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The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Equitable apportionment applies to subrogation claims January 1, 2013

By Mark Rouleau ©, Rockford

Illinois has finally joined the majority of jurisdictions[1] adopting an equitably modified version of the "make whole" doctrine for subrogation claims. The "Make-Whole" or "Made Whole" Doctrine" is an equitable principle that a third party insurance company claimant will not receive any of the proceeds from the settlement or adjudication of a claim, except to the extent that the settlement funds exceed the amount necessary to fully compensate the insured for the loss suffered.[2] Only after the injured party has been fully compensated for all the loss does the third party claimant receive payment from the settlement or judgment.

"Under the "make whole" rule of contract interpretation, absent an agreement to the contrary, an insured who has settled with a third party tortfeasor is liable to an insurer-subrogee, which has discharged its obligation to pay benefits in full, only for the excess received from the wrongdoer and the insurer over the actual loss after deducting costs and expenses. See 16 Mark S. Rhodes, *Couch on Insurance Law,* § 61:64 at pp. 145-47 (2d rev. ed.1983)"[3]

Many courts, however, have allowed this default rule to be overridden by "a boilerplate subrogation clause."[4] Illinois courts have refused to follow this doctrine in the face of clear provisions in insurance policies that the insurer is to be paid first. *Gibson v. Country Mutual Insurance Co*., 193 Ill.App.3d 87, 139 Ill.Dec. 700, 549 N.E.2d 23 (1990). Thus, *Gibson* declined to follow the

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Does a corporation need a lawyer in state court?

By Patrick M. Kinnally, Kinnally Flaherty Krentz & Loran, PC, Aurora

For those of us who represent corporations in Illinois trial courts, it has seemed customary that if a corporation wishes to litigate or defend a claim, that entity can only appear by counsel. In federal court, the rule of corporate representation by a lawyer is clear. A corporation may only appear in federal courts through a licensed attorney. *Rowland v. California Men's Colony*, 506 U.S. 194 (1993). That has been the rule for over 275 years. (*Osborn v. Bank of the United States*, 9 Wheat. 738 (1824)).

Unless you are in a small claims trial court, the Illinois maxim as to corporate representation is ambiguous. (*Downtown Disposal Services, Inc., v. City of Chicago*, 407 Ill.App.3d 822, 347 Ill.Dec. 895, 943 N.E.2d 185 (2011). ("*Downtown*")

As to small claims cases, Illinois Supreme Court Rule 282(b) says:

> Representation of Corporations. No corporation may appear as claimant, assignee, subrogee or counterclaimant in a small claims proceeding, unless represented by counsel. When the amount claimed does not exceed the jurisdictional for small claims, a corporation may defend as a defendant any small claims proceeding in any court of this State through any officer, director, manager, department manager or supervisor of the corporation as though

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made-whole doctrine that has been adopted by other jurisdictions.[5]

Illinois common law provides that when an insurance contract gives the insurer the right to subrogate to the extent of its payment, the contract will be enforced as written, and the insurer will receive full subrogation, even if the insured's losses exceed the amount it recovers from the tortfeasor and the insurer, and the insured is thus not made whole.[6]

Illinois common law on this subject has been criticized in that by subrogation a third party is merely standing in the shoes of the injured person and where the third party is an insurer it has agreed to assume the risk of non-recovery, and has been paid for this by way of premiums.[7]

In this last legislative session the Illinois legislature modified this harsh position taking an equitable middle road approach to reducing claims for subrogation or reimbursement for claims that arise out of the payment of medical expenses (med pay subro claims) or other benefits (think lost income and disability coverage) against claims for personal injury or death. Under this middle of the road approach the subrogation interest of the insurer is neither paid first nor is it paid last but it is reduced proportionately where the recovery is diminished by either (1) comparative fault and/or (2) uncollectibility of the full value of the claim due to limited liability insurance.

> [T]he subrogation claim or other right of reimbursement claim shall be diminished in the same proportion as the personal injury or death estate claimant's recovery is diminished. (770 ILCS 23/50(2) new).

The new statute provides that after reducing the claims for either comparative fault and/or limited liability insurance the party asserting the subrogation claim or other right of reimbursement shall pay their pro rata share of attorney fees and costs of collection codifying the "creation of the fund" doctrine.

Retroactive Application

The new law contains an effective date of January 1, 2013, but does not state on its face whether it applies only to cases that are filed after that date. Initially the case of *Boyd v. Madison Mutual Insurance Co*.[8] would seem to answer this issue. *Boyd* held[9] that the statute[10] requiring the insurer of an underinsured motorist to advance to the insured an amount equal to offer made by the tortfeasor in order for insurer to preserve its subrogation rights could not be applied retroactively because it would deprive insurer of its vested contractual right of subrogation.

Boyd considered the retroactive application of a provision in the insurance code as opposed to the Code of Civil Procedure, and it was decided under the older vested rights analysis that is no longer applicable. The retroactive application of many provisions of the Code of Civil Procedure has been previously considered.[11] The current analysis for such cases requires the court to "first determine if the legislature expressed its intent relative to retroactivity.[12] If the legislature's intent is clear, we must give effect to that intent unless constitutional principles otherwise prohibit the application."[13] Before *Commonwealth Edison Co.*[14] courts followed the vested rights approach to retroactivity, under which legislative intent was largely ignored.[15]

Under *Landgraf v. USI Film Products,*[16] the United States Supreme Court explained that the issue in determining retroactivity is how the substantive rights of the respective parties—either the defendant's right to procedural protections or the plaintiff's right to redress from the alleged wrongs--will be affected.[17] Thus, the question is not whether defendants' substantive right exists or is impacted. The question is whether the legislature's act in changing those rights offends due process.[18]

In general, statutory amendments relating to substantive rights must be applied prospectively while amendments relating to procedures or remedies are applied retroactively.[19] The prospective application of statutes is favored because the retroactive application of new laws is usually considered unfair and notice or warning of the rule should be given in advance.[20] The presumption of prospective application is rebuttable, but only by the act itself, which either by express language or implication, clearly indicates that the legislature intended a retroactive application.[21]

The application of these principles as they respect subrogation claims or rights of reimbursement is difficult. Both subrogation claims and rights of reimbursement generally arise out of a contract[22] that predates the payment of expenses (*i.e.,* medical, disability, property damage, etc.). A distinction between whether a contract provides for "subrogation" as opposed to a "right of reimbursement"[23] could be very important to any analysis, as a right of "reimbursement" does not arise until there is a fund to be reimbursed from.

