



Website:  
[www.lrplawfirm.com](http://www.lrplawfirm.com)

## Lindsay, Rappaport & Postel, LLC

Attorneys at Law  
180 N. Michigan Avenue, Ste. 1850  
Chicago, IL 60601  
Tel: 312/629-0208  
Fax: 312/629-1404

*Waukegan Office:*  
221 N. West Street  
Waukegan, IL 60085  
Tel: 847/244-4140  
Fax: 847/244-4203

William C. Lindsay\*  
Stuart N. Rappaport\*  
Joseph P. Postel\*

Timothy M. Arthurs  
Mary Beth O'Brien  
Christopher J. Pickett  
Natalie M. Mesplou  
Matthew A. Cohen  
Matthew J. Walters  
Jay R. Orłowski

Of counsel: Scott G. Ridge\*

\*Admitted to Federal Trial Bar

### 2008 Illinois Legal Developments

#### *Joint and Several Liability - Apportioning Liability of Settled Defendant*

- *Ready v. United/Goedecke Services, Inc.*, 2008 WL 5046833 (Ill. 2008) The Illinois Supreme Court in *Ready* held that a settled defendant's share of fault can **not** go on a verdict form, to be apportioned against the fault of other parties. Illinois has a modified joint and several liability system. Under § 2-1117 of the Illinois Code of Civil Procedure, where a defendant's share of the total fault is less than 25 % of the total fault, that defendant will only be *severally* liable, i.e. only liable for its share of fault, for all non medical damages. The minimally responsible defendant will remain *jointly* liable for medical damages, i.e. responsible for paying those damages in full if they can not be collected from other defendants. If a settled defendant's share of fault can be included on the jury verdict form, and that share is substantial, the remaining defendant(s) may find that their fault is less than 25%, which would allow them to avoid joint liability for the non medical damages (i.e. pain and suffering, and disability). *Ready* forbids this. This situation often presents where the defendant with the most culpability has minimal insurance or no insurance, and thus forces the better insured but less culpable defendants to absorb this liability. This can make for a substantial difference in the verdict. *Ready* is a considerable disappointment to Illinois liability insurers and defense counsel.

#### *Medical Damages - Amount Billed versus Amount Actually Paid*

- *Wills v Foster*, 229 Ill. 2<sup>nd</sup> 393 (Ill. 2008). In *Wills*, the Illinois Supreme Court addressed the issue of recoverable medical expenses where the amount billed by the provider is significantly higher than the amount paid, in this case by Medicare and Medicaid. Similar to private insurers, Medicare and Medicaid pay medical providers on a steeply discounted scale. In *Wills*, the court stated that Illinois will follow the "*reasonable value*" rule; i.e. that the plaintiff may recover the reasonable value of the medical services, which may not necessarily equal the amount actually paid. This was a follow up to the court's ruling in the 2005 case of *Arthur v. Catour*, where the court

allowed the plaintiff to seek recovery of the full amount of the bill even though his private insurer had only paid a portion in full satisfaction. *Arthur* still stands, and the rule still remains that only the paid amount is *presumed* reasonable. However, in *Wills*, the court took away the defendant's ability to argue that the trier of fact should look to what was actually paid to the provider to establish what that reasonable amount. The court held that, although the defendant may introduce evidence that the "reasonable value" of the medical services received is less than the amount billed, the defendant may **not** introduce evidence that the physician or hospital accepted a discounted amount from a collateral source, regardless of whether that collateral source is Medicare, Medicaid, or private insurance. This ruling is damaging to the defense. The ruling leaves the defendant with the option of calling an expert witness, such as a medical billing or health insurance expert, to challenge the reasonableness of the medical bills, but the expert will have to do so without mentioning what was actually paid or accepted in the case. In our opinion, the decision leaves open the possibility that such an expert may be able to testify as to what is usually paid for such services.

#### ***New Element of Recoverable Damages - Shortened Life Expectancy***

- In May, 2008, the Illinois Supreme Court Committee on Jury Instructions introduced a new Illinois Pattern Instruction (30.03.05) allowing a verdict line item for damages in the form of "shortened life expectancy." This item of damages had been recognized by the Illinois Supreme Court in 2002. While it will most often come into play in medical malpractice cases, it also has significance in other serious personal injury claims. It seems clear that expert testimony will be required to support this type of claim, but it is not clear whether many treating physicians will be able to competently offer this type of opinion. It also may open the door to other issues. For example, if a tradesperson claims that a significant injury will cause an inability to maintain cardiovascular fitness, thus reducing life expectancy, this would arguably allow the defense to introduce evidence that the plaintiff smokes, or perhaps even has a genetic tendency to high blood pressure.

