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Judge Posner Tears Into 'Frivolous' Appeal of Contempt Order

Two posts down, two to go. For those who did not read the first post today – *Indiana Supreme Court Analyzes Whether Workers' Compensation Applies to Diminish UIM Calculation* – in honor of the first post of the day being my 100th installment on the Hoosier Litigation Blog and the surplus of blog-worthy decisions from the Seventh Circuit and Indiana Supreme Court, today we are doing an unprecedented quadruple-post day. Typically, I only add one post on the HLB per week.

Our first discussion today was on *Justice v. American Family Mutual Insurance Company* from the Indiana Supreme Court, holding that workers' compensation payments cannot be used to diminish recovery from underinsured motorist (UIM) insurance coverage. Our second discussion of the day was on the Seventh Circuit decision *McMahon v. LVNV Funding, LLC*, holding that a would-be class representative's claims are not rendered moot unless a settlement offer constitutes a full settlement and is made prior to the initial filing of a motion for class certification. The case also held, for the first time in any Federal appellate court, that a collection letter sent after the expiration of the statute of limitations may run afoul of the FDCPA as misleading even if it does not threaten litigation. This decision directly contradicts prior decisions by the Third and Eighth Circuits.

This post now shifts to the first of two focusing on decisions by Seventh Circuit Judge Richard A. Posner. In this post we look at a decision that has been called a "benchslap" by the cheeky folks at AbovetheLaw.com. The case is *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Lewis*. The most notable line:

> The defendants' appeal brief is a gaunt, pathetic document (there is no reply brief). Minus formal matter, it is only eight and a half pages long. Brevity is the soul of wit, and all that, but still: the first seven and a half pages are simply a recitation of the history of the Georgia lawsuit, the settlement negotiations, and the present suit, along with questionable and irrelevant facts; and the tiny argument section of the brief—118 words, including citations—states merely, without detail or elaboration, that the defendants do not possess the settlement funds and therefore can't restore them.

For those new to the HLB, it merits note that your author is often fond of the bluntness used by Judge Posner in cases where a frankness and irate tone is merited by the contemptible nature of a party's argument. *Lewis* is just such a case.

The origin of the case stems from a separate personal injury lawsuit in Georgia. The Georgia case arose from an automobile accident resulting in substantial physical injury to Miss Lewis. Miss Lewis's health insurance plan paid $180,000 for her medical treatment from the accident. The Georgia case settled for $500,000. The proceeds of the settlement were divided between the Miss Lewis and her attorney. However, no portion of the settlement was ever paid to Miss Lewis's health insurer. You see, insurance companies derive liens and subrogation rights from their insureds when they pay expenses. This is a fact that often comes as great surprise to injured persons and goes overlooked by the vocal forces in support of tort reform and caps. Medical liens are also an area in which an attorney becomes a tremendous value-add in personal injury cases. Often, though not always, a personal injury attorney can substantially negotiate down the lien and thereby convince the insurer to take less than the full amount. This is usually premised on the simple fact that the insurance company would have had to pay a lawyer to bring a case against the tortfeasor – the person causing the injury – to recover the amount in the first place. Thus, it should recognize that an insured person had to pay an attorney to recover the costs and should therefore decrease its lien in accordance with attorney fees. To the credit of the insurance industry as a whole, most insurers are reasonable on this issue and are willing to decrease the lien amount. However, I cannot stress enough, this is not always true; so don't get mad at your lawyer if he cannot work this magic with every insurance provider.

Because Miss Lewis's lawyer had failed to pay the piper on her behalf, her health insurance provider brought a lawsuit in Illinois under the federal Employee Retirement Income Security Act (ERISA). During the course of that suit, the trial judge ordered that $180k be set aside in the Georgia lawyer's client trust account. The Georgia lawyer failed to comply with the court order. A year-later, the money had not been placed in the account and no evidence had been produced to prove that it could not be so done. The trial judge then ordered the defendants – both the Georgia lawyer and Miss Lewis – "to produce records that would establish their financial situations, and ordered [the Georgia lawyer] to submit a variety of documents relating to the contempt to the General Counsel of the State Bar of Georgia for possible disciplinary proceedings against him." Though some financial records had been submitted, as Judge Posner pointed out on appeal, they were "absurdly inadequate."

The first, and only substantial, issue addressed by the court was whether the order of contempt was appealable. The court found that it was. A contempt order can only be appealed as interlocutory – we've discussed interlocutory orders before in *Indiana Court of Appeals Addresses Right to Appeal Denial of Motion to Dissolve a Preliminary Injunction* – "if but only if the underlying order is appealable." This standard makes sense when you consider the alternative would allow a litigant to "obtain appellate review of any interlocutory order, at will, by defying it." Because the purpose of the contempt order in this case was to enforce a preliminary injunction – which itself was an appealable interlocutory order – the contempt order could be appealed.