Using ordinary property rights analysis would indicate that the earliest any vested right to subrogation could exist is upon the payment of funds.[24] However, because most subrogation claims arise in the context of personal injury claims, they cannot be viewed as an assignment of rights,[25] because an assignment of personal injury claims is void as contrary to public policy.[26]

Therefore, a very strong argument can be made that the right to funds recovered only vests and accrues to a subrogated party at the time that the funds are received. Certainly where the claim for funds is expressly based upon a "right of reimbursement," as opposed to a right of "subrogation," the right to reimbursement does not vest until the funds are actually recovered.

What Claims Does the Statute Apply To?

The statute expressly excludes from the statutory "make whole" provisions, liens arising under the Workers' Compensation Act, the Workers' Occupational Diseases Acts, health care liens (including but not limited to liens of long-term care facilities, physicians, and hospitals), claims made to recoup uninsured payments, or underinsured payments under the insurance code.

Does the law apply to ERISA and other claims based in federal law?

The statute might not apply to ERISA claims because those arise under federal law.[27] However, it should also be noted that ERISA saves "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A).[28] Where a state law "regulates insurance" within the meaning of § 514(b)(2)(A), and therefore is not pre-empted

by § 514(a), the law applies to insurance contracts purchased for plans subject to ERISA.[29] An ERISA "employee benefits plan" is not insurance and is therefore not subject to the savings clause.[30] Therefore, the issue should turn on whether the plan is "self-insured" and therefore a benefit plan or if the plan is not self-insured.[31]

In *Cutting v. Jerome Foods, Inc.*,[32] the Seventh Circuit held that where an ERISA plan did not specifically accept or reject the "make whole" doctrine and the administrator of the plan had discretionary authority to interpret language of the plan, the administrator could reasonably conclude that a subrogation clause which refers to "all claims" against a third party to the extent of "any and all payments made" did not incorporate the "make whole" doctrine. *Id.* at 1298.

The Eleventh Circuit[33] and Ninth Circuit,[34] on the other hand, have applied the "make whole" doctrine to ERISA claims. Now that Illinois has adopted a statute on this subject the issue will most certainly again be addressed by the Seventh Circuit.

It is also to be seen whether the Patient Protection and Affordable Care Act (PPACA)[35] and the other related legislation[36] will preempt state laws modifying subrogation clauses in private medical insurance contracts.[37]

How the Statute Works

Unless the parties can agree, the court in which the personal injury or death claim was brought shall determine the amount of comparative fault and the full value of the claim.

The statute does not indicate what type of evidence would be proper to present at a hearing regarding the value of the claim or the amount of contributory negligence, nor does it state whether the parties have a right to have a jury decide those issues. However, on this issue, guidance may be found in cases under the attorney's lien act where it has been held that there is no right to a jury trial at a lien adjudication hearing.[38]

There are no cases discussing the right to a jury trial under the Health Care Lien Act. The Health Care Lien Act provision on adjudication of liens (770 ILCS 23/30) is part of these amendments. The amendment added a provision specifying the manner of service on lien claimants. The remaining portion of the section leaves the law unchanged and states: "the circuit court shall adjudicate the rights of all interested parties and enforce their liens."

Given that such liens were unknown at common law,[39] the language of the statute and the attorney lien decisions, it would seem that the right to a jury trial on these issues does not exist.

The lien adjudication provision (770 ILCS 23/30) now provides for the manner of service necessary to obtain jurisdiction over the potential lien claimant providing: "A petition filed under this Section may be served upon the interested adverse parties by personal service, substitute service, or registered or certified mail." This amendment clarifies the practice, which heretofore required the personal service of a summons.[40]

The concept of the statute is to reduce the subrogation interests by the percentage of both comparative negligence and/or the under-insured status of the defendant. For example if the defendant had $100,000 of insurance coverage and the case settles for substantially less than the full coverage, say $60,000, the plaintiff could only seek a reduction in the subrogation claims by the percentage of the plaintiff's fault causing the settlement to be $60,000 instead of its full value. This would not necessarily require proof of the "full value" if liability evidence is presented establishing that the plaintiff bore some responsibility for their injuries. Strange as it may seem, this puts the plaintiff in a position where he or she is trying to show that they were partially at fault in the incident causing their injuries.

If the case settles for the full policy limits of the defendant the plaintiff can seek a reduction in the subrogation interest by showing that his claim was worth more than the policy limits. In this situation using the same insurance policy coverage of $100,000 and a settlement of $100,000 the plaintiff could potentially show that her claim was worth $5,000,000 and therefore she received only 2% of the full value of the claim and therefore the subrogation interest should be reduced to 2% of its full value.

Under these facts it does not seem that the plaintiff would obtain additional benefit by asserting that the settlement amount also contemplated "comparative fault" unless the $5 million figure was already discounted for "comparative fault." To do otherwise would be to engage in a "double counting". The idea is that one is made whole, not more than whole.

Lacking a verdict in which (1) the liened amounts are separately itemized,[41] and the full value of the claim and (2) any comparative fault adjudicated or (3) an agreement by

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the lien claimant and the injured plaintiff, an evidentiary hearing will be necessary.

Where the adjudication proceeding consists of a hearing *de novo,* a full presentation of all of the evidence could potentially be required. The amount that the subrogated insurer paid for the medical bills is usually less than the full value of those bills.[42] Therefore, one of the issues in the "full value" of the claim is the actual value of the medical services.

One has to wonder how many lien claimants are prepared to hire life care planners, vocational experts, economists, etc., to challenge the full value of the claims, or reconstruction experts etc, safety engineers, etc. for comparative fault issues. Certainly the lien would have to be large for such an undertaking to be financially advisable.

Likewise, the lien claimants are unlikely to know the facts supporting liability or comparative fault. The statute does not define who carries the burden of establishing the comparative fault. As the plaintiff is the party seeking the benefit of reducing the proportionate share of the subrogation interest via "comparative fault" the general rules of proof would place the burden of persuasion and proof on the plaintiff.

If the burden of proving comparative fault is on the plaintiff, it places the plaintiff in a reversal of the roles they undertook to obtain the settlement. In a *de novo* hearing, the plaintiff would be trying to show that they were as much at fault as possible.

In Illinois actions where the statutory modified comparative fault rule[43] applies, the most that should ever be attributed to "comparative fault" in a lien adjudication hearing is 50% because there would be no recovery if the plaintiff were more than 50% at fault.[44] Certainly any negotiated expression of "comparative fault" in the settlement would only be binding on the plaintiff and not on lien claimants who were not part of that settlement fault apportionment process. Therefore it does not serve a settling plaintiff to define in advance the percentage of comparative fault in the settlement letters or the final agreement as that would set the upper limit of their fault. However, it would make sense to acknowledge that the settlement figure decided upon is a compromise contemplating the plaintiff's comparative fault.

