A Midwest Law Firm

Getting Down to Business

Heyl Royster
Business & Commercial Litigation Newsletter

 Summer 2018

Welcome Letter

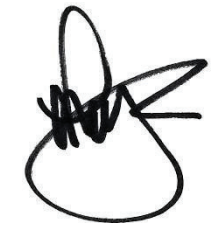
Dear Friends,

As the Managing Partner of the firm's Chicago office, I am happy to present this latest edition of Heyl Royster's Business & Commercial Litigation Practice newsletter. This issue features articles by some of the attorneys in our Chicago office.

We start off with an article on personal jurisdiction. For many of the companies we represent (and especially the companies I defend in asbestos and toxic tort litigation), the state in which litigation takes place and the law applied can have a significant effect on the final result of the case. Next is an article by Brett Mares that has to do with whether or not an employer can be held liable for the negligence of an independent contractor. Finally, Sandy Kerr provides an introduction to bankruptcy issues that can have an effect on business operations, and steps you can take to manage your company's exposure.

These articles provide a small sampling of the litigation and transactional support the firm provides to our clients – in Chicago and around the Midwest. We represent businesses large and small on a regional and/or local basis with a full gamut of business services, and we counsel clients on ways to mitigate risk and avoid litigation. We also provide e-updates and free educational seminars on topics of interest to the business community. If you have a topic of particular interest, please let us know.

We hope you enjoy this edition of *Getting Down to Business* and encourage you to contact us with questions or suggestions for future editions.



Tobin J. Taylor
Chicago Office Managing Partner
ttaylor@heylroyster.com

IN THIS ISSUE

The Business of Being Sued – A Look at the Concept of Personal Jurisdiction

By: Tobin J. Taylor, ttaylor@heylroyster.com

Around the country, courts at all levels have recently re-visited one of the most basic of legal concepts: personal jurisdiction. It is a concept that all law students learn early in law school and is a cornerstone of our system of jurisprudence. The principle of personal jurisdiction is one of fairness and helps ensure that persons, entities or businesses are only amenable to being sued in jurisdictions where it is appropriately fair to do so.

Generally speaking, the concept seeks to answer the question of how and under what circumstances the courts of any particular jurisdiction are allowed exercise jurisdiction over a person or entity. If a court doesn't properly have personal jurisdiction over a person or entity, the court cannot exercise any power over that person or entity. Without personal jurisdiction over a person or an entity, a court cannot enter a judgment or verdict against that person or entity. Without personal jurisdiction, a court cannot compel or enjoin a person or an entity with respect to any performance or obligation. Without personal jurisdiction, a court can't make a person or entity do anything. For companies and businesses, this concept essentially defines where an entity can sue or be sued. An absence of personal jurisdiction requires that a lawsuit be dismissed.

Personal jurisdiction, at its most basic, is the concept of where, or in what court, a person or entity may properly and fairly be sued. It has as its basis the fundamental Constitutional principles of due process and fairness. For a business owner, it is enough to know that the principle is rooted in the sentiment that a court in a far-flung location from the company's home or business activities should not, in fairness, exercise personal jurisdiction, or power, over that company absent some conduct or activity that might give rise to such. For instance, an entity sued in Illinois who isn't incorporated in Illinois, doesn't maintain any business operations in Illinois, hasn't conducted any business in Illinois, hasn't performed any acts or omissions in Illinois should not, in fairness, be subjected to the jurisdiction of Illinois courts.

Power of the court over a person or entity, or personal jurisdiction, is conferred in two different ways: general personal jurisdiction or specific personal jurisdiction. The latter of these, specific personal jurisdiction, is perhaps easiest to understand. Essentially, Illinois, like most states, has a "long arm statute" that allows the "long arm of the law" to wrap around a person or entity who engages in some very specific activity within the borders of this state. For instance, an entity can subject itself to specific personal jurisdiction of Illinois courts by transacting business in Illinois, committing a tortious act within Illinois, owning or possessing or using any real estate in Illinois, or breaching a fiduciary duty in Illinois, among other things. 735 ILCS 5/2-209. If your company enters into a contract that is to be performed in Illinois, it is now subject to the specific personal jurisdiction of Illinois courts. If you hire a delivery driver who drives through the state and gets into an accident within Illinois injuring someone, that activity has now subjected the company to specific personal jurisdiction and the company can properly be sued in Illinois.

