October 2014 Vol. 60, No. 4

ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS

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

Adjudication of liens in claims involving inadequate insurance coverage: *Wolf v. Toolie* as the latest contribution in this ongoing saga

By Richard L. Turner Jr., Richard L. Turner Jr Law Office, Sycamore

As the expenses for medical treatment in personal injury claims involving significant injury continue to escalate without an adequate, compensatory response in the insurance market with respect to coverage limits, we see an ever-increasing number of instances where there is simply not enough insurance coverage available to adequately compensate victims for the damages sustained.

The Illinois Legislature has attempted to respond to this situation on a couple of occasions. The Health Care Services Lien Act, 770 ILCS 23/1 *et seq.* ("the Act"), provides a 40 percent maximum limit for health care providers on the amount of the collective liens that can be asserted against a lump-sum recovery by settlement or judgment.

More recently, the Legislature amended the Act to provide that, if the claimant's recovery is diminished as a result of the "uncollectibility of the full value of the claim for personal injury or death resulting from limited liability insurance," the right of subrogation arising out of the payment of medical expenses by a health insurer will be diminished "in the same proportion as the personal injury or death estate claimant's recovery is diminished."[1]

Continued on page 2

The distraction exception explained: *Virginia Bruns v. the City of Centralia*

By Hon. Daniel T. Gillespie and Greg Conner

What exactly is the distraction exception? Does it have anything to do with distracted driving? Does it have anything to do with all those young people we see walking into each other on the street while texting each other on their smart phones? Does it mean that if a plaintiff is distracted by something that prevents her from seeing where she is going, she is able to recover when she trips over an open and obvious hazard?

The Illinois Supreme Court clarified when the distraction exception applies to the open and obvious rule in slip and fall cases in *Bruns v. City of Centralia*.[1] In this case, the roots of a "historical" tree caused the sidewalk to crack in front of an eye clinic on 2nd Street in Centralia. Twice the clinic contacted the City and offered to have the tree removed at the clinic's expense, but the City refused to remove the tree due to its historical significance.

Then on March 12, 2012, plaintiff, Virginia Bruns, stubbed her toe on the defective sidewalk and fell, injuring her arm, leg, and knee. At the

Continued on page 5

INSIDE

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Adjudication of liens in claims involving inadequate insurance coverage: *Wolf v. Toolie* as the latest contribution in this ongoing saga

Continued from page 1

Presumably this most recent statutory amendment would provide, for example, that, if the coverage limits are $250,000 but the damages to the injured party or estate were proved to be $1 million, the health insurance subrogation claim could be reduced by 75%.

To this author's knowledge, however, this new provision has not yet been tested in the federal courts on the issue of preemption, and it therefore remains to be seen whether the federal courts will give deference to the Illinois legislature on the issue of the right of an ERISA plan to recover full value of its subrogation claim in spite of this most recent legislative amendment in Illinois.

Nevertheless, it remains a significant struggle for attorneys representing claimants in Illinois to recover fair and adequate damages for their clients in the ever-increasing situations involving inadequate insurance coverage on the part of the tortfeasors who caused damage to our clients, where significant medical expenses have been incurred before it is time to determine how to divide the proceeds of settlement or judgment.

The recent appellate decision in *Wolf v. Toolie*, 2014 IL App (1st) 132243, decided September 30, 2014, does not offer plaintiffs' attorneys much in the way of relief. The First District determined that attorney's fees and costs should not be deducted from the total lump-sum recovery before determining the percentage maximum recovery that is to be distributed to health care service providers.

The interpretation of the Act by the First District in *Wolf* appears to contradict the earlier interpretation of the same provision by the Fifth District in *Stanton v. Rae*, 2012 IL App (5th) 110187, where the court found that the intent of the General Assembly in passing this legislation was that the plaintiff should receive 30% of the amount of the settlement for her injuries after all liens, expenses and medical bills have been paid, and that the 40% calculation should not begin until after the verdict or settlement had been reduced by attorney's fees and costs.

