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Saving Your Assets: Understanding Successor Liability In Illinois

by Justin K. Beyer

Imagine this scenario: One day you receive a new complaint. The plaintiff is claiming your client is liable based on decades-old conduct. But you know that the company did not even own the business at that time. What now? The answer could be directly tied to how the purchase was structured. And when it was structured to purchase assets only, a defense attorney should turn to the successor liability defense (the "defense").

In Illinois, like most jurisdictions, liabilities of the selling predecessor will not be imposed on the asset buyer. *Vernon v. Schuster*, 179 Ill. 2d 338, 344-45, 688 N.E.2d 1172, 1175 (1997); *Nguyen v. Johnson Mach. & Press Corp.*, 104 Ill. App. 3d 1141, 1151, 433 N.E.2d 1104, 1112 (1st Dist. 1982). This traditional rule of non-liability for buyers "developed as a response to the need to protect bonafide purchasers from unassumed liability and was designed to maximize the fluidity of corporate assets." *Vernon*, 179 Ill. 2d at 345. The import of the defense is that it acts as a complete defense to claims arising out of a seller's acts, including the seller manufacturing a defective product or acting negligently.

While this defense traditionally is used in product liability actions, defendants have utilized it in actions involving ERISA, breaches of real estate contracts, opposition to the EEOC's subpoena power, and security trading violations, to name a few.

Certain exceptions exist, however, and, in some ways, the defense is better known for its exceptions than the general rule. The exceptions fall under two categories: traditional and non-traditional. Illinois only recognizes the traditional exceptions. The traditional exceptions are: (1) an express or implied assumption of the seller's liabilities; (2) a merger occurring between the buyer and seller; (3) the buyer acting as a mere continuation of the seller; or (4) the transaction being completed for fraudulent purposes. *Id.* at 345. The non-traditional exceptions consist of the "product line" and "continuity of enterprise" exceptions and have been rejected in Illinois.

For the assumption of liability exception to apply, the buyer must assume the seller's liabilities. A plaintiff generally cannot establish an assumption if the agreement is silent, and, if an agreement disclaims liability, no assumption occurs. The question of when a company impliedly assumes liabilities is an open one in Illinois; however, Illinois courts have found no assumption where the buyer agrees to purchase insurance for the seller. *Green v. Firestone Tire & Rubber Co.*, 122 Ill. App. 3d 204, 210, 460 N.E.2d 895, 899 (2d Dist. 1984); *Ruiz v. Weiler & Co., Inc.*, 860 F. Supp. 602, 605 (N.D. Ill. 1994).

Where a plaintiff claims the merger exception applies, the plaintiff must establish: (a) continuity of management, personnel, physical location, assets, and

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business operations; (b) continuity of shareholders; (c) the seller ceases its business operations, liquidates, and dissolves as soon as legally and practically possible; and (d) the buyer assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of the seller's business operations. *Nguyen*, 104 Ill. App. 3d at 1143,; *Myers v. Putzmeister, Inc.*, 232 Ill. App. 3d 419, 425, 596 N.E.2d 754, 756 (1st Dist. 1992); (exception does not apply where proof of any element absent); *Nilsson v. Cont'l Mach. Mfg. Co.*, 251 Ill. App. 3d 415, 418, 621 N.E.2d 1032, 1034 (2d Dist. 1993) (continuity of ownership a prerequisite to establish exception).

When a company uses fraudulent means to escape liability, it can later be liable for the debt or liabilities of the predecessor. While Illinois has not established a test for when a fraudulent transaction takes place, *per se*, in the context of the successor liability defense, the Uniform Fraudulent Transfer Act presents a list of factors that a court may consider when analyzing the applicability of this exception.

Where a plaintiff claims the mere continuation exception applies, a plaintiff must show that no corporation existed before the asset purchase and also must establish that there was: (a) similar identity of officers and directors; and (b) stock being transferred between the selling and purchasing corporations. Generally, Illinois courts look no further than whether a continuity of ownership exists. *Nguyen*, 104 Ill. App. 3d at 1149,; *Putzmeister, Inc.*, 232 Ill. App. 3d at 423, ("a purchaser of assets will not be liable under the theory of *de facto* merger or mere continuation in the absence of continuity of ownership").

A fraudulent transfer also defeats the defense. When a company uses fraudulent means to escape liability, it can later be liable for the debt or liabilities of the predecessor. While Illinois has not established a test for when a fraudulent transaction takes place, *per se*, in the context of the successor liability defense, the Uniform Fraudulent Transfer Act (740 ILCS 160/5 (2011)) presents a list of factors that a court may consider when analyzing the applicability of this exception. *See*, *e.g.*, *Steel Co. v. Morgan Marshall Indus., Inc.*, 278 Ill. App. 3d 241, 251-52, 662 N.E.2d 595, 601-2 (1st Dist. 1996). One example of potential fraud occurs when a company sells its assets far below market value to another company in which the seller's shareholders hold a stake. *Morgan Marshall*, 278 Ill. App. 3d at 245, 662 N.E.2d at 598; *cf. Putzmeister, Inc.*, 232 Ill. App. 3d. at 425, 596 N.E.2d at 756 (no fraud despite a "disparity between the value of the predecessor's debts and assets").

