



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

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Prior results do not guarantee similar outcomes.

## **Business Law Update: Illinois Supreme Court Expands “Legitimate Business Interest” Analysis In Assessment of Non-Compete Agreements**

By: Ghazal Sharifi – Chicago, Illinois office

In *Reliable Fire Equipment Co v. Arredondo*, 2011 IL 111,871, \_\_ N.E.2d \_\_ (Ill. Dec. 1, 2011), the Illinois Supreme Court expanded the scope of analysis of the legitimacy of non-compete agreements.

In 2004, Reliable Fire Equipment Company (Reliable), filed a complaint against its former employees Arnold Arredondo, Rene Garcia, and their company, High Rise Security Systems, LLC (High Rise) for a breach of a non-competition restrictive covenant. The trial court found the provisions of the non-compete agreement unenforceable. The Illinois Appellate Court affirmed the trial court. The Illinois Supreme Court reversed the decision, expanding the breadth and applicability of non-compete clauses.

Reliable is a company that sells, installs, and services portable fire extinguishers and a variety of fire suppression and fire alarm systems. Defendants Arredondo and Garcia worked as salespersons for Reliable. Both signed non-compete agreements with the company. The non-compete agreements detailed Reliable’s stated “purpose” as supplying engineered fire alarm and related auxiliary systems throughout the Chicago metropolitan area.

In the agreements, Arredondo and Garcia each promised not to compete with Reliable during their employment and for one year after their termination from employment in Illinois, Indiana or Wisconsin. Arredondo and Garcia further promised not to solicit any sales or referrals from Reliable customers or referral sources, or to solicit Reliable employees to leave their employment with Reliable. Around 2004, Arredondo and Garcia were promoted to managers because of a restructuring of Reliable. Around that same time, Reliable became suspicious that Arredondo and Garcia were seeking to compete with Reliable. Eventually Arredondo resigned and Garcia was fired on suspicion of competition. Reliable later filed suit

for breach of the non-compete agreement.

In assessing the non-compete provisions, the Illinois Supreme Court revisited a traditional three-prong analysis to evaluate whether a non-compete agreement is reasonable. The Court identified that a restrictive covenant is reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public.

In revisiting the three-prong reasonableness analysis, the Court rejected prior case law diminishing the importance of the “legitimate business interest” of the employer as nothing more than “is whatever the parties agree to in the contract.”

The court indicated that, contrary to decades of prior case law applying restricting prongs and analyses to assess the existence of a “legitimate business interest,” courts must now apply a “totality of circumstances” analysis. Accordingly, instead of applying the traditional two-prong test or other limiting tests previously applied, courts must now look at all of the circumstances surrounding the “business interest” of the employer. The court identified that prior case law and tests “are only nonconclusive aids in determining the promisee’s legitimate business interest.”

The court outlined certain non-limited factors as possibilities for the courts to assess: the near-permanence of customer relationships, the employee’s acquisition of confidential information through his employment and time and place restrictions. However, the court warned that no factor carries any more weight than any other – but all depends on the specific circumstances of the case.

The court also noted that the “same identical

contract and restraint may be reasonable and valid under one set of circumstances, and unreasonable and invalid under another set of circumstances.” Accordingly, with respect to the facts of the case before it, the court remanded for the circuit court to make an assessment.

The implications of this case are vast. Essentially, the court expanded the variety and scope of “legitimate business interests” in non-compete agreements that can be held enforceable under a totality of circumstances analysis. Moreover, what constitutes a “legitimate business interest” is now much more open to interpretation – as there is no longer a rigid limiting analysis.

At the same time, however, the court did not completely undermine the factors that have been used by courts in evaluating non-compete agreements.

Specifically, the court did identify that these tests should be “nonconclusive aids” to determine whether there is a “legitimate business interest.” Nonetheless, it appears as if this decision opens the door for more creative non-compete agreements for a wide spectrum of employees.

