Qued In

A Monthly Legal Newsletter from

Querrey & Harrow

August 2009

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Federal Litigation Update: Legislation Seeks to Overrule *Iqbal* Decision

By: Terrence Guolee – Chicago, Illinois

The following is an update to Dominick Lanzito's excellent article in our July 2009 Qued In newsletter, regarding the recent United States Supreme Court *Iqbal* decision.

Sen. Arlen Specter, D-Pa., filed legislation on July 22, 2009, the Notice Pleading Restoration Act of 2009, designed to return the federal pleading standard to what it was prior to 2007, when the Supreme Court released its ruling in *Bell Atlantic Corp. v. Twombly*, 425 F.3d 99 (2007). That, and the more recent *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) decision, now require plaintiffs to plead sufficient facts in their complaints in order to state a "plausible" right to relief.

The legislation, conversely, seeks to return the pleading standard to only requiring plaintiffs to provide notice of their claims - which previously would often result in conclusory claims that wrongs had been done, with no supporting facts set out in complaints in federal court. If Senator Specter's bill becomes law, "a Federal court shall not dismiss a complaint ... except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*."

Conley required a complaint to be upheld "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In *Twombly*, the Supreme Court rejected *Conley* as unworkable, reasoning that the loose standard often subjected defendants to costly and burdensome discovery on the basis of little more than conclusory allegations. The Supreme Court reiterated *Twombly's* holding in *Iqbal*, and it also clarified that the standard set forth in *Twombly* applies in all civil cases.

We see the *Twombly* and *Iqbal* decisions as reasoned opinions requiring plaintiffs to properly investigate their claims and set forth a minimum right to relief before burdening defendants with the incredible expense incurred in defending cases in federal court. Indeed, in Illinois state court claims plaintiffs have successfully litigated despite much tighter "fact pleading" standards, which far exceed the burdens placed on federal litigants, even under the *Twombly* and *Iqbal* pleading requirements.

Likewise, as currently drafted, the bill would seemingly abrogate Federal Rule of Civil Procedure Rule 9(b) and the heightened pleading required by the rule in fraud cases.

As of press time, the bill has failed to attract any co-sponsors and is referred to the Senate Committee on the Judiciary. No dates have been set for consideration of the bill as yet. We will continue to report on this issue as it develops.

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Terrence Guolee, a shareholder in our Chicago office, has successfully represented defendants, plaintiffs and carriers in dozens of complex, multi-million dollar claims covering a wide area of facts and law, in both state and federal court. Terrence represents several municipalities, elected governmental officials and their employees in very complicated civil rights class actions and claims brought under state and federal whistleblower laws.

If you have any questions regarding Querrey & Harrow's federal litigation practice, or the status of the Notice Pleading Restoration Act of 2009, please contact Terrence via 312-540-7544, or via tguolee@querrey.com.

Q&H SHAREHOLDER ELECTED TO MEMBERSHIP IN AMERICAN BOARD OF TRIAL ADVOCATES

Querrey & Harrow is proud to announce that Chicago office shareholder **Roger Littman** has been elected to membership in the American Board of Trial Advocates. ABOTA is a national organization which fosters improvement in the ethical and technical standards of trial practice so that litigants may receive more effective representation and the general public may benefit from more efficient administration of justice.

With fewer than 100 Illinois lawyers so honored, ABOTA stands as one of the most selective boards in the legal profession. The organization chooses its lawyers from those with demonstrated proficiency in the art and science of jury trials. Its members must have at least 20 civil jury trials completed through verdict in order to be considered. Membership is by invitation only.

Roger concentrates his practice in medical malpractice defense and commercial litigation. He has compiled a 28-year trial record. He is a member of the Chicago, Illinois State, and Wisconsin State Bar Associations, and is licensed in Illinois and Wisconsin. He obtained his BA in 1976 and JD in 1979, both from the University of Illinois.

