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New Deadlines To Pay Settlements

A new Illinois law will impose strict time constraints on defendants settling cases. As of January 1, 2014, settling defendants must provide a release to the plaintiff within fourteen days of a settlement and then make payment within thirty days after receiving the signed release. Defendants will incur additional costs, including interest, if they fail to meet these deadlines.

The law does not account for a number of variables that often delay settlements, and we can expect both sides to spend more time in court arguing about when the clock starts to run. In the meantime, work closely with your defense counsel to understand which deadlines apply to your settlements.



For over 40 years, Purcell & Wardrobe has built its reputation as trial attorneys successfully defending clients in complex litigation while adhering to the highest ethical standards.

What Isn't A "Good Faith" Settlement?

A settlement between a defendant and a plaintiff must be found to be in good faith when the case remains pending against other defendants. Once a defendant settles in good faith, it has no further contribution liability



to the remaining defendants. A settlement will be found not to be in good faith if the parties engaged in wrongful conduct, collusion or fraud, but otherwise there is no formula for determining good faith. A recent decision demonstrates how difficult it is to establish wrongful conduct.

In *Miranda v. The Walsh Group, Ltd.*, 2013 IL App (1st) 122674, an intoxicated driver lost control of her car and collided with a concrete median barrier, causing her car to overturn and slide across the center-line until it struck the plaintiffs' vehicle. A minor passenger in the plaintiffs' vehicle sustained a serious brain injury. The intoxicated driver's blood alcohol level was .229, nearly three times the legal limit, and she

settled with the plaintiffs for the \$20,000 limit on her auto policy.

The plaintiffs continued their negligence lawsuit against Walsh Construction, who placed the concrete barrier on the roadway. Walsh Construction brought a third-party action against the intoxicated driver, which was dismissed because the \$20,000 settlement was found to be in good faith. On appeal, Walsh Construction argued that the settlement was not proportionate to the intoxicated driver's relative fault.

The court noted that an "advantageous" or "small" settlement is not an indication of bad faith. Even though the intoxicated driver's conduct was egregious and criminal, there was no sign of wrongful conduct by the settling parties. The court noted that the intoxicated driver had no assets or means to satisfy a judgment against her. "While it was likely that damages would far surpass [her] insurance policy limit and she had no potential defenses... the plaintiff here would likely be unable to recover any amount above the insurance policy limit." The \$20,000 was in good faith because it was the "best amount available under poor circumstances."

The *Miranda* court also reiterated that the decision in *Ready v. United/Goedecke Services, Inc.*, 232 Ill.2d 372 (2008), which excluded settling defendants from the verdict form for purposes of joint and several liability, does not impact the good faith determination of a settlement.

This decision illustrates that good faith settlements have little to do with a party's relative share of fault and everything to do with collectability. The majority opinion noted that the intoxicated driver had "no potential defenses," yet she escaped from a brain damage case for only \$20,000. The dissenting opinion characterized Walsh Construction's share of fault as "an infinitesimal fraction" of the intoxicated driver's share.

The dissent went on to explain the unfairness of this good faith standard and, effectively, the *Ready* decision. "If Walsh goes to trial by itself, the tragic facts could very well persuade the jury to award a large verdict. [The intoxicated driver's] drop-in-the-bucket settlement takes her off the stage at the jury trial... The good-faith finding bars Walsh from seeking contribution from [her]. That being the case, the jury is highly unlikely to precisely and properly apportion Walsh's degree of fault vis-à-vis that of the absent [intoxicated driver]." The dissent voiced concern that the amount of money the victim receives is not the predominant factor and the "relative degree of fault is just as important."

While it is encouraging to see the dissent articulate this perspective, it provides little solace to defendants. The unfairness in the system is most evident when there is a highly culpable defendant with minimal insurance and a minimally culpable defendant with deep pockets. In such a case, the plaintiff can settle out the culpable party and take a shot at the deeper pockets. The risk, as noted by the *Miranda* dissent, is that the jury cannot properly apportion the fault of the deep-pocketed defendant, which increases the value of the case exponentially.

