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A Monthly Legal Newsletter from

Querrey & Harrow

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Editors: Terrence Guolee and Jillian Taylor

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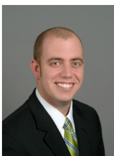

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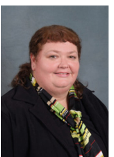

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SEASON'S GREETINGS

To all our clients and friends, on behalf of our firm and our families, we wish you all the best of this holiday season. We thank you for your support through this year and hope 2011 will find you healthy, happy and prosperous.

Sincerely,

Terrence Guolee and Jillian Taylor
Editors,
Qued In

Querrey & Harrow Congratulates Three Associates Admitted To Practice In Illinois

Querrey & Harrow congratulates three of its associates now licensed to practice in Illinois. **Kevin M. Coffey** and **Kevin L. Sterk**, both recent law school graduates, along with **Alicia A. Garcia,** admitted in Pennsylvania since 2006, were admitted to practice as Illinois attorneys on November 4, 2010.

Kevin M. Coffey will concentrate his practice in health care litigation and general litigation. In 2010, he obtained his JD, *cum laude*, from the University of Illinois College of Law, where he received the CALI Award for Excellence in both Torts and International Law and participated in the Phillip C. Jessup International Moot Court Competition. He obtained his BA from the University of Dayton in 2007.

Kevin L. Sterk will concentrate his practice in general litigation, public utilities and transactional work. He obtained his JD from the University of Kansas School of Law in 2010 and his BS from the University of Illinois in 2007. During law school, Mr. Sterk was elected president of his class and served as a Kansas School of Law Student-Ambassador. Mr. Sterk is actively involved with the Juvenile Diabetes Research Foundation and the Brother Rice High School Alumni Association.

Alicia A. Garcia obtained her JD in 2006 from the Thomas M. Cooley Law School and her BA from the University of Illinois-Chicago in 2003. She was admitted to practice in Pennsylvania and worked with a Philadelphia firm handling general litigation, professional liability, and employment discrimination matters. In 2009, Ms. Garcia returned the Chicago area, where she has practiced in the US District Court for the Northern District of Illinois while preparing for the Illinois Bar. Ms. Garcia concentrates her practice in general litigation, commercial litigation and civil rights.

Medical Malpractice Update: Are Your Patients Packing Their Bags? Precautions For The Domestic Provider In The Era Of Medical Tourism.

By: James M. Bream, Shareholder and Co-Chair of Health Care Practice Group, Chicago office

[Editor's Note: This article was originally published in the Medical Arts Insurance Newsletter]

Your patient makes an appointment to inform you that his longstanding knee pain is soon to be addressed through an offshore surgical procedure in India. Or perhaps, your patient advises you that while uncertain as to the source of his skin rash, fevers and general malaise, she recently returned from an elective plastic surgery procedure in the Dominican Republic. Medical Tourism has been estimated as a $20 billion industry which may even reach $100 billion by 2012. Some sources report that by 2007, over 500,000 Americans sought medical treatment electively in a foreign jurisdiction.

Patients have sought medical tourism for a wide variety of reasons including, the ability to recover in an exotic locale, expertise of certain foreign hospitals in certain procedures, and cost-savings. Employers and their health care insurers have begun promoting medical tourism in an effort to control health care costs by offering surgery abroad at a reduced cost to the employer and with up to no out-of-pocket expense for the employee.

Hospitals overseas are affiliating with domestic hospitals and even becoming accredited by the Joint Commission International. Wockhardt Hospitals in India proudly displays that they are an associate hospital of Harvard Medical International, with easy access to potential patients through 1-800 telephone numbers in Canada and the United States. Numerous travel sites and companies offer to schedule the patient for travel, surgery and recuperation. Robin Cook, the author of many medically-based mystery novels, has even published Foreign Body, a novel about a medical student's grandmother who dies after undergoing hip replacement surgery in a New Delhi hospital.

With the rising popularity of medical tourism, the provider of health care in the United States (the domestic provider), whether a primary care physician or a specialist, is increasingly likely to encounter a patient who is planning travel abroad or who has returned from travel abroad for a medical procedure.

This article does not seek to advocate for or against medical tourism. Further, this article does not weigh in on the motivations, success rates or cost comparisons of offshore procedures. Rather, this article intends to highlight precautions that must be considered by the domestic physician when encountering a patient who is scheduled to receive or who has received offshore medical treatment. Through awareness of the potential risks of medical services provided to the medical tourist, the domestic physician can reduce the risk of liability exposure created by the environment of mixed medical services. From preparing the patient for overseas travel to encountering infection when the patient returns, the domestic physician must understand that he or she will be only tangentially involved in the care of a patient for a procedure over which he or she has no control. It is this lack of control by the domestic physician where risk of an adverse outcome is greatest.