As indicated, personal jurisdiction may be exercised in one of two ways: general or specific jurisdiction. With respect to general personal jurisdiction, if a defendant has maintained continuous, permanent, ongoing, and systematic contacts with Illinois such that the defendant may be considered

Continued on page 6...

Hands Off: Staying Safely Behind Independent Contractors

By: Brett M. Mares, bmares@heylroyster.com

The doctrine of *respondeat superior* can be a troubling source of liability for an employer, as it allows a plaintiff to pursue the employer for the alleged negligence of its agents and contractors even if the employer itself did nothing wrong. This is a departure from how civil litigation generally operates – an injured party usually seeks redress directly from the party that actually caused the injury. Under the doctrine of *respondeat superior*, however, a non-negligent employer can be looking at significant financial exposure as a result of the actions of its contractors.

Luckily, a little bit of knowledge can go a long way towards insulating a company from such dangers. Entrusting work to an independent contractor, under many circumstances, prevents the doctrine from being put to use by a plaintiff. According to the Illinois Supreme Court, "[a]n independent contractor is one who undertakes to produce a given result but in the actual execution of the work is not under the orders or control of the person for whom he does the work." *Lawler v. N. American Corp. of Illinois*, 2012 IL 112530, ¶43. The independent contractor "may use his own discretion in things not specified [and] without his being subject to the orders of the [person for whom the work is done] in respect to the details of the work." *Lawler*, 2012 IL 112530, ¶43.

The devil, as always, is in the details. *Respondeat superior* cases tend to operate on a sliding scale, with a jury deciding the facts surrounding retained control. The more control retained by an employer, the more likely that entity is to be found liable; the less control the employer has over the project, the more insulated it is from risk. These analyses tend to be quite fact specific. For instance, even if an employer has the right to inspect completed work, order changes, and dictate safety precautions, it is still unlikely to be subject to the doctrine of *respondeat superior* unless it retains control over the "incidental aspects" of the independent contractor's work. The Restatement (Second) of Torts' analysis hinges on retention of "the operative detail of doing any part of the work." Restatement (Second) of Torts §414, cmt a, at 387 (1965). Those directing the order in which work is done, or forbidding work to be done in a dangerous manner, are more likely to be free of liability. Likewise, the ability to order work started and stopped, inspect progress, receive reports, make non-binding recommendations, and prescribe alterations are each factors that, when taken individually, are probably not enough for the doctrine to attach.

That said, their cumulative effect could be sufficient control to find an employer liable. An employer can also find itself in trouble when it has retained "a right of supervision" such that a contractor "is not entirely free to do the work in his own way." To complicate things even further, an employer retaining a supervisory role can be not just vicariously liable, but it can also be directly liable if it carries out that role in a negligent manner.

With so many variables at work, an example from the Appellate Court First District in Cook County is informative. In 2014 the court heard *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, an appeal brought after a subcontractor's employee working to disassemble a rollercoaster fell to his death. In holding that Six Flags did not retain control based on a "contractual, supervisory, or operational control over the project," *Lee*, 2014 IL App (1st) 130771, ¶97, the court held that multiple daily visits to the worksite were not sufficient for the doctrine of *respondeat superior* to apply where the visits focused on checking daily progress instead of supervising the manner in which work was being done. That Six Flags did not require submission of a daily work report, had only an

Continued on page 10...

BANKRUPTCY REVISITED: A MINI SURVIVAL MANUAL

By: Alexander D. Kerr, Jr., akerr@heylroyster.com

Introduction

Bankruptcy remains one of the last vestiges of the general practitioner. Any substantive area of the law can end up within a bankruptcy proceeding. Additionally, the Bankruptcy Code, like the U.C.C., and the Internal Revenue Code has its own internal nuances and pitfalls which can pose a problem for the unwary. Finally, Bankruptcies are always with us, in good times and in bad times. In recent decades, we have seen bankruptcies ripple through various industries in their transitions, due in no small part to technological changes. In 2017 Commercial Bankruptcies were up 6% over 2016 for a total of 5,744 Commercial Chapter 11 filings.

