

Qued In

A Monthly Legal Newsletter from
Querrey & Harrow

July 2009

Editors: *Terrence Guolee*
and *Jillian Book*



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Federal Litigation Update: Will The Pleading Standard Set Forth In The *Ashcroft v. Iqbal* Supreme Court Decision Significantly Alter Motions To Dismiss?

By: Dominick Lanzito – Querrey & Harrow, Ltd. – Chicago, Illinois

On May 18, 2009, in a 5 to 4 decision, the Supreme Court ruled held that the lawsuit filed by Javaid Iqbal, a Pakistani Muslim that was arrested during the course of the investigation into the September 11, 2001 attacks, was appropriately dismissed for failure to meet the pleading standard under Federal Rule of Civil Procedure (FRCP) 8. *Ashcroft v. Iqbal*, No. 07-1015 Slip Op. (2009). In doing so, the Supreme Court reversed the Second Circuit Court of Appeals.

By way of background, Iqbal brought suit against former US Attorney General John Ashcroft and the Director of the FBI, Robert S. Mueller III, for alleged abuses he said he suffered in a Brooklyn detention center. Although the Supreme Court addressed issues of supervisory liability and jurisdiction, the Court's decision regarding the pleading standard under FRCP 8, will have the most significant impact on federal litigation.

Under FRCP 8(a)(2), a pleading had to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." District courts have interpreted this provision liberally and have required very little in the way of factual details that were the basis for the claim. For the most part, very general, conclusory allegations were sufficient to defeat a motion for summary judgment under this standard.

Then, in *Bell Atlantic v. Twombly*, 550 U.S. 544, 521 S.Ct. 1955 (2007), an anti-trust matter, the Supreme Court explicitly stated that "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Ultimately, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 557. The Supreme Court in *Iqbal* affirmed these principles and held the *Twombly* pleading

standard for all civil actions, not just anti-trust lawsuits.

In concluding that Iqbal's complaint did not satisfy this pleading standard, the Supreme Court repeatedly referenced conclusions contained within Iqbal's complaint. For example, Iqbal alleged that the Petitioners (Ashcroft and Mueller) "knew of, condone, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Slip Op. at 16. The Court found that such claims were nothing more than "formulaic recitations of the elements" of a constitutional claim. *Id.* at 17.

This decision sheds some light on the application of FRCP 8 and is very favorable to defense interests. However, its application at the district court level remains to be seen. Ultimately, each district court judge has wide latitude and discretion, but this decision will provide a significantly higher benchmark for all pleadings. Thus, motions to dismiss may be a more viable tool to dispose of lawsuits at a very early stage than they have been in the recent past.

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Dominick Lanzito, an associate in our Chicago office, concentrates his practice in federal litigation, class action litigation, Intellectual Property, Civil RICO, and civil rights. Prior to joining Querrey & Harrow, Mr. Lanzito served as an Assistant State's Attorney for the Cook County State's Attorney's Office, gaining experience in torts and civil rights litigation, as well as in criminal prosecution and criminal appeals.

If you have any questions regarding this article, please contact Dominick via dlanzito@querrey.com, or via 312-540-7592.

Q&H Shareholder Appointed Chair of CBA Judicial Evaluation Committee

Querrey & Harrow is proud to announce that Chicago office shareholder **Larry Kowalczyk** has been appointed to the position of Chairman of the Chicago Bar Association's Judicial Evaluation Committee (JEC).

The JEC is the committee of the Chicago Bar Association that conducts evaluations of candidates for judicial offices and sitting judges seeking retention within Cook County.

As a service to the public, the CBA reports the JEC's findings on the qualifications of judicial candidates for all elections. The evaluations are designed to inform the public and the courts of the qualifications, independence and integrity of judicial candidates.

Following several years of service to the JEC in various roles, Larry was appointed to the position of Committee Chair by **Cook County State's Attorney Anita Alvarez**, who was recently sworn in as President of the Chicago Bar Association.

Querrey & Harrow takes pride in its service to the community for over 70 years and also congratulates Anita Alvarez for her historic rise to the Presidency of the CBA, and appreciates her service to the citizens of Cook County.