One of the primary concerns that a domestic physician must have over a patient's planned or past offshore medical adventure is the loss of continuity of care. With the patient planning to seek treatment through a foreign medical trip, it is in the best interest of the domestic provider to equip that patient with, or at least provide the patient with the opportunity to acquire, his medical history, list of medications, relevant test results, and any known comorbid conditions which could or might influence the delivery of anesthesia and surgery. This information can be provided through copies of the medical chart or an electronic medical chart. The electronic medical chart can be placed on a flash drive,

CD-Rom or other suitable media. Naturally, if sending the records in any format, including electronic, directly from a domestic provider to a foreign provider, this would be considered a permitted use and disclosure under HIPAA, but obtaining a patient authorization would be prudent.

For example, a patient with a known arrhythmia traveling to have knee arthroplasty performed, would benefit from having a copy of her most recent EKG or samples of her aberrant rhythm for the operating surgeon and anesthesiologist to review. Similarly, a patient with a coagulation disorder should be equipped with the necessary labs for the offshore practitioners to review. Absent provision of this form of continuity of care it is conceivable that a surgical mishap could result in a theory of negligence being asserted against the domestic provider for failing to adequately inform the operating physicians of any relative contraindications to surgery or anesthesia or conditions which warrant precaution, especially where the domestic physician has been requested to provide that information.

Perhaps of greater concern with medical tourism is the lack of continuity in care when the patient returns from a foreign medical procedure. There is no guarantee that the patient will return with any medical records, let alone records that are available in English. Further, the domestic physician will have no knowledge of the surgical procedure performed, the techniques used, the equipment used, the drugs administered, or the implant used.

Indeed, equipment, devices and implants may not be FDA approved in the United States or otherwise recognized by surgeons performing similar procedures in this country. While a primary care physician may have given medical clearance based upon expectations for surgery to proceed in a customary practice for the United States, the use of anesthesia or recovery procedures may be different in a foreign land.

The domestic provider is likely to face limited access to the offshore physician, such that consultation in the event of a complication that first manifests after the patient's return may be impossible. Liability laws vary greatly in many foreign jurisdictions and the lack of accountability in other countries may create an environment where the foreign physician has little incentive, let alone interest, in communicating further once the procedure has concluded and the patient has returned to the United States.

Rettberg and Callicoat Defeat First Amendment Political Retaliation Claim

Chicago office shareholder **Paul Rettberg** and associate **Jason Callicoat** recently won a dismissal with prejudice of a lawsuit filed by a former municipal employee alleging her job was eliminated in retaliation for her political association, in violation of the First Amendment. The Plaintiff was an assistant to the Village Manager, who was allegedly a political opponent of group of individuals who had gained a majority on the Village Board of Trustees. The Plaintiff alleged her job had been eliminated because she was known to be a friend of the Village Manager. She sued the Village, the Village President, and three of the Village Trustees.

The ordinance that eliminated Plaintiff's job also eliminated two other jobs and created one new position. Plaintiff argued these were simple administrative employment decisions regarding individuals, rather than a legislative restructuring of the Village staff based on legitimate budget priorities. Querrey & Harrow moved to dismiss the complaint, arguing the decision was entitled to the application of Absolute Legislative Immunity. That doctrine holds that legislators at all levels of government cannot be held liable for their legislative decisions, which often determine how to allocate limited resources among competing priorities. The goal of Absolute Legislative Immunity is to prevent these legislative decisions from being skewed by the fear that legislators will be sued by anyone who is negatively affected by their decisions. The U.S. District Court agreed with this argument and dismissed the case against all Defendants with prejudice

Physicians in this country encountering patients who have returned from overseas medical procedures must also recognize that the patient may have received postoperative nursing care that is less attentive to aseptic technique or close observation. If the patient required blood or blood products, they may not have been screened to the same degree as they are in the United States.

Medical tourists often recover for a very short period of time in the hospital setting, only to be further recovered in a resort or hotel setting without regard to an aseptic environment. Additionally, these patients, depending upon their locale, may be exposed to unrelated tropical illness, respiratory disease, unknown infectious agents, parasites or even insect-born illnesses.

When such disease and illness is superimposed on a recovering patient this can represent a very dangerous situation, particularly where the unrelated illness has an incubation period such that the condition first manifests after the patient's return. Patients returning from medical tourism are typically traveling by air, such that the prudent physician may be called upon to consider the effects and timing of travel on the patient's condition. A basic knowledge of aeromedical concepts may be in order.

