Downey & Lenkov LLC

General Liability Newsletter

September 2022

State Court Rules Illinois' Prejudgment Interest Statute Unconstitutional

On May 27, 2022, Cook County Circuit Court Judge Marcia Maras ruled that the newly passed six percent prejudgment interest Amendment to 735 ILCS 5/2-1303 violates the Illinois Constitution in *Hyland v. Advocate Health and Hospitals Corporation, et al.* (Case No. 2017-L-003541) (Cook County, Ill.). Per the amendment which took effect on July 1, 2021, interest begins to accrue at the time of initiating all actions seeking damages for personal injury or wrongful death caused by negligence, willful and wanton misconduct, intentional conduct, or strict liability.

Hyland v. Advocate Health and Hospitals Corporation is a medical negligence case involving the preterm births of twins at Advocate Good Samaritan Hospital where only one child survived. Plaintiff alleged that the doctors were negligent causing her to experience preterm labor and resulted in the preterm birth of the twins. The prejudgment interest statute went into effect during the pendency of the *Hyland* case. Defendant-Katherine Nolan Watson, M.D., an obstetrician, filed a motion seeking a declaration that the amendment providing for prejudgment interest was unconstitutional under the Illinois' Constitution. She argued that it unfairly penalized defendants in personal injury and wrongful death suits.

In ruling on Dr. Watson's motion, Judge Maras held the statute unconstitutional on multiple grounds. She reasoned that the statute violates a defendant's right to a jury trial, and the prohibition against special litigation. Judge Maras cited to Article 1, § 13 of the Illinois Constitution of 1970 which provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." This language has been interpreted to secure the right of a jury trial as it existed as common law. It includes the right of the jury to assess and award damages. Judge Maras held that the requirement that prejudgment interest be added to a jury's award removes the jury from determining questions of fact as to what is reasonable and just compensation for a party's injuries. It also conditions a defendant's right to a jury trial on the payment of such interest which can be deemed to be a penalty.

Judge Maras also determined that the statute was unconstitutional because it violated the prohibition against special legislation set out in Article IV, §13 of the Illinois Constitution of 1970 which provides that "[the] General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." She noted that the Illinois Supreme Court has established that this clause prohibits the General Assembly from conferring a special benefit or privilege upon one person or group and excluding others that are similarly situated from receiving such a benefit. Judge Maras concluded that the prejudgment interest statute is unconstitutional because it awards prejudgment interest only to personal injury and wrongful death plaintiffs as opposed to all tort plaintiffs. She found that the prejudgment interest statute also creates impermissible classifications of defendants because only defendants in personal injury and wrongful death cases are subject to paying prejudgment interest.

It remains unclear when the Illinois Appellate Court and Illinois Supreme Court will weigh in on the constitutionality of the statute. Judge Maras' decision in *Hyland* does not apply statewide because it is a trial-level decision to which Plaintiff has the right to a direct appeal after the case proceeds to trial.

To date, several other judges in Cook County and other state venues have denied similar motions filed on the same basis. Judge Maras's ruling is not binding on other Illinois courts. Defendants in personal injury and wrongful death cases should consider using Judge Maras's ruling to challenge the Act until the Illinois Supreme Court rules on its constitutionality.

Practice Tip:
Defendants in cases where prejudgment interest may be awarded should consider filing an affirmative defense based on the *Hyland* holding.

Indiana Supreme Court Holds Cause of Plaintiffs' Injuries Dictates Whether Exclusion for Intoxication Under Business's Insurance Policy Applies

In *Ebert v. Illinois Casualty*, 22 S-PL-8 (June 16, 2022), the Indiana Supreme Court took up the issue as to whether an insurer has a duty to defend and indemnify its insured when the policy specifically excludes coverage for bodily injury for which an insured may be liable by (1) causing or contributing to a person's intoxication, or (2) furnishing alcohol to a person under the influence of alcohol.

In *Ebert*, a patron by the name of Spence drank alcohol at Big Daddy's Show Club. After being ejected from the bar, Spence remained in the parking lot before employees ordered him to leave. After finally leaving, Spence collided with the Eberts' vehicle.

The Eberts sued Big Daddy's claiming that they violated the Indiana Dram Shop Act by continuing to serve alcohol to Spence when it knew or should have known that he was inebriated. The Eberts also claim that Big Daddy's allowed Spence to drive away from Big Daddy's and failed to obtain alternative transportation for Spence when they knew he was inebriated.

