

# DIGEST OF INSURANCE LAW

## ILLINOIS

Courtesy of  
[Pretzel & Stouffer, Chartered](#)  
Chicago, Illinois

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Under Judicial Article, Illinois Constitution, effective Circuit Court in each county is sole court of general jurisdiction. In Cook County, the civil division of the Circuit Court is divided into two departments, County Department which includes law, chancery, domestic relations, probate, county and juvenile divisions, and Municipal Department which has jurisdiction over all civil law cases where amount claimed is \$50,000 or less. Court-sponsored arbitration now required for civil cases with recovery of less than \$30,000.

Supreme Court has discretionary original jurisdiction in cases relating to revenue, prohibition, mandamus and habeas corpus.

#### Appellate Courts

Appellate Court has jurisdiction of appeals from Circuit Courts with exception of certain classes of cases which are appealed directly to Supreme Court, such as those involving revenue, constitutional questions, habeas corpus, and convictions in capital cases. There are five geographic districts of Appellate Court.

Judgments of Appellate Court are reviewable by Supreme Court only upon certificate of importance by Appellate Court, leave to appeal granted at its discretion by Supreme Court, or as matter of right when constitutional questions arise for first time in Appellate Court.

## LAW

### Abbreviations

- F. Supp. – Federal Supplement.
- F. Supp. 2d – Federal Supplement, Second Series.
- F.2d – Federal Reporter, Second Series.
- F.3d – Federal Reporter, Third Series.
- ILCS – Illinois Compiled Statutes.
- Ill. – Illinois Reports.
- Ill. 2d – Illinois Reports, Second Series.
- Ill. App. – Illinois Appellate Reports.
- Ill. App. 2d – Illinois Appellate Reports, Second Series.

Ill. App. 3d – Illinois Appellate Reports, Third Series.

Ill. Rev. Stat. – Illinois Revised Statutes.

N.E.2d – North Eastern Reporter, Second Series.

### ACCIDENT AND HEALTH INSURANCE

Disability. In order to recover, plaintiff must plead and prove that he became totally disabled as literally defined by policy provisions. *Morgan v. CUNA Mut. Ins.*, 242 Ill. App. 3d 1027, 611 N.E.2d 112 (1993). “Total permanent disability” means inability to follow any gainful occupation, so that grocer who no longer can maintain business as before, but who can earn livelihood in less strenuous manner is barred from recovering benefits. *Lincoln v. Prudential*, 345 Ill. App. 547, 104 N.E.2d 347 (1952). Loss of use of a member is a loss of the member under a policy covering loss of members. *Galindo v. Guarantee Trust Life*, 91 Ill. App. 3d 61, 414 N.E.2d 265 (1980). But where work subsequently done is injurious to health or endangers life, recovery not barred. *Walker v. Equitable*, 123 F. Supp. 306 (E.D. Ill. 1954).

Person who is no longer able to do his accustomed work and such work as he has only been trained to do, and upon which he must depend for living is “totally disabled” within accident and health policy. *Snelson v. Pennsylvania Life*, 65 Ill. App. 2d 416, 212 N.E.2d 873 (1965). Total and permanent disability to be proved by competent medical testimony. Total disability for all purposes, not just employment is not necessary. Thus, ability to drive car short distance does not negate total disability. *Wood v. Prudential*, 271 Ill. App. 103 (1933). Still, ability to perform certain functions can negate coverage. *Aronson v. Mut. Life*, 313 Ill. App. 35, 38 N.E.2d 976 (1942).

Disease induced by accident. Where disease is caused by accidental means, death from that disease is covered by policy insuring against death by accidental means. Such policy has been held to cover death from typhoid fever resulting from drinking water which was accidentally polluted because of defective valve. *Christ v. Pacific Mutual*, 312 Ill. 525, 144 N.E. 161 (1924).



Infection contracted after surgery held not accidental where surgery itself was performed without mishap. *Body v. United Ins.*, 72 Ill. App. 3d 594, 391 N.E.2d 19 (1979). Yet, secondary results of an accident do not break the causal connection, and where accident leads to medical complications such as disease or infection, effects are still the result of the initial injury-causing accident. *Rich v. Principal Life Ins. Co.*, 226 Ill. 2d 359, 376, 875 N.E.2d 1082 (2007). Exclusions for death or disability caused by or during medical treatment itself, however will be enforced. *Id.*

**Excepted Risks.** Burden is on insurer to show that certain risk is excepted from policy. *Adman Products v. Federal Ins.*, 187 Ill. App. 3d 322, 543 N.E.2d 219 (1989).

**Notice and Proof of Loss.** Where policy requires written notice, oral notice to agent insufficient, unless requirement waived; proof of loss condition precedent to recovery on policy. *Feder v. Midland*, 316 Ill. 552, 147 N.E. 468 (1925). Time limitations on when disability must take place relative to accident do not violate public policy and will be enforced. *Rich v. Principal Life Ins. Co.*, 226 Ill. 2d 359, 372, 875 N.E.2d 1082 (2007). Denial of liability by insurer on grounds unrelated to proof of loss constitutes waiver of policy requirement with regard to furnishing proof of loss. *Tibbs v. Great Central*, 57 Ill. App. 3d 866, 373 N.E.2d 492 (1978). Notice of accident does not necessarily constitute proof of claim for uninsured motorist coverage. *Rooney v. State Farm*, 119 Ill. App. 3d 112, 456 N.E.2d 160 (1983).

**Renewal.** Renewal of policy by payment of premiums from year to year constitutes in effect new policy of insurance. *Eipert v. State Farm*, 189 Ill. App. 3d 630, 545 N.E.2d 497 (1989).

### ACCIDENTAL MEANS

Accidental means is synonymous with accidental result, and is defined as something which happens fortuitously without intention or design and which is unexpected, unusual and unforeseen. *Wahls v. Aetna Life*, 122 Ill. App. 3d 309, 461 N.E.2d 466 (1983). Thus, where insured had conspired to burn down a house to collect on insurance, and gasoline which insured was using accidentally ignited, resulting in his death, such death was deemed to be accidental. *Taylor v. John Hancock*, 11 Ill. 2d 227, 142 N.E.2d 5 (1957). The test of foreseeability in interpretation of insurance policies differs from that in tort or criminal law. *Marsh v. Metropolitan Life*, 70 Ill. App. 3d 790, 388 N.E.2d 1121 (1979).

Illinois has adopted a liberal attitude in interpreting accidental death provisions when resolving litigation for recovery of insurance proceeds. *Wahls v. Aetna Life*, 122

Ill. App. 3d 309, 461 N.E.2d 466 (1983). Question of whether insured's death was accidental for jury to determine. *Scholle v. Continental Natl. Am. Group*, 44 Ill. App. 3d 716, 358 N.E.2d 893 (1976). The burden is upon the beneficiary seeking to recover accidental death benefits to prove that cause of death is accidental within terms of the policy. *Robinson v. Metropolitan Life*, 74 Ill. App. 3d 698, 393 N.E.2d 738 (1979). Once plaintiff shows a prima facie case the burden of proving an exception such as suicide is upon the insurer. *O'Mara v. Metropolitan Ins. Co.*, 1989 WL 121289 (N.D. Ill. 1989). Where a policy excludes coverage for death caused while the insured was committing or attempting to commit an assault or felony, defendant insurer has the burden of going forward with evidence that the death resulted from such cause. *Prater v. J.C. Penney Life*, 155 Ill. App. 3d 696, 508 N.E.2d 305 (1987). The fact that an actual cause of death is medically undetermined does not preclude a jury from finding that, for purposes of the insurance contract, the death was accidental. *Wahls v. Aetna Life*, 122 Ill. App. 3d 309, 461 N.E.2d 466 (1983).

When a person voluntarily engages in a fight or initiates an assault, his resulting injury or death is not accidental if it is the natural and probable result of his conduct. However, this general rule is inapplicable where the insured is coming to the aid of another. *McCall v. National Life*, 95 Ill. App. 3d 737, 420 N.E.2d 685 (1981).

Alcoholic's death from consumption of lethal quantity of alcohol found accidental. *Russell v. Metropolitan Life*, 108 Ill. App. 3d 417, 439 N.E.2d 89 (1982).

Where evidence showed that although insured traveled at 100 m.p.h. in his vehicle attempting to round curve in road, his death was held to be accidental. *Rodgers v. Reserve Life*, 8 Ill. App. 2d 542, 132 N.E.2d 692 (1956).

### ADJUSTERS

Person must obtain public insurance adjuster license before engaging in business of adjusting insurance claims or obtaining contract for public adjusting services. This does not apply to person admitted to practice of law in state, licensed agent adjusting loss or damage under policy within his control or to marine surveyor or average adjuster. Fiduciary relationship recognized between insurer and claims adjuster, where insurer reposed trust in adjuster and gave him authority to pay claims. *Federal Ins. v. Parello*, 767 F. Supp. 157 (N.D. Ill. 1990).



## ADVERTISEMENTS

Statute provides penalty for making false statement regarding terms of policy. 215 ILCS §5/149. No private right of action exists for violation of this section. *Anderson v. Humana*, 820 F. Supp. 368 (N.D. Ill. 1993). Failure to volunteer information absent a duty to do so does not constitute fraud. *In re Marriage of Travlos*, 218 Ill. App. 3d 1030, 578 N.E.2d 1267 (1991).

## AGE

See “AUTOMOBILES”; “LIABILITY INSURANCE”; “NEGLIGENCE.”

## AGENTS AND BROKERS

Authority of Agent. Insurance broker differs from insurance agent in that broker represents insurance buying public and is not permanently employed or attached to any one carrier. *Zannini v. Reliance Ins. Co.*, 147 Ill. 2d 437, 590 N.E.2d 457 (1992). Broker is construed as agent for insured and his acts and representations, if within his scope of authority, are binding on insured. *Krause v. Pekin Life Ins. Co.*, 194 Ill. App. 3d 798, 551 N.E.2d 395 (1990). Broker also owes fiduciary duties to the client-insured. *Lake County Grading Co v. Great Lakes Agency*, 226 Ill. App. 3d 697, 589 N.E.2d 1128 (1992). However, statute limits broker’s liability to cases of misappropriation of funds. 735 ILCS §5/2-2201.

Fraud of Agent. Where there is fraud or collusion between applicant and agent, knowledge of facts by agent cannot be considered knowledge of company because if engaged in defrauding his principal, he will not be presumed to have communicated information. *Teshuk v. Metropolitan Life*, 130 Ill. App. 2d 290, 264 N.E.2d 566 (1970). An insurer is responsible for the acts of an agent within the scope of his apparent authority. *Allied American Ins. Co. v. Ayala*, 247 Ill. App. 3d 538, 616 N.E.2d 1349 (1993). Broker cannot be liable under Consumer Fraud Act unless broker has personal knowledge of false or misleading character of information conveyed to insured. 815 ILCS §505/10b (3). Also, broker will not be liable if insurer denies claim for reasons unrelated to broker’s error. *Apollo Label v. Schultz*, 206 Ill. App. 3d 8, 563 N.E.2d 1044 (1990).

Knowledge of Agent. Knowledge of and notice to agent can be imputed to insurer. *Massachusetts Mut. v. Leberis*, 595 F. Supp. 157 (N.D. Ill. 1984); *Mitchell Buick v. National Dealer*, 138 Ill. App. 3d 574, 485 N.E.2d 1281 (1985).

Reformation. Mutual mistake of agent and insured regarding policy terms can be basis for reformation of policy. *Schons v. Monarch Ins. Co.*, 214 Ill. App. 3d 601, 574 N.E.2d 83 (1991). Preliminary contract of in-

surance included coverage for jewelry and agent’s failure to give insurer the schedule of personal property did not void coverage. *Zannini v. Reliance*, 147 Ill. 2d 437, 590 N.E.2d 457 (1992).

