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OVER 40 YEARS OF EXCELLENCE

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

Busy Summer at P&W

Federal Appellate Court Affirms Summary Judgment in Products Case

Jason Friedl succeeded in having the Sixth Circuit Court of Appeals affirm summary judgment in a product liability and consumer protection case involving allegedly dangerous "rocker bottom" shoes sold at Payless Shoes. The appellate court found no duty, no breach of warranty or fraud, and no proof of causation.

P&W Defeats Claims for Cost of Repairs to Neighbor's

Property

R.J. VanSwol and Tom Underwood obtained summary judgment against demands that a restaurant's insurance company shoulder the cost of repairs for the pet store next door after a fire destroyed the restaurant. The federal court for the Central District of Illinois held that the pet store's insurer could not bring a claim for equitable contribution or subrogation against the restaurant's insurer because the insurers did not insure the same parties. In a related declaratory judgment action in state court, we then obtained a judgment that we had no duty to defend the restaurant against the claims of the pet store's insurer.

Court Dismisses Two Suits Against Loss Adjusters

Mike Sanders obtained the dismissal of two suits against loss adjusters arising from their role in adjusting a water loss at a historically significant high-rise building in Dallas. The building's "boiler and machinery" carrier alleged that the loss adjusters should have put it on notice after another carrier retained them. We transferred the suits from two separate courts to the Northern District of Illinois, where the court dismissed both suits on the grounds that the insurer could not bring claims for purely economic loss under a tort theory alleging that the loss adjusters were negligent.

P&W Persuades Federal Court to Defer to State-Court Actions

Mike Sanders, Tom Underwood, and R.J. VanSwol, working on behalf of an umbrella insurer, successfully stayed a forum-shopping federal action that another insurance group had filed to get away from a pending state-court declaratory action. After years of state-court coverage litigation, the other insurers filed a purported interpleader action in the Northern District of Illinois and deposited their limits of insurance there. We argued that the federal court should abstain because the same issues were already pending in state court. The federal judge agreed and stayed the interpleader action.

Tort Reform in Illinois . . . Again

Illinois' recently elected governor, Bruce Rauner, has been campaigning for support for his "Turnaround Agenda" to help repair the state's various financial problems. One of the elements of the agenda is lawsuit reform because "Illinois has one of the worst lawsuit climates in the nation, ranking 46 out of all 50 states." He calls these "common sense reforms to restore sanity to our courts."

Venue

In order to limit plaintiffs from "venue shopping," the governor's original proposal was to allow plaintiffs to sue defendants only where they have an office, as opposed to where they "do business." Currently, Illinois allows plaintiffs to select a venue if the defendant conducts a sufficient amount of business in that venue. When the original proposal failed to gain support, the governor proposed a compromise giving priority to a county where a defendant maintains offices as being an appropriate venue, but if the defendant has no offices in the state, allowing suit where the defendant does business.

Jury Composition

Our last newsletter discussed the recent law that reduced the number of jurors in all civil cases from 6 to 12 and increased juror pay to $25 for the first day and $50 per day thereafter. Originally, the governor proposed repealing the law, but then abandoned any reform on this issue.

Joint and Several Liability
As a result of *Ready v. United/Goedecke Services*, 232 Ill.2d 369 (2009), the law prohibits the jury from allocating fault to a settled defendant for purposes of determining joint and several liability. This allows plaintiffs to settle with highly culpable defendants and target minimally culpable, "deep-pocketed defendants." The original reform proposal was to have the verdict form include the fault of any party "who could have been sued" by plaintiffs. The governor explains that this would allow defendants to point to other potentially liable defendants, even if they are not named in the lawsuit, in order to reduce their own liability. The new proposal seeks to increase the threshold for joint liability to 50% from 25%.

Medical Expense Awards
Illinois law allows for the introduction of any medical expense billed when determining damages. Commenting on the unfairness of the collateral source rule, the governor notes "while doctors and hospitals may bill large amounts, only a small percentage of those bills are actually paid by the patient... this results in inflated medical expense verdicts." To this end, he proposed that medical expenses should be limited to only those actually paid by the patient with certain accommodations for uninsured plaintiffs.

