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Evidence

Admissibility of vehicle photographs - HB 4899 House Bill 4899, introduced by Rep. Edward J. Acevedo

Representative Edward J. Acevedo recently introduced House Bill 4899, which seeks to amend the Illinois Code of Civil Procedure by adding a new provision regarding the admissibility of photographs in actions involving motor vehicle accidents. The proposed provision provides that in any action concerning a motor vehicle accident or occurrence where personal injury or damage to property is alleged, a photographic or electronic image of a motor vehicle or other property shall be deemed relevant and shall be admissible in evidence upon authentication by a lay or occurrence witness with personal knowledge that the image truly and accurately portrays such vehicle or other

property as it appeared before or after the motor vehicle accident or occurrence which is the subject of the action. The proposed provision further provides that it is not necessary for admission of the image into evidence that an expert or opinion witness testify as to the relevance of the image or to the correlation between the vehicular damage or other property damage and the claimed bodily injury.

This Bill was introduced to the House on February 11, 2008, and therefore has not yet been passed by the House. The status of this Bill can be monitored via the Illinois General Assembly's website at the following link:

<http://www.ilga.gov/legislation/default.asp>

Appellate Conflict Is Pending before Supreme Court as to Whether Recovery for Medical Services is Limited to Amounts Actually Paid by Medicare

It has long been contended with mixed success that a plaintiff ought not to recover damages for medical bills in the amount billed if the medical providers ultimately accepted less than that amount in full payment of services rendered. In *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill.2d 353, 29 Ill. Dec. 444 (1979), plaintiff was not allowed to recover the value of medical services provided to him gratuitously. In *Arthur v. Catour*, 216 Ill.2d 72, 833 N.E.2d 847 (2005), the Supreme Court held plaintiff could recover damages for medical bills in the amount billed, an amount for which he became liable at least when rendered, even though the medical providers ultimately accepted less than that amount in full payment of services rendered pursuant to contracts with plaintiff's health insurer. Plaintiff paid premiums for the insurance and was entitled to the benefit of the bargain; the reduction in payment was considered a collateral source. *Id.* In *Wills v. Foster*, 372 Ill.App.3d 670, 867 N.E.2d 1223 (4th Dist.,2007), the Court synthesized the holdings of *Peterson* and *Arthur* and held that where medical bills were paid by Medicare or Medicaid, the plaintiff could only recover the amount actually paid, not the amount billed. The Third District has taken issue with the Fourth District *Wills* decision in *Nickon v. City of Princeton*, 376 Ill. App. 3d 1095, 315 Ill. Dec. 716 (3d Dist 2007), holding evidence of the amount accepted as payment in full from Medicare was not admissible and holding the collateral source rule did apply and the charitable provider exception did not apply; plaintiff was entitled to damages based on the initial medical charges billed.

Appeals to the Supreme Court are pending in both *Wills* (oral argument heard March 13, 2008) and *Nickon*. Some liability insurance companies currently adjust losses on the basis of amounts actually paid by Medicare rather than based on amounts initially billed pursuant to *Wills*. The future propriety of that practice is now at stake before the Supreme Court.

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Civil Procedure

Right to Re-file within One Year of Voluntary Dismissal Is Not Absolute *Hudson v. The City of Chicago*, 2008 WL 217175 (Ill., Jan. 25, 2008).

In January, the Illinois Supreme Court held that a willful and wanton wrongful death action that had been re-filed within one year after it had been voluntarily dismissed was barred by res judicata where a negligence count had first been dismissed on the merits before voluntary dismissal of the remaining willful and wanton misconduct count. The plaintiff's original wrongful death action contained a negligence count and a willful and wanton misconduct count in connection with the death of his son. Pursuant to the defendant's motion for involuntary dismissal, the trial court dismissed the negligence count with prejudice on the grounds of immunity conferred by the Emergency Medical Services (EMS) Systems Act (210 ILCS 50/1 et. seq.). The plaintiff then voluntarily dismissed the willful and wanton misconduct count. The Code of Civil Procedure, §2-1009, allows a plaintiff to voluntarily dismiss all or part of a claim without prejudice. §13-217 allows a plaintiff to re-file a voluntarily dismissed action within one year of the voluntary dismissal or the remaining period of limitation for that action, which ever is greater. Just less than a year after the voluntary dismissal, the plaintiff re-filed the wrongful death action, setting forth only the willful and wanton misconduct count. The defendants moved to dismiss the re-filed wrongful death action, arguing that it was barred by res judicata. The Circuit Court and the Appellate Court agreed with the defendant's argument and held that the re-filed action was barred by res judicata.

