

November, 2008

In the interest of being ecological, we are moving to an electronic monthly newsletter. Each of the articles below can be accessed in full at <http://www.querrey.com/newsletter-33.html>



**Government Liability Update:**

***Powell v. Barrett: The Road to Restoring Bell v. Wolfish***

By: Christopher Keleher – Chicago, Illinois

**Insurance & Class Action Update:**

**First Known Insurance Coverage Decision on FACTA Credit Card Actions Released**

By: Terrence Guolee – Chicago, Illinois

**Insurance Law Update:**

**Indiana Courts Join the Fray in the Debate Over Insurance Write-Offs**

By: John Halstead – Merrillville, Indiana

**Civil Rights Litigation Update:**

**Growing Use of Motions to Bifurcate *Monell* Claims**

By: Mary McClellan – Chicago, Illinois

**Municipal Law Update:**

**Claims of Retaliatory Discharge For Exercising Workers' Compensation Rights Pierce the Veil of the Tort Immunity Act**

By: Chloé G. Woodard – Chicago, Illinois

**Products Liability Update:**

**The Court's Adoption Of A New 'Integrated Test' For Proving Strict Liability In Defective Design Claims**

By: Christopher Harney – Chicago, Illinois

Sign up to receive our newsletter via e-mail  
<http://www.querrey.com/news-letters/signup.html>

**CHICAGO**

175 W. Jackson Boulevard  
Suite 1600  
Chicago, IL 60604  
Tel: 312.540.7000  
Toll Free: 800.678.2756

**JOLIET, IL**

3180 Theodore Street  
Suite 205  
Joliet, IL 60435  
Tel: 815.726.1600

**MERRILLVILLE, IN**

8585 Broadway  
Suite 510  
Merrillville, IN 46410  
Tel: 219.738.1820

**WAUKEGAN, IL**

415 W. Washington Street  
Suite 214  
Waukegan, IL 60085  
Tel: 847.249.4400

**WHEATON, IL**

310 S. County Farm Road  
Third Floor  
Wheaton, IL 60187  
Tel: 630.653.2600

**Terrence F. Guolee, Editor**  
**Jillian Book, Editor**

Copyright © 2008 Querrey & Harrow, Ltd.  
All rights reserved.

We recommend that each article be read in its entirety. Readers should not act upon this information without seeking professional counsel. The articles in this publication may not be reprinted without the express permission of Querrey & Harrow, Ltd.

This publication may be considered attorney advertising in some jurisdictions.

## Government Liability Update: *Powell v. Barrett*: The Road to Restoring *Bell v. Wolfish*

By: Christopher Keleher – Querrey & Harrow, Ltd. – Chicago, Illinois

Courts are not perfect. They are comprised of humans, and humans make mistakes. Thus, courts occasionally err. While misconstruing a statute or using faulty logic is nothing new, what happens when courts patently ignore dispositive facts from controlling precedent?

This scenario is not a hypothetical and threatens massive liability payments by taxpayers in Cook County and throughout the United States. It depicts the current state of the law concerning the searches of detainees entering jails. The seminal Supreme Court decision on the subject is *Bell v. Wolfish*, 441 U.S. 520 (1979). *Bell* upheld a prison policy mandating everyone be strip searched after meeting visitors. The policy made no exceptions, and included minor offenders, persons arrested for contempt, and even witness protection participants. Yet this crucial fact has literally been read out of existence by a slew of federal courts. Contrary to the plain facts of *Bell*, numerous cases have held that prisons may not strip search minor offenders, absent reasonable suspicion.

*Bell* did not mandate reasonable suspicion or consideration of a detainee's underlying charges. A few decisions issued shortly after *Bell*, including the Seventh Circuit's *Mary Beth G. v. Chicago*, 723 F.2d 1263 (7<sup>th</sup> Cir. 1983), misread this plain fact. They distinguished *Bell* on the basis that *Bell*, as the Seventh Circuit explained, involved only individuals with "serious federal charges." This transparent failing went largely unnoticed as courts since have perpetuated this myth. The consequence is a state of law which has become unhinged from its moorings. Thankfully, one court has recognized this troubling development and reversed course.

The recent *en banc* decision of the Eleventh Circuit, *Powell v. Barrett*, 541 F.3d 1298, (11<sup>th</sup> Cir. Ga., September 4, 2008), resuscitates a decision on life support. The court, by a vote of 11 to 1, reaffirmed the holding of *Bell* and lamented its erosion. *Powell* was a detainee class action challenging a jail's search policy. Under the policy "neither the charge itself nor any other circumstance supplied reasonable suspicion to believe that the arrestee might be concealing contraband." Thus, the plaintiffs were searched "solely because they were

entering the general population of inmates at the detention facility." After examining *Bell*, the Eleventh Circuit concluded *Bell* dictated upholding the policy, as privacy expectations could not overcome security interests.

The Eleventh Circuit addressed cases requiring individualized suspicion for a search. These cases included not only those emanating from other circuits, but also its own. The *Powell* court rebuked these decisions because they "misread *Bell* as requiring reasonable suspicion." It explained that *Bell* does not require reasonable suspicion before a search, as *Bell* required "a search of every inmate returning from a contact visit regardless of whether there was any reasonable suspicion to believe that the inmate was concealing contraband."

As to the Seventh Circuit's *Mary Beth G.* decision and its ilk, the Eleventh Circuit was blunt:

[t]hose decisions are wrong. The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance . . . [and] finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities.

*Powell* is instructive for the court's willingness to admit its own mistakes, and its criticism of other circuits. Its 11 to 1 vote embodies the logic of its position.

The only stone *Powell* left unturned was why courts had ignored such pertinent facts. One possible theory is that courts are mindful of their former willingness to ignore unconscionable prison conditions. Shameful of this past, the pendulum has swung the other way as courts meticulously pour over prisoner complaints. But this current state of caution represents overcompensation. In the midst of a sea change in the expansion of prisoners' rights under the First, Eighth, and Fourteenth Amendments, inmates' privacy rights were swept up in the undertow.

However, privacy is incompatible with the safe operation of prisons. Thus, in the context of prison searches, courts have gone too far, elevating inmates' privacy rights to the detriment of prison security. Worse, courts seem oblivious to the fact that inmates bear the brunt of smuggled contraband. The violence in American correctional facilities is unprecedented, and contraband is the fuel for this conflagration.