Two additional exceptions exist, but Illinois does not recognize either. The "product line" exception defeats the defense when a buyer continues to manufacture the same product line as the seller. The justification for this exception is that, despite the buyer not manufacturing the defective product, the buyer benefitted from the seller's goodwill and should make the plaintiff whole. This exception was first adopted by the California Supreme Court in *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3 (Cal. 1977). This exception has been rejected in over 20 states, including Illinois. *Diguilio v. Goss Int'l Corp.*, 389 Ill. App. 3d 1052, 1063-64, 906 N.E.2d 1268, 1278 (1st Dist. 2009) (identifying cases rejecting product line exception).

The "continuity of enterprise" exception was popularized following the Michigan Supreme Court decision of *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873 (Mich. 1976). This exception effectively creates

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liability for a buyer for the seller's debt if the buyer merely continues the business of the seller. Only Michigan, Alaska, Alabama, Ohio, Pennsylvania, and New Jersey have adopted or written favorably about this exception, and 16 states, including Illinois, have rejected it. *Nguyen*, 104 Ill. App. 3d at 1144-48.

Applying this defense requires an attorney to know the client's corporate history. To determine whether the defense applies, litigators must seek out information on a company's corporate history, should request copies of all prior purchase agreements, and pay particular attention to whether those deals were structured as an asset purchase or a stock deal. If it is structured to purchase assets of the seller, then the defense applies and a litigator should then consider the exceptions discussed above. ■

Workers' Compensation Reform – The 2011 Version

by R. Mark Cosimini

It wasn't that long ago when we were talking about a new century and a new millennium. Since that time, the Workers' Compensation Act has undergone two major revisions. Back in 2006, the political climate was exceptionally favorable to the Plaintiffs' bar. Additions and amendments were made to the Workers' Compensation Act which provided for increased benefits to workers. Generally speaking, the vast majority of the changes were thought to be favorable to workers.

The business community was successful in having a medical fee schedule implemented which was intended to dramatically reduce the costs of medical treatment. Additionally, utilization reviews were allowed, and they were intended to provide employers an opportunity to dispute excessive and unnecessary medical treatment. Unfortunately, the medical fee schedule did not result in the dramatic savings as was hoped, and the utilization reviews were often ignored by many of the arbitrators.

Fast forwarding to 2010 and 2011, the political climate dramatically changed. State income taxes and business taxes were increased. This prompted neighboring states to recruit Illinois businesses, and many Illinois businesses threatened to leave the state.

The combination of the tax hike and the perception of the workers' compensation system being overly generous and possibly even corrupt caused the State Legislature to react in the hope of making Illinois appear to be a more business friendly environment.

The Workers' Compensation Act took center stage when numerous articles were published in the Belleville News Democrat. The articles highlighted a series of settlements paid to prison guards for repetitive trauma injuries resulting in the State having to pay about ten million dollars in settlements. The newspaper also published stories highlighting potentially improper behavior on the part of some arbitrators.

The combination of the tax hike and the perception of the workers' compensation system being overly generous and possibly even corrupt caused the State Legislature to react in the hope of making Illinois appear to be a more business friendly environment.

The business community made numerous demands including changing the standard of causation, further

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cutting medical expenses, and limiting benefits paid to injured workers. The labor community generally wanted to leave the Act as-is and opposed making any significant changes.

After several hearings before legislature committees, a bill was drafted. On the last day of the legislative session, the House and Senate passed the bill. On 6/28/11, Governor Quinn signed House Bill 1698 into law.

The results included some significant changes to the Workers' Compensation Act, but other changes were clearly compromises between the business groups and the labor groups.

This article will highlight some of the more significant changes made to the Workers' Compensation Act. It is not intended to be comprehensive or exhaustive. It should also be noted that the practical impact of some of the changes is yet to be determined. Many of the new provisions will lead to increased litigation requiring the Workers' Compensation Commission Division of the Appellate Court to interpret the language of the statute and how it should be applied to workers' compensation cases.

In an effort to combat the perception of Arbitrators and practicing attorneys having too close of a relationship, the format of the downstate venues is being changed. Three arbitrators will be assigned to each venue, and the arbitrators will be limited to only presiding over a particular venue for two consecutive years.

Personnel and Scheduling Changes

One of the most talked about provisions of the 2011 amendments involves the arbitrators and the logistics as to how cases will be handled. Effective July 1, 2011, the terms of all arbitrators were terminated. The arbitrators were to continue performing their duties until they were either reappointed or replaced. The Governor's office has now completed the reappointment process. Seven new arbitrators were appointed, and eight of the sitting arbitrators were not reappointed. One sitting arbitrator is becoming a commissioner. Each of the arbitrators has now been assigned to venues either in Chicago or to one of five zones downstate.

In an effort to combat the perception of arbitrators and practicing attorneys having too close of a relationship, the format of the downstate venues is being changed. Three arbitrators will be assigned to each venue, and the arbitrators will be limited to only presiding over a particular venue for two consecutive years. In order to accommodate the requirement that three arbitrators be appointed to each venue, the number of downstate venues is being reduced from 24 to 15. Additionally, each case will appear on the status call every three months as opposed to the current two-month cycle. Most practicing attorneys will have to significantly adjust their schedules in order to keep up with the changing logistics.

The Governor's office has also filled the expired terms of the commissioners. Two new commissioners have been appointed, one of whom previously served as an arbitrator.

Medical Fee Schedule Reduced

At the time the medical fee schedule was introduced in 2006, studies showed Illinois medical costs ranked sixth in the nation. Studies also showed that by 2010, the medical costs in Illinois for workers' compensation cases had increased to a ranking of second or third in the nation.

