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A Monthly Legal Newsletter from

Querrey & Harrow

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Liability Update: Statutory Medicare Changes: What Are They? How Do They Impact Settling Liability Claims Involving Medicare Beneficiaries?

By: Anthony J. Madormo – Chicago office

Introduction

For years, Risk Managers or Insurance professionals dealing with liability claims involving payments by Medicare were aware of the Medicare "Super Lien." In those instances, when settlement occurred, the defendant typically waited several months before receiving the amount to be paid to Medicare, or simply issued a check to the claimant, her counsel, and Medicare. The defendant generally perceived there was no obligation or risk provided Medicare was included on the settlement draft.

Today, a payment made to a Medicare beneficiary involving a liability claim has numerous statutory obligations attached to it. These obligations create additional potential exposure to the beneficiary, the insurer, self-insured, plaintiff's and defense counsel. In 1980, the Medicare Secondary Payor Act (MSP) was enacted with the intention to make Medicare the secondary payor when there was another source of funds available to pay for medical care received by a Medicare beneficiary. In cases where there was health insurance coverage for a Medicare beneficiary through a group insurance plan or other insurance coverage including: liability coverage, self insurance, no fault, or workers compensation insurance, Medicare was the secondary payor. In those instances, Medicare was to be, at a minimum, reimbursed if Medicare made primary payments to a beneficiary who had other sources of medical coverage.

From its inception, the MSP created obligations, penalties, interest and subrogation rights, including the right to double damages if the Government had to file suit to recover payments it made. These rights were not consistently enforced. In 2001, the landscape slowly began to change. Centers for Medicare & Medicaid Services (CMS) increased enforcement efforts, primarily involving workers compensation cases. In 2003, the Medicare Modernization Act (MMA) was enacted. The MMA confirmed that Medicare was to be the secondary payor in all cases where there was a primary payor available. Also, the MMA clarified the meaning of "Self-Insured Plan" as a primary payor. This amendment clarified that self-insureds along with insurance carriers were now primary payors and had an obligation to insure that Medicare was reimbursed for Medicare payments to a Medicare beneficiary involving a liability claim.

The Medicare, Medicaid, and Schip Extension Act of 2007 (MMSEA) is the most recent amendment to the MSP. It was signed into law in December 2007. §111 of the MMSEA imposes a reporting requirement on primary payors to report settlements to CMS. §111, if not followed, could result in significant civil penalties and fines. All insurers with respect to liability, no fault, workers compensation and self-insurers collectively are referred to as "Responsible Reporting Entities" (RREs).

The §111 new reporting obligations are separate from obligations existing since 1980 under the MSP. RREs are first required to determine whether a claimant is entitled to Medicare benefits. Once that determination is made the MMSEA requires RREs report the settlement to CMS, resolve any conditional payments, and make a determination regarding future medical responsibilities. In a situation where future medical costs are anticipated in a liability case, CMS has not provided the same guidance regarding medical set asides that currently exist in workers compensation claims.

Recent Cases Highlighting Potential Exposure For Failure To Comply With The Medicare Requirements

The potential ramifications for failure to comply with MSP requirements are highlighted by two cases. In the case of *U.S. v. Paul J. Harris*, no. 5:08CV102, 2009 WL 891931, (N.D. W.VA. 2009), the Government successfully obtained a

judgment against the plaintiff's attorney (defendant Harris) who represented a Medicare beneficiary in the underlying action. Defendant Harris settled the liability case for $25,000.00 and sent to CMS information regarding the settlement, as well as his attorney's fees and costs. Defendant Harris distributed the settlement funds before the CMS provided its demand for payment. CMS later demanded $10,253.59 to settle Medicare's claim. Defendant Harris did not respond to the CMS demand and the Government filed suit. Summary judgment was entered in the government's favor. A judgment was entered against Defendant Harris for $11,367.78 plus interest.

The *Harris* case highlights that the Government will take an aggressive posture on cases where they are entitled to reimbursement because of a liability payment to a Medicare beneficiary. Defendant Harris was responsible as soon as payment was made to the Medicare beneficiary to insure payment was made to CMS. The *Harris* decision highlights that the Government may recover from any entity that has received payment from a primary plan to settle a liability claim. Those persons or entities in a personal injury claim include: the beneficiary; plaintiffs' attorneys; the self-insured; third party administrator; or insurance carrier. (*Harris* at 7-8).

Another recent case filed by the Government places insurance carriers on notice of the Government's right to recover under the MSP. In *The United States of America v. Stricker, et al.*, (Civil Action no. CV-09-PT-2423-E), the Government sued various parties including the plaintiff's attorneys and several insurers and self-insureds involved in a $300,000,000.00 settlement. The Government alleged that under the settlement approximately 907 plaintiffs were Medicare beneficiaries. Some of the proceeds of the settlement funds were paid from liability insurance policies issued by the insurer defendants. Additional settlement funds came directly from self-insureds. The settlements in the underlying case occurred in 2003, well before the recent MMSEA Amendment.

