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Legal groups plan salvo at 7th Circuit investor ruling

By MARTHA NEIL
Law Bulletin staff writer

Local lawyers are up in arms over a recent federal appellate court ruling that interpreted Illinois law to require no award of damages to the investor in a disastrous Houston real estate deal.

The Illinois Trial Lawyers Association expects to seek leave to file an amicus brief as part of a planned petition asking the 7th U.S. Circuit Court of Appeals to reconsider its decision in the controversial case.

And the Illinois State Bar Association likely will either seek leave to file an amicus brief of its own about a rehearing or else ask the 7th Circuit to certify a question of law about causation back to the Illinois Supreme Court, said David

N. Anderson, an ISBA spokesman. At a meeting of the ISBA's Board of Directors Friday, "the Executive Committee, which is composed of our president, three vice presidents and immediate past president, has been authorized to take action, pending a prompt and thorough review of the legal issues before the court," Anderson said.

The Trial Lawyers' planned amicus brief was described as "very, very unusual — the rarest of rarities" by G. Grant Dixon III, an associate at Corboy & Demetrio PC who is drafting it.

Although the ITLA not infrequently seeks to file an amicus brief after a petition for a rehearing is granted, it rarely tries to join in requesting a rehearing, Dixon explained.

The group is concerned that the 7th Circuit's opinion in *Lotus A. Movitz, as Trustee, and Estock Corp. N.V. v. First National Bank of Chicago*, Nos. 97-3761 and 97-3818, might be interpreted to include decisions on proximate causation and tort damages under Illinois law, Dixon said.

Hence, it would like to see the Court of Appeals either clarify that the decision doesn't decide such issues or else consider and explain the issues in greater depth, Dixon noted.

The *Estock* case is also unusual, in that the 7th Circuit in essence held a district court had erred by not granting a judgment notwithstanding the verdict in a jury case — and then itself granted a judgment notwithstanding the verdict,

rather than remanding the case back to the trial court for further consideration, Dixon said.

However, the Court of Appeals' express holding is that the plaintiff in the case failed to prove any damages.

Myron M. Cherry of Cherry & Flynn, who represented the plaintiff before the 7th Circuit could not be reached for comment. The court file in the case indicates he plans to file a petition for rehearing en banc by July 21, however.

The *Estock* case began with an Iraqi investor, Jawad Hashim. In 1980, he told an executive of First National Bank of Chicago that he wanted to invest \$2 million in U.S. real estate. The bank's real estate acquisition department found

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States, tobacco industry try to strike new deal

By SKIP WOLLENBERG
Associated Press writer

NEW YORK — A month after the Senate killed a \$516 billion settlement with Big Tobacco, the industry is said to



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an office building in Houston. And Hashim then created the Estock company as the vehicle for his investment in the building, according to the 7th Circuit's June 23 opinion in the diversity case. It was written by Chief Judge Richard A. Posner. Judges William J. Bauer and John L. Coffey concurred in the opinion. After entering into a contract with Estock to evaluate, buy, operate and maintain the office building, the bank bought it for Estock with a combination of \$2.2 million cash and assumption of a \$2.9 million mortgage.

Meanwhile, according to the 7th Circuit's opinion, the bank had "carelessly failed to check in advance of the purchase the building's structural soundness and as a result failed to discover that the building had not been properly designed to prevent its foundation from settling and that the air conditioning ducts could not deliver enough cool air to keep the tenants comfortable — a serious problem in Houston's climate." The bank also "managed to overestimate the net cash flow in the very first year of Estock's ownership by a factor of almost four (\$135,000 versus \$35,000)," Posner wrote.

In 1985, following problems with tenants and despite an additional \$800,000 contributed by Estock, the entire \$2.8 million cash investment was lost after the Houston real estate market crashed and the building's mortgage was foreclosed upon.

Estock and Louis A. Movitz (investor Hashim's trustee in bankruptcy), then breached the bank for breach of contract and breach of fiduciary duty in the Northern District of Illinois. The trustee's claims were dismissed, but Estock won a \$3.3 million jury verdict.

Unlike many states, Illinois treats breach of fiduciary duty as a contract action, not a tort action, Dixon noted. Despite the bank's apparent failure to exercise due care in performing its contract with Estock, the bank was not liable because the company failed to prove any damages, the 7th Circuit held. Although Estock might well have not done so, Posner states in the opinion. One way to prove damages would have been to have an expert testify at trial about the property's value when purchased — without structural defects and based on a proper calculation of its projected net income, Posner wrote.

"Then the damages recoverable in this suit would [have been] ... the difference between the loss that Estock would have sustained had the bank acted with due care ... and the larger loss that it actually sustained" when the Houston real estate market crashed.

Instead, the plaintiff "went for the big bucks in this suit" and "tried to recover for a loss caused by extraneous economic conditions," the opinion states. Because the plaintiff limited its damages case to what it lost by purchasing the building, rather than what it lost because of the bank's conduct, reversal of the \$3.3 million jury award was required. "This result may seem very harsh," Posner wrote. "It may seem obvious that Estock lost something — at the very least, the \$66,000 that it eventually paid to correct the foundation subsidence problem that the bank had overlooked. But it may not have lost this money as a result of the bank's misconduct but only as a result of the collapse of the Houston real estate market."

At another point in the opinion, Posner seems to say that an absence of proximate causation precludes an award of damages to Estock, according to Dixon. Although actual "but-for" causation is established by the fact that Estock purchased the office building at the bank's recommendation, the legal responsibility

of the bank for Estock's damages is not, Posner writes.

The issue, he wrote, is akin to the distinction between "transaction causation" and "loss causation" in securities cases. There, just because a defendant's conduct resulted in the plaintiff's purchase of stock, it doesn't automatically follow that this defendant is responsible for the plaintiff's loss, if the stock drops in value, the chief judge explained. Comparing the damages issue in *Estock* to a famous 1874 English tort case concerning sheep swept off a ship in a storm, the court held that the cause of the plaintiff's loss was unrelated to the bank's duty.

Like the shipowner in *Gorris v. Scott*, 9 L.R. Exchequer 125, which had a duty from diving overboard," he wrote.

to build pens for the sheep to prevent the spread of disease, the bank had a duty to inspect the office building bought by Estock to make sure it was a sound purchase under then-current market conditions, Posner's opinion explains. But the bank, like the shipowner, had no duty to protect the plaintiff against the injury that occurred, Posner wrote. Just as a storm, not disease, caused the loss of the sheep, the plummeting real estate market in Houston, not the bank's conduct, was responsible for the loss of Estock's \$2.8 million investment in the Houston office building, he wrote.

"The bank had no contractual or other legal duty to build pens that would prevent the Houston real estate market