

May, 2009

Each of the articles below can be accessed in full at
<http://www.querrey.com/newsletter-42.html>



Construction Law Update: Eighth Circuit Overturns *Solis* Decision. OSHA Now Free to Cite Under “Multi-Employer Citation” Doctrine (page 2)

In a big loss to the construction industry and its insurers, a divided Eighth Circuit Court of Appeals upheld an Occupational Safety and Health Administration (“OSHA”) policy that allowed its compliance officers to issue citations to general contractors for hazards created on their construction sites by subcontractors. Chicago shareholder Terrence Guolee explains.

Indiana Supreme Court Holds Insurance Write-Offs Are Not Recoverable Damages Under Adult Wrongful Death Statute (page 5)

Merrillville, Indiana office associate John Halstead comments on the April 7, 2009 decision of the Indiana Supreme Court in *James Butler v. Indiana Department of Insurance*, which addresses Indiana’s approach to Medicaid or Medicare set-offs.

Insurance Law Update: Do Insurers Lose Right to Control Amount of Settlement Under Voluntary Payments Provision When Issuing a Reservation of Rights? (page 7)

Insurers in the Illinois First Appellate District may think twice about reserving rights under certain coverage defenses that require the insurer to pay for independent counsel for an insured. Chicago associate Michele Oshman explains.

Medical Malpractice Update: The Impact of a Settlement between a Plaintiff and a Treating Physician on the Hospital in a Vicarious Liability Cause of Action (page 10)

A hospital presents a unique environment for agency law because the hospital administration does not direct the treatment that is provided to patients by their attending physicians. Chicago associate Jamie Goldstein comments on recent cases dealing with the effect of settlements by treating physicians.

NEWS:

- Querrey & Harrow Recovers Millions More for Illinois Taxpayers!
- Q&H Serves as Host and Leadership for Copyright Society
- Q&H Attorneys Present on Major Development in Trucking Liability
- Q&H Associate Published in Lawyer Periodical on Legal Writing

Sign up to receive our newsletter via e-mail
<http://www.querrey.com/news-newslettersignup.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 © 2009 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.

Construction Law Update: Eighth Circuit Overturns *Solis* Decision. OSHA Now Free to Cite Under “Multi-Employer Citation” Doctrine

By: Terrence Guolee – Chicago Office

In a big loss to the construction industry and its insurers, a divided Eighth Circuit Court of Appeals upheld an Occupational Safety and Health Administration (“OSHA”) policy that allowed its compliance officers to issue citations to general contractors for hazards created on their construction sites by subcontractors. (*Solis v. Summit Contractors, Inc.*, No. 07-2191, 8th Cir. Feb. 26, 2009).

In the case, Summit Contractors Inc. was the general contractor overseeing construction of a college dormitory in Little Rock, Arkansas. Summit subcontracted the entire project and only had four employees on the entire jobsite. Subcontractor All Phase Construction, Inc., was responsible for performing masonry work.

As many as three times during the course of All Phase’s work, Summit’s project superintendent caught All Phase employees working without

fall protection gear on scaffolds without guardrails. Each time, the superintendent warned All Phase to correct the problem. However, when All Phase’s employees moved the scaffold to another location, they again would work without fall protection or guardrails.

An OSHA compliance officer eventually saw All Phase’s employees working without fall protection. Although no Summit employee was exposed to any fall protection hazard, the OSHA inspector cited Summit for violation of the scaffolding fall protection standard based on OSHA’s “multi-employer citation policy.”

Under its “multi-employer citation policy,” OSHA took the position that, when a violation is discovered on a construction site, the agency can issue a citation to four categories of “employers,” defined as follows:

Querrey & Harrow Recovers Millions More for Illinois Taxpayers!

Querrey & Harrow attorneys **Dan Gallagher**, **Terrence Guolee** and **Larry Kowalczyk** won another great victory for Illinois taxpayers by once-again assisting Illinois Treasurer Alexi Giannoulias' efforts in claims made against the prior owners of the President Abraham Lincoln Hotel and Conference Center in Springfield, Illinois, which once owed more than \$29.5 million on its state-backed loan.

