A Monthly Legal Newsletter from

September 2009

Editors: Terrence Guolee and Jillian Book

Municipal Liability Update:
Attacking The Courage Of Your County Sheriff Is Not Protected By The First Amendment

By: **Dominick Lanzito** - Chicago, Illinois

Insurance Coverage Update:
Court Addresses CGL Contractual Liability Exclusion – Finds No Coverage

By: **Michele T. Oshman** - Chicago, Illinois

Constitutional Law Update:
"Class of One" Equal Protection Claim Remains A Valid Cause of Action Against Police Officers

By: **Jillian Book** - Wheaton, Illinois

Federal Litigation Update:
Seventh Circuit Finds Whistleblower's First Amendment Claim Has Potential Merit, Reviews Illinois Tort Immunity Act

By: **Patrick S. Wall** - Chicago, Illinois

Recent Case Successes

- Practice Group Focus:
  Q&H's Appellate Department: On A Winning Streak
- Q&H Municipal Liability Defense Team Wins Major Victory for City of Chicago

Community Involvement / News

- Querrey & Harrow Sponsors Chicago Debate League
- Beverly Berneman Combines Charity With International Travel
- Shareholder Jim Bream Kicks Off Another Year as School Board President
- Q&H Participates In Minority Law Student Job Fair
- Len Rubin Guests on Un-Common Law Radio Program
- Berneman Named As Chair of Midwest Chapter of Copyright Society
- Schoumacher to Chair "Surviving The Economic Downturn" Conference

Copyright © 2009 Querrey & Harrow, Ltd. All rights reserved.

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
233 East 84th Drive
Suite 205
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

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.

PRACTICE GROUP FOCUS:
Q&H's Appellate Department: On A Winning Streak

Q&H is renowned for its skilled advocacy in trial courts throughout the region. Perhaps less known is the excellent track record put up by our lawyers in appellate courts, both state and federal, usually defending the great results obtained for Q&H's clients at the trial level.

Q&H's Appellate Department obtained five favorable appellate court decisions for our clients in the past month. A short synopsis of each case and a discussion of the legal issues and alleged errors involved follows.

***Moritz v. West Suburban Hospital and Medical Center* (Illinois 1st Appellate District)**

In this case, trial attorneys **Jamie Goldstein** and **Jim Bream** succeeded in obtaining the dismissal of West Suburban Medical Center. Specifically, the trial court determined that the plaintiffs had failed to assert a good faith cause of action against the Medical Center. Jamie and Jim thereafter also obtained an award of attorney's fees and costs as a sanction against the plaintiffs and their counsel and in the Medical Center's favor in excess of $10,000. The plaintiffs subsequently appealed.

The Appellate Court affirmed the trial court's sanctions order. Specifically, the Appellate Court accepted a jurisdictional argument in the Medical Center's brief asserting that, due to deficiencies in the plaintiffs' notice of appeal, the plaintiffs waived the right to challenge their liability for attorney's fees and costs in the first instance. The Appellate Court further determined that the trial court did not abuse its discretion in affixing the amount of the attorney's fees and costs awarded as a sanction. Attorneys **Jennifer Medenwald** and **Christopher Keleher** worked on the appeal.

***Sadigh v. J.B. Hunt Transport, Inc.* (Illinois 1st Appellate District)**

In this case, trial attorney **Tom Burke** obtained a dismissal of a plaintiff's complaint stemming from a fatal passenger vehicle tractor-trailer collision. The mechanics of the accident were such that after the driver lost control of the passenger vehicle, it crossed two lanes of traffic and struck and became trapped under the semi trailer. The trailer's wheels thereafter crushed and penetrated the right front compartment of the passenger vehicle where plaintiff's decedent was seated. The plaintiff contended, among other allegations, that had the tractor-trailer been equipped with side guards or side protection, the vehicle in which plaintiff's decedent was riding would have deflected off the side of the tractor-trailer. The plaintiff sued J.B. Hunt Transport, Inc., the owner of the semi tractor-trailer, under a negligence tort theory, contending that J.B. Hunt knew it was feasible and practical to design, manufacture and equip a trailer with side guards or side protection.

The trial court dismissed the plaintiff's negligence suit against J.B. Hunt based on Illinois precedent as articulated in *Mieher v. Brown*, 54 Ill.2d 539 (1973), and *Beattie v. Lindelof*, 262 Ill.App.3d 372 (1st Dist. 1994). Those cases hold, in relevant part, that a manufacturer and owner of a commercial vehicle have no duty to design a vehicle with which it is safe to collide. Plaintiff subsequently appealed, arguing that *Mieher* and *Beattie* are no longer good law in Illinois, and alternatively, that the trial court erred in applying Illinois law to her claims. The Appellate Court determined that *Mieher* and *Beattie* controlled and rejected the plaintiff's argument that the trial court erred in applying Illinois law. Attorney **Jennifer Medenwald** authored J.B. Hunt Transport, Inc.'s brief submitted to the Appellate Court and participated in oral argument on the case in June 2009. The deadlines for further appellate review, including the filing of a petition for leave to appeal to the Illinois Supreme Court, remain pending.

