded and ultimately tried. At trial, the jury awarded a verdict in favor of Joseph Furio's estate in the amount of $5,187,500. *Abruzzo*, 2013 IL App (1st) 122360, ¶ 4. An appeal once again followed, with several trial court errors being alleged, including the trial court's ruling that a statement made by Park Ridge in its reply brief in support of its 2-619 motion to dismiss was admissible at trial as an evidentiary admission.

Alleged Error: Admission of Statement in Reply Brief as Evidentiary Admission

Prior to trial, Joseph Furio's estate filed a motion *in limine* that asked the trial court to rule that a statement made in Park Ridge's reply brief filed in support of its 2-619 motion to dismiss was a judicial admission that could not be controverted. *Id.* ¶ 32. Specifically, the attorneys for Furio's estate asked that they be allowed to read the following statement from the reply brief to the jury:

> In the present case, it is clear that while the City of Park Ridge paramedics responded to the Furio home arriving at 1:11 a.m. and leaving at 1:18 a.m., they provided no medical care of any kind, including evaluation, assessment, diagnosis, treatment, or documentation.

Id. ¶ 33. Following argument on the motion *in limine*, the trial court ruled that the statement could be read as an evidentiary admission at trial (meaning that it could be controverted). The trial court further ruled that the statement would be read in rebuttal and that Park Ridge could explain the context of the statement in surrebuttal. *Id.* ¶ 34.

At trial, once Park Ridge had presented its case-in-chief, the attorneys for Furio's estate read the above statement into evidence. Following the reading of the statement, the attorneys for Park Ridge explained to the jury that the statement read was drafted by Park Ridge's attorneys and was contained within a reply brief filed in support of its motion to dismiss. Closing arguments then followed. *Id.* ¶¶ 32–35.

Trial Court's Ruling Upheld by First District

The main argument presented on appeal by Park Ridge was that the statement in Park Ridge's reply brief did not constitute an admission because it was contained within a Section 2-619 motion to dismiss, in which Park Ridge was required to admit the allegations of the estate's amended complaint as true for purposes of the motion. The Illinois Governmental Association of Pools (IGAP), which filed a brief as *amicus curiae*, joined Park Ridge in this argument. IGAP further argued that the trial court's ruling effectively rewrote Section 2-619 to include a provision that a defendant's acceptance of the well-pled allegations in a complaint as true for purposes of a 2-619 motion to dismiss constitutes an evidentiary admission which may be presented at trial. *Abruzzo*, 2013 IL App (1st) 122360, ¶¶ 37, 40.

Park Ridge compared this situation to cases in which a defendant files a third party complaint seeking contribution if it is found liable at trial. *Id.* ¶ 38. In support, Park Ridge cited *Bargman v.*

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Economics Laboratory, Inc., 181 Ill. App. 3d 1023 (3d Dist. 1989), in which the court held that statements made in a third party complaint did not constitute admissions. The *Bargman* court further explained that "'[a] party wishing to make alternative or contingent claims should not be placed in the perilous situation of either foregoing one claim or having one claim used against another as an admission.'" *Bargman*, 181 Ill. App. 3d at 1033 (quoting *Slocumb v. Ford Motor Co.*, 111 Mich. App. 127, 134 (1981)).

> Ultimately, the First District held that the trial court had not abused its discretion in admitting the statement from Park Ridge's reply brief as an admission. The court found that Park Ridge had made affirmative statements of fact in its reply brief to avoid litigating the issue of its immunity in the event that the court determined the facts alleged in the amended complaint proved insufficient on their own to support the motion.

The First District agreed that defendants should not be put in the position of only being able to assert an immunity defense if they are willing to agree with the complaint's factual allegations for purposes of a motion to dismiss, which may be then admitted as evidence at a subsequent trial. *Abruzzo*, 2013 IL App (1st) 122360, ¶ 43. The First District, however, found that Park Ridge had not merely accepted the factual allegations of the estate's amended complaint as true for purposes of its motion to dismiss, but instead had gone beyond accepting the allegations and had taken an affirmative position asserting factual matters unnecessary and unrelated to its position on its motion to dismiss. *Id*. The court pointed to specific language used by Park Ridge in its reply brief to demonstrate that Park Ridge went beyond merely accepting the allegations of the amended complaint as true and instead made affirmative statements of fact. *Id*. ¶ 46.

IGAP, *amicus curiae*, further argued that the trial court's ruling was contrary to the provision in Section 2-619 that allows a defendant to raise the same grounds in its motion to dismiss by answer. *Id*. ¶ 40. IGAP argued that this provision clearly demonstrated that the admission that the complaint's well-pled facts are true is only for the limited purpose of ruling on the motion to dismiss and is not to prevent and prejudice the defendant from denying such facts are true in an answer. *Id*. The First District rejected this argument and explained that, if Park Ridge's motion to dismiss had been denied, Park Ridge could have raised the immunity defense by answer through an affirmative defense, on which it would have had the burden of proving the facts on which the immunity was based. *Abruzzo*, 2013 IL App (1st) 122360, ¶ 47. The court noted, however, that Park Ridge instead had argued at the early stage of litigation that proceeding to a trial on those facts was unnecessary because it was clear that its paramedics had not provided any medical care. *Id*. The First District explained that the fact that the supreme court ultimately held that Park Ridge was wrong did not change Park Ridge's assertion about its facts. *Id.* ¶¶ 40, 47.

Park Ridge next argued that its answer, filed after the supreme court struck down the trial court's dismissal of the case, superseded the motion to dismiss (and reply brief). The First District also rejected this argument, finding that nothing contained in the answer was inconsistent with the admission in the reply brief. *Id.* ¶ 48.

Park Ridge also argued that the trial court's ruling was incorrect because the admission gave the jury a false idea of Park Ridge's position on whether it had acted willfully and wantonly. The First District disagreed, explaining that the statement read to the jury merely contained Park Ridge's position on what the paramedics had or had not done on the first trip to the Furio home, not whether they were willful or wanton. It was therefore a statement of fact, rather than a conclusion of law. Thus, it was still for the jury to determine whether the paramedics' conduct was willful and wanton. *Id.* ¶ 50.

Finally, the First District rejected Park Ridge's argument that the court's ruling would have a chilling effect on motions asserting immunities and other defenses in the future. The court again explained that it was not making a blanket holding that accepting the allegations of the complaint as true in pleadings on a motion to dismiss admits those allegations for purposes of trial. It emphasized that its holding did not convert a defendant's immunity defense into an admission of liability. Rather, the First District stated that its holding was limited to the facts of this case, in which Park Ridge affirmatively stated its position on the facts of the case rather than limiting itself to the allegations in

the amended complaint. On this basis, the court explained that its holding would not have a chilling effect on similar motions in the future. *Abruzzo*, 2013 IL App (1st) 122360, ¶ 51.

Ultimately, the First District held that the trial court had not abused its discretion in admitting the statement from Park Ridge's reply brief as an admission. The court found that Park Ridge had made affirmative statements of fact in its reply brief to avoid litigating the issue of its immunity in the event that the court determined the facts alleged in the amended complaint proved insufficient on their own to support the motion. Thus, it concluded that Park Ridge had gone beyond admitting the allegations of the amended complaint for purposes of the motion and had indeed made an admission. *Id.* ¶¶ 51, 56.

Conclusion

It is important for attorneys who are drafting or arguing motions at any stage of litigation to consider what effect, if any, statements and arguments made in the motions might have at a later stage of litigation, most importantly at trial. Based on the holding in *Abruzzo*, it is especially crucial that defendants moving to dismiss a case pursuant to Section 2-619 consider whether they have gone beyond accepting the complaint's allegations as true for the purposes of the motion and have actually made an affirmative statement that may be used as an admission at a subsequent trial.

This case is also a helpful reminder that statements made by attorneys at any stage can bind their clients at trial. Thus, it is always important to keep that in mind, whether the attorney is drafting motions or making arguments before the court.

Product Liability

Brian J. Benoit and **Ryan M. Frierott**
Goldberg Segalla LLP, Chicago

Design Defect and the Social Utility of a Product

Is a product unreasonably dangerous because its utility is outweighed by the cost it imposes on society? In *Stollings v. Ryobi Technologies, Inc.*, 725 F.3d 753 (7th Cir. 2013), the Court of Appeals for the Seventh Circuit addressed social utility of a product as a unique factor for which account should be taken when conducting a risk-utility analysis.

In *Stollings*, the plaintiff, Brandon Stollings was injured while operating a Ryobi Model BTS20R table saw. The plaintiff's injuries occurred while using the table saw to cut a piece of wood. While cutting the wood, the plaintiff experienced what is commonly known as a kickback. Kickback occurs when the blade catches the piece of wood and throws the wood back toward the user. As in this case, kickback can cause the user's hand to contact the blade. *Stollings*, 725 F.3d at 757.

As discussed in the opinion, the Ryobi saw was equipped with a "3-in-1" guard safety system, which has three components: "a splitter, anti-kickback pawls, and a blade shield." *Id*. This system complied with standards published by Underwriters Laboratories. The court indicated that many users disable the 3-in-1 system for ease of use. *Id.*

Despite warnings on the saw that warn against disabling the guard safety system, the court discussed two additional safety mechanisms that Ryobi could have used to prevent kickback even with the guarding system disabled. The first additional safety mechanism discussed was a "riving knife," which makes the saw more effective against preventing kickbacks. The second was an automatic braking system that stops the blade the moment the blade contacts flesh (SawStop). *Id.* at 756.

At trial, the jury returned a verdict in favor of the defendant. The court reversed the jury verdict, finding improper the defense counsel's argument at trial that the plaintiff's counsel's motivation for filing the lawsuit was a joint venture between he and the inventor of the automatic braking system as punishment for

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About the Authors

Brian J. Benoit is a partner in the Chicago office of *Goldberg Segalla LLP*. His nationwide practice focuses on the defense of product manufacturers, specializing in catastrophic losses involving fires and explosions. Mr. Benoit has authored articles and presented nationwide on investigating fire losses, evidentiary challenges, and deposing expert witnesses.

Ryan M. Frierott is a partner in *Goldberg Segalla LLP*'s Chicago office. His practice focuses on product liability defense, and he is also experienced in litigation involving construction disputes and professional liability. He has significant experience defending product liability cases in state and federal courts throughout the United States, including cases involving fires, product defect, and testimony of expert witnesses.

The district court judge ruled that Graham's methodology in determining the percentage by which the automatic braking system would work effectively was a "rough" estimate and, therefore, too speculative.

failing to pay the inventor a royalty for his flesh detection technology. Despite the reason for reversal, the court engaged in extensive discussion about whether the plaintiff's expert, Dr. John Graham, the Dean of Indiana University's School of Public and Environmental Affairs, was permitted to testify that the social cost of not having added protection on Ryobi's table saw outweighed the utility of the saw without the extra safeguard and whether such an analysis was relevant. The court examined these issues because they may be raised on appeal following the second trial of the action. The district court judge ruled that Graham's methodology in determining the percentage by which the automatic braking system would work effectively was a "rough" estimate and, therefore, too speculative. *Stollings v. Ryobi Techs., Inc.*, No. 08 C 4006, 2012 U.S. Dist. LEXIS 146063, at *9–12 (N.D. Ill. Oct. 10, 2012).

> Graham's opinion that $753 is the switch-point cost of adding SawStop to a table saw is only as reliable as the numerical inputs used in his calculation, including the assumption that SawStop has a 90% effectiveness rate. Under Rule 702, that "assumption[] . . . must rest on [an] 'adequate [basis],' . . . and cannot be the product of mere speculation." . . . .
>
> . . . .
>
> The only basis asserted in Graham's initial report for assuming a 90% effectiveness rate was [the SawStop inventor's] 2009 deposition testimony that SawStop prevented injury in a "vast majority of cases." As Magistrate Judge Kim explained in excluding Graham's materially identical testimony in another case involving a Ryobi-brand saw, [the inventor's] deposition testimony does not support Graham's 90% assumption:
>
> > [Graham] does not explain how he extrapolates from [the inventor's] testimony that SawStop works in "the vast majority of cases," that the 90% figure is appropriate. Would 80% also represent a "vast majority"? Would 65%? Without further explanation from Dr. Graham, it appears as though he plucked the 90% number more or less out of thin air, and [the plaintiff] has done nothing in his response to clarify or justify this 90% figure.
>
> *Id.* at *9–10 (certain alterations in original).

Dr. Graham's analysis was as follows: He calculated the average cost of a table saw injury (medical costs, lost wages, pain and suffering, and litigation costs) and multiplied that figure by the likelihood that a saw user would suffer an injury. That, in Dr. Graham's opinion, was the societal cost of a table saw. Dr. Graham then estimated the percentage by which injuries would be reduced if the automatic braking technology was installed. He estimated this number to be approximately 90 percent. Dr. Graham arrived at the 90-percent figure because, based on the inventor of the technology's testimony, the automatic braking system worked "a vast majority of the time." *Stollings*, 725 F.3d at 764.

The district court's decision to exclude Dr. Graham's testimony was based on his 90-percent calculation. The court stated that Dr. Graham's only basis for the 90-percent figure was the testimony of the inventor of the SawStop that his technology worked in the "vast majority of cases." *Stollings*, 725 F.3d at 764. At the conclusion of the hearing to exclude Dr. Graham due to his reliance on the 90-percent figure, the district court permitted Dr. Graham to author a supplemental report in order to provide the source for the 90-percent figure. Dr. Graham's supplemental report provided three common instances where the SawStop technology did not function: when the saw had been turned off and was slowing down; when the operator's hand is moving too rapidly; and when the detection technology is disabled. These instances accounted for 10% of the time, according to the supplemental report. Following the submission of the supplemental report, the district court still excluded Dr. Graham's testimony because it was untimely, because the information on which the supplement

was based was available at the time of the initial report, and because the court should not have permitted a "new" justification for his 90-percent assumption. *Stollings*, 2012 U.S. Dist. LEXIS 146063, at *8.

The appellate court employed a two-prong analysis in eventually concluding that the opinions of Dr. Graham were admissible. The court first evaluated whether the testimony was reliable under the lens of Federal Rule of Evidence 702 and then under Rule 702's relevancy requirement. *Stollings*, 725 F.3d at 765.

When is Testimony Reliable?

The reliability threshold of Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), requires that expert witness testimony be based on a valid and properly applied methodology. The appellate court in *Stollings*, however, cautioned that an opinion based on a reliable methodology is admissible, even where the conclusion offered is "subject to doubt." *Stollings*, 725 F.3d at 766. The *Daubert* Court intimated that it is the jury's role to vet out suspect conclusions and that, to cast doubt on such conclusions, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

In the *Stollings* case, the appellate court indicated that the methods for determining cost to society in not equipping a table saw with SawStop technology was based on a reliable methodology. The 90-percent effectiveness rate, though a rough estimate, would not change Dr. Graham's final opinion that the cost of the technology was less than the cost to society. The appellate court indicated that, even if the effectiveness rate was 50 percent, the cost on society still would be far greater than the cost of the technology. It was, therefore, up to the jury to determine how the uncertainty about the effectiveness rate affected the weight of the proffered testimony. *Stollings*, 725 F.3d at 767.

When Is Testimony Relevant to a Determination of Whether a Product Is Unreasonably Dangerous?

In a product liability case premised on a design defect, such as *Stollings*, Illinois applies the consumer expectation test and the risk utility test. A product is unreasonably dangerous under the risk utility test where "the risks associated with the product design outweigh the utility of the design." *Stollings*, 725 F.3d at 767. The inquiry into the risk-utility of a product is a broad one. The Illinois Supreme Court in *Calles v. Scripto-Tokai Corp*., 224 Ill. 2d 247 (2007), set forth 14 factors to evaluate in determining whether the risk of a product design outweighed the product's utility. The *Calles* court indicated that the inquiry is a broad one and that the 14 factors are not "exclusive." *Calles*, 224 Ill. 2d at 260–61.

Whether testimony ultimately is relevant is also a broad standard. Federal Rule of Evidence 401 defines relevant testimony as testimony that has "any tendency to make a fact more or less probable than it would otherwise be." Fed. R. Evid. 401. Taking into account the breadth of the inquiry into a product's risk and utility, the appellate court in *Stollings* concluded that "Illinois courts would consider the cost of a category of accidents to society a relevant consideration in a product liability suit," *Stollings*, 725 F.3d at 767, and that it would provide the jury with " a basis to appreciate the saw's cost to society," *id.*

The defense raised arguments that the social cost of the saw was only one factor in whether the saw was unreasonably dangerous without with the SawStop technology and that the social cost analysis was not limited to the specific saw at issue. As to both arguments, the appellate court followed the *Daubert* Court's commentary that these types of issues may diminish the value of an expert's final conclusions, but that does not render the opinions entirely inadmissible. Any flaws or issues in final conclusions that were reached through a scientific methodology are subject to cross-examination.

A product is unreasonably dangerous under the risk utility test where "the risks associated with the product design outweigh the utility of the design."

Practice Pointers

1. Attack the Expert's Methodology. Even though defense counsel in Illinois will find themselves most often in state court where a *Daubert* analysis is inapplicable, an expert still should

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be questioned on what methodology was employed as if he or she *was* being subjected to federal requirements. On what industry treatises or standard is the expert relying? It is imperative to have any industry guidebooks, handbooks, or treatises at your fingertips during a deposition of an expert. For instance, a Cook County judge could permit an expert to testify that a carpet met flammability standards after the expert tossed a lit match onto the carpet. The industry standard, however, uses the burn pill test to ensure flammability requirements are met. A jury should hear every deviation from accepted standards so they can weigh the credibility of an expert who does deviate from recognized methods.

2. Know and Explain Your Client's Process. Most product manufacturers have systematic processes in place for the design, manufacturer, and quality control evaluation of their products. Knowing each step of the process will expose any weaknesses that might subject the corporate witness to intense cross examination. Once any potential problem areas are identified, you can take steps to explain away any weakness and focus on the systems in place that make the product safer and exceed industry requirements.

A frequent question of corporate witnesses is whether the company engaged in one or multiple "FMEA," which stands for "failure modes and effects analysis." In some industries, this process is documented by actual forms that are titled "FMEA." There have been instances however, where a corporate witness is asked about whether the corporation conducted FMEAs, and the witness will answer in the negative simply because the company does not possess a document titled "FMEA." This answer is the wrong. An FMEA, whether titled as one, is a process by which the designer of a product determines potential failure modes with the product and what effect that failure might have. Any manufacturer that lists its product with "UL" or "ETL" engages in failure modes in the design phase in order to obtain certification by the global independent safety science company UL or extract, transform, and load standards, respectively. Certain industries require that a product pass certain tests with certain safety mechanisms disabled, to ensure that in the event such a safety is disabled, there is no catastrophic result. These tests are for all intents and purposes, FMEAs.

3. Know Your Document Production. In many instances, manufacturers and sellers of products are required to produce thousands of documents pertaining to the design and manufacture of a product or like products. There could be one or two documents in the whole production that you or client might think is insignificant but to opposing counsel raise a red flag. This red flag could signify to a plaintiff's counsel that the product could have been made safer for a nominal amount.

The document, however, might be misleading. For instance, there might be some documentation in the design phase of a prototype product that lists a certain widget for 50 cents. If this widget was specified as a part of a safety mechanism of the product and was not employed in the final product, the plaintiff's counsel will be telling the jury how a cost saving of 50 cents was what caused an incident to occur. If this document is pulled out ahead of time and the reasons for the election not to design a product in that manner are identified, the defense can far lessen the damage that such a document might otherwise cause.

A lesson to be learned from *Stollings* is that certain expert testimony that is based on rough numbers and assumptions, could be, and often is, allowed at trial. Defense counsel's job is to make sure that the jury understands how speculative that testimony is and how that is a reflection of the plaintiff's entire case. To do so, however, requires intimate knowledge of the industry, the safeguards in place, the costs of such safeguards, not only in dollars and cents but also in terms of opportunity cost and institutional costs that might be prohibitive. The cost of a safeguard or component to a product must be explained to the jury in terms that encompass a far greater analysis than simply the cost of the widget itself.

A lesson to be learned from *Stollings* is that certain expert testimony that is based on rough numbers and assumptions, could be, and often is, allowed at trial. Defense counsel's job is to make sure that the jury understands how speculative that testimony is and how that is a reflection of the plaintiff's entire case.

THE IDC MONOGRAPH:

A Practioner's Guide to the Consumer Product Safety Act and Navigating the Consumer Product Safety Commission

Justin K. Beyer
Seyfarth Shaw, LLP, Chicago

A Practioner's Guide to the Consumer Product Safety Act and Navigating the Consumer Product Safety Commission

I. Introduction

The Consumer Product Safety Commission (CPSC) is a federal agency having broad powers and abilities, including (a) to fine a retail clothing store $3.9 million for failing to report to that agency within 24 hours that it was selling defective clothing;[1] (b) to hold an executive of a company personally liable for a $57 million recall action;[2] (c) to force settlement with a defunct corporation to pay for the cost of a recall;[3] and (d) to be accused by a federal circuit court of "squashing" a children's art supply company and employing a "sinister exercise of discretion."[4] Accordingly, companies that manufacture and distribute products for use in the United States should endeavor to know more about the CPSC, its regulations, and the enabling act under which it operates.

This article investigates the history and scope of the Consumer Product Safety Act[5] (Act), the Consumer Product Safety Improvement Act of 2008[6] (Act of 2008), and the decisions made by the CPSC, which was established to enforce the Act. In so doing, this article performs an analysis relating to the more substantial sections of the Act, including the following: the CPSC's mandatory online database; consumer safety standards; the hazardous product ban and the CPSC's ability to litigate "imminent hazards"; the CPSC's rulemaking procedures; the CPSC's product certification program; mandatory reporting obligations for "substantial product hazards"; mandatory recordkeeping obligations and the CPSC's inspection privileges; penalties and fines for violations of the Act; and an individual's private right of action under the Act. This analysis will illustrate the CPSC's expansive powers and the level of discretion that federal courts continue to provide the CPSC. Finally, this article will provide practical tips to help Illinois practitioners better understand the manner in which they, and their clients, may utilize the Act to their advantage, particularly when defending against product liability suits.

II. The Consumer Product Safety Act and Commission

In 1970, a national study conducted by the National Commission on Product Safety found that existing federal legislation was disjointed, with enforcement mechanisms focused on post-injury civil penalties rather than prevention.[7] In 1972, in response to these findings, Congress established the CPSC, which focused on a series of educational, regulatory, and punitive measures. Under the Act, five commissioners are appointed by the president (with the advice and consent of the Senate) for staggered seven-year terms, with no more than three commissioners to be affiliated with the same political party.[8]

The Act specifically covers "consumer products," defined as:

> [A]ny article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.[9]

The Act also applies to imported products,[10] but not exported products, unless such products are intended for use in the United States or present an unreasonable risk of injury to consumers in the United States.[11] The Act also incorporates into the enforcement and interpretive powers of the CPSC certain legislation that existed when the Act was enacted.[12] Although the Act provides the CPSC with jurisdiction over a wide variety of products, not all products are covered. For example, other federal agencies have jurisdiction over child resistant packaging, aircraft, alcohol, ammunition, amusement rides, automobiles, boats, car seats, cosmetics, drugs, firearms, foods, medical devices, motorcycles, pesticides, radioactive materials, tires, and tobacco.[13]

In 2008, after a series of high-profile product recalls during 2007 and 2008—including some involving toys containing lead paint, children swallowing magnets that fell out of toys, and dangerous

About the Author

Justin K. Beyer, an attorney with *Seyfarth Shaw LLP* in Chicago, focuses his practice in the areas of product liability, complex commercial litigation, and trade secrets. Mr. Beyer represents companies in the agricultural, banking, construction, food processing equipment manufacturing, general manufacturing, healthcare, hospitality, pharmaceutical, real estate development, and transportation industries. Mr. Beyer also has substantial experience defending manufacturers in cases involving alleged exposure to asbestos.

cribs—Congress passed the Act of 2008, which modernized the Act, expanded its regulatory mandate, and doubled its budget. These changes were intended to improve the ability of the CPSC to monitor and react to issues relating to product defects and recalls.[14]

III. The Powers and Limitations of the Act and the Act of 2008

While Congress gave the CPSC tremendous powers to regulate the sales of consumer products by manufacturers, distributors, and retail stores, those powers are still limited and defined by the Act and the Act of 2008. The enumerated powers discussed in this section are but a small percentage of the overall provisions of the Act and the Act of 2008, but do present some of the more onerous regulations placed upon businesses and manufacturers.

A. The Commission's Online Database

One of the more interesting provisions contained within the Act of 2008 is the mandate that the CPSC implement a publicly-available, searchable, online database.[15] The database is required to report harm relating to use of consumer products and other products or substances regulated by the CPSC.[16] Moreover, in collecting that information, the CPSC is permitted to receive that information in a variety of ways, but also is required to provide information to manufacturers and private labelers about the contents of those reports.[17]

Specifically, within five business days of receiving a report, the CPSC is required to notify the manufacturer or private labeler of the report.[18] If a report is submitted to the CPSC that does not include the model or serial number of the product, the CPSC shall seek the model and serial number from the person or entity submitting the report and, if no model or serial number is available, a photograph.[19] Thereafter, the CPSC shall submit such information to the manufacturer of the product and make the report available 15 business days after transmitting the report to the manufacturer.[20]

After receipt of the report, the manufacturer or private labeler may, in turn, request that its own comments or response be included in the private database, request that certain information be designated as confidential, request that the information be redacted as a trade secret, or challenge issuance of the report if the manufacturer or private labeler believes that the report contains inaccurate information.[21] In an instance in which materially inaccurate information is included in the report, the CPSC is required to stay publication no more than five additional days and, if the CPSC determines that information contained in the report is materially inaccurate, must either: (a) decline to add the materially inaccurate information; (b) correct the materially inaccurate information in the report or comment and add the report or comment to the database; or (c) add information to correct inaccuracies in the database.[22]

Moreover, the prohibition on the CPSC against including "materially inaccurate information" is not limited to the reporting stage. Rather, if the CPSC determines after its investigation that information previously made available in the database is materially inaccurate, then within seven business days of learning about such information the CPSC is required to either remove the information, correct such information, or add information to correct inaccuracies in the database.[23]

Preventing the CPSC from publishing "materially inaccurate information" was analyzed recently by the Unites States District Court for the District of Maryland in *Company Doe v. Tenenbaum*.[24] In that case, the plaintiff sought to enjoin the CPSC from publishing what the plaintiff deemed to be "materially inaccurate information," specifically arguing that the report the CPSC sought to publish was "baseless and inflammatory and . . . that its publication, besides being unlawful, would cause irreparable harm to its reputation and financial well-being."[25] The dispute arose after an unidentifed local agency submitted an incident report to the CPSC.[26] Within days, the plaintiff submitted medical evidence to the CPSC supporting the plaintiff's contention that the report was materially inaccurate.[27] A back-and-forth dispute between the CPSC and the plaintiff continued over the course of several weeks. During this time, despite the CPSC's acknowledging three times that the information in the report was "materially inaccurate," the CPSC attempted to "purge" the report of this material inaccuracy rather than electing to simply not publish the report.[28]

Against this backdrop, the *Tenenbaum* court conducted a detailed and lengthy analysis of whether the CPSC's acts against the plaintiff constituted violations under the Administrative Procedure Act[29] (APA). Concluding that the CPSC's acts did violate the APA, the court questioned the methods of the CPSC, finding that the acts were arbitrary and capricious.[30] In two particularly scathing rebukes of the CPSC's decision to publish the report, the court wrote that "the [CPSC's] decision to publish the report bears no sensible relation to the purpose the [Act of 2008] aims to advance: to enhance the [CPSC's] capacity to disseminate information to consumers regarding unsafe products."[31] The court also stated that, "[a]lthough the 'related to' standard requires a showing of connection in lieu of causation, neither the enabling

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statute nor the implementing regulations suggests that rank speculation of this sort suffices to show such an association."[32]

The *Tenenbaum* decision is an important one to businesses, and possibly one causing introspection within the CPSC. Not only was *Tenenbaum* a big win for manufacturers challenging the inclusion of unsupported material on the CPSC's website, but also a very high-profile defeat for the CPSC in one of the signature pieces of the Act of 2008.