While Illinois Casualty had both a liquor liability policy and a business owner's policy, it filed a declaratory judgment action asking the court to hold that it did not owe a duty to defend or indemnify Big Daddy's under the business owner's policy. The policy contained language that excluded coverage for claims of bodily injury for which Big Daddy's would be liable for causing or contributing to the intoxication of any person or furnishing alcohol beverages to persons under the influence of alcohol.

The trial court granted Illinois Casualty's motion for summary judgment, finding that Illinois Casualty did not have a duty to defend or indemnify Big Daddy's under the business owner's policy.

The Court of Appeals, however, held that the trial court erroneously interpreted the insurance contract issue and that the policies imposes a contractual duty on Illinois Casualty to defend.

On transfer, the Indiana Supreme Court held that the liquor liability exclusion in the business owner's policy was unambiguous. The fact that the liquor liability was very broad in scope did not create an ambiguity. Insurers have a right to limit their coverage of certain risks by imposing exceptions and Illinois Casualty did so here. Further, the court noted that no ambiguity was created by the fact that the exclusion referred to "intoxication" and "under the influence" as meaning the same thing.

Having found that the language was unambiguous, the court found that the exclusion applied to the claims asserted in the Eberts' cause of action. Per the court, whether an exclusion applies is based upon what cause of action is the "efficient or predominant" focus of the allegations of the complaint.

To the extent that the Eberts' complaint alleged violations of the Dram Shop Act, the court held that claim fell squarely within the liquor liability exclusion. Turning to the allegation that Big Daddy's continued to serve Spence alcohol, allowed him to drive away from the bar, and failed to obtain alternative transportation, the court found that these allegations were so "inextricably intertwined" with the dram shop liability that the claims related factually to Spence's intoxication.

Notably, the court rejected the argument that the liability for allowing Spence to leave the bar or failing to arrange for alternative transportation could have existed without Big Daddy's actually serving alcohol to Spence. Per the court, the hypothetical suggestion that Spence's intoxication did not need to be tethered to the liquor liability of Big Daddy's was not apparent from the face of the Complaint.

Because all allegations of negligence against Big Daddy's were inextricably intertwined with liquor liability and because such liquor liability was unambiguously excluded from coverage, Illinois Casualty owed no duty to defend and indemnify Big Daddy's under the business owner's policy.

Practice Tip:
Seventh Circuit holdsIn assessing whether policy exclusions apply, it is important to carefully review the allegations of the Complaint and focus on what is the efficient and predominant cause of action(s) alleged.

Seventh Circuit Holds Damages for Unjust Enrichment, Fraud and Conversion Barred by Wisconsin Economic Loss Doctrine

In *Taizhou Yuanda Inv. Grp. Co. v. Z Outdoor Living, LLC*, 2022 U.S. App. LEXIS 22136, a district court entered a default judgment against the corporate Defendants in favor of Plaintiff's contract claims. The court also ruled against Plaintiff on their unjust enrichment, fraud, and conversion claims, finding the fraud and conversion claims barred by Wisconsin's economic loss doctrine and a "mere repackaging of Taizhou's 'straightforward breach of contract claim.'" The Seventh Circuit affirmed.

This case involved Taizhou (Plaintiff), a Chinese manufacturer, who entered into a Cooperation Agreement with Z Outdoor (Defendant), a Wisconsin company owned by Casual Products. The agreement was that Plaintiff would manufacture outdoor furniture and other related items

for Defendant to sell to customers. Defendant eventually stopped paying Plaintiff and made false statements about future business, forthcoming payments, and causes for the delays. Plaintiff continued to fill customer orders without receiving compensation. In 2018, AFG (another Wisconsin LLC owned by Casual Products) started submitting purchase orders to the Plaintiff. AFG never signed the Cooperation Agreement. Plaintiff filled the orders and sent AFG invoices. AFG eventually stopped paying Plaintiff and made false statements regarding payment delays. The total due from Z Outdoor and AFG accrued to $14 million for purchase orders sent, 2017-2019.

The economic loss doctrine *maintains that no Plaintiff may recover under a tort of negligence solely for economic losses arising out of dissatisfied expectations.* Therefore, the court held that any fraud was interwoven with the Cooperation Agreement, so the economic loss doctrine applies. To the extent the damages amounted to lost profits or lost business, those are also economic losses under Wisconsin law.

