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## State Director Of Insurance As Liquidator Could Sue Insurance Companies' Accounting Firm For Assisting Sole Shareholder In Financial Wrongdoing

*McRaith v. BDO Seidman, LLP*,  
391 Ill. App. 3d  
565, 909 N.E.2d  
310 (1st Dist.  
2009)

In *McRaith v. BDO Seidman, LLP*, the Director of the State of Illinois Division of Insurance, acting as liquidator, filed suit against the accounting firm which had performed auditing services to third-party insurance companies before they were ordered into liquidation. The liquidator alleged causes of action for negligence, breach of contract, and consumer fraud resulting from annual audited financial reports which the defendant had prepared and filed with the Director of Insurance. The accounting firm filed a motion to dismiss, arguing that under the sole-owner doctrine, any fraud by the sole shareholder of the insurance companies was imputed to the insurance companies themselves and, in turn, to the liquidator, thereby barring the claims. The trial court granted the motion to dismiss and the liquidator appealed.

The appellate court reversed and remanded. While generally knowledge and conduct of agents are imputed to their principals, an exception exists where the agent's interests are adverse to the principal. Here, the sole shareholder's conduct was exclusively designed to loot from the insurance companies for his own personal financial gain at the insurance companies' expense. It would be unlawful and illogical to impute his guilty knowledge or disloyal, predatory conduct to his corporate principals, the insurance companies, or to the liquidator, who was statutorily charged with preserving the rights of creditors and policyholders. As a matter of first impression in Illinois, the court held that the liquidator was not bound by the sole shareholder's fraudulent misreporting of the insurance companies' assets when the liquidator was acting in his capacity for the public interest and the insurance industry, and the sole shareholder would not profit from any recovery.

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## Plaintiff Who Combined Separate Causes Of Action In Complaint Could Not Recover Unpaid Amount Of Judgment From Tortfeasor In Second Auto Accident After Plaintiff Settled With Tortfeasor In First Auto Accident For Less Than Jury's Apportionment Of Damages

In *Sakellariadis v. Campbell*, the plaintiff filed suit against two motorists as a result of auto accidents that took place three months apart, alleging that they were jointly and severally liable for her injuries. The evidence showed that in the first accident the plaintiff's airbag deployed, she sustained significant trauma to her eyes, and she injured her shoulder, spine, and knee. After the second accident in which her airbag again deployed, the plaintiff went home but went to the hospital after experiencing leg and back pain. She later had surgery on her shoulder, knee, lower back, and eyes. The jury found against both defendants, awarded \$518,000 in damages, and attributed 50% of the damages to each defendant. Before the jury returned its verdict, the plaintiff settled with the motorist involved in the first accident for \$150,000 and the trial court found the settlement to be in good faith. The trial court entered judgment for 50% of the verdict against the second motorist, who paid 50% of the verdict. The trial court

rejected the plaintiff's argument that she was entitled to recover the entire judgment of \$518,000 from the nonsettling defendant less the \$150,000 settlement paid by the first defendant. The plaintiff appealed.

The appellate court affirmed. The plaintiff's injuries were not single and indivisible. Instead, the plaintiff alleged that she had suffered injuries in each accident and she presented medical testimony that the second accident aggravated the injuries sustained in the first accident. The fact that the plaintiff may have been injured twice to the same parts of her body did not make the injuries indivisible. The jury was able to reach at least a "rough estimate" to fairly apportion the damage between consecutive, not concurrent, tortfeasors, and its apportionment of fault was not against the manifest weight of the evidence. The Contribution Act did not come into play as the nonsettling defendant paid its 50% share of the verdict.

*Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 909 N.E.2d 353 (1st Dist. 2009)

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## Trial Court Lacked Subject Matter Jurisdiction To Hear Priest's Suit For Defamation And Intentional Infliction Of Emotional Distress Brought Against Abuse Victims

*Steppek v. Doe*, 392 Ill. App. 3d 739, 910 N.E.2d 655 (1st Dist. 2009)

In *Steppek v. Doe*, a Roman Catholic priest filed suit against two brothers based on statements they had made during disciplinary proceedings within the Roman Catholic Church, Archdiocese of Chicago, alleging that the priest had sexually abused them when they were minors. The priest's suit was predicated on claims of defamation and intentional infliction of emotional distress. The trial court denied the motion for summary judgment brought by one of the defendants asserting that the trial court lacked subject matter jurisdiction to hear the priest's suit and refused to certify its ruling for appeal. Eventually, the Illinois Supreme Court directed the trial court to certify the denial of summary judgment to the appellate court.

The appellate court answered the certified question by holding that the trial court lacked subject matter jurisdiction to hear the priest's suit

based on church autonomy or the ecclesiastical abstention doctrine. Under the free exercise clause of the first amendment to the United States Constitution, civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical policy on matters of discipline, faith, internal organization or ecclesiastical rule, custom, or law because freedom of religion protects not only persons but also churches in their collective capacities. Here, the victims' statements were presented solely in a canonical context during internal disciplinary proceedings as part of an evaluation of the priest's fitness for the ministry, obligating Illinois courts to refrain from interfering with an ecclesiastical body's ability to consider the veracity of the statements. Moreover, as an ordained priest, the plaintiff had acceded to the Archdiocese's policies and was bound by them. While the Roman Catholic Church's interest

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was not exclusive, it did have a strong interest in protecting minors from abuse at the hands of the clergy, and for first amendment purposes, the victims who invoked the Church's internal disciplinary process could also invoke their belief in the Church's right to be free from state

court interference in that process. Although the plaintiff's claims could be resolved without interpreting religious doctrine, it would require an Illinois court to interfere with the internal disciplinary proceedings of an ecclesiastical body convened for purposes of regulating its clergy.

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## Subcontractor's CGL Insurer Owed No Duty To Defend General Contractor Where Policy Afforded No Coverage For Liability Resulting From Its "Sole Negligence"

*National Fire Ins. of Hartford v. Walsh Construction Co.*, 392 Ill. App. 3d 312, 909 N.E.2d 285 (1st Dist. 2009)

In *National Fire Ins. of Hartford v. Walsh Construction Co.*, a roofing subcontractor's insurer issued a CGL policy which limited coverage to the subcontractor's work and excluded coverage to additional insureds for liability arising from their "sole negligence." Thereafter, an employee of the subcontractor, injured while performing roofing work, filed suit against the general contractor and the premises owner, alleging that they exercised control of the work and that their negligence caused his injuries. The subcontractor's insurer declined the general contractor's tender of the defense and filed a declaratory judgment action asserting that the underlying complaint did not allege negligence against the subcontractor and that liability was predicated on the defendants' sole negligence. The general contractor then filed a third-party contribution action against the subcontractor in the underlying action. The trial court in the declaratory action granted summary judgment to the subcontractor's insurer, finding that it owed no duty to defend the general contractor in the underlying action.

The appellate court affirmed. The general contractor did not dispute that the underlying complaint failed to allege negligence against the subcontractor. Instead, the complaint explicitly alleged that an employee of the general contractor moved a section of the roof support causing the decking on which the subcontractor's employee was working to fall. The court rejected any rule that would require a subcontractor's carrier to provide coverage whenever an employee of the subcontractor was injured on a jobsite. Otherwise, the limitation on coverage would be rendered meaningless in virtually every construction negligence case. More than some unspecified breach of the subcontractor's duty to provide a safe workplace was required to support a claim that the subcontractor was negligent. The court refused to look to the allegations in the general contractor's third-party complaint that the subcontractor failed to provide a safe workplace for its employees when the third-party complaint was filed by the same party that was seeking coverage as an additional insured.