The primary purpose of this piece is to provide businesses with a brief introduction to the current state of potential bankruptcy issues which may impact client business operations. The principles set forth are mainstream, many of which are subject to exceptions and particular limitations based upon the specific facts involved, which are beyond the scope of this article.

Early Warning Signals

As customers and vendors begin to experience financial stress, they seek to stretch payments of their accounts payable and to accelerate the payments of their accounts receivable. Accordingly, a business needs to have a periodic review of its accounts receivable policy to insure proper and immediate communication of customer pattern changes, especially, when a particular customer's account exceeds a preset dollar amount or exceeds the established time limitation. All too often, after a business has received notification that its customer has gone into bankruptcy, a retrospective review discloses early warnings, which, if properly communicated within the organization, could have managed the risk and contained the amount of loss. In order for there to be proper communication, employees having contact with the customer or vendor, not just on a sales basis, but on an invoice and collection basis, have to be educated sufficiently to understand when to alert management.

When early warning signals are properly interpreted and communicated, the company has options to limit its exposure by multiple means, including obtaining personal guarantees, obtaining a letter of credit, limiting the account and accelerating or adjusting payment terms. Some steps should be managed with the assistance of counsel in order to avoid preference issues which could require disgorgement of payments received in whole or in part as a result of these efforts.

We have seen particular industries go through wholesale readjustments and reorganizations. Notably, the automobile industry (GM, Chrysler-Dodge); brand manufacturers have been purchased at various discounts (e.g., Volvo to China, Jaguar to India); and within manufacturers various lines and models have disappeared (Pontiac, Oldsmobile, Plymouth). Each of these events destroyed some vendor businesses. The businesses which survived were able to do so by swiftly reacting either to early warnings and/or the bankruptcy filings. A recent survey identified current business sectors having a likelihood of distress in excess of normal ebbs and flows. The sectors include the retail sector, energy and resources sector, and the health care/medical/pharmaceutical sector. To the extent that a business is in these spaces or is a vendor to businesses within these spaces, the business should be taking steps now to manage exposures and risks. Anyone dealing with K-Mart, Sears, and Remington Arms should be especially alert.

The Jurisdiction Game

Only two bankruptcy jurisdictions permit critical vendors to be paid their pre-bankruptcy receivables

in full on normal and ordinary terms following the filing of a bankruptcy. Those districts are the Southern District of New York and the District of Delaware. All other jurisdictions have routinely interpreted the Bankruptcy Code as mandating that any prepetition monies owed are simply a claim in the bankruptcy. Granted that some few bankruptcies are able to pay all or virtually all of their unsecured creditors, but that result occurs only rarely. Keep in mind that once a bankruptcy is filed, even a Bankruptcy Court within these two (2) jurisdictions will not categorize all vendors as critical vendors. Generally speaking, where there are multiple vendors of a component or system, only one of the vendors is likely to be favored with the preferred category. The winner is usually the debtor's favorite, and/or the one who got before the Bankruptcy Court first.

Proofs of Claim and Committees

Once a business is on notice that a company is in bankruptcy, the clock starts to run on multiple issues. It is important to understand that virtually any form of notice will suffice. A company cannot sit back and believe that it can do nothing until or unless it receives a formal notice from the Bankruptcy Court. While every creditor is supposed to receive a formal notice from the court, in the pressured timetable of getting a bankruptcy petition on file, creditors' addresses may be erroneously entered, a creditor may be missed, or the post office can misplace the mailing. Meanwhile, the bankruptcy proceeding has moved on, decisions will have been made which will be binding on the future progress of the bankruptcy, and individual creditors' rights may have been irretrievably compromised.

Committees of creditors are usually appointed within the first weeks of the bankruptcy. The most common committee is a committee of unsecured creditors whose interests are most at risk. The committee acts as a counterbalance to secured creditors, and, in some cases, to management interests adverse to those of the unsecured creditors. Committees are entitled to counsel to be paid from the bankruptcy estate as a priority. When a company has a claim to be filed in the bankruptcy that is a significant part of its receivable inventory, then participation on the committee may be both a prudent and cost-efficient way to insure that the claim is not lost in the shuffle of the proceedings.