The saga began in 1982 when the State of Illinois gave a \$15.5 million loan to the hotel, which was owned by 80 politically-connected investors. Since then, the hotel made only intermittent payments and, following nearly 20 years of unsuccessful efforts by prior law firms, Querrey & Harrow successfully foreclosed on the property in less than a year after being retained by Treasurer Giannoulias. (See, <http://www.querrey.com/news-newsletterarticles-82.html> for news on this result.)

Since the foreclosure, Querrey & Harrow continued assisting Treasurer Giannoulias in claims against an insurer that issued a surety bond on the original mortgage for the hotel. This claim, once identified as not worth pursuing by prior counsel, has now been settled on the eve of a threatened lawsuit for payment by the carrier to Park National Bank, in its capacity as trustee of the Illinois Insured Mortgage Pilot Program (the Illinois government-funded program responsible for the mortgage) of another \$5.65 Million Dollars.

The settlement also retains ownership of the hotel with the State of Illinois. The recovery on the surety bond will allow improvements to the hotel to be made which should allow Treasurer Giannoulias to recoup millions more for Illinois taxpayers upon the eventual sale of the property.

Querrey & Harrow salutes Treasurer Alexi Giannoulias on his continuing efforts to fight for Illinois taxpayers and is proud to serve as Treasurer Giannoulias' counsel on these claims.

1. the employer that created the violation (“the creating employer”);
2. any employer whose employees were exposed to the violation (the “exposing employer”);
3. any employer responsible for correcting the violation on the jobsite (the “correcting employer”); and
4. any employer responsible for controlling the work on the jobsite (the “controlling employer”).

Indeed, OSHA asserted that Summit, as the general contractor or “controlling employer,” had the ability to prevent or abate the hazard created by All Phase’s employees through reasonable exercise of its supervisory authority. Summit contested the citation, arguing that OSHA’s regulations place a duty on an employer to protect only its own employees, not those of any subcontractor. Thus, as Summit’s employees were not exposed to the fall protection hazard, Summit argued that OSHA exceeded its authority by citing it for All Phase’s violation.

In particular, Summit argued that 29 C.F.R. 1910.12(a), the regulation establishing OSHA’s construction standards, only placed a duty on employers to protect their own employees, not other subcontractors’ employees. Thus, it was argued Summit should not have been cited as the controlling employer when its own employees were not exposed to the hazardous condition.

After the hearing, the Administrative Law Judge (“ALJ”) rejected Summit’s arguments. However, on April 20, 2007, the Occupational Safety and Health Review Commission (OSHRC), the body responsible for carrying out the adjudicatory functions of OSHA, overruled the multi-employer citation policy and held that it was impermissible to cite a general contractor if it did not create the hazard and none of its own

employees had been exposed to the hazard. The Commission then vacated the citation, with two Commissioners finding that the plain language of OSHA’s regulations required each employer to protect only its own employees. One Commissioner (OSHA’s current Chair, Thomasina Rogers) agreed with the ALJ. The OSHRC agreed with Summit’s position and vacated the citation based on: (1) what it called the “plain language” of the regulation, which states, in part, “[e]ach employer shall protect the employment and places of employment of each of *his employees* engaged in construction work” (emphasis added); and (2) the Secretary’s “checkered history” on multi-employer worksite liability characterized by inconsistent application and explanation.

OSHA, for its part, refused to change its multi-employer citation policy despite the OSHRC’s decision in *Summit*, and the Secretary of Labor filed a petition for review to the Eighth Circuit Court of Appeals on May 21, 2007. However, locally in the Chicago metropolitan area, it was observed that OSHA compliance officers stopped citing under the multi-employer worksite policy, so there is some belief that the decision of the OSHRC had been implemented on a “street level.”

Unfortunately, in OSHA’s appeal to the Eight Circuit, the court found, in a split decision, that OSHA’s “controlling employer” citation policy did not conflict with OSHA regulations. Further, writing for the court, Judge Raymond W. Gruender wrote: “[e]ven if the regulation were ambiguous, we would defer to [OSHA’s] reasonable interpretation of her own regulations.”

In particular, the court utilized a grammatical interpretation to determine whether the plain language of section 1910.12(a) precluded the multi-employer citation policy. The court separated the regulation into two parts, holding that as reconstructed, section 1910.12(a) requires that: (1) an employer shall protect his employees; and (2) an employer shall protect the places of employment of each of his employees.

