

# Qued In

A Monthly Legal Newsletter from  
**Querrey & Harrow**

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*Editors: Terrence Guolee  
and Jillian Taylor*



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## **Municipal Law Update: The Push Toward More Transparent Government: The Amended FOIA And Its Effects On Local Public Bodies**

By: Patrick Connelly – Chicago Office

On January 1, 2010, the additions and amendments to the Illinois Freedom of Information Act, 5 ILCS 140/1 et seq. (“the Act”) went into effect throughout Illinois. Many of the new provisions will have a substantial affect on how public bodies maintain and disseminate their records. The Act now presumes that all records in the custody or possession of a public body are open for inspection, and the burden is on the public body to prove by clear and convincing evidence that an exemption applies. The various changes and additions to the Act and how they relate to municipalities are discussed below.

### **Records Which Must Be Produced**

In addition to presuming that all records are public, the Act now specifically requires production of: (1) the use of all public funds (5

ILCS 140/2.5); (2) all payrolls (5 ILCS 140/2.10); (3) all arrest reports and criminal history records (5 ILCS 140/2.15; and (4) all settlement agreements (5 ILCS 140/2.20). However, it should be noted that production of these documents is subject to some redaction. Finally, the Act requires public bodies to provide records which are in the possession of third parties with whom the governmental body has contracted to provide services which relate directly to governmental functions, and which are not otherwise exempt. 5 ILCS 140/7(2)

### **How A Request Is Made**

The Act now prohibits public bodies from requiring the use of a boilerplate FOIA form. 5 ILCS 140/3. Instead, requests merely need to be written and presented to the public body in any medium available to it.

## **Querrey & Harrow Joins with Hunziker Law Group, LLC**



**Querrey & Harrow, Ltd.** is pleased to announce its agreement to enter into a strategic alliance with the **Hunziker Law Group, LLC**. Combining our strength and offices throughout the Chicago and Northern Indiana area with Hunziker's strong presence in Peoria and Central Illinois. This combination will provide a greater geographic service area for both firms' clients, together with individualized and cost effective representation and client satisfaction.

“We are partnering our resources to better serve our clients throughout Illinois,” said Michael B. Stillman, Querrey & Harrow’s managing shareholder. “The alliance also adds depth to our respective practice experience, which provides added benefit to both firms’ clients.”

“It’s about providing timely quality work product in an efficient manner. This approach results in consistent and continued client satisfaction,” said Gregory A. Hunziker, managing member of Hunziker Law Group.

“The alliance will enhance our ability to provide high-quality turnkey legal services to our clients with the continued convenience of downstate representation,” Hunziker said.

A list of coverage areas is set out in the notice on page 14 of this month's *Qued In*.

Further, requests can be made by any method of communication including oral requests. 5 ILCS 140/3(c). Finally, a public agency may not require the requester to disclose the purpose of the request except to determine whether the request has a commercial purpose or if a fee waiver is warranted.

A separate process was created to handle requests for commercial purposes. A commercial purpose is defined as “the use of any part of a public record or records, or information derived from public records, in any form for sale, resale, or solicitation or advertisement for sales or services. 5 ILCS 140/2(c-10). The response time for commercial requests is 21 working days and must include a fee estimation. If the records are not produced in the initial response and the request is not legitimately denied, an estimate of the time it will take to provide such records must be included. Fortunately, a public body may require prepayment for commercial requests and knowingly requesting a public document for a commercial purpose without disclosing it results in a violation of the Act. 5 ILCS 140/3.1(a-c).

### **The Timing And Cost Of Responding To Requests**

The amended Act changed both the time a public body has to respond to a non-commercial request and the extension of time provision from seven (7) to five (5) days. A public body must provide copies of requested materials in electronic format if requested and if so

maintained by the public body. 5 ILCS 140/6(a). If provided in paper format, the first fifty (50) pages must be produced at no charge and each subsequent page shall not be higher than the actual cost to the public body to copy the documents or fifteen cents (\$.15) a page, whichever is less. Finally, the cost for certified public records cannot exceed one (1) dollar. 5 ILCS 140/6(b).

### **Creation Of A FOI Officer**

The Act requires that each public body designate at least one FOI officer who is to be responsible for receiving and complying with FOIA requests and maintaining detailed records each request. 5 ILCS 140/3.5(a). Each FOI officer is required to undergo electronic training provided by the Illinois Attorney General by June 30, 2010, as well as, maintain ongoing educational requirements. 5 ILCS 140/3.5(b). Finally, the list of all designated FOI officers must be supplied to the Attorney General’s Public Access Counselor (PAC), who will be responsible for reviewing disputes involving FOI requests.

