COLE, SCOTT & KISSANE, P.A.

LITIGATION QUARTERLY

June 2009

Appraisal in Supplemental Hurricane Claims: a Guide to Dealing With Appraisal Demands Several Years After the Original Adjustment of the Claim.

The Wake of Amendment 7: Moving Forward to Protect Privileged Information.

Got Chinese Drywall?

Realtors Beware: Avoiding Litigation in a Troubled Florida Real Estate Market.

The Lilly Ledbetter Fair Pay Act and its Impact on Employer Liability.

Non-Binding Arbitration Fla. Stat. 44.103 (2007) and Built In Proposal for Settlement.

Cole, Scott, & Kissane's Employment Consulting and Litigation Group: From the Boardroom to the Courtroom.

Using the PIP Fee Schedule to Properly Evaluate Bodily Injury Claims.

NICA: Florida's Innovative Alternative to Costly Litigation Involving Birth-Related Neurological Injuries.

Lender Beware: a Primer on Priority of Interest in the Face of Commercial Mortgage Modifications and Future Advances in the State of Florida.

Meet One of Our Lawyers: Joseph A. Wolsztyniak

In this issue

Meet One of our Attorneys

Practice Areas

Admiralty and Aviation
Appellate
Arbitration, Alternative Dispute Resolution and Mediation
Architects and Engineers
Bad Faith and Extra-Contractual Liability
Banking and Financial
Civil Rights Law
Commercial Litigation
Condominium & Community Association
Condominium Law
Construction & Surety
Construction Defects
Corporate, Transactional & Real Estate
Directors and Officers
Education Law
Employment & Labor
Environmental
Federal Practice
Fraud Litigation
General Civil Litigation
General Civil Litigation including Business/Commercial Law
Insurance Coverage & Carrier Representation
Intellectual Property
Nursing Home\Health Care
Premises Liability
Product Liability
Professional Malpractice
Professional Malpractice (Architects, Engineers, Physicians and other licensed professionals)
Securities
SIU Insurance Fraud Defense
Vehicle Negligence
Workers' Compensation

Attorneys

Greg Ackerman
Jeffrey Alexander
Jessica Anderson
Dania Arencibia
Francisco Armada
Heather Atkinson
Scott A. Bassman
Michael R. Beane
Rhonda Beesing
Rachel K. Beige
Mark Berlick
David P. Bradley
Michael E. Brand
Monett K. Brewer
Veronica Burianek
Christopher Burrows
Melissa L. Button
Anika Campbell
Ron M. Campbell
Cristina Castellvi
Andrea B. Chirls
Lee M. Cohen
Richard P. Cole
Scott A. Cole
John D. Coleman
Marco Commisso
David A. Cornell
Lara Dabdoub
Cassidy Dang
Don Detky
Temys Diaz
Michelle Dover
Lauren Fallick
Brian Forbes
Joshua Frachtman
Camille Frazer
Vincent Gannuscio
J. Cody German
Keith E. Gitman
Joshua Goldstein
Sheila M. Gonzales-Jonasz
Jami L. Gursky
Trevor G. Hawes
Tullio E. Iacono
Ramon Javier
Scott H. Jackman
Valerie Jackson
Dara Jebrock
Hilary Jonczak
Daniel J. Kissane
Gene P. Kissane
Joseph T. Kissane
Daniel J. Klein
Beth T. Koller
Keith Knight
Julie Kornfield
Brooke Lacy
Kip O. Lassner
Yueling E. Lee
Jana Leichter
Robert Malani
Giselle Mammana
Romina Marchese
Bradley D. Martin
Scott Mason
Miles A. McGrane IV
Aram P. Megerian
Kathleen Merwin
Jonathan M. Midwall
Abby Moeddel
Robert Morvay
Denise P. Murray
Craig Novick
Robert E. O'Quinn, Jr.
Devon Ombres
Yvonne Pandolfo
Nicole Panitz
Paula Parisi
John S. Penton, Jr.
Alejandro Perez
Paula Phillips
Brian Pita
Edward S. Polk
Barry A. Postman
Trelvis D. Randolph
Jennifer Reynolds
Eric T. Rieger
Robert Rightmyer
Colin Riley
Chad Robinson
Bryan A. Rotella
Brian D. Rubenstein
Armando Rubio
Genevieve Rupelli
Steven Safra
Henry Salas
David Salazar
Blake S. Sando
George Saoud
Tawna Schilling
Howard L. Scholl
Sherry Schwartz
Thomas E. Scott
Susan K. Sells
Diran V. Seropian
Daniel A. Shapiro
Stafford N. Shealy
Scott Shelton
Wesley Sherman
Michael W. Shiver
Justin D. Siegwald
Sally L. Slaybaugh
Jennifer Smith
Lee Smith
Patrick Snyder
Rachel Soffin
Justin Sorel
James T. Sparkman
Erin Spira
Karly Spira
Gregory Stark
Clarke S. Sturge
Robert A. Swift
Ashley Sybesma
Lisa M. Szulgit
Tara Tamoney
Ivan J. Tarasuk
Lonni D. Tessler
Areti Tsitsakis
Jennifer K. Valentin
Jennifer Viciedo
Jonathan Vine
Brandon Waas
Jonathan Weiss
Isaac Wannos
Hal Weitzenfeld
Ryan K. Williams
Joseph Wolsztyniak
Steven L. Worley
Anthony Yanez
Ross Zelnick

Editors: John Penton • Alejandro Perez • Angelica Velez (Graphics)

Appraisal in Supplemental Hurricane Claims:

By Maria Morris

A guide to dealing with appraisal demands several years after the original adjustment of the claim

Envision this all too common scenario: A residential hurricane claim is reported by an insured two weeks after the date of loss, adjusted by the insurance carrier, and paid within a couple of months from the date of loss. After payment, the insurer closes the file. Fast forward many months or even years later, when the insured reappears, invoking the policy's appraisal clause, providing the carrier with a copy of a representation agreement from a public adjuster, an estimate for hurricane damages that is usually much higher than the original adjustment, and a letter claiming there is a dispute over the amount of loss.

More than three years have passed since Hurricane Wilma hit South Florida, yet new and supplemental claims are filed every day related to this and other 2004 and 2005 storms. Many of these claims are pushed into appraisal, a procedural device contained in most policies to facilitate a binding alternative dispute resolution for claims where coverage has been acknowledged but the amount of loss is in dispute. This article focuses on how insurance carriers should respond to similar appraisal demands in supplemental hurricane claims and what steps carriers should take to prevent the appraisal of non-covered items.

Is the claim appropriate for appraisal?

Generally, the appraisal clause is the same or similar from one policy form to another. The following is the appraisal clause from the Conditions portion of an HO3 policy, which states as follows:

6. Appraisal. If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. 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 loss.

Each party will:

a. Pay its own appraiser; and
b. Bear the other expenses of the appraisal and umpire equally.

The policy clearly states that appraisal is appropriate if "you or we fail to agree on the amount of the loss," and Florida courts have analyzed what is considered an amount of loss question appropriate for the appraisal panel. When the insurer admits there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid.[1] However, where

coverage was denied as a whole by the insurer, a question of whether the loss was caused by a covered peril is not appropriate for determination by appraisal.[2]

Coverage issues are exclusively judicial questions.[3] However, if the insurer acknowledges a covered loss to the insured's property, then causation of the damages becomes an amount of loss question for the appraisal panel.[4] In *Kendall Lakes*, there was a large discrepancy between the insured's and the insurance carrier's estimate of the loss (the insurer said the loss was below the $1,000 deductible and the insured provided a $716,000 estimate), but because the insurer had not wholly denied that there was a covered loss, causation became an amount of loss question for the appraisal panel and not a coverage question.[5] Therefore, once the insurer acknowledges that there is a covered loss by making payment on the original adjustment of the claim, then the amount of the loss, scope of the loss, and the cause of the loss, whether a covered or non-covered cause, becomes appropriate for the appraisal panel's determination.

Investigation Prior to Agreeing to go to Appraisal

Although appraisal of the claim may be appropriate, the insurance carrier may still compel the insured to comply with their post loss obligations prior to agreeing to appraisal. In these supplemental hurricane claims, it is essential that the insurance carrier conduct an investigation prior to agreeing to appraisal to allow for an equal footing during the appraisal process. The carrier should acknowledge the appraisal demand in writing but advise that appraisal of the claim is premature because the insured has not complied with their post loss obligations, and the insured's compliance with their post loss obligations is necessary for there to be a dispute as to the amount of loss.

