QUARTERLY
Newsletter

COLE, SCOTT & KISSANE, P.A. | WINTER 2014-2015

FINRA Arbitration and Emerging Trends

If We Didn't Do Anything Wrong, Why Would We Participate in an EEOC Mediation?

Mandatory Alternative Dispute Resolution for Florida Community Associations

A Mediator's Best Advice

Neutral Evaluation and Florida Sinkhole Claims

Dealing With Appraisal and Coverage Simultaneously Under a Homeowner's Insurance Policy in Florida

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

PRACTICE AREAS

Accounting Malpractice
Admiralty/Maritime
Aviation
Appellate
Arbitration, Alternative Dispute Resolution and Mediation
Architects and Engineers
Bad Faith and Extra-Contractual Liability
Banking and Financial
Business/Commercial Law
Civil Rights Law
Class Actions
Commercial Litigation
Condominium Law
Construction Law
Corporate, Transactional & Real Estate
Directors and Officers
Education Law
Employment & Labor
Environmental
Federal Practice
Fidelity and Surety Litigation & Counsel
First Party Property Defense
Fraud Litigation
General Civil Litigation
Government Relations
Homeowners' Association
Hospitality Industry Defense
Insurance Coverage & Carrier Representation
Intellectual Property
Land Use Litigation and Real Property Disputes
Legal Malpractice
Liquor Liability Defense
Medicare Secondary Payer Compliance
Nursing Home/Health Care
Nursing Malpractice
Physician's Malpractice
Premises Liability
Product Liability
Professional Liability
Residential Homeowner Defense
Securities
SIU Insurance Fraud Defense
Trucking Accident Defense
Vehicle Negligence
Workers' Compensation

IN THIS ISSUE

TRIVIA CONTEST

True or False: An employer's agreement to participate in an EEOC mediation may be used as evidence of an admission of wrongdoing on the part of the employer if the case subsequently goes to trial.

The first ten readers to respond correctly will receive a free CSK Tumbler.

- Please respond by e-mail to Quarterly.Trivia@csklegal.com.
- Please remember to include your name and address with your entry.
- The contest deadline is April 30, 2015.
- **See the last page for Official Contest Rules.**

A Note From the Editor

Dear Readers,

Thank you again for your interest in our Quarterly. Our publication is the result of a truly firm-wide effort. It draws upon the combined legal experience of over 270 lawyers and provides opportunities for our Associates to work closely with our Partners to further our commitment to mentorship and professional growth. Beyond that, it gives all of us at CSK an opportunity to share with our clients, colleagues, and prospective clients a wealth of experience and knowledge about current trends in litigation.

This issue is special because it is devoted to perhaps the single most important consideration for our clients—alternative dispute resolution (ADR). Although our firm's attorneys have taken more than 2,700 cases to trial, the reality is that only a very small percentage of cases ever go to trial. ADR is the means by which the vast majority of cases get resolved. This is why we have chosen to devote an entire issue to educating you, our valued readers, about the benefits and nuances of a wide variety of ADR options.

Last, but not least, I want to thank all of our many readers who participated in our last Quarterly Trivia Contest. The correct answer was "B - $75,000." Congratulations to all of the well-informed and lucky readers who received a CSK coffee mug. Please be sure to respond to this Edition's Trivia Contest for your chance to win. We look forward to hearing from you.

Sincerely,

Eric T. Rieger

Editors

Eric Rieger, Esq., Editor - **Brittany P. Borck, Esq.**, Assistant Editor - **Angelica Velez**, Design Editor

FINRA Arbitration and Emerging Trends

 *Matthew Schwartz , Esq.*  *Erin Slattery, Esq.*

FINRA arbitration, the mandatory dispute resolution forum for brokerage firms, is experiencing an all-time low in new case filings. Positive market conditions have influenced the number of new customer claims filed against registered representatives and FINRA member firms. Generally, case filings decrease when the markets perform well and increase when the markets perform poorly. Obviously, investors who see stable or increased portfolio values do not complain or file claims against their registered representatives or brokerage firms. Nevertheless, should the economy take a downturn in the future, a significant increase in new case filings will likely follow.

FINRA arbitration offers certain advantages to its users: it is much quicker than a typical court proceeding and typically more cost-effective. The costs for conducting discovery are generally less than traditional litigation, given the lack of depositions in FINRA arbitration, and the total amount of money spent on arbitration is typically less than State or Federal court. When comparing FINRA arbitrations to State or Federal cases that go to a final hearing, FINRA arbitrations generally reach the merits hearing quicker than trials, thus saving the parties time and money.

There are also disadvantages to the FINRA arbitration process for brokerage firms. For example, arbitration does not have formal rules of procedure or evidence and participants run the risk of ending up with an unsophisticated arbitration panel. Arbitrators are not required to be members of the securities industry and they are not required to issue written explanations for their awards unless requested by both parties (which is not typical and rarely occurs).

FINRA has precluded class actions from arbitration, but with regard to claims involving large monetary amounts or multiple respondents, we encourage brokerage firms to continue to press for the resolution of these claims in State and Federal court whenever possible.

Background of FINRA

FINRA is a quasi-governmental agency that was created in 2007 through the consolidation of the National Association of Securities Dealers ("NASD") and New York Stock Exchange Regulation, Inc. ("NYSE Regulation"), the regulatory arm of the New York Stock Exchange, LLC. FINRA arbitration is the primary venue for investors ("customers") to resolve disputes against their registered representatives and brokerage firms.

Alternative dispute resolution is mandatory for all members of FINRA (brokers and brokerage firms). Virtually all brokerage firms include provisions in their standard-form customer agreements requiring the arbitration of customers' disputes in the FINRA forum. When a client signs a brokerage account agreement, they are submitting to the jurisdiction of FINRA.

By all accounts, FINRA arbitration is distinguishable from typical consumer, commercial and other commercial arbitration proceedings because it has the oversight of the Securities and Exchange Commission ("SEC"). The SEC reviews and approves the procedural rules governing the arbitral forum, adding a layer of protection above and apart from the Federal Arbitration Act ("FAA"). However, FINRA arbitration is a less attractive option for brokerage firms than the traditional judicial process and U.S. Courts. Especially in complex cases, FINRA arbitration does not appear to have the necessary apparatus and structure to allow the parties to fully develop and litigate their claims.

For example, twenty days before the final arbitration hearing commences, the parties exchange documents they wish to use at the final hearing (which may or may not have been provided during discovery), along with a list of witnesses they intend to call. Arbitrators are not required to follow evidence rules, either State or Federal. The tenor of a typical FINRA arbitration proceeding is much more relaxed and informal than a courtroom hearing and typically takes place in a private conference room. These differences may lead to the likeability of the parties and counsel coming into play, as opposed to in State or Federal Court, where rules govern the content and context of the proceeding.

The advantages of litigation to securities firms should entice these firms to seek to litigate matters in either State or Federal court when both parties will agree to opt out of arbitration. As discussed above, the advantages to formal litigation are numerous; the arbitration panel may not have anyone with securities experience or understand the subject matter of the dispute, the panel may not follow formal rules of evidence and the parties may not have an opportunity to fully develop their cases during discovery.

Current Trends in Arbitration

Case filings are at an all-time low, based on statistics maintained by FINRA. When compared to the overall U.S. economy (based on the Standard and Poor 500 economic index), the number of filings directly correlates to the market conditions. After rising 65% from the same period in 2008 and spiking at a high of 7,137 claims in 2009, case filings have now leveled off to an all-time low (3,714 in 2013 and 1,344 through April 2014). This spike in filings in 2009 and continuous drop off during the following years mirrors the Great Recession which took place in the latter part of 2008.

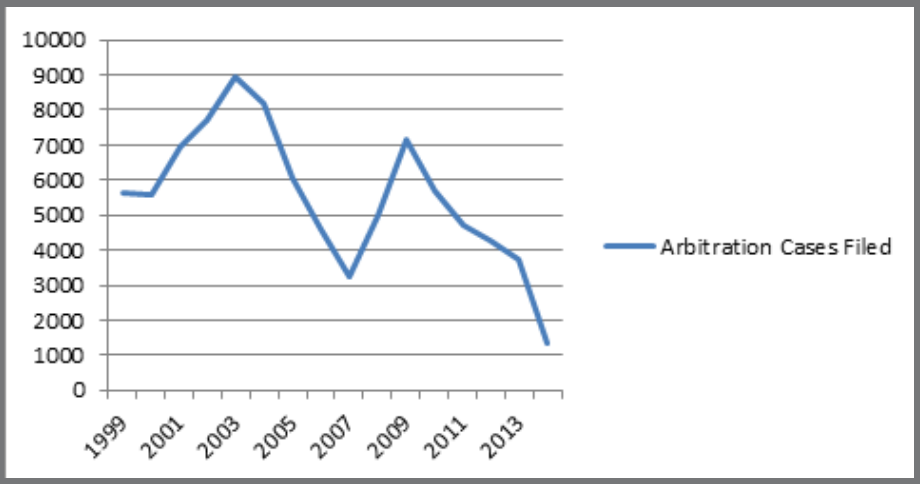
This rise and fall in claims filing is easy to understand when looking at the overall economic picture; when the economy is doing well, customers are less likely to sue their broker. In the short term, we can expect that this trend will continue. If and when the current economic expansion ends, we can expect an increase in the filing of FINRA arbitration claims. (See Charts "A," "B" and "C," showing the economic index, FINRA dispute statistics, and trends in the types of claims filed over time).