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## Subcontractor's Insurer Owed No Duty To Defend General Contractor In Premises Owner's Counterclaims Seeking Contractual Indemnification For Injuries Sustained By Owner's Employees As A Result Of Subcontractor's Work

In *American Family Mutual Ins. Co. v. Fisher Development, Inc.*, a general contractor entered into a construction contract with the premises owner. Pursuant to the contract, the general contractor agreed to indemnify the owner from any liability, loss, and expense, including attorneys' fees, resulting from bodily injury arising from performance of the work, whether by the general contractor or any subcontractor. A subcontractor on the project procured CGL insurance naming the general contractor as an additional insured for liability "arising out of [the subcontractor's] ongoing operations provided for [the general

contractor]." The subcontractor's policy excluded coverage for liability for bodily injury for which the insured was obligated to pay damages by reason of the assumption of liability in a contract, but contained an exception for the assumption of tort liability in an insured contract. While the subcontractor was performing its work, two of the owner's employees were injured. The employees made workers' compensation claims and later filed negligence actions against the general contractor and the subcontractor, alleging their injuries arose out of the subcontractor's work. The general contractor filed third-party

*American Family Mutual Ins. Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 909 N.E.2d 274 (1st Dist. 2009)

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contribution actions against the owner, which eventually counterclaimed seeking contractual indemnification for the workers' compensation awards paid to the two employees and for the general contractor's failure to obtain insurance that provided liability coverage to the owner in the third-party contribution actions. The subcontractor's insurer accepted the general contractor's tender of defense of the two actions but declined the general contractor's tender of the defense of the owner's counterclaims and filed a declaratory action seeking a determination that it owed no duty to defend the counterclaims. In the declaratory action, the trial court granted summary judgment to the subcontractor's insurer, finding that it owed no duty to defend

the counterclaims for indemnification.

The appellate court affirmed. The court held that the general contractor's assumption of additional liability to the owner based on the indemnification clause in the construction contract triggered the "contractual assumption of liability" exclusion in the subcontractor's policy. The owner's claims were not based on tort liability that could be asserted against the general contractor for the subcontractor's work, but rather were based on what the owner bargained for in the contract with the general contractor, the obligation to hold harmless was contractual, and the "insured contract" exception to the exclusion therefore did not apply.

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## Truck Driver Entitled To Underinsured Motorist Coverage When He Was In Virtual Contact With And "Occupying" The Truck While Attempting To Remove Debris Which Had Fallen From Truck Into Roadway

*DeSaga v. West Bend Mutual Ins. Co.*, 391 Ill. App. 3d 1062, 910 N.E.2d 159 (3d Dist. 2009)

In *DeSaga v. West Bend Mutual Ins. Co.*, the plaintiff's decedent was struck by a motorist after he went into the roadway to remove some pieces of angle iron that had fallen off his truck. The plaintiff sought underinsured motorist benefits under a business policy issued by the defendant to the decedent's employer. The insurer denied coverage on grounds that the decedent was not "occupying" the covered vehicle at the time of the accident. "Occupying" was defined as "in, upon, getting in, on, out or off." The trial court granted summary judgment to the insurer, finding that the decedent was not "occupying" the truck when he was struck and killed. The plaintiff appealed.

The appellate court reversed and remanded. It held that the insurer could not define "insured" more narrowly for underinsured motorist

coverage than for liability coverage. Whereas the policy defined "insured" for liability coverage as anyone using a covered vehicle with the named insured's permission, "insured" was defined for underinsured motorist coverage as anyone "occupying" a covered vehicle. Once it has been determined who is an insured under the liability coverage, the insurer may not deny uninsured or underinsured motorist benefits to the insured. Moreover, even under the "insured" definition in the underinsured motorist section of the policy, the decedent was "occupying" the truck when he had been using it just moments before the accident, he had parked the truck nearby, he had put his flashing emergency lights on, and he had left the engine running as he attempted to retrieve pieces of angle iron which had fallen into the roadway.