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Insurance Coverage Update: Delay in Filing Declaratory Judgment Action Precludes Coverage Defenses

By: Stacey McGlynn Atkins – Querrey & Harrow, Ltd. – Chicago, Illinois

When disputing coverage under an insurance policy, what is the next step to protect the insurer? Following the “reasonable time” test, the First District recently held that an insurer’s sixteen month delay in filing a declaratory action was unreasonable and precluded the insurer from raising coverage defenses, obligating the insurer to providing a defense. Additionally, the court found that the plaintiff’s claim was sufficiently drafted to allege imputed liability against a general contractor, despite the fact that the complaint made no specific allegations of vicarious liability. *Mota Construction Co. and Country Mut. Ins. Co., v. Westfield Ins. Co.*, No. 1-07-3208 (June 5, 2009).

Construction worker Fernando Berrera brought a personal injury suit against a subcontractor (not his employer) and the general contractor alleging negligence. In his count I, Berrera contended that the general contractor, Mota Construction Company (Mota), controlled, managed, and supervised construction at the site, and had a duty to maintain a safe work site. A breach of this duty was alleged to have occurred by Mota’s failure to, among other things, “supervise its employees and subcontractors.” Count II alleged Mota retained control over the work and safety at the site and controlled the means and manner of work of the subcontractors and, pursuant to Section 414 of the Restatement of Torts, was liable for entrusting work to an independent contractor. Count III alleged that the subcontractor, Sloan Mosaic Tile Company (Sloan), committed the same negligent failures alleged against Mota in Count I.

Sloan was insured under a policy issued by Westfield Insurance Company, on which Mota was named as an additional insured. Mota tendered its defense to Westfield. However, Westfield refused to defend Mota, contending that additional insureds were only covered for liability imputed on them as a result of the named insured’s actions, not direct liability. Mota was ultimately furnished a defense by the

plaintiff employer’s insurance carrier, Country Mutual, under which it was named as an additional insured. Mota and Country subsequently filed a declaratory action against Westfield seeking declaration that Westfield was required to defend and indemnify Mota. Westfield answered and filed a counterclaim seeking declaratory judgment that it did not have a duty to defend Mota, contending that the complaint did not seek to impute liability to Mota, but rather alleged only direct negligence. In support of its argument, Westfield attached its policy which explicitly provided that coverage would be provided to an additional insured only for claims for imputed liability.

The parties then filed cross-motions for summary judgment. In their motion, Mota and Country asserted that the allegations of the complaint fell within the scope of coverage and that Westfield was estopped from denying coverage due to its delay (sixteen months post-refusal to provide defense) in filing for declaratory judgment. Westfield’s position was that the complaint did not allege facts that gave rise to a duty to defend; that no estoppel occurred, as its declaratory action was filed prior to the underlying case going to trial; and that estoppel only applied to bar coverage defenses where an insurer wrongfully refused to defend. The trial court granted summary judgment in favor of Westfield, agreeing with Westfield that the allegations in the complaint were for direct, not imputed, liability, and its theory that estoppel did not apply.

On June 5, 2009, the First District reversed and remanded the lower court decision, finding that an insurer’s duty to defend extends to any claim under the pleadings which might *potentially* fall within the scope of the policy’s coverage. No matter how many different theories may be alleged in a complaint, the duty to defend arises even if only one such theory is within the potential coverage of the policy. Accordingly, the question of coverage is decided not on the

“draftsmanship skills or whims of the plaintiff” but on whether the allegations demonstrate that the plaintiff will be able to prove the insured liable under *any* theory supported by the complaint.

The First District found that allegations that Mota retained control over the “operative details” or “manner and means” of a subcontractor’s work, particularly Sloan, were adequate to assert a theory of vicarious liability, despite the fact that no such specific allegation was set forth in the complaint. Plaintiff’s allegations of negligence against Sloan, as subcontractor of Mota, left open the possibility that liability might be imputed to Mota for Sloan’s negligence. Had plaintiff only named the general contractor in his complaint, with no allegation of subcontractor negligence, there would be no possibility under the complaint that such negligence might be imputed to the general contractor, and the carrier would have no duty to defend. The liberal reading of the plaintiff’s complaint favored the triggering of Westfield’s duty to defend.

