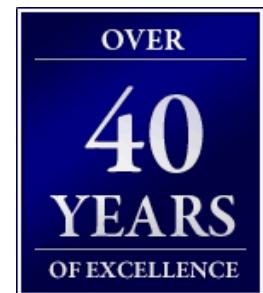




## Purcell & Wardrobe *Chartered*

### What's New at P&W?

Benjamin Franklin is credited with saying, "If you want something done, ask a busy person." Well, if you need some legal work



done, ask P&W. We're off to another busy and exciting fall season. We added a new member to our team, Leah Selinger. Leah joined us last month and brings a wealth of experience in civil rights litigation and construction negligence. Mark Abellera continued his hot streak with wins at trial and arbitration. R.J. VanSwol had his award-winning essay on coverage for intentional harms published in the Illinois Bar Journal. Last but not least, Mike Sanders obtained a coverage ruling that our client-insurer owed no duty to defend an additional insured in a construction case.

In this newsletter, you will find developments on damages in legal malpractice cases, certificates of insurance, and settlements with minors, the disabled and wrongful death beneficiaries. Let us know if you have any questions, because we're never too busy for you.

*For over 40 years,  
Purcell & Wardrobe has built its  
reputation as trial attorneys  
successfully defending clients in  
complex litigation while  
adhering to the highest ethical  
standards.*

## Calculating Damages in Legal Malpractice Cases

The Illinois Supreme Court's decision in *Goldfine v. Barack, Ferrazzano, Kirschbaum & Perlman*, 2014 IL 116362 (Oct. 2, 2014), clarified the law as it relates to calculation of damages in legal malpractice cases. The case illustrates the rule that a legal malpractice plaintiff must prove a "case within a case," which consists of proving that the plaintiff's claim or defense in an underlying case would have succeeded but for the defendant attorneys' negligence. The plaintiff's damages are limited to the amounts the plaintiff failed to obtain or had to pay in the underlying case because of the loss of that claim or defense. *Goldfine* also shows that the task of calculating those amounts can be far from straightforward, and that valuation for defense and settlement of a legal malpractice claim requires close attention to the underlying claims and remedies.

The Goldfines bought stock in First Capital Holdings, which became worthless when that company filed for bankruptcy. The Goldfines then retained the firm Barack Ferrazzano to represent them in claims against their broker. According to the legal malpractice case, the firm failed to preserve a cause of action for rescission under the Illinois Securities Law, 815 ILCS 5/1 *et seq.*, by failing to serve a required notice. The Goldfines ultimately settled their remaining claims against the broker, alleging common-law fraud and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, for \$3.2 million. The trial court in the legal malpractice case calculated the plaintiffs' damages by subtracting the \$3.2 million settlement from their total purchase price of roughly \$4.5 million. The civil remedies of the Illinois Securities Law also included interests, fees, and costs, so the trial court added 10% interest from the date of each purchase through the date of judgment, costs, and attorney fees calculated as a percentage of the total award.

On appeal, the defendant firm argued that an award of interest, fees, and costs under the Illinois Securities Law was punitive in nature, and that such an award against attorneys was therefore barred by the Illinois Code of Civil Procedure, 735 ILCS 5/2-1115. The Illinois Supreme Court disagreed, saying that those amounts were intended to compensate the plaintiffs for the actual losses that the plaintiffs suffered, and the award was part of what the Goldfines would have been entitled to recover in the underlying case if the firm had not failed to preserve their claim. The Supreme Court also said that under the Illinois Securities Act, the trial court should have calculated interest based on the plaintiffs' whole purchase price, not their net loss after recovering a settlement in the underlying case. However, there was also good news for the defendants: the plaintiffs' right to interest ended at the time the underlying suit settled, as that was all of the interest they could have recovered in the underlying suit, and did not extend through judgment in the malpractice suit. On remand, the trial court will have to recalculate interest and determine a reasonable fee award based on the correct amount of the plaintiffs' damages.