The Illinois Supreme Court affirmed. In deciding whether the voluntary dismissal of the willful and wanton misconduct claim after involuntary dismissal of the negligence claim barred the re-filing of the willful and wanton misconduct claim under the doctrine of res judicata, the Court noted that res judicata bars not only what was actually decided in the first action but also whatever could have been decided as long as three elements are satisfied: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions.

Only the first element was in dispute. Relying on its decision in *Rein v. David A. Noyes & Co.*, 172 Ill.2d 325, 216 Ill. Dec. 642, 665 N.E.2d 1199 (1996), the Court found that the first element of res judicata was met because the dismissal of the negligence count with prejudice operated as an adjudication on the merits for purposes of res judicata, regardless of whether the willful and wanton misconduct count was adjudicated or not. Res judicata will bar not only every matter that was actually determined in the first suit, but also every matter that might have been raised or determined in that first suit. Because the willful and wanton count arose out of the same set of operative facts as the negligence count, plaintiffs could have litigated and resolved the willful and wanton count in the first action and since they failed to do so, they were barred from attempting to re-litigate it based upon res judicata. The Court found that the legislature did not intend for §2-1009 and §13-217 to give plaintiffs an absolute right to split their claims

and stated that these sections should not be read to automatically immunize a plaintiff against the bar of res judicata or other legitimate defenses a defendant may assert in response to the re-filing of voluntarily dismissed counts. While the Court noted that there are six exceptions set forth in §26(1) of the RESTATEMENT (2D) OF JUDGMENTS in which plaintiffs are allowed to split their claims into multiple actions, none were applicable. It therefore affirmed the dismissal holding res judicata barred the plaintiff's re-filed complaint.

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Insurance

Settlement Duties of Excess Carriers

Central Illinois Public Service Company v. Agricultural Insurance Company, 317 Ill. Dec. 180, 880 N.E.2d 1172 (Ill. App., 5th Dist. 2008)

The 5th District recently addressed the issue of whether an excess insurance carrier owes any duty towards another excess insurance carrier. Prior to this decision, Illinois courts have not directly addressed what duties may be owed between excess carriers. The 5th District held that a lower-tiered excess insurer could owe a duty to a higher-tiered excess insurer provided that the lower-tiered excess insurer had control over the litigation process. Further, the 5th District held that the existence of that duty was not dependant on the lower-tiered insurer being able to settle the matter within its own policy limits.

For guidance in its analysis, the 5th District looked to the only case addressing the issues of the duties of an underlying excess insurer applying Illinois law, namely: *Liberty Mutual Ins. Co. v. American Home Assurance Co.*, 348 F. Supp. 2d 940 (N.D. Ill. 2004) in which *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562, 247 Ill. Dec. 750, 732 N.E.2d 1082 (1999)(discussing the duties of primary insurers) became central to its discussion. In *Schal Bovis*, the court found that a primary insurer owed a duty to an excess insurer through equitable subrogation and stated that there is a three-way relationship between the policyholder, the primary insurer and the excess insurer which creates reciprocal duties of care in the conduct of settlement negotiations. Since the underlying primary insurer had control over the litigation and made the decision on its own not to settle, the *Schal Bovis* court held it did owe a duty to the excess carrier because it retained control over the litigation and settlement negotiations. The *Liberty Mutual* court, however, found that no such duty ran between excess insurers.