The *Wolf* decision from the First District actually involves two separate cases, both stemming from separate motor vehicle accidents in which the respective plaintiffs suffered personal injuries. In both cases the plaintiffs received treatment at Stroger Hospital of Cook County. The county filed liens against the plaintiffs for unpaid medical bills on behalf of the hospital pursuant to the Health Care Services Lien Act, 770 ILCS 23/1, *et seq.* (West 2012).

After each plaintiff filed a lawsuit and recovered a settlement, each plaintiff then filed a motion to adjudicate the health care liens, arguing that the attorney fees and litigation costs should be deducted from the total recovery before calculating the amount to be distributed to the health care services providers. The two circuit court judges decided this question differently: in one case the circuit court did not deduct attorney's fees and litigation costs from the plaintiff's total recovery before calculating the amount to be awarded to Stroger for its lien; in the other case the circuit court did deduct attorney's fees and litigation costs from the plaintiff's total recovery before calculating the amount be awarded to Stroger for its lien.

In her separate claim, Kimberly Wolf recovered a settlement of $27,000. The medical bills incurred at Stroger for her injuries totaled $5,093.10. In her motion for adjudication of medical liens, she noted that she had health care liens totaling $12,257.18, and that her attorney's fees from litigating the suit totaled $8,100.00, with costs totaling $751.26.

She argued that, pursuant to the decision from the Fifth District in *Stanton v. Rae*, the attorney's fees and costs she incurred should be deducted first, before applying percentage limitations, meaning that the health care lien claimants were entitled to 40% of $18,148.74, to be split evenly between the categories, with 20% of the subtotal going to health care professionals and 20% to health care providers. Stroger, as the sole health care provider, was entitled to $3,629.75, according to her calculations.

The circuit court, distinguishing *Stanton*, held that Stroger was entitled to the full amount of its $5,093.10 lien, in that the calculations in this case showed the plaintiff would receive money even after her attorney received 30% of the settlement and costs were paid; whereas in *Stanton,* the plaintiff would have received nothing from her judg-

TRIAL BRIEFS

Published at least four times per year.

Annual subscription rate for ISBA members: $25.

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Phones: 217-525-1760 OR 800-252-8908
www.isba.org

EDITOR
Robert T. Park

MANAGING EDITOR/ PRODUCTION
Katie Underwood
kunderwood@isba.org

ment if that court had not adjusted the calculations.

In the companion case, Nora Larmena received treatment for her injuries at Stroger and incurred medical bills, of which $4,185.60 remained unpaid at the time her lawsuit was settled for a total of $24,110.60. She alleged there were health care liens totaling $23,734.24. Her attorneys were entitled to fees of 30% from the recovery, pursuant to the Act, or $7,233.18, and she incurred costs of $3,480.02. Deducting the attorney's fees and costs left a new subtotal of $13,396.50, and Larmena argued that the health care lien claimants were entitled to 40% of the $13,396.50, with 20% of the subtotal going to health care professionals and 20% to health care providers.

She argued that the two health care providers, Stroger and Jackson Park Hospital, were each entitled to half of $2,673.90, or $1,336.95. The circuit court in this companion case found that the *Stanton* lien calculation was the proper methodology and awarded Stroger $2,673.90, or 20% of the $13,396.50 subtotal after deducting plaintiffs' attorneys fees and litigation costs from the total recovery of $24,110.60.

As identified by the First District, the central question on appeal was whether, under the Act, health care services liens are to be calculated from the plaintiff's total recovery or from the subtotal resulting after attorney fees and costs have been subtracted from the total recovery.

In looking at the "plain language" of the Act, if the total amount of health care liens exceeds 40% of plaintiff's verdict, judgment, award, settlement, or compromise, then attorney liens are limited to 30% of the verdict, judgment, award, settlement, or compromise, but contrary to the interpretation the plaintiffs were suggesting, nothing in the language of the Act or the Attorneys Lien Act suggests that health care liens must be calculated from the net amount of the judgment, verdict, or settlement, after costs and attorneys fees have been deducted, in the view of the First District.

