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38 pages in 2 sections

When a liability policy owes extra coverage

FEDERAL COURTS, PAGE 4

TRIAL NOTEBOOK

STEVEN P. GARMISA
Hoey & Farina

Hospital fails in dismissal of fraud suit

Falls v. Silver Cross Hospital — Part 1

This is the first of a two-part column. The second part will be published on Wednesday.

Brian Falls sued southwest-suburban Silver Cross Hospital for allegedly violating the Illinois Consumer Fraud Act by claiming an $18,129 lien — based on the full amount of the bill for services he received after an auto accident — even though the charge was discounted to $5,957 under a "facility participation agreement" with United Healthcare.

The facility participation agreement prohibited Silver Cross from billing Falls for the balance (other than $1,264 he owed for deductibles and co-pays).

Even after Falls settled with the tortfeasor for $85,000, Silver Cross allegedly persisted in claiming it was entitled to the full $18,129.

A month after Falls sued in federal court, Silver Cross reduced its lien to $1,264. The case was dismissed for lack of jurisdiction. And when Falls tried again in Will County, the hospital moved to dismiss based on Section 2-615 of the Illinois Code of Civil Procedure.

The trial judge concluded the consumer fraud claim (Count 1) was defective because it didn't adequately allege the hospital acted with "intent" and that Falls relied on concealment, suppression or omission of material fact about the hospital's billing and lien practices.

And the judge dismissed breach-of-contract allegations (Counts 2 and 5 of the second amended complaint) on the grounds that Falls wasn't an intended beneficiary of the "facility participation agreement" between Silver Cross and United Healthcare.

Falls appealed, and the Illinois Appellate Court — looking closely at the facility participation agreement and conflicting provisions in a "consent form" — unanimously concluded that, "If proven, the alleged practices by Silver Cross described in the language of Count 1 of the second amended complaint could be construed as strong circumstantial evidence indicating that the hospital intended to attempt to secure payment of the hospital lien in the full amount of $18,129, knowing that the remaining debt plaintiff owed to the hospital was only $1,264."

But the court split 2–1 on the breach-of-contract claims. *Falls v. Silver Cross Hospital*, 2016 IL App (3d) 150319 (Nov. 30, 2016).

Wednesday's Trial Notebook focuses on the contract allegations. Here are highlights of Justice Vicki Wright's opinion on the consumer fraud claim (with omissions not noted in the text):

It is well established that the determination of whether a certain practice is unfair requires a case-by-case determination based on the facts.

Our Supreme Court provides guidance by identifying the relevant factors to be considered when evaluating whether "a given course of conduct" is unfair to the consumer according to the Consumer Fraud Act. *Robinson v. Toyota*, 201 Ill. 2d 403 (2002). These factors include: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers." Id.

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IN THE NEWS

BY CHRISTINE M. PUSATERI

First District Appellate Justice Michael B. Hyman presents Theresa Jaffe, principal of Theresa Jaffe Consulting in Highland Park, with the 2017 Impact Award from the Center for Disability & Elder Law on Thursday. Hyman praised Jaffe, a longtime legal marketer, as a connector, before the audience gathered at Baker McKenzie LLP for CDEL's annual Light Up the Loop benefit. "She connects ideas to action, she connects people with people, she connects people to careers, she connects organizations to their missions — and, for CDEL, she connects your credit cards to CDEL's bank account," Hyman said. Jaffe served as the event chair for Light Up the Loop in its first five years. Today, the awards event accounts for nearly a quarter of CDEL's annual budget, according to Anthony J. O'Neill (right, background), this year's event chair. Other honorees were corporate partner Walgreen Co. and volunteer attorney Linda M. Ochsenfeld. *Photo provided by the Center for Disability & Elder Law*

Mark W. Hetzler

Michael P. MacHarg

William K. Kane

Andrew P. Stevens

Philip A. Kunz

IN THE LAW FIRMS

Fitch, Even, Tabin & Flannery LLP elected **Mark W. Hetzler** as managing partner.

Hetzler practices on developing, managing and monetizing all aspects of his clients' intellectual property through procurement, licensing and litigation.

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Attorney **Michael P. MacHarg** has joined SmithAmundsen LLC's labor and employment practice group.

MacHarg will assist clients with issues such as union avoidance, collective bargaining, contract administration, unfair labor practices, grievance and arbitration, wage-and-hour and discrimination matters.