Based on this, the Eighth Circuit held that part 2 means that an employer shall protect the places of employment, and read this to include protecting others who work at the place of employment, so long as the employer also has employees at that place of employment. Therefore, the court ruled that the plain language of the regulation did not preclude the controlling employer citation. The court stated that to hold otherwise would render part 2 – the duty to protect places of employment – “superfluous and redundant” if it only required the employer to protect his own employees as Summit contended.

The court then discussed Summit’s alternative arguments, including that the “controlling employer” citation policy was an “ill-conceived policy that is counterproductive to the goals of the OSH Act.” Reviewing this argument, the court conceded that it was:

uncertain what potential benefits are gained in citing both a subcontractor and a general contractor for a single OSHA violation when the general contractor had informed the subcontractor of the violation on prior occasions.

However, the court stated that this was a “policy concern” that should be addressed to Congress or OSHA, and not the courts.

Notably, Judge C. Arlen Beam dissented, finding that the regulation in question unambiguously “does not support ‘controlling’ person citations such as those issued in this case.” He also observed that:

it is impossible under the OSH Act for even the most sophisticated general contractor to recognize violations by specialized subcontractors, many of whom are larger employers than the general or prime contractor.

Judge Beam also recognized that, in the case of residential construction, “the supposed general homebuilding contractor often has no

‘employees’ at all ‘engaged in construction work’ at ‘places of employment’ contemplated by the regulation.” Thus, he agreed with Summit that “to impose the Secretary’s rule on these employers is . . . absurd as a matter of rational policy.”

The *Summit* decision effectively means that in the seven states covered by the Eighth Circuit; Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota; a construction general contractor is a guarantor of an OSHA violation-free worksite for all employees on the worksite, even employees of subcontractors. On a broader level, the revival of the multi-employer citation policy will likely also allow plaintiffs’ expert witnesses in civil construction injury cases to assert violations of safety protocols against general contractors and other civil defendants in cases where employees of other contractors are injured.

The Eighth Circuit’s decision applies only with respect to work considered to be construction under OSHA, and only if the general contractor has employees on the site. It does not apply to non-construction employers who are controlling employers and whose own employees are not exposed to any hazardous condition. Also, it remains to be seen whether OSHRC will defer to the Eighth Circuit’s ruling in future cases, or remain with its original decision to see how it fares in other federal circuits. It also remains to be seen how, if at all, this decision will be applied to industries other than construction.

A full copy of the Eighth Circuit’s decision can be downloaded at:
<http://www.ca8.uscourts.gov/opndir/09/02/072191P.pdf>.

* * *



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.

Please contact Terrence with any questions regarding this article via tguolee@querrey.com or via 312-540-7544.

Indiana Supreme Court Holds Insurance Write-Offs Are Not Recoverable Damages Under Adult Wrongful Death Statute

By: John Halstead – Merrillville, Indiana Office.

On April 7, 2009, the Indiana Supreme Court decided the case of *James Butler v. Indiana Department of Insurance*, 2009 Lexis 342, 2009 WL 944383. The case addressed the situation which arises when medical providers issue statements of charges for medical services, but thereafter accept a reduced amount in full satisfaction as a result of negotiations with a health insurer, Medicaid or Medicare. The supreme court held that, in the context of Indiana's Adult Wrongful Death Statute (I.C. § 34-23-1-2), a plaintiff may not recover the total charges billed, but is only entitled to the amount ultimately paid after the insurance adjustments.

In *Butler*, plaintiff, the estate of the deceased party, sued a medical provider pursuant to the Indiana Adult Wrongful Death Statute (which applies only to adults without dependents). 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 adjusted by Medicare and written-off by the medical providers. The defendant attempted to introduce evidence of the write-offs at trial and thereby limit the plaintiff's recoverable damages.

The Indiana Collateral Source Statute (I.C. § 34-44-1-2) excludes evidence of collateral source payment made (i) by insurance for which the plaintiff or her family has paid directly or (ii) by a state or the United States (i.e., Medicaid and Medicare). The Indiana Court of Appeals in *Butler* held that the collateral source rule 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 by the appellate court to be admissible. Transfer was then granted by the Indiana Supreme Court.