Illinois House Representative Michael G. Connelly Joins Querrey & Harrow as Counsel

Chicago, Illinois - **Rep. Michael G. Connelly** has joined Querrey & Harrow and its commercial litigation practice group as Counsel. Rep. Connelly will also handle business planning and governmental liability matters.

Rep. Connelly has represented the Naperville-Lisle Region of DuPage County for more than 10 years. He previously served as a trustee on the Village of Lisle Board of Trustees for 6 years and 2 years on the DuPage County Board representing District 5.

Rep. Connelly's career in public service has focused on economic development issues, previously having served as Chairman of the DuPage County Economic Development Committee and currently as a member of the Illinois House of Representatives Jobs Creation Task Force. Rep. Connelly is also a member of the Judiciary I, Business Licenses and Occupation and Public Utilities Committees in the Illinois House.

"We are pleased to bring Mike into the firm as a member of our DuPage office," says Michael Stillman, Managing Shareholder of the Querrey & Harrow. "We believe he will bring his wide-ranging experience to supplement the strong group of attorneys already practicing there. Rep. Connelly's addition reaffirms our commitment to serving the western suburbs."

A lifelong resident of Illinois, Michael obtained his B.A. in Political Science at the Loyola University of Chicago and his J.D. from The John Marshall Law School. He and his wife, Lisa, reside in the western suburbs with their three children.

The basis of the Government's claims were the MSP (1980) and the MMA (as amended in 2003). The settlement occurred well before the MMSEA amendments.

This case was likely filed to place self-insureds, insurers and plaintiff's attorneys on notice that the Government will aggressively pursue recovery under the MSP. The *Stricker* case remains pending. The Government has recently filed a motion for summary judgment as to liability issues against certain defendants and is continuing to aggressively pursue recovery.

The enactment of the MMSEA and the Government's recent aggressive actions enforcing the MSP and the 2003 Enactment of the MMA, has created a situation where claims involving Medicare beneficiaries will require cooperation amongst the claimant, his/her attorney, defense counsel, the insurance carriers and self-insureds. The obligations to reimburse Medicare cannot be ignored without severe potential consequences and must be addressed by all parties involved from the inception of the claim.

MMSEA Reporting Requirements

Originally, MMSEA reporting requirements were to begin on July 1, 2009. Generally speaking, MMSEA requires a RRE make a determination of whether a claimant is eligible for Medicare benefits. If the claimant is a Medicare beneficiary, the RRE must electronically report specific information to the CMS until the claim is resolved by settlement, judgment, or other payment. This reporting requirement has now been extended to January 1, 2011. However, many RREs have already started the reporting process because of the original commencement date. It is hoped that this extension and the ongoing exchange of information will assist RREs and CMS to clarify certain reporting requirements.

It is important for all RREs to stay current with changes regarding implementations of their obligations. On February 22, 2010, CMS issued further §111 requirements and published its User Guide version 3.0. RREs must follow the requirements set forth in the New User Guide. RREs must also be aware that the User Guide will superseded by specific CMS alerts that are posted CMS' website. As an example, the CMS recently posted alerts after the publication of its User Guide, which supersede certain sections in the User Guide. The most recent CMS Manual can be located at www.cms.hhs.gov/manuals/downloads/mspl505c01.pdf. We suggest that all RREs review that website if they have not already done so.

To determine if a claimant is a Medicare beneficiary a RRE can request the claimant provide his or her health insurance claim number or can investigate the benefits statement from the Social Security Administration by searching the CMS "query system" or use the claimant's first and last names, social security number (if known), or a social security consent form signed by the claimant. When a claim is made, it is important that an RRE obtain this information.

Once a determination is made that a claimant is a Medicare beneficiary, the RRE must report the claimant's identity and various other required information. The information to be provided is set forth in the User Guide and includes many fields of information. There are several unanswered questions regarding specifically what and how certain information must be reported.

Also, who exactly is an RRE is still not clear. The February 24, 2010 CMS alert, which replaced the entire section 7.1 of the User Guide version 3.0, amends how an entity determines if they are a RRE. Unresolved issues involving the new alert involve situations where a policy has a deductible that must be paid by the insured. It appears that the new alert would require an insurance carrier to report the claim regardless of the deductible being paid by the insured that resolves the claim (with no money being paid by the carrier). However, certain issues in that situation still remain unresolved. This is an example of the complicated nature of the obligations created under MMSEA and CMS' implementation. It is important that any insurer

or self-insured carefully review this CMS alert to determine whether they are a RRE.