Reasonable minds may differ as to the policy issues surrounding prison strip searches. But one thing is certain, lower courts' selective reading of *Bell* is a sharp blow to the established principle of adhering to binding precedent. The casualty has been a sound decision which protects inmates, correctional staff, and society at large. *Powell* is a welcome respite from this troubling trend. Time will tell whether other courts agree. Given the tangled web of policy, Constitutional rights, and divergent precedent, this question will necessitate guidance from the Supreme Court. In the meantime, *Powell* is the first step in reaffirming the important lessons of *Bell*.

\* \* \*

*Christopher Keleher, an associate in our Chicago office, concentrates his practice in appellate litigation and is a member of our appellate, commercial and governmental liability practice*

*groups. Chris has written briefs and presented arguments to the U.S. Court of Appeals for the Seventh Circuit, the Appellate Court of Illinois and the United States Supreme Court.*

*Mr. Keleher graduated from law school, summa cum laude. He was awarded the Order of the Coif. He served as the Editor of Notes and Comments and the Business Manager for the DePaul Law Review. He also received the CALI Award in Legal Writing II, Advanced Trial Advocacy, Criminal Law, Federal Income Taxation and Pre-Trial Litigation. Following graduation from law school, Mr. Keleher served as a clerk to the Honorable William J. Bauer of the U.S. Court of Appeals for the Seventh Circuit.*

*Chris was involved in the briefing of the motions for summary judgment *Querrey & Harrow* prepared on behalf of the Cook County Sheriff's Office and various individual defendant recently in a class action currently pending in the Federal Court for the Northern District of Illinois, Eastern Division, contesting the constitutionality of strip search procedures employed at the Cook County Jail in Chicago, the largest single-site detention facility in the United States. To review these motions and their supporting memoranda, please go to <http://www.querrey.com/news-66.html>.*

#### **QUERREY & HARROW CHARITIES**

On October 1, 2008, the Muscular Dystrophy Association held its annual "Most Wanted Lock-Up" at Applebee's in Merrillville, Indiana, to raise funds for the MDA's summer camp, wheelchair assistance, leg braces and research. **Teresa Mysliwy**, a Merrillville associate, agreed to go "behind bars" to collect bail money for the MDA, and was successful in raising over \$2,000.00 in bail from local donors, making her the MDA's "#1 jailbird".

\* \* \*

On October 24, 2008, Chicago office associate **Gwendolyn Drake** attended the Alpha Kappa Alpha Sorority, Inc. Lambda Tau Omega Chapter's and The Twenty Pearls Foundation's *Jazz'n Under the Stars*, featuring Joan Collaso at the Olympia Fields Country Club. Gwen is a member of the Chapter's Executive Board and a Committee Chairman.

Twenty Pearls Foundation, Inc., the financial arm of Lambda Tau Omega (LTO) Chapter of Alpha Kappa Alpha Sorority, Incorporated, was established and registered as a 501(c)(3) tax-exempt organization in March 2001. Its purpose is to meet the philanthropic needs of LTO. For thirty years, Lambda Tau Omega Chapter of Alpha Kappa Alpha Sorority, Inc., the oldest African-American sorority for college educated women in the United States, has provided scholarships and conducted programs to enhance the health, welfare and educational development of individuals and families in the Far South Chicagoland Community.

\* \* \*

Chicago shareholder **Dan Gallagher** and firm Marketing Assistant **Julie Heinzl** marched in the American Cancer Society's *Making Strides Against Breast Cancer Walk*. Julie has been an organizer of her team's efforts in this walk, which has raised over \$55,000 for the cause. This year there were over 11,000 walkers in the event, which raised \$1 Million for the cure.

# Insurance & Class Action Update: First Known Insurance Coverage Decision on FACTA Credit Card Actions Released

By: Terrence Guolee – Querrey & Harrow, Ltd. – Chicago, Illinois

Previously, we wrote on the huge threat posed to businesses and insurers alike by the wave of litigation following from the Fair and Accurate Credit Transactions Act ("FACTA") (see articles by Terrence Guolee in our October 2007 and June 2008 newsletters). Now, an early indication regarding the potential insurance coverage aspects of FACTA is available for review.

## Background – Congress' Cure is Worse Than The Potential Illness

FACTA, enacted into law in 2003, added new sections to the Fair Credit Reporting Act, codified at 15 U.S.C. §1681 *et seq.*, requiring businesses to come into compliance by December 4, 2006. Following this date, FACTA requires businesses to limit the amount of information printed on credit card receipts, as follows:

... no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

15 U.S.C. §1681c(g)(1).

Pursuant to Section 1681n of the Act, a person who "willfully" fails to comply with these requirements can be liable for:

- Actual damages of not less than \$100 or more than \$1000
- Punitive damages
- Lawyer fees and costs

Likewise, Section 1681o of the Act provides that a person who "negligently" fails to comply can be liable for actual damages and legal fees. To comply with Section 1681c(g)(1), electronically-printed credit card receipts should contain no more than the last five digits of the card number and should not include the card's expiration date. While the language of the statute could seemingly be read to mean that, alternatively, the receipt could contain the expiration date and not the last five digits of the

card number, several Federal District Court judges held the statute's language prohibited printing more than the last five digits of the card number and also prohibits printing the expiration date.

Congress' purpose behind the Act was noble: to prevent identity theft. Indeed, Congress set out to reduce the amount of potentially sensitive personal information from being available to identity thieves by prohibiting merchants from printing credit and debit card information on receipts. However, Congress' best intentions led to a wave of very damaging litigation throughout the country, such that the "cure," seems clearly to have been worse than the feared illness.

In this respect, the law was drafted such that the Act is violated if a merchant prints a receipt containing nothing more than a card's expiration date – *even if the card numbers were properly truncated*. Many merchants and credit card vending companies assumed they were complying with FACTA by simply deleting the customers' card numbers on receipts, not realizing that they needed to omit the expiration date as well. As a result, a wave of class action claims arose first in California, then through Illinois and then onto the rest of the nation where merchants who thought they had complied with the Act faced potentially annihilating damage claims for allegedly non-compliant receipts.

Important is that none of the cases seen to date actually alleged that the named plaintiff or the proposed class members suffered any instances of identity theft or damages because of the defendants' failure to truncate the credit card numbers and/or expiration dates. This wasn't necessary, as FACTA does not require plaintiffs to either plead or prove any actual injury before seeking damages and attorney fees under the Act.

Not surprisingly, plaintiff class action lawyers were quick to jump on the FACTA bandwagon. Merchants who either did not know of the Act's requirements or mistakenly thought they had complied by truncating just the credit card number and left the expiration date on their receipts (or vice versa), were subject to hundreds, and in many cases, thousands of potential claims, given that each

violating receipt provided to a customer can lead to a separate statutory damage claim of \$100-1000.

