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A Monthly Legal Newsletter from

Querrey & Harrow

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Editors: *Terrence Guolee and Jillian Taylor*

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Insurance Update:
Third District Appellate Court Holds That While Some Insurance Policy Limitations May Be Good For Some, They Are Not Good For All

By: Kevin L. Sterk - Chicago office

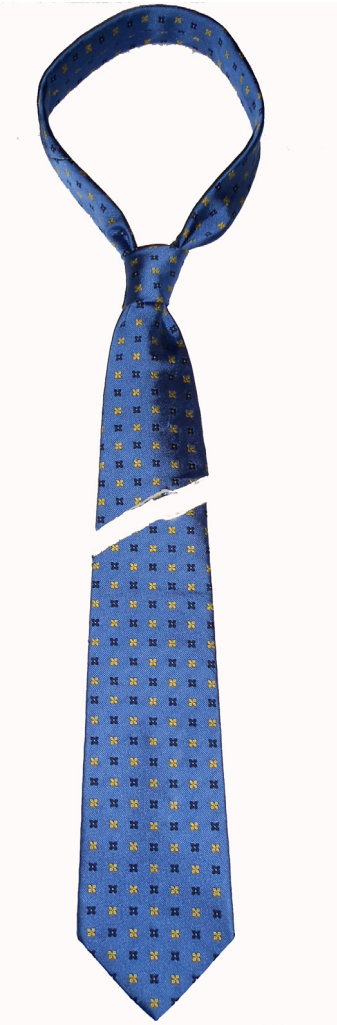
Recently, the Third District Appellate Court rendered a split decision that adds one more item to the bevy of inconsistent state laws that insurance companies must consider when preparing insurance policies and placing coverage in Illinois. In *Country Preferred Insurance v. Whitehead*, 3-11-0096 (3rd Dist., August 30, 2011), the court considered whether a provision of an auto insurance policy violates Illinois public policy if it limits coverage to two years after an accident occurs in a state that has as three-year statute of limitations. The majority found that such a provision violates Illinois public policy. A persuasive dissent found the opposite.

On July 27, 2007, defendant Whitehead, an Illinois resident, was involved in an automobile accident in Wisconsin with an uninsured driver. Whitehead notified her insurance company, plaintiff Country Preferred, of the accident, and was assigned a claim number and claim representative in October 2007. After several telephone calls and letters with the claim representative, Whitehead hired an attorney. On May 5, 2009, her attorney wrote the claim representative and requested a copy of Whitehead's insurance policy. Although Whitehead arguably submitted her claim properly, (an issue not raised in this case) Country Preferred never declined the claim in whole or in part. Instead, it remained silent.

On October 6, 2009, Whitehead's attorney made a written demand for arbitration under the policy. The demand was made after the expiration of the of the policy's two-year limitation period. Country Preferred then filed a complaint for declaratory judgment on October 30, 2009. In its complaint for declaratory judgment, Country Preferred argued that Whitehead was barred from asserting an uninsured motorist claim under her policy because she did not make a written demand for arbitration within two years of her accident. On July 19, 2010, Whitehead countered with a motion to compel arbitration, arguing that the two-year period contained in the policy violated Illinois public policy because it effectively shortened the applicable Wisconsin statute of limitations from three years to two years. She further argued that as a result of shortening the applicable statute of limitations, she was placed in a substantially different position than she would have been had the other driver been insured. The trial court, however, denied her motion.

In siding with Whitehead on appeal, the majority ruled that the contract provision violates public policy because it shortens the applicable Wisconsin statute of limitations from three years to two years. It began its analysis with the axiom that where a provision of an insurance contract conflicts with public policy, courts will not enforce it, citing *American Service Ins. Co. v. Pasalka*, 363 Ill.App.3d 385, 390 (1st Dist. 2006). Whether a contractual provision violates public policy is a determination made on a case-by-case basis. *American Federation of State, County & Municipal Employees v. State*, 158 Ill.App.3d 584, 592 (1987), aff'd, 124 Ill.2d 246 (1988). Illinois law requires insurers to offer uninsured motorist coverage in all automobile polices. 215 ILCS 5/143a (West 2008). The intent of the legislature in enacting Section 143a was to ensure that persons injured by an uninsured motorist are protected at least to the extent that compensation is made available to persons injured by a motorist insured for the minimum legal limits. *American Service Ins. Co.*, 363 Ill.App.3d at 390.