The 2011 amendments state that for all medical treatment provided on or after September 1, 2011, the

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appropriate amount set forth in the fee schedule shall be reduced by 30 percent.

While we can expect the overall costs of medical care provided to injured workers to be decreased as a result of this change, it would be naïve to think there will be an actual reduction of 30 percent. A more realistic expectation is the doctors and medical facilities will add additional procedure codes in an effort to circumvent the limits set forth by the fee schedule. This is not to suggest the doctors will perform unnecessary treatment, but as with the 2006 amendments, we can expect to see changes in billing practices.

Utilization Review Changes

Utilization reviews consist of having a medical professional examine an injured worker's treating medical records and diagnostic studies and render an opinion as to whether ongoing treatment or recommended treatment is appropriate. When utilization reviews were introduced with the 2006 workers' compensation amendments, the idea was to try and limit excessive and unnecessary chiropractic treatment and physical therapy treatment. The 2006 version of the utilization review section required arbitrators and commissioners to consider the utilization review when rendering their decision. However, the statute in no way obligated arbitrators or commissioners to give any weight to the utilization review.

The 2011 version of the utilization review section does not necessarily require the arbitrators or commissioners to give more weight to the utilization review, but it does require more involvement by the treating doctors.

Now, when an employer notifies a workers' compensation claimant and his or her treating physician of the intent to have a utilization review performed, the treating doctor is obligated to make reasonable efforts to provide timely and complete reports justifying the recommended treatment. If the treating doctor fails to make reasonable efforts, payment for the treatment provided and payment for recommended treatment could be denied.

If a medical professional performing a utilization review renders an opinion that the recommended treatment is not appropriate, then the claimant has the burden to show by a preponderance of the evidence that the recommended treatment is reasonably required to cure or relieve the effects of the work injury.

The changes to the statute will most likely result in litigation based upon expert opinion disputes, but there is also a possibility the extra steps made necessary by the utilization review section will cause some treating physicians to refrain from providing excessive medical care.

Preferred Provider Program

Prior to the 2011 amendments being signed into law, several employer groups lobbied to have some level of control over the medical care provided to injured workers. The general rule is an injured worker is entitled to two choices of physicians as well as chains of referrals from those physicians.

The changes made to the Workers' Compensation Act include a new section providing for Preferred Provider Programs (PPP). The new section allows employers to create and use a PPP in an effort to control medical costs.

A PPP consists of a network of physicians competent to treat common injuries experienced by injured workers in the geographic area where the employees reside. The physicians in the network must include both occupational and non-occupational specialities.

The statue provides that when a worker reports an injury to the employer, the employer must provide notice of the PPP to the worker. The notice shall set forth the names and contact information of the member physicians and shall also set forth the policies and procedures of the program including the responsibilities of the injured worker. Most likely, an injured worker's responsibilities will include providing notice to the employer of his ability to work in either a restricted or unrestricted capacity.

The injured worker must choose a physician from within the network. Assuming the injured worker sustained a compensable work accident, the employer is obligated to pay for the medical treatment provided by the

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physician chosen from the network as well as the treatment provided by any physicians within a chain of referrals from the chosen physician.

The injured worker also has the option of choosing a second physician from within the PPP, and the employer is obligated to pay for the treatment provided by the second choice of physician as well as a chain of referrals from that physician.

If the injured worker decides not to treat with a physician from within the PPP, he or she can advise the employer in writing of a decision to seek treatment from outside the PPP. In that scenario, the "opting out" by the injured worker constitutes one of the two choices of physicians to which the worker is entitled.

In the event an injured worker needs treatment from a physician who specializes in a certain area of medicine, and the PPP does not include a physician of the needed speciality, the employer may not unreasonably withhold authorization for the injured worker to seek and obtain the necessary treatment from a physician outside of the network.

It is important to note that even though the employer is providing a network of physicians to the injured worker, the employer is not obligated to pay for any medical treatment for injuries which are determined to not arise out of or in the course of the worker's employment. Similarly, if the treatment being provided to the worker from a physician within the network is found to be excessive or unnecessary based upon a utilization review, the employer may deny payment for the excessive or unnecessary treatment.

Several large employers and insurance carriers are currently in the process of creating PPPs. As time goes on, it is widely anticipated that most if not all insurance carriers, third-party administrators, and large employers will utilize Preferred Provider Programs in an effort to steer injured workers toward qualified physicians in the hope of providing reasonable and necessary medical treatment which will allow for the injured workers to recover as quickly as possible from their injuries.

Evaluation of Permanency Benefits

One of the most significant changes to the Workers' Compensation Act involves the evaluation of permanent partial disability benefits. Prior to the recent changes, an injured worker's compensation for an alleged permanent disability was based upon previous decisions involving similar injuries and similar medical procedures. The "going rate" method of deciding the amount a claimant's injuries were worth resulted in significant inconsistencies between Arbitrators.

The changes made to the Workers' Compensation Act provide for a completely different method of evaluating an injured worker's level of permanent partial disability. The changes apply to all injuries which occur on or after September 1, 2011. For the applicable injuries, an injured worker's permanent partial disability shall be based upon an impairment rating pursuant to the most current edition of the American Medical Associations "Guides to the Evaluation of Permanent Impairment." The level of permanent partial disability is also based upon a claimant's occupation, age, and future earning capacity as well as upon the medical records. The statute expressly states that no one factor is dispositive.

