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In the interest of ecology, we have moved to an electronic monthly newsletter. Each of the articles below can be accessed in full at <http://www.querrey.com/newsletter-38.html>



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Work Comp Update: Recent Changes to Illinois Workers' Compensation Statute Places Burden of Proof on the Employer

By: Kevin Casey – Querrey & Harrow, Ltd. – Chicago, Illinois

Beginning on January 1, 2009, municipal and private employers of paramedics, emergency medical technicians (EMT) and firefighters noticed a shift in the burden of proof in defending workers' compensation claims. The basis for this new burden on such employers is the result of Public Act 95-316 House Bill 928 which was codified as 820 ILCS 306/6(f). This relatively new provision reads as follows:

Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee **shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment.** This presumption shall also apply to any hernia or hearing loss suffered by an employee employed as a firefighter, EMT, or paramedic. However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT, or paramedic for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission. The Finding and Decision of the Illinois Workers' Compensation Commission under only the rebuttable presumption provision of this subsection shall not be admissible or be deemed res judicata in any

disability claim under the Illinois Pension Code arising out of the same medical condition; however, this sentence makes no change to the law set forth in *Krohe v. City of Bloomington*, 204 Ill.2d 392 (Ill. 2003) (*Emphasis added*).

As noted above, any impairment to the health of a firefighter, EMT, or paramedic which results directly *or* indirectly from any of the aforementioned conditions will be presumed to arise out of and be causally connected to the hazards or exposures of the employees' job. Although this presumption is limited to those individuals who have been employed for at least five years when they file their Application for Adjustment of Claim, the burden of rebutting such claims now lies with the employer. As such, it is clear that in passing this provision, the Illinois state legislature has created an atmosphere wherein claims filed by firefighters, EMT's and paramedics have an even greater chance of succeeding. The net result then is a new class of potential petitioners who may now seek compensation for conditions which would otherwise be considered the result of ordinary life.

* * *



Kevin Casey, an associate in our Chicago office, concentrates his practice in general litigation. Kevin currently handles claims involving premises liability, construction litigation and workers' compensation for both corporate and governmental entities.

Querrey & Harrow has long served the needs of governmental units, governmental officials and employees, as well as corporate and private clients, with all of their legal needs, including workers' compensation litigation. Should you need any further information regarding this issue and/or any workers' compensation matter please do not hesitate to contact Kevin Casey directly at (312) 540-7052, or via kcasey@querrey.com.

Litigation Update: Bill Providing for Prejudgment Interest Advances in Illinois Legislature

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

Those involved with Illinois litigation should be aware of the progress of Illinois Senate Bill 184 (Haine, D-Alton). This bill would amend the Illinois Code of Civil Procedure to allow prejudgment interest in certain cases.

As now proposed, the bill will automatically allow for the assessment of prejudgment interest against a defendant from the date notice of a claim is forwarded to the defendant or suit is filed, whichever is earlier, to the date of judgment. Defendants seeking to avoid the application of prejudgment interest must make a settlement offer within 120 days of the filing of their initial answer. After that, the parties may agree in writing to extend the 120-day period.

If the plaintiff does not accept the made offer of settlement, he or she must receive a verdict greater than the offer of settlement in order to receive prejudgment interest. As proposed, defendants may also use this statute and seek prejudgment interest if they file counter-claims, third-party claims, or contribution claims. Prejudgment interest is not awarded if a civil case settles and will only be awarded if the plaintiff receives a verdict, and that verdict is greater than any tendered offer of settlement by the defendant.

The interest rate to be applied would be the average U.S. Treasury bill rate plus two percentage points (for example, given the current 0.47% rate, January 2009's rate would be 2.47%). Currently, the bill exempts certain situations or parties from the application of prejudgment interest: (1) A unit of local government or any other governmental entity, (2) actions in small claims, (3) awards for punitive damages, and (4) if the cause of action is governed by a more specific statute such as the Interest Act.

Obviously, if passed, this bill will result in increased pressure on defendants to make settlement offers early in the case. However, in

many cases facts supporting the defense of many claims are not revealed within the first three months of the case, making it difficult to apply a reasonable settlement value.

In particular, in many complicated claims the process of obtaining a plaintiff's medical records, accident records and statements from witnesses can easily exceed the provided 120 day time period. Likewise, where plaintiffs have had months to investigate an accident before forwarding their claim, plaintiffs can delay defendants from obtaining necessary records via withholding necessary releases, stalling in answers to written discovery and failing to appear for depositions. Nevertheless, as proposed, the bill offers no exceptions to defendants based on the unavailability of information needed to make a reasonable settlement demand, or actions by plaintiffs blocking early investigation of a claim.

Conversely, as written, the bill's only pressure on plaintiffs is the potential loss of prejudgment interest if they reject a made settlement offer, something that plaintiffs are not entitled to under current Illinois law. Unlike Federal Rule of Civil Procedure 68, there are no provisions in the proposed bill allowing defendants to make offers of judgment to a plaintiff, whereby a plaintiff rejecting an offer and obtaining a judgment equal to or less than the offer made being subject to paying a defendant's costs incurred following the date of the offer. As a result, the bill is unfortunately "one-sided" in its approach to promoting settlement of claims, placing all pressure on the defense with no real risk placed upon claimants.

