



McKENNA LAW UPDATE & NEWS

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ILLINOIS SUPREME COURT CLARIFIES REQUIREMENTS FOR RESTRICTIVE COVENANTS

On December 1, 2011, the Illinois Supreme Court issued its opinion in *Reliable Fire Equipment Company v. Arnold Arredondo et al.*, 2011 IL 111871 (2011). The issue before the Court was whether the circuit court applied the correct legal test when it held that a noncompetition restrictive covenant was unenforceable.

Reliable Fire Equipment Company (Reliable) sells, installs and services portable fire extinguishers and various other fire suppression and fire alarm systems. It designs systems for installation in industrial, commercial and retail businesses; hospitals and schools; and all types of nonresidential buildings. Defendants Rene Garcia and Arnold Arredondo were employed by Reliable as salesmen. Their employment was contingent on signing a noncompetition restrictive covenant. In their agreements, Garcia and Arredondo agreed not to compete with Reliable during their employment and for one year after their termination from employment in Illinois, Indiana, or Wisconsin. They further agreed not to solicit any sales or referrals from Reliable customers or referral sources, or to solicit Reliable employees to leave their employment with Reliable. The defendants subsequently formed their own business that operated in direct competition with Reliable, in violation of the restrictive covenant.

When Reliable became aware of the defendants' actions, it filed a complaint in the circuit court of DuPage County. The defendants filed a counterclaim that sought a declaration that the restrictive covenants were unenforceable. The circuit court concluded that Reliable failed to

prove the existence of a legitimate interest that justified the enforcement of the covenants and ruled that the restrictive covenants were unenforceable. The appellate court affirmed. The lead opinion agreed with the circuit court's conclusion that Reliable did not have a legitimate business interest that justified the enforcement of the restrictive covenants.

The Supreme Court reversed this decision and remanded the cause to the circuit court for further proceedings. In Illinois, a restrictive covenant will be upheld if it contains a reasonable restraint and the agreement is supported by consideration. A restraint is reasonable if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor; and (3) is not injurious to the public. The Court refers to this standard as a three-prong rule of reason. The Court's acceptance of this three-prong rule of reason overrules recent appellate court cases that used a two-prong reasonableness test that did not account for the legitimate business interest of the employer-promisee.

The Court also clarified the application of the legitimate interest prong of the three-prong rule of reason. Prior case law in Illinois attempted to apply rigid "tests" to determine whether a covenant was reasonable under the legitimate business interest prong. The Supreme Court rejected that approach. Instead, the Court stated that the determination of whether a legitimate business interest exists shall be based on the totality of the facts and circumstances of the individual case. A court will look at, but is not limited to, the near-permanence of the customer relationships, the employee's acquisition of confidential

information through his employment, and time and place restrictions. No one factor carries more weight than the others, and its importance will be determined by the specific facts of each case.

In this case, the circuit court applied the rigid “tests” that are rejected by the Supreme Court. Since the circuit court should have looked to the totality of the facts and circumstances of the case, the cause was reversed and remanded for further proceedings.

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INSURED NOT ENTITLED TO COVERAGE FOR INJURIES ARISING OUT OF DISPERSION OF TOXIC FUMES

In *Pekin Insurance Co. v. Pharmasyn Inc.*, No 2-10-1000, Ill App. 2nd Dist. (October 19, 2011) the Second District Appellate Court upheld the trial court’s summary judgment granted in favor of an insurer that issued a Commercial General Liability (“CGL”) policy. Since the language of the pollution exclusion in the CGL policy excluded the accidental dispersal of toxic fumes “at or from the premises” where it conducted its business, it held that an insurer was not obligated to defend and indemnify its insured, Pharmasyn, in the underlying action.

Pharmasyn, an Illinois Corporation, was engaged in the business of production of organic compounds at a commercial building located in Libertyville. At this location, the Plaintiffs in the underlying cause, Robert M. Fergus, Nathan T. Walker, and Patricia W. Steward (“the underlying Plaintiffs”) were also occupying spaces in separate suites of the same building. They claimed Pharmasyn released chemicals and toxic fumes from its corporate building that allegedly caused bodily injuries and damages to the surrounding environment.

Pekin issued a CGL Policy to Pharmasyn, which described Pharmasyn’s business as “Chemical

Distributors.” The Policy contained an exclusion for bodily injury or property damage caused by pollution which states as follows:

“This insurance does not apply to:

* * *

f. Pollution

(1) ‘Bodily injury’ or ‘property damage’ arising out of the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time owned or occupied by or rented or loaned to, any insured.

* * *

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured’s behalf are performing operations:

* * *

(i) If the pollutants are brought on or to the premises site or location in connection with such operations by such insured, contractor or subcontractor.

“Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.”

The Pekin CGL Policy further defined the term “bodily injury” to mean: “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” The term “occurrence” was defined to mean “an accident, including continuous or repeated exposure to substantially the same general or harmful conditions.” The term “property damage” was defined under the Pekin CGL Policy as follows:

“a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the ‘occurrence’ that caused it.”

