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INTRODUCTION

The Illinois General Assembly enacted the Workers' Compensation Act to insure the orderly administration of a minimum recovery in every instance of employee injury. The Act establishes a system of employer liability without fault and abrogates the employer's common law defenses. The exclusive remedy provision of the Act grants immunity to the employer from additional common law or statutory actions. The Illinois Workers' Compensation Act has generally worked to the benefit of both the employer and the employee.

Unrestricted application of the exclusive remedy provision may, however, be neither reasonable nor equitable in employment situations in which the employer assumes a second capacity with respect to its employee's injury. The dual capacity doctrine is designed to minimize potential unfairness to the employee. Under

1. ILL. REV. STAT. ch. 48, § 138.1 et seq. (1979) [hereinafter referred to as the Workers' Compensation Act]. See notes 8-20 infra and accompanying text.

The Act is not, however, without its problems. Critics have attacked the Act on the ground of benefits afforded to employees. Some commentators argue that benefits are insubstantial, while others believe that benefit levels are already too high and that Illinois businesses are suffering due to the cost of workers' compensation insurance. Further, some contend that the increase in litigation inhibits the ability of the Act to achieve its purpose of providing a speedy and inexpensive remedy. See Stevenson, The Illinois Workmen's Compensation System: A Description and Critique, 27 DePaul L. Rev. 675 (1978) [hereinafter cited as Stevenson].

6. See generally, 2A A. Larson, THE LAW OF WORKMEN'S COMPENSATION, § 72.80 (1976 & Supp. 1980) [hereinafter cited as Larson]. The Illinois courts have also used the phrase "dual capacity doctrine" to permit a person who is simultaneously an employer and employee to collect workers' compensation benefits. Although an employee may receive work-
this doctrine, an employer shielded by the exclusive remedy provision may become liable in tort based upon a second capacity which confers on it legal obligations independent of those imposed on it as an employer. Despite the apparent simplicity of the application of dual capacity, the doctrine presents a controversial issue in Illinois. Specifically, the Illinois courts cannot agree on the requirements for finding that a second capacity exists.

This article will discuss the foundations and applications of the dual capacity doctrine. The case law in Illinois dealing with dual capacity and the different approaches to its application will be surveyed. Finally, this article will recommend the most suitable approach for Illinois.

BACKGROUND

The Workers' Compensation Act

Prior to the enactment of the Illinois Workmen's Compensation Act in 1911, few employees injured during the course of their employment recovered damages against negligent employers. Employers successfully relied upon the common law defenses of contributory negligence, assumption of risk, and the fellow-servant doctrine. Because of the inequities of the common law system, the Act was enacted to afford protection to employees by providing them with prompt and automatic compensation for their work-related injuries. The Act establishes a system of employer liability

ers' compensation benefits, an employer-owner may not. Courts have adopted a dual capacity doctrine to remedy this situation:

Prior decisions of this court have, however, adopted the 'dual capacity' doctrine as to the corporate executives and clearly establish that one who is a sole stockholder, president and director of a corporation may still be considered in an employer-employee relationship with the corporation if at the time of injury he is performing the work of an ordinary employee as distinguished from discharging his executive responsibilities.


7. See notes 29-34 infra and accompanying text.

8. Of all the Illinois cases concerning dual capacity, only Smith v. Metropolitan Sanitary District, 77 Ill. 2d 313, 396 N.E.2d 524 (1979), Sharp v. Gallagher, 94 Ill. App. 3d 1128, 419 N.E.2d 443 (1st Dist. 1981), and Marcus v. Green, 13 Ill. App. 3d 699, 300 N.E.2d 512 (5th Dist. 1973) have actually applied the doctrine.

9. See notes 60-97 infra and accompanying text.


11. Stevenson, supra note 4, at 675.

without fault that abrogated the familiar common law defenses.\textsuperscript{13}

The exclusive remedy provision of the Act embodies the basic principles of the "workmen's compensation compromise," to which all covered employers and employees have expressly or impliedly agreed.\textsuperscript{14} Employers compromise their common law rights by foregoing the common law defenses and by compensating employees for all injuries occurring during the course of employment, irrespective of fault.\textsuperscript{16} Employees sacrifice important attributes of their common law rights because the exclusive remedy provision precludes the maintenance of separate tort actions against their employers.\textsuperscript{16} Employees must also accept compensation fixed by

\begin{footnotesize}

\footnote{1 Larson, supra note 6, § 2.20 at 5.}


\footnote{14. Employer Suability, supra note 5, at 832. The exclusive remedy provision provides, in relevant part:}

\footnote{No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or anyone otherwise entitled to recover damages for such injury.}

\footnote{ILL. REV. STAT. ch. 48, § 138.5(a) (1979).}

\footnote{The Workers' Compensation Act also delineates possible recipients of coverage, Ill. Rev. Stat. ch. 48, § 138.1(4)(b) (1979), and requires employers to maintain suitable workers' compensation insurance, Ill. Rev. Stat. ch. 48, § 138.1(3).}

\footnote{15. Larson, supra note 6, § 65.20. Employers also gain the benefit of relief from the prospect of large damage verdicts by use of various compensation schedules. Further, the Workers' Compensation Act establishes the Illinois Industrial Commission. The commission provides a special forum to handle claims. Claims are governed by provisions relating to compensable injuries, benefit limits, and appealability of the decisions of arbitrators.}

\footnote{16. Larson, supra note 6, § 65.20. An exception to this general principle is provided where the employer commits an intentional tort against his employee. Illinois courts have refused to extend protection of the exclusive remedy provision where actual intent is alleged and proved. See Collier v. Wagner Castings Co., 70 Ill. App. 3d 233, 388 N.E.2d 265 (4th Dist. 1979), aff'd 81 Ill. 2d 229, 408 N.E.2d 198 (1980). In Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the Illinois Supreme Court allowed an action for damages against an employer, notwithstanding the exclusive remedy provision, where the employer discharged the employee after the employee filed a workers' compensation claim against the
statutory schedules17 which exclude normal categories of common law damages such as pain and suffering and loss of consortium.18 Thus, both parties compromise fundamental rights in order to provide and promote an efficient system to compensate all injured employees.

