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Employers need caution to avoid liability

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The Illinois Supreme Court not only recently recognized the tort of intrusion upon seclusion in *Lawlor v. North American Corporation of Illinois*, No. 112530 (Oct. 18, 2012), but also put employers on notice that they could be vicariously liable under such a theory for the acts of a nonemployee private investigator. The *Lawlor* case has significant implications for employers hiring investigators or other third parties to unearth potentially private information concerning employees.

Employers may be familiar with the tort of intrusion upon seclusion because all five Illinois appellate districts have recognized the tort. However, the Illinois Supreme Court did not formally adopt the privacy tort until *Lawlor*, though the court discussed this tort in *Lovgren v. Citizens First National Bank of Princeton* 126 Ill. 2d 411 (1989). Employers must be cognizant of how the court's recent decision opens the door to vicarious liability for intrusion upon seclusion.

The Restatement (Second) of Torts Section 652B (1977) states that "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person."

Publication is irrelevant. An individual may be liable for investigating or examining an individual's private concerns without ever publishing the information to a third party. An individual may be liable for opening private and personal mail, searching a safe or wallet or examining a private bank account of another person.

After working for North American Corp. for seven years, Kathleen Lawlor voluntarily left to work for the company's competitor. Subsequently, North American hired Probe, a private investigation firm, to ensure that Lawlor was not contacting North American customers in violation of her covenant not to compete.

To assist in the investigation, North American gave Probe Lawlor's date of birth, address, home and cellular telephone numbers and Social Security number. Probe then hired another investigative entity, Discover, to obtain Lawlor's personal phone records. Probe provided Discover with Lawlor's personal information, which Discover then used to contact Lawlor's telephone company and pretend to be her to obtain her private phone records.

Discover sent the records to Probe, who then sent the records to North American. North American used the records to determine whether Lawlor contacted North American customers in violation of her covenant not to compete.

Lawlor brought suit against North American, in part alleging the tort of intrusion upon seclusion. Lawlor claimed that she experienced anxiety and restlessness after learning that North American obtained her phone records. North American did not dispute that there was sufficient evidence to establish an invasion of Lawlor's privacy. However, the company argued that it was not vicariously liable for the tortious acts of Probe and Discover.

The case reached the Illinois Supreme Court last year. The court held that North American could be liable for the tortious acts of Probe and Discover. Although no direct evidence established that North American knew how Probe had obtained the phone records, the court stated that a reasonable jury could infer that North American was aware that Lawlor's phone records were not public and by requesting the records, North American initiated a process that resulted in an invasion of Lawlor's privacy. However, because North American did not have an intentional, premeditated scheme to harm Lawlor, the court decreased her punitive damages award.

Lawlor's impact on investigations related to noncompete matters is especially significant for employers. The decision raises issues concerning employers' potential vicarious liability in other realms as well; for instance, it increases employers' risks of using social media, particularly in light of HB 3782, an amendment to the Illinois Right to Privacy in the Workplace Act, which recently became effective.

Under this law, an employer

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Federal insured's

All disability insurance policies contain provisions requiring that insureds receive regular care from a physician. However, such clauses are usually liberally interpreted. For example in *Heller v. Equitable Life Ins. Soc'y*, 833 F.2d 1253, 1257 (7th Cir. 1987), the court ruled that such a clause could not be read to require an insured to undergo carpal tunnel surgery as a condition of receiving disability benefits.

In a recent ruling from the 6th U.S. Circuit Court of Appeals, *McCandless v. Standard Ins.Co.*, 2012 U.S.App.LEXIS 26235 (6th Cir. Dec. 20, 2012)(unpublished), the court addressed the topic from a different perspective. The court reversed a lower court ruling that the plaintiff was not eligible to receive benefits due to her failure to seek treatment from a rheumatologist. As will be explained later, the court of appeals found the insurer abused its discretion and that its interpretation of the care of a physician clause in its policy was fraught with problems.

The plaintiff, Sandra McCandless, worked as a manager for Countrywide Home Loans until beginning a medical leave in 2005 on account of a variety of medical conditions including a swelling of the middle layer of the eye known as uveitis, along with ankylosing spondylitis (AS) (an inflammatory arthritis of the joints and spine) and severe depression.

Benefits were initially approved for depression, however, by characterizing the claim as psychiatric, Standard Insurance Co. maintained that benefits were subject to a two-year maximum benefit duration on account of policy provisions relating to psychiatric disorders. Although Standard was informed about all of the plaintiff's medical conditions, the insurer denied it had overlooked her physical impairments and reaffirmed the 24-month benefit limitation.

McCandless appealed Sandard's determination. According to the record, she discussed her case

They sought to adopt siblings, he said.

"We're hoping to keep the boys we met together so the older one can help the younger one out with learning (English) words and being able to be that big brother," he said.