In this case, the counter-defendant, a higher-tiered excess carrier, alleged that the counter-defendant, a lower-tiered excess carrier, actually controlled the settlement process because counter-defendant's policy gave it the right to take control of the defense and settlement negotiations when the carriers below it settled the first set of claims. Counter-plaintiff further alleged that counter-defendant was in control of the defense and that counter-plaintiff was powerless to act other than to demand that counter-defendant settle the case or tender the policy limits. Counter-defendant denied it controlled the

litigation. The 5th District found that a question of fact existed as to whether counter-defendant had any control over the litigation or settlement negotiations and therefore found that dismissal was inappropriate and remanded the matter back to the trial court. The Court stated that if the evidence shows that counter-defendant lacked control, then a decision in line with *Liberty Mutual* finding the lower-tiered excess carrier had no duty to the higher-tiered excess carrier would be warranted. However, if the evidence showed that counter-defendant had control over the litigation process and settlement negotiations, then a decision in line with *Schal Bovis* finding that the lower-tiered excess insurer owed a duty to the higher-tiered excess insurer would be in order. The Court distinguished *Liberty Mutual* on the grounds that control was not a factor in that case.

In an effort to avoid bad faith claims, excess insurance companies should be aware that they may owe a duty to a higher-tiered excess insurer depending upon whether they have control over the litigation process and settlement negotiations at any point during the progression of the case. As an excess carrier, this duty would most likely arise in complex litigation where a number of insurance carriers are involved. The duty owed is the same duty a primary insurer owes to an excess carrier, which is a duty to participate in settlement negotiations in good faith. If an excess insurer fails to recognize and satisfy this duty, it risks exposure to a bad faith claim by a higher-tiered excess insurer.

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Proposed Expansion of Statutory Penalties for Vexatious Delay

Senate Bill 2109, Introduced by Senator John J. Cullerton on 2/14/08

Senator John J. Cullerton recently introduced Senate Bill 2109, which seeks to amend the Illinois Insurance Code in three key places. First, SB 2109 seeks to amend 215 ILCS 5/154.6, which defines the acts that constitute improper claims practice under the Illinois Insurance Code. The proposed amendment adds language to this section providing that a company that commits an improper claims practice as described in this section may be subject to civil penalties pursuant to the Code or a private cause of action, or both. If this Bill is passed and made into law as written, insurance companies will be subject to civil penalties arising under the Code as well as damages pursuant to a private cause of action for committing acts constituting improper claims practices.

Second, Senate Bill 2109 seeks to amend 215 ILCS 5/155, which currently allows for attorneys fees to be assessed for unreasonable delay or vexatious refusal in settling or paying a claim as well as a penalty not to exceed \$60,000. The proposed amendment seeks to remove the \$60,000 damage cap thereby exposing insurance companies to an unlimited amount of damages under this statute for unreasonable delays or vexatious refusal in settling or paying claims of their insureds.

Finally, Senate Bill 2109 seeks to amend the Criminal Code of 1961, 720 ILCS 5/46-5, which sets forth a civil cause of action for insurance fraud or fraud on a governmental entity. Currently, §5/46-5 establishes the civil cause of action for insurance fraud but also sets forth the rights of person against whom a civil cause of

action for insurance fraud has been filed in bad faith. As the law currently reads, if an insurance company brings an action against a person for insurance fraud in bad faith, the insurance company is liable to that person for twice the value of the property claimed, plus reasonable attorney's fees. The proposed amendment seeks to change the insurance company's liability to three times the value of the property claimed, plus reasonable attorney's fees, if it brings an action against a person for insurance fraud in bad faith.

This Bill was introduced to the Senate on February 14, 2008 and therefore has not yet been subject to vote by the Senate. The status of this Bill can be monitored via the Illinois General Assembly's website at the following link:

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Firm News

Associate Appointed Managing Attorney of Workers Compensation Department

Edwardsville, February 25, 2008: Because of our expanding workers compensation practice, Reed Armstrong has appointed associate James L. Hodges as managing attorney of our workers compensation department. Mr. Hodges has extensive civil experience in defending bodily injury and workers compensation claims.

James Hodges Associates with Reed Armstrong

Edwardsville, July 9, 2007: James L. Hodges, J.D., has become an associate with Reed Armstrong Gorman Mudge & Morrissey, P.C. After attaining his Juris Doctorate degree in 2001 at the John Marshall Law School in Chicago, Illinois, James was admitted to the Illinois Bar in 2002 and worked in Chicago where he tried more than 70 jury trials to verdict for insurance companies and their insureds in civil cases involving motor vehicle accidents, premises liability, Dram Shop and general liability.

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