PAVLACK LAW LLC

www.PavlackLawFirm.com

March 14 **2014**

by: Colin E. Flora
Associate Civil Litigation Attorney

Seventh Circuit (Posner) Weighs in on Contractual Indemnification After Settlement of Underlying Injury Suit

Three posts down, one to go. We are in the home stretch. For those who did not read the first post today – *Indiana Supreme Court Analyzes Whether Workers' Compensation Applies to Diminish UIM Calculation* – in honor of the first post of the day being my 100th installment on the Hoosier Litigation Blog and the surplus of blog-worthy decisions from the Seventh Circuit and Indiana Supreme Court, today we are doing an unprecedented quadruple-post day. Typically, I only add one post on the HLB per week.

Our first discussion today was on *Justice v. American Family Mutual Insurance Company* from the Indiana Supreme Court, holding that workers' compensation payments cannot be used to diminish recovery from underinsured motorist (UIM) insurance coverage. Our second discussion of the day was on the Seventh Circuit decision *McMahon v. LVNV Funding, LLC*, holding that a would-be class representative's claims are not rendered moot unless a settlement offer constitutes a full settlement and is made prior to the initial filing of a motion for class certification. The case also held, for the first time in any Federal appellate court, that a collection letter sent after the expiration of the statute of limitations

may run afoul of the FDCPA as misleading even if it does not threaten litigation. This decision directly contradicts prior decisions by the Third and Eighth Circuits. Our third discussion focused on Judge Richard A. Posner's discussion of whether a civil contempt order could be appealed as an interlocutory order and display of his ire toward a "frivolous" appeal in *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Lewis*.

Remaining in the Seventh Circuit, we now move to another decision authored by Judge Posner from this week: *Krien v. Harsco Corp.* In *Krien*, the issue to be decided was whether the supplier of the scaffolding that may have failed resulting in the injuries who had settled with a general contractor's employee for injuries on a Wisconsin worksite could seek indemnification from the general contractor. Specifically, Krien was an employee of Riley Construction. Riley was the general contractor on the project. It had hired Harsco to supply the scaffolding. While Krien was on the scaffolding, the plank under his feet broke and he fell. He settled his claim against Harsco for $900,000.

Prior to the settlement, Harsco filed a third-party suit against Riley to seek indemnification for the lawsuit. Thus, in addition to the $900,000 paid to Krien, Harsco also sought recovery of the attorney's fees it had to expend in defending itself in Krien's lawsuit from the pockets of Riley. More accurately, I'm guessing the real pockets are Riley's insurance provider. Both Riley and Harsco filed motions for summary judgment to resolve the case. The trial judge agreed with Riley and granted summary judgment against Harsco. Harsco appealed.

Because the case arose from a Wisconsin contract, the case was governed by Wisconsin law. The case turned on interpretation of a form contract from the Associated General Contractors of America. We've discussed the use of form contracts before: *Indiana Court of Appeals Once More Asked to Interpret AIA Standard Construction Contract*. However, unlike our prior discussions, this case has a catch. Though it was a form contract, it was not an unchanged form contract.

> Article 3, paragraph 3.25 . . . provides that Harsco may use Riley's equipment only with Riley's "express written permission," and must "defend, indemnify and be liable to Riley Construction as provided in Article 9 for any loss or damage (including bodily injury or death) which may arise from" Harsco's use of Riley's equipment "except to the extent that such loss or damage is caused by the negligence of Riley Construction's employees operating Riley Construction's equipment."

There was also a "mirror-image provision" in paragraph 4.8 which adds:

> Riley and its employees may use Harsco equipment, including scaffolding, only with Harsco's "express written permission," and that if Riley or its employees "utilize any of [Harsco's] equipment, including . . . scaffolding . . . ," Riley "shall defend, indemnify and be liable to

> [Harsco] as provided in Article 9 for any loss or damage (including bodily injury or death) which may arise from such use, except to the extent that such loss or damage is caused by the negligence of [Harsco's] employees operating [Harsco's] equipment."

The changed portion of the contract is that twice-referenced Article 9. The parties had crossed out its first paragraph, thereby removing the portion that "provides indemnity to Riley similar to the indemnity granted it by paragraph 3.25 but slightly broader: it excuses Harsco from having to indemnify Riley only if the loss or damage is caused by "the *sole* negligence or willful misconduct of [Riley]." The contract also contained a rider that limited Harsco's obligations to its "sole negligence and proportionate share of joint or concurrent negligence."

Despite the favorable language to Harsco in the Rider, Riley argued, and the district judge agreed, that the phrase in paragraph 4.8 "'as provided in Article 9' confines paragraph 4.8 to indemnities mentioned in that article, and because the parties crossed out paragraph 9.1.1 (captioned 'Indemnity'), Riley does not have to indemnify Harsco ever.'" The court rejected this interpretation as implausible. Judge Posner, relying on Wikipedia for background, illustrative facts, recognized that Harsco is "a $3 billion industrial company operating worldwide" and is therefore "unlikely to have allowed itself to be hoodwinked into give up basic contractual rights." More importantly, the argument ignores the Rider.

Because Judge Posner's citation to facts derived from internet sources is highly criticized, I think it merits a brief discussion. Judge Posner has argued that he only uses these sources to make his opinions more illustrative but that he does not use these types of facts for determinative purposes. Though it may seem on superficial glance that he has run afoul of his own rule here, he has not. The turning point for the analysis is not the likelihood that Harsco had gotten "hoodwinked," but rather the specific terms of the Rider. There is an additional argument that Judge Posner has advanced that I find satisfactory. Succinctly, if the internet-derived facts are inaccurate, the parties can dispute them and seek rehearing. One might question the propriety of a judge risking an action that would compel the parties to incur further litigation costs, but that would appear to not be a concern for the judge as he also strongly advocates for district judges to appoint a theoretically neutral, court-appointed expert in cases in which plaintiffs and defendants have experts battling it out in the courtroom. Such a procedure results in additional costs to be born by the litigants, not the court.