The Act precludes common law or statutory actions only against covered employers. Employees may still bring suit for injuries arising out of their employment against third parties.19 Since third parties have not agreed to the workers' compensation compromise, they are subject to the tort actions of employees.

The Illinois Supreme Court has declared that all provisions of the Workers' Compensation Act are remedial and should be liberally construed to accomplish its purposes and objectives.20 This mandate of liberal construction is particularly relevant in determining how the dual capacity doctrine should apply in Illinois.

**Difficulties Associated With The Exclusive Remedy Provision**

Unrestricted application of the exclusive remedy provision can lead to situations in which employers may reap benefits not contemplated by the workers' compensation compromise. For example, if an employee of a contractor implicitly agrees that the contractor owes him certain duties within the employment relationship, the breach of those duties cannot form the basis of a tort action because of the exclusive remedy provision.21 If the con-

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18. Id.
19. ILL. REV. STAT. ch. 48, § 138.5(b) (1979) provides, in relevant part:
   Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act.
   This section also provides that if an employee recovers damages from a third party, the employer is entitled to payment of the benefits previously paid to the employee less a pro rata share of the costs of the third party action. Moreover, the section allows an employer to initiate a suit on behalf of the employee.
21. The duties owed by a master to a servant include the duty to provide a safe place to work, the duty to provide safe tools, the duty to warn, the duty to provide a sufficient number of suitable fellow servants, and the duty to promulgate and enforce rules for the conduct of other employees in order to make the work safe. W. PROSSER, HANDBOOK OF THE LAW OF
tractor coincidentally owns the land on which a project is being undertaken, that employer will have common law and statutory duties to all workers who come on to the land based on his second capacity as landowner or supervisor of the construction. Workers employed by third parties would be able to maintain tort actions against the contractor in the event of injury; the contractor's own employee would be precluded from maintaining the same action derived from duties violated by the employer-landowner acting in a capacity outside of the primary employment relationship. The employment relationship thus gives the employer a broad range of protection against normal common law actions, which were not contemplated in the workers' compensation compromise.

Undue benefits may also accrue to an employer when an employee is injured by the use of a product which is manufactured and sold by the employer. A worker injured by a defective tool or machine may generally maintain an action against the manufacturer premised on strict products liability. If the employee is injured by a product manufactured by the employer, however, an action would be foreclosed because of the exclusive remedy provision.

Torts § 80, at 526 (1971).

22. These duties may flow from the common law, as in the case of premises liability, or statutes such as the Illinois Structural Work Act. Ill. Rev. Stat. ch. 48, § 60 et seq. (1979). The Structural Work Act essentially attempts to protect those exposed to the daily hazards of construction by requiring that construction be conducted in a "safe, suitable and proper manner." Ill. Rev. Stat. ch. 48, § 60(1) (1979). Violations of these standards will give rise to an action by an injured person against the person or entity in charge of the construction. Section 60 of the Act covers a wide class of persons, extending protection to "any person . . . employed or engaged thereon, or passing under or by the same . . . ."

23. See notes 46-67 infra and accompanying text.

24. See generally Employer Suability, supra note 5.

25. For a detailed analysis of employer-manufacturer dual capacity, see Third Party Liability, supra note 16; Comment, Manufacturer's Liability As A Dual Capacity of An Employer, 12 Akron L. Rev. 747 (1979).

26. Illinois adopted strict products liability in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). The Illinois Supreme Court stated that a manufacturer will be liable without regard to fault to users or consumers for unreasonably dangerous and defective products. Strict products liability promotes the desire to protect the public from unreasonably dangerous products while allowing the manufacturers to spread the costs of this protection throughout the particular industry and society as a whole.


An employer also gains more protection than the Act may have contemplated when an employee of a doctor or hospital is injured while working. If the doctor or hospital treats the injured worker, the employee cannot sue for negligent treatment because of the exclusive remedy provision. This result obtains even though the negligence occurred outside of the employment relationship.
Thus, an employee could be denied significant protections enjoyed by others merely because he worked for an employer covered by workers’ compensation. An employer who assumes a relationship to an employee in addition to the primary employment relationship thus will often be afforded significant additional protection by the Act, even though these protections were neither explicitly nor implicitly agreed to by the employee in the compromise.\(^{28}\)

**Fundamental Principles of the Dual Capacity Doctrine**

In response to the potential abuse of the exclusive remedy provision, courts have utilized the dual capacity doctrine.\(^{29}\) The doctrine recognizes that an employer who is also a landowner, doctor, or manufacturer may be held liable to his own employee for injuries, notwithstanding the exclusive remedy provision.\(^{30}\) The rationale behind this doctrine suggests that an employer should be held liable when acting in a second capacity that confers obligations independent of those of an employer.\(^{31}\) This principle recognizes complex employment relationships without undermining workers’ compensation.\(^{32}\) One basic prerequisite of an action premised on the dual capacity doctrine is the presence of additional obligations of an employer to an employee which are distinct from those obligations arising from the employment relationship.\(^{33}\) The dual capacity test does not concern the nature of the second function of the employer, but rather examines whether the second function generates obligations unrelated to those of an employer.\(^{34}\)

The courts first recognized the dual capacity doctrine nearly

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28. The problem has been noted in this manner:

The employee, in accepting employment, can be presumed to have accepted all the conditions of his employment obvious to him and to have implicitly or explicitly agreed to the workmen's compensation compromise. But he cannot be presumed to have waived his right to bring common law actions against negligent third parties who coincidentally share the role of employer.

