News From Our Illinois Chapter

The Chapter President's Message from Eric W. Moch...

Happy September! I hope all of you had a safe and enjoyable summer. Here in Illinois we are transitioning into autumn and winter with the help of two wonderful upcoming events. This year we are fortunate to host the NSPII national seminar right here in our backyard, November 14-15, 2016, at the Hilton Chicago/Indian Lakes Resort in Bloomingdale. The topics are always timely and engaging, the networking opportunities are first-rate and the location itself is always a big draw. This year is no exception. **IF YOU HAVE NOT YET REGISTERED, PLEASE TAKE JUST A FEW MOMENTS AND DO SO NOW.** Additionally, if you see an opportunity, encourage another colleague or two to do so as well. We have plenty of spots still available. The cost for this excellent seminar pales in comparison to the professional benefits it provides, which includes continuing education credits. We are also still soliciting sponsors for this great event. If you are interested in a high visibility sponsorship opportunity, please contact me.

On Thursday morning, September 29th, we will be presenting our quarterly training session for the Illinois chapter. We are excited to host Arlington Heights Police Officer Brian Clarke, who will speak about the use of cell phone and cell phone tower data in police investigations. This topic is of obvious value to insurance investigators as well. Come join us at 8:30 a.m. at JC Restoration, 3200 Squibb Avenue in Rolling Meadows.

Finally, we have three informative articles for your consideration below. Three of my colleagues here at HeplerBroom jumped at the chance to discuss some recent legal developments that you should be aware of. If you have any questions about these developments, please feel free to contact the authors directly, or simply call me. I am always available at (312) 205-7712 or . Thank you very much.

Illinois Enacts Anti-Indemnity Legislation in Snow and Ice Removal Contracts, *by Aleen Tiffany and Stephanie Weiner*

It's official: Illinois Governor Bruce Rauner signed the Snow Removal Service Liability Act ("the Act") into law. Effective August 29, 2016, this legislation holds that certain indemnity agreements between a "service provider," i.e., a snow and ice removal contractor, and a "service receiver," i.e., a customer, are unenforceable in Illinois.

Specifically, the Act provides that it is against public policy and void for a snow and ice removal contract to require *either* a snow and ice removal contractor *or* customer to: (1) indemnify the other for their own negligence; (2) hold the other harmless for their own negligence; or (3) impose a duty to defend the other for their own negligence.

The Act, and similar legislation pending in other states, was spearheaded by the lobbying efforts of the Association of Snow Contractors Association ("ASCA"). ASCA sought multi-state legislation making indemnity, duty to defend and hold-harmless provisions in snow and ice removal contracts void against public policy and unenforceable as a matter of law. ASCA focused its lobbying activities across states within the "Snow Belt," and anti-indemnity legislation is pending in Michigan, New York, New Jersey, and Pennsylvania.

ASCA's motivation behind these efforts (as stated) are multi-fold, but the primary goal appears to be to lower insurance premiums for snow and ice removal contractors. Other benefits to this legislation (as touted by ASCA) include alleviating insurance carrier concerns about contract language; increasing the value of professional snow and ice contractors; and more favorable scope of work provisions (such as decreased trigger depths and more specific criteria for salt application).

While the ASCA was successful in in its efforts in having anti-indemnity legislation passed in Illinois, it is not a complete "win" for the ASCA. Following successful lobbying efforts by the Illinois Association of Defense Trial Counsel ("IDC"), the Act does not apply to insurance policies, and is reciprocal to prevent indemnification reciprocally between service providers and receivers.

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Illinois Enacts Anti-Indemnity Legislation *(cont'd.)*

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Therefore, while the Act makes contract provisions requiring contractual indemnity for one's own negligence void as against public policy, additional insurance requirements remain enforceable. The import of this insurance policy exclusion means that customers can, and likely will, continue to require that the snow and ice contractor name the customer as an additional insured on the contractor's CGL policy.

The insurance exception to the Act may undermine some, if not all, of the ASCA's stated goals. Enforceable "additional insured" requirements may mean that, in reality, contractor's CGL premiums are not decreased. As such, while the Act provides some insulation to contractors for contractual indemnity claims, it leaves these same contractors out in the cold on their primary goal of reducing insurance premiums as additional insured requirements remain enforceable in Illinois.

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Estoppel, and Duty to Defend, and Moorman, Oh My!, *by Alex Belotserkovsky*

June and July of 2016 were busy months for Illinois appellate courts. Among the cases of particular interest due to developments involving insurance law are Hartwell v. Fireman's Fund Ins. Co. of Ohio, (Ill. App. Ct. 1st Dist.) (June 30, 2016 decision); Hecktman v. Pacific Indem. Co., (Ill. App. Ct. 1st Dist.) (July 20, 2016 decision); and Westfield Ins. Co. v. West Van Buren, L.L.C., (Ill. App. Ct. 1st Dist.) (July 20, 2016 decision).