That brief interruption completed, let us segue back into the decision. Of further note, the court looked at the fact that the parties had crossed out numerous provisions in Articles 3 and 4. This led to the conclusion that had the parties meant to "delete the indemnity in favor of Harsco they would have crossed out paragraph 4.8 as well," and not just paragraph 9.1.1. Further, because other portions of Article

9 remained in tact, the deletion of paragraph 9.1.1. could not render paragraph 4.8 to "be treated as a dead letter."

The court, having decided that "paragraph 4.8 is alive and well," turned to its application to Krien's injuries. This is where the fact that Krien's underlying case was settled and not resolved by trial comes in to play. As the court recognized, "We don't know whether the plank was supplied by Harsco. It may not have been, because Riley didn't obtain all the scaffolding for the project from Harsco." Because the case was settled, "there has never been a judicial resolution of these questions." Further, even if the plank was supplied by Harsco, it may not have been defective: "it could have been carelessly laid," – a conclusion supported by an OSHA determination after investigation of the accident.

The court also sought to correct an apparent typographical error in the trial court's decision: that the "unexpected statement that 'a strict liability claim . . . is a type of negligence claim[, d]oubltess . . . meant . . . a claim of strict products liability is much like a negligence claim because it requires proof either that the product was unreasonably dangerous or, what amounts to the same thing, that it was defective."

The court further noted the errant logic of Riley's "insist[ance] that Krien's settlement with Harsco proves that Harsco's negligence was responsible for the accident." Despite listing several issues with this argument, the most important is that "a settlement is not a determination of liability." It merits note that this is not entirely true in all circumstances. The best example that quickly comes to mind is Indiana medical malpractice law. In *Robertson v. B.O.* – discussed on the HLB in *Major Medical Malpractice Decision: Robertson v. B.O.* – the Indiana Supreme Court held that the Patient's Compensation Fund could not contest liability where the medical practitioner had admitted liability in settling the case. Nevertheless, it is a generally true statement, and is especially evident in this case. Krien could not sue Riley in tort law because it was his employer. Consequently, he could only recover from Riley under worker's compensation. Thus, though Harsco could have "spun the roulette wheel of litigation to judgment" and won, it did not have to.

Riley also argued that its immunity from suit directly by Krien acted to shield it from indemnity to Harsco. This argument finds no basis in Wisconsin law. Specifically, "there is nothing in Wisconsin law to prevent Riley from waiving its worker's compensation exemption," which the court concluded it had done in paragraph 4.8. I fail to see why a waiver of worker's compensation law need be made to permit an indemnification suit. A very brief examination of the Wisconsin Worker's Compensation Act by unfamiliar eyes suggests that the act only applies to actions by "employees" against an "employer." Perhaps the definition of employee is sufficiently broad as to encompass Harsco's relationship to Riley.

Lastly, Riley argued that Harsco may have been the responsible, negligent party "after all, and . . . that it's unthinkable that someone whose negligence is responsible for a harm should be entitled to indemnification." The court rejected

this proposition noting that "[i]ndmenification is a form of insurance." Thus, just as liability insurance can provide indemnity "for damages caused by the insured's negligence[,]" Harsco could enter into a contract with Riley to indemnify Harsco, even where it was the negligent party – at least vis-à-vis a third-party.

At the end of the day, the Seventh Circuit reversed the trial court, instructed the trial court to award summary judgment to Harsco, and directed for payment of attorney's fees in addition to the $180,000 along with prejudgment interest at the rate of 5% per annum.

Join us again next time for further discussion of developments in the law.

Sources

- *Krien v. Harsco Corp.*, ---F.3d---, No. 13-2272, 2014 WL 975482 (7th Cir. Mar. 13, 2014).
- *Justice v. Am. Family Mut. Ins. Co.*, ---N.E.3d---, No. 49S02-1303-PL-221 (Ind. Mar. 13, 2014).
- *McMahon v. LVNV Funding, LLC*, ---F.3d---, Nos. 12-3504 & 13-2030, 2014 WL 929358 (7th Cir. Mar. 11, 2014).
- *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Lewis*, ---F.3d---, No. 13-2214, 2014 WL 943412 (7th Cir. Mar. 12, 2014).
- *Robertson v. B.O.*, 977 N.E.2d 341(Ind. 2012).
- Colin E. Flora, *Indiana Court of Appeals Once More Asked to Interpret AIA Standard Construction Contract*, HOOSIER LITIGATION BLOG (Oct. 25, 2013).
- Colin E. Flora, *Major Medical Malpractice Decision: Robertson v. B.O.*, HOOSIER LITIGATION BLOG (Oct. 25, 2013); for truncated discussion, consider Colin E. Flora, *Indiana Supreme Court Rules PCF Cannot Defend Against Petition to Recover Excess Damages When Healthcare Provider Admits Liability*, 37 MED. LIABILITY MONITOR 2 (Dec. 2012).
- Colin E. Flora, *Indiana Supreme Court Analyzes Whether Workers' Compensation Applies to Diminish UIM Calculation*, HOOSIER LITIGATION BLOG (Mar. 14, 2014).

- Colin E. Flora, *Seventh Circuit Examines Standing for Class Rep and Departs from 3rd & 8th Circuits on FDCPA Interpretation*, HOOSIER LITIGATION BLOG (Mar. 14, 2014).

- Colin E. Flora, *Judge Posner Tears Into 'Frivolous' Appeal of Contempt Order*, HOOSIER LITIGATION BLOG (Mar. 14, 2014).