The courts have held that the existence of a real difference in fact, arising out of an honest effort to agree between the insured and the insurer, is necessary to render operative a provision in a policy for appraisal of differences.[6] Furthermore, there must be an actual and honest effort to reach an agreement between the parties, as it is only then, that the clause for arbitration becomes operative, the remedies being successive.[7] The exchange of information sufficient for the insurance carrier to arrive at a conclusion is accepted as a matter contemplated by the parties.[8] The courts have held that property insurance policies are not ambiguous as to the insureds' obligation to comply with duties after a loss before compelling appraisal, even though the appraisal clause does not mention the duties after loss; the policies were not susceptible to interpretation in opposite ways.[9] In reaching its decision, the USF&G Court stated that no reasonable and thoughtful interpretation of the policy could support compelling appraisal without first complying with the post-loss obligations.[10]

If the insured was not required to first comply with post loss obligations, then a policyholder, after incurring a loss, could immediately invoke appraisal to secure a binding determination as to the amount of loss. Accordingly, if there is additional information the insurer needs from the insured prior to engaging in appraisal, a request for this information should be made in response to the appraisal demand, advising that the insured is not entitled to appraisal until he has complied with his post loss obligations. The investigation should consist of an examination under oath and document request, focusing on the repairs that have been completed since the original adjustment of the loss, as well as the current damages being claimed. A proof of loss should also be requested, which requires the insured to commit to the public adjuster's estimate and prevents the insured's appraiser from submitting a higher estimate to the umpire during appraisal. Finally, a reinspection should be completed. In anticipation of the appraisal, the insurance carrier can have the reinspection completed by their expected appraiser. Ideally, the reinspection can be completed prior to the examination under oath and the appraiser can advise what information he/she needs to assist in their presentation to the umpire. All of the information gathered during the investigation should be provided to the appraiser for their use during the appraisal process.

Issues of Coverage revealed during investigation

As previously discussed, issues of coverage are to be resolved by the courts. In order to preserve any coverage defenses under the policy, the carrier can first request that the opposing appraiser agree to a memorandum of appraisal outlining the scope of the appraisal. While the opposing appraiser will often not agree to any limitations of the appraisal scope, the insurance carrier can file a Petition to Delineate or Limit the Scope to the appraisal, requesting that a court issue an order limiting the scope of the appraisal to the items in which the carrier has acknowledged coverage or requiring the umpire derive an amount of the total loss, breaking down that amount by exclusion causes. Appraisal awards issued in lump sums, with no explanation of how the amount was reached, precludes the insurance carrier from challenging specific coverage issues because there is no way of knowing whether the award included non-covered damages. Therefore, the insurer can argue that a delineation of the appraisal award is necessary, asserting that the courts have held that coverage issues are exclusively judicial questions and a lump sum award prevents the court from being the ultimate decided of issues of coverage.

Finally, a Petition for the Appointment of a Neutral Umpire can be used as an opportunity to spur the court to require the limitation of the scope of the appraisal or the umpire to delineate the scope of appraisal. The appraisal clause states that if the appraisers cannot agree upon an umpire within 15 days, "you or we may request that the choice be made by a judge of a court of record in the state where the 'residence premises' is located." Therefore, the carrier can essentially "kill two birds with one stone" by asking the court to issue an order limiting the scope of the appraisal to the items in which the carrier has acknowledged coverage or requiring the umpire derive at an amount of the total loss and to breakdown that amount by excluded causes as well as appointing the umpire. Therefore, when the umpire is notified of their court appointment, the carrier can also present them with the court's order regarding the scope or delineation of appraisal.

Conclusion

Even though the insurance carrier may be surprised when a demand for appraisal is received several years after they believed the claim to be paid and closed, it does not mean that insurance carriers have to enter the appraisal process blind and at the mercy of whatever information the insured's appraiser submits to the umpire. A simple but thorough investigation prior to engaging in the appraisal can help narrow the issues and ensure that the appraisal only addresses covered items, limiting the insurer's exposure to additional losses.

(Endnotes)

1 *State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996).
2 *Johnson v. Nationwide Mutual Insurance Company*, 828 So. 2d 1021 (Fla. 2002).
3 *Id.*
4 *Kendall Lakes v. Agricultural Excess and Surplus Lines Ins. Co.*, 916 So. 2d 12 (Fla. 3d DCA 2005).
5 *Id.* at 16.
6 *United States Fidelity & Guaranty Company v. Romay*, 744 So. 2d 467 (Fla. 3d DCA 1999).
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.* at 471.

Got Chinese drywall?

By Ashley N. Sybesma

Several hurricanes destroyed thousands of homes in South Florida and the Gulf Coast in 2005 and 2006. This, combined with the nationwide housing boom, resulted in short supplies of building supplies from roofs to drywall. Chinese manufacturers flooded the market, and American construction companies used millions of pounds of Chinese made gypsum boards and drywall. Shipping records reviewed by the Associated Press indicate that imports of potentially tainted Chinese building materials exceeded 500 million pounds during a four-year period; and that the drywall may have been used in more than 100,000 homes.[1] Two types of drywall were imported: half-inch standard drywall and 5/8-inch "fire rated" or type "X" drywall.[2] A majority of the drywall came into the country in 2006, during a domestic shortage due to the national housing boom, and because the Chinese drywall was cheaper.[3]

A recent study found that the Chinese-manufactured drywall contains higher levels of organic material and sulfuric compounds than its U.S. counterpart.[4] The study also found that "exposure to moisture accelerates the release of volatiles from the drywall."[5] The primary problem identified at this time is the potential that the drywall is emitting sulfur-based gasses that may corrode copper piping, air-conditioner coils, computer wiring, and metal picture frames.[6] It is still unknown what causes the reaction, but suggested problems include fumigants sprayed on the drywall and material inside it.[7] Another theory is that water used to mix the gypsum during manufacturing may have been wastewater that contained chemicals, including sulfur.[8] In addition, the drywall in China is made with a coal byproduct called "fly ash" which is less refined than the form used by U.S. drywall manufacturers.[9] As of the writing of this article, no health problems have been definitively linked to the drywall. In early April 2009, however, a letter sent by Florida Governor Charlie Crist requested the U.S. Environmental Protection Agency (EPA) and the Centers for Disease Control and Prevention (CDC) to step in and inspect homes and evaluate possible health hazards.

There are some key ways to identify if a home or commercial property was built, in whole or in part, using potentially-defective Chinese drywall. All products imported into the U.S. are required to indicate the country of origin. As such, a simple means of ascertaining whether the material is Chinese Drywall is to locate a sticker or stamp on the back of the drywall that says "Made in China." Another means is to look for the name of one of the manufacturers which may indicate it is possibly a variety of Chinese drywall, "Knauf Plasterboard Tianjin (KPT)" or "Taishan Gypsum." Another way the drywall may be detected is due to a smell of rotten eggs, which is caused by sulfur gasses being released into the air. The odor is more likely to be present in areas with high humidity.

One should also check the copper piping located in the wall near the potentially defective drywall. There are two colors to remember when conducting this check: green and black. The natural color of copper is pinkish with a bright metallic luster. Copper turns green after exposure to air in a process called oxidation. The outer green layer, formed after the oxidation of copper, is known as patina. Patina acts as a protective layer and prevents further corrosion of copper beneath the oxidized layer and very often can act as a waterproofing layer.[10] If the copper pipes are green, then this is normal oxidation and a good sign. If, on the other hand, the piping is black, this is a potential sign of corrosion caused by sulfur gases.

The concern now becomes how significant will defective Chinese drywall be, among the already growing construction defect and product liability litigation in Florida. A quick Internet search provides easy access to several Plaintiff firms jumping on the potential litigation including chinesedrywall.com and defective-chinese-drywall-lawsuit.com. On January 30, 2009, Lennar Corp. filed the first class action lawsuit on behalf of homeowners and a separate product liability case. Both lawsuits are targeting manufacturers, distributors, and installers of the drywall.[11] Only a short time later, in February 2009, a class-action lawsuit was filed in U.S. District Court for the Southern District of Florida against Lennar Corp. Lennar has stated that it has been inspecting homes it built that might have the Chinese drywall and paid to have the drywall, ventilation and air conditioning systems replaced.[12]

One of the manufacturers targeted is Knauf Platerboard Tianjin. Although Knauf

Tianjin has acknowledged its drywall was defective, it has claimed there is no indication the drywall causes health problems.

Lennar Corp. was not alone in obtaining and installing the Chinese drywall as other builders include: Taylor Morrison, WCI Communities, Meritage Homes, Ryland Homes, Standard Pacific Homes, and Aubuchon Homes. The potential defects, however, are not limited to Florida, as complaints have been reported in California, Arizona, Ohio, Texas, Louisiana, Nevada, the Carolinas, Georgia, Mississippi, and Virginia.

Liability for defective drywall may fall on manufacturers, distributors, builders, contractors, architects or engineers, designers, construction firms and inspection teams. Even insurers are not immune from potential lawsuits. Some of the potential causes of action include tort liability for negligently manufacturing and selling the drywall which was "unreasonably dangerous," strict products liability, and breach of warranty. There may be questions regarding whether any of the parties were on notice that the drywall was potentially defective, based on the weight and composition compared to domestic drywall. There is some early indication that the Chinese drywall was heavier and broke differently.[13]

It has also been suggested that insurers may be named directly in lawsuits for first-party claims under homeowners and commercial property policies. This is in addition to third-party claims under liability policies for drywall distributors, builders, and installers. Michael Hamilton, a partner with Nelson Levine deLuca & Horst, predicted that "there will be actions filed directly against insurance companies," similar to after-market parts type litigation in the auto insurance arena.[14] Suspected damages include specification damages and installation damages. "Specification damages" are the actual specification of Chinese drywall on repair estimates. "Installation damages" are the cost of removing the defective drywall.[15]

However, there may be applicable policy exclusions in contractor's general liability insurance policies, which could result in uninsured losses for builders and drywall subcontractors. Most of the aforementioned policies contain a pollution exclusion. It may be argued that the sulfur dioxide fumes allegedly released by the Chinese drywall are "pollution" under the pollution exclusion. "Pollutants" are quite broadly defined as any solid, liquid, gaseous, or thermal irritant or contaminant; and includes smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.[16] Should the use of the total pollution exclusion be upheld by local courts, this could result in property owners directly targeting US distributors of Chinese drywall, in addition to targeting the corporate and/or personal assets of builders and drywall subcontractors.