The Indiana Supreme Court first noted that, under the common law, "the extent of recovery by an injured plaintiff for medical expenses depends not upon what the plaintiff paid for such services but rather their reasonable value." However, the court went on to observe that the plaintiff in the present case was presenting a statutory, not a common law, cause of action. The court also noted that statutes in derogation of the common law, like the Adult Wrongful Death Statute, were to be construed narrowly.

The Adult Wrongful Death Statute itself allows recovery for "reasonable medical expenses necessitated by" the tortious conduct. Focusing on the word "necessitated", the court found that, where charges for medical services which are billed but thereafter settled for a lesser amount, the difference between the amount billed and the amount paid is not a *necessitated* expense. In short, the supreme court held that the trial court had not erred in introducing into evidence the amounts actually paid for the decedent's medical expenses. The supreme court's holding appears to overrule the holding of the district court of the Northern District of Indiana, in *Maurer v. Iehl*, 2008 U.S. Dist. LEXIS 69296 (N.D. Ind. Sept. 10, 2008), which was decided while the *Butler* case was on transfer before the Indiana Supreme Court.

It is critical to emphasize, however, that the supreme court's holding was limited to the context of the Adult Wrongful Death Statute. The holding may not even apply to the Wrongful Death Statute (for adults *with dependents*) (I.C. § 34-23-1-1), which does not contain the phrase "necessitated by" (but does include the word "necessary"), although it may well apply to the Child Wrongful Death Statute (I.C. § 34-23-2-1), which does contain the phrase "necessitated by."

The Court is still set to decide the same issue in the context of a *common law* claim for damages, in the case of *Stanley v. Walker*. The court of

appeals in *Stanley v. Walker*, 888 N.E.2d 222 (Ind. Ct. App. 2008), reached the opposite conclusion as the court of appeals in *Butler*. In *Stanley*, the appellate court reasoned that write-offs constituted an insurance benefit for which the plaintiff had paid his premiums, and thus fell under the exclusionary rule of the Collateral Source Statute. The court also observed that the fact that medical bills are written-off does not necessarily mean that the plaintiff is not obligated to pay the billed amount.

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 supreme court has yet to issue its ruling.

However, given the limited nature of the *Butler* holding and the supreme court's observation that, under the common law, plaintiffs may recover the "reasonable value" of medical services, not the amount actually paid, it will not

be surprising should the supreme court uphold the court of appeals' holding in *Stanley*.

[Editor's Note: 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) was discussed along with other cases on this set-off issue in our November 2008 newsletter. See, Insurance Law Update: Indiana Courts Join the Fray in the Debate over Insurance Write-Offs, John Halstead – Querrey & Harrow, Ltd.

<http://www.querrey.com/newsletter-33.html>

* * *



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.

If you have any questions regarding this article, please contact John via jhalstead@querrey.com, or via 219-738-1820.

Querrey & Harrow Defeats Unusual 13th Amendment Claim



Chicago office shareholders **Brandon Lemley** and **Paul Rettberg** defeated a rather unusual claim that a suburban municipality "enslaved" the plaintiff. The 13th Amendment of the United States Constitution prohibits slavery and involuntary servitude. The plaintiff alleged that an ordinance that required him to mow the parkway - the strip of grass located between the sidewalk and the street on his property - effectively was slavery. Plaintiff argued that the ordinance amounted to slavery or involuntary servitude because he was given

no choice but to engage in manual labor to tend to the parkway that was actually the property of the municipality.

The Circuit Court of the 18th Judicial Circuit in DuPage County rejected Plaintiff's arguments and dismissed the entire case (including claims for slander of title and equal protection) with prejudice. After all, the United States Supreme Court had previously found a Florida law requiring all able-bodied adults to perform 40 hours of road and bridge construction per year without pay did not violate the 13th Amendment.

Insurance Law Update: Do Insurers Lose Right to Control Amount of Settlement Under Voluntary Payments Provision When Issuing a Reservation of Rights?