The Illinois Supreme Court Abolished the "Test the Waters" Doctrine

In *Palos Community Hospital v. Humana Insurance Company, Inc.*, 2021 IL 126008, the Illinois Supreme Court held that a judge cannot deny a motion to substitute a judge based on the notion that the moving party had "tested the waters" before filing the motion. It had long been established in Illinois that a party could not successfully seek to replace a judge after the judge had entered an order in the matter where the party had an opportunity to "test the waters" and form an opinion as to the court's view of the issues in the case. The "test the waters" doctrine was frequently cited by judges as a basis to deny a motion for substitution.

In *Palos*, the hospital filed suit for fraud, breach of contract, and other relief against Humana and other defendants. The trial judge had entered orders addressing numerous discovery issues. The trial judge appointed a discovery master to address the ongoing discovery issues. After the discovery master submitted a report including his recommendations regarding the discovery issues, a new judge was assigned to the case. At a status hearing, Palos was granted leave to file objections to the discovery master's report, including a challenge to the trial judge's authority to appoint a discovery master. Palos filed a motion to strike the discovery master which was taken under advisement by the new judge.

While the motion to strike was pending, Palos moved for substitution of judge as a matter of right. The motion was filed pursuant to 735 ILCS 5/2-1001(a)(2) which states that a party's motion for substitution as a matter of right in a civil action shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties. The trial judge denied Palos' motion, citing the "test the waters" doctrine. The appellate court affirmed the trial court's ruling and reliance on the "test the waters" doctrine. On appeal the Illinois Supreme Court held that the "test the waters" doctrine is an improper basis on which to deny a motion for substitution of judge as of right. The court reasoned that the "test the waters" doctrine was incompatible with the right of a litigant to move for a substitution of judge pursuant to 735 ILCS 5/2-1001(a)(2.) The court sought to adhere to the language of the statute which did not carve out an exception for denial of a motion to substitute if a party had "tested the waters." The court stated that the statutory text is clear that so long as a party filed its substitution motion before certain, specified occurrences, the party was entitled to one substitution of judge without cause as a matter of right.

The court held that the trial court erred in denying the hospital's motion for substitution of judge as of right where it had filed the motion before trial or hearing began and before the judge had ruled on any substantial issue in the case, and its motion followed the requirements set forth in 735 ILCS 5/2-1001(a)(2.) The court reasoned that the "test the waters" doctrine is not the only tool available to a trial judge to protect the integrity of the court.

The Illinois Supreme Court entered an order reversing the holding of the appellate court and remanding the case to the trial court with directions to vacate all orders entered after the date of the order denying Palos' Motion to Substitute.

Practice Tip:
This holding serves to abolish the "test the waters" doctrine, and to reinforce a litigant's statutory right to a one-time substitution of judge as a right.

Indiana Court of Appeals Rejects Application of Limit Reduction Provision In UIM Policy

In *Kearschner v. American Family Mutual Insurance Company*, 21A-CT-1888 (July 13, 2022), the Indiana Court of Appeals reinterpreted what is "adequate" bodily injury insurance under a UIM policy to mean what is the bodily injury limit under the Auto policy, not what is the statutory minimum for the tortfeasor's bodily injury coverage.

In *Kearschner*, Plaintiff was in an automobile accident within the course and scope of his employment. He sued the other driver and ultimately settled for that driver's auto policy limits of $50,000. Plaintiff also settled his own worker's compensation claim for $62,084.52.

In the related suit against American Family Insurance (AFI), to recover UIM benefits, AFI moved for summary judgment arguing that a Limit Reduction Provision of the UIM Policy coverage of $100,000 should be reduced by the $50,000 Plaintiff received from the tortfeasor. The $62,000 Plaintiff received in worker's compensation benefits should also be deducted from the available coverage. AFI argued that Plaintiff had $100,000 in UIM coverage and contracted to have limitations to reduce that amount. The trial court agreed and granted summary judgment in favor of AFI, which resulted in Plaintiff recovering nothing under the UIM policy.

The Court of Appeals agreed that the Limit Reduction Provision was unambiguous and would otherwise require a setoff of the worker's compensation benefits. However, the court held that the provision violated the state UIM statute. I.C. §27-7-5-2(a) requires UIM coverage that provides a minimum level of compensation to the insured if they are injured by someone with "inadequate or no insurance." The court noted that "the purpose of UIM coverage is to give the insured the recovery he or she would have received if the underinsured motorist had maintained an adequate policy."