*Employer Suability, supra* note 5, at 832.


30. *Larson, supra* note 6, § 72.80.

31. *Id.*

32. Serious questions arise, however, concerning the propriety of requiring an employer to submit to a common law or statutory action in addition to workers’ compensation. This concern is mitigated by the fact that the employer can utilize the traditional defenses available against a particular claim, thus minimizing any potential unfairness.

33. *Larson, supra* note 6, § 72.80.

34. *Id.*
The California Supreme Court held that a chiropractor who negligently aggravated his employee's work-related injuries could be held liable for malpractice without regard to liability under California's workers' compensation laws. The court distinguished the capacity in which the doctor treated his employee from the employment relationship and thus permitted a third party action against the employer. It is significant that the court based its decision on an examination of the relationship between the parties. It did not concern itself with the issue of whether the doctor existed as an entity legally separate from the employer.

The United States Supreme Court has also discussed and endorsed the principles underlying the dual capacity doctrine. In a case dealing with the exclusive remedy provision of the Longshoremen's Act, the Court held an employer liable in tort to an employee who was injured while unloading a vessel that the employer had leased to a third party. The Court emphasized that it would be unjust to preclude recovery because employees of third parties who work on the same vessel would be entitled to recovery against the lessor of the ship for a similar injury.

Despite the progressive nature of the doctrine, most jurisdictions encountered difficulties in creating the dual capacity exception to

36. Id. at 796, 249 P.2d at 15. The California Workers' Compensation Act, nearly identical to that of Illinois, provides for exclusive remedy and third party actions. See CAL. LAB. CODE §§ 3601, 3852 (West 1971).
38. Id. at 793, 249 P.2d at 13.
41. Id. at 415. Since The Yaka, several courts have held that an employer-shipowner could be liable for injuries to its own employees irrespective of the exclusive remedy provision, based upon the rationale enunciated therein. That is, employees should not be denied common law recovery merely because their employers coincidentally own the ship. See Smith v. M/V Captain Fred, 546 F.2d 119 (5th Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976).
exclusive remedy provisions. A sampling of the approaches utilized in other jurisdictions discloses that only a minority of states accept and apply dual capacity. Those courts which reject dual capacity do so on the basis of perceived inconsistencies with the exclusive remedy provisions, avoidance of judicial legislation, or lack of

42. See notes 43-45 infra and accompanying text. Only California, Illinois, and Ohio have unequivocally acknowledged and applied the dual capacity doctrine.

Michigan courts have also applied what is essentially the dual capacity doctrine. In Panagos v. North Detroit Gen. Hosp., 35 Mich. App. 554, 192 N.W.2d 542 (1971), a hospital employee was injured when she cut her mouth on a foreign particle in a piece of pie purchased in the hospital's cafeteria. Id. at 555, 192 N.W.2d at 542. Without specifically mentioning the dual capacity doctrine, the court allowed the plaintiff to bring a tort action separate from the workers' compensation remedy:

Plaintiff's present case is based upon the vendor-vendee relationship. The whole theory of the cause of action has nothing to do with the fact that plaintiff also happened to be employed by the defendant. We see no need for plaintiff to first seek relief from the Workmen's Compensation Department when it is clear that the employee-employer relationship is unrelated to the cause of action.

Id. at 559, 192 N.W.2d at 544.

The test expressed in Panagos examines the nature of the second function of the employer. Actually, the dual capacity doctrine is not concerned with the precise legal nature of the second function of the employer, but rather whether that second function generates obligations unrelated to those flowing from the capacity of employer. See note 34 supra and accompanying text. Other Michigan cases utilizing the same test include Robards v. Estate of Kantzler, 98 Mich. App. 414, 296 N.W.2d 265 (1980); Neal v. Roura Iron Works, Inc., 66 Mich. App. 273, 238 N.W.2d 837 (1975).


44. Courts in four states have declined to adopt dual capacity by judicial decision. See Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 359 N.E.2d 544 (1977) (case involving employer-manufacturer of pressure cooker); Herbert v. Gulf States Util. Co., 369 So.2d 1104 (La. App. 1979) (suit against utility company-landowner for electrical burns); Longiver v. Revere Copper & Brass, Inc., 80 Mass. Adv. Sh. 1783, 408 N.E.2d 857 (1980) (suit against employer-landowner for negligence); Trotter v. Litton Sys. Inc., 370 So.2d 244 (Miss. 1979) (suit for employer's aggravations of work-related injuries). Citing the strict language of the exclusive remedy provisions, these courts have ruled that the decision to adopt dual capacity rests with the legislature. In Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 359 N.E.2d 544, 545 (1977), the court remarked, "The clear and unambiguous language of the Act precludes our adoption of the dual capacity doctrine. . . . " The court continued, "If a change in the law is to be made in this respect, such change must be by Act, or at least authorization of the General Assembly."
appropriate factual settings.\textsuperscript{45}

