Heather Maguire

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# Purcell & Wardrope Chtd.

## 7th Circuit Ruling More Than Triples Judgment For P&W Client

In *National Union v. AMICO*, 707 F.3d 797 (7th Cir. 2013), the Seventh Circuit affirmed the District Court's rulings in our clients' favor, while remanding the case for the District Court to recalculate the amount of the judgment to which our clients were entitled. On remand, we successfully increased that judgment from $960,000 to nearly $3.1 million. The District Court agreed with our arguments in their entirety, holding that AMICO could not modify the court's earlier judgment relating to another carrier, which led to a settlement on appeal, and could not seek a reduction based on the settlement of those separate claims. This victory wraps up a declaratory action where we secured judgments of almost $6 million for our client insurer.

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## Surveillance in Illinois

There is no better way to show that the plaintiff is exaggerating the claimed injuries than playing a surveillance videotape at trial. Nothing you can say or do would be more effective than the plaintiff's own actions undermining his or her claims. But it is important to be aware of the discovery and evidentiary pitfalls of surveillance videotape before proceeding. It is not enough to just catch the plaintiff in the act.

In general, surveillance photographs and videotapes are admissible to show that the plaintiff's claimed injuries are exaggerated. *Carney v. Smith*, 240 Ill.App.3d 650 (1992). Courts long ago permitted the use of surveillance films "to expose a malingering plaintiff." A videotape recording may be introduced at trial if it is properly authenticated and is relevant to an issue in the case. Authentication can be done by anyone with personal knowledge and accuracy of the footage -- even the plaintiff during cross-examination.

Establishing relevance is the more difficult evidentiary issue. Surveillance is relevant if its probative value outweighs the danger of unfair prejudice. Improper editing that would suggest that the plaintiff's activities were constant for extended periods of time would be misleading to the jury and, therefore, unfairly prejudicial. *Carroll v. Preston Trucking Co*., 349 Ill.App.3d 562 (2004).

Even surveillance without editing can be excluded if it may leave a false impression. For example, video footage of a plaintiff driving and overseeing work at a construction site would not be allowed where the plaintiff admits he or she could do these activities. The video would not counter any claims made by the plaintiff and, therefore, would be considered prejudicial because it gives the appearance that the plaintiff was caught in the act. *Donnellan v. First Student, Inc.,* 383 Ill.App.3d 1040 (2008). Footage of "obscured" moments where the plaintiff's activities are unclear also lead to false impressions and may result in the entire video being excluded. Make sure your investigator knows not to perform any edits and to minimize obstructed views.

Keep in mind that surveillance videotapes are discoverable by other parties. *Shields v. Burlington Northern & Santa Fe Ry. Co.*, 353 Ill.App.3d 506 (2004). The most recent case law on the matter held that such evidence is not protected by the work product doctrine and must be disclosed even if the defense decided to not introduce the evidence at trial. *Id*.; *see also Wiker v. Pieprzyca-Berkes,* 314 Ill.App.3d 421 (2000). Be prepared to disclose everything before your investigator ever presses the record button.

The best time to perform surveillance is probably after the plaintiff's deposition but before the discovery phase closes. This will allow you to get testimony from plaintiff that can be impeached with the videotape evidence. If the surveillance is done too early, it may need to be disclosed before depositions are taken and the plaintiff will be able to tailor his or her testimony accordingly. Surveillance taken after discovery closes may be barred as untimely.

The key to surveillance is to prepare a game plan ahead of time to ensure the evidence will be as effective, relevant and fair as possible.

## Can Your Cell Phone Be Searched During An Arrest?

The answer depends on where you are. Federal and state courts throughout the United States are divided as to whether police officers are permitted to search cell phones incident to an arrest or if a warrant should be obtained. A "search incident to an arrest" permits an officer to search an arrestee's person and the areas within the person's immediate control for weapons or evidence. *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979).

The United States Court of Appeals for the Seventh Circuit, which encompasses Illinois, Indiana, and Wisconsin, issued a very limited ruling regarding the legality of searching a cell phone without a warrant. In *United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012), the Appellate Court held that searching an arrestee's cell phone for the *very limited purpose* of obtaining the arrestee's cell phone number was not an illegal search and seizure. *Id*.at 810. The Court recognized that cell phones are not simply comparable to a purse or address book, but are instead similar to a computer that contains not only a vast variety of business information, but also private data as well. *Id*. at 805-807.

However, there may also be a sense of urgency that a police officer feels to obtain private information contained on the cell phone. For example, if potential co-conspirators are involved, the arresting officer may believe that they would erase data found on the cell phone from a third-party application, *i.e.*remote-wiping. *Id*.at 807-808. Nonetheless, the Court only ruled that "these are questions for another day" as the cell phone number was the only information obtained from the arrestee's cell phone and that was permissible under the Fourth Amendment. *Id*. at 810.

Other Circuits have reached different conclusions. The Fifth Circuit held that a cell phone is searchable because it is considered a "container" on an arrestee's person. The Fourth Circuit only permitted the search of a cell phone because the arrestee instructed the officers on how to obtain the information on his phone that they were seeking. The Ninth Circuit has not decided this issue but the Northern District of California held that a cell phone is *not searchable* because there is no longer a concern of danger once in police custody, which was originally why "search incident to an arrest" was created. Likewise, the Second Circuit is undecided but the Southern District of New York suppressed evidence obtained from a cell phone during an arrest; however in that case the court found that the officers searched hours after the arrest was made, therefore negating the applicability of a "search incident to an arrest."

Until this issue is decided by the United States Supreme Court, it is important to know where your state stands on whether police officers must obtain a warrant before searching a cell phone found on an arrestee's body.

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## Safety Companies Entitled to Employer's Immunity

Certain non-employer organizations may be entitled to the exclusive remedy defense granted to employers. Under this defense, employers are immune from civil actions from their injured employees in exchange for payment of workers' compensation benefits. The exclusive remedy provision of the Illinois workers' compensation statute extends the immunity not only to the employer, but to its insurer, broker and "any service organization retained by the employer... to provide safety service, advice or recommendations for the employer." 820 ILCS 305/5(a)

To qualify a service organization for statutory immunity under this section, the organization must only "provide safety service, advice or recommendations for the employer." *Mockbee v. Humphrey Manlift Co.*, 2012 IL App (1$^{st}$) 093189 ¶46. Check your case lists to see if you are defending any safety companies retained by the plaintiff's employer. The *Mockbee* court took an expansive view of the exclusive remedy defense for these types of companies.

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## Dram Claims May Be Allowed After 1-Year Limitations Period

The legislature created a limited statutory action for injuries arising out of the sale or gift of alcohol. The statute, known as the Dramshop Act, is very appealing to plaintiffs because liability is not predicated on fault, and there are few recognized defenses. The defense limitations are balanced in part by a short time to bring suit. The plaintiffs have one year to file their claims. This applies equally to adults, incompetents, and minors.

Of course, there is an exception to the rule. The court in *Litwiller v. Skar Enterprises, Inc.*, 2011 IL App (4th) 100870, held that the dram actions may be asserted in amended pleadings if the original action was filed within one year. The ruling is based on the relation-back doctrine, which applies to situations where a pleading is amended after the limitation period has expired. Its purpose is to preserve actions against dismissal from "technicalities." Relation-back allows amendments adding new causes of action and adding or changing parties where the pleadings arise out of the same occurrence.

Thus, in *Litwiller*, a plaintiff who was injured in a bar fight and sued the wrong party was allowed to amend his complaint to name the correct dram defendant.

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