In short, the public policy behind the Illinois uninsured motorist statute is to place the injured party in substantially the same position he would have been in had the uninsured driver been insured. Here, the accident occurred in Wisconsin, which has a three-year statute of limitation for personal injury claims. Thus, the



CASE SUCCESS

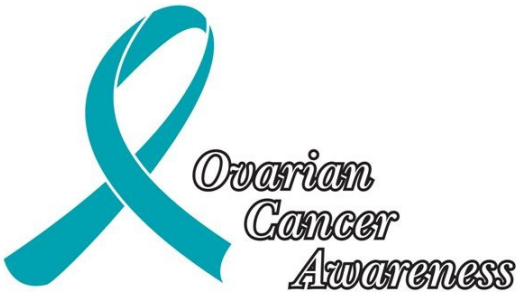
Congrats to **Dominick Lanzito** and **Scott Rochelle** on obtaining a "not guilty" verdict in a civil rights case on behalf of two Chicago Police Department officers. The plaintiff, a police officer himself on duty disability, claimed excessive force, excessive detention and malicious prosecution stemming from a traffic stop. The jury, who were out for less than an hour, including lunch, found in favor of both defendant officers on all three counts.

Per tradition, Scott's tie was cut to recognize his first trial win.

COMMUNITY SERVICE

Q&H Golf Outing Raises Funds For Ovarian Cancer Research

Querrey & Harrow attorneys and staff gathered at Lincoln Oaks Golf Course in Crete, Illinois on October 16, 2011 for the firm's annual fall golf outing. This year the firm directed proceeds from the event towards the Ovarian Cancer Research Fund, raising $1,960 for the cause. Thanks go to shareholder **Tom Kauffman** and legal assistant **Ann Lang** who led the organization of the outing.



majority held that the two-year period contained in the limitation provision violates Illinois public policy because it effectively shortens the Wisconsin limitations period from three years to two years. Therefore, the contractual provision placed Whitehead in a substantially different position than she would have been in had the other driver been insured. *Citing Burgo v. Illinois Farmers Insurance Co.*, 8 Ill.App.3d 259, 263-64 (1st Dist. 1972). If the driver of the other vehicle been insured, Whitehead could have brought her personal injury action against him in Wisconsin, and a three-year statute of limitations would apply. *See* Wis. Stat. §§ 801.05(3), 893.54(1) (2011).

Although Country Preferred cited numerous Illinois cases that approved two-year contract limitation provisions, the majority was not swayed. It distinguished the cases because they involved personal injuries occurring in Illinois, while Whitehead was injured in Wisconsin. In contrast, the dissent concerned itself with Illinois public policy, finding it inherently inconsistent for an Illinois court to use another state's laws to establish a violation of Illinois' public policy. It claimed that the majority had done just that.

Public policy varies from state to state, and each state has shaped its policies through years of law-making and simply by being in existence. Common sense dictates that Illinois public policy is not violated when the limitation period in a provision of an Illinois contact is a year shorter than the Wisconsin statute of limitations. The dissent points out that Whitehead fails to provide any authority supporting her claim that the law of another jurisdiction can somehow be used to show a violation of Illinois public policy, and exclaims fear that applying such logic would result in subjugating Illinois public policy to the laws of other states. Under the majority's analysis, an Illinois citizen involved in a vehicle accident in Wisconsin with an uninsured driver would be afforded broader rights than an Illinois citizen involved in a vehicle accident in Illinois with an uninsured driver, despite both claims being filed in Illinois courts. The dissent believes that this is the true violation of Illinois public policy.

This presents yet another problem for insurance carriers. Several months ago, the Illinois First District Appellate Court addressed the validity of contractual limitations provisions of insurance policies in *American Access Casualty v. Tutson*, No. 1-09-2566 (April 22, 2011). While the court noted that Illinois law recognizes limitations period as valid contractual provisions in an insurance contract, it determined that the Illinois Insurance Code tolls a the contractual provision when the insured supplies the insurer with information sufficient to constitute a proof of loss and the carrier does not deny the claim within the appropriate limitation period.

It can be inferred through a careful reading of *Whitehead* that the court intended to protect the interests of the insured rather than pursuing continuity and consistency of Illinois law. Country Preferred never declined Whitehead's claim in whole or in part, despite receiving both notice of the accident and sufficient information to constitute proof of loss. However, as the dissent points out, Whitehead's public policy argument is the basis of her counterclaim, and she only briefly raises the proof of loss issue. In its quest for coverage, the majority overlooks this thin argument and misapplies Illinois law.

As a result, the majority saves one at the expense of many. Insurance carriers already must stringently ensure that policy declinations are made and documented carefully. Now, this inconsistent ruling requires that insurance carriers must also juggle foreign statutory limitation questions when claims arise outside the state where the policy and insured reside. As a result, Illinois carriers should carefully review and possibly re-write policy limitation provisions to ensure compliance with recent case law, and thus curb further litigation of disputes over said policy provisions.