Federal Litigation Update:
Seventh Circuit Raises Bar for False Claims Act Actions

By: Matthew Byrne – Chicago, Illinois

In *Glaser v. Wound Care Consultants, Inc., et al.*, No. 07-4036 (7th Cir., decided July 2, 2009), the Seventh Circuit Court of Appeals reviewed their minority position with regards to the standard to be applied to the False Claims Act jurisdictional bar.

The False Claims Act ("FCA"), 31 U.S.C. Section 3730, prohibits the submission of false and fraudulent claims for payment to the Government. It also authorizes private citizens (called "Relators") to file civil actions on behalf of the Government (called "*qui tam*" actions) to recover money that the Government paid on account of false or fraudulent claims.

To encourage private citizens to come forward with knowledge of fraudulent activity, the FCA entitles prevailing Relators to collect a substantial share of the funds recovered. *Qui tam* actions are subject to a jurisdictional bar when a Relator's action is "based upon" a "public disclosure" of the alleged fraudulent conduct "unless…the person bringing the action is an original source of the information." 31 U.S.C. Section 3730(e)(4). Therefore, once false claims are made public, a Relator may only bring a claim based on that public disclosure if he or she is the original source.

In *Glaser*, Plaintiff's complaint was related to payments made by Medicare for wound care treatment obtained from defendant Wound Care Consultants, Inc. The plaintiff alleged that defendants billed Medicare for treatment provided by a physician's assistant at a higher than appropriate rate. The higher rate is permitted only for physician's assistant services which are incident to services provided by a physician. In order to be incident to the services of a physician, the services must be supervised by a physician.

Plaintiff's complaint alleged that defendants improperly submitted bills to Medicare at the higher rate for a physician's assistant's services incident to physician's services. Plaintiff alleged that these practices were fraudulent because Dr. Miller, the listed supervising physician, was not on the premises when plaintiff received treatment and, therefore, could not have supervised the assistant's services. Plaintiff alleged that she learned of defendants' fraudulent billing practices from her attorney.

Defendants pointed out that in January of 2005, nearly four months before plaintiff's suit was filed, a representative with the Federal Centers for Medicare and Medicaid Services ("CMS") contacted defendants to discuss billing irregularities that had been detected in a routine agency audit.

NEWS

Q&H's Dominick Lanzito Appointed to Village of Roselle's Board of Fire and Police Commissioners

Querrey & Harrow congratulates **Dominick Lanzito**, who was sworn in to the Village of Roselle, Illinois' Board of Fire and Police Commissioners by Mayor Gayle Smolinski on July 27, 2009.

Roselle's Board of Fire and Police Commissioners is responsible for the hiring of police officers and firefighters, and disciplinary hearings. Dominick's work with the Village of Roselle is a great addition to the over 70 years of community service provided by the lawyers and staff of Querrey & Harrow. Congrats to Dominick on this impressive appointment!

Thereafter, beginning in March of 2005 until December of 2006, CMS periodically sent letters to the defendants requesting repayment of funds which had been paid at improperly high rates.

Therefore, defendants move to dismiss plaintiff's claim for lack of subject matter jurisdiction because it was based upon the public disclosure of allegations or transactions and plaintiff was not the original source of the disclosures. The district court dismissed plaintiff's complaint and noted that, when the complaint was filed in April of 2005, CMS had already contacted the defendants regarding the same billing irregularities that formed the basis of the plaintiff's complaint. The plaintiff appealed claiming that the FCA jurisdictional bar had been improperly applied to her lawsuit.

On appeal, the Seventh Circuit Court of Appeals began their review by noting that an analysis of the jurisdictional bar requires a three step inquiry: first, whether the Relator's allegations have been *publicly disclosed*; second, whether the lawsuit is *based upon* those publicly disclosed allegations; and third, whether the Relator is an *original source* of the information upon which the lawsuit is based.

