October 1, 2007

A recent decision of the Illinois Appellate Court will have a direct impact on insurance carriers in Illinois. In **Jones v. O'Brien Tire and Battery Service Center, Inc.**, 871 N.E.2d 98, the Fifth District Appellate Court held that an insurer could be held liable for negligent spoliation of evidence for advising an insured not to dispose of evidence, even when the evidence was never in the control of the insurer.

The plaintiff was injured after a tire fell off a truck, causing an accident. The tire installer settled with the plaintiff and pursued a claim for negligent spoliation against Country Mutual. Country Mutual insured the owner of the truck while Ohio Casualty insured the tire installation company. After the accident, the Country Mutual adjustor wrote in a letter which stated the following:

> In our conversation[,] I indicated to her it would be crucial for our case for you to retain the two wheels and tires which came off of your vehicle during this collision. I would ask that you label them clearly 'evidence, do not touch' and store them in a secure place so that they may not be tampered with in the event we need these as evidence in a trial situation. I would also ask that when you have your [truck] repaired that [*sic*] you save the wheel studs and attach them to the wheels and also mark them clearly as evidence for trial purposes."

The general rule is that a party has no duty to preserve evidence. The Illinois Supreme Court has issued a two prong test regarding preservation of evidence. The first prong upon which a duty may arise is if there is an agreement or contract between the parties imposing the duty, if the duty is imposed by statute, or if some other special circumstance warrants it. A duty to preserve evidence may also arise where a party voluntarily assumes the duty by its conduct. **Boyd v. Travelers. Ins. Co.**, 166 Ill.2d at 195, 209 Ill.Dec. 727, 652 N.E.2d at 270-71. Under the second prong, the plaintiff must show that the duty extends to the specific evidence at issue by demonstrating that a reasonable person in the defendant's position should have known the evidence would be material to potential civil litigation. If the spoliation plaintiff does not satisfy both prongs of the test, there is no duty to preserve the evidence at issue. **Id.**

The Country Mutual court held that the letter sent by the adjustor was a voluntary undertaking on the part of Country Mutual to ensure the preservation of the wheels at issue. The primary issue is control of the evidence and whether the insurance carrier exercised sufficient control over the evidence to justify

imposing such a duty upon them to preserve evidence. The court found that "Country Mutual, once having undertaken the duty to preserve the wheels, had a duty to exercise reasonable care to preserve the wheels as evidence for any party that might need to use them in future litigation." **Jones**

Clearly, imposing a duty to preserve evidence on an insurance carrier can be extremely harsh. In this case, it is even harsher as the carrier never had the evidence in its possession and never undertook any repairs to the vehicle. The entirety of the spoliation claim arose from the letter sent by the adjustor. The incongruence of this opinion was discussed in detail in the dissent of Justice Spomer wherein he stated:

> In addition, the majority's distinction goes against logic and would in effect turn public policy on its head. It defies common sense to say that by advising an insured not to preserve evidence, an insurance company can avoid liability, but by advising an insured to preserve evidence, an insurance company is assuming liability. The public policy implication of the majority's holding would be to encourage insurance companies to advise their insureds not to preserve evidence. This cannot be the intention of the Illinois Supreme Court. . . . Also troublesome is the majority's holding that 'once Country Mutual undertook to preserve the evidence for its own benefit, this voluntary undertaking imposed a duty to continue to exercise due care to preserve the evidence for the benefit of *any other potential litigants.*

Although spoliation of evidence is not a new theory in the law, the application of spoliation claims to insurers is a recent trend. This decision will do little to deter such claims in the future. It would appear that the logic of the dissent is the more reasoned approach. It should be noted that this decision is from the Fifth District Appellate Court which covers the area of southern Illinois that includes Madison County. Until the Supreme Court states otherwise, this is the law in that District. This will not preclude challenges to such claims in other districts of Illinois.

Very truly yours,

Busse, Busse & Grassé, P.C.

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