Prior to the 2011 changes taking effect, numerous employer groups lobbied for the permanent partial disability evaluations to be based entirely upon the AMA Guidelines. The statute which was signed into law is somewhat of a compromise. It appears the legislature intended to have the AMA Guidelines as a baseline for the value of an injured worker's permanent partial disability, but it is also clear other factors are to be considered.

When an arbitrator or commissioner issues a decision as to the level of permanent partial disability, the decision must set forth the relevance and weight of any factors utilized in addition to the level of impairment.

The AMA Guidelines are based upon objective measures of disability including a loss of range of motion, loss of strength, measured atrophy, and any other measurements which establish the nature and extent of the

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impairment. The AMA Guidelines also address disability based upon pain which is a subjective component of the disability, but the overall assessment of a worker's disability is significantly more objective that what has previously been utilized by the arbitrators and the commission.

If the arbitrators utilize the AMA Guidelines as this author believes was the intent of the legislature, then there should be a reduction in the value of permanent partial disability awards. Generally speaking, the AMA Guidelines provide for significantly reduced levels of disability as compared to the "going rates" previously utilized by the Commission. It is also anticipated the awards will be challenged by both claimants and employers. Claimants will almost certainly try to draw a distinction between impairment ratings as set forth in the AMA Guidelines and permanent partial disability as defined in the Workers' Compensation Act. Conversely, employers will challenge any decisions which significantly deviate from the proposed level of disability as set forth in the AMA Guidelines.

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Limits on Wage Differential Benefits

Prior to the 2011 amendments, an injured worker who suffered injuries which resulted in a diminished earning capacity was entitled to receive wage differential benefits which are equal to two-thirds of the actual reduction in earnings. These benefits were to be paid for as long as the disability exists which was generally interpreted to be a lifetime award.

The 2011 amendments limit wage differential awards in that an employer is only obligated to pay benefits until the injured worker reaches the age of 67 years or for a period of five years whichever is later.

With more and more workers filing claims as they approach their retirement years, the limits on wage differential awards will provide significant savings to numerous employers.

Limits on Carpal Tunnel Cases

The focus of several articles published in the Belleville News Democrat was on carpal tunnel cases. The cited cases involved prison guards who claimed repetitive trauma injuries including carpal tunnel syndrome and cubital tunnel syndrome. These articles resulted in a public relations nightmare for the State of Illinois which had paid several million dollars for these types of cases.

The legislature reacted to the public outcry by imposing limits as to the amount of disability an injured worker can claim as a result of obtaining carpal tunnel syndrome due to repetitive or cumulative trauma. An injured worker with an accident date on or after 6/28/11 is limited to receiving no more than 15% loss of use of a hand. Additionally, for only repetitive trauma carpal tunnel cases, the value of the hand is reduced from 205 weeks to 190 weeks. For other injuries to the hand including traumatically induced carpal tunnel syndrome, the value of the hand remains at 205 weeks.

The permanent partial disability can only be increased to up to 30% of a hand if a claimant is able to show

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by clear and convincing evidence an increased level of disability.

It is not clear what impact this section will have on permanent partial disability awards. The AMA Guidelines generally provide for an impairment rating of significantly less than 15% of a hand for most carpal tunnel cases. However, the new section limiting the value of carpal tunnel cases appears to exclude the possibility of an injured worker claiming entitlement to wage differential benefits or permanent total disability benefits as a result of carpal tunnel syndrome caused by repetitive trauma.

It is widely anticipated that this section will be challenged as being unconstitutional. One of the arguments which will be presented is the new limits on certain carpal tunnel cases fail to provide equal treatment among similarly situated claimants.

Only time will tell as to the impact these new limits will have as well as whether they will survive constitutional challenges.

Conclusion

The legislature addressed several other provisions of the Workers' Compensation Act, and it also provided for a pilot program for a system where injured workers could seek compensation outside of the Illinois Workers' Compensation Commission. The pilot program is limited to two construction unions and the employers who utilize workers from those unions. As of the time of this writing, it is believed the program has not yet been instituted.

As most of the amendments and additions to the Workers' Compensation Act apply to accidents which have recently occurred, litigation has not yet progressed to the point of addressing the application of the amendments and additions to the Act. As the litigation progresses, we will all have a better idea as to how the Commission and the Courts interpret the legislature's intent.

At least on the surface, it appears the legislature responded to the widely-held perception that the business climate in Illinois was not favorable to employers by modifying the Workers' Compensation Act to help reduce the costs borne by employers and their insurance carriers. With the potential to minimize permanent disability awards, and with the opportunity to steer claimants toward qualified medical professionals as well as the reduction in the medical fee schedule, defense counsel and employers should be optimistic that the changes made to the Workers' Compensation Act will be successful in reducing the overall costs per claim. ■

How to Lose a Forum *Non Conveniens* Motion…That You Won

by Mandi K. Ferguson

The last thing you want to tell your client is, "you know that forum motion we won; that unbelievable result I got for you; which transferred your case to Arizona? Well…it's back." You do not want to hear the response on the other end of that call. Our work is not done, and in many ways has just begun, when a case is transferred under Supreme Court Rule 187.

The doctrine of *forum non conveniens* provides trial courts with the inherent power to decline jurisdiction over a case where a different forum is significantly more convenient and the interests of justice require that the case be adjudicated in the more convenient forum. When forum motions are successful, and a case is dismissed to be filed elsewhere, it is absolutely necessary that defendants are aware of Illinois Supreme Court Rule 187. Rule 187 (c)(2) provides that "dismissal of an action under the doctrine of *forum non conveniens* shall be upon the following conditions: (i) if the Plaintiff elects to file the action in another forum within six months of the dismissal

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order, the defendant shall accept service of process from that court; and (ii) if the statute of limitations has run in the other forum, the defendant shall waive that defense."

