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Illinois Supreme Court Recognizes Privacy Tort and Holds Employer Liable Under Agency Law

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On October 18, 2012, the Illinois Supreme Court delivered a very important decision for Illinois employers in *Lawlor v. North American Corporation of Illinois*, Case No. 112530 (Oct. 18, 2012). The court not only confirmed that the tort of intrusion upon seclusion is recognized in Illinois, it also applied principles of agency law to find an employer liable for the torts of a non-employee private investigator because the investigator was acting as the employer's agent.

Intrusion Upon Seclusion

The formal recognition of the tort of intrusion upon seclusion by the Illinois Supreme Court was expected as each of the state's appellate districts had previously recognized the tort. Still, while the tort was discussed in *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411 (1989), it had not, until *Lawlor*, been formally recognized by the state's highest court.[1]

In addition to recognizing the tort, the Illinois Supreme Court decision formalized the elements necessary to prove the tort of intrusion upon seclusion, citing to the Restatement (Second) of Torts:

> *Section 652B of the Restatement (Second) of Torts* provides: "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 his privacy, if the intrusion would be highly offensive to a reasonable person." *Restatement (Second) of Torts § 652B* (1977). For purposes of illustration relevant to the facts in this case, comment b to *section 652B of the Restatement* provides, in pertinent part.
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> "b. The invasion may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the information outlined." *Restatement (Second) of Torts § 652B cmt. b*, at 378-79 (1977).

Turning specifically to the employment law arena, this decision confirms that Illinois plaintiffs' attorneys have another potential cause of action that may arise out of the employment relationship. Following on the heels of the new Illinois law protecting employees' privacy rights

1 Indeed, in *Lawlor* the parties had not even raised the issue.

in regards to social media,[2] the court's decision underscores the need for employers to tread cautiously when unearthing or even reviewing personal information relating to an employee, whether the source of the information is social media or another outlet.

Employer Liability for the Torts of Its Non-Employee Investigators

The decision also serves as a cautionary tale for employers and their employee-related investigatory practices. In *Lawlor*, the Illinois Supreme Court revisited the longstanding principle that an employer is liable for the tortious conduct of its agents. Specifically, the court examined whether an employer could be held liable to its employee for an intrusion into private seclusion made by a non-employee private investigator.

The facts reviewed by the court showed that, in 2005, Plaintiff Kathleen Lawlor, a salesperson, accepted a sales position with a competitor of North American Corporation. North American then hired Probe, a private investigation firm, to determine whether Lawlor was violating her covenant not to compete by contacting North American customers. To assist with the investigation, North American provided Probe with Lawlor's date of birth, address, home and cellular phone numbers, and Social Security number. Probe, in turn, engaged another investigation agency, Discover, to obtain Lawlor's personal phone records. Evidence at trial established that a Discover employee obtained the phone records by pretending to be Lawlor. The phone records were sent to Probe, who then faxed them to North American. Upon receipt, North American employees attempted to verify whether Lawlor was calling North American customers.

Lawlor claimed that she experienced a number of problems as a result of North American's possession and review of her illicitly obtained phone records, including sleeplessness and anxiety for her own and her family's safety. North American countered with claims that Lawlor breached her fiduciary duty by communicating confidential corporate sales information to a competitor. Judgments were entered for both sides – including punitive damages of $1.75 million against North American.

In arguing before the Illinois Supreme Court, North American did not dispute that the actions of the investigators in obtaining Lawlor's phone records without her authorization constituted an actionable intrusion into her seclusion. Rather, North American contended that there was no evidence that it personally obtained Lawlor's phone records, and that an agency relationship did not exist between North American and Probe or Discover. In attacking the agency relationship, North American asserted that it lacked knowledge of how the call logs were obtained and it had no control over the manner in which the investigators did their work.

In affirming the jury's findings, the court recognized there was no direct evidence that North American knew how the phone records were acquired by the investigators. However, the court determined that the jury could reasonably infer that North American was aware that Lawlor's personal phone records were not publically available, and that by requesting the records North American set in motion a process by which investigators might pose as Lawlor or otherwise invade her privacy to obtain her phone records. By providing non-public, personal information to Probe, including Lawlor's Social Security number, the court found that North American's conduct was consistent with a principal exercising control over its agent by directing it to obtain specific information and providing it with the tools to do so.

Implications for Employers

- The Illinois Supreme Court's decision in *Lawlor* highlights the potential liability created by the relationship between employers and their non-employee investigators. Whether the investigative goal is a thorough background check, high-level candidate vetting, workers' compensation surveillance, or, as was the case here, enforcement of a noncompetition clause, Illinois employers must be concerned with the processes and tactics used by their non-employee investigators.
- Illinois employers should be cognizant of the privacy rights of their employees and tread carefully when sharing and/or releasing a current or former employee's private and personal information. Employers must take care when they provide such information to outside (or inside) investigators in the context of employee privacy rights. Employers should also be prepared to question how private information will be used by an investigator to ensure and require that the purpose is lawful.

2 *See* Philip Gordon and Kathryn Siegel, Illinois' Social Media Password Protection Law Handicaps Employers' Legitimate Business Activities, Littler ASAP (Aug. 7, 2012)

- The court in *Lawlor* found that North American knew, or should have known, that acquiring its former employee's personal phone records would require skirting the law, or at a minimum, an invasion of privacy. Since investigators are unlikely to front "how they make the sausage," employers should continue to draft carefully their engagement letters with private investigators. Employers should consult counsel appropriately and ensure that any written engagement clearly sets out expectations that include the exclusive use of legal and professionally acceptable investigatory practices

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