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TRYING PRODUCT LIABILITY CASES IN ILLINOIS

Our office obtained another defense verdict this week. This time it was in a product liability case in Cook County, Illinois, where the manufacturer was sued in strict liability and negligence for allegedly providing unsafe components for a residential garage door. The plaintiff settled out the co-defendants and went after the deepest pocket, seeking in excess of $2.5 million. We were confident that our client sold a safe product, but Illinois product liability law makes the path to a defense verdict much less certain.

Strict product liability is imposed on manufacturers, suppliers, distributors, retailers and commercial lessors for defective products. The plaintiff must prove that the injury resulted from a condition of the product manufactured or sold by the defendant, that the condition was "unreasonably dangerous," and that the condition existed at the time it left the defendant's control. The defects can be a manufacturing flaw, improper design or inadequate warnings. The jury is instructed that the defendant's duty to make the product safe cannot be delegated or left to some other person. In other words, it is not a defense that another person (e.g., employer, installer) failed to make the product safe.

The Illinois Supreme Court recently clarified how to determine whether a product is unreasonably dangerous in design defect cases. *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516 (2008). But there are many open questions for a defendant heading into a product liability trial. Will

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evidence of the user's assumption of risk be admitted? If so, how is that different from contributory negligence? What verdict forms will be used when strict liability and negligence claims are tried concurrently? When and how can industry standards be used as a defense? What constitutes misuse of a product? The court's rulings on any one of these questions could substantially change a defendant's exposure at trial.

Another wrinkle to our case was that the settling defendants were not included on the verdict form for purposes of joint and several liability under the *Ready v. United/Goedecke Services, Inc*. decision. 232 Ill.2d 369 (2008) That left our client as the last one standing for a strict liability trial in Cook County. Fortunately, the jury only made us wait for a couple hours before returning a verdict for our client. But if you find yourself in a similar situation, make sure all evidentiary contingencies are explored before trial.

LEGAL MALPRACTICE UPDATE

Our firm represents professionals against allegations of malpractice, as well as reviewing coverage for such claims on behalf of professional liability insurers. Here are several recent developments, discussing to whom an attorney owes a duty, how to reconcile an attorney's ethical obligations and insurance policy conditions, and whether a Medicare lien can attach to recovery in a legal malpractice case.

The Attorney-Client Relationship Extends to Wrongful Death Beneficiaries

In *Estate of Powell v. John C. Wunsch, P.C.,* 2013 IL App (1st) 121854, the Appellate Court held that attorneys bringing a wrongful death action owed a duty to the decedent's next of kin as intended beneficiaries of the attorney-client relationship. Perry Powell was a disabled adult whose parents were co-guardians of his person. After Powell's father died, two firms worked on a wrongful death suit brought in the name of Powell's mother, Leona Smith, as special administrator. When Powell's sister became concerned that Leona was misusing Powell's portions of the settlements in that action, the probate court appointed a public guardian for Powell's estate, who filed this suit alleging professional negligence against the law firms and several claims against Leona. The circuit court granted the firms' motions to dismiss because they had no attorney-client relationship with Powell, holding that the wrongful death suit was to benefit the father's estate and not the estate beneficiaries.

The Appellate Court reversed and remanded. Under the Wrongful Death Act, 740 ILCS 180/2, a wrongful death action is brought in the name of the personal representative for the benefit of the surviving spouse and next of kin. Although Leona signed the attorney-client agreements with the firms, the next of kin were still statutory beneficiaries of the cause of action brought in her name, and the firms owed a duty to the next of kin. The court said that the personal representative was merely a nominal party filing suit on behalf of the surviving spouse and next of kin as the true parties in interest, and the wrongful death action was not a true asset of the decedent's estate. The complaint sufficiently alleged that Powell was his father's next of kin to state a cause of action and defeat the firms' motions to dismiss. The complaint also sufficiently alleged proximate cause in that the firms allegedly failed to take action to ensure

that the probate court would supervise the settlement distribution and protect Powell's interests. It is important to limit this case to its facts in the context of the Wrongful Death Act, as the circumstances in which courts recognize that an attorney owed a duty to a non-client remain very limited.

Professional Liability Insurer Cannot Prevent Attorney's Disclosure of Mistake to Potential Claimants

In *Illinois State Bar Association Mutual Insurance Co. v. Frank M. Greenfield & Associates, P.C.,* 2012 IL App (1st) 110337, the Appellate Court held that a condition in a professional liability insurance policy was contrary to public policy because it could allow the insurer to limit an attorney's disclosure of a possible malpractice claim to potential claimants. Greenfield's policy from ISBA Mutual provided that the insured would not, except at its own cost, "admit any liability, assume any obligation, incur any expense, make any payment, or settle any Claim, without the Company's prior written consent." After the death of an estate-planning client, Greenfield discovered a scrivener's error in her will that resulted in changes to the distribution of certain trust assets. Greenfield advised her beneficiaries of the error and recommended that they retain counsel to consider their possible courses of action. ISBA refused to defend Greenfield in the beneficiaries' suit and filed an action seeking a declaratory judgment that Greenfield had breached the above policy condition by admitting liability. The trial court granted summary judgment for Greenfield and found ISBA had a duty to defend.

The Appellate Court affirmed. The parties agreed that Greenfield had an ethical obligation to disclose his mistake to the beneficiaries, but ISBA Mutual contended that Greenfield went beyond the scope of his obligations in admitting to the elements of a legal malpractice action. The court said that it was one thing to admit a fault and another to admit legal liability. ISBA Mutual claimed that it would not have interfered with Greenfield's disclosure but would have advised him how to fulfill his ethical obligations without compromising his defenses to a malpractice case. However, the court said it was an attorney's obligation to comply with the rules as he understood them, and it was against public policy to limit his disclosures as the policy condition had the potential to do. ISBA Mutual therefore could not refuse to defend Greenfield based on the letter that he had sent to his client's beneficiaries.