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**Ghazal Sharifi**, an associate in our Chicago office, concentrates her practice in general litigation with a focus on municipal defense.

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Querrey & Harrow represents a myriad of businesses, large, mid-size and small, through all aspects of business and corporate matters - including drafting of non-compete agreements, employee handbooks and in all aspects of employer-employee legal relations.

## CASE SUCCESS

### Christopher Keleher Wins in Sixth Circuit on Appointment in Criminal Appeal



**Christopher Keleher** was appointed by the Sixth Circuit Court of Federal Appeals to handle the case of Gary Clay, who previously was convicted by a jury of violating 18 U.S.C. § 2119 and 18 U.S.C. § 924(c)(1)(A)(ii). Mr. Keleher drafted the appellate briefs and presented oral argument to the Court in Cincinnati. The appeal involved an interpretation of Federal Rule of Evidence 404(b), and whether the district court erred in admitting evidence of a prior conviction. Federal Rule of Evidence 404(b) allows the government to introduce evidence of “other crimes, wrongs, or acts” committed by the defendant so long as the evidence is not used merely to show propensity and if it “bears upon a relevant issue in the case.” Chris convinced the Sixth Circuit that the U.S. Attorney admitted evidence for improper purposes. In a 2-1 decision, the Sixth Circuit held the district court abused its discretion in admitting evidence of prior bad acts. The Court further agreed with Clay that the errors were not harmless. The Court thus reversed and remanded for a new trial.

This is a significant victory, when it is considered that only about 5% of criminal appeals are successful. Congratulations to Chris on his very successful *pro bono* representation of Mr. Clay.

## Construction Law Update: Owed Money? Be Proactive.

By: Bruce Schoumacher - Chicago, Illinois office

A recent study by Sageworks highlights the need for design professionals and contractors to act aggressively in collecting their bills. In the study, Sageworks looked at the accounts receivables of architects, foundation contractors, and certain contractors who perform work close to substantial completion. The study showed that both architects and contractors are taking longer to collect their accounts receivable.

In 2006, architects waited an average of just under 55 days to get paid. In 2011, they waited around 73 days to get paid. Finishing contractors had to wait longer in both years. In 2006, they waited around 61 days on average to be paid and 80 days in 2011.

Obviously, design professionals and contractors must be proactive in collecting their receivables. Merely having your accounts receivable clerk sending out reminders about past due invoices will not work. Senior management must make

phone calls and visits to their counterparts to have their invoices moved to the top of the list for payment. At the A/E firm, the project director should be making the calls. At the contractor, a principal or the project manager should be making the calls. Do not rely on one call. Repeated calls may be necessary to get your client to act.

Granted, your senior people may not like making such calls. However, they must realize that cash is what makes their firms go and what puts food on their table.

Further, many firms now have interest or late payment penalty provisions in their contracts to encourage prompt payment by their clients. They should enforce those provisions. If they do, their clients will see the need for prompt payment of their invoices.

### Rettberg and Lemley Obtain Dismissal of Municipal Federal Class Action Claim



Congratulations to Chicago office shareholders **Paul Rettberg** and **Brandon Lemley** for their recent victory in *Markadontas v. Woodridge*.

On January 11, 2012, Chief Judge James Holderman granted the Village of Woodridge's Motion to Dismiss a putative class action. Woodridge enacted Village Code Section 5-1-12(A), which states: "Booking fee: When posting bail or bond on any legal process, civil or criminal, or any custodial arrest including warrant." The code states that the booking fee is \$30.

Plaintiff was arrested, taken to the Woodridge Police Department, and charged with shoplifting. Upon being booked, the arresting officer required Plaintiff to pay the \$30 booking fee, which he did. Plaintiff later sued, claiming Section 5-1-12(A) is unconstitutional. Specifically, he alleged Woodridge violated his Fourteenth Amendment due process rights by requiring him to pay the \$30 booking fee upon his booking at the jail. Plaintiff also sought class action status.