#### ***Construction Negligence and Premises Liability Intersect with Toxic Torts***

- *Gregory v. Beazer East*, 384 Ill.App.3rd 178 (1<sup>st</sup> Dist 2008). In this case, the plaintiff attempted to hold a construction site owner responsible for a construction worker's exposure to asbestos. The decedent had worked as a pipefitter at a Mobil refinery project, however, the testimony was that the general contractor had supplied the insulating blankets and gloves that contained the asbestos. The court looked at the construction negligence claim under the "retained control" analysis. The court held that Mobil had not retained the sufficient degree of control over the decedent's work to create a duty. As for the premises liability claim against Mobil as the land owner, the court explained that the asbestos contamination came from the gloves and blankets, which is not a "condition on the land." Moreover, there was no evidence that Mobil had any

notice that the gloves and blankets contained asbestos. *Gregory* is a helpful ruling for the defense, as it limits a property owner's liability for toxic torts to situations where the owner has some control over the construction and exposure.

- ***Sale of Workers' Comp Lien Triggers Obligation to Pay 25% Statutory Fee***

*Evans v. Doherty Construction, Inc.*, 382 Ill.App. 3rd 115 (1<sup>st</sup> Dist 2008). This case holds that the proceeds from an assignment, or sale, of a workers' compensation lien, constitutes "reimbursement" to the employer. This then triggers the employer's obligation under § 5(b) of the Workers Compensation Act to pay the plaintiff's attorney a 25% fee, and proportionate costs, out of the lien recovery proceeds. The court also rejected the contention that where a direct defendant that purchased a workers' compensation lien for a percentage of the recoverable amount can nonetheless claim a set off for the entire amount.

- ***Photos of Vehicles Held Admissible***

*Fronabarger v Burns*, 385 Ill.App.3d 560 (5<sup>th</sup> Dist. 2008). In this auto accident case, the defendant introduced photographs showing minimal property damage, and argued that the plaintiff could not have experienced enough of an impact to cause the injuries claimed. This was a common practice until the First District *DiCasola* decision in 2003. In *Fronabarger*, the defendant did not have an expert biomechanical engineer testify, but did offer the testimony of a neurologist who opined that plaintiff sustained no injuries in the accident, and that as the photos showed no evidence of significant impact, it was unlikely that the passenger of the vehicle suffered any impact. *Fronabarger* ratifies what many defense counsel have been doing for some time to avoid the *DiCasola* case and introduce photos showing minimal impact.

- ***Joint Venturer Entitled to Workers' Comp Immunity***

*Iorger v Halvorsen*, 2008 WL 5246049 (Ill. 2008). In this case, the plaintiff ironworker was injured while employed by Midwest, and repairing a bridge for IDOT. Plaintiff sued Halvorsen, a company that had formed a joint venture with Midwest to repair the bridge. The contract documents indicated that the two companies were joint venturers, and the IDOT contract was with the joint venture. The Illinois Supreme Court held that Halvorsen was immune from suit, under the exclusive remedy provision of the Workers' Compensation Act.

- ***Auto Insurance—Mandatory Omnibus Insureds***

*State Farm Mut. Auto. Ins. Co. v. Enterprise Leasing Co. of Chicago*, 2008 WL 4981357 (1st Dist. 2008). Although automotive liability policies must, by statute, extend

coverage to those who drive the insured's vehicle with permission—referred to as an “omnibus insured”—the statute does not extend such coverage to a rented automobile.

*Zurich American Ins. Co. v. Key Cartage, Inc.*, 896 N.E.2d 400 (1st Dist. 2008). Statute requiring automotive liability policies to extend coverage to those who drive the insured's vehicle with permission—referred to as an “omnibus insured”—also applies to policies of commercial trucking insurance.

- ***Homeowner's Coverage—Use of an Auto Exclusion***

*State Farm Fire & Cas. Co. v. Perez*, 2008 WL 5381959 (1st Dist. 2008). State Farm sought a declaration that it was not obligated to defend or indemnify its insured under a homeowner's policy because the underlying complaint sought damages “arising out of the ownership maintenance, [or] use . . . of a motor vehicle,” and coverage was, therefore, excluded by the policy. The underlying plaintiff, Perez, contended that State Farm was obligated to defend and indemnify its insured, Baeza, because the underlying complaint contained a count for Baeza's negligent modification of the vehicle's safety restraint system. Perez contended that this second count did not fall within the State Farm homeowner's policy exclusion for damages “arising out of the ownership, maintenance, [or] use . . . of a motor vehicle.” The court rejected Perez' contention, reasoning that the injury itself would not have occurred “but for” Baeza's *use* of the vehicle: “No matter how negligent Baeza was in modifying the seats and seat belt restraint system, the modifications could not, on their own, proximately cause injuries to Perez without the actual operation of the car.”

