Winter/Spring 2011

Friends and Clients:

Enclosed is the latest edition of our *Quarterly Review of Recent Decisions*, edited by Rex Linder. We trust that you will find this information helpful in your day-to-day handling of Illinois claims.

Claims Handling Seminars

Please mark your calendars for the afternoon of **Thursday, May 19** in order to attend our **26th Annual Claims Handling Seminars** that will be held at the Doubletree Hotel in Bloomington, Illinois. Those of you who have joined us in the past know that our seminars are tailored to address the day-to-day needs of individuals handling claims throughout Illinois. As in the past, there will be two concurrent programs – one for **casualty & property** claims and another devoted to **workers' compensation**.

While an invitation will be mailed in the near future as well as posted on our website, www.heylroyster.com, I would like to provide you with a brief preview.

In addition to our traditional updates on insurance law, uninsured and underinsured motorists, premises liability, property and tort law, the **casualty & property session** will feature presentations on the investigation of catastrophic accidents, liquor liability claims, defending claims involving treatment by "pain doctors," Medicare Set-Aside Trusts, and spoliation.

On the **workers' compensation side**, our lawyers will focus on the impact of some of the proposed legislative changes as well as the recent venue changes and arbitrator assignments announced by the Commission. Some of the *proposed* changes include intoxication as a defense, limits on wage differential, utilization review and the medical fee schedule, and medical causal connection. In addition, they will undertake an examination of the effect on TTD of the *Interlake* case. You will also hear about Medicare set-aside issues and developments as well as retaliatory discharge cases.

New Attorneys at Heyl Royster

The firm has been fortunate to continue to grow and attract high quality lawyers to serve our clients' needs. Since our last *Quarterly Review*, Maura Yusof has returned to Heyl Royster as a resident lawyer in our **Chicago** office, which is located at the Theater District Business Center, 60 W. Randolph St., Suite 237, Chicago, IL 60601, phone 312.762.9235, myusof@heylroyster.com. It is conveniently located directly across the street from the Daley Center and the State of Illinois Center.

Following graduation from Washington University School of Law in 2002, Maura began her legal career as an associate with Heyl Royster's office in Edwardsville, Illinois. She was a litigation associate, focusing on representing corporate defendants in asbestos toxic tort litigation for serious injury cases pending in Madison and St. Clair counties, as well as general civil defense litigation.

In 2004, Maura moved to Chicago, where she expanded her litigation practice to large loss property subrogation matters throughout the United States and internationally, including a three week arbitration in Tokyo, Japan, that resulted in a multi-million dollar recovery affirmed by the Japanese courts. Maura's experience includes construction defects, product defects, fires, explosions, and boiler and turbine failures. She is familiar with exculpatory provisions and limitation of liability clauses in contract documents, including whether exculpatory provisions and limitations of liability are enforceable based on the applicable state law.

Maura will be working on our clients' civil matters pending in Chicago and nearby jurisdictions while continuing to work with our asbestos clients. In addition to asbestos litigation, her areas of practice will include construction and premises liability, product liability, and healthcare and medical malpractice defense. Maura also will continue her subrogation practice relative to recovery for large property damage claims as well as subrogation arising from workers' compensation matters.

In addition to adding Maura in Chicago, we have added three new attorneys in our Peoria office: Brad Keller - a 2010 University of Illinois College of Law graduate, Stacy Crabtree - a 2010 graduate of the Florida Coastal School of Law, and Shari Berry - who practiced in Missouri and Texas after graduating from Washburn University School of Law in 1994. Our Springfield office added Jeff Cox, who came to us from the Sangamon County State's Attorney's Office where he started practice after graduating from Florida Coastal School of Law in 2008. Finally, our Edwardsville office added two new law graduates: Mike McGinley, who graduated from St. Louis University School of Law in 2010; and Greg Flatt, who graduated from Washington University School of Law in 2010. Be sure to check our website for more information about our new lawyers.

We hope you will get a chance to meet and work with these "younger" lawyers in our firm along with the rest of us "older" ones! And we look forward to seeing you at our seminar on May 19th.