***Nweze v. Weiss Memorial Hospital* (Illinois 1st Appellate District)**

The plaintiff brought a medical malpractice action against Weiss Memorial Hospital, among other defendants, seeking damages for the alleged wrongful death of his mother. Specifically, the plaintiff alleged that the Hospital and other defendant physicians negligently failed to timely diagnose and treat a bacterial infection, which omission purportedly resulted in plaintiff's decedent's death. The action was tried to a jury. Trial attorneys **April Walkup** and **Joan Stohl** obtained a verdict in the Hospital's favor and against the plaintiff, with the jury finding no liability and awarding zero damages.

Plaintiff later appealed, contending that certain evidentiary errors at trial warranted the reversal of the jury's verdict and the granting of a new trial. Among other claimed errors, the plaintiff contended that the trial court abused its discretion in allowing plaintiff's expert to be questioned regarding a public reprimand on his medical license. Plaintiff complained that the license censure was not linked to expert's qualifications as an expert witness or the expert's standard of care opinions in the case.

As an additional, alternative alleged point of error, the plaintiff contended that rehabilitation of the expert witness on the subject of the license reprimand should have been permitted at trial.

On appeal, the Appellate Court determined that no abuse of discretion occurred as to both issues. Specifically, the Appellate Court determined that the expert's license censure was a proper subject of inquiry and cross-examination during trial. Further, the Appellate Court held that to allow the expert to explain the circumstances surrounding the license censure would have created a sub-trial on a collateral issue and otherwise distracted the jury's attention from the main issues of determining whether the defendants were negligent or whether the defendants' negligence was the proximate cause of the plaintiff's decedent's death. Attorney **Jennifer Medenwald** authored the Hospital's brief submitted to the Appellate Court

***Zysko Construction v. White Nights USA, Inc.* (Illinois 1st Appellate District)**

Trial attorney **Scott Krider** succeeded in obtaining a money judgment in excess of $50,000 against Zysko Construction, Inc. for its failure to substantially complete certain carpentry work at a residential property.

COMMUNITY SERVICE

Querrey & Harrow Sponsors Chicago Debate League

On October 3, 2009, Querrey & Harrow, together with corporate partner IST, will sponsor the Chicago Debate League Season Opener Debate Tournament, in which more than 400 Chicago public high school students will compete. Querrey & Harrow volunteers will provide judges and administrative services for the tournament. Two Querrey & Harrow attorneys, **R. Scott Rochelle** and **Michele T. Oshman**, have committed to serving the league for the entire 2009-2010 school year; Scott as an Assistant Coach and Michele as a judge.

The Chicago Debate League (CDL), with 70 high schools and elementary schools, and more than 1200 debaters, is part of the Urban Debate Network, a group of Urban Debate Leagues in 24 of the nation's largest cities. Urban Debate leagues organize competitive academic debate programming within urban school systems to help students improve reading, speaking, writing, and listening skills, all while empowering them with confidence and knowledge about world issues not normally encountered by teenage students. CDL debaters spend hundreds of hours outside of the classroom researching and writing on public policy issues, and argue them for hours on end.

Querrey & Harrow is proud to support a program which directly influences the ability of our young people to succeed in the business world.

Scott thereafter filed a motion to pierce Zysko Construction's corporate veil and impose liability for the money judgment on its proprietors.

By way of background, a corporation is an entity separate and apart from its shareholders, directors and officers, who are not, as a general rule, liable for the corporation's debts and obligations. However, in certain situations, courts will find shareholders, directors or officers personally liable for corporate obligations through an equitable remedy commonly known as "piercing the corporate veil." That remedy is meant to attach liability for corporate indebtedness to an individual that uses a corporation merely as an instrumentality to conduct his or her personal business.

The trial court granted the motion to pierce the corporate veil and held Zysko Construction's owners personally liable for the subject money judgment. Zysko Construction later appealed that ruling. The Appellate Court affirmed the trial court's judgment. In doing so, the Appellate Court noted that Zysko Construction was the mere alter ego or business conduit of its owner, the legal separateness of individual and corporation ceased to exist, and the facts were such that adherence to the separate existence of the corporation would have sanctioned fraud. Attorney **Jennifer Medenwald** authored the brief submitted to the Appellate Court.

***Mach v. Will County Sheriff* (Seventh Circuit Court of Appeals)**

In this case, trial attorneys **Terrence Guolee**, **Paul O'Grady** and **Matt Byrne** obtained a summary judgment order from Federal District Court Judge James Zagel, dismissing plaintiff's Title VII age discrimination claim against the Will County Sheriff's Office. Moreover, they were also successful in obtaining a very unusual order from Judge Zagel entering sanctions against the plaintiff equivalent to 5/6th of the attorney fees expended in preparing the defendant's Motion for Summary Judgment and ordering plaintiff to pay all expenses incurred by the Will County Sheriff in defending plaintiff's claims.