Senate Bill 184 has been assigned to the Senate Committee on Assignments for referral to a substantive committee. Action is expected on the bill during the current legislative term. We will report on any amendments to the bill, as well as should the bill be voted upon by the legislature. While recently impeached Governor

Rod Blagojevich was understood to be a supporter of the bill, current Governor Pat Quinn has not commented on the proposal. A full copy of the bill is available at <http://tinyurl.com/arj87d>.

* * *



Terrence Guolee, a shareholder in our Chicago office, has successfully represented defendants, plaintiffs and carriers in dozens of complex, multi-million dollar claims covering a wide area of facts and law, in both state and federal court. 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. Mr. Guolee also represents several businesses in defense of various claims and has a long record of successful representation of businesses, property owners, utilities and contractors in high-exposure catastrophic injury claims. Terrence also represents insurance carriers, claims administrators and companies in coverage claims and litigation involving third-party claims administration practices.

If you have any questions regarding Senate Bill 184, please contact Terrence via 312-540-7544, or via tguolee@querrey.com.

CASE SUCCESSES

Q&H Client Dismissed From Massive Federal Personal Injury Litigation

Chicago shareholder **Terrence Guolee** recently obtained the dismissal of all claims against his client, a commercial grounds maintenance company, in a serious personal injury suit involving the collapse of a concrete fence on the head of a young child at the Great Lakes Naval Base in North Chicago, Illinois, pending in the Federal District Court for the Northern District of Illinois, Eastern Division.

Q&H Obtains Not Guilty Verdict in Auto-Bicycle and Auto-Auto Accident Cases

Joliet, Illinois office associate **Rich Turiello** obtained a not guilty verdict at trial in a case where the plaintiff, a 13 year old bicyclist, alleged that our client was traveling too fast and not keeping a proper lookout. The minor sustained a fractured left ankle and incurred \$17,000 in medical bills.

Rich also obtained a not guilty verdict at trial in an auto accident case where the plaintiff suffered a comminuted fracture of her right patella that required surgery. The plaintiff's claim of damages exceeded \$250,000. The jury deliberated for 40 minutes and returned a not guilty verdict.

Q&H Wins Jail Wrongful Death Case

Chicago office shareholders **Dan Gallagher, Paul O'Grady** and **Larry Kowalczyk** recently obtained a full dismissal of all claims raised by the heirs of a detainee at a local jail that was stabbed to death by another detainee using a shank.

Q&H Wins Nursing Home Case

Chicago shareholders **Robert Huebsch** and **Ellen Gibson** recently obtained a summary judgment order in a nursing home case. Plaintiff alleged under the Nursing Home Care Act that our client's nursing home personnel caused or contributed to the death of Plaintiff's husband due to various allegations of substandard care.

Intellectual Property Update: Character Licensing – an Overview

By: E. Leonard Rubin – Querrey & Harrow, Ltd. – Chicago, Illinois

I. INTRODUCTION

Quite simply, licensing is the granting of permission by a rights holder to another entity to temporarily use a property, whether a name, image, brand or logo, owned or controlled by the grantor.

Although this is a simplistic definition, it is important to reinforce this meaning from time to time in order to delve more deeply into specialized versions of licensing agreements. "Character licensing" is the granting of permission to use a name, character (real or cartoon), or image for a usually limited period of time, for a limited commercial purpose. The business of character licensing has existed for many years, but it is only relatively recently that it has grown to very large proportions, and the main reason for that growth has been changes in interpretation of privacy law.

Cartoon characters represent an easy introduction to the subject of character licensing. Because they are not real people, cartoon characters are easier to use in a licensing situation, especially where they have little in the way of moral impressions that must be upheld. As might be imagined, it is very difficult to defame a cartoon character, because defamation involves diminishment of reputation in the

community. However, these characters may be protected in other ways. A number of years ago, a series of cartoons depicting Mickey and Minnie Mouse in sexual situations never permitted (or perhaps even envisioned) by Walt Disney resulted in a conviction of the satirists for copyright infringement. Of course, even where licensing seems to involve a few simple steps, certain basic licensing provisions must still be observed; those provisions are discussed in greater detail as this article progresses.

With regard to changes in the law relating to invasion of privacy, it has not been very long since IBM ran a series of advertisements on television featuring an actor who looked and acted like Charlie Chaplin, the famous movie star-director-author-composer of the late silent and early sound film days, essentially hawking IBM's wares. Chaplin had died a few years before, and IBM's advertising agency apparently felt it would be no problem to use Chaplin's likeness and distinguishing bodily movement characteristics without first obtaining rights from Chaplin's Estate. There was a basis in the law of that time for the agency's conclusions; however, IBM suddenly pulled its entire ad campaign and substituted one that did not use any celebrity's name or likeness, when IBM learned that its suppositions were incorrect because the law was changing.