The Village of Woodridge moved to dismiss the suit in its entirety under Rule 12(b)(6), and the Court granted it. The Court found that the ordinance did not violate the Plaintiff's procedural due process rights under United States Constitution. The Court reasoned that there was no risk of erroneous deprivation of the arrestees rights because it is charged to all individuals who are arrested. Additionally, additional procedures would not provide any additional safeguards. As such, the \$30 fee passed constitutional muster.

More importantly, because payment is now delayed for some designers and contractors on average more than 70 or 80 days, they must be aware of the time deadlines of the relevant construction lien statute. In Illinois, subcontractors should send a notice to the owner and lender no later than 90 days after completion of their work if they have not been paid. Both the general contractor and subcontractors should file their mechanics lien claims with the recorder of deeds within four months of completion of their work in order to get the best possible priority over other creditors who may have liens against the property.

Because of the time it takes for a designer or contractor to collect its receivables, they must keep a close eye on accounts receivable aging. When an account has not been paid and 60 days has passed since completion of the work of the designer or contractor, they should seriously consider starting the mechanics lien process.

They also should consult with their attorney to be sure of what they must do to create a valid mechanics lien claim. They should not wait any longer because gathering the information to prepare a 90 - day notice and a mechanics lien claim takes time. Sometimes, it can take weeks to collect the necessary information.

Remember, don't be afraid to take bold steps to collect what you are owed.

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**Bruce Schoumacher**, co-chair of *Querrey & Harrow's Construction Law Group*, practices construction, antitrust, commercial and professional liability law. If you have questions regarding this bulletin, please contact him via [bschoumacher@querrey.com](mailto:bschoumacher@querrey.com) or 312-540-7046.

### **Turiello, Farmans and De Angelis Win in Second District Appellate Court**



Chicago shareholder **Jennifer Turiello** successfully obtained a decision from the Second District Appellate Court upholding the trial court's summary judgment ruling on behalf of Q&H's client, a homeowners' association. In this premises liability case, the plaintiff suffered severe and permanent injuries when she slipped and fell on ice located on the sidewalk outside of her townhome. The plaintiff appealed the trial court's order granting summary judgment in favor of the homeowners association under the Illinois Snow and Ice Removal Act. On appeal, the Second District Appellate Court affirmed the trial court's order, and held that the homeowners' association was immunized from liability under the Snow and Ice Removal Act. The initial decision by the trial court to grant summary judgment in favor of the homeowners association was obtained by Joliet office shareholder **Janet Farmans** and associate **Aaron De Angelis**.

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### **Gallagher, Littman and Schoumacher Attain "Super Lawyer" Listing. Atkins a "Rising Star"**



Congratulations to **Dan Gallagher** (Personal Injury Defense: General), **Roger Littman** (Personal Injury Defense: Medical Malpractice) and **Bruce Schoumacher** (Construction/Surety) for the honor of their inclusion in the 2012 Illinois **Super Lawyers** listing.

Congratulations also go to **Stacey Atkins** for being named as an Illinois "Rising Star" for Government/Cities/Municipalities.

## **Municipal Law Update: Forest Preserve District May Be Held Liable To Motorist Who Was Not Intended Or Permitted User Of Its Property, In Spite of Tort Immunity Act**

By: Jason Callicoa – Chicago office

Public entities are generally shielded from liability when individuals are injured by a condition on public property, provided those individuals were not intended or permitted users of the public property. However, the First District Appellate Court recently held that in certain circumstances, even someone who was not an intended or permitted user of public property could maintain a lawsuit against a public entity for an injury caused by a condition on that entity's property.

In *Belton v. Forest Preserve Dist. of Cook County*, 407 Ill.App.3d 409 (1st Dist. 2011), a motorist was driving on a highway adjacent to land owned by the Cook County Forest Preserve District. The highway itself was not owned by the District, but a dead tree limb stretched out over the road from a tree on the District's property. It broke off and fell on the plaintiff's car, resulting in a crash in which the plaintiff suffered a fractured vertebra.