Similar to its obligation to publish reports of product defects, the CPSC also has certain Freedom of Information Act[33] (FOIA) obligations as a governmental agency. Those obligations are defined within the Act at 15 U.S.C. § 2055(b)(1)[34] and further explained by the Supreme Court in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*[35] In that case, the CPSC obtained various accident reports, most of which were accompanied with claims of confidentiality, and—despite such confidentiality claims—decided to release such accident reports upon FOIA requests from certain consumer advocacy groups.[36] The companies impacted by such a decision moved for a permanent injunction to prevent the CPSC from releasing such information. In arguing against the injunction, the CPSC took the position that the prohibition on disclosure contained within the Act applied only when the CPSC sought to disclose information to the public, but not when served with a FOIA request.[37] When confronted with this issue, the District Court for the District of Delaware permanently enjoined the CPSC from disclosing the submitted accident reports (as well as data compiled about the accidents on a spreadsheet).[38] The Court of Appeals for the Third Circuit later affirmed, noting that

> the information disclosure requirements of the [Act] were meant to protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the [CPSC], through any means, of material obtained pursuant to its broad information-gathering power. The policies designed to be served by [this section] would be severely undermined, if not eviscerated, were the [CPSC's] interpretation to prevail.[39]

The Supreme Court affirmed both of the lower courts' finding that the CPSC's interpretation of the Act was inconsistent with the legislative history and the plain languge of the Act. In so doing, it held that

> our interpretation of the language and legislative history of [15 U.S.C. § 2055(b)(1)] reveals that any increased burdens imposed on the [CPSC] as a result of its compliance with [Section 2055(b)(1)] were intended by Congress in striking an appropriate balance bewteen the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the [CPSC].[40]

Not all challenges to the disclosure of information pursuant to a FOIA request are sustained, however. One such example occurred in *Daisy Manufacturing Co., Inc. v. Consumer Products Safety Commission*,[41] in which the Court of Appeals for the Eighth Circuit refused to enjoin disclosure of information relating defects of the plaintiff's air rifle and related injuries. Responding to the FOIA request, the CPSC determined that it was required to release certain records from its prior investigation of the plaintiff: namely, in-depth investigation reports, consumer product complaints, and summaries of incident reports. In finding that the CPSC properly released the documents, the Eighth Circuit held that this action was an "informal adjudication," and, as such, would be reversed only if it was deemed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[42] Finding the CPSC's actions to not be so, the Eighth Circuit found that the CPSC acted reasonably by conducting independent investigations to corroborate information disclosed in each investigation report; released only those documents it independently verified; planned to release a written explanation that it had not determined the cause of the accidents; and planned to release the plaintiff's comments, if the plaintiff so consented.[43]

B. Consumer Safety Standards

In addition to the power and obligation to publish consumer complaints, the CPSC is also authorized to promulgate consumer safety standards.[44] Such standards shall consist of performance requirements, requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.[45] One caveat to this is that standard-making shall be avoided when (a) compliance with voluntary standards would eliminate or adequately reduce the risk of injury, and (b) is likely to lead to substantial compliance with such voluntary standards.[46]

The CPSC's standard-making authority is broadly discretionary and generally its decision to include particular sectors of an industry and not others is not subject to outside challenges. Such a challenge occurred in *O'Keeffe's, Inc. v.*

Consumer Product Safety Commission.[47] There, a glass manufacturer, subject to the Safety Standard for Architectural Glazing Materials,[48] requested an amendment to the regulations to include transparent ceramic materials and wired glass doors, neither of which were subject to this safety standard. The CPSC denied the plaintiff's request. In challenging the CPSC's decision, the plaintiff argued that the CPSC failed to consider relevant factors necessary to determine whether ceramics and wired glass fire doors posed an unreasonable risk of injury.[49] The plaintiff further assumed that, because transparent ceramic materials manufactured by the plaintiff's competitors were being used for similar architectural purposes as the plaintiff's products and the plaintiff's products were being regulated, then the competitors' products should also be regulated. In further support of its argument, the plaintiff submitted a single incident involving transparent ceramics, though no evidence was submitted by the plaintiff that the incident—a student breaking a transparent ceramic window in a door with his elbow—involved an injury or about the severity of that injury.[50]

Rejecting the plaintiff's argument,[51] the Court of Appeals for the Ninth Circuit found that the CPSC was required to undertake a two-part analysis for determining whether a standard was necessary. First, the CPSC must determine that the class of products pose "an unreasonable risk of injury" looking "specifically at transparent ceramics to determine the nature and the extent of the risk of injury associated with transparent ceramics, the need for transparent ceramics, and the probable effect of the amendment on the utility, cost, and availability of transparent ceramics."[52] Second, the CPSC must make and support findings that an amendment is "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product; that the expected benefits of the amendment bear a reasonable relationship to its costs; and that the amendment imposes the least burdensome requirement that prevents or adequately reduces the risk of injury under consideration."[53] Finding that the CPSC met its obligations in rejecting the request for an amendment to the standard, the Ninth Circuit found that "the [CPSC] is not statutorily required to conduct an exhaustive study or to revise its data-gathering systems in response to a request to rulemaking."[54] Relying on the same rationale, the court also rejected the plaintiff's challenge to the wired glass fire doors.[55]

C. Hazardous Product Ban and Power to Litigate Against "Imminent Hazards"

The CPSC also has the power to ban hazardous products where the product (a) presents an unreasonable risk of injury, and (b) no feasible consumer product safety standard would adequately protect the public from the unreasonable risk of injury associated with such product.[56] Products that have been specifically examined by the CPSC under the Act and considered for banning include certain types of lawn mowers,[57] lawn darts,[58] certain types of automatic garage door openers,[59] and certain classes of bicycle helmets.[60] The CPSC also has established regulations relating to durable nursery products for infants and toddlers,[61] and has enacted mandatory toy safety standards.[62]

The CPSC also has the power to file actions in United States district courts where it believes "imminent hazards" exist, through which the CPSC may seek to seize a product or to enjoin the sale or distribution of a product.[63] Moreover, included amongst the statutory relief available to the CPSC are notification of such risk to purchasers, public notice, recall, repair of the product, replacement of the product, and refund for the product.[64]

One of the main methods by which the CPSC seeks hazardous product bans is through the Federal Hazardous Substances Act[65] (FHSA). Under the FHSA, a "hazardous substance" is defined as:

> Any substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means, if such substances or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.[66]

While seemingly axiomatic, "a product cannot be a 'banned hazardous substance' unless it is first determined to be a hazardous substance."[67]

For example, in an opinion issued by the Court of Appeals for the Second Circuit, the court held that the CPSC properly banned a children's art supply—a shaving cream colored with food coloring—when the CPSC determined that it was flammable because it exhibited flashback when tested according to applicable regulations.[68] In that case, the court found that "the contents of a self-pressurized can [of shaving creams, including Rainbow Foam Paint,] are considered to be flammable if flashback (a flame extending back to the dispenser) is obtained at any degree of valve opening."[69] Finding that the art or educational material

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exemption did not apply, the court noted that "a product that is determined to be hazardous within the meaning of the statute cannot be exempt under the regulations, even if it is an art material, if its intended child user is too young to heed a warning label."[70] In addition to banning the sale of Rainbow Foam Paint, by way of additional examples, the CPSC has also banned the sale of fireworks,[71] firework parts,[72] and children's clothing.[73]

The case involving Rainbow Foam Paint involved a complicated and divisive litigation history.[74] After Linda Weill invented "Rainbow Foam Paint" in 1985, a private consumer organization in 1990 wrote in its magazine that Rainbow Foam Paint was a possible hazard due to flammability. Weill then notified the consumer organization that its allegations were inaccurate and demanded an immediate retraction. Even after the consumer organization agreed to print the retraction, Weill contacted it and stated that she still intended to sue for money damages. The consumer organization decided against printing a retraction and referred the matter to the CPSC. The CPSC subsequently obtained cans of Rainbow Foam Paint. In testing the cans, the CPSC determined that Rainbow Foam Paint was flammable when tested in the upside down position. The CPSC then contacted Weill and explained that, as a result of the testing, the CPSC classified Rainbow Foam Paint as a banned hazardous substance. As the Ninth Circuit explained, "There ensued a rancorous exchange of correspondence between CPSC staff and counsel for Ms. Weill as to whether the substance should be categorized as a 'banned hazardous substance' and enforcement action undertaken. It is apparent that Weill and her counsel became increasingly frustrated over what they perceived to be excessive threats on the part of staff of the [CPSC] in the absence of any action by the [CPSC] officially declaring the product a banned substance under the provisions of the Act."[75] Acting upon the CPSC's threats, the U.S. Attorney's Office in New Haven, Connecticut, filed a seizure complaint in federal court naming as the defendant the Rainbow Foam Paint canisters stored at a preschool toy distribution warehouse in Connecticut. Weill and her company, X-Tra Art, Inc., then filed an action in the U.S. District Court for the Northern District of California seeking to enjoin the Connecticut action. The Ninth Circuit dismissed that action, holding that "where the [CPSC] opts to proceed in court on an allegation that the substance is a banned hazardous substance, the issue should be litigated by the manufacturer in that forum."[76]

Possibly more disturbing than a product ban case like the one involving Rainbow Foam Paint, part of the "substantial product hazard" section of the Act apparently permits the CPSC to place companies in administrative limbo. For example, the Court of Appeals for the D.C. Circuit held in *Reliable Automatic Sprinkler Co., Inc. v. Consumer Product Safety Commission*[77] that the CPSC can issue a statement of its intentions to make a preliminary determination that a product is defective and can request that the company submit to a voluntary corrective action without (a) triggering judicial review or (b) even allowing for a determination of whether the CPSC has jurisdiction over the class of products at issue.[78] There, the plaintiff, Reliable Automatic Sprinkler Co., Inc. (Reliable), was a manufacturer of automatic sprinkler heads that were incorporated into automatic fire sprinkler systems installed in commercial buildings.[79] Consistent with similar investigations and administrative enforcement proceedings that the CPSC brought against other manufacturers of sprinkler heads, the CPSC informed Reliable that it intended to make a preliminary determination that Reliable's sprinkler heads constituted a "substantial product hazard" and requested that Reliable take voluntary corrective action to address the alleged hazards.[80] At the time that the CPSC sent Reliable the letter and up to and including the time that the D.C. Circuit issued a ruling on Reliable's appeal, however, the CPSC had

> not yet made a formal determination that the sprinkler heads present a "substantial product hazard," or even filed an administrative complaint initiating the administrative proceedings that would be required before the agency could make such a determination. Indeed, the [CPSC] has not as yet made a record determination that it has jurisdiction over Reliable's sprinkler heads.[81]

And, in affirming dismissal of Reliable's complaint, the D.C. Circuit acknowledged that the CPSC assumed jurisdiction existed, writing: "Certainly the [CPSC's] investigation *assumes* for now that it has jurisdiction to regulate sprinkler heads. But the [CPSC] has not yet made any determination or issued any order imposing any obligation on Reliable, denying any right of Reliable, or fixing any legal relationship."[82]

D. Commission Rulemaking Procedures

For the CPSC to introduce a rule relating to consumer product safety, certain specific procedures must be followed. The rulemaking must be initiated by an advance notice of proposed rulemaking, through which (a) the product and nature of risk of injury associated with the product

are identified; (b) a summary of each regulatory alternative under consideration is identified; (c) information is identified relating to any existing standard, together with a summary of the reasons why the CPSC believes the proposed standards are not adequate; (d) interested persons or entities are invited to submit comments, regulatory alternatives, or other possible alternatives for addressing the risks; (e) any person or entity is invited to submit an existing standard or portion of a standard as a proposed consumer product safety standard; and (f) any person or entity is invited to submit to the CPSC a statement of intention to modify or develop a voluntary consumer product safety standard to address the risk of injury identified as well as a description of the plan to modify or develop the standard.[83] Each of the various sections of the notice identified above carry with it certain statutorily-prescribed timeframes for response.[84]

If during the notice period, the CPSC receives a proposed standard that is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice and will result in substantial compliance with the proposed standard, the CPSC shall terminate any proceeding to promulgate a new rule and may publish and rely upon the voluntary standard to eliminate or reduce the risk of injury.[85]

It is important to note, however, that the CPSC's rulemaking authority is subject to strict compliance with the procedures outlined in the Act. For example, in *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission*,[86] the Court of Appeals for the Fourth Circuit set aside the CPSC's rule as it related to testing under the Small Parts Rule,[87] finding that the CPSC failed to provide notice and comment required for amendments to rules.[88] In response, the CPSC argued that this "rule" was merely an "interpretation" of a current rule and not a new rule. In rejecting this argument, the court explained that "interpretative rules simply state what the administrative agency thinks the statute means," whereas "a substantive or legislative rule . . . has the force of law, and creates new law or imposes new rights or duties."[89] Based on that definition, the Fourth Circuit held that "the language of the statement and related comments establishes that more is involved than mere 'interpretation,' because the proposed statement has the clear intent of eliminating a former exemption and of providing the [CPSC] with power to enforce violations of a new rule."[90]

And it is also worth noting that the CPSC's decision to terminate or not to start[91] a rulemaking process is not easily overturned. In *Consumer Federation of America v. Consumer Product Safety Commission*,[92] the Court of Appeals for the D.C. Circuit upheld the CPSC's decision—after a consent decree with ATV distributors was entered—to terminate a rulemaking procedure begun against the all-terrain vehicle industry. The matter began when the CPSC published an Advance Notice of Proposed Rulemaking, following 161 deaths and 66,956 ATV-related injuries occurring over a three-year span in the mid-1980s.[93] After further study, the CPSC decided to file a civil action against manufactures of ATVs to gain a judicial determination that ATVs are an "imminently hazardous consumer product" through which the CPSC could effect temporary or permanent relief as necessary to protect the public, which could include certain product bans.[94] During the course of the litigation, the CPSC and ATV manufacturers entered into a 10-year consent decree, which required extensive consumer education, an immediate prohibition on the sale of new three-wheeled ATVs, and a good faith attempt to develop consensus standards.[95]

Challenging the CPSC's decision to end the rulemaking, a number of consumer advocacy groups sued the CPSC, arguing that it acted arbitrarily in failing to ban the sale of adult-sized ATVs for use by children.[96] Holding that the CPSC acted properly, the D.C. Circuit focused on two particular points: (1) that "[u]nder the [Act], a youth ban could not be implemented absent a finding that 'less burdensome' requirements were inadequate to deal with the problem;"[97] and (2) "the Consent Decree regime should be carried out for a reasonable time before further measures are added to the regulatory agenda."[98]

E. Product Certification Program

All manufacturers and private labelers are required to certify—based on a test of each product or upon a reasonable testing program—that their product complies with all rules, bans, standards, or regulations applicable under the Act or any other incorporated acts enforced by the CPSC under the Act, and shall specify the rule, ban, standard, or regulation applicable to the product.[99] Based on the Act of 2008, manufacturers and private labelers are required to submit certain products—specifically, children's products, including those containing or relating to lead paint, cribs, pacifiers, small parts, children's metal jewelry, and baby bouncers, walkers, and jumpers—to third party testing before importation or distribution.[100]

F. Mandatory Reporting for "Substantial Product Hazards"

One of the most troublesome sections for manufacturers of consumer products is found in 15 U.S.C. § 2064,[101] through which Congress created a mandatory reporting requirement for manufacturers

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that fail to comply with a voluntary safety standard, fail to comply with any other rule, regulation, standard, or ban under the Act, whose product contains a defect, or whose product creates an unreasonable risk of serious injury or death.[102] Importantly, where a company so reports, such reporting may not be used as a basis for criminal charges, unless the offense requires a showing of intent to defraud or mislead.[103]

Failing to report a violation can carry with it one of the stiffest penalties that the CPSC will levy under the Act. A prime example of the penalty provisions is shown in *United States v. Mirama Enterprises, Inc.*[104] In that case, the defendant distributed between 30,000 and 40,000 juice extractors in the United States that utilized a rapidly spinning metal grater. The defendant began to receive consumer reports of failed juicers, with such failure manifesting itself in the form of exploding juicers causing pieces of plastic cover and portions of the separator screen being flung as far as eight feet from the juicer.[105] Despite receiving complaints from 23 consumers—including reports of a juicer exploding in a user's face, a report of a flying blade slicing the hand of another, and one report of a woman being taken by ambulance to the hospital—the defendant failed to report any of these malfunctions to the CPSC. After an evidentiary hearing, the defendant was ordered to pay $300,000 plus costs.[106] Affirming the district court's decision, the *Mirama Enterprises* court noted,

> [The defendant] was required to report not merely the twenty-three juicers that shattered, but the 30,000 to 40,000 juicers in the stream of commerce that might well pose an unreasonable risk of serious injury to consumers. When it failed to do so, [the defendant] committed 30,000 to 40,000 reporting offenses. Consequently, the district court could have imposed a penalty of up to $1.5 million. The court did not abuse its discretion in imposing a penalty of one-fifth the maximum amount.[107]

The harshness of the reporting policy does not end at the potential fine imposed, or that that fine is based on all such products in the stream of commerce. Instead, a company may be fined where it fails to report ***even when a product turns out not to be defective.*** Indeed, in *Mirama Enterprises*, the Ninth Circuit explained:

> It makes sense for Congress to have imposed fines for reporting failures even when a product turns out not to be defective. Information about a possible defect triggers the duty to report, which in turn allows the [CPSC] either to conclude that no defect exists or to require appropriate corrective action. Congress's decision to impose penalties for reporting violations without requiring proof of a product defect encourages companies to provide necessary information to the [CPSC].[108]

Moreover, *res judicata* does not apply where the CPSC first institutes an action to prevent distribution of hazardous products and then, later, files another action seeking civil penalties for failing to timely report defects in a defendant's products.[109] In other words, the CPSC may properly sue a company to enjoin distribution of the product and then later sue it again for money damages for failing to report the earlier consumer complaints about the same product line.

Out of this mandatory reporting doctrine, Illinois has developed a duty to warn doctrine based, in part, on public announcements made by the CPSC.[110] Under this doctrine, a party—otherwise not subject to the Act—is considered placed on notice of a potential danger when the CPSC articulates a concern about use of a product used in conjunction with the non-covered party's product.[111] Under the Illinois treatment of this duty to warn, the non-covered party is deemed to have a subsequent duty to warn customers who may encounter a danger based on the corresponding use of the non-covered party's product in conjunction with the covered product of another party.[112] In *Adams v. Northern Illinois Gas Co.*,[113] the Illinois Appellate Court First District and, subsequently, the Illinois Supreme Court held that Northern Illinois Gas Company ("NI-Gas") owed consumers a duty to warn about the dangers of using its gas with a type of flexible brass gas connector that, when used with the company's gas containing a sulfur-component, would become brittle. Holding that the defendant had a "superior knowledge" and "helped to create the dangerous condition," the Illinois Supreme Court held "that NI-Gas owned a common law duty of reasonable care with respect to the brazed connectors."[114]

G. Mandatory Recordkeeping and Inspection Privileges

The Act also requires companies to maintain certain records and permits the CPSC to inspect those records.[115] As explained by the District Court for the Northern District of Illinois,[116] and the Court of Appeals for the Seventh Circuit,[117] a company's recordkeeping obligations under the Act and the CPSC's inspection privileges under the Act are particularly broad. In *In re Establishment*

Inspection of Skil Corp.,[118] the CPSC applied for and received an administrative warrant to inspect and copy the books, records, and papers of the defendant as they related to incidents involving the defendant's circular saw where the lower blade guard might have failed or otherwise did not properly shield the blade.[119] Prior to applying for the warrant, the CPSC conducted inspections of the defendant's facility twice in June 1986 as a follow-up to two incidents involving persons injured by the defendant's circular saw. In September 1986, the CPSC attempted to conduct a follow-up inspection after being notified of 16 additional injuries, including two that resulted in death. At that time, the defendant refused to provide the CPSC access to any records relating to incidents involving circular saws and to files containing engineering information.[120]

Finding that the CPSC had the power to conduct such an inspection—even where it did not adopt recordkeeping rules relating to circular saws or defining what records must be kept—the district court determined that, so long as the documents were relevant and not subject to privilege, the CPSC had the right to inspect them.[121] In its decision, the district court also determined the level of probable cause necessary to obtain an administrative search warrant, holding that such probable cause "may be based either on specific evidence of an existing violation or a general administrative enforcement plan."[122] Moreover,

> the administrative probable cause standard does not require the [CPSC] to present sufficient information to enable the Magistrate to determine whether the consumer product has a defect or presents a substantial product hazard. Rather, the application must provide enough information to enable the Magistrate to decide whether the agency's decision to conduct an inspection to aid its investigation of those questions was itself a reasonable decision. Such a showing provides "specific evidence of an existing violation".[123]

Equally concerning, the Seventh Circuit—despite recognizing that "the search authorized by the district court is extraordinarily broad," that the defendant's "records go back to 1924, and the [CPSC] wants all of them"[124]—held that "all reasonable deference must be shown the [CPSC's] judgment on the necessary scope of the search" and that "[t]he warrant is reasonable in the circumstances."[125]

H. Penalties and Fines

If a manufacturer fails to comply with the Act, such violation can carry with it potentially serious fines and civil penalties,[126] as well as criminal penalties.[127] Criminal penalties include fines or imprisonment for not more than five years, or both, and apply to individual directors, officers, or agents of a corporation who knowingly and willfully authorize, order, or perform any of the acts or practices constituting a violation.[128]

The CPSC is not authorized to seek civil penalties in an administrative proceeding, but rather only before a district court.[129] The discretion of a district court to assess civil penalties, however, is quite broad. As developed by a number of United States courts of appeal, to determine the amount of a penalty, a district court should consider "(1) the good or bad faith of defendants; (2) the injury to the public; (3) the defendants' ability to pay; (4) the desire to eliminate the benefits derived by the violations; and (5) the necessity of vindicating the authority of [the federal agency]."[130]

In further defining these factors, the Court of Appeals for the Eleventh Circuit in *United States v. Danube Carpet Mills, Inc.* found that the "public harm" factor did not require actual injury.[131] Additionally, in determining a defendant's ability to pay a fine, the *Danube* court also found that it is appropriate to gauge the net worth of the defendant, and rejected defendant's arguments that "(1) the relevant gauge of ability to pay is the profit earned from the nonconforming carpet and (2) calculation of net worth should focus on liquid, not illiquid, assets."[132] Moreover, the civil penalties can extend to corporate officers, as well as the corporation.[133] Further, beyond civil penalties being assessed against a defendant, a defendant's employees or officers may be criminally liable for making false statements to a CPSC investigator.[134]

I. Private Right of Action

Under the Act, individuals may sue manufacturers for knowing (including willful) violations of any rule or order for matters in controversy that exceed $10,000, exclusive of interest and costs.[135] Pursuant to the Act, a private cause of action for damages exists for "any person who is injured by virtue of a knowing violation of a 'consumer product safety rule, or any other rule or order' issued by the [CPSC], and provides attorney fees to the prevailing plaintiff."[136] The key phrase is "rule or order," as the private right of action does not extend to violations of the Act itself. Recovery may, in addition to reasonable attorneys' fees, include damages sustained and reasonable expert witness fees.[137] But, it should be noted that where a plaintiffs' recovery is less than $10,000, the court may deny costs to the plaintiff and, in addition,

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may impose costs on the plaintiff.[138] Additionally, the attorney general of an individual state may also bring suit on behalf of the citizens of that state, provided that the state gives written notice to the CPSC prior to initiating the suit.[139] The CPSC may intervene also.[140]

Because of the distinction, "rule or order," set out in the Act, courts have rejected private rights of action for claimed violations of the Act's mandatory reporting provisions[141] where the CPSC did not mandate standards that would have prevented the injury, even where the CPSC could have, and where a component part of the product was covered by the Act.[142] Additionally, courts have rejected private rights of action for claims of punitive damages under the Act.[143] Finally, a private right of action has been rejected where a party sought to hold a defendant manufacturer liable for failing to utilize child-proof packaging for a prescription drug container.[144] But, a private right of action has been found to exist where the CPSC specifically banned the sale of a certain product in certain circumstances, like, for example, the sale of lawn darts.[145]

IV. Using the Act and the Act of 2008 to Your Advantage

While the Act creates a number of disadvantages for businesses, it also presents certain opportunities. Such advantages include: (a) additional defenses to product liability suits in states (like Illinois) in which the risk-utility test is utilized; (b) preemption of certain state law claims; and (c) the very limited ability of private individuals to challenge a company's settlement with the CPSC. Each advantage is discussed below.

A. Evidence of Compliance with the Act

Because the Act serves as a mandatory standard, companies that face private suits can utilize compliance with the Act or cooperation with the CPSC to their benefit. First, in states in which the court has adopted the risk-utility test for examining whether a product is defective or not, including Illinois, compliance with the Act can be introduced to demonstrate that the product was "state of the art"[146] and to defend against "alternative design"[147] attacks.[148] Second, where the CPSC investigates but does not find a product defect, companies can and should offer such non-finding as persuasive evidence that the company's product is not defective.