Monitoring of Markets and Proper Reserves

Given the drop-off in claims submitted to FINRA arbitration and the correlation to market performance, savvy brokerage firms should monitor and track economic forecasts to determine when to reserve for increased litigation and arbitration costs. Based on current trends, when the securities market dips, FINRA arbitration claim filings will again rise. Firms that have reserved appropriately will have the ability to weather the storm to deal with increased litigation.

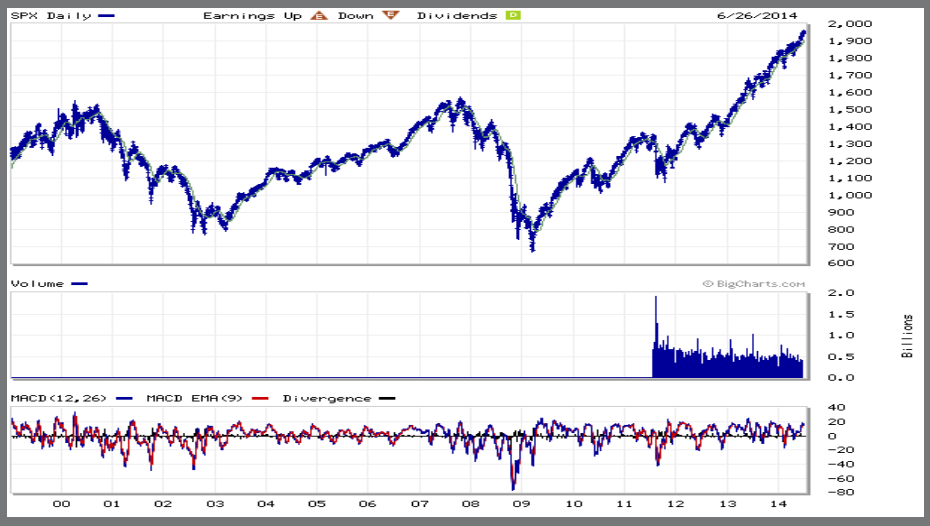
Arbitration Cases Filed

CHART A



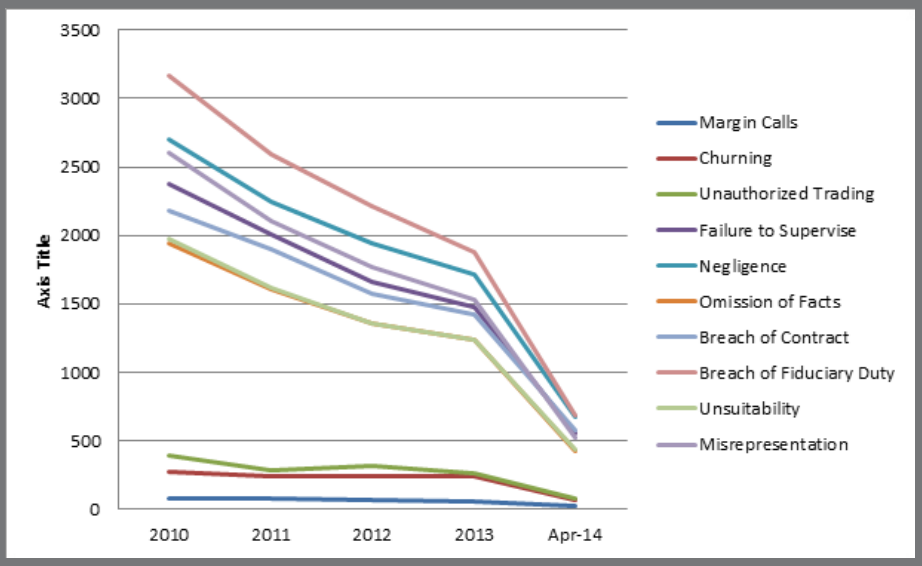
S&P 500 Index, 1999-present

CHART B



Cases Served by Controversy Involved

CHART C



(Endnotes)

1 SIFMA, White Paper on Arbitration in the Securities Industry: The Success Story of an Investor Protection Focused Institution that has Delivered Timely, Cost-Effective, and Fair Results for Over 30 Years (October 2004).

2 *Id.*

3 Benjamin J. Warach, *Mandatory Securities Arbitration After Finra Rule 12403(d): The Debate Remains the Same*, 18 PIABA B.J. 109, 112 (2011)

4 See Release, Sec. & Exch. Comm'n, S.E.C. Release No. 34-55495, Notice of Filing of Proposed Rule Change Related to Governance and to Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc. 1-2 (Mar. 20, 2007) [hereinafter Notice of Filing Proposed Rule Change], available at http://www.sec.gov/rules/sro/nasd/2007/34-55495.pdf (last visited Jun. 30, 2014).

5 Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 VILL. L. REV. 701, 706 (2010)

6 Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 Stan. J. Complex Litig. 1, 4 (2012)

7 Teresa J. Verges, *Opening the Floodgates of Small Customer Claims in Finra Arbitration: Finra v. Charles Schwab & Co., Inc.*, 15 Cardozo J. Conflict Resol. 623, 663 (2014)

8 (FINRA Rule 12514.)

9 (FINRA Rule 12604.)

10 Dennis A. Stubblefield, *The Nuts and Bolts of Customer-Stockbroker Arbitration*, 51 Orange County L.J. (Dec 2009)

11 See FINRA Dispute Resolution Statistics, available at http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/ (last visited Jun. 30, 2014).

12 See the below charts, which were prepared from the FINRA dispute resolution statistics, available at http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/ (last visited Jun. 30, 2014).

13 Dennis A. Stubblefield, *The Nuts and Bolts of Customer-Stockbroker Arbitration*, 51 Orange County L.J. (Dec 2009)

If We Didn't Do Anything Wrong, Why Would We Participate in an EEOC Mediation?

Kristyne Kennedy, Esq.

The first question our employer-clients often ask when the subject of an EEOC mediation comes up: "*Why would we participate in an EEOC mediation if we didn't do anything wrong?*" Many employers faced with responding to a seemingly meritless Charge of Discrimination instinctively feel that participation in a voluntary EEOC mediation essentially admits some wrongdoing on the part of the employer; however, this is a common misconception. In fact, the decision to participate in a pre-suit mediation of a threatened employment claim often comes down making a simple business decision due to the high cost of litigating such a claim. Indeed, there are many potential benefits to participation in an EEOC mediation that employers should be aware of when making the decision whether to participate. Before getting into some of these, let us clear up some misconceptions.

An EEOC mediation is very similar to a private mediation. It is an informal and confidential way for the parties to come together and resolve a dispute with the assistance of a mediator trained to help the parties work out solutions. Just as in a private mediation, an essential part of

the process is *confidentiality*. The decision to participate in an EEOC mediation is completely voluntary. When a Charge of Discrimination is selected for mediation, shortly after the Charge is filed, the EEOC will contact both the employee and the employer to invite them to participate and determine whether both parties are interested in participating in mediation. If either party declines to participate, the Charge will return to the EEOC's investigative unit and be assigned to an investigator. If both parties agree to the mediation, the EEOC will assign a mediator who will contact the parties to schedule the mediation.

There are a few notable differences between private mediations and EEOC mediations. First, most EEOC mediators are not lawyers. Rather, many of them are experienced EEOC investigators who were promoted within the EEOC. This can be important to know going in to an EEOC mediation because it may mean the mediator will not have the same insight into what it means to take a case to trial before a jury or having a judge weigh the evidence on a motion for summary judgment. On the other hand, they can often provide much different (and in many ways valuable) insight into what *EEOC investigators* tend to be looking for when determining whether to find cause for discrimination.

An obvious benefit employers should be aware of is that EEOC mediations are offered with no charge for the mediator's fee to either party. In a private mediation, the mediator's fees will typically average between $200-$400 per hour (often requiring a minimum number of hours to be charged). Moreover, it is not unusual for a private mediation of an employment claim to last a full day. An EEOC mediation, on the other hand, usually only takes about three to four hours (although the time can vary depending on the complexity of the case). Notably, statistics show that these cases have a high chance of resolving at mediation. In 2012, the EEOC reported a 76.6% resolution rate at mediation.[1]

There are several other potential benefits to an employer who agrees to participate in an EEOC mediation. As a general rule, most employment related disputes simply do not go to trial. Resolving a case through an early pre-suit mediation speeds up the process for bringing a matter to a final resolution and very often at a much lower cost. Conversely, litigation can take a long time and really take a toll on an employer's business. Depending on the case and the status of the court's docket, these cases can take a few years before getting before a jury. Further, it can cause great disruption to a business, especially through the discovery phase when parties may be requesting voluminous amounts of documents and depositions of company officials, managers and any number of employees who may have knowledge regarding the claim. Resolving a claim early through an EEOC mediation can not only speed up the process, but could save an employer great time and energy and help avoid the cost of litigation.

Another important benefit employers should be aware of is the confidential nature of mediation. All parties *must* sign a confidentiality agreement prior to participating in an EEOC mediation.[2] Often, clients will say such an agreement is not going to stop an employee/former employee from telling everyone how much money he or she received from a settlement. A settlement agreement reached through mediation is a contract that is *enforceable* (i.e. breach of contract) in court just like any other contract. Moreover, the value of such agreed-upon confidentiality also rests in another aspect that many employers overlook. Reaching an agreement at mediation keeps your business name out of the very public and searchable court dockets. Once a party files a *lawsuit* in court, even if the case is ultimately thrown out completely, it becomes part of the public record and a company's business name will always be listed as a "defendant," indicating that it was sued. Resolving such claims at mediation can prevent this from occurring.

