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Are Consulting Physicians Required to Intervene?

Repeal of the McCarran Act Would Roil the Insurance Industry.

The 20% Rule: An Emerging Theory of Liability Under the FLSA.

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EDITORS: Linda C. Sweeting, Esq., Editor - Lissette Gonzalez, Esq., Editor - Angelica Velez, Design Editor

Trivia Question

A secondary medical provider in Florida has no duty to intervene or override the treating physician's plan in the care and treatment of a patient where the consulting physician does not supervise or control the treating physician.

✓ TRUE

X FALSE

- The first ten readers to respond correctly will receive a $10.00 Starbucks gift certificate.
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- Please remember to include your name and address with your entry.
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In addition, a new vCard feature has been added to the website. You will see a link to "Download VCF" under every attorney's profile. Clicking on this will download all of the attorney's contact information into Outlook or smartphone contacts.

A Note from the Editors

We are proud to present the 2016 Summer Edition of the CSK Quarterly. Thank you for your continued interest. We are especially excited to announce that this is the first edition comprised of contributions from our newly selected CSK Staff Writers, not all of whom are featured in this issue. We hope you will agree that our collective efforts have resulted in a high quality publication addressing some of the current legal trends.

This Edition covers a variety of topics. Our attorneys have provided insight into whether consulting physicians have a duty to intervene in a patient's care when they are not the treating or supervising provider, the potential impact on the insurance industry should Congress repeal the McCarran Act, and the practical effects of an emerging theory of liability under the FLSA for employers with tipped employees.

We are always looking for ways to improve our publication. If you have any comments or suggestions, please let us know. We greatly value your feedback. Also, congratulations to the winners of our last Quarterly Trivia Contest. We encourage you all to participate in this Edition's Trivia Contest for your chance to win.

We look forward to hearing from you.

Linda C. Sweeting and Lissette Gonzalez

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ARE CONSULTING PHYSICIANS REQUIRED TO INTERVENE?

By Paula J. Lozano

Paula J. Lozano is a Partner and member of the Medical Malpractice group.

In Florida medical malpractice lawsuits, plaintiffs' attorneys often sue not only the providers involved in the direct care of the patient, but also providers who were remotely in contact with the patient's care. Plaintiffs' attorneys often take the position that if an insurance policy exists – sue them and maybe we will get a few bucks. Occasionally, it is an effective tactic. By suing all potential parties, plaintiffs avoid a *Fabre* defense and an "empty chair" at trial, and they may actually obtain a nominal settlement just so the defendant-physician can avoid the cost and inconvenience of litigation or trial. However, defending such cases can become protracted and the litigation costs immense.

Duty to Intervene Allegations and the Costs of Defense

While the true focus of the lawsuit is on the primary care providers, secondary claims often involve a consulting physician's failure to intervene or override the decisions of the treating physician. In the last several years, CSK attorneys were presented with this "failure to intervene" issue in four different lawsuits. The issues were as follows: (1) whether the treating obstetrician should have presented to the hospital to evaluate his patient after the emergency room physician called regarding use of a steroid for an allergic reaction; (2) whether the anesthesiologist who evaluated the patient in the Post Anesthesia Care Unit ("PACU") should have convinced the surgeon to take the patient back to surgery to evaluate post-operative bleeding; (3) whether the consulting intensivist who saw the patient in the Intensive Care Unit ("ICU") five hours after surgery should have overridden the surgeon's orders and called another surgeon to take the patient back to surgery to explore for a developing hematoma; and, (4) whether the anesthesiologist administering an epidural to a patient in labor should have convinced the obstetrician to perform a C-Section. All patients suffered complications resulting in significant injuries.

In each case, the plaintiff's attorney alleged negligence on the secondary physicians. Two cases resulted in a nominal settlement, another in a defense verdict, and the last in a dismissal before trial. Only one case pursued a Motion for Summary Judgment on behalf of the secondary physician, which the trial court denied. All four cases were in litigation for years with significant costs.

In Florida, Is There a Duty to Intervene?

In Florida, there is presently no duty for a consulting physician to intervene or convince the treating physician to take a different course of action. However, no Florida court has held that such a duty does not exist. Therefore, plaintiffs' attorneys are free to file claims against consulting physicians alleging that the provider had a duty to intervene. When confronted with such claims, it is advisable that defense attorneys file early dispositive motions seeking summary judgment. Convincing the courts in Florida that there is no legal duty for a consulting physician to intervene in the care of a patient is the best means of controlling defense costs. However, despite the absence of case law recognizing such a duty in Florida, establishing that plaintiffs have failed to meet their burden of proof as a matter of law is challenging.

Plaintiff's Burden of Proof and Challenging the Duty Owed

In order to prevail in a medical malpractice matter, the plaintiff bears the burden of proving all four elements of the cause of action: (1) a duty owed to the patient; (2) a breach in the applicable standard of care; (3) a legal causal connection between the breach and the injuries; and, (4) damages. Too often, lawyers and courts gloss over the first element. However, because there is no case law imposing a duty for a physician to intervene in Florida, defense attorneys should aggressively pursue summary judgment on this first element.

Whether a legal duty exists in a negligence action is a question of law decided by the trial court.[1] In all four CSK cases discussed above, the plaintiffs' claims involved whether the secondary provider had a duty to intervene or override the treating provider's orders. Currently, Florida imposes no such duty on physicians, nor does Florida negate such a duty. In fact, there is no Florida case on point. There are, however, cases from various other jurisdictions that support summary judgment on this question of duty.

Case Law in Foreign Jurisdictions that Support No Duty to Intervene

Kansas provides direct, persuasive support. Specifically, in *Dodd-Anderson By and Through Dodd-Anderson v. Stevens*, the appellate court considered adopting a duty for a secondary physician to override the judgment and decisions of another physician.[2] In the case, the plaintiffs alleged that the consulting physician negligently failed to intervene in the treating physician's treatment of a child. The plaintiffs' expert opined that the secondary physician "should have done something....should have examined and assumed control."[3] Plaintiffs often rely upon such evidence in Florida. However, the Kansas court disagreed, upheld the entry of summary judgment, and provided the following rationale:

> [N]o reasonable person, applying contemporary standards, would recognize and agree that a physician has, or should have, a legal duty to unilaterally and perhaps forcibly override the medical judgment of another physician, particularly a treating physician. [4]

In fact, the court opined that such a duty would result in "medical, and ultimately legal, chaos."[5] Although the court noted the obvious and endless adverse consequences to the medical community and patients, it did not elaborate on these consequences.[6]

Alabama lends further support to challenge these "failure to intervene" cases. In *Wilson v. Athens-Limestone Hosp.*, the parents filed a wrongful death action against the hospital and hospital-employed pediatrician alleging improper discharge of their four year old who ultimately died.[7] The emergency room physician consulted the child's pediatrician, Dr. Teng, who had a pre-existing physician-patient relationship with the child.[8] Dr. Teng presented to the emergency department, saw the child, and spoke to the emergency room physician, but did not diagnose, treat, or make any recommendations for the patient.[9] Still, the plaintiffs alleged that Dr. Teng had a duty to intervene, which he breached by negligently failing to ensure the child received proper care through admission and administration of medication.[10] The trial court, however, disagreed and granted the defendants' directed verdict at trial. The appellate court also agreed and, citing *Dodd-Anderson*, found that Dr. Teng owed the patient no duty to intervene or override the independent medical judgment of the emergency room physician who retained control of the child.[11]

More recently, in *Gilbert v. Miodovnik,* the Court of Appeals for the District of Columbia relied on *Dodd-Anderson* to determine that a Medical Director did not owe a duty to intervene in the patient's care.[12] In this case, the plaintiff received obstetrical care and treatment from a midwifery group who counseled the patient on the dangers and increased risks of complications giving birth vaginally after two prior C-Sections (VBAC). The midwifery group often consulted with Dr. Miodovnik during "chart review" meetings regarding various patients.[13] When the midwives brought this patient to his attention during a routine chart review, Dr. Miodovnik expressed great concern, recommended the patient have a C-section, and instructed the midwives to reiterate the dangers and risks involved in a VBAC in order to obtain proper consent.[14] However, the midwives failed to again inform the patient of the risks and failed to again obtain her consent to forego the C-section.