The same logic would apply to placing a "full value" on the claim. When a demand is presented to the at fault party it might be wise to include language expressing that the demand contemplates the plaintiff's comparative fault without specifying the percentage.

Other things to consider

Another factor that may arise in the context of malpractice verdicts (not settlements) is the interplay between this new statute and the Civil Practice Act provision eliminating the collateral source rule (735 ILCS 5/2-1205). The companion statute intending to modify the collateral source doctrine in all other tort actions (735 ILCS 5/2-1205.1) will not come into play because it is unconstitutional.[45]

It is conceivable that a medical malpractice defendant could be successful in reducing a verdict based upon the provisions of 735 ILCS 5/2-1205 preventing the plaintiff from recovering "full value" of the claim and thereby reducing the interests of the subrogated parties to their subrogation claims. It will be interesting to watch the dynamic that will result pitting the insurance and medical industries against each other as this plays out in the courts.

In most ordinary cases with limited subrogation claims, it would be in the best interest of all parties to reach an agreement rather than to engage in full discovery and proceed to an evidentiary hearing to establish the "full value" of the claim and the plaintiff's "comparative fault."

Given the narrow scope of the statute excluding Workers Compensation, Occupational Diseases Acts, uninsured and underinsured auto coverage, and health care liens coupled with the view of the Seventh Circuit with respect to ERISA and the "make whole" doctrine,[46] the application of this statute for the most part will be limited to automobile and premises medical payment coverage subrogation claims. In these cases the amount of the medical payments made is usually relatively small in contrast to the potential reduction making the costs of a full evidentiary hearing unattractive to all parties. There will be some cases to be sure where private health insurance will claim subrogation interests in the recovery and it is conceivable that the size of those claims will merit full-blown hearings.

Conclusion

Plaintiff's attorneys and their clients will welcome this statutory change as an advancement of justice in tort recoveries for injured persons. For years plaintiffs' attorneys have found it very difficult to convince their clients to accept settlements where the bulk of the settlement is going back to insurance companies or other third parties. At least where the primary claims are for medical payments from insurers, this statute should assist in getting those cases resolved without the necessity of a trial against the at fault party.

Unfortunately the scope of the legislation does not reach health care provider liens, self-funded ERISA plans, or Medicare and Medicaid reimbursement claims. Those types of claims are likely to prevent fair and reasonable settlement of claims without some type of equitable reduction in their claims for reimbursement due to comparative fault or the judgment proof status of the at fault party.

The additional burden of potentially litigating these claims on a case that has already settled may require the plaintiff's counsel to engage in additional work without additional compensation.[47] It is yet to be seen how much additional burden if any will be placed upon the court system in conducting full evidentiary hearings to adjudicate these claims versus the number of suits that were previously forced to trial because the subrogation claims would not be subject to reduction for comparative fault or the fact that the defendant was underinsured. ■

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1. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation, 70 Mo. L. Rev. 723 (2005).

2. *See generally* Jeffrey A. Greenblatt, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337 (1997) (discussing assorted techniques of subrogation and supporting a pro tanto method allowing the insurer to recover before the insured has been made whole); Todd L. Fulks, *The "Made-Whole" Doctrine: Its Effect on Tennessee Tort Litigation and Insurance Subrogation Rights*, 32 U. Mem. L. Rev. 87 (2001) (discussing Tennessee's "made-whole" doctrine which prevents insurers from exercising subrogation rights where the court finds that plaintiff has not been made whole); and Andrea L. Parry, *Subrogation in Pennsylvania—Competing Interests of Insurers and Insureds in Settlements with Third-Party Tortfeasors*, 56 Temp. L.Q. 667 (1983) (addressing priority issues in Pennsylvania when the subrogation claims of two insurers are made to the same proceeds of a third-party recovery). See, *e.g., Ruckel v. Gardner*, 646 N.W. 2d 11 (Wisc. 2002) (refusing to apply a subrogation clause that required payment to the insurer "prior to" any recovery by the insured from any wrongdoer.)

3. *Harris v. Harvard Pilgrim Health Care, Inc.*, 20 F.Supp.2d 143 (D. Mass. 1998); see also, *Ruckel v. Gardner*, 646 N.W. 2d 11 (Wisc. 2002) (holding that the plaintiff is entitled to all of the funds until they are made whole even where a contractual subrogation provision claims the right of payment from the first funds recovered by the injured person); *Health Cost Controls, Inc. v. Gifford*, 108 S.W.3d 227 (Tenn. 2003); and N. *Buckeye Edn. Council Group v.*

Lawson, 798 N.E.2d 667 (Ohio App. 6th 2003).

4. *Cutting v. Jerome Foods, Inc.,* 993 F.2d 1293, 1297 (7th Cir.1993) (pointing out that the equitable rule applies as a "gap-filler" only when the parties are silent).

5. *Eddy v. Sybert*, 335 Ill.App.3d 1136, 783 N.E.2d 106 (5th Dist. 2003).

6. *Trogub v. Robinson*, 366 Ill.App.3d 838, 853 N.E.2d 59, (1st Dist. 2006).

7. Edeus, *Subrogation of Personal Injury Claims: Toward Ending an Inequitable Practice*, 17 N.Ill.U.L.Rev. 509 (1996-1997)

8. 116 Ill.2d 305, 309-10, 107 Ill.Dec. 702, 507 N.E.2d 855 (1987). Boyd involved "subrogation as opposed to a 'right of reimbursement'."

9. *Id.*

10. ch. 73, par. 755a-2, now 215 ILCS 5/143a-2.