As to estoppel, the court agreed with Mota and Country, finding the sixteen month gap between Westfield’s refusal to defend and filing its declaratory judgment to be unreasonable. Because an insurer’s duty to defend is triggered by actual notice of the claim, an insurer’s unexplained delay in complying with its legal obligation to file a declaratory action precludes that insurer from later asserting coverage defenses. (relying on *Central Mutual Ins. Co. v. Kammerling*, 212 Ill.App.3d 744 (1st Dist. 1991)). The Court further held that the fact that

Mota obtained coverage from another insurer, Country, is of no significance and “the contract

becomes no less breached because of the fortuitous existence of another insurer who is willing to meet its own obligations.” Westfield’s “tardiness” was not excused by Country’s defense of Mota. Therefore, the Court held that Westfield was estopped from asserting coverage defenses due to its failure to seek timely adjudication of its rights with regard to the underlying lawsuit.

The *Mota* decision clarifies liability among insurers of a general contractor and subcontractors when an employee of the subcontractor is injured on the job site. Insurers must heed the following: they may not simply refuse to defend their insured; rather, they must either defend the suit under a reservation of rights or seek declaratory judgment that no coverage exists. Failure to assert coverage defenses in a timely matter may result in the insurer being obligated to defend.

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Stacey Atkins, an associate in our Chicago office, concentrates her practice in municipal liability litigation. Prior to joining Querrey & Harrow, she worked with a local litigation firm concentrating her efforts in litigation of municipal employment and labor matters, personal injury and professional negligence litigation.

If you have any questions regarding this article, please contact Stacey via 312-540-7656 or satkins@querrey.com.

CASE SUCCESSES

Q&H Scores Yet Another Victory for Cook County Sheriff and Illinois Taxpayers

Chicago attorneys **Dan Gallagher**, **Terrence Guolee** and **Dominick Lanzito** recently obtained summary judgment in two cases alleging malicious prosecution, racial and sexual harassment and violation of two Cook County Jail correctional officers’ First Amendment rights by the Cook County Sheriff and various Jail administrators. In the cases, two male officers alleged that they, in essence, were framed by the defendants in retaliation for union activities at the Jail and in a move to remove male officers from the women’s division of the Jail. Investigation revealed, however, that the officers had been alleged to have had sexual relations with female detainees and that they were properly treated in administrative actions seeking their termination from the Sheriff’s office, despite their respective acquittals in criminal trials.

Insurance Update: Delay By Insured In Providing Notice to Insurer of Claim Breaches Policy

By: Gwendolyn Drake – Querrey & Harrow, Ltd. – Chicago, Illinois

The Third Appellate District in *West American Insurance Co v. Yorkville National Bank*, No. 3-07-0104 (Feb. 27, 2009) reversed the circuit court's finding that the defendant was entitled to a declaratory judgment that the plaintiff owed a duty to provide coverage. The case was remanded for further proceedings.

The plaintiff sought declaratory judgment stating it had no obligation to provide coverage to the defendant based on its breach of the policy. The policy had a notice provision requiring that the defendant notify the plaintiff of any lawsuits against them in writing as soon as practicable. The defendant did not forward written notice until 27 months after the complaint was filed. The defendant argued that the plaintiff had actual notice on several occasions and the circuit court held that actual notice triggered a duty to defend.

On appeal, the court considered whether written notice given 27 months after the suit was filed violated the policy's notice provision and if so, what effect did the defendant's breach have on the defendant's right to coverage. Coverage was conditioned upon receiving written notice of the lawsuits. The condition ensures that the insurance carrier is allowed the opportunity to adequately investigate the facts of occurrence, take part in discovery and settlement negotiations and also defend the suit if the matter proceeds to trial. *Zurich Insurance Co., v. Walsh Construction Co.*, 352 Ill.App.3d 504, 509 (2004). The court determined that a 27 month delay from the time that the suit was filed did not constitute reasonable time since discovery had already closed and the case was scheduled to proceed to trial in 8 weeks.

The court rejected the defendant's argument that actual notice trumped technical policy language and relied on the well settled principle of contract construction where each provision of a contract must be given its full effect. *Country Mutual Insurance Co. v. Livorsi Marine, Inc.*,

222 Ill.2d 303, 311 (2006). In such a situation, each term is given its plain, ordinary, and popular meaning. *Id.*

In Illinois it is clear that insurance policy provisions impose valid prerequisites to insurance coverage. *Id.* A delay of even a few months in giving notice can breach the policy as a matter of law. *Montgomery Ward and Co., v. Home Insurance Co.*, 324 Ill. App.3d 441, 449 (1st Dist. 2001). A breach of a policy notice by failing to give reasonable notice will defeat the right of the insured party to coverage under the policy.