In particular, Judge Zagel noted that of the 6 different claims brought by plaintiff, 5 were shown during the discovery phase of the case to have no merit, and the 6th was deserving of dismissal by summary judgment. However, given that plaintiff and his counsel failed to withdraw or dismiss the 5 meritless claims until after the time that defendants conducted discovery and moved for summary judgment on all of the plaintiff's claims, the court deemed the litigation to have been conducted in bad faith and sanctions proper. The court then also granted summary judgment on the remaining 6th claim, based on the evidence developed by Q&H showing that the Will County Sheriff's office properly based the complained of transfer of the officer on the officer's failure to perform his job in accordance with reasonable expectations.

On appeal, plaintiff's counsel directed his briefing and argument primarily against the sanction order. Among other arguments, appellate counsel **Terrence Guolee** and **Christopher Keleher** supported the sanction award as reasonable given the lack of merit to plaintiff's claims and supported by the evidence documented at the trial level. The Seventh Circuit agreed and affirmed both the summary judgment and sanctions orders in its opinion released on August 31, 2009. Currently, the time limit is open for petitions for rehearing or further appeal to the United States Supreme Court.

* * *

If you have any questions regarding Querrey & Harrow's Appellate Practice Group, please contact Group Chair, Jennifer Medenwald at 312-540-7588, or via jmedenwald@querrey.com.

Our considerable appellate experience enables us to incisively evaluate cases, suggest effective strategies and render informed opinions as to the likelihood of success in post-trial proceedings. In both pursuing and defending post-trial motions and appeals, our appellate lawyers are persuasive brief writers and oral advocates. Dedicated to quality work, we are also sensitive to their clients' economic and professional concerns.

Municipal Liability Update: Attacking The Courage Of Your County Sheriff Is Not Protected By The First Amendment

By: Dominick Lanzito – Chicago office

In *Milwaukee Deputy Sheriff's Association (MDSA), et al., v. Clarke, et al.*, 08-3298, the Seventh Circuit had to decide whether criticism of Milwaukee County Sheriff David A. Clarke rose to the level of protected free speech. Ultimately, the Seventh Circuit determined that the speech, which had undertones of issues of public concern, was motivated by personal interest and not actionable.

Central to the allegations was an exchange between the Sheriff and the response by Deputy Sheriff Michael Schuh. Initially, a representative from the MDSA criticized the Sheriff in the local newspaper for his personal use of security personnel to take him to and from the airport. This criticism came on the heels of budget cuts and lack of financial resources. In response, the Sheriff posted a quote on the roll-call board as an "inspirational message". The posting read as follows:

> If you are afraid or have lost your courage, you may go home, otherwise you will ruin the morale of others.
>
> Deuteronomy, Chapter 20, Verse 8.

Deputy Schuh responded by submitting a statement for the MDSA newsletter, which read:

> If you are afraid or your have lost your courage and need two deputies and a sergeant to escort you every time you fly in and out of the airport and patrol deputies to drive by your house when you're out of town you should resign and go home! Then you would lift the morale of this whole department (a.k.a. office).

Following publication of this statement, Deputy Schuh allegedly was assigned to a new "pilot program" assignment where he was required to patrol a portion of Milwaukee on foot, in full uniform, without a partner. *Id*. at 5. The idea of foot patrol is nothing new, but the assignment placed Schuh in an area characterized as "the City's deadliest area". Additionally, Deputy Schuh had to take public transportation to and from his assigned area.

Deputy Schuh filed suit contending that this assignment was in retaliation in violation of his protected free speech. He maintained that the use of public resources for personnel use was a matter of public concern. The Seventh Circuit had no qualms finding that the reassignment was in retaliation to the speech, however, the court found that the statement focused on the "Sheriff's lack of courage", and did not directly comment on the waste of taxpayer dollars, such that the tangential relationship of the underlying public issues of misappropriation of resources was not sufficient to rise to the level of constitutionally protected speech. Thus, the court held the statement was more appropriately deemed to be of a purely personal nature. Based upon the ambiguities in the statement, the Seventh Circuit affirmed the district court's granting of summary judgment in favor of the Sheriff.

* * *

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.

Insurance Coverage Update: Court Addresses CGL Contractual Liability Exclusion – Finds No Coverage

By: Michele T. Oshman – Chicago office

The Appellate Court of Illinois has issued another opinion limiting insurance coverage in cases involving commercial general liability insurance in the construction context. In *American Family Mut. Ins. Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 909 N.E.2d 274 (1st Dist. 2009), the First District Appellate Court found that a contractual liability exclusion precluded the CGL insurer's duty to defend a general contractor claiming additional insured coverage under a policy issued to a subcontractor.