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Kevin L. Sterk, *an associate in our Chicago office, concentrates his practice in general litigation, construction litigation, insurance defense, and transactional work.*

Kevin can be contacted via ksterk@querrey.com or at 312-540-7614.

Class Action Update: Illinois First District Reaffirms Defendants' Rights To "Pick Off" Class Representatives

By: Terrence Guolee – Chicago office

In baseball, when a runner gets on base, the skill of a pitcher to pick off the runner with a quick throw can be a great assist to the defense. Less known (and certainly not quite as exciting) is that in class action litigation, the defense's quick "pick off" of plaintiffs intending to represent a class can not only assist the defense but, in some cases, bring the game to a quick end.

In many cases, purported class action complaints are filed without the plaintiffs simultaneously filing a motion for class certification. In such circumstances, tactical legal defense practice has long supported consideration of whether the named defendants should immediately offer full relief to the named plaintiffs in order to "pick off" the potential class action representatives and moot the claim before it moves to a large class action with the resulting legal expenses and, often, catastrophic potential liability. While offering this payment will leave the defense threatened by claims from any other individual claimants that may come along, in many cases a successful pick off ends the case as the plaintiff counsel is left without a proper class representative.

A recent decision of the First District Appellate Court highlights the survival of the ability of defendants faced with potential class action claims to pick off or moot the claims by making settlement offers to the purported class representatives. However, the decision also highlights how quickly defendants need to act in order for this defense tactic to be successful.

In *Gatreaux v. DKW Enterprises et al.*, 2011 IL App (1st) 103482 (decided September 22, 2011), defendant DKW Enterprises and several other defendant companies running McDonald's franchises were faced with a purported class action complaint under the Illinois Minimum Wage Law, 820 ILCS 105/1 *et seq.* (West 2006). The complaint sought the certification of a class of individuals employed by the defendants as hourly non-exempt wage employees, who worked regular or overtime hours but did not receive the proper pay. Before the plaintiffs filed a motion for class certification, the defendants made a tender to each of the three named plaintiffs of "all amounts allegedly due to each such plaintiff." After the plaintiffs rejected this offer, the defendants filed a motion to dismiss contending that the plaintiffs' cause of action was moot as a result of the defendants' tender. The circuit court agreed and granted the defendants' motion to dismiss.

NEWS

Querrey & Harrow Expands National Medical Equipment and Drug Effect Practice



Chicago shareholders **Dan Gallagher, Larry Kowalczyk** and **Chris Keleher** were recently retained as national monitoring counsel for a generic manufacturer of metoclopramide. Dan, Larry and Chris are also serving as national monitoring counsel for an insurance carrier in the pelvic mesh Multidistrict Litigation. Querrey & Harrow has successfully represented several medical equipment and pharmaceutical manufacturers in nationwide actions.

On appeal of the dismissal, the court noted a letter from defense counsel to the plaintiffs offering to settle all claims. Of note, the letter agreed to pay all amounts allegedly due for unpaid work, to pay all alleged unpaid overtime, to reimburse all alleged improper deductions from the plaintiffs' pay, to pay an additional award of 2% for all underpayments and to pay applicable prejudgment interest. Moreover, the defendants offered to pay all reasonable attorney fees and costs incurred by the plaintiffs in the civil action and requested plaintiffs' counsel to advise regarding the specific amounts that each plaintiff would be entitled to. This offer letter was rejected by plaintiffs. Nevertheless, the circuit court deemed the plaintiffs' case as having been mooted by the offer of full damages and costs to the plaintiffs, such that there did not remain a controversy for the court to decide.

Reviewing prior court decisions that allowed plaintiffs to continue with class action claims even if settlements were offered prior to the filing of the plaintiffs' motions for class certification if the plaintiffs exercised "reasonable diligence" in prosecuting their class action claims, the First District Appellate Court primarily followed the dictates of the Illinois Supreme Court's decision in *Barber v. American Airlines, Inc.*, 241 Ill.2d 450, 455 (2011). In *Barber*, a case involving alleged improper airline baggage fees being kept by airlines even when flights were canceled, the Supreme Court reaffirmed the viability of the "pick off" rule and upheld the dismissal of a case where American Airlines immediately offered to refund held baggage fees, and indeed credited the plaintiff's credit cards on receipt of the claim, together with all costs incurred by the plaintiffs. *Id.* at 455-60. In particular, the Supreme Court found that, regardless of whether the plaintiff had exercised "reasonable diligence," she could not proceed with her claim because she failed to seek certification of the class prior to being tendered the full relief she requested by American Airlines. *Id.* at 458.