Rights and Duties Upon Termination of Employment. After termination of agency relationship, former agent may negotiate for his own interest and may act adversely to his former principal. *Prudential v. Sempetrean*, 171 Ill. App. 3d 810, 525 N.E.2d 1016 (1988). In absence of restrictive covenant in employment contract, improper taking of customer list or trade secret or fraud, former agent may compete in business with former employer and solicit former customers, without breach of any implied obligation so long as there was no demonstrable business activity on his part prior to termination of employment. *Prudential v. Van Matre*, 158 Ill. App. 3d 298, 511 N.E.2d 740 (1987).

Definition. By legislation, “Insurance Agents” and “Insurance Brokers” became collectively referred to as either “Insurance Producers,” “Limited Insurance Representatives” or “Temporary Insurance Producers.” “Insurance Producers” sell, solicit, or negotiate insurance. 215 ILCS §5/500-10. “Limited Insurance Representative,” now known as “Limited Lines Producer,” may only solicit policies sold in connection with transportation by common carriers, industrial life. Accident and health insurance, and insurance issued by municipal companies as defined under Insurance Code. 215 ILCS §5/500-100.

Unless exempt, after application and examination “Insurance Producer” is licensed. 215 ILCS §5/500-45. “Limited Insurance Representative” is also licensed by application. 215 ILCS §5/500-100.

Despite the statutory reclassification, when determining their respective legal duties, the courts still recognize the prior distinction between “insurance agents” and “insurance brokers.” *Economy Fire & Cas. v. Bassett*, 170 Ill. App. 3d 765, 525 N.E.2d 539 (1988). Broker’s duties are to the insured, while agent’s duties are to the insurer.

Two year statute of limitations applies for civil actions brought against insurance producers relating to procurement or renewal of insurance. 735 ILCS §5/13-214.4.

## ARBITRATION

Uniform Arbitration Act in Illinois. 710 ILCS §5/1 *et seq.* Mandatory arbitration program authorized by statute took effect throughout Illinois in January, 1990. It now applies to cases where court determines the damages do not exceed \$30,000, 735 ILCS §5/2 1001A *et seq.*; Ill. Sup. Ct. Rules 86-95. A party who participates in good faith at arbitration may have results vacated by



paying a \$200 fee. Case then proceeds to trial. A party who does not participate in good faith at arbitration will be barred from rejecting the result. *Morales v. Mongolis*, 293 Ill. App. 3d 660, 688 N.E.2d 1196 (1997). However, where failure to appear is due to reasonable extenuating circumstances, party is not barred from rejecting award. *Johnson v. Saenz*, 311 Ill. App. 3d 693, 725 N.E.2d 774 (2000).

Courts in Illinois will enforce a valid arbitration agreement even if some of the parties to litigation did not sign an arbitration agreement. *Board of Mgrs. of Courtyards v. IKO Chicago*, 183 Ill. 2d 66, 697 N.E.2d 727 (1998).

### ATTORNEYS

Rules of Professional Conduct for attorneys promulgated by Illinois Supreme Court, effective August 1, 1990. Attorney discipline regulated by Illinois Supreme Court, through Attorney Registration & Disciplinary Commission.

### AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE."

Age. Drivers may be licensed at eighteen. 625 ILCS §5/6-103. But, for special conditions and lower ages, see §5/6-107. Instruction permit for minors, §5/6-107.1. Instruction permits and temporary licenses for persons 18 years of age or older, §5/6-105.

Agency. Owner of automobile who permits another to operate it is not liable for negligence of latter, unless driver is servant or agent of owner. *Darner v. Colby*, 375 Ill. 558, 31 N.E.2d 950 (1941). Employer will not be held liable for negligent driving of employee unless employee was acting within scope of his employment. *Hengels v. Gilski*, 127 Ill. App. 3d 894, 469 N.E.2d 708 (1984).

Mandatory Insurance. Illinois motorists must carry minimum amounts of liability insurance for bodily injury or death and destruction of property. Violators will be fined. Motorists must carry proof of insurance that must be displayed at request of police officer. 625 ILCS §5/7-6d; 625 ILCS §5/7-602.

Family Purpose Doctrine. "Family purpose" doctrine is not in force in Illinois. *White v. Seitz*, 342 Ill. 266, 174 N.E. 371 (1931).

Guest Cases. Wilful and wanton conduct of driver required to establish liability to non-paying guests. 625 ILCS §5/10-201.

Intoxication. See 625 ILCS §5/11-500.

Imputed Negligence/Joint Enterprise. Where driver of automobile and passenger are engaged in joint enterprise, negligence of driver imputable to passenger. *Grubb v. Illinois*, 366 Ill. 330, 8 N.E.2d 934 (1937). No imputation of negligence of driver-husband to passenger-wife even in joint enterprise. *Smith v. Bishop*, 32 Ill. 2d 380, 205 N.E.2d 461 (1965). Passenger has duty to take action to preserve own safety when driver is known to be incompetent or unsafe. *Moreno v. Mercier*, 275 Ill. App. 3d 884, 656 N.E.2d 1114 (1995).

Last Clear Chance. Doctrine abolished in Illinois. See "NEGLIGENCE."

No-Fault. No-fault insurance does not exist in Illinois.

Ownership/Title. Certificate of title required with limited exceptions. 625 ILCS §5/3-101, 102. Certificate is prima facie evidence of facts contained on it. *Id.* 5/3-107 (c). Offenses involving certificates punishable as misdemeanors. *Id.* 5/3-703.

Seat Belts. Each driver and front seat passenger of motor vehicle operated on street or highway in this state shall wear properly adjusted and fastened safety seat belt. There are very few exceptions to this requirement. 625 ILCS §5/12-603.1. Evidence of failure to wear seat belt is not admissible in a civil action with respect to either liability or damages. *Clarkson v. Wright*, 108 Ill. 2d 129, 483 N.E.2d 268 (1985). However, such evidence is admissible to rebut a products liability, defective design allegation to show overall design was reasonable. *DePaepe v. General Motors*, 33 F.3d 737 (7th Cir. 1994); or to show contributory negligence and assumption of risk. *Walsh v. Emergency One*, 26 F.3d 1417 (7th Cir. 1994).

Service of Process on Non-Resident Motorists. Service of process on non-resident motorist may be made by serving Secretary of State, and mailing to defendant by registered mail notice of service and copy of process. 625 ILCS §5/10-301. Strict compliance with statute required. Service of process also may be had on any non-resident who commits tortious act within State. 735 ILCS §5/2-209.

Speed Limit. Statute prohibits driving at speed greater than 1) is reasonable and proper, or 2) maximum speed limits except where otherwise prescribed by regulation or ordinance; highway on Interstate system - outside urban district of over 50,000 people, 65 mph, for class 1 vehicles, pursuant to Federal statutes, otherwise 55 mph; urban district: 30 mph; alleys: 15 mph. 625 ILCS §5/11-601. No person shall drive at such slow speed as to impede reasonable movement of traffic, except when reduced speed is necessary for safe operation of vehicle. 625 ILCS §5/11-606. Emergency vehicles are



excepted from speed limits but they must exercise due regard for safety of others. 625 ILCS §5/11-205.

**Theft—Liability of Owner.** Leaving car without removing ignition key makes owner liable for damages proximately caused by theft. *Ney v. Yellow Cab*, 2 Ill. 2d 74, 117 N.E.2d 74 (1954). However, owner not liable for damage caused by thief if car was parked on private property. *Lorang v. Heinz*, 108 Ill. App. 2d 451, 248 N.E.2d 785 (1969).

### AVIATION

Due to statutory repeal, engaging in aviation (other than riding as fare paying passenger on regularly scheduled route of commercial air line) is no longer recognized excepted risk.

Illinois Aeronautics Act governs. Proceedings initiated with Illinois Dept. of Transportation, Div. of Aeronautics, 620 ILCS §5/55.

### BROKERS

See “AGENTS AND BROKERS.”

### BURGLARY INSURANCE

**Exterior.** Insurance coverage denied to proprietor of service station who sought to recover losses sustained after burglary. *Gray v. Great Central Ins.*, 4 Ill. App. 3d 1084, 283 N.E.2d 261 (1972). Vandals gained access to store by punching hole through wall separating restroom and storage area. Issue was the interpretation of the word “exterior” in policy which defined “burglary” as “a felonious extraction of insured property from within the business premises by a person making felonious entry therein by actual force and violence as evidenced by visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the business premises at the place of such entry.” *Id.* Damage to only inside walls was not “exterior” of the station and rightfully denied. *Id.*

**Unattended Vehicle.** Insurance coverage denied to corporation engaged in buying, selling and transporting jewelry. *Zurich Midwest, Inc. v. St. Paul*, 159 Ill. App. 3d 961, 513 N.E.2d 59 (1987). Salesman loaded suitcases of jewelry into locked trunk of car and left car unattended and jewelry was stolen. Issue was interpretation of the phrase “unattended vehicle” in exclusion. Referring to Dictionary, court held car was unattended as it lacked a “guard, escort, caretaker, or other watcher.” *Id.*

**Presence and Cognizant.** Coverage denied to grocery store for theft. *Cummings Foods v. Great Central Ins.*, 108 Ill. App. 3d 250, 439 N.E.2d 37 (1982). Store manager became suspicious of customers suspected to be shoplifters. Manager saw perpetrators run to parking

lot. Issue was definition of “robbery.” Court held that policy requires an unobstructed physical presence at the place of the overt felony. *Grimes v. Maryland Cas.*, 300 Ill. App. 62, 20 N.E.2d 982 (1939).

**Material Misrepresentation.** Coverage denied to art collector for items stolen in burglary. *Stone v. Lloyds*, 81 Ill. App. 3d 333, 401 N.E.2d 622 (1980). Plaintiff art collector purchased art objects for \$19,800.00 and applied for insurance. Application asked, “Is there any other material fact, within your knowledge, regarding this proposal of insurance, which should be submitted for consideration.” Plaintiff answered “no” despite the fact that the art collection was appraised at a value of \$275,800.00. The misrepresentation affected the materiality of the risk assumed and provided grounds for rescission. *Id.*

### CANCELLATION

**Cancellation under Illinois law** defined as unilateral termination of policy by insurer before expiration of policy term. *Olympic Federal v. American Interinsurance Exchange*, 203 Ill. App. 3d 942, 561 N.E.2d 226 (1990).

**Accident and Health Insurance.** Must include standard provision on face of policy for cancellation by insurer at any time by 30 days written notice and return of unearned premium, and by insured when policy has been continued beyond its original term by written notice with return of unearned premium based upon short-rate table, and without prejudice to claims originating prior thereto. 215 ILCS §5/357.22. As a contract, policy only cancelled by mutual consent or per terms. *Copley v. Pekin*, 111 Ill. 2d 76, 488 N.E.2d 1004 (1986). In absence of policy provision, or where provision is ambiguous, return of unearned premium is condition precedent to effective cancellation. Cancellation can only be effective as of date when premiums are returned. *Barr v. Country*, 345 Ill. App. 199, 102 N.E.2d 656 (1952). Material misrepresentation of insured’s health on application may void policy. *Johnson-Maday v. Prudential Ins. Co.*, 276 Ill. App. 3d 371, 657 N.E.2d 1114 (1995).

**Life Insurance.** 6 months after insured fails to pay premium, insurer has no duty to notify insured of lapse prior to cancellation. *First Nat’l Bank v. Mutual Trust*, 122 Ill. 2d 116, 522 N.E.2d 70 (1988). Life insurance insured cannot compel cancellation of policy even though his ex-wife/beneficiary had attempted to murder him due to fact that other beneficiaries would lose interests. *Meehan v. Transamerica Occidental*, 148 Ill. App. 3d 477, 499 N.E.2d 602 (1986).

### CHATTEL MORTGAGE

See “FIRE INSURANCE.”