The underlying case arose when two employees of the property owner, The Gap, were injured at Gap stores where policyholder-subcontractor Shanahan Drywall Service, Inc. were working. The Gap had entered into a construction contract with general contractor Fisher Development, Inc. ("FDI") and FDI had subcontracted some of the work to Shanahan. There was no dispute that the employee's injuries arose out of Shanahan's work.

Pursuant to the subcontract with FDI, Shanahan purchased a CGL policy from American Family Mutual Insurance Company that named FDI as an additional insured with respect to liability arising out of Shanahan's ongoing operations for FDI. The policy contained a contractual liability exclusion which excluded coverage for liability for bodily injury "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." The exclusion contained an exception for "liability for damages … [t]hat the insured would have in the absence of the agreement or contract." That exception involves what is generally deemed an "insured contract" for purposes of the exception to the contractual liability exclusion.

The employees sued FDI and Shanahan in separate lawsuits. American Family accepted FDI's tender and defended FDI in the employees' lawsuits. FDI filed third party contribution actions against the Gap in each employee lawsuit. The Gap filed an independent action against FDI seeking indemnity for its workers compensation awards paid to its two employees, as well as asserting that FDI breached the construction contract with The Gap by failing to procure insurance that would cover The Gap for the actions filed by the employees. That action was dismissed, so The Gap filed a counterclaim in the third party action against it, which was also dismissed. American Family denied FDI's tender of The Gap lawsuits, asserting that the policy did not cover FDI for The Gap claims.

American Family filed a coverage action against FDI, seeking a declaration of no duty to reimburse FDI for the defense costs incurred. FDI filed its own declaratory judgment action against American Family, seeking a declaration of coverage as well as asserting breach of contract and a violation of §155 of the Illinois Insurance Code. The trial court granted summary judgment in favor of American Family, finding the insurer had no duty to defend FDI in The Gap lawsuit and counterclaim.

On appeal, FDI asserted that the trial court erred on three grounds. First, FDI argued that the underlying facts potentially fell within the policy's coverage, triggering the duty to defend. Second, FDI argued that the contractual liability exclusion did not apply to preclude coverage and third, if the exclusions did apply, then the "insured contract" exception to the exclusion applied as well, resulting in coverage.

The appellate court's analysis in the *American Family v. Fisher* case began, and ended, with a review of the contractual liability exclusion in the American Family policy because, as the court noted, the case turned on whether the exclusion applied. FDI argued that the Indemnification provision in its contract with the Gap was simply a restatement of its liability in

contribution to The Gap for its *pro rata* share of the common liability for the injuries to the employees. FDI proffered that, as such, it would not be liability assumed under a contract and did not trigger the contractual liability exclusion in the American Family policy.

In support, FDI relied on the case of *Virginia Surety Co. v. Northern Ins. Co. of New York*, 224 Ill.2d 550, 866 N.E.2d 149 (2007), and its holding that the *pro rata* share of the common liability between the general contractor and the subcontractor/employee of the injured party is not shifted by a hold harmless agreement from the subcontractor to the favor of the general contractor. *American Family v. Fisher,* 391 Ill. App. 3d at ___, 909 N.E.2d at 279. *See also, Virginia Surety,* 224 Ill.2d at 568, 866 N.E.2d at 160. Thus, FDI essentially argued that this holding meant that FDI had not assumed any extra liability by the indemnity provision in its contract with the Gap because FDI already had that liability through the Illinois Contribution Act.

American Family, on the other hand, relied on the express language of the indemnity provision in the contract with The Gap, which stated that FDI agreed "to indemnify and hold harmless The Gap … from any and all liability … resulting from (i) personal injury … arising in whole or in part … from the performance of the Work, whether by FDI or any subcontractor." The parties agreed that, based on the language of the contractual liability exclusion and the "insured contract" exception, the exclusion precluded coverage for contractual liability assumed by FDI in the event the liability not otherwise imposed upon FDI by law.

CASE SUCCESSES

Q&H Municipal Liability Defense Team Wins Major Victory for City of Chicago

Q&H attorneys **Dan Gallagher, Larry Kowalczyk, Terrence Guolee, Dominick Lanzito, Chris Keleher** and **Patrick Connelly** recently obtained a major victory for the City of Chicago by defeating a plaintiff's motion for class certification in a case contesting hundreds of DUI arrests over a several year period.

In the case, plaintiff claimed that he was wrongfully stopped by a City of Chicago police officer and charged with driving under the influence. Plaintiff sought class certification on behalf of hundreds of other drivers also stopped by the officer in question, asserting that the stops were based on an alleged pattern and practice in the City of improperly stopping and charging drivers without probable cause to believe a crime had been committed. Indeed, plaintiff raised evidence that the Cook County State's Attorney's office dismissed the criminal charges in over 100 arrests made by the officer in question over a several month period based on the claims of improper police tactics, and that evidence that would have helped the arrestees defeat their criminal charges, had not been tendered to their criminal defense counsel.