Finally, as any surgical procedure carries the risk of infection, the offshore surgical procedure carries the risk of an exceptionally virulent bacteria or an infectious agent that is not familiar to practitioners in this country.

In July, 2005, Cleveland Clinic researchers reported in the Annals of Plastic Surgery regarding five patients returning from plastic surgery in the Dominican Republic with Mycobacteria abscessus infections. New York City residents were also reported as returning from offshore cosmetic surgery vacations with unexplained boils, swelling and red splotches.

On August 11, 2010 the BBC News reported the existence of a superbug infection, which manufacture an enzyme, NDM-1, that is resistant to even carbapenem class drugs. The infection was reported in patients returning from medical tourism procedures in India and Pakistan. This past summer NDM-1 infections were also identified in at least three patients returning to the United States from surgery in India.

It has been theorized that the world we live in is now flat, a global marketplace. This is likely to be true for medical services as well. With the global delivery of healthcare to domestic patients, the domestic health care provider will be called upon to assist in preparing patients for travel abroad for medical purposes and will receive patients who have undergone such procedures.

An awareness of the potential risks that can ensue from such care will lead to safer travels for the patient and reduce the risk of complications developing postoperatively and after the patient returns to the United States. A prudent global awareness is the best tool to reduction of global risk.

* * *

***Jim Bream**, a shareholder in our Chicago office, concentrates his practice in health care litigation and the counseling and defense of hospitals, managed care organizations, and physicians for a variety of health care issues, including professional liability programs. He has handled all aspects of major medical malpractice cases in the trial and appellate courts.*

If you have any questions regarding this article, please contact Jim via jbream@querrey.com, or via 312-540-7520.

Illinois Health Care Update:
Amendments to the Illinois Power of Attorney Act

By: Jamie Goldstein-Waynee - Chicago office

The Illinois Power of Attorney Act was devised by the General Assembly in order to provide an individual (the principal) with the right to appoint an agent to make any property, financial, personal or health care decisions on his or her behalf. The General Assembly has recently passed Public Act 96-1195, which substantially amends the Illinois Power of Attorney Act in order to further delineate the rights of the principal and the duties of the agent. The changes to the Illinois Power of Attorney Act will take effect on July 1, 2011. This article contains a summary of the recent changes to the Illinois Power of Attorney Act that apply to the field of health care.

Pre-Existing Powers of Attorney – Section 2-10.6

Illinois healthcare providers are most familiar with the "Illinois Statutory Short Form Power of Attorney for Health Care" (POAHC), which is the most prevalent form that is utilized among patients. Although this form has now been amended by Public Act 96-1195, any pre-existing power of Attorney form will remain valid and enforceable in Illinois, so long as the form was created in compliance with the law as it existed at the time.

Effective Date of Agency Powers under the POAHC – Section 2-3 (c-5)

The POAHC instructs the principal to designate the time upon which the power of attorney shall become effective. Under the new version of the statute, a principal is now advised to either choose a specified future date, or in the alternative, to identify an event during the principal's lifetime, such as a court determination of disability, or a written determination by a physician that the principal is incapacitated. The Act defines "incapacitation" as a legal disability as set forth by the Probate Act of 1975 , or when:

> i) a physician licensed to practice medicine in all of its branches has examined the principal and has determined that the principal lacks decision making capacity;
>
> ii) that physician has made a written record of this determination and has signed the written record within 90 days after the examination; and
>
> iii) the written record has been delivered to the agent.

If a patient chooses for a power of attorney to only become effective upon a physician's determination of incapacitation, it will be necessary for a health care provider to confirm that the physician's report was written and signed by a physician within 90 days of the examination. Otherwise, the power of attorney will not be effective and should not be relied upon by the health care provider.

Duration of Agency for Appointed Power of Attorney – Section 2-5

The Act still provides that, unless stated otherwise, the agency that is created under the POAHC shall continue until the death of the principal. However, any previously executed power of attorney will remain in effect and not be revoked by a new power of attorney, unless the principal expressly provides in the new power of attorney that the previous power is revoked. As such, a health care provider should review a power of attorney form for any language concerning the revocation of prior forms. If the power of attorney form does not contain a revocation clause, then the health care provider should inquire as to the existence of any prior forms before relying upon the power of attorney document that is presented at the time of a patient's admission.