NEWS

Entertainment and Copyright Lawyer Joins Querrey & Harrow

E. Leonard Rubin, an experienced entertainment and copyright lawyer, has joined Querrey & Harrow and its intellectual property group as Counsel. Mr. Rubin also practices trademark, trade secret and defamation law and relocates to Querrey & Harrow from an international law firm.

Prior to returning to private practice, Mr. Rubin served for 13 years as Vice President, General Counsel and Corporate Secretary for Playboy Enterprises, Inc. Currently, Mr. Rubin is president of the Midwest Chapter, and sits on the Executive Committee of the Copyright Society of the United States. He is a past president and Board member of Lawyers for the Creative Arts, was a Director of CBA-TV Inc., and for 35 years was the director and co-author of "Christmas Spirits," an annual show produced by the Chicago Bar Association.

Mr. Rubin currently teaches Entertainment Law at John Marshall Law School and previously taught copyright law at Northwestern University School of Law, the University of Illinois College of Law, and Loyola University Law School.

It was not a stretch of imagination for IBM to conclude at first that it would have no problem. A "right of privacy" law had been passed by many states in the aftermath of a seminal article suggesting that such a right existed was published in the Harvard Law Review in the late 19th century. That law, as originally defined by legal scholars of the time and interpreted by courts until the 1960s, was considered a personal right that terminated with the death of the person whose privacy was invaded. Dean Prosser and the drafters of the Restatement (Second) of Torts divided privacy rights into four categories:

- 1) Intrusion upon the plaintiff's seclusion or solitude, or into his or her private affairs;
- 2) Public disclosure of private facts about the plaintiff;
- 3) Publicity that places the plaintiff in a false light in the public eye, and
- 4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

This fourth category was so much a part of the overall privacy concept that, like its sibling categories, it was originally deemed to fall with the death of the potential plaintiff.

That began to change in the 1960s, as survivors of celebrities began to convince courts that where the privacy invasion involved the use of a person's name or likeness for commercial purposes, this aspect of the privacy right should be treated differently; it was not so much an unwarranted intrusion into the affairs of another as the exploitation of a commercially valuable right that can continue to exist after a person's death. This concept gradually became separated from the other three categories and began to be called a "right of publicity." It has become generally accepted by many state courts, and has consequently led to the need to exercise extreme care in connection with the use of anyone's name or likeness, or even his or her characteristics, for commercial purposes, whether the individual is alive or dead.

Woody Allen's movie "Zelig" placed characters in electronically created and manipulated montages with a number of very real people, including celebrities and politicians, some alive and some deceased. The movie "Forrest Gump" placed the actor Tom Hanks, playing the fictional title character, in similarly manipulated scenes with other renowned people. For these and similar uses, motion picture producers now feel it is absolutely necessary to obtain licenses, often referred to as "character licenses." (It should be stated early on that licenses are not always required in every business situation; more will be noted on that subject later in this article.)

II. LICENSES GENERALLY

In almost every situation that involves a request by one entity to temporarily use the property of another (as opposed to buying the property outright), there are certain standard conditions that the licensee should expect to encounter. They are almost always driven by the economics of the business situation; they are:

a. A time limitation.

It may be possible to license a property in perpetuity, but this is seldom done. Licensors normally realize that continued use of a property by a licensee can enhance the value of the property, so that whatever fee is initially charged may turn out to be inadequate in the future. Also, it may be that a future unrelated prospective licensee is willing to pay considerably more for the same type of use as a current licensee.

b. A fee.

Obviously, this will vary substantially, depending on the nature of the property being licensed. Where famous articles of property are concerned, that fee may involve a percentage of gross or net sales or profits, with a minimum amount of royalty to be paid at the end of certain accounting periods.

c. Some amount of control over the method of use by the licensee.

Licensors who understand their business will also understand that the licensed property may carry with it an image, and the worth of the property can lean heavily on that image. Therefore, the licensor will ordinarily demand some approval rights in connection with the contemplated uses by the licensee.

- d. Some control over the methods of advertising and promotion of the property.

Again, this is to make certain that the property is not denigrated, or promoted in a manner that might lessen its value in the marketplace.

In addition, there may be other provisions, such as:

- e. An acknowledgement of licensor's rights by the licensee.

This provision is designed to prevent a licensee from later challenging the licensor's capacity to grant the license in question.

- f. An agreement regarding the defense of or challenge to the rights of the licensor.

Those licensor's rights may possibly be infringed by another party, or another party may accuse the licensor, and the licensee because of its use, of infringing the rights of the challenger. This can be a sensitive negotiating point; where the license is exclusive to the licensee, a successful challenge can seriously hurt or even destroy the business of a licensee whose offerings are totally dependent on the license.

III. CHARACTER LICENSES

A cottage industry has sprung up in connection with the obtaining of character licenses. A number of companies as well as individuals have persuaded both living celebrities and survivors of celebrities that there can be an income stream from the licensing of names and likenesses. Consequently, there are now a number of companies who specialize in granting character licenses for specific purposes.