Thereafter, while the patient ultimately agreed to a C-section at the last minute, her uterus ruptured causing significant damages to the baby.[15] The plaintiff argued that because Dr. Miodovnik was the Medical Director who gave advice when the midwives presented her case, he owed the patient a duty to intervene, override the judgment of the nurse midwives, and directly communicate with and counsel the patient that the VBAC was inadvisable.[16] However, the Court of Appeals found that a traditional physician-patient relationship did not exist between the plaintiff and Dr. Miodovnik, since he never met with or examined the patient.[17] The Court of Appeals also found that even though Dr. Miodovnik consulted on the case, he had no duty to intervene, take charge of the patient's care and treatment plan, or even monitor the situation.[18] In summary, the patient already had skilled treating practitioners managing her care, which Dr. Miodovnik neither supervised nor had a duty to supervise.[19]

Conclusion

In CSK's experience in medical malpractice lawsuits over the years, plaintiffs persist in making creative arguments that challenge the existence of a duty to intervene. From a practical standpoint, the case law from Kansas, Alabama and the District of Columbia support the proposition that secondary providers consulting on patients' care, or merely discussing care with the treating provider, have no such duty to intervene or override the treating physician's plan. In Florida, there is no case law that specifically addresses the issue. However, the holdings from these other jurisdictions provide aggressive defenses to allegations that a physician had the duty to intervene. Florida counsel should raise these defenses early via the filing of dispositive motions in cases where the plaintiffs assert a physician's duty to intervene, before extraordinary time and resources are expended in litigation. The challenge we continue to face in Florida, however, is finding trial courts willing to grant these motions.

(Endnotes)

1 *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992).

2 905 F. Supp. 937 (D. Kan. 1995), *aff'd*, 107 F.3d 20 (10th Cir. 1997).

3 *Id*. at 947.

4 *Id*. at 948.

5 *Id.*

6 *Id.*

7 894 So. 2d 630 (Ala. 2004).

8 *Id. at* 631.

9 *Id.*

10 *Id.* at 633.

11 *Id.* at 635.

12 990 A.2d 983 (D.C. 2010).

13 *Id.* at 986.

14 *Id.*

15 *Id.* at 987.

16 *Id.* at 991.

17 *Id.*

18 *Id.* at 996-97.

19 *Id.*

REPEAL OF THE McCARRAN ACT WOULD ROIL THE INSURANCE INDUSTRY

By David C. Borucke

David C. Borucke is a Partner and member of the Appellate Practice group.

The business of insurance is insulated from the full weight of antitrust law under the McCarran-Ferguson Act (the "McCarran Act").[1] This statutory protection, however, may soon disappear. Multiple bills to repeal the McCarran Act are pending in the 114th Congress, with some bi-partisan support. If the McCarran Act is repealed, for example as a step toward replacing the Affordable Care Act, carriers will need to update their antitrust compliance practices. In particular, carriers will need to radically limit information sharing. Thus, with timely reason, we describe the scope of the McCarran Act and then some antitrust basics to underscore the potential impact of repeal.

The McCarran Act Antitrust Exemption

The federal government once deemed insurance as a purely local matter, *i.e.*, a state concern beyond the constitutional reach of federal regulation. New Deal jurisprudence then expanded the scope of the Commerce Clause.[2] However, in 1944 the U.S. Supreme Court ruled that insurance transactions affect interstate commerce and are, therefore, subject to federal antitrust law.[3]

Congress moved quickly in response to the Supreme Court decision. In 1945 Congress passed the McCarran Act to maintain the predominance of state regulation over the industry. The Act includes a limited but important exemption for the "business of insurance." The exemption applies where the following three requirements are met:

First, the conduct must be the "business of insurance" and not just any business conducted by an insurance company. The focus is on the nature of the conduct. The conduct is likely exempt where it involves underwriting and the spreading of risk, has a direct connection to the contract between the insurer and insured, and/or involves only entities within the insurance industry. In particular, Congress sought to maintain the industry practice of pricing through rating organizations – the quintessential "business of insurance" that would otherwise be subject to antitrust scrutiny.

Second, the conduct must be regulated by the state. This is a lenient requirement. Active and effective state regulation is not necessary. The mere potential to regulate is sufficient.[4] For example, this requirement is readily satisfied in Florida given the broad authority of the Office of Insurance Regulation to enforce the Insurance Code and the Unfair Insurance Trade Practices Act.[5]

Third, the conduct must not constitute "[a] boycott, coercion or intimidation."[6] The U.S. Supreme Court has clarified that, for purposes of the McCarran Act, a boycott requires something more than an agreement among insurers to set prices and a refusal to deal.[7] It requires that extra step of coercing others into conformance, or enlisting third-parties to compel the target to capitulate through conduct in a collateral transaction.

In sum, the McCarran Act is a form of reverse "preemption" – if a state takes minimal steps to regulate the business of insurance, then federal antitrust law is largely preempted. In this way, the McCarran Act provides the breathing space that allows insurers to engage in beneficial, collective action without antitrust concerns, including: joint ratemaking through rating organizations; the standardization of insurance forms; agreements based on the joint collection of underwriting information; and the exchange of pricing information among insurers to determine if rates are competitive.[8] Notably, this is a measure of protection for collective action among competitors unheard of in most other industries.

Antitrust Basics - The Sherman Act

The Sherman Antitrust Act of 1890 is enforced by two federal agencies, the Department of Justice and the Federal Trade Commission.[9] Aggrieved private parties may also have standing to bring lawsuits and, if successful, recover treble damages, attorney's fees, and costs.[10] Significant violations may also result in criminal penalties, including incarceration for the individuals involved.