It is important to note that once a case is dismissed on forum grounds, there is nothing in Illinois law that requires the plaintiff to re-file their suit in the "most convenient forum." The plaintiff may re-file the case wherever they choose. In fact, they may file in a state that baits you into raising a statute of limitations defense; and when you do, you are at risk of the case coming right back.

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In *Miller v. Consolidated Rail Corporation*, 173 Ill. 2d 252, 671 N.E.2d 39 (Il. 1996), the Illinois Supreme Court spoke directly to this point. In *Miller,* the plaintiff initiated a claim under the Federal Employers' Liability Act (FELA) in Madison County, Illinois. The defendant moved to dismiss the case as time-barred under the FELA's three year statute of limitations. *Miller, 671 N.E.2d at 40-41.* However, before that motion was heard, the defendant moved forward on a forum non conveniens motion, which was granted by the court, subject to the conditions of Rule 187. *Id.* The defendant claimed that Indiana, not Illinois, was the most convenient forum for the case. The court ruled that the plaintiff had the right to re-file the case in another jurisdiction within six months, upon the condition that the defendant waived the statute of limitations, and if the defendant failed to do so, the case would be reinstated. *Id.* One month later, the plaintiff re-filed his case in St. Louis, Missouri. *Id. The* defendant again moved to have the case dismissed under both the FELA three year statute of limitations and forum non conveniens grounds. *Id.* Like defendant's earlier forum motion, this motion also claimed that Indiana was the most convenient forum for the case. *Id.* However, before the Missouri court could rule on the forum motion, the case was reinstated back to Madison County, Illinois. *Id.* The defendant contended that Rule 187 does not permit a plaintiff to file a lawsuit in a forum which is less convenient than the court that had previously dismissed the suit on the basis of forum non conveniens. *Id*. at 44. The Illinois Supreme Court rejected this argument and stated that Rule 187 (c)(2)(i) contains no qualifying criteria regarding plaintiff's choice of an alternate forum. *Id.*

The defendant also argued the requirement, that it waive the statute of limitations defense, only applied to lawsuits which are not time-barred under the applicable statute of limitations when initially filed. *Id.* The defendant claimed the applicable statute of limitations had already run at the time of the initial filing in Madison County, Illinois. *Id*. at 44-45. The supreme court noted the defendant had raised the statute of limitations defense in the first Madison County lawsuit, however, they also voluntarily moved forward with their forum non conveniens motion first. The supreme court went on to state that whether a defendant has been prejudiced by its own procedural maneuvering is irrelevant. *Id.* at *47.* Had the defendant first moved forward on its statute of limitations motion, the case may have been dismissed.

Two related situations have again recently occurred in Madison County. In the case of *Guilio Cardella v. A.W. Chesterton, Inc., et al*., Madison County, IL Circuit Court Case No. 09-L-0434, the defendants were suc-

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cessful in having the case dismissed on forum non conveniens grounds in December, 2009. The case was then re-filed in Arizona. After several defendants raised a statute of limitations defense in the Arizona lawsuit, the case was re-instated in Madison County, Illinois in February, 2011. However, in *Joseph Staley v. A.W. Chesterton, Inc., et al.,* Madison County, IL Circuit Court Case No. 10-L-022, reinstatement was denied. The *Staley* case was initially dismissed on forum grounds from Madison County in January, 2011. It was then re-filed in St. Louis, Missouri within six months. Some of the defendants raised a statute of limitations defense in the Missouri action. However, those defendants quickly withdrew their statute of limitations claims by amending their pleadings. The Madison County court denied the plaintiff's motion for reinstatement in July of 2011 based on the fact that those defendants who did raise the statute of limitations, also withdrew it within the time frame allowed by Missouri law.

Raising statute of limitations in a routine responsive pleading or as an affirmative defense may be a Rule 187 violation which gives the plaintiff the right to bring it back to the original forum. It is important to understand the requirements of Illinois Rule 187, especially in litigation that involves multiple defendants. All defendants must be aware of these requirements and communicate them to their clients so that the information can be shared with other counsel in the transferee jurisdiction. Knowledge of Illinois' statutory requirements, once a case is dismissed on forum non conveniens grounds, is the only way a defendant can ensure it will not end up back in the same inconvenient forum where it started. ■

Take the Fifth in a Civil Case and Live to Tell the Tale; Yes You Can!

by George Kiser

O.J. Simpson did not take the stand in his criminal trial to deny the allegations against him. More recently, Casey Anthony was acquitted in Florida of murdering her own daughter. She decided not to take the stand to testify in her own behalf.

The Fifth Amendment to the United State Constitution provides that citizens of the United States cannot be compelled to incriminate themselves in a criminal case or to implicate themselves in a criminal act. We know it inures to the benefit of those on trial for crimes, like O.J. and Casey Anthony. But the Fifth Amendment also protects citizens who have not been charged with a crime and who are not being questioned by law enforcement.

The protections of the Fifth Amendment also apply in civil matters to protect parties and witnesses from incriminating themselves. In a civil case, a party's refusal to answer questions is not always without consequence. While dismissal of a civil action based solely on the invocation of a party's Fifth Amendment privilege is available in extreme cases, there are other consequences that may nevertheless follow.

Are There Consequences for Pleading the Fifth Amendment in a Civil Action?