**The Dual Capacity Doctrine in Illinois**

**History**

Illinois courts first recognized and applied the dual capacity doctrine in *Marcus v. Green.*\textsuperscript{46} The plaintiff was employed by a sole proprietorship.\textsuperscript{47} The individual employer was also a member of a partnership that owned the land on which the plaintiff worked.\textsuperscript{48} The employer thus simultaneously occupied two capacities with respect to his employee: a partnership and a sole proprietorship. While working on the partnership's property, the plaintiff-employee incurred injuries.\textsuperscript{49} The employee accepted workers' compensation benefits provided by the employer, and then brought an action against the partnership as owner of the land and supervisor of construction.\textsuperscript{50} Because the employer had paid the workers' compensation benefits, the partnership contended that the exclusive remedy provision immunized it from suit by virtue of the employer's membership in the partnership.\textsuperscript{51}

The Fifth District of the Illinois Appellate Court refused to apply the exclusive remedy provision to bar the plaintiff's action. Instead, the court applied the dual capacity doctrine to support an action against the partnership.\textsuperscript{52} The court found that the em-

\textsuperscript{45} Courts in at least five states have implied that the dual capacity doctrine may be viable in their jurisdictions, but the fact situations in the cases presented were not amenable to its application. *See, e.g.,* Stone v. U.S. Steel Corp., 384 So. 2d 17 (Ala. 1980) (suit alleging dual capacity based on separate divisions of a corporate employer); Adair v. Moretti-Harrar Marble Co., 381 So. 2d 181 (Ala. 1980) (suit for negligence in safety inspections by a self-insured employer); Mapson v. Montgomery White Trucks, Inc., 357 So. 2d 971 (Ala. 1978) (case in which an employee was injured during employment and no independent obligations to the employee existed); Wright v. Moore, 380 S.W.2d 172 (La. App. 1979) (suit against state employer for malfunction of railroad crossing signal); Latendresse v. Preskey, 290 N.W.2d 267 (N.D. 1980); Parker v. Williams and Madjanik, ___ S.C. ___, 267 S.E.2d 524 (1980) (wrongful death action against landowner by employee of separate subcontractor). These cases express a high degree of understanding of the fundamental issue of distinct obligations to the employee and demonstrate a willingness to apply the doctrine in appropriate fact situations.

\textsuperscript{46} 13 Ill. App. 3d 699, 300 N.E.2d 512 (5th Dist. 1973).

\textsuperscript{47} *Id.* at 701, 300 N.E.2d at 514.

\textsuperscript{48} *Id.*

\textsuperscript{49} *Id.* at 701, 300 N.E.2d at 513.

\textsuperscript{50} *Id.*

\textsuperscript{51} *Id.* at 702, 300 N.E.2d at 515.

\textsuperscript{52} *Id.* at 707-08, 300 N.E.2d at 517-18. The court thus allowed a claim against the employer, as a landowner in charge of construction, for violation of the Illinois Structural Work Act, ILL. REV. STAT. ch. 48, § 60 et seq. (1979).
ployer possessed two sets of legal duties to its employee: one arising out of the employment relationship and one resulting from the partnership activity. The Fifth District concluded that while an action against the employer as such was precluded, an action against the employer acting in the capacity of a landowner was permissible. In reaching this conclusion, the court analyzed the employment relationship without regard to the legal organizational structure of the employer. It, of course, considered the result as consistent with the remedial purposes of the Workers' Compensation Act.

Despite this reasoning and authority, Illinois appellate court decisions after Marcus declined to apply the dual capacity doctrine. The courts denied third-party actions against employers acting as landowners or manufacturers, and held that workers' compensation was the exclusive remedy. These courts found persuasive the Marcus court's subsequent retreat from its statement of the doctrine. In a later case, the Fifth District stated that it did not read its earlier opinion as a broad repeal of employer immunity. The court distinguished Marcus on the ground that the employer

53. Id. at 708-09, 300 N.E.2d at 519. The court stated that the Structural Work Act was designed to provide a remedy for personal injuries and property damage sustained by particular employees. The court concluded that the duty imposed by the Structural Work Act on an owner in charge of the work was entirely separate from the duty of an employer. Id. at 707-08, 300 N.E.2d at 517.

54. Id. at 707-08, 300 N.E.2d at 518.

55. Id.

56. Employer-landowner situations presented several cases for review. In Walker v. Berkshire Foods, Inc., 41 Ill. App. 3d 595, 354 N.E.2d 626 (1st Dist. 1976), a packing house maintenance man was injured while washing windows at his place of employment. The court noted the existence of the defendant as a single entity and thus applied the exclusive remedy provision. Id. at 598, 354 N.E.2d at 629. In Carey v. Coca-Cola Bottling Co. of Chicago, 48 Ill. App. 3d 482, 484, 363 N.E.2d 400, 401-02 (2d Dist. 1977), the Second District refused to consider the existence of dual capacity where the employee was injured while working at his usual place in a building owned by his employer. The Fourth District also declined to apply the dual capacity doctrine in McCarty v. City of Marshall, 51 Ill. App. 3d 842, 366 N.E.2d 1052 (4th Dist. 1977), where an employee of the defendant city was injured while performing maintenance duties at the city power plant.

57. See Carey v. Coca-Cola Bottling Co. of Chicago, 48 Ill. App. 3d 482, 484, 363 N.E.2d 400, 401 (2d Dist. 1977), where the court noted that "the holding in [Marcus v. Green] has been substantially rejected, not only by the Fifth District itself, but by the other appellate courts of this State."