Failure to comply with the MMSEA's requirements may result in penalties up to $1,000.00 per day for late reporting for each claim. Considering the number of claimants a RRE may have, this fine could become staggering. Also, although live reporting does not begin until January 1, 2011, RREs must report settlements they have made with Medicare beneficiaries retroactively to January 1, 2010.

Is There A Set Aside Obligation For Future Medical Care?

The MSP requires that all parties involved in a liability claim give "reasonable consideration" to Medicare's interest. There is a burden on RREs and attorneys to assess both past payments (typically medical expenses) and future Medicare covered expenses. It is currently unknown whether set aside arrangements must be made in personal injury liability cases.

If a claimant is being compensated for future injuries, Medicare as a general rule will not be responsible to pay for future medical services related to injuries suffered in the personal injury case. When a verdict has been entered this amount is clear, in a settlement there is no independent method to set future compensation.

The MMSEA is silent on whether a set aside is required in personal injury liability claims. However, Medicare set aside procedures are in place in the workers compensation context. The most prudent approach is to protect Medicare's interest for future expenses in liability cases. This issue is the most contentious point of resolving liability claims involving Medicare beneficiaries. Many plaintiffs' attorneys take the position that the MMSEA and MSP does not require set asides in liability claims. This position may expose RREs; beneficiaries and their attorneys to penalties, and for beneficiaries, a loss of future benefits.

It is critical that this issue be addressed prior to reaching any settlement figure with the claimant. The MMSEA has the potential to impede settlements and to remove finality from the settlement process. With the lack of definite answers regarding set aside provisions or approval of beneficiary settlements, all parties involved face potential exposure for the failure to timely reimburse Medicare or the failure to reasonably consider Medicare's interest involving future medical expenses. Until there is further direction from CMS this uncertainty will remain.

MSP also provides a private cause of action for a Medicare beneficiary. Similar to Medicare's right to initiate a suit, a Medicare beneficiary can sue a RRE; or his/her attorney should Medicare's interest not be protected. The private cause of action allows for double recovery, if a RRE or the beneficiaries' attorney fails to reimburse Medicare.

Proactive Steps To Take In Claims Involving Medicare Beneficiaries

In addition to determining who a RRE, and complying with the reporting requirements, there are several steps that should be taken early either in the claim process or the litigation to address the issues created by the recent Medicare changes. It is important at an early stage to:

Investigate through the CMS website the claimant, or his/her attorney whether the claimant is a Medicare beneficiary;

Begin a dialogue immediately with the claimant or the claimant's attorney regarding Medicare issues;

Include in pretrial discovery requests information confirming whether the plaintiff is a Medicare beneficiary and related information;

Determine the applicable IDC Codes related to the claimant's injuries and discuss these issues with claimant or the claimant's counsel.

Frequently, in litigation plaintiffs claim as many injuries as possible, however, in a liability claim involving a Medicare beneficiary, the more injuries asserted, the greater likelihood of reducing a claimant's benefits in the future;

· Prior to agreeing to mediation and certainly settlement, all parties must address the interplay of their Medicare obligations and whether a set aside will be included, and the specific injuries being claimed and compensated for;

· Revise releases involving Medicare beneficiaries to include any set aside; beneficiaries obligations; applicable IDC Codes; and the claimant/plaintiff waiving his/her private cause of action.

Conclusion

This article only generally addresses some of the numerous complexities created by the MSP and the MMSEA. It is important that all parties are proactive in understanding their obligations, and the impediments to settlements created by these changes in the law. It is important that all parties work together on this specific issue to protect Medicare's interest and the interest of each party.

* * *

***Anthony Madormo**, a shareholder in our Chicago office, has practiced in many areas of law including premises liability, product liability, construction litigation, and mechanics lien. A significant percentage of his current practice involves representing large retail companies in defending all aspects of premises liability claims, including construction negligence, false arrest, civil rights, assault and battery, intentional infliction of emotional distress, and malicious prosecution claims.*

Tony has also defended numerous security guard companies in similar civil litigation in federal and state court. Mr. Madormo has had significant success in obtaining summary judgment in these types of cases. He also represents numerous contractors in various aspects of construction law.

Tony also has extensive experience in insurance coverage litigation involving excess coverage issues and environmental coverage disputes, and first party insurance issues. He is also a regular lecturer at construction lien seminars. He is a member of the American, Chicago and Illinois Bar Associations and the Illinois Association of Defense Counsel. If you have questions regarding this article, contact Tony via 312-540-7680 or amadormo@querrey.com.