The Court determined that the plaintiff's written notice provided 27 months after the filing of the lawsuit did not satisfy the obligation to provide written notice of the claim as soon as practicable. Therefore, because of the defendant's breach of the policy's notice provision, the plaintiff was relieved of any duty it had to provide any coverage to the defendant under the policy.

* * *



Gwendolyn Drake, an associate in our Chicago office, concentrates her practice in litigation. Gwen has extensive courtroom experience from her previous position as a prosecuting attorney in the Child Support Enforcement Division of the Cook County State's Attorney's Office.

Gwen has also been an Investigator for the U.S. Department of Labor in the Employee Benefits Security Administration (EBSA) and holds a certificate in Employee Benefits from the John Marshall Law School (2006).

Please contact Gwen via gdrake@querrey.com, or via 312-540-7668, with any questions you may have regarding this article. You may also contact Jennifer Medenwald, group chair of our Insurance Coverage practice group, via jmedenwald@querrey.com, with any questions you may have regarding Querrey & Harrow's insurance coverage practice.

Indiana Litigation Update: Indiana Supreme Court Takes On Collateral Source Rule

By: Teresa Mysliwy – Querrey & Harrow, Ltd. - Merrillville, Indiana

In this very timely case decided May 27, 2009, the Indiana Supreme Court determined that amounts actually paid by health insurers after taking their discount on medical bills paid on behalf of an injured plaintiff could be introduced into evidence to the extent they could be admitted without reference to insurance.

This case arose out of an automobile accident where Danny Walker, plaintiff, sustained injury, and incurred medical expenses. Defendant admitted fault, so trial proceeded on the issue of damages only. Walker's medical bills totaled \$11,570; however, his medical providers accepted payment from his insurer of \$6,820 in satisfaction of the bills. Walker objected to defendant's attempted introduction of the discounted bills, saying that such evidence violated Indiana's collateral source statute, I.C. 34-44-1-2, which in part prohibits the introduction of insurance benefits in personal injury actions.

The court discussed Rule 413, which allows actual past medical charges to be introduced as prima facie evidence that the charges are reasonable. However, if the reasonable value of the medical services is disputed, the court stated, the paid bill is not dispositive of the reasonable value of the services.

The court looked at, and adopted, Ohio's approach to this issue, stating that it was up to the jury to determine what was a reasonable charge: the amount originally billed, the amount the provider accepted as payment, or some amount in between. Both the amount billed and the amount accepted were relevant and admissible.

Also, in order to assist the jury, the court held a defendant could cross-examine any witness called by the plaintiff to establish reasonableness, introduce its own witnesses to testify that the billed amounts did not constitute the reasonable value of the services, and/or introduce the discounted amounts into evidence to rebut the reasonableness of the charges admitted by plaintiff, to the extent it could be done without referring to insurance coverage.

* * *



Teresa Mysliwy, an associate in our Merrillville, Indiana office, concentrates her practice in subrogation, litigation, and collections. During her legal career, she has handled and/or arbitrated thousands of insurance subrogation disputes. She is also a certified civil mediator in the state of Indiana.

Should you have any questions regarding this article, please contact Teresa via tmysliwy@querrey.com, or via 219-738-1820.

COMMUNITY INVOLVEMENT

Chicago Shareholder Jim Bream Speaks to Hospital Risk Management Group

Jim Bream was an invited speaker at Resurrection Health Care's celebration of the annual National Healthcare Risk Management Week on June 18, 2009, presenting "Disclosure: Tell Me Why I Don't Like Mondays," as part of Resurrection's "Exposure to Disclosure" program.

Chicago Associate Dominick Lanzito Speaks at ITDA Seminar

Chicago associate Dominick Lanzito spoke at the Illinois Technology Development Alliance's "Expert Perspectives 360°" seminar on July 8, 2009.

Chicago Associates Participate In "Women Everywhere" Service Project

Chicago associates Gwen Drake, Alexis Widlak and Jessica O'Neill participated in the 10th annual Women Everywhere Partners in Service Project. Gwen, Alexis and Jessica's project was to plant flowers at the Way Back Inn/Grateful House, which provides clinical services to men and women recovering from substance abuse problems.