In Hartwell v. Fireman's Fund Ins. Co. of Ohio, the plaintiff, an employee of a subcontractor, sued general contractor for negligence in supervising the construction site where he was injured. General contractor's insurer paid for the defense due to the duty to defend. General contractor's attorneys for whom the insurer was paying filed an answer to the plaintiff's interrogatories stating that general contractor had a liability insurance policy with the insurer and the maximum liability limit under the policy was $1 million.

The policy included an endorsement requiring the general contractor to obtain certificate of insurance and hold harmless agreements from all subcontractors, and that failure to do so would result in insurer's paying a maximum of $50,000 for all damages and defense costs due to any "bodily injury" "arising out of any covered acts". The insurer send the general contractor a series of letters stating that, due to the general contractor's failure to comply with this endorsement, the limits of insurer's liability have been reduced to $50,000. General contractor received these letters after its attorneys filed responses to interrogatories stating that the maximum liability limit was $1 million, but general contractor's attorneys (who also represented the insurer), never amended this discovery response regarding the maximum liability limit under the policy.

After the case went to trial against the general contractor only (with the insurer paying for the defense), the jury found in favor of the Plaintiff, awarding more than $50,000 in damages and the general contractor went out of business with no assets to satisfy the judgment. The Plaintiff brought a declaratory judgment action against the general contractor and insurer asking for a declaration that the policy covered his damages. Both parties moved for summary judgment and the court granted summary judgment to the insurer. The Appellate Court for the First District reversed finding that the insurer was estopped from asserting endorsement against the Plaintiff because the failure to disclose to the Plaintiff the change in the policy limits prevented the Plaintiff from seeking settlement with the general contractor or changing his trial strategy.

In Hecktman v. Pacific Indem. Co., (Ill. App. Ct. 1st Dist.) , the First District affirmed the dismissal of Plaintiffs' negli-

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Estoppel, and Duty to Defend, and Moorman, Oh My! *(cont'd.)*

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gence claims on the basis that they were barred by the *Moorman* economic doctrine (that a plaintiff cannot recover for solely economic loss under a tort theory of negligence). The claims of the Plaintiffs involved portions of their hardwood flooring beginning to bow upward allegedly as a result of the water infiltration as a result of inadequate construction and inadequate design. The First District reasoned that there the three recognized exceptions to the *Moorman* doctrine 1) where the plaintiff sustaining damage, i.e., personal injury or property damage, resulting from a sudden or dangerous occurrence; 2) where the plaintiff's damages are proximately cause by defendant's intentional false representation (i.e. fraud); and 3) where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions.

The First District noted that the Plaintiffs only claimed that the first exception was at issue. The Court reasoned that the Plaintiffs did not allege a sudden, dangerous or calamitous event and their complaint explicitly stated that their hardwood floors became deformed "over time". The Court also found that the "property damage" alleged by the Plaintiffs was nothing more that damage incidental to the defective construction of the building which was damage "consequent to qualitative defects, " and therefore not recoverable in tort.

In Westfield Ins. Co. v. West Van Buren, L.L.C. , (Ill. App. Ct. 1st Dist.), the First District affirmed a summary judgment in favor of the insurance company finding that there was no duty to defend. The policy in question offered coverage for "occurrences", defined as accidents, and also for "property damage". The lawsuit against insured involved claims that construction defects in the roof in the condominium development insured constructed caused water to infiltrate into the building and individual condominium units and also caused damages to personal and other property in the condominium units.

The Court reasoned that the allegation of intentional conduct was incorporated in all counts of the underlying complaint and the complaint alleged nothing accidental. The allegations of the complaint, instead, focused either on intentional bad acts of the insured, or nonfortuitous events, like resulting damage to the condo building due to shoddy workmanship of which the insured was allegedly aware. The Court also found that the allegations in the underlying complaint do not fall within the definition of "property damage". The complaint only sought to hold insured responsible for shoddy workmanship. This involves an economic injury or diminution in value and not a "physical" injury when property is altered in appearance, shape, color or in other material dimension.

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Appellate Court Clarifies, Expands Scope of Discovery in First Party Insurance Litigation, *by Jennifer Martin*

In *Zagorski v. Allstate Insurance Company*, 2016 IL App (5th) 140056 (May 16, 2016), the Illinois Fifth District Appellate Court issued important rulings regarding the scope of discovery in cases involving bad faith claims under Section 155 of the Illinois Insurance Code (215 ILCS 5/155). *Zagorski* involved a fire damage claim which was filed with Allstate five days after the plaintiffs purchased an Allstate homeowner's policy. *Id.* at ¶ 3. Allstate's Special Investigation Unit conducted an investigation of the claim, which included sworn interviews of the plaintiffs by the insurer's outside counsel, Robert Brady. *Id.* at ¶ 4. Following the investigation, Allstate denied the claim based on its finding that plaintiffs had intentionally set the fire. *Id.* Plaintiffs filed a declaratory judgment action seeking relief under Section 155 of the Illinois Insurance Code for Allstate's alleged vexatious and unreasonable denial of plaintiff's fire loss claim, and for common law fraud based on statements allegedly made by Allstate's agent during the claim investigation. *Id.* at ¶ 5.