Guolee and Scharg Defeat FLSA Class Action Claim

Chicago shareholder **Terrence Guolee** and associate **Ari Scharg** recently obtained the dismissal of a developer of a condominium project and one of its principals from a class action lawsuit filed in the Northern District of Illinois Federal District Court under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201. In the case, the plaintiffs alleged that Q&H's clients assumed responsibilities for payment of a contractors' employees during the construction project following problems that arose on the project with the general contractor and one of its subcontractors. Through early investigation and aggressive use of the threat of sanctions under Federal Rule of Civil Procedure 11, plaintiff counsel was forced to drop his claims against Terrence and Ari's clients.

Medical Malpractice Update: Two Steps Forward and One Step Back - Hospital Consent Forms Pivotal in Defeating Apparent Agency Claims for Conduct of Independent Physicians

By: Joan Stohl - Chicago office

As hospitals continue efforts to provide notice to patients of the independent contractor status of physicians, two decisions issued this past year by the Illinois First District Appellate Court, Fifth Division, illustrate the effectiveness and ineffectiveness of such notification contained in general consent forms presented to patients at the outset of treatment at the summary judgment stage and after an adverse verdict.

First, in *Wallace v. Alexian Brothers Medical Center*, 389 Ill.App.3d 1081 (1st Dist. 2009), the First District Appellate Court affirmed the entry of summary judgment in favor of the defendant hospital on the issue of apparent agency, finding that the minor decedent's mother knew, or should have known, that the physicians who cared for the decedent were independent contractors and not employees of the defendant hospital. After arriving at the defendant hospital where her 14-year-old daughter was receiving emergency treatment, the *Wallace* plaintiff was presented with a consent form stating that the physicians were independent contractors and not employees of the defendant hospital. At her deposition, the *Wallace* plaintiff testified that the signature on the consent form was hers, and the record revealed that she had signed the identical consent form at the defendant hospital four previous times during the four previous years with the last consent being signed about a month before the subject occurrence.

After the *Wallace* plaintiff's deposition, the defendant hospital moved for summary judgment on the issue of agency as to the emergency medicine physician and trauma surgeon involved in the decedent's care, to which the plaintiff responded with an affidavit stating that she did not personally sign the consent and had no idea who placed her signature on it. The *Wallace* plaintiff further averred in her affidavit that none of the forms she signed were ever explained to her, that she did not read them in their entirety, that she was never given the opportunity to ask questions about the consent forms, and that she had no knowledge that the physicians at the defendant hospital were independent contractors due to her "limited education" and "state of shock" at the time her daughter was injured.

In finding that the plaintiff could not satisfy the "holding out" element set as forth by the Illinois Supreme Court in *Gilbert v. Sycamore Municipal Hosp*., 156 Ill.2d 511 (1993), as she knew or should have known that the physicians were independent contractors, the *Wallace* court emphasized that the record undeniably demonstrated that the plaintiff had previously signed identical consent forms at the defendant hospital on at least four occasions, with one occurring only a month before the care at issue. The *Wallace* court further noted that no case cited by the plaintiff stands for "the proposition that an emotional condition, or one's educational level for that matter, without more, creates a genuine issue of material fact."

The *Wallace* plaintiff also argued that because the defendant hospital never informed her that her consent was not necessary to the continuity of her daughter's care under the "emergency exception," the consent form was inoperative and should not have been considered by the trial court. The *Wallace* court agreed that consent is not necessary in emergency situations where treatment is required to protect the patient's health and it is impossible or impractical to obtain consent from the patient or someone responsible for the patient's care and acknowledged that the minor decedent's treatment had already commenced before her mother arrived at the defendant hospital as this was one such emergency. However, the *Wallace* court emphasized that these facts did not render the consent irrelevant. In rejecting the plaintiff's argument, the *Wallace* court noted that the plaintiff cited no authority requiring the defendant hospital to inform an emergency

patient such as the decedent or the plaintiff that it must continue treatment regardless of whether the patient or someone on behalf of the patient signs a consent form. The *Wallace* court further noted that the Illinois Supreme Court did not "remotely require anything similar" when it addressed apparent agency in the medical malpractice setting in *Gilbert*, but rather stated that all that was necessary to defeat such a claim was "some evidence to show that the plaintiff knew or should have known of the physician's independent contractor status." The *Wallace* court then stated that this is precisely what the defendant hospital did "via clear and concise language in [the] consent form."

The *Wallace* court held that the plaintiff's affidavit did not create a genuine issue of material fact defeating summary judgment, as the plaintiff failed to present any specific facts to support her averments that she had no knowledge that the physicians involved in her daughter's care were independent contractors. The *Wallace* court noted that the plaintiff's affidavit was internally contradictory, as it stated that the plaintiff's signature appeared on the consent but that she did not sign the consent. Her affidavit was also at odds with her deposition testimony confirming her signature on the consent, which clearly delineates the independent contractor status of the physicians and the fact that the plaintiff read the consent and had the opportunity to ask questions regarding the consent. The *Wallace* court stated, "It is well established that a party cannot create a genuine issue of material fact in an effort to defeat a motion for summary judgment by filing an affidavit that conflicts with her prior sworn testimony."