### **Denying A Request**

The Act now requires a denial response to include a detailed application of the exemption claimed including citations to legal authority along with a statement of the requestor’s right to have the denial reviewed by the Attorney General’s PAC. In that regard, the denial must include the address and phone number of the PAC. 5 ILCS 140/9(a)(b).

### **Kowalczyk Leads CBA Judicial Evaluation Committee**

Congratulations to shareholder **Larry Kowalczyk**, this year's Chairman of the Chicago Bar Association's Judicial Evaluation Committee, for all his hard work in reviewing candidates for Cook County judicial slots in advance of this February's primary elections. Larry was assisted by Q&H attorneys **Dominick Lanzito**, **Mary McClellan**, **Chloé Woodard** and **Scott Rochelle**, who each spent many *pro bono* hours this year serving the Committee as investigators. A copy of the Committee's recommendations can be found at <http://www.chicagobar.org>. Likewise, Larry will be appearing in a TV discussion with Cook County States Attorney **Anita Alvarez** on WYCC Channel 20 at 3:30 p.m. on January 31 to discuss the judicial review process and the importance of the work of the CBA's Judicial Evaluation Committee.

Moreover, if a request is denied under the “personal information exception” (140/7(1)(c)) or the “preliminary draft section (140/7(1)(f)) the public body must notify the PAC of intent to deny within the five (5) day response period. 5 ILCS 140/9.5(b).

### **Administrative And Judicial Review**

The Act now makes failures to comply subject to both administrative and judicial review. Administratively, the person who has been denied records may submit a request for review with the PAC. 5 ILCS 140/9.5(a). The PAC may then require the public body to turn over the disputed records for further review. At that point, the PAC can issue a binding legal opinion as to whether the disputed documents must be released to the requestor. 5 ILCS 140/9.5(c)(f).

Alternatively, the requestor can file suit for injunctive or declaratory relief. Although this remedy has been available in the past, the Act now places the burden on a public body to prove that the disclosure is exempt by clear and convincing evidence. 5 ILCS 140/11(f). If the requestor prevails, he or she is entitled to reasonable attorney fees, and more notably, if the court finds the public body willfully failed to comply or otherwise acted in bad faith a civil penalty of \$2,500 to \$5,000 will be imposed. 5 ILCS 140/11(j).

### **Helpful Changes**

Although many of the changes and additions to the Act place a greater burden upon public bodies, there are a few which will be beneficial. For example, the list of exemptions now includes “private information” which

encompasses “unique identifiers” such as a person’s social security number, driver’s license number, biometric identifiers, and personal e-mail addresses, etc... 5 ILCS 140/2(c-5). Finally, Section 3(g) addresses the problem of the repeat requestor by deeming repeated requests from the same person for the same records after they have already been supplied or properly denied unduly burdensome. 5 ILCS 140/3(g).

As detailed above, the amended Act creates a greater burden on public bodies in their retention, maintenance, and dissemination of public records. As such, all municipalities should examine their current FOIA policies and make all necessary changes to ensure efficiency and compliance with the Act.

\* \* \*

As counsel for dozens of municipalities and counties in Illinois, as well as many elected representatives, officers and governmental employees, our attorneys have dealt with nearly all issues affecting government in Illinois. Should you have any questions regarding Querrey & Harrow’s municipal and governmental practice, please contact Terrence Guolee at 312-540-7544 for referral to the proper attorney to handle your questions.

***Patrick Connelly**, an associate in our Chicago office, concentrates his practice in municipal defense and general litigation. He has successfully defended a number of §1983 lawsuits for municipalities including the Cook County Sheriff’s Office and the City of Aurora. In addition to defending §1983 suits, Pat provides counsel to our municipal clients on the issues they encounter daily, including tax issues, ordinance adoption and allocation of federal funding. If you have any questions about the article, please contact Pat via [pconnelly@querrey.com](mailto:pconnelly@querrey.com), or via 312-540-7556.*

## **COMMUNITY INVOLVEMENT**



Chicago associate **Chris Keleher** spoke at a continuing legal education seminar on Appellate Law for the DuPage County Bar Association on January 12th at the DuPage County Courthouse.

Chicago office shareholder **Beverly Berneman** will be teaching a class titled *Bankruptcy and Intellectual Property Law* at the John Marshall School of Law this winter semester. Ms. Berneman created the curriculum for the class which she has been teaching for the past 8 years.