While many suits settled for confidential amounts, certain settlements were made in the typical class action mode of coupons provided to class members and high attorney fees assessed. *See, for example, Palamara v. Kings Family Restaurants*, 2008 U.S. Dist. LEXIS 33087 (W.D. P.A. April 22, 2008) (each class member gets coupon for their choice of ice cream, soup, salad or homemade pie from the defendant's restaurant, with a value of up to \$4.68, with plaintiffs' attorney's fees awarded in an amount up to \$75,000).

### **Congress Tries to Cure its Cure**

Seeing this wave of class action litigation spreading across the country and hearing the cry of retailers and their lobbying associations regarding the huge threat posed to businesses by FACTA, Congress stepped in and attempted to close the loophole that allowed for liability based on nothing more than an expiration date violation. A limited cure for the cure provided by FACTA was provided via the passage of the Credit and Debit Card Receipt Clarification Act ("Clarification Act") (Public Law No. 110-241) on June 3, 2008.

The Clarification Act states that any person who printed an expiration date on a receipt that was provided to a consumer between December 4, 2004 and June 3, 2008, but which otherwise complied with the card number truncation requirements of FACTA, shall not be deemed in willful noncompliance of FACTA. There was no noted opposition to the amendment - the House voted 407-0, the Senate passed the bill by unanimous consent and the bill was signed into law just days after Congress' passage.

By deeming that an expiration date violation taking place during the December 4, 2004 – June 3, 2008 window would not be considered "willful," the Clarification Act did wipe away hundreds of FACTA cases. However, the threat of FACTA remains. In this respect, the Clarification Act does not do away with claims for FACTA violations based solely on expiration dates printed after June 3, 2008. Likewise, no relief is provided for merchants whose credit card receipts contain more than five of the consumer's credit card number.

Moreover, the Clarification Act itself has been argued to be further "notice" to merchants issuing receipts in violation of FACTA's truncation requirements, such that later-filed claims pose more of a threat to merchants that their failure to truncate their receipts was reckless or willful, even in the absence of any evidence that the merchant was aware of the Act or the truncation requirements.

So, despite Congress's efforts to cure its cure, FACTA lives on and the early signs of a new wave of class action litigation have been seen in the months since the passage of the Clarification Act. Cases against both "mom and pop" retailers, as well as very large corporate businesses, remain to be filed on a regular basis as businesses largely still are completely unaware of the truncation requirements of FACTA. In either case, the potential for annihilating damages remains. Where a case involving a few hundred or a few thousand receipts could bankrupt a small retailer, larger businesses (and their employees) are similarly threatened by FACTA class action claims which often involve tens of thousands of receipts.

### **The First Insurance Coverage Decision**

Lagging behind the development of the waves of class action litigation has been the insurance coverage considerations posed by the claims. When FACTA litigation first appeared, many insurers faced the question of whether it posed a kind of liability included within the scope of commercial general liability coverage, especially as to the costs of defense. Carriers considered this issue without the benefit of any case law either from the state or federal courts – and often themselves first became aware of FACTA on the tender of the first claim to their claims offices. Not surprisingly, the response of carriers has been varied, from straight denials of the claims, to defenses under reservations of rights and to the filing of declaratory judgment actions. Likewise, now slowly becoming aware of the massive liability posed by FACTA, certain carriers have added endorsements to their policies specifically excluding FACTA claims. However, to date, this appears to be more "the exception than the rule."

Now, nearly two years after the first FACTA violations occurred, the first known FACTA coverage case has been released, finding that no coverage was available to a policyholder under a

commercial general liability (CGL) policy for an alleged violation of FACTA. *Whole Enchilada, Inc. v. Travelers Property and Casualty*, No. 2:07-cv-1533 (Federal District Court for the Western District of Pennsylvania, September 29, 2008).

In *Whole Enchilada*, the defendant business, a Mexican restaurant in Pittsburgh, provided plaintiff in the underlying class action with an electronically printed receipt that included the expiration date only. The question addressed by the court was whether coverage was available under the "Personal Injury" section of a CGL policy issued by Travelers Insurance to the parent company of the restaurant.

The Travelers policy at issue initially contained a standard Insurance Services Office ("ISO") definition of "personal injury," which defined the term as:

... injury, including consequential 'bodily injury,' arising out of one or more of the following offenses:...

\* \* \*

e. Oral or written publication, in any manner, of material that violates a person's right of privacy.

However, the Travelers policy was amended by endorsement to define "personal injury" as:

... injury, other than 'bodily injury' arising out of one or more of the following offenses:...

\* \* \*

e. Oral, written or electronic *publication of material that appropriates a person's likeness, unreasonably places a person in a false light or gives unreasonable publicity to a person's private life.*" (emphasis added).

In summary, the court concluded that, based on the nature of a FACTA violation – arising from a “one-on-one” transaction between customer and merchant - it does not involve the kind of public communication to which the terms "publication" and "publicity" refer.

Reviewing the complaint at issue, the court reasoned:

Here, however, the [ ] Complaint does not allege publication that gives unreasonable publicity to a person's private life. It does not allege that Whole Enchilada displayed the plaintiff's information to the public or took any action designed to disseminate the information to the public at large. Rather, the Complaint alleges factual allegations stating that the [ ] plaintiffs' credit or debit card information was printed on a receipt that was handed back to them, in violation of FACTA. While the Complaint alleges that Whole Enchilada printed information, this Court finds it does not allege the kind of public communication to which the term "publicity" refers, thereby triggering coverage...

\* \* \*

In the context of the factual scenario surrounding Whole Enchilada's alleged violation of this provision of FACTA, the Court's reasoning becomes clear. At the point of sale transaction, a cardholder gives his or her credit or debit card to the individual at the cash register. The credit information is exchanged between the cardholder, Whole Enchilada and the cardholder's bank. There is no violation of a privacy right, insofar as the cardholder willfully gives over his or her credit information to Whole Enchilada so that the information can be used to process the sale. This factual scenario does not meet the requirement of publicity under the policies.

*Whole Enchilada*, at 36-37.

The *Whole Enchilada* court addressed coverage under a non-standard definition of "personal injury," namely, *publication* of material that gives unreasonable *publicity* to a person's private life. However, most FACTA claims test whether coverage is available for "personal injury" that is defined as oral or written *publication*, in any

manner, of material that violates a person's *right of privacy*. This decision decides this issue, even though it was not before the court. Indeed, given the court's additional holding that a FACTA violation does not involve "publication" and its determination that the "statutory damages" being sought for a FACTA violation are not compensatory and, therefore, do not satisfy the policy's "damages" requirement, *Whole Enchilada* seems broad enough to encompass claims brought under the standard ISO definition of "personal injury."