The *Wallace* court found that the consent for the care at issue clearly represented that the defendant hospital contracted with independent physicians to provide services to patients, noting that the consent specifically used the term "independent contactors" in reference to the attending and consulting physicians, plainly explained that the defendant hospital was not responsible for the services provided by these physicians, stated that the payment for these physicians and the defendant hospital would be separate, and provided an acknowledgement in bold print that the signatory had read the consent and had the opportunity to ask questions about it.

In applying the law enunciated in *York v. Rush Presbyterian-St. Luke's Medical Center*, 222 Ill.2d 147 (2006), with regard to the reliance element, the *Wallace* court found that the plaintiff could not have relied upon the defendant hospital or the physicians alleged to be its apparent agents as the record established that she knew, or should have known, that the physicians were independent contractors. The *Wallace* court emphasized that the plaintiff did not object to ambulance personnel transporting her daughter to the defendant hospital, which was well known to her and where she had signed consents on four previous occasions stating the independent contractor status of the physicians with the last one being signed only a month before the subject occurrence.

Shortly after the *Wallace* decision, in *Spiegelman v. Victory Memorial Hospital*, 392 Ill.App.3d 826 (1st Dist. 2009), the First District Appellate Court affirmed trial court rulings with regard to the apparent agency of an independent emergency room physician employed by an emergency physician group and not the defendant hospital. In *Spiegelman*, wherein the jury returned a multimillion dollar verdict against both the defendant hospital and the defendant emergency physician group, the plaintiff had signed a one-page, multiple-paragraph consent form with one paragraph including language stating, "I understand that the Emergency Department physician and my attending physician are independent contractors and not employees or agents of [the defendant hospital]."

This paragraph further states, "I am also aware that any other physicians who may be called to attend my care are independent contractors and not employees or agents of [the defendant hospital]." The *Spiegelman* court noted that, although the defendant hospital attached significance to the above paragraph, it did not "adequately address the ambiguity created by

the rest of the form," including its multi-part format, its various provisions unrelated to the independent contractor disclaimer, its title, "CONSENT FOR EMERGENCY TREATMENT," and the signature line appearing below a separate, unnumbered paragraph regarding the release of property.

The *Spiegelman* court further noted that the paragraph immediately preceding the paragraph containing the independent contractor disclaimer states, "I am aware that during my visit to the Emergency Department of [the defendant hospital], ***hospital employees***, will attend to my medical needs as may be necessary." (Emphasis added.) The *Spiegelman* court reasoned that from this language alone, "the jury could rightfully infer that plaintiff was confused as to which doctors were employees of the hospital and which were independent contractors." Moreover, the *Spiegelman* court noted that the plaintiff had complained of dizziness and problems with her vision in the emergency room and that there was evidence that her condition rapidly deteriorated. As such, the *Spiegelman* court found that "a jury could reasonably conclude that the consent was confusing and ambiguous and therefore did not adequately inform plaintiff of her doctor's independent contractor status." In distinguishing the case before it from *Wallace*, the *Spiegelman* court stated that there were "additional facts beyond the independent contractor disclosure in the consent form which supports the jury's verdict."

Hospitals would be prudent in continuing to fine tune their efforts to provide notice to patients of the independent contractor status of physicians practicing at their facilities with the help of counsel and in light of these recent decisions. Properly drafted forms and notifications provided by hospitals at the beginning of treatment can, literally, save hospitals millions in potential liability in future malpractice cases.

* * *

***Joan Stohl**, an associate in our Chicago office and a member of our Health Care practice group, concentrates her practice in medical and pharmaceutical negligence defense. She has litigated a myriad of very serious medical and pharmaceutical negligence matters. Joan has handled matters involving a multitude of catastrophic injuries, including wrongful death, brain damage, cerebral palsy, quadriplegia, paraplegia, amputation, cancer progression, heart damage, hearing loss and blindness. If you have questions regarding this article, please contact Joan via 312-540-7624, or jstohl@querrey.com.*

*Our health care attorneys offer a full range of services, including the defense of medical, managed care, hospital, nursing, and psychiatric liability claims involving hospitals, nursing homes, physicians, nurses, psychiatrists, and psychologists across Illinois. In addition to representing institutions and health professionals insured by Illinois' largest professional liability insurers, we also represent a wide variety of self-insured medical/surgical and psychiatric hospitals ranging from large teaching institutions to smaller, community-based hospitals. We further provide negotiation, contracting, real estate, and certain transactional services to health care clients. If you have questions regarding our practice in this area, contact group Co-Chair, **Jim Bream**, at 312-540-7520, or via jbream@querrey.com.*

Jim Bream Elected as President-Elect of Chicagoland Healthcare Risk Management Society

Congratulations to **Jim Bream** on his election as President-Elect of the Chicagoland Healthcare Risk Management Society. Jim will be inducted on April 30, 2010 at the Annual Meeting and then serve as President-Elect for one year and then as President for one year.