11. The retroactive application to the Illinois long arm jurisdiction statute (735 ILCS 5/2-209) was decided in *Rose v. Franchetti*, 979 F.2d 81 (7th Cir. (Ill.) 1992); *Ores v. Kennedy*, 218 Ill.App.3d 866, 161 Ill.Dec. 493, 578 N.E.2d 1139 (1st Dist. 1991), *appeal allowed* 142 Ill.2d 656, 164 Ill.Dec. 919, 584 N.E.2d 131. The retroactive application of 735 ILCS 5/2-209.1, involving actions by and against voluntary associations, was considered in *Zielnik v. Loyal Order of Moose, Lodge No. 265*, 174 Ill.App.3d 409, 123 Ill.Dec. 839, 528 N.E.2d 384 (1st Dist. 1988); *Rivard v. Chicago Fire Fighters Union, Local No. 2*, 122 Ill.2d 303, 119 Ill.Dec. 336, 522 N.E.2d 1195 (1988), *cert. denied* 488 U.S. 909, *rehearing denied* 488 U.S. 987. Who may be plaintiff--Assignments—Subrogation (735 ILCS 5/2-403); action brought by an assignee in his own name prior to the revision of Practice Act was not prejudicial, where it was tried after that revision. *Jones & Laughlin Steel Co. v. Graham*, 273 Ill. 377, 112 N.E. 967 (1916); but see *Steele-Wedeles Co. v. Shoodoc Pond Pack Co.*, 153 Ill.App. 576 (1911), and *Thomson v. Caverley*, 148 Ill.App. 295 (1909), for contrary holdings. The retroactive application of changes in the Code of Civil Procedure regarding product liability actions (735 ILCS 5/2-621) was considered in *Link by Link v. Venture Stores, Inc.*, 286 Ill.App.3d 977, 222 Ill. Dec. 283, 677 N.E.2d 486 (5th Dist. 1997), *appeal denied* 174 Ill.2d 566 (5th Dist. 1977); *Kirk v. Michael Reese Hosp. and Medical Center,* 136 Ill.App.3d 945, 91 Ill.Dec. 420, 483 N.E.2d 906 (1st Dist. 1985), *appeal allowed, reversed* 117 Ill.2d 507, 111 Ill.Dec. 944, 513 N.E.2d 387, *cert. denied* 485 U.S. 905. The retroactive application of changes to the healing art malpractice provisions (735 ILCS 5/2-622) was considered in *Calamari v. Drammis*, 286 Ill.App.3d 420, 221 Ill.Dec. 760, 676 N.E.2d 281 (1st Dist. 1977); *Blalark v. Chung*, 177 Ill.App.3d 541, 126 Ill. Dec. 833,532 N.E.2d 518 (1st Dist. 1988); *Sakovich v. Dodt*, 124 Ill.Dec. 438, 174 Ill.App.3d 649, 529 N.E.2d 258 (3rd Dist. 1988), *appeal denied* 124 Ill.2d 562, *appeal denied* 127 Ill.2d 641, *cert. denied* 494 U.S. 1019; and *Bassett v. Chen Chii Wang*, 169 Ill. App.3d 663, 120 Ill.Dec. 109, 523 N.E.2d 1020 (1st Dist. 1988). The Code of Civil Procedure provisions regarding modified comparative fault, "Limitation on recovery in tort actions; fault" (735 ILCS 5/2-1116) in *West v. Boehne*, 229 Ill.App.3d 1045, 171 Ill. Dec. 863, 594 N.E.2d 1383 (2nd Dist. 1992), *appeal denied* 146 Ill.2d 654, and *Fetzer v. Wood*, 211 Ill. App.3d 70, 155 Ill.Dec. 626, 569 N.E.2d 1237 (2nd Dist. 1991); as were the provisions regarding joint and several liability (735 ILCS 5/2-1117) in *Ready v. United/Goedecke Services, Inc.*, 305 Ill.Dec. 166, 367 Ill.App.3d 272, 854 N.E.2d 758 (1st Dist. 2006), *appeal allowed, affirmed in part, reversed in part*, 232 Ill.2d 369, 328 Ill.Dec. 836, 905 N.E.2d 725, *rehearing denied*; *on remand*, 393 Ill.App.3d 56, 331 Ill. Dec. 910, 911 N.E.2d 1140.

12. *Commonwealth Edison Co. v. Will County Collector*, 196 Ill.2d 27, 255 Ill.Dec. 482, 749 N.E.2d 964 (2001); *M.K. v. L.C.,* 387 Ill.App.3d 1077, 901 N.E.2d 468 at 474 (3rd Dist. 2009).

13. *Commonwealth Edison Co. v. Will County Collector*, 196 Ill.2d 27, 255 Ill.Dec. 482, 749 N.E.2d 964 (2001)

14. *Id.*

15. *Diocese of Dallas*, 379 Ill.App.3d 792, 319 Ill. Dec. 105, 885 N.E.2d 384, quoting *Commonwealth Edison Co.,* 196 Ill.2d 34, 255 Ill.Dec. 482, 749 N.E.2d 969.

16. 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

17. *M.K. v. L.C.*, 387 Ill.App.3d 1077, 901 N.E.2d 468 at 476 (3rd Dist. 2009).

18. *Id.*

19. *Allegis Realty Investors v. Novak*, 223 Ill.2d 318, 860 N.E.2d 246 (2006)*; Ready v. United/Goedecke Services, Inc.*, 367 Ill.App.3d 272, 854 N.E.2d 758 (1st Dist. 2006); *Harraz v. Snyder III*, 283 Ill.App.3d 254, 259, 218 Ill.Dec. 590, 669 N.E.2d 911 (2nd Dist. 1996).

20. *Ready v. United/Goedecke Services, Inc.*, 367 Ill.App.3d 272, 854 N.E.2d 758 (1st Dist. 2006), *Harraz v. Snyder III*, 283 Ill.App.3d 254, 259, 218 Ill. Dec. 590, 669 N.E.2d 911 (2nd Dist. 1996)

21. *Id.*

22. There is a doctrine of "equitable subrogation," which is not addressed in this article.

23. See *Wendling v. Southern Illinois Hosp. Services*, 242 Ill.2d 261, 950 N.E.2d 646 at 651 (2011), explaining *Bishop v. Burgard*, 198 Ill.2d 495, 510, 261 Ill.Dec. 733, 764 N.E.2d 24 (2002), where the court indicated that for the equitable "creation of the fund" doctrine application to an ERISA plan's right of recovery, the distinction between the two rights is unimportant; however, where the right to compensation was not contingent (*e.g.,* hospital lien) on the receipt of the actual funds, the "creation of the fund" doctrine would not apply. Thus, where the patient still owed the bills for the medical services absent a recovery against a third party, the fund doctrine would not apply.

24. *Glidden v. Farmers Auto. Ins. Ass'n*, 11 Ill. App.3d 81, 296 N.E.2d 84 at 88 (2nd Dist. 1973).

25. See *Illinois Farmers Ins. Co. v. Makovsky*, 293 Ill.App.3d 77, 689 N.E.2d 618 (1st Dist. 1977), and *Remsen v. Midway Liquors, Inc.*, 30 Ill.App.2d 132, 142-143, 174 N.E.2d 7 (2nd Dist. 1961).

