

Qued In

A Monthly Legal Newsletter from
Querrey & Harrow

November 2010

*Editors: Terrence Guolee
and Jillian Taylor*



The Illinois Predator Accountability Act: A Sleeping Giant

By: Christopher Keleher - Chicago, Illinois



Civil Rights Update: Seventh Circuit Addresses Private Individual/Public Employee Issue

By: Alicia A. Garcia - Chicago, Illinois



Indiana Law Update: Lender May Sue Title Commitment Issuer for Negligence in Failing to Find Defect During Title Search

By: Stacy Vasilak - Merrillville, Indiana

George v. NCAA - Is The NCAA's Championship Ticket Distribution An "Illegal Lottery?"

By: Stacy Vasilak - Merrillville, Indiana

Recent Case Successes

- Q&H Successfully Defends Municipality's Issuance of Liquor License

Community Involvement / News

- Q&H To Host Women's Bar Association of Illinois Foster Teen Event
- Mysliwy Tutors at Campagna Academy
- Bream Endorsed By District 30 Caucus
- Lanzito To Co-Chair Chicagoland Chamber of Commerce Committee
- Tom Kaufmann Interviewed on WGN Radio

Seminars

- Current Issues in Illinois Construction Lien Law

Copyright © 2010 Querrey & Harrow, Ltd. All rights reserved.

CHICAGO

175 W. Jackson Boulevard
Chicago, IL 60604
Tel: 312.540.7000
Toll Free: 800.678.2756

JOLIET, IL

3180 Theodore Street
Joliet, IL 60435
Tel: 815.726.1600

MERRILLVILLE, IN

233 East 84th Drive
Merrillville, IN 46410
Tel: 219.738.1820

OAK LAWN, IL

4550 W. 103rd Street
Oak Lawn, IL 60653
Tel: 708.424.0200

PEORIA, IL

416 Main Street
Peoria, IL 61602
Tel: 309.676.7777

WAUKEGAN, IL

415 W. Washington Street
Waukegan, IL 60085
Tel: 847.249.4400

WHEATON, IL

300 S. County Farm Road
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.

This information disclosed in this newsletter are matters of public record. Prior results do not guarantee similar outcomes.

The Illinois Predator Accountability Act: A Sleeping Giant

By: Christopher Keleher, Chicago office

Every year the Illinois General Assembly passes a raft of new laws. Some sink into obscurity while others become unavoidable. One law that has lain dormant is the Illinois Predator Accountability Act of 2006.^[1] That this Act has fallen to the wayside is surprising because it could spell the demise of the sex trade. The statute grants trafficked and sexually exploited persons the right to sue pimps, brothels, and customers in civil court.

Laws are most effective when they prevent the exploitation of people. The sex trade is exploitation in its rawest form. Occupational hazards include drugs, disease, and violence. Reflecting their shunned societal status, prostitutes are often kept at the margins of legal discourse. In the face of such realities, the Illinois Predator Accountability Act represents an upheaval. No state has moved so invasively against those who profit off sex trade workers. The rationale of the Illinois General Assembly is simple. The legal system's approach to sexual exploitation and trafficking is outmoded. Worse, it is toothless. Money moves pimps and traffickers, and endangering their wealth may drive them out.

Prostitution is a controversial issue. But even its most ardent defenders would agree that no one should be forced into the profession. The Illinois General Assembly has concluded that giving sexually exploited persons a private cause of action will reduce exploitation and trafficking. This article considers whether the Illinois Predator Accountability Act can do so.

The Essentials of the Illinois Predator Accountability Act

The Act came into effect in July of 2006. Groundbreaking, its enactment was accompanied by significant fanfare. But expectations have since waned. It appears no lawsuit has ever been brought under the Act. No

court has interpreted, applied, or discussed the Act. Even legal commentary has been minimal. This void notwithstanding, the law warrants attention.

The language of the Act is straightforward. The Act "allow[s] persons who have been or who are subjected to the sex trade to seek civil damages."^[2] "Sex trade" is defined clinically: "any act, which if proven beyond a reasonable doubt, could support a conviction for a violation or attempted violation of" soliciting a prostitute, pandering, keeping a place of prostitution, pimping, obscenity, or trafficking of persons.^[3] The definition thus encompasses street level prostitution, pornography, escort services, and massage parlors.

Plaintiffs under the Act include persons sexually exploited, sexually trafficked, or solicited to act as prostitutes.^[4] Those appearing in obscene materials, including child pornography, can also sue.^[5] Plaintiffs must prove the defendant caused long-term physical or emotional harm due to trafficking, pimping, or abusing them in any form while keeping them in the sex trade.^[6] They must also detail their injuries.^[7] A pattern of incidents need not be shown, once is enough.^[8] Plaintiffs can recover compensatory damages, punitive damages, and attorney's fees.^[9] The statute of limitations is generous—ten years from the last act involving the sex trade.^[10]

The Act targets those who exploit persons in the sex trade.^[11] A cause of action exists "against a person or entity who recruits, profits from, or maintains the victim in any sex trade act."^[12] The pool of potential defendants is diverse, ranging from the street level pimp to the escort agency to the buyer. Other defendants include those that knowingly advertise or publish advertisements recruiting women into the sex trade.^[13] Beyond these obvious targets, the Act goes one step further. The sex trade is a multifaceted industry with legitimate businesses such as taxi services and hotels occasionally

playing peripheral roles. Such a business can be liable under the Act if it “knowingly receives a higher level of compensation ... than it generally receives from customers.”^[14]

An integral part of the Act is the defenses that cannot be invoked. Indeed, to be called a “defendant” under the Act is a misnomer; those sued are rendered virtually defenseless. The Act eliminates plaintiff’s consent or payment for the service as defenses.^[15] That plaintiff remained with the pimp is not a defense.^[16] Marital, sexual, or familial relations between the parties are immaterial.^[17] Finally, plaintiff’s criminal conduct is not a defense.^[18] Thus, plaintiffs’ lopsided balance of power in the courts resembles what defendants enjoy in the streets.