Health Care Provider's Reliance on a Power of Attorney Document – Section 2-8

A health care provider who acts in good faith reliance on a copy of a document purporting to establish an agency is fully protected under the Illinois Power of Attorney Act. Under the new version of the statute, a health care provider may request that the agent provide either an affidavit or an "Agent's Certification and Acceptance of Authority" stating that the instrument relied on is a true copy of the agency and that, to the best of the agent's knowledge, the principal is alive and the relevant powers have not been altered or terminated. However, a health care provider is not required to request an affidavit or a certification from an agent. It is still acceptable under the Act for a health care provider to rely in good faith upon the document that is presented, unless the health care provider has actual knowledge that the power of attorney was improperly executed.

Successor Agents – Section 2-10.3

A principal is now authorized to designate one or more successor agents to act in the event that an initial or predecessor agent resigns, dies, declines, or is found to be incapacitated or unqualified by a Court. A health care provider who acts in good faith reliance on the representation of a successor agent regarding the unavailability of predecessor agent will be fully protected under the Act. A health care provider may request that the agent provide either an affidavit or a "Successor Agent's Certification and Acceptance of Authority," stating that the instrument relied on is a true copy of the successor agency and that, to the best of the agent's knowledge, the principal is alive and the relevant powers have not been altered or terminated. However, a health care provider is not required to request an affidavit or a certification from a successor agent. It is still acceptable under the Act for a health care provider to rely in good faith upon the document that is presented, unless the health care provider has actual knowledge that the power of attorney was improperly executed.

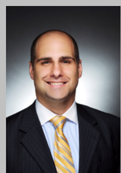
Power of Attorney Executed in Another State – Section 2-10.6

A power of attorney executed in another state is valid and enforceable in Illinois if its creation complied with Illinois law and the law of the state or country where the power of attorney was executed, where the principal resides, or where the agent resides. At a minimum, the power of attorney should contain the signature of the principal, the name of the agent, a description of the agent's powers and the signature of a witness.

Farmans and De Angelis Obtain Summary Judgment For Homeowners Association

Joliet office shareholder **Janet Farmans** and associate **Aaron De Angelis** recently obtained a summary judgment for a defendant/homeowners association on this premises liability case where the plaintiff claimed that she slipped and fell on ice located on the sidewalk outside of her townhome. Plaintiff filed a 2-count complaint for breach of contract (terms of the condo declarations to maintain the common areas, including snow removal) and willful and wanton conduct against the homeowners association. Plaintiff alleged that she sustained a broken leg as a result of her fall, requiring two surgeries, including future physical therapy and treatment. Plaintiff's last demand was $400,000.

Lanzito Obtains Dismissal of Civil Rights Claim Alleging "Involuntary Servitude"



Congrats to Chicago office shareholder **Dominick Lanzito** for obtaining the dismissal of an interesting case where the plaintiff, suing as "John Doe", challenged the constitutionality of the Illinois Sex Offender Registration Act. Specifically, plaintiff claimed that the Act was tantamount to a Bill of Attainder and cruel and unusual punishment. Dominick successfully filed for dismissal on behalf of all municipal defendants.

Witness Requirement –Section 4-5.1

The POAHC still requires one witness to sign the power of attorney form. However, the witness must now certify that he or she is not (a) the principal's attending physician or mental health service provider (or their relative); (b) an owner or operator (or their relative) of a health care facility in which the principal resides; (c) a parent, sibling, descendant or (or their spouse) of the principal or agent; or (d) an agent or successor agent under the power of attorney. The Act provides that the prohibition of the operator of a health care facility extends to the directors and executive officers of an operator that is a corporate entity but not to any other employees of the operator. Under the new version of the statute, it is important to ensure that any attending physician at a hospital is made aware of the fact that his or her signature as a witness on a power of attorney form could serve to invalidate the form.

Statutory Short Form Power of Attorney for Health Care (POAHC): Medical Records Authorization for Agents – Section 4-10

The new version of the POAHC includes a section that authorizes the appointed agent to be treated as the principal would be with respect to his or her rights regarding the use and disclosure of individually identifiable health information or other medical records, including records or communications governed by the Mental Health and Developmental Disabilities Confidentially Act. This release authority expressly applies to any information that is governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The POAHC specifically provides that the agent is to serve as the principal's personal representative as defined under HIPAA. The agent is granted the power to authorize the release of the principal's information that is governed by HIPAA to third parties. In addition, the POAHC expressly authorizes any physician or other health care provider, or any insurance company and the Medical Informational Bureau, Inc., or any other health care clearinghouse to disclose all of the principal's individually identifiable health information and medical records, including any information related to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, drug or alcohol abuse and mental illness. Further, the authority given to the agent under the POAHC is noted to supersede any prior agreement that the principal may have with any health care providers. Accordingly, if a patient's POAHC contains this language concerning the release of medical information, a health care facility is authorized to disclose protected health care information to the agent without violating any statute governing the privacy of that information.