Noting that "adequate" under the statute does not refer to an insured's UIM coverage, the court penned that it is still a relevant term with reference to the amount of damages to incurred by the insured. If damages to the bodily injury do not exceed $50,000, then the $50,000 recovered from the settling tortfeasor would be "adequate." However, if the damages exceeded $50,000, then the $50,000 policy of the settling tortfeasor would be "inadequate."

In turn, the court noted that there are two minimums under I.C. §27-7-5-2(a). One limit would be the bodily injury limits for the insured's auto policy. The second would be the $50,000 statutory minimum.
By adopting the view that "adequate" policy of liability is determined by the amount of coverage afforded under the UIM policy, the court of appeals, rejected the Indiana Supreme Court's analysis in Justice v. American Family Mutual Insurance Company, 4 N.E. 3d 1171 (Ind. 2014). In Justice, Plaintiff had $50,000 in UIM coverage. A Limit Reduction Provision within the policy reduced the coverage by $25,000 for the amount the Plaintiff recovered from a settling tortfeasor and by $71,958.50 for worker's compensation benefits received.

According to the Indiana Supreme Court, it was entirely appropriate under the language of the policy to reduce the $50,000 by the $25,00 received by the tortfeasor and the $71,958.50 received in worker's compensation benefits. However, since Plaintiff only recovered $25,000 of the full $50,000 that the tortfeasor should have had in coverage (read "adequate" under the UIM statute), the Plaintiff was still entitled to received $25,000 from his insurer. Under the Justice analysis, adequacy is determined by the statutory minimum of $50,000 not the contracted policy limits of the insured.

Practice Tip:
We anticipate further appeal of the Kearschner decision in light of the fact it is in direct conflict with the Supreme Court's decision in Justice.

Seventh Circuit Upholds Illinois Exculpatory Clause

On August 9, 2022, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's entry of summary judgment finding that an exculpatory clause was valid and enforceable in *Oscar Munoz v. Nucor Steel Kankakee, LLC*, No. 21 L 1287. The finding served to bar the underlying claim of Plaintiff, Oscar Munoz.

Plaintiff was a truck driver that owned his own company, Munoz Sons Trucking, LLC. He was an independent contractor for Star Line Trucking (Star Line.) Plaintiff delivered scrap metal to Nucor's scrap metal yard as part of his contracted work with Star Line. Nucor required Plaintiff to execute an agreement annually before he could enter the facility which contained an exculpatory clause releasing Nucor from any liability for injuries sustained by Plaintiff at the facility. Plaintiff executed the agreement in 2016 - 2018 because he was delivering scrap metal to Nucor on a weekly basis.

Star Line required Plaintiff to sweep his truck after making deliveries. Nucor provided a dirt pile where the shavings could be deposited at the facility and offered a rolling staircase that Plaintiff could use when sweeping his truck. Nucor did not require Plaintiff to sweep his truck.

Plaintiff was injured in March of 2018 when the rolling staircase broke while he was sweeping his truck. Plaintiff filed suit against Nucor alleging negligence and willful and wanton conduct due to Nucor' s alleged failure to properly maintain the staircase. The district court granted Nucor's motion for summary judgment premised on the argument that the exculpatory clause was valid and barred Plaintiff's claim.

Plaintiff appealed, raising three arguments for reversing the district court's summary judgment ruling which included that the alleged disparate bargaining power between the parties rendered the exculpatory clause invalid, Nucor's failure to maintain the staircase was not within the scope of the exculpatory clause, and Nucor's conduct was willful and wanton rendering the clause unenforceable in the case.

In affirming the entry of summary judgment in favor of Nucor, the Seventh Circuit held that while Defendant's conduct may have been negligent, the conduct was not outside the scope of the exculpatory clause. The court reasoned that Plaintiff had not shown that the balance in his bargaining power with Nucor was so uneven as to impact the validity of the exculpatory clause. The court cited to the fact that Plaintiff delivered scrap metal to numerous entities for Star Line and could have opted not to sign Nucor's agreement.