Gary D. Nelson, Managing Partner

AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Winter/Spring 2011

INSURANCE

Supreme Court Upholds Auto Policy Exclusion Precluding Liability Coverage When The Person Using Vehicle Did Not Have a Reasonable Belief to be Entitled To Do So

Two insurance carriers sought a declaration that coverage did not apply where the driver did not have a valid license at the time of an accident. They contended a person who has not been issued a driver's license, or whose license has been suspended or revoked, could not have a reasonable belief to be entitled to drive merely because he or she owns the vehicle or was granted permission for its use. The trial court ruled in favor of the insurers, but was reversed by the Appellate Court.

The Supreme Court reinstated judgment for the insurance carriers. Regardless of whether a person owns a vehicle, or is a permissive user, without a valid license, a person cannot have a reasonable belief that he or she is entitled to drive. Therefore, six of the involved drivers, who either never obtained a license or their license was suspended, could not as a matter of law have a reasonable belief that they were entitled to drive. *Founders Ins. Co. v. Munoz*, 237 Ill. 2d 424, 930 N.E.2d 999, 341 Ill. Dec. 485 (2010)

No UM Coverage for Second Vehicle That Had Been Placed in Storage for Winter

The insureds were a retired couple killed in a vehicle accident caused by an uninsured driver. The car they were operating had UM coverage of $300,000 per person and $500,000 per accident. A second auto had similar coverages, but they were reduced to include only comprehensive loss because the vehicle was going to be in storage for the winter. The insureds' adult children sought to stack UM coverage from both vehicles. The trial court held for the carrier dismissing the complaint.

The First District affirmed. The auto policy did not provide UM coverage for the second vehicle which had been placed in storage for the winter. Further, even if the stored vehicle had UM coverage, anti-stacking provisions in the policy unambiguously precluded stacking. The Court also held a personal umbrella policy, which did not provide UM coverage, did not violate law or public policy. *Abram v. United Services Auto. Ass'n*, 395 Ill. App. 3d 700, 916 N.E.2d 1175, 334 Ill. Dec. 287 (1st Dist. 2009)

UIM Carrier Could Not Set Off Settlement Monies Not Paid by Under-Insured Driver

The defendant was severely injured when a car drove through the window of a Subway Restaurant striking her and two others. The driver had $50,000 liability limits, and the defendant received $24,000 with the balance going to the other injured people. The defendant also received $410,000 from the restaurant owner and franchisee. She then sought UIM benefits which had limits of $300,000 per person. Farmers contended she was not entitled to receive UIM benefits because she had already received $434,000 which was more than the coverage provided under its policy. It filed the present declaratory judgment action, and the trial court granted Farmers summary judgment.

The Fifth District reversed. It held allowing Farmers to set off the amounts paid by the property owner and franchisee would violate public policy and would be against what the legislature intended to be deducted under the Insurance Code. Consequently, the insured could recover under the UIM coverage up to $276,000. Farmers could only deduct the $24,000 paid by the driver's insurance carrier but not the amount recovered from the property owner and franchisee. *Farmers Auto Ins. Ass'n. v.*

Coulson, 402 Ill. App. 3d 779, 931 N.E.2d 1257, 342 Ill. Dec. 74 (5th Dist. 2010)

Insured's Failure to Comply With Notice Requirement Defeated Coverage

In 2007, the insured confessed to police that he drove a vehicle that struck and killed a pedestrian in 2002. He was sentenced to fourteen years in prison. The decedent's mother filed a wrongful death action against the insured who tendered the defense of the case to his auto carrier. The auto carrier denied coverage because the insured failed to notify it of the 2002 accident in accordance with the policy's notice provision. The trial court entered summary judgment for the insurance carrier.