Following extensive research into hundreds of arrest reports totaling tens of thousands of pages of evidence, Q&H opposed the class certification motion on several grounds, including that there was no evidence that the allegedly improper stops and arrests were based on any practice or custom of the City of Chicago, that the proposed class members' claims were too individual and distinct to be handled in a class action setting and that trying the cases in a class action setting would require, literally, thousands of "mini-trials" regarding the probable cause and evidence supporting each stop and arrest. Moreover, it was argued that trying the case in a class action setting would obscure the actual criminal actions of individual drivers that supported the stops and arrests in the first place.

The district court judge agreed with Q&H's position and denied plaintiff's motion for class certification. This ruling should allow direct focus on each claimant's evidence and, indeed, should allow for a successful defense of the claims on an individual basis.

The appellate court in *American Family v. Fisher* analyzed the *Virginia Surety* case in depth. The appellate court viewed the case as a dispute between a workers' compensation insurer and a CGL insurer, and noted that the issue before the Illinois Supreme Court was whether the insured subcontractor's waiver of contribution rights against the general contractor, known as a *Kotecki* waiver, was an "insured contract" under the CGL policy there.

(The waiver is called a *Kotecki* waiver because it waives the subcontractor's right to assert the statutory workers' compensation cap on liability as set forth in *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155, 164-64, 585 N.E.2d 1023, 1027-28 (1991).)

The appellate court then noted that in the *Virginia Surety* case, if the liability assumed by the subcontractor in waiving its contribution rights against the general contractor via the *Kotecki* waiver was liability that the general contractor would have had by law, then there was a shift of tort liability from the general contractor to the subcontractor, which would trigger coverage by the CGL carrier via the "insured contract" exception to the contractual liability exclusion. *See American Family v. Fisher*, 391 Ill. App. 3d at ___, 909 N.E. 2d at 281.

The appellate court continued its analysis of the *Virginia Surety* case by stating that, if the liability addressed by the *Kotecki* waiver agreement would have fallen upon the subcontractor by law but for the waiver, the subcontractor could have asserted a workers' compensation defense against accepting its full *pro rata* share of common liability. Thus, by virtue of the *Kotecki* waiver, the subcontractor had assumed liability that it would not have had otherwise, and there would be no duty to defend pursuant to the contractual liability exclusion in the CGL policy. *Id.*

At this point, it is tempting to ask why the appellate court expended so much energy discussing the *Virginia Surety* case when the facts in the *American Family v. Fisher* case do not involve a *Kotecki* waiver. The answer is found in the appellate court's discussion of that case's reasoning regarding the "insured contract" exception to the contractual liability exclusion.

The appellate court in *American Family v. Fisher* looked at the *Virginia Surety* case in terms of the nature of the liability under consideration and whether there was a shift in liability from one party onto the insured through the contractual liability provision at issue. The Appellate Court stated that the Illinois Supreme Court based its holding in *Virginia Surety* on the "interplay" of the Workers' Compensation Act, the Joint Tortfeasor Contribution Act (740 ILCS 100/1 *et seq.*), the Illinois Construction Contract Indemnification for Negligence Act (740 ILCS 35/0.01 *et seq.*) and principles of joint and several liability. *American Family v. Fisher*, 391 Ill. App. 3d at ___, 909 N.E. 2d at 281.

The court described the holding as finding that the portion of the common liability above the *Kotecki* cap was not imposed on the general contractor by law but instead stayed with the subcontractor, such that the waiver agreement was not an "insured contract" and the CGL insurer had no duty to defend. *Id.*

The appellate court extrapolated certain propositions from the *Virginia Surety* decision which it then applied to the case at bar. The court stated that Illinois law clearly provides a cap to a subcontractor in a third-party action against it by a general contractor that would be available to the subcontractor's CGL insurer exercising its duty to defend. The subcontractor that gives up this workers' compensation affirmative defense faces financial liability above the cap, for which the CGL insurer faces financial responsibility, unless there is an exclusion for this contractual assumption of liability. *American Family v. Fisher*, 391 Ill. App. 3d at ___, 909 N.E. 2d at 281.

The court then surmised, without citation to drafting history or other support, that CGL insurers responded to the potential increased liability by excluding coverage for the subcontractor's assumption of liability, presumably meaning the contractual liability

exclusion. *Id.* at ___, 909 N.E.2d at 281-82. This is a bit of a leap absent drafting history for the contractual liability exclusion since the exclusion itself usually makes no reference to contractors or construction contracts.