Dulling the Lures of the Sex Trade: The Benefits of the Act

The sex trade is often viewed in an unrealistically sanguine light. The Illinois General Assembly looked at the dark realities.

The U.S. Department of Justice estimates that up to three million children are ensnared in the global sex trade.^[19] Many are trekked through Chicago.^[20] Through the fortuity of geography, Chicago is ground zero for the American sex industry. In Chicago alone, upwards of 25,000 women are involved in prostitution each year.^[21] The number of youth prostituted yearly in Illinois approaches 7,000.^[22]

The Illinois General Assembly concluded that the sex trade thrives on coercion. While some may dispute that assessment, it is well established that many individuals are forced into the trade.^[23] Some are enticed by lies of legitimate work in a foreign land.^[24] Others may enter desperate for money. However one enters the trade, most find the exit sealed by drug addiction, illegal status, language barriers, and physical abuse. Exploited and trafficked persons thus have little recourse to fight their oppressors. The Act changes that dynamic.

Q&H Successfully Defends Municipality's Issuance of Liquor License



Congratulations to **Christopher Keleher** and **Larry Kowalczyk** on their recent victory on behalf of a municipality in the First District Appellate Court. The matter surrounded a day care’s challenge to the issuance of a local liquor license to a retail establishment next door, but in a neighboring town. The day care argued the license was issued in violation of the Illinois Liquor Control Act’s prohibition of any retail liquor establishment within 100 feet of a “school.” A

lengthy evidentiary hearing, consisting of several witnesses and extensive document submissions occurred before the Illinois Liquor Control Board.

Following same, the Illinois Liquor Commission ruled that the day care, who admittedly provided certain educational programs, failed to prove that they were a “school” within 100 feet of a retail liquor establishment under the Illinois Liquor Control Act. The matter then proceeded as an Administrative Review action in the chancery court, where Larry and Chris were successful in same.

Following briefing and oral arguments, the First District Appellate Court, stating this was a case of first impression, deferred to the legislature, and affirmed the Commission’s decision that the petitioner failed to prove it was a “school” within 100 feet of liquor retail establishment. Of note, the decision was issued only two weeks following the oral arguments. Congratulations to Chris and Larry!

April Walkup, Jennifer Medenwald-Turiello and Christopher Keleher also won before the First District Appellate Court in a matter entitled *Jane Doe v. Han et al.*, where the appellate court accepted Chris’ arguments and affirmed the trial court’s dismissal order against the University of Chicago. The court determined that the Gender Violence Act cannot be retroactively applied to alleged conduct by a defendant that occurred before the Act’s effective date.

Studies confirm that free will is at a nadir in the sex trade. This reflects what common sense suggests—few people choose to be degraded. Of women in the sex trade:

- 62% are prostituted before the age of 18;
- 86% are victims of domestic violence;
- 75% are victims of sexual assault;
- 66% are victims of incest;
- 50% experience homelessness;
- 45% give money to a pimp, and 65% of those women would face physical harm if they did not.^[25]

These figures explain why many work in the sex trade; the psyche of a sexually abused person is fertile ground for further exploitation.

The hurdles facing law enforcement also highlight the Act's utility. Human trafficking is a \$50 billion business transcending continents.^[26] Law enforcement is often stymied by the transnational nature of trafficking and prostitution rings. Additionally, it is difficult identifying trafficked persons and infiltrating trafficking organizations. Many trafficked persons shun assistance because they are engaged in criminal behavior, in the country illegally, or at physical risk. Private causes of action against pimps and traffickers may bridge the gaps law enforcement cannot.

Agencies in Illinois that target traffickers and pimps include the sex crimes division of the state's attorney's office, the Illinois Department of Public Health, and the Illinois Department of Human Services.^[27] Such entities face an uphill battle as street corner prostitution and red light districts fade into folklore. The sex trade has gone virtual, enveloping an already enigmatic industry in another layer of secrecy. Worse, websites like Craigslist and Backpage have enabled prostitute and customer to transact in an efficient, effective, and discreet manner. Such developments have enabled prostitution to proliferate.

The Act does what the criminal justice system cannot—allow sex trade victims to take the offensive. Private actors are less encumbered by

logistical, budgetary, and political obstacles. The Act also makes exploitation cost prohibitive. Punitive damages and attorney's fees are not abstractions. Recognizing the Sisyphean task law enforcement faces in stemming the tide of trafficking and exploitation, the Act opens a new front in the battle against pimps, traffickers, and associated businesses.