Many states, like Florida, have laws that mirror the Sherman Act.[11] Importantly, the McCarran Act does not preempt these state laws. While Florida has adopted federal exemptions and immunities,[12] some states have not. For example, in a recent Texas case against a large insurance brokerage, the Fifth Circuit Court of Appeal affirmed the dismissal of federal antitrust claims pursuant to the McCarran Act, but reversed and remanded similar claims brought under a Texas antitrust statute.[13]

Our focus here is the prohibition against agreements that unreasonably restrain trade. Stated differently, there are two essential elements for a Sherman Act "Section 1" violation: (i) an *agreement* between separate individuals or entities; and (ii) that agreement is *unreasonable*.[14]

Agreement - A Knowing Wink

An "agreement" is broadly defined by antitrust law. It does not need to be in writing or expressed; rather, an informal understanding or a "knowing wink" can also be an agreement. For example, three competitors are sitting in a hotel bar after a trade association meeting. One says: "I sure hope prices rise tomorrow." If not a further word is said between them and prices go up the next day, the competitors may be found guilty of an agreement to fix prices despite the absence of a formal or explicit agreement. However, it is important to note that affiliated companies, even if separately incorporated, as well as officers and employees of the same company are typically (not always) considered part of a single entity and, thus, unable to reach such agreements.

Per Se Unreasonable Conduct

Once an agreement exists, the next question is whether that agreement "unreasonably" restrains competition. Certain trade restraints are so injurious to competition that they are deemed to be automatically unreasonable and, thus, illegal *per se*.[15] There is no defense to a *per se* violation. Courts will not consider the business justifications, the good motives of the parties involved, or even a lack of market power.

With few exceptions, *per se* unlawful agreements are those entered into by competitors. Price fixing among competitors is the most familiar, but the prohibition may be broader than you think. Any agreement or understanding between two or more competitors to fix, raise, maintain or stabilize prices, or one that tends to affect a material term of price, is *per se* unlawful.

As should be clear, in the absence of the protection afforded by the McCarran Act, many collective ratemaking activities traditional in the insurance industry could be deemed *per se* unlawful, particularly those involving prospective loss costs, setting final/end rates, and rating plans and schedules. Likewise, insurers exchanging information about their current rates would run a serious risk of being found liable, absent immunity. Other types of *per se* unlawful agreements include agreements to restrict output or allocate customers or territories, group boycotts, and tied selling (*e.g.*, tying two insurance coverages).

The Rule of Reason

All other agreements are subject to a balancing test, referred to as the "rule of reason," which uses defined markets to weigh the anti-competitive restraints caused by the agreement against its pro-competitive benefits.[16] If, on balance, the agreement is pro-competitive, the agreement is deemed reasonable and lawful. Under this analysis, courts will consider a number of factors, including the motives of the parties, all reasonable business justifications, and the impact of the agreement in defined product and geographic markets.

A rule or reason analysis is often complicated and uncertain. There is no bright-line test for determining whether a particular agreement is, on balance, pro-competitive. Agreements typically subject to a rule of reason analysis include exclusive dealing, reciprocal dealing, information exchanges, bundled discounts, and joint ventures or pooling arrangements. These types of agreements can involve complicated assessments to determine their legality.

For example, joint underwriting arrangements and joint data collection typically constitute the "business of insurance" exempt from antitrust scrutiny under the McCarran Act. If the exemption is lost, however, a joint venture analysis may apply. Federal guidelines for analyzing collaborations among competitors typically involve complex assessments of market power and then an assessment of market impact.[17]

Community Outreach

CSK is proud to share the positive contributions that our attorneys make in the community. Recently, John and Rochelle Chiocca from CSK's West Palm Beach office organized the second annual "Presents for Pets" to benefit the Peggy Adams Animal Rescue League/Humane Society of the Palm Beaches. For the second year in a row, the Chioccas celebrated their son's birthday by asking guests to bring items from the animal shelter's "Wish List." With these generous contributions, the Chioccas gathered numerous items to help dogs and cats in the community. Pictured are John and Rochelle Chiocca with their children, birthday boy Camber (11) and daughter Mia (9).

In sum, the McCarran Act permits insurers to cooperate in ways that federal antitrust law would prohibit in other industries. Attention should be paid, therefore, to developments in Congress. If the McCarran Act is repealed, carriers will need to update their antitrust compliance policies and practices. In the meantime, an important objective of compliance will remain avoiding activities that result in the loss of immunity.

(Endnotes)

1 15 U.S.C. §§ 1011 *et seq.*

2 *See Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that a farmer growing wheat not for sale, but to feed his own animals, is engaged in interstate commerce subject to federal regulation).

3 *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

4 *See Lawyers Title Co. of Mo. v. St. Paul Title Ins. Corp.*, 526 F.2d 795, 797 (8th Cir. 1975) ("[T]he McCarran Act exemption does not depend on the zeal and efficiency displayed by a state in enforcing its laws. Congress provided that exemption whenever there exists a state statute or regulation capable of being enforced.").

5 *See* Florida Insurance Act, chs. 624-632, 634-636, 641-642, 648, 651, Fla. Stat.

6 15 U.S.C § 1013(b).

7 *Hartford Fire Ins. Co. v. California*, 509 U.S. 704 (1993); *see also Slagle v. ITT Hartford*, 102 F.3d 494, 498 (11th Cir. 1996) ("Conduct constitutes a 'boycott' [for purposes of the McCarran Act] where, in order to coerce a target into certain terms on one transaction, parties refuse to engage in other, unrelated or collateral transactions with the target . . . unrelated transactions are used as leverage to achieve the desired ends.").

8 *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979) (describing the protection of cooperative rate-making as the core purpose behind the McCarran Act exemption).

9 15 U.S.C. § 1 *et seq.*

10 15 U.S.C. § 15.

11 *See, e.g.*, § 542.18, Fla. Stat. ("Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful.").

12 *See* § 542.20, Fla. Stat.

13 *Sanger Ins. Agency v. Hub Int'l, Ltd.*, 802 F.3d 732 (5th Cir. 2015).

14 15 U.S.C § 1. The Sherman Act also prohibits monopolization and related violations, which are beyond the scope of this article.

15 *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

16 *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

17 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (April 2000).

HABITAT FOR Humanity

CSK joined forces with Westfield Insurance to help construct a Habitat for Humanity of Greater Orlando home. CSK attorney Scott Shelton summed up the significance of this project, stating: "Habitat for Humanity exemplifies our firm belief that, by working together as a team, we can make our community better for everyone. We look forward to participating in future events and helping others obtain their dream of being a homeowner."

The lawyers who participated were: Scott Shelton, David Harrigan, Brooke Boltz, Justin Seekamp, Thomas Shea and Melissa Crowley.

THE 20% RULE: AN EMERGING THEORY OF LIABILITY UNDER THE FLSA

By Eric B. Moody

Eric Moody is a member of the firm's Labor and Employment group.

Employers are no doubt familiar with the Fair Labor Standards Act ("FLSA"), but may not be aware of an emerging theory of liability under the FLSA that affects employers with tipped employees.[1] This new cause of action is based on a United States Department of Labor handbook that states a tipped employee cannot spend in excess of 20% of their work time performing side work.[2] This article explores the origins in law of this emerging theory of liability, discusses the practical difficulty of the 20% Rule, and provides some analysis on how to minimize or resolve these claims.