59. Id. at 512, 341 N.E.2d at 427.
in the later case was not a common party in two legal entities.60

Often without any substantial analysis of the particular facts, Illinois appellate courts cited the Fifth District's reappraisal of Marcus in support of their refusal to recognize the dual capacity doctrine.61 An example of the counteraction against dual capacity is Kim v. Raymond,62 a case involving facts strikingly similar to Marcus. Although the defendant in Kim was arguably acting both as an individual and a corporate employer, the court distinguished Marcus, holding that the common law defendant and the employer were the same entity.63 And even assuming that separate legal entities existed, the Kim court found little precedential value in Marcus.64

Illinois courts also found dual capacity inapplicable to cases involving the liability of employer-manufacturers. Several courts noted the limitations imposed by the Fifth District on the Marcus holding,65 and specified the separation of legal entities as a basis for their rulings.66 In their analyses, however, the courts examined whether the particular item that caused the injury was merely a tool furnished to employees, or whether it was a product sold to the public and coincidentally used by an employee.67 Thus, unlike

60. Id.
61. See note 56, supra. It must be noted, however, that application of the dual capacity doctrine in the employer-landowner cases probably would not have changed the results. In those cases, the employees worked on their employer's land, not as a matter of circumstance, but as a matter of necessity in the employment relationship. Thus, claims for violations of the Structural Work Act did not rely upon any truly distinct obligations arising from a second capacity.
62. 44 Ill. App. 3d 37, 358 N.E.2d 34 (1st Dist. 1976) (employee injured while laying shingles on the roof of a structure owned by his employer).
63. Id. at 38, 358 N.E.2d at 35.
64. Id.
65. See, e.g., Profilet v. Falconite, 56 Ill. App. 3d 168, 371 N.E.2d 1069 (1st Dist. 1977), where a laborer was injured when a crane leased by his employer to a third party came in contact with overhead electrical wires. Id. at 169, 371 N.E.2d at 1070. The court held that the defendant-employer existed as only one entity, thus making dual capacity inapplicable due to the limitations on the Marcus holding. Id. at 171-72, 371 N.E.2d at 1072.
66. See Sago v. Amax Aluminum Mill Prods. Inc., 67 Ill. App. 3d 270, 385 N.E.2d 17 (1st Dist. 1978), where an employee was injured by a machine that had been manufactured by a division of the corporate defendant. Id. at 272, 385 N.E.2d at 17-18. At the time of the injury, the division had been sold and was an independent corporation. Id. Noting that at the time of the sale the defendant did not participate in two different entities, the court declined to apply the dual capacity doctrine. Id. at 275, 385 N.E.2d at 19-20.
67. See Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d 787, 354 N.E.2d 553 (1st Dist. 1976). The plaintiff was injured while operating a punch press manufactured by a third party. The employee alleged that the defendant occupied a second capacity as a quasi-manufacturer by removing the machine's safety devices, thereby causing the plaintiff's injuries.
the employer-landowner cases, the employer-manufacturer cases attempted to analyze the employment relationship at issue.

The appellate court cases prior to 1979 adopted a strict position on the enforcement of the exclusive remedy provision. The courts thereby avoided difficult questions of potentially conflicting policies involving equity and statutory language.8 The confusion throughout the state as to the existence and application of dual capacity necessitated guidance from the Illinois Supreme Court or the Illinois General Assembly.69

The Illinois Supreme Court's Reaction

In 1979, the Illinois Supreme Court addressed the issues of the existence and application of the dual capacity doctrine in *Smith v. Metropolitan Sanitary District.*70 The plaintiff was employed by a joint venture composed of S.J. Groves & Sons Company and W.E. O'Neil Construction Company.71 Pursuant to the joint venture agreement, O'Neil leased a truck to the venture.72 The truck malfunctioned and struck the plaintiff.73 The plaintiff commenced a strict products liability action against defendant O'Neil for leasing the allegedly defective truck to the joint venture.74 The court re-
jected O’Neil’s claim that its membership in the joint venture conferred immunity pursuant to the workers’ compensation exclusive remedy provision. Applying the dual capacity doctrine, the court held that the employer occupied a second capacity which conferred obligations separate and independent from the capacity of employer. The court stated, however, that the employer must exist as a separate legal persona in order for such independent obligations to be present.

Characterizing the allegedly defective truck as equipment leased to the joint venture, not as a tool furnished by the defendant as a member of the joint venture, the court applied the dual capacity doctrine to sustain the cause of action. The court reasoned that the plaintiff’s right to bring the action should not depend on whether the truck was leased from one of the joint venturers or from a third party. The court concluded that O’Neil’s coincidental status as a member of the joint venture should not determine its liability.

75. Id. at 318-20, 396 N.E.2d at 527-28.
76. Id.
77. Id. at 319, 396 N.E.2d at 527.
78. Id.
79. Id. at 320, 396 N.E.2d at 528.
80. Id. The Illinois Supreme Court expressed a similar rationale in Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 359 N.E.2d 125 (1976), in which a general contractor paid workers’ compensation benefits for an injured employee of an uninsured subcontractor. Id. at 441, 359 N.E.2d at 127. The employee attempted to maintain an action against the general contractor under the Illinois Structural Work Act. Id. The court allowed the action despite the fact that the defendant had paid workers’ compensation benefits to the employee. Id. at 447, 359 N.E.2d at 130. Noting that an unfair classification might arise between employees of insured versus uninsured employers, the court reasoned:

The sole basis for this differentiation is the fortuitous circumstance of whether the workman’s employer carries compensation insurance. Moreover, the classification of general contractors in regard to their liability as third-party tortfeasors is equally arbitrary, for it, too, is based upon the fortuitous circumstance of whether the particular subcontractor provides compensation coverage.

Id. at 446, 359 N.E.2d at 129.