At this time, the area of potentially defective Chinese drywall litigation is an emerging legal issue. While Chinese drywall has caused both property damage and potentially has health ramifications, the full impact and scope of the problem have yet to be quantified. As more testing is done and more lawsuits are filed, the litigation surrounding Chinese drywall could be a booming area of litigation in both construction defect and products liability.

(Endnotes)

1 The Associated Press. "AP: Chinese drywall poses potential risks; Officials investigation cause of rotten-egg stench, health complaints." *MSNBC.com*, 11 April 2009. (http://www.msnbc.msn.com/id/30169267).

2 Wiggins, Sheila Raftery. "'The Writing Is on the Wall': Defective Drywall Claims Prompt More Legal Action." *Building & Bonding: The Construction Group Newsletter,* Spring 2009. (http://www.duanemorris.com/articles/article3209.html).

3 *Id*.

4 Ross, Allison. "Chinese drywall may be sulfur source." *PalmBeachPost.com,* 23 March 2009. (http://www.palmbeachpost.com/business/content/business/epaper/2009/03/23/a6b_drywallvizcaya_0324.html).

5 *Id*.

6 Corkery, Michael. "Chinese Drywall Cited in Building Woes." The Wall Street Journal 12 January 2009: A3.

7 The Associated Press. "AP: Chinese drywall poses potential risks; Officials investigation cause of rotten-egg stench, health complaints." *MSNBC.com,* 11 April 2009. (http://www.msnbc.msn.com/id/30169267).

8 Wiggins, Sheila Raftery. " 'The Writing Is on the Wall': Defective Drywall Claims Prompt More Legal Action." *Building & Bonding: The Construction Group Newsletter,* Spring 2009. (http://www.duanemorris.com/articles/article3209.html).

9 *Id*.

10 Sandhyarani, Ninthoujam. "Why Does Copper Oxidize and Turn Green." *Buzzle.com,* 29 April 2009. (http://www.buzzle.com/articles/why-does-copper-oxidize-and-turn-green.html).

11 Brinkman, Paul. "Some drywall issues were quietly settled." *South Florida Business Journal,* 9 February 2009. (http://southflorida/stories/2009/02/09/story2.html).

12 Veiga, Alex. "Lennar named in Chinese-made drywall lawsuit." *The Associated Press,* 20 April 2009.

13 *See*. Wiggins, Sheila Raftery. " 'The Writing Is on the Wall': Defective Drywall Claims Prompt More Legal Action." *Building & Bonding: The Construction Group Newsletter,* Spring 2009. (http://www.duanemorris.com/articles/article3209.html).

14 Sclafane, Susanne. "Insurers Could Be Named In Drywall Suits: Legal Expert." *P&C National Underwriter,* 21 April 2009. (http://www.property-casualty.com/News/2009/4/Pages/Insurers-Could-Be-Named-In-Drywall-Suits-Legal-Expert.aspx).

15 *Id*.

16 Sadler, John. "Chinese Drywall: Builders, Subs Face Huge Uninsured Losses." *Contractor Insurance And Risk Management Blog*. 23 April 2009. (http://www.contractor-insure.com/blog/index.php/2009/04/chinese-drywall-builders-subs-face-huge-uninsured-losses).

THE LILLY LEDBETTER FAIR PAY ACT AND ITS IMPACT ON EMPLOYER LIABILITY

By Joshua A. Goldstein

In January, 2009 President Obama signed into law the "Lilly Ledbetter Fair Pay Act of 2009." The Act, in effect, overturns the widely publicized Supreme Court decision in *Ledbetter v. Goodyear Tire and Rubber Co.* In that case, Ledbetter worked for Goodyear for the approximately 19 years, but in 1988, as she was close to retirement, she learned that her male colleagues were making significantly more money than she was, and had been doing so for close to her entire employment.[1] Ledbetter commenced an action based upon Title VII of the Civil Rights Act of 1964 for pay discrimination and the Equal Pay Act of 1963, 29 U.S.C. 206(d).[2]

The court held that plaintiff, Lilly Ledbetter, was estopped from suing her employer Goodyear Tire for pay discrimination because she did not file her complaint within the then statutorily required 180 days from the date of the first instance of discrimination.[3] Title VII requires an individual challenging an employment practice to first file a charge with the Equal Employment Opportunity Commission, within a specified period after the alleged unlawful employment practice occurred. In Ledbetter's case, the charge had to be filed within 180 days.[4] "The EEOC charging period is triggered when a **discrete unlawful practice takes place**."[5] However, "a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts" that are the result of the prior discriminatory acts.[6] Similarly, while a new EEOC charging period is triggered whenever an employer issues paychecks based upon a discriminatory pay structure, in violation of Title VII, "[a] new charging period **is not triggered** when an employer issues paychecks pursuant to a system that is 'facially nondiscriminatory.'"[7] Thus, the court reasoned that the later effects of Goodyear's past discrimination did not reset the clock for Ledbetter to file a charge with the EEOC, and therefore, her claims were untimely.

The new act amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 and modifies the operation of the American with Disabilities Act of 1990 and the Rehabilitation Act of 1973.[8] The need for this amendment was based on Congress's finding that

> [t]he Ledbetter decision undermines those statu tory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.[9]

A majority in Congress believed that the Supreme Court's decision put an unnecessary burden on employees to (1) realize that they were not being treated fairly, (2) to timely file within 180 days of the first instance of discrimination, and (3) prevented any recovery if the employee did not timely file within 180 days from the date of the first instance of discrimination.

This Act, in turn, seeks to remove those burdens and inequities. Specifically, the Act amends Title VII's section on discrimination in compensation based upon race, color, religion, sex or national origin, by adding that

> 3(A) For the purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation..., when a discriminatory compensation decision or other practice is adopted, ... [becomes subject to same], or when an individual is affected by... [the application of same], including **each time wages, benefits, or other compensation is paid**, resulting in whole or in part from such a decision or other practice.
>
> 3(B) Liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back

> pay **for up to two years** preceding the filing of the charge, where the unlawful employment practice that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation….[10]

This added language effectively eliminates those burdens the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber* imposed, by in essence resetting the 180 day statute of limitations period each time wages, benefits or any other compensation is paid out, based upon the original discriminatory decision.

This is a major change in the law, and critics of the legislation charged that it opens employers to law suits by its employees filed at any point during their employment when and if they discover a discriminatory inequity. Yet, while this subjects employers to the potential of being sued based upon decisions made several years prior,[11] the potential liability for remedies such as back pay do not relate back to the alleged first occurrence of a discriminatory decision. Instead, the aggrieved employee will be entitled to back pay for up to two years preceding the filing of the charge. The law applies retroactively, to any claim filed on or after May 27, 2007, the day before the Supreme Court published its opinion.[12]

Although the overall effect this Act will have is still unknown, it has many companies increasing their litigation budgets for fear of what is "coming down the pipeline."[13] Given the current economic crisis which has many companies making large scale lay-offs, and the unemployment rate steadily rising, there is a fear that more and more employees will be filing employment discrimination suits. Employers must now continuously maintain detailed documentation of any action relating to employee, including but not limited to salary or wage decisions, in order to avoid and/or adequately defend against those suits filed.

(Endnotes)

1 *Ledbetter v. Goodyear Tire and Rubber, Co.*, 550 U.S. 618 (2007)
2 *Id.*
3 *Id.*; *see also* 42 USC § 2000e-5 (2007).
4 *Id. citing* 42 U.S.C. § 2000e-5(e)(1) and (f)(1).
5 *Ledbetter*, 550 U.S. 628.
6 *Id.*
7 *Id.* at 636 (emphasis added).
8 Lilly Ledbetter Fair Pay Act of 2009, 123 Stat 5 (West 2009); The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 was amended to reflect the language in section 3(A) below, *supra* note 6; American with Disabilities Act of 1990, is modified to apply to claims of discrimination in compensation set forth in section 3, *supra* note 6, for claims brought under 42 U.S.C. § 12111 et seq., 12203; the Rehabilitation Act of 1973 is modified to apply to claims of discrimination in compensation set forth in section 3, *supra* note 6, for claims brought under 29 U.S.C § 791 and 29 U.S.C. § 794.
9 *Id.*
10 *Id.* (emphasis added); *see also* 42 U.S.C. § 2000e-5(e)(3)(b) (West 2009).
11 *See e.g. supra* note 1 (where in Ledbetter filed suit based upon decisions made 19 years prior).
12 *Supra* note 3.
13 Brian Katkin, *GCS Warned to Prep Litigation War Chest Employment Lawyers Say Significant Shift In Labor Laws Combined With Mass Layoffs Will Lead To More Suits*, Legal Times, February 2, 2009, *available on Westlaw at* 2/2/2009 LegalTimes 11.

