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### **2007 ILLINOIS JUDICIAL HIGHLIGHTS**

#### ***Collateral Source Rule / Bills Paid by Medicaid or Medicare***

- *Wills v Foster*, 372 Ill. App. 3d 670 (4<sup>th</sup> Dist.)

Trial court reduced jury's award for medical bills from \$80,000 billed by providers to \$19,000 paid by Medicare. The court affirmed the trial court, holding that the "collateral source rule" did not bar consideration of the fact that the plaintiff was covered by Medicare and that her providers accepted the greatly reduced payment in full satisfaction of the bills. The plaintiff was under no further liability to the providers, by virtue of Medicare's rules, and she paid no premium for enrollment in Medicare. Therefore, the collateral source rule—barring evidence that plaintiff received compensation from a collateral source—did not apply.

The Supreme Court accepted this case for review on September 26, 2007 and will issue an opinion in 2008.

- *Nickon v. City of Princeton*, 376 Ill. App. 3d 1095 (3<sup>rd</sup> Dist.)

Trial court properly barred evidence of reduced Medicare payments under collateral source rule.

The defendant filed a petition for leave to appeal this decision to the Illinois Supreme Court on November 28, 2007. The court has not yet acted on the petition.

### ***Construction Site Injuries—Section 414 Liability***

- *Joyce v. Mastri*, 371 Ill. App. 3d 64 (1<sup>st</sup> Dist.)

General contractor not liable under either retained control theory (§414 of the Restatement of Torts) or under premises liability theory (§343 of the Restatement). Plaintiff, an employee of a subcontractor, fell off a ladder. The subcontract did not retain to the general contractor sufficient control over the means and methods of plaintiff's work to be subject to liability, nor did the general contractor take any action that constituted such control. Therefore, summary judgment was proper on the §414 claim. The general contractor likewise was not liable under §343, premises liability. The court found that the general contractor neither knew nor should have known about the purportedly unsafe conditions at the work site. Therefore, summary judgment was also proper on that claim.

- *Pestka v. Town of Fort Sheridan*, 371 Ill. App. 3d 286 (1<sup>st</sup> Dist.)

Same analysis and result as *Joyce v. Mastri*, *supra*.

### ***Workers' Compensation Liens***

- *Gallagher v. Lennart*, 226 Ill.2d 208 (Illinois Supreme Court)

Workers compensation insurer that settles a workers compensation claim need not include in settlement contract any provision specifically preserving its lien on any claims the employee may assert against third party tortfeasors. The lien is conferred by the statute.

### ***Insurance Coverage***

#### ***Blanket Additional Insured Status***

- *Clarendon America Ins. Co. v. 69 West Washington Mgmt. LLC*, 374 Ill. App. 3d 580 (1<sup>st</sup> Dist.)
- *Clarendon America Ins. Co. v. Aargus Sec. Syst., Inc.*, 374 Ill. App. 3d 591 (1<sup>st</sup> Dist.)

A contract requiring a party to obtain insurance covering the business activities that are the subject of the contract will not be construed as requiring that party to make the other party an additional insured on the policy to be obtained unless the contract specifically says so.

- *Cincinnati Ins. Co. v. Gateway Constr. Co.*, 372 Ill. App. 3d 148 (1<sup>st</sup> Dist.)

A requirement in a blanket additional insured endorsement that the person seeking additional insured status have a written contract so requiring means what it says—a *written* contract. An oral agreement to add the person as an additional insured will not satisfy the blanket endorsement’s requirement.

### ***Construction Defect***

- *Country Mut. Ins. Co. v. Carr*, 372 Ill. App. 3d 335 (4<sup>th</sup> Dist.)

The court held that the definition of “occurrence” in the ISO CGL policy is ambiguous.

### ***Horizontal Exhaustion***

- *Kajima Constr. Svcs. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill.2d 102 (Illinois Supreme Court)

The court held that a general contractor that is an additional insured on both a subcontractor’s primary and excess policies cannot make a *John Burns* election so as to trigger the additional insured coverage on the subcontractor’s excess policy before first exhausting its own primary policy. In other words, the general contractor cannot vertically exhaust his additional insured coverage, but rather, he must horizontally exhaust all primary coverage before any excess coverage is triggered.

### ***Number of Occurrences***

- *Addison Ins. Co. v. Fay*, 376 Ill. App. 3d 85 (3<sup>rd</sup> Dist.)

Two boys went fishing and walked through an industrial property on their way back home. One of them stepped into an excavation pit and became trapped in the thick clay soil. Water started to rise in the pit due to rain, threatening to drown the boy. His friend waded in to help him and he, too, became stuck. The boys both died, one from hypothermia and the other from drowning. Their families sued the landowner, which had a liability policy with a combined single limit of \$1,000,000. The claims exceeded that amount in value and the plaintiffs, as assignees of the insured, sought to double their recovery by contending that the deaths were caused by two separate occurrences. The Appellate Court held that there was only one occurrence, and the families have petitioned the Illinois Supreme Court for leave to

appeal. Their petition was filed on December 10, 2007, and the court has not yet acted on it.

### ***Scope of Additional Insured Coverage***

- *Pekin Ins. Co. v. Beu*, 376 Ill. App. 3d 294 (1<sup>st</sup> Dist.)