## CONSTRUCTION OF POLICY

Insurance policy will be interpreted in accordance with the rules of contract construction. *Smagala v. Owen*, 307 Ill. App. 3d 213, 717 N.E.2d 491 (1999). Policy is not to be interpreted in a factual vacuum. *Glidden v. Farmers*, 57 Ill. 2d 330, 312 N.E.2d 247 (1974). Must be construed according to sense and meaning of terms which parties have employed, and if free from ambiguity, terms are to be understood in their plain, ordinary, and popular sense. *Ansvar v. Hallberg*, 209 Ill. App. 3d 206, 568 N.E. 2d 77 (1991). Provisions will be given effect if clear. *Pestka v. Safeway*, 11 Ill. App. 3d 837, 298 N.E.2d 270 (1973). Policy must be read as a whole with consideration for type of insurance purchased, nature of risks involved, and overall purpose of the contract. *State Farm v. Villicana*, 181 Ill. 2d 436, 692 N.E.2d 1196 (1998). Primary objective is to ascertain and give effect to the intentions of the parties. *American States v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997). Courts cannot construe so as to make a new contract for the parties. *Polzin v. Phoenix*, 5 Ill. App. 3d 84, 283 N.E.2d 324 (1972).

**Ambiguity of Terms.** Policy provisions are “ambiguous” only if they are subject to more than one reasonable construction. *Indiana Ins. v. Liaskos*, 297 Ill. App. 3d 569, 697 N.E.2d 398 (1998). In determining if ambiguity exists, court should consider subject matter of the contract, facts surrounding execution, situation of the parties, and predominant purpose of the contract. *Illinois Central v. Continental Cas.*, 132 Ill. App. 3d 310, 476 N.E.2d 1266 (1985). Policy need not be model of clarity and is not ambiguous merely because parties disagree on its meaning. *Rich v. Principal Life Ins. Co.*, 226 Ill. 2d 359, 372, 875 N.E.2d 1082 (2007). Term which initially appears unambiguous might not be when viewed in context of factual setting under which policy was issued. *NICOR v. Assoc. Elec. and Gas Ins.*, 223 Ill. 2d 407, 860 N.E.2d 280 (2006). Provision is not ambiguous simply because term is not defined or because parties suggest creative meanings. *Lapham-Hickey v. Protection Mut.*, 166 Ill. 2d 520, 655 N.E.2d 842 (1995). Court will not search for ambiguity where none exists. *Crum and Forster v. Resolution Trust*, 156 Ill. 2d 384, 620 N.E.2d 1073 (1993). If provisions are clear and unambiguous, there is no need for construction, and the provisions will be applied as written. Further, provision may be unambiguous because it has acquired an established legal meaning. *U.S. Fire Ins. v. Schnackenberg*, 88 Ill. 2d 1, 429 N.E.2d 1203 (1981). Rules of punctuation and grammar may be consulted to determine meaning of provisions, including placement or absence of commas. *Rich v. Principal Life Ins. Co.*, 226 Ill. 2d 359, 374, 875 N.E.2d 1082 (2007).

If terms are susceptible to more than one reasonable meaning, they are considered ambiguous, and will be construed strictly against the drafter of the provisions. *American States v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997). Generally, contract should be construed liberally in favor of the insured and strictly against the insurer. *Grevas v. U.S. Fidelity and Guar.*, 152 Ill. 2d 407, 604 N.E.2d 942 (1992). Especially with respect to an exclusion, ambiguities will be rigorously construed in favor of coverage, *Elson v. State Farm*, 295 Ill. App. 3d 1, 691 N.E.2d 807 (1998), and the exclusion will only be applied where the terms are clear, definite, and explicit. *O'Rourke v. Access Health*, 282 Ill. App. 3d 394, 668 N.E.2d 214 (1996).

**Conditional Receipt of Application.** Where applicant complied with both conditional premium receipt conditions, payment of premium and insurability, the receipt provides temporary insurance, as a matter of law. *Goetze v. Franklin Life Ins.*, 26 Ill. App. 3d 104, 324 N.E.2d 437 (1975). Application and receipt of premium, which clearly make coverage dependent upon either approval of application under company's rules at the time of payment of initial premium, will be upheld, and unless condition precedent is fulfilled, no interim coverage is in effect. *Wallace v. Prudential Ins.*, 12 Ill. App. 3d 623, 299 N.E.2d 344 (1973). This applies to death benefits. *Fields v. Franklin Life Ins.*, 115 Ill. App. 3d 954, 451 N.E.2d 930 (1983).

**Inconsistent Policy Terms and Endorsements.** If an insurance contract contains inconsistent or conflicting clauses, the clause which affords greater or more inclusive benefit for insured will govern. *Standard Mut. Ins. v. General Cas.*, 171 Ill. App. 3d 758, 525 N.E.2d 965 (1988). When portions of an insurance policy conflict and the conflict can only be resolved by adopting a construction which would make one portion highly misleading and, in addition, cause the policy to fail in its essential purpose, then terms have been held ambiguous. *Dinges v. Lawyers Title*, 106 Ill. App. 3d 188, 435 N.E.2d 944 (1982).

**Oral Binders.** An insurance binder is in the nature of temporary insurance, and insurance coverage by its use is effectuated immediately. *Zannini v. Reliance Ins.*, 147 Ill. 2d 437, 590 N.E.2d 457 (1992). Binder is an instrument providing temporary insurance from the time of application to until policy is issued or refused. *Maxton v. Garegnani*, 255 Ill. App. 3d 291, 627 N.E.2d 723 (1994). Agreement to insure may be oral and essential elements can be established by implication if not explicitly stated. *Devers v. Prudential*, 86 Ill. App. 3d 542, 408 N.E.2d 462 (1980). When binder does not specify terms of the policy, it incorporates all of the terms of the policy for which application through the binder is made. *Max-*



*ton v. Garegnani*, 255 Ill. App. 3d 291, 627 N.E.2d 723 (1994). So long as the parties manifest common understanding of the provisions, a meeting of the minds is presumed, and contract is considered complete upon the insured's agreement to pay a premium, though the policy has not been issued. *Devers v. Prudential*, 86 Ill. App. 3d 542, 408 N.E.2d 462 (1980).

Where insurer, by issuing an oral binder, promises to provide auto coverage, and insured promises to pay for that coverage, mutual promises constitute sufficient consideration for oral contract, and return of application was not needed for consideration. *Anderson v. Vrahnos*, 149 Ill. App. 3d 251, 500 N.E.2d 110 (1986).

## CONTRIBUTION

See "FIRE INSURANCE," "LIABILITY INSURANCE."

In *Skinner v. Reed-Prentice*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977), Illinois Supreme Court made doctrine of contribution applicable to tort causes of action arising on and after March 1, 1978. 740 ILCS §100/1 *et seq.* The Contribution Act applies to all tort causes of action arising on or after March 1, 1978, and provides for right of contribution when two or more persons are subject to liability in tort arising out of same injury to person or property, or same wrongful death, even though judgment has not been entered against any or all of them. 740 ILCS §100/2(a). The Act also applies to pre-litigation settlements made in good faith. *In re Guardianship of Babb*, 162 Ill. 2d 153, 642 N.E.2d 1195 (1994). Right of contribution exists only in favor of tortfeasor who has paid more than his pro rata share of common liability, and his total recovery is limited to amount paid by him in excess of his pro rata share. *Midwest v. Roderick*, 132 Ill. App. 3d 463, 476 N.E.2d 1326 (1985). Basis for liability among tortfeasors is the same for contribution. *J.I. Case v. McCartin*, 118 Ill. 2d 447, 516 N.E.2d 260 (1987). However, a party subject to liability for breach of contract cannot obtain contribution from another party. *Guerino v. Depot Place Partnership*, 191 Ill. 2d 314, 730 N.E.2d 1094 (2000).

Sweeping tort reform legislation adopted in 1995 was stricken down as unconstitutional. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997). This ruling restored pre-1995 law on contribution.

Generally, a party seeking contribution must assert claim in the underlying action. 740 ILCS §100/5. Two year personal injury statute of limitations governs actions for contribution. *Caballero v. Rockford Punch Press*, 244 Ill. App. 3d 333, 614 N.E.2d 362 (1993).

Good faith settlements discharge settling tortfeasors from all contribution liability. *Alvarez v. Fred Hintze*

*Constr.*, 247 Ill. App. 3d 811, 617 N.E.2d 821 (1993). A settling tortfeasor's right to contribution depends only on his elimination of another tortfeasor's tort liability. *Hall v. Archer-Daniels-Midland*, 122 Ill. 2d 448, 524 N.E.2d 586 (1988).

Immunity which one tortfeasor may use as defense in action by plaintiff is not a bar to contribution action by joint tortfeasor. *Wirth v. Highland Park*, 102 Ill. App. 3d 1074, 430 N.E.2d 236 (1981). *But see, Kim v. Kim*, 196 Ill. App. 3d 1095, 554 N.E.2d 621 (1990). Thus, tortfeasor may pursue contribution from spouse in third party action, *Wirth*, or from parent or child, *Larson v. Buschkamp*, 105 Ill. App. 3d 965, 435 N.E.2d 221 (1982), or from employer, *Doyle v. Rhodes*, 101 Ill. 2d 1, 461 N.E.2d 382 (1984), regardless of statute providing immunity against suit in direct action. *Higginbottom v. Pillsbury Co.*, 232 Ill. App. 3d 240, 596 N.E.2d 843 (1992). However, employer's liability restricted to amount of its worker's compensation payments to plaintiff. *Kotecki v. Cyclops Welding Co.*, 146 Ill. 2d 155, 585 N.E.2d 1023 (1991). 740 ILCS §100/3.5. This rule includes the present cash value of future payments. *Pavelich v. All American Homes*, 239 Ill. App. 3d 173, 606 N.E.2d 859 (1992).

Elements of contribution and indemnification are different. *Heinrich v. Peabody*, 99 Ill. 2d 344, 459 N.E.2d 935 (1984). Contribution is a statutory creation providing for apportionment of damages while indemnity is a common law doctrine providing for complete shifting of liability.

Finding of wilful and wanton misconduct bars defendant's right to contribution from other culpable parties. *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill. 2d 429, 593 N.E.2d 522 (1992).

## DAMAGES

Appellate Review. Excessive verdicts. Courts generally will not disturb a jury's determination on the issue of damages unless there is an error of law, or the amount is so excessive as to show prejudice or passion. *Nancy's House of Pizza v. Cirrincione*, 144 Ill. App. 3d 934, 494 N.E.2d 795 (1986). The test for determining whether a verdict is excessive is whether the total amount is so large as to shock or offend judicial conscience. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997). Courts often consider factors such as pain and suffering, and the potential for future problems. *Barry v. Owens-Corning Fiberglas Corp.*, 282 Ill. App. 3d 199, 668 N.E.2d 8 (1996) (\$12 million award upheld).

Arbitration Awards. Collateral Estoppel. An award granted pursuant to arbitration, in which the arbitrators have been given full authority to decide a controversy, is

a final adjudication of the matter. *Kimball v. Walker*, 30 Ill. 482 (1863). The parties to arbitration would thus be collaterally estopped from bringing an action in a court of law involving the same matter unless there was apparent fraud or mistake, or the arbitrators did not have the authority to render a binding decision.

**Comparative Negligence.** In Illinois, courts and juries assess the relative degree of liability of each party, and apportion damages among all the parties accordingly. Illinois follows a “modified” form of comparative negligence. 735 ILCS §5/2-1116. If a plaintiff is more than 50% negligent, his action is barred. If a plaintiff is less than 50% negligent, his recovery will be reduced by the percentage of fault attributable to him. *Id.* Illinois follows joint and several liability, except that party found less than 25% at fault has joint and several liability only for plaintiff’s past and future medical and medically related expenses and severally liable for all other damages. 735 ILCS §5/2-1117.