26. *Remsen v. Midway Liquors, Inc.*, 30 Ill.App.2d 132, 142-143, 174 N.E.2d 7 (2nd Dist. 1961), and *Haley v. Posdal*, 201 Ill.App.3d 963, 147 Ill.Dec. 743, 559 N.E.2d 1083 (2nd Dist. 1990).

27. (See *FMC Corp. v. Holliday*, 498 U.S. 52, 64-65 (1990) (ruling that ERISA preempted Pennsylvania's anti-subrogation law as it applied to self-funded ERISA plans); *Harris v. Harvard Pilgrim Health Care, Inc.*, 20 F.Supp.2d 143 (D. Mass., 1998), and *Wausau Benefits v. Progressive Ins. Co.*, 270 F.Supp. 2d 980 (S.D. Ohio 2003)).

28. *Benefit Recovery, Inc. v. Donelon*, 521 F.3d 326 (5th Cir. 2008); *cert. den.* 555 U.S. 882 (2008).

29. *Metropolitan Life Insurance Company v. Massachusetts Travelers Insurance Company v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985)

30. *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)" "To summarize the pure mechanics of the provisions quoted above: If a state law "relate[s] to . . . employee benefit plan[s]," it is pre-empted. § 514(a). The saving clause excepts from the preemption clause laws that "regulat[e] insurance." § 514(b)(2)(A). The deemer clause makes clear that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company. § 514(b)(2)(B)."

31. See *Unum Life Ins. v. Ward*, 526 U.S. 358, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999)

32. 993 F.2d 1293, 1297 (7th Cir.1993).

33. *See Cagle v. Bruner,* 112 F.3d 1510, 1521 (11th Cir.1997)

34. See *CGI Techs. & Solutions Inc. v. Rose* (9th Cir., 2012)

35. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–48, 124 Stat. 119.

36. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–52, 124 Stat. 1024 and the changed requirements of part A of title XXVII of the Public Health Service Act, relating to health insurance issuers of group and individual coverage and group health plans (Interim Final Rules for Group Health Plans and Health Insurance Issuers Under the Patient Protection Affordable Care Act, 75 Fed. Reg. 43,331 (July 23, 2010)).

37. For an excellent discussion of the potential interplay between State law provisions seeking to limit the terms of group and individual health plan insurance policies see, Post-Firestone Skirmishes: The Patient Protection And Affordable Care Act, Discretionary Clauses, And Judicial Review Of ERISA Plan Administrative Decisions, Maria O'Brien Hylton, at <http://www.bu.edu/law/faculty/scholarship/workingpapers/2010.html>.

38. *Zazove v. Wilson*, 334 Ill.App. 594, 80 N.E.2d 101 (1st Dist. 1948); *McCracken v. City of Joliet*, 271 Ill. 270, 111 N.E. 131 (1915), and *Standidge v. Chicago Rys. Co.*, 254 Ill. 524, 98 N.E. 963 (1912).

39. The right to a jury trial extends only to actions known at common law and, where the common law recognized an action as equitable, the fact that the legislature creates a statutory remedy does not necessarily invoke the right to a jury trial. If there is a contract right being determined in the process there is a right to a jury trial to the extent of that contract. See, *Swords v. Risser*, 55 Ill.App.3d 676, 13 Ill.Dec. 487, 371 N.E.2d 182 (4th Dist. 1977); and *Turnes v. Brenckle*, 249 Ill. 394, 94 N.E. 495 (1911), (in the mechanics lien context), but see *Gage v. Ewing*, 107 Ill. 11 (1883).

40. See, *Fremarek v. John Hancock Mut. Life Ins. Co.,* 272 Ill.App.3d 1067, 652 N.E.2d 601 (1st Dist. 1995).

41. If a plaintiff does not receive a verdict for the medical bills that were paid by her insurer, the right of subrogation should not attach. See for example *York v. El-Ganzouri*, 817 N.E.2d 1179, 353 Ill.App.3d 1, 652 N.E.2d 601 (1st Dist. 2004), where the defendant sought a reduction in the judgment based upon 735 ILCS 5/2-1205, modifying the collateral source rule for malpractice defendants, the court found that the reduction could only occur if there was proof that the medical bills that were

part of the judgment were paid for by insurance and that the insurance did not have a right of subrogation. In *DeCastris v. Gutta*, 237 Ill.App.3d 168, 604 N.E.2d 359 (2nd Dist. 1992), for a reduction in a medical malpractice judgment for collateral source payments (under Ill.Rev.Stat.1983, ch. 110, par. 2-1205), where the defendant doctor failed to show that the bills were not subject to subrogation and where the lost wages which had already been reimbursed were not presented at trial, no reduction of the judgment could occur. See also *First Springfield Bank and Trust v. Galman*, 299 Ill. App.3d 751, 702 N.E.2d 1002 (4th Dist. 1998).

42. See *Wills v. Foster*, 229 Ill.2d 393, 892 N.E.2d 1018 (2008).

43. 735 ILCS 5/2-1116.

44. 735 ILCS 5/2-1116(c).

45. *Best v. Taylor Machine Works*, 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057 (1997).

46. Note that prior decisional law may not apply in cases where an ERISA plan funds its medical benefits through insurance, see discussion above.

47. That is litigating contractual or statutory claims of the injured person and not tort claims against an at fault party. Perhaps some aggressive tort attorneys will assert entitlement to a percentage for the amount of reduction in the claims against their client's recovery.

Does a corporation need a lawyer in state court?

Continued from page 1

> such corporation were appearing in its proper person. For the purposes of this rule, the term "officer" means the president, vice-president, registered agent or other person vested with the responsibility of managing the affairs of the corporation.

This rule is unmistakable. It says in cases of less than $10,000, a corporation may appear through an officer or a person responsible for managing the affairs of a corporation in order to defend an action.

So what happens in other types of civil litigation where the amount in controversy exceeds $10,000, is an ordinance violation or a law case? The answer is muddied by conflicting precedent. (Compare, *Siakapere v. City of Chicago,* 374 Ill.App.3d 1079, 872 N.E.2d 495 (1st Dist. 2007) ("*Siakapere*") with *Moushon v. Moushon,* 147 Ill.App.3d 140, 497 N.E.2d 820 (3rd Dist. 1986) [corporate President representation by non-lawyer permitted].