Plaintiffs' initial interrogatories (12) – (15) to Allstate requested information regarding: (i) cases in which Illinois courts had awarded damages and/or other relief against Allstate under Section 155 during the preceding five years, (ii) cases brought against Allstate during the preceding five years for failure to pay a fire loss claim, (iii) claims filed by All-

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state's insureds with the Illinois Department of Insurance during the preceding five years alleging improper claims practices for fire loss claims, and (iv) Allstate's policy manual or related documents for fire loss claims. *Id.* at ¶ 6. Plaintiffs also sought to depose Allstate's outside counsel, and when this was denied by the circuit court, filed supplemental interrogatories seeking detailed information regarding Mr. Brady's involvement with the investigation of plaintiffs' claim and similar claims, including the dates of his involvement, his communications with Allstate's agent, his hourly rate and total bill, the number of fire claims or cases sent by Allstate to his firm during the three year period preceding the date of loss, the names and captions of lawsuits in which his firm had represented Allstate, and the total amount that the firm had received from Allstate for legal services during the three year period preceding the date of loss. *Id.* at ¶ 11. Allstate objected to all of the discovery requests on grounds of privilege and relevance, and asserted other generic objections (overbroad, unduly burdensome, harassing) to the initial discovery requests. *Id.* at ¶ 8. With some minor adjustments, the circuit court ordered Allstate to respond to plaintiffs' initial and supplemental discovery requests. *Id.* at ¶ 13.

Following the circuit court's denial of its motion for reconsideration, Allstate and Brady jointly filed a "Motion for Contempt for Purposes of Facilitating Appellate Review" of the circuit court's discovery order, and asked the circuit court to enter a "friendly" contempt order against Brady in order to allow appellate court review of the circuit court's discovery order. *Id.* at ¶ 15. (While discovery orders are not appealable under Illinois law, a contempt order is a final and appealable order which "necessarily requires a review of the discovery order upon which it is based." *Id.* at ¶ 20.) With some reluctance, the circuit court held Brady in contempt and stayed the $25 per day contempt sanction pending the outcome of an appeal. *Id.* at ¶ 17.

The Fifth District Appellate Court rejected Allstate's objections to plaintiffs' original Interrogatories (12) – (15), and held that all of the information sought in these interrogatories was discoverable, reversing the circuit court to the extent of any limitations imposed by its discovery order. In particular, with regard to plaintiffs' request for information concerning improper claims practices reported to the Department of Insurance, the Appellate Court found that such information was "relevant to, but not dispositive of" a claim of vexatious and unreasonable conduct under Section 155. *Id.* at ¶¶ 9-10 ("In this case, we believe that the plaintiffs could properly ask whether, within the five-year period preceding their fire loss, Allstate had ever been cited by the Director of Insurance for improper claims practices arising under subsections 154.6(f) and (g) of the Code, because these subjects are relevant to the plaintiffs' claims for breach of contract, section 155 penalties, and fraud.") However, the Appellate Court found that the information sought in plaintiffs' supplemental interrogatories concerning outside counsel and his firm was not relevant or discoverable, with the sole exception of the transcripts of Brady's interviews of the plaintiffs. *Id.* at ¶ 24. The Appellate Court's opinion thus stands for the propositions that (i) information regarding an insurer's claims handling history is relevant in a Section 155 action, but (ii) information concerning the involvement of insurer's outside counsel with the insureds' claim or similar claims is not relevant or likely to lead to the discovery of relevant information.

Finally, in what may be construed as a stern warning to Illinois practitioners, the Appellate Court expressed its unhappiness and frustration with the actions of Allstate regarding plaintiff's discovery requests, and devoted several paragraphs of its opinion to a "remedial primer" regarding the roles of parties in discovery disputes:

> [W]e noted that Allstate had raised the identical grounds for objection as to interrogatories 12, 13, 14 and 15, and we found no indication that Allstate defended any of these stated grounds, except for relevance. As a result, we believe it appropriate and necessary to comment on this tendency of civil litigators, both plaintiffs' counsel and defendants' counsel, to tender stock, formulaic objections to discovery requests, and then, when the objections are called for hearing, to completely abandon those grounds without consequence. . . Stock objections and fractional disclosures render our discovery rules and procedures meaningless. [Cite omitted.] Such tactics delay the search for truth, waste judicial resources, and should not be condoned by the parties or the trial court. We hope that this will serve as an admonition that asserting an objection followed by a litany of hollow grounds, without the intention or means to defend

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those grounds, is an abuse of the discovery process that may warrant sanctions.

Id. at ¶¶ 34 – 39.

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