A proof of claim is required to be filed in order to protect the claim interests. In some instances, creditors will be told not to file a proof of claim until such time as the bankruptcy trustee, the court, or the debtor has determined that there is a prospect of claim payments. Notwithstanding this point, the better practice is to always file a proof of claim so that rights are not inadvertently lost through administrative machinations. Even if a creditor is listed in the bankruptcy schedules as being owed and the amount listed is acceptable to the Company, the filing of a proof of claim remains essential to ensure that rights are preserved. A copy of the standard proof of claim form is available from every bankruptcy court website and provides a good checklist for the assembly of documents and data necessary for its filing.

The Time Trap

In bankruptcy, an order becomes final and not appealable after just 14 days. Bankruptcy Rule 8002 (A) (1) and 28 USC § 158 (d). In order to effect an appeal, the clerk of the Bankruptcy Court must receive the notice within the 14 days of its entry. An order authorizing the sale of debtor assets becomes final after 14 days. An order authorizing the assumption and assignment of a contract which the company had with the debtor becomes final after 14 days. This can be troublesome. If the company does not want to do business with the entity to which a contract is being assigned, it nevertheless may be stuck for the duration of the contract. The time for calculation runs from the entry of the order, which could be earlier than the

receipt of the order. This is one of the time deadlines which is absolute and jurisdictional, it is not a mere suggestion. The 14-day deadline is unyielding and unbendable.

Emerging Financing Trend

Over the past 10 years or so a new business model has sprung up whereby specialist providers of litigation finance provide funding necessary to pursue commercial litigation. In this situation, the value of the litigation claim is used to finance the pursuit of the claim. Financing is provided on a non-recourse basis in exchange for a contractually defined return tied to case results. Historically, bankruptcy trustees have not had resources to pursue claims which they deemed to be legitimate. In order to receive the value of those claims for the estate, the trustees have frequently sold claims at discounts to interested parties willing to pursue them for their own benefit. The historic structure did not maximize the value for the bankruptcy estate to be received from debtor claims requiring litigation. Financing availability changes the equation, and a company, even if holding a creditor claim, may now be faced with a well-funded trustee pursuing a debtor's claim against it. Thus, it behooves any creditor who believes that a bankruptcy debtor may have a claim against it to actively monitor the bankruptcy and be involved early in the proceedings in order to contain or limit any exposure to such claim.

Sandy Kerr concentrates his practice in litigation, bankruptcy and commercial transactions. In private practice, and as a government lawyer, he has tried numerous state and federal criminal and civil cases, as well as briefed and argued state and federal appeals.

"The Business of Being Sued," continued...

"at home" in the State, the defendant is said to be doing business in the State and is subject to general jurisdiction there. *Daimler AG v. Bauman,* 134 S. Ct. 756, 751 (2014) ("a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive' as to render [it] essentially at home in the forum State."). In other words, if an entity lives, resides, or is "at home" in Illinois, it could be subject to general personal jurisdiction. A corporation may be said to be "at home" somewhere other than the state of its incorporation or even the state of its principal place of business. This is where the courts grapple with the notion of where it is a fair for a company to be sued.

Recent court decisions are helpful for companies looking to combat "forum shopping" in which plaintiff's often try to find the most favorable venue in which to sue certain companies by choosing plaintiff friendly jurisdictions. A company who finds itself in one of those jurisdictions within Illinois, may find that raising personal jurisdiction defenses might convince a court to dismiss a lawsuit that is filed in an improper place. The most recent decisions from the Illinois Supreme Court and Illinois appellate courts suggest that such a defense may be effective.

In *Aspen American Insurance Company v. Interstate Warehousing, Inc*., the Illinois Supreme Court recently held that a lawsuit was properly dismissed from the Illinois venue in which it was filed because Illinois courts lacked general personal jurisdiction over the defendant. Interstate was headquartered and incorporated in Indiana and operated a warehouse in Michigan where a roof collapsed, giving rise to the subrogation lawsuit that Aspen filed in Cook County, IL. Interstate's only connection to Illinois was a warehouse it operated in nearby Joliet, IL. The Illinois Supreme Court reversed the trial court and

the appellate court by finding no general personal jurisdiction existed as there was no showing that the defendant was essentially "at home" as required by the U.S. Supreme Court's recent opinions – in other words, the activities and presence in the state of Illinois was not sufficient to give rise to the conclusion that Interstate was "at home" in Illinois. The opinion explicitly rejected the arguments that simply "doing business" or registering to do business as a foreign corporation somehow confers personal jurisdiction upon a corporation. Overall, the opinion is favorable for defendants and non-resident businesses in Illinois.