Generally, a court cannot penalize a party for validly taking the Fifth Amendment in a civil case. However, there are exceptions to this general rule. There are circumstances in which a court may impose consequences for the invocation of the Fifth Amendment privilege.

The general proposition was best stated in the Supreme Court case of *Spevack v. Klein*, 385 U.S. 511 (1967), in which the Court held that where the Fifth Amendment does apply, sanctions that would make use of the privilege "costly" may not be imposed because that would effectively destroy the right to remain silent. *Spevack* 385 U.S. at 515. Several federal circuits have held that an automatic dismissal of a civil complaint when the plaintiff invokes the Fifth Amendment is an impermissible sanction. See *Attorney General of the United States v. Irish People, Inc.*, 684 F. 2d 928, 953 (D.C. Cir. 1982) cert denied, 459 U.S. 1172, 103 S. Ct. 817, 74 L.Ed. 2d

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1015 (1983); *Campbell v. Gerrans*, 592 F.2d 1054-58 (9th Cir. 1979); *Wehling v. CBS*, 608 F.2d 1084, 1087 (5th Cir. 1979). This rule is not absolute and where a plaintiff properly invokes the Fifth Amendment, the case may be subject to dismissal where the defendant can show a substantial need for the specific information requested and show that there are no other less burdensome ways to prevent unfairness to the defendant. *Irish People, Inc.*, 824 F.2d at 953; *Wehling*, 608 F. 2d at 1088.

These courts seem to be employing a balancing test, weighing one party's right to assert his or her Fifth Amendment privilege against the other party's need for critical information. "A civil plaintiff has no absolute right to invoke silence in this lawsuit. Neither, however, does the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege." *Wehling*, 608 F.2d at 1088.

The Seventh Circuit seems to be in this camp. In the case of *Hiley v. United States*, 807 F. 2d 623 (7th Cir. 1986), the Seventh Circuit reversed a district court's dismissal of a tax case where the taxpayer had invoked his Fifth Amendment right rather than answer certain questions posed by the government. *Hiley*, 807 F.2d at 628. The court indicated that the government should have been required to rely on a source other than the taxpayer to make its case. *Id.* at 629.

[I]t was the plaintiffs who sought affirmative relief in court and then refused to answer pertinent and proper questions which might have a bearing upon their right to maintain their action. The court noted that the plaintiffs sought to utilize the privilege not only as a shield but also as a sword to refuse to answer questions and prevent any discovery on questions pertinent to the issues involved.

There are cases where dismissing a cause of action has been upheld in the appellate courts. In the First District case of *Galante v. Steel City National Bank of Chicago*, 66 Ill. App. 3d 476, 384 N.E. 2d 57 (1st Dist. 1978), two plaintiffs brought an action to recover insurance proceeds after property they claimed an interest in was destroyed by fire. The defendants raised the affirmative defense of arson. During the depositions of the plaintiffs Jerry Galante and Sam Messina, each witness stated their name under oath but refused to answer any and all other questions on the grounds that their answers may incriminate them under the Fifth Amendment. *Galante*, 384 N.E.2d. at 59-60. The defendants proceeded to file motions to dismiss the plaintiffs' Complaint as well as a motion for sanctions pursuant to Supreme Court Rule 219. The court held a hearing and asked plaintiffs' counsel whether his clients were going to persist in pleading the Fifth Amendment in their depositions. The appellate court opinion indicated that counsel confirmed the plaintiffs fully intended to rely upon their Fifth Amendment protection and not answer any questions. *Id*.

The appellate court upheld the dismissal of the action. The court first noted that in this situation, it was the plaintiffs who sought affirmative relief in court and then refused to answer pertinent and proper questions which might have a bearing upon their right to maintain their action. *Id.* at 61. The court noted that the plaintiffs sought to utilize the privilege not only as a shield but also as a sword to refuse to answer questions and prevent any discovery on questions pertinent to the issues involved. "Plaintiffs have forced defendants into court. It would be unjust to allow them to prosecute their cause of action and, at the same time, refuse to answer questions, the answers to which may substantially aide defendants or even establish a complete defense." *Id.* at 62. While plaintiffs argued that the trial court should have first ordered them to answer questions before dismissing their

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Complaint, the appellate court held that since the plaintiffs' attorney had repeatedly indicated in open court plaintiffs' intention to take the Fifth Amendment, ordering them to abandon their Fifth Amendment claim would have been a futile gesture. *Id.*

While the *Galante* case seems to stand for the proposition that once a plaintiff or any party invokes their Fifth Amendment privilege regarding pertinent questions, the case may be dismissed, it should be noted that both plaintiffs in that case refused to answer any questions whatsoever. Additionally, when pressed by the trial judge, their counsel persisted in indicating that they would not answer any questions. This case was further distinguished by the subsequent First District opinion in *Acerra v. Gershinzon*, 200 Ill. App. 3d 327, 558 N.E.2d 137 (1st Dist. 1990). In that case, plaintiff, Lewis Acerra, sued the defendant, who was the Special Administrator for the Estate of David Wolfson, deceased, for an oral contract regarding real property. Not long after suit was filed, the plaintiff had become the subject of a murder investigation into the defendant's death. The plaintiff voluntarily dismissed the case but the trial court granted sanctions against both the plaintiff and his attorney since the trial court determined they should have known at the time of filing the case the plaintiff was under investigation, would need to assert the Fifth Amendment privilege and that his case could not be proven. *Acerra.* 558 N.E.2d at 138-139. The defendant had argued that the sanctions were proper because the plaintiff's complaint was not well founded in fact or law under Section 2-611 of the Code of Civil Procedure. The court distinguished the *Galante* opinion by noting that in the *Acerra* matter, the plaintiff did not exercise his Fifth Amendment privilege prior to voluntarily dismissing his cause of action. *Acerra*, 558 N.E.2d at 140-141. The *Acerra* court further noted that the plaintiffs in Acerra did not risk possible self-incrimination by testifying and did not risk disobeying a trial court's order to attend a deposition only to invoke his Fifth Amendment privileges. Rather he voluntarily dismissed his cause of action. This was different than the situation in *Galante*, where the plaintiffs expressly invoked their Fifth Amendment privilege and at the same time expected to continue with their claim. *Id*. at 142.