Following *Barber,* the *Gatreaux* court reaffirmed that the key question is whether the plaintiffs have filed a motion for class certification at the time the settlement offer is made by the defendants. In cases where a motion for class certification has been filed, the claims of the class members are deemed to be at issue and the overall case will not be rendered moot by the offer to the named defendants. In this respect, the court relied on the following language from *Barber*:

> ... a motion for class certification, while pending, sufficiently brings the interests of the other class members before the court 'so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole. The situation is different where the tender is made before the filing of a motion for class certification. There, the interests of the other class members are not before the court, and the case may properly be dismissed.

Gatreaux, at p.13, quoting *Barber*, 241 Ill.2d at 456-57.

The appellate court also rejected the plaintiffs' arguments that the bright line rule announced in *Barber* preventing a class action from going forward any time a tender is made prior to a motion for class certification, will necessarily create a "race to the courthouse" and require a class action plaintiff to file a class certification motion concurrently with his or her complaint. The plaintiffs argued that this is impracticable because, in most situations, discovery is essential to properly define a class. While noting that the "pick off" rule has been criticized by various courts as subverting the benefits of class resolution of mass claims, the court nevertheless noted that it was bound to apply the Illinois Supreme Court's ruling in *Barber* and that settlements remain proper as the claims of the remainder of the potential class have not been affected. *Gatreaux*, at p.16.

The court likewise rejected the plaintiffs' argument that dismissal was improper as the tendered amounts were not specific and were not actually given to the plaintiffs. Moving past

procedural issues caused by the plaintiffs' failure to raise the argument in the lower court, the court found that the tender would make the plaintiffs "whole" and was an unconditional offer that would not support any valid objection that the plaintiffs would not be fully compensated. *Gatreaux*, at p.18.

In the end, the lessons of the *Barber* and *Gatreaux* decisions will likely spur most plaintiffs' class action counsel to file bare bones motions for class certification along with their initial complaints. Indeed, many of the class action plaintiffs' counsel we regularly encounter have long combined class certification motions with their complaints, for the very reason of avoiding the "pick off play." However, it is encouraging that the courts will continue to recognize, in situations where no class motion has been filed, that plaintiffs who have been offered all that their individual claims would support as damages should not be allowed to serve as class representatives. Indeed, in many cases a minor payment to one claimant may effectively end what often can be very expensive and threatening class litigation.

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***Terrence Guolee**, who fears he will never see a Cubs pitcher pick off a batter in the World Series, is a shareholder in our Chicago office and an Editor of this newsletter.*

Terrence 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 represents several municipalities, elected governmental officials and their employees in a variety of matters, including very complicated civil rights class actions and claims brought under state and federal whistleblower laws. Terrence also represents several businesses in defense of statutory consumer rights class action claims under FACTA and TCPA and has a long record of successful representation of property owners, utilities and contractors in high-exposure construction and electrocution cases and other catastrophic injury and loss claims.

If you have any questions regarding this article or Querrey & Harrow's class action litigation practice, please contact Terrence via tguolee@querrey.com or 312-540-7544.

COMMUNITY SERVICE

Bream Addresses Seminar on Youth Sports

Chicago shareholder **James Bream** recently gave the opening remarks at a seminar in Glenview, Illinois entitled: "For Pay or For Play: Minimizing Professionalism in Youth Sports." The forum, attended by parents, coaches, youth sports organization officials, teachers, principals and other youth leaders, focused on the benefits of increasing the emphasis of sportsmanship, teamwork, fun and lifelong participation in youth sports.

Workers' Compensation Update: Employers Can Now Cut Employees' Choice of Doctors Through a Preferred Provider Program (PPP)

By: Matthew J. Daley - Chicago office

A recent change to the Illinois Workers' Compensation Act (the Act) allows employers to establish a Preferred Provider Program (PPP) of medical providers approved by the Department of Insurance. In order for the PPP to be approved by the Department of Insurance, the PPP must meet the following requirements:

1. The provider network shall include an adequate number of occupational and non-occupational providers.

2. The provider network shall include an adequate number and type of physicians or other providers to treat common injuries experienced by injured workers in the geographic area where the employees reside.

3. Medical treatment for injuries shall be readily available at reasonable times to all employees. To the extent feasible, all medical treatment for injuries shall be readily accessible to all employees.

4. Physician compensation shall not be structured in order to achieve the goal of inappropriately reducing, delaying, or denying medical treatment or restricting access to medical treatment.