Another benefit of resolving these claims at mediation is it allows employers to have the ability to control all of the terms of the settlement agreement including obtaining a general release from the claimant, which prevents the claimant from successfully suing your business in the future for some other employment-related claims. Of course, these are negotiated terms that you should speak with your attorney about during the mediation. For example, an employer may wish to include a provision requiring the claimant to return any company property or customer information or a no-rehire provision or termination provision (for a current employee) that prevents an employee from later claiming they were retaliated against. Although it is difficult sometimes to think outside of the "monetary box," often there may be other creative non-monetary solutions that can be reached to satisfy the parties besides money exchanging hands. In many cases an employee may simply want a neutral reference or even an apology letter. The important aspect is that you have more control in this phase.

Even where an agreement is not reached through an EEOC mediation, an employer can still benefit from the process. Sometimes walking away at mediation does not mean the case does not resolve and goes straight into heated litigation. The parties may leave without reaching a settlement, but may change their position after having more time to reflect. We find that many of these cases that do not settle at the actual mediation are resolved not long after the mediation.

Even where a case does not settle during or after mediation, there can be other benefits to participating in the process. During the mediation, many facts may be brought to light and can even identify potential workplace issues that an employer may have not been aware of and needs to correct. Mediation can also be used as a valuable fact-finding exercise (e.g., getting some "free discovery") to hear what a claimant is going to say, what the attorney is going to ultimately argue at trial, and obtain information regarding the overall theory of the case.

Ultimately, it is the employer's choice whether to agree to participate in an EEOC mediation. Every business is unique, just as each case is unique. To some employers, some of the above benefits may not be as important as making sure that the claimant does not receive a dime. But it is important to look past the misconception that simply participating in an EEOC mediation somehow admits wrongdoing on the part of the employer. Mediation can offer an opportunity not only to resolve a case early and inexpensively, but also provide an opportunity to obtain valuable information and insight into a potential strategy for defending against a claim.

(Endnotes)

1 EEOC Mediation Statistics FY 1999 through FY 2012, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm. (last visited June 22, 2014).

2 U.S. Equal Employment Opportunity Commission Mediation, http://www.eeoc.gov/eeoc/mediation/facts.cfm (last visited June 22, 2014).

Mandatory Alternative Dispute Resolution for Florida Community Associations

Ron Campbell, Esq.

The Florida Legislature imposes alternative dispute resolution, including mediation and arbitration, on certain community association disputes as a precondition to filing suit. As discussed in both Florida Statutes Chapter 720, which governs homeowners' association, and Florida Statutes Chapter 718, the Condominium Act, the legislature recognizes that alternative dispute resolution helps reduce court dockets and trials and offers a more efficient and cost-effective alternative to litigation.[1] The Condominium Act also discusses the legislature's concern for unit owners that are seen as being at a disadvantage when litigating against condominium associations. "Specifically, a condominium association, with its statutory assessment authority, is often more able to bear the costs and expenses of litigation than the unit owner who must rely on his or her own financial resources to satisfy the costs of litigation against the association."[2]

Depending on the nature of the dispute, as discussed in detail below, the association or the owner initiating the dispute must file a petition for binding arbitration, nonbinding arbitration, or pre-suit mediation. This tolls the applicable statute of limitations.[3]

Homeowners' Association Disputes

Chapter 720 requires pre-suit mediation as a precondition to filing suit for disputes between a homeowners' association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes. Pre-suit mediation is also required for disputes regarding amendments to the association documents, meetings of the board and committees appointed by the board, membership meetings, and access to the official records. This does not

apply to disputes regarding election meetings, which are subject to binding arbitration. Pre-suit mediation is also not required for disputes regarding the collection of any assessment, fine, or other financial obligation, including attorney's fees and costs, or any action to enforce a prior mediation settlement agreement between the parties. [4]

Homeowners' association board of director election and recall disputes are subject to binding arbitration in accordance with the provisions of the Condominium Act and the rules adopted by the Division of Florida Condominiums, Timeshares, and Mobile Homes in the Department of Business and Professional Regulation ("Division"). Neither election nor recall disputes are eligible for pre-suit mediation.[5]

The aggrieved party must serve the responding party with a written demand to participate in pre-suit mediation in substantially the form set forth in Fla. Stat. § 720.311 (2) (a) (2014). Service of the demand for pre-suit mediation must be made by certified mail, return receipt requested, with a copy being sent by first-class mail to the address of the responding party as it last appears in the association's official records. The responding party has 20 days from the date of mailing of the demand to serve a response in writing. The response must be by certified mail, return receipt requested, with a copy being sent by first-class mail to the address shown on the demand.[6]

Pre-suit mediation must be conducted in accordance with Rule 1.720 of the Florida Rules of Civil Procedure. Unless stipulated by the parties in writing, each party must appear at mediation either in person or through a party representative having full authority to settle without further consultation. In addition, for any insured party, a representative of the insurance carrier must appear who is not the carrier's outside counsel and "who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation."[7]

Persons who are not parties to the dispute may not attend the pre-suit mediation without the consent of all parties. Both parties may attend with counsel and the association may appoint a corporate representative. If mediation is attended by a quorum of the board, the mediation is not considered a board meeting requiring notice to the membership.[8] The mediation must be conducted by a circuit civil mediator certified pursuant to the requirements established by the Florida Supreme Court.[9]

The parties must share the costs of mediation equally, including the mediator's fee, unless they agree otherwise. The mediator may require advance payment. The failure of any party to respond to a demand or response, to agree upon a mediator, to make payment of fees and costs within the time required by the mediator, or to appear for a scheduled mediation without the approval of the mediator, constitutes a failure or refusal to participate in the mediation process. This operates as an impasse by such party. It also entitles the other party to proceed in court and to seek an award of the costs and fees associated with mediation. Additionally, persons who fail or refuse to participate in the entire mediation process may not recover attorney's fees and costs in subsequent litigation relating to the dispute.[10]

If presuit mediation does not resolve all the issues between the parties, the parties may file the unresolved dispute in court or agree to enter into binding or nonbinding arbitration, pursuant to the procedures set forth in the Condominium Act and the rules adopted by the Division. The arbitration may be conducted by a Florida Department of Business and Professional Regulation arbitrator or by a private arbitrator certified by the Department. If all parties do not agree to arbitration proceedings, any party may file the dispute in court. A final order resulting from nonbinding arbitration is final and enforceable if a complaint for trial *de novo* is not filed in court within 30 days after entry of the order. All costs and attorney's fees incurred in the presuit mediation process are subject to recovery by the prevailing party of any subsequent arbitration, litigation, or action seeking enforcement of the settlement agreement.[11]

Condominium Association Disputes

Before filing suit, a party to a condominium association dispute must petition the Division for nonbinding arbitration.[12] Nonbinding arbitration is meant to act as a filter for common disagreements between condominium associations and owners. "The nonbinding arbitration required by section 718.1255(4) is well suited to deal with everyday condominium disputes such as keys, pets, proxies, renters, election violations and offensive exterior decoration or maintenance of a unit. These types of cases are factually simple. They can be presented to an arbitrator without extensive discovery, expert testimony or sophisticated legal assistance."[13]

Because filing for pre-suit arbitration is a condition precedent to filing suit, a stay is not an appropriate remedy if a Plaintiff files suit without having first petitioned the Division. In fact, the appropriate relief for "violation of a condition precedent to filing an action in court should properly be a dismissal, not a stay."[14]

Mandatory nonbinding arbitration applies to any "dispute" between two or more parties that is

defined as a disagreement over the following: the authority of the board to require any owner to take any action, or not to take any action, involving the owner's unit or the appurtenances thereto; the authority of the board to alter or add to a common area or element; the failure of the association to properly conduct elections; the failure of the association to give adequate notice of meetings or other actions; the failure of the association to properly conduct meetings; or the failure of the association to allow inspection of books and records.[15] The Division defines "dispute" as any "disagreement that involves use of a unit or the appurtenances thereto, including use of the common elements."[16] This does not include any disagreement over the alleged failure of the association to enforce, or properly enforce, the condominium documents, unless the controversy otherwise constitutes a "dispute" as defined by the Condominium Act and the rules promulgated by the Division.[17]

The only disputes eligible for arbitration are those between owners and the association or the board of directors. Tenants and other unit owners having an interest in the proceeding may also be named as respondents, but controversies between or among unit owners, or between or among a unit owner or unit owners and tenants, are not eligible for arbitration except where the association is a party and the dispute is otherwise eligible for arbitration.[18]

Nonbinding arbitration is not required for any disagreement that primarily involves title to any unit or common element; the interpretation or enforcement of any warranty; levying and collection of fees or assessments; the eviction or removal of a tenant from a unit; alleged breaches of fiduciary duty by directors; or claims for damages based on the alleged failure of the association to maintain the condominium property.[19] No matter may be accepted for arbitration if the dispute is moot, abstract, hypothetical, or otherwise lacking the requirements of a case or controversy. In addition, no petition may be accepted for arbitration under the rules adopted by the Division that alleges the failure of the association to properly repair, replace, or maintain the common elements, common areas, or association property, unless the petition also alleges how the petitioner's use of the property has been directly affected as a result. [20]

The prevailing party in an arbitration is entitled to the costs of the arbitration and reasonable attorney's fees in an amount determined by the arbitrator. This includes the costs and reasonable attorney's fees incurred in the arbitration proceeding and the costs and reasonable attorney's fees incurred in preparing for and attending any scheduled mediation.[21] In any subsequent litigation, the prevailing party is also entitled to recover any costs and attorneys' fees incurred in connection with arbitration and mediation.[22]

If a party appeals the arbitrator's order by filing a complaint for trial *de novo* and does not obtain a more favorable judgment, then he or she is assessed the other party's arbitration costs, court costs, and other reasonable costs, including attorney's fees, investigation expenses, and expenses incurred after the arbitration hearing. If he or she obtains a more favorable judgment, the party who filed for a trial *de novo* is entitled to recover reasonable court costs and attorney's fees.[23] Regardless of who prevails at arbitration, if a trial *de novo* is instituted after arbitration, the party who prevails in the trial *de novo* by obtaining a judgment more favorable than the arbitration decision is entitled to attorney's fees for the arbitration and the subsequent litigation.[24] Be sure to consult with legal counsel regarding the specific pleading requirements.