The court of appeals addressed each of these questions in sequence to determine if the district court had properly dismissed plaintiff's claim. The court first addressed whether the allegations contained in plaintiff's complaint had been publicly disclosed. The court began its analysis by stating that a public disclosure occurs when the critical elements exposing the transaction as fraudulent are placed in the public domain. The court further noted that mere governmental awareness of wrongdoing does not mean a public disclosure has occurred. However, the court held that CMS had made clear to the defendants beginning in January of 2005 that it was actively investigating its billing practices. Additionally, CMS's letters to the defendants beginning in March of 2005 demanding repayment for defendants' improper billing practices were sufficient to constitute a public disclosure. Therefore, plaintiff's April 2005 filing of her lawsuit was performed after public disclosure.

The court of appeals next addressed whether the plaintiff's lawsuit was based upon publicly disclosed information. The court noted that there was a dispute within the federal circuits with regards to the interpretation of the phrase "based upon." The Seventh Circuit followed the minority position which held that a *qui tam* suit is "based upon" publicly disclosed information when it "depends essentially upon publicly disclosed information and is actually derived from such information."

Conversely, the majority view, followed by eight federal circuits, holds that a lawsuit is "based upon" publicly disclosed allegations when the Relator's allegations and the publicly disclosed allegations are substantially similar. The court noted that the policy concern behind the "based upon" inquiry was to prohibit FCA lawsuits filed by opportunistic – also known as "parasitic" - plaintiffs concerning information about fraud that is already in the public domain. Based on that policy concern and additional rules of statutory interpretation, the Seventh Circuit Court of Appeals overruled prior holdings and adopted the majority position, concluding that a Relator's FCA complaint is based upon publicly disclosed allegations or transactions when the allegations in the Relator's complaint are substantially similar to publicly disclosed allegations.

Applying this standard to the plaintiff's complaint, the court concluded that plaintiff's complaint and the CMS public disclosures both related to defendant's over-billing of the Government for physician's assistant's services by falsely representing that they had been performed incident to or supervised by a physician. The court further noted that even if plaintiff's complaint contained additional allegations of fraud not mentioned in the public disclosure, the allegations were still based upon the prior public disclosures.

The court then proceeded to the third inquiry of whether plaintiff was the original source of the allegations in her complaint. The court noted that a plaintiff is considered the original source if plaintiff: (1) has "direct" knowledge of the information on which her allegations are based;

(2) has "independent" knowledge of the information on which her allegations are based; and (3) "has voluntarily provided the information to the Government before filing" a complaint based on her information. 31 U.S.C. § 3730(e)(4)(B).

The court of appeals questioned whether the plaintiff could establish that she had "direct" knowledge of the information on which her allegations were based due to the fact that the only knowledge that she possessed came from her attorney. Plaintiff admitted that she had no knowledge whatsoever of the fraudulent conduct of the defendants before being informed of the conduct by her attorney. However, regardless of whether plaintiff possessed "direct" knowledge of the substance of her allegations, the court held that plaintiff did not meet her burden of establishing that she had "independent" knowledge.

On this, the court found that if a Relator claims that all her knowledge or fraudulent activity comes from a third party, but refuses to explain how that third party learned of the fraud, she can not meet her burden of establishing "independent" knowledge simply by disclaiming knowledge of the subject public disclosure. Without addressing the question of whether independent knowledge could be obtained from a third party such as an attorney, the court held that by failing to provide information regarding her attorney's knowledge of fraudulent activity, the plaintiff had failed to meet her burden of proving she possessed "independent" knowledge.

In conclusion, Plaintiff's complaint was based upon publicly disclosed information and plaintiff had failed to show that she was an original source of the information used to support the allegations. Accordingly, the court of appeals held that the district court correctly concluded that the jurisdictional bar of Section 3730(e)(4)(A) applied to plaintiff's *qui tam* suit. In doing so, the court adopted the majority view with regards to the standard to be applied to the "based upon" inquiry of the FCA jurisdictional bar.