The court further explained that Illinois courts have held that an exculpatory clause "constitutes an express assumption of risk wherein one consents to relieve another party of a particular obligation." *Platt v. Gateway Int'l Motorsports Corp.,* 813 N.E.2d 279, 283 (Ill. App. Ct. 2004.) These agreements "must contain clear, explicit, and unequivocal language

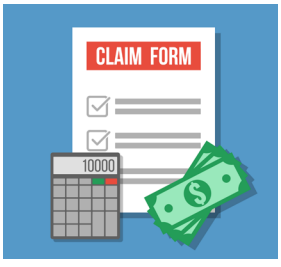
referencing the type of activity, circumstance, or situation that it encompasses and for which the plaintiff agrees to relieve the defendant from a duty of care." *Evans v. Lima Flight Team, Inc.*, 869 N.E.2d 195, 203 (Ill. App. Ct. 2007.) Foreseeability often defines the scope of an exculpatory agreement. Plaintiff's familiarity and experience with the activity of sweeping his truck was a factor in the court determining that his injury was foreseeable and within the scope of the exculpatory clause.

The court held that Plaintiff failed to provide any evidence to support a finding of willful and wanton conduct by Nucor based on Nucor's alleged failure to instruct its employees or users of the staircase to inspect the staircase to ensure it was in safe operating order.

Practice Tip:
First, to be enforceable, a business must ensure that the individual being asked to sign off on the exculpatory clause is not an employee and is an independent contractor. A key issue in establishing an independent contractor is that the business has no control over the means or manner the individual performs the work. Employees cannot waive off their right to pursue a workers' compensation claim versus their employer in such a clause.

Second, an exculpatory clause must be reasonable in scope to be enforceable. It must contain clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation that it encompasses and for which the individual agrees to relieve the business from liability.

Illinois Supreme Court Holds That Plaintiff is Not Precluded From Seeking to Hold an Employer Liable for Employee's Negligence and Liable for Its Own Negligence



In *McQueen v. Green*, 2022 IL 126666 (4/21/22), Plaintiff was injured when a skid steer being transported by Defendant Green on behalf of his employer, Pan-Oceanic Engineering came loose and struck Plaintiff. Green had noticed that the skid steer was not steady and, despite his complaints to the company that loaded the steer and to his employer, it was not reload. Instead, Pan-Oceanic ordered Green to transport the load as it was.

Plaintiff sued both Green directly, as well as Pan Oceanic for negligence. Appellate court precedent in Illinois and in other jurisdictions hold that an employer's admission of vicarious liability for its own employee's negligence precluded direct negligence claims against the employer. However, the trial court allowed Plaintiff to proceed to trial with these claims and the jury found Pan Oceanic liable for its own conduct but found that Green was not liable. The appellate court reversed, finding that the verdicts were inconsistent.
On review, the Illinois Supreme Court considered the issue of whether a plaintiff may pursue a direct action against an employer who has admitted vicarious responsibility for the tortious conduct of its employee. The court held that it was not unjust or otherwise inappropriate for an employer to be held liable for its own negligence even if that employer had admitted negligence with respect to a vicarious liability count. The possibility of a double recover could be eliminated with carefully crafted jury instructions. The court reversed the appellate court and reinstated the judgment of the trial court.

The ruling in *McQueen* will no doubt lead to more direct claims against employers being appended to causes of action based on defendant-employees' negligence.

Practice Tip:
McQueen demonstrates that plaintiffs in Illinois have a new route of establishing potential negligence with respect to an employer. Although previously an employer could admit liability with respect to its employee and avoid liability sin its capacity as the employer, no such limitation exists now. It will be important to closely read any and all complaints to determine whether plaintiffs are pleading this kind of independent negligence against an employer in light of the *McQueen* decision.

Seventh Circuit Holds Indiana Landowner Owes No Duty For Open and Obvious Condition

Appeals for the Seventh Circuit affirmed the United States District Court for the Northern District of Indiana's entry of summary judgment in favor of a Defendant landowner in a premises liability case centered around a raised curb. Plaintiff Cheryl Weaver brought the premises liability claim in state court alleging that Defendant Speedway LLC ("Speedway") was negligent in failing to paint the top of the curb yellow in front of its convenience store. Plaintiff claimed that the curb posed an unreasonable tripping hazard and she sustained injuries when she tripped over it. Plaintiff also alleged that Speedway did not follow the internal policy that called for the curb in front of the doorway to be painted. Speedway moved for summary judgment on the issue of liability. Speedway argued that the curb was an open and obvious condition for which it owed no duty to Plaintiff and also argued that the internal policy regarding painting of curbs did not create a duty.

The court entered summary judgment for Speedway and concluded that as a matter of law, the curb was an open and obvious condition for which Speedway owed no duty to Plaintiff. The court also rejected the assertion that Speedway's failure to paint the curb in accordance with its internal policy evidenced negligence.