Illinois is one of a handful of states in which the risk-utility test has been adopted.[149] Under this test, to determine whether a product is unreasonably dangerous, a series of factors is weighed, such factors include:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[150]

Illinois also separately has adopted a number of other factors, though the list is meant to be suggestive and not inclusive.[151] Those additional factors include:

> (1) the appearance and aesthetic attractiveness of the product; (2) its utility for multiple uses; (3) the convenience and extent of its use, especially in light of the period of time it could be used without harm resulting from the product; and (4) the collateral safety of a feature other than the one that harmed the plaintiff.[152]

The Illinois Supreme Court dealt with the interplay between the risk-utility test and a defendant's compliance with the Act in *Calles v. Scripto-Tokai Corp.* in 2007.[153] There, the plaintiff sought to recover damages in strict liability and negligent design when a three-year-old child died of smoke inhalation in a fire that she allegedly started by using one of the defendant's products.[154] The trial court granted summary judgment to the defendant, finding that the defendant

neither owed a duty to plaintiff nor breached any such duty.[155] The appellate court reversed, finding that the risk-utility test did not apply to a simple device as a lighter.[156] While the Illinois Supreme Court affirmed the appellate court based on questions of material fact, the defendant utilized findings of the CPSC to attack the plaintiff's expert's opinions as they related to a feasible alternative design and whether the alternative design met regulatory standards.[157] To that end, the defendant argued that

> the [CPSC], the regulatory body for these products, required safety devices on cigarette lighters beginning in 1994, but exempted utility lighters. It was not until 1999 that CPSC required safety devices on utility lighters. [Citation omitted.] CPSC exempted utility lighters because it was concerned about "flashbacks" (the build up of gas and resultant sudden flash when a lighter was not ignited properly). Specifically, CPSC feared that if a child-resistant device on a utility lighter needed to be reset between attempts, this could cause a delay in ignition, resulting in the increased risk of flashback. [The defendant] maintains that this concern shows that some of the child-resistant options proffered by [the plaintiff's expert] in his affidavit were not, in fact, feasible. [The defendant] also disputes [the plaintiff's] claim that there would be no impairment to the [lighter] from modification with a child-resistant safety device since she cites no evidence in support of her argument.[158]

Although the court considered the defendant's arguments and accepted its evidence of compliance, it did find a question of fact that precluded summary judgment.[159]

Other Illinois courts likewise have held that evidence of compliance with the Act is proper evidence. In *Hubbard v. McDonough Power Equipment, Inc.*,[160] the Illinois Appellate Court Fifth District reversed the trial court, which had ruled that such evidence was inadmissible. In holding that this evidence was, in fact, admissible, the *Hubbard* court explained that Illinois precedent had established that "a defendant in such a products liability case 'should be allowed to show that a given alternative design is not required by Federal regulations.'"[161] Commenting on this premise further, the *Hubbard* court explained that if

> the product is in compliance with national standards, the finder of fact may well conclude that the product is not defective or that the defect is not unreasonably dangerous. Moreover, such evidence does not improperly remove the focus of the inquiry from the product since it merely indicates that the product, not the manufacturer's conduct, conforms to national standards.[162]

An additional evidentiary advantage exists for a company when the CPSC investigated its product but did not take enforcement action against the product, which serves as proof that the product was not defective.[163] Such a situation arose before the U.S. Court of Appeals for the Sixth Circuit in *Cummins v. BIC USA, Inc.*[164] In that case, a plaintiff sought to recover damages against the defendant, alleging that the defendant's product was defective insomuch as the child-safety guard was easily removed from the lighter. After the jury found BIC not liable, the plaintiff moved for a new trial and eventually appealed, arguing that the trial court erred in allowing the defendant to introduce evidence of the failure of the CPSC to take action concerning the type of lighter that caused the plaintiff's injuries. In determining that the introduction of such evidence was not error, the Sixth Circuit relied on another of its decisions[165] and a decision of the District Court for the District of Maine,[166] where, in each, the courts determined that evidence that the CPSC failed to act was barred only where there was a

> "complete failure by the CPSC to engage in activity on a product; [and] that failure is not to be introduced into evidence as somehow implying that a particular product is not unsafe. [But, w]here the CPSC has engaged in activity, on the other hand, those activities are admissible even if they lead ultimately to a decision not to regulate, just as an ultimate decision to regulate is admissible . . . . They are not 'failure[s] to take any action.'"[167]

B. Preemption of Certain State Law Claims

Courts interpreting the Act also have found that a number of state law tort claims are preempted by the Act. For example, state law failure-to-warn claims are preempted by the FHSA.[168] What this holding means, practically, is that to the extent that a plaintiff or his expert argues that a defendant's label "should have

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included additional or different warnings not required by the FHSA or its regulations, those claims are preempted."[169] This holding additionally means that no liability will attach to a manufacturer in a private right of action suit under the FHSA, provided that the manufacturer complies with the labeling requirements of the FHSA.[170]

C. Very Limited Right to Challenge Settlement with Commission

One particularly important lesson to draw from the above-discussed cases is that the CPSC does not like to have its authority questioned. From recall actions that put companies out of business[171] to multi-million dollar fines,[172] the CPSC can and does come down hard on companies that violate the Act. But, on those occasions when companies voluntarily comply with the Act and enter into settlement agreements, private individuals find little, to no, success in challenging the terms of those settlement agreements. For example, in *Mahoney v. Consumer Products Safety Commission*,[173] the Third Circuit held that the CPSC's decision to enter into and to accept a settlement with the manufacturer of a BB gun was not subject to judicial review.[174] Moreover, as illustrated by the D.C. Circuit's decision in *Consumer Federation of America v. Consumer Product Safety Commission*, where a company enters into a consent decree with the CPSC, a subsequent decision by the CPSC to terminate a rulemaking session against the same company or industry is not likely to be overturned.[175]

V. Conclusion

The Consumer Product Safety Act and the Consumer Product Safety Improvement Act of 2008 present manufactures, distributors, and others in the supply chain with very precise rules that must be followed. Given the scope of the products over which it has jurisdiction and the stiff penalties that may be assessed for violating its rules and regulations, companies should be ever mindful of their responsibilities under the Act, particularly those required under the mandatory reporting requirements. And, while the Act is possibly more problematic for businesses than inherently good, compliance with the Act does present companies opportunities for additional defenses and preemption of state law claims.

(Endnotes)

1 Ron Nixon, *Ross Stores Fined in Sales of Defective Clothing*, The New York Times (June 20, 2013), http://www.nytimes.com/2013/06/21/business/ross-stores-fined-in-connection-with-defective-childrens-clothing.html?_r=0.

2 Andrew Scurria, *CEO Sues to Escape CPSC's $57M Buckyballs Recall Suit*, Law360.com (Nov. 12, 2013, 5:15 PM), http://www.law360.com/articles/487981/print?section=productliability.

3 *CEO Sues to Escape*, *supra* note 2 ("In June, the agency obtained a settlement from **Baby Matters LLC** forcing the defunct company to pay for a recall of a portable baby recliner, signaling that it would not shy away from pursuing companies even after they go out of business.").

4 *United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 99 (2d Cir. 1994).

5 15 U.S.C. §§ 2051–2089.

6 Pub. L. No. 110-314, 122 Stat. 3016 (2008).

7 *See, e.g.*, Robert A. Faller, *State Implementation of the Consumer Product Safety Act*, 2 Hofstra L. Rev. 693 (1974) (discussing National Commission on Product Safety report).

8 15 U.S.C. § 2053.

9 *Id*. § 2052.

10 *Id*. § 2066.

11 *Id*. § 2067.

12 15 U.S.C. § 2079. The acts that Congress incorporated into the Consumer Product Safety Act (Act), and with which the CPSC is empowered to regulate, are as follows: (a) the Flammable Fabrics Act of 1953, 15 U.S.C. § 2079(b), pertaining to mandatory standards used to manufacture clothing items, interior furnishings, and nonfabric raw materials; (b) the Refrigerator Safety Act of 1956, 15 U.S.C. § 2079(c), which requires all refrigerator manufacturers to equip products with a device to allow the refrigerator to be opened from the inside; (c) the Federal Hazardous Substances Act of 1960, 15 U.S.C. § 2079(a), which governs all toxic, corrosive, flammable, pressure-generating, irritant, or strong sensitizer products, and requiring manufacturers to label products with a warning alerting consumers to the hazard presented (the Federal Hazardous Substances Act also bans any children's product containing a hazardous substance that a child could access as well as allowing for the ban or regulation of products for which a warning would be insufficient to protect a consumer from potential harm, 15 U.S.C. § 1262(e)); (d) the Poison Prevention Packaging Act of 1970, 15 U.S.C. § 2079(a), which requires certain household products be packaged in containers that are difficult for children under the age of five to open within a reasonable amount of time; (e) the Children's Gasoline Burn Prevention Act of 2008, Pub. L. No. 110-278, 122 Stat. 2602 (2008), which mandates certain child-resistant closures for portable gasoline containers; and (f) the Virginia Graeme Baker Pool and Spa Safety Act of 2008, 15 U.S.C. § 8001 *et seq.*, which requires manufacturers to design against hidden drain hazards in pools and spas, as well as design and install additional anti-entrapment systems when there is a single main drain.

13 Consumer Products Safety Commission, *Products Under the Jurisdiction of Other Federal Agencies and Federal Links*, http://www.cpsc.gov/en/Regulations-Laws--Standards/Products-Outside-CPSCs-Jurisdiction/ (last visited Feb. 6, 2014).

14 The changes included: (a) creating a publicly-searchable website, identifying reports of products causing injury, illness, or death, or risks of injury, illness, or death associated with consumer products; (b) requiring that the CPSC issue mandatory federal safety standards for durable infant nursery products; (c) setting new limits on lead-based paint utilized in consumer and children's products; (d) requiring third-party testing and certification of certain children's products; (e) authorizing more direct engagement with foreign agencies tasked with monitoring consumer product safety; (f) enabling the CPSC to order mandatory recalls; (g) prohibiting the sale or resale of recalled products; (h) requiring tracking

labels on children's products; (i) increasing maximum civil and criminal penalties for violations of CPSC laws; and (j) establishing whistleblower protections for employees of manufacturers, retailers, distributors, or private labelers. Consumer Product Safety Commission, 2011–2016 U.S. Consumer Product Safety Commission Strategic Plan 5 (2011), *available at* https://www.cpsc.gov//PageFiles/123374/2011strategic.pdf.

[15] 15 U.S.C. § 2055A(a)(1).

[16] *Id*. § 2055A(b)(1)(A).

[17] *Id*. § 2055A(c).

[18] *Id*. § 2055A(c)(1).

[19] *Id.* § 2055A(c)(5)(A).

[20] 15 U.S.C. § 2055A(c)(5)(A).

[21] *Id*. § 2055A(c)(2)(A)–(C).

[22] *Id*. § 2055A(c)(4).

[23] *Id*. § 2055A(c)(4)(B).

[24] *Company Doe v. Tenenbaum*, 900 F. Supp. 2d 572 (D. Md. 2012). It is worth noting that, in this case, the plaintiff sought to seal the entire case, including filing as "Company Doe." In granting this motion, the court explained that:

> Although the law favors access to judicial records, the facts of this case overcome this presumption. The challenged report is materially inaccurate, injurious to Plaintiff's reputation, and risks harm to Plaintiffs (sic) economic interests. To obviate such harm, Plaintiff sought, and successfully obtained, an injunction evermore enjoining the report's publication. However, were the Court to unqualifiedly unseal the case, Plaintiff would sacrifice the same right it sought to safeguard by filing suit.

Tenenbaum, 900 F. Supp. 2d at 609. The court further granted plaintiff's request to proceed as "Company Doe," finding that "revelation of Plaintiff's identity would yield the very injury that is the cynosure of the underlying litigation." *Id.* at 611.

Despite the district court's holding, which appeared to offer a powerful tool to companies seeking to prevent disclosure of its identity (which would in turn lead to discovery of the product at issue), the disclosure of which would injure a company's reputation and harm its economic interests, the Fourth Circuit reversed the district court's decision in *Company Doe v. Public Citizen*, 12-2209, 2014 U.S. App. LEXIS 7113 (4th Cir. Apr. 16, 2014). Unfortunately for companies seeking to rely on the *Tenenbaum* decision, the Fourth Circuit explained:

> A corporation very well may desire that the allegations lodged against it in the course of litigation be kept from public view to protect its corporate image, but the First Amendment right of access does not yield to such an interest. The interests that courts have found sufficiently compelling to justify closure under the First Amendment include a defendant's right to a fair trial before an impartial jury; protecting the privacy rights of trial participants such as victims or witnesses; and risks to national security. Adjudicating claims that carry the potential for embarrassing or injurious revelations about a corporation's image, by contrast, are part of the day-to-day operations of federal courts. But whether in the context of products liability claims, securities litigation, employment matters, or consumer fraud cases, the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company.

Public Citizen, 2014 U.S. App. LEXIS 7113, at *55 (internal citations omitted).

[25] *Id.* at 577.

[26] *Id.* at 576.

[27] *Id.*

[28] *Id.*

[29] *See* 5 U.S.C. § 706(2)(A).

[30] *Tenenbaum*, 900 F. Supp. 2d at 593.

[31] *Id.*

[32] *Id.* at 594–95.

[33] 5 U.S.C. § 552.

[34] Section 2055(b)(1) of the Act states:

> Except as provided by paragraph (4) of this subsection, not less than 15 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the [CPSC] publishes a finding that the public health and safety requires a lesser period of notice), the [CPSC] shall, to the extent practicable, notify and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the [CPSC] in regard to such information. The [CPSC] shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. In disclosing any information under this subsection, the [CPSC] may, and upon the request of the manufacturer or private labeler shall, include with the disclosure any comments or other information or a summary thereof submitted by such manufacturer or private labeler to the extent permitted by and subject to the requirements of this section.

15 U.S.C. § 2055(b)(1).

[35] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

[36] *GTE Sylvania*, 447 U.S. at 106.

[37] *Id.* at 107.

[38] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 443 F. Supp. 1152, 1162 (D. Del. 1977).

[39] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 598 F.2d 790, 811–12 (3d Cir. 1979).

[40] *GTE Sylvania*, 447 U.S. at 123–24.

[41] *Daisy Mfg. Co., Inc. v. Consumer Prod. Safety Comm'n*, 133 F.3d 1081 (8th Cir. 1998).

[42] *Daisy Mfg. Co.*, 133 F.3d at 1083 (citing 5 U.S.C. § 706(2)(A) (1994)).

[43] *Id.*

[44] 15 U.S.C. § 2056.

[45] *Id.* § 2056(a)(1)–(2).

[46] *Id.* § 2056(b)(1).

[47] *O'Keeffe's, Inc. v. Consumer Prod. Safety Comm'n*, 92 F.3d 940 (9th Cir. 1996).

[48] 16 C.F.R. §§ 1201.1(c)(1), 1201.2(a)(10).

[49] *O'Keeffe's*, 92 F.3d at 942.

[50] *Id.* at 943.

[51] A particularly strong dissent was lodged to the majority's opinion in *O'Keeffe's*. In one particularly scathing commentary on the majority's

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determination that one incident was insufficient to merit amending the standard, Judge Reed wrote: "As Congress recognized, when your intelligence tells you that something will create an injury and that it seems conceptually clear that an injury will occur, it is primitive to wait until a number of people have lost their lives, or sacrificed their limbs before we attempt to prevent those accidents." *Id.* at 950 (Reed, J., dissenting) (internal quotation marks omitted).

[52] *Id.* at 942 (majority opinion).

[53] *Id.* (internal quotation marks omitted).

[54] *O'Keeffe's*, 92 F.3d at 943 (citing *Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 883 F.2d 1073, 1078 (D.C. Cir. 1989)).

[55] *Id.* at 944–45.

[56] 15 U.S.C. § 2057.

[57] Lawn Mower Standard, Pub. L. No. 97-35, § 1212, 95 Stat. 357 (1981).

[58] An Act to provide that the Consumer Product Safety Commission Amend its Regulations Regarding Lawn Darts, Pub. L. No. 100-613, 102 Stat. 3183 (1989).

[59] Consumer Product Safety Improvement Act of 1990, Pub. L. No. 101-608, § 203, 104 Stat. 3110 (1990).

[60] Child Safety Protection Act, Pub. L. No. 103-267, § 205, 108 Stat. 722 (1994).

[61] Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 104, 122 Stat. 3016 (2008), *amended by*, An Act to provide the Consumer Product Safety Commission with Greater Authority and Discretion in Enforcing the Consumer Product Safety Laws, and for Other Purposes, Pub. L. No. 112-28, 125 Stat. 273 (2011).

[62] *Id*. at § 106.

[63] 15 U.S.C. § 2061.

[64] *Id*.

[65] 15 U.S.C. § 1261.

[66] *Id*. § 1261(f)(1)(A).

[67] *United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994) [hereinafter *Rainbow Foam Paint*] (internal quotation marks omitted) (quoting 16 C.F.R. § 1500.3(C)(6)(viii) (1993)).

[68] *Rainbow Foam Paint*, 34 F.3d at 91.

[69] *Id.* at 97.

[70] *Id.* at 98 (footnote omitted).

[71] See, *e.g., United States v. Midwest Fireworks Mfg. Co., Inc.*, 248 F.3d 563 (6th Cir. 2001) (upholding permanent injunction banning defendants from selling 79 types of fireworks in violation of the FHSA).

[72] *United States v. Focht*, 882 F.2d 55 (3d Cir. 1989) (imposing injunction upon fireworks parts distributor from selling tubes, plugs, and fuses in interstate commerce); see also *Shelton v. Consumer Prod. Safety Comm'n*, 277 F.3d 998 (8th Cir. 2002) (affirming permanent injunction of importing fireworks in violation of the FHSA and fining the corporate defendant $100,000).

[73] *United States v. Sun & Sand Imports, Ltd., Inc.*, 725 F.2d 184 (2d Cir. 1984) (affirming preliminary injunction during the pendency of the litigation prohibiting clothing company from importing and selling two lines of clothing that the [CPSC] deemed to be sleepwear and that contained flammable materials under the Flammable Fabrics Act, 15 U.S.C. §§ 1191–1204).

[74] The facts in this paragraph are compiled from *Rainbow Foam Paint*, 34 F.3d at 93–94, and *X-Tra Art v. Consumer Prod. Safety Comm'n*, 969 F.2d 793, 795 (9th Cir. 1992).

[75] *X-Tra Art*, 969 F.2d at 795.

[76] *Id.* at 796.

[77] *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726 (D.C. Cir. 2003).

[78] *Reliable Automatic Sprinkler Co.*, 324 F.3d at 731–33.

[79] *Id.* at 730.

[80] *Id.* at 729–30.

[81] *Id.* at 730.

[82] *Id.* at 731–32 (emphasis in original).

[83] 15 U.S.C. § 2058.

[84] See generally *id*.

[85] *Id*. § 2058(b)(2).

[86] *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989).

[87] 16 C.F.R. 1501.1–1501.5 (1988).

[88] *Jerri's Ceramic Arts, Inc.*, 874 F.2d at 206.

[89] *Id.* at 207.

[90] *Id.* at 208.

[91] See, *e.g., Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 883 F.2d 1073, 1079 (D.C. Cir. 1989) (upholding the CPSC's decision to deny the plaintiff's petition to initiate a rulemaking proceeding to ban the use of the solvent methylene chloride in household products, writing that "[w]hile some of the [CPSC's] judgments may be subject to question, Congress has entrusted the responsibility to make them to the [CPSC] and not this court. We cannot conclude that this is that rare and compelling case that would justify our overturning the [CPSC's] refusal to institute a rulemaking.").

[92] *Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 990 F.2d 1298 (D.C. Cir. 1993).

[93] *Consumer Fed'n of Am.*, 990 F.2d at 1300 & n.2.

[94] *Id.* at 1300.

[95] *Id.* at 1300–01.

[96] *Id.* at 1304.

[97] *Id.* at 1306 (citing 15 U.S.C. § 2058(f)(3)(F)).

[98] *Id.* at 1308.

[99] 15 U.S.C. § 2063(a)(1).

[100] *Id*. § 2063(a)(3)(B).

[101] Section 2064(b) specifically provides:

> Every manufacturer of a consumer product, or other product or substance over which the [CPSC] has jurisdiction under any other Act enforced by the [CPSC] . . . . distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—
>
> > (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the [CPSC] has relied under section 2058 of this title;
> >
> > (2) fails to comply with any other rule, regulation, standard, or ban under this chapter or any other Act enforced by the Commission;
> >
> > (3) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section; or
> >
> > (4) creates an unreasonable risk of serious injury or death,
>
> shall immediately inform the [CPSC] of such failure to comply, of such defect, or of such risk, unless such manufacturer, distributor, or retailer has actual knowledge that the [CPSC] has been adequately informed of such defect, failure to comply, or such risk. A report provided under paragraph (2) may not be used as the basis

> for criminal prosecution of the reporting person under section 1264 of this title, except for offenses which require a showing of intent to defraud or mislead.

15 U.S.C. § 2064(b).

[102] *Id.*

[103] *Id*.

[104] *United States v. Mirama Enters., Inc.*, 387 F.3d 983 (9th Cir. 2004).

[105] *Mirama Enters., Inc.*, 387 F.3d at 985.

[106] *Id.*

[107] *Id.* at 988.

[108] *Id.* at 988–89.

[109] *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 982, 985 (3d Cir. 1984) (holding that defendant's "motion for summary judgment was improvidently granted because the prior judgment has no res judicata effect between the parties to the present action" and, later concluding that, "[i]n the imminent hazard case, the wrong for which the [CPSC] sought redress was [the defendant's] *distribution* of baseball pitching machines which presented an imminent hazard to the public, while in this civil penalty suit, the wrong for which it seeks redress is not the distribution of the dangerous machines, but [the defendant's] *failure to report* certain information to the [CPSC] . . . .").

[110] See, *e.g., Adams v. N. Ill. Gas Co.*, 333 Ill. App. 3d 215, 223–24 (1st Dist. 2002), *aff'd*, 211 Ill. 2d 32 (2004).

[111] *Adams*, 333 Ill. App. 3d at 223–24.

[112] *Id.*

[113] *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32 (2004), *aff'g* 333 Ill. App. 3d 215 (1st Dist. 2002).

[114] *Adams*, 211 Ill. 2d at 54. The court, however, limited its holding by stating: "This holding is directed exclusively to the element of duty and is limited to the evidence contained in the present record." *Id.*

[115] 15 U.S.C. § 2065(a)–(b).

[116] See, *e.g., In re Establishment Inspection of Skil Corp.*, 119 F.R.D. 658, 665–66 (N.D. Ill. 1987), *aff'd*, 846 F.2d 1127 (7th Cir. 1988).

[117] See, *e.g., In re Establishment Inspection of Skil Corp.*, 846 F.2d 1127, 1134 (7th Cir. 1988).

[118] *In re Establishment Inspection of Skil Corp.*, 119 F.R.D. 658 (N.D. Ill. 1987), *aff'd*, 846 F.2d 1127 (7th Cir. 1988).

[119] *In re Establishment Inspection of Skil Corp*, 119 F.R.D. at 660–61.

[120] *Id.* at 661.

[121] *Id.* at 664.

[122] *Id.* at 666 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320–321 (1978)).

[123] *Id.* at 668 (quoting *Burkhart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1320 (7th Cir. 1980)).

[124] *In re Establishment Inspection of Skil Corp.*, 846 F.2d at 1134.

[125] *Id.*

[126] 15 U.S.C. § 2069.

[127] *Id.* § 2070.

[128] *Id.*

[129] *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983).

[130] *United States v. Danube Carpet Mills, Inc.*, 737 F.2d 988, 993–94 (11th Cir. 1984) (citing *United States v. Reader's Digest Ass'n*, 662 F.2d 955, 967 & n.18 (3d Cir. 1981)); see also *United States v. J.B. Williams Co.*, 498 F.2d 414, 438–39 (2d Cir. 1974).

[131] *Danube Carpet Mills, Inc.*, 737 F.2d at 994.

[132] *Id.* at 995.

[133] See, *e.g., id.*; see also *Shelton v. Consumer Prod. Safety Comm'n*, 277 F.3d 998 (8th Cir. 2002).

[134] *United States v. Anthony*, 280 F.3d 694, 696 (6th Cir. 2002) (involving the interpretation of sentencing guidelines for an employee sentenced to 24 months of imprisonment, followed by three years of supervised release for altering records during the course of a CPSC investigation to make it appear as though lighters sold by the company were child-proof).

[135] 15 U.S.C. § 2072.

[136] *Drake v. Honeywell, Inc.*, 797 F.2d 603, 604 (8th Cir. 1986).

[137] 15 U.S.C. § 2072(a).

[138] *Id*. § 2072(b).

[139] 15 U.S.C. § 2073(a)(1)–(2).

[140] *Id*. § 2073(a)(3).

[141] *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936, 942 (7th Cir. 1988) ("The causal connection between a defendant's reporting violation and a plaintiff's injury is too attenuated and speculative to satisfy generally applicable standards of causation in fact or proximate causation."). The U.S. Court of Appeals for the Eighth Circuit in *Drake v. Honeywell, Inc.* stated:

> First, the plaintiff would have to show that the defendant "knowingly" violated the reporting rules. Second, the plaintiff would have to show that but for the violation, the injury would have been prevented. In essence, the plaintiff would have to prove that had the defendant reported in accordance with 16 C.F.R. Part 1115, the [CPSC] pursuant to sections 15(c) and (d) would have held a hearing, determined that the product in fact contained a defect which presented a substantial product hazard, and ordered a remedy that would have prevented the plaintiff's injury. The causation problem not only burdens the plaintiff, it also strains the judicial factfinding process. It requires speculation as to whether and how the [CPSC] would have responded to the defendant's report, and whether the [CPSC's] response would have succeeded in preventing the plaintiff's injury. We doubt that Congress intended to set such a tortuous process in motion.

Drake, 797 F.2d at 610 (footnote omitted).

[142] *Carlson v. BIC Corp.*, No. 94-1772, 1996 U.S. App. LEXIS 16643 (6th Cir. 1996) (an unpublished opinion appearing in the Table of Decisions Without Reported Opinions, 89 F.3d 832) (affirming dismissal of a claim under the Act, where the manufacturer owed no duty under the statute to provide protective features on a lighter on the date of the accident).

[143] *DeHaan v. Whink Prod. Co.*, No. 91-CV-00014, 1995 U.S. Dist. LEXIS 750, at *6 (N.D. Ill. Jan. 21, 1995) ("[T]here is no explicit or implicit indication from the text of the Act of any intent to create a private remedy of punitive damages.").

[144] *Deck* ex rel. *Deck v. McBrien*, 759 F. Supp. 454 (C.D. Ill. 1991). The *Deck* court stated:

> In short, we hold that the Consumer Product Safety Commission must by rule designate prescription drugs for regulation before the act can apply.
>
> It hasn't.
>
> We dismiss.

Deck, 759 F. Supp. at 454.

[145] See, *e.g., Aimone v. Walgreen's Co.*, 601 F. Supp. 507 (N.D. Ill. 1985), *rev'd in part on other grounds sub nom. First Nat'l Bank of Dwight v. Regents Sports Corp.*, 803 F.2d 1431 (7th Cir. 1986).

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[146] "State of the art" refers to the "custom and practice at the time of the manufacture" of the allegedly defective product, and conformity with the applicable state of the art can be "taken into account in determining negligence." *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542, 547 (1995).

[147] Whether a "reasonable alternative design" exists is a question that a plaintiff might attempt to address in product liability litigation to demonstrate that a product is unreasonably dangerous. As the Illinois Supreme Court explained in *Kerns v. Engelke*:

> [A] plaintiff must present pertinent evidence, such as an alternative design which is economical, practical and effective, to the fact finder, who determines whether the complained-of condition was an unreasonably dangerous defect. This, we believe, is what Sutkowski v. Universal Marion Corp. (1972), 5 Ill. App. 3d 313, 319, 281 N.E.2d 749, 753, also stands for:
>
> > "In the development of product's liability principles design alternatives are appropriately considered whether reasonable care is the basis of liability or where liability is predicated upon strict tort liability. (Citation.) In both cases it appears that policy considerations are involved which shift the emphasis from the defendant manufacturer's conduct to the character of the product. Such change in emphasis furnishes additional reasons for permitting evidence of alternative designs in a strict tort liability case.
> >
> > The possible existence of alternative designs introduces the feature of feasibility since a manufacturer's product can hardly be faulted if safer alternatives are not feasible. In this connection feasibility includes not only the elements of economy, effectiveness and practicality but also the technological possibilities viewed in the present state of the art. If the feasibility of alternative designs may be shown by the opinions of experts or by the existence of safety devices on other products or in the design thereof we conclude that evidence of a post occurrence change is equally relevant and material in determining that a design alternative is feasible."

