

# **Qued In**

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

February 2010

*Editors: Terrence Guolee  
and Jillian Taylor*



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## Dominick Lanzito and Christopher Keleher Voted In As Q&H Shareholders

Congratulations to **Dominick Lanzito** and **Christopher Keleher** who were voted into the partnership at Querrey & Harrow on January 23, 2010.

**Dominick Lanzito** 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.

During his service as an Assistant State's Attorney, Dominick conducted approximately 150 bench trials on behalf of the state. He also has tried several matters to jury verdict, both in state and federal courts. His litigation experience includes complex, voluminous discovery, as well as dispositive motions and appeals. Notably, Dominick has successfully defeated class action and injunctive claims in several matters. He is a member of the Trial Bar for the Northern District of Illinois and the Seventh Circuit Court of Appeals.

Apart from litigation, Dominick counsels technology and emerging corporations in all aspects of their business, from entity formation, IP protections, IP licensing, contract negotiations, and private placements.

**Christopher Keleher** concentrates his practice in appellate litigation. He also has experience in commercial litigation and insurance coverage. Chris has written briefs and presented arguments to the U.S. Court of Appeals for the Seventh Circuit and the Appellate Court of Illinois. He also drafted a *writ of certiorari* to the Supreme Court of the United States. Beyond the appellate realm, Chris assists trial attorneys in writing motions for summary judgment and motions to dismiss.

Prior to joining Q&H, Chris was a clerk to the Honorable William J. Bauer of the U.S. Court of Appeals for the Seventh Circuit. Chris graduated law school *summa cum laude* and was awarded the Order of the Coif. He served as the Editor of Notes and Comments and the Business Manager for the DePaul Law Review. He also received the CALI Award in Legal Writing II, Advanced Trial Advocacy, Criminal Law, Federal Income Taxation, and Pre-Trial Litigation.

Chris also passed the Illinois Certified Public Accountant Examination on the first sitting.

### Q&H Attorneys Attend Chicago Bar Association CLE in Cancun Meetings

Chicago shareholders **Dan Gallagher**, **Terrence Guolee**, **Larry Kowalczyk** and **Paul O'Grady** attended the Chicago Bar Association's Continuing Legal Education ("CLE") in Cancun event. Dan, Terry, Larry and Paul were joined at the event by Cook County States Attorney and CBA President **Anita Alvarez**, Seventh Circuit Appellate Court **Judge William J. Bauer**, Illinois Supreme Court **Judge Anne Burke** and her husband **Alderman Edward Burke** and several other legal luminaries. Once in Mexico, all met with Mexico Supreme Court **Chief Justice Guillermo I. Ortiz Mayagotia** and **Justice Jose Fernando Gonzalez-Salas**. Dan Gallagher was involved in organizing the event and presented at a session on legal ethics.

## **Liability Update: *Thornton* Case Expands Negligent Infliction of Emotional Distress Claims and Clarifies Requirement of Counterclaims for Set-offs**

By: Patrick S. Wall - Chicago office

Recently, the Illinois Supreme Court clarified previous rulings on how settlements will affect non-settling defendants' set-offs as well as issuing a new rule regarding expert testimony on claims of negligent infliction of emotional distress. *Thornton v. Garcini*, Docket No. 107028, issued October 29, 2009.

The facts of *Thornton* are quite disturbing. The Plaintiff was an expectant mother who attempted to give birth to a severely premature 26 week old infant. However, the baby became breached, and later entrapped at the neck during the delivery. When informed of the delivery problems, the defendant physician took a shower and arrived at the hospital having told the nurses essentially not to deliver the baby. The infant died before the physician arrived at the hospital.

The Plaintiff waited over an hour - with the deceased infant partially delivered - for the physician to arrive. As a result of the lying in a hospital bed for over an hour with the infant partially delivered, Plaintiff testified that her emotional state was devastated and that she soon became suicidal. Plaintiff said she could not eat nor sleep as a result of the delivery. Following this event, she could not stop reliving it, even after seeking medical treatment.