Often, news of alleged governmental or corporate fraud is followed closely by a wave of suits filed by plaintiffs claiming they were the source of the discovery of the fraud. More often than not, the suits filed are truly "parasitic" claims, with claimants who are filing suit and only aware of the alleged wrongdoing based on their reading of public disclosures and, often, only on information provided to them by opportunistic plaintiff attorneys seeking clients. The Seventh Circuit's adoption of the majority burden of proof placed on plaintiffs to show that the investigations were "based upon" the claimant's efforts to disclose the alleged fraud should go a long way towards derailing the efforts of such parasitic claims.

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Matthew Byrne, an associate in our Chicago office, concentrates his practice in commercial litigation and general defense litigation, as well as municipal and school law If you have any questions regarding this article, please contact Matt via 312-540-7644, or via mbyrne@querrey.com.

Querrey & Harrow Wins in Illinois Liquor Control Board Litigation

Larry Kowalczyk and **Matthew Byrne** successfully defended a municipality in an Administrative Review action seeking to overturn a decision of the Illinois Liquor Control Board supporting the issuance of a license to a local store. The petitioner, a day care facility situated adjacent to the property but in a neighboring town, sought to block the issuance of the license arguing they constituted a "school" within the meaning of the Illinois Liquor Control Act and thus the "100 feet" statutory prohibition was in effect. Following written submissions and oral argument on same, Judge Rita Novak accepted Larry and Matt's arguments and ruled in favor of the municipality's issuance of the license, finding the Illinois Liquor Control Board's decision was supported by the evidentiary record.

Q&H's Jim Jendryk Scores Two Big Victories in Tough Auto Cases

Plaintiff's Request for $10.3 Million Judgment Thwarted

Shareholder **James S. Jendryk** obtained an outstanding verdict on July 22, 2009, following a two-week trial of a very serious auto liability lawsuit in Will County. In what plaintiff claimed to be a $10 million lawsuit, the jury returned a verdict for less than one-quarter of 1% of the plaintiff's request.

Summary judgment was granted on liability in favor of the plaintiff as a result of a rear end collision. As to damages, the plaintiff claimed that, as a result of the car accident, he underwent four surgical procedures on his back. Plaintiff complained of lower back pain from the day of the accident through the date of the trial. Claimed medical expenses were over $562,000 and claimed future medical expenses were over $500,000. The plaintiff also claimed past lost wages of over $276,000 and future wage losses exceeding $1.5 million. The plaintiff was 50 years old at the time of trial.

Following the close of evidence and argument, the attorney for the plaintiff asked for an award of $10.3 million, based on the fact that the plaintiff was permanently disabled and would never be able to return to work.

However, based on the excellent defenses and argument made by Jim on behalf of his client, the jury returned a verdict of only $25,700. Querrey & Harrow congratulates Jim for his skilled advocacy in a very tough case!

Credibility Issues Outweigh Admitted Liability - $1.7 Million Requested/$47,000 Awarded

James Jendryk also, for the second time in less than a month, obtained an incredibly successful verdict on behalf of another client. This time in Lake County. In the second case, the plaintiff, a 59 year old male, underwent a fusion from L1 to L5 following a motor vehicle accident wherein Jim's client, a 17-year-old female, rear-ended the plaintiff at 45 mph. Despite prior back problems, including a prior fusion at L3 – 5, plaintiff's doctors were adamant that the car accident resulted in the need for the fusion surgery and $445,000 in medical bills.

The plaintiff's attorney asked for $1.7 million in damages. The jury awarded the plaintiff only $47,000, all of which was covered by Jim's client's insurer, which was ecstatic about the result. Congrats to Jim!