Kerns v. Engelke, 76 Ill. 2d 154, 162–63 (1979).

[148] See, *e.g., Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 264–65 (2007) (collecting cases).

[149] *Calles*, 224 Ill. 2d at 264–65 (identifying the risk-utility test and factors that have been adopted in South Carolina, Michigan, Arizona, Colorado, Connecticut, Hawaii, Illinois, Maryland, Mississippi, Missouri, New Jersey, New Mexico, New York, Oregon, Pennsylvania, and Tennessee).

[150] John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837–38 (1973), quoted in *Calles*, 224 Ill. 2d at 264–65.

[151] *Id.* at 265–66.

[152] Am. L. Prods. Liab. 3d § 28:19, at 28-30 to -31 (1997), quoted in *Calles*, 224 Ill. 2d at 265–66.

[153] *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247 (2007).

[154] *Calles*, 224 Ill. 2d at 250–51.

[155] *Id.* at 253.

[156] *Id.*

[157] *Id.* at 267.

[158] *Id.* at 267–68.

[159] *Id.* at 269.

[160] *Hubbard v. McDonough Power Equip., Inc.*, 83 Ill. App. 3d 272 (5th Dist. 1980).

[161] *Hubbard*, 83 Ill. App. 3d at 278 (quoting *Rucker v. Norfolk & W. Ry.*, 77 Ill. 2d 434, 438 (1979)).

[162] *Id.* (citing *Rucker*, 77 Ill. 2d at 439).

[163] Businesses, conversely, may seek to exclude correspondence with the CPSC where the letters do not definitively indicate that the CPSC is finding a product defective, even in situations where the CPSC has made a preliminary determination that a product presents a substantial risk of injury and where the defendant is taking voluntary corrective action. See *Tober v. Graco Children's Prod., Inc.*, 431 F.3d 572, 576 (7th Cir. 2005) (interpreting the Indiana Product Liability Act, Ind. Code 34-20-1, *et seq.*).

[164] *Cummins v. BIC USA, Inc.*, 727 F.3d 506 (6th Cir. 2013).

[165] *Cummins*, 727 F.3d at 512–14 (citing *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 512–13 (6th Cir. 1998)).

[166] *Id.* (citing *Johnston v. Deere & Co.*, 967 F. Supp. 578, 580 (D. Me. 1997)).

[167] *Id.* at 513 (quoting *Johnston*, 967 F. Supp. at 580, and omitting footnotes).

[168] *Kirstein v. W.M. Barr & Co.*, 983 F. Supp. 753, 760–61 (N.D. Ill. 1997).

[169] *Kirstein*, 983 F. Supp. at 762 (citing *Moss v. Parks Corp.*, 985 F.2d 736, 740 (4th Cir. 1993)).

[170] See *Moss*, 985 F.2d at 740. The court in *Moss v. Parks Corp.* stated that

> a common law tort action based upon failure to warn may only be brought for noncompliance with existing federal labeling requirements. In actions such as the present one, if the plaintiff requests a label that is "more elaborate or different" than the one required by the FHSA and its regulations, the claim is preempted.

Id.; see also *Terrazas v. Ashland Chem. Co.*, No. 98-CV-07491, 1999 U.S. Dist. LEXIS 17935, at *4 (N.D. Ill. Nov. 10, 1999) (awarding summary judgment to a kerosene manufacturer in a wrongful death suit for exposure to kerosene manufactured by the defendant, which allegedly caused the decedent's fatal breast cancer; the court found that common law claims were preempted and that no question existed that the labeling of the kerosene complied with the FHSA); *Miles v. S.C. Johnson & Son, Inc.*, No. 00-CV03278, 2002 U.S. Dist. LEXIS 22695, at *23, *26–27 (N.D. Ill. Nov. 25, 2002) (holding that warning and design defect claims were preempted by the FHSA and PPPA). But cf. *Leipart v. Guardian Indus., Inc.*, 234 F.3d 1063, 1067–68 (9th Cir. 2000) (stating, "[W]e believe that the [Act] expressly pre-empts only requirements imposed by state standards or regulations, not requirements imposed by state common law.").

[171] See, *e.g., United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 99 (2d Cir. 1994); *see also* Scurria, *CEO Sues to Escape*, *supra* note 2 ("Maxfield [& Oberton LLC] shut down late last year after the CPSC publicly branded Buckyballs as dangerous and urged six major retailers to yank them from store shelves over longstanding worries that the rare-earth magnets can cause severe injury if accidentally swallowed.").

[172] Nixon, *Ross Stores Fined*, *supra* note 1 ($3.9 million fine levied upon a company for failing to report that it continued to sell defective children's clothing after the agency warned that the clothes could cause injuries or death).

[173] *Mahoney v. Consumer Prod. Safety Comm'n*, 146 Fed. Appx. 587 (3d Cir. 2005).

[174] *Mahoney*, 146 Fed. Appx. at 589.

[175] *Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 990 F.2d 1298, 1305–08 (D.C. Cir. 1993).

Commercial Law

James K. Borcia
Tressler LLP, Chicago

"Commercial" Speech? Seventh Circuit Sides with Michael Jordan on Congratulatory Advertisement on His Hall of Fame Induction

In the decision of *Jordan v. Jewel Food Stores, Inc.*, No. 12-1992, 2014 U.S. App, LEXIS 3030 (7th Cir. Feb. 19, 2014), the U.S. Court of Appeals for the Seventh Circuit reversed summary judgment in favor of a defendant in a right of publicity case because the subject speech was unprotected commercial speech. On Michael Jordan's induction into the Basketball Hall of Fame in September 2009, *Sports Illustrated* published a special commemorative issue devoted to Jordan's career. Jewel was offered free advertising space in the issue and submitted a full-page ad congratulating Jordan on his induction into the Hall of Fame. The ad ran on the inside back cover of the commemorative issue. *Jordan*, 2014 U.S. App. LEXIS 3030, at *2. The text of the ad was as follows:

> A Shoe In!
>
> After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel–Osco salutes # 23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.

Id. at *5–6.

To Jordan, the ad was a misappropriation of his identity for the supermarket chain's commercial benefit and not a celebratory gesture. *Id.* at *2. Thereafter, he filed a lawsuit against Jewel for trademark infringement and other claims, including violation of his right of publicity. Jewel denied liability and claimed blanket immunity from suit under the First Amendment. *Id.*

Jewel filed a motion for summary judgment. The district court sided with Jewel on the constitutional defense, maintaining that the ad was "noncommercial" speech and, thus, had full First Amendment protection. Jordan insisted that the ad was garden-variety commercial speech, which gets reduced constitutional protection and may give rise to liability for the private wrongs he alleged in this case. The district court disagreed and granted summary judgment. *Jordan v. Jewel Food Stores, Inc.*, 851 F. Supp. 2d 1102, 1112 (N.D. Ill. 2012), *rev'd*, 2014 U.S. App. LEXIS 3030 (7th Cir. 2014). Jordan appealed, and the Seventh Circuit reversed. *Jordan v. Jewel Food Stores*, No. 12-1992, 2014 U.S. App, LEXIS 3030 (7th Cir. Feb. 19, 2014).

The parties agreed that if Jewel's ad was "noncommercial speech" in the constitutional sense, then the First Amendment provided a complete defense to all claims in the suit. The Seventh Circuit noted that it was unsure that was correct but, because the parties agreed, left that issue for another day. To determine whether speech falls on the commercial or noncommercial side of the constitutional line, the court defined commercial speech to mean "speech that proposes a commercial transaction." *Jordan*, 2014 U.S. App. LEXIS 3030, at *15. The court noted the following guideposts for classifying speech that contains both commercial and noncommercial elements, including "whether: (1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech." *Id.* at *19.

Jewel argued that its ad did not propose a commercial transaction and, therefore, could not be deemed commercial speech. The Seventh Circuit, however, held that the commercial-speech category is not limited to speech that directly or indirectly proposes a commercial transaction. Although the textual focus of Jewel's ad was a congratulatory salute to Jordan on his induction into the Hall of Fame, the ad prominently featured the "Jewel-Osco" logo and marketing slogan, which were creatively and conspicuously linked to Jordan in the text of the ad's con-

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About the Author

James K. Borcia is a partner with the Chicago firm of *Tressler LLP*, and is active in the firm's litigation practice with an emphasis on commercial and complex litigation. He was admitted to the bar in 1989 after he received his J.D. from Chicago-Kent College of Law. Mr. Borcia is a member of the Chicago and Illinois State Bar Associations, as well as the IDC and DRI.

gratulatory message. The court found that, based on its content and context, the ad was classified properly as a form of image advertising aimed at promoting the Jewel-Osco brand. The court also found that that Jewel's ad served two purposes: congratulating Jordan on his induction into the Hall of Fame and promoting Jewel's supermarkets. *Id.* at *21. The court noted that the latter commercial message was implicit, but easily inferred, and was the dominant one. Although no specific product or service is offered, the ad generally promoted patronage at Jewel-Osco stores. The court, thus, found that the ad was commercial speech and subject to the laws invoked by Jordan. *Id.* at *26.

The court concluded that a "contrary holding would have sweeping and troublesome implications for athletes, actors, celebrities, and other trademark holders seeking to protect the use of their identities or marks" because image advertising is commonplace. *Id.* at 27. Rather than expressly selling particular products, this type of advertising "features appealing images and subtle messages alongside the advertiser's brand name or logo with the aim of linking the advertiser to a particular person, value, or idea in order to build goodwill for the brand." *Id.*

The Seventh Circuit was careful to note that its specific holding applied to the ad at issue in the case. It specifically stated that "it was not suggesting that a company cannot use its graphic logo or slogan in an otherwise noncommercial way without transforming the communication into commercial speech." *Id.* at 29. Despite the narrowing of this holding, advertisers need to be aware of this decision when engaging in these types of promotional activities. If there is any doubt, the safest course is to obtain permission from the person being congratulated or referenced in the promotional materials.

Property Insurance

Catherine A. Cooke
Robbins, Salomon & Patt, Ltd., Chicago

Mechanics Lien by Contractor/Member of a Limited Liability Company on Limited Liability Company's Property Held Valid

In a 2013 case with significance for contractors, mortgagees, and property owners, the Illinois Appellate Court Fifth District held that a limited liability member's mechanics lien against the real estate owned by the limited liability company was valid. *Peabody-Waterside Dev., LLC v. Islands of Waterside, LLC*, 2013 IL App (5th) 120490. The facts of the case are fairly simple. Peabody-Waterside Development, LLC ("Peabody-Waterside"), a Delaware limited liability company, was a 50% member in Islands of Waterside, LLC ("Islands"). *Peabody-Waterside Dev., LLC*, 2013 IL App (5th) 120490, ¶ 2. Islands owned approximately 900 acres of property in Marissa, Illinois. *Id.* ¶ 3. In 2007, Islands executed a mortgage in favor of its bank lender to secure repayment of a $7.5 million dollar loan that was to be used for acquisition, construction, and development of the property. *Id.* ¶ 4.

Islands then sought bids from contractors to perform necessary site preparation and grading work. The bids, however, all came back much higher than expected or desirable. In search of cheaper contractor options, Islands looked to its member, Peabody-Waterside, to perform the work. Islands and Peabody-Waterside entered into a contract whereby Peabody-Waterside agreed to furnish the labor, materials, equipment, supplies, and all other permits, fees, and services necessary to perform site preparation and grading work at the property. In exchange, Islands was to pay Peabody-Waterside the cost of the work plus a contractor's fee of 15%. Peabody-Waterside completed the work and submitted invoices to Islands for $4,543,799.77, but Islands never paid Peabody-Waterside. *Id.* ¶ 5.

Mechanics Lien Foreclosure Proceedings in the Trial Court

Without other recourse to recoup the money it had expended, Peabody-Waterside recorded its claim for a mechanics lien against the property, and it subsequently filed a complaint

About the Author

Catherine A. Cooke is an associate at *Robbins, Salomon & Patt, Ltd.* and concentrates her practice in the area of commercial litigation and creditors' rights. She earned her undergraduate degree from Indiana University–Bloomington in 2003, and law degree from The John Marshall Law School in 2006, where she served as Administrative Editor of *The John Marshall Law Review*. She is licensed to practice law in both Illinois and Indiana.

for breach of contract and to foreclose on the mechanics lien. The bank lender filed a motion for summary judgment on the basis that Peabody-Waterside's mechanics lien on the property was void and unenforceable because Peabody-Waterside performed the work for its own benefit as a co-owner of the property. The trial court entered summary judgment in favor of the bank lender, while simultaneously denying Peabody-Waterside's cross-motion for summary judgment seeking to foreclose its mechanics lien. *Peabody-Waterside Dev., LLC*, 2013 IL App (5th) 120490, ¶ 6.

In granting summary judgment in favor of the bank lender, the trial court relied primarily on *Fitzgerald v. Van Buskirk*, 16 Ill. App. 3d 348 (2d Dist. 1974). In that case, the court found that, in the construction of certain buildings, the plaintiff acted in the capacity as a joint venturer with the defendants and, therefore, was not a person entitled to a mechanics lien under Section 1 of the Mechanics Lien Act. *Fitzgerald*, 16 Ill. App. 3d at 349. Based on *Fitzgerald*, the *Peabody-Waterside* trial court concluded that, because Peabody-Waterside was jointly interested in developing the property, it "was not the type of claimant that is entitled to a mechanic's lien under Illinois law." *Peabody-Waterside Dev., LLC*, 2013 IL App (5th) 120490, ¶ 7.

Appellate Court Reverses Trial Court and Finds Lien Is Valid

Peabody-Waterside appealed on the basis that being a member of a limited liability company is not the equivalent of being a joint venturer or having co-ownership in the real property owned by the limited liability company. *Id.* The appellate court began by acknowledging the principle that an owner or co-owner of property cannot claim a lien against his own property. *Id.* ¶ 8. The underlying rationale behind this rule is that an individual who is an owner or has a beneficial interest in real property makes improvements at his own risk and should not be able to enforce a mechanic's liens in his favor to the prejudice of third parties. See *Thomas Elec. Co. v. Severson Enters., Inc.*, 376 N.W.2d 631, 633 (Iowa Ct. App. 1985) (citing 57 C.J.S. Mechanic's Liens 37 (1948)).

The bank lender argued that, because Peabody-Waterside was entitled to a 50% share of any profits resulting from the development of the property by Islands, Peabody-Waterside performed the construction work for its own direct benefit. *Peabody-Waterside Dev., LLC*, 2013 IL App (5th) 120490, ¶ 8. Therefore, according to the bank, because Peabody-Waterside could receive not only the compensation for the value of work performed but also potentially share in the profits from the building, Peabody-Waterside would receive far more than a typical construction lien claimant. *Id.* Given the loose definition of a joint venture as an association of two or more persons to carry out a single enterprise for profit, the bank asserted that Peabody-Waterside's relationship with the other 50% member in the LLC satisfied the criteria under Illinois law. The trial court agreed and invalidated Peabody-Waterside's mechanics lien. *See id.*

Limited liability company members own an economic "distributional" interest in the cash flow (if any) of the LLC, but hold no interest in the property or business that actually generates the profits.

Limited Liability Company Is a Distinct Entity Separate from Its Members

In rejecting the trial court's holding, the appellate court noted that the bank lender's argument and the court's acceptance of the "jointly interested" theory ignore the specific corporate form of the limited liability company and the relationship between a limited liability company and its members. *Id.* ¶ 9. The choice of entity as a limited liability company differentiates it from a joint venture or a general partnership. Limited liability company members own an economic "distributional" interest in the cash flow (if any) of the LLC, but hold no interest in the property or business that actually generates the profits. *See* 805 ILCS 180/30-1(a); *In re Weiss*, 376 B.R. 867, 879 (Bankr. N.D. Ill. 2007) (noting that a "membership interest" includes a member's right to receive distributions of the limited liability company's assets, but a member does not own the underlying assets of the limited liability company). Conversely, joint ventures are *not* distinct legal entities. The co-venturers are co-owners of the venture property and are personally liable for the joint venture's debts. *Peabody-Waterside Dev., LLC*, 2013 IL App (5th) 120490, ¶ 9.

The Illinois Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.*, was originally

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enacted in 1825 and has not undergone many major substantive revisions since its adoption. The introduction of new types of business entity structures, including limited liability companies, since the 1800s has required courts to adapt traditional mechanics lien principles over time. Though courts have been interpreting various laws with respect to LLCs for quite some time, the *Peabody-Waterside* court reemphasized that a limited liability company is a legal entity distinct from its members, with its own legal rights and obligations. *Peabody-Waterside Dev., LLC*, 2013 IL App (5th) 120490, ¶ 9; see also *First Mid-Illinois Bank & Trust, N.A. v. Parker*, 403 Ill. App. 3d 784, 792 (5th Dist. 2010).

> "Sharing in the profits and losses of an LLC does not make the LLC members jointly interested or co-owners of the LLC's property." If it did, a creditor would be able to attach the LLC's property to satisfy a judgment against a limited liability company member, which is expressly prohibited by the LLC Act. Instead, a creditor is only permitted to attach the member's distributional interest in the LLC, because that is all the member actually "owns."

LLC Membership Confers No Ownership Interest in LLC Property—Only a Right to Distributions from the LLC

The Illinois Limited Liability Company Act ("LLC Act"), 805 ILCS 180/1-1, *et seq.*, clearly states that membership in a limited liability company does not confer any ownership interest in the limited liability company property, whether that property is real or personal. *See* 805 ILCS 180/30-1(a). A member of an LLC owns its membership or "distributional" interest only. *Id.* § 30-1(b); *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 110749, ¶ 41. As the *Peabody-Waterside* court noted: "Sharing in the profits and losses of an LLC does not make the LLC members jointly interested or co-owners of the LLC's property." *Peabody-Waterside Dev., LLC*, 2013 IL App (5th) 120490, ¶ 9. If it did, a creditor would be able to attach the LLC's property to satisfy a judgment against a limited liability company member, which is expressly prohibited by the LLC Act. *Id.* Instead, a creditor is only permitted to attach the member's distributional interest in the LLC, because that is all the member actually "owns." 805 ILCS 180/30-20(a).

Having concluded that Peabody-Waterside was not a "co-owner" of the LLC's property, the appellate court overruled the trial court and found that Peabody-Waterside's mechanics lien was valid. *Peabody-Waterside Dev., LLC*, 2013 IL App (5th) 120490, ¶ 9. The court further opined that Peabody-Waterside was in no different a position than a third-party independent contractor by nature of its contract with Islands and the consideration for the contract was separate from any indirect benefit Peabody-Waterside might receive by virtue of its membership in the LLC. *Id.* ¶ 10.

Ruling Might Not Be Applicable to Single-Member Limited Liability Companies

Lastly, the bank argued that Peabody-Waterside, as an LLC member, waived the LLC's defenses to its own lien claim and therefore should be ineligible to assert the mechanics lien. *Id.* ¶ 11. The court dismissed this argument because Peabody-Waterside did not control the LLC's actions alone, as it was only a 50% owner with another independent LLC holding the other 50% membership interest. Because the other member's consent was necessary for any action by the LLC, the other member was also the LLC's managing member, and the two members were separate and unaffiliated. *Id.*

Though arguably *dicta*, this last portion of the court's ruling calls into question whether the same holding would follow if the limited liability company had only one member. Although the LLC would still be a legal entity separate and distinct from its sole member, and the LLC and not the member would still be the owner of the property, a sole member's complete control over the LLC likely would be fatal to the member's mechanic's lien, given the court's discussion of the importance of the two members' shared control.

Recent Decisions

Stacy Dolan Fulco
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

Summary Judgment Upheld Based on the *De Minimus* Rule

In *Morris v. Ingersoll Cutting Tool Co.*, 2013 IL App (2d) 120760, the plaintiff was injured after tripping and falling in a loading bay at the defendants' business while making a delivery. The plaintiff filed a negligence suit against the defendants for failing to maintain the premises in a reasonably safe condition. The trial court granted the defendants' motion for summary judgment, holding that the defect on which the plaintiff tripped, which measured 1.5 inches high, was *de minimus* and not actionable. The plaintiff appealed the ruling, arguing that the *de minimus* rule should not have been applied, given the overall size of the defect and other aggravating factors. The Illinois Appellate Court Second District affirmed the summary judgment ruling for the defendants. *Morris*, 2013 IL App (2d) 120760, ¶ 1.

On the day of the incident, the plaintiff backed his truck into the loading bay and began to exit his vehicle. After reaching the ground, while still facing the vehicle, the plaintiff stepped back in order to shut the trailer door. His foot caught on a difference in the elevation, causing him to fall. The plaintiff estimated the crack to be 1.5 inches, and he was aware of the crack from deliveries he made prior to that day. He had also previously informed the defendants about the crack. *Id*. ¶ 3.

The plaintiff retained an expert to inspect the fall area. The expert found a crack in the asphalt that was 2.5 feet long, one foot wide, and 1.5 inches deep. *Id*. ¶ 5. The trial court granted the defendants' motion for summary judgment based on the *de minimus* rule, and in doing so, the court refused to consider the measurements of the defect beyond the 1.5-inch height discrepancy because the plaintiff did not state that anything but the height caused him to trip. The trial court also noted that it found the expert's testimony regarding the current appearance of the defect to be suspicious because he was describing a defect that, by his own suggestion, took place over time. *Id*. ¶ 6.

On appeal, the plaintiff argued that the appellate court erred in finding the defect *de minimus* because certain aggravating factors removed the case from that rule. The plaintiff also contended that there was a genuine issue of material fact as to whether the asphalt defect was *de minimus*, so summary judgment should not have been granted. *Id*. ¶¶ 8–9.

The appellate court started its analysis by first looking at the requirements for a negligence claim. To state a cause of action for negligence, a plaintiff must allege facts establishing a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Morris*, 2013 IL App (2d) 120760, ¶ 10 (citing *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006)). In determining whether a duty exists and the scope of that duty, the court considers the foreseeability of injury, the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the defendant. *Id.* (citing *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18).

In this case, the defendants were the owner and the lessee of the property, so there was no question that they owed a duty to the plaintiff to keep the premises in a reasonably safe condition. The appellate court noted that the question in this case was whether the scope of the defendants' duty included repairing a 1.5-inch crack in the loading bay. The trial court applied the *de minimus* rule, so the appellate court indicated that it needed to determine whether that rule actually applied to the situation. *Id.* ¶ 11.

The *de minimus* rule states that, if a defect is such that a reasonably prudent person would not anticipate some danger to persons walking upon it, the defect is *de minimus* and not actionable. *Id*. ¶ 12 (citing *Arvidson v. City of Elmhurst*, 11 Ill. 2d 601, 605 (1957)). The rule recognizes that minor defects are outside the scope of a landowner's duty to maintain the property in a reasonably safe condition for the purposes for which the property is intended. *Id.* (citing *Hartung v. Maple Inv. & Dev. Corp.*, 243 Ill. App. 3d 811, 813 (2d Dist. 1993)). The rule has been extended to private landowners and recognizes that requiring sidewalks

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About the Author

Stacy Dolan Fulco is a partner at the Chicago law firm of *Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC*. She practices primarily in the areas of premises liability, products liability, and wrongful death defense. She received her undergraduate degree at Illinois State University and her J.D./M.B.A. degree from DePaul University. She is a member of the IDC.

Courts have found that areas not considered sidewalks, such as parkways, are held to a lesser standard, in part due to the changing conditions inherent in a landscaped area.

be kept free of minor defects would be unduly burdensome, impractical, and expensive. *Morris*, 2013 IL App (2d) 120760, ¶ 12 (citing *Putman v. Vill. of Bensenville*, 337 Ill. App. 3d 197, 202 (2d Dist. 2003)).

Even though there is no mathematical formula or bright-line rule as to what constitutes a slight defect, and each case is to be determined on its own facts, cases have identified that liability attaches for sidewalk defects approaching two inches in height. *Id.* (citing *Birck v. City of Quincy*, 241 Ill. App. 3d 119, 121 (4th Dist. 1993), and *Hartung*, 243 Ill. App. 3d at 816–17). Therefore, in this case, the appellate court held that the 1.5-inch defect, located in an area not intended for, and with little, pedestrian traffic was a minor defect and fell within the *de minimus* rule. *Id.* ¶ 13.

Next, the appellate court looked at the scope of the defendants' duty as to the foreseeability of injury, the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the defendants. The appellate court determined that the plaintiff's injury was not reasonably foreseeable because it occurred in an industrial area used specifically for large semitrailers being loaded with product. The likelihood of injury was found to be minor because the area was not for pedestrian use, but rather was used by large, heavy trucks carrying heavy loads. *Id*. ¶¶ 13–14.

As to the burden of guarding against it, the plaintiff argued that the cost of repairing the defect was slight. In response, the appellate court noted that requiring the defendants to repair every 1.5-inch defect in the loading bay would create an economic burden. In addition, the appellate court explained that, if it refused to apply the *de minimus* rule here, it would be placing a heavy burden on the defendants over time. Because there were 350 employees working in the building, there was no inference that the facility was small or that repairing the asphalt would not be burdensome on the defendants over a number of years. *Id*. ¶ 14.

In continuing its analysis, the appellate court stated that the area in question was more like a parkway than a sidewalk because it was not a pedestrian area. When applied to parkways, the *de minimus* rule has allowed for height variations that generally were acceptable in a sidewalk—even up to a 2.5-inch variation. *Morris*, 2013 IL App (2d) 120760, ¶ 15 (citing *Barnhisel v. Vill. of Oak Park*, 311 Ill. App. 3d 108, 115 (1st Dist. 1999)). Although the rule has been applied only in the context of the Local Governmental and Governmental Tort Immunity Act, 745 ILCS 10/1-101, the appellate court indicated that it found the logic behind the parkway versus sidewalk distinction to be useful in this case. *Id.*

Courts have found that areas not considered sidewalks, such as parkways, are held to a lesser standard, in part due to the changing conditions inherent in a landscaped area. *Id.* ¶ 16 (citing *Marshall v. City of Centralia*, 143 Ill. 2d 1, 10–11 (1991)). In this case, the appellate court found that the wear and tear on a loading bay used by large vehicles was more akin to the changing conditions of a parkway than it was to the light pedestrian traffic of a sidewalk. In addition, just as a parkway has limited pedestrian use, the loading bay was for vehicular use in an industrial environment. For these reasons, the appellate court found that the defect was consistent with the justifications behind the *de minimus* rule. *Id.* ¶¶ 16–17.