Following the Smith decision, Illinois courts decided three dual capacity cases. In McCormick v. Caterpillar Tractor Co., 82 Ill. App. 3d 77, 402 N.E.2d 412 (4th Dist. 1980), rev’d 85 Ill.2d 352, 423 N.E.2d 876 (1981), the Illinois Supreme Court reversed the Illinois Appellate Court’s application of the dual capacity doctrine. Plaintiff was injured during the course of his employment at the Caterpillar Tractor Company. 82 Ill. App. 3d at 78, 402 N.E.2d at 413. Physicians, employed on a full-time basis by the defendant employer, negligently aggravated plaintiff’s injury. 82 Ill. App. 3d at 78, 402 N.E.2d at 413. The Fourth District of the Illinois Appellate Court found the employer liable for the negligence of its doctors because it assumed a second capacity in furnishing medical services to its employee. 82 Ill. App. 3d at 78-80, 402 N.E.2d at 414-415.

The Illinois Supreme Court reversed the appellate court’s finding and held that the provi-
The Impact of Smith

The Illinois Supreme Court may have finally settled the uncertainty about the existence of the dual capacity doctrine in Illinois. Where the employer is a common part in two separate legal entities which have distinct obligations to the employee, the employee can apparently maintain a cause of action against the employer for breach of those duties not contemplated within the primary employment relationship. The employer's presence in two entities places it in a third party relationship to its employee. In its capacity outside the primary employment relationship, the employer does not enjoy the protections of the exclusive remedy provision. Smith essentially utilized dual capacity to prohibit an employer who acted in two capacities from escaping liability by hiding behind the employment relationship.

The Smith decision, however, does not conclusively answer the question of how dual capacity claims should be evaluated where provision of medical care to the employee was within the scope of the employer-employee relationship. This holding was based on the Illinois Workers' Compensation Act's requirement that an employer "'provide and pay for all the necessary first aid, medical and surgical services, and all necessary medical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury.' (Ill. Rev. Stat. 1977, ch. 48, par. 138.8(a))." 85 Ill.2d at 358, 423 N.E.2d at 878. The actions of the doctors did not give rise to a separate doctor-patient relationship; therefore no duty arising outside of the workers' compensation compromise was breached.

In Sharp v. Gallagher, 94 Ill. App. 3d 1128, 419 N.E.2d 443 (1st Dist. 1981), plaintiff was injured while working on land owned by his employer, a contractor. 94 Ill. App. 3d at 1130, 419 N.E.2d at 445. Plaintiff sued the contractor for violations for the Structural Work Act, Ill. Rev. Stat., ch. 48, ¶ 60 1977. 94 Ill. App. 3d at 1134, 419 N.E.2d at 449.

The First District of the Illinois Appellate Court applied the dual capacity doctrine in reversing the trial court's dismissal of the action. 94 Ill. App. 3d at 1135, 419 N.E.2d at 449. The court found the facts in the case to be indistinguishable from those in Marcus v. Green, 13 Ill. App. 3d 699, 300 N.E.2d 512 (5th Dist. 1973) noting that the contractor had separate obligations to the plaintiff in its different capacities of employer and landowner. 94 Ill. App. 3d at 1135, 419 N.E.2d at 449. See notes 46-55 supra and accompanying text. Significantly, the defendant's existence as only one legal entity did not preclude application of the doctrine. 94 Ill. App. 3d 1133, 419 N.E.2d at 446.

In Goetz v. Avilsen Tool & Machs., Inc., 82 Ill. App. 3d 1054, 403 N.E.2d 555 (1st Dist. 1980), the First District refused to apply dual capacity against the employer-manufacturer because the machine that injured the plaintiff was merely a tool furnished by the employer. In Goetz, the employee was injured by a defective machine manufactured by one of the defendant's employees for exclusive use in the factory. Id. at 1056, 403 N.E.2d at 558. Because the machine was a tool for the exclusive use of the defendant's employees, the manufacturer of the machine did not create any obligations to the plaintiff which were distinct or independent from those generated by the employment relationship. Id. at 1062, 403 N.E.2d at 562.

82. Id. at 319, 396 N.E.2d at 527-28.
only one legal entity is involved. The Smith court suggested that simply a separate theory of liability against the same legal person of the employer would not properly invoke the dual capacity doctrine. Rather, application of the doctrine requires a "distinct separate legal persona." Whether the presence of separate legal entities should solely and conclusively establish the existence of separate legal persona or whether the court should undertake an analysis of obligations in a particular employment relationship undertaken regardless of the particular business forms of the employer remains uncertain.

In determining the present application of dual capacity in Illinois an understanding of the meaning of "separate legal persona" is critical. A widely accepted definition of the term "legal per-
sona,” is not, however, readily ascertainable. A persona may be described as a person or entity which possesses a bundle of rights and obligations. Under this definition, an employer might owe different legal obligations to the same employee, depending upon which persona or capacity the employer occupies at any particular moment.

Although the term legal persona has not been expressly mentioned, the underlying principles of its definition suggested above have been applied by the California and Ohio courts. These courts analyze the particular employment relationship and determine whether the employer breached duties owed exclusively to the employee as an employee, or to the employee as a member of the general public. Both jurisdictions hold that a manufacturer-employer owes the same duty to their employees who use their products in the course of their employment as that owed to the public.

the approach that examines the separation of legal entities as the test of the existence of dual capacity.