Origins of the 20% Rule Claim

The FLSA requires that employers pay employees a minimum wage. However, the FLSA allows employers to pay tipped employees a reduced minimum wage, often referred to as a "tip rate."[3] Provided certain other conditions are met, an employer may count a tipped employee's tips toward meeting the minimum wage requirement under the FLSA.[4]

In order to prevent employers from abusing the FLSA's tip credit provisions, the regulations interpreting the FLSA place limits on when an employer may pay an employee at a tip rate. For instance, if an employee works in two or more separate jobs for an employer, with one job receiving tips and the other not receiving tips, then the employer can only pay the tip rate for the employee's time spent in the job receiving tips.[5] The FLSA refers to this working arrangement as a "dual job" occupation.[6]

The FLSA regulations distinguish an employee in a dual job from the typical job of a restaurant server. In addition to serving customers, restaurant servers often perform "side work." Side work encapsulates a wide variety of tasks, depending on the restaurant, and includes such duties as balancing cash receipts, stocking, cleaning, inventory, and preparatory work.[7] Many of the duties that constitute side work do not "directly" produce tips.[8] However, the FLSA allows employers to require servers to perform side work even though it does not directly produce tips. The FLSA and interpreting regulations do not affix a specific time limit to the amount of time that a tipped employee can perform side work, other than stating a tipped employee can spend "part of her time" engaging in side work.[9]

Recently, the agency in charge of enforcing the FLSA, the United States Department of Labor Wage and Hour Division ("Wage and Hour Division"), added a restriction to the amount of time a tipped employee can spend performing duties that are not "tip producing." Specifically, the Wage and Hour Division publishes a Field Operations Handbook for its investigators and staff to use in enforcing the FLSA.[10] The Field Operations Handbook limits the percentage of time a tipped employee can spend performing side work to 20% of the employee's shift.

Agency interpretations, such as the Field Operations Handbook, are not "automatically" law, such as a statute or a regulation.[11] But courts can give an agency's interpretation deference, thus giving it the force of law.[12] Unfortunately for employers, many federal district courts have given the Field Operations Handbook deference and allowed claims based on the 20% Rule to proceed, including federal district courts in New York, South Carolina, Illinois, and Georgia.[13]

The Middle and Southern Districts of Florida have also allowed claims based on the 20% Rule to proceed.[14] Moreover, there is limited authority contrary to the 20% Rule in the Eleventh Circuit, meaning employers with tipped employees can expect to see more of these claims in the future.[15] Courts that have given the 20% Rule deference, however, may have failed to fully consider the practical difficulties the 20% Rule creates in workplaces such as restaurants.

Practical Difficulties of the 20% Rule

From a practical standpoint, maintaining records to show strict compliance with the 20% Rule is difficult due to the fluid nature of a server's job. Analysis of a server's shift under the 20% Rule requires dissection of each of a server's shifts on a minute-by-minute basis to determine when the server performed tipped labor versus non-tipped labor. Often, 20% Rule claims involve an employee claiming he spent large percentages of his time performing side work, much of which will be intertwined with time serving customers. The employer will typically not have (and realistically may not be able to produce) the type of records that could disprove the employee's testimony.

Moreover, while many duties are certainly tip producing activities, such as taking and serving orders, it is unclear whether other activities are tip producing

activities or non-tip producing activities. For example, a customer requests new silverware from a server. The server is unable to locate clean silverware, so he washes silverware instead and takes it to the customer. An argument could be made that cleaning the silverware was an activity directed toward producing tips, while a counterargument could be made that cleaning the silverware was work incidental to tip producing activities and, therefore, should count toward the 20% calculation. These types of distinctions could be left to a jury, who may not understand the nuances of the FLSA or the realities of the restaurant business.[16]

In *Pellon v. Business Representation Intern., Inc.*, a federal district court in Florida recognized the difficulty of proving compliance with the 20% Rule and the difficulty of litigating such a case, describing 20% Rule cases as infeasible.[17] The *Pellon* court recognized that the 20% Rule creates an exception that could swallow the tip credit whole, resulting in a "discovery nightmare," and may require "perpetual surveillance" of tipped employees during their shifts.[18] Unfortunately for employers, other federal courts, including Florida's federal courts, have ignored the *Pellon* court's criticism for a number of reasons. Most notably, the *Pellon* case involved sky caps, not waiters, who had not even made a threshold showing that their non-skycap duties exceeded 20% of their workday.[19]

Practical Tips for Preventing and Resolving 20% Rule Claims

Employers with tipped employees can take several steps to attempt to prevent 20% Rule claims. First, employers can shift some tasks typically falling under the umbrella of side work to non-tipped employees.

Second, employers can attempt to limit side work to distinct periods, such as before the employee begins serving customers or after the employee finishes serving customers. This action should minimize the percentage of time an employee may later argue they spent performing non-tipped duties.

Third, an employer may also consider paying the employee minimum wage during these discrete periods while performing side work. While this may result in higher labor costs—always a critical consideration in the restaurant industry—the employer may offset some of these costs by more closely monitoring the number of servers working and cutting servers when demand dictates. In other words, if servers are not spending time performing side work while they serve customers, they should be able to serve additional tables.

When faced with a 20% Rule claim, an employer may consider early resolution due to the limited value of the claim. Damages are limited to the difference between tip wage and minimum wage for the percentage of time an employee spends performing non-tipped duties.[20] If an employee proves that he spent more than 20% of his time performing side work, then the employee can recover for all time spent performing side work. For example, if a tipped employee spends 30% of his work time performing non-tipped duties, he will only be able to recover the difference between tip wage and minimum wage for the 30% of work time performing non-tipped duties.

Early valuation of a 20% Rule claim can be difficult since employers typically do not keep the type of records that would allow the employer to ascertain a server's time spent on side work duties. Moreover, plaintiffs may refrain from tipping their hand as to the amount of work time they allege exceeded the 20% Rule.

Employers can attempt to make some valuation of a 20% Rule claim by examining their tipped employees' duties during "discrete time periods—such as before the restaurant opens to customers, after the restaurant is closed to customers, or between the lunch and dinner shifts."[21] In fact, the United States District Court for the Middle District of Florida ruled that the plaintiffs in a 20% Rule case were limited to these discrete periods in proving that their related non-tipped duties exceeded 20% of their shifts due to the difficulties of attempting a minute-by-minute

BROWARD COUNTY JUDICIAL ROBING CEREMONY

Pictured from left to right: Daniel Schwarz, Scott Gold, Omar Giraldo and Gregory Hoffmann, Jr.

CSK had the pleasure of participating as a Silver Sponsor at the 2016 Broward County Circuit Court Judicial Robing Ceremony and Reception. The event honored recently installed County Court Judges Stephen Zaccor and Nina Di Pietro and newly appointed Circuit Court Judges Ernest A. Kollra and Alberto Ribas.

HAWL

Hillsborough Association of Women Lawyers

CSK was a Gold Sponsor at this year's Hillsborough Association for Women Lawyer's Judicial Reception. Attorney Kristen O'Donnell proudly represented CSK at this event.

examination of a typical server shift.[22] Successfully making this argument early in a 20% Rule case can help cap the value of the claim.

Due to the limited value of a 20% Rule claim, the greatest source of exposure is typically the attorney's fees. Under the FLSA, a prevailing plaintiff will likely be entitled to liquidated damages in the same amount as the unpaid minimum wages.[23] As with other FLSA claims, a prevailing plaintiff will also likely be entitled to his or her reasonable attorneys' fees and costs, which can be substantial in disputed 20% Rule claims. Moreover, defending and litigating a 20% Rule claim can be expensive due to the factual questions involved. Accordingly, depending on the specific circumstances of the case, employers may want to consider early resolution in order to avoid potential exposure and to limit defense fees and costs.