The plaintiff argued that, even if the defect was *de minimus*, there were aggravating factors concerning its dimensions and location that allowed for liability. First, the plaintiff contended that, despite the *de minimus* height of the defect, its width and breadth, along with the existence of an associated defect in the curb and gutter, had to be considered. In viewing the evidence in the light most favorable to the plaintiff, the appellate court accepted the dimensions in the plaintiff's expert's affidavit, as the plaintiff also submitted an affidavit asserting that the defect measured by the expert was the defect that caused him to fall. Therefore, the appellate court next determined whether the added dimensions of 2.5 feet in length and one foot in width were aggravating factors that would remove the defect from the *de minimus* rule. *Id*. ¶ 21.

The question was whether a 2.5-foot by one-foot defect was an aggravating factor specifically in the defendant's loading bay. The photographs showed that the loading bay was at least the length of a semitrailer (approximately 65 feet long). Because 2.5 feet of the total 65 feet was less than 4% of the length of the loading bay, the appellate

court determined that the chances that the defect would be encountered were low, so the foreseeability and likelihood of injury were low. Because the defect was a small crack within the entire loading bay area, its added dimensions did not preclude the application of the *de minimus* rule. *Morris*, 2013 IL App (2d) 120760, ¶ 22.

The plaintiff's second argument was that, because the defect was in an area of ingress and egress to the plaintiff's truck, the plaintiff had no choice but to encounter it, and because he would be distracted when he encountered the defect, the *de minimus* rule would not apply. *Id*. ¶ 23. As support for this argument, the plaintiff cited to *Harris v. Old Kent Bank*, 315 Ill. App. 3d 894 (2d Dist. 2000). *Morris*, 2013 IL App (2d) 120760, ¶ 23. The appellate court found the facts in *Harris* to be distinguishable, because *Harris* involved the entrance of a bank, not a loading bay. *Id*. ¶¶ 24–25. The loading bay was not a pedestrian means of ingress or egress to the facility, but instead was meant for vehicular traffic. In addition, everyone going to the facility, including all truck drivers, did not encounter the loading bay. Therefore, the foreseeability of harm was diminished. *Id*. ¶ 25.

Next, the plaintiff argued that, where a defect was obscured or there was dim lighting, it was foreseeable that a plaintiff would fail to see the defect, especially because the plaintiff was exiting his vehicle. The appellate court responded that the defect could have been seen before the plaintiff exited his vehicle. The defect was not obscured by dim lighting and, as the plaintiff's own expert indicated in his affidavit, the defect could be clearly seen from different angles. *Id*. ¶ 28.

The plaintiff's final argument was that, because the property manager testified that he was trained that a one-inch defect amounts to a trip hazard, the defect was removed from the *de minimus* rule, as a result of the defendants' own policy. *Id*. ¶ 29 (citing *Martinkovic v. City of Aurora*, 150 Ill. App. 3d 589, 591 (2d Dist. 1986)). The appellate court determined that the defendants did not have a policy of repairing defects over one inch. The court reasoned that the fact that the property manager took a class that established a general guideline about trip hazards did not transform his knowledge into an explicit company policy. In addition, his weekly inspections of the premises did not remove the defect in question from the *de minimus* rule. *Morris*, 2013 IL App (2d) 120760, ¶ 30.

Because the appellate court determined that there were no aggravating factors sufficient to remove the defect from the *de minimus* rule, the appellate court affirmed the trial court's grant of summary judgment in favor of the defendants. *Id*. ¶ 31.

The Collateral Source Rule Prevented a Judicial Estoppel Affirmative Defense to a Retaliatory Discharge Claim, and Denial of the Defendant's Motion for Judgment N.O.V and New Trial Request Upheld

In *Batson v. Oak Tree, Ltd.*, 2013 IL App (1st) 123071, the plaintiff filed an action alleging breach of contract and retaliatory discharge from her position as a manager of the defendant's restaurant. A jury entered judgment for the plaintiff. The defendant appealed, asserting that the trial court erred in: (1) holding that the collateral source rule prohibited the defendant from asserting the affirmative defense of judicial estoppel; and (2) denying its motion for a new trial or judgment *n.o.v.*, because there was insufficient evidence of a breach of contract. The Illinois Appellate Court First District affirmed the trial court's rulings. *Batson*, 2013 IL App (1st) 123071, ¶ 1.

The plaintiff worked at the defendant's restaurant as a manager from 1985 until 1995, when she moved to Michigan. In 1996, the plaintiff returned to Illinois and was re-hired. Upon her return, the plaintiff was paid a bi-weekly salary and, pursuant to a deferred compensation agreement, a sum was placed into a trust account annually for the duration of the eight-year contract. The plaintiff claimed that she was injured at work in 2000, but the defendant denied that the injuries were work-related. So, the plaintiff filed a workers' compensation claim. The plaintiff took a leave of absence from work in September 2000 due to her injuries and was cleared to return to work in 2001. When the plaintiff called to arrange her return to work, she was informed that she no longer had a job. The plaintiff claims that prior to her termination, the defendant closed out her trust account and deposited the balance into her personal account. *Id*. ¶¶ 4–5.

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After suit was filed, the defendant filed its answer and affirmative defenses based on judicial estoppel. In prior applications for social security disability benefits and supplemental income, the defendant asserted that the plaintiff claimed that she was continuously and totally disabled since September 9, 2000, and the defendant asserted that those were quasi-judicial proceedings under Illinois law. The plaintiff was then successful in obtaining benefits from the Social Security Administration. Her complaint, however, alleged that she was cleared to work in 2001. The defendant asserted that this allegation was inconsistent with allegations the plaintiff presented to the Social Security Administration. *Id*. ¶ 6.

Prior to trial, the trial court granted the plaintiff's motion *in limine* to bar any statement regarding the plaintiff's application for social security benefits, and the court agreed that the collateral source rule precluded the defendant's affirmative defense of judicial estoppel. *Id*. ¶ 7. After trial, the defendant filed a combined motion for judgment *n.o.v.* or a new trial pursuant to Section 2-1202 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-1202. The trial court denied the motion, and the defendant filed an appeal. *Id*. ¶ 19.

On appeal, the defendant first argued that the trial court erred in applying the collateral source rule to prevent the defendant from raising its judicial estoppel affirmative defense to the retaliatory discharge claim. The defendant claimed that the collateral source rule, which generally precludes evidence that a plaintiff has obtained collateral benefits such as insurance, implicitly requires that the collateral benefits be legitimately acquired. It was the defendant's position that legitimate acquisition of benefits was not the case with the plaintiff and, to the extent that there was conflict between judicial estoppel and the collateral source rule, judicial estoppel should control. *Batson*, 2013 IL App (1st) 123071, ¶ 22.

Before analyzing that issue, the appellate court explained the two areas of law. Judicial estoppel is an equitable doctrine invoked by the court at its discretion. *Id*. ¶ 23 (citing *People v. Runge*, 234 Ill. 2d 68, 132 (2009)). Before such discretion is applied, the party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) succeeded in the first proceeding and received some benefit from it. *Id.*

Under the collateral source rule, "evidence of benefits received by a plaintiff from collateral sources independent of the tortfeasor will not serve to diminish any damages otherwise recoverable." *Id*. ¶ 24 (citing *Lang v. Lake Shore Exhibits, Inc.*, 305 Ill. App. 3d 283, 289 (1st Dist. 1999)). The rationale behind this rule is to keep the jury from learning anything about collateral income that could influence its decision. *Id.* (citing *Boden v. Crawford*, 196 Ill. App. 3d 71, 76 (4th Dist. 1990)).

The allegation at issue was retaliatory discharge. As a general rule, an at-will employee in Illinois may be discharged by the employer at any time and for any reason. *Batson*, 2013 IL App (1st) 123071, ¶ 25 (citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 181–82 (1978)). The Workers' Compensation Act (the Act), 820 ILCS 305/1, *et seq.*, however, plainly prohibits discharge in retaliation for the exercise of an employee's workers' compensation rights. *Id.* (citing *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 119 (2008)). The Act also establishes a cause of action allowing former employees to sue former employers for retaliatory discharge, and thus creates an exception to the general rule that at-will employees are terminable at any time for any or no cause. *Id.* (citing *Smith*, 231 Ill. 2d at 181–82).

To properly state a retaliatory discharge claim, a plaintiff must establish the following elements: (1) she was an employee of the defendant at or before the time of the injury; (2) she exercised some right under the Act; and (3) her discharge was causally related to the exercise of her rights under the Act. *Id.* ¶ 26 (citing *Grabs v. Safeway, Inc.*, 395 Ill. App. 3d 286, 291 (1st Dist. 2009)). The element of causation is not met if the employer has a valid, non-pretextual basis for discharging the employee, so the issue to decide is what the employer's motivation was in discharging the employee. *Id.* (citing *Clemons v. Mech. Devices Co.*, 184 Ill. 2d 328, 336 (1998)).

The defendant in *Batson* tried to prove that the plaintiff's retaliatory discharge claim was judicially estopped by having the plaintiff testify that she claimed an inability to work in her applications for social security benefits. In turn, the plaintiff's theory did not depend on her own ability to work, but rather alleged that she was discharged after filing a workers' compensation claim. The appellate court noted that the defendant presented no evidence at trial to show that it had a valid, non-pretextual basis for terminating the plaintiff. Instead, the restaurant owner testified that he did not have a problem with the plaintiff's job performance, but was skeptical of the validity of her injury and its being caused by her work at the restaurant. The appellate court determined that, because the defendant never presented any evidence

of a valid basis for discharging the plaintiff and because the plaintiff's retaliatory discharge claim was predicated solely on the defendant terminating her for filing the workers' compensation claim, the plaintiff's indication to the Social Security Administration that she was unable to work due to a disabling condition was not a "factually inconsistent" position that would judicially estop her claim. *Batson*, 2013 IL App (1st) 123071, ¶ 27.

The defendant next challenged the trial court's denial of its motion for a new trial or judgment *n.o.v.*, arguing that that it was uncontested that the plaintiff did not work for the full eight years required in the contract, so the defendant did not breach the contract. *Id*. ¶ 32. The appellate court explained that a judgment *n.o.v.* should be granted only where all of the evidence, viewed in the light most favorable to the opposing party, so overwhelmingly favors the moving party that no contrary verdict based on that evidence could ever stand. *Id*. ¶ 33 (citing *York v. Rush–Presbyterian–St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 178 (2006)). In contrast, a motion for a new trial should be granted only when the verdict is contrary to the manifest weight of the evidence. *Id.* ¶ 34.

The essential elements of a breach of contract are: (1) the existence of a valid and enforceable contract, (2) performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resultant injury to the plaintiff. *Id*. ¶ 35 (citing *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 27). If the terms of an agreement are unambiguous, they should be enforced as they appear. *Batson*, 2013 IL App (1st) 123071, ¶ 35. Any ambiguity in a contract term must be resolved against the drafter of the disputed provision. *Id*.

The appellate court determined that, even though the agreement defined discharge "for cause" as excessive absenteeism, construing that provision as allowing discharge for cause for filing a claim under the Workers' Compensation Act would render it void as against public policy.

In *Batson*, the evidence put forth at trial showed that the plaintiff suffered injuries to her hands and then filed a workers' compensation claim. When she was ready to return to work, she was informed that she was terminated, even though her employer never had an issue with her performance. The controlling shareholder of her employer also admitted that he did not believe that the plaintiff was injured as a result of her job. The appellate court determined that these facts, construed in the light most favorable to plaintiff, established that the defendant terminated the plaintiff in retaliation for filing a workers' compensation claim. *Id*. ¶ 36.

The deferred compensation agreement, which was the agreement at issue, provided that the plaintiff would be 100% vested in the trust funds if she were discharged "not for cause." It required "continuous employment" by the plaintiff for the entire term of the agreement, but excluded discharge by the employer "without cause." *Id*. ¶ 37. Furthermore, it had a provision that, if any term were found to be void, the remaining provisions would be binding "with the same effect as though the void parts were deleted." *Id*. The appellate court determined that, even though the agreement defined discharge "for cause" as excessive absenteeism, construing that provision as allowing discharge for cause for filing a claim under the Workers' Compensation Act would render it void as against public policy. *Batson*, 2013 IL App (1st) 123071, ¶ 37 (citing *Kelsay*, 74 Ill. 2d at 181). Therefore, the appellate court ruled that the defendant's discharge of the plaintiff in retaliation for her claim under the Act was not a discharge "for cause," the plaintiff vested 100% in the funds under the deferred compensation agreement and her discharge could not be excluded from the definition of continuous employment. *Id*.

For these reasons, the appellate court determined that it could not hold that all of the evidence, viewed in the light most favorable to the plaintiff, so overwhelmingly favored the defendant that no contrary verdict based on that evidence could ever stand. The appellate court also could not hold that a conclusion opposite from the jury's verdict was clearly evident or that the jury's findings were arbitrary, unreasonable, or not based upon any of the evidence. Therefore, the appellate court determined that the trial court did not err in denying the defendant's combined motion for judgment *n.o.v.* and motion for a new trial. *Id*. ¶ 38.

Professional Liability

Martin J. O'Hara
Much Shelist, P.C., Chicago

What's Good for the Goose May be Good for the Gander

In the 4th Issue of Volume 19 of the *IDC Quarterly*, I discussed a decision from the Appellate Court, First District, in *Orzel v. Szewczyk*, 391 Ill. App. 3d 283 (1st Dist. 2009), wherein the court addressed the question of whether an attorney who filed a complaint on behalf of his client in an underlying litigation matter could assert as a defense in a legal malpractice action brought against him that the plaintiff lacked a meritorious claim in the underlying matter. *Avoiding a Finding of Estoppel Against the Defense Attorney*, 19 IDC Quarterly no. 4, 2009, at 39. The court in *Orzel* held that the lawyer was not estopped from contending that the plaintiff lacked a meritorious claim in the underlying matter as long as "the merits of the claims never were tested fully through adversarial argument or at an evidentiary hearing." *Orzel*, 391 Ill. App. 3d at 288. Without the merits of the claim ever being fully tested, an attorney filing the complaint is merely indicating his subjective opinion that the case has merit. That opinion, however, is not a judicial admission by the attorney that would bar him from asserting a contrary position in defense of a claim for legal malpractice.

The First District addressed the converse issue in *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122. Specifically, the court in *Nelson* was called upon to decide whether the plaintiff in a legal malpractice action was estopped from asserting a position in the legal malpractice action that was contrary to a sworn affidavit submitted by the plaintiff in the underlying litigation.

The Underlying Dispute

Quarles & Brady represented Kenneth Nelson in connection with a dispute he had with Richard Curia. In 1989, Nelson was the sole owner of the outstanding shares of capital stock in two auto dealerships. At that time, Nelson and Curia entered into an agreement whereby Nelson would sell to Curia shares of capital stock in the two dealerships at a specific price and with a specific closing date. The agreement also gave Curia a series of three additional successive options to purchase the remaining shares of the dealerships. The agreement required Curia to provide notice in writing of his election to exercise each option. The agreement further required that Curia make a lump sum cash payment to Nelson of the amount required by the agreement within 60 days after notice was sent. *Nelson*, 2013 IL App (1st) 123122, ¶¶ 5–8.

Thereafter, Curia did not exercise the initial option within the terms of the agreement. At some point, however, Curia made a lump sum payment to Nelson and the two corporations that owned the dealerships were recapitalized to reflect an ownership interest by Curia in both of the dealerships. In July 2004, Nelson and Curia purportedly entered into an oral agreement whereby Curia would purchase all of Nelson's remaining stock for $4.2 million, with the closing to take place prior to December 31, 2004. Curia, however, failed to tender the $4.2 million to complete the sale and refused to perform under the oral contract. Instead, Curia sent a Notice of Exercise of Option, whereby he indicated that he was exercising the additional options provided to him in the original 1989 agreement. *Id*. ¶¶ 7–8, 10, 15–17.

After receiving Curia's notice, Nelson retained Quarles & Brady to represent him in the dispute with Curia. Quarles & Brady filed a declaratory judgment action in federal court seeking to have the court declare that Curia could not exercise the options in the 1989 agreement. Curia then initiated a separate action against Nelson in the Northern District of Illinois requesting specific performance of the 1989 agreement to force Nelson to sell all of his shares in the dealerships. In the action initiated by Curia, the district court entered partial summary judgment in favor of Curia, holding that he could exercise the options in the 1989 agreement. The court thereafter entered a further order requiring

About the Author

Martin J. O'Hara, a Principal in *Much Shelist, P.C.*'s Litigation & Dispute Resolution practice group, concentrates his practice on commercial litigation and the defense of professionals in malpractice actions. Mr. O'Hara earned his B.A. in 1990 from Illinois State University and his J.D. in 1995 from the John Marshall Law School. He is a member of the Illinois State Bar Association, the Chicago Bar Association, the Defense Research Institute, the Illinois Association of Defense Trial Counsel and the Society of Trial Lawyers. While in law school, he served on the John Marshall Law Review, and won a Graduate School Scholarship Award and the Dean Herzog Scholarship.

Nelson to sell all of his remaining shares in the auto dealerships to Curia. Both the district court and the Court of Appeals for the Seventh Circuit later denied Nelson's motions to stay the judgments pending appeal. *Id*. ¶¶ 18–19.

While Nelson's appeal was pending, he sold all of his remaining shares to Curia. Nelson then discharged Quarles & Brady and hired new counsel to represent him in his appeal. Thereafter, the Seventh Circuit, *sua sponte*, decided that the 1989 agreement was ambiguous and therefore reversed and remanded the case to the district court. During the period between the sale of the shares to Curia and the Seventh Circuit's decision, however, Curia had obtained substantial loans and encumbered the dealerships' assets by using them as security for the loans. As a result of Curia's actions, there was no practical means for Nelson to undo the sale of his shares to Curia. Nelson, therefore, settled with Curia to minimize his continued losses, and he was unable to regain his majority ownership of the dealerships. *Id*. ¶ 20.

The Malpractice Action

Nelson then filed a legal malpractice action against Quarles & Brady. Nelson alleged that Quarles & Brady was negligent by failing to assert complete defenses to Curia's attempted exercise of the 1989 options. Nelson further alleged that Quarles & Brady was negligent in failing to argue that the writings and agreements were ambiguous. Finally, Nelson alleged that Quarles & Brady was negligent in failing to enforce the July 2004 oral agreement. Quarles & Brady moved to dismiss Nelson's claims, contending that its actions constituted non-actionable errors of judgment and not professional negligence. The trial court agreed and dismissed Nelson's claims with prejudice. *Id*. ¶ 23.

> The court's distinction of *Beverly Bank* on the basis that Nelson was suing his attorney is somewhat troubling. The court in essence holds that Nelson is not bound by the sworn statement contained in the affidavit that he executed in connection with the underlying case because Quarles & Brady drafted the affidavit.

On appeal, the court first addressed the trial court's determination that Quarles & Brady's actions constituted non-actionable errors of judgment and not professional negligence. After reviewing the case law with respect to that issue, the appellate court held that the trial court erred in finding that, as a matter of law, Quarles & Brady's conduct constituted a mere error of judgment for which it was immune from liability. The appellate court found that it could not determine from the record whether Quarles & Brady made a conscious decision not to assert certain claims or defenses, or whether Quarles & Brady simply was unaware of or overlooked the existence of specific legal arguments. *Nelson*, 2013 IL App (1st) 123122, ¶¶ 41–45.

Because the appellate court could affirm on any basis supported by the record, however, the court went on to address the other arguments that Quarles & Brady had asserted on appeal as an alternative basis for affirming the dismissal of Nelson's complaint. *Id*. ¶ 58. Among the other bases for affirmance, Quarles & Brady argued that Nelson was judicially estopped from arguing the existence of a 2004 oral agreement. Quarles & Brady contended that Nelson could not assert the existence of a 2004 oral agreement because he had submitted an affidavit in the underlying litigation specifically stating that Curia had not accepted the oral agreement offered by Nelson in July 2004. *Id*.

In response, Nelson contended that he was not estopped from asserting the existence of a July 2004 oral agreement because Quarles & Brady had drafted the affidavit in the underlying litigation. Nelson argued that the legal conclusion asserted in the affidavit regarding Curia's lack of acceptance of the July 2004 oral agreement was a conclusion made by Quarles & Brady and not Nelson. Nelson further contended that Quarles & Brady advised him that under Illinois law, Curia's oral agreement did not constitute a legally effective acceptance. Nelson thus argued that his prior affidavit was not legally binding on him, and therefore, he was not estopped from taking a contrary position in his legal malpractice action against Quarles & Brady. *Id.* ¶ 60.

The *Nelson* court initially acknowledged that an argument similar to the one asserted by Nelson had been rejected in *Beverly Bank v. Coleman Air Transport*, 134 Ill. App. 3d 699 (1st Dist. 1985). *Id*. ¶ 61. In *Beverly Bank*, the bank brought an action against the defendants, a corporation and an individual, which were the maker and guarantor

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The defendant individual sought to disavow an earlier admission of liability in his original verified answer, contending that his attorney did not consult with him or allow him to review the answer, and that therefore the answer was the product of mistake or inadvertence.

of promissory notes, respectively. The defendant individual sought to disavow an earlier admission of liability in his original verified answer, contending that his attorney did not consult with him or allow him to review the answer, and that therefore the answer was the product of mistake or inadvertence. The *Beverly Bank* court found that the defendant's statements were unsupported, were largely conclusory, and were insufficient to show mistake or inadvertence. The *Beverly Bank* court further noted that there was nothing in the record indicating that the attorney did not have knowledge of the statements in the answer or that he did not have authority to file a verified answer on behalf of his client. *Beverly Bank*, 134 Ill. App. 3d at 704.

Despite acknowledging the decision of the court in *Beverly Bank*, the *Nelson* court held that the facts before it were distinguishable. Specifically, the *Nelson* court held that "the instant case, however, is different because plaintiff is suing his attorney and alleging that the attorney drafted these statements for him." *Nelson*, 2013 IL App (1st) 123122, ¶ 61. The court additionally noted that, after the district court in the underlying case had granted summary judgment for Curia, Quarles & Brady unsuccessfully sought to file an amended complaint on behalf of Nelson to allege that Nelson and Curia, in fact, had entered into an oral agreement in July 2004 whereby Curia agreed to purchase Nelson's shares for $4.2 million. Because Nelson was suing his attorneys, and because Quarles & Brady attempted to file an amended complaint acknowledging the 2004 oral agreement, the *Nelson* court concluded that "we do not believe the judicial estoppel doctrine can be invoked by the attorney defendant under the particular circumstances of this case." *Id.*

The court's distinction of *Beverly Bank* on the basis that Nelson was suing his attorney is somewhat troubling. The court in essence holds that Nelson is not bound by the sworn statement contained in the affidavit that he executed in connection with the underlying case because Quarles & Brady drafted the affidavit. Of course, regardless of who drafted the affidavit, Nelson signed the affidavit and affirmed under oath the statements contained therein. To simply hold that the sworn statement is not binding in a later legal malpractice action seems to invite perjury because it allows the client to take a position in the legal malpractice action that is contrary to a sworn statement made in the underlying action. This policy would seem to be dangerous for the court to advance.

Therefore, if presented with this issue, practitioners should not simply assume that a plaintiff in a legal malpractice suit is permitted to take a position contrary to a sworn statement made by the plaintiff in the underlying case. Instead, one could argue that the court's holding in *Nelson* was dependent upon the fact that Quarles & Brady attempted to file an amended complaint in the underlying case that asserted a position contrary to the sworn statement made by Nelson. In other words, one could argue that Nelson should not be estopped from asserting a contrary position when Quarles & Brady itself attempted to assert the contrary position in the underlying case. Therefore, the argument to make to the court is that a plaintiff in a legal malpractice action may not simply contradict a sworn statement made in the underlying case ***unless*** the attorney asserted the contradictory position in the underlying case as well.

[T]he argument to make to the court is that a plaintiff in a legal malpractice action may not simply contradict a sworn statement made in the underlying case ***unless*** the attorney asserted the contradictory position in the underlying case as well.

Civil Practice and Procedure

Edward K. Grassé and **Troy Radunsky**
Busse, Busse & Grassé, P.C., Chicago

The Employer That Has Not Been Sued Should Not be Included on the Jury Verdict Form

As practitioners, we are all fully aware of the Illinois Supreme Court's decision in *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369 (2008), and its impact on trial strategy. The *Ready* court held that settling defendants should not be included on the verdict form and, in so holding, changed the landscape of every multiparty jury case in the state. *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, could be just as important in transforming the legal landscape in multiparty cases, especially where the plaintiff's employer might have some arguable culpability.

In *Ramirez*, the Illinois Appellate Court First District held that a plaintiff's employer should not be included on a verdict form in a case where the employer was not brought into the suit as a third-party defendant. *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 189–94. The defendant, FCL Builders ("FCL"), was a general contractor responsible for the design, construction, and maintenance of a warehouse facility in Romeoville, Illinois. The plaintiff, an employee of Sullivan Roofing, was working on the roof of the warehouse when he and his co-workers were manually pushing a heavy roll of roofing membrane material. It was during that process that the plaintiff was injured. The plaintiff filed suit against FCL. *Id*. ¶ 4. In his second amended complaint, the plaintiff plead a construction negligence cause of action based on the Restatement (Second) Torts § 414 (1965). *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 117–21. Notably, FCL did not file a third-party complaint for contribution against Sullivan Roofing. *Id.* ¶ 4.

Testimony from various supervisory personnel for each party revealed that FCL was present during the construction and supervised the work being done. *Id*. ¶¶ 4, 37, 137. Additionally, testimony revealed that FCL retained the authority to stop the work and to order changes in the work in the event that the work was being performed in a dangerous manner, or for any other reason. *Id*. ¶¶ 4, 25, 46, 128.

During the trial, FCL argued that, pursuant to Section 2-1117 of the Code of Civil Procedure, 735 ILCS 5/2-1117, Sullivan Roofing should not be placed on the verdict form. The court disagreed and instructed the jury that the negligence of Sullivan Roofing should be considered in rendering its verdict. *Id*. ¶ 109. Ultimately, the jury returned a verdict in favor of the plaintiff. The jury apportioned liability as follows: the plaintiff was found to be 20% contributorily negligent; and, FCL and Sullivan Roofing were each found 40% at fault. *Ramirez*, 2014 IL App (1st) 123663, ¶ 110.

FCL's appeal largely focused on the evidence produced at trial relating to its claim that it did not owe a duty under the Restatement (Second) Torts § 414. FCL argued that the evidence and testimony at trial failed to show sufficient control and, accordingly, they were neither vicariously nor directly liable for the plaintiff's injuries. *Id*. ¶ 122. The trial court and appellate court disagreed. Although not the focus of this article, the court's interpretation of these liability issues is still important for any construction litigation practitioner.

Of note to this article, FCL argued that, based on *Ready v. United/Goedecke Services* and its interpretation of Section 2-1117, the plaintiff's employer should not have been included on the verdict form. *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 181–94. In *Ready*, a wrongful death case, the general contractor and owner settled prior to trial, but a subcontractor proceeded to trial. *Ready*, 232 Ill. 2d at 372–73. At trial, the subcontractor was prevented from presenting

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About the Authors

Edward K. Grassé is a partner at the law firm of *Busse, Busse & Grassé, P.C.* He has practiced in the area of tort litigation for over 10 years and concentrates his practice in the defense of personal injury, construction, fire and explosion, and premises liability suits. He is the former co-chair of the IDC Civil Practice Committee and is a former chair of the Civil Practice and Procedure Committee of the Chicago Bar Association.