- ***Professional Liability Coverage—Insured Not Performing Professional Service***

*Westport Ins. Corp. v. Jackson National Life Ins. Co.*, 2008 WL 5378256 (2nd Dist. 2008). The Handleman Insurance agency was insured under an E&O policy issued by Westport. In a class action complaint, Handleman was sued for sending unsolicited fax transmissions in violation of federal law. Class action plaintiffs settled with Handleman and took an assignment against Westport. Westport filed a declaratory judgment action against Handleman and the class action plaintiffs, contending that when Handleman sent the faxes, it was not “rendering services for others as a licensed insurance agent,” as was required for coverage under the Westport policy. The court agreed with Westport. The analysis focused on the fact that a “professional” must perform more than an ordinary task to be considered a “professional,” i.e., a task does not become a “professional service” merely because it is rendered by a professional. The court determined that the fax transmitted by Handleman did not contain any evaluation, calculation or other specific information. The fax transmission recipients, therefore, had not received a professional service, only an invitation to have a professional service performed for them. Consequently, the class action plaintiffs' damages for the mere

receipt of the fax transmissions did not arise from “rendering services for other as a licensed insurance agent” as required for coverage under the Westport policy.

- ***Duty to Defend—Extrinsic Evidence***

*Clarendon America Ins. Co. v. B.G.K. Security Services, Inc.*, 2008 WL 5382331 (1<sup>st</sup> Dist. 2008). CGL insurer Clarendon sought a declaration that it was not obligated to defend or indemnify its named insured, B.G.K. Security Services, Inc., because BGK’s liability in the underlying case arose from its actions while engaged in a joint venture, and the Clarendon policy excluded coverage for such liability. BGK moved for summary judgment as to Clarendon’s duty to defend, contending that the underlying complaint did not allege BGK was acting as a joint venture. In response, Clarendon argued that the trial court should consider evidence extrinsic to the underlying complaint, including the joint venture agreement between BGK and another entity. The trial court refused to consider the joint venture agreement and granted partial summary judgment in favor of BGK; Clarendon appealed.

The court held that the trial court properly refused to consider the extrinsic evidence and, that regardless, the Clarendon exclusion was vague. Regarding extrinsic evidence, the court noted that extrinsic evidence could be considered when ruling on an insurer’s duty to defend, but not if it involved an “ultimate fact” or might estop a party from litigating an issue crucial to the insured’s liability in the underlying case. The court held that finding BGK was engaged in a joint venture could affect BGK’s liability in the underlying case and, therefore, any consideration of extrinsic evidence or ruling on that issue would be improper. The court also noted that, regardless, the Clarendon exclusion for conduct arising from a joint venture was ambiguous. The exclusion read:

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

The court found that language ambiguous “because nothing in the provision requires the organization indicated as the ‘Named Insured’ to be named as the joint venture.” In other words, it was unclear whether BGK would have had to identify itself as a member in a joint venture or identify the name of the joint venture in order to avoid triggering the exclusion.

*American Economy Ins. Co. v. DePaul Univ.*, 383 Ill. App. 3d 172 (1st Dist. 2008). In evaluating its duty to defend an insured from liability in a direct action lawsuit, an insurer should also consider allegations contained in a third-party complaint. Such consideration is proper even where the third-party complaint has been prepared by the party seeking coverage for its liability as a direct defendant. **Note:** This case is now on review to the Supreme Court.

- ***Estoppel***

*State Farm Fire & Cas. Co. v. Martinez*, 384 Ill. App. 3d 494 (1st Dist. 2008). Homeowner's insurer was not estopped from denying coverage where it defended named insured under a reservation of rights, subsequently withdrew the defense, and then filed a declaratory judgment action over two years later. Insureds failed to establish that they detrimentally relied on insurer's initial decision to undertake the defense.

- ***Additional Insureds***

*United Stationers Supply Co. v. Zurich American Ins. Co.*, 896 N.E.2d 425 (1st Dist. 2008). A subcontractor sought additional insured coverage under a general contractor's CGL policy, pursuant to a subcontractor's certificate of insurance ("COI"). The subcontractor contended that the COI identified the subcontractor as an additional insured on the general contractor's CGL policy. The general contractor's CGL insurer argued that the terms of the CGL policy controlled, and that the terms of the CGL policy did not confer additional insured status to the subcontractor. The CGL insurer prevailed on a dispositive motion and subcontractor appealed.

The court affirmed, holding that: 1) the subcontractor was not listed as an additional insured in the CGL policy; 2) the blanket additional insured endorsement did not apply because the contract at issue did not require the general contractor to add the subcontractor as an additional insured; 3) the general and subcontractor did not otherwise express any intent that the subcontractor would be added as an additional insured; and 4) the COI contained a sufficiently clear disclaimer to put the subcontractor on notice that the COI did not confer any coverage that was not otherwise provided in the CGL policy.

- ***Construction Defect Coverage***

*Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731 (2nd Dist. 2008). A homeowner sued a builder for damage to his home, and diminished value, resulting from improper soil compaction. The builder's CGL insurer sought a declaratory judgment that it was not obligated to defend or indemnify the builder, because there was no "occurrence" or "property damage" as those terms were defined in the CGL policy. The builder prevailed on its dispositive motion and the CGL insurer appealed.