Conclusion

With this new 20% Rule theory gaining steam, employers with tipped employees who perform side work will likely see more of these claims. Unfortunately, most federal courts in Florida have not recognized the difficulty this rule creates for employers. Therefore, employers should consider minimizing their exposure from such claims by reconsidering their side work assignments. When faced with a lawsuit, employers may ultimately want to consider early resolution of these claims to avoid exposure and significant defense costs.

(Endnotes)

1 29 U.S.C. § 201, et seq.

2 The cause of action is referred to as the "20% Rule" throughout this article, and the term "side work" is defined later in the article.

3 The FLSA defines tipped employees as employees "engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t); 29 C.F.R. § 531.50.

4 29 U.S.C. § 203(m); *see also* 29 C.F.R. § 531.50 et seq.

5 29 C.F.R. § 531.56(e) (hereinafter "regulation 531.56(e)").

6 An example of a dual job in the restaurant context would be an employee who works as a prep cook during some shifts, as a maintenance person during some shifts, and as a server during other shifts. The employer must pay the employee minimum wage while working as a prep cook or a maintenance person. The employer may pay the employee at a tip rate when working as a server. *Id.*

7 Regulation 531.56(e) permits a server to spend part of "her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses."

8 Courts have interpreted the applicable regulations to create three categories of duties for tipped employees: (1) tip producing activities, which can be compensated at the tip rate; (2) non-tip producing activities incidental to tip producing duties, the subject of the 20% Rule; and (3) non-tip producing activities unrelated to tip producing duties, such as time spent in the chef role described above. *Fast v. Applebee's Intern., Inc.*, 502 F. Supp. 2d 996, 1002 (W.D. Mo. 2007). Although outside of the scope of this article, plaintiffs bringing 20% Rule claims will often bring an alternative claim that some side work duties are unrelated to tip producing duties and claim compensation at minimum wage for time spent performing these duties.

9 29 C.F.R. § 531.56(e).

10 United States Department of Labor, Wage and Hour Division, *Field Operations Handbook*, § 30d00(e), available at: http://www.dol.gov/whd/foh/ (last visited June 16, 2016). The Field Operations Handbook provides Wage and Hour Division investigators and staff with "interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance." *Id.*

11 Instead, agency interpretations are "entitled to respect, but only to the extent that they are persuasive." *Christensen v. Harris Cnty.*, 529 U.S. 576, 578 (2000) (internal citations omitted).

12 *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

13 *See, e.g., Flood v. Carlson Restaurants Inc.*, 94 F. Supp. 3d 572 (S.D.N.Y. 2015); *Irvine v. Destination Wild Dunes Mgmt, Inc.*, 106 F. Supp. 3d 729 (D.S.C. 2015); *Hart v. Crab Addison, Inc.,* No. 13-CV-6458 CJS, 2014 U.S. Dist. LEXIS 85916 (W.D.N.Y. June 24, 2014); *Driver v. AppleIllinois, LLC*, 890 F. Supp. 2d 1008, 1013 (N.D. Ill. 2012); *Holder v. MJDE Venture, LLC,* No. 1:08-CV-2218-TWT, 2009 U.S. Dist. LEXIS 111353 (N.D. Ga. Nov. 30, 2009).

14 *Ash v. Sambodromo, LLC*, 676 F. Supp. 2d 1360 (S.D. Fla. 2009); *Crate v. Q's Rest. Group LLC*, No. 8:13-cv-2549-T-24 EAJ, 2014 U.S. Dist. LEXIS 61360 (M.D. Fla. May 2, 2014).

15 Some defendants outside of the Eleventh Circuit have successfully argued that the 20% Rule is not entitled to deference, resulting in dismissal of 20% Rule claims, but these decisions are limited to date. *See Montijo v. Romulus Inc.*, No. CV-14-264-PHX-SMM, 2015 U.S. Dist. LEXIS 41848 (D. Ariz. Mar. 30, 2015); *Richardson v. Mountain Range Restaurants LLC*, No. CV-14-1370-PHX-SMM, 2015 U.S. Dist. LEXIS 35008 (D. Ariz. Mar. 19, 2015).

16 Which "duties may prompt a customer to tip is a question of fact upon which reasonable finders of fact could disagree." *See Fast,* 502 F. Supp. 2d at 1004.

17 528 F. Supp. 2d 1306 (S.D. Fla. 2007), *aff'd,* 291 F. App'x 31 (11th Cir. 2008).

18 *Id.* at 1314.

19 *Crate v. Q's Rest. Group LLC*, 2014 U.S. Dist. LEXIS 61360. As another example, a Missouri District Court found that *Pellon* was "inconsistent with 29 C.F.R. § 785.13 and 29 C.F.R. § 516.18, which require the employer to exercise control over work performed by an employee and to keep records of work done in tipped and non-tipped occupations." *Fast v. Applebee's Intern., Inc.*, 159 Lab. Cas. P 35714 (W.D. Mo. 2010), *aff'd*, 638 F.3d 872 (8th Cir. 2011); *see also Flood,* 94 F. Supp. 3d 572.

20 *Fast*, 502 F. Supp. 2d at 1002.

21 *Crate v. Q's Rest. Group LLC*, 2014 U.S. Dist. LEXIS 61360.

22 *Id.*

23 29 U.S.C. § 216(b).

Pictured from left to right: Katherine E. Woods, Anika C. Grant, the Honorable Justice James Perry, Alan St. Louis, Jonathan Vine and Alison K. Thomas.

THE F. MALCOLM CUNNINGHAM BAR ASSOCIATION'S ANNUAL HOLLAND SCHOLARSHIP LUNCHEON

CSK sponsored the F. Malcolm Cunningham Bar Association's Annual Holland Scholarship Luncheon in West Palm Beach. This well-attended event serves to promote diversity and leadership among Bar members, and CSK was proud to be among its sponsors.

SUCCESS STORIES

Jonathan Vine and **Jonathan Railey,** of CSK's West Palm Beach office, successfully obtained final summary judgment in a legal malpractice case. The plaintiffs claimed that the defendant's attorney drafted vague, ambiguous, and usurious promissory notes and mortgages with regard to the sale of the plaintiffs' home. In the underlying litigation between the plaintiffs and third-party buyers, the plaintiffs utilized the subject notes and mortgages to foreclose on the buyers. The plaintiffs mediated an agreement with the buyers and, thus, purportedly did not recoup the full amount of monies allegedly owed to them. They then asserted a legal malpractice action against our client, in an attempt to hold him liable for the monies not recovered. CSK successfully argued that the subject promissory notes were not usurious as a matter of law and, therefore, our client did not breach any alleged duty of care to the plaintiffs. The court agreed and entered final summary judgment in favor of our client. In addition, the court granted our client's entitlement to an award of attorneys' fees based upon a rejected Proposal for Settlement.