While dismissal appears to be a remedy reserved for the most serious cases, the party who invokes the Fifth Amendment may be unable to prove his or her case on the merits and be subject to summary judgment. This has happened several times. In the case of *Kisting v. Westchester First Insurance Co*., 416 F.2d 967 (7th Cir. 1969), for example, summary judgment was affirmed for the defendant insurance company where the plaintiffs failed to prove that they complied with policy provisions by refusing to answer questions under oath based on the Fifth Amendment. Similarly, summary judgment was granted for the defendant in an emotional distress claim where the plaintiff asserted his Fifth Amendment privilege by refusing the answer questions about drug dependency in *Crandall v. Hard Rock Café Intl (Chicago) Inc.*, 99 C 6094, 2000 W.L. 782938 (N.D. IL, June 16, 2000).

The other consequence that may flow from the assertion of the Fifth Amendment is that an adverse inference may be drawn at trial from the party's refusal to answer questions based on the Fifth Amendment privilege. This was noted in the case of *Bootz v. Childs*, 627 F. Supp. 94 (N.D. Ill. 1985). In *Bootz*, the United States District Court for the Northern District of Illinois considered a defendant's motion to bar plaintiff's lost earnings and lost wages claim when the plaintiff refused to answer questions about his immigration status. The district court refused to dismiss those wage loss claims but noted that an adverse inference may be drawn from the assertion of the Fifth Amendment privilege. *Bootz, 627 F. Supp..* at 102. See also *Baxter*, 425 U.S. at 318; and *Zuniga v. Morris Material Handling, Inc.*, 2011 W.L. 663136 (N.D. Ill. 2011).

Summary

A plaintiff or defendant may raise the Fifth Amendment privilege against self-incrimination in a civil proceeding, whether that be in a deposition, written discovery or at trial. Generally, a trial court is not to dismiss an action or bar a claim by a litigant who validly invokes his or her Fifth Amendment privilege, though that option may be available in extreme circumstances. This does not mean that there are no consequences for invoking a

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Fifth Amendment privilege.

While automatic dismissal of a cause of action is generally not available, a party's ability to proceed with a cause of action absent the evidence that is the basis for the privilege may result in a court's decision on the merits, such as a summary judgment. Additionally, the courts are clear that while an adverse inference cannot be drawn from the assertion of a Fifth Amendment privilege in a criminal case, the same is not true in a civil matter. A civil party's assertion of the Fifth Amendment privilege can result in an adverse inference being drawn at trial. ■

There are Ruts on Construction Sites. Who Would Have Guessed?

by David M. Lewin

While at least one construction worker was so distracted by a phone call that he forgot that a construction site might have ruts, the true answer to that question is "just about anybody." In *Wilfong v. L.J. Dodd Construction*, 401 Ill.App.3d 1044, 930 N.E.2d 511 (2nd Dist. 2010), the Illinois Appellate Court ruled that a general contractor did not have a duty to provide a rut-free work site. Importantly, the court ruled that the plaintiff was not a third party beneficiary to the general contractor's agreement and as such, the plaintiff could not use language of that contract to impose a duty on the contractor.

The case arose from an accident during the construction of a school. L.J. Dodd was the general contractor. The plaintiff was employed as a Project Manager for a steel fabricator. Dodd's construction trailer was about 75 yards from the school building. Much of the site was muddy and filled with ruts. At the request of the school, Dodd had installed a gravel path leading from the trailer to the school. However, there was no designated path from the trailer to the school.

On the day in question, the plaintiff had been at a progress meeting at Dodd's trailer. During the meeting, a question was raised as to whether there was a sufficient amount of a certain steel component on site. The discussion was "heated." The plaintiff decided to leave the trailer and go count the items in question. He then left the building to walk to the school, assuming the items were inside the building.

> The court found that where there is no question about the physical nature of the condition, the question of open and obvious is a question of law.

Rather than use the gravel path, the plaintiff walked across bare ground. He began walking in one rut that a truck had made. However, as that rut did not lead to the building, he walked across several other ruts. As he walked from one rut to another, the ground gave away causing him to lose his balance and turn his right ankle. At the time of the fall, the plaintiff was talking on his cell phone to his office about the quantity of items that had been delivered.

According to the plaintiff, for two or three weeks before the accident he had complained about rough site conditions. Plaintiff had worked in construction for twenty years and was familiar with how to avoid ruts while walking over them. He claimed, not surprisingly, that the ruts on this project were worse than ruts on other projects. The testimony from others on the issue of conditions was mixed. Some said it was bad, while others said it was typical. However, there was no testimony of any method by which the site could have been made rut-free.