In effect, by requesting that the attorney lien be subtracted from the plaintiff's total recovery before the health care services liens are calculated, the plaintiffs were requesting to shift their attorney fees and costs in part onto the health care services lien holders.

Citing to *Maynard v. Parker*, 75 Ill.2nd 73 (1979), and *Wendling v. Southern Illinois Hosp. Services*, 242 Ill.2nd 261 (2011), the appellate court found that deducting attorneys' fees and costs would be shifting attorney fees to a health care lien holder, which our Supreme Court did not permit in these earlier decisions.

It should be noted that in these earlier decisions (*Maynard* and *Wendling*), the Supreme Court addressed the issue of whether the Common Fund Doctrine applied to require health care lien holders to share in the *pro rata* contingent fee of the plaintiffs' attorneys, finding the doctrine should not apply. The hospital's recovery of its charges does not depend on the creation of a fund by the plaintiff's attorney, in that plaintiff was a debtor obligated to pay for the services rendered by the hospital out of any resources which might become available; and under these circumstances, a hospital is not unjustly enriched by the attorney's services, and therefore not required to contribute costs of litigation. *Wendling*, 242 Ill.2d 265 - 66.

The *Stanton* court had also reviewed *Wendling*, but distinguished it on the basis that *Wendling* simply determined that lien holders are not responsible for a proportionate share of attorney's fees under the Common Fund Doctrine, while the *Stanton* court performed its analysis based solely upon statutory interpretation, not the Common Fund Doctrine, which pertains to attorney's fees.

The *Wolf* court discussed *Stanton v. Rae* but disagreed with the Fifth District in its interpretation of the Act, finding that the calculation of the health care services lien must be calculated from plaintiff's total recovery and, to the extent that the Fifth District suggests otherwise, "we disagree." 2014 IL App (1st) 132243, ¶ 33.

As things now stand, there is an apparent conflict among the appellate districts. The issue of the intent of the Legislature in the amendments to the Act really centers around whether the central purpose in limiting liens or subrogation claims is to provide some reasonable recovery to the plaintiff where there is insufficient insurance coverage, or providing some limited but minimal recovery to health care service providers.

It does not appear that subrogation claims played any part in the court's analysis in *Wolf*, even though perhaps there may have been potential subrogation claims involved in both settlements. The statutory amendments to the Health Care Services Lien Act, found at 770 ILCS 23/50, effective January 1, 2013, also play a part, and sometimes a significant role, in determining what the net recovery will be to an injured party or surviving family, particularly where significant medical expenses have been incurred and paid for by a group health insurance plan. The relevant statutory amendment relative to subrogation is as follows:

> Subrogation claims. If a subrogation claim or other right of reimbursement claim that arises out of the payment of medical expenses or other benefits exists with respect to a claim for personal injury or death, and the personal injury or death estate claimant's recovery is diminished:
>
> (1) by comparative fault; or
>
> (2) by reason of the uncollectibility of the full value of the claim for personal injury or death resulting from limited liability insurance;
>
> the 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. Unless otherwise agreed by the interested parties, the amount of comparative fault and the full value of the claim shall be determined by the court having jurisdiction over the matter.

After reduction of the subrogation claim or other right of reimbursement claim due to either comparative fault or limited liability insurance, or both, the party asserting the subrogation claim or other right of reimbursement claim shall bear a pro rata share of the personal injury or death estate claimant's attorneys fees and litigation expenses. This Section 50 does not apply to any holder of a lien under the Workers' Compensation Act, the Workers' Occupational Diseases Act, or this Act including, but not limited to, licensed long-term care facilities, physicians, and hospitals, or to claims made to recoup uninsured payments pursuant to Section 143a of the Illinois Insurance Code or underinsured payments pursuant to Section 143a-2 of the Illinois Insurance Code. A subrogation claim or other right of reimbursement claim may be adjudicated even when a lien has not been filed regarding such claim.[2]