The Carrasquillos, who receive updates from their coordinator, still hope to adopt the boys, Joe Carrasquillo said. The couple met the children and already call them "our kids."

"Every day that we were there for that short time, we felt a little

Leslie J. Friedberg, a partner at Nottage and Ward LLP who handles a couple of international adoptions each year, said the ban likely serves as retaliation to a U.S. law that imposes U.S. travel and financial restrictions on human rights abusers in Russia.

"Adoption is always difficult...," she said. "The older they are, the more difficult it is — whether it is domestic or an international adoption."

Solo practitioner Kathleen Hogan Morrison, who has practiced adop-

My clients are anxious and concerned and want to finalize their adoptions because they feel the children they've been matched with are already theirs," she said.

Some of Morrison's other clients, who are in earlier stages of the process and originally considered adopting children from Russia, may pursue other countries, she said.

Solo practitioner Eugenia Miller Gillespie said international adoption paperwork typically gets handled by the other country and finalized by U.S. adoption agencies.

including an American woman sending her adopted 7-year-old son back to Russia in 2010.

"Thousands of success stories" of Russian adoptions still exist, Gillespie said.

"It would be one thing if Russia said, 'We aren't going to let U.S. families ... adopt our children anymore, but we have these five things we're going to do to make it better for our children here,' " she said. "But without a plan, it's really a shame."

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Club

appellate court has to conduct some sort of review — otherwise the appellate court would simply affirm any jury verdict."

The case stems from a February 2003 incident that resulted in 21 fatalities and injuries to 50 other people.

After security guards used pepper spray to stop a fight on the club's dance floor, patrons got trapped in a narrow staircase while trying to escape.

Kyles and Hollins avoided involuntary manslaughter convictions, but the city later accused them of indirect criminal contempt, claiming noncompliance with a court order led to the deaths and injuries.

Years later, the city and owners continue to dispute over whether the order blocked the club from operating that night.

At a proceeding seven months prior to the event, Cook County

Christopher W. Carmichael

Circuit Judge Daniel Joseph Lynch heard testimony over code violations at the building, then issued an order to keep the second floor vacant.

The owners contended the layout of the building created ambiguity in that document, and the appellate court agreed.

A restaurant occupies the first floor of the facility, while the nightclub takes up the second level — but it also includes a mezzanine area with VIP boxes that overlook the dance floor.

Vicki F. Rogers, an assistant Cook County public defender who represents Hollins, said city building inspectors reported problems with the mezzanine level.

But the judge's order didn't clearly indicate whether he wanted the VIP section shut down or the entire club, she said.

Rogers also argued that if the court sought closure of the full second floor, the city missed chances to enforce that demand.

After the order came out, she said, the city approved a liquor license and a license to maintain late night hours, yet it didn't indicate it should stop operating.

"If you know your club is open and the court knows your club is open, then you believe that you can occupy that club," she said. "And that the order is as you've been told — not to occupy the VIP rooms."

The city, though, contended that Kyles and Hollins needed to ask the court for clarification if the order confused them.

While the appellate court found the document ambiguous, a jury determined the men understood it — and a court of review should defer to that assessment, Laytin said.

"The court weighed the evidence itself, instead of looking only to whether a rational jury could reach the verdict," she said.

Carmichael, however, said unclear orders shouldn't prompt criminal contempt charges.

"Are we suggesting that if we can read one of the ambiguities and find a violation, therefore we'll convict?" he said. "That's not the weight of authority nationwide on the issue."

Laytin said even a ruling in the city's favor will not completely resolve the dispute. The appellate court's decision didn't tackle all the questions the defendants presented for review, she said, so the high court could still remand the case for further proceedings.

The case is *People ex rel. City of Chicago, etc., v. Le Mirage Inc., etc., et al.*, No. 113482.

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may not request a password or other account information to access a current or prospective employee's social networking website. Although employers may still access information regarding employees that is in the public domain and obtained in compliance with the act, the act does not contain any exclusion for investigating workplace misconduct.

The full effect of *Lawlor* and the amendment remains to be seen. Courts may be asked to decide whether *Lawlor* can be applied to impose vicarious liability on employers for hiring a private investigator to uncover an employee's social media password or access social media information not generally available to the public.

Whether investigating a potential violation of a noncompete agreement or any other type of employment claim, employers must be cautious when hiring third-party investigators. Among other concerns, employers must consider privacy rights.

While an employee's cellphone records, social media activity or other potentially private information may be tremendously helpful to employers investigating workplace misconduct, employers must be cautious when hiring independent investigators to obtain such information in order to avoid potential liability.

Employers should assess the investigator's methods and practices, the type of information that will be obtained, the scope of the investigation, the parties that will be involved and potential uses of the personal information.

A failure to exercise such care could result in a suit by a former employee, whose private affairs were intruded upon, by a well-intended investigation conducted by an overzealous investigator.