In its decision, the Illinois Supreme Court relied heavily on the three recent personal jurisdiction opinions from the Supreme Court of the United States: *Daimler*, *BNSF*, and *Bristol Meyers Squib*. In 2014, the Supreme Court of the United States examined the issue of personal jurisdiction in *Daimler AG v. Bauman*, 134 S. Ct. 746. Subsequently, in 2017, the Supreme Court addressed the topic of personal jurisdiction again and more narrowly defined a state court's exercise of personal jurisdiction over an out-of-state corporate defendant in two opinions. These two decisions built upon the Court's earlier 2014 decision in *Daimler*.

In *Daimler*, the Supreme Court recognized that an entity, if subject to personal jurisdiction, could be subject to either general or specific jurisdiction. *Daimler* rejected the notion that "doing business" within a state was sufficient to confer general personal jurisdiction. Rather, the Court held that a court may exercise general jurisdiction over an out-of-state corporation only if its contacts with the forum state are so constant as to render the defendant essentially "at home" within that state. This decision set a high standard for establishing general jurisdiction as corporations are usually only "at home" in the state of incorporation or principal place of business. With respect to specific personal jurisdiction, a court may exercise specific personal jurisdiction over a defendant only if the defendant's suit-related contacts with the forum state are related to the underlying claim. Disputes continued after *Daimler* as lower courts attempted to determine the appropriate application of these tests. Three years after the *Daimler* decision, the Supreme Court further narrowed the test for general personal jurisdiction and specific personal jurisdiction in two separate cases released within months of each other.

The first of the 2017 Supreme Court decisions addressing the concept of general personal jurisdiction was *BNSF Railway Co. v. Tyrell*, 137 S. Ct. 1549 (May 30, 2017). BNSF Railway argued that it was improper for a Montana court to exercise general personal jurisdiction over it as it was not incorporated in Montana nor did it have its principle place of business in Montana. The Supreme Court of Montana disagreed holding that Montana's state statute on personal jurisdiction allowed it to exercise personal jurisdiction over "all persons found within" the state, and found that since BNSF Railway had over 2,000 employees and over 2,000 miles of track within the state, that its connections to Montana were sufficient to confer jurisdiction.

The Supreme Court of the United States reversed the Montana court. The Court held that BNSF Railway's connections and activities within Montana were not sufficiently continuous and systematic as to make BNSF Railway "at home" in Montana. Citing to *Daimler*, the Court held that for an out-of-state corporate defendant, the paradigm forums for where the defendant is "at home" are 1) the state in which it is incorporated and 2) the state of its principle place of business. The Court rejected the other contacts – 2,000 employees and 2,000 miles of track – as insufficient and not rising to the level of making BNSF Railway appear as if it were "at home" in Montana. The Supreme Court ruled that the application of the Montana personal jurisdiction statute and the decision of its supreme court violated the 14th Amendment's Due Process Clause. This Supreme Court opinion

shows that the Court clearly expects that activities with the forum jurisdiction must be incredibly significant to establish that an entity is "at home" for purposes of general jurisdiction.

Following its opinion defining the test for general personal jurisdiction in *BNSF Railway*, the Supreme Court issued another decision a month later discussing and narrowing the application of specific personal jurisdiction in the case of *Bristol-Meyers Squib, Co. v. Superior Court of California*, 137 S. Ct. 1773 (June 19, 2017). This case was the classic paradigm of forum shopping, as a group of more than 500 non-California residents filed suit in a California state court alleging that a drug manufactured by defendant Bristol-Meyers Squib Co. ("BMS") had caused them personal injury. There was no argument that BMS was subject to general personal jurisdiction in this case. Rather, the California Supreme Court held that BMS had sufficient case connected and specific contacts within California to allow for exercise of specific personal jurisdiction. The California Supreme Court used a "sliding scale" approach to find the necessary minimum contacts for the exercise of personal jurisdiction. The court held that "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." BMS had five research facilities in California; BMS employed over 100 people in California; and BMS had sold 187 million pills of the drug at issue in California and took in more than $900 million in revenue from those sales. The California court determined that those contacts warranted the exercise of specific personal jurisdiction.