Subsequently, Plaintiff sued the physician, among others, including the hospital who settled prior to a second trial of the matter. The case ultimately went to trial where the Plaintiff and her mother testified as to the effect of the infant's death and the circumstances of the delivery had on Plaintiff. Among her claims, the Plaintiff submitted a negligent infliction of emotional distress claim. Negligent infliction of emotional distress involves conduct that goes beyond the bounds of decency and would be considered intolerable in a civilized society. No expert witness testimony was presented on Plaintiff's claim for emotional distress. The jury awarded her \$700,000 in damages. the Defendant immediately appealed.

On appeal, Defendant argued that the Plaintiff failed to prove negligent infliction of emotional distress by expert testimony, and that Defendant was entitled to set-off the amount of the hospital's settlement with the Plaintiff, following the first trial. The Appellate Court affirmed. The Illinois Supreme Court granted argument.

The Defendant argued that the Plaintiff failed to offer expert testimony to establish the causation of her emotional distress in connection with delivering the deceased infant. The Defendant argued that under the Illinois Supreme Courts' decision in *Corgan v. Muehling*, emotional distress must be proven by expert testimony to ensure any verdict for emotional distress is supported by competent evidence. Plaintiff argued *Corgan* required otherwise.

In *Corgan*, the plaintiff brought an action for psychological malpractice alleging the defendant therapist violated his duties when he engaged in sexual relations with her under the guise of therapy. The Illinois Supreme Court examined the issue of whether a plaintiff must allege physical symptoms to support a claim for emotional distress. In rejecting such a requirement, The Court stated:

[L]ack of precision is not a justifiable reason to preclude recovery, as expert witnesses such as psychiatrists, psychologists and social workers are fully capable of providing the jury with an analysis of a plaintiff's emotional injuries. [T]his court has not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress. Furthermore, the women and men of the mental health care field have made significant improvements in the diagnosis, description and treatment of emotional distress. *Corgan*, 143 Ill.2d at 311-12.

In reaching the conclusion that a plaintiff need not allege physical symptoms of emotional distress, the court quoted *Knierim v. Izzo*, 22 Ill.2d 73 (1961):

The stronger emotions when sufficiently aroused do produce symptoms that are visible to the professional eye and we can expect much more help from the men of science in the future". "In addition, jurors from their own experience will be able to determine whether conduct results in severe emotional disturbance.

*Corgan*, 143 Ill.2d at 311-12, quoting *Knierim*, 22 Ill.2d at 85.

The Illinois Supreme Court agreed with plaintiff that *Corgan* does not require expert medical testimony in order to recover for emotional distress. Rather, the existence or nonexistence of

medical testimony goes to the weight of the evidence, but does not prevent this issue from being submitted to the jury.

In so ruling, the Illinois Supreme Court specifically overruled a First District Case, *Hiscott v. Peters*, an oft-cited case which required expert testimony to establish negligent infliction of emotional distress as a result of a car accident. The Illinois Supreme Court held that expert testimony, while it may assist the jury, is not required to support a claim for negligent infliction of emotional distress.

This is a big decision with serious ramifications in the area of personal injury law in Illinois. However, the Court appeared to signal some hesitation in endorsing a "bright line" rule, later stating that expert testimony may be required in some cases to prove physiological injury, but it was unnecessary given the facts of this case discussed in painful detail above.

## **Q&H Obtains Not Guilty Verdict In Wrongful Death Medical Malpractice Case. \$16 Million Jury Demand Averted.**



Chicago shareholder **Robert Huebsch** and associate **Patrick Wall** obtained a not guilty verdict on February 1, 2010 in a medical negligence wrongful death trial brought against their client, a radiologist, as well as a gastroenterologist and a south side hospital.