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## Hospital Not Liable For Spoliation Of Evidence When The Loss Of Cardiac Monitoring Strips Did Not Prevent Plaintiff's Expert From Rendering Standard Of Care Opinions In Medical Malpractice Case

In *Midwest Trust Services, Inc. v. Catholic Health Partners Services*, the plaintiff, after filing a wrongful death action based on medical malpractice, brought a separate action four years later for spoliation of evidence against the hospital where the plaintiff's decedent had surgery 48 hours before his death. The plaintiff alleged that the hospital's failure to preserve

cardiac monitoring strips generated during the decedent's stay in intensive care impaired the plaintiff's ability to prosecute the medical malpractice case. The jury returned a verdict in favor of the hospital and its resident in the underlying medical malpractice action. The trial court granted summary judgment to the hospital in the spoliation case and the plaintiff appealed.

*Midwest Trust Services, Inc. v. Catholic Health Partners Services*, 392 Ill. App. 3d 204, 910 N.E.2d 638 (1st Dist. 2009)

continued...

The appellate court affirmed. To satisfy the element of proximate cause in an action for negligent spoliation of evidence, a plaintiff must show that the loss or destruction of evidence caused the plaintiff to be unable to prove an underlying suit. Even without the strips, the plaintiff's expert witness, a cardiologist, testified that he had enough information to render

standard of care opinions against the resident based on the depositions of various doctors and nurses, the medical records, and an autopsy report. Based on the expert's testimony, the loss of the cardiac monitoring strips did not cause the plaintiff to be unable to prove its case against the resident in the underlying action.

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## Consent Form To Emergency Treatment Did Not Entitle Hospital To Judgment On Plaintiff's Apparent Agency Claim

In *Spiegelman v. Victory Memorial Hospital*, the plaintiff filed a medical malpractice action against a hospital, an emergency room physician employed as an independent contractor, and the professional corporation which employed him, based on a misdiagnosis of bacterial meningitis. As a result of the infection, the plaintiff sustained permanent brain injuries, which left her wheelchair-bound and in need of assistance for all of her daily functions. The trial court granted the hospital's motion for directed verdict based on institutional negligence but denied the hospital a directed verdict based on apparent agency with the emergency room physician. The jury returned a verdict in the plaintiff's favor and against the hospital, the emergency room physician, and the professional corporation. The emergency room physician paid a portion of the judgment and the hospital appealed.

The appellate court affirmed. It held that, based on the totality of the circumstances, the hospital was not entitled to judgment

notwithstanding the verdict on apparent agency when the consent form to emergency treatment was multipart and ambiguous. The form was titled "CONSENT FOR EMERGENCY TREATMENT" and contained various provisions unrelated to an independent contractor disclaimer. The signature line was underneath a separate unnumbered paragraph concerning the release of property. Moreover, immediately preceding the disclaimer was a paragraph stating that "hospital employees will attend to my medical needs as may be necessary." The court concluded that the jury could find that the plaintiff was confused as to which doctors were hospital employees and which were independent contractors. Furthermore, the plaintiff was dizzy and had vision problems at the time that she signed the form, the plaintiff reasonably relied on the hospital to provide complete care in the emergency room as advertised by the hospital, and the plaintiff presented evidence that she did not choose the physician in emergency room.

*Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826, 911 N.E.2d 1022 (1st Dist. 2009)

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## Rescue Doctrine Allowed Rescuer To Recover From Defendant Who Placed Himself In Danger

*Strickland v. Kotecki*, 392 Ill. App. 3d 1099, 913 N.E.2d 80 (3d Dist. 2009)

In *Strickland v. Kotecki*, the sister-in-law and brother-in-law of the defendant brought an action for negligence against the defendant and his wife for injuries sustained by the brother-in-law when he jumped over a fence to stop the defendant from committing suicide. The trial court granted the defendants' motion to dismiss on grounds that the complaint failed to state a cause of action and the plaintiffs appealed.