(Endnotes)

1 Fla. Stat. §720.311 (1) (2014); Fla. Stat. § 718.1255 (3)(b) (2014).
2 Fla. Stat. §718.1255 (3)(a) (2014).
3 Fla. Stat. §720.311 (1) (2014); Fla. Stat. § 718.1255 (4)(i) (2014).
4 Fla. Stat. §720.311 (2) (2014).
5 Fla. Stat. §720.311 (1) (2014).
6 Fla. Stat. §720.311 (2)(b) (2014).
7 Fl. R. Civ. P. Rule 1.720 (b) (2014).
8 Fla. Stat. §720.311 (2)(a) (2014).
9 Fla. Stat. §720.311 (2)(d) (2014).
10 Fla. Stat. §720.311 (2)(b) (2014).
11 Fla. Stat. §720.311 (2)(c) (2014).
12 Fla. Stat. §718.1255 (4)(a) (2014).
13 *Carlandia v. Obernauer*, 695 So. 2d 408, 410 (Fla. 4th DCA 1997).
14 *Neate v. Cypress Club Condo.*, 718 So. 2d 390, 392 (Fla. 4th DCA 1998).
15 Fla. Stat. §718.1255 (1) (2014).
16 Fla. Admin. Code R. 61B-45.013 (2013).
17 Fla. Admin. Code R. 61B-45.013 (2013).
18 Fla. Admin. Code R. 61B-45.013 (2013).
19 Fla. Stat. §718.1255 (1) (2014).
20 Fla. Admin. Code R. 61B-45.013 (2013).
21 Fla. Stat. §718.1255 (4)(k) (2014).
22 Fla. Stat. §718.1255 (4)(h) (2014).
23 Fla. Stat. §718.1255 (4)(l) (2014).
24 *Huff v. Vill. of Stuart Ass'n*, 741 So. 2d 1217, 1219 (Fla. 4th DCA 1999).

A Mediator's Best Advice

Zarra R. Elias, Esq.

Mediation serves as a powerful and invaluable means to resolve a case. With the proper technique or approach to negotiation, you can maximize your gains at the bargaining table and consequently increase the chances of achieving a successful mediation. The question now becomes: which is the best technique or approach to follow to increase the likelihood of obtaining a fruitful outcome? The answer varies as alternative dispute professionals and experts have developed various approaches to negotiation and mediation. However, the two most common and popular approaches are the adversarial and problem-solving approaches. Leonard Riskin, et al, Dispute Resolution and Lawyers, 117-167 (4th ed., Westgroup 2009).

The adversarial approach has also been referred to as "value-claiming" or "positional" approach. See id. This approach evokes feelings of rigidity, concealment, and deception. It further draws the mindsets: "What one loses, the other side gains," and "go big, or go home." A negotiator utilizing this approach typically begins the negotiation with an outrageously high demand, tends to anchor to extremes, and makes small concessions until the other side concedes.

The problem-solving approach, on the other hand, generates a sense of collaboration and joint gains. See id. A negotiator employing this approach not only addresses the monetary aspect of the case but also attempts to unearth and acknowledge the other non-monetary needs of the opposing party. Thus, this approach produces a wider variety of potential solutions including unconventional terms or agreements.

Whether you are the attorney, client, or claims professional, you are an integral part of the mediation process and should always strive to develop your negotiation skills. How can these two approaches be useful to you? A skilled negotiator adapts to the environment and frequently blends these two approaches during the mediation. For instance, you can take an adversarial approach at the beginning of the mediation by making few and minor concessions to deliver a firm message. The objective is to uncover as much information as possible from the other party during the early stages of negotiation while withholding information known to you that may be helpful to them.

Accordingly, you pressure your opponent to expose their strengths early in the game. If no significant development surfaces, you can subsequently switch to the problem-solving approach and combine both the monetary and non-monetary aspects of the case into the negotiation discussions. Some negotiators incorporate a formal apology or sincere acknowledgment of the opposition's losses in cases where emotions run high. In some cases, you can even suggest that the mediator gather the parties in the same room again to simply reiterate the ultimate goal of the parties—to resolve the case. Alternatively, you can start with a problem-solving approach and proceed to embark on an adversarial approach.

Interestingly, fusing these two approaches can provoke a perception of "rough justice" when parties settle. This phenomenon is not necessarily a bad thing. When this feeling is generated, both parties have essentially compromised and a "win-win" situation is naturally achieved. The key is to remain malleable and keep an open mind throughout the course of the mediation.

A few additional practical tips:

1. **Embrace Active Listening.** "Active listening" requires the listener's acknowledgment of not just the substance or details of the presentation but also the complete message being sent. You can

oftentimes detect the intensity of emotional undertone by making a conscious effort to actively listen to your opposition's presentation. This awareness is crucial to your negotiation approach.

2. **Serve a meaningful counteroffer.** With each counteroffer you make, attempt to present facts, information, and/or defense to justify that number to prevent your opposition from purely playing the "number game" to reach your maximum authority. Stay in control throughout the process to maximize your gains.

3. **Be flexible with your plan of action.** Damaging facts or additional details could emerge during the mediation that may affect your entire case and your counsel's recommendation. Acclimate to the situation even if it means walking away to conduct additional discovery to reevaluate your case.

4. **Use every opportunity to gain the support of the mediator.** Ask for and listen to the mediator's assessment of the case. An effective mediator will address the merits of the claim and defenses (or the lack thereof), the potential risks, and possible outcome of the case if no settlement is reached. A mediator's remarks and observations can occasionally be the best way to discover your opponent's "bottom line." A mediator appreciates a party who meaningfully engages; hence, do not hesitate to actively participate in the process.

5. **Be open to a continuance.** If the mediator proposes a continuation of settlement negotiation when it is becoming apparent that the parties are nowhere near a resolution, welcome this "cooling off" period. An informal conciliation at a later time may assist the parties in ultimately resolving the case.

CSK & Ronald McDonald House

The Tampa office of Cole, Scott, & Kissane P.A., headed up by Elizabeth Tosh, volunteered time by cooking dinner for the residents of the Ronald McDonald House in St. Petersburg, Florida. Tampa lawyers Carlos Morales, Maja Lacevic, Justin Saar, Amy Recla, and Geoffrey Schuessler , along with Elizabeth, put together a build your own burger dinner for the house residents. CSK Tampa also donated Publix gift cards for purchase of supplies, paper and cleaning products and other items on the House's wishlist to help RMH continue to serve those in the local community. The Ronald McDonald House of Tampa Bay provides a home-away-from-home for families of pediatric patients in local area hospitals. Since opening in 1980, the Tampa House has provided care for over 46,000 families and continues to play a critical role in assisting those in need.

Neutral Evaluation and Florida Sinkhole Claims

Stephen Richardson, Esq.

From 2006 to 2010 the number of sinkhole claims in Florida tripled, costing insurers a total $1.4 billion over the period, according to a report by the Florida Office of Insurance Regulation.[1] In response to the growing number of sinkhole claims in the State of Florida, the legislature has taken numerous steps to limit the potential exposure of insurance carriers and provide recourse to policy holders when they dispute the elimination of sinkhole activity or the recommended method of repair for a confirmed loss. The largest such measure involved the creation of a non-binding procedure for the resolution of disputed claims, called Neutral Evaluation. The Department of Financial Services is tasked with enforcing the provisions and creating the procedures for the neutral evaluation program.

Fla. Stat. §627.7074 was enacted in 2006 and supersedes the alternative dispute resolution process under Florida Statute §627.7015, but does not invalidate the appraisal clause of the insurance policy (if applicable).[2] Additionally, filing for neutral evaluation tolls the requirement for filing suit for 60 days of the time prescribed Florida Statute 95.11, whichever is later.[3] Furthermore, neutral evaluation can be utilized for the resolution of denied or disputed method of repair claims.

Neutral evaluation allows for a sinkhole claim to be reviewed by a neutral third-party professional, either an engineer or geologist, certified by the Department as a neutral evaluator. Typically, the neutral evaluator will inspect the property and review all geotechnical reports prior to rendering its opinion. Once the neutral evaluator renders their opinion, the parties may either accept or reject the findings. However, accepting the findings may limit potential exposure, which is discussed in more detail below.