Cole, Scott, & Kissane's Employment Consulting and Litigation Group:

From the Boardroom to the Courtroom

Have you ever wondered if your employees are appropriately classified under the FLSA for purposes of overtime compensation?

Have you had your employee handbook reviewed to avoid future litigation, or do you even have one?

Our employment lawyers are experienced counselors and litigators in both federal and state employment statutes, including discrimination laws and the Fair Labor Standards Act and are integrally familiar with the agencies and courts that administer those laws. Our attorneys collaborate with you to innovatively address the everyday human resource issues that all companies face. For example, we can assist with developing, reviewing and revising Employee Handbooks and the policies therein, to ensure that they reflect the current state of the law and will best protect your business from litigation. We can also conduct company-wide and/or management training on a variety of topics, including workplace harassment, diversity, and EEO compliance. Our attorneys also regularly assist employers on issues arising under wage and hour laws, including the proper classification of exempt and non-exempt employees.

Please contact Barry A. Postman, the managing partner of our Employment Consulting and Litigation Group, to assist you with all your employment law needs – from the boardroom to the courtroom.

Barry A. Postman, Esq.
1645 Palm Beach Lakes Blvd.
2nd Floor
West Palm Beach, FL 33401
561.383.9241
Barry.Postman@csklegal.com

By Giselle Mammana

Florida's Innovative Alternative to Costly Litigation involving Birth-Related Neurological Injuries

Unbeknownst to many in the medical malpractice community, Florida legislators have passed a government-funded alternative to litigation for claimants seeking to sue treating physicians for birth-related neurological injuries during labor, delivery, or in the immediate post-delivery period. This well-preserved secret is called the Florida Birth-Related Neurological Injury Compensation Association Plan ("NICA Plan").[1] This tort-reform system is intended to resolve certain catastrophic claims in a streamlined, administrative forum in lieu of costly legal proceedings.

NICA ensures that birth-injured infants receive the lifetime care and compensation they need while reducing the financial burden on medical providers and families by eliminating costly legal proceedings. NICA serves a three-fold purpose. First, it encourages physicians to practice obstetrics with a diminished fear of lawsuits. Second, it stabilizes and makes malpractice insurance available to all physicians. Finally, it provides the needed care to injured infants.

The NICA Plan is available to eligible families statewide, without litigation, after their child has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury.[2] The NICA Plan is an exclusive compensation plan that is only available if there has not already been a settlement in a malpractice lawsuit. Covered claims are paid on a no-fault basis.[3] Significantly, however, the NICA Plan does not bar lawsuits presenting clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety or property arising out of or related to a medical malpractice claim.[4]

To be eligible for the NICA Plan, the general criteria for birth-related neurological injury[5] must be met. First and foremost, the infant must be born alive and must have sustained injury to the spinal cord or the brain. The injury must have been caused by oxygen deprivation or mechanical injury during labor, delivery, or resuscitation immediately after delivery. The birth had to occur in a hospital. The weight at birth must be at least 2500 grams at birth or 2000 grams in the care of multiple gestations. The child must be permanently and substantially mentally *and* physically impaired,[6] especially since the Plan does not apply to genetic or congenital abnormalities. Notably, pursuant to *Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Administrative Hearings,*[7] the infant must suffer both substantial mental and substantial physical impairments,[8] and it is insufficient that the infant suffer only substantial impairment, mental or physical. Finally, and most importantly, there must be a participating physician, as defined in Fla. Stat. § 766.302(7).[9] Since the NICA statute is strictly construed to include only "participating physicians," hospitals, nurses and hospital staffing agencies are not eligible to participate in this plan.[10]

Unfortunately, this is not an automatic option for all medical providers in obstetrics. Only participating physicians and OBGYNs who pay the annual assessment of $3,000 can opt to participate in this compensation plan. Once a participating physician is active in the program, the participating physician is required to inform obstetrical patients of the NICA Plan by providing a brochure that explains the program to expecting mothers.[11]

Another drawback to the NICA Plan is that physicians, being sued for medical negligence related to neurological injuries at delivery, cannot file the petition for benefits on behalf of the claimant or plaintiff suing for medical negligence.[12] Only the child's legal parent or guardian can file the petition with the Florida Division of Administrative Hearings.[13] Nevertheless, a defendant physician can plead an affirmative defense of the plaintiff's eligibility for the NICA Plan.[14] The opportunity for filing the petition terminates on the child's fifth birthday.[15]

The decision on whether a child is covered under the NICA Plan is made by an

administrative law judge.[16] The circuit court, however, has jurisdiction to determine whether an infant's injury falls within the definition of birth-related neurological injury without deferring to an administrative hearing.[17] The administrative law judge has exclusive jurisdiction to determine whether a claim filed under NICA is compensable[18] and whether sufficient notice was given to the expecting mother as to the physician's participation in the NICA Plan.[19] The administrative law judge must set the hearing date no sooner than 60 days and no later than 120 days after the claimant files the petition.[20]

An administrative law judge's findings of fact are reversible on appeal when they are not supported by competent substantial evidence in the record or where the agency's interpretation of the law was clearly erroneous.[21] Once the petition is accepted by an order from the judge, the child is covered for a lifetime, and no other compensation from a malpractice lawsuit is available. Notably, this exclusive compensation plan is only available if there has not already been a settlement in a malpractice lawsuit. Additionally, if the petitioner cannot recover under NICA, the petitioner may be entitled to pursue remedies within the judicial system and outside of the NICA Plan.[22]

The NICA Plan offers various benefits for eligible families. NICA provides assistance with medical care, co-pays, equipment, therapy, nursing care, medications, handicap modifications, transportation, and supplies that are medically necessary and are not covered by a collateral source, such as insurance or Medicaid. In contrast, the NICA Plan benefits do not include payments made from insurance, state government, federal government, or from other collateral sources.[23]

These coverage benefits continue throughout the child's lifetime and, depending on the child's circumstances, may provide services not available through other sources. For example, NICA will provide diapers and baby food for children after the age of two. The NICA Plan benefits require that expenses previously incurred be paid immediately and that future expenses be paid as they are incurred.[24]

In conclusion, medical malpractice defense attorneys must be cognizant of the NICA Plan. There may be instances where a claimant files a medical malpractice action against a physician in circuit court, as opposed to seeking benefits under the NICA Plan. In such a situation, the defense attorney should raise the exclusive remedy of the NICA Plan as an affirmative defense, thereby raising the issue whether the infant suffered compensable injury under the NICA Plan. In such a scenario, an administrative law judge, rather than the circuit court judge, would have jurisdiction to determine whether the claim falls under the NICA Plan. Assuming that the claim fals under the NICA plan, litigation costs for these high-risk medical specialists would be dramatically curtailed.

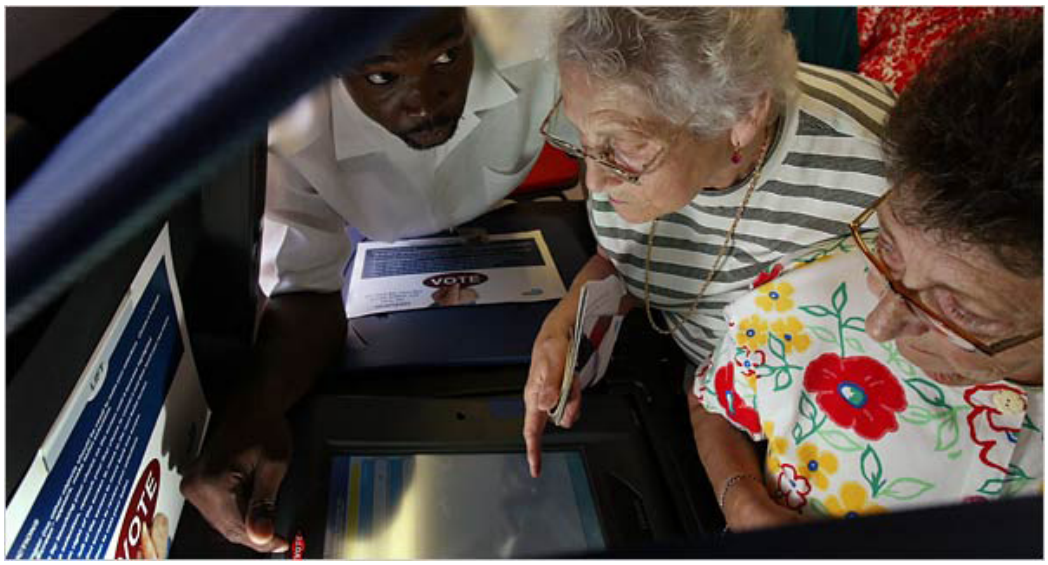
(Endnotes)