Class Actions Update: Illinois Second District Appellate Court Decides Private Claims Under TCPA Junk Fax Prevention Act Can Be Brought in Illinois Courts Without Need For Enabling Legislation

By: Terrence Guolee - Chicago office

Across Illinois, many businesses have been caught up in potentially devastating private class action claims based on the Telephone Consumer Protection Act's (TCPA) (47 U.S.C. §227 (2000)) prohibitions against unsolicited advertising faxes. Very recently, in *Italia Foods Inc. et al. v. Sun Tours, Inc. d/b/a Hobbit Travel et al.*, No. 2-08-1148 (Illinois 2d Dist., April 5, 2010), the Illinois Second District Appellate Court resolved a previously undecided question in Illinois on whether there is jurisdiction in Illinois state courts for the class action "Junk Fax" cases.

In this respect, the court had the following question presented to it (among other questions not pertinent here): Does the language and purpose of the federal TCPA require that the Illinois General Assembly enact enabling legislation before private TCPA claims can be brought and enforced in Illinois state courts? The court answered "no" to the question, finding that the Illinois General Assembly need not enact enabling legislation before private TCPA claims can be brought and enforced in Illinois state courts. This ruling, in effect, green-lights many pending class action claims and represents the first appellate court opinion in Illinois on this issue - an issue that has resulted in conflicting decisions among various other state courts.

In the case, a class action was filed in June 2003 alleging that the defendant, Sun Tours d/b/a Hobbit Travel, had sent several unsolicited one-page fax advertisements for discounted travel offers. Through several amendments to the pleadings and realignment of the parties in the case, it was alleged that Hobbit Travel's actions violated the TCPA and the Consumer Fraud and Deceptive Business Practices Act (Fraud Act) (815 ILCS 505/1 et seq. (West 2002)) and constituted common-law conversion. As to the TCPA claim, Eclipse sought statutory and punitive damages, an injunction and attorney fees.

Following several procedural steps, Hobbit Travel eventually moved to dismiss Eclipse's Third Amended Complaint, arguing, among other things, that the TCPA claim could not be litigated in Illinois because the operative language of the TCPA - namely, that state court TCPA actions must be "otherwise permitted by the laws or rules of court of a State" (47 U.S.C. §227(b)(3) (2000)) - required the Illinois General Assembly to affirmatively opt in to the TCPA's enforcement scheme, which it had not done. In so doing, defendant relied principally on the Texas Supreme Court decision in *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 184 S.W.3d 707 (Tex. 2006) (hereinafter *Chair King*). However, on August 26, 2008, the trial court denied Hobbit Travel's motion to dismiss Italia Foods' TCPA claim. The trial court then certified several questions to the appellate court for decision, including the question addressed in this article.

In answering the question, the appellate court first noted that, under the supremacy clause of the United States Constitution, federal causes of action are presumed to be enforceable in state courts, and only in limited cases may a state "discriminate against federal causes of action." Likewise, the United States Congress is deemed to have the power to confine jurisdiction for federal claims to the federal courts. Otherwise, there is a presumption of "concurrent" jurisdiction of federal claims in both the federal and state courts. Indeed, the presumption of concurrent jurisdiction is defeated in only two narrow circumstances: when Congress expressly ousts state courts of jurisdiction and when a state court refuses jurisdiction on the basis of a neutral state rule of court administration and such rule is not preempted by federal law.

With this understanding, the discussion turned to the TCPA. The TCPA was enacted in 1991 (Pub. L. No. 102--243, 105 Stat. 2394 (1991)) and it amended Title II of the Communications

Act of 1934 (47 U.S.C. §201 et seq. (1994)), principally by adding a new section (47 U.S.C. §227 (1994)). The statute places restrictions on unsolicited, automated telephone calls to the home and restricts certain uses of facsimile machines and automatic dialers. 47 U.S.C. §227(b)(1) (2000). The TCPA "seeks to address the increased use of automated telephone equipment to make telephone calls in bulk and fax unsolicited advertisements that cross state lines and fall outside the regulatory jurisdiction of individual states" and allows private claims.

The TCPA prohibits the "use [of] any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. §227(b)(1)(C) (2000). The statute's first private right of action, which targets the misuse of fax machines, prerecorded message technology, or automatic dialing machines, is contained in section 227(b)(3):

> "A person or entity may, **if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State**--
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.

COMMUNITY INVOLVEMENT

Look for Q&H Attorneys and Staff "Shaking Their Cans" on Friday, April 23!