## Landlord Alert: Are You Applying the Right Security Deposit Interest Rate?

By: Ari Scharg - Chicago Office

Chicago and Evanston, Illinois Landlords: the 2010 Illinois Security Deposit Interest Act (“Act”) rate (0.095%) is again higher than the Chicago Landlord Tenant Ordinance (“RLTO”) rate (0.073%). This also happened in 2009, when the Act rate was (0.25%) and the RLTO rate was (0.12%). The Act applies to all landlords who lease 25 or more units in either a single building or a complex of buildings located on contiguous parcels of real property (“Affected Landlords”).

Affected Landlords in Chicago and Evanston must pay the higher of the two rates in order to avoid severe penalties under the Act or RLTO. The Illinois Act, like the Chicago Residential Landlord Tenant Ordinance, imposes harsh penalties on landlords for noncompliance. Tenants may recover an “amount equal to the amount of the security deposit, together with court costs and reasonable attorneys fees” from landlords who fail to apply the proper interest rate. 765 ILCS 715/2.

Take immediate precaution to avoid present and future liability:

**1. Determine whether the Act applies to you before you pay interest on any security deposits held in 2009.** Remember that the RLTO rate still applies to buildings with less than 25.

**2. If the Act applies, pay the Act rate of 0.25% on all 2009 security deposits and cure**

**any deficient payments.** If you have already paid interest on 2009 security deposits at the Chicago RLTO rate of 0.12%, issue a second payment immediately for the difference. Remember that both the Illinois Act and RLTO allow 30 days for payment of interest. Be sure to cure any underpayment within this 30-day window.

### **3. Train your staff to deal with the variation between the Illinois Act and Chicago RLTO.**

Even though the Chicago RLTO interest rate is currently inapplicable, you will violate the RLTO if you fail to attach the Chicago interest rate to any 2010 lease. Accordingly, train your staff to: (1) attach the Chicago rate to each lease; but (2) pay the Illinois rate at the end of the 12-month lease term.

These recommendations are easy to implement compared to the consequences of inaction. If you have any questions or would like additional information on this subject, contact Ari J. Scharg at (312) 540-7514 or [ascharg@querrey.com](mailto:ascharg@querrey.com).

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*Ari Scharg is a member of the firm's litigation practice group and focuses his practice in the areas of commercial, real estate, employment and tort defense. In addition, Mr. Scharg works closely with startup companies and investment groups. He enjoys counseling entrepreneurs and drafting operating agreements and private placement memorandums.*

## Q&H Obtains Dismissal in Construction Case



**Terrence Guolee** and **Matthew Byrne** recently obtained the dismissal of all claims against their clients, a condo developer and the developer's construction project manager, in a construction accident case involving the demolition of a former roller rink on the north side of Chicago. The case involved serious injury claims of a project geologist. Interestingly, the accident allegedly occurred on the first day in which work resumed following a period where demolition at the site was suspended by the Chicago Police following the discovery of two corpses sealed in the walls of the building many years before.

## Municipal Liability Update: Who Is the Intended User?

In *Gatson v. City of Danville*, the Appellate Court of Illinois, Fourth District, analyzed whether the City of Danville owed a duty of care to the decedent under the Local Governmental and Governmental Employees Tort Immunity Act because he was not an intended user of the parking garage.

On April 4, 2006, the decedent, Charles Gatzen, was killed while descending a public parking garage stairwell when a stair stringer collapsed and, as a consequence, a stair case fell on him from above. On April 11, 2006, plaintiff, decedent's father, filed a complaint alleging negligence and willful and wanton misconduct against the City of Danville. In September of 2008, the trial court considered and granted the defendant's motion for summary judgment holding that the City owed no duty of care to the decedent under the Tort Immunity Act because

he was not an intended user of the parking garage. The plaintiff appealed and argued that the trial court erred in concluding decedent was not an intended user of the stairwell and that the City had a mandatory duty to inspect its property and maintain it in a safe condition.

Through discovery it was shown that the parking garage was open 24 hours per day, but parking was not permitted between the hours of 2:00 a.m. and 6:00 a.m. Any member of the public was able to rent a space in the parking lot and public restrooms were located within the parking garage as well. The City's motor vehicle parking system (MVPS) office was located on the first floor of the garage, and members of the public used the office to fill out and drop off monthly permit applications, pick up monthly parking pass keys, pay parking tickets, and lodge complaints.