The Forest Preserve District defended itself in the Cook County Circuit Court by arguing it was immune from liability to the plaintiff based on Section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act. (745 ILCS 10/3-102(a)). That section provides, in relevant part, that "a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition."

The Cook County Circuit Court granted summary judgment to the Forest Preserve District, agreeing that its property maintenance duties to the world were limited to the "intended and permitted" users of its property by Section 3-102(a) of the Tort Immunity Act, and that it owed no duty of care to a person who was on adjacent or abutting property when he was injured due to a condition on the public property.

The appellate court vacated the judgment, finding that Section 3-102 did not necessarily determine the outcome of the case. The court noted that unless a specific immunity applies, public entities are liable for ordinary negligence just like any private party. The purpose of Section 3-102 is to require public entities to maintain their property so that it is safe for those individuals who are intended and permitted users. However, the public property does not have to be maintained in such a way that it is safe for all users.

For example, public roads do not have to be made safe for drag racers, because they are not intended or permitted users of those roads. On this, the court explained that Section 3-102 and the cases interpreting it all dealt with the situation where someone was on the defendant public entity's property, and the question to be answered was whether that person was an intended or permitted user. Essentially, the point of Section 3-102 is to make clear that a public entity does not have to maintain its property so that the property is safe for unintended and non-permitted uses.

The *Belton* court decided that Section 3-102 meant that "as to users of public property," the public owner of the property has a duty only toward those who are "intended and permitted" users. However, the section did not mean that as to the world at large, an owner of public property only owes a duty of care toward

intended and permitted users of public property. When the public entity allows a condition to exist on its property that injures someone who is on neighboring property, the public entity can still be held liable.

Ultimately, the appellate court ruled that the lower court erred in determining that because of Section 3-102, the Forest Preserve owed no duty of care to the plaintiff. The case was thus remanded to the lower court and ordered it to determine whether a duty was owed under traditional tort principles, without regard to whether the plaintiff was an intended or permitted user of Forest Preserve property.

This case demonstrates that the “intended and permitted user” immunity will not be applied automatically to cases where someone is injured by a condition on public property. While that immunity will still apply in many situations,

traditional negligence principles must be analyzed where the plaintiff was on neighboring property when injured by a condition on public property.

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**Jason Callicoat**, an associate in our Chicago office, concentrates his practice in municipal liability and construction law, defending municipalities in civil rights litigation and defending construction companies in injury cases and breach of contract litigation. He also handles mechanics liens and contract suits on behalf of construction companies that have not been paid for work they performed.

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## SEMINARS

### **Construction Professional Service Agreements Webinar**

February 2, 2012

**Bruce Schoumacher** is a featured speaker for this 90-minute live webinar through Strafford Publications. Mr. Schoumacher will cover common issues, international topics, and serve as moderator for the webinar, which will also cover drafting key provisions and streamlining contract negotiations.

Strafford Publications is offering friends of Querrey & Harrow a 50% discount on this program by registering through [this link](#). If you have questions regarding the seminar or its content, please contact Mr. Schoumacher at [bschoumacher@querrey.com](mailto:bschoumacher@querrey.com).

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### **"Handling Motor Vehicle Crashes" From the Occurrence Up To Trial - IICLE**

February 3, 2012 - Chicago, Illinois

On February 3, 2012, Chicago office shareholders **Christopher Johnston** and **Larry Kowalczyk** will be featured speakers for the defense perspective in a seminar hosted by the Illinois Institute of Continuing Legal Education.

Mr. Johnston will cover the basic requirements of uninsured and underinsured claims, avoiding conflicts of interest and bad faith claim, minimizing damages, counterclaims and contributory negligence. Mr. Kowalczyk will discuss trucking litigation, experts, investigations and black box issues, driver documentation, and independent contractor issues.

For more information and/or to register for the seminar, please visit the [IICLE website](#).