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A Roadmap of an Illinois Department of Human Rights Claim

When an employer allegedly discriminates on the basis of race, color, religion, sex, national origin, age, or

disability, a complainant (person who was discriminated against) has the option of filing his or her Charge of Discrimination with the Illinois Department of Human Rights ("IDHR"), the Equal Employment Opportunity Commission ("EEOC"), or both, provided certain requirements are met. The EEOC generally defers to the IDHR in investigating a complainant's claims and rendering a decision if the Charge has been filed with both commissions, *i.e.* cross-filed. If there is a letter "A", "E", or "F" in the Charge number, then the Charge has been cross-filed with the EEOC.



Upon receipt of a perfected or notarized Charge of Discrimination, the IDHR will issue a copy of the Charge within 10 days and a request for information in the form of a questionnaire. The respondent, *i.e.* the person charged with discrimination, must answer the Charge with admissions or denials of the allegations contained within and generally explain in a position statement the non-discriminatory basis for the action complained of in the Charge. The questionnaire typically requests documents and information about the respondent. For example the number of its employees, whether any other charges of discrimination have been filed against the respondent, and specific information about the complainant.

Thereafter, the IDHR will assign an investigator and he or she will contact both parties to determine whether both would like to participate in mediation. If a settlement is reached but not accepted within 10 days, a settlement is not reached in mediation, or the parties do not want to engage in mediation, then the investigator will begin investigating the claim and conduct a fact-finding conference.

At the fact-finding conference, the complainant and respondent are asked a series of questions, not under oath, and have the opportunity to present their side of the argument. An attorney is permitted to be present and advise his or her client, but may not ask any questions of anyone. Following the fact-finding conference, an investigator may request additional information and/or request to speak with additional witnesses.

Once the investigation is complete, the investigator will issue a report and recommend a finding. A finding of *substantial evidence* means that there is enough evidence for the complainant to take the case before the Human Rights Commission ("HRC"). The complainant may then request within 14 days that the IDHR file a complaint with the HRC or elect to file the case in the Illinois circuit courts within 90 days. If the investigator dismisses the complainant's charge for *lack of substantial evidence*, then the complainant may request a review within 30 days or file a complaint with the Illinois circuit courts within 90 days. If more than 365 days have passed, excluding extensions, and the IDHR has not issued a finding, then the complainant has 90 days to file a complaint with the HRC or file a complaint in the Illinois circuit court.

If the HRC finds that there is discrimination, the HRC may opt to award the following: actual damages for injury or loss suffered; specific relief (for example hire, reinstatement, back pay, etc.); attorney's fees; or other relief to make the complainant whole. A respondent may seek review of an HRC final order within 35 days from the date the decision is issued by petitioning to the appellate court, but must first exhaust other administrative remedies including petitioning the HRC for a re-hearing. 56 Ill. Admin. Code Part 5300.1020; 775 ILCS 5/8-11(B)(1). If the HRC decision is challenged on appeal to the appellate court, the decision cannot be overturned unless it is arbitrary or capricious. *Young v. Illinois Human Rights Com'n*, 362 Ill.Dec. 864 (1st Dist. 2012).



What Is Open and Obvious Is Not Always Obvious

Most of us are familiar with the open and obvious doctrine in Illinois. In general, property owners are not liable for conditions on the land whose danger is known or obvious. Common conditions like fire, bodies of water and height are considered to be obviously dangerous. But the application of the distraction and deliberate encounter exceptions make it very difficult to recognize when the doctrine will bar a plaintiff's claim. Below is a sampling of open and obvious rulings to provide you with some guidance in evaluating your premises claims.