### Q&H Municipal Practice Group Defeats Civil Rights Claim Brought By Police Officer



Congrats to **Dan Gallagher** and **Dominick Lanzito**, who recently obtained an order from the Federal District Court for the Northern District of Illinois granting their clients summary judgment and dismissing all of the plaintiff's civil rights claims. In the case, the plaintiff, a Chicago police officer, was alleged to have been present when cocaine was planted on an arrestee. In the subsequent Internal Affairs investigation, the plaintiff was ordered to appear at a location where Q&H's client

and several officers connected with the City of Chicago Police Department's Internal Affairs Division ("IAD"), were waiting with a drug sniffing dog, which subsequently indicated "positive" for drugs possibly in a duffel bag in the back of plaintiff's patrol car. Following the plaintiff identifying the duffel bag as his property, the bag was brought into the police station for an administrative search. Q&H also represented the City of Chicago as a defendant.

Following orders for the plaintiff to remain in the station and not touch the duffel bag, the plaintiff officer walked out the station with the bag. The defendants ordered a search for the plaintiff and the duffel bag. Plaintiff then returned to the station with the bag, which had been opened. While plaintiff claimed he had left properly because he was able to leave at the end of his shift, he was placed under arrest. Plaintiff then was charged with Obstruction of a Police Officer by the Cook County State's Attorney's Office, but was acquitted following a bench trial. Nevertheless, the police department sought plaintiff's termination in an administrative hearing, based on his disobeying the orders to remain in the station and not touch the duffel bag.

Plaintiff then filed suit alleging, among other claims, that the defendants had conspired to violate his civil rights and that he had been maliciously prosecuted and falsely imprisoned. In defense, among other arguments, Dan and Dominick set out evidence that the defendants had probable cause for their detention and arrest of the plaintiff based on his removal of the duffel bag - which was potential evidence in the claim that drugs had been planted on the original arrestee. In its opinion, the District Court agreed with each of the arguments raised for the defendants and dismissed all claims.

The garage also hosted public events at various times.

The MVPS superintendent had the responsibility for managing and maintaining the garage. She gave an evidentiary deposition in which she admitted that children and teenagers frequently played in the garage, especially on the rooftop parking deck and the ramps. In response, at some unspecified time prior to the stair-stringer collapse, the superintendent asserted that she had placed signs stating “no trespassing, patron parking only” around the garage, including at the automobile entrances. The Danville Code of Ordinances also made the garage a public place.

The appellate court highlights that as early as 2001, the City had knowledge that the stairwell had structural problems. In late September or early October of 2001, a MVPS maintenance worker alerted City officials to problems in the north stairwell. The maintenance worker testified that he was walking down the stairway at Level 2 when the staircase connecting Levels 2 and 2.5 broke loose from the stair stringers at the landing of Level 2. The maintenance worker jumped out of the stairwell saving himself, and upon report the City immediately closed it for repairs. The City then contacted a licensed structural engineer and on September 25, 2001, the City was provided with a written report of their findings.

In a section entitled “Assessment of Existing Conditions,” the report states, that “the stairway is beginning to fail.” The City was provided with four different options of proposed repairs and replacements. The City ultimately chose option number three, which proposed repairing and replacing the second floor landing, including “scraping off rust and re-painting around the landings” and came to an estimated cost of \$7,000.00. By November of 2001, the repairs were completed to Level 2, but the City never asked the engineer to return to the garage to re-inspect the stairwell or make any additional repairs. According to the MVPS superintendent, the City did not have an inspection policy and the stairwell underwent no further repair work before its April 2006 collapse.

On the day of the incident, the decedent was at the garage with two friends when the collapse occurred. Statements were taken from both teens at the time of the collapse and in July, 2006 they both gave evidentiary depositions. The witnesses admitted that the group had arrived on foot and did not have a car parked in the garage. They both also admitted that none of them owned a car or even had a driver’s license.

According to the testimony, the group walked up a stairwell to the garage’s roof where they spent some time throwing pebbles at the walls. The group spent somewhere between one to four hours on the roof and at some point the two friends descended the ramps telling the decedent to follow them, but they lost sight of the decedent.

According to the police report the group had mistakenly believed that they had caused a car accident by throwing rocks at a car and ran to avoid being arrested. The report indicated that one of the friends heard a crash while running down the ramp but ultimately the timing was uncertain. According to testimony the two friends searched for the decedent for a few hours. They looked through the parking garage and called decedent’s cell phone and the public safety building to see if the decedent had been arrested. Around 8:00 p.m. that evening the two friends parted ways and went home separately after they were unable to find the decedent.