These companies have negotiated with those people, usually celebrities because their names and likenesses have more commercial value than others, or with their estates, to exploit licensing rights in exchange for royalty payments.

Not all uses of names or likenesses require a license. If the use does not involve commercial activity or commercial gain to the user, no license should be required. For example, relating true incidences involving real people, if factual and not reasonably construed as an endorsement, should not require a license. A casual mention of a real person in a book or movie or article, again without an implication of endorsement of a product or service, also should not be construed as an infringement of someone's right of publicity. Care must be taken, however, to make certain that there is no implication that the named person has been directly or peripherally involved in some illegal or embarrassing activity, because this could give rise to a different cause of action for invasion of privacy.

IV. TRADEMARK AND COPYRIGHT CONSIDERATIONS

- a) Trademarks.

There are several important differences between the licensing of names and likenesses, and of trademarks and copyrights. The essence of trademark law is the avoidance of confusion in the marketplace as to the source of goods or services. Where trademarks are concerned, the law imposes several duties on trademark owners that are required to be transferred to trademark licensees, under penalty of loss of trademark rights. First is the general concept that trademarks must be used to remain valid; if they are not used for an undefined period of time, without good reason and without a clear indication that they will be used soon, they may fall and become available for generic or other use by the public.

Next is the requirement that the trademark owner exercise sufficient control over a licensee's use of a mark so that the mark continues to be used in a manner consistent with the quality requirements of the licensor. A lack

of a provision allowing this type of creative control can also result in the loss of trademark rights.

Importantly, the law concludes that trademark use builds goodwill for the trademark owner, because the public associates the trademark with the product or service upon which it is being used, and could therefore continue to ask for a branded product by name. Any transfer of trademark rights must recognize this principle, so that a license of those rights normally will provide that the goodwill that builds up from the licensee's use of the mark will inure to the benefit of the licensor.

b) Copyrights.

A copyright is a government granted monopoly of sorts, conferred upon the creator of an eligible work, that allows that creator to control almost all uses of the work. Copyright law protects all creative material that is original the moment it is reduced to some tangible means of expression. No copyright notice is required to be used, and no registration of the copyright with the Copyright Office needs to be observed. As a result, any copying of this material without permission, without some sort of license, can constitute copyright infringement. Nevertheless, there are certain fundamental requirements imposed on those who claim copyright protection and wish to license their works for a fee.

The material must be original; that is, the expression must have been created and not copied from someone else's work. Concepts, an idea, a formula, facts themselves, are not protectable by copyright; only the original expression of the ideas enjoys protection. Someone seeking to license copyrighted works should therefore seek warranties from the licensor that the material is in fact original and protected by copyright.

This concept becomes important to observe where a prospective licensee is seeking to create what is called a derivative work based on and using a copyrighted work. The easiest example of that is where a motion picture producer

wishes to adapt a written work for the screen. The license of rights to make that adaptation should include warranties from the owner of the written work, the licensor, that along other things, the copyright in the underlying work is valid and the work is original with the licensor.

There is in copyright law a principle called "fair use", providing that under certain circumstances, an unlicensed use of a portion of a copyrighted work is forgivable. It is possible, therefore, to use a copyrighted work or a portion thereof without first obtaining a license. The problem with reliance on this principle is that it is highly subjective, and subject to the whim of a judge or jury because of its amorphous guidelines. It is often worth exploring, however, especially where a licensor is demanding an unreasonable fee for use of copyrighted material.

As with trademark concepts, the question of who will handle the prosecution of an infringer or the defense of a challenge to copyright rights is a negotiating difficulty. Copyright law requires that, in addition to registration in order to have standing to sue, the plaintiff must either be the copyright owner or an exclusive licensee. Thus, where a licensee does not have exclusive rights, but its business is dependent upon exploitation of the copyrighted material, the license agreement should contain a requirement that the licensor/copyright owner take action against infringers. There is also the question of how any judgment against an infringer should be shared, and this is part of the negotiating process.

An additional negotiating question involves control of the defense of an infringement action brought by another party. The licensor has a serious interest in obtaining an adjudication that it has valid copyright rights, but the licensee has its own serious interest, where its business depends on that same adjudication. Which party should exercise ultimate control over the defense, even where costs are split? It is often difficult for the parties to determine a fair solution to this problem.

Finally, it should be noted that copyright protection does not extend to utilitarian works. Utilitarian works are creations that have a useful

function, and copyright law is not intended to protect them; rather, they can become the subject of patent protection if they otherwise qualify under patent laws. However, where a utilitarian article is concerned, if there exists an artistic element that is conceptually severable from the utilitarian aspect, that artistic element may qualify for copyright protection. The classic case illustrating this principle involves a lamp with a base that was a reproduction of a work of sculpture. The court ruled that the sculpture may be protected by copyright, but that copyright did not extend to the entire lamp itself, only to its artistic element. If this were not the case, the monopoly granted to the creator in this instance might operate to prohibit others from creating or using a lamp without the artistic element. As another example, extending the copyright to a sweater on which an artistic scene is reproduced could prohibit everyone else from making similar sweaters without that artistic scene. Protection for utilitarian articles is, as mentioned above, strictly the province of patent

law, which has its own limitations and restrictions.