**Indemnification** involves a shifting of some or all the liability for damages to another party. Implied indemnification applies when a defendant who is without fault is forced to pay for the wrongful conduct of another because of a relationship between the parties. The doctrine of implied indemnity will shift the responsibility for the loss to the person who actually caused the loss. *Van Jacobs v. Parikh*, 97 Ill. App. 3d 610, 422 N.E.2d 979 (1<sup>st</sup> Dist. 1981). Contracts to indemnify one for his conduct, with the exception of insurance agreements, are generally disfavored by the Illinois courts and legislature. 740 ILCS §35/1-3. In the insurance law context, the insurer has contracted to indemnify the insured, and therefore the appropriate amount of damages covered under the policy of insurance is shifted to the insurer.

**Psychic Injuries-Mental Pain and Suffering.** Damages for mental pain and suffering may be a proper element of damages, as long as these psychic injuries are connected with a physical injury. *Martino v. Family Service*, 112 Ill. App. 3d 593, 445 N.E.2d 6 (1982). Generally, mental pain and suffering alone is insufficient to allow for the recovery of damages. However, under the ‘zone of danger’ doctrine, a person who is in a zone of physical danger, and because of this has a fear for their own safety, has a right of action for physical injury relating to emotional distress. Illinois courts have also ruled that there may be damages awarded for mental pain and distress without physical contact or injury to the person. *Allen v. Otis*, 206 Ill. App. 3d 173, 563 N.E.2d 826, *appeal denied*, 141 Ill. 2d 535, 580 N.E.2d 107 (1990). In the context of mental pain and suffering, many standard insurance agreements specifically limit recovery to ‘physical injury,’ and thus exclude these types of injuries. Liability for intentional, rather than negligent, in-

fliction of emotional distress is limited to instances of outrageous conduct that exceeds the bounds of decency. *Doe v. Calumet City*, 161 Ill. 2d 374, 641 N.E.2d 498 (1994).

**Punitive Damages.** Punitive damages are awarded to punish the wrongdoer and to deter future conduct. Generally such awards are only appropriate when the conduct the court is seeking to punish is found to be wanton, willful, violent, or reckless. Punitive damages are generally not available for intentional acts committed by mistake, or in good faith. *Wiemer v. Havana Nat’l*, 67 Ill App. 3d 882, 385 N.E.2d 340 (1978). Punitive damages are generally not insurable because of the policy’s “intentional acts” exclusion.

**Collateral Source Rule.** Under the collateral source rule, damages received by an injured party from a source independent from the actual tortfeasor will not diminish the damages recoverable from the tortfeasor. *Wilson v. Hoffman*, 131 Ill. 2d 308, 546 N.E.2d 524 (1989). However, in cases where subrogation is appropriate through an agreement between parties, the collateral source rule does not apply.

**Statutory Caps on Awards.** Illinois does not have any caps on damages awards. Legislation enacted in March, 1995 imposed a \$500,000 cap on plaintiff’s right to recover non-economic damages in any type of personal injury case. 735 ILCS §5/2-1115.1. This legislation was stricken down as unconstitutional. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997).

## DEATH

See Law Digest Tables.

**Abatement and Survival of Actions.** In addition to actions which survive by common law, following survive: replevin; actions to recover damages for injury to person (except libel and slander); actions to recover damages for injury to real or personal property or for detention or conversion of personal property; actions against officers or deputies for misfeasance, malfeasance or nonfeasance; actions for fraud or deceit; and Dram Shop actions. 755 ILCS §5/27-6.

**Action for Wrongful Death.** 740 ILCS §180/1, *et seq.* creates right of action for pecuniary injuries in name of personal representative of deceased for exclusive benefit of surviving spouse and next of kin. Parents are entitled to presumption of pecuniary injury in loss of minor child’s society, *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984), and adult child’s society, *Ballweg v. Springfield*, 114 Ill. 2d 107, 499 N.E.2d 1373 (1986). Recovery now allowed for loss of society of viable fetus. *Riley v. Koneru*, 228 Ill. App. 3d 883, 593 N.E.2d 788

(1992). Adult siblings or collateral heirs may recover for loss of society, but only when they qualify as next of kin. *Sheahan v. N.E. Illinois Reg. Comm.*, 146 Ill. App. 3d 116, 496 N.E.2d 1179 (1986). Recovery is allowed for pain and suffering prior to death under survival action. *Murphy v. Martin Oil*, 56 Ill. 2d 423, 308 N.E.2d 583 (1974), and loss of consortium. *Elliot v. Willis*, 92 Ill. 2d 530, 442 N.E.2d 163 (1982). However, no recovery for pain and suffering under Wrongful Death Act. *Murphy v. Martin Oil*, *supra*. No recovery is generally given for prejudgment interest, *Wilson v. Cherry*, 244 Ill. App. 3d 632, 612 N.E.2d 953 (1993). *But see In re Air Crash Disaster Near Chicago, Illinois on May 25*, 480 F. Supp. 1280 (D.C. Cir. 1979), *aff'd*, 644 F.2d 633 (7th Cir. 1981). Punitive damages are also not allowed. *Mattyasovszky v. West Towns Bus Company*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975).

Action must be commenced within two years after death subject to Discovery Rule's tolling provisions. See "LIMITATION OF TIME."

Illinois Supreme Court's blanket rejection of 1995 tort reform legislation restores validity of case law which held that contributory negligence of one beneficiary bars that beneficiary's claim, but does not bar cause of action as to others. *Haist v. Wu*, 235 Ill. App. 3d 799, 601 N.E.3d 927 (1992). Presumption of death arises where unexplained absence of seven years, persons most likely have heard nothing, and diligent search has been conducted. *Morrison's Estate v. Rosewell*, 92 Ill. 2d 207, 441 N.E.2d 68 (1982). There is no presumption as to survivorship in cases of multiple deaths by common disaster. *Modern v. Parido*, 335 Ill. 239, 167 N.E. 52 (1929).

### DISABILITY

See "ACCIDENT AND HEALTH INSURANCE, Disability."

In order to show total and permanent disability it is necessary for plaintiff to aver and prove that he is wholly disabled by bodily injury or disease, and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation. *Harris v. Metropolitan*, 325 Ill. App. 182, 59 N.E.2d 339 (1945). In case of laborer, total disability where insured is no longer able to do his accustomed task. *Snelson v. Pennsylvania*, 65 Ill. App. 2d 416, 212 N.E.2d 873 (1965).

### FINANCIAL RESPONSIBILITY ACT

See Law Digest Tables.

### FIRE INSURANCE

Arson. Vendor under land installment contract can recover under policy purchased by buyer for vendor even if buyer's coverage is denied due to alleged arson. *West Bend v. Salemi*, 158 Ill. App. 3d 241, 511 N.E.2d 785 (1987).

Assignment. Contract of fire insurance is personal contract with insured which does not run with insured's property unless expressly so stipulated, and in absence of assignment of policy with insurer's consent purchaser of interest acquires no privity with insurer. Assignment and consent constitutes new and independent contract between insurer and assignee. *Third Establishment v. 1931 North Park Apts.*, 93 Ill. App. 3d 234, 417 N.E.2d 167 (1981). But if no restriction in policy or its mortgage clause, mortgagee may, without consent of insurer, transfer mortgagee's rights under policy along with assignment of mortgage. *Reinhardt v. Security*, 312 Ill. App. 1, 38 N.E.2d 310 (1941). Assignment of policy after loss but before proof of loss has been made is valid. *United States v. Home Ins. Co. of New York*, 142 F. Supp. 478 (D.C. Ill 1956).

Cancellation. Instructions given by insurer to its agent to cancel policy, not brought to knowledge of insured, do not affect liability of insurer. However, positive written notification from insurer to insured can effect binding cancellation. *Conley v. Ratayczak*, 92 Ill. App. 3d 29, 414 N.E.2d 500 (1980). 215 ILCS §5/143.11-5/143.23a sets forth specific cancellation requirements.

Contributions. Loss should be divided pro-rata among co-insurers where there is overlapping coverage and where parties have not agreed to contrary. Clear and unambiguous provision that insurer is not liable while insured has other insurance on property, will be given effect and will preclude operation of pro-rata liability clause. *Songer v. State Farm*, 91 Ill. App. 3d 248, 414 N.E.2d 768 (1980). Pro-rating policies must cover identical interests. *Hartford Fire v. Peterson*, 209 Ill.112, 70 N.E. 757 (1904). Contribution clauses will not be so construed as to diminish protection of assured. *Kiefer v. Alliance*, 266 Ill. App. 362 (1932). Policy which does not list individual as named insured will constitute "other insurance" only where policy covers same interests and property in favor of same person. *Defoor v. Northbrook Excess*, 128 Ill. App. 3d 929, 471 N.E.2d 938 (1984).

Explosion. Explosion produced by ignition of match in room filled with illuminating gas does not render insurer liable, where policy excludes loss caused by "explosion of any kind, unless fire ensues." *Pre-Cast*

*Concrete Products v. Home Ins. Co.*, 417 F.2d 1323 (7<sup>th</sup> Cir. 1969).

Ownership. Neither making of executory contract for delivery of deed nor occupancy of premises by vendee constitutes change of "interest or possession." *International Ins. Co. v. Melrose Park Nat'l Bank*, 145 Ill. App. 3d 286, 495 N.E.2d 1197 (1986).

Provision in policy stating that institution of foreclosure action against property will render policy void is valid and will be given effect. *Twin City Fire Ins. Co. v. Old World Trading Co.*, 266 Ill. App. 3d 1, 639 N.E.2d 584 (1993).

Proof of Loss. Provisions in fire policy requiring insured to furnish proof of loss within specified time are valid. *Second New Haven Bank v. Kobrite Inc.*, 86 Ill. App. 3d 832, 408 N.E.2d 369 (1980). Notice within reasonable time is question of fact. *U.S. Fidelity v. Maren Eng. Corp.*, 82 Ill. App. 3d 894, 403 N.E.2d 508 (1980). Whether or not agent has authority to waive requirement of proof of loss depends upon extent of his apparent authority. Mere soliciting agent does not necessarily have such power. *Spence v. Washington Nat'l Ins. Co.*, 320 Ill. App. 149, 50 N.E.2d 128 (1943). However, proofs of loss may be waived by one who has authority to solicit, deliver policies and collect premiums. *Reinhardt v. Security Ins. Co. of New Haven, CT*, 321 Ill. App. 324, 53 N.E.2d 13 (1943). Strong proof is not required to establish waiver. *Mathis v. Lumbermen's Mut. Cas. Ins. Co.*, 354 Ill. App. 3d 854, 857, 822 N.E.2d 543 (2004). Necessity of proof of loss is waived by denial of liability and may be waived by investigation by adjusters if accompanied by negotiation looking toward settlement. *Tibbs v. Great Central Ins. Co.*, 57 Ill. App. 3d 866, 373 N.E.2d 492 (1978). Insured has duty to provide documentation and to supplement proof of loss if requested by insurer and required by terms of contract. Sole act of filing proper proof of loss statement does not necessarily entitle insured to recovery. *Horton v. Allstate Ins. Co.*, 125 Ill. App. 3d 1034, 1037, 467 N.E.2d 284 (1984). Insured's knowing refusal to disclose can preclude recovery, but technical or unimportant omissions of information will not. Forfeiture of recovery based on events subsequent to loss are disfavored. Insurer is obligated to inform insured of deficiencies and give opportunity to cure. Absent prejudice or other equitable reason, recovery is still available even where insured completes disclosure of information during suit on fire policy. *Piro v. Pekin Ins.*, 162 Ill. App. 3d 225, 514 N.E.2d 1231 (1987).

Time Limitation for Bringing Suit. Policy requirement that suit on policy must be commenced within certain time after loss is enforceable. Time bar may be waived by insurer, however, through conduct such as

failing to comply with insurance regulation requirements as to information and notices to be provided to the insured. *Mathis v. Lumbermen's Mut. Cas. Ins. Co.*, 354 Ill. App. 3d 854, 822 N.E.2d 543 (2004).

Valuation. Even if policy limits valuation to insured's interest, contract sale price will not limit recovery if parties abandon contract under Uniform Vendor and Purchaser Risk Act, 765 ILCS §65/1. *International Ins. Co. v. Melrose Park*, 145 Ill. App. 3d 286, 495 N.E.2d 1197 (1986).