Thomas Shea, of CSK's Orlando office, successfully obtained a final summary judgment in a trip and fall case. The plaintiff fell and broke her ankle in our client's driveway. She then filed a negligence action alleging a failure to maintain the property in a reasonably safe condition by failing to correct "washouts" or dips in the gravel driveway. However, photographs depicted a normal driveway covered with a bed of gravel or rocks. During her deposition, the plaintiff was unable to identify where she fell, the location of the alleged washout, or how long the washout existed in the driveway. She also could not say with certainty that her foot did not create the alleged washout when she fell. In fact, she conceded that cars driving on the driveway could have created the washout moments earlier. CSK successfully argued that a gravel driveway is not an unreasonably dangerous condition as a matter of law and that the plaintiff failed to proffer sufficient evidence of the existence of any washout or dip. CSK also argued that a jury could not decide this case without engaging in impermissible stacking of inferences. The court agreed and entered final summary judgment. The plaintiff now faces a potential fee award as a result of a rejected Proposal for Settlement.

Michael Brand and **David Salazar**, of CSK's Miami office, successfully obtained a defense verdict following a thirty-day jury trial. CSK represented a general contractor who replaced six miles of water pipeline on

the median of Overseas Highway. As part of an emergency maneuver, the plaintiff allegedly went into the median, which the Florida Department of Transportation ("FDOT") defines as a "clear zone" designed to be a safe refuge for the motoring public. The plaintiff, a former FDOT employee who claimed he was aware that the median was a "clear zone," suffered a traumatic brain injury as a result. The plaintiff brought the action against our client, claiming that the defendant built a concrete pad that wasn't flush to grade per the plans and specifications, which caused him to fly off his motorcycle fourteen feet in the air and land on his face. Plaintiff sought $14.5 million in damages. After only thirty-three minutes, the jury returned a complete defense verdict.

Christina Bredahl and **Patrick Ruttinger**, of CSK's Orlando office, successfully obtained a dismissal with prejudice in favor of our clients, a homeowners' association and its property management company. Protracted litigation over five years between a homeowner and our clients resulted in a 2010 state court final judgment entered in favor of the homeowners' association. Following multiple, unsuccessful appeals in state court, the homeowner filed a lawsuit in federal court in 2015 alleging that our clients violated various State and Federal Acts arising out of our clients' efforts to enforce the final judgment. Ultimately, the federal court agreed that the Rooker-Feldman doctrine and Florida's litigation privilege barred a number of the homeowner's causes of action. The federal court also agreed that under no set of facts could the homeowner maintain any causes of action against our clients and deemed the lawsuit vexatious and frivolous. Accordingly, the court dismissed the claims against our clients with prejudice and awarded attorneys' fees and costs against both the homeowner and her counsel.

Barry Postman, of CSK's West Palm Beach office, successfully obtained a judgment of minimal liability for our client, a South Beach golf cart shuttle service. The plaintiff was a front seat passenger in a golf cart. Our client, the designated driver of the golf cart, double parked the vehicle on a busy South Beach street, left the keys in the ignition and went to find his next scheduled pick-up. A third party, who had previously been given permission to drive the golf cart, jumped in and drove off with the plaintiff in the front passenger seat. The plaintiff fell out of the golf cart, tearing the ligament in his right wrist, which required surgery, including shortening of the bone and implementation of a metal plate for stabilization. The plaintiff sued for negligence in leaving the keys in the ignition of the golf cart (for which CSK, on behalf of our client, admitted fault), double parking, and implied consent to a third party to drive off in the vehicle. CSK made the plaintiff a pre-trial offer of $100,000 to settle the case. The plaintiff asked the jury for over $500,000. After just over two hours, the jury found our client only 25% at fault and, therefore, responsible for only 25% of the $93,000 verdict.

Ryan Sawyer, of CSK's Orlando office, successfully obtained a dismissal with prejudice in a slip and fall action. The plaintiff brought the action after allegedly slipping and falling on a staircase that our client was resurfacing, resulting in injuries to her lumbar spine, knees, and ankle that required surgery. The plaintiff treated under a Letter of Protection and had approximately $65,000 in medical bills. In her interrogatory responses and deposition testimony, the plaintiff denied having any history of treatment for her back or knees, as well as any prior falls involving injury. However, her medical records revealed ongoing treatment for lumbar pain during the nine-year period immediately prior to the subject fall and at least three prior falls with injuries. CSK filed a Motion to Dismiss for Fraud, alleging the plaintiff's misrepresentations warranted a dismissal with prejudice. Following an evidentiary hearing, the court dismissed the case with prejudice.

Lee Cohen and **Claire Hurley**, of CSK's West Palm Beach office, successfully obtained settlement mid-trial for our client, a prestigious high-end country club in Palm Beach County. Plaintiff sued the country club, along with the manufacturer of a golf cart, for alleged negligent maintenance of the plaintiff's golf cart. The golf cart caused a fire in the plaintiff's home and significant injury to the plaintiff when he ran inside the home to save his family. The plaintiff sought damages in excess of $20 million. CSK maintained throughout the entirety of the case that it had no liability for the fire or the resulting injuries to the plaintiff. Through extensive discovery, CSK found inconsistencies in the plaintiff's damage claims. CSK also successfully thwarted the plaintiff's attempt to proceed late in the litigation with an unpled cause of action for agency against the defendant and the servicer of the subject golf cart. Months prior to trial, CSK tendered a modest Proposal for Settlement; and, after three days of trial, the plaintiff accepted the proposal amount.

Juan Diaz and **James Sparkman**, of CSK's West Palm Beach office, successfully obtained a defense verdict following a three-day trial in a minimal-impact automobile accident case in which our client admitted negligence, but not causation. The plaintiff claimed a torn meniscus in his right knee. During trial, the plaintiff presented live testimony of orthopedic and radiology experts, who stated that the plaintiff, a 38-year-old insurance agent, was a candidate for arthroscopic surgery. The plaintiff contended that he could no longer participate in amateur baseball, but had delayed surgery due to the recent death of his mother-in-law. The plaintiff argued that our client should be held responsible for her reckless driving and sought $189,000 in damages. CSK also presented the testimony of an orthopedic expert, who agreed that the plaintiff had a torn meniscus in his right knee, but stated that a rear-end car accident would not cause a torn meniscus. After only twenty-three minutes, the jury returned a verdict for the defense.

Patrick Boland, of CSK's Bonita Springs office, and **Jessica Murray**, of CSK's Tampa

office, successfully obtained a judgment in favor of our client, a country club that brought an action for breach of contract and specific performance against one of its members. Recent challenges to the community's mandatory country club membership requirement complicated the case; and the country club had been embroiled in litigation involving related issues for several years. The court ultimately entered judgment in favor of our client on all counts, granted the monetary relief requested, and granted our client an entitlement to prevailing party attorney's fees. This is an important win as the judgment provides favorable precedent for our client in several collateral but related and ongoing actions.

John Chiocca and **Rochelle Chiocca**, of CSK's West Palm Beach office, successfully obtained a dismissal of a premises liability action against our client, a kitchen designer. The claim arose out of a residential renovation project. The plaintiff alleged that she was seriously injured when an over-sized refrigerator tipped over, trapping her underneath for hours. CSK, on behalf of our client, moved for statutory sanctions against the plaintiff for filing a frivolous lawsuit against the defendant designer, and obtained the evidence necessary to prevail on that motion via discovery. Days before the hearing, plaintiff's counsel dismissed the action as to CSK's client, while continuing to pursue several other defendants.