The Plaintiff alleged the radiologist deviated from the standard of care when he failed to recognize a very rare disease known as Budd-Chiari on a CT exam taken when the decedent first presented to the defendant hospital. Plaintiff further alleged that the Defendant gastroenterologist failed to transfer the patient to a tertiary care center as would be the standard of care to deal with the Budd-Chiari. Plaintiff argued that, as a result of these alleged deviations, the decedent died at the University of Chicago Hospital approximately two weeks later from liver failure.

Bob and Pat argued the radiologist had limited involvement in this case and the decedent was seen by numerous physicians who correctly confirmed the diagnosis and treated the patient properly at the defendant hospital and the University of Chicago. As such, Bob and Pat argued the radiologist read the CT properly as a radiologist in the same or similar circumstances would have. In addition, Bob and Pat argued any deviation from the standard of care by the radiologist failed to proximately cause the death of the decedent, arguing that the cause of death at the University of Chicago was due to multi-organ failure as a result of a flawed TIPS procedure.

Plaintiff's counsel asked the jury for \$16 million. However, the jury deliberated for less than two hours before returning a not guilty verdict in favor of the hospital and both doctors.

Defendant next argued that since the hospital settled with the Plaintiff prior to trial, he would be entitled to a dismissal of the suit due to the "single recovery rule", i.e. that a plaintiff may only recover once for an injury. Alternatively, Defendant argued he was entitled to a set-off of what the hospital paid to Plaintiff to settle the case.

As to the single recovery argument, the court reiterated that obtaining a judgment against one tortfeasor does not bar a plaintiff from bringing claims against another defendant. The court also found but that the Defendant waived the claim by failing to argue it at the trial court level. The court then addressed the Defendant's argument that it was entitled to a set off from the hospital's settlement. The Plaintiff argued the defendant waived the argument since it had not raised the issue in its Answer to the Plaintiff's Complaint at Law. The Illinois Supreme Court agreed.

The Supreme Court discussed Section 2-608 of the Illinois Code of Civil Procedure which states a "set-off" may be raised as a cross claim in the answer of the defendant. While the court noted that the code speaks in permissive terms, by the use of the word "may", the court noted that it had also recently recognized that a party cannot be afforded relief without a corresponding pleading. *Mid America Bank, FSB v. Charter One Bank, FSB*, 232 Ill.2d 560, 574 (Ill. 2009).

The Court reiterated that "a defendant is required to raise a claim for a set off in the pleadings to give the plaintiff notice and an opportunity to defend against the claim." Accordingly, the Court agreed with the trial court, which denied Defendant's motion for a set off as he failed to raise the set-off issue till his post-trial motion, finding that Defendant had forfeited this claim.

The import of these rulings cannot be understated. First, the court's ruling on expert testimony is dangerous, as it may lead courts to allow questionable claims of emotional distress to reach juries, and lead to awards not consistent with the evidence, nor medically verifiable. This could increase awards and settlements, increasing the cost of litigation across the board.

Additionally, the court's ruling on set-offs presents a danger to defendants in thousands of pending cases. For example, the case does not address set-offs in claims currently pending before the courts. Specifically, it has been a matter of routine in Cook County and throughout Illinois to enforce set-offs at the time of trial or judgment, with no consideration of whether the defendants had pleaded any counterclaims against plaintiffs seeking set-offs.

To that end, the court was unclear if their ruling is prospective or retrospective. Given, however, that they were construing an existing statute, the belief has to be that the ruling applies to pending cases. Where this becomes problematic is when claims have progressed to the point that a defendant seeking to file a counterclaim for set-off is met with the argument that the statute of limitations for the filing has expired.

\* \* \*



**Patrick Wall**, an associate in our Chicago office, concentrates his practice in the defense of medical malpractice and Nursing Home Care Act litigation. He has represented individuals and corporations in matters through all phases of litigation including trying several matters to verdict. If you have any questions regarding this article, please contact Pat via [pwall@querrey.com](mailto:pwall@querrey.com), or via 312-540-7598.

## COMMUNITY INVOLVEMENT

Chicago office counsel **E. Leonard Rubin** recently finished teaching a course in Entertainment Law at the John Marshall Law School. Len has taught this course for over 20 years.