5. Before entering into any agreement under this section, a program shall establish terms and conditions that must be met by noninstitutional providers wishing to enter into an agreement with the program. These terms and conditions may not discriminate unreasonably against or among noninstitutional providers. Neither difference in prices among noninstitutional providers produced by a process of individual negotiation nor price differences among other noninstitutional providers in different geographical areas or different specialties constitutes unreasonable discrimination.

Additionally, the PPP must be in place and approved at the time of the alleged injury by the employee. The amendment requires the employer to notify the employee of the program on a form promulgated by the IWCC of the PPP.

The significance of the PPP, from an employer's standpoint, is that it limits the employee to two choices of treating providers from within the established network. In the past, section 8.1(a) and 8(a)(4) of the Act allowed the employee the ability to choose two separate medical providers along with the referrals from each. It should be noted that the employee has the option to "opt out" of the network, if done so in writing. However, opting out will constitute a choice of physician by the employee leaving them with one choice. This change effectively cuts in half the employee's choice of doctors. Should the employee select a physician within the network, this will constitute one of his choices. Referrals within the network will not be counted against the employee as a choice of physician. The employee may be allowed to be examined by a specialist that is not a member of the PPP, if there is no doctor within the PPP that can render proper treatment.

As a result of this new amendment, PPP's may also reign in some of the "doctor shopping" by employees, thereby facilitating a quicker road to recovery and resolution of the claim. Additionally, as another side benefit, the PPP may facilitate timely reporting of an injury. If the employee decides to seek non-emergency treatment prior to reporting the injury to the employer, this will constitute a choice of physicians. As such, an employee will need to timely report his/her injury prior to seeking non-emergency treatment.

However, the petitioner can argue that a treating physician within the network is not providing adequate treatment. Should the Commission determine that the second choice of physician within the network has not provided adequate treatment, the employee will be allowed to choose another physician from outside the network. Specifically, section 8.1(a)(d) provides "except as provided in subsection (a)(4) of section 8, upon a finding by the Commission that the care being rendered by the employee's second choice of provider from within the network is improper and inadequate, the employee may then choose, a provider outside the network at the employer's expense."

As such, potential benefits from this new amendment can be far ranging, from medical cost savings to more efficient resolution of claims. Hence, any employer with the ability to establish a PPP, should seriously consider doing the same as the benefits and potential increased control over medical costs will be well worth the effort for years to come.

Further information on setting up and gaining approval of a PPP can be obtained on the Illinois Department of Insurance's website or by contacting this author.

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***Matthew J. Daley**, an associate in our Chicago office concentrates his practice in municipal liability, workers' compensation, and employment and labor. He also handles criminal defense matters. If you have any questions regarding this article, please contact Matt via 312-540-7678 or mdaley@querrey.com.*

SEMINARS

Bream Speaking and Appearing at Several Health Care Seminars

Chicago shareholder **Jim Bream** is keeping a busy speaking schedule through November of 2011. Jim attended the ASHRM Annual Conference as Chapter President of CHRMS from October 16 to 18, 2011. He then led a roundtable discussion at the IAHA Annual Law Symposium Conference on October 25, 2011.

On November 2, 2011, Jim will speak on Informed Consent for Rockford Health Systems. On November 4, 2011, he will speak at the CHRMS Law Day. Finally, on November 30, 2011, Jim will present "Dare to Discharge" for Vanguard Health Systems at West Suburban Medical Center.

Publicity and Entertainment Licensing
Gleacher Center - Chicago, Illinois
November 3 and 4, 2011

Len Rubin will be speaking on the subject of rights of publicity and entertainment licensing at the upcoming Practising Law Institute seminar "Understanding the Intellectual Property License", being held on November 3 and 4, 2011. In addition, Len will participate in a mock license negotiation session during the seminar, which will be held at the Gleacher Center in downtown Chicago.

Construction Lien Law in Illinois
Naperville, Illinois - December 1 and 9, 2011

On December 1, 2011, in Chicago and on December 9, 2011, in Naperville, Illinois, Querrey & Harrow attorneys will present a one-day seminar entitled "Construction Lien Law in Illinois." This Lorman Education Services seminar is designed for contractors, owners, developers, subcontractors, suppliers, architects, engineers, lenders, accountants, and allied construction professionals. Construction Practice Co-Chair **Bruce Schoumacher** will serve as Moderator for the seminar. Other speakers include **Jason Callicoat**, **Thomas J. Condon**, **John Halstead**, **Thomas Kaufmann**, **Scott B. Krider**, **Anthony Madormo** and **Timothy Rabel**.

For more information or to register for this seminar, please visit lorman.com and enter seminar ID 388620 for Chicago or ID 388480 for Naperville.