Sheila Gonzales-Jonasz and **Michael Brand**, of CSK's Miami office, successfully obtained a finding of no probable cause in favor of our client after the Department of Health initiated an administrative action. The investigation concerned whether our client, a mental health counselor, failed to release a minor child's psychotherapy records in response to the minor child's father's request.

Elizabeth Tosh and **Carlos Morales**, of CSK's Tampa office, successfully obtained final summary judgment in favor of our client in a premises liability action with highly contested liability and damages. In addition, CSK prevailed on a motion for sanctions related to discovery violations. The court retained jurisdiction for the purpose of taxation of costs and attorney's fees, which may result in even further remedies for our client.

Beth Koller, of CSK's Fort Lauderdale West office, successfully obtained a complete dismissal in a workers' compensation action based on a statute of limitations defense. The claimant argued that the defendant employer/carrier was estopped from asserting the statute of limitations because the claimant allegedly never received the required information outlining his workers' compensation rights. In addition, the provider allegedly never obtained the claimant's Maximum Medical Improvement ("MMI") date and rating. The Judge of Compensation Claims found that, since the claimant returned other forms included in the initial packet and the claimant received the informational brochure, the defendant was not estopped from raising the statute of limitations defense. The Judge further found the claimant's condition was personal and, therefore, a MMI rating was not required as there were no benefits to be put "in the hands" of the claimant. The claimant was not entitled to medical or indemnity benefits, and the claim was ultimately dismissed.

Michael Brand and **Sheila Gonzales-Jonasz**, of CSK's Miami office, successfully obtained a defense verdict in a wrongful death action. A vehicle struck the plaintiff's wife in our client's parking lot, causing her to fall backward and hit her head. As a result of the accident, the decedent sustained a traumatic brain injury, which required surgery. Ultimately she died days later. The plaintiff brought the action claiming that the improper design and maintenance of the defendant's parking lot, forcing pedestrians into the path of moving cars. The plaintiff retained three experts - an architect, an engineer and an accident reconstruction expert - each of whom testified that the parking lot was in violation of the municipal code and caused the death of the 62-year-old woman, leaving behind a husband and three children. The plaintiff asked the jury for $3.4 million. After just ninety minutes, the jury returned a complete defense verdict.

Aram P. Megerian and **Carlos Morales**, of CSK's Tampa office, successfully obtained a directed verdict in a legal malpractice action that arose out of estate planning work our client performed over the course of sixteen years. The plaintiff alleged our client breached the standard of care and fiduciary duties related to not providing enough for the client's wife of twenty-two years, preparing an invalid amendment to an antenuptial agreement, failing to protect

Asia Fest

Pictured: Lindsay Lee and Patrick M. Boland.

CSK helped sponsor Asia Fest, an annual celebration of Asian culture presented by the Naples Asian Professionals Association ("NAPA"). The organization's mission is to support charitable and educational causes. Through the success of Asia Fest, NAPA provides college scholarships as well as financial support to the Education Foundation of Collier County, The Greater Naples YMCA Preschool, Big Brothers Big Sisters, and many other organizations. Each year, Julie Clark Ireland works with Cynthia Roemisch of Progessive Insurance Company to support this great event. Other CSK attorneys who participated this year include: Lindsay Lee, Patrick M. Boland, Danielle M. Balczon, Mandy M. Smith and Ron M. Campbell.

the wife from a CA tax assessment, and continually favoring the husband and his children throughout the representation. The court earlier granted partial summary judgment as to the claims for breach of the standard of care relating to the amendment of the antenuptial agreement and breach of the duty of loyalty to the wife. CSK, on behalf of our client, offered $650,000 prior to trial, while the plaintiff's lowest demand was $2,000,000, and the plaintiff's expert testified that she should receive $12,000,000. After hearing all the evidence, the court granted a series of directed verdicts cutting the plaintiff's claims down to $768,000. The parties ultimately resolved the case for a fraction of the pre-trial offer.

Elizabeth Tosh and **Geoffrey Schuessler**, of CSK's Tampa office, successfully obtained three dismissals with prejudice in favor of our client in a professional negligence action. Our clients were a real estate advisory firm and two employees of the firm. The allegations in the plaintiff's complaint were voluminous, with various theories of liability in a highly contested matter. Through targeted motion practice, CSK secured dismissals with prejudice on behalf of each client, thereby ending the litigation against them with finality.

Ryan Sawyer, of CSK's Orlando office, successfully obtained a dismissal with prejudice in favor of our client based on the plaintiff's fraudulent deposition testimony. The plaintiff alleged she injured her knee after the defendant's vehicle struck her while standing in a parking lot. During her deposition, the plaintiff omitted other accidents in which she suffered knee injuries, and also provided testimony in direct contradiction to testimony given just eight (8) months prior in an unrelated case regarding her ability to work and physical limitations. CSK, on behalf of our client, argued that the plaintiff's misrepresentations and omissions violated the integrity of the judicial process. The court agreed and dismissed the plaintiff's case with prejudice.

Scott Bassman and **Craig Minko**, of CSK's Fort Lauderdale East office, successfully obtained a complete dismissal with prejudice in an action that a unit owner and her spouse brought against our clients, a condominium association and its property management company. The plaintiffs alleged claims of negligence, statutory and common law breach of fiduciary duty, and nuisance. After years of litigation in this highly contested claim, the court set the case for trial. However, CSK successfully argued that the plaintiffs' repeated and willful discovery violations and contumacious disregard of multiple court orders warranted the complete dismissal of the case.

Michael Brand and **Sheila Gonzales-Jonasz**, of CSK's Miami office, successfully obtained a finding of no probable cause in favor of our client, a clinical social worker, after the Department of Health initiated an administrative action. The investigation concerned whether our client's therapy treatment fell below the minimum standards of performance in professional activities.

Paula Lozano and **Kevin Joyce**, of CSK's Tampa office, successfully obtained a defense verdict in a medical malpractice case. The plaintiff claimed that he sustained severe injuries because our client, a traveling nurse, did not follow up on a post-surgical order that led to a code. The plaintiff suffers from falls, speech issues, anxiety and depression as a result of the code and subsequent seizure. The plaintiff sought damages close to $1 million. CSK, on behalf of our client, successfully argued that our client was the only one who did what the providers were supposed to do, while the doctor who performed the surgery failed to follow up despite several calls and the pharmacist failed to fill the order despite multiple calls from nursing staff. CSK also successfully argued a complete lack of causation between the post-surgical events and alleged damages. After two and a half hours of deliberations, the jury returned a complete defense verdict.

R. Wade Adams and **Linda Sweeting**, of CSK's Miami office, obtained a favorable settlement after opening statement in the trial of a breach of insurance contract claim for the alleged theft of the plaintiff's vehicle. CSK asserted defenses that included the plaintiff's material misrepresentations, concealment of fact, and fraud in both the application for insurance and in submitting the proof of loss. After years of litigation, the client retained CSK only about one (1) month before trial. During that time, CSK obtained certified records from another state's licensing department, which verified that the vehicle needed a lot of mechanical work and had a value of only $500, not the $11,000 value the plaintiff claimed. The plaintiff asserted damages for the theft of the vehicle and attorney's fees exceeding $100,000. The case settled for a small fraction of that amount, and only $5,000 more than our client offered at mediation.