## Intellectual Property Update: Web Site Creation and Maintenance Not Subject to UCC; Copyright is Owned By Designer

By: Teresa Mysliwy - Merrillville, Indiana office

A recent Indiana Supreme Court case held that the creation of a website and its maintenance is not subject to the Uniform Commercial Code (U.C.C.) and that the copyright for the website is owned by the designer, rather than the purchaser.

In the case, Piece of America (POA), a small business that sold one-inch-square parcels of land in each of the 50 states, decided they needed a plan to market their product. To do so, they hired Gray Loon Marketing, which agreed to design and publish POA's website. POA agreed to Gray Loon's proposal and paid a deposit, paying the remainder after Gray Loon had completed the site. About six months later, POA wanted to make changes, some of which involved major programming work. POA did not request a proposal or quote, and Gray Loon did not provide one. After Gray Loon had completed the changes and billed POA for another \$5,000, POA told Gray Loon that it no longer required the changes. Gray Loon also charged POA \$75 per month to host the website. POA did not pay for either the modifications or the hosting fee, so Gray Loon took the website offline.

After the trial court entered judgment for Gray Loon on its claim for non-payment and against POA on its counterclaim for conversion, which

alleged that Gray Loon took its original website, for which it had paid, POA appealed. The trial court applied the U.C.C. in its conclusions of law, as did the Court of Appeals.

The Indiana Supreme Court held that the "predominant thrust" of this transaction was a service, rather than a good, and therefore, the U.C.C. did not apply. The arrangement called for a designer to fashion, program and host POA's operation, which was not tangible or moveable in the conventional sense. Even though the website could be copied using tangible, moveable objects such as hard drives, cables and disks, it did not follow that the information that those products contained were goods as well. Therefore, the U.C.C. was not applicable, and ordinary contract law was employed.

POA then contended that Gray Loon's "destruction" of the paid-for website constituted conversion. Gray Loon had advised POA that it owned the work product; however, even by doing so, the Court held that Gray Loon did not vest ownership in POA. POA's claim to ownership could rest on two concepts in copyright law: 1) the site could be a "work for hire" in which it's the original owner, or 2) Gray Loon could have been the initial owner but transferred ownership to POA.

### Bruce Schoumacher Accepts Society of Illinois Construction Attorneys Presidency



Congratulations to Chicago shareholder **Bruce Schoumacher** who recently became President of the Society of Illinois Construction Attorneys ("SOICA"). Membership in SOICA is by invitation only. It is limited to attorneys licensed to practice in Illinois who have devoted a majority of their professional time to the practice or teaching of construction law for a period of at least ten years immediately preceding nomination, who have made a significant and outstanding service and contribution to the practice of construction law through teaching and lecturing, authorship of books, articles, program materials or other scholarly publications, and/or substantial participation in or leadership of professional or industry organizations and committees concerned with the practice or application of law in construction industry; and who have demonstrated, in the opinion of the other Members of the Society, the highest ethical and professional standards of practice.

Under copyright law, a “work for hire” is 1) a work prepared by an employee within the course and scope of his/her employment; or 2) a work specially ordered or commissioned for use as a contribution to a collective work...if the parties expressly agree in writing that the work shall be considered a work for hire. A copyright vests ownership initially in the author of the work, giving the owner exclusive rights to reproduce it, prepare derivative works based upon it, to distribute copies of the work, and to display it publicly. 17 USC 106. The Court examined first whether the seller was an employee or independent contractor. Works specially ordered or commissioned from independent contractors aren’t works for hire unless the work falls within one of nine narrow statutory categories and the parties agree in a signed instrument. Here, it was clear that Gray Loon was not an employee, but an independent contractor and no writing existed agreeing that POA was the owner; therefore, this was not a “work for hire”.