The Fourth District affirmed. The uncontested facts were that the insured drove a vehicle that struck and killed another person in 2002. At the time of the accident, he had a valid policy with American Standard but failed to report it until five years later. The policy unambiguously required notice to be given, and the failure to do so was a breach of the insured's obligations. *American Standard Ins. Co. of Wisconsin v. Slifer*, 395 Ill. App. 3d 1056, 919 N.E.2d 372, 335 Ill. Dec. 653 (4th Dist. 2009)

Homeowner's Insurer Not Required to Defend Alleged Misrepresentation in Sale of Home

The insureds were sued for fraudulent misrepresentation in connection with the sale of their home which they said had no water damage. After successfully defending the suit, the insureds filed a declaratory judgment action against their homeowner's carrier to recover the defense costs. The trial court found the underlying complaint against the insureds triggered the carrier's duty to defend and entered judgment in favor of the insureds for $29,645.79, the amount of legal fees they paid.

The Third District reversed. It concluded the underlying complaint against the insureds did not allege an occurrence that caused property damage. Further, the underlying complaint alleged economic losses stemming from the allegedly false statements which would not be covered under the policy. *Rock v. State Farm Fire & Cas. Co.*, 395 Ill. App. 3d 145, 917 N.E.2d 610, 334 Ill. Dec. 784 (3d Dist. 2009)

Homeowner's Carrier Not Obligated to Defend Insureds Who Caused Intoxication of Minor Resulting in Fatal Crash

The complaint against the insureds alleged that they negligently and wilfully supplied alcoholic beverages to a 17-year-old boy who became intoxicated. As a result of the intoxication, he was killed driving a motor vehicle. The homeowner's carrier filed the present action seeking a declaratory judgment it did not have a duty to defend or indemnify the insureds because coverage was excluded for an act or omission intended or expected to cause bodily injury as well as an exclusion for damage resulting from a criminal act or omission. The trial court entered summary judgment against the insured.

The Third District affirmed. In the underlying complaint, the decedent's parents alleged the insureds supplied alcoholic beverages to the decedent, causing him to become intoxicated and impaired, resulting in the accident. Those allegations describe criminal conduct which prohibits anyone who obtains alcoholic liquor to give or deliver to another person under age 21. The policy expressly excluded "bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person." *Allstate Ins. Co. v. Greer*, 396 Ill. App. 3d 1037, 921 N.E.2d 793, 336 Ill. Dec. 937 (3d Dist. 2009)

General Contractor Was Not Entitled to Defense as an Additional Insured Where Complaint Alleged Independent Negligence

Pekin Ins. filed a declaratory judgment action to determine whether it owed a duty to defend a general contractor under its policy which named the general contractor as an additional insured. In the underlying case, a subcontractor's employee was injured and sued the general contractor. The policy provided that the general contractor was "an additional insured only with respect to liability incurred solely as a result of some act or omission of the named insured and not for its own independent negligence or statutory violation." Although the complaint

alleged the general contractor was negligent, the trial court entered summary judgment holding Pekin had a duty to defend.
The First District reversed. The underlying complaint alleged negligence on the part of the general contractor, and consequently the additional insured endorsement did not cover the claim. *Pekin Ins. Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055, 931 N.E.2d 799, 341 Ill. Dec. 902 (1st Dist. 2010)

SUBROGATION

Statutory Hospital Lien Subject to Reduction Under Common Fund Doctrine

Injured motorist brought two separate personal injury suits against tortfeasors. After settlement, they filed petitions to adjudicate liens of hospital where they were treated. Plaintiff sought to apply the Common Fund Doctrine to reduce the amounts of the liens by one-third for attorneys' fees. The trial court held the Common Fund Doctrine applied, and the hospitals' appeals were consolidated.