In the City’s motion for summary judgment, the City argued that it had no duty to the decedent because he was not an intended and permitted user of the stairwell within the meaning of Section 3-102 of the Tort Immunity Act. The City defined “intended” as anyone using the garage for a legitimate purpose. The City relied on the depositions of the witnesses to argue that the decedent was not in the garage to park, use the bathroom, visit the MVPS office, or for any other intended purpose. Rather, the decedent was simply loitering on the premises. The plaintiff argued that the decedent was an intended user of the stairwell because 1) the decedent was using the stairwell as a pedestrian and, 2) the garage was a public place based upon the effect of Danville Code Section 114.01.

The question before the appellate court was whether the decedent was an “intended” user of the stairwell within the meaning of Section 3-102 of the Tort Immunity Act. The court examined the specific uses of the property on which the plaintiff was injured, not the general areas uses. In the court's view, the stairwell was intended to provide access to the parking decks for the general public.

The court referenced *Roberson v. City of Chicago*, 260 Ill.App.3d 994, 997-98 (1st Dist. 1994), which examined the intended uses of the median strip dividing a four lane highway, rather than the highway's intended uses. In analogizing *Roberson*, the court found that the parking decks and the stairwell were not one contiguous space with identical uses. The court refused to allow the City to limit the stairwell's intended uses with reference to the parking lots intended uses, and found that the decedent was using the stairwell for its intended purposes: ascending or descending the stairs on foot.

In relying upon the witness deposition testimonies regarding their specific movements, although they were found to differ substantially, both youths testified that they were moving around the garage and told the decedent to follow them. Rather than using the ramps, the decedent chose to use the stairwell. The court reasoned that the City built the stairwell to provide pedestrian access to the garage. There was no evidence presented that showed the decedent was, for example, bicycling, roller skating, skateboarding, or driving down the stairwell.

In response, the City argued that the decedent was not an intended user of the stairwell because he was not using it to access his parked car. The City compared this case to *Greene v. City of Chicago*, 209 Ill.App.3d 311 (1st Dist. 1991). In *Greene*, the court held a pedestrian walking to a friend's house was not an intended user of the street even though he was injured in the curbside parking area. *Id.* The court in *Greene* found the curbside parking area had two permitted uses: driving and parking, which necessarily included pedestrian access to parked cars. *Id.* at 313-14. Because Greene was not driving or walking to his parked car, he was not an intended user of the curbside parking area. *Id.*

The court found the City's comparison left much to be desired. Reasoning that in this case, the City intended the public use for stairwells to include ascending and descending the garage. The parking ramps themselves might have limited pedestrian uses, such as parking, using the MVPS office, using the restrooms, or attending public events, but the same was not true of the stairwell.

The appellate court found that the City's argument that decedent was not an intended user of the stairwell because he did not have what the City deems a “legitimate purpose” to be misplaced. Relying upon the witnesses' testimony, the court pointed out that both witnesses indicated that the decedent was using the stairwell to either access or exit the parking garage.

## Q&H Wins Lawsuit Following Parking Spot Altercation



Chicago shareholder **Chris Johnston** recently obtained a not guilty verdict for his client following a jury trial. In the case, the plaintiff alleged that Chris' client, a 54-year-old orchestra leader, was alleged to have pushed an 85-year-old to the ground during an altercation over a parking space. Plaintiff claimed over \$90,000 in medical bills and sought damages for a fractured hip that required a prosthetic implant. The jury accepted the defendant's testimony that he only pushed away the plaintiff when the plaintiff came up to him swinging his fists.

The City then argued that the decedent's possible violation of the City's trespassing ordinance as evidence that the decedent was not an intended user of the stairwell. However, in the court's view, the decedent's injuries were not within the risk contemplated by a violation of the trespass ordinance. The court in relying on the case of *Sullivan v. City of Hillsboro*, 303 Ill.App.3d 650 (5th Dist. 1999), found that the City's trespass ordinance was not designed to combat the type of injury the decedent suffered. The court reasoned that while the trespass ordinance aimed to keep trespassers out of the garage, which included the stairwell due to its dangers, the harm the decedent encountered (a falling staircase) was assuredly not within the type of harm the trespass ordinance was designed to protect against. The court held that, as a result, the decedent's possible violation of the trespass ordinance did not change his status as an intended user of the property.

With that, the appellate court held that as a matter of law the decedent was an "intended" user of the garage stairwell within the meaning of Section 3-102 of the Tort Immunity Act. Because intended users are always permitted users, the court found that the defendant was also qualified as a permitted user of the stairwell.