Q&H Attorney Quoted In National Law Journal Article on Michael Jackson

Q&H's E. Leonard Rubin was quoted in a National Law Journal article regarding intellectual property law issues and the Michael Jackson estate. <http://tinyurl.com/qhjacksonip>

Indiana Construction Update: Defective Design And Inspection Services Are Subject To Indiana's Economic Loss Doctrine

By: Teresa Mysliwy – Querrey & Harrow, Ltd. - Merrillville, Indiana

An interesting case, involving the Indianapolis-Marion County Public Library, alleged defective design and inspection services on the part of two defendants, which were involved with building a parking garage at the new library facility.

Indianapolis-Marion Library v. Charlier Clark & Linard, P.C., et al, 900 N.E.2d 801 (Ind. App. 2009).

The first defendant, TTE, was hired by the architect, WMP, which settled out of the case. TTE was hired to provide the structural design for the project, as well as to obtain bids and provide construction documents. WMP also hired CCL, a small civil engineering firm, to perform site visits to determine whether the project was in general compliance with engineering standards.

A contractor was hired to perform the construction of the garage, and numerous design changes were then implemented by TTE. Several concrete pours were made on the garage, and after each, numerous defects were discovered, including major voids in the concrete beams and columns of the garage. Indianapolis-Marion Library ("Library") hired an expert who stated that the garage would be "at serious risk for structural failure if construction were allowed to continue." Therefore, Library suspended work upon the project, and was required to repair the garage at an additional cost of \$40-\$50 million dollars. Library, which had never contracted with either TTE or CCL, then sued both in negligence for defective design and inspection of its garage.

Both TTE and CCL filed motions for partial summary judgment, claiming that Library's causes of action against them were barred by Indiana's economic loss doctrine, which states that damage from a defective product or service may be recoverable in negligence if the product or service caused personal injury or damage to other property, but contract law governs purely economic loss arising from the failure of the

product or service to perform as expected. If there is no physical harm to property other than the product or resulting from the service, these "economic losses" are viewed as disappointed contractual expectations, and damage to the product itself is not recoverable. Likewise, consequential damages resulting from the destruction or damage to the product, such as lost profits, rental expense or lost time are similarly not recoverable.

Previous Indiana cases applied the economic loss doctrine to the construction realm and explained that the theory underlying the economic loss doctrine is that this type of loss is best relegated to contract law or warranty, where buyer and seller are able to allocate risks and price their product or service accordingly. Therefore, under the economic loss doctrine, the contract is the sole remedy for the failure of the product or service to perform as expected.

In this respect, the court of appeals analyzed the case of *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150 (Ind. 2005), which involved construction of a single-family residence, and relied heavily on its findings. The *Gunkel* court held that the economic loss rule did not bar recovery in tort for damage that a separately acquired defective product or service causes to other portions or a larger product into which the former has been incorporated. *Id.* at 156. In *Gunkel*, the homeowners had separately contracted with a mason to apply a stone façade to their home, who did so improperly, which resulted in water damage to the residence.

In that case, there was a direct contract between the homeowners and the mason. However, in this case, there was no direct contract between Library and TTE or CCL. The court held that the complete design of the projects was the "product" that Library purchased; therefore, there was no separately acquired defective service causing damage to part of the larger project, and the damages sought by Library were

not recoverable in tort. All of the repair expense, legal fees, additional architectural and engineering service costs were merely consequential damages, which were not available in a setting where Library merely lost the benefit of its bargain.

Library then asserted that its claims fell within exceptions to the economic loss doctrine, which would keep its action alive under tort law. It first claimed that the defendants' failure to fulfill their professional duties to perform design services in accordance with applicable standards of care should be an exception to the doctrine. The court held that unless there was a risk of imminent danger or personal injury resulting from the professional's services, a third party's claim against the professional is not favored.

Library then argued that there was indeed an imminent danger, since its expert determined that there was "serious risk for structural failure if construction were allowed to continue." The court held fast to its determination that if there was no physical injury or damage to property, then there was no exception to the doctrine. The fact that Library made repairs to insure the structural integrity of the building was not relevant. The court asserted that Library did the correct thing by suing the architect and the general contractor for their breach of contract, which ultimately resulted in settlements with both prior to this appeal.

Library next emphasized that the defendants conveyed false or misleading information to it, which constituted negligent misrepresentation by them. However, since Library did not sue either defendant upon that theory, the court threw out that exception to the doctrine.