Strangely, the appellate court in *American Family v. Fisher* acknowledged that much of the Illinois Supreme Court's discussion in the *Virginia Surety* case had little to do with the facts before it. 391 Ill. App. 3d at ___, 909 N.E. 2d at 282. The appellate court then drew an analogy between the *Kotecki* waiver agreement in *Virginia Surety* and the indemnification clause in the contract between the Gap and FDI, in that they both operated to assume liability by contract that was excluded under the respective CGL insurance policies. *Id.* The court referred disparagingly to FDI's claim that the *Virginia Surety* case established that the *pro rata* share of the common liability remained with each liable party (thus arguing that the exception for liability the insured would have had by law saved coverage from the contractual liability exclusion.) The court offered that the proper question was whether FDI had assumed additional liability by the indemnification provision, concluding that it had. *Id.* at ___, 909 N.E.2d at 283.

The appellate court found that FDI's agreement to hold the Gap harmless through the indemnification clause in the FDI-Gap contract went beyond merely accepting its *pro rata* share of liability, thus triggering the contractual liability exclusion in the American Family policy. *Id.* Further, the appellate court rejected FDI's argument that the "insured contract" exception applied, reasoning that the Gap's claim against FDI was not founded on any tort liability but, rather, arose out of the agreement to procure insurance protection for the Gap relating to its liability based on work done by FDI and/or its subcontractor Shanahan. *Id.* at ___, 909 N.E.2d at 284. The court stated that as such, the claim was based on a contractual obligation, and not on any liability that might be imposed by operation of law. *Id.*

In the end, the appellate court took a circuitous route in ultimately holding that hold harmless agreements between subcontractors and general contractors constitute an assumption of liability under contract that is excluded by contractual liability exclusions. Future courts applying the reasoning of this case will look at the nature of the liability that is being transferred to the insured under the agreement. If that liability is the type that the insured would have had anyway by operation of law, there may be a chance that an "insured contract" exception would defeat the effect of the contractual liability exclusion. Absent that, subcontractors seeking coverage under a CGL policy for their liability to their general contractors under hold harmless agreements may be disappointed.

* * *

Michele T. Oshman, an associate in our Chicago office, is a member of the firm's Appellate and Insurance Coverage practice groups. Michele concentrates her practice in the areas of insurance coverage and complex defense litigation and has represented the interests of insurance companies in state and federal courts throughout the country, including disputes over coverage for underlying mass tort, professional liability, environmental, asbestos, construction defects, product liability, medical, municipal liability and other claims. She has also defended manufacturers in product liability cases, including nationwide class action matters, and has done reinsurance related work.

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

COMMUNITY INVOLVEMENT
Beverly Berneman Combines Charity With International Travel

Chicago office shareholder **Beverly A. Berneman** and her family recently spent two weeks in Israel. During that time, they visited the Rambam Children's Hospital in Haifa. Beverly and her family brought toys and games from the USA to distribute to the young patients. During the visit, they spent time with the patients and their families, playing games and singing songs in English, Hebrew and Arabic. Beverly and her family also planted trees in the John F. Kennedy Memorial Forest near Jerusalem.

Constitutional Law Update: "Class of One" Equal Protection Claim Remains A Valid Cause of Action Against Police Officers

By: Jillian Book – Wheaton Office

The Seventh Circuit recently revisited the issue of a "class of one" equal protection claim in the case of *Hanes v. Zurick, et al*, No. 09-1043 (7th Cir., decided Aug. 18, 2009). Pursuant to the defendants' appeal, the court reviewed the 2000 case of *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000) and the 2008 United States Supreme Court case of *Engquist v. Oregon Dep't of Agriculture*, 128 S.Ct. 2146 (2008), but affirmed the trial court's decision based on the noted difference between police work and public employment.

In *Hanes*, the plaintiff alleged that he was repeatedly arrested and charged with crimes because the defendant police officers "hated" him. It was argued that their underlying intent was "unrelated to the police officers' duties." The officers moved to dismiss the claim under the "class of one" theory because police power is inherently discretionary and the Supreme Court case of *Engquist* held that no "class of one" equal protection claim can be made in the public employment context. The officers argued that *Engquist* overruled *Hilton*, which held that a "class of one" equal protection claim could be made against the police.

The court reviewed the holding of *Engquist,* because it was important to appreciate the context of the decision. The Court held that a "class of one" equal protection claim could not stand up against someone in a public employment context for several reasons. First of all, employment decisions usually involve treating individuals different. This is a common and necessary occurrence which would likely cause a "slippery slope" and expose every discretionary decision to a possible equal protection claim. Further, "the constitutional constraints on government are much less onerous when it acts as employer as compared to acting as soverign." *Engquist*, 128 S.Ct. at 2151.

After reviewing the context of *Engquist*, the court held that it could not dismiss the claim "based on broad generalities." Important to consider is that the discretion of police officers is much less than that of public employees. Also, "while employment decisions are inherently subjective, 'subjective intentions play no role' in evaluating police seizures under the Fourth Amendment." The police power is subject to constant constitutional constraints, and this is nothing new. For these reasons, the Seventh Circuit found that there was a claim under the "class of one" equal protection theory.