86. Neither Professor Larson nor the cases applying the separate legal persona test define the concept, except by way of case situations. Marcus v. Green, 13 Ill. App. 3d 699, 300 N.E.2d 512 (5th Dist. 1973) and the United States Supreme Court case of Reed v. The Yaka, 373 U.S. 410 (1963) are cited as examples of the existence of separate legal persona. But in Reed the employer existed as only one legal entity. See notes 39-41 supra and accompanying text.

87. Black’s Law Dictionary, 1029 (5th ed. 1979) defines persona as a “character in virtue of which certain rights belong to a man and certain duties are imposed upon him. Thus, one man may unite many characters . . . as, for example, the characters of father and son, of master and servant.”


89. In Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 113, 137 Cal. Rptr. 797, 803 (1977), the court applied the dual capacity doctrine despite the presence of only one legal entity. The employee was injured while working on a scaffold manufactured by the defendant for sale to the public. Id. at 106, 137 Cal. Rptr. at 798. The court reasoned that the employer, by manufacturing a product for sale to the public, assumed all the duties and liabilities of a manufacturer with respect to its employee. Id. at 113, 137 Cal. Rptr. at 803.

In Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976), a truck driver employed by the defendant pursuant to an agreement with a stevedoring company was injured when a tire manufactured by the defendant blew out. The court allowed the maintenance of the action because of the existence of obligations to the employee as a member of the public that were unrelated to the defendant’s obligations as an employer. Id. at 285, 361 N.E.2d at 496.
The Separate Legal Entities Requirement

Despite the persuasiveness of the independent obligations approach, the separate legal entities requirement of the dual capacity doctrine has significant legal support.90 In both Smith and Marcus v. Green, the employer took part in two separate legal entities.91 Some observers contend that if an injury occurs during employment by a single entity, an employee should not be allowed to circumvent the exclusive remedy provision by recovering damages in excess of workers' compensation.92 The Seventh Circuit has held duties owed to an employee of a single entity to be unseverable.93 Coincidence in duties by itself may not sufficiently justify avoiding the exclusive remedy provision.94 Additional common law or statutory damage actions should therefore be barred even if the employer owes the public a general duty as a manufacturer or a landowner.95

Further, serious practical difficulties might exist in attempting to separate the duties of an employer owed to his employee from those owed to the public.96 In refusing to apply the dual capacity doctrine to a single entity employer-manufacturer situation, the New York Court of Appeals reasoned that any duties owed to an employee merely constitute subcategories within the network of obligations arising out of the employment relationship.97

Deficiencies in the Separate Legal Entities Approach

The separate entities requirement is not, however, free from criticism. The imposition of an additional legal requirement fails to conform with the underlying principles of dual capacity discussed.

90. The issue of whether to apply a legal entities test or independent obligations test has not be specifically decided. Neither Ohio nor California, the only states other than Illinois that have accepted dual capacity, apply any entity requirement.
91. See notes 48 and 72 supra and accompanying text. In Smith, the defendant was a corporate lessor and also a member of a joint venture. In Marcus, the defendant was a sole proprietor and a partner in a partnership.
94. Id.
96. State v. Purdy, 601 P.2d 258, 260 (Alaska 1979): "It would be an enormous, and perhaps illusory, task to draw a principled line of distinction between those situations in which the employee could sue and those in which he could not."
by the Illinois Supreme Court in Smith.\textsuperscript{88} The court noted the unfairness of determining the employee's right to recovery upon the fortuitous choice of a particular business organization.\textsuperscript{89} Further, the court embraced a case which involved only one legal entity as an example of a proper application of the dual capacity doctrine.\textsuperscript{100}

While the separate legal entities requirement does present courts and litigants with concrete guidelines about dual capacity claims,\textsuperscript{101} it ignores the difference between duties and obligations owed to an employee which arise out of the employment relationship and those which arise out of the employee's status as a member of the public.\textsuperscript{102} The fact that a particular employee works for only one entity or employer forecloses analysis of separate obligations of the employer, thus exalting form over substance. It is doubtful that the states intended that workers' compensation statutes should immunize an employer from any and all liability for the injuries of one who, by coincidence, happens to be an employee.\textsuperscript{103}

Application of the separate entities requirement fails to discern whether the injury stems from risks assumed by an employee as a party to the workers' compensation compromise. The employee implicitly knows what risks inhere in the employment relationship.\textsuperscript{104} The workers' compensation compromise envelopes those risks.\textsuperscript{105} One of the purposes of the Act is to compensate only for losses resulting from risks to an employee which are a result of working in the industry.\textsuperscript{106} When an employer makes a business decision to use tools in its operations that it manufactures, or to employ workers on land that it also owns, and an employee received injuries, those injuries stem from decisions and risks made by the employer

\begin{footnotes}
\footnotetext[88]{Smith v. Metropolitan Sanitary Dist., 77 Ill. 2d 313, 320, 396 N.E.2d 524, 528 (1979). See note 79 supra and accompanying text.}
\footnotetext[89]{Id.}
\footnotetext[90]{Id. at 319, 396 N.E.2d 527, citing Reed v. The Yaka, 373 U.S. 410 (1963).}
\footnotetext[91]{Id. at 319, 396 N.E.2d 527, citing Reed v. The Yaka, 373 U.S. 410 (1963).}
\footnotetext[92]{Id. at 319, 396 N.E.2d 527, citing Reed v. The Yaka, 373 U.S. 410 (1963).}
\footnotetext[93]{Id. at 319, 396 N.E.2d 527, citing Reed v. The Yaka, 373 U.S. 410 (1963).}
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\footnotetext[101]{Id. at 319, 396 N.E.2d 527, citing Reed v. The Yaka, 373 U.S. 410 (1963).}
\footnotetext[102]{Id. at 319, 396 N.E.2d 527, citing Reed v. The Yaka, 373 U.S. 410 (1963).}
\footnotetext[103]{Id. at 319, 396 N.E.2d 527, citing Reed v. The Yaka, 373 U.S. 410 (1963).}
\footnotetext[104]{Employer Suability, supra note 5, at 832.}
\footnotetext[105]{Id. at 319, 396 N.E.2d 527, citing Reed v. The Yaka, 373 U.S. 410 (1963).}
\footnotetext[106]{Lewis v. Gardner Eng'r Corp., 254 Ark. 13, 17, 491 S.W.2d 778, 784 (1973) (Fogleman, J., dissenting).}
\end{footnotes}
in an extra-relational capacity.\textsuperscript{107} Neither the employment contract nor the workers' compensation scheme necessitates the employer's assumption of a second status in these situations.\textsuperscript{108}