The appellate court affirmed in part, reversed in part, and remanded. The rescue doctrine has long been recognized in Illinois. The doctrine arises when a plaintiff brings a negligence action

against a defendant whose negligence has placed a third person in peril. The doctrine provides that it is foreseeable that someone may attempt to rescue the third person who has been placed in a dangerous position and that the rescuer may incur injuries in doing so. However, unlike many other jurisdictions, Illinois has not decided whether the rescue doctrine allows a rescuer to bring a negligence action against a defendant who places himself in danger when the rescuer is injured attempting the rescue. Joining other jurisdictions which recognize recovery, the court held that the rescue doctrine allowed the rescuer to recover from the rescued party

*continued...*

for injuries sustained during the rescue, even when the defendant was attempting to commit suicide. Here, the defendant's wife contacted the plaintiff when she became concerned that her husband was going to try to kill himself. The plaintiffs found the defendant's vehicle with a hose running from the exhaust pipe to the passenger window. In these circumstances,

it was foreseeable that someone would attempt a rescue and become injured in the process. While the complaint stated a cause of action against the defendant, the court held that the defendant's wife could not be held liable merely for requesting or demanding the plaintiffs' assistance.

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## Injury Suffered By Bartender In High Crime Area When Struck By Stray Bullet Arose Out Of And In Course Of Employment

*Restaurant Development Group v. Oh*, 392 Ill. App. 3d 415, 910 N.E.2d 718 (1st Dist. 2009)

In *Restaurant Development Group v. Oh*, the claimant was a bartender who filed an application for adjustment of claim pursuant to the Workers' Compensation Act and sought benefits from her employer for injuries she suffered when she was struck by a stray bullet. An arbitrator found that the claimant proved she had sustained accidental injuries arising out and in the course of her employment with the restaurant, and awarded her medical expenses and permanent total disability benefits for life. The Workers' Compensation Commission affirmed and adopted the arbitrator's decision. The trial court affirmed the Commission's decision and the employer appealed.

The appellate court affirmed. There are three types of risk which an employee might be exposed to: (1) risks distinctly associated with employment; (2) risks which are personal to the employee; and (3) "neutral risks" which have no particular employment or personal characteristics. The risk of being struck by a stray bullet was a neutral risk. Whether an injury

caused by a neutral risk arises out of employment depends on whether the employee was exposed to a risk to a greater degree than the general public. It was not enough that employment placed the employee in a particular place at a particular time. This is known as positional risk and Illinois has rejected the positional risk doctrine as a theory of recovery. Here, however, the claimant was exposed to injury from a stray bullet to a greater degree than the general public. The employer's restaurant was located in a high crime area with rival gangs feuding over turf. The assailants lived a short distance from the restaurant and were shooting at a rival gang member driving in the neighborhood at the time that the bartender was working near the restaurant's floor-to-ceiling windows, adjacent to the street, with her body exposed, and her employment required her to work late at night and on weekends when most of the shooting was taking place. In these circumstances, the claimant's risk was not merely positional as the conditions of employment exposed her to greater risk than the general public.

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### CHICAGO OFFICE:

150 North Michigan Ave., Suite 3300

Chicago, IL 60601

[www.salawus.com](http://www.salawus.com)

312.894.3200

## Our other office locations:

2460 Lake Shore Drive  
Woodstock, Illinois 60098-6911

815.337.4900

Stewart Square  
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Suite 320  
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815.987.0441

3815 East Main Street  
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St. Charles, Illinois 60174-2488

630.587.7910

4811 South 76th Street  
Suite 306  
Milwaukee, Wisconsin 53220

414.282.7103

Editor *Michael Resis*

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# Product Liability

INSERT TO CASE REPORTS

## The CPSIA and Its Public Database of Incidents

In August of 2008, Congress passed the Consumer Product Safety Improvement Act (“CPSIA”) of 2008. Part of this far-reaching legislation requires the establishment of a “public database” in which the Consumer Product Safety Commission (“CPSC”) will make available reported incidents involving consumer products to the general public. Specific plans for the database were submitted to Congress in February 2009, and on November 11, 2009 the CPSC will hold a public hearing in order to receive oral comments on the database from all interested parties. Though little is known about the format or administration of the database, certain things are known: The database must be public, searchable, and accessible through the CPSC website and it must include “reports of harm” received from local, state and federal agencies, as well as health care professionals, child services providers, public safety entities, and *consumers*.