This case stands to put police officers on notice that, although they may be public employees, their actions are still held to a higher constitutional standard because of the nature of the inherent police power. This power has never been taken lightly in the past and this case shows that nothing will be changing in the near future.

* * *

Jillian Book, an associate in our Wheaton office and Co-Editor of this newsletter, concentrates her practice in vehicle and premises liability. Ms. Book has tried over 10 cases to verdict and has participated in over 30 arbitrations. If you have questions regarding this article, please contact Jillian via jbook@querrey.com, or via 630-653-2600.

COMMUNITY INVOLVEMENT

Shareholder Jim Bream Kicks Off Another Year as School Board President

Chicago shareholder **James Bream**, Board of Education President of Glenview School District 30, recently spoke at the District's Teacher Institute Day 2009.

Q&H Participates In Minority Law Student Job Fair

Querrey & Harrow recently participated in the Cook County Bar Association Minority Law Student Job Fair. Shareholders Ernie Burden and Tony Madormo and associate Scott Rochelle spent the day meeting prospective hires from several local law schools.

Federal Litigation Update: Seventh Circuit Finds Whistleblower's First Amendment Claim Has Potential Merit, Reviews Illinois Tort Immunity Act

By: Patrick S. Wall – Chicago office

Recently, the Seventh Circuit Court of Appeals reviewed free speech and the First Amendment in the workplace. *Valentino v. Village of South Chicago Heights, et al*., 04 CV 2373. The appellate court held that the district court incorrectly granted summary judgment in favor of the Village and against an employee who exposed Village corruption, and was subsequently fired. Furthermore, the court found the actions of the Mayor were not immune under the Illinois Tort Immunity act and could expose the municipality to liability and damages.

The court opinion begins with the telling statement, "In 2001, nepotism was alive and well in the Village of South Chicago Heights. Its small municipal government employed at least six members of its mayor's extended family, and several of his friends and campaign supporters." *Id.* A city employee soon discovered that the Village was paying several of these employees for work that was not performed. In fact, the employee was told by a newly hired water inspector that he was hired because he was a "vote getter" of the Mayor, as well as an active supporter of his campaign. Upon further investigation, the employee noted that these individuals were rarely in the office, but still received weekly paychecks. The employee soon began copying widely available public timesheets, in part to verify her suspicions regarding ghost payrolling of the Mayor's friends and in part to determine if the Village was unfairly docking her pay, and not those of the "ghost workers".

The employee brought the information to the attention of a member of a public group, Citizens against Corruption ("Citizens'"). Citizens then filed FOIA requests for the timesheets, which caused the Mayor to indicate that "[The employee"] is going to get her butt canned". *Id.* at 4. Soon after, on February 28, 2003, Citizens' released a letter detailing the ghost payrolling, among other complaints, to the Village residents. On March 3, 2003, the City Administrator surreptitiously searched the employee's desk and found the copied timesheets. The next day, the Village Administrator, pursuant to approval of the Mayor, terminated the employee.

The employee sued the Mayor, the Village Administrator and the Village alleging a violation of her First Amendment rights and retaliatory discharge, a state law violation. All defendants moved for summary judgment, alleging the employee engaged in "theft" of the publicly displayed timesheets. The district court agreed and dismissed the case, finding that the defendants had shown they had a lawful reason to terminate the employee. The appellate court disagreed, saying the defendants' explanation was "too fishy" or "too convenient", and the search was due to the "extreme displeasure with the content of [the employee's] statements".

On appeal, the court reviewed three key legal theories: Plaintiff's *prima facie* case, the municipality's vicarious liability, and the Village's immunity from suit.

First, the appellate court reviewed whether the employee had met her burden in showing that she was fired in retaliation for exercising her First Amendment rights. The employee had to show that 1) she engaged in constitutionally protected speech, 2) she suffered from exercising her right, and 3) the speech was a motivating factor in her firing. The court restated that if you speak as a private citizen, on a matter of public concern, your First Amendment rights will be protected.

Specifically, the court found that "An employee's ability to highlight the misuse of public funds or breaches of the public trust is a critical weapon in the fight against government corruption and inefficiency", in finding the employees statements deserved First Amendment protection. The court was clear that the timing of the release of the public letter, the

search of the employee's desk and the Mayor's statements regarding termination was enough circumstantial evidence to withstand a summary judgment motion.

In response, the defendants alleged that "theft" was their true motivation for firing the employee. They argued that the timesheets were private and to expose the sign-in times, would bring with it "identify theft", as well as "low morale". The court stated that defendants' post hoc explanation of employee's termination is too fishy to allow summary judgment, and not worthy of credence".