1 Fla. Stat. § 766.315 (establishing NICA); Fla. Stat. § 766.302(1); see also Fla. Stat. § 766.303 (establishing the plan).
2 The NICA Plan only applies to births occurring on or after January 1, 1989. *See* Fla. Stat. § 766.303(1).
3 *White v. Florida Birth-Related Neurological*, 655 So. 2d 1292 (Fla. 1995).
4 Fla. Stat. § 766.303(2).
5 Fla. Stat. § 766.302(2) (defining "birth-related neurological injury).
6 *Adventist Health System/Sunbelt, Inc. v. Florida Birth-Related Neurological Injury*, 865 So. 2d 561 (Fla. 5th DCA 2004) (holding that physical disabilities that impede the cognitive and social development of a child are not alone enough to constitute a "substantial mental impairment" under the NICA statute). *But see Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Administrative Hearings*, 686 So. 2d 1349 (Fla. 1997) (holding that the infant was eligible for NICA benefits after finding the infant was both permanently and "substantially mentally and physically impaired" due to oxygen deprivation and a focal injury to the basal ganglia).
7 686 So. 2d 1349 (Fla. 1997).
8 *See Matteini v. Florida Birth-Related Neurological*, 946 So. 2d 1092 (Fla. 5th DCA 2006) (interpreting "physical impairment" to mean an infant's motor abnormalities or impairment of his physical functions, which along with the brain injury, significantly affects the infant's mental capabilities so that the infant will not be able to translate his cognitive capabilities into adequate learning or social development in a normal manner).
9 Fla. Stat. § 766.302(7) (defining "participating physician" as a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred).
10 *Depart, CNM v. Macri*, 902 So. 2d 271 (Fla. 1st DCA 2005) (holding that the administrative law judge had no jurisdiction to hear the certified nurse midwife's claim that she was immune from civil action due to NICA because the NICA statute, strictly construed, only involves "participating physicians"); *see also* Fla. Stat. § 766.303(2) and § 766.309(1).
11 Fla. Stat. § 766.304; Fla. Stat. § 766.316.
12 *Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan*, 668 So. 2d 974 (1996) (stating that statute providing that claim for benefits under NICA may be filed only by the legal representative of the injured infant who is affirmatively seeking such benefits).
13 Fla. Stat. § 766.305 (stating the procedure for filing a claim); *see also* Fla. Stat. § 766.302(3) (stating that a claim may be filed by any legal representative on behalf of an injured infant).
14 *Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Administrative Hearings*, 948 So. 2d 705 (Fla. 2007); *Weinstock v. Houvardes*, 924 So. 2d 982 (Fla. 2d DCA 2006).
15 Fla. Stat. § 766.313.
16 Fla. Stat. § 766.309.
17 *Humana of Florida, Inc. v. McKaughan on behalf of McKaughan*, 652 So. 2d 852 (Fla. 2d DCA 1995).
18 Fla. Stat. § 766.304; Fla. Stat. § 766.316.
19 Fla. Stat. § 766.316 (stating that every physician participating in the NICA Plan, and every hospital with a participating physician on its staff, must provide notice to each obstetrical patient of the limited no-fault alternative for birth-related neurological injuries); *see also O'Leary v. Florida Birth-Related Neurological Injury Compensation Ass'n*, 757 So. 2d 624 (Fla. 5th DCA 2000).
20 Fla. Stat. § 766.307(1).
21 *Nagy v. Florida Birth-Related Neurological Injury Compensation Ass'n*, 813 So. 2d 155 (Fla. 4th DCA 2002).
22 *See id.*
23 Fla. Stat. § 766.31(1).
24 Fla. Stat. § 766.31(2).

THE WAKE OF AMENDMENT 7:

By Paula J. Parisi & Areti G. Tsitsakis

Moving Forward to Protect Privileged Information



The Amendment: Discoverable Adverse Incident Reports

Florida residents voted to pass Amendment 7 on November 2, 2004, which became Article X, Section 25 of the Florida Constitution. The Amendment provides patients access to "any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." The legislation then passed Florida Statute Section 381.028 in an effort to implement the Amendment. The statute grants patients access to "records of adverse medical incidents, which records were made or received in the course of business by a health care facility or provider."[1] However, the access is subject to the restrictions set forth in other sections of the code, such as Florida Statute Section 766.101, which protects the investigations, proceedings, and records of medical peer view committees[2] from "discovery or introduction into evidence in any civil or administrative action."[3] Section 381.028 also defines "records" as only the final reports of adverse medical incidents.[4]

Diverse Judicial Interpretation

In 2008, the Florida Supreme Court in the case of *Florida Hospital Waterman, Inc. v. Buster,* held that the Amendment is self-executing and retroactive, applying to adverse medical incidents occurring prior to the date of passage.[5] The Court also held unconstitutional the provisions of Florida Statute Section 381.028[6] pertaining to the discoverability of only final reports of adverse medical incidents. This includes documents created during the peer review process. To justify the effect of the Court's decision on the seemingly protected peer review process, the Court reasoned that realistically the statutes affording confidentiality for peer review committees merely limit the discovery of committee proceedings in judicial or administrative actions. The statutes do not prevent the use of the information at the medical institution involved or amongst the medical community.[7] As such, the statutes do not create a privilege or vested right.[8]

The Court also held unconstitutional the provision allowing only patients at a particular medical institution to access that institution's records.[9] Essentially, the Court upheld the statute as a whole, and severed the unconstitutional provisions.[10]

Since the *Waterman* decision and its elimination of the shell protecting the peer review process, District Courts have been all over the spectrum with regard to the reach of Amendment 7. In a defamation case between two physicians, which included a claim for tortious interference with a business relationship, one of the physicians claimed the other misappropriated a patient.[11] The patient filed an affidavit requesting peer review materials related to the patient's adverse medical incident.[12] The Fourth District Court of Appeal held the request appropriate, reasoning that the Amendment "does not require the information a patient seeks to be relevant to a pending medical malpractice action or to a medical care decision."[13] The court also held the Amendment also does not restrict the patients' subsequent revelation of the information.[14] Clearly, this is a devastating and overly broad interpretation of this already too liberal Amendment.

Conversely, in a medical malpractice action, the Third District Court of Appeal held the blanket disclosure of the complete credentialing files of the defendant physicians violated the Florida Statutes.[15]

Medical institutions can take some solace by virtue of Amendment's application only to records. Protective guards remain against liability, compelling testimony, identity of peer reviewers, use of information in litigation, and attorney-client and work product information.[16] As such, these institutions can transform the peer review process aimed at potential claims into attorney-client privileged communications.[17] **The institutions can and should include counsel during root cause investigations and meetings**. However, the Supreme Court may re-establish the limits of the attorney-client privilege in light of this certain future use and potential misuse of the privilege.[18]

Another avenue for challenging the Amendment arises from a claim of federal preemption. Though the federal government promotes the free flow of medical information through Hospital Compare[19] and other tools,

the Patient Safety and Quality Improvement Act of 2005 provides incentive to medical institutions by offering a privilege that protects patient safety work product from subpoena or discovery.[20] This law could form the basis for a preemptive challenge to Amendment 7. One case based on this theory involved individual patients challenging Amendment 7 in federal court who argued federal statutes requiring the confidentiality of certain records preempt Amendment 7, which violates the United States Constitution.[21] The issue did not reach a conclusion, however, as the plaintiffs opted to dismiss the suit.[22] The claim lingers and will likely regain momentum in the near future.

In addition to the aforementioned options and recommendations, medical institutions may also consider the following practices in the wake of Amendment 7:

- Replacing the peer review rating system with a system of concise narratives that are less apt to be misinterpreted by a layperson;
- Tracking the identity of a peer reviewer by a method other than one requiring signatures on each peer review document;
- Substituting oral discussions for written letters and other documents;
- Deleting overly broad and negative language from peer review forms;
- Beginning each peer review committee meetings with a comment that discussions are confidential as between the participants in the committee and/or inclusion of the institution's counsel within the meeting;
- Reviewing draft copies of the minutes from peer review committee meetings and ensure the final does not contain a reviewer's signature;
- Auditing peer review criteria, bylaws, rules/regulations, and quality improvement plans and procedures;
- Allowing a flexible peer review process for cases involving anticipated litigation;
- Including only facts and observations in incident reports and omit all speculative commentary;
- Including narrative opinions in documents using statistics to show trends in incidents;
- Changing the purpose of the peer review committee to a general statement regarding improvement of general quality; and,
- Considering having patients sign a confidentiality agreement upon presentation to the institution.[23]

Amendment 7 still spurs a great deal of controversy. As the Amendment "heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality in order to foster disclosure of information,"[24] medical institutions will endeavor to be able to self police and improve the profession without the fear of completely transparent exposure… without such an ability, the medical profession will merely suffer and weaken as the threat of litigation becomes reality.