The CPSIA defines “harm” as (1) injury illness, or death; or (2) risk of injury, illness, or death, as determined by the CPSC. The report of the harm must describe the product, identify the manufacturer or private labeler, describe the harm related to the product’s use, provide contact information for the person submitting the report, and include a statement verifying its truth and accuracy. Though the identity of the person submitting the report must be provided to the CPSC, it will *not* be provided to the manufacturer or private labeler, unless the individual making the report expressly consents to the disclosure. Thus, manufacturers and private labelers will have to respond to these reports

of harm without having any opportunity to contact or question the complainant. Once the report of harm is filed with the CPSC, the CPSC must transmit the report to the manufacturer or private labeler within five business days, “to the extent practicable.” Furthermore, it is mandatory for the report to be included on the CPSC database within ten business days after the 5 day period. Thus, there is a maximum of 15 days from report to publication, which is not a lot of time for a manufacturer to respond to the allegations. Furthermore, it remains to be seen how and to whom the CPSC will “transmit” the report to the corporation in order ensure a real opportunity to respond.

Once the report is received by the CPSC, the CPSC is permitted to determine (within the 15 business days before publication) whether the information is “materially inaccurate.” If the information is determined to be materially inaccurate, the CPSC must (1) decline to add the inaccurate information to the database; (2) correct the inaccurate information and add the revised information to the database; or (3) explain the inaccuracies in the database. During the 15 day period, the manufacturer or private labeler may submit comments to convince the CPSC that the report is materially inaccurate. As stated above, considering the fact that the CPSC may not even get the report to the manufacturer until day 5, this leaves the manufacturer with only 10 days to investigate the alleged problem and draft a response.

Another problem with the new public database is that confidential information is likely to be disseminated. Although a manufacturer

Consumer  
Product Safety  
Improvement  
Act (“CPSIA”)  
of 2008

or private labeler may request that portions of the report identified as confidential be so designated and redacted, the CPSC is charged with determining whether the information contains or relates to trade secrets or financial information. If the CPSC does not agree with the manufacturer that the report contains confidential information, the company may bring an action in U.S. District Court to seek the removal of the information from the database; however, the company may not seek to enjoin its publication. This may prove to be “too little too late,” as it cannot prevent the dissemination of the information, but only limit its scope after the cat is out of the bag.

The most pressing problem with the public database is the possibility that these reports could be used against a manufacturer in subsequent litigation involving the product. Reports of harm are hearsay; however,

they may fall under one or more hearsay exceptions. For instance, the fact that the database is created and maintained by the U.S. Government gives the information a “cloak of reliability,” especially since the agency screens for “material inaccuracies.” Also, a manufacturer or private labeler’s published comments in response to the reports would likely fall under an exception to the hearsay rule if considered by the court as a party admission. These reports may also be invoked to prove notice of the alleged defect, even though the company will have virtually no opportunity to investigate.

Though much remains unknown about this piece of legislation, it is readily apparent that manufacturers and private labelers must begin to prepare an efficient plan to react to “reports of harm.”

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## *Hudson and Rein* Likely Have Long-Term Effects on Applicability of *Res Judicata* Doctrine in Illinois

In August 2009, the Appellate Court of Illinois (First District) decided *Kiefer v. Rust-Oleum Corp. & U.S. Can Corp.* (No. 1-08-2879) and affirmed that *res judicata* will bar a plaintiff’s entire claim if plaintiff had taken a previous voluntary non-suit, and any single count of the plaintiff’s complaint had already been dismissed with prejudice before plaintiff took the voluntary non-suit. This doctrine can be valuable to defense attorneys in cases in which a plaintiff has filed a multi-count complaint and one of the counts has already been dismissed with prejudice by the court. If the plaintiff then takes a voluntary non-suit on the rest of the counts, his entire action will be barred when he attempts to re-file the complaint.