The Fifth District affirmed. The settlement funds had been created as a result of legal services performed by plaintiff's attorney, the lienholders did not participate in the creation of the fund, and they would benefit from the funds which were created. This included the relationship between the plaintiffs and the lienholder hospitals was more similar to a subrogor/subrogee relationship rather than a debtor/creditor relationship. *Howell v. Dunaway*, 398 Ill. App. 3d 1078, 924 N.E.2d 1190, 338 Ill. Dec. 664 (5th Dist. 2010)

SETTLEMENT AND RELEASES

Trial Court Not Required to Hold Evidentiary Hearing Prior to Finding Good Faith Settlement

Using false identification, a U-Haul truck was rented by a person who went on a crime spree resulting in a high speed police pursuit. During the pursuit, the U-Haul collided with another vehicle killing one person and injuring two others. The estate of the deceased and two injured people filed suit against the Village alleging they were wilful and wanton in continuing the high speed chase, as well as against U-Haul for negligently renting the truck. The Village reached a settlement for $1 million to a brain-injured passenger; $50,000 for the other injured passenger; and $500,000 on the wrongful death claim. Without holding an evidentiary hearing, the trial court held the settlements were in good faith and dismissed U-Haul's contribution counterclaim. U-Haul appealed the $1 million settlement claiming the court abused its discretion.

The First District affirmed finding U-Haul failed to demonstrate by a preponderance of evidence there was bad faith by the settling parties. The trial court did not err in failing to hold an evidentiary hearing to determine the culpability of the Village and the extent of the plaintiff's brain injury. The trial court had ample facts before it to determine each party's relative culpability regarding whether the settlement agreement was entered into in good faith. It also commented that the disparity between the settlement amount and the *ad damnum* in the complaint is not an accurate measure of the good faith of a settlement. *Cellini v. Village of Gurnee*, 403 Ill. App. 3d 26, 932 N.E.2d 1139, 342 Ill. Dec. 678 (1st Dist. 2010)

DAMAGES

Verdict of $100,000 Affirmed for Wrongful Death of 34 Year Old Wife and Mother of Two

Plaintiff's wife died as a result of alleged medical malpractice. In addition to being survived by her husband, decedent had two teenage children. During closing arguments, defendant's counsel made a statement that if liability was found, "A fair verdict would be $1,000,000…" A Randolph County jury returned a plaintiff's verdict determining damages were $100,000 and then reduced it by 50% for comparative fault by the decedent.

In a split decision, the Fifth District affirmed. It rejected plaintiff's argument that the damages awarded did not comport with verdicts in similar cases. It is impossible to measure the propriety of damage awards for wrongful death by comparing them to other verdicts because they are not subject to exact mathematical computation and cannot be measured by comparison with other verdicts. There was no concrete evidence in the record of any specific money loss or other economic

loss as a result of the death as she was a stay-at-home wife. *Doloyns v. Chung*, 399 Ill. App. 3d 272, 926 N.E.2d 847, 339 Ill. Dec. 372 (5th Dist. 2010)

Verdict Found Inadequate Following Rear-End Collision

Plaintiff hit her head on the steering wheel after her car was rear-ended. She did not seek immediate attention but complained of headaches and a sore neck. Shortly thereafter, she was saw a sports medicine physician and was treated with pain medication and physical therapy for about six months. She subsequently developed left shoulder complaints and was diagnosed with a torn labrum which resulted in surgery. During trial, two physicians testified the shoulder injury was related to the accident, and there was no contradictory evidence. Medical bills totaled $28,804. The jury awarded $5,000 for medical bills and $7,500 for pain and suffering.

The Fifth District vacated the award and remanded the case for a new trial on damages. Positive testimony can be contradicted or discredited by adverse testimony, circumstantial evidence or the inherent improbability of the testimony itself. However, a jury is not allowed to arbitrarily reject unimpeached testimony. If testimony is not contradicted, the testimony cannot be disregarded. The only testimony on the issue of causation of the shoulder injury was by plaintiff's treating physicians who connected it to the accident. *Anderson v. Zamir*, 402 Ill. App. 3d 362, 931 N.E.2d 697, 341 Ill. Dec. 800 (5th Dist. 2010)

VENUE

Customer Suit Against Grocery Store Where He Slipped and Fell Transferred Under *Forum Non Conveniens*

Plaintiff was a customer who fell at defendant's grocery store in Joliet. Suit was originally filed against the store and a doctor who treated plaintiff's elbow in Will County. After seven years of litigation, plaintiff voluntarily dismissed the case and re-filed in Cook County. The defendants moved to transfer venue to Will County, but the trial court denied the motion.