The *Whole Enchilada* decision, being only the decision of a federal district court, is not precedent over any other state or federal courts. However, it may well provide a point of reference for courts considering FACTA coverage claims and may foretell the response of other courts soon to consider FACTA coverage disputes. In the interim, in jurisdictions with no authority documenting a potential lack of insurance coverage for plaintiffs' claims, the financial lure supporting the continued filing of FACTA class actions remains.

### **Conclusion**

*Whole Enchilada* appears to be a huge blow for merchant policyholders. Some defendants who had their FACTA claims extinguished by the Clarification Act still have claims for defense costs pending and will benefit from a finding of coverage. Likewise, defendants facing claims in the second wave of FACTA litigation arising following the passage of the Clarification Act still risk potentially devastating statutory damage and attorney fee claims with questionable insurance coverage.

That said, on a greater scale, the future of FACTA litigation is in doubt. If other courts follow the lead of *Whole Enchilada* and find no insurance coverage exists, the current feeding frenzy of class action claims may abate with the removal of insurance money from the cost-benefit analysis made by plaintiff counsel when deciding whether to file suit.

Alternatively, a trend towards no coverage may make the filing of cases easier as the only relief available to defendants may be quick settlements under the threat of having the defendants' businesses being bankrupt by pending FACTA claims. Indeed, a business owner hit with a

FACTA class action claim considering whether to risk the annihilation of his business and the jobs of his employees will find no solace in learning that the number of FACTA claims across the country are diminishing due to the lack of available insurance proceeds.

\* \* \*



*Terrence Guolee, a shareholder in our Chicago office, has successfully represented defendants, plaintiffs and insurance carriers in dozens of complex, multi-million dollar claims covering a wide area of facts and law.*

*Terrence represents several municipalities, elected governmental officials and their employees in very complicated civil rights class actions and claims brought under state and federal whistleblower laws. He also represents several businesses in defense of statutory consumer rights class action claims – including several FACTA claims.*

*Terrence also represents insurance carriers, claims administrators and companies in coverage claims and litigation involving third-party claims administration practices and has represented insurers in a variety of complex coverage disputes.*

*Prior to joining Q&H in 2002, Terrence was Assistant Director and Counsel to The Hartford where he managed the carrier's claims systems and trained regional claims office management and employees on proper claims handling and review of attorney billing. He also worked on the drafting of the carrier's case management and attorney billing guidelines, the design of the carrier's electronic billing submission and review systems, and served as a liaison to several defense bar groups and legislative lobbying units in representing the carrier and the insurance industry's interests in connection with pending legislation in several states.*

*If you are facing a FACTA claim, whether on the defense or coverage side, or should you have any questions regarding this article, please contact Terrence via 312-540-7544 or via [tguolee@querrey.com](mailto:tguolee@querrey.com).*

## **Insurance Law Update: Indiana Courts Join the Fray in the Debate Over Insurance Write-Offs**

By: John Halstead – Querrey & Harrow, Ltd. – Merrillville, Indiana

The United States District Court for the Northern District of Indiana, in *Maurer v. Iehl*, 2008 U.S. Dist. LEXIS 69296 (N.D. Ind. Sept. 10, 2008), recently entered the fray in a heated debate about the admissibility of write-offs by insurers who pay an injured plaintiff's medical bills.

The debate began in Indiana with the October 2007 decision of the Indiana Court of Appeals in *Butler v. Ind. Dep't of Ins.*, 875 N.E.2d 235 (Ind. Ct. App. 2007). In *Butler*, the plaintiff, the estate of the deceased party, sued a medical provider pursuant to the Indiana Adult Wrongful Death Statute (I.C. § 34-23-1-2). Medicare and Medicaid had paid a portion of the decedent's medical expenses, the total of which was approximately \$410,000. About \$288,000 was written off by the medical providers. The defendant attempted to introduce evidence of the write-offs at trial.

The *Butler* court held that the exclusionary rule found in the collateral source statute, I.C. § 34-44-1-2, did *not* apply since the write-offs were not "payments." The court reasoned that an injured party should be compensated for medical expenses for which they are liable, but should not receive a windfall by recovering for amounts which did not represent an "actual pecuniary loss" to the plaintiff. Accordingly, evidence of the write-offs was held to be admissible. Thus, the plaintiff estate was not entitled to recover the 70% of the decedent's medical bills which had been written off. Transfer was then granted by the Indiana Supreme Court on April 30, 2008.

After the Indiana Supreme Court granted transfer in the *Butler* case, another panel of the Indiana Court of Appeals, in *Stanley v. Walker*, 888 N.E.2d 222 (Ind. Ct. App. 2008), reached the opposite conclusion. In the *Stanley* case, the court of appeals determined that the write-offs constituted an insurance benefit for which the plaintiff had paid his premiums, apparently overlooking the fact that it is *the insurer*, not the insured, which receives this particular benefit. The court noted that the fact that medical bills are written off does not mean that the plaintiff is not obligated to pay the billed amount, a finding which is debatable. In any case, the *Stanley* court held that the collateral source rule *does* apply

to write-offs and that evidence of insurance write-offs should be excluded from the calculation of the plaintiff's damages. The Indiana Supreme Court granted transfer on September 30, 2008.

The Indiana Supreme Court has yet to release its opinion in either the *Stanley* or *Butler* cases. Of note, the Illinois Supreme Court, however, recently decided this issue in favor of plaintiffs in *Wills v. Foster*, 229 Ill. 2d 393 (Ill. 2008). Reversing both the trial and the lower appellate courts, the Illinois Supreme Court held that a plaintiff's recovery is not limited to the amount actually paid by the medical insurer (in this case Medicare and Medicaid). The *Wills* court relied on its earlier decision in *Arthur v. Catour*, 216 Ill. 2d 72 (Ill. 2005). [Editor's note: A discussion of Illinois' *Wills* and *Arthur* decisions appears in our July 2008 newsletter and is available at <http://www.querrey.com/news-newsletterarticles-128.html>.]

Most recently, on September 10, 2008, the United States District Court for the Northern District of Indiana, in *Maurer v. Iehl*, 2008 U.S. Dist. LEXIS 69296 (N.D. Ind. Sept. 10, 2008), joined the voices favoring the admission of evidence of insurer write-offs. The plaintiffs in *Maurer* filed a motion *in limine* to exclude the defendants from introducing evidence or referring to any write-offs or reductions of the plaintiff's medical bills by Medicare or her private insurer. The plaintiff contended that the write-offs were inadmissible under the collateral source rule since the write-offs were an insurance benefit for which she paid her premiums. The plaintiffs also relied on an oral ruling in an earlier case. The defendants, in turn, relied on an earlier ruling from the Southern District of Indiana, in *Brunfiel v. United States*, 2005 U.S. Dist. LEXIS 43974 (S.D. Ind. Oct. 25, 2005).

