

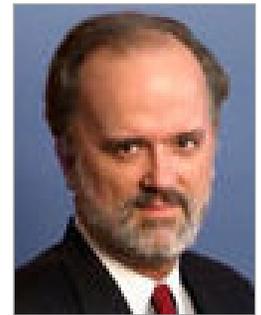


Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
 Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Ill. Supreme Court 2012: Year In Review

During 2012, the Illinois Supreme Court filed 71 written opinions, 39 in civil cases. Although the total opinion output was down somewhat from recent years, this represents the court's highest number of civil decisions since 2009.

All in all, 2012 was a reasonably good year at the court for the business defense bar. With a few notable exceptions we'll review below, the court turned back attempts to expand the scope of several torts and strengthened trial courts' power to control abusive practices. The court gave expansive interpretations to government immunities and rejected an attempt to create long-tail liabilities for dissolved corporations. The court also gave important protection to the attorney-client privilege in the context of routine business negotiations.



Kirk Jenkins

Narrowly Defining Torts

Choate v. Indiana Harbor Belt Railroad Co. arose from an injury to a 12-year old boy who tried to jump aboard a slow-moving freight train. Illinois landowners have long been subject to a limited duty to minor trespassers. In determining whether a duty exists, the courts have applied a four-factor test, including whether children are incapable of appreciating the risk involved.

The Supreme Court's opinion finding no duty in Choate is important for several reasons. First, the court brought Illinois in line with a number of jurisdictions around the country, holding that a moving train is an open and obvious danger to children. Second, the court held that the test was an objective one for the court, not for the jury, thereby making similar cases subject to summary disposition. Third, the court recognized that the burden to defendants of avoiding such accidents is often tremendous.

Illinois courts have narrowly defined any duty to preserve evidence, usually insisting on two things: special circumstances and foreseeability. In Martin v. Keeley & Sons, the court rejected an attempt to turn that limited duty into a significant burden on business. Martin involved personal injuries which occurred when an I-beam collapsed at a construction site. The day after the accident — long before the plaintiffs sued the manufacturer — the plaintiff's employer ordered the beam destroyed. One by one, the court rejected propositions which would have created satellite litigation in a host of personal injury cases. Mere possession does not mandate preservation. Nor did defendant's status as plaintiff's employer create a duty. Nor did the likelihood of plaintiffs' injuries ending in litigation against someone mandate a duty.

Bonhomme v. St. James arose from a fraudulent Internet-based relationship which the defendant allegedly maintained with the plaintiff for nearly two years while posing as a man. The complaint alleged a single claim for fraudulent misrepresentation. As the court pointed out, the tort of fraudulent misrepresentation has its roots in common law deceit, a narrow tort limited to business and financial transactions. The court properly refused to expand the tort to the parties' "purely personal" relationship, thus avoiding a potential avalanche of lawsuits arising from the normal rough-and-tumble of daily life.

Two Problematic Decisions

Nevertheless, there were missteps this year. The court's most troubling decision was Doe-3 v. McLean

Co. Unit Dist. No. 5. Doe-3 arises from a teacher's sexual abuse of two children. The claims at issue were not against the plaintiff children's school, but rather against the teacher's previous employer — principally that the defendants had negligently completed a verification of employment form, failing to disclose the teacher's disciplinary suspensions during the school year. The majority held that these allegations adequately stated a duty of care.

Justice Lloyd Karmeier filed a compelling dissent, joined by Justice Mary Jane Theis. The dissenters criticized the weakest point of the majority's opinion, questioning how it could be reasonably foreseeable that anyone would rely on a routine verification of employment form as the sole indicator of a potential teacher's character and conduct. The dissenters pointed out that the amorphous duty conjured up by the majority all but moots a long-standing line of authority holding that there is no private right of action for failure to report under the state's Abused and Neglected Child Reporting Act. The court characterized the majority's theory as a duty to report misconduct by inference — a duty to report facts which might (or might not) lead the defendant to uncover misconduct.

The potential for mischief in *Simpkins v. CSX Transportation* depends on further litigation. The plaintiff alleged that she had contracted mesothelioma from inhaling asbestos brought home on her former husband's person and work clothes. As Justice Charles Freeman pointed out in dissent, the first medical studies of bystander asbestos exposure were published in 1965. Given that plaintiff's former husband left the defendant's employ in 1964, that should have been the end of the matter, with no foreseeability found as a matter of law — the conclusion courts in several other jurisdictions have reached. Unfortunately, a majority of the court remanded the case to allow the plaintiff to attempt to plead sufficient facts to support the complaint's conclusory allegation that harm to plaintiff was somehow foreseeable.

Strengthening Tools for Fighting Abuse

The court also strengthened two important tools for trial courts to control procedural abuse in 2012. *Fennell v. Illinois Central Railroad Co.* involved allegations that the plaintiff had been exposed to asbestos during nearly four decades of employment. The case had virtually no connection to Illinois at all; the plaintiff was from Mississippi, he worked in Mississippi and nearby states, and the plaintiff's treating physicians and family lived in and near Mississippi too.