In concurring, Justice Steigmann pointed out the majority conclusion that the scope of the property under Section 3-102(a) is the stairs

themselves for the purpose of determining who was an intended user. Justice Steigmann took issue with the majority also appearing to conclude that the scope of the property should be the parking garage as a whole when determining who was a permitted user. In disagreeing with the majority's analysis on that issue Justice Steigmann reasoned that the scope of the property is either the stairs or it is the garage as a whole, but the scope should be the same when deciding who is an intended and permitted user. Justice Steigmann stated that the scope of the property in this case should have been limited to the stairs, and as such a question of material fact existed as to whether the decedent was "permitted" to use those stairs for their "intended" use. As Justice Steigmann pointed out, as the court's evaluation of the ever growing and increasingly complex public structures becomes the norm, the court's evaluations may too change.

Unfortunately, this case signals a reduction in the effectiveness of municipal defenses under Section 3-102 of the Tort Immunity Act. In effect, it sets the stage for potential municipal liability in cases where people are injured while arguably trespassing on municipal properties.

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*If you have any questions regarding this article, please contact Dan Gallagher via [dgallagher@querrey.com](mailto:dgallagher@querrey.com), or via 312-540-7674.*

## Q&H Prevails in Longstanding Insurance Coverage Dispute for Jesuits



**Michele Oshman, Robert Huebsch and Dennis Marks** of our Chicago office obtained a favorable ruling for the Chicago Province of the Society of Jesus (also known as the Jesuits) in a longstanding insurance coverage dispute with one of the Jesuits' primary insurers.

## **Alleged Violation of No Child Left Behind Act Cannot Support Retaliatory Discharge Claim**

By: Jason Callicoat - Chicago Office

The Seventh Circuit Appellate Court recently upheld summary judgment against a teacher who had alleged she was fired for reporting a violation the federal No Child Left Behind Act, although the court remanded the case because a triable issue existed on the teacher's claim of national origin discrimination.

Anne Darchak was a Polish bilingual probationary teacher, and she was let go after her one-year contract with the public school district ran out. She sued the board of education alleging national origin discrimination, retaliatory discharge and First Amendment retaliation, claiming she was fired for complaining that her teaching assignment in a room with mostly native Spanish-speaking students violated the federal "No Child Left Behind" Act. The U.S. District Court granted the school board's motion for summary judgment, and the teacher appealed.

During the 2004-2005 school year, Darchak had worked part-time for Princeton Alternative Center, where most of the students were Hispanic (77%); there were also African-American (17%) and Polish (6%) students. Princeton Principal Rosalva Acevedo hired Darchak for a one-year contract for the 2005-2006 year, to teach English as a Second Language ("ESL"), in anticipation of an increase in Polish-speaking students at Princeton. Darchak's contract was renewable at the end of the school year. Her position was funded by the Chicago Public Schools Office of Language and Cultural Education, and was dependent on the number of English Language Learners at Princeton.

Darchak claimed that within the first month of her full-time employment at Princeton, she noticed the Hispanic students were receiving better treatment than the Polish students, meaning better resources and native language services. When Darchak approached Acevedo with her concerns, Acevedo allegedly

responded, "[Hispanic students] are better than Polish and deserve more than Polish people.... [I]f you don't want to do whatever I tell you to do, you can leave my school." Then, in early November, Acevedo gave Darchak a "cautionary notice" charging her with "insubordination" for refusing to follow the ESL teaching schedule. When Darchak confronted Acevedo about the notice, Acevedo allegedly replied, "I brought you to this school and you stupid Polack pushed the teachers against me."

Darchak immediately began complaining to Acevedo's supervisors in meetings and letters about what she perceived as Acevedo's mismanagement of the school, but she did not mention any disparaging remarks about her national origin. In March 2006, a teaching position opened in Room 206, a classroom with a number of English Language Learners, most of whom were native Spanish speakers. After confirming with the Chicago Public Schools Accountability Department that Darchak was qualified to temporarily teach the students in Room 206, Acevedo assigned her to the classroom on a temporary basis.

Darchak felt this assignment violated the No Child Left Behind Act because she was not qualified to teach in a bilingual Spanish classroom. She repeatedly expressed this concern to Acevedo and to Acevedo's supervisors. On March 10, Darchak received a second cautionary notice, which said that she had been discourteous and negligent in supervising her students. She then received a negative performance evaluation, which stated that Darchak had difficulty following rules, interacting with students, and getting along with other school community members.