On appeal, the Court of Appeals applied the substantive law of Indiana premise liability to determine whether Plaintiff could establish her negligence case and that: 1) Speedway owed her a duty of care; 2) it breached that duty, and 3) the breach proximately caused injury to Plaintiff.

In affirming summary judgment, the court focused solely on the issue of duty. Under Indiana law, a landowner breaches its duty to an invitee when the landowner (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care in protecting them against danger.

The parties did not dispute that Speedway had knowledge of the curb's condition (being unpainted). However, the court noted that its focus must be on whether Plaintiff produced sufficient evidence from which a jury could conclude that the condition of the curb presented an unreasonable risk of harm that she could not have been expected to recognize on her own.

The court looked at evidence regarding the condition of the curb and its surroundings and found that Speedway's failure to paint the curb was not negligent because the curb itself was an open and obvious hazard. The fact that Speedway's internal policy stated that the curb should be painted did not require a different result. The court noted that failure to follow an internal policy was not necessarily evidence of a failure to exercise ordinary care. Further, the court found that there was no evidence that the area surrounding the curb made the curb particularly dangerous or that Plaintiff would have been distracted in her effort to see the step or enter the store. Accordingly, the trial court correctly determined that a rational jury, properly instructed on Indiana law, could not have determined that Speedway was liable for Plaintiff's fall.

Practice Tip:
While not precedential authority in Indiana state court proceedings, this decision is still persuasive authority for the proposition that a landowner does not owe a duty to protect invitees from open and obvious conditions. The decision also reiterates the Indiana position that internal policies of a landowner do not create a duty of care to invitees.

Illinois Workers' Compensation Act Not A Bar to Biometric Claims

In a case of first impression, the Illinois Supreme Court held that the Illinois Workers' Compensation Act's exclusive remedy provisions do not preclude a civil claim by an employee against the employer for damages under the Illinois Biometric Privacy Act. *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511. Plaintiff filed a putative class action suit against his employer under the Privacy Act contending that he and other employees did not consent to be fingerprinted under the company's biometric system when this site was used to store and track employees' whereabouts during the workday.

In affirming the denial of the employer's motion to dismiss premised on the Exclusive Remedy Doctrine, the court reasoned that the form of injuries alleged by the class action members were distinguishable from physical and psychological injuries incurred at work.

Practice Tip:
As required by the Illinois Biometric Privacy Act, it is imperative that any employer who seeks to secure an employee's fingerprints, eye scan or similar personal identifying characteristics must secure the written consent of such employees to avoid a potential civil privacy claim for damages.

Newsletter **Contributors**

Storrs Downey, Ryan Danahey, Jeff Kehl, Jen Meyer and Kristy Singler contributed to this newsletter.

View more information on our **General Liability practice.**

Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Construction Law
- Entertainment Law
- Healthcare Law
- Insurance Law
- Intellectual Property
- Labor & Employment Law
- Products Liability
- Professional Liability
- Real Estate
- Transportation Law
- Workers' Compensation

Firm **News**

Jessica Jackler Obtains Summary Judgment On An Illinois Case

Jessica Jackler secured affirmance of a trial court's granting of Summary Judgment by Illinois Appellate Court in *Eckerty v. Eastern Illinois Foodbank*; No. 19L112. Plaintiff alleged retaliatory discharge of his employment in exercising his rights under the Illinois Workers' Compensation Act. We moved for summary judgment which the trial court granted. On appeal, because there was no genuine issue of material facts, the appellate court agrees that Defendant was entitled to judgment as matter of law on Plaintiff's retaliatory discharge claim.

Margery Newman Secures Illinois Arbitration Panel Finding of No liability on a $2.9 Million Mechanics Lien Contract Dispute

Margery Newman secured a finding of no liability on a $2.9 million dollar contract dispute when an Illinois arbitration panel ruled in favor of Defendant. The Plaintiff was a developer of a hotel chain who hired the Defendant to design and specify furniture fixtures and equipment ("FF&E") for the hotel and to change its brand. The primary claim against Defendant was a breach of contract due to taking excessive time to prepare the various interior design "deliverables" for the project, in addition to various claims for improperly specifying certain FF&E for the hotel.

This was a complete win for the Defendant as Plaintiff recovered nothing and was ordered to pay Defendant their unpaid balance for the project.