Generally, character licensing follows normal licensing principles, but adds a few of its own. Licensors in this area tend to be very vigilant regarding the unlicensed use of property they represent, and are litigious, which sends out a strong signal of caution to would-be licensees. That is, of course, their point; they have acquired licensing rights from others based on their promises to generate royalties, and they are generally successful at it.

* * *

E. Leonard Rubin recently joined Querrey & Harrow's intellectual property group as Counsel. Leonard's background is detailed in the "News" section of this month's newsletter. If you have any questions regarding this article, please contact Len via lrubin@querrey.com, or via (312) 540-7676.

NEWS

Eileen Sethna and Brandon Lemley Elected As Shareholders

Querrey & Harrow is proud to announce that that **Eileen M. Sethna** and **Brandon K. Lemley** have been elected as shareholders.

Eileen concentrates her practice in commercial litigation and bankruptcy matters, including business reorganizations, creditors' rights, and individual insolvencies. She is a member of the Chicago Bar Association and the Illinois State Bar Association and is an active volunteer and supporter for Misericordia. Eileen earned her JD from The John Marshall Law School in 2002 and her BA from Providence College in 1996. Ms. Sethna resides in Chicago.

Brandon concentrates his practice in civil rights defense, municipal liability, commercial litigation and appeals. He is a member of the Chicago Bar Association Judicial Evaluation Committee and the American Bar Association. Mr. Lemley also serves as an adjunct professor at the John Marshall Law School, teaching legal writing and appellate advocacy. Mr. Lemley earned his JD, *cum laude*, from The John Marshall Law School in 2001 and his BA, with honors, from Indiana University in 1998. He resides in Chicago's Lincoln Square neighborhood.

Ellen Gibson Elected to Nursing Home Board of Directors

Chicago shareholder **Ellen Gibson** was recently elected to the Board of Directors of Three Crowns Park, a continuing care retirement community with independent living, assisted living, memory care and intermediate and skilled nursing care onsite.

Red Light Cameras Survive Constitutional Challenge

By: Brian Begley – Querrey & Harrow, Ltd. – Joliet, Illinois

In *Idris, et al., v. City of Chicago, et al.*, 2009 U.S. App. LEXIS 42 (7th Cir. Ill. Jan. 5, 2009), the United States Court of Appeals for the Seventh Circuit, recently affirmed the decision of the United States District Court for the Northern District of Illinois, holding that the City of Chicago's practice of fining vehicle owners under a local ordinance, regardless of the identity of the driver, pursuant to its red light camera enforcement system, does not violate the Fourteenth Amendment Due Process Clause.

In July, 2003, the City of Chicago enacted Chapter 9-102 of the Chicago Traffic Code, allowing the City to install cameras at traffic intersections around the city to photograph vehicles entering intersections against red lights or making illegal turns. Under the code section, the photographs are considered *prima facie* evidence of the traffic violation and the registered owner of the vehicle is generally liable for a \$90 fine if the owner's car is photographed, regardless of the identity of the driver. Three of the plaintiffs in *Idris*, were issued citations for violation of Chapter 9-102, as the registered owners of certain vehicles, even though they were not the actual drivers of those vehicles at the time of the alleged infraction.

Plaintiff owners appealed a decision of the United States District Court for the Northern District of Illinois granting summary judgment to the City of Chicago in their action alleging that Chapter 9-102 violated the Fourteenth Amendment Equal Protection and Due Process Clauses. On appeal, plaintiffs asserted that vicarious liability offended the substantive component of the due process clause.

In reviewing the case, the Seventh Circuit noted: "When a government action is challenged under substantive due process, a court must first determine whether a fundamental right is implicated and if not, must apply the rational basis test." *Idris, et al., v. City of Chicago, et al.*, 2008 U.S. Dist. LEXIS 3933 (N.D. Ill. Jan. 16, 2008); citing, *Doe v. City of Lafayette*, 377 F. 3d 757, 773 (7th Cir. 2004). "The rational

basis test under substantive due process ... requires only that a government action be 'rationally related to a legitimate government interest.'" *Id.*

In this case, the Seventh Circuit dismissed the implication of a fundamental right, noting that no one has a fundamental right to run a red light or avoid being seen by a camera on a public street. Thus, review under the rational-basis doctrine left the court to decide whether the City's approach of fining the owner rather than the driver was rationally related to a legitimate government interest. The court ultimately found that it was.