The *Maurer* court reviewed the history and intent behind Indiana's collateral source statute and its application by Indiana courts, including the *Butler* and *Stanley* decisions, and concluded that the insurance write-offs were *not* benefits for which the plaintiff paid. Accordingly, the plaintiff's request to exclude evidence of the write-offs was denied. The court also noted that the plaintiff had failed to show that she was personally liable for the amounts

which were written off or that they represented an actual pecuniary loss to her.

This issue will most likely be resolved when the Indiana Supreme Court releases its opinions on the *Butler* and *Stanley* transfers. A decision in favor of the defendants, following the *Butler* panel and the recent decision of Judge Springmann in the district court, will have a profound impact on tort recoveries in Indiana - especially in cases involving Medicare and Medicaid where write-offs tend to be significant. In the *Butler* case alone, approximately \$288,000 and 70% of the plaintiff's recovery was at issue.

\* \* \*



*John Halstead, an associate in our Merrillville, Indiana office, concentrates his practice in civil litigation, title defense and mechanics liens.*

*Prior to joining Querrey & Harrow, John gained experience as a plaintiff's attorney in personal injury, contract, and estate law, which provides him a view of opposing perspectives in a lawsuit or in a contract dispute. John is a former law clerk to the Allen Superior Court and interned in the US District Court for the Southern District of Indiana. He was also the Director of the Indiana University Protective Order Project.*

*If you have any questions regarding this article, please contact John via [jhalstead@querrey.com](mailto:jhalstead@querrey.com), or via 219-738-7820.*

## CASE SUCCESSES

### **Wrongful Death Trial Returns Verdict In Favor Of Doctor And Hospital**

October 2008

**April Walkup** and **Jim Bream**, shareholders in the Chicago office, obtained a not guilty verdict on October 6, 2008 in a medical negligence wrongful death action brought against their clients, a local hospital and its employed physician.

The plaintiff alleged that the decedent's attending internal medicine physician deviated from the standard of care when he failed to administer Coumadin to the decedent following diagnosis of an acute DVT and as a protection against pulmonary embolism. The plaintiff argued that, as a result of this alleged deviation, the decedent died of a pulmonary embolism two days after he was discharged from the hospital.

April and Jim argued that there were significant contraindications to the administration of Coumadin, including hematuria, being a fall risk, mental status changes, dizziness and deconditioning. In addition, the decedent had an inferior vena cava (IVC) filter in place which was between 95% to 98% effective in protecting the decedent from a fatal pulmonary embolism. April and Jim also argued that because there was no autopsy, there was insufficient evidence to establish that the decedent died from a pulmonary embolism. The plaintiff asked for \$5.5 million and the jury deliberated for less than 2 hours before returning a not guilty verdict in favor of both the hospital and the doctor.

## Civil Rights Litigation Update: Growing Use of Motions to Bifurcate *Monell* Claims

By: Mary McClellan – Querrey & Harrow, Ltd. – Chicago, Illinois

Rule 42(b) of the Federal Rules of Civil Procedure is most commonly used in personal injury trials and other civil matters to separate issues of liability from those of damages. Under this rule, a growing numbers of federal trial courts are using bifurcation in Section 1983 civil rights cases to sever a plaintiff's claim against individual police officers from claims against municipal defendants for trial, and sometimes to defer discovery on the *Monell* claims until after the trial of the claim against the individual officer.

Rule 42(b) allows a federal trial court to order a separate trial of any claim or issue when it finds such an order appropriate:

**(b) Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.

Fed. Rule of Civ. Pro. 42(b) (2007). Likewise, when a court orders bifurcation for trial, the Rule also gives the court discretion to defer discovery of any issue that will be tried separately.

Several principles control the courts' consideration of Rule 42(b) motions. First, bifurcation is the exception, not the rule, for conducting a trial. A single trial is the preferred method for the adjudication of competing claims and issues because it tends to lessen the delay, expense and inconvenience to all parties. A court must exercise its discretionary power under the Rule based on informed judgment; it must avoid granting bifurcation as a matter of policy. As with other discretionary decisions, trial courts must evaluate bifurcation motions on an individual, case-by-case basis and refrain from routinely approving such motions.

Second, because of the general presumption favoring a single trial, the party seeking bifurcation has the burden of persuading the trial court that severance is appropriate in the matter at hand. The moving party's arguments should demonstrate that

separate trials are necessary to protect them from undue prejudice or inconvenience, and that the procedure would not cause the adversary any such prejudice or inconvenience. Alternatively, the movant may attempt to convince the court that bifurcation will be conducive to expedition and economy. Addressing each of these factors, the moving party must persuade the court that bifurcated discovery or trials would satisfy Rule 42(b)'s "paramount" consideration: to ensure a fair and impartial trial and process to all litigants through a balance of benefit and prejudice.

Third, in ruling on a Rule 42(b) motion, a court may consider other factors to determine whether bifurcation would avoid prejudice and further convenience, expedition, and economy. For example, a court may decide that bifurcation would be inappropriate in a case in which there is an overlap in the probable evidentiary proof of the issues sought to be tried separately, or when it believes that the moving party would gain an unfair advantage from separate trials. On the other hand, a court might grant bifurcation when it appears that a single issue could be dispositive of the case, and resolution of it might make it unnecessary to try the other issues, or when it believes that a single trial of all issues would create the potential for jury bias or confusion.

Finally, Rule 42(b)'s mandate to preserve any right of trial by jury requires a court to remain mindful that bifurcation may prevent the trial jury from fulfilling its role as the fact-finder. Bifurcation of individual and municipal defendants in section 1983 lawsuits, for example, may prevent the jury from engaging in the "equitable loss-spreading," *Owen v. City of Independence*, 445 U.S. 622, 657 (1980), that *Monell* liability is intended to promote, because it cannot properly apportion fault between the defendants. Moreover, the inherent difficulty of proving a Section 1983 claim against an individual police officer, especially when accompanied by a judge's misunderstanding of the applicable law, can work to deny a jury trial on a viable *Monell* claim. However, Rule 42(b) was amended in 1966 in an effort to provide trial courts "broad discretion" in managing their case dockets "with expedition and

economy while providing justice to the parties." When courts follow the principles explained above in ruling on bifurcation motions, it is likely that the amendment's objectives will be met.