The Supreme Court would have created significant problems for defense counsel if it had affirmed the trial and appellate courts and declined to dismiss. But not only did the court reverse, the majority made several important points. "Decent judicial administration cannot tolerate forum shopping" as a legitimate reason for keeping litigation where it clearly doesn't belong, the court wrote. Indeed, combating forum shopping is one of the concerns animating forum non conveniens law. The majority also insisted that trial courts should evaluate all of the public and private factors found in the case law in every case — including the often overlooked issue of the practicality of a possible jury view of the premises (whether one seems likely or not).

Mashal v. City of Chicago posed another important question: When does the trial court lose the power to decertify a class? Under Illinois law, the answer is once the court has made a decision on the merits. *Mashal* was a good example of why the phrase "decision on the merits" should be narrowly defined — the only common question in the case had been litigated and decided relatively early on, obviating any need to proceed as a class.

Mashal could have easily resulted in a circular ruling: The plaintiffs argued that the order adjudicating the common question was itself a "decision on the merits," ending the power to decertify. Had the court accepted that argument, courts might have been stuck with class adjudication in some cases long after the justification had ended. But the court unanimously affirmed the appellate court, holding that a "decision on the merits" occurred quite late in the litigation process, when a "complete determination of liability" is made.

Narrowing Government Liability

In three cases, the court set narrow standards for holding the government and its employees liable in tort. *Moore v. Chicago Park District* was a survival and wrongful death action arising from a decedent's fall in the snow-and-ice covered parking lot of a city-owned recreational facility. The state Tort Immunity Act bars liability "based on the existence of a condition of any public property"

available for recreational use, but the decedent had actually fallen over a pile of snow moved by a city plow. So was the decedent injured by a "condition" of the property at all, as opposed to allegedly negligent plowing? The court answered "no," finding that the act immunized the government from liability for falls on snow and ice, even when government employees had plowed the property.

Patrick Engineering v. The City of Naperville arose from cost overruns on a stormwater management system. The plaintiff alleged that it undertook additional work outside the contract based on the city's representations; various city employees supposedly knew about the additional work, but never directed the plaintiff to stop. The Supreme Court unanimously held that a municipality could not be equitably estopped based only on the apparent authority of its officials; express authority (and reasonable reliance on words or conduct) were necessary for liability.

Harris v. Thompson arose from a collision between the plaintiffs' vehicle and an ambulance owned by a public hospital district. Harris involved a perceived conflict between the Tort Immunity Act, which states that absent willful and wanton conduct, neither local public entities nor their employees are "liable for an injury caused by the negligent operation" of an emergency vehicle responding to an emergency call, and the Vehicle Code, which imposes on the drivers of emergency vehicles a "duty of driving with due regard" for the safety of others. The Supreme Court held that in fact, the statutes were not in conflict. While the Vehicle Code extended certain privileges to drivers of emergency vehicles, the Tort Immunity Act bestowed immunity from liability on government employees and entities whether or not a duty of care was present.

Promoting Predictability for Illinois Business

Late in the year, the court handed Illinois business two important victories, turning back arguments which would have substantially hamstrung ordinary business operations.

Pielet v. Pielet involved claims under a breached consultancy contract. By the time of the suit, the corporation which had signed the contract had been dissolved for several years; a successor had declared bankruptcy and stopped paying on the contract.

Whether or not the dissolved corporation could be liable turned on the meaning of the Business Corporation Act, which permits suits against dissolved corporations for five years "for any right or claim existing, or any liability incurred" before they were dissolved. Had the court agreed with the plaintiff that mere contract rights without a breach were a "right or claim existing," it would have become substantially more difficult to fully and finally wind up any corporation in Illinois.

Under such a standard, winding up a corporation would have required not merely worrying about accrued claims, but accounting for potential long-tail liabilities from every active contract the corporation has which might be breached by a successor sometime after dissolution. Ultimately all seven justices agreed that a "right or claim existing" was limited to a claim which accrued before the dissolution of the corporation.

The court took an equally pragmatic approach in Center Partners Ltd. v. Growth Head GP, a case arising from the purchase of a large company by a group of corporations, partnerships and trusts. During the negotiations, the buyers had disclosed to each other some of their attorneys' advice on the deal, shared certain documents and permitted their attorneys to confer about potential legal issues. The buyers were sued by limited partners in one of the target company's assets, and the plaintiffs successfully argued that the buyers' disclosure of privileged materials to each other triggered a general subject matter waiver of documents relating to the sale.

Declining to follow a number of federal decisions in other parts of the country broadly applying waiver, the Supreme Court unanimously reversed, holding that unless the information is later abused to gain a tactical advantage in litigation, nonjudicial disclosures should not result in a general subject matter waiver. The court's recognition of the policy interests at stake is particularly to be applauded; the court pointed out that a broad waiver would have made negotiations for the sale of business and products with intellectual property aspects far more difficult, impeding communication between buyers and sellers, and likely leading to more litigation.

2013 promises to be another active year for high-stakes business litigation at the court. The year begins in two weeks with Russell v. SNFA, the court's first opportunity to apply the United States

Supreme Court's Nicaastro decision limiting U.S. courts' jurisdiction over foreign-based companies.

--By Kirk C. Jenkins, Sedgwick LLP

Kirk Jenkins is a partner in the Chicago office of Sedgwick and maintains an exclusively appellate practice, with special emphasis in matters of antitrust, tort and constitutional law.

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