



Purcell & Wardrobe Chtd.

It has been another eventful summer for P&W in and out of the courtroom. The warm weather brought us two defense verdicts at trial and multiple dismissals. All the while we have been renovating our offices, updating our technology and expanding our team to better serve our clients.

Our latest newsletter covers new legal issues ranging from climate change to criminal background checks for employers. Let us know what you think.



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.

Municipal Liability for Climate Change?



Earlier this year, Illinois Farmers Insurance Company filed class action lawsuits in nine Illinois counties against the City of Chicago and more than 100 surrounding municipalities. Our office was retained to represent several municipalities. The suits alleged that the municipalities failed

to adequately plan for climate change that was responsible for the heavy rains and flooding in April 2013. Farmers stated that the municipalities had "adopted the scientific principle that climate change has caused increases in rainfall amount" and to help address the problem had adopted the Chicago Climate Action Plan. Farmers alleged that the municipalities failed to properly plan for the increased rainfall caused by climate change, which in turn caused Farmers to pay out claims for damage to 600 homes in the Chicagoland area.

Our office removed two of the actions to federal court before most defendants had been served and forced Farmers to actively litigate the case. This, coupled with a growing backlash from local policyholders, caused Farmers to voluntarily dismiss the lawsuit.

Unfortunately, this may not be the last we see of climate change-related lawsuits against local governments. "The Farmers suit is likely only the first, not the last of its type that we are going to see," said Melrose Park Mayor Ronald M. Serpico for a recent article in the Huffington Post. "The General Assembly should consider strengthening the local tort immunity statute to protect us against climate change lawsuits."



Illinois Verdicts By the Numbers

The Jury Verdict Reporter, located in Chicago, tracks Illinois verdicts by county and looks for patterns and trends where available. Based on the numbers, Cook County remains a more difficult venue to obtain a defense verdict versus the surrounding counties, and defendants can expect to pay higher awards too.

In the "collar counties" (Kane, DuPage, Lake, Will, McHenry), 51.4% of trials resulted in a defense verdict between 2010 and 2012. This includes a 78.2% success rate in medical malpractice trials. In that same period, defendants obtained favorable verdicts in 44.2% of trials in Cook County, including 69.8% in medical malpractice cases. For traffic-related cases, plaintiffs prevailed at around the same rate throughout the state, but defendants could expect to pay about \$18,000 more on an award in Cook County.

From 2008 to 2012, the average wrongful death verdict in Cook County was \$3,370,027. The highest verdict for a single decedent was \$16,560,000. By contrast, the rest of Illinois had an average wrongful death verdict of



\$2,868,887 and a high of \$8,750,000.

There is a sense that Cook County is improving as a venue for defendants. While this may be true, defendants are statistically likely to fare better at trial on liability and damages outside of Cook County. Until the numbers tell us differently, we recommend continuing to transfer venue out of Cook County when possible.

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Implications of Illinois' New "Ban the Box" Law



On July 19, 2014, Governor Patrick Quinn signed into law the "Job Opportunities for Qualified Applications Act", the so-called "Ban the Box" law. The nickname is derived from the checkbox usually found on employment applications asking whether the applicant has ever been convicted of a crime.

Illinois is the fifth state after Hawaii, Massachusetts, Minnesota and Rhode Island to require both public- and private-sector employers to remove questions regarding criminal history from their employment applications. New Jersey very recently followed suit. Cities such as Seattle, Philadelphia, Buffalo and Baltimore have passed "Ban the Box" ordinances as well.

"Ban the Box" initiatives are based on the notion that ex-offenders are deserving of a second chance. Proponents of such measures argue that employers all too often summarily reject job seekers who check "the box" on their employment applications, irrespective of their qualifications. Proponents say that employers also fail to reasonably consider how much time has passed since the commission of the crime and the nature of the crime itself.

The scope of a ban-the-box law depends on the jurisdiction that has it in place. Illinois' law prohibits employment agencies and private employers with 15 or more employees from inquiring about, requiring disclosure of, or considering an applicant's criminal history until the employee is called in for an interview. Where there is no interview, these restrictions remain in place until after a provisional job offer has been extended.

The new law does not allow job applicants a private right of action to sue the employer for violations. However, it opens the door for negligent hiring claims against employers for failing to conduct criminal background checks on hired individuals whose actions result in property damage or bodily injury. Can the law be used as a defense for such an employer? Or will there be more negligent hiring claims because employers fail to perform a follow-up background check after an individual is hired?

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Illinois Appellate Court Narrows "Targeted Tender" Doctrine

On May 5, the First District of the Illinois Appellate Court issued a decision in *AMCO Insurance Co. v. Cincinnati Insurance Co.*, 2013 IL App (1st) 122856, that may limit the scope of the Illinois doctrine of "targeted tender" or "selective tender." As you may already know, targeted tender is based on the premise that when an insured has more than one policy available at the same level of coverage to cover it against the same claim, it should be able to decide the order in which those policies will provide the insured with a defense and indemnity,

regardless of the policies' Other Insurance clauses. Most often, this means that the insured will "target" a policy on which it is an additional insured, while "deselecting" its own policy to protect itself against the possibilities of increased premiums, cancellation, or non-renewal.

In the underlying lawsuit, an employee of subcontractor Edward Allen Construction was injured at a construction project and sued the general contractor (Hartz), the carpentry subcontractor (Cimarron), and the concrete subcontractor (Van Der Laan), which were insured by Cincinnati, AMCO, and Erie, respectively. Hartz made targeted tenders to AMCO and Erie. The underlying suit settled with AMCO paying \$450,000 under its primary policy for Cimarron, \$550,000 under its primary policy for Hartz, and \$450,000 under its umbrella policy for Hartz. The twist in the AMCO case is that Hartz and Cimarron also purportedly assigned to AMCO any rights they had against Erie or Cincinnati. AMCO then filed an action against Erie and Cincinnati, arguing that Hartz had assigned the right to deactivate its prior targeted tenders and that AMCO could therefore seek to recover from Cincinnati under theories based in equitable subrogation, equitable contribution, or the policies' "other insurance" clauses.



The trial court dismissed AMCO's claims against Cincinnati, and the appellate court affirmed. The court noted that courts in previous cases had criticized and refused to expand the targeted tender doctrine. AMCO argued that allowing the targeted tender against it to survive after settlement would improperly expand the doctrine. However, the appellate court agreed with Cincinnati that it was instead AMCO who sought to expand the doctrine by seeking to allow assignment of the right to target and deselect policies. Targeted tender remains a right that only the insured can assert.

Although *AMCO v. Cincinnati* exemplifies a recent trend for courts to limit the scope of the targeted tender doctrine, targeted tender remains the law in Illinois, at least in construction cases. Our attorneys are well-versed in issues related to the scope and applicability of targeted tenders, and we are available to advise you on the doctrine



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