Secondly, transfer of ownership of a copyright requires a writing signed by the owner or his agent conveying the rights. POA contended that Gray Loon’s proposal document stated that it was Gray Loon’s “philosophy that clients have purchased goods and services from us and that inherently means ownership of those goods and services...” and that transferred rights to POA. The Court stated that Gray Loon’s statement did not carry the weight and certainty required by the Copyright Act to transfer ownership, especially since the document was not signed. Therefore, the website was not owned by POA.

Finally, the court noted that one incidence of ownership that might be transferred without a writing is a “nonexclusive license”, which is created where parties intend to transfer a copyright but fail to do so in writing. The license can be granted orally or implied from the parties’ conduct. In reviewing the facts, the Court found that POA had a nonexclusive

license. As such, POA never had ownership of the site under copyright law, merely a grant of rights to use the site. Because POA did not own the website, it could not bring a conversion claim. Even if it had owned the website, the Court held, Gray Loon did not commit conversion. It performed the work, including hosting the website, at POA’s request. POA’s failure to pay the hosting fees was justification alone for Gray Loon taking down the site.

If POA had paid all other fees, the Court noted, there might be some dispute as to whether Gray Loon had breached its license agreement by refusing to transfer the files, but POA failed to pay the modification invoice and did not request the files from Gray Loon, so Gray Loon was not at fault for withholding the files or removing the website. Therefore, the trial court’s judgment was affirmed. *Dennis Collwell & Frank Splittorff d/b/a Piece of America v. Gray Loon Outdoor Marketing Group, Inc.*, Ind. S. Court 82S04-0806-CV-00309 (May 19, 2009).

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***Teresa Mysliwy***, an associate in our Merrillville, Indiana office, concentrates her practice in subrogation, litigation, and collections. During her legal career, she has handled and/or arbitrated thousands of insurance subrogation disputes. She is also a certified civil mediator in the state of Indiana. After receiving her law degree, Ms. Mysliwy worked for 11 years for one of the nation’s largest insurance carriers. Prior to joining *Querrey & Harrow*, Ms. Mysliwy was a partner at a large insurance defense firm, and subsequently, a sole practitioner.

*If you have any questions regarding this article, or Querrey & Harrow’s operations in Indiana, please call Teresa via 219-738-1820, or via [tmysliwy@querrey.com](mailto:tmysliwy@querrey.com).*

## **Illinois Supreme Court Rules Medical Malpractice Damage Caps Are Unconstitutional**

By: Terrence Guolee - Chicago office

On February 4, 2010, the Illinois Supreme Court ruled in *LeBron v. Gottlieb Memorial Hospital*, No. 105741 and 105745 *cons.* (2010), that the state's medical malpractice reform law passed in 2005, Section 2–1706.5 of the Code of Civil Procedure (735 ILCS 5/2–1706.5 (West 2008)) is unconstitutional. The Court's decision reverses the law's capping of non-economic damages - such as pain and suffering - for physicians at \$500,000 and hospitals at \$1 million.

The Court involved the severe disability of a young girl, Abigaile Lebron. Cook County Circuit Judge Joan Larsen, relying on the Illinois Supreme Court's prior decision in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997), ruled that the statutory caps violate the separation of powers clause of the Illinois Constitution (Ill. Const. 1970, art. II, §1) and declared the entire Act unconstitutional in in 2007.

In particular, the circuit court determined that the statutory cap on noneconomic damages in section 2–1706.5, like the statutory damages cap at issue in *Best*, operates as a legislative "remittitur" in violation of the separation of powers clause of the Illinois Constitution (Ill. Const. 1970, art. II, §1). Based on the Act's inseverability provision (Pub. Act 94–677, §995, eff. August 25, 2005), the circuit court invalidated the Act in its entirety.

Reviewing the trial court's order, the Illinois Supreme Court noted that the limitation on noneconomic damages set forth in section 2–1706.5 is one of several "significant reforms" to the civil justice system the General Assembly adopted in response to a "health-care crisis" in the state. Pub. Act 94–677, §101(4), eff. August 25, 2005. According to the legislative findings set forth in the Act, the rising cost of medical liability insurance increases the financial burdens on physicians and hospitals and is believed to have contributed to a reduction of available medical care in portions of Illinois. Pub. Act 94–677, §§101(1), (2).