In support of its decision, the court noted that a camera can reliably show which vehicles go through red lights, but is less likely to show who was driving, imposing a virtually impossible burden on the municipality to prove the identity of the driver after the respondent invokes a "innocent owner" defense. Also, the use of a red light camera system reduces the cost of law enforcement and increases the proportion of all traffic offenses that are detected, which said objectives can be achieved only if the owner is held responsible. Finally, expanding on the city's contention in the district court that Chapter 9-102 is rationally related to advancing its interest in deterring traffic violations and promoting traffic safety, the appellate court noted that "[a] system that simultaneously raises money and improves compliance with traffic laws has much to recommend it and cannot be called unconstitutionally whimsical." *Id.*

This decision is important because it provides a constitutional basis for municipalities, which may have previously deferred, to move forward in introducing red light camera systems without having to incur a relatively impossible burden of proof in adjudication of the same. In addition, this decision may provide guidance in the potential expansion of red light camera initiatives beyond their current use.

* * *



Brian Begley, an associate in our Joliet, Illinois office, concentrates his practice in municipal and premises liability. Mr. Begley previously served as an Assistant State's Attorney in the Cook County State's Attorney's Office, where he tried numerous cases in the traffic and narcotics divisions. Mr. Begley also served in the Civil Actions Bureau, representing Cook County in complex building and zoning matters.

Prior to joining Querrey & Harrow, Ltd., Mr. Begley also served as an Associate at another local law firm where his concentration included representation of municipal entities and local school districts. Mr. Begley has also served as an Administrative Hearing Officer where he adjudicated local municipal code violations. If you have any questions regarding this article, please contact Brian via bbegley@querrey.com, or via (815) 726-8153.

Insurance Update: Interesting Decision Follows From Cook County Building Fire Tragedy

By: Perry Accardo – Querrey & Harrow, Ltd. – Waukegan, Illinois

Duty to Defend: The obligation of an insurer to provide an insured with a legal defense against claims of liability, within the terms of the policy. *Black's Law Dictionary* (8th ed. 2004).

Duty to Indemnify: An obligation to compensate another for the other's loss. *Black's Law Dictionary* (8th ed. 2004).

The case of *Clarendon America Insurance Company v. B.G.K. Security Services, Inc.*, No. 1-07-2994, 2008 Ill. App. LEXIS 1282 (1st Dist. 6th Div. Dec. 19, 2008), examines an insurer's duty to defend versus the duty to indemnify and arises out of the numerous lawsuits that were filed following the tragic 2003 fire at the Cook County Administration Building that left six dead and scores injured.

In April of 2002, management for the Cook County Administration Building, located at 69 W. Washington Street in Chicago, entered into a contract with Aargus Security Systems, Inc. (Aargus) to provide security guard service for the building. Aargus then contracted with B.G.K. Security Services, Inc. (BGK) to jointly provide security guard services for the building. Clarendon American Ins. Co. (Clarendon) insured BGK under a \$1 million per occurrence and \$5 million aggregate commercial general liability policy. The declarations page of the

policy contained "BGK Security Services, Inc." and a detective agency as "Named Insureds". The body of the policy contained the following language in a section entitled "Insuring Agreement", which served as both the indemnification clause as well as the duty to defend clause:

We will pay those sums that the insured becomes legally obligated to pay as damages...to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages...to which this insurance does not apply.

Additionally, the policy contained the following exclusionary language:

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

The October 17, 2003 fire at the Cook County Administration Building resulted in six fatalities, numerous injuries, and twenty-two lawsuits which were ultimately consolidated and have since been settled. BGK was named as a party-

defendant in a majority of the underlying lawsuits. In those lawsuits in which it was named, BGK was sued in its individual capacity and not as part of an alleged joint venture with Aargus. Subsequently, BGK tendered its defense to Clarendon.

In reaction to BGK's tender, Clarendon filed a declaratory action seeking a determination that it had no duty to defend or indemnify BGK in the underlying lawsuits. Clarendon's complaint alleged that the work performed by BGK was part of a joint venture with Aargus and that the joint venture was not an insured under the policy based on the language found in the exclusionary clause.

Both parties filed motions for summary judgment and the trial court granted BGK's motion, denied Clarendon's, and stayed ruling on Clarendon's duty to indemnify. Clarendon appealed arguing that although an "insurer's duty to defend flows in the first instance from the allegations contained in the underlying complaint", the trial court should have considered the agreement between BGK and Aargus as proof that BGK was involved in a joint venture that was excluded under the policy. Not surprisingly, BGK countered that the underlying lawsuits named BKG in its individual capacity, the various complaints contained allegations against BGK individually - and not as part of any joint venture with Aargus - and that the complaints did not make any allegations involving BKG's actions as part of any joint venture with Aargus.

The First District Appellate Court sided with BGK and affirmed the trial court's ruling that Clarendon had a duty to defend BGK under the terms of the policy. The court did not visit the issue of Clarendon's duty to indemnify BGK; stating that the case had not yet reached the indemnification stage. In so ruling, the court noted that an insurer's duty to defend is much broader than its duty to indemnify and that in determining whether an insurer has a duty to defend, a comparison is generally made between the allegations contained in the underlying complaint and the relevant provisions of the policy in question. *Fremont Compensation*

Insurance Co. v. Ace-Chicago Great Dane Corp., 304 Ill.App.3d 734, 738 (1999), *Northbrook Property & Casualty Co. v. Transportation Joint Agreement*, 194 Ill.2d 96, 98 (2000).