Ryan Danahey Secures Dismissal of Illinois Breach of Fiduciary Duty Case

In an Illinois Cook County case involving alleged tortious interference with a contract and aiding and abetting a breach of fiduciary duty, Ryan Danahey was able to secure a motion to dismiss the entire case with prejudice.

In his motion Ryan successfully argued that the plaintiff employee had not responded to a specific request for assent to the contract terms and that the evidence alleged as to assent by behavior was unfounded. Further, because the contract was never signed by the plaintiff he argued that as there was no agreement on the terms and therefore our client could not have aided and abetted any breach of fiduciary duty pursuant to that alleged contract.

Jessica Jackler and Jeff Kehl Win Summary Judgment in Unlawful Termination Case

The Cook County Circuit Court granted Defendant's Motion for Summary Judgment against Plaintiff's allegations of unlawful termination, fraudulent misrepresentation, and retaliatory discharge. The court agreed with Jessica Jackler and Jeff Kehl's arguments of undisputed evidence of no unambiguous promise and/or false statement of material fact and that Plaintiff was an at-will employee.

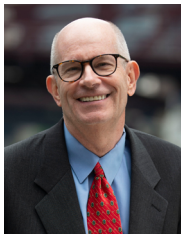
Ryan Danahey Secures Summary Judgment in Property Damages Case

Ryan Danahey secured a summary judgment in the Illinois Cook County Circuit Court on behalf of a property management company. Plaintiff alleged negligence resulting in property damages and personal injuries related to water intrusion and subsequent mold intrusion. The property damages claim was dismissed based on a waiver of subrogation clause. The Plaintiff's insurer paid $1million for the property damages so Plaintiff could not recover those damages twice. Such a double recovery and would have violated the clear intent of all parties to shift the risk for all property damages to the relevant insurance companies.

Summary judgment was granted as to the alleged personal injuries. Plaintiff, by virtue of being a condominium owner and agreeing to the terms in the declarations and bylaws, agreed to waive any damages related to mold, as outlined in the management agreement between the association and our insured property management company. The court dismissed any argument that such a contractual limitation violated public policy or represented an adhesion contract. The court held that the clear language of this provision was binding upon Plaintiff and prohibited a claim for personal injury damages against the property management company.

Storrs Downey Presented Recent Employment Law Developments with Perrin

Capital Member Storrs Downey moderated fellow members of Management & Professional Liability Alliance during the "Emerging Issues and Recent Developments in Employment Law" Perrin webinar on 6/2. Select topics included sexual harassment & assault claims, COVID-19 litigation issues, remote workers and more.



Management & Professional Liability Alliance ™

Kirsten Kaiser Kus Named Influential Women of Northwest Indiana Award Finalist

We are excited to announce that Capital Member Kirsten Kaiser Kus is a finalist for the 2022 Influential Women of Northwest Indiana Awards. Kirsten was nominated in the Law Influential Woman category for her commitment to empowering and supporting women within her industry and demonstrating exemplary leadership in the community.

Winners will be announced at the Influential Women Awards Banquet on 9/29.

Congratulations to Kirsten on her nomination!

Samuel Levine Named Inaugural Recipient of ISBA CLE Distinguished Service Award

Downey & Lenkov is pleased to announce that Of Counsel Samuel Levine has been selected as the inaugural recipient of the Illinois State Bar Association CLE Distinguished Service Award.

Samuel will be honored for his outstanding, quality contributions to ISBA continuing legal education programing throughout the years.

Join us in congratulating Samuel on this amazing distinction!

ILLINOIS STATE BAR ASSOCIATION ™

Ryan Danahey Named Divorce Volunteer Attorney of the Year

Downey & Lenkov is pleased to announce that Income Member Ryan Danahey has been named Divorce Volunteer Attorney of the Year by Legal Aid Chicago and was honored at their 2022 Annual Luncheon on 6/14.

Ryan was recognized for his work on the Simple Divorce pro bono project as well as his dedication, support, and service to Legal Aid Chicago as a volunteer.

Join us in congratulating Ryan!

LEGAL AID CHICAGO
EQUAL JUSTICE STARTS HERE

Firm Name Change & New Chicago Office

We are pleased to announce that our firm name has changed from Bryce Downey & Lenkov LLC to Downey & Lenkov LLC, effective April 4, 2022. Our updated website and e-mail domains are noted below. Our telephone number and facsimile number remain the same.