The United States Supreme Court held that there can be no *Monell* municipal liability under § 1983 unless there is an underlying unconstitutional act. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). In *Heller*, the Court found that the magistrate judge's decision to bifurcate the trial was eminently reasonable in the interests of judicial economy and avoiding possible juror confusion.

Likewise, without a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of section 1983 damages liability on the part of the municipality. On the other hand, a verdict against the municipal employee will almost always result in satisfaction of the judgment by the municipality because of the indemnification provisions typically found in bargaining agreements between municipalities and their employee unions. There is, however, nothing to prevent a plaintiff from foregoing the naming of an individual officer as a defendant and proceeding directly to trial against the municipality. The predicate burden of proving a constitutional harm on the part of a municipal employee remains an element of the case regardless of the route chosen and is much easier to flesh out when the tortfeasor is a party amenable to the full powers of discovery.

From a tactical defense standpoint, the advantages of bifurcation are that, from an economic standpoint, a prevailing plaintiff in a Section 1983 excessive force case against a police officer in Illinois gets nothing more from suing the municipality under *Monell* than he would get from

suing just the officer. While bifurcation will not avoid a second trial where an individual officer prevails on qualified immunity grounds, in cases where the underlying officer is found not guilty on other legal grounds or the jury's consideration of the case's facts, the need for the expense of discovery on the municipality's procedures and a second trial is avoided.

Likewise, and perhaps most importantly, there often is evidence connected solely to the municipality's current or past practices that a jury often has trouble considering separate from the claims against the individual officer. In most instances, bifurcation will provide a "cleaner" trial for the individual officer defendant, uncluttered by myriad alleged bad actions of others that have no bearing on the particular incident alleged by the plaintiff.

\* \* \*



*Mary McClellan, an associate in our Chicago office and a member of our Municipal Liability practice group, concentrates her practice in civil litigation. Prior to joining Querrey & Harrow, Ms. McClellan was a trial attorney in the Civil Division of the McHenry County States Attorney's Office. During her tenure there, she defended actions against the body politic in both federal and state courts and completed trials in Code violation lawsuits.*

*If you have questions regarding this article, please contact Mary via [mmclellan@querrey.com](mailto:mmclellan@querrey.com), or via 312-540-7516. If you have questions regarding Querrey & Harrow's work defending municipalities, please contact Daniel Gallagher, via [dgallagher@querrey.com](mailto:dgallagher@querrey.com), or via 312-540-7674.*

# Municipality Law Update: Claims of Retaliatory Discharge For Exercising Workers' Compensation Rights Pierce the Veil of the Tort Immunity Act

By: Chloé G. Woodard – Querrey & Harrow, Ltd. – Chicago, Illinois

In the Illinois Supreme Court's modified decision in *Smith v. Waukegan Park District*, the court provides the definitive response to the question of whether or not public entities enjoy immunity under the Illinois Tort Immunity Act against claims of retaliatory discharge for exercising workers' compensations rights. No. 104960 (April 17, 2008.-Modified Upon Denial of Rehearing September 22, 2008). Unfortunately, the answer remains: "No."

The Local Governmental and Local Governmental Employees Tort Immunity Act ("Tort Immunity Act"), 745 ILCS 10/1-101, et seq., provides local governmental units with certain immunities based upon specific government functions and "protect[s] local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1(a). In effectuating this purpose, the Tort Immunity Act grants immunities and defenses, while preserving other common law defenses available to any private person. *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30 (1998). Over the years, the Tort Immunity Act has come to the aid of many deserving "local public entities" and provides defenses that otherwise would not exist. However, as the court expresses in *Smith*, one must be careful in its application.

In *Smith*, the plaintiff alleged that he was wrongfully discharged in retaliation for filing a claim under the Workers' Compensation Act, 820 ILCS 305/1 et seq. The Waukegan Park District ("District") responded to the complaint by filing a motion to dismiss under 2-619(a)(9) of the Illinois Code of Civil Procedure, asserting immunity from Smith's claims of retaliatory discharge under section 2-109 of the Tort Immunity Act.

Relying on the court's prior ruling in *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill.2d 12 (1998), the District argued that section 2-109 provided immunity to local public entities when the entity's employee could not be held liable for the act or omission causing the alleged injury. In *Buckner*, the court held that individual employees are not liable for retaliatory discharge. *Id.* Applying the reasoning here, the District argued that because

its individual employee could not be liable then the District could not be held liable.

Alternatively, the District asserted that it would not be liable since it enjoyed discretionary immunity under the combined effect of sections 2-201 and 2-109, of the Tort Immunity Act, because section 2-201 provides immunity to governmental employees for their acts or omissions involving discretion or determination of policy.

In support of its argument the District attached an affidavit drafted by Smith's supervisor explaining the decision to terminate Smith. The supervisor averred that the District's drug and alcohol testing policy permits testing an employee if the District has reasonable suspicion that the employee is under the influence of drugs or alcohol. In processing Smith's workers' compensation claim, the District received a medical record indicating Smith's use of marijuana every morning and evening. Smith was asked to take a drug test and he refused. Smith's admission of daily drug use indicated to the supervisor that Smith came to work after smoking marijuana causing the supervisor to believe that he had the "reasonable suspicion" necessary to demand a drug test. After Smith's refusal to take the drug test, he was terminated.

The circuit court granted the District's motion to dismiss Smith's complaint and the appellate court affirmed. 373 Ill. App. 3d 626. The appellate court held the District immune from suit under section 2-109 of the Tort Immunity Act specifically determining that, since retaliatory discharge claims can only lie against employers and not supervisory employees, public entities can never be liable for retaliatory discharge because their public employees are not liable. 373 Ill. App. 3d at 629. *Smith* reversed this ruling.

In the Illinois Supreme Court's *de novo* review it first addressed the appellate court's basis for finding the District immune and then explained why the combined effect of sections 2-201 and 2-109 provided no discretionary immunity to the District. On this first point, the court referred to their decision in *Buckner* where they established that

section 2-109 should be removed from consideration because it established that the employee never “acts” in a case of retaliatory discharge. Agreeing with Smith, the court suggested that it is not the public entity’s employee who causes the retaliatory discharge. Rather, it’s the employer and section 2-109 only grants immunity to a public entity from “an injury resulting from an act or omission of its employee” where the employee is not liable.” Accordingly, the court found in *Smith* that section 2-109 immunity does not apply in cases of retaliatory discharge because the employer, not the employee, ultimately causes the injury.