Going Too Far: The Downsides of the Act

The ends sought by the Act are worthwhile. But the law is not a panacea. Permitting prostitutes to sue those who pimped or hired them is novel. One problem with the Act is that sex trade workers are engaging in criminal behavior. As such, the "victim" label bestowed by the Act raises questions. While the plight of many in the sex trade is tragic, should it be the basis to sue another person for engaging in what is at its core, a sale of services?

One newspaper editorial criticized the Act along these lines. "It is a bad idea to begin using the overtaxed civil legal system to allow criminals or former criminals to fight each other over the take."^[28] Such criticism has appeal. Like the pimp or customer, a prostitute's conduct is criminal. But this line of reasoning assumes sex trade workers are no different than other participants. Reality suggests otherwise. Customers often live a comfortable existence, their periodic forays into the underworld chosen. Sex trade workers by contrast often operate in coerced conditions, the threat of arrest or physical danger implicit in each knock at the door. Pimps and traffickers also exert control via physical abuse. These realities aside, the Act eliminates the prostitute's conduct from the equation. "Any illegality of the sex trade activity on the part of the victim of the sex trade shall not be an affirmative defense...."^[29] Thus, even if defendants wanted to make the case a referendum on plaintiff's criminality, they could not.

The above criticism also oversimplifies the Act. The law is not merely a mechanism to redistribute ill-gotten gains. The Act's *raison d'être* is curbing sexual exploitation. And the General Assembly surmised this can be achieved

by targeting the entities behind the bodies of the sex trade.

Additionally, the Act may clash with the doctrine of *in pari delicto*. Under *in pari delicto*, parties to an illegal contract (such as hiring a prostitute) cannot hold one another liable if those parties are equally guilty.^[30] The defense of *in pari delicto* prohibits a party from recovering damages arising from misconduct for which the party bears responsibility.^[31] To apply *in pari delicto*, the illegal transaction must have been entered voluntarily and the fault apportioned equally.^[32] The coercive nature of the sex trade may render this theory inapt. *In pari delicto* would not apply if the plaintiff showed she was acting under the defendant's compulsion.^[33] Indeed, where the party seeking relief consented to an illegal transaction because of duress, menace, or undue influence, that party is not *in pari delicto*.^[34] Thus, a plaintiff under the Act could likely circumvent *in pari delicto*.

Constitutional Considerations

In its zeal to combat exploitation and trafficking, the General Assembly may have overreached. A constitutional challenge might be a defendant's most promising line of attack given the affirmative defenses unavailable. However, no guidance on this question exists because the Act has never been cited in an opinion, let alone discussed.

At first blush, the Act encroaches on protected conduct, raising overbreadth concerns. A statute is overly broad if, in proscribing unprotected conduct, it also proscribes protected conduct.^[35] But the Act may inoculate itself from an overbreadth challenge because liability only exists if one has engaged in criminal (unprotected) conduct. One provision which may not fit that description is the section targeting businesses with a tangential relationship to the sex trade.^[36] This is not an academic question, for legitimate businesses would be the most attractive defendants. That a hotel or taxi service knowingly receives a kickback may simply reflect market forces. While such arrangements indirectly contribute to the exploitation of sex trade workers, whether

they justify punitive damages and attorney's fees is a stretch. A court might find different treatment for a preferred customer too tenuous for the Act's onerous liability.

The Act may court constitutional scrutiny in another respect—its target of sex trade publications. Plaintiffs can sue mediums that carry or sell sex trade advertisements. However, such businesses are liable only if they knowingly publish advertisements intended to recruit individuals into prostitution.^[37] This appears permissible. While commercial speech is protected, speech that aids or abets criminal activity is not.^[38] Thus, there is no constitutional interest in publishing ads soliciting prostitution.^[39]

Most sex trade advertisements do not trumpet the sale of sex. Instead, euphemisms such as “massage” and “escort” are *de riguer*. Whether such ads are protected speech is a question not definitively answered. The Supreme Court has noted that some businesses “apparently are not protected by the First Amendment e.g., escort agencies and sexual encounter centers”^[40] The Ninth Circuit held an escort service could not invoke the First Amendment because “escort services are primarily commercial enterprises, and their activities are not predominately of the type protected by the First Amendment.”^[41] The court further observed the relationship between the client and her paid companion is “the antithesis of the highly personal bonds protected by the Fourteenth Amendment.”^[42]

Prostitution and its diplomatically phrased permutations are typically not afforded much, if any, constitutional protection. However, for a defendant under the Act, this may be the best route.

Interpretations of Similar Provisions

Examining other jurisdictions offers few clues how the Act would weather a constitutional challenge. Florida, Hawaii, and Minnesota provide civil actions for individuals coerced into the sex trade.^[43] However, none replicate the Act's reach. Only Illinois targets sex trade advertisers and businesses with a peripheral

connection to the trade. Additionally, Illinois eliminates more defenses and provides a longer statute of limitations.

Under Hawaii law, an individual can sue a person who coerced her into prostitution.^[44] She can also sue those who hire her for sex acts when a reasonable person would believe she was coerced into prostitution.^[45] Minnesota provides the same.^[46] Under those laws, coercion constitutes blackmail, promise of marriage, or physical isolation.^[47] No case law addresses the Hawaii or Minnesota statute.