Statutory Short Form Power of Attorney for Health Care (POAHC): Life-Sustaining Treatment – Section 4-10

The POAHC still instructs a principal to choose one of three statements to serve as guidance to the agent on the subject of life-sustaining treatment. The three options are as follows:

1) the principal does not want any life-sustaining treatment to be provided or continued, if the agent believes that the burden of the treatment outweighs the benefit;

2) the principal wants life-sustaining treatment, unless in the opinion of the attending physician and in accordance with reasonable medical standards at the time of reference, the principal is in a state of "permanent unconsciousness" or suffers from an incurable or " irreversible condition" or "terminal condition."

3) the principal wants his/her life to be prolonged to the greatest extent possible in accordance with reasonable medical standards, without regard to his/her condition, the chances of recovery or the cost of procedure.

The new version of the statute changed the second option for life-sustaining treatment, replacing the word "coma" with more medically relevant terminology. The Act defines a state of "permanent unconsciousness" as a condition

that, to a high degree of medical certainty, (i) will last permanently without improvement, (ii) in which thought, sensation, purposeful action, social interaction, and awareness of self and environment are absent, and (iii) for which initiating or continuing life-sustaining treatment, in light of the patient's medical condition, provides only minimal medical benefit (which refers to a chance to cure or reverse the condition).

An "incurable or irreversible condition" is an illness or injury (i) for which there is no reasonable prospect of cure or recovery, (ii) that ultimately will cause the patient's death even if life-sustaining treatment is initiated or continued, (iii) that imposes severe pain or otherwise imposes an inhumane burden on the patient, or (iv) for which initiating or continuing life-sustaining treatment, in light of the patient's medical condition, provides only minimal medical benefit.

Finally, a "terminal condition," is an illness or injury for which there is no reasonable prospect of cure or recovery, where death is imminent, and where the application of life-sustaining treatment would only prolong the dying process. Accordingly, if an agent acting pursuant to this second option requests that treatment be withdrawn, before issuing any such order, a health care provider should confirm that the principal has one of the aforenoted qualifying conditions. If the principal is not in a state of permanent unconsciousness, or suffering from an irreversible or terminal condition, then the agent does not have the authority to make such a request under the second option of the POAHC. Public Act 096-1195

The amendments to the Illinois Power of Attorney Act could be viewed in their entirety at http://www.ilga.gov/legislation/publicacts/96/PDF/096-1195.pdf.

* * *

Jamie Goldstein-Waynee *is an associate in the firm's Chicago office. She concentrates her practice in the areas of medical malpractice, healthcare liability, guardianship law and premises liability. She represents hospitals, physicians, nurses and other healthcare providers involving various medical specialties in all aspects of the litigation process. She also specializes in petitioning for the appointment of a guardian for patients with diminished mental capacity who do not have an advanced directive or family member available to assist with their healthcare decisions. Jamie has served as a guest lecturer on medical malpractice law at Notre Dame Law School and has presented to medical students and residents at Midwestern University.*

If you have any questions regarding this article or the revisions to the Power of Attorney Act, please contact Jamie via jwaynee@querrey.com, or via 312-540-7522.

Q&H Wins Dismissal Of Civil Rights and Wrongful Death Claims Arising in Municipal Jail

Chicago office shareholders **Dan Gallagher, Larry Kowalczyk** and **Dominick Lanzito** recently obtained a summary judgment order dismissing with prejudice a federal civil rights and wrongful death lawsuit filed against a county sheriff and others following the death of a detainee. In the case, a detainee with a history of prior falls and injuries, was noted to have collapsed while waiting in an intake processing line at the jail and died shortly after being taken for emergency medical care. Post-mortem medical examinations resulted in a dispute between experts on both sides on whether the decedent's death was due to natural causes or the effects of prior injuries, or the result of injuries allegedly caused by an attack by unknown officers or other detainees. Despite several expert reports from plaintiffs' side claiming that the death must have been caused by an assault, Q&H obtained the dismissal of the case by documenting that there was no competent evidence regarding there being any assault occurring at the jail, detailing the decedents' history of past injuries and falls and setting forth evidence that the death could just have easily occurred due to natural causes. The District Court agreed with these arguments and found that the plaintiff's failure to identify any particular officer or detainee involved in any attack of the decedent left the case dependent solely on improper speculation and conjecture.