Troy S. Radunsky is an attorney with the firm of *Busse, Busse, & Grassé* in Chicago, Illinois, where he concentrates his practice in the area of construction litigation and general defense. Mr. Radunsky received his J.D. from the John Marshall Law School in 1999 and his B.A. in Political Science with honors from Arizona State University in 1994. He practices in both Illinois federal and state courts. Mr. Radunsky is a member of the IDC and Ilinois State Bar.

evidence of the general contractor's and owner's liability. The trial court also did not place the general contractor and owner on the verdict form. The jury found the subcontractor liable, and the subcontractor appealed. *Id*. at 373. On appeal, the supreme court considered whether, under Section 2-1117, settling defendants were "defendants sued by the plaintiff" such that they should be on the jury verdict form. *Id.* at 372. The *Ready* court held that the language of Section 2-1117 prohibited settling defendants from being included on the verdict form. *Id.* at 383, 385.

The *Ramirez* court, relying heavily on *Ready*, ultimately agreed with FCL and found that the plaintiff's employer should not have been on the verdict form. *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 182–94. Therefore, *Ramirez* appears to have extended the *Ready* rationale to also now include employers regardless of whether they were sued. On this point, the court's analysis was as follows:

> In *Ready*, as noted, the supreme court reversed the appellate court's determination that settling tortfeasors should be listed on the jury verdict form, finding that "section 2-1117 does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit." [Citation omitted.] *Ready* came before the supreme court again after its remand to the appellate court, and the supreme court then determined that the trial court erred in excluding evidence of the settling parties' culpability, finding that it would have supported the defendant's sole-proximate-cause defense. [Citation omitted.] Thus, despite the settling defendants' absence from the verdict form, evidence of their culpability should have been presented to the jury. According to the IPI comments, then, since (1) the jury should have heard evidence to suggest fault on the part of settled parties and (2) the jury found the plaintiff's comparative negligence to be 35% [citation omitted], meaning that contributory negligence was claimed, it would follow that "the settled parties should be listed on the verdict form to correctly determine the percentage contributory fault of the plaintiff" [citation omitted]. However, the supreme court held that the settled parties should *not* be listed on the verdict form, without any reference to the impact of the settled parties' absence on the plaintiff's percentage of fault. Indeed, none of the cases citing *Ready* and concluding that settled tortfeasors should not appear on the verdict form contain any discussion of the determination of the plaintiff's level of fault. Instead, the conclusion to be drawn is that the section 2-1117 analysis determines whether the nonparty may appear on the verdict form. [Citation and related parenthetical omitted.] Here, since section 2-1117 expressly excludes Sullivan Roofing as plaintiff's employer, Sullivan Roofing should not have been named on the verdict form.

Ramirez, 2014 IL App (1st) 123663, ¶ 193 (emphasis in original).

It is the court's holding that the plaintiff's employer should not have been on the verdict form that makes this case so noteworthy for wary practitioners. Section 2-1117, the statute governing joint and several liability, provides as follows:

> Except as provided in Section 2-1118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any 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 third party defendant except the plaintiff's employer, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants except the plaintiff's employer, shall be jointly and severally liable for all other damages.

735 ILCS 5/2–1117 (West 2002) (as amended by Pub. Act No. 93-10, § 5 (eff. June 4, 2003) and Pub. Act No. 93-12, § 5 (eff. June 4, 2003)).

FCL argued that the plaintiff's employer, Sullivan Roofing did not fit within the parameters of Section 2-1117 and should not be listed on the verdict form. It appears that FCL's argument

might have been based on the fact that it made a conscious decision not to file a third-party complaint against Sullivan Roofing. Oddly, this critical fact seemed irrelevant to the court and the logic behind its decision. Instead, the *Ramirez* court felt more comfortable relying heavily on *Ready* and the supreme court's interpretation concerning the application of Section 2-1117 to support its conclusion. Unfortunately, in a rather cruel twist for FCL, while the court agreed with its position that the inclusion of the plaintiff's employer on the verdict form was in error, the court still found that FCL was not entitled to a new trial because it did not result in "serious prejudice." *Ramirez*, 2014 IL App (1st) 123663, ¶ 196.

The most important aspect of this case, and what is not stated anywhere in the analysis, is whether this decision extends to all cases or only to cases in which the plaintiff's employer is not named as a defendant. Also unclear is whether this aspect of the case is a distinction without a difference. It would appear that the court concludes that the language of Section 2-1117, which excludes the plaintiff's employer from the calculation of fault, also excludes employers from the verdict form in all cases, whether named as a defendant or not.

Under either scenario, the *Ramirez* decision could have a sweeping effect on all cases where a plaintiff is injured during the course of employment. The case may also pose far more probing questions than it answers. For instance, under the court's analysis, a cautious practitioner might wonder whether employers should be capable of being sued at all. It could be argued that employers are entitled to automatic dismissal because the jury would not be instructed to assess their fault as they are excluded from the Section 2-1117 equation. In addition, it could be argued that evidence of the employer's fault should not be considered by the jury at all, even in conjunction with sole proximate cause arguments. Until these and many other questions are resolved by the court, we can expect that the *Ramirez* decision will generate more litigation in the immediate future.

The Current Construction Negligence Jury Instructions Do Not Accurately Reflect the Law

The *Ramirez* opinion is also noteworthy for another reason and one in which construction litigation practitioners cannot ignore. Importantly, *Ramirez* is the first and only Illinois appellate decision to finally recognize that the current Illinois Pattern Jury Instructions (IPIs) for construction negligence claims (the 55.00 series) fail to instruct the jury properly as to the requisite degree or level of retained control that is sufficient to impose either vicarious or direct liability under Section 414 of the Restatement (Second) Torts. *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 162,168–69.

In *Ramirez*, FCL argued that the trial court erred in giving certain jury instructions based on the IPIs, claiming that they were not accurate statements of the law. FCL maintained that the IPI construction negligence instructions did not accurately state the law because a general right to retain "some control" over safety is not sufficient to impose liability under Section 414. The appellate court agreed. *Id.* ¶ 165.

In reaching it conclusion, the appellate court leaned heavily on the committee comments within the 55.00 series jury instruction. After carefully evaluating those committee comments and considering the fundamental principles espoused within Section 414 of the Restatement (Second) Torts, the appellate court held that

> "[i]t would appear that the ability to stop unsafe work and not permit it to be resumed until done to the satisfaction of the controlling entity" would bring the contractor under the purview of section 414 is likely an accurate statement of the law because, under that scenario, the contractor would have the power to affect the methods by which the subcontractor alleviated the safety problem. See, *e.g., Calloway[v. Bovis Lend Lease, Inc.]*, 2013 IL App (1st) 112746, ¶ 74 (general contractor's authority included right "to stop any work that they saw being done in an unsafe manner and to direct that the work be done in a different manner"); *Bokodi v. Foster Wheeler Robbins Inc.*, 312 Ill. App. 3d 1051, 1063 (2000) (general contractor's authority included right to "shut down the work of the subcontractors until a safety breach was alleviated to defendants' satisfaction").

Ramirez, 2014 IL App (1st) 123663, ¶ 167. The appellate court further remarked:

> Section 414's use of the phrase "the control," then, implies that there is only one person or entity exercising control over a part of the work, something that is not true of the pattern instruction's

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requirement of "some control." Indeed, since the jury is not instructed as to the amount of control required, a jury could easily find that minimal control over safety is sufficient to hold a contractor liable. Thus, it is evident that IPI Civil (2011) No. 55.01 encompasses conduct that would not give rise to liability under section 414.

Furthermore, the IPI language does not include the explanation of "retained control" found in the comments to section 414. Comment c to section 414 specifically provides that "[i]t is not enough that [the contractor] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." Restatement (Second) of Torts § 414, cmt.c (1965). However, under the language of IPI Civil (2011) No. 55.01, a jury could consider such a general right to be a retention of "some control over the safety of the work," since the jury is not further instructed as to what conduct constitutes control.

Ramirez, 2014 IL App (1st) 123663, ¶¶ 168–69.

In its analysis, the appellate court noted that there have only been two cases in which the accuracy of the construction negligence jury instructions have been tested: *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 3 (1st Dist. 2008), and *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13 (1st Dist. 2009) (applying the holding in *Jones*). *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 171–72. In neither case did the appellate court permit the use of non-IPI construction negligence jury instructions. The *Ramirez* court, however, easily distinguished both cases, finding that

> the court in *Jones* proceeded from an assumption that the pattern instruction was an accurate statement of the law, and only considered whether *Martens* changed the accuracy of the statement. Here, by contrast, defendant does not begin with such an assumption but instead argues that the instruction is inaccurate because it is based on an incorrect interpretation of section 414. Thus, the fact that the *Jones* court did not find that the pattern instruction no longer reflected an accurate statement of the law does not preclude us from finding that IPI Civil (2011) No. 50.01 is not an accurate statement of the law.

Ramirez, 2014 IL App (1st) 123663, ¶ 172.

Despite reaching the conclusion that the construction negligence pattern jury instructions were not an accurate reflection of the law, the court quickly cautioned FCL that even though "the trial court issued an improper instruction, reversal is not warranted unless the error results in 'serious prejudice' to the appellant's right to a fair trial." *Id.* ¶ 173. In this case, in yet another cruel twist for FCL, the appellate court stated, "In the case at bar, we cannot find that the erroneous instruction resulted in serious prejudice to defendant. Although the pattern instruction permits a jury to find control in situations that would not satisfy the requirements of section 414, there is no indication that this was the case here." *Id.* ¶ 173.

In light of the *Ramirez* holding that the current IPIs for construction negligence claims failed to properly instruct the jury as to the requisite degree or level of retained control that is sufficient to impose either vicarious or direct liability under Section 414 of the Restatement (Second) Torts, it is recommended that aggressive construction litigation practitioners representing general contractors and owners at trial consider submitting to the judge for consideration non-IPIs, or modified construction negligence jury instructions, and then be prepared to argue that those non-IPI instructions more closely resemble the duty outlined in Section 414, including the concepts of "retained control" highlighted in comments (a), (b), and (c).

Medical Malpractice Update

Dede K. Zupanci
HeplerBroom LLC, Edwardsville

Demonstrative Evidence to Aid Expert's Testimony: Ensuring Its Admissibility

The issues involved in medical malpractice cases typically are complex and outside the scope of a juror's common knowledge. The elements involved in making a diagnosis, performing a surgical procedure, or prescribing treatment for diseases must be explained clearly and accurately in order for the fact finder to be able to determine whether a defendant healthcare provider breached the standard of care and proximately caused a plaintiff's injuries. *Alm v. Loyola Univ. Med. Ctr.*, 373 Ill. App. 3d 1, 6 (1st Dist. 2007) (requiring expert testimony in medical malpractice cases to establish the appropriate standard of care as well as proximate cause). The assessment of the alleged negligence typically requires knowledge, skill, or training in a highly technical area outside the understanding of laypersons. An expert's verbal testimony may be supplemented with visual aids that can further assist the jury in its understanding of the underlying issues. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 93. For example, an illustration or model of the heart's anatomy would be a useful visual aid in a case involving heart surgery. Such visuals can be effective in a sterile courtroom while discussing technical medical procedures to a jury comprised of individuals who are accustomed to receiving information through visual stimuli.

Visual aids are a type of demonstrative evidence, which can be highly effective to explain difficult and foreign concepts in most medical malpractice cases. Demonstrative evidence is admitted during trial as a visual aid to the fact finder. *Sharbono v. Hilborn*, 2014 IL App. (3d) 120597, ¶ 29. It is important, therefore, for counsel to follow proper procedure to ensure that the demonstrative evidence is allowed.

Courts favor the use of demonstrative evidence because it provides the trier of fact with a better understanding of the matters before it. *Sharbono*, 2014 IL App (3d) 120597, ¶ 29. The evidence has no probative value, but it can be admitted or used at trial to assist the jury. "The great value of demonstrative evidence 'lies in the human factor of understanding better what is seen than what is heard.'" *Id.* (quoting *Smith v. Ohio Oil Co.*, 10 Ill. App. 2d 67, 75 (4th Dist. 1956)). It is distinguished from real evidence, which is a "physical object that has a direct part in the incident at issue such that it has probative value in and of itself." *Id.*

But, demonstrative evidence must be timely disclosed, introduced with proper foundation, and be relevant to the pertinent issues in the case without being misleading. *Id.* ¶¶ 29–30. In *Sharbono*, the plaintiff surviving spouse of a patient who died from breast cancer alleged that the defendant failed to diagnose that disease. *Id.* ¶ 9. At trial, the defendant's expert referred to a PowerPoint slide presentation that contained images and diagrams from a treatise that included the captions "benign," "benign appearing lesions," and other descriptors of mammogram images. *Id.* ¶ 15. Within the same slide, the patient's own images were placed under or to the side of the headings. *Id.* The plaintiff objected to the use of the PowerPoint presentation on various grounds, but the objections were overruled. Ultimately, the jury decided the case in favor of the defendant. *Id.* ¶ 20.

The appellate court, however, reversed due to procedural defects with the defendant's use of the PowerPoint presentation. *Id.* ¶ 42. First, although the defendant used diagrams and images from a learned treatise, the defendant never laid a proper foundation because it failed to establish that the learned treatise was a reliable authority. *Id.* ¶ 33 (citing *Wilson v. Clark*, 84 Ill. 2d 186, 192–96 (1981), and Ill. R. Evid. 703). Second, the court found that the PowerPoint presentation was not "sufficiently disclosed in a timely manner" as required by Illinois Supreme Court Rules 213 and 214. *Id.* ¶ 34. As a result, the court held that reversal and remand was required because "[w]ithout timely disclosure, plaintiff was completely deprived of her ability to effectively cross-examine defendants . . . ." *Id.* ¶ 35.

Further, the court examined the substantive issues involved with the use of the exhibit. *Id.* ¶ 32. It determined that the slide presentation was not truly demonstrative evidence, but instead was real evidence. *Id.* Relying upon *Schuler v. Mid-Central Cardiology*, the *Sharbono*

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About the Author

Dede K. Zupanci is a partner in the Edwardsville office of *HeplerBroom LLC*. Her practice focuses on the defense of medical malpractice actions, as well as other healthcare litigation. She is a 2002 graduate of Saint Louis University School of Law.

Demonstrative evidence can be beneficial to help a jury understand the complexities involved in medical malpractice cases, especially during expert witness testimony, which at times can become technical and difficult to understand. To ensure that demonstrative evidence will be allowed by the court, defense counsel should timely disclose the exhibit to the plaintiff and lay the proper foundation. The exhibit must also be relevant to the pertinent issues in the case and cannot be unfair to the other party.

court confirmed that relevancy and fairness are the primary considerations in making a determination regarding the admissibility of demonstrative evidence. *Id*. ¶ 30 (citing *Schuler v. Mid-Central Cardiology*, 313 Ill. App. 3d 326, 337 (4th Dist. 2000)). In *Schuler*, the surviving wife brought suit against a cardiologist after her husband died during a stress test. *Schuler*, 313 Ill. App. 3d at 329. The defense introduced a "risk stratification" chart as a demonstrative exhibit at trial. *Id*. at 337. The chart illustrated a cardiologist's evaluation process when a patient presents with chest pain. The plaintiff objected, contending that the diagram was argumentative and was not previously disclosed, although its content was not a surprise. *Id*.

The *Schuler* court confirmed that the trial court has discretion in determining whether a party may introduce demonstrative evidence to explain an expert's testimony. In upholding the trial court's decision, it reasoned that the chart was relevant because the plaintiff's own expert, along with the defendant and the defendant's expert, recognized that risk stratification protocols were widely accepted by physicians. *Id*. The court disagreed with the plaintiff's contention that the chart was argumentative and a surprise, stating that it was merely a visual aid that helped the jury understand the risk stratification process, and that the witness would have discussed this issue with or without the exhibit. *Id*. at 338.

The *Sharbono* court explained that demonstrative evidence is relevant when it is introduced to "illustrate or explain the verbal testimony of a witness" regarding relevant issues in the case. *Sharbono*, 2014 IL App (3d) 120597, ¶ 30. For the evidence to be considered fair, its probative value cannot be outweighed by the possibility of unjust prejudice. *Id*. After the evidence is found to be relevant and fair, the proponent must then lay a proper foundation for the exhibit. *Id*. ¶ 31.

Rather than assisting the jury in its understanding of how radiologists evaluate breast lesions, the court found that the exhibit was used instead to illustrate the expert witness's opinion that the defendant's diagnosis was correct. The specific problem identified by the court was that the exhibit not only contained images of benign lesions, but also used images of the plaintiff's own tests under a general slide heading of "benign." *Id.* Thus, the PowerPoint presentation took on the character of evidence with probative value because the expert used it to support his testimony of a correct diagnosis.

The appellate court cautioned that, although demonstrative evidence has probative value, it is possible for the evidence to give a dramatic effect or excessive emphasis to a particular issue over others. *Id*. ¶ 29. The trial court, therefore, must be cognizant to avoid such situations. *Id*.

Demonstrative evidence can be beneficial to help a jury understand the complexities involved in medical malpractice cases, especially during expert witness testimony, which at times can become technical and difficult to understand. To ensure that demonstrative evidence will be allowed by the court, defense counsel should timely disclose the exhibit to the plaintiff and lay the proper foundation. The exhibit must also be relevant to the pertinent issues in the case and cannot be unfair to the other party. If those requirements are met, the exhibit should be allowed and can be a persuasive tool in communicating a party's message to the jury.

Insurance Law Update

Timothy R. Lessman
SmithAmundsen LLC, Chicago

Ohio Federal Court's Broad Definition of "Publication" Could Have Cyber Coverage Consequences

In *Encore Receivable Management, Inc. v. ACE Property and Casualty Insurance Company*, No. 12-297, 2013 WL 3354571, at *13 (S.D. Ohio July 3, 2013), an Ohio federal court held that an umbrella insurer had a duty to defend its insured, which was alleged to have recorded telephone conversations without consent. The insured, Encore Receivable Management, Inc. and its related entities (collectively, "Encore"), operated call centers for an automobile manufacturing company. *Encore Receivable Mgmt., Inc.*, 2013 WL 3354571, at *1. Underlying claims filed against the insured alleged that it recorded various telephone conversations with customers without obtaining their consent. *Id.* The insured allegedly distributed these recordings internally for training and quality control purposes. *Id.* Parties filed two class action lawsuits against the insured in California alleging, *inter alia*, invasion of privacy, negligence, and violations of California statutory law. *Id.* at *2–3.

The insured's primary insurance policies excluded coverage for liability arising out of the recording of information in violation of law. *Id.* at *1. Its umbrella policies, however, did not contain a similar exclusion. *Id.* Encore sought coverage under these umbrella policies because the allegations against it constituted "personal and advertising injury," which was defined in the umbrella policies to mean "injury . . . arising out of . . . oral or written publication, in any manner, of material that violates a person's right of privacy." *Id.* at *4.

The umbrella insurer claimed that it owed no duty to defend the insured. *Id.* at *2. The insurer argued that there was no "oral or written publication" because the insured did not distribute the recordings to the public. *Id.* at *8.

In determining whether a "publication" occurred, the court relied on the reasoning in *LensCrafters, Inc. v. Liberty Mutual Fire Insurance Co.*, No. C 04-1001 SBA, 2005 WL 146896 (N.D. Cal. Jan. 20, 2005). The underlying claim at issue in *LensCrafters* involved eye exam patients alleging LensCrafters disclosed their confidential medical information. *LensCrafters, Inc.*, 2005 WL 146896 at *1. LensCrafters had its employees participate in eye exams for the purposes of offering patients its products and services. *Id.* at *7. It tendered the lawsuit to its insurer, which declined coverage on the basis that there was no "publication" of the medical information sufficient to trigger its coverage obligations. *Id.* Finding that the term "publication" was ambiguous in the insurer's policy and referencing that California constitutional and statutory law created privacy rights for medical information that could be violated by an unauthorized or "less-than-public" dissemination of such information, the *LensCrafters, Inc.* court held that the insurer had a duty to defend the insured. *Id.* at *8–9.

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Encore sought coverage under . . . umbrella policies because the allegations against it constituted "personal and advertising injury," which was defined in the umbrella policies to mean "injury . . . arising out of . . . oral or written publication, in any manner, of material that violates a person's right of privacy."

About the Author

Timothy R. Lessman is an attorney in *Smith Amundsen*'s Chicago office. Mr. Lessman has experience representing domestic and international insurers, and reinsurers in matters ranging from claims management to coverage dispute resolution via litigation, arbitration, and mediation. He has handled complex insurance and reinsurance coverage disputes involving both domestic and international policy forms. Additionally, he has experience with a variety of claims, including mass torts, environmental liability, product liability, cyber liability, employers and professional liability, government entity liability, and construction defect. Prior to his legal career, Mr. Lessman worked as a legislative aide in both the Colorado House of Representatives and the British House of Commons.

Similarly, the *Encore Receivable* court found that secret information need not be widely disseminated to constitute publication. *Encore Receivable Mgmt., Inc.*, 2013 WL 3354571, at *9. The court stated:

> The courts that have looked at recording in the secrecy context have all read publication very broadly and held that a transmittal or a further dissemination of secret information satisfies publication. The firsthand experience of the communication, the words, the tone, and the cadence are all protected. When the firsthand aspect of the communication is transmitted to the mechanical device, it constitutes publication—dissemination of that unique aspect of the conversation that the speaker no longer has the ability to control. Here, this court need not find that the communications were actually disseminated to third parties, because the initial dissemination of the conversation constitutes a publication at the very moment that the conversation is disseminated or transmitted to the recording device.

Id.

The court concluded by stating that it "need not find that the recordings were disseminated to the public in order to find publication." *Id.* Notwithstanding this statement, the court went on to discuss in a footnote that dissemination to the public had occurred because the underlying complaints alleged that the recorded communications were "eavesdropped on" and were disclosed to employees who were not participants in the original calls. *Id.* at 9 n.17.

Subsequent decisions will undoubtedly test the *Encore Receivable* court's rationale in the cyber context. The decision may be distinguished on several factual grounds—most notably that the case involved an unauthorized recording and "publication" of a conversation obtained in a secrecy context, as opposed to exposure of personally identifiable information.

This decision could have significant implications in the realm of cyber coverage, especially in the context of data breaches or hacking claims. Although *Encore Receivable* involved an umbrella policy, many CGL policies contain language similar to that in the umbrella policy in that case.

CGL insureds faced with these types of claims often assert that a data breach constitutes "personal and advertising injury" because it represents a publication of material that violates a person's right to privacy. Insurers typically respond that such claims lack the requisite "publication" because the information obtained in a data breach does not reach the public. The *Encore Receivable* decision now offers such insureds a rebuttal argument; specifically, that the publication of secret information occurs once the ability to control its dissemination is lost.

Subsequent decisions will undoubtedly test the *Encore Receivable* court's rationale in the cyber context. The decision may be distinguished on several factual grounds—most notably that the case involved an unauthorized recording and "publication" of a conversation obtained in a secrecy context, as opposed to exposure of personally identifiable information.

Further, one could distinguish the case on the basis of the alleged surreptitious nature of how the information was gathered by the insured and the manner in which the "breach" occurred. Additionally, the *LensCrafters* case upon which the *Encore Receivable* court based its finding addressed the privacy expectations of medical information, an area where California constitutional and statutory law conferred a heightened "right of privacy" to individuals. *LensCrafters*, 2005 WL 146896, at *8.

Nevertheless, because the court found a duty to defend, the *Encore Receivable* decision will appeal to CGL policyholders in data breach or hacking claims. CGL insurers, thus, should be aware of the holding—and its potential limitations—when comparing their policies to claims involving cyber issues.

Civil Rights Update

Bradford B. Ingram
Heyl, Royster, Voelker & Allen, P.C., Peoria

Absolute and Qualified Immunity: Recent U.S. Supreme Court and Seventh Circuit Decisions

Fields v. Wharrie

In *Fields v. Wharrie*, 740 F.3d 1107 (7th Cir. 2014), the Court of Appeals for the Seventh Circuit held that a prosecutor cannot transform qualified immunity into absolute immunity by the introduction of fabricated evidence at trial. *Fields*, 740 F.3d at 1114. A prosecutor cannot retroactively immunize himself from suit by perfecting his wrongdoing through the introduction of the fabricated evidence at trial and then argue that the tort was not completed until its admission at trial, entitling the prosecutor to absolute immunity for acts committed at the trial stage. *Id.*

The court denied Prosecutors Lawrence Wharrie's and David Kelley's claims of immunity. No absolute immunity exists for a prosecutor's administrative and investigative work fabricating evidence. Nor can a prosecutor retroactively transform such work into prosecutorial work because it was used at trial.

Facts

The lawsuit filed by Nathson Fields charged that the defendants deprived him of liberty in violation of the Fourteenth Amendment due process clause, committed torts of malicious prosecution, intentional infliction of emotional distress, and conspiracy in violation of Illinois law. The plaintiff accused the defendants of having coerced witnesses to give testimony that the defendants, as well as witnesses, knew to be false, resulting in his conviction for two murders and imprisonment for 17 years until he was acquitted on a retrial. *Id.* at 1109. He also later received a certificate of innocence from the court. *Id.*

Fields accused Wharrie of two separate acts of coercing false testimony from witnesses in 1985. He accused Kelley of similar coercion in 1998. *Id.* at 1109–10.

Originally, the district court had dismissed the case on the grounds of absolute prosecutorial immunity. *Id.* at 1110. The only federal claim against Wharrie was based on his alleged misconduct in 1985. *Fields*, 740 F.3d at 1110. Fields did not appeal, but the prosecutors appealed, challenging the district court's refusal to dismiss the other claims. This case was still alive in the district court when the district judge granted plaintiff's Motion to Reconsider the Dismissal of one of his federal claims that Wharrie's alleged fabrication of testimony by a witness during the investigation in 1985 led to the indictment of Fields and trial. *Id.* This circumstance was based upon the court's intervening decision in *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012). *Id.*

The claim that the district court judge reinstated against Wharrie is one that concerns his investigation of Fields in 1985. The court decision summarized and affirmed the rules of law regarding absolute immunity. *Id.* Absolute immunity is only for acts that are committed within the scope of employment as prosecutors. *Id.* (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273–76 (1993)). The court also reviewed qualified immunity rules, noting that prosecutors often go beyond their strictly prosecutorial work and involve themselves in investigation and other non-prosecutorial work. When they engage in such activity, they lose their absolute immunity and are left with qualified immunity that other investigators have when engaged in such work. *Id.* at 1111 (quoting *Buckley*, 509 U.S. at 275–76).