The legal entities approach also fails to incorporate fundamental changes in tort law, such as strict product liability, into the workers' compensation compromise.\textsuperscript{109} As the law changes to provide the public greater protections against various hazards, under this approach the employee's rights remain stagnant. These developments upset the legislative balance in favor of the employer by according it greater protection than may have been originally anticipated. For instance, an injured person may not bring suit against a manufacturer for strict products liability, simply because the manufacturer employs the injured party.\textsuperscript{110} The employee is thereby penalized by only partial restoration of the loss through workers' compensation.\textsuperscript{111} Yet, a manufacturer must account for the full loss if his product injures a third person.

In addition, the separate entities approach transforms the deterrence element of workers' compensation benefits into a shield against greater liability, which exists independent of the common law defenses.\textsuperscript{112} Unconditional application of the exclusive remedy provision may result in ameliorating the effects of lawsuits against an employer-third party tortfeasor for its negligent acts toward its employees. Sloppy procedure in manufacturing, substandard practice of medicine, and careless upkeep of premises may thus go partially unpunished.\textsuperscript{113}

\textbf{Recommendations}

The application of the dual capacity doctrine should be conditioned upon a complete analysis of facts, not upon legal formalities which ignore the fundamental principles that initially gave rise to the doctrine. The examination of separate legal persona as prescribed by the Illinois Supreme Court should also be undertaken with the ameliorative goals of dual capacity in mind. The in-

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109. New actions, not in existence when the workers' compensation compromise was formed, have developed to increase the liability of employers to third parties.
111. \textit{Id.} at 111, 137 Cal. Rptr. at 802.
112. \textit{Id.}
113. Employer Suability, supra note 5, at 832.
\end{flushleft}
dependant obligations approach of California and Ohio avoids the harsh results that can occur with the unrestricted application of an exclusive remedy provision. That approach also conforms to the dual capacity rationale, as stated in Smith v. Metropolitan Sanitary District, that the fortuitous circumstance of a particular business organization should not determine the liability that attaches to an employer's actions.\textsuperscript{114}

In applying the dual capacity doctrine, courts should analyze the particular obligations of an employer to his employee in the employment relationship.\textsuperscript{115} If the employer has an additional legal capacity from which separate and distinct obligations are owed to the employee, the dual capacity exception should apply without reservation.\textsuperscript{116} Although identifying distinct obligations is not simple, several factors help to establish the existence of dual capacity.

For example, the California courts have limited dual capacity in employer-manufacturer cases to situations where the item causing the employee's injury is primarily manufactured for sale to the public and only incidentally used in the defendant's activities.\textsuperscript{117} Similarly, courts confronted with an employer-landowner fact situation can evaluate the reason for the employee's presence on the land. If the employee is always present on the employer's land while engaged in his duties, the duty to provide a safe place to work is exclusively owed to the employee. Where an employer requires its employee to work on land owned or supervised by a third party who has separate duties to the employee, the fact that the employer coincidentally employed its worker on its own land should not preclude recovery. Therefore, by evaluating the reasons for the employee's presence on the land or use of a tool manufactured by the employer, the courts can more easily ascertain the existence of separate, independent obligations. In this manner, the duties owed can be traced to either the employment relationship or to the employer's third party capacity.

\textsuperscript{114} See notes 79-80 supra and accompanying text.
\textsuperscript{115} Comment, Manufacturer's Liability As A Dual Capacity Of An Employer, 12 Akron L. Rev. 747, 769 (1979).
\textsuperscript{116} Bryant, Employer Suability, supra note 5, at 833: "[T]here will not be many situations where the employer occupies a separate capacity giving rise to distinct duties, and admittedly, courts will have to make searching examinations of the facts peculiar to each alleged dual capacity case." (footnote omitted).
CONCLUSION

Notwithstanding the previous rejection and confused application of the dual capacity doctrine, the Illinois Supreme Court has clearly accepted the doctrine as a viable exception to the exclusive remedy provision of the Worker's Compensation Act. It has, however, left many questions about the application of the doctrine unanswered. Whether to accept the legal entities approach or the independent obligations approach has proved to be an obstacle to the application of dual capacity. The independent obligations approach, however, is more consistent with the dual capacity doctrine and its utilization in Illinois. Restricting dual capacity analysis to the presence of distinct legal entities fails to take cognizance of the underlying rational of the doctrine.

Illinois should apply the dual capacity doctrine to its fullest extent in order to promote the continuing fundamental fairness of the worker's compensation compromise. Adoption of the independent obligations approach by the Illinois Supreme Court would reduce uncertainty in the application of the dual capacity doctrine for the lower state courts and potential litigants. The dual capacity doctrine, with necessary clarifications, can constitute a viable use of equitable principles, without encouraging frivolous actions against employers.

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