The First District reversed. Plaintiff was a resident of Will County and slipped in a Will County store. They litigated their initial action and related medical malpractice case for a number of years which suggested Will County was a convenient forum for them. It was clear that Will County would be more convenient for the witnesses. Both public and private interest factors favored transfer to Will County. *Wagner v. Eagle Food Centers, Inc.*, 398 Ill. App. 3d 354, 925 N.E.2d 243, 338 Ill. Dec. 746 (1st Dist. 2010)

AUTOMOBILES

Plaintiff Who Discovered Other Driver Was Working at Time of Accident Cannot Add Employer After Limitation Expired

After an auto accident, plaintiff sued the other driver for personal injuries a few days before the two-year statute of limitations was to expire. During discovery, plaintiff learned the other driver was calling on customers for his employer when the accident occurred. More than two years after the accident, plaintiff sued the employer. The trial court dismissed the complaint holding timely suit against the driver did not allow plaintiff to file a tardy action against the employer.

The First District affirmed. The timely filing of a personal injury action against the driver was not sufficient to preserve a claim against the driver's employer after the statute of limitations expired. It rejected plaintiff's attempt to employ a relation back theory as that section applied only in cases of mistaken identity. *Wilson v. Molda*, 396 Ill. App. 3d 100, 918 N.E.2d 1165, 335 Ill. Dec. 352 (1st Dist. 2009)

PRODUCT LIABILITY

Economic Loss Doctrine Bars Strict Liability and Negligence Claims Following Tractor Fire

Within a year of purchase, plaintiff's insured's tractor caught fire and burned during routine farming operations. After paying the claim, plaintiff sued the dealer

and manufacturer. Strict liability, negligence and breach of warranty were advanced as theories. The trial court dismissed the strict liability and negligence claims based upon the Economic Loss Doctrine. The warranty claims were dismissed based upon a disclaimer in the sales contract.

The Third District affirmed. The Economic Loss Doctrine is based upon the theory that parties may contract to allocate their risks by agreement and do not need tort law to recover damages caused by a breach of contract. An exception is where a plaintiff sustained personal injury or property damage resulting from a sudden or dangerous occurrence. However, for the exception based upon property damage to apply, the damage must be to property other than alleged defective product. The defective product that damages only itself cannot be the subject of a suit for tort damages. The Court also held the warranty disclaimer was conspicuous and presented in a manner reasonably sufficient to draw attention to it. *Westfield Ins. Inc. v. Birkey's Farm Store*, 399 Ill. App. 3d 219, 924 N.E.2d 1231, 338 Ill. Dec. 705 (3d Dist. 2010)

Pharmacy Had No Duty to Warn Under Learned Intermediary Doctrine

Plaintiff's decedent had been prescribed Lithium for ten years to treat manic depressive psychosis. Her doctor then prescribed Tenoretic for high blood pressure. The pharmacy computer indicated there would be an interaction between the drugs. The pharmacist called the doctor who said to fill the prescription, and he would monitor the patient. Three weeks later, she died from Lithium toxicity. The trial court held the drug store had no duty to warn under the Learned Intermediary Doctrine.

The First District affirmed. The Learned Intermediary Doctrine provides that manufacturers of prescription drugs have a duty to warn prescribing physicians of the drug's known dangers, and the physicians, using their medical judgment, have a duty to convey the warnings to their patients. Therefore, there is no duty upon a drug manufacturer to directly warn patients. The record indicated the defendant pharmacist called the prescribing physician prior to filling the prescription and advised of the potential interaction. The physician indicated he would monitor the patient. Under these circumstances, the pharmacist had no duty to warn of the possible interaction between the two drugs. *DiGiovanni v. Albertson's, Inc.*, No. 1-09-1297, 2010 WL 3359645 (1st Dist. Aug. 25, 2010)

Fact Question Existed as to Whether Dealer Purchased Truck and Sold to Plaintiff's Employer Was Within Distributive Chain

Plaintiff was injured while using a truck allegedly equipped with a defective seat. He filed a products liability claim against a dealer and others. Evidence indicated the defendant paid the manufacturer for the truck and sold it to plaintiff's employer for the same price. It never took possession of the truck and had no knowledge of its condition. The trial court entered summary judgment in favor of the dealer finding it was not in the chain of distribution of the product.