After a funding decrease, Acevedo did not recommend renewing Darchak's one-year contract, and the school board accepted Acevedo's recommendation. In the ensuing lawsuit, Darchak claimed the Board refused to

renew her teaching contract in retaliation for her complaints that her teaching assignment violated the No Child Left Behind Act.

To establish a retaliatory discharge, Darchak had to demonstrate that she was (1) discharged; (2) in retaliation for her activities; and (3) that the discharge violated a clear mandate of public policy. The appellate court found that nonrenewal of Darchak's contract did not violate "a clear mandate of public policy." Clearly mandated public policies include reporting an employer's criminal violations, or reporting violations of health and safety standards.

Darchak claimed the clearly mandated public policy in her case was found in the general purpose declaration of the No Child Left Behind Act: "that all children have a fair, equal, and significant opportunity to obtain a high-quality education." Darchak claimed that the Polish students at Princeton did not have the same access to a "high-quality" education as the Hispanic students did. The appellate court noted that while educational quality was doubtless an important social objective, Illinois courts have never recognized a claim for retaliatory discharge based on a reported violation of that policy or any like it. Instead, the appellate court found that the Illinois Supreme Court had defined "public policy" within the limited bounds of reporting criminal conduct and health and safety violations. The appellate court also noted that the Illinois Supreme Court had consistently sought to restrict the common law tort of retaliatory discharge.

As a result, the appellate court refused to recognize this claim for retaliatory discharge based on the teacher's complaints that her school was violating the general purpose stated in the No Child Left Behind Act. As a separate basis for its decision, the court also found that the non-renewal of Darchak's contract was not a "discharge" under the Illinois case law interpreting that term.

Darchak had also sued the school board claiming that Acevedo had violated her First Amendment rights by not renewing her contract based on her statements that No Child Left Behind was

violated. The appellate court found the lower court had properly granted summary judgment against Darchak, because the school board was not responsible for the alleged constitutional violations of its employee, Acevedo, pursuant to the U.S. Supreme Court decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Darchak had presented no evidence that the school board itself had directly violated her First Amendment rights.

The appellate court did remand the case to the lower court for a determination of the national origin discrimination claim. The court found that although the only evidence of the principal's alleged improper racial motivation for not renewing the contract came from the teacher's own testimony, a jury should be allowed to evaluate the believability of that testimony.

As to the retaliatory discharge claim, the appellate court's decision maintains the narrow bounds under which such claims can be brought. The court declined to recognize an expansion of these claims, such that "general purpose" language in a piece of legislation such as the No Child Left Behind Act, could be used to support them. The Act's general purpose statement essentially provided that the Act seeks to give equal opportunities for high-quality education to all children. Almost any complaint by a teacher about the operation of the school could arguably implicate that general purpose language. Any subsequent firing of the teacher could then be the basis of a retaliatory discharge claim. The appellate court's decision re-affirms that claims of retaliatory discharge in Illinois must follow reports of criminal conduct or health and safety violations, not simply making complaints that a school could be providing better education to its students.

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**Jason Calliccoat**, an associate in our Chicago office, concentrates his practice in municipal liability and construction law. He has previous experience in the areas of construction injury, insurance coverage, and workers compensation. If you have any questions regarding this article, please contact Jason via [jcalliccoat@querrey.com](mailto:jcalliccoat@querrey.com), or via 312-540-7646.

## Rebuilding Your Credit After Bankruptcy

By Robert R. Benjamin - Chicago Office

Credit is necessary and affects our daily lives. Not only do you need credit to obtain a loan to buy a home or car, but your credit score is an important factor in renting an apartment, the cost of insurance premiums and whether you and your family are eligible for certain student loans. Foreclosures, medical bills, divorce, job loss through layoffs and business failures are the primary reasons why Americans seek relief under the bankruptcy laws. With these symptoms of financial distress on the rise, bankruptcy filings are experiencing an upsurge as well.

Rebuilding your credit after bankruptcy is not impossible. Many things can affect your credit score. Credit scores will reflect not only a bankruptcy filing but foreclosures, lawsuits and past due bills. Rehabilitating your credit after the filing of a Chapter 7 or after the conclusion of a Chapter 13 petition can be done with a few careful steps to reestablish creditworthiness.

**Start with a credit card.** You may have a credit card where there was no balance due at the time you filed your bankruptcy petition, as a result no debt was discharged. Many department stores will continue to honor their credit card when there was no balance due at the time of filing and therefore not scheduled as a debt to be discharged.

Apply for a credit card with a low spending limit. Then promptly pay the balance due each month.