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Sheppard, Mullin, Richter & Hampton LLP added **William K. Kane** as a partner in the business trial practice group.

Kane practices on complex commercial litigation for a broad base of corporate, real estate, media and entertainment clients.

He was previously with Baker & Hostetler LLP.

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Corboy & Demetrio added attorney **Andrew P. Stevens** as an associate attorney.

Stevens practices personal-injury law in all areas, including environmental negligence.

After completing law school, he worked as a law clerk for Cook County Circuit Judge **James N. O'Hara** from 2015 to 2016.

Stevens served as Corboy & Demetrio's head law clerk and post graduate clerk from 2013 to 2015.

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K&L Gates LLP has elected **Philip A. Kunz** as a partner in the post-grant patents practice effective Wednesday.

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"[W]e believe the individuals had no reason to believe that anybody was listening ..."

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Bill to alter labor appeals process gets mixed reviews

BY ANDREW MALONEY
Law Bulletin staff writer

SPRINGFIELD — Illinois House lawmakers have approved a bill adding language to the appeals process in labor disputes.

House Bill 622, approved on a party-line vote in the state's lower chamber, states that orders of the Illinois Labor Relations Board are not automatically stayed when taken to the appellate court.

The measure was pushed by the Associated Fire Fighters of Illinois, which advocates for union firefighters and emergency medical service providers. The group's president said this week it was aimed at codifying the current process for appeals under the Illinois Public Labor Relations Act.

But opponents have argued there's no need to make the change; that it is a potential separation-of-powers problem; and that it places additional burdens on local governments.

The labor relations act regulates the actions of public employers and labor organizations and aims to ensure an even playing field for the two when it comes to negotiating workers' rights and contracts. When one side alleges an unfair labor practice, the labor relations board can investigate and issue decisions on the dispute.

If the party aggrieved by the labor board's decision wants to appeal, the law states that it can appeal "in accordance with the provisions of the Administrative Review Law ... except that such judicial review shall be afforded directly in the appellate court."

The bill, approved by a handful of votes in the House last week, adds a section that says appeals "shall not automatically stay the enforcement of the [b]oard's order. An aggrieved party may apply to the [a]ppellate [c]ourt for a stay of the enforcement of the [b]oard's order after providing notice to the [b]oard and the prevailing party or parties and may be granted a stay of enforcement after making a showing of good cause" under the Administrative Review Law.

Pat Devaney, president of the Associated Fire Fighters of Illinois, said the group was recently made aware of an instance where an employer's attorney suggested there is an automatic stay of the board's decision when it goes up on appeal.

"And we believe that's contrary to the principles of the Administrative Review Law and how it's applied across all the various statutes that reference it," Devaney said today. He declined to go into details on that case.

But he said there are plenty of examples of unfair labor practice awards given to employers and unions, "so this isn't a one-dimensional bill that somehow protects the unions. It clarifies what we believe has always been the case."

But Republicans in the House said the bill was unnecessary because courts already understand there's not an automatic stay of a board's order, and they didn't want to go out of their way to tell the judiciary what to do.

"The crux of this bill is that the rule is already in place. And number two, it is not our responsibility as legislators to tell the third branch of government, the Supreme Court, what they should be doing," said Rep. Jeannie Ives, a Wheaton Republican, during a House floor debate.

Rep. Peter C. Breen, a Lombard Republican, said he is concerned the measure will "shift the balance" between local governments and unions. He said the idea is not clearly unconstitutional, in his opinion, "but I know there were some concerns expressed, and so those needed to be fleshed out."

And he said it didn't make sense to approve the bill while the state has major unresolved financial issues.

APPEALS, *Page 6*

Class-action arbitration bid rejected

Although opinions on matter differ, plaintiffs must pursue separately

BY PATRICIA MANSON
Law Bulletin staff writer

Disgruntled clients will have to go it alone with their accusations that Johnson & Bell Ltd. placed their confidential information at risk.

In a written opinion last week, U.S. District Judge John W. Darrah held the clients must arbitrate their claims on a case-by-case basis rather than as a group.

The two clients who filed the class-action lawsuit against Johnson & Bell — Jason Shore and Coinabul LLC — signed a client engagement letter when they retained the law firm to represent them in an unrelated civil case, Darrah wrote.

He wrote the letter calls for any dispute that might arise to be resolved through binding arbitration using the services of JAMS.