The governor's proposals would be welcomed by defendants in tort litigation and bring Illinois in line with many other states. But even if the tort reform plan is passed by the legislature, it will only be a matter of time before the courts weigh in. The Illinois Supreme Court has not been kind to reform measures in the recent past. *Lebron v. Gottlieb Memorial Hosp.*, 237 Ill.2d 217 (2010) (caps on non-economic damages in medical malpractice cases were unconstitutional); *Ready v. United/Goedecke Services*, 232 Ill.2d 369 (2009) (fault of settling defendants is not to be considered for purposes of joint/several liability); *Best v. Taylor Machine Works*, 179 Ill.2d 367 (1997) (tort reform known as the Civil Justice Reform Amendments of 1995 was unconstitutional, including a $500,000 damage cap and elimination of joint liability).

The Many Faces of Indemnity in Illinois

Courts and litigants often struggle with claims seeking to enforce a contractual indemnification provision because it is not always clear what is recoverable or enforceable. Can a party shift its losses for its own wrongful conduct to another? Are indemnity claims satisfied by procuring insurance for another? We will discuss the possibilities below with an imagined contract in which Alpha Company agrees to indemnify Bravo Corp.

Contractual Indemnity-Shifting Liability
Traditionally, under Illinois law, indemnity provisions have been read narrowly. *See, e.g.*, *Westinghouse Elec. Elevator Co. v. LaSalle Monroe Bldg. Corp.*, 395 Ill. 429 (1946); *Karsner v. Lechters Ill., Inc.*, 331 Ill.App.3d 474 (3d Dist. 2002); *McNiff v. MIllard Maint. Serv. Co.*, 303 Ill.App.3d 1074 (1st Dist. 1999). Alpha will not be liable to indemnify Bravo for damages arising out of Bravo's own negligence unless the contract language is "clear and explicit" or the intention is "unequivocal." *Buenz v. Frontline Trans. Co.*, 227 Ill.2d 302, 309 (2008). However, the *Buenz* Court departed from earlier cases in holding that an agreement to indemnify and hold harmless a party for "any and all claims" can be sufficiently clear and explicit to include indemnity for that party's own negligence. The Court found that this catchall language is sufficient because it is "all inclusive" without limiting the indemnity agreement to losses arising from the indemnitor's negligence.

If the contract here does not limit the scope of Alpha's indemnification obligation to Bravo's liability arising from Alpha's *negligence*, but includes any liability arising from Alpha's *operations*, then Bravo could transfer the entire loss-including liability for its own negligence-to Alpha under the indemnity agreement, even if Alpha itself is only minimally culpable. A broadly worded indemnification provision could be a game-changer for Alpha and

perhaps its insurer, which may cover the indemnity claim as liability assumed in an "insured contract" (although this presents a host of additional coverage issues). It is important for Alpha and its insurer to examine these provisions carefully and early in the case in order to assess their exposure properly.

Anti-Indemnity Statutes & *Kotecki* Waivers
Illinois does not permit a company like Bravo to seek indemnity for its own negligence in every setting. The legislature has enacted "anti-indemnity" statutes that prohibit transferring risk in cases involving construction, 740 ILCS 35/1, and real property leases, 765 ILCS 705/1, and that prevent exculpatory clauses in the context of healthcare, 225 ILCS 60/29, and bailments, 810 ILCS 5/7-204. So what happens to the "indemnity" provision if Bravo has retained Alpha as a construction subcontractor?

Although a court would hold that Alpha cannot owe indemnity for Bravo's own negligence, it would still try to give the clause some meaning by treating it as Alpha's agreement to waive any limits it would otherwise have on Bravo's contribution claim. This usually comes up if an Alpha employee is injured and sues Bravo, which brings a third-party claim against Alpha. The Workers' Compensation Act would ordinarily limit Alpha's contribution liability to the amount of its workers' compensation liability, known as its "*Kotecki* cap" based on *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155 (1991), but a court could find that the contract's apparent indemnity clause is really a "*Kotecki* waiver." *See also Va. Sur. Co. v. N. Ins. Co. of N.Y.*, 224 Ill.2d 550 (2007); *Braye v. Archer-Daniels-Midland Co.*, 175 Ill.2d 201 (1997); *Pierre Condo. Ass'n v. Lincoln Park W. Assocs. LLC*, 378 Ill.App.3d 770 (1st Dist. 2007). An indemnification provision in a construction contract can be void by statute and operate as a *Kotecki* waiver at the same time. While Alpha does not owe indemnity to Bravo, Alpha has waived its cap on liability and owes unlimited contribution to Bravo for Alpha's *pro rata* share of the award.