Fields was not arrested until June of 1985. *Fields*, 740 F.3d at 1111. Wharrie's alleged procurement of false statements from a prospective witness in Fields' forthcoming trial had taken place one month earlier. The trial took place a year later. Wharrie was one of the prosecutors at trial and argued that he was insulated from liability for his investigative work by the court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). That case involved a malicious prosecution claim that prosecutors had coerced witnesses in the investigative stage to testify against the plaintiff. The Seventh Circuit held that Fields could not base a legal claim on those alleged acts of malfeasance until the evidence obtained

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About the Author

Bradford B. Ingram is a partner with *Heyl, Royster, Voelker & Allen, P.C.* His practice concentrates on the defense of civil rights and municipal entities and the defense of employers in all types of discrimination claims. He is a frequent speaker before local and national bar associations and industry groups.

by improper acts was introduced at trial. *Id.* He had not been injured, and therefore, no tort had been committed. *Id.* (citing *Buckley v. Fitzsimmons*, 20 F.3d 789, 796 (7th Cir.1994)). Wharrie argued that such acts did not support recovery under Section 1983 because they were not actionable until the coerced evidence was presented at trial. *Id.*

Presenting evidence at trial is a core prosecutorial function protected by absolute prosecutorial immunity and is a bar to any award of damages in a suit for malicious prosecution against the prosecutor. *Id.* The court acknowledged its *Buckley* decision and the principle that there is no tort without an actionable injury caused by defendant's wrongful act. *Fields*, 740 F.3d at 1111. The court also focused its analysis on the differences between coerced, fabricated, and false testimony and held that the terms have distinctions that are relevant to Fields' claim. *Id.*

The court rejected arguments that it overrule its decisions in *Buckley* and *Whitlock.* The court found it unnecessary to embrace either option. The court held those cases distinguishable. *Id.* at 1112. The present case is closer to the *Whitlock* side of the line. The court agreed with the district judge's reinstatement of claim by Fields against Wharrie for his alleged fabrication of evidence in 1985 before the indictment and arrest of Fields. Both *Whitlock* and the present case differed from the *Buckley* decision in that the misconduct of the prosecutor in *Whitlock* was not about coercing witnesses, as was the case in *Buckley*, but rather was about fabricating evidence. In rejecting Wharrie's argument, the court held Wharrie was asking the court to "bless a breathtaking injustice" and responded as follows:

> Prosecutor, acting pre-prosecution as an investigator, fabricates evidence and introduces the fabricated evidence at trial. The innocent victim of the fabrication is prosecuted and convicted and sent to prison for 17 years. On Wharrie's interpretation of our decision in *Buckley*, the prosecutor is insulated from liability because his fabrication did not cause the defendant's conviction, and by the time that same prosecutor got around to violating defendant's rights he was absolutely immunized. So: grave misconduct by the government's lawyer at a time where he was not shielded by absolute immunity; no remedy whatsoever for the hapless victim.

Id. at 1113.

The court held that the defendant's argument resulted in an offensive and senseless conclusion that was not consistent with the court's *Buckley* decision, where the court said the following:

> [That] the prosecutors later called a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial. A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial.

Buckley, 509 U.S. at 275–76, quoted in *Fields*, 740 F.3d at 1113–14.

Conclusion

The court held that Wharrie had not demonstrated entitlement to absolute or qualified immunity for his fabrication of evidence. *Fields*, 740 F.3d at 1114. "[I]t was established law by 1985 (indeed long before), . . . that a government lawyer's fabricating evidence against a criminal defendant was a violation of due process. *Id.* (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 215–16 (1942); *Mooney v. Holohan*, 294 U.S. 103, 110, 112–13 (1935) (per curiam)). The test for qualified immunity is focused on the objective legal reasonableness of an official's act. *Id.* (quoting *Harlow*, 457 U.S. at 819). Public officials, including prosecutors, are expected to know what types of conduct violate the law (statutory or constitutional rights). Entitlement to absolute or qualified immunity depends on the official's acts. *Id.* As a result, the existence of a cause of action depends upon whether those acts violated the law and caused injury.

Prosecutors entitled to immunity will be subject to an objective reasonableness test. They will be expected to know that certain conduct violates statutory and constitutional rights and cannot retroactively immunize themselves from suit for conduct performed during an investigative stage by introduction of the evidence at trial. Absolute immunity will not protect a prosecutor from acts that occurred during the investigative stage. Accordingly, the Seventh Circuit denied

Wharrie's motion to dismiss the federal and state claims against him relating to fabrication of false statements from a witness during an investigation in 1985.

Stanton v. Sims

In *Stanton v. Sims*, 134 S. Ct. 3 (2013) (per curiam), the United States Supreme Court held that a police officer was entitled to qualified immunity and was immune from a lawsuit for his warrantless entry into the yard of the plaintiff Drendolyn Sims while in hot pursuit of a fleeing misdemeanant. Officer Mike Stanton made a split-second decision to enter the plaintiff's yard. That action, however, did not violate clearly established law entitling him to qualified immunity. *Stanton*, 134 S. Ct. at 7. The Court reviewed the status of the law at the time Officer Stanton made his decision to enter the plaintiff's yard without a warrant. There were two opinions of the United States Supreme Court that were equivocal on the lawfulness of his entry: *Welch v. Wisconsin*, 466 U.S. 740 (1984), and *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001). Two opinions from the state court of appeals, *People v. Lloyd*, 216 Cal. App. 3d 1425 (1989), and *In re Lavoyne M.*, 221 Cal. App. 3d 154 (1990), had affirmatively authorized the entry; the most relevant opinion of the Ninth Circuit, *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001), was readily distinguishable; and two federal district courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion, *Kolesnikov v. Sacramento County*, No. S-06-2155, 2008 WL 1806193 (E.D. Cal. Apr. 22, 2008), and *Garcia v. Imperial*, No. 08-2357, 2010 WL 3834020 (S.D. Cal. Apr. 22, 2008). Although both federal and state courts of last resort around the nation were also sharply divided on this point, the Supreme Court held that Officer Stanton did not violate clearly established law and was entitled to qualified immunity, immunizing him from the plaintiff's lawsuit.

In *Stanton v. Sims*, 134 S. Ct. 3 (2013) (per curiam), the United States Supreme Court held that a police officer was entitled to qualified immunity and was immune from a lawsuit for his warrantless entry into the yard of the plaintiff Drendolyn Sims while in hot pursuit of a fleeing misdemeanant.

Facts

On May 27, 2008, Officer Stanton and his partner responded to a call about an unknown disturbance involving a person with a baseball bat in a neighborhood in La Mesa, California. *Stanton*, 134 S. Ct. at 3. This neighborhood was known to be associated with gangs and violence. Officer Stanton and his fellow officer, wearing uniforms and driving a marked police vehicle, approached the area where the disturbance had been reported and noticed three men walking in the street. Two of the men turned into a nearby apartment complex. The third crossed the street 25 yards in front of Stanton's car and quickly walked toward a residence. *Id.* at 3–4.

Officer Stanton did not observe the suspect with a baseball bat, but considered his behavior suspicious and decided to detain him in order to investigate. He exited his patrol car and called out "police," ordering him to stop in a loud voice. The suspect did not stop. He looked at Stanton, ignored his lawful order, and went through the front gate of a fence enclosing the plaintiff's front yard. When the gate closed behind the suspect, it blocked Officer Stanton's view of the yard. Stanton believed the suspect had committed a jailable misdemeanor under the California Penal Code by disobeying the order to stop. He made a split-second decision to kick open the gate and pursue the suspect. Unfortunately, the plaintiff was standing behind the gate when it flew open and struck her, cutting her forehead and injuring her shoulder. She filed suit against Stanton under Section 1983, alleging that Stanton unreasonably searched her home without a warrant in violation of the Fourth Amendment. The district court granted summary judgment to Stanton, ruling that he was entitled to qualified immunity because no clearly established law put him on notice that the conduct was unconstitutional. *Id*. at 4.

The Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit held that Stanton's warrantless entry into the plaintiff's yard was unconstitutional because the plaintiff was entitled to an expectation of privacy in her home when there was no immediate danger. The suspect had committed only the minor offense of disobeying a police officer. Based on those facts, the Ninth Circuit held that Stanton was not entitled to qualified immunity. *Id.* at 4.

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The United States Supreme Court reversed the Ninth Circuit and rejected its analysis. The Supreme Court held that it had not laid down a categorical rule for all cases involving minor offenses, saying only that a warrant is usually required. *Id.* at 6. While the rule regarding warrantless searches often involves a felony, the Court's holdings were not limited to felonies. *Stanton*, 134 S. Ct. at 6.

The Court held that the suspect's act of retreating into the house could not thwart an otherwise proper arrest. *Id.* The Court clarified its prior ruling in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), by stating that it did not say that such an arrest of a misdemeanant is never justified; rather, such warrantless entry while in hot pursuit of a misdemeanant should be rare. *Id*.

The court's review of its previous decisions as well as other court decisions on warrantless search entitled Stanton to immunity precisely because the law regarding warrantless entry while in hot pursuit of a fleeing misdemeanant was not clearly established. Officer Stanton's split-second decision to enter the plaintiff's yard entitled him to qualified immunity because he did not violate clearly established law.

Conclusion

Officers are entitled to qualified immunity for their actions and split-second decisions that do not violate clearly established law. The fleeing misdemeanant in *Stanton* could not thwart an otherwise proper arrest by retreating into a house or a yard. The court's decisions regarding warrantless entry are very fact specific. A warrantless entry while in hot pursuit will entitle an officer to qualified immunity when they involve felonies and on rare occasions involve misdemeanors.

Feature Article

Brad A. Elward
Heyl, Royster, Voelker & Allen, P.C., Peoria

Recent Cases Emphasize Need for Reform with Section 19(f) Appeal Bonds in Workers' Compensation Judicial Reviews

Two appellate court decisions issued in 2013 illustrate the potential troubles employers face when prosecuting a judicial review from the Illinois Workers' Compensation Commission to the circuit court, pursuant to Section 19(f) of the Illinois Workers' Compensation Act (Act), 820 ILCS 305/1, *et seq*. In *Illinois State Treasurer v. Illinois Workers' Compensation Commission*, 2013 IL App (1st) 120549WC, ¶ 4, the appellate court held that the state, as *ex officio* custodian of the Injured Workers' Benefit Fund, was required to file an appeal bond in compliance with Section 19(f)(2) of the Act, 820 ILCS 305/19(f)(2). In *QBE Insurance Co. v. Illinois Workers' Compensation Commission*, 2013 IL App (5th) 120336WC, ¶ 24, that same appellate court panel held that an insurance carrier could not, by motion under Section 4(g) of the Act, 820 ILCS 305/4(g), intervene in an existing case and prosecute an appeal on behalf of the employer. As explained below, these cases emphasize why the Illinois General Assembly must amend Section 19(f)(2) of the Act and permit employers and insurance carriers more leeway in providing satisfactory bonds to secure judicial review.

Judicial Review

Judicial review from the Commission to the circuit court is governed by Section 19(f)(2) of the Act. Section 19(f)(2) mandates that the party seeking review, if it is the party against whom an award is rendered, file an appeal bond. Specifically, the section provides that no summons to review a decision issued by the Commission shall be issued by the circuit court "unless the one against whom the Commission shall have rendered an award for the payment of money shall upon the filing of his written request for such summons file with the clerk of the court a bond conditioned that if he shall not successfully prosecute the review, he will pay the award and the costs of the proceedings in the courts." 820 ILCS 305/19(f)(2). The bond requirement is jurisdictional,

About the Author

Brad A. Elward is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He practices in the area of appellate law, with a sub-concentration in workers' compensation appeals and asbestos-related appeals. He received his undergraduate degree from the University of Illinois, Champaign-Urbana, in 1986 and his law degree from Southern Illinois University School of Law in 1989. Mr. Elward is a member of the Illinois Appellate Lawyers Association, the Illinois State, Peoria County, and American Bar Associations, and a member of the ISBA Workers' Compensation Section Counsel.

Berryman Equip. v. Indus. Comm'n, 276 Ill. App. 3d 76, 78–79 (1st Dist. 1995), and strict compliance is required to vest subject-matter jurisdiction in the circuit court, *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 502–03 (1st Dist. 2007).

Section 19(f)(2) expressly exempts certain local government entities from the appeal bond requirement. These excluded entities include "[e]very county, city, town, township, incorporated village, school district, body politic or municipal corporation against whom the Commission shall have rendered an award for the payment of money." 820 ILCS 305/19. Although recent cases suggest that the "party against whom an award is rendered" language has a broader scope than simply the employer, in reality, Section 19(f)(2) is meant to apply to non-governmental employers.

The Decisions of 2013

Two published decisions from 2013 addressed the sufficiency of appeal bonds filed by an employer in the prosecution of a judicial review. These cases, when viewed as part of the body of case law applicable to Section 19(f)(2) bonds, highlight some of the problems employers face in complying with the section and provide further support for amending it.

In *Illinois State Treasurer v. Illinois Workers' Compensation Commission*, 2013 IL App (1st) 120549WC, the Illinois State Treasurer, as *ex officio* custodian of the Injured Workers' Benefit Fund, filed a Section 19(f) judicial review of the Commission's decision awarding compensation against an uninsured employer. The State Treasurer did not file an appeal surety bond as required by Section 19(f)(1). The appellate court initially reversed the Commission's decision, but then on rehearing vacated its opinion and reinstated the Commission's decision because the State Treasurer had failed to comply with Section 19(f)(2). The court held that the State Treasurer was not filing a review on behalf of the State of Illinois, but rather as the employer, which under the Act was required to file an appeal bond because it was the party against which an award was rendered. *Illinois State Treasurer*, 2013 IL App (1st) 120549WC, ¶ 24. The court noted that, had the State Treasurer filed an appeal on behalf of the State, the appeal would have been barred expressly. *Id.* ¶ 15. Moreover, the State Treasurer did not qualify as a municipality under the Act and was not otherwise excluded from the bonding requirements. Because no bond was filed, the appeal was dismissed for want of jurisdiction. *Id.* ¶ 14.

In *QBE Insurance Co. v. Illinois Workers' Compensation Commission*, 2013 IL App (5th) 120336WC, the appellate court held that a workers' compensation insurance carrier could not intervene to prosecute a Section 19(f) judicial review where the carrier was not named in the original action by the claimant's application. The claimant prevailed on a Section 19(b) petition and the employer's insurer, QBE Insurance Co. (QBE), which had not been named as a party in the original application, sought to file its own review before the Commission. The employer already had filed a petition for review, but QBE argued that a last minute amendment of the accident date during arbitration implicated its policy coverage. *QBE Ins. Co.*, 2013 IL App (5th) 120336WC, ¶ 6.

QBE asked to be added as a named party in the case and made reference in its motion to Section 4(g) of the Act, which states that the insurance company, if the employer does not pay compensation, shall become primarily liable to the employee. The motion to add the carrier was granted by the Commission and the case was decided on the merits. It then proceeded on review to the circuit court, which affirmed the decisions below. The employer did not file a further appeal with the appellate court, although QBE filed a notice of appeal. *Id.* ¶ 13.

On its own, the appellate court addressed its jurisdiction to hear QBE's appeal and concluded that the motion to add QBE was improperly granted. The court held that Section 4(g) created a right for an employee to proceed directly against an insurance carrier in the event that the employer does not pay the award, but neither mandated that the carrier be made a party to a proceeding nor even be advised of a proceeding. *QBE Ins., Co.*, 2013 IL App (5th) 120336WC, ¶ 24. The court further concluded that nothing in the Act provided for intervention following a Section 19(b) award by an insurer who was not a party to the original proceedings and where the claimant chose to bring his claim against the employer alone. *Id.* ¶ 24.

The *QBE Insurance* case must be viewed in the context of the appellate court's 2010 decision in *Vallis Wyngroff Business Forms, Inc. v. Illinois Workers' Compensation Commission*, 402 Ill. App. 3d 91 (1st Dist. 2010), where the court held that an appeal bond signed by the employer's insurance carrier was defective, even though there was evidence that the employer was no longer in business and could not be located. In *Vallis Wyngroff Business Forms*, the court strictly interpreted the language of Section 19(f) that requires a signature by the employer and held there was nothing in the record showing that the employer

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had specifically authorized the insurance agent to sign the bond on its behalf.

The Problem: Non-Existent Employers

In many situations, the employer is no longer in business, cannot be located, or both, and thus cannot sign an appeal bond. Moreover, it is common that an employer goes out of business in the time between the claimant's accident and the time the case is filed or tried or goes through judicial review. Without the employer's signature on the bond as the party against whom the award was rendered, the case law is clear that the appeal cannot go forward.

One frequently used practice to circumvent this "non-existent employer" scenario is to have the insurance carrier sign the appeal bond for the employer and attach an addendum and affidavit to the bond stating that, because the employer cannot be located and sign the bond, the insurance carrier assumes liability under the Act for payment of the award under Section 4(g) and is signing the bond in that capacity. The carrier then procures an independent surety to back the bond.

At first blush, *QBE Insurance* makes this approach questionable. A close reading of the case, however, actually supports the continued viability of this practice when faced with an employer that cannot be located. *QBE Insurance*, while prohibiting insurer intervention into the case based on Section 4(g), does not preclude the insurer from executing the appeal bond based on the authority of Section 4(g) where the employer is out of business and cannot be located and cannot pay the award. Also, in *QBE Insurance*, the employer had filed its own review and, for some unstated reason, had chosen not to file a notice of appeal to the appellate court. Thus, the scenarios are not analogous, and the case can be distinguished on its facts with respect to this issue.

QBE Insurance, while prohibiting insurer intervention into the case based on Section 4(g), does not preclude the insurer from executing the appeal bond based on the authority of Section 4(g) where the employer is out of business and cannot be located and cannot pay the award.

Moreover, the reality of current workers' compensation practice is that the insurance carrier and not the employer, absent a self-insured employer, actually pays the award. The current expectations of the court and of Section 19(f)(2) as to who truly pays an award are pure fiction.

Suggested Changes

Section 19(f)(2) should be re-written to reflect the reality of todays' workers' compensation practice and to recognize that virtually all employers have workers' compensation insurance that pays the benefit awards. Recognizing that the carrier (and not the employer) generally is the entity paying the award, an amended Section 19(f)(2) should permit an authorized insurance representative to sign the bond as the party against whom an award is rendered. This proposed modification also addresses the situation where the employer is no longer in business or cannot be located to sign the bond. Allowing the insurance carrier to sign the bond, together with the added protection of an independent surety backing the bond, adequately protects the claimant during the appeal.

Additionally, as in civil appeals, a new Section 19(f)(2) should permit employers to post the insurance policy in lieu of a bond. The framework for such a process is already in place through Illinois Supreme Court Rule 305(j) and is time-tested in the civil appeal world. If there are any concerns that the policy might be inappropriate, legislation can provide for a short window to challenge the policy tender and a commensurate safety valve added for the submission of a bond. Although the courts have stressed that nothing should unduly delay the review process, given that most current workers' compensation appeals take from 12 to 18 months to resolve following the Commission's ruling, a brief delay of an additional two weeks is immaterial.

The current relevant portion of Section 19(f)(2) reads as follows:

> (2) No such summons shall issue unless the one against whom the Commission shall have rendered an award for the payment of money shall upon the filing of his written request for such summons file with the clerk of the court a bond conditioned that if he shall not successfully prosecute the

review, he will pay the award and the costs of the proceedings in the courts. The amount of the bond shall be fixed by any member of the Commission and the surety or sureties of the bond shall be approved by the clerk of the court. The acceptance of the bond by the clerk of the court shall constitute evidence of his approval of the bond.

Every county, city, town, township, incorporated village, school district, body politic or municipal corporation against whom the Commission shall have rendered an award for the payment of money shall not be required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons.

820 ILCS 305/19(f)(2). The following proposal should be enacted in place of the current section 19(f)(2):

(2) No such summons shall issue unless the one against whom the Commission shall have rendered an award for the payment of money, or the applicable insurance carrier, shall, upon the filing of the written request for such summons, file with the clerk of the court a bond conditioned that, if he shall not successfully prosecute the review, he will pay the award and the costs of the proceedings in the courts.

(a) The amount of the bond shall be fixed by any member of the Commission and the surety or sureties of the bond shall be approved by the clerk of the court.

(b) The filing of an insurance policy pursuant to section 392.1 of the Illinois Insurance Code (215 ILCS 5/392.1) shall be considered the filing of a bond for purposes of this section. No surety shall be required if the policy exceeds the amount of the bond set by the Commission.

(c) The acceptance of the bond, insurance policy, or funds tendered in escrow account by the clerk of the court shall constitute evidence of approval of the bond, policy, or escrow.

(d) No bond shall be required where the party against whom the award for money is rendered is a county, city, town, township, incorporated village, school district, body politic or municipal corporation.

In conjunction with this proposal, the time for filing a judicial review should be enlarged from 20 to 30 days. *See* 820 ILCS 305/19(f)(1). Furthermore, the Act should permit the filing of a corrected or substitute bond within a short period of time after filing of the action, wherein any challenges to the bond or surety may be addressed. The proposed amendment serves the dual purpose of giving an employer and insurance carrier additional workable options for filing an appeal bond, while providing the claimant with assurance that the award and requisite costs will be paid at the conclusion of the appeal.

Without question, any modification of Section 19(f)(2) should afford employees the same level of protection that the current statute provides. But all parties understand that this same level of comfort can be obtained through a variety of means not currently expressed in Section 19(f)(2). Indeed, the proposals herein accomplish both purposes: the proposed amendment to the Act gives employers more options in obtaining appeal bonds or their equivalent, and simultaneously provides claimants with the confidence that funds are available for payment of the award and the costs associated with the appeal.

The time has come for Section 19(f)(2) to be brought into line with modern workers' compensation practice, which depends heavily on the presence of insurance carriers. No appeal should be dismissed where compliance, in circumstances where the employer cannot be located, is physically impossible. The proposal outlined above should be part of the next round of amendments to the Workers' Compensation Act, if not proposed on its own merits.

Without question, any modification of Section 19(f)(2) should afford employees the same level of protection that the current statute provides. But all parties understand that this same level of comfort can be obtained through a variety of means not currently expressed in Section 19(f)(2).

Amicus Committee Report

Craig L. Unrath
Heyl, Royster, Voelker & Allen, P.C., Peoria

In October 2013, the IDC filed an *amicus* brief in the Illinois Appellate Court Third District, in *Mackey v. DeFranco*, Appeal No. 3-13-0219.

In *Mackey*, the plaintiffs named Dr. John DeFranco as a respondent in discovery under Section 2-402 of the Code of Civil Procedure, 735 ILCS 5/2-402. Under Section 2-402, a respondent in discovery may be converted into a defendant within six months even though the limitations period expired during that period. The Code provides that an extension may be granted for good cause *only once*, for up to 90 days.

The plaintiffs in *Mackey* advised the court that they could not determine whether to convert Dr. DeFranco to a defendant until they took his deposition and the deposition of an ER doctor. The trial court extended discovery for over a year, but the plaintiffs waited until nearly eight months after the deadline expired to file a motion to extend the deadline to convert Dr. DeFranco into a defendant.

The trial court granted the motion to extend the deadline, but ultimately dismissed the claim against Dr. DeFranco, finding that there was no physician-patient relationship. The trial court never addressed the respondent-in-discovery issue. The plaintiffs appealed. The IDC filed an *amicus* brief in support of Dr. DeFranco's argument that the trial court erred in extending the deadline for converting him to a defendant. The Illinois Trial Lawyers Association filed an *amicus* brief in support of the plaintiffs.

On appeal, the plaintiffs argued that both the trial court and defense counsel knew that the decision to convert Dr. DeFranco could not be made until the doctors' depositions had been taken. The IDC argued that the trial court erred in allowing the plaintiffs to convert Dr. DeFranco into a defendant after the deadline expired, pointing out that the delay in taking Dr. DeFranco's deposition was not the result of a failure to cooperate. Moreover, it was only after Dr. DeFranco sought to terminate his status as respondent in discovery that the plaintiffs sought to convert him to a defendant. The IDC argued that the clear language of the statute should have been enforced as written.

Troy A. Bozarth, Daniel W. Farroll, and Matthew B. Champlin of *Hepler-Broom, LLC* are to be commended for preparing the *amicus* brief on behalf of the IDC in support of the defendant.

In March 2014, the IDC filed an *amicus* brief in support of the defendant in *Bruns v. City of Centralia*, 2013 IL App (5th) 130094, a case now pending before the Illinois Supreme Court.

In *Bruns*, the plaintiff suffered injury when she tripped over a raised section of a public sidewalk while on her way to the Centralia Eye Clinic (the Clinic). The cracked sidewalk rose about three inches above the adjacent concrete slabs. The Clinic previously had reported the condition to the defendant. Indeed, one year earlier, the Clinic reported that another person had tripped on the same spot.

The plaintiff was 80 years old and being treated for various eye problems. During past visits, she routinely walked along the same sidewalk and considered the defect an accident waiting to happen. At the time of her fall, her attention was focused on the entrance and she did not notice the crack in the sidewalk ahead of her.

The trial court found that the condition was open and obvious and that the distraction exception was inapplicable. The court granted the defendant's motion for summary judgment, explaining that the "mere existence of an entrance, and/or steps leading up to it, would provide a universal distraction exception to the open and obvious doctrine." *Bruns v. City of Centralia*, 2013 IL App (5th) 130094, ¶ 5.

The appellate court reversed, noting that the "distraction" exception to the open and obvious danger rule applies when an individual must focus on some other condition to such an extent that he or she will forget the hazard that has already been discovered. *Id.* at ¶ 6. The court explained that it is foreseeable that "an elderly patron of an eye clinic may

About the Author

Craig L. Unrath is partner at *Heyl, Royster, Voelker & Allen, P.C.*, and Chair of the firm's Appellate practice group. He is also Vice Chair of the Professional Regulation/Licensure practice group. He began his career with *Heyl Royster* in 1994 after serving for two years as law clerk to Justice Carl A. Lund of the Illinois Appellate Court, Fourth District. Mr. Unrath has extensive experience in the Illinois Appellate Courts, Illinois Supreme Court, and the Seventh Circuit Court of Appeals. He has also argued cases in the United States Courts of Appeals for the Eighth Circuit, and the Federal Circuit. He served as President of the Illinois Appellate Lawyers Association from 2007 to 2008, and currently serves as Chair of the Amicus Committee for the Illinois Association of Defense Trial Counsel (IDC).

have had certain procedures performed on his or her eyes and, upon exiting the clinic, may not be looking down at the sidewalk all of the time, even though the patron may have previously noticed the defect and have knowledge of it." *Id.* at ¶ 8. The court also noted that it is reasonable to foresee that patrons might focus on the clinic's entrance to see how much farther they would need to go.

The appellate court concluded that it is unnecessary for the defendant to foresee the precise nature of the distraction. Rather, all that is required is the defendant's "awareness that those in proximity to the open and obvious hazard are likely to become distracted in some way and forget about the hazard." *Id.* at ¶ 9.

Georgiann Oliver and Laura K. Beasley of *Joley, Oliver & Beasley, P.C.* are to be commended for preparing the *amicus* brief on behalf of the IDC in support of the defendant. The Supreme Court Watch at page 15 of this issue provides a more detailed discussion of the parties' positions and arguments in the *Bruns* case.