Be sure to keep an eye out for Q&H attorneys and staff on corners throughout Chicago's downtown on Friday, April 23, 2010! Querrey & Harrow, Ltd. is thrilled to once again support Misericordia Heart of Mercy's Candy Days and will be out "shaking our cans" for donations. Over the past four years, our volunteers have raised $29,196.31 for the over 500 children and adults who call Misericordia home! Every year we have exceeded our prior year's collection... and we hope this year's no different!

Misericordia is a residential facility serving 550 children and adults with development and physical disabilities from all ethnic, religious, racial and socio-economic backgrounds. A not-for-profit 501(c)(3) organization, Misericordia is operated by the Sisters of Mercy under the auspices of the Catholic Archdiocese of Chicago. Misericordia is located at 6300 N. Ridge Road, Chicago, Illinois 60660. Please visit www.misericordia.org for more information.

Berneman Speaks to Wood Oaks Middle School Students

On March 25, 2010, **Beverly A. Berneman** participated in Career Day at Wood Oaks Middle School in Northbrook, Illinois. Beverly spoke to 8th grade students about the life of an Intellectual Property Attorney.

Lanzito Appointed to Board of Directors of Italian American Political Coalition

Chicago shareholder **Dominick Lanzito** was appointed on April 12, 2010 to the Board of Directors of the Italian American Political Coalition. The Coalition's focus is advancing the political, judicial and governmental goals of the Italian American community in the Chicago metropolitan area.

> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph." 47 U.S.C. §227(b)(3) (2000) (emphasis added).

The bolded language in the statute above has led courts to offer that "the statute contains some unusual features." *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 512 (5th Cir. 1997) (hereinafter *Houston Cellular*). In this respect, the TCPA "creates a federal private right of action, but *** confers exclusive jurisdiction on state courts to entertain it." *Chair King*, 184 S.W.3d at 710.

Indeed, there is a split of authority in the federal courts over whether federal district courts can even have jurisdiction to entertain private claims under the TCPA, as six courts of appeal have held that federal courts lack federal question subject matter jurisdiction to hear TCPA cases. *See, Murphey v. Lanier,* 204 F.3d 911, 913-15 (9th Cir. 2000); *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.*, 156 F.3d 432, 438 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289, modified, 140 F.3d 898 (11th Cir. 1998); *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997); *Houston Cellular,* 131 F.3d at 513. However, three courts of appeal have held that federal courts may hear TCPA claims when subject matter jurisdiction is based on diversity (actions between litigants from different states). *See, US Fax Law Center, Inc. v. iHire, Inc.*, 476 F.3d 1112, 1118 (10th Cir. 2007); *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 341 (2d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 450-51 (7th Cir. 2005).

In reviewing this language, the Illinois Second District concluded that the phrase "if otherwise permitted by the laws or rules of court of a State" is ambiguous, as it is unclear what, if any, state action is required before private actions may commence in state courts. Indeed, three general interpretations of the TCPA's "if otherwise permitted" language have emerged: (1) the "opt-out" approach; (2) the "acknowledgment" approach; and (3) the "opt-in" approach. The court then concluded that that the "acknowledgment" approach is the correct framework to analyze the TCPA's private right of action, and discussed the competing theories.

a. "Opt-out" Approach

Per the court, the "opt-out" approach interprets the TCPA's "if otherwise permitted" language to authorize private TCPA suits in state courts without affirmative state action. However, the theory allows states to legislatively decline to address such suits.

b. "Acknowledgment" Approach

The court then considered the "acknowledgment" approach, which requires "no enabling legislation for parties to assert private TCPA claims." Courts adopting this approach interpret the TCPA's "if otherwise permitted" clause as merely acknowledging "the principle that states have the right to structure their own court systems and that state courts are not obligated to change their procedural rules to accommodate TCPA claims."

The court then surveyed the seven state court decisions that have adopted this approach, noting that "advocates of this interpretation base their opinions on the supremacy clause and the TCPA's legislative history." As to the supremacy clause, they conclude that permitting states to "opt-in" or "opt-out" would violate the supremacy clause's language making federal law the supreme law of the land and charging states courts with a coordinate responsibility to enforce federal law pursuant to their regular modes of procedure.

> "[F]ederal law must take state courts 'as it finds them,' because the states 'have great latitude to establish the structure and jurisdiction of their own courts.' Thus, a state may decline to exercise jurisdiction over a federal claim by applying a neutral rule of

judicial administration. Likewise, the 'if otherwise permitted' language means that states are permitted to determine which of their courts will hear TCPA claims, not whether their state will be open to such claims."

c. "Opt-in" Approach

The court then noted that the "opt-in" approach, suggested by defendant Hobbit Travel, concludes that Congress intended to deprive state courts of jurisdiction over private TCPA claims. It interprets the statute's "if otherwise permitted" language as indicating that the TCPA does not create an immediately enforceable right. Under this approach, actions may be maintained in state courts only upon a legislative action or court rule "opting-in" to exercise jurisdiction over such actions.