## FRAUD

See "AGENTS AND BROKERS"; "REPRESENTATIONS AND WARRANTIES."

## GUEST CASES

See "AUTOMOBILES."

## HOSPITALS

Liability. Hospital is under duty to conform to legal standard of reasonable conduct within medical community in light of apparent risk as determined by expert testimony. *First National v. Porter*, 114 Ill. App. 3d 1, 448 N.E.2d 256 (1983). But expert testimony not required where hospital's liability does not involve a matter of medical judgment. *Decker v. St. Mary's Hosp.*, 249 Ill. App. 3d 802, 619 N.E. 3d 537 (1993). This duty of care to patient is independent of duty from physician to patient, absent principal-agent relationship. *Darling v. Charleston Comm. Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965). A hospital can be held liable for acts of its apparent agents, including independently employed physicians. *Gilbert v. Sycamore Mem. Hosp.*, 156 Ill. 2d 511, 622 N.E.2d 788 (1993). Hospital does have duty to know qualifications and standards for its staff physicians. *Pickle v. Curns*, 106 Ill. App. 3d 734, 435 N.E.2d 877 (1982). Strict liability actions against hospital for sale or use of "blood products" have been abolished by statute. 745 ILCS §40/2. Res ipsa loquitur may attach to patients rendered unconscious for surgery. *Kolakowski v. Voris*, 83 Ill. 2d 388, 415 N.E.2d 397 (1980). Hospitals are included in Medical Malpractice Reform Act legislation. 735 ILCS §§5/2-109, 2-622, 2-1010, 2-1109, 2-1701, 8-2001, 8-2501. Institutional negligence also applies to HMO's. *Jones v. Chicago HMO, Ltd. of Illinois*, 191 Ill. 2d 278, 730 N.E.2d 1119 (2000).

Liens. Nonprofit hospital given lien upon judgment or settlement, not to exceed one-third thereof, for its reasonable charges for services rendered to injured person provided notice of lien is given to injured person and defendant. Hospital claiming lien must permit examination of its records upon request of any party to action



pending, and refusal to permit examination renders lien void. 770 ILCS §35/1. *In re Enloe's Estate*, 109 Ill. App. 3d 1089, 441 N.E.2d 868 (1982).

**Management.** While staff decisions of private hospital are generally not subject to judicial review, bylaws must be followed. *Barrows v. Northwestern Mem. Hosp.*, 123 Ill. 2d 49, 525 N.E.2d 50 (1988). Cause of action exists for disciplinary action taken against employee or staff physician in violation of bylaws. *Barrow, supra*.

**Regulation.** State's police power includes imposing conditions on licensed hospitals reasonably designed to promote public health and safety. *People v. Adams*, 149 Ill. 2d 331, 597 N.E.2d 574 (1992).

**X-rays.** Hospital required by statute to retain x-rays for five years. 210 ILCS §90/1. Loss of patient's x-rays may support a civil cause of action by patient. *Rodgers v. St. Mary's Hosp.*, 149 Ill. 2d 302, 597 N.E.2d 616 (1992).

## HUSBAND AND WIFE

See Law Digest Tables.

**Community Property Rights.** System of community property does not exist in Illinois.

**Tort Liability.** Interspousal tort immunity was eliminated by statute effective January 1, 1988. A husband or wife may now sue the other for any tort committed during marriage. 750 ILCS §65/1. Interspousal tort immunity does not preclude third party action for contribution between spouse and third party. *Wirth v. City of Highland Park*, 102 Ill. App. 3d 1074, 430 N.E.2d 236 (1981).

Spouse's recovery in loss of consortium case is now subject to reduction by comparative negligence of physically injured spouse. *Blagg v. Illinois FWD Truck*, 143 Ill. 2d 188, 572 N.E.2d 920 (1991).

## INDEMNIFICATION AGREEMENTS

With respect to contracts or agreements, either public or private, entered into after September 23, 1971, for construction, alteration, repair or maintenance of building, structure, highway, bridge, viaducts or other work dealing with construction, or for any moving demolition, or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable. 740 ILCS §35/1. This rule does not apply to construction bonds or insurance contracts or agreements. *Bosie v. Branigor Org.*, 154 Ill. App. 3d 611, 506 N.E.2d 996 (1987). It also does not apply to promises or contracts to obtain insurance covering a third party. Accordingly, a

claim may be brought seeking indemnity based on a theory of breach of contract to procure "additional insured" coverage. *Jokich v. Union Oil of Cal.*, 214 Ill. App. 3d 906, 574 N.E.2d 214 (1991).

By contract, a party can waive a limitation on its liability or its right to assert a defense under the exclusive remedy provision of Workers' Compensation Act. *Liccardi v. Stolt Terminal*, 178 Ill. 2d 540, 687 N.E.2d 968 (1997).

## INFANTS

See "AUTOMOBILES, Age"; "LIABILITY INSURANCE"; "NEGLIGENCE, Age."

**Parental Responsibility:** Parent or legal guardian of unemancipated minor (ages 11 through 18) who resides with such parent or legal guardian is liable for actual damages for wilful and malicious acts of such minor which cause injury to person or property. No recovery under this Act may exceed \$2,500 actual damages for each person or legal entity, for each occurrence, in addition to taxable court costs. Only damages recoverable in personal injury action under this Act are medical, dental and hospital expenses. Act does not change other basis for parental liability. 740 ILCS §115/1, *et seq.*

## INLAND MARINE INSURANCE

**Definition.** Inland marine insurance provides business risks coverage for (1) property damage or destruction of insured's property and (2) liability exposure for damage or destruction of someone else's property under insured's care, custody, or control. *Barron's Dictionary of Insurance Terms*, 1987.

**Coverage.** Inland marine insurance has evolved to cover virtually all kinds of things that move or are in transport. *Village of Kiryas v. Insurance Co. of North America*, 996 F.2d 1390 (1993). Inland marine policies, similar to marine and transportation policies, typically are only issued in a commercial context. *Rusty Jones, Inc. v. Transit Cas. Co., et al.*, 1985 WL 2489 (N.D. Ill. 1985). Marine and transportation insurance include loss or damage to persons or property in connection with or appertaining to marine, inland marine, transit or transportation insurance. *Id.*

**Exceptions.** Pursuant to Section 164 of the Illinois Insurance Code, marine and transportation policies are exempted from requirement that misrepresentations and false warranties need to be apparent on the face of the policy or attached to it for an insurer to void it on those grounds. *Smith v. Interstate Fire & Cas.*, 47 Ill. App. 3d 555, 362 N.E.2d 38 (1977). This exception would also apply to inland marine policies. This special rule is based on the policy consideration that often the convey-

ance cannot be inspected by the insurer. *Id.*, citing Rodda, *Inland Marine and Transportation Insurance*, 2d ed. (1958).

### LIABILITY INSURANCE

Accident. "Accident" in general liability policy, covers injury received over seven months by employee from exposure to radiation, *Canadian Radium v. Indemnity*, 411 Ill. 325, 104 N.E.2d 250 (1952), and insured's negligence (sloppy use of acid) does not bar recovery under liability policy covering "accidents." *Cross v. Zurich*, 184 F.2d 609 (1950).

Charitable Corporations. Immunity of charitable corporation for torts of its servants or agents is abolished and such corporation is liable for damages regardless of extent of its insurance coverage. *Darling v. Charleston Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

Compromise of Claims. Insurer not liable for refusing to settle case for amount within policy limits, in absence of fraud, negligence or bad faith. Prima facie case established where, pending appeal, offer to settle \$20,000 judgment for \$8,000 is declined by insurer, and limit of policy is \$10,000. *Smiley v. Manchester*, 71 Ill. 2d 306, 375 N.E.2d 118 (1978); *Salvator v. Admiral Merchants Motor Freight*, 156 Ill. App. 3d 930, 509 N.E.2d 1349 (1987).

Contribution Between Joint Tortfeasors. Contribution between joint tortfeasors is allowed in Illinois. *J.I. Case v. McCartin-McAuliffe*, 118 Ill. 2d 447, 516 N.E.2d 260 (1987). Legislature subsequently enacted Contribution Act. 740 ILCS §100/1 *et seq.*

See title "CONTRIBUTION."

Co-operation of Insured. Admission of fault held not to bar recovery on policy despite provision forfeiting policy for voluntary admission of liability. *Blake v. Continental*, 278 Ill. App. 232 (1934). Refusal of insured to aid in preparation of trial and to appear at trial, bars recovery on policy by injured person against insurer. *Zitnik v. Burik*, 395 Ill. 182, 69 N.E.2d 888 (1946). Insurer must show material prejudice to avoid responsibility. *M.F.A. Mutual v. Cheek*, 66 Ill. 2d 492, 363 N.E.2d 809 (1977).

Duty to Defend. Insurer's duty is generally determined by comparing policy terms to the complaint and all other pleadings filed in the suit against the insured, including those filed by the insured itself. *Pekin Ins. Co. v. Wilson*, 2010 Ill. LEXIS 670, Docket No. 108799 (Ill. 2010). Duty attaches to claims within policy coverage even if false or fraudulent. *Fruit of the Loom v. Travelers Indem. Co.*, 284 Ill. App. 3d 485, 672 N.E.2d 278 (1st Dist. 1996). If conflict of interest, insurer to reim-

burse insured for costs of independent defense counsel. *Pepper Constr. v. Casualty Ins.*, 145 Ill. App. 3d 516, 495 N.E.2d 1183 (1986). Illinois courts have substantially expanded the scope of duty to defend another party under "additional insured" endorsement. *John Burns Constr. v. Indiana Ins. Co.*, 189 Ill. 2d 570, 727 N.E.2d 211 (2000).

Excess Insurance. Excess insurer's duty to indemnify does not arise until insured has exhausted limits or tried and failed to collect limits under primary policies. *Rhone-Poulenc Inc. v. International Ins. Co.*, 71 F.3d 1299 (7<sup>th</sup> Cir. 1995).

Infants. Youthful driver endorsements on automobile policies are not void as against public policy but will be enforced in their clear, ordinary meaning. *Economy Fire & Cas. v. Pearce*, 79 Ill. App. 3d 559, 399 N.E.2d 151 (1979).

Insolvency of Insured. Statute requires standard provision in policy that insolvency or bankruptcy of insured shall not release insurer and that injured person shall have direct right of action against insurer if execution against insured is unsatisfied. 215 ILCS §5/388.

Jury. Questioning jury on voir dire regarding insurance company is reversible error unless in good faith and substantial reason for question shown. *Strasma v. Rager*, 145 Ill. App. 3d 826, 495 N.E.2d 1343 (1986). In rural area where several members of jury were insured by same company that insured defendant, it would not be error for plaintiff's attorney to interrogate them in voir dire as to their interests in that insurance company. *Rains v. Schutte*, 53 Ill. App. 2d 214, 202 N.E.2d 660 (1964). Supreme Court rule permits trial judge to conduct voir dire himself. Ill. S. Ct. R.234.

Number of Occurrences. Illinois uses the "cause theory" to determine number of occurrences as respects available per occurrence policy limits. Each separate cause of injury is a separate occurrence and the type of activity in which the insured engages must be considered. *NICOR v. Assoc. Elec. and Gas Ins.*, 223 Ill. 2d 407, 860 N.E.2d 280 (2006). Where restaurant's liability was predicated on its serving tainted food to particular customer, each time restaurant served the tainted food was a separate occurrence. *Mason v. Home Ins. Co.*, 177 Ill. App. 3d 454, 532 N.E.2d 526 (1988). Yet, uninterrupted and continuing cause from which multiple injuries flow is a single occurrence. So, where liability of insured was not based upon its installing asbestos containing material but rather its manufacture and sale of building materials containing asbestos over period of several decades, only a single occurrence took place. *U.S. Gypsum v. Admiral Ins. Co.*, 268 Ill. App. 3d 598, 643 N.E.2d 1226 (1994). Any intervening separate neg-



ligent act is a new occurrence. Thus, truck's second collision with auto just minutes after a first impact with another auto was new occurrence where truck driver tried to move truck to safe location following first accident thereby placing it in position for second accident. *Ill. Nat. Ins. Co. v. Szczepkowitz*, 185 Ill. App. 3d 1091, 542 N.E.2d 90 (1989). As part of system wide program to replace household gas meters, each time mercury was spilled during replacement was a separate occurrence. *NICOR v. Assoc. Elec. and Gas Ins.*, 223 Ill. 2d 407, 860 N.E.2d 280 (2006).