In *Kiefer*, the plaintiff sued the seller and alleged manufacturer of spray paint after a can of spray paint exploded, striking the plaintiff in the face causing severe injuries to his face, head, neck, and left eye. The plaintiff’s initial complaint alleged both strict product liability and negligence claims. The trial court dismissed the strict products claims with prejudice on the grounds that British Columbia law (which applied) did

not recognize such claims. Subsequent to the dismissal with prejudice, the plaintiff voluntarily dismissed the negligence claims pursuant to 735 ILCS 5/2-1009. When plaintiff attempted to re-file these negligence claims, they were dismissed on the grounds of *res judicata*, and the appellate court affirmed that ruling.

The *Kiefer* Court, citing *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008), explained that three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been reached 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. *Hudson*, 228 Ill. 2d at 467. In *Kiefer*, the plaintiff did not dispute that the second and third requirements had been met, but contended that the first requirement had not been met because there never was a final judgment on the negligence count, i.e., only the strict liability count had been dismissed with prejudice.

Nonetheless, the *Kiefer* Court reiterated that in *Hudson*, the Illinois Supreme Court held

*Kiefer v. Rust-Oleum Corp. & U.S. Can Corp.*  
(No. 1-08-2879)

*Kiefer* Court,  
citing *Hudson v. City of Chicago*,  
228 Ill. 2d 462,  
467 (2008)

*Rein v. David A. Noyes & Co.*,  
172 Ill. 2d 325  
(1996)

continued...

that when a plaintiff asserts multiple claims arising from the same set of operative facts in a single action and one of those claims is dismissed on the merits, the doctrine of *res judicata* will bar the plaintiff from refiling not only those claims that were dismissed on the merits as part of the original action, but also any claims that could have been determined as part of that action. *Hudson*, 228 Ill. 2d at 467.

In reaching this conclusion, the *Hudson* Court considered its earlier decision in *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325 (1996). In *Rein*, the Illinois Supreme Court considered the public policy against “claim-splitting,” which serves to prevent parties from splitting their claims into multiple actions, and held that a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense. *Rein*, 172 Ill. 2d at 339-42. The *Hudson* decision explicitly upheld this principle, and the appellate court in *Kiefer* carried it out by concluding that [based on] the holdings of *Hudson* and *Rein*, *Kiefer*’s negligence claims are barred by *res judicata*.

When this litigation strategy becomes a possibility for a defense attorney, the attorney must keep in mind that there are exceptions to the rule. First, the *Kiefer* court distinguished

the *Kiefer* case from *Piagenti v. Ford Motor Co.*, 387 Ill. App. 3d 887 (2009), in which the Illinois Supreme Court held that granting partial summary judgment in the originally filed lawsuit was not a final order because “partial summary judgment was granted as to certain allegations within separate counts of the complaint but no actual count was dismissed;” and “the dismissal of certain allegations under one theory of recovery merely determines which allegations under that theory are allowed to remain.”

Second, the *Rein* Court specifically adopted the exceptions to the prohibition on “claim-splitting” set out in Section 26(1) of the Restatement (Second) of Judgments (1982). Under the Restatement, the rule against claim-splitting would not bar a second action if: (1) the parties have agreed, in terms or in effect, that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court in the first action expressly reserved the plaintiff’s right to maintain the second action; (3) the plaintiff was unable to obtain relief because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that policies favoring preclusion of a second action are overcome for an extraordinary reason.

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## A Brave New World in Genetic Engineering and Product Liability Law

*Donovan v. Idant Laboratories*, 625 F. supp. 2d 256 (E.D.P.A. 2009)

On June 10, 2009, the United States District Court for the Eastern District of Pennsylvania had an opportunity to address a products liability case that foreshadowed possible liability theories in the new millennium that may be asserted against manufacturers of genetically modified cells and organisms. In *Donovan v. Idant Laboratories*, 625 F. supp. 2d 256 (E.D.P.A. 2009), the plaintiff was the mother of a child that was born via artificial insemination and suffered a disability that was genetic in origin. The mother brought non-economic claims on behalf of her daughter for the pain and suffering associated with the condition, and economic claims on the mother’s own behalf due to the costs incurred in raising a child with a disability. The

mother’s claims were barred by the statute of limitations, and therefore the only issue before the court was the minor child’s non-economic claims for loss of a normal life.