When tendered the defense of the underlying suit, Pekin filed suit in the Lake County Circuit Court seeking a declaration that no coverage was owed to Pharmasyn for the underlying suit. Pekin contended that the underlying claim was for bodily injury caused by pollution, coverage for which was excluded under the terms of its policy. Pekin moved for summary judgment arguing that the underlying claim arose out of the release of a pollutant, and that the release constituted “traditional environmental pollution” which triggered the above-quoted exclusion. The trial court granted Pekin’s motion for summary judgment holding that the underlying complaint alleged “traditional environmental pollution,” and the pollution exclusion applied to preclude coverage.

While agreeing with the trial court’s ruling, the Second District Appellate Court defined the issue as whether the dispersion of pollutant fumes that caused injury to others “at or from the premises” was the type of accident specifically excluded by the Pekin CGL Policy. Finding that the Pekin policy language “at or from the premises” was not ambiguous, the court further noted that the exclusion was broad, covering both pollution “at” the location of the business and pollution leaking “from” the location of the business. Since the Pekin CGL Policy included “premises” in its pollution exclusion, coverage was excluded. Therefore, the Court held that Pekin was not obligated to defend and indemnify Pharmasyn in the underlying action.

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TRIAL RESULTS

Julie Ramson obtained another verdict in favor of her client in a recent case involving a woman who lost a twin pregnancy. The plaintiff had come to our client three days after losing the first of her 18-19 week old twins. She was advised that it was inevitable she would lose the second twin but she was given some options in the hope that the pregnancy could be sustained long enough to allow the second twin to survive. Sadly, she lost the second twin the next day, but blamed our client for the loss. The jury took an hour to find that there was nothing our client could do at that point to save the pregnancy. Julie was assisted in the trial by Dawn Ehrenberg.

Alex Sweis arbitrated a case where his client rear-ended the plaintiff’s car. One plaintiff was awarded \$29,000 and the second plaintiff was awarded \$5,000. Both plaintiffs had medical damages of less than \$5,000 each and both were involuntarily discharged from physical therapy for missing sessions without notice, so Alex rejected the award, even though his clients had not appeared at the arbitration because the plaintiff failed to serve an Illinois Rule 237 Notice to Produce. The plaintiff moved to bar the defendants from rejecting the award, arguing that the defendants did not participate in good faith and judgment should be entered on the arbitration award in their favor. Alex showed that the Rule 237 Notice was crucial to compelling his defendants to appear at arbitration and without that notice the defendants could reject the award and send the case to a jury trial. The judge agreed with Alex and a jury will now hear all the issues.

WELCOME!!!

McKenna Storer welcomes **Kelly Purkey** to the firm as an associate. Prior to joining McKenna, Kelly worked at defense firms in Chicago and St. Clair County, Illinois. Kelly has primarily

handled insurance defense matters including personal injury, insurance coverage, property damage and toxic tort cases. Kelly graduated from the University of Arizona in 1995 with a B.A. in Communication. She received her J.D. from Southern Illinois in 2004. She is admitted to practice law in Illinois and Missouri.

IN MEMORIAM

McKenna Storer was saddened by the recent death of one of our founding partners, **Royce Glenn Rowe, Jr.**, who was a leader and innovator in the defense of individuals and businesses in civil litigation.

Mr. Rowe was a lifelong resident of Wilmette who joined the Navy near the end of World War II. He then graduated from Northwestern University in 1950 and obtained his law degree from Cornell Law School in 1952. He began his legal career by working as a government lawyer for a short time in Washington but soon returned to Chicago where he helped found the firm in 1954 that eventually became McKenna, Storer, Rowe, White & Farrug. He recognized the need for more education for attorneys who specialized in the defense of lawsuits and organized the first "Defense Tactics Seminar" in

November, 1964. That led to the formation of the Illinois Association of Defense Trial Counsel, (IDC) and Mr. Rowe became its first President. He stayed active in the IDC and remained on its board until 1972. The IDC continued to grow and is the premier defense counsel organization in Illinois. The annual defense tactic seminars continue to this day and are an important source of legal education for defense lawyers from all over the state.

After being inducted into the American College of Trial Lawyers in 1978, Mr. Rowe remained a highly respected trial attorney with a commanding presence in the courtroom until his retirement in 1992. He was legendary at the firm for his immaculate desk top with nothing on it except a single china cup. It was a reflection of his superb organization and sharp mind. However, he is also remembered for always being a gentleman who was a master of the English language. He only needed a few words to get his meaning across. He once referred to a young attorney as "naive, but educable". He left quite a legacy, not only for the attorneys who continue at the firm he founded, but also for the thousands of lawyers over the years who were, and continue to be, trained and supported by the defense counsel association he had the vision to organize.

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