**Property Damage.** "Physical injury to tangible property" means property has been altered in appearance, shape, color or other material dimension. Intangible damage such as diminution in value due to possibility product will not function or might later cause damage is insufficient. *Traveler's Ins. Co. v. Eljer Mfg.*, 197 Ill.2d 278, 757 N.E.2d 481 (2001).

**Punitive Damages.** Public policy prohibits insurance against liability for punitive damages that arise out of insured's own misconduct. *International Surplus Lines Ins. Co. v. Pioneer Life Ins. Co.*, 209 Ill. App. 3d 144, 568 N.E.2d 9 (1990). However, employer may insure self against punitive damages which arise from wrongdoing of employee under respondent superior doctrine. *Nandorf v. CNA Ins.*, 134 Ill. App. 3d 134, 479 N.E.2d 988 (1985). *But see, Village of Lombard v. IR-MA*, 288 Ill. App. 3d 1003, 681 N.E.2d 88 (1997).

**Uninsured and Underinsured Motorist.** No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of ownership, maintenance or use of motor vehicle shall be issued unless coverage is provided therein of at least minimum legal amount to protect persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. Equal amount of underinsured motorist coverage must be provided. Insured has right to elect to have additional uninsured and underinsured motorist coverage in amount up to insured's bodily injury liability limits, and insurer may be liable for failing to inform insured of right to elect such coverage. 215 ILCS §5/143a; 625 ILCS §5/7-203. Insurers can be held liable for failing to make adequate offer of such coverages to insured. *Holland v. State Farm*, 216 Ill. App. 3d 463, 576 N.E.2d 981 (1991). "Anti-stacking" provisions in policy will be upheld. *Bruder v. Country Mut. Ins. Co.*, 156 Ill. 2d 179, 620 N.E.2d 355 (1993); *Hagler v. Country Mut. Ins.*, 274 Ill. App. 3d 896, 655 N.E.2d 26 (1995). However, Courts will allow "stacking" if ambiguity is perceived to exist in policy's declarations page. *Pekin Ins. Co. v. Estate of Goben*, 303 Ill. App. 3d 639, 707 N.E.2d 1259 (1999); *Yates v. Farmers Ins. Co.*, 311 Ill. App. 3d 797,

724 N.E.2d 1042 (2000). *See also, Pekin v. Estate of Ritter*, 322 Ill. App. 3d 1004, 750 N.E.2d 1285 (2001).

Insurer can deduct amount of workers' compensation payments to insured from underinsured motorist coverage benefits paid to insured. *Sulser v. Country Mut. Ins. Co.*, 147 Ill. 2d 548, 591 N.E.2d 427 (1992). Insurer may also require insured exhaust all other applicable insurance limits before right to assert underinsured motorist insurance claim will arise. 215 ILCS §5/143a-2(7).

## LIMITATION OF TIME

See Law Digest Tables. Limitations as to particular actions are as follows:

Insurance Producers - two years. 735 ILCS §5/13-214.4.

Written contracts: ten years 735 ILCS §5/13-206; Oral contracts: five years 735 ILCS §5/13-205; Uniform Commercial Code, action on contract for sale of goods: four years; may be reduced by agreement to one year 810 ILCS §5/2-725.

Construction work-related injuries-four years. *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 595 N.E.2d 561 (1992).

Personal injuries: two years 735-ILCS §5/13-202; Personal injury v. Municipality: one year 745 ILCS §10/8-101, 102; Personal injury v. Regional Transp. Authority: one year and notice within six months 70 ILCS §3615/5.03;

Libel and Slander: one year 735 ILCS §5/13-201; Wrongful death: two years 740 ILCS §180/2; Property Damage: five years 735 ILCS §5/13-205; Dram Shop Action: one year 235 ILCS §5/6-21. All civil actions not otherwise provided for: 5 years 735 ILCS §5/13-205.

Loss of consortium - Same period of time (two years) as action for damages for injury sued upon 735 ILCS §5/13-203. Contribution - two years after payment toward discharge 735 ILCS §5/13-204. Contribution action must be filed within two years of service of underlying suit upon defendant seeking contribution or such later period on any applicable statutes of limitations. *Henderson v. Jones Bros. Constr.*, 234 Ill. App. 3d 871, 602 N.E.2d 16 (1992).

Medical Malpractice - within 2 years of discovery but in no event more than 4 years after date of occurrence. 735 ILCS §5/13-212. *See, Courtney v. Searle Pharmaceuticals, Inc.*, 208 Ill. App. 3d 413, 567 N.E.2d 370 (1990). Product liability: two years; but as to manufacturer, in no event greater than twelve years after product first enters stream of commerce 735 ILCS §5/13-213.

Discovery Rule. Discovery rule is two-pronged test. Plaintiff must file his suit within two years from date that he 1) knew or should reasonably have known of his injury and 2) knew or should have known that it was wrongfully caused. 735 ILCS §5/13-212; *Courtney v. Searle*, 208 Ill. App. 3d 413, 567 N.E.2d 370 (1990); *Sharpe v. Jackson Park Hosp.*, 99 Ill. App. 3d 874, 425 N.E.2d 1244 (1981); *Hitt v. Stephens*, 285 Ill. App. 3d 713, 675 N.E.2d 275 (1997). When party knows he has been injured, he is under obligation to inquire whether actionable wrong was committed. *Witherall, supra*; discovery rule applies in medical malpractice cases, *Licka v. William A. Sales*, 70 Ill. App. 3d 929, 388 N.E.2d 1261 (1979), and in construction/architect cases. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 430 N.E.2d 976 (1981). Also, four-year outer limit period is constitutional. *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979).

### MALPRACTICE

Medical. All medical malpractice lawsuits filed on or after August 15, 1985 are governed by legislation prescribing specialized rules and procedures. These procedures include: filing an affidavit and physician's report, sanctions for untrue pleading, expert witness standards, itemized verdicts, and limits on attorney's contingent fees. *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986). Physician's report as to merit of claim is required. 735 ILCS §5/2-622.

A suit for medical malpractice must be brought within two years of discovery but in no event more than four years after date of occurrence. 735 ILCS §5/13-212; *Courtney v. Searle*, 208 Ill. App. 3d 413, 567 N.E.2d 370 (1990).

In order to prove medical malpractice, a party must establish the standard of care by which the defendant's conduct is to be measured, that the defendant deviated from that standard and committed medical negligence, and that the defendant's negligence proximately caused injury to the plaintiff. *Walski v. Tiesenga*, 72 Ill. 2d 249, 381 N.E.2d 279 (1978). Other theories for recovery against physicians for which expert not required include: res ipsa loquitur, *Spidle v. Steward*, 79 Ill. 2d 1, 402 N.E.2d 216 (1980); and contract. *Cirafici v. Goffen*, 85 Ill. App. 3d 1102, 407 N.E.2d 633 (1st Dist. 1980). Treating physician has a duty to inform patients of the foreseeable risks and results of a procedure and the reasonable alternatives to such a procedure. *Weekly v. Solomon*, 156 Ill. App. 3d 1011, 510 N.E.2d 152 (2<sup>nd</sup> Dist. 1987).

Expert testimony is required for plaintiff to sustain the burden of presenting prima facie case against a medical care provider. A defendant physician can be com-

pelled to give testimony regarding standard of care and any deviations therefrom. *Fawcett v. Reinertsen*, 131 Ill. 2d 380, 546 N.E.2d 558 (1989). New Supreme Court Rules eliminate distinction between "retained" expert witnesses and treating physicians who may testify. Both now termed "opinion witnesses" who must be disclosed before trial. Ill. Sup. Ct. Rule 213 (g). Failure to comply will result in witness or particular portion of testimony being barred at trial. *Seef v. Ingalls Mem. Hosp.*, 311 Ill. App. 3d 7, 724 N.E.2d 115 (1999).

An action for the wrongful birth of a genetically or congenitally defective child may be maintained for breach of duty by the physician in depriving the parents of the opportunity to accept or reject the continuance of the pregnancy. *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 512 N.E.2d 691 (1987). The cause of action for wrongful life is not recognized in Illinois. *Goldberg v. Ruskin*, 113 Ill. 2d 482, 499 N.E.2d 406 (1986).

Hospitals. Hospitals are under a duty to conform to legal standard of reasonable conduct within medical community in light of apparent risk as determined by expert testimony. *First National v. Porter*, 114 Ill. App. 3d 1, 448 N.E.2d 256 (1983). Expert testimony is required unless hospital's liability does not involve a matter of medical judgment. *Decker v. St. Mary's Hosp.*, 249 Ill. App. 3d 802, 619 N.E.2d 537 (1993). A hospital owes a duty of care to a patient separate and apart from the duty of the physician. *Andrews v. Northwestern*, 184 Ill. App. 3d 486, 540 N.E.2d 447 (1989). A hospital may be held liable for acts of its apparent agents including independently employed physicians. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 622 N.E.2d 788 (1993). *But see, Harraz v. Snyder*, 283 Ill. App. 3d 254, 669 N.E.2d 911 (1996); *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 688 N.E.2d 732 (1997). Obtaining consent from a patient of treatment is a duty which falls on the physician because of the special relationship with the patient. Hospital has duty to know the qualifications and standards for its physicians. *Pickle v. Curns*, 106 Ill. App. 3d 734, 435 N.E.2d 877 (1982). Res ipsa loquitur claims may be brought by patients rendered unconscious for surgery. *Kolakowski v. Voris*, 83 Ill. 2d 388, 415 N.E.2d 397 (1980).

Legal. See "ATTORNEYS."

Other Professionals. Standard of care for an accountant is a high level of professional responsibility, similar to that required by other professionals, such as attorneys and doctors. *Jerry Clark Equip. v. Hibbits*, 245 Ill. App. 3d 230, 612 N.E.2d 858 (5th Dist. 1993), *appeal denied*, 152 Ill. 2d 560, 622 N.E.2d 1208 (1993). Also see "AGENTS AND BROKERS."



**NEGLIGENCE**

See Law Digest Tables.

See "AUTOMOBILES."

Age. Majority is reached upon attaining 18 years. 755 ILCS §5/4-1. Minor under age of seven (7) deemed legally incapable of conduct which would constitute contributory negligence. *Crutchfield v. Meyer*, 414 Ill. 210, 111 N.E.2d 142 (1953); *Seaburg v. Williams*, 16 Ill. App. 2d 295, 148 N.E.2d 49 (1958). Minor over age of seven only required to exercise that degree of care which child of his age, intelligence, capacity, and experience would naturally use. *Dawson v. Hoffmann*, 43 Ill. App. 2d 17, 192 N.E.2d 695 (2<sup>nd</sup> Dist. 1963).

Minor under age of seven (7) is incapable of active negligence but can be held liable for intentional torts. Minor under age seven cannot be contributorily negligent. *Seintiago v. Package*, 123 Ill. App. 2d 305, 260 N.E.2d 89 (1970).

Attractive Nuisance. Doctrine of "attractive nuisance" no longer recognized in Illinois. *Kahn v. Burton Co.*, 5 Ill. 2d 614, 126 N.E.2d 836 (1955). Test is whether owner reasonably should foresee that children will enter premises and encounter danger or risk. *Cope v. Doe*, 102 Ill. 2d 278, 464 N.E.2d 1023 (1984).