Insurance Law Update: The Right to Attack the Reasonableness of a Settlement and the Right to Discovery Is Given to Insurers Where the Duty to Defend Has Been Breached

By: Kevin M. Casey – Chicago, Illinois

In a recent Illinois Second District Appellate Court opinion, the court held that where a liability insurer has breached its duty to defend an underlying lawsuit and is estopped from raising any coverage defenses, said insurer still has a right to challenge the reasonableness of the underlying settlement between the insured and the plaintiff.

In the matter of *Stonecrafters, Inc. v. Wholesale Life Insurance Brokerage, Inc.*, 03 CH 435, the Plaintiff filed a class action complaint against the Defendant alleging violations of the Telephone Consumer Protection Act of 1991 (TCPA; 47 U.S.C. §227, et seq. 2000), common-law conversion and violations of the Illinois

Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 et seq.) In summary, the suit sought damages for Defendants' alleged practices of sending advertising "junk faxes" in violation of various provisions of the TCPA. In response, the Defendant tendered a notice of the complaint to its insurer, Milwaukee Insurance Company, seeking a defense based on its commercial general liability policy. Despite this tender, Milwaukee Insurance Company responded by denying the requested defense and coverage.

Eight months after the initial filing, the Plaintiff and the Defendant reached a preliminary class settlement in the amount of $5,999,999.98 with the caveat that the Defendant assign its claims, rights to payment and rights of action against every insurer covering any portion of the period from November 15, 2002 through November 21, 2002, including Milwaukee Insurance Company. Furthermore, the settlement also included the provision that the settlement was collectable only against the Defendant's insurers. Following approval of the aforementioned settlement, the Plaintiff initiated a third-party citation proceeding against Milwaukee Insurance Company to discover assets and collect on the Defendant's commercial general liability policy pursuant to 735 ILCS 5/2-1402.
In response, Milwaukee Insurance Company filed a motion to strike the citation, arguing that the turn over of insurance proceeds and any attendant insurance coverage determinations could not be adjudicated in a supplementary third-party citation proceeding. However, the trial court denied this motion and allowed the parties to engage in preliminary discovery.

During disputes over the subject discovery, the Plaintiff filed a partial motion for summary judgment on the issue of whether Milwaukee Insurance Company had a duty to defend the Defendant. Following oral arguments on this issue, the trial court ruled that Milwaukee had in fact owed the Defendant a duty to defend and in breaching this duty, it was estopped from raising any policy defenses to coverage for payment of the judgment. In so ruling however, the trial court further ruled that this estoppel did not bar Milwaukee Insurance Company from challenging the reasonableness of the underlying settlement and, in doing so, Milwaukee Insurance Company was entitled to pursue discovery as to the issue of reasonableness of the settlement; a source of contention for the Plaintiff. As such, the trial court certified this issue for purposes of an interlocutory appeal.

In response to this interlocutory appeal, the Appellate Court of Illinois, Second District ruled that, consistent with the Illinois Supreme Court decision in *Guillen v. Potomac Insurance Company of Illinois*, 203 Ill. 2d 141 (2003), when a liability insurer which has breached its duty to defend an underlying lawsuit and is estopped from raising any coverage defenses, said insurer still has a right to challenge the reasonableness of the underlying settlement between the insured and the plaintiff. Moreover, the insurer retains the right to engage in discovery to support its defense that the settlement is unreasonable.

* * *

Querrey & Harrow has successfully represented clients in many TCPA cases such as the matter discussed above, both in the underlying "junk fax" litigation, as well as in coverage disputes connected to TCPA claims. For more on this issue as well as any issues involving the Telephone Consumer Protection Act of 1991, please contact the author Kevin M. Casey at kcasey@querrey.com or Terrence F. Guolee at tguolee@querrey.com of Querrey & Harrow, Ltd.

Government Liability Update: Limitations to Qualified Immunity

By: Chloé G. Woodard – Chicago, Illinois

On July 9, 2009, the United States Court of Appeals for the Seventh Circuit took steps to clarify a limitation on the qualified immunity of municipal officials in suits premised upon Section 1983 and Title III, a federal statute prohibiting government officials from intercepting wire or electronic communications, through its decision in *Narducci v. Moore, et al*, 572 F.3d 313 (7th Cir. 2009).