What is the interplay between this most

recent statutory amendment to the Act and the liens of health care services providers? Perhaps when it comes time to determine this issue, the appellate courts will find that each statutory provision should be considered separately and that there is, in fact, to be no consideration of interplay between the separate claims of lien holders and subrogation claimants. In fact, in the last paragraph of the section, it specifically provides that this section does not apply to any holder of a lien as elsewhere described under this Act, including physicians and hospitals.

But looking at the express language of Section 50, it provides that the subrogation claim or the right of reimbursement shall be diminished in the same proportion as the personal injury or death estate claimant's recovery is diminished by reason of the uncollectibility of the full value of the plaintiff's claim. Arguably, in determining what is collectible by the plaintiff, the effect of reduction by the payment of all liens to physicians or hospitals should be considered. If the plaintiff pays out 40% on a $100,000 settlement to health care lien holders, but the full value of the plaintiff's claim is $1 million, is the *pro rata* distribution to the subrogation claimants 6% or 10%? Perhaps it should be determined at 6%.

The conflict between the appellate districts on how to apply the lien calculation is an issue the Supreme Court may need to decide. The interplay, if any, between the separate provisions of the Health Care Services Lien Act is a further issue needing guidance from the appellate court.

Finally, as pointed out at the outset of this article, we can expect that both federal and state courts may weigh in on the issue of preemption by ERISA with respect to the application of Section 50 of the Act to reduce *pro rata* subrogation claims in those health insurance plans which are arguably self-funded. ■

1. 770 ILCS 23/50, eff. Jan. 1, 2013 (West).
2. Id.

The distraction exception explained: *Virginia Bruns v. the City of Centralia*

Continued from page 1

time she fell, Bruns was looking forward towards the door and steps of the clinic. Bruns "definitely" saw the defect each time she visited the clinic and the City of Centralia filed a motion for summary judgment on the grounds that the defect was open and obvious. The trial court granted the city's motion for summary judgment, and the appellate court reversed and remanded.

Section 3-102 of the Local Government and Governmental Employees Tort Immunity Act[2] dictates that municipalities have a duty to "exercise ordinary care to maintain its property in a reasonably safe condition." Yet under the "open and obvious rule," a locality does not have such a duty if the dangerous condition is open and obvious. Rather, people are expected to appreciate and avoid open and obvious conditions that are potentially dangerous.

However, the open and obvious rule does not totally eliminate the duty to maintain property when conditions are very apparent. The "distraction exception" re-establishes the duty to maintain "where the possessor of land has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it."[3] In other words, while people are expected to appreciate and avoid open and obvious conditions, they are not expected to do so when they are distracted by something the defendant should foresee.

But what constitutes a distraction? Speaking for a unanimous court, Justice Mary Jane Theis distinguished *City of Centralia* from other distraction cases decided by the Illinois Supreme Court. For example, Theis described that in *Ward v. K mart Corp.*, the defendant K mart should have reasonably foreseen that the plaintiff leaving the store with a mirror would be distracted and unable to notice the large cement columns right outside the store exit.[4] Similarly, in *Diebert v. Bauer Brothers Construction Co.*, the plaintiff was distracted by the defendant's workers, who had previously thrown debris at him from above.[5]

In *American National Bank & Trust Co. of Chicago v. National Advertising Co.,* a painter was electrocuted on a billboard ledge by a power line because he was paying close attention to where he placed his feet.[6] The Court ended by distinguishing *Rexroad v. City of Springfield*, where a student football manager was distracted by directions to retrieve a helmet from the locker room.[7] "In each of these cases, some circumstance was present that required the plaintiff to divert his or her attention from the open and obvious danger, or otherwise prevented him or her from avoiding the risk."[8]

Conversely, the Court explained that in *City of Centralia*, Bruns merely argued that she was distracted by looking forward towards the steps and door of the clinic. She argued that the City should have reasonably foreseen the potential for an accident because most people do not continuously look down as they walk.