In a split decision, the Fifth District reversed. It held fact questions existed as to whether the dealer was engaged in the business of selling trucks, whether it benefited from the sale of the truck and whether it might ultimately profit from the sale as plaintiff's employer was a related company. The dissent said there was no evidence that the defendant was engaged in the business of selling trucks and that it acted only as a "paper shuffler" to assist the purchaser. *Graham v. Bostrom Seating, Inc.*, 398 Ill. App. 3d 302, 921 N.E.2d 1222, 337 Ill. Dec. 84 (5th Dist. 2010)

Manufacturer Who Knew of Hazard at Time of Manufacture and Later Developed Safety Features or Information Protecting Consumer From the Hazard Had a Duty to Inform Users of the Safety Features and Information

Plaintiff was injured and her husband killed as a result of a rear-end collision which ignited the fuel tank on their car. Plaintiff claimed the defendant was aware of the dangers presented by an aft-of-axle fuel tank at the time their car was manufactured yet failed to inform them a retro-fit guard that was available. The case was submitted to the jury under both negligence and wilful and wanton theories concerning various design defects and failure

to warn. The jury returned a verdict in excess of $43 million, including $15 million in punitive damages.

The Fifth District affirmed. With respect to the failure to warn theory, the Court felt there was evidence that the defendant knew or should have known of the hazard presented by the gas tank at the time of manufacture. If a manufacturer later develops safety features or safety information for the purpose of protecting consumers from the hazard, it has a duty to use reasonable care to inform them of the existence of those safety features and information. *Jablonski v. Ford Motor Co.*, 398 Ill. App. 3d 222, 923 N.E.2d 347, 337 Ill. Dec. 788 (5th Dist. 2010)

Distraction Exception to Open and Obvious Rule Did Not Apply to Slip and Fall on Muddy Steps

An adult daughter brought a premises liability action against her parents claiming they were negligent in allowing mud to remain on steps leading into their home which caused plaintiff to slip and fall. The defendant mother had been gardening and wiped mud from her shoes on the steps when she entered the house. When plaintiff arrived, her mother warned her of mud on the steps. Hours later, after her mother cleaned more mud from her shoes on additional occasions, plaintiff fell while going down the steps as she was leaving the house. The trial court granted the defendant summary judgment holding the mud on the steps was an open and obvious condition.

The Fourth District affirmed. Landowners have no duty regarding open and obvious dangers. An exception is that the property owner has reason to expect someone may be distracted or would forget the obvious condition. Plaintiff attempted to claim that activities she undertook while in the house distracted her from the mud on the steps. The Court noted that the distraction should occur at the time and place of the injury, not earlier. *Hope v. Hope*, 398 Ill. App. 3d 216, 924 N.E.2d 581, 338 Ill. Dec. 375 (4th Dist. 2010)

Condominium Driveway Was Not a "Sidewalk" Under Statute Granting Immunity For Negligent Snow Removal

Plaintiff was a condominium owner injured when he slipped and fell on an icy driveway leading to his unit. He sued the condominium association and snow removal contractor. The defendants moved to dismiss based upon the Snow and Ice Removal Act (745 ILCS 75/1). It provides owners, occupants or others in charge of residential property who "attempts to remove snow or ice from sidewalks abutting the property" would not be liable for personal injuries except for wilful and wanton misconduct. The trial court dismissed the complaint.