Website: www.dl-firm.com
Tel.: (312) 377-1501
Fax: (312) 377-1502

In addition, our Chicago office has moved to a new location., 30 North La Salle, Suite 3600, Chicago, IL 60602, effective June 1, 2022.

We remain fully committed to exceeding expectations in the years to come. Thank you for your continued support.

30 N LaSalle Street
Suite 3600
Chicago, Illinois 60602

Downey & Lenkov Is Ring Certified

We are proud to announce that Downey & Lenkov has been acknowledged by Recognizing Inclusion for the Next Generation (RING) for our ongoing commitment to diversity and inclusion.

We believe in creating and maintaining a positive, healthy, inclusive and safe environment for our clients and employees regardless of their race, sex, religion, sexual orientation, gender identity, etc. We believe in achieving excellence through diversity and respect for differences among firm members.

RING is a certification program that evaluates an organization's commitment to embracing and expanding Diversity, Equity, Inclusion and Allyship initiatives.

2022 RING CERTIFIED
Recognizing Inclusion for the Next Generation

Samuel Levine Published in ALI CLE's The Practical Real Estate Lawyer

Of Counsel Samuel Levine authored an article for ALI CLE's *The Practical Real Estate Lawyer* May 2022 issue.

"Consequences of Stopping Construction: Delays and Disruptions Resulting from Catastrophes" details the impacts of suspending a construction project and the importance of defining the suspension parameters in contracts to ensure protection of all parties involved.

ALI CLE

DL Is **Growing**

Please join us in welcoming associates Dana Djokic, Ryan Dezonno and Frank Swanson to our Chicago office.

Dana joins the firm with 20 years of litigation experience. She worked as in-house counsel for a major insurance company for 12 years. She has successfully resolved hundreds of complex workers' compensation claims. Dana has also tried many claims before the Illinois Workers' Compensation Commission and obtained a "no accident" decision.

Ryan focuses his practice on representing employers, insurance companies, and third party administrators in the defense of worker's compensatio matters. He is an experienced litigator who collaborates with his clients to develop successful legal strategies. Ryan brings a unique perspective to the firm having previously worked for two Illinois county public defenders' offices.

Frank concentrates his practice in coverage, commercial litigation and construction defense. Frank is a dedicated attorney who is committed to providing his clients with aggressive legal counsel from start to finish. Prior to joining Downey & Lenkov, Frank worked at another prominent Chicago law firm handling insurance defense, civil litigation, personal injury claims, coverage litigation, and federal criminal defense. Frank also has experience in successfully representing his clients at an appellate level.

Who We Are

Downey & Lenkov LLC is a full-service law firm with offices in Illinois and Indiana. Our expertise spans across several practice areas, providing transactional, regulatory and business solutions for clients across the nation. The firm's continued growth is a result of an aggressive, results-oriented approach. Unlike larger law firms however, we do not face massive overhead and are able to charge more reasonable rates that both small and larger employers can more readily afford.

We evolve with our clients, representing Fortune 500 and small companies alike in all types of disputes. Downey & Lenkov is a team of experienced, proactive and conscientious attorneys that have been named Leading Lawyers, Super Lawyers, Rising Stars and AV Preeminent.

Previous seminars include:

- Assessing Liability in *Evans v. Walmart*
- Kotecki at 25: The Minefield of Employer Liability in Third Party Tort Actions in Illinois
- Public Entity Claims in Illinois and Indiana
- Exploiting the Internet in Pre-Suit Investigations
- Use of Drones: Ag Cases
- Sexual Harassment in the Workplace: Confronting & Addressing This Growing Problem
- 10 Tricky Employment Termination Questions Answered
- Approaching LGBT Issues in Today's Workplace
- Employment Law Issues Every Workers' Compensation Professional Needs to Know About

Cutting Edge Continuing Legal Education

If you would like us to come to you for a free seminar, Click here or email Storrs Downey.

Our attorneys provide free seminars on a wide range of general liability topics regularly. We speak to individuals and companies of all sizes. Some national conferences that we've presented at are:

- American Conference Institute's National Conference on Employment Practices Liability Insurance
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-Conference
- Employment Practices Liability Insurance ExecuSummit
- National Workers' Compensation and Disability Conference & Expo
- National Workers' Compensation & Disability Conference
- RIMS Annual Conference

If you would like a copy of our other prior webinars, please email us at mkt@dl-firm.com.

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- **Crown Point, IN**
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