Dramshop Law Update: Illinois Second District Reviews Social Host Liability

By: Patrick S. Wall - Chicago office

Recently, the Illinois Second District Appellate Court reviewed social host liability and its connection with the Dramshop Act in a tragic case from 2006, *Bell v. Hutsell*, No. 02-09-0577 (2nd. Dist. 2010).

On October 13, 2006, in Deerfield, Illinois, Daniel Bell, age 18, crashed into a tree, killing himself and a passenger, Ross Trace. According to the allegations of the complaint, Defendants' son, Jonathan Hutsell, an 18-year-old high school student, had a party at the family's residence on the evening of October 13, 2006. The party was attended by numerous high school friends of Jonathan's who were under the legal drinking age, including Daniel. Before the party, defendant Jeffrey Hutsell told Jonathan that no alcoholic beverages would be allowed at the party and that Jeffrey and Sara, Jonathan's mother, would be present to check on the partygoers. Jeffrey told Jonathan that they would monitor and inspect the activities in the lower level of the house, the garage, and the driveway to ensure that no one consumed alcoholic beverages anywhere inside the residence or on the property.

Nevertheless, throughout the evening, defendants Jeffrey and Sara were present when the partygoers consumed alcohol, including beer, vodka and rum, which was brought into the residence by the partygoers. Defendants did not furnish the alcohol, having stocked the bar area in the lower level of the house with soft drinks. At approximately 11:30 p.m., Daniel, who was impaired by alcohol he consumed at the party, drove his car with Ross Trace and others as passengers and struck a tree. Daniel died as a result of the injuries he sustained in the accident.

Daniel's mother soon filed suit against Jonathan's parents for Daniel’s death. First, the Bells alleged that the defendant Hutsells voluntarily undertook the duty to monitor the party guests who were under the age of 21 and to inspect the inside and outside of the property to ensure that the partygoers would not consume any alcoholic beverages. Second, the Bells argued that the Hutsells were negligent in failing to carry out their intention to prohibit the consumption of alcoholic beverages.

The Bells also attempted to state a civil cause of action based upon a violation of a section of the Liquor Control Act of 1934 (Act), which is a criminal statute making it unlawful (misdemeanor) for any parent to permit his or her residence to be used by an invitee of the parent's child, if the invitee is under the age of 21, in a manner that constitutes a violation. A violation takes place if the parent knowingly authorizes, enables, or permits such use to occur by failing to control access either to the residence or to the alcoholic liquor maintained in the residence.

The Defendants moved to dismiss arguing that the Hutsells owed no duty to Daniel because there is no social host liability in Illinois. A social host is a noncommercial supplier of liquor; one who, "in his own house or elsewhere, gives a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness." The Hutsells moved to dismiss the other allegations on procedural grounds. The trial court dismissed the complaint. The Plaintiffs appealed.

Guolee Successfully Defends Village Before IDHR

Chicago office shareholder **Terrence Guolee** recently obtained the dismissal of all age discrimination and harassment claims pending before the Illinois Department of Human Relations raised by a terminated office administrator against a south suburban Chicago-area village government. In entering its Notice of Dismissal for Lack of Substantial Evidence, the IDHR accepted the defenses raised for the village that the claimant's termination was connected to a required contraction of the village's administrative staff due to a severe budget shortfall. The IDHR also accepted the presentation of claimant's employment records that refuted her claims that she was improperly denied vacation and overtime.

First, the Plaintiffs alleged that when the Hutsells inspected and monitored the property to ensure that no underage party guest would drink alcoholic beverages, they undertook a duty to exercise due care by saying:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."

Restatement (Second) of Torts §323 (1965).

In this case, the Plaintiffs claimed that the Defendants voluntarily undertook a duty to Daniel when defendant Jeffrey told his son, Jonathan, that no drinking of alcoholic beverages would be allowed at the party and that he and Sara would be present to check on those coming to the party and would monitor and inspect the partygoers to ensure that no drinking occurred. Plaintiff alleged that, in furtherance of this undertaking, Defendants were present in the house during the party and they walked through the areas where the partygoers were gathered "to ensure that no one was drinking alcohol anywhere inside or outside their residence or on their property."

Conversely, Defendants claimed that the complaint failed to state a duty because there is no social host liability in Illinois and the voluntary-undertaking theory is an attempt to circumvent the rule against social host liability. Illinois law is clear that the Dramshop Act "extends to social hosts who provide alcoholic beverages to another person, whether than person is an adult, an underage person, or a minor".

However, the appellate court went a step further, and appeared to decide the issue on wholly separate grounds from what the parties argued. In an unusual move, the court found that the Hutsells were not even social hosts, a legal fact the Defendants had apparently conceded.