It was this reasoning again that halted the District’s second argument based upon the combined effect of sections 2-201 and 2-109 of the Tort Immunity Act. Together these sections provide discretionary immunity to public entities. *Arteman v. Clinton Community Unit School Dist No. 15*, 198 Ill.2d 475, 484 (2002) (Because ‘a local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable,’ this broad discretionary immunity applies to the entities themselves). The court disagreed with this reasoning, stating that it “fails” because it incorrectly views the employee as the pertinent actor when it is the employer who “acts” within the meaning of section 2-109 in a retaliatory discharge.

In support of it’s argument, the court cited section 4(h) of the Workers’ Compensation Act which reads: “it shall be unlawful for any employer \*\*\* to discharge \*\*\* an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.” With painstaking effort, the court highlighted that the Tort Immunity Act has its limitations specifically identifying that the legislature’s declaration in section 2-101(c) of the Tort Immunity Act stating “nothing in this Act affects the liability, if any, of a local public entity or public employee, based on: \*\*\* [t]he ‘Workers’ Compensation Act.”

Via its decision in *Smith v. Waukegan Park District*, the Illinois Supreme Court has, in effect, pierced the protective veil of the Tort Immunity Act in establishing that section 2-109 provides public entities no immunity for retaliatory discharge claims based on the exercise of workers’ compensation rights. While this decision reminds us once again of the Tort Immunity Act’s

limitations, it nevertheless is a blow to taxpayers in Illinois.

\* \* \*



*Chloé Woodard is an associate in Querrey & Harrow's Chicago office and concentrates her practice in municipal liability and commercial litigation. Having been a law clerk with the Illinois Attorney General Lisa Madigan's Office and Querrey & Harrow, Ms. Woodard has a well rounded base in these practice area to handle the key aspects of these types of matters.*

*Chloé currently handles cases which involve a variety of issues municipalities face including premise liability and those based upon 42 USC §1983 (discrimination, equal protection, due process and freedom of speech). Her recent successes include the dismissal by motion for summary judgment of a §1983 due process civil rights matter, and a successful summary judgment motion in a §1983 class action claiming equal protection violations.*

*Chloé is active in the Women's Bar Association of Illinois, serving on the Budget Committee, Judicial Reception Committee, and the Annual Dinner Committee. She is also an active member of the Chicago Bar Association, where she participates in the Richards Career Academy Mentoring Program. Ms. Woodard is also a member of Phi Alpha Delta Legal Fraternity Story Chapter.*

*If you have any questions regarding this article, please contact Chloé via [cwoodard@querrey.com](mailto:cwoodard@querrey.com), or via 312-540-7604.*

## **Products Liability Update: The Court's Adoption Of A New 'Integrated Test' For Proving Strict Liability In Defective Design Claims**

By: Christopher Harney – Querrey & Harrow, Ltd. – Chicago, Illinois

The Supreme Court of Illinois recently ruled that a defendant in a product liability claim is entitled to a jury instruction on the "Risk Utility Test," despite the fact that plaintiff attempted to prove her case solely by way of the "Consumer Expectations Test." *Mikolajczyk v. Ford Motor Company*, No. 104983 (October 17, 2008).

In so holding, the court adopted a new 'Integrated Test' for proving strict liability in defective design cases, a test that combines both the Consumer Expectations Test and the Risk Utility Test into one "Integrated Test". In *Mikolajczyk*, James Mikolajczyk died of injuries sustained when the Ford Escort he was driving was struck from behind by another vehicle. His widow filed a negligence claim against the other driver and a defective design claim against Ford Motor Company and Mazda Motor Corporation. The Escort was manufactured by defendant Ford, and the seat was designed by defendant Mazda. The Illinois Supreme Court granted defendants' petition for leave to determine whether the trial court erred by instructing the jury on the Consumer Expectations Test and rejecting defendants' tendered instruction on the Risk Utility Test for defective design. In the underlying case, the plaintiff tendered the pattern jury instruction No. 400.06 which defines the expression "unreasonably dangerous" in a way that coincides with the Consumer Expectations Test. However, this instruction does not include any factors specific to the Risk Utility Test.

Under Illinois law, strict liability may be imposed based on proof of an injury proximately caused by an unreasonably dangerous condition of a product and such a condition may consist of a manufacturing defect, a design defect or inadequate warnings. The elements of a claim of strict liability based on a defect in the product are: 1) a condition of the product as a result of manufacturing or design; 2) that made the product unreasonably dangerous; 3) that existed at the time the product left the defendants' control; 4) an injury to the plaintiff; 5) that was proximately caused by the condition. The plaintiff has the burden of proof on each element. *See, Sollami v. Eaton*, 201 Ill.2d 1, 7

(2002); *Suvada v. White Motor Co.*, 32 Ill.2d 612, 623 (1965).

A plaintiff may prove that a design defect is unreasonably dangerous by offering proof under either the Consumer Expectations Test or the Risk Utility Test. Under the Consumer Expectations Test, the plaintiff offers evidence that the product failed to perform as safely as an ordinary customer would expect when used in an intended or reasonably foreseeable manner. *Lamkin v. Towner*, 138 Ill. 2d 510, 529 (1990). The Risk Utility Test offers proof of factors not contemplated by the Consumer Expectations Test; particularly, the defendant attempts to prove that the benefits of the challenged design outweigh the risk of danger inherent in such designs and may offer proof of a lack of an alternative design or inquiries into such a design's feasibility. *Id.*

On petition before the Illinois Supreme Court, the defendants made three arguments. First, the defendants argued that Illinois law establishes that in a product liability action for defective design, the plaintiff may only prove her case by way of the Risk Utility Test. *Hansen v. Baxter Healthcare Corp.*, 309 Ill. App. 3d 869 (1999); *Blue v. Environmental Engineering, Inc.*, 345 Ill. App. 3d 455 (2003); *Calles v. Scripto-Tokai Corp.*, 358 Ill. App. 3d 975 (2005). In the alternative, the defendants argued if the court did not find that precedent dictates a bright line rule adopting only the Risk Utility Test in all defective design cases, precedent does exclude use of the Consumer Expectations Test when the case involves a "complex product."

Finally, the defendants challenged the trial court's rejection of defendants' tendered non-patterned jury instructions which would have informed the jury to consider factors unique to the Risk Utility Test, such as: the overall safety of the design, whether the foreseeable risks of harm of the design outweighed its benefits and whether the adoption of a feasible alternative design would have avoided or reduced the risks. The defendants asserted that this instruction should have been given either instead of or in addition to the plaintiff's tendered instruction

400.06, which provides the method of proof depicted in the Consumer Expectations Test.

After analysis of the history of the Consumer Expectations and Risk Utility Test, and the precedent cited by the defendants, the court rejected defendants' claim that under Illinois law the Risk Utility Test is the sole measure of the dangerousness of an allegedly defectively designed product in all strict liability cases.

