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Consumers, banks brace for new Check 21 Act

by Megan G. Heeg and Dana M. Considine

As the effective date of the Check Clearing for the 21st Century Act nears, it appears the days of paper checks are numbered.

The Act, also called the "Check 21 Act," takes effect Oct. 28, 2004. Its goal is to eliminate paper checks from the check processing system and, in the process, reduce the costs of that system by $2.3 billion a year.

Under the Check 21 Act, the first bank to process a check is allowed to create a "substitute check," a reproduction of the original check that contains an image of both sides of the original check and other account and bank information. Each substitute check also must bear a legend stating, "This is a legal copy of your check. You can use it the same way you would use the original check."

The bank creating the substitute check must remove the original check from circulation. The substitute check then becomes the legal equivalent of the original check for all purposes and must be accepted by courts, retailers and service providers in the same manner as they would accept the original. Because the substitute check is an electronic image that can be conveyed and processed electronically, the "float" time — the time between when a check is written and

when funds ultimately are withdrawn from the account — is reduced.

An original check removed from circulation will not be returned to the account holder or the bank on which the check is drawn. Consumers therefore will need review their monthly statements carefully. If a consumer believes a substitute check is inaccurate, he or she has 40 days from the later of the date the statement is

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Inside

Restrictive covenants make comeback

by Douglas E. Lee

Once thought by many to be unenforceable in most contexts, non-compete agreements are making a comeback in Illinois and across the county. As a result, both employers and employees should take renewed interest in non-compete restrictions.

Restrictive covenants still are disfavored by Illinois courts, which view such provisions as potentially unlawful restraints on free competition. Employment lawyers, however, have developed more creative non-compete agreements that courts are willing to enforce. Employees therefore no longer can assume that non-compete provisions are unenforceable.

The critical element in determining the enforceability of a non-compete

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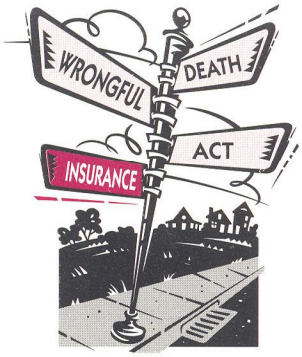
Insurer can be liable for negligently issuing life insurance



by Megan G. Heeg

In a matter of first impression, the Illinois Supreme Court recently ruled that a family of a murdered man could sue an insurance company under the Wrongful Death Act to allege that the insurance company's negligent issuance of a life insurance policy proximately caused the man's murder.

In *Bajwa v. Metropolitan Life Insurance Co.*, the family alleged that Muhammad U. Cheema ("U Cheema") applied for a life insurance policy on the life of Muhammad Cheema ("Muhammad"), falsely representing that Muhammad was his father. U Cheema named himself as the beneficiary of the policy and arranged for the premiums to be deducted from his bank account.

With the insurance agent's consent, U Cheema promised to take the application to his "father" to obtain his signature, which was a violation of the insurance company's procedural rule that an agent meet personally with the proposed insured to witness his signature and obtain answers to certain questions. When U Cheema returned with a signed application, the insurance agent signed the application under the heading "witness," indicating he had personally witnessed Muhammad's signature.

Thereafter, but prior to the policy's issuance, an insurance company underwriter noticed multiple irregularities in the application. After questioning U Cheema about the irregularities, however, the underwriter approved the application, and a policy was issued.

After the policy was issued, someone identifying himself as "Muhammad" called the insurance company on five occasions to confirm coverage. The insurance company found these calls strange enough to send the case to its consulting services office, where the file was "noted," according to court pleadings. Just nine days after the last of the five calls, Muhammad was stabbed and beaten to death in his apartment, and U Cheema fled to Pakistan.

In the trial court, Muhammad's family alleged that the insurance company's negligent issuance of the policy was the motive for the murder of Muhammad, but the judge dismissed the case, holding the insurance company could be liable only if it knew of the murderous plot but failed to act.

In a unanimous decision, however, the appellate court reversed, holding actual knowledge was not required. The Illinois Supreme Court agreed, stating "an insurer may not, with impunity, provide coverage on someone's life without undertaking reasonable precautions to ascertain whether the insured is aware of and has consented to the issuance of the policy."

Although the lasting effect of this decision is unknown, it likely will require life insurance applicants and their agents to more stringently follow the company's procedural rules in the insurance application process.

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mailed or the date the substitute check was made available to make a claim for "recredit." The 40-day period can be extended for a "reasonable amount of time" for "extenuating circumstances, including extended travel or the illness of the consumer."

A bank has 10 days to research a consumer's claim that a substitute check is inaccurate. In most cases, if a bank fails to determine the validity of the claim within that time, it must recredit the consumer's account for the amount of the challenged check or $2,500, whichever is less.

Although the Check 21 Act will speed up check processing and reduce the costs involved in transporting and processing paper checks, it represents a significant change and will force many consumers to change the way they conduct business.

Porn spam threatens to create hostile work environment

by Douglas E. Lee

As the volume of pornography-related spam e-mail continues to grow, employers should ensure they are protecting themselves against hostile work environment sexual harassment claims.

In hostile work environment cases, the employee typically claims the employer has allowed offensive material of a sexual nature to pervade the workplace. Employment attorneys who have seen such cases built out of centerfold pinups, lunchroom jokes and suggestive remarks now worry that pornographic spam also might lead to liability, especially if an employer has refused to respond to employee complaints about the spam.