Surveying the law, the Illinois Second District found that only one state - Texas - has adopted the "opt-in" theory. Indeed, in *Chair King*, the Texas Supreme Court held that unsolicited faxes sent before the enactment of a state statute permitting a private right of action for TCPA violations were not actionable under the TCPA in Texas state courts. *Chair King*, 184 S.W.3d at 708. The court held that the TCPA's plain, unambiguous language, its purpose, and its historical context warranted adoption of the "opt-in" approach. *Chair King*, 184 S.W.3d at 711.

However, the Illinois Second District rejected the *Chair King* court's analysis and concluded that the case was wrongly decided. In so doing, the court noted that the *Chair King* court's textual analysis and its review of the legislative history is unconvincing to rebut the presumption of state-court jurisdiction, finding that the TCPA's proviso reflects Congress's "explicit statutory directive" and that the "if otherwise permitted" language reflects a congressional intention "that Federal claims remain subject to State procedural law."

Among other considerations, the court noted that the Illinois Constitution's discussion of the jurisdiction of Illinois courts would counter the "opt-in" approach. In this respect, the court noted that Article VI of the Illinois Constitution provides that Illinois circuit courts have original jurisdiction of all justiciable matters, except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office. Thus, the Illinois General Assembly "has no power to enact legislation that would contravene article VI." As a result, per the court, "our constitution precludes and would invalidate any legislative action purporting to 'opt-in' or 'opt-out' of the TCPA."

The Illinois Second District's *Italia Foods* decision goes into much more detail on the statutory and constitutional issues than presented above. Its import is that it is the first Illinois appellate court decision directly holding that there is no requirement for the Illinois legislature to affirmatively act in any way to allow TCPA Junk Fax cases to be litigated in Illinois state courts. Other Illinois appellate courts - including the Illinois First District covering Chicago and the majority of the Chicagoland metropolitan area - are free to disagree with the Second District and adopt the other approaches to TCPA jurisdiction. Nevertheless, it is believed that the *Italia Foods* decision will be persuasive, if not controlling, authority to the other Illinois appellate courts. Moreover, pending any such contrary decisions by the other districts, it is expected that Illinois trial court judges handling the many TCPA class action cases filed across the state will apply the *Italia Foods* reasoning and reject defense motions to dismiss cases based on jurisdiction arguments.

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***Terrence Guolee**, a shareholder in our Chicago office, has successfully represented defendants, plaintiffs and carriers in dozens of complex, multimillion dollar claims covering a wide area of facts and law, in both state and federal court. Terrence has successfully defended several businesses in statutory consumer rights class action claims, including claims under the TCPA. If you have questions regarding this article, please contact Terrence via 312-540-7544, or via tguolee@querrey.com.*

SEMINARS

Law Bulletin Seminar for Trial Attorneys
April 21, 2010

On April 21, 2010, Q&H Shareholder **Roger Littman** will speak at the Law Bulletin Seminar - *Make Your Case: Courtroom Visuals*. He will complete a panel which includes Allison Evans of Tower Design Group and Attorney Lawrence Kream, whom Roger opposed on a medmal trial a few years ago. The session entitled, "Proving Your Client's Position" provides a comparison of low-tech and high-tech options for the same case facts.

For more information on this 4-hour MCLE course, please contact Law Bulletin Seminars or visit its website: http://www.lawbulletin.com/legal/law-bulletin-seminars/courtroom-visuals---apr-21

ISBA Construction Law CLE
April 21, 2010

On April 21, 2010, at the Double Tree Hotel in Bloomington and again on April 27, 2010, at the Chicago ISBA regional office, **Bruce Schoumacher** and **Jennifer Sackett Pohlenz** will participate in a CLE seminar presented by the ISBA Special Committee on Construction. Jennifer will address issues and new state regulations regarding green building. Bruce's portion will cover the latest cases that have affected the construction industry.

Understanding Copyright Law 2010
June 17, 2010

E. Leonard Rubin is the designated Chair for this one-day seminar regarding Copyright Law at the Gleacher Center in Chicago, Illinois. The seminar is designed as an introduction for attorneys with limited experience in copyright law and as a review and update for those who need to reacquaint themselves with intellectual property practice and procedure.

Technology continues to evolve and the hotly contested DVD-burning issues of last year will give way to new legal issues relating to copyright law. Because of the inevitable uptick of issues, it is essential for practitioners to be familiar with the basic tenets of this important legal area. For additional information regarding this seminar, please visit the Practising Law Institute website at www.pli.edu.