Because of the omnipresence of administrative courts in lieu of many traditional circuit court venues, the issue is becoming more commonplace. Can a corporation appear without a lawyer at an unemployment hearing? Yes. Can a corporation appear without a lawyer at a county or municipal zoning hearing? Yes. How about a tax appeal hearing or in an immigration case? Probably, if that tribunal's administrative rules permit it.

Downtown is a reflection of the trend where a corporation engages in litigation without counsel at an administrative hearing. There, Downtown, a corporation, appeared by an individual who was not a lawyer in an administrative hearing to contest certain default judgments entered by the administrative law judge for failure to comply with municipal ordinances. A fine of $1,500 plus costs was entered against Downtown.

Downtown, by its officer, Van Tholen, a non-attorney, moved to set aside the judgments alleging improper notice. The administrative law judge denied the motion to set aside the defaults. Van Tholen then filed *pro se* complaints seeking administrative review in the circuit court.

The municipality moved to dismiss the complaints, arguing Van Tholen could not represent the corporation since he was not an attorney. The City asserted that a corporation could only appear by an attorney at all legal proceedings, including the filing of pleadings with the court. And, because Downtown had filed its complaint for administrative review through Van Tholen, that complaint should be treated as null and void, even though Downtown was later represented by an attorney. The latter principle is called the "nullity rule." See, *Santiago v. E.W. Bliss Co.,* 2012 IL 111,792 (Aug. 9, 2012)

By the time the matter was called for hearing, Downtown had hired a lawyer who asked to amend Downtown's administrative complaints. Its attorney also moved to dismiss the original ordinance violation complaints since they were signed for the City by a non-attorney and the City was also a corporation, albeit a municipal one. The trial court granted the City's motion to dismiss and denied Downtown's motion to dismiss.

On appeal, Justice Lavin, writing for the court, acknowledged that a different First District panel agreed with the dismissal of an administrative complaint involving an ordinance fine appeal in exactly the same circumstances, finding the complaints filed by a non-lawyer for a corporation he owned were "void *ab initio.*" (*Siakapere, supra.)* Justice Lavin was unpersuaded by *Siakapere's* analysis of the nullity rule.

First, the court looked at *Ford Motor Credit Co. v. Sperry*, 214 Ill.2d 371 (2005), ("*Ford Motor*") to determine whether Van Tholen's filings of the administrative review complaints were void. In *Ford Motor,* the issues were whether Ford properly obtained a judgment for attorney's fees against Sperry, where the attorney who represented Ford had let her law firm's registration with the Supreme Court lapse (S.Ct. R. 721(c)), and whether, because she was not registered to practice law, the trial court was without authority to award her and her client attorney's fees.

The Supreme Court in *Ford Motor* said the requirement of a lawyer's registration as a professional corporation was a regulation that permitted lawyers to organize their law firms as corporations if they chose to do so upon payment of a fee to the Supreme Court. The court held this was not the unauthorized practice of law, and stated:

> … When unlicensed individuals engage in the practice of law, the public is at risk of harm. In contrast, when a law firm fails to comply with the registration requirement in our rule 721(c), it is the noncomplying firm that is harmed, not the public. … This reality further underscores that the registration requirement in Rule 721(c) was not enacted to safeguard the public welfare but to benefit those law firms seeking the tax and limited liability advantages of incorporation…

In reversing the appellate and trial courts, the Supreme Court in *Ford Motor* declined to enforce the nullity rule.

The *Downtown* appellate panel also discussed *Applebaum v. Rush University Medical Center,* 231 Ill.2d 429 (2008). The issue in *Applebaum* was whether a lawyer who was on inactive status, could file a *pro se* complaint for wrongful death on behalf of an estate (his

father's estate) and not run afoul of the nullity rule. Again, the *Applebaum* court held, even though the attorney who filed the complaint had not complied with Supreme Court Rule 756 to be in an "active" status, he was not engaged in the unauthorized practice of law. Too, the Supreme Court opined the purpose behind Rule 756 was not to protect the public from unlicensed or incompetent individuals but the rule was an administrative one to collect fees based on an attorney's registration status.

It has long been the common law in Illinois that a complaint drafted by a non-attorney for a corporation results in the unauthorized practice of law. And because such representation is unauthorized, the pleading is given no efficacy and is a nullity. *Housing Authority of Cook v. Tonsul*, 115 Ill.App.3d 739 (1st Dist. 1983). See also, *Edwards v. City of Henry*, 385 Ill.App.3d 1026 (3rd Dist. 2008).

Contrary precedent exists where the nullity rule has been ignored but generally these opinions have occurred with respect to individuals who are trained as lawyers and sought to represent a family member or family estate (*Applebaum v. Rush University Medical Center*, 231 Ill.2d 429 (2008) ("*Applebaum*"); or were unknowingly represented by an unlicensed attorney (*Janiczek v. Dover Management Co.*, 134 Ill.App.3d 543 (1st Dist. 1985)). But see *Pratt-Holdampf v. Trinity Medical Center*, 338 Ill.App.3d 1079 (3rd Dist. 2003), where a non-attorney plaintiff was allowed to file a medical negligence complaint for wrongful death.

The *Downtown* appellate tribunal reversed the trial court's application of the nullity rule. This is because Van Tholen was told by the administrative law judge he could appeal, and how to file the appeal, and Von Tholen did exactly what the administrative law judge told him and what he apparently thought he had the right to do. Finally, the court concluded the City suffered no prejudice from what Van Tholen did and showed no reason why the purposes of imposing the nullity rule were implicated by Van Tholen's conduct.

Until reviewing the First District opinion in *Downtown*, the Supreme Court had really never addressed the unauthorized practice of law by corporate officers, although in *dicta*, it appeared to have approved of it. (See, *Bolton v. Progressive Insurance Co.*, 44 Ill.2d 392 (1970)).

Our Supreme Court has now weighed in on the nullity rule, affirming the appellate court. *Downtown Disposal Services, Inc., vs. The City of Chicago,* 2012 IL 112,040, 2012 WL 5359269 (2012). In a 4 to 3 decision with a vigorous dissent from Justice Karmeier, the *Downtown* majority concluded that actions by a non-attorney on behalf of a corporation are curable defects that permit a corporation a reasonable time to obtain counsel and make necessary amendments to pleadings which would otherwise be null and void. What constitutes the unauthorized practice of law now seems to be a discretionary decision, the parameters of which are not evident.

To get that result, Justice Burke relied on a Federal court case, *In re: IFC Credit Corp.*, 663 F.3d 315 (7th Cir.2011), ("*IFC*") to conclude a corporation does not need a lawyer to represent it in a state trial court proceeding.