The Supreme Court also noted that the that the scope of the statute at issue in *Best* was much broader than the statute before it in *LeBron*. The damages cap in *Best* applied to all actions, whether based on the common law or statute, that sought damages "on account of death, bodily injury, or physical damage to property based on negligence, or product liability based on any theory or doctrine." 735 ILCS 5/2–1115.1(a) (West 1996). In contrast, the damages cap in section 2–1706.5 applies to "any medical malpractice action or wrongful death action based on medical malpractice." 735 ILCS 5/2–1706.5(a) (West 2008). Nevertheless, the Court found the "encroachment upon the inherent power of the judiciary is the same in [*LeBron*] as it was in *Best*."

Of interest, the Court specifically noted the defendants' arguments in support of the Act that the limitations provided were consistent with other states' statutes limiting noneconomic damages in medical malpractice cases. *Citing*, Alaska Stat. §09.55.549 (2007) (\$250,000 to \$400,000 cap); Cal. Civ. Code §3333.2 (West 2009) (\$250,000 cap); Colo. Rev. Stat. §13–64–302 (2008) (\$300,000 cap); Fla. Stat. §766.118 (2009) (\$150,000 to \$1,500,000 cap); Ga. Code Ann. §51–13–1(b) (2009) (\$350,000 to \$1,050,000 cap); Haw. Rev. Stat. §663–8.7 (2009) (\$375,000 cap); Idaho Code Ann. §6–1603 (2008) (\$250,000 cap); Md. Code Ann. Cts. & Jud. Proc. §3–2A–09 (2009) (\$650,000 cap with \$15,000 annual increase beginning January 1, 2009); Miss. Code Ann. §11–1–60(2)(a) (2008) (\$500,000 cap); Mo. Rev. Stat. §538.210 (2009) (\$350,000 cap); Nev. Rev. Stat. §41A.035 (2009) (\$350,000 cap); N.D. Cent. Code §32–42–02 (2009) (\$500,000 cap); Ohio Rev. Code Ann. §§2323.43(A)(2), (A)(3) (West 2009) (\$250,000 to \$1,000,000 cap); Okla. Stat. tit. 63, §§1–1708.1F, 1–1708.1F–1 (2009) (\$300,000 cap which may be lifted in some cases); S.C. Code Ann. §15–32–220 (2008) (\$350,000 to \$1,050,000 cap with annual adjustment); Tex. Civ. Prac. & Rem. Code Ann.

§74.301 (Vernon 2009) (\$250,000 to \$500,000 cap); Utah Code Ann. §78B-3-410 (2008) (\$400,000 cap beginning July 1, 2002, plus yearly inflation adjustment); W. Va. Code §55-7B-8 (2008) (\$250,000 to \$500,000 cap, plus yearly inflation adjustment); Wis. Stat. §893.55(4)(d)(1) (2008) (\$750,000 cap).

While the Court reviewed the other states' statutes for whether their ranges were consistent with what was proposed by the Act in Illinois, it also noted that it could not determine the basis used by defendants to determine that the ranges set by other states were "reasonable," and noted that it is not the Illinois Supreme Court's role to judge the reasonableness of other states' legislation. Tellingly, the Court then dispatched this argument by noting that defendants':

contention that because the damages caps established by section 2-1706.5 fit within the range of caps established by other states is not dispositive of whether section 2-1706.5 runs afoul of the separation of powers clause of this state's constitution. That "everybody is doing it" is hardly a litmus test for the constitutionality of the statute.