The court next addressed the defendants' second argument that if the court does not adopt the Risk Utility Test as a sole exclusive test in all design defect cases, it should be the exclusive test when a product is complex because the circumstances are not familiar to the ordinary customer. The defendants argued that, by very definition, a design defect of a complex product requires considerations of the feasibility of alternative designs, costs, safety and other factors which the ordinary customer is not familiar with, and which the Consumer Expectations Test does not capture. The court, however, rejected this argument, finding that while a feasible alternative design in the balancing of risks and benefits are relative considerations in a product liability design defect case, they are not and should not be elements of the claim that the plaintiff is required to plead and prove in every case.

In answering the defendants' third argument, the court stated that the plaintiff is entitled to an instruction setting out her own theory of the case, based on her own theory of liability. In this case, the plaintiff chose strict liability on defective design, and her own chosen method of proving defective design was the Consumer Expectations Test. However, the court further stated that the plaintiff may not unilaterally preclude the defendant from tendering a jury instruction that presents the defendant's theory of the case. In this case, the defendants wished to prove their case by way of the Risk Utility Test, despite the fact that the plaintiff chose to prove her case exclusively by way of the Consumer Expectations Test. The court held that the defendants are entitled to jury instruction on their theory of the case so long as the defendants' instruction 1) accurately states the law and 2) is supported by the evidence.

The defendants also argued that if the court was to hold that both tests may be used by the plaintiff to prove her case, then the Risk Utility Test must

trump the Consumer Expectations Test when both are offered as methods of proof. The defendants argued that, by allowing the plaintiff to prove her case by way of both tests, the plaintiff is essentially given "two bites at the same apple" and the court would be requiring defendants prove their case and succeed under both tests.

The court addressed the defendants' concerns by adopting an Integrated Test as set out in *Mele* and *Besse*. *Mele v. Howmedica, Inc.* 348 Ill. App. 3d 1 (2004); *Besse v. Deere & Co.*, 237 Ill. App. 3d 497 (1992). The court stated that while both tests are still mutually exclusive, if there is evidence that tends to prove the Risk Utility Test, then the Consumer Expectations Test is "integrated" into the broader Risk Utility Test. Specifically, "consumer expectations" become merely one factor in the broader balancing of risks and benefits as defined by the Risk Utility Test.

Thus, the court held that when the evidence presented by either or both parties supports the application of this Integrated Test, an appropriate instruction is to be given at the request of either party. However, if both parties' theories of the case are framed entirely in terms of the Consumer Expectations Test, then the jury should be instructed on only the Consumer Expectations Test.

After adoption of this Integrated Test, the court next turned to determine whether or not the defendant in this case was nevertheless entitled to instruction on this Integrated Test. In order to hold that the trial court erred in rejecting defendants' tendered non-patterned jury instruction the court needed to find three things in the defendants' favor: 1) that the defendants' jury instruction accurately states the law, 2) that evidence presented on the record supports application of this Integrated Risk Utility Test, and 3) that the defendant in this case was prejudiced by exclusion of their non-patterned jury instruction. The court found all of the above questions in favor of the defendant and held that a retrial on liability was required because the jury was inadequately instructed, and was therefore unable to apply the correct legal principles to the submitted evidence.

In summary, the court held that both the Consumer Expectations Test and the Risk Utility Test may be utilized in a strict liability design defect case to prove that the product is unreasonably dangerous.

However, when both Tests are employed, consumer expectations are to be treated as merely one factor in the broader Integrated Risk Utility Test adopted by the court.

This decision appears at first glance as being pro-plaintiff because the court rejected defendants' argument that the court must adopt the Risk Utility Test as the sole means of proof. However, such an impression does not accurately assess the consequences of this court's decision. If a plaintiff wishes to prove its theory of liability strictly by way of the Consumer Expectations Test, the defendant, by its own initiative, may introduce evidence regarding feasibility of an alternative design, existence of an alternative design or any evidence towards the balancing of risks and benefits towards such a design and by presenting this evidence. By introducing this evidence, the defendant makes herself entitled to a jury instruction encapsulating the 'Integrated Test' adopted by this opinion. Under these circumstances, this new Integrated Test essentially swallows the plaintiff's chosen method of proof because the Consumer Expectations Test becomes merely one factor in the broader Risk Utility Test proposed by the defendant.

It is unclear whether the court's adoption of this Integrated Test applies only to strict liability design defect cases, or whether it will be applied in negligent product liability claims. However, one could make a compelling argument that the court's adoption of the Integrated Risk Utility Test applies

to all product liability cases in which evidence offered tends to prove both the Consumer Expectations Test and the Risk Utility Test, and that this holding is not merely limited to strict liability design defect cases.

\* \* \*

*Christopher Harney, admitted to the bar on November 6, 2008, is a new associate in Querrey & Harrow's Chicago office. We welcome Chris to our firm! Chris previously clerked for Querrey & Harrow during law school and concentrates his practice in general litigation and currently assists in a variety of matters, including: auto liability cases, premises slip and fall claims, and drafting commercial contract provisions. We welcome Chris to our practice.*

*Christopher graduated Cum Laude from the University of Mississippi School of Law, following receiving a Bachelor's Degree in Psychology from the University of Chicago as a four-year recipient of the Chicago Police and Fire Scholarship.*

*During law school, Christopher was active on the moot court team and successfully competed in a variety of appellate competitions and was a Semifinalist in the State of Mississippi Appellate Advocacy Competition. If you have any questions regarding this article, or would like copies of any of the materials cited, please contact Chris via charney@querrey.com, or via 312-540-7622.*

## SEMINARS

Chicago shareholder **Beverly Berneman** had a busy October, speaking at three different seminars. First, Beverly spoke at the October 14 and 28 sessions of Lorman Educational Services' Construction Lien Law - Bankruptcy and Mechanic's Liens seminar. She then spoke on October 21 at the Practising Law Institute's seminar on Intellectual Property Licenses - Open Source Licenses. Finally, on October 24, Beverly was a speaker at the New York Bar Association's and CMJ CLE's 2008 Music Business Law Seminar Confirmation - Bankruptcy and Intellectual Property seminar in New York City.

\* \* \*

Querrey & Harrow attorneys regularly provide seminars and training sessions to clients across the country on a vast array of legal topics. We are always willing to develop specific seminars and sessions addressing a client's particular needs and would be happy to discuss this with you and your team.

If you are interested in discussing a training session at your location, or at any one of our offices, please contact **Terrence Guolee** via tguolee@querrey.com or 312-540-7544 to discuss your topic or for referral to the Querrey & Harrow attorney whose expertise best matches your particular needs.