The question before the court was whether the child’s claims of strict liability and breach of warranty against the sperm bank were valid. The defendant argued that these claims were essentially claims for “wrongful life,” which had been prohibited by New York law. Wrongful life claims are barred because the New York Court of Appeals has ruled that there is no legally cognizable injury because tort law seeks to put a plaintiff in a position that he would be in if the tort was not committed, i.e., never being born

*continued...*

at all. Whether being born with a defective condition is worse than never being born at all is a non-justiciable question better left for philosophers and theologians. However, the *Donovan* Court pointed out that “wrongful life” claims have never been brought pursuant to a theory of strict liability for a defective product and thus have not been barred by New York law (the wrongful life claims were only in the context of medical malpractice claims). Nonetheless, the *Donovan* Court went on to determine that the child’s claims were essentially the same as a wrongful life claim, although the child’s claims were nominally titled as claims for strict product liability and implied warranty. This is because the child was not seeking the economic costs of treatment for her condition (the mother sought those damages). Instead, the child was seeking compensation for having to live with the condition: essentially non-economic pain and suffering. The *Donovan* Court reiterated that these types of non-economic damages cannot be determined and are non-justiciable because without the donated sperm, the child would never have been born at all, and no court or jury can determine whether it is better to never have been born at all.

This case merely illustrates the possibilities that will be raised in the near future concerning different types of human tissue and “genetic transplants.” For instance, in Illinois there is a valid Blood Shield Statute, which prohibits product liability claims against blood banks as manufacturers of blood because blood transfusions expose patients to risks that are so great as to make blood an unavoidably

unsafe product. § 745 ILCS 40/2, specifically states:

The procuring, furnishing, donating, processing, distributing or using human whole blood, plasma, blood products, blood derivatives and products, corneas, bones, or organs or other human tissue for the purpose of injecting, transfusing or transplanting any of them in the human body is declared for purposes of liability in tort or contract to be the rendition of a service by every person, firm or corporation participating therein, whether or not any remuneration is paid therefore, and is declared not to be a sale of any such items and no warranties of any kind or description nor strict tort liability shall be applicable thereto, except as provided in Section 3 [745 ILCS 40/3].

This section applies to and shields the manufacturers of blood for human transfusions, and on its face it would appear to apply to a sperm bank that distributes “other human tissue,” however, that issue has not been before the courts in Illinois.

An even more interesting question is whether and to what extent the Blood Shield Statute would apply to gene therapy treatments that will one day be used to treat a variety of human conditions such as multiple sclerosis and Huntington’s Disease. For states that do not have blood shield laws it seems apparent that companies which manufacture genes to insert into human cells in order to cure certain disease will, in the near future, be exposed to product liability suits for defective design or manufacture of those products.

## SmithAmundsen Product Liability Practice Group

SmithAmundsen’s Product Liability Practice Group consists of attorneys who possess over 50 years of trial experience as well as the business sense needed to defend the integrity of our clients’ products. Our lawyers successfully defend the product brands of prestigious manufacturers, distributors, and retailers across the nation. We are knowledgeable about the latest advancements in failure analysis, biomechanics, consumer product safety, federal regulations, and trade secret protection. We have served as national and regional counsel for manufacturers who value our experience in court and our knowledge of the industry and their businesses.

For more information on our Product Liability Practice, please contact Michael McGowan (mmcgowan@salawus.com).

## Publication Contributors

### *Editor:*

Michael McGowan

### *Writers:*

William Seth Howard

Courtney S. Karamanol (Law Clerk)