By: Michele T. Oshman – Chicago Office

Insurers in the Illinois First Appellate District may think twice about reserving rights under certain coverage defenses that require the insurer to pay for independent counsel for an insured. A recent ruling by the Illinois First District Appellate Court found that, by giving up control of the insured's defense, the insurer also relinquished the right to control settlement of the claim under the voluntary payments provision in that policy. The insurer in *Myoda Computer Center, Inc. v. American Family Mutual Ins. Co.*, appeal No. 1-07-1915, 2009 Ill. App. LEXIS 180 (1st Dist. March 31, 2009), was still permitted, however, to dispute its obligation to indemnify the insured for the settlement amount.

American Family had issued an insurance policy which covered, *inter alia*, "advertising injury" in Section II and included "infringement of copyright, title, or slogan" as one of the covered offenses. The policy also contained the following voluntary payments provision:

If there is an occurrence or offense that may be covered under Section II which may lead to a claim or suit being made against you [...]:

h. Do not make any payment or accept any financial obligations without our authorization. If you do, we may not reimburse you, even if the cost is otherwise covered by this policy.

2009 Ill. App. LEXIS 180 at **2-3.

Policyholder Myoda Computer Center, Inc. was sued by Microsoft Corporation for copyright and trademark infringement for allegedly selling counterfeit Microsoft software. American Family agreed to pay for independent counsel for Myoda and reserved its right to later deny coverage. Several months later, Myoda informed American Family that it was

negotiating a settlement with Microsoft and asked for the insurer's position on contributing to any settlement. American Family responded that it was not in a position to authorize Myoda to settle the claim and asked for information enabling it to value the case and determine Myoda's potential liability.

A week later, Myoda sent American Family a letter stating that it had potentially settled with Microsoft for \$50,000. The letter included copies of underlying pleadings, underlying discovery responses and a copy of the U.S. Code concerning the amount of damages available in a breach of copyright case. American Family responded that the settlement was in breach of the insurance policy and that it would not reimburse Myoda for any settlement. Two weeks later, Myoda executed the settlement agreement with Microsoft. *Id.* at *4.

Coverage litigation ensued, and both sides filed motions for summary judgment under stipulated facts. The trial court granted American Family's motion and denied Myoda's motion, and an appeal followed.

Myoda's argument on appeal was that American Family was not entitled to summary judgment solely because Myoda settled the underlying claim without first obtaining the insurer's consent. Myoda equated the settlement with its defense and argued that American Family had given up control of the settlement by reserving rights and agreeing to pay for independent counsel. American Family countered that under Illinois law, unless an insurer was in breach of its obligations, an insured must obtain the insurer's consent before settlement of a claim. 2009 Ill. App. LEXIS 180 at **4-5.

After discussing the standards for summary judgment and construction of insurance policies, the appellate court turned to Illinois case law regarding settlement of claims. The court noted

that while the general rule is that an insured must obtain the insurer's consent to settle a claim if the insurer is not in breach of its duty to defend, the insurer does not have unfettered discretion to withhold that consent. The court also noted that the fact that a settlement is within policy limits does not make it *per se* reasonable.

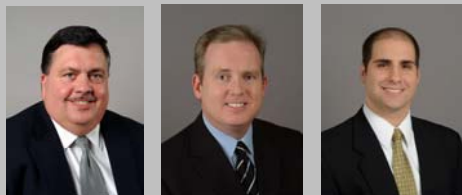
The court then stated that under a voluntary payments provision such as the one in American Family's policy, an insurer will not be responsible for the insured's voluntary payments *incurred before tender of a lawsuit*. This is to prevent collusion between the insured and the claimant, but the insurer must show prejudice to avoid paying under the voluntary payments provision. *Id.* at **7-8. The court's analysis regarding whether American Family was properly granted summary judgment due to Myoda's failure to obtain its consent before settling consisted essentially of discussing two

cases, one relied on by Myoda and the other by American Family.

American Family relied on *Alliance Syndicate, Inc. v. Parsec*, 318 Ill.App.3d 590 (1st Dist. 2000), where the insured paid a \$2,500,000 settlement against itself and CSX Corporation, a third party whom the insured had agreed to indemnify. The insurer there also argued that it was not responsible for paying the settlement because the insured had settled without first obtaining the insurer's consent. The First District Appellate Court found that the insurer was relieved of coverage obligations due to a breach of the voluntary payments provision in the policy there. The same court in the *Myoda* case, however, distinguished that holding on the facts, because the insured there had violated the provision by accepting the tender of the third party and settling the case. 2009 Ill. App. LEXIS 180 at **9-11.