Florida provides for punitive damages against individuals who coerce another into prostitution.^[48] Coercion is any form of inducement, including promise of legal benefit or promise of greater financial rewards.^[49] A Florida court examined the law in *Balas v. Ruzzo*.^[50] The dispositive issue was the statute's limitation on discovery. The defendant challenged his inability to inquire about the plaintiff's work in the sex trade.^[51] The *Balas* court rejected the defendant's contentions because the law was designed to encourage prostitutes to sue their pimps.^[52] For that reason, "discovery may be constricted so that prostitutes will not be embarrassed, harassed or hindered in their actions."^[53] The court was sensitive to the policy underlying the law: "to lessen the incentive to traffic in human flesh by giving the prostitute access to the judicial system without first having to be arrested."^[54]

Balas found a prostitute's private cause of action against her pimp permissible. While *Balas* is isolated, it demonstrates a court's receptiveness

to the policy underlying the Illinois Predator Accountability Act.

Illinois courts might also be inclined to respect the Act's legislative aims and policy concerns.

Conclusion

The Illinois Predator Accountability Act is designed not to cull the weeds of the sex trade but to sever its roots. Human trafficking is the fastest growing criminal industry.^[55] Trafficking a woman into the United States can net \$250,000.^[56] Until the civil legal system follows the money, trafficking and sexual exploitation will continue to proliferate. Whether the Act is the answer to this problem remains to be seen.

* * *

[Editor's Note: This article was first published in the November 2010 issue of the Illinois Bar Journal and is republished with the agreement of the Illinois State Bar Association.]

Christopher Keleher, a shareholder in our Chicago office, concentrates his practice in appellate litigation. He also has experience in commercial litigation and insurance coverage. Chris has worked on appeals before the United States Supreme Court, the U.S. Court of Appeals for the Sixth, Seventh and Eighth Circuits and the Appellate Court of Illinois. Mr. Keleher also helped draft the complaint against Craigslist to close its erotic services section.

If you have any questions regarding this article, please contact Chris via 312-540-7626, or via ckeleher@querrey.com.

Please see footnotes on page 13

Lanzito To Co-Chair Chicagoland Chamber of Commerce Committee



Chicago office shareholder **Dominick Lanzito** was recently named as a Co-Chairman of the Chicagoland Chamber of Commerce's Small Business Committee. Dominick concentrates his practice in federal litigation, class action litigation, Intellectual Property, Civil RICO, and civil rights. Dominick also counsels technology and emerging corporations in all aspects of their business, from entity formation, IP protection, IP licensing, contract negotiations, and private placements.

Civil Rights Update: Seventh Circuit Addresses Private Individual / Public Employee Issue

By: Alicia Garcia, Chicago office

The distinction between private citizen and public employee, as it relates to free-speech under the First Amendment, is a fine line. Whether Plaintiff, Paul Ogden acted as a private individual or government employee when writing a memo to Defendant Atterholt, the Commissioner of the Indiana Department of Insurance, is the question decided in *Ogden v. Atterholt*, 606 F.3d (7th Cir. 2010).

Plaintiff was hired as the manager of the Title Insurance Division falling under the Consumer Protection Unit headed by Chief Deputy Commissioner Carol Mihalik. Plaintiff filed a formal complaint against Mihalik claiming that she (1) flouted Personnel Division regulations on hiring, (2) misused funds directed for the Title Insurance Division, and (3) fostered a hostile work environment. Plaintiff requested that a reorganization of the division occur in which the Title Insurance Division be removed from Mihalik's control.

In a memo drafted by Ogden to Atterholt, he outlined 35 reasons why the reorganization should take place. Most of his reasons involved allegations that Mihalik was corrupt or incompetent. Notably, he never referenced his formal complaint nor did he request that Mihalik be disciplined. As a result of the memo, Ogden was forced to resign his position. He brought a §1983 action claiming free-speech and due-process violations. The trial court granted Defendants' Motion for Summary Judgment finding that Plaintiff's free-speech and due-process rights were not violated.

According to the *Atterholt* court, in order for Plaintiff to establish a prima facie case that his free-speech rights were violated, he must establish that that he engaged in constitutionally protected speech and that speech was a motivating factor in his dismissal. In addressing whether Plaintiff's memo was constitutionally protected speech, the *Garcetti* decision is controlling. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

In *Garcetti*, the Supreme Court held that public employers, similar to private employers, may exercise a significant degree of control over their employees' words and actions. Moreover, public employees remain citizens such that the First Amendment limits "the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419. The *Garcetti* Court opined that public employees making statements in their official duties do not speak as citizens for First Amendment purposes, and can be disciplined. The rationale underlying these cases is that while public employees have certain rights under the First Amendment, "it does not empower them to constitutionalize the employee grievance." *Id.* at 420.

The *Atterholt* court noted that Ogden wrote the memo in his official capacity as the manager of the Title Insurance Division, not as a private citizen. Therefore, his First Amendment free-speech rights were not implicated. Although Ogden acknowledged that the reorganization request in his memo was related to official duties, he argued that he was a "whistleblower" and concerned citizen in notifying Atterholt that Mihalik mismanaged Title Insurance Division funds, not a public employee. Significantly, the *Atterholt* Court surmised that Ogden's "whistle-blowing" allegations were part and parcel of the rationale he offered for the reorganization. Therefore, Ogden's memo was the act of a public employee, not a private citizen, and as such, his speech was not constitutionally protected.