The Supreme Court of the United States reversed the California court, holding that the exercise of personal jurisdiction over BMS under these facts violated the Due Process Clause of the 14th Amendment. The Court held that for specific or "case linked" jurisdiction to exist, the suit must arise from the defendant's contacts with the forum state. While the Court considers in its personal jurisdiction analysis the interest of the forum state and the plaintiff's choice of forum, the primary concern in a personal jurisdiction analysis is the burden on the defendant. In rejecting the California Supreme Court's "sliding scale" approach, the majority stated that they could find no support in the precedents for an approach that allows the connection between the forum contacts and the specific injury to be relaxed if the defendant has extensive connections unrelated to the injury. The majority described such an approach as a "loose and spurious form of general jurisdiction." The Court concluded that there was no evidence of any connection between BMS' contacts with California and the claims of the out-of-state residents, as these plaintiffs were not prescribed the drug in California; did not ingest the drug in California; did not purchase the drug in California; and did not suffer injury in California. This opinion further defines the notion that the connection to forum state must be specifically related to the lawsuit.

Following these decisions, it is perhaps not surprising that the Illinois Supreme Court in *Aspen* held the way that it did limiting the application of personal jurisdiction. Indeed, in May of 2018, an appellate court in Illinois also determined that a defendant should not have been subjected to specific personal jurisdiction. In *Campbell v. Acme Insulations, et. al*., 2018 IL App (1st) 173051 (May 18, 2018), the appellate court declined to find general personal jurisdiction or specific personal jurisdiction.

The plaintiff in *Campbell*, an Alabama resident, alleged that he was exposed to asbestos in Illinois, Alabama, Louisiana, and Texas between 1961 and 1999 when he was exposed to products of defendants, including defendant General Electric ("GE"). Campbell's only work in Illinois was at one jobsite, Republic Steel, in 1964 to 1965. GE contended that general personal jurisdiction didn't exist because it was not "at home" in Illinois and that specific personal

jurisdiction didn't exist because plaintiff's injury did not arise from GE's contacts in Illinois. The appellate court agreed and reversed the trial court.

The *Campbell* plaintiff argued that GE had a significant presence in Illinois and conducted a large amount of business within the state. The appellate court noted that GE's business activities within Illinois, including the 3,000 employees at 30 facilities within Illinois with sales in excess of $1 billion, were only a relatively small portion of GE's total global operations. The court held that the business activities of GE did not rise to the level that would amount to the "exceptional" circumstance of saying GE was at home somewhere other than where incorporated or where it had its principal place of business. The *Campbell* court also rejected the argument that GE consented to jurisdiction by having a registered agent for service of process in Illinois.

Turning next to specific personal jurisdiction, the *Campbell* court properly noted that the BMS opinion from the Supreme Court of the United States requires that there be some connection of GE's activities within Illinois that give rise to the cause of action to confer specific personal jurisdiction. Here, the appellate court determined that there was not sufficient competent evidence that the *Campbell* plaintiff had been exposed to GE asbestos-containing products at the sole jobsite within Illinois. Notably, the appellate court rejected the suggestion that a "sliding scale" approach be utilized citing to the BMS decision that expressly rejected it. Finally, the appellate court rejected the plaintiff's argument that jurisdiction was appropriate under the doctrine of "jurisdiction by necessity" where it was argued that there was no single state in which any court could otherwise exercise jurisdiction over all the various defendants.

In summation, the recent line of decisions from the Supreme Court of the United States and Illinois courts show that the courts are helping to ensure that corporate defendants are not subjected to inappropriate "forum shopping." This line of cases should lend much-needed predictability to the question of where corporate defendants are appropriately subject to defending a lawsuit.

Tobin Taylor is the Managing Partner of the firm's Chicago office. He handles a wide range of civil litigation for businesses, corporations, professionals, and insurance companies.