In the present case, the allegations made against BGK in the underlying lawsuits were not based on BGK's obligations under its agreement with Aargus, but rather on BGK's alleged breach of a general duty to exercise care, skill, and diligence in providing security services to the Cook County Administration Building on the day of the fateful fire. The court held that it could not, "look beyond the allegations in the underlying complaints and Clarendon's policy provisions to determine a duty to defend." If it did, the court reasoned, BGK would be forced to defend itself against claims related to the existence of an alleged joint venture with Aargus in the declaratory judgment action; something which BGK had denied throughout the course of the underlying lawsuits.

In the case of BGK, the question of the existence of a joint venture with Aargus could lead to the determination of an "ultimate fact" in the declaratory judgment action which could then affect a determination of BGK's liability in the underlying lawsuits. In support of its position, the court stated that, "declaratory judgment should not be used to force the parties to an injury action to have a 'dress rehearsal' of an important issue expected to be tried in the injury action." *State Farm Fire & Casualty Co. v. Shelton*, 176 Ill.App.3d 858,865 (1988), citing *Employers' Fire Insurance Co. v. Beals*, 103 R.I. 623, 240 A.2d 397 (1968).

Although the court was careful to state that it was not bound by cases from other jurisdictions, the court examined several such cases which suggest that both insurers and insureds may want to re-examine the boilerplate indemnity and duty to defend clauses contained in their policies. For example, the Minnesota Supreme Court in the case of *Austin P. Keller Construction Co. v. Commercial Union Insurance Co.*, 379 N.W.2d 533 (Minn. 1986), and the Eighth Circuit Court of Appeals in the case of *W.S.A., Inc. v. Liberty Mutual Insurance Co.*, 7 F.3d 788 (8th Cir.

1993), considered nearly identical exclusionary clauses which, in language much narrower than that found in Clarendon's policy, excluded any partnerships or joint ventures in which the insured is a partner or a member and which is not listed as a named insured.

Additionally, the California Supreme Court recently decided a case where it undertook an extensive and detailed examination of the basics of indemnity and duty to defend clauses, eventually holding that there exists a significant difference between clauses which serve to indemnify and hold harmless versus those which only contain a duty to defend. *Crawford v. Weather Shield Mfg., Inc.*, 44 Cal.4th 541 (2008). In California, the *Crawford* case has been the subject of a considerable amount of critique and comment relating to the specific language used in indemnity clauses.

Ultimately, parties to any general liability insurance policy and the attorneys who represent them are always well served to regularly take the time to revisit the language of their policies in light of their ongoing business concerns and contracts in negotiation. In so doing, special attention should be paid to language in the indemnity/hold harmless and duty to defend clauses. Careful consideration should be given to the potential effect of specific language in

those clauses in light of potential declaratory litigation on the basic issues of the duty to defend as separate and distinct from the duty to indemnify and the separate rules which apply to both.

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Perry Accardo, an associate in our Waukegan, Illinois office, concentrates his practice in general litigation, with emphasis in auto and premises liability claims and in representing major insurance carriers in subrogation

matters. Prior to joining Querrey & Harrow, Perry obtained experience in civil litigation, defending the insureds of two major national insurance carriers, and in subrogation, representing some of the largest insurance carriers in Illinois. Perry has tried over 500 mandatory arbitration hearings and successfully tried 17 jury cases. Perry is also a Certified Subrogation Recovery Professional through the National Association of Subrogation Professionals.

If you have any questions regarding this article, please contact Perry via paccardo@querrey.com, or via 847.249.444.

[Editor's Note: Chicago office shareholders Dan Gallagher and Terrence Guolee were involved in the defense of Aargus Security in the underlying lawsuits on behalf of their excess carrier.]

Construction Law Update: The Importance of Defining a Relationship

By: Tom Condon – Querrey & Harrow, Ltd. – Chicago, Illinois

The First District of the Illinois Appellate Court recently upheld a \$1.8 million verdict in favor of the Plaintiff, Anthony Grillo, an employee of a subcontractor, and against Yeager Construction, the general contractor. *Grillo v. Yeager Construction*, No. 1-07-2335 (Ill. App. 1st Dist., December 31, 2008). Yeager Construction based their appeal on three issues; the most significant being the trial court's denial of their motion for judgment notwithstanding the verdict. The motion alleged that the plaintiff was unable to prove a prima facie case of negligence as he failed to establish that Yeager Construction owed a duty of care pursuant to

Section 414 of the Restatement (Second) of Torts, Section 414, 1965.

The basis of the claim and facts of the accident are simple and straightforward. The plaintiff, Anthony Grillo, (Grillo) was injured while working on the construction of a home for the third party defendants, Rubina and Solhail (Sam) Shakir. He sustained injuries as a result of a 12 ft. fall from scaffolding. The scaffolding tipped and he and it fell upside down into an open hole. He suffered injuries to his neck and back which required surgery to relieve pressure on the spinal cord. Also, he had permanent metal screws and plates placed on his lower spine. According to

his doctor, he has a permanent disability and he would likely develop additional degenerative changes.