Interestingly, Ogden took to the internet to discuss the trial court granting Defendants' summary judgment motion on May 18, 2010 and May 20, 2010. Ogden's blogs are full of mistruths about the trial court's decision and the Seventh Circuit's reasoning. Apparently, the lesson learned from Ogden's civil lawsuit falls on deaf ears. Ogden states, "the 7th Circuit got a

little loose in its language and started talking interchangeably about ‘whistleblowing’ and free speech.” <http://www.masson.us/blog/?p=6510>. Ogden further states, “Whistleblowing relates to a state law protecting state employees and has lower standard that required for free speech, especially post-*Garcetti*.” *Id.*

Ogden fails to realize that this case was never about whistleblowing, but rather, what constitutes constitutionally protected speech. The only reason whistleblowing was addressed is because Ogden argued he was a whistleblower during the Appeal. Ogden attempted to confuse the issue by arguing that he was acting as a private citizen/whistleblower when bringing to light Mihalik’s alleged mismanagement of Title Division funds. However, the key issue was whether the memo itself constituted constitutionally protected speech.

Ogden’s blog conveniently ignores the linchpin of why his whistleblower argument fails: the allegations that Deputy Commissioner Mihalik mismanaged funds were part and parcel of Ogden’s rationale as to why reorganization should occur. In arguing that there should be a reorganization of the Title Insurance Division, Ogden acted as a public employee, not a concerned “private citizen/whistleblower.” Therefore, his memo was not constitutionally protected speech, and the Department of Insurance could discipline him for his speech.

The lesson of *Ogden v. Atterholt* is clear. A public employee’s speech is not constitutionally protected. And just because you argue that you are a whistle-blower does not make it so.

* * *



Alicia A. Garcia, an associate in our Chicago office, concentrates her practice in general litigation, commercial litigation and civil rights and is a member of Q&H's Municipal Liability team. Prior to joining Querrey & Harrow, Ms. Garcia gained experience with a Philadelphia litigation firm, first as a law clerk and then as an associate. While at the Philadelphia firm, Ms. Garcia concentrated her practice in general litigation and professional liability. She also handled employment discrimination matters.

Alicia served as an Arbitrator in the Philadelphia Court of Common Pleas. She was also a member of the Executive Committee for the Young Lawyers Division of the Philadelphia Bar Association. In addition, Alicia worked with the Support Center for Child Advocates a Pro Bono Attorney handling matters involving child abuse. In January of 2010, Alicia received the First Judicial District of Pennsylvania Pro Bono Roll of Honor Certificate for being recognized by the judiciary as exemplary in her pro bono work.

If you have any questions regarding this article, please contact Alicia via agarcia@querrey.com or 312-540-7516.

Q&H To Host Woman's Bar Association of Illinois Foster Teen Event



Querrey & Harrow will host an event for the Community Outreach Committee of the Women's Bar Association of Illinois. The event, directed towards mentoring foster teens will take place at our Chicago office on November 30. All WBAI members have been invited to participate and Chicago office associate **Ghazal Sharifi** will service as Q&H's contact to the WBAI for the event. If you are interested in participating, please contact

Ghazal via gsharifi@querrey.com

Mysliwy Tutors at Campagna Academy



Teresa Mysliwy of our Merrillville, Indiana office tutors teenagers weekly at the Campagna Academy in Schererville, Indiana, which caters to at-risk youth. The facility is designed to house the teens on a temporary basis, to provide an alternative education program and to work them back into a home environment.

Indiana Law Update: Lender May Sue Title Commitment Issuer for Negligence in Failing to Find Defect During Title Search

By: Stacy Vasilak - Merrillville, Indiana office

Recently, the Indiana Supreme Court issued its opinion in *U.S. Bank, N.A. v Integrity Land Title Corp.* (June 29, 2010). In that case, the Indiana Supreme Court considered for the first time whether a title insurance company could be held liable in tort for negligence in issuing a title commitment and subsequently issuing a title insurance policy.

In January of 2006, a buyer of real property secured a mortgage from Texcorp Mortgage Bankers ("Texcorp"). Texcorp contracted with Integrity Land Title Corp. ("Integrity") to prepare a title commitment, conduct the mortgage closing, and provide Texcorp with an insured first and superior mortgage lien. After conducting a title search, Integrity issued a title commitment which indicated that its search had uncovered no judgment against the seller of the real property. Based on the commitment, Southern National Title Insurance Corporation ("Southern") issued and underwrote a mortgage policy ("the Policy") naming Texcorp and its successors as insured. Texcorp approved a mortgage loan. The deal closed in February 2006, at Integrity's office. Integrity was paid for conducting the closing, the title search and the premium for the Policy.

It was later discovered that Integrity's title search did not discover a 1998 foreclosure judgment on the property by LPP Mortgage LTC ("LPP"). In August 2006, LPP filed suit against the owner of the property to enforce and foreclose the prior judgment. U.S. Bank, N.A. ("U.S. Bank"), who was the successor in interest to Texcorp, filed a third party claim against Southern and Integrity alleging breach of contract and the tort of negligent real estate

closing. The Court eventually entered judgment in favor of LPP and the property was sold. LPP received all proceeds from the sale leaving U.S. Bank with no recovery from the sale and no recourse on its mortgage loan.