Daniel M. Schwarz, of CSK's Fort Lauderdale West Office, successfully obtained a reversal of a $245,000.00 additur award in a personal injury action arising out of a motor vehicle accident. In the accident, the plaintiff sustained fractured vertebrae in his neck; he was hospitalized for several days and wore a medical "halo" for three months. After removal of the halo, the plaintiff sought physical therapy. However, by the time of trial, the plaintiff's fractures had healed, he was capable of performing daily activities, was not receiving further medical treatment, and complained of only neck pain. The jury returned an award of $5,000.00 for past and future pain and suffering. The plaintiff then filed a motion for additur, claiming the evidence supported a higher award. The trial court found the jury's verdict "coldblooded" and shocking to its conscience, and increased the award to $250,000.00. On appeal, the Third District Court of Appeal reinstated the jury verdict, finding no basis upon which to conclude the jury could not have reached its decision on the evidence presented.

Daniel M. Schwarz, of CSK's Fort Lauderdale West Office, obtained a

per curiam affirmance of a trial court's dismissal of a complaint alleging common law and statutory claims against a travel booking website, its principal, and the principal of the plaintiff's employer for unjust enrichment, tortious interference with advantageous relations, and violations of the Florida Deceptive and Unfair Trade Practices Act. The plaintiff, a limousine driver, alleged he was entitled to damages for his employer's and the booking website's (incorrectly) alleged practice of retaining "gratuities" or "tips" included when booking customers for limousine services, without remitting the gratuities to the drivers. CSK successfully obtained a dismissal. On appeal, the plaintiff argued that various federal courts have permitted similar claims to proceed against employers. Following oral argument, the Fourth District Court of Appeal affirmed per curiam the trial court's dismissal as to CSK's clients who were parties to the appeal.

Scott Bassman and **Craig Minko** of CSK's Fort Lauderdale East office, successfully obtained a complete dismissal of a complex derivative action that the plaintiff, a condominium association unit owner, brought against nine (9) separate defendants, including the Association, the Association's Board of Directors, property manager, bookkeeper, and certain committee members. The unit owner's over one-hundred-page complaint alleged numerous claims against the nine (9) defendants, including common law fraud, statutory breach of fiduciary duty, violation of the Florida Deceptive and Unfair Trade Practices Act, and violation of the Florida RICO Act, for which the unit owner sought damages in excess of $17 million. CSK obtained a complete dismissal of the action, and the court determined that the defendants were entitled to their attorneys' fees and costs. On appeal, filed by the unit owner, the Third District Court of Appeal affirmed the trial court's dismissal.

Daniel M. Schwarz, of CSK's Fort Lauderdale West Office, obtained an affirmance of a final summary judgment against a general contractor and its plumbing subcontractor in a personal injury action. The plaintiff, an employee of the "owner" of the construction project, alleged that he fell into a hole on the site next to a building where the plumbing subcontractor was working and that it had been covered with cardboard. However, at his deposition, the plaintiff testified he fell into a hole ten feet away from the building. The contractor and plumbing subcontractor filed affidavits in support of CSK's motions for summary judgment that neither was responsible for the alleged dangerous condition. When the plaintiff failed to come forward with sufficient counter-evidence to create a genuine issue of fact, the trial court granted summary judgment in the defendants' favor. On appeal, the Fifth District Court of Appeal agreed with the trial court and affirmed the final summary judgment.

ZO'S HOOP-LAW
MADNESS CHARITY EVENT

Pictured from left to right: Daniel Perez, Alonzo Mourning, Octavia Green and Gregory Pierre.

This year, CSK joined other law firms in South Florida to compete in Alonzo Mourning's 3-on-3 charity basketball tournament. The event is a testament to the commitment that CSK and the legal community have made to make a difference in the lives of at-risk students who have the opportunity to receive services from the Overtown Youth Center in Miami-Dade County.

PRACTICE AREAS

Accountant's Malpractice
Admiralty and Maritime
Appellate
Arbitration & Alternative Dispute Resolution
Architects and Engineers
Asbestos Litigation
Aviation & Transportation
Bad Faith and Extra-Contractual Liability
Banking and Financial
Business/Commercial Law
Catastrophic and Personal Injury
Civil Rights Law
Class Action
Commercial Litigation
Condominium & Homeowners' Association Law
Class Action
Construction
Corporate, Real Estate & Title Insurance Transactions
Cyber Risk and Privacy Liability
Directors and Officers
Education Law
Employment & Labor
Environmental
Family Law
Federal Practice
Fidelity and Surety Litigation and Counsel
Fiduciary Litigation
FINRA Arbitration
First Party Property
Foreign Corrupt Practices Act
Fraud Litigation
General Civil Litigation
Government Relations
Hospitality Industry Defense
Insurance Coverage & Carrier Representation
Intellectual Property
Land Use Litigation
Legal Malpractice
Liquor Liability Defense
Medical Malpractice
Medicare Secondary Payer Compliance
Municipal Finance (Tax Free Bonds)
Nursing Home Health Care
Nursing Malpractice
Personal Injury Protection (PIP)
Physician's Malpractice
Premises Liability
Product Liability
Professional Malpractice
Qui Tam/False Claim/Whistblower Claims
Real Estate and Foreclosures
Securities
SIU Insurance Fraud Defense
Trucking Accident Defense
Vehicle Negligence
Workers' Compensation

TRIVIA OFFICIAL RULES

NO PURCHASE NECESSARY. PURCHASE WILL NOT INCREASE YOUR CHANCES OF WINNING. Void where prohibited. This contest is sponsored by Cole, Scott, & Kissane P.A. A total of 10 prizes available to be awarded. No cash prizes. Each prize is valued at $10.00. Odds of winning will depend upon the number of eligible entries received (estimated odds based upon the number of Quarterly readers: 1 in 1000). Contest is open to anyone in the United States who is 18 years of age or older. Employees of Cole, Scott, & Kissane P.A. are not eligible to participate. Contest begins at 12:01 a.m. (EST) on **July 8, 2016.** Entries must be received by 12:00 p.m. (EST) on **August 8, 2016.** Entries must also include contestant's name and mailing address. Winners will be chosen according to the first 10 eligible responses received that correctly answer the Trivia Question. If less than 10 correct entries are received, remaining prizes will be awarded at random to other participants.

Entries must be e-mailed to Quarterly.Trivia@csklegal.com. Limit of one entry per household. Winners will be selected on **August 15, 2016** and notified via e-mail by **August 22, 2016.** If you do not wish to receive or if you would like to be removed from subsequent mailings, please call, toll free, at 1-888-831-3732. A list of winners can be obtained after **August 31, 2016** via e-mail to: eric.rieger@csklegal.com. Cole, Scott, & Kissane P.A. is not responsible for any lost e-mail or technical problems encountered by contestants in connection with this contest.

Save the Date

FOR CSK'S 2017 CLAIMS SEMINAR

in Orlando, Florida

March 2, 2017 through March 3, 2017

Details to follow.

FROM THE OFFICES OF COLE, SCOTT & KISSANE, P.A.

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