The Court also noted that it was not persuaded by defendants' argument that the circuit court's judgment should be reversed because courts of other states, which have considered whether a limitation on noneconomic damages violates separation of powers, have rejected this argument. *Citing, Garhart v. Columbia/HealthOne, L.L.C.*, 95 P.3d 571, 581-82 (Colo. 2004), *Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 955-56, 663 N.W.2d 43, 76 (2003); *Evans v. State*, 56 P.3d 1046, 1055-56 (Alaska 2002); *Zdrojewski v. Murphy*, 254 Mich. App. 50, 81-82, 657 N.W.2d 721, 739 (2002); *Judd v. Drezga*, 2004 UT 91, 36, 103 P.3d 135, and *Estate of Verba v. Ghaphery*, 210 W. Va. 30, 35, 552 S.E.2d 406, 411 (2001); *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 470-71, 4 P.3d 1115, 1121-22 (2000); *Owens-Corning v. Walatka*, 125 Md. App. 313, 335-39, 725 A.2d 579, 590-02 (1999). On this point, that Court noted that, while decisions from other jurisdictions can

provide guidance where precedent from Illinois is lacking, Illinois law is not a "blank slate" based on the prior decision in *Best*.

As a result, the Court held that the limitation on noneconomic damages in medical malpractice actions set forth in section 2-1706.5 of the Code violates the separation of powers clause of the Illinois Constitution (Ill. Const. 1970, art. II, §1) and is invalid. Because the Act contains an inseverability provision (Pub. Act 94-677, §995, eff. August 25, 2005), such that the entire Act is void in its entirety.

*[Editor's Note: We previously wrote on Judge Diane Larson's ruling in our December 2007 Newsletter (available at <http://www.querrey.com/newsletter-17.html>). At that time we predicted the Supreme Court's ultimate decision above and, in particular, noted that the inseverability provision in the Act likely was "a calculated effort to make the initial passage of the Act a worthless endeavor." We also noted that, with the *Best* decision, there was little hope that the entire Act would survive review. We continue with our prediction and belief set out in our earlier article that "in all likelihood the prospects for tort reform in Illinois are effectively "dead," short of amendment to the Illinois Constitution."]*

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**Terrence Guolee**, a shareholder in our Chicago office and an Editor of this newsletter, has successfully represented defendants, plaintiffs and insurance carriers in dozens of complex, multimillion dollar claims covering a wide area of facts and law, in both state and federal court, up to both the Illinois and United States Supreme Courts. Mr. Guolee represents several municipalities, elected governmental officials and their employees in very complicated civil rights class actions. He also represents several businesses in defense of statutory consumer rights class action claims and has a long record of successful representation of property owners, utilities and contractors in high-exposure catastrophic injury and loss claims.

If you have any questions regarding this article, contact Terrence via [tguolee@querrey.com](mailto:tguolee@querrey.com), or via 312-540-7544.

## Medical Malpractice Update: College Must Indemnify Hospital For Lawsuit Arising Out Of Actions Of A Student

By: Jamie Goldstein – Chicago office

In a recent ruling by the First District Appellate Court, a college was required to indemnify a hospital for the cost of defending a lawsuit that arose out of the conduct of one of its students who was participating in a clinical training program at the hospital. *Smith v. West Suburban Medical Center*, Case No. 06 L 11238 (1st Dist. January 21, 2010).

In November of 2005, Kilume Nkulu was enrolled as a student at Triton Community College. As part of his college curriculum, Mr. Nkulu was participating in a clinical training program at West Suburban Medical Center in the field of radiologic technology. On November 18, 2005, Dorothy Smith was a patient in the radiology department at the hospital and claimed to have fallen off of a stool while Mr. Nkulu was assisting her with a procedure. Ms. Smith filed a lawsuit alleging ordinary negligence against the student individually and as the agent of Triton and the apparent agent of West Suburban.

Prior to the alleged occurrence, West Suburban and Triton had entered into a contract that set forth the terms of a clinical training program that would be offered to Triton students in the radiology department at the hospital. The contract contained an indemnification clause wherein each party agreed to hold the other party harmless in the event that a lawsuit arose out of the activities of one of its students, employees or agents.