(Endnotes)

1 Fla. Stat. § 381.028 (2008).
2 A committee "formed to evaluate and improve the quality of health care rendered by providers of health service or to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care or that the cost of health care rendered was considered reasonable by the providers of professional health services in the area." § 766.101.
3 Fla. Stat. § 766.101.
4 Fla. Stat. § 381.028.
5 *Florida Hospital Waterman, Inc. v. Buster* 984 So.2d 478 (Fla. 2008).
6 The following aspects of Florida Statute Section 381.028 conflict with Amendment 7: "(1) the statute only allows for final reports to be discoverable, while the amendment provides that "any records" relating to adverse medical incidents are subject to the amendment; (2) the statute only provides for disclosure of final reports relating to the same or a substantially similar condition, treatment, or diagnosis with that of the patient requesting access; (3) the statute limits production to only those records generated after November 2, 2004; and (4) the statute states that it will have no effect on existing privilege statutes." *Waterman,* 984 So.2d at 492.
7 *Id.* at 490-491.
8 *Id.*
9 *Id.*
10 *Id.*
11 *Amisub North Ridge Hosp., Inc. v. Sonaglia*, 995 So.2d 999 (Fla. 4th DCA 2008).
12 *Id.*
13 *Id.*
14 *Id.*
15 *Baptist Hospital of Miami, Inc. v. Garcia*, 994 So. 2d 390 (Fla. 3d DCA 2008). The court reasoned that the entire file likely contained documents not discoverable pursuant to Sections 395.0191(8) and 766.101(5) of the Florida Statutes. *Id.* at 393.
16 *See* Peer Review in Florida Since Constitutional Amendment 7 Passed, http://www. benedictriskmanagement.com/docs/Peer_review_06062006.pdf.
17 *See* Riding the Red Rocket: Amendment 7 and the End to Discovery Immunity of Adverse Medical Incidents in the State of Florida, http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/ 8c9f13012b96736985256aa900624829/258fdd31c33e3cda85257567006b3148?OpenDocument.
18 *See* Riding the Red Rocket: Amendment 7 and the End to Discovery Immunity of Adverse Medical Incidents in the State of Florida, http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/ 8c9f13012b96736985256aa900624829/258fdd31c33e3cda85257567006b3148?OpenDocument.
19 Hospital Compare is a tool that provides information on how well hospitals care for patients with certain medical conditions or surgical procedures, and results from a survey of patients about the quality of care they received during a recent hospital stay. *See* http://www.hospitalcompare.hhs.gov/Hospital/Search/ Welcome.asp?version=default&browser=IE%7C7%7CWinXP&language=English&defaultstatus=0&pagelist=Home.
20 42 U.S.C. § 299b-22.
21 *See* Riding the Red Rocket: Amendment 7 and the End to Discovery Immunity of Adverse Medical Incidents in the State of Florida, http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/ 8c9f13012b96736985256aa900624829/258fdd31c33e3cda85257567006b3148?OpenDocument.
22 *See* Riding the Red Rocket: Amendment 7 and the End to Discovery Immunity of Adverse Medical Incidents in the State of Florida, http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/ 8c9f13012b96736985256aa900624829/258fdd31c33e3cda85257567006b3148?OpenDocument.
23 *See* Peer Review in Florida Since Constitutional Amendment 7 Passed, http://www. benedictriskmanagement.com/docs/Peer_review_06062006.pdf.
24 *Waterman,* 984 So.2d at 494.

REALTORS BEWARE:

By J. Cody German

Avoiding Litigation in a Troubled Florida Real Estate Market

As once happy real estate purchasers watch their property values plummet, it can be no surprise that these purchasers are upset and looking for someone to blame for their once proud investment becoming their new found liability. Unfortunately, there seems to be a sudden increase in lawsuits against real estate agencies and real estate agents throughout the country, and particularly in Florida. *See* David Streitfeld, *Feeling Misled on Home Price, Buyers Sue Agent*, N.Y. Times (Jan. 22, 2008). The most common basis for these lawsuits involves allegations that the real estate agencies and/or real estate agents misled the buyers throughout the subject purchase.

However, the good news is that Florida law tends to favor both real estate agencies and real estate agents. For example, in Florida, there is a presumption that a real estate agent is acting as a transaction agent, unless a single agent relationship is established, in writing, with a customer. *See* § 475.278(2)(a), *Fla. Stat*; *see also Burchfield v. Realty Executives*, 971 So.2d 138, 139-140 (Fla. 5th DCA 2007). In Florida, a transaction agent owes their clients a duty to deal honestly and fairly, to use skill, care, and diligence, and to ensure limited confidentiality. *See* § 475.278(2)(a), *Fla. Stat*. This is helpful in defending real estate malpractice lawsuits because a transaction agent is one who provides only limited representation to a buyer, a seller, or both, in a real estate transaction, but does not represent either in a fiduciary capacity or as a single agent. Accordingly, an agent who has not executed a written single agent agreement with a principal has no fiduciary duty to the principal because a written agreement is the only way to rebut the statutory presumption that the real estate agent is acting as a transaction agent. *See* § 475.278(3)(b), *Fla. Stat*.

Because a transaction agent does not have a fiduciary relationship with its clients, the agent is not subject to a breach of fiduciary duty claim by the Plaintiff. Therefore, it may be advisable that a real estate agent not sign a single agency agreement with their client, as a transaction agent has less exposure, and stands in a better legal position with respect to potential litigation.

Real estate brokers can be held vicariously responsible for the conduct of their agents. However, recent Florida court decisions have held that a real estate broker is not vicariously liable for the negligence of its independent contractor real estate agents, even when the agent is operating under the name/letterhead of the broker firm. *See* Order Granting M.S.J, *Cent. Land Dev. v. Weits, et al.*, No. 07-14377, 2009 WL 252091, at *5 (S.D. Fla. Jan. 30, 2009). These decisions are fact specific and based upon a finding that the real estate licensee is an independent contractor of the real estate agency, as generally, an employer is not liable for the torts of an independent contractor. *See Hubbard Const. Co. v. Orlando/Orange County Expressway Auth.*, 633 So.2d 1154, 1155 (Fla. 5th DCA 1994). Florida courts consider some of the following factors in determining whether a real estate agent is an independent contractor of the real estate agency:

1. Whether the agent and the real estate agency entered into an Independent Contractor Agreement;
2. Whether the agent was free to determine their own business hours and to choose their own target clients, marketing techniques and sales methods;
3. Whether the agent had authority to incur obligations on behalf of the agency;
4. Whether the agent was to abide by the agencies policies concerning unsolicited sales practices, privacy issues, registration of domain names, and the use of the agencies trade name and logo on the agents' literature;
5. Whether the agency had employment policies and guidelines which the agent was obligated to comply with;
6. Whether the agent was required to close a minimum amount of transactions, attend certain classes concerning policies and procedures, and comply with the agencies employment policies and guidelines;
7. Whether the agent is responsible for paying the costs of advertising their real estate listings;
8. Whether the agent is paid a certain salary or on a hourly basis, or whether the agent's compensation is based on commission; and
9. Whether the real estate agency supplies the instrumentalities, tools, and a place of work for the agent doing the work.

See Freedom Labor Contractors of Fla., Inc. v. State of Fla., Div. of Unemployment Comp., 779 So.2d 663, 665 (Fla. 3d DCA 2001).

Courts will balance the above factors in determining whether the real estate agent is an independent contractor of the real estate agency, and no one factor is dispositive to the courts' determination. However, it may be advisable for a real estate firm to consider the above factors when determining the relationships that they wish to have with their real estate agents, as this could potentially lead to the real estate agency insulating itself from future liability of its agents.

Particularly, in order to potentially limit a broker's liability, any written agreement between the agency and the real estate agent should specify, if applicable, that the agent is: responsible for client development, responsible for marketing and determining their work schedule, paid based on commission, responsible for paying for their own advertising costs, as well as any other factors that would demonstrate that the real estate agent is separate and independent from the real estate agency, not taking direction directly from the real estate broker firm.

The more factors that are outlined throughout the agreement between the real estate agency and the agent which demonstrate an independent relationship between the two parties, the greater the chance is that a court will determine that the real estate agent is an independent contractor. *Id.*

As the Florida real estate market continues to be troublesome, real estate agencies and real estate agents may find themselves adversely impacted by past clients who want to blame them for their involvement in the client's decision to purchase the price-declining property. Even though Florida law tends to provide favorable defenses via the transactional agent relationship, there still remains potential for liability and exposure in these cases. While we all hope that the current situation quickly improves, real estate agencies and real estate agents would be well advised to be mindful of their potential exposure in each transaction and take the necessary precautions to avoid unnecessary claims.

NON-BINDING ARBITRATION FLA. STAT. 44.103 (2007) AND BUILT IN PROPOSAL FOR SETTLEMENT

By James Sparkman

Many Florida courts are utilizing the provisions of Fla. Stat. 44.103 (2007) to order the parties in litigation to a Non-Binding Arbitration proceeding as a method of case management. The process is a simple one and is quite similar to a Mediation. In fact, some courts order Arbitration which is then followed by Mediation. At the time of this writing, an informal survey among the lawyers at Cole, Scott, & Kissane indicated that the following counties were using Arbitration: Dade, Broward, Palm Beach, Martin, Collier, Lee and Union County. The U.S. District Court of the Middle District for Florida apparently has its own version of a Non-Binding Arbitration rule as well.

Courts often designate an Arbitrator with a provision that the parties may stipulate to a different Arbitrator within a fixed period of time. Usually, the Court orders that the Arbitration should be completed within sixty days of the Arbitration Order. Generally, the Arbitrator's charge for the proceeding is similar to costs for a Mediation. Although customarily, there is no witness testimony, witness testimony is permissible if desired, and a party wishing the same can petition the Court to authorize the Arbitrator to issue subpoenas for witnesses or for the production of documents. Most Arbitrations last from between an hour to two hours.

The Arbitrator is required to issue a written opinion. Once the written opinion has been issued, either party may file a request for a trial de novo within twenty days of the opinion. "De Novo" is Latin for "new" and is just a fancy way of saying a new trial by a judge or a jury. It only takes one party to request a trial de novo, and the subsequent trial will take place.