"Hands Off," continued...

initial meeting with subcontractors before work began, and had Six Flags employees drive by the worksite to look things over were not enough to create liability. Small talk about the project's progress was likewise allowed, and Six Flags' lack of an active role in safety checks throughout the project supported a rejection of the *respondeat superior* doctrine. However, the first district warned that if Six Flags was found to have superintended the job itself, it could be held "directly liable for not exercising [its] supervisory control with reasonable care." *Id*. ¶99. Ultimately, the Court held that Six Flags did not superintend the job, citing the employer's lack of regular safety meetings and inspections relating to the project.

With such a fine line to walk, it can be hard for an employer to know how to best protect itself from the *respondeat superior* doctrine. A few key suggestions can help bring a bit of certainty to these situations:

- First, if a task lies outside of a company's area of expertise, hiring the right outside contractor to get the job done is extremely important. The more experienced and trustworthy a contractor is, the more control can be ceded to it, making the employer less vulnerable legally.
- Second, if an employer needs to be involved in a project even after hiring a contractor, each party's responsibilities should be explicitly spelled out. The process for expanding the employer's responsibilities under various circumstances should also appear in a written contract. Of particular importance is the assignment of safety duties.
- Third, shutting down a worksite for safety violations could be a double edged sword – if your company retains the power to do so and unsafe practices are observed, swift and effective action must be taken to rectify the problem. However, hiring a safety-conscious contractor could free an employer from that burden. Hiring the right people will help to avoid such a problem. The safer everyone is, the less any company needs to worry about liability.

Simply put, when the right people are hired for the job, everyone benefits.

Brett Mares focuses his practice on commercial litigation, with an emphasis on contractual disputes. His clients include multi-national corporations as well as local businesses. He also writes and speaks on topics of concern to business owners – including commercial contracts, ERISA and employment agreements.

EMAIL NEWSLETTER AVAILABLE

Would you like to receive the newsletter electronically? Just send an email request to newsletters@heylroyster.com. You'll be able to enjoy the most cost-effective, environmentally-friendly way of receiving our business and commercial litigation news!

Heyl Royster is a regional Midwest law firm with more than 120 lawyers and seven offices located in Illinois (Peoria, Champaign, Chicago, Edwardsville, Rockford, and Springfield) and Missouri (St. Louis). The firm provides legal services for businesses and corporations, professionals, healthcare organizations, governmental entities, universities, insurance carriers, and other major institutions. Heyl Royster lawyers have successfully defended clients in all of the federal courts and in each of the 102 counties in the State of Illinois, as well as in courtrooms in Indiana, Iowa, Missouri and Wisconsin. Our attorneys also counsel clients on all aspects of business life. Through our lawyers' participation in bar and industry activities, we identify and help develop trends in the law which we believe will be of benefit to our clients.

heylroyster.com

Heyl, Royster, Voelker & Allen, P.C.
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601-6199

For More Information

If you have questions about this newsletter, please contact:

John P. Heil, Jr. - *co-chair*
jheil@heylroyster.com
Mark A. Ludolph - *co-chair*
mludolph@heylroyster.com
Heyl, Royster, Voelker & Allen, P.C.
Phone (309) 676-0400 – Fax: (309) 676-3374

Champaign, Illinois 61824-0467
Suite 505, 301 North Neil Street
PO Box 467
Phone (217) 344-0060 – Fax (217) 344-9295

Chicago, Illinois 60603
33 N. Dearborn Street, Seventh Floor
Chicago, IL 60602
Phone (312) 853-8700

Edwardsville, Illinois 62025-0467
Suite 100, Mark Twain Plaza III
105 West Vandalia Street
PO Box 467
Phone (618) 656-4646 – Fax (618) 656-7940

Peoria, Illinois 61601-6199
300 Hamilton Boulevard
PO Box 6199
Phone (309) 676-0400 – Fax (309) 676-3374

Rockford, Illinois 61105-1288
Second Floor
120 West State Street
PO Box 1288
Phone (815) 963-4454 – Fax (815) 963-0399

Springfield, Illinois 62711
3731 Wabash Ave.
PO Box 9678
Phone (217) 522-8822 – Fax (217) 523-3902

St. Louis, Missouri 63177
Suite 1505, 701 Market Street
PO Box 775430
St. Louis, MO 63177
Phone (314) 241-2018 – Fax (314) 297-0635

www.heylroyster.com