To protect themselves against such claims, employers should install software to block offensive e-mail and adopt and enforce a policy on pornographic spam.

While blocking software likely will not be totally effective, its installation could demonstrate an employer's good-faith effort to minimize the amount of pornography reaching its employees. Equally important is a written policy that prohibits employees from both accessing and forwarding sexually explicit e-mails. To obtain the benefit of such a policy, however, the employer must monitor compliance with the policy and discipline employees who violate it.

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agreement is whether the employer has a legitimate business interest in need of protection from former employees. In making this determination, courts consider a number of factors, including whether the business has a "near-permanent" relationship with its customers, whether the employee brought customers to the employer or served pre-existing customers, whether the employment involved specialized on-the-job training and whether the employee learned trade secrets while employed by the employer.

Carefully drafted non-compete agreements fully describe the employer's business interest in the non-compete provisions and contain the employee's acknowledgment that the business interest is legitimate. In addition, non-compete restrictions are much more likely to be enforced if they are narrowly drawn and prohibit only conduct that actually threatens the employer's business interest.

Other provisions that increase the likelihood that a restrictive covenant will be enforced include:

- the inclusion of the non-compete restriction in a broader employment contract that protects the employee from at-will termination and guarantees specified compensation and fringe benefits;
- a severance package that provides the employee some compensation during the life of the non-compete agreement and
- an option for the employee to "buy out" the non-compete agreement.

A non-compete agreement also poses practical problems for a former employee who is contemplating competing against his or her former employer. Even if the enforceability of the non-compete terms is uncertain, the cost of defending against the employer's attempt to enforce the agreement can be prohibitive, especially for a former employee seeking to start a new venture. A carefully drafted non-compete agreement therefore can in many cases prevent competition without a court fight.

Indecent police officer gets First Amendment protection

by Douglas E. Lee

The decision in *Roe v. City of San Diego* is a good example of why some people think the First Amendment is sometimes pushed too far.

In *Roe*, a San Diego police officer was fired after supervisors discovered he was selling sexually explicit videos on the adults-only section of eBay. According to the U.S. Court of Appeals for the Ninth Circuit, the videos depicted Roe alone, his face partially masked, taking off a generic police uniform and performing various lewd acts. In firing Roe, the supervisors concluded he had violated several department policies, including policies prohibiting immoral conduct and conduct unbecoming of a police officer.

Roe then sued, alleging the firing violated his First Amendment right to engage in non-obscene expressive activity. The trial court threw out the lawsuit, but the Ninth Circuit reinstated it, holding that because Roe's speech occurred outside the workplace and did not relate to his status in the workplace, Roe's conduct was protected by the First Amendment.

The Ninth Circuit, however, also held that, like the free speech rights of all public employees, Roe's right to engage in expressive activity had to be balanced against his employer's interest in promoting the efficiency of its public service. The appellate court therefore directed the trial court to determine whether this balancing justified Roe's termination.

In Print and At the Podium

Mr. Ehrmann recently completed his term as president of the Lee County Bar Association by moderating a debate between the candidates for Lee County State's Attorney . . . **Mr. Gehlbach** was elected the new president of the Association, **Mr. Badger** was elected vice-president and **Mrs. Heeg** was re-elected secretary . . . **Mr. Gehlbach** recently served as the chaplain for the annual convention of the Illinois Association of Mutual Insurance Companies, leading each session with a prayer . . . **Mr. Lee** was re-appointed legislative chair for the Rock River Human Resources Professional Association . . . **Mrs. Considine** has been named volunteer in charge of collecting donations from attorneys for the United Way of Lee County . . . **Mr. Ehrmann** assisted the Lee County Council on Aging in its recent election.

Deals and Decisions

Mr. Lee successfully represented Lee County Landfill, Inc., in obtaining local siting approval for a sizeable expansion of the landfill . . . In a family law case, **Mr. Ehrmann** helped a client establish that a self-employed business owner could not rely on assumptions and instead must prove the actual value of his business and income . . . Farm and commercial real estate transactions continue to be a major part of **Mr. Gehlbach**'s practice. He currently is involved in several transactions in which farmland near Rochelle, Sycamore and Naperville is being sold to commercial developers . . . **Mr. Ehrmann** defeated a husband's claim that the husband was entitled to one-half of an inheritance received by his wife, establishing that the wife's decision to place her husband's name on the investments was for convenience only . . . **Mr. Lee** assisted a local insurance company in recovering from an electrician who had caused a fire in the insured's home. During the case, **Mr. Lee** was able to force the electrician's expert — who had been retained to establish that the electrician was not negligent — to admit that the electrician in fact had negligently caused the fire . . . **Mr. Gehlbach** is involved in several complex estate plans, including structuring a qualified personal residence trust for a client's vacation home and drafting a charitable remainder trust to be the beneficiary of a client's retirement plan . . . **Mr. Ehrmann** is representing a municipality in the development of a Tax Increment Financing District . . . **Mrs. Considine** recently helped a client settle a wage-and-hour issue with the Illinois Department of Labor . . . **Mr. Lee** successfully represented a client in an appeal of a Department of Children and Family Services finding that the client had sexually abused his children . . . **Mr. Lee** assisted a client in establishing at trial that, because she was a minor, she was able to rescind a contract through which she had purchased a horse.