The appeals court affirmed the district court decision and found that it did not err in denying in part the defendant's motion for summary judgment, alleging qualified immunity with respect to the plaintiff's Section 1983 action alleging that the defendants had violated his fourth amendment rights by secretly taping his phone calls made from the Village phones over a six year time period.

The court noted that the plaintiff had a reasonable expectation of privacy with respect to use of his work telephone, and that factual questions remained as to (1) whether the plaintiff was actually aware his phone calls were being recorded, (2) whether the plaintiff had a subjective expectation of privacy when using said phone, and (3) whether a third party actually listened to any of the plaintiff's phone calls. Most importantly, the appellate court noted that case law was sufficiently established so as to put the defendants on notice that their actions of taping said conversations constituted a violation of the plaintiff's constitutional rights.

In 1993, the comptroller of the Village of Bellwood began to worry about infuriated residents threatening employees of the Village's Financial Department over the telephone and also worried that employees of the Finance Department were making personal calls on the Village's time and over the Village's phone lines.

During a "pre Village Board of Trustees Meeting", it was requested that the Village begin recording calls to and from the Finance Department on the same system used to record calls to the police and fire departments. The Board of Trustees agreed to the proposal at the meeting and authorized the designated parties to begin recording the Finance Department telephone lines. It took about 30 days for the process to be completed. However, there were questions as to whether the Village provided notice which would have alerted the Finance Department employees that the Village was recording their telephone calls.

The plaintiff in this matter, and class-action representative, Mr. Narducci, took over as Bellwood's comptroller sometime between 1997 and 1998. He did not learn until February 28, 2000 that the Village was recording the phone lines in the Finance Department. He immediately notified two trustees of the Village that he thought the taping was illegal, alerted the FBI and the State's Attorney and wrote a memorandum to the Chief of the Police Department directing him to stop the recordings. There is a question as to whether the recordings were discontinued in March of 2000 or not until February 2002. Mr. Narducci subsequently left the Village and continued employment elsewhere.

In February 2001, Mr. Narducci filed a lawsuit against the Village of Bellwood, the Chief of the Police Department, the Village President, and various unknown trustees and employees of the Village. He later dismissed the claims against the unnamed trustees and employees, but proceeded with the case against the three named defendants, and later had his lawsuit certified as a class action on behalf of the other employees of the Finance Department whose phone calls were also recorded.

Mr. Narducci's lawsuit claimed that his rights were violated under 42 U.S.C. § 1983, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968. In addition, he claimed his

Fourth Amendment Right not to be subjected to illegal searches and illegal wiretapping was violated. He also brought Illinois state law claims under the Eavesdropping Act and a tort action for intruding on a place of seclusion.

However, the district court granted the defendants' motion for summary judgment on the state law claims and on any Title III claims involving phone calls made after Mr. Narducci learned about the recordings in February of 2000. The District Court denied summary judgment on the § 1983 claims and the remaining Title III claims, finding there were disputed issues of fact and the defendants were not entitled to qualified immunity. The defendants brought an appeal of the district court's denial of their qualified immunity claims.

The doctrine of qualified immunity protects government officials from lawsuits for damages when their conduct did not involve "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). One of the stated purposes of qualified immunity is to provide reasonable notice to government officials that certain conduct violates constitutional rights before a plaintiff can subject them to liability. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

For a right to be clearly established, "it's contours 'must be sufficiently clear that a reasonable official would understand that what he's doing violates that right…in the light of pre-existing law the unlawfulness must be apparent.'" *Id.* at 739. When examining a qualified immunity claim, a court examines whether a constitutional right has been violated; and then, if a constitutional right was violated, whether the right in question was sufficiently well-established that a reasonable officer would have been aware of it. *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

With regards to the Fourth Amendment violation, the defendants first argued that the plaintiff's § 1983 suit failed because he did not establish a violation of his Fourth Amendment rights. It is important to note that 42 U.S.C. §1983 is not an independent source of tort liability; instead, it creates a cause of action for "the deprivation, under color of state law, or a citizen's rights, privileges, or immunities, secured by the constitution and laws of the United States." Essentially, this statutory section is simply a means of vindicating rights that are secured elsewhere. *Green v. Butler*, 420 F.3d 689, 694 (7th Cir. 2005).