Eventually, the Court granted summary judgment in favor of Integrity finding that there was no breach of contract because it was not a party to the title insurance policy issued by Southern and that it was not negligent because it owed no duty to U.S. Bank in tort. The Indiana Court of Appeals eventually affirmed the rulings of the trial court.

The Indiana Supreme Court upheld the judgment in favor of Integrity on the breach of contract claim finding that Integrity was not in contractual privity with U.S. Bank. It did, however, after thorough analysis find that Integrity could be sued in tort.

On the same date, the Indiana Supreme Court issued its opinion in *Indianapolis-Marion County Public Library v. Charlier Clark & Linard* (Ind. June 29, 2010). In that case, the Supreme Court discussed the economic loss doctrine in detail. The economic loss rule is that "a defendant is not liable under a tort theory for any purely economic loss caused by its negligence." *Id.* There are, however, exceptions to the rule.

The Supreme Court found that one such exception - negligent misrepresentation - was applicable in this case. After considering the law in several states regarding whether a title insurer

Bream Endorsed By District 30 Caucus



Chicago office shareholder **Jim Bream** has been endorsed by the District 30 Caucus and will be an endorsed candidate for the April 5, 2011 election for the Northbrook/Glenview School District 30. Jim currently serves as Board President for the District and looks forward to reelection.

or a commitment insurer can be exposed to tort liability for negligent misrepresentation regarding the search of title records, the Court was persuaded by those states that held that they could be held liable in tort.

The Supreme Court determined that the existence or non-existence of a contract was not the important factor. Rather what was important were several factors some of which included the cost and difficulty of obtaining the information, whether the actor was compensated for supplying the information, whether the actor was in the business of supplying the information, the ability of the recipient to determine the accuracy of the information on their own, the superior knowledge of the actor, whether the relationship is adversarial or advisory, and the specificity and generality of the information given.

The Supreme Court held that Integrity had a duty under Restatement §552 to communicate the state of the title accurately when issuing the preliminary commitment. Of great importance in arriving at this conclusion was the fact that Integrity should have been aware that Texcorp would act in justifiable reliance on the statement in the preliminary commitment that title was free and clear in closing on the loan to the buyer. In fact, in the case in question, Texcorp had communicated directly with Integrity and instructed Integrity to prepare a title commitment, conduct the mortgage closing and provide an insured first and superior mortgage lien against the real property in question. With this knowledge, Integrity prepared the title commitment that indicated it had performed the title search on the property and found no prior judgment liens. The Court held that in justifiable reliance on the commitment, Texcorp approved the mortgage loan and Integrity provided the

Policy which insured a first and superior mortgage against the real estate.

In addition to this reliance, the Court found that other factors suggested a finding of tort on the facts presented. For example, the relationship was an advisory one; Integrity had superior knowledge; Integrity was in the business of supplying title information; and Integrity was compensated for the provision of the information. Further, Integrity deliberately provided specific information in response to a request by Texcorp to guide Texcorp in its transactions with third parties. Finally, Integrity vouched for the accuracy of the information.

Therefore, based on the Indiana Supreme Court's ruling a title company may have liability in tort for issuing incorrect title commitments if they are aware that another party will justifiably be relying on their commitments.

* * *



Stacy Vasilak, an associate in our Merrillville, Indiana office, concentrates her practice in general litigation and arbitration, with an emphasis in auto and premises liability. She previously obtained experience in first party claims, automobile liability, premises liability, products liability, construction claims, bad faith claims, and insurance coverage. She also has experience in class actions and in drafting appellate briefs for the Indiana Court of Appeals, the Indiana Supreme Court, and the Seventh Circuit Court of Appeals.

If you have any question regarding this article, please contact Stacy Vasilak via svasilak@querrey.com

Tom Kaufmann Interviewed on WGN Radio



On November 4, 2010, Chicago office shareholder **Tom Kaufmann** was interviewed by Greg Jarrett on WGN Radio regarding his sports agency business, Kaufmann Sports Management Group. The interview is available at [www.wgnradio.com](http://www.wgnradio.com/business/businessofsports/wgnam-business-of-sports-tom-kaufmann-free-agency-agent-greg-110410,0,1644695.mp3file) via the following link: <http://www.wgnradio.com/business/businessofsports/wgnam-business-of-sports-tom-kaufmann-free-agency-agent-greg-110410,0,1644695.mp3file>

George v. NCAA - Is The NCAA's Championship Ticket Distribution An "Illegal Lottery?"

By: Stacy Vasilak - Merrillville, Indiana office

The Indiana Supreme Court has been asked to weigh in on whether the method in which the National Collegiate Athletic Association ("NCAA") sells tournament tickets for the Final Four taking place in Indiana is legal claiming the method used constituted an illegal lottery. Their input could have a wide spread effect on how tickets are sold for many sporting events in Indiana.

This suit arose when three individuals ("customers") sued the NCAA after unsuccessfully attempting to purchase tickets through NCAA websites. Due to diversity of citizenship, the complaint was filed in Federal Court in the Southern District of Indiana. The NCAA filed a Motion to Dismiss the Second Amended Complaint for failure to state a claim which was granted by the District Court. The customers then appealed. Originally, on July 16, 2010, the Seventh Circuit Court of Appeals reversed the District Court and remanded the case for further proceedings. On October 18, 2010, after rehearing, the Seventh Circuit certified the matter to the Indiana Supreme Court asking for its input on the application of Indiana law to the facts presented. The Indiana Supreme Court has established a briefing schedule and set oral arguments in this matter on December 22, 2010.

