October 1, 2006

Re: Two recent Illinois Supreme Cases: Premises Liability and "Late Notice" Defense

Two recent Ilinois Supreme Court cases have addressed issues that could greatly affect the handling of cases in Illinois. It should be noted before addressing these opinions that neither case has been officially released for publication, despite being issued in June and May of this year, respectively. A such, they could be subject to revision before becoming final.

The first is the case of **Marshall v. Burger King Corporation**, 2006 WL 1703488, which addressed how courts should handle decisions as to whether a duty exists in premises liability cases.

Detroy Marshall was a patron of a Burger King restaurant. While eating, Mr. Marshall was struck and killed by a vehicle that crashed through the wall of the Burger King after its accelerator stuck.

Mr. Marshall's family filed suit against Burger King alleging, inter alia, negligence. The suit alleged that the improper design of the restaurant and the improper construction of the restaurant lead to the decedent's injuries. Burger King sought dismissal of the suit alleging that it owed no duty to Mr. Marshall to protect him from a runaway car and, therefore, no such cause of action could exist. The trial court granted the motion, holding that the likelihood of this accident was remote and to hold a restaurant responsible "would require fortifying every building within striking distance of any crazed or incredibly inept driver."

The Illinois Supreme Court reversed the trial court's holding and ruled that a duty existed based on the facts plead in the complaint. The court held that a duty arises when a special relationship exists between the parties, namely, in this case, business invitor/invitee. The court stated that Mr. Marshall was a business invitee of Burger King and, therefore, based on that allegation, a duty was created between Burger King and Mr. Marshall.

Courts have traditionally utilized the following four factors in determining whether a duty exists in a particular situation: the foreseeability of the injury; the likelihood of the injury; the magnitude of the burden of guarding against it; and the consequences of placing the burden on the defendant. The court addressed these factors and stated:

> "The touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. This court often discusses the policy considerations that inform this inquiry in terms of four factors: (1) the reasonable foreseeability of the injury, (2) the

> likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant."
> . . .
> "Based on the allegations in plaintiff's complaint, the duty of care that a business invitor owes to invitees to protect them against the unreasonable risk of physical harm is clearly applicable to this case. The complaint alleges that while the decedent was a customer at a restaurant owned and operated by defendants, he was injured by the negligent act of a third person-namely, Fritz's act of driving her car into the restaurant. Defendants' business, a restaurant, is undoubtedly of such a nature that it places defendants in a special relationship with their customers, as it is an establishment open to the general public for business purposes. . . . In addition, the duty of care that arises from the business invitor-invitee relationship encompasses the type of risk-*i.e.,* the negligent act of a third person-that led to the decedent's injuries."

The court went on to address the factors mentioned above and found that these factors did not exempt Burger King from the duty owed. The court cautioned that the issues of breach and proximate cause cannot enter into the discussion of whether a duty exists in a given situation. The court also addressed the defendant's argument that the costs of guarding against such a duty would be enormous and stated:

> [t]hese arguments are based on mistaken assumptions about the nature of a duty of care. Recognizing that the duty of reasonable care that businesses owe to their invitees applies to cases where invitees are injured by out-of-control automobiles is not the same as concluding the duty has been breached because a business failed to take a certain level of precaution. Nor is it the same as concluding that the breach was the proximate cause of an invitee's injuries. In short, merely concluding that the duty applies does not constitute an automatic, broad-based declaration of negligence liability.

This decision may greatly impact any premises liability case in which a motion to dismiss or motion for summary judgment is brought on the basis that no duty exists. Although the court allows for the discussion of the four factors, it seems that overcoming those factors is much easier once it is concluded that a duty exists based on the special relationship of the parties.

Another recent Illinois Supreme Court, case addressed the role prejudice (or lack thereof) plays in an insurance carrier's denial of coverage based on late notice. In **Country Mutual v. Livorsi Marine, Inc.**, 2006 WL 1348722, Country Mutual sought to deny coverage as it was not provided notice of a lawsuit for 20 months. Both parties to the suit were insured by Country Mutual and both parties sued the other on the same date, August 1, 1999. Country Mutual was not advised of either suit until August 2001. The trial court and appellate court ruled in favor or Country Mutual.

The Supreme Court addressed two lines of cases which took up this issue. The court noted that, despite a ruling from the Supreme Court in 1954 holding that prejudice was simply a factor to be considered, courts have recently treated the lack of prejudice as a bar to a claim of late notice. The court addressed this line of cases and held

> "that the presence or absence of prejudice to the insurer is one factor to consider when determining whether a policyholder has fulfilled any policy condition requiring reasonable notice. We also hold that once it is determined that the insurer did not receive reasonable notice of an occurrence or a lawsuit, the policyholder may not recover under the policy, regardless of whether the lack of reasonable notice prejudiced the insurer."

Clearly, this will be of great benefit to any carrier seeking to preclude coverage based on a late notice defense.

Should you wish to have copies of these cases, please contact me directly and I can email them to you. If you have any questions about either case, please contact me.

Very truly yours,

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