The Second District reversed. It concluded the language of the Act did not provide immunity for injuries sustained on driveways. As the Act was in derogation of the common law, it had to be strictly construed and could not be presumed to provide protection for something beyond what the statute expressly stated. *Gallagher v. Union Square Condominium Homeowners Ass'n*, 397 Ill. App. 3d 1037, 922 N.E.2d 1201, 337 Ill. Dec. 624 (2d Dist. 2010)

Rescue Doctrine Did Not Apply Against Defendant Who Asked Neighbor to Drive Her to Hospital

The defendant was a 67-year-old lady recuperating at home from recent open-heart surgery. She began experiencing pain in one of her legs and called the plaintiff who was her next-door neighbor and asked for assistance. Plaintiff claims that while helping the defendant walk to her car, she hurt her shoulder, which required surgery. The trial court entered summary judgment for the defendant because she owed no duty to plaintiff.

On appeal, plaintiff claimed the defendant owed her a duty under the Rescue Doctrine because she was attempting to rescue the defendant when she was injured. The doctrine provides that it is foreseeable that someone may attempt to rescue a person who has been placed in a dangerous position and that the rescuer may incur injuries in so doing. The Court disagreed holding the defendant did not place herself in a dangerous position but simply asked that plaintiff drive her to the hospital rather than have her call an ambulance. Summary judgment for the defendant was affirmed. *Tannehill v. Costello*, 401 Ill. App. 3d 39, 929 N.E.2d 89, 340 Ill. Dec. 785 (1st Dist. 2010)

Potential Liability for Parents Who Hosted Party Where Under-Aged Guest Became Drunk and Was Killed in an Accident

Plaintiff's 18-year-old son attended a party at defendant's home. The defendants prohibited drinking and did not furnish alcohol, but some attendees secretly brought in liquor. The complaint alleged the defendants voluntarily undertook a duty to monitor party guests to ensure that they would not consume alcoholic beverages. It also alleged the violation of a criminal statute prohibiting access by minors to alcohol maintained at a residence. The trial court dismissed the complaint.

The Second District held the allegation of a voluntary undertaking was not based upon supplying alcohol, and therefore, did not violate the rule against social host liability. However, the allegation relating to violation of the criminal statute attempted to plead a cause of action based upon giving or furnishing of alcohol and was properly dismissed. The Illinois Dram Shop Act has pre-empted the field of liquor liability. *Bell v. Hutsell*, 402 Ill. App. 3d 654, 931 N.E.2d 299, 341 Ill. Dec. 691 (2d Dist. 2010)

PREMISES LIABILITY

Tavern Potentially Liable Where Bartenders Were Aware of Customer's Plan to Get Plaintiff Drunk and Sexually Exploit Her

Plaintiff was at a bar and discovered her car would not start. She asked the bartender to call a taxi, but he told her none were available. Two other patrons then offered to drive plaintiff back to her hotel, but before doing so, they bought her several drinks. Plaintiff then left with the two other customers, and when it appeared they were not taking her to her hotel, she escaped from the car. She was intoxicated and wandered into a nearby highway on ramp and was struck by a car. The complaint alleged the tavern, through its bartenders, knew of the plan but failed to protect her from the attack. The trial court dismissed the complaint.

In a split decision, the Seventh Circuit reversed. It noted the Dram Shop Act only preempts actions based upon providing alcohol. It does not protect a tavern from negligence. Accepting the allegation that the bartender knew of the criminal purpose, it concluded the defendant had a duty to protect plaintiff. *Reynolds v. C. B. Sports Bar, Inc.*, 623 F. 3d 1143 (C.A.7 2010)

Strip Club Owner May Be Liable For Ordering Drunk Patron to Drive Himself Away From Premises

Two men went to defendant's strip club which did not sell liquor. They brought with them vodka and rum and purchased mixes, glasses and ice from the club. One of the men became visibly intoxicated and was found vomiting in the restroom. Employees ejected both men and instructed the auto valet service to start their car and bring it to the front door. When the car arrived, employees opened the driver's side and directed them to leave the premises. Fifteen minutes later, they were involved in a collision killing two people and injuring another. The complaint alleged the defendant encouraged the intoxication and then ordered the men to drive off from the premises. The trial court's refusal to dismiss the case was affirmed by the Second District.