This result left Judge Posner questing for an answer as to "why a finding of civil contempt should ever be appealable as an interlocutory order[?]" Acknowledging that there is no "good answer," he delved into possible bases. As this is a discreet and theoretical concern that does not impact the outcome, I refrain from any further discussion and leave any curious reader to the esoteric analysis in the opinion.

With jurisdiction for the appeal affirmed, the court turned to the merits of the appeal. As noted in the excerpt above, the brief on appeal was a paltry document lacking any meaningful argument. The only asserted basis was an inability to pay that was made in a single affidavit. The court rejected any thought that such a limited basis could suffice. Judge Posner aptly noted, "[f]ew judgments would be paid were that the rule. It's true that if a sworn assertion of inability to pay is false the affiant can be prosecuted for perjury. But the likelihood of prosecution for perjury committed in a civil suit is slight."

The judge concluded that the appeal was frivolous and issued an order

preliminarily granting the insurer's request for attorney's fees to defend the appeal under Appellate Rule 38. The order is preliminarily granted because the court provided the defendants thirty days to show cause why they should not be required to do so. The court, as is characteristic of Judge Posner's thinking-aloud style of writing, provided insight into how the attorney's fee is to be calculated.

> The plan was represented by an in-house lawyer, but that doesn't defeat a claim for attorneys' fees. Rather, in such a case the amount awarded is based on the market price of those services in the law firm market. "Lawyers who devote their time to one case are unavailable for others, and in deciding whether it is prudent to pursue a given case a firm must decide whether the cost—including opportunities foregone in some other case, or the price of outside counsel to pursue that other case—is worthwhile. Opportunity cost, rather than cash outlay, is the right way to value legal services. The going rate for comparable legal services in the market reveals that cost directly, avoiding a complex inquiry that is in the end likely to produce a comparable figure."

The court concluded by admonishing the trial court for not more expediently determining the case. The case was permitted to "drag on" for more than two and a half years. Indeed, as an interlocutory appeal, the case is still ongoing in the trial court; though I cannot imagine it will remain there for long after this decision. Judge Posner advised,

> As soon as the defenses were pleaded—that the settlement was not of Lewis's personal injury claim arising from the accident, that the plan didn't have standing to sue under ERISA, and (another frivolous contention) that Lewis hadn't been properly served—the court should have smelled a rat. And the stench rose when the defendants ignored or defied discovery requests (causing the court to grant a motion to compel) and disobeyed orders to prepare for a settlement conference, thus forcing its cancellation; and when [the Georgia lawyer]'s lawyer withdrew in June 2012 over "differences in material litigation strategy with" [the Georgia lawyer] and when Lewis's lawyers followed suit in September. The preliminary injunction was not issued until ten months after the suit had been filed and the contempt order not until a year after that. We don't understand why the judge waited until the contempt hearing before ordering the turnover of documents, and why she didn't notify the General Counsel of the Georgia Bar of [Georgia lawyer]'s shenanigans herself rather than entrust the responsibility of doing so to the untrustworthy [Georgia lawyer]. The sequence is so strange: to find the defendants in contempt, and only then order them

to produce documentation confirming (or, improbably, refuting) their contemptuous behavior.

The court further added that the conduct of the Georgia lawyer was so very outrageous that "the district court should give serious consideration to transmitting copies of this opinion and the record to the Department of Justice and to the General Counsel of the Georgia Bar." The court also directed the trial judge to determine whether the defendants should be jailed – "a standard remedy for civil contempt" – until they comply with the order.

Join us again next time for further discussion of developments in the law.

Sources

- *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Lewis*, ---F.3d---, No. 13-2214, 2014 WL 943412 (7th Cir. Mar. 12, 2014).

- *Justice v. Am. Family Mut. Ins. Co.*, ---N.E.3d---, No. 49S02-1303-PL-221 (Ind. Mar. 13, 2014).

- *McMahon v. LVNV Funding, LLC*, ---F.3d---, Nos. 12-3504 & 13-2030, 2014 WL 929358 (7th Cir. Mar. 11, 2014).

- Employee Retirement Income Security Act (ERISA) – codified at 29 U.S.C. ch. 18.

- Federal Rules of Appellate Procedure 38.

- Staci Zaretsky, *Judge Posner Rips Litigant A New One, Calls His Brief 'Pathetic'*, ABOVE THE LAW (13 Mar. 2014), available at http://abovethelaw.com/2014/03/judge-posner-rips-litigant-a-new-one-calls-his-brief-pathetic/ (last visited Mar. 14, 2014).

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