Neutral evaluation is non-binding, but attendance is mandatory if requested by either party.[4] Additionally, neutral evaluation can have significant implications for the litigation of sinkhole claims, including issues associated with attorneys' fees and admissible evidence. Therefore, it is critical for adjusters, attorneys and carriers to understand the evolving changes to the neutral evaluation process and how those changes will affect their defenses and strategies moving forward.

Waiver of Neutral Evaluation

Neither the statute nor the Department has established any clear cut time requirements in which a party must request neutral evaluation, nor does the statute provide a waiver provision. The only requirement is that either a sinkhole report has been issued or the carrier has denied the claim.[5]

In *Citizens Prop. Ins. Corp. v. Trapeo,* 136 So.2d 670, 680 (Fla. 2d DCA 2014), Citizens invoked neutral evaluation subsequent to Plaintiff's filing suit and Plaintiff argued that Citizens waived its right to neutral

evaluation by litigating the matter. The circuit court agreed with Plaintiff and Citizens filed its appeal.

The Second District Court of Appeal quashed the trial court's order to the extent that it prohibited neutral evaluation and directed that the trial court stay the proceedings pursuant to Fla. Stat. §627.7074.[6] The court in *Trapeo* opined that neutral evaluation is both a "precursor to litigation and as a parallel, contemporaneous process. It is not an 'either or' of 'opt out of litigation' procedure, unlike contractual arbitration provisions."[7] Furthermore, the statute does not contain a waiver provision or timeframe for requesting neutral evaluation. "It is an optional but statutorily guaranteed process."[8]

Additionally, the Court in *Trapeo* held that the "circuit court does not have authority over the neutral evaluation process."[9] Most notably, the Second District held that "Whether a party can or have waived neutral evaluation is a determination within the Department's authority and power, as reasonably implied from the statute's express language. As a result, the circuit court is not in a position to determine whether neutral evaluation can or has been waived."[10]

Therefore, based on the statute and holding in *Trapeo*, there is nothing preventing a party from invoking neutral evaluation at any time after the denial of the claim or issuance of a sinkhole report.

Staying Litigation In Favor of Neutral Evaluation

Quite often litigation is commenced prior to the request for neutral evaluation. Fla. Stat. §627.7074(10) was amended in May 2011 to provide that "[R]egardless of when noticed, any court proceeding related to the subject matter of the neutral evaluation shall be stayed pending completion of the neutral evaluation and for 5 days after the filing of the neutral evaluator's report with the court."

However, what happens if the claim was made under a policy issued effective prior to May 17, 2011, the effective date of the amended language. Case law typically mandates that "[T]he statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract."[11]

The Second District Court of Appeal addressed this very issue in *Trapeo*, in which they discussed procedural versus substantive changes to the statute. The court noted that the right to neutral evaluation is clearly substantive, in which the parties have a substantive right to have a neutral evaluator review the claim and render their opinion.[12] However, the means by which neutral evaluation occurs is procedural.[13]

The court in *Trapeo* held that "Section 627.7074(10) does not create new rights or impede existing rights; it is not substantive. And procedural statutes 'should be applied to pending cases in order to fully effectuate the legislation's intended purpose."[14] Therefore, the stay provisions of Fla. Stat. §627.7074, are procedural in nature and do not affect the parties substantive rights, it is applicable to any lawsuit filed after May 17, 2011, or until amended by the legislature.[15]

Additionally once neutral evaluation is requested; a notice of stay is all that is required to stay the court proceedings, pursuant to the holding in *Trapeo.*[16] The court noted that a motion is not required to stay the proceedings. "The fact that the amended statute uses the phrase 'regardless of when noticed' is also instructive. The legislature chose not to use the word 'requested' or otherwise indicate that a motion for stay should be filed. Rather the stay is to be noticed."[17]

Therefore, pursuant to Fla. Stat. §627.7074, and *Trapeo,* any proceedings shall be stayed pending the completion of neutral evaluation and a notice is sufficient to stay the proceedings. It is also important to note that the proceedings shall be stayed for five days after the neutral evaluation report has been filed with the court. In short, it is not the completion of neutral evaluation which lifts the stay; it is the filing of the report with the court.

Selecting a Neutral Evaluator

The Department maintains a list of those approved as neutral evaluators. These persons are either engineers or geologists. Once neutral evaluation is requested, the parties have 14 days to agree to a neutral evaluator or the Department will initiate its random selection process. With respect to the random selection process, each party holds two strikes which may be utilized for any reason. Additionally, a neutral evaluator may be struck for cause as defined by the statute.[18]

However, it is important to note that the period for striking a neutral evaluator is no longer five business days. Effective December 26, 2013, Rule 69J-8.008 requires that a strike be entered within three business days.[19]

Once a neutral evaluator is agreed upon or the parties exercise their strikes, the neutral evaluation conference should occur within ninety days.[20] However, failure to conduct the conference within ninety days does not invalidate either party's right to neutral evaluation or to a conference held outside of the ninety day timeframe. [21]

Accessibility of the Subject Property

Fla. Stat. §627.7074(5)(2013) provides that "The neutral evaluator

must be allowed reasonable access to the interior and exterior of insured structures to be evaluated or for which a claim has been made." However, the statute does not provide any guidance on whether parties' retained experts may attend the neutral evaluation conference or whether they are allowed access to the property.

It is beneficial to have retained trial experts attend the neutral evaluation process. It allows our experts to inspect the subject property and compare their inspection with the geotechnical reports prepared by the respective engineers and geologists, in forming their own opinions regarding sinkhole activity and causes of damage. Several Plaintiffs' firms have objected to the carrier's experts attending neutral evaluation and have even stopped the conference from occurring. However, the Department has previously advised that nothing in the statute prohibits the carrier's experts from attending the neutral evaluation site conference. Nor is there anything in the statute that limits access to the subject property from the carrier's experts.

Prior to the neutral evaluation conference, we have found it beneficial to notify the Insureds' representatives that the carrier's experts are tentatively scheduled to appear. This allows for additional time to take further action in the event the Insureds' representative objects to their attendance.

In the event the Insureds' representatives object to the carrier's experts attending the conference or deny access to the property, we recommend reaching out to the Department and requesting a ruling on this issue prior to the neutral evaluation.

Admissions of Liability

Typically, once a claim is denied by a carrier, a subsequent acceptance of coverage for the claim is deemed a confession of judgment or admission of liability. However, neutral evaluation provides an opportunity for a carrier to accept the findings of the neutral evaluator without admitting liability. Specifically, Fla. Stat. §627.7074(15)(b) provides that "[T]he actions of the insurer are not a confession of judgment or admission of liability, and the insurer is not liable for attorney's fees under s. 627.428 or other provisions of the insurance code unless the policyholder obtains a judgment that is more favorable than the recommendation of the neutral evaluator."

Therefore, should the neutral evaluator disagree with the findings of the carrier's engineers, the carrier can accept the findings of the neutral evaluator and remit payment in accordance with the findings, without the burden of admitting liability pursuant to the statute.[22] Pursuant to the statute, only in the event Plaintiff receives a more favorable verdict than the neutral evaluator's findings, does the carrier become obligated for attorneys' fees under Florida Statute 627.428. [23]

Additionally, Fla. Stat. §627.7074(9) provides that "[E]vidence of an offer to settle a claim during the neutral evaluation process, as well as any relevant conduct or statements made in negotiations concerning the offer to settle a claim, is inadmissible to prove liability or absence of liability for the claim or its value, except as provided in subsection (14)." This allows the carrier to effectuate a settlement offer during the neutral evaluation process which cannot later be used to show admission of liability. However, it is important to note that there have been several circuit court judges who disagree and have ruled that acceptance of neutral evaluation is a confession of judgment.

In short, neutral evaluation provides many of the same protections as mediation when it comes to offers of settlement and admissions of liability. However, regardless as to whether the findings are accepted or rejected, the findings are admissible in any action, litigation or proceeding relating to the claim for sinkhole loss.[24] Therefore, it is important to remember that any report, findings or testimony of the neutral evaluator; good, bad and/or unfavorable will be admissible in litigation.

Conclusion

Sinkhole claims are a fact of life in many parts of Florida and have created a substantial financial burden for the carriers that provide sinkhole coverage. The legislature is aware of this burden and has taken numerous steps to curtail the vast number of sinkhole claims. One such measure was the creation of the neutral evaluation process. Carriers can substantially limit exposure for attorneys' fees and extra-contractual damages through a successful neutral evaluation. However, it is vital that adjusters, attorneys and carriers understand continuous changes to the rules and procedures of neutral evaluation and their implications on the handling of sinkhole claims.