Comparative Negligence. Plaintiff's damages are reduced by percentage of his contributory negligence up to 50%. All bodily injury, death or property damage actions accruing after November 24, 1986 are subject to modified comparative negligence. 735 ILCS §5/2-1116. Recovery is barred if plaintiff more than 50% at fault. Recovery allowed but reduced by plaintiff's fault less than 50%. Comparative negligence in strict liability is applied in the same way as in standard negligence context. *Freislinger v. Emro*, 99 F.3d 1412 (7<sup>th</sup> Cir. 1996). Related issues yet to be resolved include potential applicability of comparative negligence to cases based on statutory actions where contributory negligence was not previously defense (Dram Shop and Road Construction Injury Act).

Economic Loss. No cause of action for negligence available if person sustains only "economic loss." Remedy limited to claim for breach of contract of warranty. Exception if loss is consequence of property damage or if defendant found to be in business of supplying others with information. *Moorman Mfg. v. National Tank*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982). *But see, Evans ex rel. Husted v. General Motors*, 314 Ill. App. 3d 609, 732 N.E.2d 79 (2000). Claims of legal and accountant's malpractice also are exception to this rule. *Jerry Clark Equipment v. Hibbits*, 245 Ill. App. 3d 230, 612 N.E.2d

858 (5th Dist. 1993); *Collins v. Reynard*, 154 Ill. 2d 48, 607 N.E.2d 1185 (1992).

Imputed Negligence. To impute negligence of one person to another, such persons must stand in relation of privity as master and servant or principal and agent. *Palmer v. Miller*, 380 Ill. 256, 43 N.E.2d 973 (1942), or as joint venturers. *Kinney v. O'Flaherty*, 323 Ill. App. 579, 56 N.E.2d 473 (1944).

Joint and Several Liability. In actions accruing after November 24, 1986, subject to several exceptions, defendant found less than 25% at fault is not jointly and severally liable, with exception for environmental pollution cases, 735 ILCS §5/2-1117. Doctrine still applies to defendants 25% or more at fault, to medical expenses, and in medical malpractice actions.

Last Clear Chance Doctrine. Doctrine of last clear chance abolished in Illinois. *West C.S.R. v. Liderman*, 187 Ill. 463, 58 N.E. 367 (1900).

Negligent Infliction of Emotional Distress. Illinois allows recovery for negligent infliction of emotional distress in absence of physical impact. *Rickey v. C.T.A.*, 101 Ill. App. 3d 439, 428 N.E.2d 596 (1<sup>st</sup> Dist. 1981). However, plaintiff must be in "zone of physical danger" to recover.

Proximate Cause. Negligent act or omission is proximate cause of injury if consequences follow unbroken sequence from wrong to injury without intervening efficient cause. Test of liability is whether at time of negligence wrongdoer might, by exercise of ordinary care, have foreseen that some injury might result from his negligence. *Orrico v. Beverly Bank*, 109 Ill. App. 3d 102, 440 N.E.2d 253 (1st Dist. 1982).

**NO-FAULT**

No-fault insurance does not exist in Illinois.

**PENALTY AND ATTORNEY FEES**

If insurer's refusal to pay loss payable under policy is vexatious and without reasonable cause, insured may maintain action against insurer. Court may allow reasonable attorney fees to insured who prevails against company, not to exceed 60% of what party is entitled to recover, \$60,000, or excess of amount party is entitled to recover over what company offered in settlement prior to action. 215 ILCS §5/155. Section 155 of Insurance Code preempts all common law actions for unfair claims practices against insurers. *Buais v. Safeway Ins. Co.*, 275 Ill. App. 3d 587, 656 N.E.2d 61 (1995). Attorneys fees also recoverable if a pleading or cause of action found to be frivolous. Ill. Sup. Ct. R. 137.



## PRIVILEGED COMMUNICATIONS

**Attorney/Client.** Communications made in confidence and concerning legal advice between attorney and client are privileged from discovery and disclosure at trial. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982); Ill. Sup. Ct. Rule 201 (b) (2). Corporations are entitled to assert attorney-client privilege, but that privilege extends only to communications between attorney and members of corporate "control group," not to all communications pertaining to subject of litigation. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, *supra*.

**Insured/Insurer.** Communications from insured to liability insurer are privileged if insurer under duty to defend insured and communication meant to assist in defense. *People v. Ryan*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964); *Exline v. Exline*, 277 Ill. App. 3d 10, 659 N.E.2d 407 (1st Dist. 1995). Although communications are protected only if made after litigation is contemplated (*Monier v. Chamberlain*, 35 Ill. 2d 351, 221 N.E.2d 410 (1966)), statements to non-attorney employees of insurer are protected. *Braglia v. Cephus*, 146 Ill. App. 3d 241, 496 N.E.2d 1171 (1st Dist. 1986). Certain information also privileged from discovery as attorney's "work product." *Mlynarski v. Rush Med. Ctr.*, 213 Ill. App. 3d 427, 572 N.E.2d 1025 (1991).

**Other Privileges.** Illinois recognizes other privileges by statute or common law: Husband/Wife: 735 ILCS §5/8-801. Physician/Patient: 735 ILCS §5/8-802; *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 499 N.E.2d 952 (1986) (privilege prevents ex parte communications between plaintiff's physician and opposing counsel). Can be waived by delay in bringing violation to court's attention. *Sottile v. Carney*, 230 Ill. App. 3d 1023, 596 N.E.2d 140 (1st Dist. 1992). Psychiatrist / Patient: 740 ILCS §110/10. Accountant / Client: 225 ILCS §450/27. Clergyman/Penitent: 735 ILCS §5/8-803. Reporter/Source: 735 ILCS §5/8-901 *et seq.* Department of Labor/Unemployment insurance applicant: 820 ILCS §405/1800; *McMahon v. Richard Gorazd, Inc.*, 135 Ill. App. 3d 211, 481 N.E.2d 787 (5th Dist. 1985) (privilege does not prevent discovery of information from personal injury plaintiff).

## PRODUCTS LIABILITY

There are four legal theories of liability that may apply to products liability case: 1) negligence concepts, 2) warranty under UCC, 3) strict liability in tort, 4) *res ipsa loquitur*. Comprehensive legislation affecting all types of product liability claims was enacted in 1995. However, several provisions ruled unconstitutional. Issues await resolution by Illinois Supreme Court in 1996/1997.

Under negligence concept, plaintiff must prove following: 1) Defendant failed to exercise ordinary care. (i.e. plaintiff must trace or connect defect in product to defendant.) *Shramek v. GMC*, 69 Ill. App. 2d 72, 216 N.E.2d 244 (1966). Action by one party is product liability case against another for negligent spoliation of evidence (i.e., the product may also be maintained. *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 652 N.E.2d 267 (1995). Proof of defect alone does not establish defendant's failure to exercise ordinary care. *Samansky v. Rush Presbyterian*, 208 Ill. App. 3d 377, 567 N.E.2d 386 (1990); 2) Injury was proximately caused by defendant's negligence. Comparative fault applies just as it does for negligence. *Freislinger v. Emro*, 99 F.3d 1412 (7th Cir. 1996). Although plaintiff need not allege freedom from contributory negligence, issue of his comparative fault applies in any strict liability case. *Maxwell v. Hobart Corp.*, 216 Ill. App. 3d 108, 576 N.E.2d 268 (1991). Defendant has burden of proving plaintiff's contributory fault. *Casey v. Baseden*, 111 Ill. 2d 341, 490 N.E.2d 4 (1986).

Warranties in Illinois are provided for in U.C.C., 810 ILCS §§5/2-312 to 318. For plaintiff's burden of proof under implied warranty, *See Dunham v. Vaughn & Bushnell Mfg.*, 86 Ill. App. 2d 315, 229 N.E.2d 684, *aff'd*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969); *Malawy v. Richards*, 150 Ill. App. 3d 549, 501 N.E.2d 376 (1986) (defect requirement questioned.)

Under strict liability plaintiff must prove: 1) Defendant was engaged in business of selling product; *Sutton v. Washington Rubber Parts & Supply*, 176 Ill. App. 3d 85, 530 N.E.2d 1055 (1988) (failure to identify manufacturer whose defective eye pin it was, fatal to action, *Schmidt v. Archer Iron Works*, 44 Ill. 2d 401, 256 N.E.2d 6 (1970)). Product must have been released into stream of commerce at time of injury, and if still in unmarketable state, no strict liability, *Genaust v. Illinois Power*, 62 Ill. 2d 456, 343 N.E.2d 465 (1976). One who does not originally manufacture products but later alters it after leaving stream of commerce, is not manufacturer. *Rosales v. Verson Allsteel Press*, 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976). Dismissal of product distributors and non-manufacturers from strict liability actions is proper when identity of manufacturer of product is disclosed and remains amenable to suit. *Saieva v. Budget Rent-A-Car*, 227 Ill. App. 3d 519, 591 N.E.2d 507 (1992). 2) Product contained condition which was unreasonably dangerous when it left defendant's control; *Suvada v. White Motor*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965), *overruled on other grounds*; Restatement (Second) of Torts §402 A (1965); malfunction of product, *Bollmeier, supra*, product's failure to meet reasonable expectation, *Dunham, supra*, or manufacturer's failure to warn of risks of use. *Hammond v. North American As-*



*bestos*, 97 Ill. 2d 195, 454 N.E.2d 210 (1983). 3) Plaintiff was injured or property was damaged. *Suvada, supra*. 4) Injury proximately caused by unreasonably dangerous condition in product. In strict liability, it is not necessary to prove specific defect, *Suvada, supra*; unreasonably dangerous means unsafe when put to reasonably foreseeable use. *Rios v. Niagara Mach. & Tool Works*, 59 Ill. 2d 79, 319 N.E.2d 232 (1974).

In strict liability actions alleging failure to warn, plaintiff must also prove element that manufacturer knew or should have known of dangerous propensity of product. *Woodill v. Parke-Davis*, 58 Ill. App. 3d 349, 374 N.E.2d 683, *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980). Plaintiff who admittedly did not read warnings may not maintain claim for inadequate warnings. *Kane v. R.D. Werner Co.*, 275 Ill. App. 3d 1035, 657 N.E.2d 37 (1995).

Parties to Actions. All participants in distribution chain may be held to strict liability standard. Retailer found not guilty on wilful and wanton count. *Elliott v. Sears, Roebuck*, 173 Ill. App. 3d 383, 527 N.E.2d 574 (1988), *abrogated on other grounds*. Failure to provide safety devices, *Willeford v. Mayrath Co.*, 7 Ill. App. 3d 357, 287 N.E.2d 502 (1972); *Weiss v. Rockwell Mfg. Co.*, 9 Ill. App. 3d 906, 293 N.E.2d 375 (1973); assumption of risk, *Kirby, supra*, (affirmative defense to be plead by defendant). Comparative negligence is applicable in strict liability actions in the same way as in standard negligence. *Freislinger v. Emro*, 99 F.3d 1412 (7<sup>th</sup> Cir. 1996).

State of art is defense where evidence shows compliance with Federal standards. *Rucker v. Norfolk and Western*, 77 Ill. 2d 434, 396 N.E.2d 534 (1979).

Economic loss is not recoverable in tort (including strict liability). *Moorman Mfg. v. National Tank*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982) (buyer of grain storage tank could not recover in tort from tank manufacturer for lost profits and diminution of storage tank's value caused by crack in tank's side); emotional distress is also not recoverable under strict liability. *Woodill v. Parke-Davis, supra*.

Statute of Limitations. Strict liability and negligence are two years for personal injuries and five years for property damage. Warranty actions are four years. See, "LIMITATIONS." Time begins with injury, knowledge or defect, *Klondike v. Fairchild Hiller*, 334 F. Supp. 890 (N.D. Ill. 1971).

However, no product liability action based on strict liability except within twelve years of first sale or lease of any product by a seller, or ten years from date of first sale, use or delivery to its initial user, whichever occurs first. 735 ILCS §5/13-213; *Thorton v. Mono Mfg.*, 99 Ill.