The letter says nothing about class arbitration, Darrah wrote.

And citing *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), he wrote the U.S. Supreme Court "has expressed doubt that an agreement to authorize class arbitration can be implied."

Darrah granted Johnson & Bell's motion to block the clients from arbitrating their claims as a class.

The lead attorney for the plaintiffs, Jay Edelson of Edelson P.C., said his clients will challenge Darrah's ruling before the 7th U.S. Circuit Court of Appeals.

"We feel confident that the 7th Circuit will give us a fair shot," he said.

"The ruling that the district court issued will force us to file hundreds, if not thousands, of individual arbitrations, which I don't think will be good for any party."

The lead attorney for Johnson & Bell, Michael C. Bruck of Caruso & Roeder LLC, could not be reached for comment.

In a suit filed last year, Shore and Coinabul accused Johnson & Bell of failing to adequately safeguard its clients' confidential information.

The suit alleged "critical vulnerabilities" in the law firm's internet-accessible web services left client data exposed.

But Johnson & Bell charges "market-rate attorneys' fees without providing industry standard protections for client confidentiality," the suit maintained.

About three weeks after the suit was filed, Johnson & Bell said the problems had been fixed. The plaintiffs' lawyers confirmed that statement.

Shore and Conabul then dismissed their claims without prejudice.

They later filed a complaint in arbitration before JAMS and a demand for class arbitration.

Johnson & Bell filed a motion in federal court to enjoin class arbitration.

In his opinion, Darrah conceded neither the Supreme Court nor the

ARBITRATE, *Page 6*

Broadview president loses against trustees

Can't stop village board from hiring own legal counsel: appeals panel

BY DAVID THOMAS
Law Bulletin staff writer

The village president of a western suburb has lost in his attempt to prevent rival trustees from hiring outside counsel to assist the board with legislative drafting.

On Monday, the 1st District Appellate Court affirmed the dismissal of a lawsuit filed by Broadview President Sherman C. Jones that sought to invalidate an ordinance passed by four members of the Better Broadview Party after they took majority control of the six-trustee village board from Jones' party.

The ordinance in question allows trustees to contract with attorneys for a variety of matters.

Jones contended the Legislative Counsel Ordinance diminished his executive power, as using outside counsel takes away responsibilities otherwise handled by the appointed village attorney. But the panel was quick to address the political undertones.

"Plaintiff, as the village president, does not like the [L]egislative [C]ounsel [O]rdinance, particularly because the appointed village attorney is loyal to him while outside counsel is predictably hostile," Justice John B. Simon wrote in the 10-page unpublished order.

Jones also sought to disqualify Ancel Glink Diamond Bush DiCianni & Krafthefer P.C. from further representing trustees in any legislative matters, arguing that the firm has been a party to prior lawsuits involving the village.

He pointed to Rule 1.7 of the Illinois Rules of Professional Conduct, which prohibits attorneys from representing clients if where there is a conflict of interest.

"Plaintiff basically maintains that ... the minority party (board) members ... are being forced to be represented by Ancel Glink despite the fact that they oppose parties in ongoing legislation that are represented by Ancel Glink," Simon wrote.

All four defendants are trustees who ran as part of the Better Broadview Party. Their electoral victories meant Jones and his Broadview First Party lost its majority on the board.

The four defendants were sworn in on June 1, 2015, and three days later at a special board meeting, the board passed the Legislative Counsel Ordinance. It allows trustees to hire outside attorneys for anything a trustee might need help with, including drafting legislation and contracts.

Jones filed suit in Cook County Circuit Court the same month. By June 29, 2015, Circuit Judge Thomas R. Allen denied Jones' request to disqualify Ancel Glink from serving as the defendants' legislative counsel. And in September, Allen dismissed the entire lawsuit.

This is one of many fights that have spilled into the courts between Jones and the defendants — Trustees Judy Brown-Marino, Diane Little, Tara Brewer and John Ealey — since the defendants' election to the village board in the April 2015, according to Adam W. Lasker, an associate at Ancel Glink who represented the defendant trustees on appeal.

He's also the main attorney at Ancel Glink who advises the four trustees in legislative issues as well.

In the order, Simon wrote it was "odd" that while Jones sought to disqualify Ancel Glink as legislative counsel, he made no moves to disqualify the law firm from representing the defendants in this lawsuit.

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