If neither party files a timely request for trial de novo then the Arbitration decision becomes a final decision. At that point, either party can petition the Court to enter a Final Judgment consistent with the Arbitration Award.

If the party that requests the trial de novo does not receive a more favorable result at trial than through the Arbitration Award, the Court "may" assess arbitration costs, court costs, attorney's fees, expert witness fees or other witness fees incurred after the Arbitration. The court may also award such items as investigation expenses as well. Although the sanction provision is not mandatory, it is difficult to envision circumstances in which a judge would not award the same.

The determining factor for the application of this provision is very similar to that of the Proposal for Settlement rule. The Plaintiff must receive a jury verdict that is greater than 25% of the Arbitration Award. If the Arbitrator awarded the sum of $10,000.00, then the Plaintiff would have to receive a jury verdict award in excess of $7,501.00 (i.e. $10,000.00 x 25% = $7,500.00).

Similarly, if a Defendant requests a trial de novo, then the Defendant must pay the aforementioned costs and attorney's fees if the verdict received by the Plaintiff is 25% greater than the Arbitrator's Award. Accordingly, if the Arbitrator awarded $10,000.00, then the Plaintiff would be entitled to recover attorney's fees and costs from the date of the Arbitration Award if a jury verdict exceeded $12,501.00 (i.e. $10,000.00 x 125% = $12,500.00).

When the Plaintiff seeks fees under the Statute, determination of the Plaintiff's judgment includes the jury verdict, plus taxable costs, plus any post-Arbitration collateral source payments received or due as of the date of the Judgment. Should a Co-Defendant settle with the Plaintiff after the Arbitration, the amount of that settlement is also added to determine the "Judgment" within the meaning of the Statute. For example, if the verdict was $10,000.00, taxable costs were $4,000.00, post Arbitration collateral source was $2,000.00, and settlement with a Co-Defendant was $5,000.00, the judgment would be $21,000.00. If the Arbitrator awarded $16,000.00, the Defendant might feel comfort-

able that the Plaintiff could not receive a verdict less than 25% of this figure ($15,750.00) and might seek a trial de novo. However, the Plaintiff would actually prevail, as the "judgment" after adding the additional items would be 25% greater than the Arbitration Award ($16,000.00 x 125% = $20,000.00).

If the Defendant seeks costs and fees under the Statute, any post-Arbitration settlement with a Co-Defendant that was applied to reduce the verdict would also be added to the verdict to obtain the Judgment figure. For example, if the verdict was $10,000.00 which was reduced by a collateral source setoff to $5,000.00, a settlement with a Co-Defendant in the amount of $5,000.00 would be added back to determine the Defendant's entitlement to fees. Accordingly, the figure to be measured against would be $10,000.00 and the Defendant would be entitled to move for fees as the net judgment would not be greater than 25% of the $16,000.00 Arbitration Award; i.e. $15,750.00.

There are two practical uses for attorney with regards to Fla. Stat. § 44.103. First, the attorney can use this as a tool for further evaluation of liability issues or damage issues. If the judge has not ordered arbitration a party may request the same. This will force Plaintiff to show his hand on these issues. For example, we recently arbitrated a slip and fall case involving five different Defendants. As might be expected, most of the lesser Defendants were pointing the finger at one major Defendant who did bear culpability. The Arbitrator agreed with the lesser Defendants and placed all of the liability on the major Defendant. He also fixed the damages at a figure that was far less than the Plaintiff had asked for. This served as a helpful tool for the lesser Defendants to encourage the most culpable Defendant to increase its offer. At the same time, it served to educate the Plaintiff, who had overly high expectations, as to the true value of the case.

The second value to the attorney is a second bite at the Proposal for Settlement apple. As discussed above, it can be difficult to compute the proper number for the Proposal for Settlement, and sometimes the Defendant's Proposal for Settlement becomes too low after discovery unfolds, or as time passes, e.g. unexpected surgery. If this assessment comes to light within the forty-five day window prior to the start of the jury trial, the Proposal for Settlement cannot be increased during that time. On the other hand, there is no such forty-five day limitation on the "pseudo" Proposal for Settlement that is contained in the Non-Binding Arbitration Statute. In other words, if the Arbitration takes place within forty-five days of the beginning of the trial period, the figure set by the Arbitrator would serve as the Proposal for Settlement figure that would potentially expose either the Plaintiff or the Defendant to attorney's fees incurred subsequent to the Arbitration.

There is a paucity of case law interpreting Fla. Stat. § 44.103. *Wedgewood Holdings, Inc. v. Wilpon*, 972 So.2d 1044, is a Fourth District Court of Appeal case, that serves as a warning to the practicing lawyer to carefully read the Court's Order of Referral to Non-Binding Arbitration. In *Wedgewood*, the Order of Referral to Arbitration, directed the Arbitrator to determine the issue of taxable costs in addition to liability and damages. The Arbitrator, however, did not determine the amount of costs. Upon completion of the Arbitration proceeding, neither party moved for a trial de novo. Pursuant to the rule, the Defendant moved the Court for an entry of Final Judgment in its favor. The Defendant also requested the Court to award it taxable costs as the prevailing party. The trial Court entered taxable costs notwithstanding its prior directive to the Arbitrator to do the same. The Appellate Court reversed the granting of the Defendant's taxable costs on grounds that the Arbitration Award did not include the same. It went on to point out that the Defendant could have sought to modify and/or clarify the Arbitration Award pursuant to Fla. §682.10, or §682.13 or §682.14. The moral of the story is to make sure that the Order Referring the case to Non-Binding Arbitration is read carefully before proceeding to the Arbitration hearing.

Antunez v. Whitfield 980 So.2d.1175 (Fla. 4th DCA 2008), discusses the change of the statute effective October 1, 2007. The prior version of Fla. Statt. § 44.103 did not use the 25% test, instead, it used a "more favorable" standard. The prior statute read:

> The party having filed for a trial de novo may be assessed the Abitration costs, Court costs, and other reasonable costs of the party, including attorney's fees, estigation expenses, and expenses for expert or other testimony or evidence incurred after the Arbitration Hearing if the Judgment upon the trial de novo is not more favorable than the Arbitration decision.

In *Antunez*, an automobile case, the Court referred the case to Arbitration, and a trial de novo was requested by the Defendant thereafter. The case proceeded to trial, and the Plaintiff received a Final Judgment in its favor on March 1, 2006. The Plaintiff then moved for an award of attorney's fees and costs under Fla. Stat. § 44.103. The Court ruled that the enactment of the 25% test in the amended statute Fla. Stat. § 44.103 was not retroactive, and therefore the Plaintiff was not entitled to fees. The Court went on to discuss that costs are to be included as part of the "Judgment" when determining application of the 25% rule in comparison of the Arbitration Award and the amount of the final judgment.

In summary, Fla. Stat. § 44.103 can be a useful settlement tool as its "built-in" attorney fees and costs sanction creates another consideration for continued litigation. The procedure is similar to participation in Mediation and the cost is comparably the same. Also, the Arbitration can be used as a second bite at a Proposal for Settlement within 45 days of trial, unlike the traditional proposal for settlement.

USING THE PIP FEE SCHEDULE TO PROPERLY EVALUATE BODILY INJURY CLAIMS

By Yvonne Pandolfo

Effective January 1, 2008, Florida Statutes §627.736 (5)(a)(2) instituted a fee schedule for medical bills submitted to an insurance carrier under the Personal Injury Protection (PIP) coverage of an insurance policy for medical treatment related to an auto accident. Specifically, the statute states:

> (2) The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
> (a) For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.
> (b) For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.
> (c) For emergency services and care as defined by s. 395.002(9) provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.
> (d) For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.
> (e) For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for he specific hospital providing the outpatient services.
> (f) For all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians scheduled of Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.

The most common charges submitted to an insurance carrier in relation to an auto accident, and the amounts payable pursuant to the fee schedule[1] are:

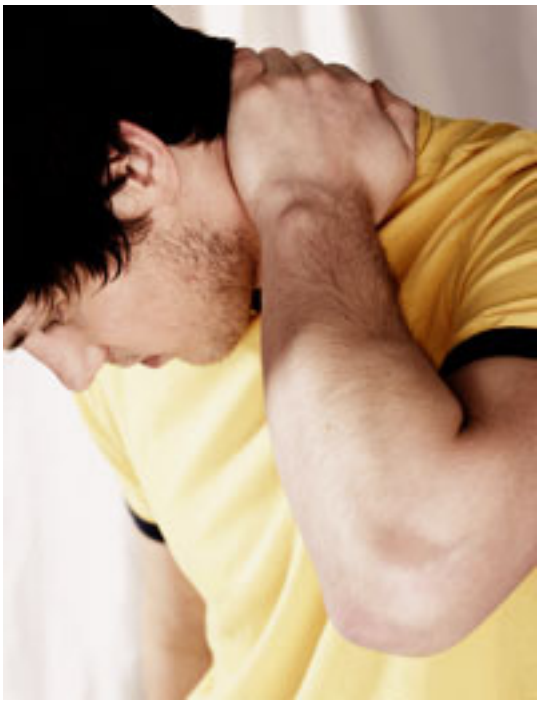
Ambulance	200 percent of Medicare
Hospital ER treatment	75 percent of usual and customary
ER Physician	usual and customary
Radiology at ER	usual and customary
Chiropractor	200 percent of Medicare Part B
Massage Therapist	200 percent of Medicare Part B
Medical Doctor	200 percent of Medicare Part B
Physical Therapist	200 percent of Medicare Part B

Consider the following scenario. John Doe is injured in an auto accident. He treats with a chiropractor thirty-five times. During his treatment, he receives hot packs, traction, chiropractic manipulation, EMS, Ultrasound, water bed, massage and an initial examination.