The Case Against Medicare Liens in Attorney Negligence Cases

When Medicare makes payments to a personal injury plaintiff who subsequently receives a settlement or judgment, Medicare is generally entitled to reimbursement under the Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b)(2). In a legal malpractice case, in contrast, it can be argued that the Medicare "super lien" and other liens based on treatment for an underlying personal injury should not attach against a settlement or judgment. Whether Medicare's lien applies to such a claim has not been the subject of any reported decisions, but the argument is consistent with court decisions regarding other statutory liens, such as *Eastman v. Messner,* 188 Ill.2d 404 (1999).

In *Eastman,* the Illinois Supreme Court held that a workers' compensation lien did not attach to the injured worker's recovery in a legal malpractice suit. The Workers' Compensation Act, at 820 ILCS 305/5(b), says that a

lien arises against recovery from a person that caused the injury or death for which compensation is payable. However, the Court said that the injuries resulting from legal malpractice are not personal injuries but pecuniary injuries to intangible property interests. Attorneys who are negligent in bringing a claim based on a personal injury do not themselves cause the personal injury on which the claim was based; they are potentially liable only because of their own alleged failures in prosecuting the claimant's suit. The Court further noted that a plaintiff who obtains recovery in a malpractice suit can be in no better position by bringing suit against the attorney than if the underlying action had succeeded. Since the plaintiff's recovery in the underlying suit would have been reduced by legal fees and any liens asserted by Medicare or a workers' compensation carrier and those amounts are excluded from the plaintiff's recovery for attorney negligence, there is no double recovery and no reason to allow the lien on the legal malpractice proceeds. The reasoning of *Eastman* supports the argument that a verdict for legal malpractice is not the kind of award that Medicare can recover from the claimant because it compensates the plaintiff for the attorney's professional errors, and not for the personal injury compensated by Medicare.

The *Eastman* Court's distinction between liability for personal injuries and liability for legal malpractice receives further support from federal decisions interpreting the Longshore and Harbor Workers' Compensation Act (LHWCA) and the reporting requirements of the Medicare, Medicaid and SCHIP Extension Act (MMSEA). *See ITT Fed. Servs. Corp. v. Anduze Montaño,* 474 F.3d 32, 36 (1st Cir. 2007) (employer that had paid claim under LHWCA could not assert subrogation rights against injured employee's potential recovery for legal malpractice); *Or. State Bar Prof'l Liab. Fund v. U.S. Dep't of Health and Human Servs.,* 2012 WL 1071127 at *5 (D.Or.) (professional liability insurer had no reporting obligations under MMSEA because insurer covered claims based on provision of legal services, not tortious conduct resulting in bodily injuries). Even so, we must caution that while *Eastman* apparently represents the majority position among state courts, its reasoning has not been accepted nationwide. *See Haugenoe v. Workforce Safety & Ins.,* 748 N.W.2d 378, 382 (N.D. 2008) (reviewing split of authority). Parties should consult whatever state's law is applicable to their case.

We are aware of two cases, one of which our office handled, in which Medicare agreed with an *Eastman*-like argument that it could not assert a lien against a legal malpractice recovery. While it may seem like a plaintiff-friendly position to argue that Medicare's lien does not attach to a plaintiff's recovery, the ultimate significance of successfully making this argument to Medicare is that it should allow defendants to settle legal malpractice claims for a lesser amount. Without a Medicare lien on the malpractice claim, the plaintiff gets to keep a greater share of the settlement and his or her demand does not have to include an amount to reimburse Medicare.

PRACTICE POINTER: While this argument can be used effectively, defendants and insurers should never agree to take Medicare off a settlement check unless the plaintiff's attorney has obtained a letter from Medicare confirming that it is not asserting its lien.

SHOULD YOU CONSIDER BINDING MEDIATIONS?

We always look for new and cost-effective ways to resolve our clients' claims. One approach that is gaining popularity is the binding mediation. This may sound like a contradiction of terms, but the format is a hybrid version of a mediation and arbitration that may be well suited for some of your claims.

In a binding mediation, the process starts with a conventional mediation where the parties attempt to reach an agreement by their own determination. If they are "too far apart" at a certain point, the mediator effectively takes the role of an arbitrator and issues a ruling that would bind the parties.

The format is flexible and can be tailored to meet the needs of any particular case. The key is to have a clear written agreement signed by the parties to help the mediator understand the parameters of his/her authority. For instance, the agreement should specify when the mediator has the right to cease settlement talks and rule on the unresolved issues. The parties may wish to add time limits or set a high-low agreement in place.

The chief advantage to the binding mediation is a prompt and certain resolution. The parties can save the time and expense of discovery, trial preparation and a protracted settlement process. This format also provides added incentive for the parties to settle on their own terms before a final determination is made - much like a settlement on the courthouse steps, but earlier in the process.

Some parties are reluctant to participate in binding mediations because it places too much authority in the hands of the mediator. Choosing a trusted mediator, therefore, is the critical first step. Most mediators, who are often former judges, have a business interest in being fair to all parties. This may make them a safer choice than a jury.

There may be other drawbacks to consider as well. Choosing a binding mediation means the parties lose the right to an appeal. There is also the risk that the mediator will consider inadmissible evidence learned during the mediation process in his/her ruling.

Binding mediations are most frequently used in lower-value cases where the litigation costs can outweigh the exposure at trial. But they also merit consideration in larger cases, especially where the parties have widely divergent views on liability or evidentiary matters that prevent meaningful settlement discussions. The parties should consider whether on balance there is any greater risk in having a mediator resolve the claim today versus a jury several months down the road.

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