The facts that establish and define the relationships, however, are as clear as mud. The three parties' testimony differed greatly and was contradictory. The following is a brief synopsis of the relevant details of their testimony:

Grillo testified that he was contacted by David Yeager of Yeager Construction to give an estimate for masonry work on the construction of a home for the Shakirs. He met with David at the project site multiple times and they orally agreed to price for services. Upon inquiry by Grillo, David indicated that he would not be paid by him rather by Yeager Construction. However, there was no written document memorializing their conversation. Grillo submitted his bills to David but they were paid by the Shakirs.

David Yeager testified that he was introduced to the Shakirs by Scott Yeager, the president of Yeager Construction. He was not an employee or agent of Yeager Construction. He was hired by the Shakirs to act as a construction consultant as Rubina Shakirs, one of the owners, was going to be her own general contractor. In fact, she was listed as the general contractor on the permit issued by the City of Northbrook. He was paid by the Shakirs a monthly salary plus expenses and his duties included assisting the Shakirs in hiring sub-contractors. Their agreement was not reduced to writing.

Sam Shakir testified that the general contractor was Yeager Construction. He had hired them to build his house because he has worked with them in the past. They had built many gas stations for him. During the course of the initial planning for this project, he met with both David and Scott to discuss the details. As the project progressed he would ask for updates from Scott. Further, during the initial consultation Scott told him that David would be assigned to the project. Again, of course, there was no writing relating to their agreement.

Scott Yeager, the president of Yeager Construction, testified that Yeager Construction did not enter into contract with Grillo or with the Shakirs and that David, his brother, was not an employee or on the payroll of Yeager Construction. He admitted, however, that he prepared various invoices for David on Yeager Construction letterhead directed to the Shakirs. Additionally, many correspondences pertaining to the project were on Yeager Construction letterhead. Furthermore, he assisted the Shakirs in obtaining a bank loan to fund the construction by indicating on their loan form that Yeager Construction was the general contractor on the job.

The crux of Yeager Construction's argument was that Grillo was unable to prove that they were the general contractor and, thus, they had no duty of care with respect to Grillo. The court concluded that, conversely, the plaintiff sufficiently established an agency relationship between David Yeager and Yeager Construction. Agency is fiduciary relationship in which the principle has the right to control the agent's conduct and that the agent has the power to act on the principle's behalf. The authority may either be actual or apparent and may be expressed or implied. The court employed a three part test to determine that apparent authority existed. The plaintiff had to show apparent authority by demonstrating that: (1) the principal consented to or knowingly went along with the agent's exercise of authority; (2) the third person reasonably concluded that the party was an agent of the principal; and (3) the third person justifiably relied on the apparent authority to his detriment.

The Defendant's next argument that Section 414 of the Restatement was not applicable as the plaintiff was an independent contractor, rather than an employee, was meritless. Section § 414 provides that:

One who entrusts work to an independent contractor, but who retains control of any part of the work, is subject to liability for

physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

The court found that the exception to general rule that one who employs an independent contractor is not liable for the acts or omissions of the independent contractor was inapplicable in this matter. There was evidence to indicate the Anthony Grillo was not an independent contractor - rather he was an employee of Anthony Grillo Construction, Inc. In fact, the defendant in his third party alleged the relationship in his complaint.

This is case is evidence of the necessity to establish clearly defined roles with respect any project. As the old saying going, "an ounce of prevention is worth a pound of cure."

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Thomas Condon, an associate in our Chicago office, concentrates his practice in auto and premises liability. Tom also has experience in the areas of commercial, construction, liquor liability and municipal litigation and has successfully tried multiple cases to verdict. Prior to joining Querrey & Harrow, Tom was the Assistant Department Counsel for the City of Chicago Department of Buildings. There, Tom prosecuted violations of the City of Chicago Building Code, drafted and analyzed proposed legislation and amendments to the Building Code and advised management on legal issues related to departmental operations. Additionally, Tom served as the Director of the City of Chicago's Fast Track demolition program.

If you have any questions regarding this article, please contact Tom via tcondon@querrey.com, or via 312-540-7606.

PUBLICATIONS AND SEMINARS

Querrey & Harrow Shareholders Contribute New Topic to Construction Law Handbook, Second Edition

November 25, 2008

Querrey & Harrow shareholders **Bruce Schoumacher** and **April Walkup** were recently published as contributing authors in Aspen Publishing's Construction Law Handbook, Second Edition, which is written by 30 construction industry professionals. Mr. Schoumacher and Ms. Walkup wrote a new chapter for this edition: "Construction Management."

Jennifer Pohlenz Article on The Chicago "Green" Code Published

January 16, 2009

Jennifer Sackett Pohlenz' article, [*The Chicago "Green" Code*](#) appears in the inaugural issue of Green Space Today, an online publication designed to connect people, companies, institutions, and cities that value green building and sustainable practices. For more information on this new online publication, please visit www.greenspacetoday.com.