Purchasing Insurance
The contract may have also required Alpha to procure coverage for Bravo as an additional insured. An agreement to procure insurance is not an invalid indemnity agreement. If the claim against Bravo comes within the scope of its coverage as an additional insured, then Alpha will be entitled to a setoff against Bravo's contribution claim in the amount of the insurance that Alpha procured for Bravo. Bravo's contribution claim against Alpha will survive only to the extent that Bravo (or Bravo's own insurer) has to pay the plaintiff. *See Mondschein v. Power Constr. Co.*, 404 Ill.App.3d 601 (1st Dist. 2010); *Briseno v. Chi. Union Station Co.*, 197 Ill.App.3d 902 (1st Dist. 1990). Efforts to resolve the case may involve Alpha's waiver of all or part of its workers' compensation lien, coverage for the contribution claim under Alpha's employer's liability policy, coverage for Bravo under Alpha's general liability policy, and an umbrella policy that applies above both.

It is critically important to understand what risk exposure you have if you're Alpha versus Bravo in a case. We commonly see parties misinterpreting, if not ignoring, the consequences of an indemnity provision in a contract. As complicated as these issues can become, our office has had great success in navigating them as either defense counsel or coverage counsel, and we will be glad to answer any questions you may have concerning this area of Illinois law.

The U.S. Supreme Court Weighs in on EEOC Conciliation

The EEOC investigates charges of discrimination, harassment, or a hostile work environment to decide whether there is reasonable cause to support the charge. If the EEOC finds reasonable cause, Title VII of the Civil Rights Act requires the EEOC to engage in informal conciliation efforts before it files suit. The conciliation process is different from an EEOC mediation, which takes place after a charge is filed but before there is a finding. In this process, the EEOC represents the interests of any claimants and decides whether to accept any offer by the employer to remedy the alleged unlawful practice and compensate the claimants.

Recently, the United States Supreme Court examined the scope of judicial review of the EEOC's efforts to fulfill its conciliation obligations. In *Mach Mining, LLC v. EEOC*, the Supreme Court reiterated that the EEOC

has a statutory duty to "first endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The Supreme Court noted that it is the EEOC's duty to tell the employer about the claim, including what unlawful practice has harmed the claimed injured person or class of persons, and it must provide the employer with an opportunity to discuss the matter in an effort to reach voluntary compliance. However, the Supreme Court found the scope of judicial review was limited to whether the EEOC complied with those duties. Moreover, the EEOC can make a prima facie showing of its compliance through its own affidavit asserting compliance. The burden is then on the employer to provide credible evidence that the EEOC did not meet these standards, and convince the court to conduct fact-finding to decide the limited issue. Even if the employer proves the EEOC did not engage in good-faith conciliation, all the trial court can do is stay the case while the EEOC fulfills its obligation to engage in the conciliation process to try to obtain voluntary compliance. Additionally, the EEOC's strategic decisions as to how to conduct the conciliation are not subject to review.

While the Supreme Court decision is an improvement over the Seventh Circuit ruling that there is no judicial review of the conciliation process, the ruling only allows a very limited judicial review and a limited remedy. The EEOC still holds the ultimate authority to accept an employer's offered settlement or bring a lawsuit. Moreover, its reasons and strategy for rejecting a settlement proposal from the employer are not subject to review. While a court may review whether the EEOC has complied with the conciliation requirements, the review ends there. An employer may later argue that the EEOC did not engage in the conciliation process in good faith, but the threshold is low for the EEOC to prove that it met its statutory requirement. Finally, the only remedy for a failure of the EEOC to engage in a good-faith conciliation is not dismissal of the lawsuit but merely a return to the conciliation process. The *Mach Mining* unanimous ruling still leaves the EEOC with ultimate authority as how to conduct the conciliation efforts and whether to settle or file suit.

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