Investigate a "secured" credit card. With a secured credit card you are permitted to purchase items on credit to the same extent that you have deposited a sum of money with the credit card company. Banks that offer secured credit cards usually require you to open a savings account which allows the bank to draw money from the account if you do not pay what you owe. Be careful with these credit cards because the interest rates can be steep. Be especially careful of credit cards issued from

South Dakota because there is no limit to the amount of interest they can charge. Go online to [www.Bankrate.com](http://www.Bankrate.com) or [www.CreditCards.com](http://www.CreditCards.com) to search for credit cards with better terms.

Your credit risk actually improves after you file a Chapter 7. Although your credit score will be low after filing a bankruptcy petition, the credit card issuer knows that you cannot file another Chapter 7 for eight years and you have no other debts putting pressure on you to pay them as opposed to your new credit card. Besides, the creditors know that you have an incentive to pay the new credit card debt so you can rehabilitate your credit. There are deals out there for getting credit cards if you search enough.

**Open a new checking or savings account.** If your job offers direct deposit of your paycheck, use the bank your employer has negotiated with; they will usually accommodate you in opening an account.

**Apply for a small loan.** Apply for a \$1,000.00 loan from a bank or credit union. Although you may be asked to put up collateral, a small loan that is regularly paid back can help rebuild your credit.

**Obtain a car loan.** Although interest rates will be high, the car loan is the next best thing to a mortgage for building credit. If you attempt to get a car loan with little or no money down, it is very likely that you will be turned down. The closer you come to cash and trade-in value totaling 20% of the purchase price, the easier it will be for the dealer to get you a loan.

Work with your dealer to attempt to get a loan from a lender that is affiliated with the automobile company where you are buying the car. Those lenders are not only trying to make a profit on car loans, but also trying to sell cars. So the lender may be willing to work with you on the loan. The goal with the first car loan is to help build your credit, so search for a used car to keep your costs down.

**Work towards obtaining a mortgage.** The earliest that you will be able to obtain a mortgage and buy a home after a bankruptcy filing is two years from the date of filing. You will need to put money down when you buy your next home. Once again, the closer you get to putting down 20% of the purchase price, the more likely it is that you will get your mortgage. Obtaining a mortgage loan guaranteed by the Federal House Administration will provide easier terms than a traditional mortgage. A bank trying to sell a foreclosed home will also work with you and may even provide the financing necessary to purchase the home. Work with a mortgage broker to assist in finding a loan.

**Pay your new credit card bills or bank loans as soon as you receive the monthly statements.** Don't try to time your payments so that they arrive at the creditors' billing address the day the bill is due. Invariably you will miss the payment date at least once and that will drop your hard earned credit score. Consider an automatic payment directly from your checking account. However, you must be sure that the funds are in the checking account or you wind up with a double hit, the creditor not being paid and the bank charging you for an overdraft fee.

**Make sure that your credit accounts are reported.** After you have established credit, contact the creditor and find out if they are reporting your good credit to the credit reporting companies. If they are not, encourage them to send in a report and start looking for other credit opportunities.

**Avoid "credit repair" offers.** These are companies that tell you that for a fee they will clear up your credit. What they do is complain to the credit bureaus about negative entries on your credit report. The credit reporting company then temporarily removes the negative items while they attempt to confirm the accuracy of the objections. If the credit repair company fails to prove that a mistake was made, then the negative entries will be listed again. If you truly have found an error in the credit report you can simply contact the reporting company and provide them with proof that the alleged late payment was really made on time or that you did

pay off the bill that shows up as delinquent. And you have not had to pay a fee.

**Keep track of your credit.** You can order a free credit report from any of the three major credit reporting services. Go online to [www.annualcreditreport.com](http://www.annualcreditreport.com) to learn what is being reported to merchants about your credit. By law you are entitled to one free credit report annually from each of the reporting services.

In conclusion, repairing your credit after bankruptcy takes organization and careful attention. But credit repair has long lasting benefits; so it is worth the effort.

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**Robert R. Benjamin**, a shareholder in our Chicago office, has over 30 years experience in bankruptcy matters, including business reorganizations, creditor's remedies, and individual insolvencies. Bob also offers substantial expertise in complex litigation such as business disputes, shareholder derivative actions, mechanics liens, and mortgage foreclosures. Bob was one of the original panel of Chapter 7 trustees and helped develop many of the forms and procedures currently used by the trustee program. If you have any questions regarding this article, or *Querrey & Harrow's* bankruptcy and creditor's rights practice, please contact Bob at [rbenjamin@querrey.com](mailto:rbenjamin@querrey.com), or via 312-540-7140.



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