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The construction contract provided in relevant part: "(2) `The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract' and (3) `The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to employees on the Work and other persons who may be affected thereby.'"

Upon those facts, summary judgment was granted for the general contractor. On appeal, the court focused on whether the general contractor owed any duty to the plaintiff. On that issue, the court first looked at foreseeability and at Section 343 of the Restatement (Second) of Torts. The court noted that an open and obvious condition is a recognized exception to that rule. The court found that where there is no question about the physical nature of the condition, the question of open and obvious is a question of law. On the facts presented, the court found that the ruts were open and obvious.

In response to the claim of open and obvious, the plaintiff argued that he was distracted. However, the court found that the plaintiff cannot create his own distraction. By talking on the phone, he did just that. According to the court, "distraction should not be solely within the plaintiff's own creation."

Finally, the court addressed the issue of the contract. The defendants argued that the plaintiff was not a third party beneficiary of the contract and as such, the contract could not create a duty to the plaintiff. The court agreed ruling:

> Even if the contracting parties know, expect or intent that others will benefit from their agreement, that alone is not sufficient to overcome the presumption that the contract was intended only for the parties' direct benefit.

The result of this case is that defendants in construction cases especially now have strong authority to overcome the plaintiff's standard arguments about boiler-plate contract language. As importantly, even where summary judgment is not appropriate the case may be provide a basis for a motion to bar evidence of contract terms such as the one presented. ■

Medical Malpractice Plaintiffs Can Now Obtain More Than Just a Copy of Their Own Records Before Filing a Certificate of Merit Under Section 2-622

by David J. Sullivan

Section 2-622 of the Illinois Code of Civil Procedure requires a plaintiff in a healing arts malpractice claim to attach to her complaint a certificate from a reviewing health professional that a "reasonable and meritorious" claim exists. 735 ILCS 5/2-622(a). The purpose of Section 2-622 is "to reduce the number of frivolous lawsuits that are filed and to eliminate such actions at an early stage, before the expenses of litigation have mounted." *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 65, 588 N.E.2d 1139 (1992). A recent decision by the Illinois Appellate Court First District, however, would appear to be at odds with that goal. In *Zangara v. Advocate Christ Medical Center*, 951 N.E.2d 1143 (1st Dist 2011), the court may have unwittingly allowed a plaintiff to seek extensive discovery before she is required to file a certificate of merit.

Zangara involved two consolidated suits against Advocate Christ Medical Center and several physicians. Both suits concerned patients who contracted methicillin-resistant staphylococcus aureas (MRSA) while in the hospital. *Id.* ¶ 2. Neither of the complaints included a certificate of merit under Section 2-622. *Id.* ¶ 5. Instead, the plaintiffs' counsel each attached an affidavit pursuant to Section 2-622(a)(3), claiming that a review was not possible because plaintiffs requested, but did not receive, certain records from Advocate. *Id.*

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Section 2-622(a)(3) excuses a plaintiff from filing a certificate of merit if the plaintiff has made a request for records under Part 20 of Article VIII of the Code of Civil Procedure (735 ILCS 5/8-2001 *et seq.*) and the party to whom the request is directed has not complied with the request. Section 8-2001 permits a patient of a hospital or other health care facility to examine and copy "the health care facility patient care records, including but not limited to the history, bedside notes, charts, pictures and plates, kept in connection with the treatment of such patient . . ." 735 ILCS 5/8-2001(b).

The plaintiffs in *Zangara* requested, among other things, data from Advocate reflecting the number of MRSA infections at the hospital for the six months prior to as well as during the time that the plaintiffs were hospitalized there along with the hospital's policies and procedures relating to MRSA. *Zangara*, 951 N.E.2d 1143. Advocate objected to producing the requested information. It claimed that the documents were privileged under the Medical Studies Act and that Section 8-2001 was limited to discovery of a patient's own records – not discovery of other hospital records. *Id.* at ¶ 9.

The parties spent more than a year litigating the issue of the discoverability of the requested information. Ultimately, the trial court ruled that the MRSA infection data sought by the plaintiffs was protected under the Medical Studies Act. *Id.* at ¶ 20. It then dismissed the complaints for lack of a Section 2-622 certificate of merit. *Id.* at ¶ 21.

The plaintiffs appealed and the appellate court reversed. The court held that discovery before filing a Section 2-622 affidavit "is not confined to the plaintiffs' personal records" but is subject to the Medical Studies Act and the court's discretion. *Id.* at ¶ 33. The court found that information regarding the number of MRSA infections at that hospital could be gleaned from documents that were not part of any privileged documents. *Id.* at ¶ 42. Therefore, the court held, Advocate was required to turn over information regarding infection rates so that the plaintiffs' reviewing physician could determine if plaintiffs had meritorious cases against the hospital. *Id.* at ¶ 45.

While Section 8-2001(b) appears to limit patient requests to records "kept in connection with the treatment of such patient" the *Zangara* court instead took a more expansive reading of the statute by focusing instead on the "including but not limited to" language. 735 ILCS 5/8-2001(b). In so doing, the *Zangara* court has potentially handed plaintiffs a new tool with which they can seek discovery before they have even demonstrated that a meritorious malpractice claim exists. With requests under Section 8-2001(b) no longer limited to simply copies of a patient's own medical records, a plaintiff can now potentially obtain other records by filing an affidavit under Section 2-622(a)(3) and claiming that the information is needed for obtaining a certificate of merit. This would seem to run directly counter to the very purpose of Section 2-622. ■

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at **www.iadtc.org**.

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