However, the Illinois Supreme Court reversed the appellate court and held that the city could not reasonably foresee that the plaintiff would be distracted by looking forward. The court reasoned that, if it were to hold that simply looking elsewhere was enough to be legally distracted, "then the open and obvious rule would be upended and the distraction exception would swallow the rule."[9]

Moreover, the Court emphasized that the issue is not whether the plaintiff had looked elsewhere, which frequently happens in slip-and-fall cases, but why she was looking elsewhere. As the opinion pointed out, Bruns was not focusing her attention on the door of the clinic to avoid another hazard, as were the plaintiffs in *Deibert* and *American National Bank*. Nor was she distracted because some other task required her attention, as was the case with the plaintiffs in *Ward* and *Rexroad*.

To this point, the Supreme Court points to the explanation given by the appellate court in another case:

> A plaintiff should not be allowed to recover for self-created distractions that a defendant could never reasonably foresee. In order for the distraction exception to be foreseeable to the defendant so that the defendant can take reasonable steps to prevent injuries to invitees, the distraction should

> not be solely within the plaintiff's own creation. The law cannot require a possessor of land to anticipate and protect against a situation that will only occur in the distracted mind of his invitee.[10]

Justice Theis further illustrated the point with a reference from the Restatement (Second) of Torts, which observed that no liability would lie for a customer's injury where the customer was "preoccupied with his own thoughts."[11]

Today, whenever one is on a bus or a train or talking to one's own daughter, someone seems to be preoccupied with texting or reading a text. In *Bruns v. City of Centralia*, the Supreme Court has made it clear that would not likely qualify for the distraction exception in the face of an open and obvious hazard. ■

Hon. Daniel T. Gillespie is an Associate Judge serving in the Cook County Circuit Court Law Division. Greg Conner is a law student at Chicago-Kent College of Law and an extern for the Law Division of the Circuit Court of Cook County.

1. *Bruns v. City of Centralia*, 2014 IL 116998.
2. 745 ILCS10/3–102 (West 2012).
3. *Sollami v. Eaton*, 201 Ill.2d 1, 15, 265 Ill.Dec. 177, 772 N.E.2d 215 (2002).
4. 136 Ill.2d 132, 153-154, 143 Ill.Dec. 288, 554 N.E.2d 223 (1990).
5. 141 Ill.2d 430, 433, 152 Ill.Dec. 552, 566 N.E.2d 239 (1990).
6. 149 Ill.2d 14, 25, 27–28, 171 Ill.Dec. 461, 594 N.E.2d 313 (1992).
7. 207 Ill.2d 33, 36, 46, 277 Ill.Dec. 674, 796 N.E.2d 1040 (2003).
8. *Bruns v. City of Centralia*, 2014 IL 116998, at ¶ 28.
9. *Id*. at ¶34.
10. *Whittleman v. Olin Corp.,* 358 Ill. App. 3d 813, 817-818 (5th Dist. 2005), cited in *Bruns*, 2014 IL 116998, at ¶ 31.
11. Restatement (Second) of Torts, Sec. 343A, cmt. E., illus. 1 at 220 (1965).

Employer may be liable for deaths after employee sent threats from company computer

By The Honorable Russell W. Hartigan, Judge, Cook County Circuit Court, and Jessica L. Fangman, Student, Loyola University Chicago School of Law

On August 12, 2014 the Illinois Appellate Court, Fifth District, decided *Regions Bank v. Joyce Meyer Ministries, Inc.*,[1] finding an employer may be liable for the deaths of an employee's wife and children, when death threats were sent by the employee to himself and his family using the employer's computer network, and the employer voluntary undertook the responsibility to provide security and surveillance for their safety but failed to do so.[2]