(Endnotes)

1 *Report on Review of the 2010 Sinkhole Data Call,* Florida Office of Insurance Regulation, (Nov. 8, 2010)
2 Fla. Stat. §627.7074(3)(2013)
3 Fla. Stat. §627.7074(4)(2013)
4 *Id.*
5 Fla. Stat. §627.7074(3)(2013)
6 *Citizens Prop. Ins. Corp. v. Trapeo,* 136 So.2d 670, 680 (Fla. 2nd DCA 2014)
7 *Trapeo,* 136 So.2d 670 at 678.
8 *Trapeo,* 136 So.2d 670 at 677.
9 *Id.*
10 *Trapeo,* 136 So.2d 670 at 678.
11 *Menendez v. Progressive Express Ins.Co. Inc.,* 35 So.3d 873, 876 (Fla. 2010)
12 *Trapeo,* 136 So.2d 670 at 675.
13 *Id.*
14 *Trapeo,* 136 So.2d 670 at 676.
15 *Id.*
16 *Trapeo,* 136 So.2d 670 at 679.
17 *Id.*
18 Fla. Stat. §627.7074(7)(a)(2013)
19 Fla. Admin. Code Ann. r. 69J-8.008 (Dec. 26, 2013)
20 Fla. Stat. §627.7074(7)(c)(2013)
21 *Id.*
22 Fla. Stat. §627.7074(15)(b)(2013)
23 *Id.*
24 Fla. Stat. §627.7074(13)(2013)

Dealing With Appraisal and Coverage Simultaneously Under a Homeowners' Insurance Policy in Florida


Hal S. Weitzenfeld


Debra Auerbach, Esq.

A small group of homeowners' insurance companies in Florida removed the appraisal provision from their policy; however, most have maintained the provision and utilize it as a tool to avoid costly litigation and exposure to attorney's fees. For those that continue to use the provision, we are frequently asked whether appraisal is an absolute bar to litigation and whether the provision is available to the insured or insurer when there has been a complete or partial denial of coverage. The standard appraisal provision typically reads as follows:

Mediation or Appraisal

If you and we fail to agree on the amount of loss, either may:

b. Demand an appraisal of the loss.

In this event, each party will choose a competent and disinterested appraiser within twenty (20) days after the receipt of a written request from the other.

1. The two appraisers will choose a competent and independent umpire. If they cannot agree upon an umpire within fifteen (15) days, you or we may request that a judge of a court of record in the state where the "residence premises" is located make the choice.
2. The appraisers will separately set the amount of the loss and assign the amount of loss attributable to each specific policy coverage.
3. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of the loss.
4. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of the loss.
5. A decision by any two must assign the amount of loss attributable to each specific policy coverage.
6. An appraisal decision is subject to all terms and conditions of this policy.
7. All specific policy coverages which have a covered loss from the occurrence will be addressed during this process.

Appraisal of a loss with no dispute over coverage is typically a smooth process. Both the insurer and insured will choose an appraiser who will independently assess the cost to repair the covered property. Subsequently, the appraiser for each side will meet to discuss their assessment and attempt to reach a mutual agreement on the total cost to repair the property. If this initial meeting is unsuccessful and the appraisers are unable to reach an agreement, they will choose an umpire who will set the amount of loss in a written appraisal award.

Although the appraisal process is designed to avoid unnecessary litigation for both parties, insurers must be aware that electing

appraisal may allow the insured to continue litigation and pursue extra-contractual damages under Fla. Stat. §624.155 if all of the following occur: (1) the insured filed a valid Civil Remedy Notice of Insurer Violation ("CRN") with the Florida Department of Insurance; (2) 60 days passed since the CRN was filed; and (3) the appraisal award resulted in a favorable resolution. For example, in a covered sinkhole claim with no dispute other than the cost to repair, the Second District Court of Appeal in *Hunt v. State Farm Florida Insurance Company* held that a favorable appraisal award (an amount more than the carrier agreed to pay as the undisputed damage) amounted to a favorable resolution for the insured, which is required for a bad faith action to commence. 112 So. 3d 547, 549 (Fla. 2d DCA 2013*). See Vest v. Travelers Ins. Co.,* 753 So. 2d 1270, 1276 (Fla. 2000) ("[B]ringing a cause of action in court for violation of section 624.155(1)(b)1 is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract."). Accordingly, requesting appraisal and paying the appraisal award timely may not serve to end litigation.

The appraisal process becomes less clear when at least one issue of coverage is in dispute. For example, the insured claims a sudden pipe burst caused water damage to kitchen cabinets and caused the ceramic tile in the kitchen to become debonded. For purposes of this example, assume the insurer agreed to cover the cost to repair or replace the kitchen cabinets; however, the insured does not agree to the amount. Further, the insurer denies coverage for the debonded kitchen tile on a causation theory. The Florida Supreme Court has held "causation is a coverage question for the court when an insurer wholly denies that there is a covered loss and an amount-of-loss question for the appraisal panel when an insurer admits that there is covered loss, the amount of which is disputed." *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1022 (Fla. 2002). As such, coverage issues are "to be judicially determined by the court" and therefore are "not subject to determination by appraisers." *Id.* at 1025.

The application of the foregoing principle has been the subject of confusion. The confusion centers on whether or not appraisal can commence and move forward simultaneously with the court's coverage determination. The courts in Florida are split on what "track" to resolve these issues. "One-track" or "single-track" jurisdictions hold that the trial court must first resolve all underlying coverage disputes prior to ordering an appraisal on damages, while "dual-track" jurisdictions hold that appraisal panel's damage award investigations can proceed contemporaneously with the judge's coverage determination.

Florida's Fourth District is a "one-track" or "single-track" jurisdiction requiring the trial court to first resolve all underlying coverage disputes prior to ordering an appraisal on the cost to repair. See *Sunshine State Ins. Co. v. Corridori,* 28 So. 3d 129, 131 (Fla. 4th DCA 2010)." This conflicts with the Third District's ruling In *Sunshine State Ins. Co. v. Rawlins*, 34 So. 3d 753 (Fla. 3d DCA 2010), which has consistently held that the trial court may use its own discretion when determining if appraisal can move forward on a "dual track" basis while preserving the insurer's right to dispute coverage as a matter of law.

The root of the Fourth District's determination stems from the belief that a finding of liability must come before a determination of damages. "Once the court establishes that the losses are covered by a policy, then those losses may be appraised." *Corridori*, 28 So. 3d at 131. As such, appraisal is premature where there is a disputed issue of fact regarding coverage and where the trial court fails to "resolve this dispute of fact with competent evidence to support its determination of coverage." *Id.* In the pipe burst example discussed *supra*, the judge could not order the parties to enter appraisal until the coverage dispute over the debonded kitchen tile was resolved.

The Third District's rationale for the "dual-track" approach is rooted in the belief that it will save judicial resources that may otherwise be required in resolving the factual and legal issues pertaining to the coverage issue by a "relatively swift and informal decision by the appraisers as to the amount of the loss." See *State Farm Fire & Casualty Co. v. Middleton*, 648 So. 2d 1200 (Fla. 3d DCA 1995). Accordingly, the pipe burst analysis in a dual-track jurisdiction would allow the judge discretion to send the entire claim to appraisal before a coverage determination regarding the debonded kitchen tile is made.

There has been limited discussion on this split from Florida's other District Courts; however, the Second District addressed the issue in *Citizens Prop. Ins. Corp. v. Admir. H., Inc.*, 66 So. 3d 342 (Fla. 2d DCA 2011). The Second District agreed with the Third District's discretionary "dual-track" approach to the order of determining damages and coverage. Specifically, the Court stated "[w]e note that "[o]nce the trial court determines that a demand for appraisal is ripe, the court has the discretion to control the order in which an appraisal and coverage determinations proceed." "Id. at 344 *(*quoting *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n,* 48 So.3d 188,

191 (Fla. 3rd DCA 2010).

The "one-track" and "dual-track" approaches carry respective advantages and disadvantages. The "dual-track" approach may cause excessive time and cost to be spent reaching an appraisal award which may ultimately be rendered moot if the court determines there is no (or minimal) coverage. Alternatively, experience dictates that a case is more likely to settle if the cost to repair is known than if the parties are thousands of dollars apart; therefore, "setting" the cost of repair as early as possible should avoid unneeded costs in the long run. The "one-track" approach may benefit the parties by allowing them to focus on the coverage dispute and avoid unnecessary time litigating cost of repair issues which will be dealt with following resolution.

Conversely, a disadvantage of the approach is the repair costs may be so vastly different that it is impossible to settle the case early. Also, the party requesting appraisal may regret its decision if collateral facts developed during litigation would strengthen their respective repair cost arguments in front of a jury. Finally, the pipe burst example may lead to a jury determination that the ceramic kitchen tile damage is not covered. The case would then proceed to appraisal on the cost to repair the cabinets alone. If the appraisal award is more than then the insurer's cost to repair, the insured could sue for extra contractual damages under the favorable resolution theory. Had the carrier known the result of appraisal early in the case, it could have assessed this risk.

CSK's First Party Property Group is well versed in all aspects of appraisal and property litigation. If you ever have any questions or concerns about appraisal or litigation strategy, please do not hesitate to contact us.

Blake Sando is the new President of the Coral Gables Bar Association

Blake Sando sworn in as the new President of the Coral Gables Bar Association. The event was attended by a number of members of the firm as well as clients and judges. It was a wonderful event and Blake will make us all proud by serving with distinction.

CSK has a history of having its members serve in leadership positions of the various Bar Associations, Professional Organizations and Charities of which we are a member. In addition to hard work and quality representation of clients, we recognize our obligation to these organizations and the community by such participation.

success STORIES

Ron Campbell and **Patrick Boland** of CSK's Bonita Springs office obtained a final summary judgment and an award of $55,000 in attorneys' fees for our client in a covenant enforcement case, which was contentiously litigated for more than five years.