IFC, however, has little to do with state trial court litigation involving the nullity rule. It pertains to precepts applicable in bankruptcy tribunals, (Bankruptcy Rule 9011(a) to be exact), which allow the omission of a signature, perhaps the signature of a lawyer, to be "corrected promptly."

In *IFC*, the corporation voluntarily declared bankruptcy based on the signature of its president. That *faux pas* was rectified a day later by a lawyer who amended the corporation's bankruptcy petition. The issue presented to the Seventh Circuit Court of Appeals in *IFC* was not whether the original filing was a nullity, but whether the federal court had subject matter jurisdiction to entertain the case. As the 7th Circuit said, "We must meet the jurisdictional argument head on." *In re: IFC Credit Corp.*, 663 F.3d 315 (7th Cir.2011).

The 7th Circuit, relying on Bankruptcy Rule 9011(a), saw no impediment to exercising federal jurisdiction.

Bankruptcy rules, however, have nothing to do with the nullity rule in Illinois. Although the latter might be discretionary where an inactive attorney (*Applebaum*) or an unregistered lawyer *(Ford Motor)* appears, in *Downtown*, no lawyer appeared until after the original decision had been entered in the administrative tribunal.

It is hard to understand how our Supreme Court can permit the unauthorized practice of law by a person untrained in the law to represent a corporation. Van Tholen was neither an unlicensed attorney, an unregistered one, or a lawyer who had been disbarred. The *Downtown* majority opinion makes the rule prohibiting non-lawyers from representing corporations an exception that engulfs the rule against it.

In our circuit courts, an epidemic exists. Mortgage foreclosures, evictions and collection actions are rampant. Our citizens seek help from a variety of sources: self-help, individuals who are untrained in the law, notaries, as well as sovereign citizens. The nullity rule exists to protect litigants against the errors of those untrained in the law, and those with unethical or illegal designs, as well as protect the court in the administration of justice. *Janiczek*, 134 Ill.App.3d at 546.

In an effort to promote integrity in judicial proceedings, the majority opinion in *Downtown* seems to underestimate what is occurring in our circuit courts. Merely because an administrative law judge told a layperson, Mr. Van Tholen, that he could appeal a default judgment does not make that statement a fact. Our Supreme Court has recognized for over 170 years that no person is permitted to commence an action in an Illinois state court on behalf of another unless s/he is an attorney. *Robb v. Smith*, 4 Ill. 46 (1841).

The nullity rule protects those who need it most. (*Downtown*, Karmeier dissenting, (2012 IL 112,040, sl. op., pp. 11-13.) It prohibits non-lawyers from practicing law. It has nothing to do with subject matter jurisdiction in a federal bankruptcy court. It addresses whether, as a matter of public policy, Illinois trial courts should allow non-lawyers to appear or defend complaints they are unqualified to perform. (See, *Chicago Bar Association v. Quinlan & Tyson*, 34 Ill.2d 116, 122-123 (1966))

With units of local governments' endless love affair with administrative tribunals, issues like those presented in *Downtown* are likely to recur. This is because these tribunals make their own rules, which may or may not comply or be in conflict with Supreme Court Rules or those enacted by the legislature. For example, in *Adair Architects, Inc., v. Bruggeman*, 346 Ill.App.3d 523 (3rd Dist. 2004) ("*Adair*"), a legislative enactment which permitted a corporation to prosecute a small claims complaint was held unconstitutional because it contravened Supreme Court Rule 282(b).

The majority opinion in *Downtown* dilutes the nullity rule when it permits non-attorney representation of corporations in administrative tribunals. Like the opinion in *Santiago v. E.W. Bliss, supra,* where filing a complaint with a false name was not a nullity, practicing attorneys may wonder if the nullity rule survives. In cases other than small claims, our Supreme Court has provided us with a decision that makes corporate representation by a non-attorney in our state's trial courts a permitted activity. ■

Lawlor v. North American Corporation of Illinois: The Illinois Supreme Court recognizes the Tort of Intrusion upon Seclusion and speaks again on punitive damages

By Richard L. Turner, Jr., Sycamore, Illinois

Introduction

In its recent decision, *Lawlor v. North American Corporation of Illinois,* 2012 IL 112530, the Illinois Supreme Court offered guidance on three developing areas of Illinois law: the tort of intrusion upon seclusion as a recognizable cause of action; principal and agent liability; and further guidance with respect to the appropriateness of punitive damages. For the first time, the Illinois Supreme Court expressly recognized the tort of intrusion upon seclusion as an actionable claim in Illinois. The Court further held that defendant's hiring of a private investigator to obtain the phone records of defendant's ex-employee without her permission, in the course of investigating her possible violation of a non-compete agreement, was sufficient to support this claim. The court also found that, because there was no evidence that the offending conduct was part of any intentional or premeditated scheme to harm the employee, the highest supportable punitive damages award was equal to the compensatory damages award by the jury, or $65,000.

Factual background

Kathleen Lawlor brought an action in the Circuit Court of Cook County alleging the tort of invasion of privacy by intrusion upon seclusion against her former employer, North American Corporation of Illinois (North American). She alleged and presented testimony that North American, through its corporate attorney, hired a private investigative firm ("Probe") to investigate Lawlor's suspected violation of a non-competition agreement by providing confidential corporate sales information to North American's competitor while she was still North American's employee. North American then filed a counterclaim against Lawlor for breach of fiduciary duty of loyalty.

At trial, the defendant's corporate attorney, Greenblatt, testified that he retained Probe to investigate the possible violation of Lawlor's non-competition agreement but did not discuss with Probe any of the investigative techniques that Probe would use in order to investigate this potential breach of duty. Greenblatt testified that he did not know whether Probe obtained Lawlor's phone records. Probe's president testified that Probe did, in fact, have contact with a corporate representative of North American in which they discussed the identity of owners of phone numbers on phone records that Probe had obtained.

The jury answered several special interrogatories in its verdict. The jury found that Discover, another investigative entity hired by Probe, had obtained information about Lawlor's telephone calls without her authorization on a pretextual basis by calling Plaintiff's telephone carriers and pretending to be her. The jury further found that (i) Probe knew that Discover had engaged in this pretexting conduct; (ii) Probe was acting as North American's agent when it received the information from Discover; (iii) Discover was acting as Probe's agent when it engaged in pretexting; (iv) Probe was acting within its scope of authority granted by North American; and (v) North American knew that Discover had obtained the information about Lawlor's phone calls without her authorization. The jury returned a verdict in Lawlor's favor and awarded her $65,000 in compensatory damages and $1.75 million in punitive damages.