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## New Illinois Law on Certificates of Insurance

Construction contracts, maintenance contracts, and similar agreements often require one party to procure coverage for another as an additional insured and to provide a certificate of insurance reflecting the party's insurance policies. Effective January 1, 2015, a new section of the Illinois Insurance Code will clarify the effect of certificates issued in connection with contracts related to property, operations, or risks located in Illinois.

Consistent with existing Illinois case law and the disclaimers that already appear on the face of most certificates of insurance, 215 ILCS 5/155.45 provides that a certificate of insurance may not amend, extend, or alter the coverage provided under the listed policies, and may not confer any rights in addition to those expressly provided in the policies. The statute also provides that a certificate cannot contain a warranty that the listed policy complies with the insurance or indemnification requirements of a contract, and that no one is entitled to notice of cancellation, nonrenewal, or material changes in a policy unless the person has those rights under the terms of the policy itself.

Section 155.45 further provides that a person may not prepare, issue, request, or require the issuance of a certificate of insurance that contains false or misleading information. Any insurer, broker, or producer who issues a certificate violating the statute is subject to reprimand by the Department of Insurance. Any issuer found to be in violation of section 155.45 is potentially subject to monetary penalties and to suspension, probation, or revocation of its license.

Illinois joins a list of other states that have enacted similar statutes in response to purported fraud and misrepresentations on certificates of insurance. Section 155.45 provides greater certainty for insurers by helping to protect them against arguments that a broker or producer modified the insured risk or bound the insurer to additional obligations by issuing a certificate. The statute also serves as a good reminder that a person or entity seeking coverage as an additional insured should know the terms of the policy and should not rely on a certificate to determine whether it is insured or whether a policy provides primary and noncontributory coverage.

## Mandatory Court Approval Required for Settlements Involving Minors, Disabled Persons & Wrongful Death

Not too long ago, courts often would allow parties to settle low-value claims of minors without the time and expense of obtaining approval by a probate court. But the law over the past decade has made clear that this is no longer the case. Illinois appellate courts are consistently finding that no settlement of a minor's claim is enforceable "unless and until" the settlement is approved by the probate court. *Villalobos v. Cicero School Dist.* 99, 362 Ill.App.3d 704, 712 (1st Dist. 2005); *Smith v. Smith*, 358 Ill.App.3d 790, 793 (4th Dist. 2005); *Wreglesworth v. Arcticco, Inc.*, 316 Ill.App.3d 1023, 1026-27 (1st Dist. 2000); 755 ILCS 5/19-8. A parent has no legal right to settle a minor's cause of action. For this reason, court review and approval of the minor settlement is mandatory. The same holds true for those deemed mentally incompetent. *Glavinskas v. Dawson Nursing Center, Inc.*, 392 Ill.App.3d 347, 353 (1st Dist. 2008).

In response to this trend, the Circuit Court of Cook County recently issued new procedures for settling the claims of minors, disabled persons and wrongful death beneficiaries. Now after a settlement is reached, the attorney seeking approval must submit a petition and an order of distribution. The reviewing judge must make a finding that the settlement is "fair and reasonable" after examining various factors, including the severity of the injury and disputed liability issues.

If the amount of the settlement is less than \$10,000.00, then the reviewing judge has the discretion to order the proceeds to be distributed and controlled by the parent or guardian for the "sole benefit" of the minor or disabled person. If the amount of settlement is greater than this threshold, a probate proceeding must be initiated. The probate court will appoint a guardian for the claimant and make determinations on whether bonds, vouchers and other safeguards are necessary to protect the settlement proceeds. Any funds allocated to a

structured settlement are also subject to court approval.

Each jurisdiction has its own special rules for finalizing the settlement of a claimant who is a minor, disabled or deceased, but most track the above procedure used by Cook County. The process can take several months to prepare the necessary documentation, appoint the guardians, adjudicate liens and attorneys' fees, and assure the court that the claimant's estate is well-protected. "Unless and until" this is done, the settlement is unenforceable and remains a loose end. Best practice and peace of mind call for court approval for all claims involving minors, the disabled and wrongful death claimants.

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