The court stated that the Hutsells did not supply the alcohol that Daniel consumed to the point of impairment. They stocked the lower bar area with soft drinks, and the alcohol that was brought onto the premises was supplied by the invited partygoers. That Defendants may have negligently failed to prevent the consumption of alcohol on the premises, but this does not convert them into social hosts. Therefore, per the court, whether the voluntary-undertaking theory was a way of circumventing the rule against social host liability was not present. Rather, the court found the complaint alleged something different from the direct or indirect giving, selling, or delivery of alcohol. It alleged that Defendants voluntarily undertook the duty to prevent the consumption of alcohol on their premises and that they negligently performed that duty. Because Defendants did not supply the alcohol, store the alcohol, or affirmatively permit its consumption, they were not social hosts.

Surprisingly, the court sent the case back to the trial court to see if in fact the Hutsells may have undertaken the duty by inspecting the premises. Down the road, it may be true that no good deed goes unpunished, as the adage goes.

As the court found, "the drinking of the intoxicant, not the furnishing of it, [that] is the proximate cause of the intoxication and the resulting injury." Defendants did not furnish the alcohol. Accordingly, the trial court erred in dismissing counts I, II, and III of the complaint.

As to the ability to bring a private right of action in civil court from a criminal charge, because the Hutsells allegedly violated the criminal statute, Plaintiffs alleged that as a proximate result of the defendant's statutory violation, Daniel suffered serious injuries that resulted in his death. Plaintiff could offer no portion of the statute which created that right, but argued instead that this was the legislature's intent. Conversely, given the legislature's past refusal to

impose social host liability, the courts have refused since to graft social host liability onto a criminal statute. The court refused to do the same here.

The lesson to take away from this case is that the mere hosting of a party where parental supervision is shown may lead to liability. Given the court's pronouncements here, a return visit for the Bells and Hutsells to the Second District Appellate Court seems probable. Secondly, the appellate court may always decide a case on a separate point from the ones argued by the parties. A thorough review of your cases prior to resolution of this appeal may be warranted.

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Insurance Law Update: The Erosion of Late Notice Defense

By: Michele T. Oshman – Chicago office

> "Better three hours too soon than a minute too late." WILLIAM SHAKESPEARE, THE MERRY WIVES OF WINDSOR act 2, sc 2.

There once was a time when Illinois courts determining whether an insured had given proper notice of a claim concurred with Falstaff's concern about timing. Courts regularly ruled that an insured that did not give prompt notice of a claim against it had failed to meet a condition of coverage under its commercial general liability policy, thus excusing the insurer from its coverage obligations. A recent case from the Illinois Supreme Court, however, exemplifies how the concept of "late" notice is being eroded by rulings that policyholders acted reasonably in giving notice despite waiting for years to notify the insurer of a lawsuit against it.

The underlying event in *West American Ins. Co. v. Yorkville National Bank*, 238 Ill.2d 177 (2010), involved a claim of defamation. The claimant asserted that in November 2000, the vice president of insured Yorkville Bank uttered false statements against her in his official capacity that damaged her professional reputation. The claimant filed a defamation lawsuit against the Bank on September 24, 2001. The Bank, however, did not provide written notice of the claim to West American until January 19, 2004, which was less than two months before the scheduled March 15, 2004 trial of the defamation lawsuit and almost 27 months after that lawsuit was filed.

At the time of the alleged defamation, Yorkville Bank was covered by commercial general liability primary and umbrella policies issued by West American. The West American policies required that the Bank notify West American if a claim is made or a suit is brought "as soon as practicable" and that the Bank immediately send copies of any legal papers received in connection with a claim or suit. Based on these notice provisions, West American filed a declaratory judgment action denying coverage due to late notice.

At the bench trial, the president of the Bank testified that he had discussed the possibility of coverage under the West American liability policies for the underlying defamation suit on two occasions with two different representatives of the insurance agency that had placed the policies. Both representatives had informed the Bank's president that the claim was likely not covered. In addition, one of the insurance agents sat on the Bank's Board and was present when the defamation lawsuit was discussed at three separate meetings. The trial court considered these conversations and meetings, and found that actual notice of the claim had been given to West American. On appeal, the Appellate Court reversed and found that the Bank had breached the notice requirements by waiting 27 months to submit written claim forms and a copy of the complaint to West American.

On further appeal to the Illinois Supreme Court, the court noted that a policy provision requiring notice "as soon as practicable" means that the notice must be given "within a reasonable time." Further noting that the timeliness of an insured's notice to its insurer is a question for the trier of fact, the Illinois Supreme Court went on to examine the following factors that are considered in determining whether notice to an insurer has been given within a reasonable time:

1. The specific language of the notice provision;
2. The Insured's sophistication in commerce and insurance matters;
3. The insured's awareness of an event that may trigger coverage;
4. The insured's diligence in ascertaining whether insurance coverage may be available; and
5. Prejudice to the insurer.