Factual Background

In early May of 2005, Sheri Coleman and her two young sons, Garett and Gavin, were murdered by Christopher Coleman ("Christopher"), Sheri's husband and the children's father.[3] After Coleman was convicted of the murders and sentenced to life in prison without parole, the administrator of the decedents' estates filed a claim against Christopher's employer for wrongful death.[4]

The complaint alleges Christopher sent email death threats to himself, his wife and children, and his employer, Joyce Meyer Ministries, Inc. ("JMM"), from his work computer.[5] JMM filed a motion to dismiss for failure to state a claim. The trial court granted the motion, but allowed the plaintiff to amend the complaint.[6]

Count III of the amended complaint claims JMM is liable for the wrongful deaths of the decedents under the "theory of negligent undertaking to protect the decedents from threatened harm."[7] JMM filed a motion to dismiss the amended complaint, which the trial court granted.[8] The issue presented to the appellate court was whether the plaintiff had stated a claim for which relief can be granted.[9]

Christopher was employed for over eight years at JMM in high-level security positions.[10] While employed at JMM, Christopher e-mailed and hand delivered "harassing notes and death threats" to himself, the decedents, and JMM.[11] JMM was aware of the death threats directed to Christopher and his family.[12]

To monitor its employees' work-computer activities, JMM enforced an "electronic communications policy" designed to oversee its employees' computer use including electronic communications.[13] The policy prohibited JMM employees from "sending or viewing inappropriate, obscene, harassing, or abusive images, language" on its computer system, and "JMM reserved the right to monitor and inspect" any communication "sent, received, or stored" on its computer system.[14]

Armed with JMM's computer system policy and the e-mails sent by Christopher, the plaintiff argues JMM reasonably should have known that, because of the life-threatening emails, JMM had a legal duty to use its computer policy to protect the decedents.[15] Specifically, plaintiff argues JMM *voluntarily undertook* a duty "to provide security services for the protection and safety of the decedents" in that it should have monitored and inspected the threats sent from one of its computers, and (1) taken action against Christopher, (2) stationed security outside the decedents' residence, (3) installed surveillance equipment, and (4) informed the local authorities of the death threats made against the decedents.[16]

Analysis

The appellate court found the plaintiff put forth a sufficient claim to survive a motion to dismiss, and held JMM owed the decedents a duty as a matter of law under the theory that "JMM voluntarily undertook to protect the decedents from the criminal acts of a third person."[17] In reaching this conclusion, the court found that, while it is uncommon for a person to have an "affirmative duty to protect another from harmful or criminal acts by a third person,"[18] this case is an exception to that general rule.

The Second Restatement of Torts defines liability for the actions of a third party under the voluntary-undertaking exception, as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the

> other's person or things, is *subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking*, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.[19]

The plaintiffs claim that, under its own computer policy, JMM breached the duty it owed to decedents because it failed to investigate the death threats, failed to provide the decedents with security and to monitor their residence or install surveillance equipment, and failed to inform law enforcement authorities of the death threats Coleman made to himself, his family, and JMM.[20]

The court noted that, while the voluntary undertaking exception is narrowly construed in Illinois, because JMM voluntarily promised the decedents it would investigate the death threats and provide security at the Coleman home, the exception applies in this case.[21] The court held JMM voluntary undertook a responsibility to investigate the death threats and thus owed a duty to the decedents, which was sufficient to establish a cause of action that could survive JMM's motion to dismiss.[22]

Practical Implications

Regions Bank offers the legal community a direct and glaring image of the realities of the national gun violence problem. Just as JMM may be held responsible under the voluntary undertaking theory for the deaths of Christopher's family, members of the legal profession have a duty to act responsibly when presented with information that endangers the life or safety of the client or others.