Young Lawyer Division

Michelle M. Wahl
Swanson, Martin & Bell, LLP, Chicago

On March 4, 2014, Greg Odom of *HeplerBroom LLC* in Edwardsville and I held orientation for the inaugural class of mentors and mentees participating in the IDC's new mentoring program with the Illinois Supreme Court Commission on Professionalism. Greg and I are honored to serve as our organization's program administrators and were thrilled to see so many members who share in our enthusiasm. This program will focus on many of the IDC's missions, including building lasting professional and personal relationships between members, strengthening the dynamic between young lawyers and veteran lawyers, encouraging education, and providing CLE credit. Over the next year, participants will address professionalism, legal ethics, civility, diversity and inclusion, and wellness, including mental health and addiction. Special thanks goes to all those involved in the planning and execution of our inaugural class, including Greg Odom, Aleen Tiffany, Howard Jump, and of course, our remarkable Executive Director, Sandra Wulf.

YLD Past Events

Since the American Red Cross blood drives, Chicago Public School System supply drive, and the John Marshall Law School and Southern Illinois Law School law presentations organized by the YLD between August and October 2013, the following YLD events have also been a great success:

On December 5, 2013, as part of the IDC Holiday Party at Lloyd's, Chicago, the YLD hosted a fundraiser and raised over $1,000 for the American Red Cross's "Service to the Armed Forces," which benefits our military men and women.

On January 24, 2014, at Swanson, Martin & Bell, the YLD hosted a CLE on "Avoiding the Pitfalls of Legal Malpractice & Ethical Business Development for Young Attorneys." The program featured presentations from Adnan Arain of ProQuest and Swanson, Martin & Bell attorney Pete Skiko.

On February 26, 2014, the YLD partnered with DRI to present Foundations: An IDC Series in Litigation Fundamentals. The program featured IDC

— Continued on next page

About the Author

Michelle M. Wahl is an associate with the Chicago office of *Swanson, Martin & Bell, LLP*, where she focuses her practice in asbestos litigation and toxic tort defense litigation, which includes the preparation of pleadings and discovery requests, voluminous document reviews, deposing of witnesses, keeping abreast of legal developments, and the preparation of discovery responses for matters in multiple jurisdictions. Ms. Wahl also has experience in intellectual property litigation and transactional services, including work with clients in various aspects of the entertainment industry. She also has assisted in the registration and policing of trademarks and copyrights. In addition to her current involvement with the Illinois Association of Defense Trial Counsel, she is also a member of the American Bar Association, Women's Bar Association of Illinois, Chicago Bar Association, and Indiana State Bar Association.

member J. Dennis Marek of *Ackman, Marek, Meyer, Tebo and Coghlan, Ltd.*, and Timothy L. Epstein of *SmithAmundsen LLC*, representing DRI. The Chicago office of *SmithAmundsen LLC* hosted the event, followed by a mixer at Sweetwater Tavern & Grill.

As the end of my term as YLD Chair draws near, I reflect back on all the events the YLD organized, educational, social and philanthropic alike, and am forever grateful to all those who contributed in making them a success. Thank you to all of our speakers, venues and firms that offered to host events, community organizations that allowed us to take part in "paying it forward" and most importantly, to the IDC members whose generosity is unparalleled. Special thanks to Starr Rayford, the YLD Vice-Chair, my YLD cohort and fellow mentoring program administrator, Greg Odom, all my fellow YLDers, and the law student members who took the initiative to get involved. Of course, we could not have accomplished a fraction of what we did without our fearless leader and friend, Aleen Tiffany, and Past IDC President and "mentor" to the YLD, Howard Jump. Finally, a gigantic thank you to our Executive Director, Sandra Wulf, for her remarkable support—there are simply no words to express just how valuable of an asset you truly are to the IDC, and particularly, the YLD. Farewell my friends, I'm sure I'll be seeing you!

Association News

IDC Annual Meeting and Awards Reception

Hinshaw & Culbertson LLP
222 N. LaSalle Street, Suite 300, Chicago

Friday, May 30, 2014
3:00 p.m. — Annual Meeting
4:00 p.m. — Awards Reception

The Illinois Association of Defense Trial Counsel and Its Board of Directors Cordially Invite You to Join Us for the 2014 Annual Meeting and Awards Reception!

Recognition of 2014–2015
Board of Directors, Committee Chairs, and Vice Chairs

Recognition of 2013–2014 President
Aleen Tiffany
Aleen R. Tiffany, P.C.

Induction of 2014–2015 President
David H. Levitt
Hinshaw & Culbertson LLP

Awards Presentation

Join with your fellow IDC members as we celebrate the installation of our new officers and directors and the appointment of our committee chairs and vice chairs.

Special thanks to our sponsors!

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IDC Legislative Reception

On March 25, 2014, IDC members from throughout the state gathered in Springfield for our annual Legislative Reception. Special thanks to our event planning committee: **C. William Busse**, *Busse, Busse & Grassé, P.C.*, **David Herman**, *Giffin, Winning, Cohen & Bodewes, P.C.*, **Stephen R. Kaufmann**, *HeplerBroom LLC*, **William K. McVisk**, *Johnson & Bell, Ltd.*, **R. Mark Mifflin**, *Giffin, Winning, Cohen & Bodewes, P.C.*, **Aleen Tiffany**, *Aleen R. Tiffany, P.C.*, and **Thomas H. Wilson**, *HeplerBroom LLC.*

We would like to thank the following firms for their generous support of the IDC and this event:

Aleen R. Tiffany, P.C.

Craig & Craig, LLC

Alholm, Monahan, Klauke, Hay & Oldenburg, LLC

Cray Huber Horstman Heil & VanAusdal LLC

Bleyer and Bleyer

Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC

Brown, Hay & Stephens, LLP

ESI (Engineering Systems, Inc.)

Busse, Busse & Grassé, P.C.

Giffin, Winning, Cohen & Bodewes, P.C.

Cassiday Schade LLP

HeplerBroom LLC

Heyl, Royster, Voelker & Allen, P.C.

Jump & Associates, P.C.

Litchfield Cavo LLP

McKenna Storer

Hinshaw & Culbertson LLP

Quinn, Johnston, Henderson, Pretorius & Cerulo

Hoagland, Fitzgerald & Pranaitis

Schuyler, Roche & Crisham, P.C.

S-E-A

Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.

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SmithAmundsen LLC

— Continued on next page

IDC Hosts Spring Symposium with the Illinois Insurance Association

In early April, the IDC once again partnered with the Illinois Insurance Association to present the annual Spring Symposium. The program offered great presentations on construction law, including *The Construction Contract and GL Insurance: 10 Things Every Attorney Should Know; What's New in Construction Law?; Deposing Fact Witnesses on Liability Issues; An In-House Safety Expert Presentation; How to Use Technology Advancements in Construction Litigation; Choosing the Best Expert for Your Construction Case*; and a Panel Discussion on *Ethical Obligations.*

We would like to thank the many individuals who devoted their time and talent to putting this program together:

Symposium Leadership

Aleen Tiffany — *Aleen R. Tiffany, P.C.*

Construction Law Committee

Dennis J. Cotter — *SmithAmundsen LLC, Co-Chair*
Patricia J. Hogan — *Cassiday Schade LLP, Co-Chair*
Lindsay Drecoll Brown — *Cassiday Schade LLP*
C. Wm. Busse, Jr. — *Busse, Busse & Grassé, P.C.*
Keith E. Fruehling — *Heyl, Royster, Voelker & Allen, P.C.*
Edward K. Grassé — *Busse, Busse & Grassé, P.C.*
Mark J. McClenathan — *Heyl, Royster, Voelker & Allen, P.C.*
Jeanine S. Oury — *SmithAmundsen LLC*
Jamie M. Rein — *Aleen R. Tiffany, P.C.*
Aleen Tiffany — *Aleen R. Tiffany, P.C.*
John J. Vitanovec, IV — *Cassiday Schade, LLP*
Hillary Weigle — *SmithAmundsen LLC*
Holly C. Whitlock — *Aleen R. Tiffany, P.C.*

Events Committee

Heather R. Watterson — *CNA, Events Committee Chair*
Jeremy Burton — *Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd., Vice Chair*
Denise Baker-Seal — *Brown & James, P.C.*
R. Sean Hocking — *Craig & Craig, LLC*
Paul R. Lynch — *Craig & Craig, LLC*
Jamie M. Rein — *Aleen R. Tiffany, P.C.*
Scott D. Stephenson — *Litchfield Cavo LLP*
Holly Whitlock-Glave — *Aleen R. Tiffany, P.C.*
Maura Yusof — *Heyl, Royster, Voelker & Allen, P.C.*

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We would also like to offer our sincere thanks to the following companies for their generous support of the association and the Spring Symposium:

Engineering Systems Inc.

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Finally, we would like to thank the following companies for participating in our Exhibit Hall:

21st Century Forensic Animations
Bridges Court Reporting
CED Investigative Technologies, Inc.
Crane Engineering
ESI (Engineering Systems Inc.)
Exponent
Minnesota Lawyers Mutual Insurance Company
Packer Engineering Group
Records Deposition Service
Rimkus
S-E-A
Sikich, LLP

IDC 50th Anniversary Gala

In 1964, a small but determined group of Illinois attorneys founded the Illinois Association of Defense Trial Counsel (IDC). Its purpose was to provide support and professional contacts for attorneys practicing the defense of civil cases and workers' compensation claims in Illinois.

Since that time, the IDC has grown to become an organization boasting over 1,000 members. The IDC is recognized as one of the most active and successful state organizations for defense lawyers in the nation.

This June we will celebrate our 50th Anniversary! In honor of this very important milestone, a Gala Celebration will be held on the evening of Saturday, June 28, 2014, at the Trump Tower in Chicago. This will be a "black tie" event, and will include dinner and music by the Stuart Rosenberg Orchestra.

We hope you can join us for this very special event. Complete the accompanying registration form or visit www.iadtc.org to register today!

Registration

Registration for this event is as follows:

- $175 IDC Member/Guest*
- Tables of 10 may be purchased for $1,500. Please contact Sandra Wulf at **idc@iadtc.org** or 800-232-0169 for more information.
- *Special Pricing Note: Attorneys who have been in practice less than 10 years register for just $125 for this event.

Accommodations

The IDC has a small block of rooms at the Trump International Towers for the evening of June 28, 2014. Room rates are $365 (single/double), plus tax. To make a reservation, please contact the hotel directly at 877-458-7867 and reference "IDC Annual Gala" to receive this special room rate.

Sponsors

Our sincere thanks to the member firms and industry partners listed on the next page for their sponsorship of this event!

Become a Sponsor! It's not too late to get in on the festivities! If you are interested in sponsoring this event, please contact the IDC at **idc@iadtc.org** or 800-232-0169.

Please complete this registration form and return it as soon as possible to:
Illinois Association of Defense Trial Counsel
PO Box 588 ■ Rochester, IL 62563-0588

50th Anniversary Gala Celebration Saturday, June 28, 2014

Main Contact _____

Firm _____

Address _____

City, State, Zip Code _____

Firm Line _____

Email _____

Attendees _____ _____

_____ _____

_____ _____

_____ _____

_____ _____

Special Dietary/Accessibility Needs

_____

Individual Registrations:

Attendee _____

Firm _____

Address _____

City, State, Zip Code _____

Firm Line _____

Email _____

Special Dietary/Accessibility Needs _____

_____

Registration

___ Table of 10 – $1,500 ..... $ _____
___ IDC Member in practice >10 years – $175 ..... $ _____
___ Guest of Member in practice >10 years – $175 .... $ _____
___ IDC Member in practice <10 years – $125 ..... $ _____
___ Guest of Member in practice <10 years – $125.... $ _____

Total Amount Due $ _____

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IDC 50th Anniversary Gala Sponsors

Advancing the Law

Aleen R. Tiffany, P.C. with Alholm, Monahan, Klauke, Hay & Oldenburg

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Hinshaw & Culbertson LLP

Jump & Associates, P.C.

Lipe, Lyons, Murphy, Nahrstadt & Pontikis Ltd.

Litchfield Cavo, LLP

Minnesota Lawyers Mutual Insurance Company

SmithAmundsen, LLC

Ensuring Equity

Cassiday Schade, LLP

Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC

Sikich

Advocating Justice

Bleyer & Bleyer

Cray Huber Horstman Heil & VanAusdal, LLC

ESI (Engineering Systems, Inc.)

Exponent

LWG Consulting

MDD Forensic Accountants

Schuyler, Roche & Crisham, P.C.

S-E-A, Ltd.

After Hours Reception

McKenna Storer

Gala Dinner

ISBA Mutual Insurance Company

Wine with Dinner

Hoagland, Fitzgerald & Pranaitis

Welcome

The IDC is proud to welcome the following members to the Association:

Elizabeth S. Abraham
Madison Law Associates, LLC, Chicago
- Sponsored by: Al Pranaitis

Katherine J. Calhoun
SmithAmundsen LLC, Chicago

Katherine C. Crouch
Lindsay, Rappaport & Postel, LLC, Chicago
- Sponsored by: Stuart Rappaport

Kathrin Deutschle
Litchfield Cavo LLP, Chicago
- Sponsored by: Scott Stephenson

Laura Fahey
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago
- Sponsored by: Nicole Milos

Max B. Goodman
SmithAmundsen LLC, Chicago

Erin A. Johnson
SmithAmundsen LLC, Chicago

Thomas R. Kelley
Lewis Brisbois Bisgaard & Smith LLP, Edwardsville

Timothy R. Lessman
SmithAmundsen LLC, Chicago

Marie Lynch
LaBarge, Campbell & Lyon, L.L.C., Chicago

Jason T. Mayer
SmithAmundsen LLC, Chicago

Elliott R. McDonald, III
McDonald, Woodward & Carlson, P.C., Davenport, IA

Jennifer B. Pigeon
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Nina Rosenbach
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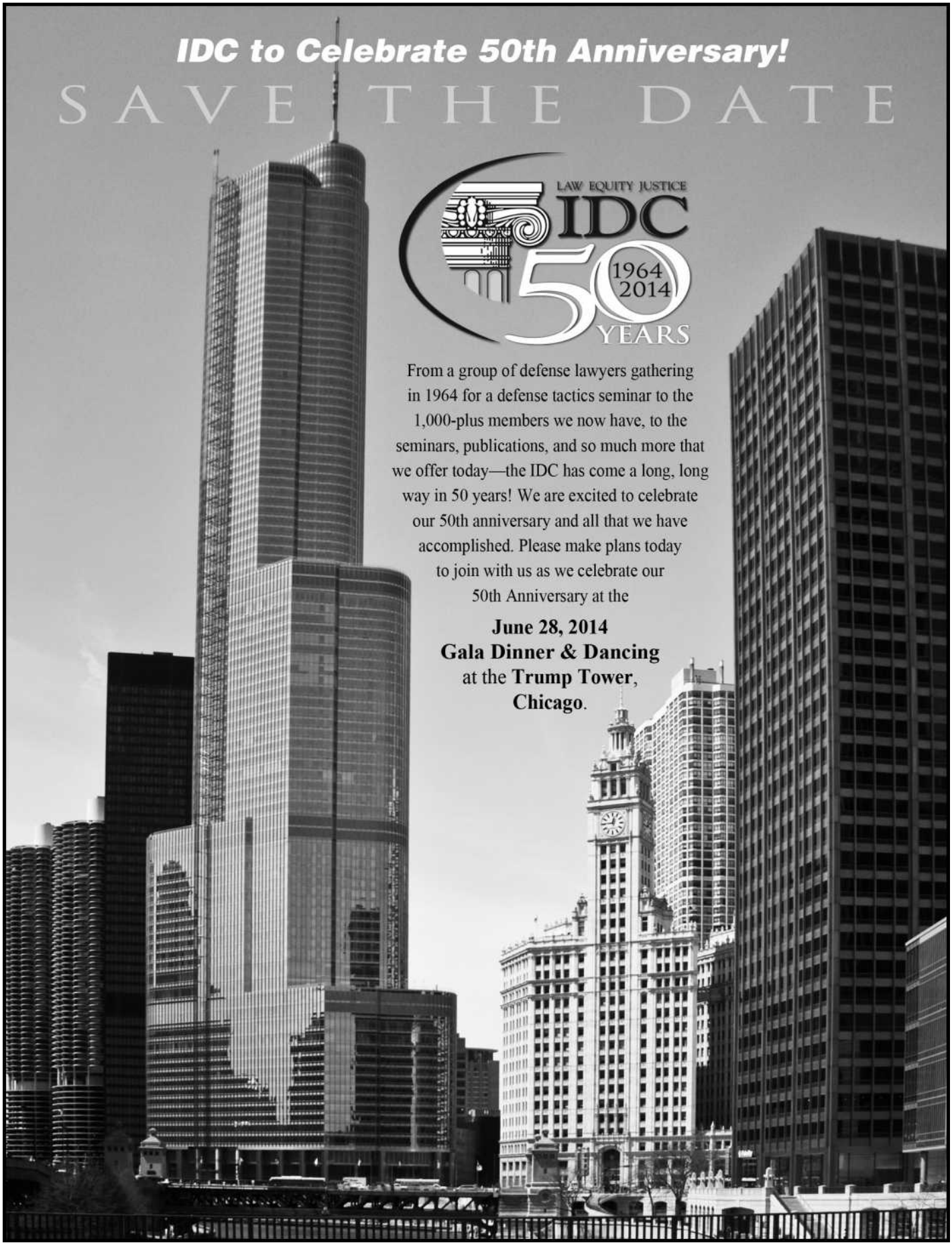
Cassiday Schade LLP, Chicago

Katherine Strle
LaBarge, Campbell & Lyon, L.L.C., Chicago

William S. Thomas
Pitzer Snodgrass, P.C., St. Louis, MO


IDC to Celebrate 50th Anniversary!
SAVE THE DATE
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IDC
1964
2014
50
YEARS
From a group of defense lawyers gathering in 1964 for a defense tactics seminar to the 1,000-plus members we now have, to the seminars, publications, and so much more that we offer today—the IDC has come a long, long way in 50 years! We are excited to celebrate our 50th anniversary and all that we have accomplished. Please make plans today to join with us as we celebrate our 50th Anniversary at the
June 28, 2014
Gala Dinner & Dancing
at the Trump Tower,
Chicago.

Illinois Association of Defense Trial Counsel

MEMBERSHIP APPLICATION

Membership in the Illinois Association of Defense Trial Counsel is open to Individuals, Corporations, Educators, and Law Students. For a list of qualifications, visit www.iadtc.org or phone the IDC office at 800-232-0169. Applicants shall be admitted to membership upon a majority vote of the Board of Directors.

I am (We are) applying for membership as a(an) (Select Only One):

Individual Attorney, in practice:
- ❍ 0-3 years ($100)
- ❍ 4-5 years ($150)
- ❍ 6-9 years ($225)
- ❍ 10+ years ($250)

Governmental Attorney, in practice:
- ❍ 0-3 years ($75)
- ❍ 4-5 years ($100)
- ❍ 6-9 years ($160)
- ❍ 10+ years ($190)

Corporation, with:
- ❍ 1-2 Affiliates ($250)
- ❍ 3-5 Affiliates ($500)
- ❍ 6-10 Affiliates ($750)
- ❍ 11-15 Affiliates ($1,000)
- ❍ 16-20 Affiliates ($1,500)

- ❍ **Student** ($20)
- ❍ **Educator** ($75)

Individual Applicant Information – Attorneys & Governmental Attorneys

Prefix _____ First _____ Middle _____ Last _____ Suffix _____ Designation _____

Firm or Government Agency _____

Address _____

City _____ State _____ Zip Code _____ County _____

Firm or Agency Line _____ Direct Line _____ Fax Line _____

Email _____ Website _____

Area of Practice _____ # of Attorneys in Firm _____

IDC Sponsor Name and Firm _____

Law School _____ Admitted to the Bar in the State of _____ Year _____ ARDC # _____

Home Address _____ City, State, Zip Code _____

Home Phone _____ Alternate Email Address _____

Corporate Applicant Information

Corporation Name _____ Business or Service Provided _____

Address _____ City, State, Zip Code _____

Phone _____ Fax _____ Website _____

On a separate sheet of paper, please list all individuals who are to be affiliated with this Corporate Membership. Be sure to include Name, Address (if different than the corporate address), Phone, Fax, and Email Address for all affiliates.

Educator and Law Student Applicant Information

Prefix _____ First _____ Middle _____ Last _____ Suffix _____ Designation _____

Law School _____ Anticipated Graduation Date _____

Address _____ City, State, Zip Code _____

Email Address _____ Phone _____

Biographical Information

IDC is committed to the principle of diversity in its membership and leadership. Accordingly, applicants are invited to indicate which one of the following may best describe them:

Race _____ Gender _____ Birth Date _____

Free DRI Membership

In addition to joining the IDC, you can take advantage of the DRI Free Membership Promotion! As a new member of the IDC and if you've never been a member of DRI, you qualify for a 1 year free DRI Membership. If you are interested, please mark the box below and we will copy this application and send it to DRI. Also, if you have been admitted to the bar 5 years or less, you will also qualify to receive a Young Lawyer Certificate which allows you one complimentary admission to a DRI Seminar of your choice.

❍ Yes, I am interested in the Free DRI Membership!

(Application continued on next page)

Illinois Association of Defense Trial Counsel

COMMITTEE INVOLVEMENT

All Substantive Law Committees are open to any IDC member. Event and Administrative Committees are generally small committees and members are often appointed by the Board of Directors. Substantive Law Committees are responsible for writing the Monograph for the *IDC Quarterly* and may submit other Feature Articles. Committees keep abreast of current legislation and work with the IDC Legislative Committee, as warranted. Committees also serve as a resource to seminar committees for speakers and subjects and, if and when certain issues arise that would warrant a specific "topical" seminar, the committee may produce such a seminar.

Please select below the committees to which you would like to apply for membership:

Substantive Law Committees

- ❍ Commercial Law
- ❍ Construction Law
- ❍ Employment Law
- ❍ Insurance Law
- ❍ Local Government Law
- ❍ Tort Law

Administrative Committees

- ❍ Events
- ❍ Legislative
- ❍ Membership
- ❍ Young Lawyers

Event Committee

- ❍ Events

Membership Commitment

By providing a fax number and email address you are agreeing to receive faxes and emails from the association that may be of a commercial nature. I certify that:

- ❍ As an **Individual Attorney**, I am actively engaged in the practice of law, that at the present time a substantial portion of my litigation practice in personal injury and similar matters is devoted to the defense.
- ❍ As a **Corporate Member**, we will support the purpose and mission of the Association.
- ❍ I am currently a **Professor** or **Associate Professor** of law at an ABA accredited law school.
- ❍ I am currently a **Student** enrolled in an ABA accredited law school.

Signed _____ Date _____

Membership Investment

Membership Dues ..... $ _____

Voluntary Political Action Committee Donation * ..... $ _____

Total Amount Due ..... $ _____

* **Recommended Amount:**
<3 years in practice..... $15
4-5 years in practice..... $25
6-9 years in practice..... $55
10+ years in practice..... $75

Please Note: IDC dues are not deductible as a charitable contribution for U.S. federal income tax purposes, but may be deductible as a business expense. The IDC estimates that 2.5% of your dues are not deductible because of the IDC's lobbying activities on behalf of its members.

Payment Information

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❍ Enclosed is check # _____ in the amount of $ _____ . ❍ Visa ❍ MasterCard ❍ AmEx

❍ Please charge Credit Card # _____ in the amount of $ _____ Exp. Date ____/____

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Thank you for your interest in joining the Illinois Association of Defense Trial Counsel. Your application will be presented to the Board of Directors for approval at their next regular meeting. Until that time, if you have any questions, please contact the IDC office at:

Illinois Association of Defense Trial Counsel
PO Box 588 • Rochester, IL 62563-0588 • 800-232-0169 • 217-498-2649 • www.iadtc.org

ILLINOIS
Association of
DEFENSE TRIAL
COUNSEL

The Voice of the Defense Bar in Illinois

Promoting a level playing field in civil litigation

Representing the interests of business and industry in Illinois

Dedicated to improving the quality of the legal profession

To learn more about the Illinois Association of Defense Trial Counsel, Visit us online at

www.iadtc.org

What is the IDC?

We are the premier association of attorneys in Illinois representing business, corporate, professionals, and other individual defendants in civil litigation. The IDC is an exceptional community of defense attorneys dedicated to improving the judicial system and the practice of law.

The IDC is a reasoned and independent voice for fairness in the legal system. We work with the business, insurance, and medical communities to ensure a fair and equal justice system for all litigants.

The IDC is

- An advocate for the legal profession
- 1,000 members strong
- Looked to for advice and support by the judiciary
- A resource for legislators

How is the IDC Making a Difference?

The IDC strengthens the practice of law and improves the skills of lawyers that defend individuals and businesses in Illinois. We enhance the knowledge of defense attorneys through our nationally respected publication the *IDC Quarterly* and the new *Survey of Law*, by our continuing legal education programs, and committees that focus on specialty practice areas like **Civil Practice**; **Commercial Law**; **Employment Law**; **Municipal Law**; and **Tort Law**.

The IDC is working to protect the Illinois legal system, demanding a level playing field and resisting attempts to dismantle the jury system. The IDC is a respected resource providing:

- Fact sheets on the impact of pending litigation
- Expertise to legislative committees and political leaders
- Amicus briefs on legal issues pending before the Illinois reviewing courts

IDC members are as diverse as the clients we represent

From big firms and small and all corners of the state, attorneys join the IDC based on our common issues and a common desire to improve our legal system.

Over the past five decades, we have grown from an organization of mostly insurance defense attorneys to a broad-based association of litigators who represent an entire range of business and industry throughout Illinois and the United States. The diversity of our membership and clientele informs our independent and balanced view of Illinois's judicial system and the litigation that affects it.

What are Our Core Values?

- To promote and support a fair, unbiased, and independent judiciary
- To take positions on issues of significance to our membership, and to advocate and publicize those positions
- To promote and support the fair, expeditious, and equitable resolution of disputes, including the preservation and improvement of the jury system
- To provide programs and opportunities for professional development to assist members in better serving their clients
- To increase its role as the voice of the defense bar of Illinois, and to make the IDC more relevant to its members and the general public
- To support diversity within our organization, the defense bar, and the legal profession

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CALENDAR
of Events

- **May 30** — **Executive Committee Meeting, Annual Meeting, Board Meeting & Awards Presentations**
  Hinshaw & Culbertson LLP • Chicago
- **June 27** — **50th Anniversary Gala After Hours** • Location TBA • Chicago
- **June 28** — **50th Anniversary Gala** • Trump International Hotel & Tower • Chicago
- **July 25** — **Executive Committee & Board Meeting** • Location TBA • Chicago
- **August 21** — **IDC After Hours** • Location TBA • Chicago
- **August 22** — **Executive Committee & Board Meeting** • Location TBA • Chicago
- **September 11–13** — **North Central Region Trial Academy** • Star Plaza Hotel • Merrillville, IN
- **September 18** — **IDC / MODL Fall Seminar** • Busch Stadium • St. Louis, MO
- **October 10** — **Executive Committee & Board Meeting** • Location TBA • Chicago
- **October 22–26** — **DRI Annual Meeting** • San Francisco, CA
- **October 30** — **Conceled Carry in Illinois** • Location TBA
- **November 6** — **IDC After Hours** • Location TBA • Chicago
- **November 7** — **Executive Committee & Board Meeting** • Location TBA • Chicago
- **December 4** — **Executive Committee Meeting** • Location TBA • Chicago
- **December 4** — **Holiday Party** • Location TBA • Chicago