Finally, Library maintained that because the suit involved a service, rather than a product, it should not be subject to the economic loss doctrine. Unfortunately, Library failed to cite any case or provide any analysis as to why a service should not be subject to the same doctrine as a product, and therefore, the court rejected Library's argument on that issue as well.

In summary, the court found that Library was restricted to contract law against both defendants in this case. However, because Library never contracted with either defendant, it could not recover anything from either defendant. No exceptions to the economic loss doctrine were applicable here, and the trial court's entry of summary judgment for both defendants on Library's allegations of negligence against them was proper.

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Should you have any questions regarding this article, please contact Teresa via tmysliwy@querrey.com, or via 219-738-1820.

CASE SUCCESS

Q&H Obtains Summary Judgment In Additional Insured Claim



Associate **Michele Oshman** recently obtained summary judgment on an additional insured insurance coverage claim in the Chancery Division of Cook County Circuit Court arising out of a bodily injury at a construction site. In the case, our client and its insurer sought additional insured coverage from the insurer of a co-defendant. Michele successfully argued that the allegations of the underlying complaint could support a claim of vicarious liability on our client, thus triggering the co-defendant's carriers' duty to defend.

Municipal Liability Update: CTA Gets To Stop Where It Wants Snowbound Commuters Out Of Luck

By: Patrick Wall – Querrey & Harrow, Ltd. – Chicago, Illinois

[EDITOR'S NOTE: As we finally get to the dog days of summer, and soaring temperatures, we thought an article about a cold frigid day in January would be a welcome relief.]

Recently, the Illinois First District Appellate Court ruled that the Chicago Transit Authority (CTA) is not required to stop its commuter trains under a canopy during inclement weather.

Krywin v. Chicago Transit Authority, No. 01-08-0377, 2009 WL 1444989 (Ill. App. Ct. May 21, 2009). The First District also ruled that the well known natural accumulations rule, dealing with snow and ice, takes precedence over the transit company's highest duty of care to its riders.

On January 13, 2005, a security controller with the CTA received a call that a woman had fallen on the southbound Sheridan Road "EL" Platform. A report filed that day indicated that icy conditions existed on the platform at the time of the accident. The record appeared to indicate that no snow removal took place on the platform on the day of the accident, nor the two days before.

On the day of the accident, the Plaintiff exited the EL cars and fell down. A witness described the station as "very icy", due to the "ice on the platform, without sand or salt." The witness further said that there was no room for anyone to exit the car without having to traverse the icy platform, nor any sand or salt to quickly melt the ice. The Plaintiff herself said that she fell onto the platform, and the "snow was not clean whatsoever." Plaintiff suffered two fractures and sued the CTA for damages.

The Plaintiff argued that the CTA was negligent for failing to provide a safe place to exit from the train, and further argued that the failure of the CTA to provide a safe place to exit was also willful and wanton. The jury agreed and awarded Plaintiff almost \$375,000 in damages.

The CTA appealed, arguing that the Plaintiff failed to show it owed anyone the duty of removing the natural accumulation of snow and ice on its platform. Plaintiff counter argued that the CTA owed her a duty to ensure that the exit was under the canopy, away from the snow and ice. Plaintiff also argued either the CTA could have moved the train further or lesser into the station. Likewise, it was argued that the CTA could have required Plaintiff and other riders to depart from a different car.

On the first point, the First District's analysis boiled down to one main question: did the CTA owe a duty to provide plaintiff with the opportunity to safely exit from the train to reach a place of safety? To provide guidance, the court reviewed three prior cases involving similar issues with accumulation of natural substances in adverse conditions.

One such case included a plaintiff who slipped on a CTA bus step due to slush. The trial court found for the CTA. The plaintiff in that case argued, as here, that the CTA owed its customers the highest duty of care. The appellate court held, as is the rule in Illinois, that natural accumulations of ice and snow, which were not caused or aggravated by the business or property owner, are not a basis for liability. Accordingly, the owner has no duty to remove or take other precautions against dangers inherent in natural accumulations of snow and ice. The court was clear that the natural accumulations rule prevailed over the carrier's duty of highest care, stating that requiring [the CTA's] drivers to remedy a slushy condition on steps that was brought about by snow tracked into the vehicles by patrons, would bring the transit system to a complete standstill.