Insurer that issued “vicarious liability” additional insured endorsement owed no duty to defend additional insured homeowner sued for his own negligence, even though the named insured—a contractor—was also sued.

- *State Auto Mut. Ins. Co. v. Habitat Constr. Co.*, 875 N.E.2d 1159 (1<sup>st</sup> Dist.)

Line of cases involving vicarious liability endorsements does not apply to cases involving ISO endorsements. Thus, it is irrelevant that the complaint contained no allegation that the named insured was negligent. The insurer still owed a duty to defend the additional insured.

### ***Spoliation of Evidence***

- *Essex Ins. Co. v. Wright*, 371 Ill. App. 3d 437 (1<sup>st</sup> Dist.)

Claim against insured for spoliation of evidence not covered by CGL policy. Claim sought damages for loss of cause of action due to inability to prove the claim as a result of the spoiled evidence. Loss of a cause of action is not covered property damage, because it is not “physical injury to tangible property” or “loss of use of tangible property.”

### ***Waiver of Kotecki Cap***

- *Virginia Surety Co. v. Northern Ins. Co. of New York*, 224 Ill.2d 550 (Illinois Supreme Court)

The court held that when an employer waives its *Kotecki* cap in a contract, the resulting additional liability, i.e., the liability beyond the *Kotecki* cap, is not covered by the GL policy, but only by the EL policy. So it is now settled that the EL carrier has the sole duty to defend and indemnify employers with respect to third-party contribution complaints filed by tortfeasors, and GL carriers have no duty whatsoever.

## ***Negligence***

### ***Duty to Prevent Criminal Acts by Third Parties***

- *Iseberg v. Gross*, 227 Ill.2d 78 (Illinois Supreme Court).

In this case, a shooting victim brought an action against his former business partners for negligence, alleging that they failed to warn him that a disappointed former investor had made threats against his life. The court affirmed dismissal of the claim, based on the “special relationship” rule. This rule provides that a person has no duty to act affirmatively to protect another from a criminal attack, or to protect from reasonably foreseeable negligent conduct by a third person, absent a “special relationship” between the parties. The generally recognized “special relationships” are common carrier-passenger, innkeeper-guest, voluntary custodian-protectee and business invitor-invitee. Of course, the business invitor-business invitee relationship is so common that many claims will fall under this relationship, as was the situation in the 2006 case of *Marshall v. Burger King*, where the Illinois Supreme Court considered the extent of a property owner’s duty to protect an invitee from the negligence of the driver of a vehicle that crashed into the building, injuring patrons inside the building. *Iseberg* is significant in that the Supreme Court was willing to limit the extent of this duty to warn of threatened criminal conduct to these “special relationship” situations, rather than expand it as the plaintiff requested to any situation where one may have “superior knowledge” of the threat.

### ***Photos of Plaintiff’s Car Prove Low Impact Could Not Have Caused Concussion***

- *Jackson v. Seib*, 372 Ill. App. 3d 1061 (5<sup>th</sup> Dist.)

Trial court properly denied plaintiff’s post-trial motion for judgment notwithstanding the verdict in rear-end auto accident case. Defendant’s expert, basing his opinion on photos of the plaintiff’s car which showed little or no damage, testified that the impact was too minimal to have caused the plaintiff’s concussion.

### ***Proximate Cause***

- *Shank v. Fields*, 225 Ill.2d 676 (Illinois Supreme Court)

Trial court properly entered summary judgment for defendant road construction contractor because its failure to adhere to a requirement in its contract with IDOT, which required that all lanes be left open over a holiday, was not the proximate cause of the injuries suffered by the plaintiff in an auto accident. The connection

between the two events was too remote and as a matter of law, the breach of contract was not the proximate cause of the injury.

### ***Premises Liability***

- *Judge-Zeit v. General Parking Co.*, 376 Ill. App. 3d 573 (1<sup>st</sup> Dist.)

Landowner's duty to provide its customers a safe means of ingress and egress does not include a duty to plow snow from a parking deck.

- *Gilley v. Kiddell*, 372 Ill. App. 3d 271 (2<sup>nd</sup> Dist.)

Landowner owes no duty to third parties who are guests of tenants to maintain stairway located entirely within leased premises, as opposed to common area.

### ***Product Liability***

- *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247 (Illinois Supreme Court)

The court held that a minor plaintiff injured by a utility lighter could recover from the manufacturer either on the previously well-settled "consumer expectation test" (which judges a product unreasonably dangerous and defective only if it presents a danger that the ordinary consumer wouldn't expect), or under the more plaintiff-friendly "risk/utility test." Under the risk/utility test, a product can be deemed unreasonably dangerous and defective even if the danger it presents would be expected by an ordinary consumer, if the risk created by the product outweighs the utility of designing the product with the defect. In this case, it was undisputed that the danger that a utility lighter can start fires was well within the expectations of an ordinary consumer, and thus, under that test, the lighter could not be deemed unreasonably dangerous and defective. But under the risk/utility test, it would be for the jury to decide whether the product was unreasonably dangerous and defective.

### ***Spoilation of Evidence***

- *Stark v. Illinois Emcasco Ins. Co.*, 373 Ill. App. 3d 804 (1<sup>st</sup> Dist.)

Liability insurer voluntarily assumed duty when it sent letter to its insured advising the insured to preserve evidence for trial.