In response to the plaintiff's lawsuit, which solely arose out of the alleged negligent conduct of a Triton student, the hospital filed a counterclaim and moved for summary judgment against Triton based upon a contractual agreement for indemnification. Cook County Circuit Judge Lynn M. Egan granted summary judgment in favor of the hospital. Triton appealed this decision to the First District Appellate Court. In an 11-page opinion written by Justice Margaret O'Mara, the panel affirmed the decision of the trial court.

In its appeal, Triton argued that it was not responsible for the conduct of its student because the mere presence of a stool in the radiology department constituted negligence by West Suburban. However, the plaintiff had not raised such a claim in her Complaint and the record did not contain any evidence that the stool was defective. Rather, the plaintiff had only alleged that she fell off a stool as a result of the actions of a Triton student, and therefore, the Court held that the indemnification clause was applicable to this case.

Triton also raised the argument that it was not required to indemnify West Suburban because the parties had agreed to indemnify each other for claims arising out of the activities of their "agents," and the plaintiff had alleged that the student was both the agent of Triton and the "apparent agent" of the hospital. The Court disagreed and held that the plaintiff's belief that the hospital assumed a supervisory role over the student did not make him an "agent" of the hospital under the terms of the contract. Such an interpretation would have conflicted with the expressed intent of the parties, which was to protect the hospital from the potential exposure it would face by allowing students to train on its premises.

In affirming the decision of the trial court, the Court ruled that the plaintiff's characterization of a student as an "apparent agent" did not relieve Triton's indemnity obligations under the contract for claims arising out of the activities of its students. The hospital was represented by **James Bream, Jamie Goldstein and Jennifer Medenwald** of Querrey & Harrow Ltd.

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*Jamie Goldstein concentrates her practice in healthcare liability and medical malpractice.*

*If you have any questions regarding this article, please contact Jamie via [jgoldstein@querrey.com](mailto:jgoldstein@querrey.com) or via 312-540-7552*

## SEMINARS

On February 12, 2010 Chicago associate **Jamie Goldstein** and shareholder **Tim Rabel** presented a seminar on medical malpractice claims and business organizations to medical students and residents at Midwestern University.

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### **2010 Claim and Defense Tactics Symposium**

Illinois Association of Defense Trial  
Counsel/Illinois Insurance Association  
March 25, 2010

Bruce Schoumacher will serve as a facilitator on the topic, "Issues Faced by the Third Party Claims Handler", at the 2010 Claim and Defense Tactics Symposium, on March 25 and 26, 2010 at the Marriott Chicago Oak Brook in Oak Brook, Illinois.

The Symposium, presented jointly by the Illinois Association of Defense Trial Counsel and the Illinois Insurance Association, features many well known attorneys and insurance professionals and will offer real-world, tips on how to handle complex claims from onset through trial. The program will provide valuable strategies on resolving complex claims.

This is a must-attend event for claims managers, defense attorneys, insurance adjusters and general counsel. It will also provide an excellent two-day networking opportunity.

For more information regarding this seminar, please visit the IDC website:  
<http://iadtc.affiniscape.com/displayconvspecific.cfm?convnbr=7506>

### **Construction Law - What's New in 2010** Chicago, Illinois - April 27, 2010

Chicago shareholders **Bruce Schoumacher** and **Jennifer Pohlenz** will be speakers at the Illinois State Bar Association's "Construction Law - What's New in 2010" seminar at the ISBA's Regional Offices in Chicago.

This program explores the many new developments taking place in the construction industry with special emphasis on the new laws that are affecting home repair, remodeling, green building, and prompt payment to contractors. Topics include the Home Repair and Remodeling Act, recent case law, responding to a commercial contractor's payment request, protection against paying the contractor twice, types of construction damages (including how damages are calculated and proven), consensus documents, American Institute of Architects construction contracts, architectural agreements, building green (and the new state act), and construction insurance/indemnity. Hot topics in the construction law arena are also discussed.

The program is designed for the beginning to intermediate level construction law counsel, real estate practitioners, environmental attorneys, and general practice lawyers. Five MCLE credits are available to practicing attorneys. Further details are at:  
<http://www.isba.org/lawed/2010/04constructionchicago/>.