CASE SUCCESSES

Querrey & Harrow Wins Jail Employment Law Claim



Dan Gallagher, Terrence Guolee and Dominick Lanzito recently obtained an order from Federal District Court Judge Amy St. Eve granting all defendants summary judgment in all claims brought by a former guard at the Cook County Jail against the Cook County Sheriff's office and other defendants alleging racial and sexual discrimination and violation of First

Amendment free speech rights.

In the case, detainees in the women's jail of the Cook County jail complex alleged that the plaintiff and several other male officers were having improper sexual relations with female detainees in the division. Following an extensive investigation by the Cook County Sheriff's Police Department and the Cook County State's Attorney's office, charges were brought by the Cook County State's Attorney against three of the nearly dozen officers implicated by the detainees.

Following the criminal trial, the guard was acquitted of the criminal charges by the court and filed suit alleging that his prosecution was motivated by retaliation against the plaintiff by a jail supervisor for his complaints of sexual harassment and in an effort to remove male officers from the female jail division. Following extensive discovery, Querrey & Harrow documented that plaintiff's sexual harassment claims were only brought after the detainee's complaints surfaced and the plaintiff was de-deputized, that the investigation was properly run by the Sheriff's Police and the State's Attorney and that the named defendants were not to blame for the criminal prosecution. Likewise, the court accepted defense arguments that, despite the acquittal, there was more than sufficient evidence to support the prosecution.

Myoda relied on *Commonwealth Edison Co. v. National Union Fire Ins. Co.*, 323 Ill.App.3d 970 (1st Dist. 2001). In that case, the claimant was the estate of a woman killed by a downed power line. The estate sued insured Commonwealth Edison and Asplundh Tree Expert Company, the company that trimmed the trees around the power lines. National Union agreed to provide a defense for ComEd under a reservation of rights and relinquished control of that defense due to a potential conflict of interest. The case settled, with ComEd paying \$15,000,000 and National Union paying another \$15,000,000 on behalf of Asplundh.

National Union subsequently refused to indemnify ComEd because it failed to obtain the insurer's consent prior to the settlement. On appeal, the appellate court rejected the insurer's argument and found that "a reasonable settlement effectuated by the insured does not bar an action for indemnification against the insurer." Myoda, 2009 Ill. App. LEXIS 180 at **11-12, quoting Commonwealth Edison, 323 Ill. App. 3d at 984-85. (Additional citation omitted.)

On this, the court in *Myoda* found that American Family was not entitled to summary judgment because reasonable minds may have differing inferences on the undisputed facts and reversed the case and remanded it for further proceedings. 2009 Ill.App. LEXIS 180 at **14-15. Based on the court's ruling, American Family would still be entitled to litigate any coverage defenses it had other than the breach of the voluntary payments provision.

In the *Myoda* case, the court limited the scope of the voluntary payments provision so that it

applied only before the insured gave notice and tendered the claim to American Family. The court does not discuss the reasoning behind that holding. The provision was located in the same section as the notice provision, but the court did not rely on that factor.

The case cited for limiting the effect of the voluntary payments provision to pre-tender costs, *Westchester Fire Ins. Co. v. G. Heileman Brewing Co.*, 321 Ill.App.3d 622, 637 (1st Dist. 2001), involved an insured that had defended itself for almost two and a half years before giving notice, so its application to the *Myoda* settlement is unclear. However, by limiting the application of the voluntary payments provision to pre-tender costs, the court in *Myoda* in essence merged the right to settle claims into the right to control the defense, and found that by giving up the right to control the defense, the insurer also forfeited the right to any input in the settlement process.

* * *



Michele Oshman is a member of the firm's Appellate and Insurance Coverage practice groups and concentrates her practice in the areas of insurance coverage and complex defense litigation. Michele has represented the interests of insurance companies in state and federal courts throughout the country. Michele has also defended manufacturers in product liability cases, including nationwide class action matters.