The next case involved a plaintiff leaving Rush-Presbyterian-Saint Luke's Medical Center after falling while exiting an elevator in one of Rush's buildings. The plaintiff fell on a natural accumulation of water tracked in from outside.

The trial court found for Rush. The appellate court affirmed.

Lastly, a wayward traveler exited a flight on American Eagle, and slipped on ice on the tarmac between the plane and the terminal. The jury found for plaintiff. On appeal, the court held that “the natural accumulations rule may be arbitrary in some situations, but overall, the certainty involved in a definite rule has been considered to outweigh any possibility of unfairness in unusual situations.”

The court specifically found that the danger didn’t result from *any failure on the part of business owner* to maintain or safely operate its equipment; rather when *the plaintiff* fell on the ice patch on the tarmac, she had as much control over her own safety as if she had been walking across a parking lot.

On the second issue, Plaintiff next argued that the CTA could have pulled the train further or lesser into the station, or tell her which exit to take to exit safely. She argued that if the CTA allowed her to exit under the canopy, the CTA could have fulfilled all of its duties.

In response, the court stated that:

“Plaintiff is effectively asking this court to impose a duty on the CTA to analyze every one of its platforms, every single time that its trains pull into them, to determine which portion of the platforms has the least amount of snow or ice or has the most sand spread and is therefore, theoretically, the safest place upon which to alight.”

The court rebuked the Plaintiff further by stating:

“[t]o impose such a duty on the CTA would be impractical. The transit system would be brought to a standstill if passengers were not allowed to alight from their trains until a CTA train operator and/or other employee ran around the platform, taking measurements to determine which portion of the platform currently had the least amount of snow or ice or the most sand spread. The slowdown of the

CASE SUCCESSES

Dead Man’s Act Leads To Not Guilty Verdict.

Chicago office associate **Patrick Wall** successfully defended the estate of a deceased motorist who had been sued for permanent and debilitating injuries which affected her daily living. The plaintiff alleged at the time of the accident that the deceased motorist proceeded across a through street after stopping at a stop sign and negligently collided with the plaintiff. The plaintiff alleged that the defendant failed to yield the right-of-way and was not in control of his car while crossing the street. Subsequent to the accident, the defendant died of unrelated causes.

The plaintiff alleged permanent residual migraine headaches and upper extremity radicular symptoms as well as soft tissue injuries. Pat successfully moved to exclude the plaintiff’s testimony regarding the facts of the accident using the Dead Man’s Act. Further, Pat utilized the Dead Man’s Act and Illinois case law to bar the responding police officer’s opinion testimony as it related to the point of impact and all accident reconstruction. This left the police officer only able to testify as to the defendant’s statements, which did not demonstrate negligence. The plaintiff was left with the officer’s visual observations at the scene of the accident, which was insufficient to show liability. At the conclusion of trial, the plaintiff requested approximately \$550,000 arguing that the Plaintiff suffered life-altering injuries. The jury deliberated for less than an hour and returned a verdict of Not Guilty in favor of the deceased motorist, awarding no damages to the Plaintiff.

transit system would be exacerbated as the CTA repeated this process every single time a new train arrived at the platform. The magnitude and consequences of imposing such a duty on the CTA would be overwhelmingly detrimental to the efficient performance of the transit system.”

Based on this analysis, the First District reversed the jury’s verdict and remanded the case.

The consequences of the Plaintiff’s argument would be felt to its most detrimental effect during rush hour on a snowy Friday in December. According to the CTA, approximately 660,000 passengers ride the CTA during a normal week. Forcing the “EL” to stop under the canopies for all trains would give a whole new meaning to the words “traffic jam”, or “mass” transit.

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Patrick Wall, an associate in our Chicago office, has managed matters through all phases of litigation in automobile liability, premises liability, fraud, and general commercial litigation matters. Pat has tried ten cases to jury verdict, including three which resulted in no non-economic damages being awarded. He has also participated in more than 20 mandatory arbitrations. Pat has represented both individual clients and corporations in mandatory and binding arbitrations and pre-trial conferences.

Pat has practiced in several different divisions of Cook County, DuPage and Lake County, and is licensed in the United States Northern District Federal Court of Illinois. Pat brings a unique background to the firm. Before joining Querrey & Harrow, Ltd., Mr. Wall worked for two Fortune 500 companies, with significant management experience. Pat also served as an extern at The White House and the United States House of Representatives.

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