Stores: A plaintiff holding a large mirror he purchased walked into a concrete post outside of a K Mart. The post was not an obvious danger because "it was reasonable that a customer carrying a large item which he had purchased in the store might be distracted and fail to see the post upon exiting the door." *Ward v. K Mart Corp.*, 136 Ill.2d 132 (1990)

A plaintiff exiting a drug store was injured by a "cartnapping barrier" set up outside to prevent shopping carts from being taken off of the premises. The barrier was not an obvious danger because a reasonable person may fail to anticipate the difficulty in passing through it. *Simmons v. American Drug Stores, Inc.*, 329 Ill.App.3d 38 (1st Dist. 2002)

A one-inch ridge in the pavement just outside of a grocery store was not an obvious danger because the store should have reasonably anticipated that a plaintiff may become momentarily distracted. *Green v. Jewel Food Stores, Inc.*, 343 Ill.App.3d 830 (1st Dist. 2003)

Gravel: Gravel around a pothole in a parking lot was an obvious danger because the plaintiff knew that it could cause his motorcycle to slip even at slow speeds. *Ford v. Round Barn True Value, Inc.*, 377 Ill.App.3d 1109

(4th Dist. 2007)

Glass Doors: Floor-to-ceiling clear glass doors at a bank where the plaintiff had been once before were not obviously dangerous. *King v. NLSB f/k/a/ New Lenox State Bank*, 313 Ill.App.3d 963 (3rd Dist. 2000)

Stairs: An intoxicated plaintiff was barred from recovery when she fell down stairs because they were held to be an obvious danger. *Ruppel v. Hyeon Jin, Inc.*, 272 Ill.App.3d 527 (1st Dist. 1995).

Tire ruts: A rut on a construction site is an obvious danger. *Deibert v. Bauer Bros. Const. Co., Inc.*, 141 Ill.2d 430 (1990); *Wilfong v. L.J. Dodd Const.*, 401 Ill.App.3d 1044 (2d Dist. 2010). Even though the *Deibert* court recognized that the risks from ruts are obvious, workers may become distracted (e.g., falling debris at a construction site) and the open and obvious doctrine would not bar a plaintiff's claim in those circumstances.

Pallets: An empty wood pallet on a store floor was an obvious danger. *Kleiber v. Freeport Farm and Fleet, Inc.*, 406 Ill.App.3d 249 (3d Dist. 2010)

Power lines: Electric power lines were an obvious danger when a painter was electrocuted while painting a grain bin at the defendant's farm. *Dinkins v. Ebbersten*, 234 Ill.App.3d 978 (4th Dist. 1992)

Water: Swimming pools and bodies of water are considered obvious dangers, including for injuries resulting from diving into shallow depths. *Bucheleres v. Chicago Park Dist.*, 171 Ill.2d 435 (1996); *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill.2d 110 (1995).

Children: A duty may be owed to children for conditions that are otherwise obvious to adults or even teenagers. A treadmill was not deemed an obvious danger to children. *Qureshi v. Ahmed*, 394 Ill.App.3d 883 (1st Dist. 2009) A four-foot high dirt pile on a playground was not an obvious risk to a child who was injured riding his bicycle on the pile. *Grant v. South Roxana Dad's Club*, 381 Ill.App.3d 665 (5th Dist. 2008) However, jumping aboard a slow-moving train was an obvious danger, despite lack of warning signs and fencing to prevent minors from accessing the tracks. *Choate v. Indiana Harbor Belt Railway Co.*, 2012 IL 112948.

There is no bright line rule to be gleaned from the cases interpreting the open and obvious doctrine. Defendants stand their best chance of prevailing under this defense when they establish that the plaintiffs were aware of the hazard before the accident. For instance, no duties were owed to a plaintiff who tripped over a fan or one who tripped on a bicycle when they had seen those objects before encountering them. *True v. Greenwood Manor West, Inc.*, 316 Ill.App.3d 676 (4th Dist. 2000); *Belluomini v. Stratford Green Condo. Assoc.*, 346 Ill.App.3d 687 (2d Dist. 2004).



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