In reviewing this issue, the court noted that the Supreme Court has held that the Fourth Amendment applies to searches and seizures by government employers or supervisors of the private property of their employees.

NEWS

Chicago Associate Chris Keleher to Appear in Chicago Alliance Against Sexual Exploitation Documentary

Chicago associate **Chris Keleher** will be starring in a documentary being shot by the Chicago Alliance Against Sexual Exploitation. Filming was done in mid-August and Chris was interviewed by the director in front of the O'Hare Marriott Hotel. This site was chosen because Cook County Sheriff Tom Dart has conducted prostitution stings at this Hotel. Chris' interview provides a background of Sheriff Dart's lawsuit against Craigslist, online prostitution, why the Sheriff has brought the lawsuit and Craigslist's erotic services section. The film will also feature Sheriff Dart.

The film is being produced by Chicago Alliance Against Sexual Exploitation, excerpts will be shown at a launch event on September 17, 2009 at a panel presentation featuring Sheriff Dart.

O'Connor v. Ortega, 480 U.S. 709, 715 (1987). The court continued, however, that the operational realities of the work place make some employees' expectations of privacy unreasonable. *Id.* at 717. To prove one's case, an employee must first demonstrate a reasonable expectation of privacy, and then demonstrate that the search was unreasonable. This reasonableness standard has two requirements: first, the search much have been justified at its inception, and second, it must have been reasonably related in scope to the circumstances which justified the interference in the first place.

In this light, the court first considered whether the plaintiff has a reasonable expectation of privacy in his phone line use. The defendants argued that the plaintiff did not have a reasonable expectation of privacy in the phone line in the Finance Department because the phone line was located in a crowded work place and anyone working nearby could easily overhear his conversations. They also argued that the recording system emitted an audible beep at the beginning of every phone call which should have lead users of the system to conclude their calls were recorded.

The court found the existence of the alleged beep and the indication that it gave to the Finance Department employee about the privacy of their phone call, to be disputed. The court further reasoned that if the recording procedures were as obvious as the defendants claimed, then a jury may well conclude that the plaintiff did not have a subjective expectation of privacy in his phone use, ultimately finding this to be a factual dispute that the jury would need to resolve.

Second, the defendants argued that even if the plaintiff had a subjective expectation of privacy, that it was not an objectively reasonable one. The defendants contended that society would not recognize a reasonable expectation of privacy in a public phone line provided by the Village for public purposes. Under the defendant's theory, the need to monitor the efficient provisions of public services militates against an expectation of privacy on such a phone line. For that issue, the court turned to the previously decided decision in *Ortega* which found that the idea that one could conduct confidential business at work, and have an expectation of privacy when doing so, not to be per se unreasonable.

On this first prong, the defendants argued that there was no actual "search" within the meaning of the Fourth Amendment because, while the calls were recorded, there was no evidence that anyone ever listened to them. The court was unwilling to accept the defendant's argument in this instance as it would require the court to infer from the absence of evidence in the record that no one from the Village ever listened to the recorded phone calls. However, drawing that inference would be incompatible with a requirement that the court draw all reasonable inferences in favor of the non-moving party, a tried and true summary judgment hurdle. Taking the facts in the light most favorable to the plaintiff, the court found that the plaintiff had demonstrated a reasonable expectation of privacy in the use of his phone line at work.