App. 3d 722, 425 N.E.2d 522 (1981). Also, no strict liability if injury caused by inherent properties of product obvious to all users. *Smith v. American Motors Sales Corp.*, 215 Ill. App. 3d 951, 576 N.E.2d 146 (1991).

## RELEASE

Release only affects tortfeasors who are parties thereto unless other concurrent tortfeasors are specifically identified. *Alsup v. Firestone Tire & Rubber*, 101 Ill. 2d 196, 461 N.E.2d 361 (1984). However, release described in comprehensive language will be extended to claims for contribution even if they are inchoate at time release is executed. *Rakowski v. Lucente*, 104 Ill. 2d 317, 472 N.E.2d 791 (1984). *But see McNamara v. Shermer*, 157 Ill. App. 3d 864, 510 N.E.2d 950 (1987).

A full or unqualified release as to one individual injury given to any of those concurring in its cause releases both joint and independent concurrent tortfeasors. *Porter v. Ford*, 96 Ill. 2d 190, 449 N.E.2d 827 (1983). Release will not affect claim for separate and divisible injury. *Cram v. Showalter*, 140 Ill. App. 3d 1068, 489 N.E.2d 892 (1986). Release of agent automatically releases principal. *Gilbert v. Sycamore Hosp.*, 156 Ill. 2d 511, 622 N.E.2d 788 (1993).

Recovery on claims against parties not covered by the release is reduced by the amount stated in the release or the amount paid for it, whichever is greater. 740 ILCS §100/2

## REPRESENTATIONS AND WARRANTIES

Misrepresentations or false warranties will not void insurance policy unless 1) made with actual intent to deceive or 2) it materially affects either acceptance of risk or hazard assumed by insurer. 215 ILCS §5/154. *Ratliff v. Safeway Ins. Co.*, 257 Ill. App. 3d 281, 628 N.E.2d 937 (1993). Intent to defraud in and of itself is insufficient to relieve insurer of liability under policy where there is no evidence that insured misled insurer. *Knysak v. Shelter Life Ins. Co.*, 273 Ill. App. 3d 360, 652 N.E.2d 832 (1995). *But see, Golden Rule Ins. v. Schwartz*, 323 Ill. App. 3d 86, 751 N.E.2d 123 (2001). Burden remains on insurer to make timely inquiry into facts upon which insurer intends to rely in deciding to issue policy where those facts are implausible or any representation by insured is doubtful. *Meier v. Aetna*, 149 Ill. App. 3d 932, 500 N.E.2d 1096 (1986). But, conversely, where intent to deceive is shown, insurer need not prove a scheme to defraud it in order to avoid the policy. *Stone v. Certain Underwriters*, 81 Ill. App. 3d 333, 401 N.E.2d 622 (1980).



## SERVICE OF PROCESS

Personal service requires leaving copy of summons and complaint with defendant personally. 735 ILCS §5/2-203.

Substituted or abode service requires leaving copy of summons at defendant's usual place of abode, with some person of family thirteen (13) years of age or older, and informing that person of contents and mailing copy to defendant at same address. 735 ILCS §5/2-203. The underlying considerations whether substituted service is reasonably likely to provide defendant with actual notice of the proceedings. *United Bank v. Dohm*, 115 Ill. App. 3d 286, 450 N.E.2d 974 (1983).

Personal jurisdiction over Illinois and foreign corporations obtained by leaving copy of process with registered agent or any officer or agent of corporation found anywhere in state. 735 ILCS §5/2-204. Same procedure governs service our voluntary unincorporated associations. 735 ILCS §5/2-205.1.

Personal jurisdiction over partnership sued in its firm name is obtained by personal or abode service on any partner or agent of partnership found anywhere in state. 735 ILCS §5/2-205 (a).

Long-Arm Jurisdiction. *See*, 735 ILCS §5/2-208, 2-209. Illinois courts have jurisdiction to resolve cause of action of any nature deriving from insurance contract, no matter where the contract was made, if contract insured any person, property or risk located within state at time of contracting. 735 ILCS §5/2-209 (a) (4). *United Services Auto v. Cregor*, 617 F. Supp. 1053 (N.D. Ill. 1985).

Delay in serving defendant after expiration of statute of limitations can result in dismissal of case with or without prejudice. Ill. Sup. Ct. R. 103 (b).

## SUBROGATION

The right to subrogation arises at common law or by contract. *Johnson v. State Farm*, 151 Ill. App. 3d 672, 503 N.E.2d 602 (1987). Requirements of doctrine are that property of one party is used to discharge a debt owed by another under circumstances where the other would be unjustly enriched if subrogation were not allowed. *American Nat'l Bank v. Weyerhaeuser*, 692 F.2d 455 (7th Cir. 1982). *See also Geneva v. Martin*, 4 Ill. 2d 273, 283, 122 N.E.2d 540 (1954). If subrogation is based on an agreement, subrogee must show that it has paid the debt in full not as a volunteer. *Transamerica Ins. Co. v. South*, 125 F.3d 392 (7th Cir. 1997). Subrogee has no greater rights than subrogor, *Atlantic Mutual v. Poseidon*, 206 F. Supp. 15, *aff'd*, 313 F.2d 872 (1963) and can enforce only such rights as subrogor can enforce., *William Aupperle & Sons v. American Indem.*, 75 Ill. App.

3d 722, 394 N.E.2d 725 (1979). Subrogee steps into shoes of subrogor for purposes of enforcing rights against third parties. *Signode v. Normandale*, 177 Ill. App. 3d 526, 532 N.E.2d 482 (1988). Insurer must bring subrogation action in its own name or designate that it is the subrogee of its insured. *Prudential v. Romanelli*, 243 Ill. App. 3d 246, 612 N.E.2d 24 (1993).

Insurer is subrogated to rights given employer under Workers' Compensation Act. *See* 820 ILCS §305/5. Illinois Family Expense Act often a bar to subrogation recovery from a minor-plaintiff. *Estate of Aimone v. State Health Plan*, 248 Ill. App. 3d 882, 619 N.E.2d 185 (1993).

## WAIVER AND ESTOPPEL

Estoppel implies the prejudicial reliance of insured upon some act, statement, or representation of insurer regarding policy or claim. *Aetna v. Oak Park*, 168 Ill. App. 3d 1000, 523 N.E.2d 117 (1988). Insurer which wrongfully fails to defend insured is estopped from raising its policy defense in action brought by insured against insurer. *Casualty Ins. v. Northbrook*, 150 Ill. App. 3d 472, 501 N.E.2d 812 (1986). Insurer may also be estopped from asserting defense of non-coverage if it undertakes a defense and prejudice results to the insured. *Western Cas. v. Brochu*, 105 Ill. 2d 486, 475 N.E.2d 872 (1985). Prejudicial reliance by insured not required to prove waiver by insurer. *Id.* Waiver is unilateral act by insurer. *Id.*

Mere pendency of negotiations with insurance carrier is not sufficient basis for invoking estoppel against it. *McCue v. Colantoni*, 80 Ill. App. 3d 731, 400 N.E.2d 683 (1980). Acknowledgement of notice, furnishing of forms or acceptance of proofs does not constitute waiver of any insurer's rights. *Simmons v. Continental*, 285 F. Supp. 997 (D.C. Neb. 1968), *aff'd*, 410 F.2d 881 (8th Cir. 1969).

*See* "ACCIDENT AND HEALTH INSURANCE, Notice and Proof of Loss."

## WORKERS' COMPENSATION

Workers' compensation in Illinois is wholly statutory, governed by the Workers' Compensation Act, 820 ILCS §305/1 *et seq.* Right of employee or his survivors to compensation from accidental injury or death arising out of, or in the course of, his employment is governed by the Act. *Huntoon v. Pritchard*, 371 Ill. 36, 20 N.E.2d 53 (1939). The Act was intended to provide financial protection for injured workers, regardless of a showing of negligence, while precluding the employee from common law tort remedies against the employer. *Peoria County Belwood Nursing Home v. Industrial Comm.*,



115 Ill. 2d 524, 505 N.E.2d 1026 (1987). An employee may bring a claim under this Act in any of three forums: the state where he was injured or disabled, the state where the contract of hire was made, or the state where the employment is principally located. 820 ILCS §305/1 (b) 3.

The Workers' Compensation Act provides an employee with the exclusive remedy against his employer for an industrial accident. *Doyle v. Rhodes*, 101 Ill. 2d 1, 461 N.E.2d 382 (1984). However, the parties may agree by contract to supplement the benefits provided by the Act. *Millis v. Industrial Comm.*, 89 Ill. 2d 444, 433 N.E.2d 662 (1982). Employer can also waive exclusive remedy protection by contract. *Liccardi v. Stolt Terminal*, 178 Ill. 2d 540, 687 N.E.2d 968 (1997).

The Act applied only when an employer-employee relationship existed at the time that the accident occurred. *City of West Frankfort v. Industrial Comm.*, 406 Ill. 452, 94 N.E.2d 413 (1950).

In order to be compensable under the Act, the injury must have been sustained in the course of the employee's employment. *Crow's Hybrid Corn Co. v. Industrial Comm.*, 72 Ill. 2d 168, 380 N.E.2d 777 (1978). In determining whether an employee is in the course of employment, the controlling factor is whether the employee is within the orbit, area, scope, or sphere of his employment. *Danville U&C Ry. v. Industrial Comm.*, 307 Ill. 142, 138 N.E. 289 (1923). The employee's scope of duties is determined by what he was employed to do, and what he did with his employer's consent. *Lee v. Industrial Comm.*, 167 Ill. 2d 77, 656 N.E.2d 1084 (1995).

A common law action against a co-employee is also precluded if the parties come within the scope of the Act and the injury arose out of the course of employment. *Carrillo v. Hamling*, 198 Ill. App. 3d 758, 556 N.E.2d 310 (1990). However, the exclusive remedy of the Act is not applicable where an employee commits an intentional tort against a fellow employee. *Zurowska v. Berlin Ind.*, 282 Ill. App. 3d 540, 667 N.E.2d 588 (1996).

The amount of compensation payable to an employee for an injury or death is regulated by the Workers' Compensation Act. 820 ILCS §305/7 to 10. The basis for computing such compensation is the employee's "average weekly wage." 820 ILCS §305/10. Under the Act, the payment claim or award may not be subject to any lien, debt, penalty or damages. 820 ILCS §305/21.

An employer otherwise shielded from tort liability because of the exclusive remedy principle, may be liable under the "dual capacity doctrine," which states that an employer may become liable in tort to his employee if he occupies a second capacity that confers obligations independent of his role as employer. *Dalton v. Community Hosp.*, 275 Ill. App. 3d 73, 655 N.E.2d 462 (1995).

Under the Act, an employer who has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due under the Act, or unreasonable or vexatious delay, intentional under-payment, or frivolous defenses, may have attorney's fees and costs assessed against it. 820 ILCS §305/16. The claimant is entitled to attorney's fees and costs only when the party unreasonably and vexatiously refuses to make payment after an award in favor of the claimant. *Brinkmann v. Industrial Comm.*, 82 Ill. 2d 462, 413 N.E.2d 390 (1980). Workers Compensation Act also recognizes independent action against employer for retaliatory discharge or threat to discharge employee because of rights exercised under the Act. 820 ILCS §305/4 (h); *Webb v. County of Cook*, 275 Ill. App. 3d 674, 656 N.E.2d 85 (1995).

In tort litigation, a defendant can sue a plaintiff's employer for contribution. However, unless waived by contract the employer's liability is capped by the amount the employer paid to the plaintiff under Workers' Compensation. *Kotecki v. Cyclops Welding*, 146 Ill. 2d 155, 585 N.E.2d 1023 (1991); *Braye v. Archer Daniels Midland*, 175 Ill. 2d 201, 676 N.E.2d 1295 (1997). Additionally, if a plaintiff recovers a judgment or settlement against a third party after the employer had already paid workers' compensation for that injury, then the employer is entitled to recoup its workers' compensation payments. 820 ILCS §305/5.