The Supreme Court affirmed holding the Club owed a duty to the decedents not to encourage and assist a patron in the tortuous conduct of driving while intoxicated. The Court noted that it was not holding restaurants, parking lot attendants or social hosts have to monitor patrons or guests to determine whether they are intoxicated. Rather, where a defendant is alleged to have removed a patron for being intoxicated, placed him into a vehicle and required him to drive off, there were sufficient facts to state a common law negligence claim. *Simmons v. Homatas*, 236 Ill. 2d 459, 925 N.E.2d 1089, 338 Ill. Dec. 883 (2010)

SPORTS AND RECREATION

Contact Sports Exception Did Not Apply to Bar Athletic Trainer's Negligence Action Against Amateur Hockey Team and Player

Plaintiff was an athletic trainer whose employer contracted with the Chicago Steel, an amateur hockey team, to provide training services. Part of his job responsibilities included refilling water bottles near a bench next to the ice rink. While in the process of gathering water bottles, he was hit below the eye by a puck. He sued the hockey team and the player. The trial court dismissed the complaint holding the contact sports rule applied because plaintiff was in an area encompassed by the game even though he was not a player.

The Second District reversed. The contact sports exception provides that voluntary participants in a contact sport may be liable for wilful and wanton or intentional conduct, but not for ordinary negligence. The Court noted plaintiff was not a voluntary participant in the hockey activities, but was a trainer employed by an independent company. He was only in the vicinity of a hockey rink during practice to replace water bottles which was required of him pursuant to his job responsibilities. *Weisberg v. Chicago Steel*, 397 Ill. App. 3d 310, 922 N.E.2d 489, 337 Ill. Dec. 366 (2d Dist. 2009)

Contact Sports Exception Did Not Apply to Spectator Struck by Football Player Who Went Out of Bounds

Plaintiff was a spectator at an indoor football game who was injured when a player ran out of bounds, fell over a wall and collided with her. She sued the football team and operators of the arena where the incident occurred alleging they encouraged her to sit in an area that was dangerously close to the playing field and did not erect a wall that was high enough to protect spectators from being hit by football players during the game. The trial court applied the contact sports rule which would require the plaintiff to plead and prove willful and wanton misconduct for recovery and dismissed the complaint.

The Fourth District reversed. It stated a court could not take judicial notice that arena football players tumble over walls and into spectators with great frequency the way a basketball player might run out of bounds and collide with a spectator. As the defendants possessed and controlled the auditorium and held it open to members of the public, they had a duty to take reasonable action to protect plaintiff from the risk of physical harm. *Pickel v. Springfield Stallions, Inc.*, 398 Ill. App. 3d 1063, 926 N.E.2d 877, 339 Ill. Dec. 402 (4th Dist. 2010)

We recommend the entire opinion be read and counsel consulted concerning the effect these decisions may have upon your claims —

Rex K. Linder, Editor
rlinder@heylroyster.com

Peoria, Illinois 61602-1352
Suite 600, Chase Building
124 S.W. Adams Street
Fax (309) 676-3374
(309) 676-0400

Springfield, Illinois 62705-1687
Suite 575, National City Center
1 North Old State Capitol Plaza
P.O. Box 1687
Fax (217) 523-3902
(217) 522-8822

Urbana, Illinois 61803-0129
Suite 300, 102 East Main Street
P.O. Box 129
Fax (217) 344-9295
(217) 344-0060

Rockford, Illinois 61105-1288
Second Floor
National City Bank Building
120 West State Street
P.O. Box 1288
Fax (815) 963-0399
(815) 963-4454

Edwardsville, Illinois 62025-0467
Suite 100
Mark Twain Plaza III
105 West Vandalia
P.O. Box 467
Fax (618) 656-7940
(618) 656-4646

Chicago, Illinois 60601-3392
Suite 237
60 West Randolph Street
Fax (312) 762-9287
(312) 762-9235

www.heylroyster.com