The NCAA has used the same ticket distribution system for over a decade. It is currently used for both men's and women's basketball championship tournaments and hockey championship tournaments. In order to be eligible, a person submits an application for tickets. On each application a person could submit 10 entries in an attempt to win 2 tickets. For each entry, the applicant would pay for the tickets up front (\$150 each) and a non-refundable handling fee (\$6). If a person was successful and obtained tickets, only the ticket price for the other 9 entries would be refunded (\$2,700); the handling fee (\$60) would be retained. If a person was completely unsuccessful he would receive a refund of

\$3,000. Once again the \$60 paid for handling fees would be forfeited.

The customers alleged that the handling fee and the temporary use of the customers' money constituted consideration for a chance to win the right to purchase "highly prized" tickets for priority seating and, therefore, the NCAA ticket distribution system constitutes an unlawful lottery.

Under Indiana law, a lottery is "a scheme for the distribution of prizes by lot or chance." *Leshner v. Baltimore Football Club*, 496 N.E.2d 785, 789 (Ind. Ct. App. 1986), vacated in part on other grounds (internal citations omitted). In order to establish that a lottery exists one has to prove that there is a prize, an element of chance and consideration for the chance to win a prize. *Id.* The customers claim that the consideration was the handling fee which was forfeited because the handling fee had no relation to the NCAA's actual cost in administering the ticket-distribution process. In addition, they allege that the prize was the ticket themselves because the value of the tickets far exceeded the actual cost of the same. Finally, since the selection of persons who received tickets was random, the element of chance was obvious. Therefore, since the plaintiffs alleged the elements of a lottery, the complaint would survive a motion to dismiss based on a failure to state a claim.

The NCAA argued that even if the ticket distribution method was deemed a lottery, it squarely fit in the exception to the proscription against gambling which allows "bona fide business transactions that are valid under the law of contracts." Ind. Code §35-45-5-1(d). The Seventh Circuit determined that the exception was to exclude activities such as regulated investing from the definition of gambling. In addition, the Seventh Circuit determined that all lotteries except those run by the state are illegal in Indiana irrespective of whether the ticket distribution method was deemed gambling under Indiana statutes.

Finally, the Seventh Circuit considered that doctrine of *in pari delicto*. This doctrine is an equitable doctrine which means “in equal fault or guilt.” Black’s Law Dictionary 6th Edition. Prior Indiana Court of Appeals cases refused to find for the plaintiff because they found that the plaintiff knowingly participated in unlawful lotteries prohibited by Indiana law. *See Leshner v. Baltimore Football Club*, 496 N.E.2d 785 (Ind. Ct. App. 1986). Here, the Seventh Circuit rationalized that the NCAA was more at fault than the customers because although the customers participated in the ticket distribution process or lottery, they did not know that the “lottery” was illegal. Therefore, the customers fault was less than that of the NCAA who was running the illegal lottery.

One judge dissented. He relied on *Leshner v. Baltimore Football Club*, *supra*. In *Leshner*, the plaintiffs alleged that the ticket distribution system (which was identical to the NCAA’s system except the handling fees were refundable) was an illegal lottery. The Indiana Court of Appeals found that system was not an illegal lottery. Further, the Court of Appeals indicated in dicta that “If the plaintiff, with the facts before him, saw proper to become a participant in such an illegal and prohibited transaction . . . he is not in condition to ask . . . the aid of a court.” *Id.* at 790 nt. 1 *quoting Swain v. Bussell*, 10 Ind. 438, 442 (1858). Therefore, even if the ticket distribution scheme was deemed an illegal lottery under Indiana law, the Court of Appeals made it apparent that it would still not find for the plaintiffs in the *Leshner* matter. The dissenting judge also noted that merely because the tickets had a resale value higher than what was charged by the NCAA did not make the tickets a prize. The face value was the amount charged and realized by the NCAA. Merely because someone could then sell it for more did not raise the face value of the tickets. As noted by the dissenting judge, while the

ruling by the Court of Appeals is not binding on the Supreme Court, it is instructive on how the Supreme Court may rule in this matter since there are no Supreme Court opinions in Indiana on this issue.

After being requested to rehear the matter en banc, the Seventh Circuit noted that the question of whether or not the ticket distribution system constituted a lottery was a close one. Therefore, it decided the best solution to this puzzle was to certify questions to the Indiana Supreme Court. Specifically, the Indiana Supreme Court has been asked to advise if 1) the plaintiff’s allegations about the method for allocating scarce tickets to the NCAA championships constitute an illegal lottery; 2) if it is an illegal lottery, does the ticket allocation method fall under the exception for bona fide business transactions that are valid under the law of contracts; and 3) if it is an illegal lottery, are the customers’ allegations subject to the *in pari delicto* defense.