The Seventh Circuit Court of Appeals called the Village's claims specious at best, and that they failed to see any evidence that even remotely supports a belief in one specific argument advanced by the Village. Specifically, the court said that the employee did not "steal" the timesheets, but simply photocopied them and placed them in her desk. The court highlighted the fact that the timing of the Citizens' letter and the termination presented a genuine issue of fact regarding the true reasons for the dismissal. The court said the timing "demonstrates an extreme displeasure with the content of [employee] statements just as easily as it indicates a concern for potential disruption in the Department", noting the employee had 15 years of uninterrupted service. The court reversed the grant of summary judgment in favor of the defendants.

Next, the appellate court reviewed the municipality's liability. Normally, for the Village to be liable, it must be shown that, 1) it had a well-settled municipal custom or practice that was the moving force behind the Plaintiff's constitutional injury or 2) an individual with *final policymaking authority* for the [Village] caused the constitutional deprivation. (Emphasis added).

Here, the employee could not show a practice of the Village terminating employees based on speech, so she attempted to show liability under the Mayor's policymaking authority. The court stated "when a particular course of action is directed by those who 'set municipal policy', the municipality is responsible under Section 1983 even if the action is only undertaken *once*.

Both sides argued regarding the definition of what is meant by the phrase "set municipal policy". The court indicated the official must be responsible for establishing final government policy on a particular issue. Therefore, the key question was if the Mayor was the policymaker on personnel decisions? The court found in the affirmative.

COMMUNITY INVOLVEMENT

Len Rubin Guests on Un-Common Law Radio Program

On Sunday, August 23, 2009, Q&H's **E. Leonard Rubin** appeared as a guest on Chicago attorney, Kurt Muller's weekly radio program "UN-COMMON LAW" ® which is broadcast on Air America's Chicago affiliate, WCPT 820 AM, and via the internet @ www.wcpt820.com. Mr. Rubin answered questions from callers about trademarks, copyrights and Internet Law.

Berneman Named as Chair of Midwest Chapter of Copyright Society

Chicago shareholder **Beverly Berneman** has been named Chair of the Midwest Chapter of the Copyright Society of the USA. This is Beverly's second term as the chapter chair. **E. Leonard Rubin**, Of Counsel to Q&H, is the immediate past chair. The Society is dedicated to advancing the study of and related rights in literature, music, art, theater, motion pictures, television, computer software, architecture, and other works of authorship, distributed via both traditional and new media. Beverly is working with copyright law practitioners and academics to develop seminars that will explore various aspects of copyright law.

To support that finding, the court highlighted that the Mayor hired several people on the payroll and had the final say-so regarding the termination at issue. Specifically, the Mayor had "unfettered discretion" to hire and fire whomever he pleased. The court said that "indeed, [Mayor] had hired several of his relatives and others without so much as a whisper from the board of trustees". Most damaging was the appellate court's statement that, "given Mayor's preference to hire his relatives and campaign supporters to government jobs, it appears that to be a Village custom and practice to allow [The Mayor] to set whatever hiring/firing criteria he sees fit." Again, the appellate court reversed the district court finding on this issue and indicated that if the jury finds that the Mayor violated the employee's constitutional rights, the Village could be liable to the plaintiff for damages.

Lastly, the court reviewed the employee's state law claim alleging retaliatory discharge. Plaintiff argued she was discharged in retaliation for activities in violation of a clearly mandated public policy. The court stated that "terminating a government employee for speaking out against corruption in her workplace is 'contrary to clearly mandated public policy'. The Village argued that it was immune from suit because someone serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act in determining policy. However, the court found that the Mayor was "not making a policy decision" when he fired the employee, calling the Village's arguments "futile".

The 7th Circuit Court of Appeals appears to have indicated its distaste for nepotism and patronage in the Village of Chicago Heights and set a high bar for dismissal of First Amendment claims. A review of your employment policies may be in order. Contact Querrey & Harrow for more information on our Employment Law and Municipal Liability practice groups.

* * *

Patrick Wall has been an Associate of Querrey & Harrow, Ltd. since 2006. He has managed matters through all phases of litigation in automobile liability, premises liability, fraud, and general commercial litigation including trying several matters to verdict.

Mr. Wall 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. Mr. Wall brings a unique background to the firm. Before joining Querrey & Harrow, Ltd., Mr. Wall worked for two Fortune 500 companies, with significant management experience. Mr. Wall has also served as an extern at The White House and the United States House of Representatives.

If you have any questions regarding this article, please contact Pat via pwall@querrey.com, or via 312-540-7598.

UPCOMING SEMINAR

"Surviving The Economic Downturn"

A Seminar Sponsored by the Chicago Building Congress (CBC) and the Society of Illinois Construction Attorneys (SOICA), October 9, 2009

Chicago office shareholder **Bruce Schoumacher** will serve as moderator at this seminar at Maggiano's Little Italy, 111 W. Grand, Chicago, IL 60610, with breakfast and registration at 7:00 a.m. and seminar from 8-9:30 am. For details, see the Chicago Building Congress website at www.chicagobuildingcongress.org.