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Evidence and Practice Tips

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Extracontractual Damages in First-Party Property Insurance Claims

Cramer v. Insurance Exchange Agency, No. 79943, 1996 WL 616221 (Ill., Oct. 24, 1996).

In *Cramer*, the Court held that Section 155 of the Illinois Insurance Code, 215 ILCS 5/155 (1994), does not preempt a separate and independent tort action involving insurer misconduct. The Court also held that the tort of bad faith is not a separate and independent tort action that is recognized in Illinois.

Section 155 of the Insurance Code provides an extracontractual remedy for policyholders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable. Great confusion has existed among the appellate courts of Illinois arising from the interaction of the statute and a purported tort of "bad faith and unfair dealing."

In *Cramer*, the Court found that while a duty of good faith and fair dealing is implied in all contracts, the tort of bad faith is simply not an independent tort action that is recognized in Illinois. The Court held that "well established" tort actions, such as common law fraud, required proof of different elements and a remedy for a different sort of harm than does the statute and that these torts addressed insurer misconduct that was not merely vexatious and unreasonable. Thus the statute did not insulate an insurer from "such tort actions."

In *Cramer*, the Court restated the elements of common law fraud: a false statement of material facts; the party making the statement knew or believed the statement to be untrue; the party to whom the statement was made had the right to rely on the statements; the party to whom the statement was made did rely on the statements; the statement was made for the purpose of inducing the other party to act; and the reliance by the person to whom the statement was made led to the person's injury. The Court in *Cramer* clarified some issues but the opinion may create as many issues as it resolves. We now know that there is no tort of breach of an implied covenant of good faith and fair dealing, but we also know that other tort actions, including common law fraud, are not preempted by Section 155 of the Insurance Code. We do not know what other tort actions might or might not be preempted. The Supreme Court cites *Kelsay v. Motorola*, 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec. 559 (1978) and discusses common law fraud at great length. *Kelsay* permitted a claim for punitive damages and punitive damages may be recovered in an action for common law fraud. It is reasonably clear from the Court's decision that where an insurer simply refuses to pay because of a mistaken belief that it does not owe the claim, the plaintiff will have a difficult time pleading the elements of common law fraud. With respect to the recovery of any punitive damages against a corporation for the tort of its employees, Illinois has previously adopted the requirements of the Restatement (Second) of Torts §909 and the Restatement (Second) of Agency §217C which requires corporate complicity. See IPI 800.07 and the cases cited in the comments therein. Punitive damages, even in a fraud claim, may not be awarded solely upon a finding of fraud without requiring wilful and wanton misconduct. *See Home Savings & Loan Association v. Schneider*, 108 Ill.2d 277, 284, 483 N.E.2d 1225, 91 Ill.Dec. 590 (1985) and the comments to IPI 800.06.

Forum Non Conveniens – Use of Public and Private Interest Factors

Kinzler v. Chicago & Northwestern Transportation Co., ___ Ill.App.3d ___, 669 N.E.2d 1247, 218 Ill.Dec. 721 (5th Dist. 1996).

This case contains an interesting discussion of the public and private interest factors for interstate *forum non conveniens* transfer. A freight train of the Chicago Northwestern Railroad collided with a grain truck owned by Dever & Sons Trucking in Bureau County, Illinois. The plaintiff, one of the train crew, filed suit in Madison County against both the truck company and the railroad. The railroad sought to transfer the matter to Bureau County under the doctrine of interest *forum non conveniens* but the trial court denied the defendant's motion. The defendant filed a petition for leave to appeal and the Appellate Court for the Fifth District denied the petition. The Supreme Court vacated the order and directed the Appellate Court for the Fifth District to enter an order granting leave to appeal and to consider the case on the merits. The Fifth District then did so resulting in this decision.

The court considered the following private interest factors: the relative ease of access to sources of proof; the availability of compulsory process for attendance of
unwilling witnesses and the cost of obtaining the attendance of willing witnesses, the possibility of review of the premises and any other practical problems that would make the trial of the case easy, expeditious and inexpensive. The court considered the following public interest factors: court congestion, and interest in having localized controversies decided at home, the burden of jury duty upon local citizens in an unrelated forum and others.

The plaintiff was a resident of Pekin, Illinois in Tazewell County, 140 miles from Madison County and 72 miles from Bureau County. Since the plaintiff worked on the "St.Louis Subdivision," which ran from Madison County to Nelson, Illinois, and the plaintiff had, at times, worked in and out of Madison County (although not on this occasion), it was convenient for the plaintiff to file suit in Madison County. Since the plaintiff had combined a hearing loss claim with this specific injury claim, the appellate court reasoned that part of the hearing loss claim might have occurred over the entire 230 mile radius of the "St. Louis Subdivision" of the defendant railroad.

The court found that Madison County was more convenient for counsel since both the railroad and the plaintiff had St. Louis lawyers and an Edwardsville lawyer represented the truck company. The court also noted that both the plaintiff's lawyer and the railroad's lawyer had offices in St. Clair County which was right next door to Madison County.

The court found that public interest factors also favored denying the defendant's motion and that "numerous plaintiffs find Madison County a decidedly convenient place to file a lawsuit." The fact that Madison County had many times the number of cases pending than Bureau County was a factor that was found to work to the detriment of the defendant. The appellate court reasoned that it was "obvious that a lengthy and complex jury trial in a smaller county like Bureau County" would "cause a major disruption in that county's court system" but that the same trial in Madison County would only cause a "minor ripple."

This decision is required reading for anyone arguing motions to transfer venue in the southern part of the state as it provides valuable information as to how some courts will analyze the appropriate factors.

About the Author

Stephen J. Heine is a partner in the Peoria firm of *Heyl, Royster, Voelker & Allen*. He has tried cases in the areas of construction, first party property claims, railroad, products liability, professional liability, trucking and automobile. Mr. Heine received his B.S. from Illinois State University in 1978 and his J.D. from Southern Illinois University in 1981. He is a member of several organizations, including the IDC, DRI, National Association of Railroad Trial Counsel, Illinois Appellate Lawyers Association and Peoria County, Illinois State and American Bar Associations.