It is important to keep in mind that Rule 1.6(c) of the Illinois Rules of Professional Conduct requires a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."[23] Rule 1.6(b) permits a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary … to prevent the client from committing a crime" not including the scenario in Rule 1.6(c) which requires a lawyer to report.[24]

This case also instructs employers that they may be held responsible when they voluntary undertake a duty to protect individuals from harm and then fail to do so. If JMM had adequately investigated the death threats, per its computer system policy, the court may have found the plaintiff failed to state a claim.

The appellate court remanded the case for trial and noted that it was strictly deciding a procedural issue and the parties should not take this as a "measure of the merits of the case."[25] ■

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1. 2014 IL App (5th) 130193, 15 N.E.3d 545.
2. 2014 IL App (5th) 130193 at ¶ 21.
3. *Id*. at ¶ 2.
4. *Id*. at ¶¶ 2-3.
5. *Id*. at ¶ 2.
6. *Id*. at ¶ 4.
7. *Id*. at ¶ 5.
8. *Id*.
9. *Id*. at ¶ 7.
10. *Id*. at ¶ 2.
11. *Id*. at ¶ 15.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*. at ¶ 16.
16. *Id*.
17. *Id*. at ¶¶ 8-9.
18. *Id*. at ¶ 9.
19. *Id*. at ¶ 10 (citing Restatement (Second) of Torts § 323 (1965) (emphasis added)).
20. *Id*. at ¶ 17.
21. *Id*. at ¶ 9.
22. *Id*. at ¶¶ 20, 23
23. Ill. Rs. Prof'l Conduct R. 1.6(c) (Jan. 1, 2010).
24. Ill. Rs. Prof'l Conduct R. 1.6(b) (Jan. 1, 2010).
25. 2014 IL App (5th) 130193, ¶ 22.

When is a mailbox not a mailbox?

By John J. Holevas, WilliamsMcCarthy LLP, Rockford

When is a "mailbox" not a "mailbox"? According to the Second District Appellate Court, the use of FedEx delivery for service of a tax appeal does not trigger the "mailbox rule."

In *BLTREJV3 Chicago, LLC v. Kane County Board of Review*, 2014 IL App (2d) 140164, decided September 3, 2014, the petitioner taxpayers had sent to the Kane County Board of Review a tax appeal for property located in St. Charles Township by depositing the appeal document with a third party commercial carrier, namely FedEx, on the due date for the filing of the appeal.

The respondent Kane County Board of Review's rules state that only documents transmitted by U.S. Mail will receive the benefit of the "mailbox rule." The Board rules further state that the provision that "communications transmitted through the United States mail shall be deemed filed with or received by the Board on the date shown by the post office cancellation mark stamped * * * does *not* apply to communications delivered by Federal Express, UPS, DHL, or any other commercial or non-commercial delivery entity."

Petitioners claimed that, because the Illinois Supreme Court Rules apply to the practice of law, Supreme Court Rules 11 and 12 must apply to tax appeals. Supreme Court Rule 11(b)(4) allows for delivery to a third-party commercial carrier—including deposit in the carrier's pickup box…" Petitioners argued that the respondent Board of Review is a quasi-judicial body regulated by the Tax Code and that the Supreme Court Rules should apply to them.

The appellate court first noted that service is not equivalent to filing, citing *Shatku v. Wal-Mart Stores, Inc.*, 2013 IL App. (2d) 120412, 990 N.E.2d 826, 371 Ill. Dec. 638.

The appellate court went on to rule that, had petitioners sent the appeal by U.S. Mail, the postmark would have served as the date of filing, and the Board would have not considered the appeal untimely.

The court noted that the Board had the authority pursuant to Section 9-5 of the Tax Code, 35 ILCS 200/9-5 (West 2012), to establish rules governing its own procedures. Until the Board extends its filing rules to apply the mailbox rule to third-party commercial carriers, appeals sent by any means other than the U.S. mail must be actually received on or before the due date.

The moral of the story seems to be: "If it absolutely positively has to be there," use the U.S. Mail! ■

Trial Briefs
Illinois Bar Center
Springfield, Illinois 62701-1779
October 2014
Vol. 60 No. 4

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