The trial court subsequently entered judgment separately against Lawlor on North American's breach of fiduciary claim, finding that Lawlor breached her duty of loyalty by disclosing confidential business information to a competitor and by attempting to steer business from North American to the competitor. The trial court, despite disputed testimony at trial on the issue of whether or not such activity took place, awarded North American $78,781 in compensatory damages and $551,467 in punitive damages.

After a post-trial motion requesting remittur, the trial court reduced the punitive damages award in favor of Lawlor and against North American from $1.75 million to $650,000. The trial court denied Lawlor's post-trial motion seeking relief from the trial court's judgment on North American's counter-claim.

Both parties appealed. The appellate court affirmed the judgment on the intrusion claim and reinstated the jury's $1.75 million punitive damages award, concluding that Lawlor effectively proved that Probe was acting as North American's agent when Probe obtained information about her telephone calls. The appellate court also reversed the judgment for North American on its counter-claim after concluding that it was based upon an unproven assertion that Lawlor attempted to steer business from North American to the competitor.

The Tort of Intrusion upon Seclusion is recognized

Recognizing that it had not previously expressly addressed whether the tort of intrusion upon seclusion is actionable in Illinois, the Illinois Supreme Court turned to Section 652(B) of the Restatement (Second) of Torts, which provides as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts §652(B) (1977).

The court cited specifically to subsection B of the comment to the Restatement, which provides examples of forms of investigation or examination into private concerns that may be actionable, such as by opening private or personal mail, searching a person's safe or wallet, examining a person's bank account, or compelling a person by a forged court order to permit an inspection of his personal documents. The court indicated that by its decision, Illinois was now joining the vast majority of other jurisdictions that have recognized the tort of intrusion upon seclusion.

An agency relationship is recognized

North American argued in the Supreme Court that even though there might be a sufficient basis to conclude that the actions of the investigators constituted an intrusion or prying into Plaintiff's seclusion, there was no evidence to establish an agency relationship between North American and Probe or Discover such that North American could be liable for their conduct .

The majority held that, when considering all of the evidence and all reasonable inferences in a light most favorable to Lawlor, the jury's determination that Probe was acting within its scope of authority as North American's agent was not against the manifest weight of the evidence. The jury could reasonably infer that North American was aware that Lawlor's phone records were not publically available, and that by requesting such records from Probe and providing Probe's president with Lawlor's personal information, North American was setting into motion a process by which investigators would pose as Lawlor to obtain the material. The specific contact between Probe's president, DiLuigi, and Dolan, a vice-president of North American, with respect to Lawlor's phone records was a key source of interaction in the court's opinion.

The jury's finding that the investigators were acting as agents of North American was not against the manifest weight of the evidence because the opposite result was not clearly evident and the jury's finding was neither unreasonable nor arbitrary and was reasonably based on the evidence submitted at trial. The Supreme Court found that the appellate court correctly held that the trial court did not abuse its discretion in denying North American's motion for a new trial.

Thus, the Court found that there was sufficient evidence for the jury to have found an agency relationship, even though the Court recognized that there was "no direct evidence that North American knew how the phone records were acquired by investigators."[1]

Punitive damages

The court held that punitive damages may be awarded against a principal because of an act by an agent, and sufficient evidence was proffered here for the jury to conclude that North American authorized the manner in which the investigators obtained Lawlor's telephone records. Citing its prior decision in *Slovinski v. Elliot,* 237 Ill.2d 51 (2010), the court found North American's conduct to be on the low end of the scale for punitive damages, far below those cases involving a defendant's deliberate intent to harm another, and warranting an award of punitive damages no higher than the award of compensatory damages. The test set out by *Slovinski* was adopted by the court in *Lawlor* and affirmed as applicable even though the egregious conduct was not directly committed by the principal but committed by the principal's agent. This test required that the tortious conduct evince either a high degree of moral culpability, *i.e.*, fraud, actual malice, deliberate violence or oppression, or that the defendant acted willfully or with such gross negligence as to indicate a wanton disregard of the right of others.

North American's counterclaim

Finally, the majority agreed with the appellate court below that the record was entirely devoid of evidence to support the trial court's judgment in favor of North American with respect to Lawlor's alleged breach of fiduciary duty. The trial court's judgment was based solely on an unproven assertion that Lawlor unsuccessfully attempted to steer MapQuest business from North American to one of its competitors while still working at North American and, therefore, the trial court's judgment in favor of North American on its counter-claim was against the manifest weight of the evidence.

Chief Justice Kilbride's dissent

In a lengthy dissent, Chief Justice Kilbride joined with the majority in all but one issue. He felt that the majority failed to apply the highly deferential standard of review and could not agree with the majority that the trial court abused its discretion in remitting the jury's punitive damages award to $650,000. The Chief Justice argued that the majority improperly focused only on the character of the defendant's act and the nature and extent of the harm to the plaintiff in determining the propriety of the punitive damages award. He noted that, in addition to those considerations, punitive damages also serve to punish the offender and deter that party and others from committing similar acts of wrongdoing in the future. Given those additional considerations, and North American's financial strength, he was unable to conclude that the punitive damages award on remittur by the trial court was a clear abuse of the trial court's discretion. The Chief Justice questioned the deterrent value of a $65,000 punitive damages award against a company with a net worth 77 times greater than the $650,000 punitive damages award set by the trial court.

As he had previously indicated in his dissent in *Slovinski*, Chief Justice Kilbride stated that a highly deferential standard of review should be applied when considering an award of punitive damages. He felt that the majority only paid "lip service" to the standard, but instead substituted its own judgment for that of the trial court.

The import of the case with respect to employer/employee relationships

In light of the *Lawlor* decision, employers may be held liable on an agency theory for acts of third parties traditionally considered independent contractors (such as attorneys or investigators) where there might appear to be a close nexus between those third-party activities and some concern or motive on the part of the employer. This is particularly true where there is evidence that the employer's high-level executives knew of the third party's conduct.

In such an instance, punitive damages may be assessed against the employer if that conduct is determined to evince a "high degree of moral culpability," as previously defined in *Slovinski* and reaffirmed in *Lawlor*.[2]

Just as important, Illinois now formally recognizes the tort of intrusion upon seclusion as described in §652(B) of the Second Restatement of Torts. Activities such as opening private and personal mail, searching a person's safe or wallet, examining his/her bank account, or using a pretext to obtain telephone records might all give rise to this claim. ■

1. *Id*. at ¶ 46.
2. *Id*. at ¶ 58.

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