If you have any questions regarding this article, please contact Michele via moshman@querrey.com, or via 312-540-7590.

NEWS



Chicago shareholder **Jim Bream** was quoted extensively in an article in the "Report on Medicare Compliance," Vol. 18, No. 12, April; 6, 2009, on the settlement of a civil monetary case involving an on-call doctor who was claimed to have not shown as required to an emergency department call. Jim is co-chair of Querrey & Harrow's medical malpractice defense group.

Jim was also recently re-elected to his position as Board President for Northbrook/Glenview School District 30. Congrats to Jim!

Medical Malpractice Update: The Impact of a Settlement between a Plaintiff and a Treating Physician on the Hospital in a Vicarious Liability Cause of Action

By: Jamie Goldstein – Chicago Office

A hospital presents a unique environment for agency law because the hospital administration does not direct the treatment that is provided to patients by their attending physicians. It is common for the physicians at a hospital to be independent contractors who are not employees or actual agents of the hospital. In those circumstances, it would seem logical that a hospital would not be responsible for any alleged negligence of a treating physician, since the hospital is not the employer of the physician and did not control the care that was provided to the patient.

However, in *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511 (1993), the Illinois Supreme Court held that a hospital may be liable based upon a principal-agency relationship between the hospital and the physician, even where the physician is not an employee or actual agent of the hospital. The *Gilbert* court found that a hospital can be held vicariously liable for the negligent acts of a physician providing care at the hospital under a theory of apparent agency.

Under the doctrine of apparent agency, a hospital will only be liable for the alleged negligence of an independent contractor where the plaintiff can establish the following three elements:

(1) that the hospital, or its alleged agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged

to be negligent was an employee or agent of the hospital;

(2) that the acts of the alleged agent create the appearance of authority; and

(3) that the plaintiff acted in reliance upon the conduct of the hospital or its alleged agent, consistent with ordinary care and prudence.

However, the *Gilbert* court cautioned that if a patient knows, or should have known that a treating physician is an independent contractor, then the hospital will not be liable.

Although, under *Gilbert*, a plaintiff is entitled to file a cause of action against both the treating physician and the hospital, even if there is no employment or actual agency relationship, the right of the plaintiff to recover against each party is not unlimited. The *Gilbert* court ruled that where a plaintiff enters into a settlement with the treating physician, the settlement also serves to extinguish the hospital's vicarious liability for the acts of its alleged agent.

Further, a plaintiff cannot expressly reserve the right in a settlement agreement to seek recovery from the hospital. The court explained that an alleged agent would otherwise be discouraged from entering into a settlement, because he/she would remain liable to the principal for indemnification.

NEWS

Chicago shareholder **Jim Bream** invites all to the May 14, 2009 panel discussion "Ethics in Public Service: A Question of Character" through the CHARACTER COUNTS! organization in Glenview, Illinois. Moderated by Glenview Village President Kerry Collins, the discussion will include Brian Brady of the Mikva Challenge; Cynthia Canary, the Director of the Illinois Campaign for Political Reform; and Bruce Dold, of the Chicago Tribune's Editorial Board, among others. The event will be at the Glen Club, 2901 West Lake Avenue, Glenview, Illinois, and is free and open to the public. For more information, call (847) 904-4371.

An alleged agent would not benefit from a settlement unless the principal's vicarious liability was also extinguished by way of the settlement agreement.

In *Casey v. Forest Health System, Inc.*, 291 Ill.App.3d 261 (1st Dist. 1997), the Illinois First District Appellate Court applied the court's reasoning in *Gilbert* and held that a trial court properly dismissed a defendant hospital from an action where plaintiff entered into a settlement with the hospital's alleged agent.

The plaintiff in *Casey* alleged that two treating physicians were the apparent agents of a hospital. The hospital denied that the treating physicians were its agents and filed a motion for summary judgment on the issue of apparent agency. The trial court granted the hospital's motion for summary judgment, after which one of the treating physicians entered into a settlement with the plaintiff. The other treating physician proceeded to trial and the jury returned a not guilty verdict.