The court then considered the second reasonableness standard prong of whether the workplace search in this case was conducted in a reasonable manner. Under the reasonableness standard, both the inception and the scope of the intrusion must have been reasonable. *Ortega*, 480 U.S. at 726. A search by a superior is considered to be justified at its inception when there are reasonable grounds for suspecting the search will turn up evidence that the employee is guilty of work related misconduct, or that the search is necessary for non-investigatory work related purposes. *Id.* The search is reasonable in scope as long as the measures taken by the employer are reasonably related to the search's objective and they are not overly intrusive in light of the nature of the alleged misconduct. *Gossmeyer v. McDonald*, 128 F.3d 481, 491 (7th Cir. 1997).

The district court then found that the search was justified at its inception because it was motivated by the work-related need to record instances of customers being abusive to employees or vice versa and to monitor the use of village phone lines for personal calls. Ultimately, however, the district court concluded

that under the plaintiff's versions of the facts, recording every single phone call made on those lines for upwards of six years without ever notifying the employees was not a reasonable scope for the search.

The appellate court agreed. On this point, the defendants argued that the district court erred by finding that the search was unreasonably expansive because, as they claimed, the parameters of the search were never broadened, thus if it was reasonable at its inception, then it was reasonable throughout the duration. The appellate court felt as though this argument ignored the excessive duration of the time period for the search. In this instance, the facts indicated the recordings lasted at least six years and possibly even longer. The court reasoned that, given the allegations in the case including that the recordings were of every single phone call for at least a six year period, with no notice to the affected employees and with the invasion of privacy following directly on the Finance Department employees who used the line every day, the plaintiff had presented sufficient evidence of a violation of the Fourth Amendment to withstand summary judgment.

The court then turned to the second qualified immunity prong of whether the right was clearly established. The district court denied qualified immunity on this issue because it found that no reasonable official could have believed that the indiscriminate taping of all phone calls, with no notice to the affected employees, for several years after the complaints and alleged threats had ceased, was reasonably related to the problem justifying the continued search.

The defendants argued that there was no opinion explicitly finding that such conduct violated the Fourth Amendment, but the Supreme Court only requires that the "unlawfulness must be apparent" in light of the case law. *Shields v. Burge*, 874 F.2d 1201, 1204-05 (7th Cir. 1988). The appellate court looked to their sister circuits which had held that in light of the ruling in *Katz*, recording and disclosing a police officer's personal phone call to his wife on a police department telephone system as a clear violation of the Fourth Amendment and that the supervisor responsible for the recording was not entitled to qualified immunity. *Zaffuto v. City of Hammond*, 308 F.3d 485, 489 (5th Cir. 2002). Agreeing with their sister circuits, the appellate court found that at the time of the recordings in this case, it was sufficiently clear that the government employees enjoyed a reasonable expectation of privacy in the work place to preclude qualified immunity.

The Seventh Circuit Appellate Court affirmed the district court's denial of the defendant's motion for summary judgment. Although this is not a final disposition in this matter, it is important to note that there may be yet another ground for limiting the seemingly unlimited span of the qualified immunity doctrine.

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Chloé Woodard, an associate in our Chicago office, concentrates her practice in municipal liability and commercial litigation. Having been a law clerk with the Illinois Attorney General Lisa Madigan's Office and Querrey & Harrow, Ms. Woodard has a well rounded base to handle key aspects in these types of matters.

Ms. Woodard currently handles cases which involve a variety of issues municipalities face including premise liability and those based upon 42 USC §1983 (discrimination, equal protection, due process and freedom of speech). Her recent successes include the dismissal by motion for summary judgment of a 42 USC §1983 matter premised upon violation of due process rights, and dismissal by motion for summary judgment of a 42 USC §1983 class action claiming equal protection violations.

If you have any questions regarding this article, please contact Chloé via 312-540-7604, or via cwoodard@querrey.com.