Jennifer J. Smith of CSK's Ft. Lauderdale East office, obtained a final summary judgment in favor of our client in a breach of contract action involving insurance coverage. The Plaintiff homeowner retained a mitigation company to perform dry out services to her home and executed an Assignment of Benefits in favor of the mitigation company. The mitigation company subsequently filed suit in a separate action in county court. Due to the language of the assignment, it appeared that the Plaintiff assigned all rights and obligations under her insurance policy to the mitigation company and therefore lacked standing to pursue her claims. The court agreed and granted final summary judgment.

Jennifer J. Smith and **Jonathan Diocares** of CSK's Ft. Lauderdale East office, obtained a final summary judgment in favor of our client in a first party breach of contract action involving a mitigation company as the named Plaintiff. The mitigation company Plaintiff claimed there was a breach of the insurance contract due to a denial of the claim. We argued that the assignment of benefits attached to the Plaintiff's Complaint was defective because the mitigation company's form assignment included the named insured rather than the mitigation company as the assignee of the benefits. In addition, the assignment referenced a Broward County facility rather than the Miami-Dade mitigation facility that was the Plaintiff in the suit which was a separate entity incorporated in the State of Florida. The court agreed and granted final summary judgment in favor of our client.

Paul Vicary of CSK's Miami office, obtained a summary judgment in a first party property case in Miami-Dade County. The Plaintiff claimed her property sustained significant damage by fire, affecting the entire home. Our client canceled the policy with 25 days' notice, prior to the date of loss. The Plaintiff never disputed the fact that she received the notice of cancellation.

Rather, The Plaintiff tried to argue that our client misread the cancellation statute and was required to provide 45 days' notice. Therefore, the cancellation was ineffective and the loss is covered. The court and the Plaintiff's reading of the statute did not comport with basic rules of English and ruled that only 20 days' notice was required.

Jami Gursky and **Jonathan Weiss** of CSK's Ft. Lauderdale East and Miami offices, just received a great verdict in a motor vehicle negligence case, where liability was admitted. The plaintiffs suffered from paralysis resulting from childhood-onset polio, and were involved in a collision in their handicap van after the defendant made an illegal U-turn. The impact of the collision propelled plaintiff/wife out of her wheelchair and into the front windshield. Plaintiff requested more than $550,000 in past and future medical bills, including spine, wrist and knee surgery recommendations for the husband's injuries. More specifically, as a result of the accident, the Plaintiff claimed to have sustained multi-level cervical herniations, trauma-induced carpal tunnel syndrome, and aggravation of a meniscal tear in his knee. There was also a consortium claim from the wife, which was significant due to the fact that she was quadriplegic and her husband was her sole caretaker. The jury returned a verdict of $65,000, inclusive of the consortium claim. The verdict came under the PFS amount.

Joe Kissane and **Daniel Duello** of CSK's Jacksonville office, obtained a Summary Judgment in a bad faith case in Circuit Court in Duval County, Florida. The underlying matter involved an unfortunate case where a 32 year old father of two passed away as the result of a complication in post-surgical care after a liposuction. The estate of the gentleman was able to obtain a final judgment in the amount of more than $43,000,000 against the physician. The insurance policy for the physician had policy limits of $250,000.

Cole, Scott, & Kissane was able to successfully argue for the application of the safe harbor provision in the medical malpractice act to completely immunize the insurance company from a bad faith claim as it tendered its policy limits prior to the expiration of the presuit screening period. At the time of the Order, the judgment had a value of over $50 million due to post-judgment interest.

Joe Kissane and **Daniel Duello** of CSK's Jacksonville office, obtained a Summary Judgment in a bad faith case in the Southern District of Florida involving a judgment in the amount of $750,000. The underlying matter involved

an automobile accident that injured nine people including the bad faith claimant who lost an eye. The insured driver only had policy limits of $10,000 per person and $20,000 per accident.

Cole, Scott, & Kissane was able to so persuasively present the argument on behalf of the insurance company that the District Court Judge admonished the plaintiff's attorney for attempting to set up a bad faith claim stating, "I am left with the disturbing conclusion that the attorneys acted pre-textually to set the insurance company up for a bad faith suit."

Jami Gursky and **Lonni Tessler** of CSK's Ft. Lauderdale East office, obtained a very favorable verdict in a motor vehicle negligence lawsuit where liability was admitted and the case was tried on damages only. As a result of the motor vehicle accident, the Plaintiff alleged he sustained a low back injury for which he underwent back surgery and required a future back surgery. The Plaintiff asked the jury to award more than $404,000 (including approximately $81,000 in past medical expenses, $100,000 in future medical expenses, $18,000 in lost wages, and $205,000 in past and future pain & suffering combined). Jami and Lonni argued that the Plaintiff sustained a mere back strain in the accident and that the damages should be limited to the ten weeks of treatment for the strain and ten days of missed time from work.

The jury returned a verdict of $27,364.00 ($26,764.00 in past medical expenses and $600.00 in lost wages), the amount the Jami and Lonni suggested to the jury to award. The jury also agreed with the defense in that the Plaintiff did not sustain a permanent injury as a result of the accident. Thus, the Plaintiff did not meet the threshold for an award for pain and suffering. Our client was entitled to a set off for Personal Injury Protection benefits in the amount of $10,000.00 received by the Plaintiff. Accordingly, the net award to the Plaintiff was only $17,364.00.

Barry Postman and **Sherry Schwartz** of CSK's West Palm Beach office, successfully defended an association in a breach of contract case brought by their property management company following a 3 day jury trial. The Plaintiff's case arose out the association's alleged failure to honor the renewal of the property management contract for a five year term. Hence, the Plaintiff argued that he was entitled to receive lost profits for the five year term, plus attorneys' fees. During discovery, the defense discovered fraudulent and unethical practices of the Plaintiff that dated back nearly 20 years. In sum, the Plaintiff had essentially devised a scheme wherein the Plaintiff, unknown to the association, was receiving kickbacks from third party contractors that the Plaintiff hired – including the Plaintiff's own maintenance company, amongst other illegal activities. This resulted in illegal profits to the Plaintiff at the unconscionable cost to the association that blindly trusted the Plaintiff given the near two decades the Plaintiff had managed their affairs. To that end, the crux of the defense was that the contract was illegal, and therefore, could not be enforced per Florida Law. At trial, after the Plaintiff was excessively impeached and ultimately admitted the majority of illegal conduct performed in connection with the contract. After the Plaintiff completed its case in chief, the Plaintiff offered to resolve the case for less than 10% of the demand in opening, and less than half of what was offered in mediation, a number less than the defense costs that would have been incurred in completing the trial – a true nuisance value.

Aram Megerian and **Andrew Bickford** of CSK's Tampa office, obtained a Voluntary Dismissal in a highly contested a first party water damage case which was pending for two and a half years. The Plaintiff contractor, operating under an assignment of benefits from the carrier's insureds, filed a lawsuit alleging breach of contract based on the carrier's denial of a sewage backup claim resulting from a septic pump malfunction. The Plaintiff demanded approximately $40,000.00 in contractual benefits. The carrier filed a Motion for Summary Judgment based on the Plaintiff's lack of standing and the policy's water damage exclusion. The carrier argued that the Plaintiff lacked standing because the insureds assigned any and all insurance benefits to a different water mitigation contractor the day before the insureds assigned benefits to the Plaintiff. The carrier also relied on the affidavit of a septic installer in arguing that the policy only provides coverage for water damage caused by accidental discharge or overflow of water from within a plumbing system, and that a septic pump is similar to a sump pump, which is not part of the plumbing system pursuant to the express provisions of the insurance policy. Two days before the hearing on Defendant's Motion for Final Summary Judgment, the Plaintiff filed a Notice of Voluntary Dismissal, without Prejudice.

Aram Megerian and Andrew Bickford of CSK's Tampa office, obtained a Voluntary Dismissal in a first party sinkhole case which was pending for over a year. The Plaintiffs filed a lawsuit alleging breach of contract based on the carrier's failure to timely render a coverage determination and retain an engineer to perform statutory sinkhole testing. The Plaintiffs demanded $230,000.00 to resolve their claim. The carrier moved to stay the litigation to conduct sinkhole testing and the Court entered an order staying the litigation until testing was completed.

After several months of trying to perform sinkhole testing on the Plaintiffs' property to no avail, the carrier filed a Motion to Compel sinkhole testing. The Court granted the Defendant's Motion to Compel. After the Plaintiffs failed to timely allow sinkhole testing on their property, the carrier filed a Motion for Order to Show Cause seeking fees and costs. The day before the hearing on the Defendant's Motion for Order to Show Cause, the Plaintiffs filed a Notice of Voluntary Dismissal, without Prejudice.

Steven Befera and **Vinod Bajnath** of CSK's Miami office obtained a dismissal with prejudice in defense of a property damage claim brought by a tenant against our client, the landlord and a roofing company. The Plaintiff was seeking $175,000.00 in damages to exotic cars and loss of income. By aggressively taking advantage of favorable terms in the lease agreement, CSK was able to obtain a dismissal with prejudice of all claims against our client. After reviewing CSK's Motion for Judgment on the Pleadings, the Plaintiff agreed to a joint dismissal with prejudice of our client. CSK was able to resolve the matter in just one-hundred and twenty (120) days.