The plaintiff appealed the summary judgment order entered by the trial court and argued that an issue of material fact existed as to whether the physician was an apparent agent of the hospital. Although the appellate court agreed with the plaintiff that the record, as it existed at the time the summary judgment order was entered, might have been sufficient to withstand summary judgment, the plaintiff had subsequently entered into a settlement with the physician, and that settlement agreement served to extinguish any vicarious liability that the hospital might have had for that physician. In addition, with respect to the physician who proceeded to trial, the court held that a jury verdict in favor of an agent vitiates any liability on the part of the principal. The court explained that an adjudication on the merits as to either an agent or a principal operates by law as an adjudication as to the other.

Over ten years later, the First District Appellate Court reaffirmed its decision in *Casey*, and confirmed that under Illinois law, the settlement of an alleged agent extinguishes the vicarious liability of a principal. In *Doe v. Brouillette*,

2009 WL 884822 (1st Dist. March 31, 2009), a non-medical malpractice case, the plaintiff alleged that the Catholic Bishop was vicariously liable for the alleged negligence of a guidance counselor in the treatment of a child parishioner. The guidance counselor was not an employee of the Catholic Bishop, but was alleged by the plaintiff to be the Bishop's apparent agent.

The plaintiff entered into a settlement with the guidance counselor, but expressly reserved his right in the settlement agreement to continue to proceed against the Catholic Bishop. The court cited to both *Gilbert* and *Casey* as support for its ruling that the settlement agreement with the guidance counselor also extinguished the vicarious liability of the Catholic Bishop, even though the plaintiff had expressly reserved his right to seek recovery from the Catholic Bishop.

The court's recent decision in *Doe* reinforces the importance of the protection afforded to a hospital under agency law. Although a plaintiff may attempt to seek recovery against a hospital where a treating physician is not an employee or actual agent, the plaintiff is prevented from pursuing a cause of action against the hospital if a settlement is reached with the alleged agent. As such, it is good practice for defense counsel to move for a dismissal immediately after a settlement with an alleged agent is reached, in order to avoid the time and expense of unnecessary litigation.

* * *



Jamie Goldstein, an associate in our Chicago office and a member of our Health Care practice group concentrates her practice in healthcare liability and medical malpractice. If you have any questions regarding this article, please contact Jamie via 312-

540-7552, or jgoldstein@querrey.com.

Our health care attorneys offer a full range of services, including the defense of medical, managed care, hospital, nursing, and psychiatric liability claims involving hospitals, nursing homes, physicians, nurses, psychiatrists, and psychologists across Illinois. For information regarding our health care practice, please contact group Co-Chair, Jim Bream, via jbream@querrey.com, or via 312-540-7520.

SPEAKING ENGAGEMENTS AND PUBLICATIONS

Q&H Serves as Host and Leadership for Copyright Society

On April 16, 2009, Querrey & Harrow hosted a meeting of the Midwest Chapter of the Copyright Society of the USA. Midwest Chapter Chair, **E. Leonard Rubin**, Of Counsel, introduced a debate between renowned copyright lawyers on the topic of whether photographs of copyrighted works are protectable as original works. The discussion was prompted by *Schorck v. Learning Curve*, currently awaiting a decision from the 7th Circuit Court Appeals.

Chicago shareholder **Beverly Berneman** will take over for Leonard Rubin late this summer as Midwest Chapter Chair. Beverly has planned quarterly meetings and all are invited to submit their name for our intellectual property mailing list to be sure they are notified when speakers are confirmed. To enroll, please send an e-mail to Julie Heinzl, at jheinzl@querrey.com.

For more information on the Copyright Society of the USA, visit its website at: <http://www.csusa.org/> Midwest Chapter events can be found at: http://www.csusa.org/chapters_midwest.cfm

Q&H Attorneys Present on Major Development in Trucking Liability

Thomas Burke, Larry Kowalczyk and Kevin Casey recently made presentations to J.B. Hunt and USA-Truck, Inc. in Arkansas regarding the impact on the trucking industry of Q & H's recent trial in which the jury found an agency relationship between the driver and the co-defendant broker, who had denied all liability.

Q&H Associate Published in Lawyer Periodical on Legal Writing

Chicago associate **Christopher Keleher's** article, "On Legal Writing" appeared in the May 2009 DuPage County Bar Association's monthly magazine. Chris' article provides excellent tips to lawyers on effective legal writing.