The court determined that the first factor did not aid in the analysis of whether the notice was reasonable because there was no time limit set out in the provision. The court further found that the second factor weighed in favor of West American because the Bank was presumed to be sophisticated in commercial and insurance matters. The court also found that the third factor favored a finding of unreasonable notice since the Bank was clearly aware that there had been an event that could trigger coverage under the West American policies.

The court then discussed the fourth factor, which is the insured's diligence in ascertaining whether insurance coverage may be available. Noting that courts have found that an insured's reasonable belief of noncoverage may excuse the failure to give timely notice, even when the delay is lengthy, the court agreed with the trial court's finding that this factor favored the insured Bank. The court further stated that the trial court's finding that, after the Bank's president conversation with the insurance agent, the Bank reasonably believed that sending written notice to West American would be futile, was not against the weight of the evidence. Finally, the court stated that there had been no testimony relating to the fifth factor, the presence or absence of prejudice to the insurer from the late notice.

The Illinois Supreme Court then discussed the concept of what constitutes "actual notice" of a lawsuit against the insured by an insurer. The court had previously ruled that an insurer has "actual notice" when it has sufficient information to locate and defend a lawsuit, meaning that the insurer knows that a cause of action has been filed and that the complaint falls within, or potentially within, the policy's scope of coverage. In this case, the Illinois Supreme Court agreed with the trial court's finding that the Bank president's conversation "in passing" with the insurance agent about the potential for coverage, plus the agent's attendance at Board meetings where the lawsuit was discussed, provided "actual notice" of the lawsuit to West American. The court therefore affirmed the judgment of the trial court and found for the insured Bank and against West American.

One Justice wrote a spirited dissent to the opinion, based on additional testimony at trial not discussed in the opinion. The dissent noted that, although the majority cited long-standing legal precepts in Illinois finding that notice provisions are not technical requirements but rather, are conditions precedent to triggering insurance coverage, it failed to apply them. The

dissent notes that the majority failed to consider other language in the West American notice provision requiring the insured transmit specific information about a lawsuit, such as details of the event and the nature of the claimed injury, and noted that the Bank did not provide any of this information to West American after it was informed of the alleged defamatory occurrence. The Bank also failed to "immediately" forward a copy of the complaint as required by the West American policies. The dissent states that the Bank breached every reporting requirement in the notice provision, depriving West American of the opportunity to make a timely investigation, to preserve evidence and to make an informed decision whether to defend or settle the underlying defamation case. The dissent expresses concern that the opinion undercuts precedent regarding late notice without discussing or supporting the reason for doing so, leading to confusion to the bench and the bar about the continued validity of previously settled principles.

The dissent is further concerned by the majority's reliance on the factor of whether the insured was diligent in ascertaining whether insurance coverage was available. The dissent notes that there is no support for the conclusion that sending written notice would have been futile and the lack of detail about the claim in the "in passing" conversation between the Bank president and the insurance agent. Another concern is that the majority dilutes the concept of "actual notice" because West American was not an actual participant in the underlying litigation, which was distinguishable from other cases where an insurer was found to have such "actual notice." Based on the majority's failure to apply settled principles regarding notice provisions and the potential confusion regarding that precedent by the bench and the bar, the dissenting Justice did not join in the majority opinion.

The ruling in *West American Ins. Co. v. Yorkville National Bank* is remarkably pro-insured without setting forth any grounds based on the insurance policy, or even public policy, to support such a sweeping disregard of the express requirements of the notice provision in the policy. In essence, an informal discussion with the insurance agent about the claim supplanted the requirement to send written notice of the claim and copies of the complaint to the insurer. The dissent correctly notes that this opinion calls into question the validity of all of the prior Illinois cases finding that an insured's compliance with the notice provision is a condition precedent to coverage. Now, a chit-chat with an insurance agent may be enough to trigger an insurer's coverage obligations.

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SEMINARS

Gibson Organizing CHRMS Healthcare Seminar

Chicago office shareholder **Ellen Gibson** is organizing the Chicago Healthcare Risk Management Society's 1/2-day seminar that will take place on January 21, 2011 in Oak Brook, Illinois. The theme of the seminar is "Keeping Risk Management In The Loop" and will include several speakers on a variety of legal and healthcare topics. E-mail Ellen at egibson@querrey.com for more detail.