Obviously, the ruling of the Indiana Supreme Court could potentially have a great impact on the method in which tickets are sold to not only sporting events but any other event, through which such a method is used to sell tickets. Many universities and other teams use this method to distribute tickets to highly sought after events. Owners, management, and fans alike will be keeping a watchful eye to see if the often used system for distributing tickets will withstand the review by the Supreme Court of Indiana as well as how the Seventh Circuit will rule once Indiana’s Supreme Court answers the questions. It is unlikely that a ruling be issued by the Supreme Court until well after the holidays.

* * *

If you have any question regarding this article, please contact Stacy Vasilak via svasilak@querrey.com

SEMINARS

Current Issues in Illinois Construction Lien Law

December 1, 2010

Querrey & Harrow Shareholders **Bruce Schoumacher** and **Tim Rabel** will present a 90-minute teleconference regarding Illinois Construction Liens in conjunction with Lorman Education Services. The teleconference is designed for contractors, owners, developers, subcontractors, suppliers, architects, engineers, lenders, accountants, and allied construction professionals. Topics will include an overview of mechanics lien procedures, the importance of deadlines, priority of liens, and recent developments.

For registration or additional information regarding the webinar, please visit the Lorman teleconference page at <http://www.lorman.com/teleconference/387002>.

(Continued from page 6)

[1] 740 ILCS 128/1 Illinois Predator Accountability Act.

[2] 740 ILCS 128/5.

[3] 740 ILCS 128/10.

[4] 740 ILCS 128/10.

[5] 740 ILCS 128/10.

[6] 740 ILCS 128/20.

[7] *Id.*

[8] 740 ILCS 128/25(a)(7).

[9] 740 ILCS 128/20.

[10] 735 ILCS 5/13-225(b).

[11] 740 ILCS 128/5.

[12] 740 ILCS 128/15(b).

[13] 740 ILCS 128/15(b)(3).

[14] 740 ILCS 128/15(c)(2).

[15] 740 ILCS 128/25(a)(3) & (6).

[16] 740 ILCS 128/25(a)(5).

[17] 740 ILCS 128/25(a)(1) & (2).

[18] 740 ILCS 128/25(b).

[19] Trafficking in Persons 2009 located at

<http://www.state.gov/g/tip/rls/tiprpt/2009/>.

[20] Peter Landesman, The Girls Next Door, N.Y. Times Mag., January 25, 2004 at 34.

[21] Chicago Coalition for the Homeless—The Predator Accountability Act, located at <http://www.sapromise.org/pdfs/PABFactSheet.pdf>.

[22] *Id.*

[23] Katherine Kaufka, T Nonimmigrant Visas and Protection and Relief for Victims of Human Trafficking: A Practitioner's Guide, 09-06 Immigr. Briefings 1 (Oct. 2006) ("Victims of trafficking are subjected to both physical violence such as detention, beatings, or rape; and psychological coercion and intimidation, such as threats of retribution or physical force, debt bondage, threats of deportation, and withholding of identity documents.").

[24] Press Release, U.S. Dep't. of Justice, Rockford Man Found Guilty on Federal Charges Involving Prostitution at Royal Health Spa 2 (May 11, 2006).

[25] Chicago Coalition for the Homeless—The Predator Accountability Act, located at <http://www.sapromise.org/pdfs/PABFactSheet.pdf>.

[26] Trafficking in Persons 2009 located at

<http://www.state.gov/g/tip/rls/tiprpt/2009/>.

[27] See Vanessa Vergara, Looking Beneath the Surface: Illinois' Response to Human Trafficking and Modern-Day Slavery, 38 U. Tol. L. Rev. 991 (2007).

[28] Editorial, Chicago Sun Times, March 14, 2005.

[29] 740 ILCS 128/25(b).

[30] *In re Verestar, Inc.*, 343 B.R. 444, 478-79 (Bankr. S.D.N.Y. 2006).

[31] *Id.*

[32] *In re Grumman Olson Industries, Inc.*, 329 B.R. 411, 425 (Bankr. S.D. N.Y. 2005).

[33] Restatement (Second) of Contracts § 198(b).

[34] *Smith v. Smith*, 50 N.E. 2d 889, 895 (Ohio App. 1943).

[35] *Broadrick v. Oklahoma*, 413 U. S. 601, 612-13 (1973).

[36] 740 ILCS 128/15(c)(2).

[37] 740 ILCS 128/15(b)(3).

[38] *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

[39] *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110, 1117 (11th Cir. 1990).

[40] *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224 (1990).

[41] *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1195 (9th Cir. 1988).

[42] *Id.* at 1193.

[43] Haw. Rev. Stat. Ann. § 663J-3, Minn. Stat. Ann. § 611A.81, Fla. Stat. Ann. § 796.09(1).

[44] Haw. Rev. Stat. Ann. § 663J-3.

[45] *Id.*

[46] Minn. Stat. Ann. § 611A.81.

[47] Minn. Stat. Ann. § 611A.80; Haw. Rev. Stat. Ann. § 663J-4.

[48] Fla. Stat. Ann. § 796.09(1).

[49] *Id.* § 796.09(3).

[50] 703 So. 2d 1076 (Fla. Dist. Ct. App. 1997).

[51] *Id.* at 1077.

[52] *Id.* at 1079.

[53] *Id.*

[54] *Id.*

[55] [Traffickfree.org](http://www.traffickfree.org), Human Trafficking in Illinois Fact Sheet.

[56] *Id.*