Peter D. Weinstein of CSK's Fort Lauderdale (West) office, obtained an order granting summary judgment in favor of his client, a commercial landlord, in a dog-bite personal injury claim. A four-year old boy taunted a neighbor's dog which jumped through a screened enclosure, biting the boy's leg. The boy's mother brought suit claiming the commercial landlord was negligent in permitting the dog on the property and for strict liability (even though the commercial landlord was not the dog owner). The dog owner and his roommate had previously executed an agreement with the commercial landlord which provided for indemnification and defense for any claims arising from the dog's behavior.

Peter successfully demonstrated the validity of the contract despite any perceived or potential liability which could be asserted and/or apportioned against the commercial landlord. The Broward County Circuit Court ordered the dog owner and his roommate to indemnify, defend and hold harmless the commercial landlord and further ordered the commercial released from any obligation to compensate the plaintiff. The Court also granted Peter's motion for attorney's fees and costs.

Blake Cole of CSK's Jacksonville office, obtained a final summary judgment in this suit for Uninsured Motorist benefits and Personal Injury Protection Benefits. The Plaintiff filed suit against his insurer alleging that the insurer was negligent in handling his claim and alleging that he was entitled to uninsured motorist coverage and PIP coverage stemming from a road rage incident. The Plaintiff was traveling down the highway when he allegedly was nearly side-swiped by another vehicle. The Plaintiff alleged that the other driver pulled in front of the Plaintiff's vehicle and then "break-checked" him causing the Plaintiff to bring his vehicle to a stop on the shoulder of the highway. The other driver, allegedly, proceeded to exit his vehicle and approach the Plaintiff's vehicle shouting obscenities. The Plaintiff alleged as he tried to exit his vehicle, the other driver slammed the Plaintiff's car door shut on him, causing injuries to the Plaintiff's hip and knee. The other driver then allegedly proceeded to punch the Plaintiff in the face and repeatedly slam the Plaintiff's head onto his own vehicle causing severe injuries. The Plaintiff alleged that he was entitled to UM benefits and also alleged that he was entitled to $100,000 worth of PIP benefits pursuant to the policy. The Plaintiff also brought a count against the insurer for negligence for the failure to tender said benefits.

Blake Cole of CSK's Jacksonville office, able to demonstrate that the Plaintiff's PIP demand letter and supporting documentation failed to comply with Florida Statues and thus, the Plaintiff could not recover PIP benefits. Blake was also able to demonstrate that the injuries the Plaintiff sustained during the physical altercation did not arise out of the ownership, maintenance, or use of the tortfeasors vehicle - and thus, the Plaintiff was not entitled to recover UM benefits. Because the Plaintiff's claims for PIP and UM benefits failed, the court held that the insurer properly denied the claims and therefore

was not negligent.

Blake Cole and **Joe Kissane** of CSK's Jacksonville office, obtained affirmation of a final summary judgment motion from the First District Court of Appeal. The First DCA issued a ten-page opinion affirming the lower court's decision. The lower court had granted summary judgment in favor of our client on a slip and fall case, based upon the notice requirements of § 768.0755, Florida Statutes.

Krystina Machado of CSK's Miami office obtained summary judgment on behalf of a general contractor in a breach of contract cross-claim against its subcontractor. In the underlying claim, the Plaintiff filed a negligence action against our client and its subcontractor with respect to injuries the Plaintiff allegedly suffered while crossing an intersection at which our client and subcontractor were performing construction work. The subcontract concerned installation and removal of light poles in the incident area. The underlying action was settled. Our cross-claim was the only remaining action. We moved for summary judgment on the grounds that the record evidence conclusively established that the subcontractor breached the contract by failing to name our client as an additional named insured on its general liability insurance policy. The Court agreed and granted summary judgment in favor of our client.

Justin Saar of CSK's Tampa office, obtained a summary judgment in a slip and fall case. The Plaintiff claimed she was injured after a slip and fall inside a mall on a rainy day. Justin relied upon Florida's slip and fall statute, section 768.0755 (2011), and convinced the Court that the Plaintiff failed to prove that the mall had actual or constructive notice of water being on the floor, despite evidence that guests had tracked water into the mall during rainstorms on previous occasions. After considering the parties arguments and the Plaintiff's own deposition testimony, the Court agreed with Justin, and granted his motion.

Justin Saar of CSK's Tampa office, convinced a Plaintiff's counsel to dismiss with prejudice a Complaint against our client following the deposition of the landowner and co-defendant's corporate representative. The Plaintiff, our client's employee, tripped and fell on a ramp covering air conditioning lines and pipes. The ramp was located outside a warehouse rented by our client from the co-defendant and the fall occurred after the Plaintiff clocked-out so that workers' compensation immunity did not apply. The Co-Defendant took the position that the ramp was controlled by the insured. Justin deposed the head of maintenance to obtain testimony that the landowner placed the ramp, maintained the ramp, and made remedial measures following the incident, to show that the landowner exercised control over the ramp, so that if there was any liability, it belonged to the landowner and not our client. Following the deposition, the Plaintiff's counsel agreed to dismiss our client with prejudice.

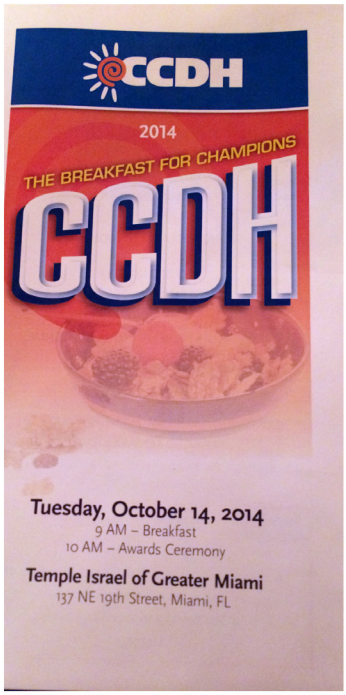
Scott Cole and **Katie Smith** of CSK's Appellate Group obtained affirmance of a final judgment in favor of our client in Fagan v. AMN, Healthcare, Inc., etc. et al., in the Second District Court of Appeal.

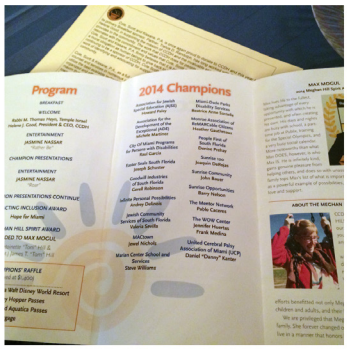
This matter involved allegations of medical negligence due to the Defendants' alleged failure to treat a blood clot that developed in the Plaintiff shortly after he underwent surgery. After four years of litigation and on the eve of trial, the Plaintiffs dismissed a key defendant from the litigation. As a result, the remaining Defendants moved to name this defendant as a Fabre defendant and to offer testimony relevant to his contributory negligence. The Plaintiffs objected, but declined the trial court's offer to continue the trial in order to allow further discovery to take place. After a three-week trial, the jury returned a complete defense verdict.

On appeal, the Plaintiffs argued that a new trial was warranted due to the "unfair strategic advantage" allegedly obtained by the defense when the trial court permitted testimony regarding the negligence of a non-party and, further, allowed the non-party to be placed on the verdict form. In response, the defense argued that testimony regarding the non-party's negligence could not be prejudicial since extensive discovery had already taken place regarding this former-party's alleged negligence. Moreover, the Plaintiffs, themselves, caused any prejudice by declining the trial court's offer to continue the trial for further discovery. Finally, the Defendants argued that, because the jury returned a complete defense verdict, the jury never reached the issue of apportionment of liability to the non-party.

The Second District agreed with the defense. After oral argument, the Second District issued a per curiam decision, affirming the final judgment on all grounds.

Breakfast For CHAMPIONS!





CSK is once again proud to donate to CCDH and this year to be its primary Breakfast sponsor. CCDH is Miami-Dade's lead agency for providing, coordinating and arranging for services benefitting people with developmental and other disabilities. Partner, Trelvis D. Randolph, has long worked with President, Helene Good, in supporting the mission of CCDH and the invaluable services that the organization provides to the community. The work that CCDH does for people with disabilities and their families resonates with the commitment and values that Cole, Scott and Kissane, P.A. has long espoused.

CSK firmly believes that it is both an ethical responsibility as attorneys and a moral obligation as human beings to give back to the communities in which we live and work. By continuing to be a sponsor of CCDH, CSK is proud to help advance the work of identifying and advocating for support and services to people with disabilities in our community.

Ice Bucket Challenge

Is that our Managing Partner, Richard Cole, getting warmed- up for an icy Soak? *It sure is!*

What began as a charitable challenge that flooded the internet (pardon the pun), quickly became an interoffice rivalry among CSK's attorneys and support staff. We are pleased to report that our efforts helped to raise a lot money and awareness for the ALS Association. CSK promotes a philosophy of community awareness and philanthropy and we are proud of all of the participants who not only braved the icy waters, but also gave generously to support such a worthwhile cause.

CSK Clothing Drive

CSK participated in a clothing drive (and a Collection of non-clothing items there are needed) in conjunction with the South Florida Association of Legal Administrators to provide items needed for the Lotus House Lotus House is an organization dedicated to improving the lives of homeless women, youth and children.

If you would like to donate here is a link that will describe items that would be helpful:

www.lotushouse.org/donate/view-our-wish-list/

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 February 25, 2015. Entries must be received by 12:00 p.m. (EST) on April 30, 2015. 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 May 1, 2015 and notified via e-mail by May 2, 2015. 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 May 10, 2015 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.

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