CPT Code	Description	Number of times billed	Amount Billed	Amount Payable	Total Amount Billed	Total Amount Payable	Difference
97010	Hot packs*	35	$40.00	$10.00	$1,400.00	$350.00	$1,050.00
97012	Traction	35	$45.00	$28.76	$1,575.00	$1,006.60	$568.40
98941	Manipulation 3-4 regions	35	$75.00	$67.10	$2,625.00	$2,348.50	$276.50
97014	EMS*	35	$35.00	$14.00	$1,225.00	$490.00	$735.00
97035	Ultrasound	35	$50.00	$23.16	$1,750.00	$810.60	$939.40
97039	Unspecified	35	$50.00	$15.00	$1,750.00	$525.00	$1,225.00
99203	Initial Examination	1	$350.00	$183.72	$350.00	$183.72	$166.28
97124	Massage	35	$65.00	$44.10	$2,275.00	$1,543.50	$731.50
					$12,950.00	$7,257.92	$5,692.08

**These CPT codes are not payable under the Medicare fee schedule. Pursuant to the statute, if the CPT Code is not payable under Medicare, look to the Workers' Compensation fee schedule.[2]*

The provider's charges as compared to the amounts payable under the fee-schedule are outlined above. The facility is charging a total of $12,950.00. The amount payable under the fee schedule is $6,942.92, resulting in a difference of $5,692.08, for which the provider may not balance bill the injured party.[3]



The provider may not attempt to collect the difference between the amount billed and the amount paid from the injured party. Therefore, when a demand is presented to a BI or UM carrier and PIP applies, the amount of the medical expenses should be reviewed to determine whether the fee schedule applies. If the fee schedules do apply, the range of value may be drastically impacted. If the injured party has only coverage for 80 percent of their medical under PIP coverage, the provider may attempt to collect the remaining 20 percent.[4]

The fee schedule applies to medical expenses that are covered under Personal Injury Protection. The statute states that a provider may bill or attempt to collect for charges that are in excess of the fee schedule.[5] If the medical bills exceed the PIP limits, it is arguable that the provider's charges are no longer subject to the fee schedule. Then, the insurance carrier may use a reasonableness argument with opposing counsel. For example, is it reasonable to charge (or accept) $10.00 for a hot pack on one day and then demand $40.00 a month later, simply because the medical expenses exceeded the policy limits? This will affect the provider's credibility.

Because the fee-schedule is relatively new, and many attorneys who work in the personal injury arena are unaware of the statutory changes and how the changes apply to BI and UM cases, there are not many cases, if any, dealing with the application of the fee-schedule to personal injury cases.

(Endnotes)

1 Florida Statutes §627.736(5)(a)(2).
2 Florida Statutes §627.736 (5)(a)(2)(f).
3 Florida Statute §627.736(5)(a)(5) Florida Statute §627.736(5)(a)(5) further states: If an insurer limits payment as authorized by subparagraph 2, the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits, except for amounts that are not covered by the insured's personal injury protection coverage due to the coinsurance amount of maximum policy limits.
4 *Id.*
5 *Id.*

LENDER BEWARE:

By David Salazar & Joy C. Harrison

A primer on priority of interest in the face of commercial mortgage modifications and future advances in the State of Florida

Lenders, in today's economic climate, are faced with more loans in default than any time since the 1930s. The "mortgage crisis," as aptly dubbed, presents pitfalls that can harm both borrower and lender. This is primarily because, in an effort to avoid default, a lender may feel compelled to modify or restructure a loan. But lender, beware! Modification can lead to loss of priority, the consequences of which can be staggering. The leading cases concerning modification hail from the 1930s. These cases, which are becoming increasingly relevant, are discussed below to alert lenders, lawyers, and other financial professionals of the minefield that has become mortgage modifications and future advances. To this end, please note that this article is no supplement for legal counsel, but rather, an educational piece that serves to inform involved parties of the current state of the law. This advisory article will begin with a general discussion on priority. It will then discuss problems modifications give rise to that can lead to a loss of priority. This article will also address subordinations of a future advance. Finally, it will present practical approaches to those problems as well as safeguards a lender can implement in this marketplace.

I. Priority generally

Florida is a notice state, such that a lender must record its mortgage to preserve priority over subsequent encumbrances.[1] If a lender does not record the mortgage, a subsequent lender will not be put on notice of the prior mortgage, which may be used as an argument by that lender that his lien has a superior priority.[2]

Although lenders may take proper steps in recording a mortgage, priority can still be affected by way of a modification of that mortgage. A lender, for instance, may unintentionally waive priority if his mortgage is modified in such a way that the new obligation is characterized as a new mortgage that discharges the original mortgage along with its priority. Many lenders and borrowers foresee that the borrower will eventually need additional funds. Thus, they build a future advance clause in the mortgage. While advances made under these clauses normally retain the priority of the mortgage, actions taken by the lender can cause intervening encumbrances to become superior.

II. Modification

Modification documents, at the very least, should refer to the original mortgage, in order to maintain priority of interest. There are additional, less conspicuous issues which can also alter priority. These are: A) Renewal and the importance of the Parties' Intent; B) Right of Subrogation; C) Change in Parties; D) Change in Securities: New Consideration/ Different Debt; E) Mistake in Fact / Fraud; and F) Equities in Favor of Subsequent Lenders. When these situations arise, it is up to the court to determine whether a new agreement is a renewal or an extinguishment of the original.[3] In so doing, courts will examine the intent of the parties to determine which lien has priority.

A. Renewal and the importance of the Parties' Intent

During the 1930s, the Florida Supreme Court established a clear rule on renewal (the "*Godwin* rule"). The Godwin rule stands for the proposition that a new mortgage deemed a renewal of an old debt can keep its priority over an intervening lien and/or judgment.[4]

In *Federal Land Bank of Columbia v. Godwin*[5] ("*Godwin*"), Mr. Godwin executed and delivered four subsequent mortgages to three different lenders. After he executed mortgage 1 and mortgage 2, he renewed mortgage 1 (renewed mortgage 1 will be referred to as mortgage 3). As to the priority between mortgage 2 and mortgage 3, the Court looked to the intention of the parties to determine whether it was a renewal or an extinguishment. It was clear to the court that the intention of the parties was to "simply . . . make a renewal and extension of the old debt."[6] The mortgage was between the same parties, for the same lands, made in good faith, and the satisfaction of mortgage 1 was practically simultaneous to the taking of mortgage 3. Thus, Mortgage 3 retained priority over mortgage 2.[7] Although the parties' intentions are not always as clear, where the Court finds a good faith intention that a new

mortgage is substituted for the old to affect a renewal of the loan, most courts agree that the original debt is not discharged.

B. Right of Subrogation

The right of subrogation in this context is the right to assume the legal rights of an entity for which a debt has been paid.[8] For purposes of this article, this includes the right to retain priority. To be entitled to the right of subrogation and the retention of priority, a subsequent loan must pay off the original, and the lender should be ignorant of any intervening mortgages or judgments.[9] In *Godwin*, along with determining the priority between mortgage 2 and mortgage 3, the Court also had to determine the priority between mortgage 2 and a fourth mortgage executed by Mr. Godwin, mortgage 4.[10] In his loan application to mortgage 4's lender,[11] Mr. Godwin represented that there were no other mortgages or liens on the property,[12] such that the mortgage was given for the purpose of securing mortgage 4's lenders with all the rights Mr. Godwin had in the property, and that mortgage 4, when recorded, would be a first lien. There was also evidence to show that mortgage 4's lender paid mortgage 3's lender directly. The Court found that it was the parties' intent to subrogate mortgage 4's lender to the rights of mortgage 3's lender.[13] Mortgage 4 was executed to pay off mortgage 3, and mortgage 4's lender was not aware there were any other liens on the property. Thus, mortgage 4 had priority over mortgage 2.

It should be noted, and will be discussed more extensively below, that inherent in the Court's decision was the fact that mortgage 2's position was not prejudiced by mortgage 4's retention of priority. If mortgage 2 was placed in a worse position by the subrogation, it is likely the Court would not have allowed mortgage 4 to retain priority.[14]

C. Change in Parties

The *Godwin* rule[15] is not always applicable where there is a change in parties. A court will take into account the fact that a mortgage executed to pay off an original debt was given to a different lender.[16] For example, borrower has three mortgages, mortgage 1 executed to lender 1, mortgage 2 executed to lender 2, and mortgage 3 executed to lender 3. As mentioned above, if mortgage 3 is executed to pay off mortgage 1, it may retain priority over mortgage 1 under the right of subrogation. However, if lender 3 assigns mortgage 3 to a new lender, lender 4, this may cause mortgage 3 to lose priority over mortgage 2. This occurred in *Resolution Trust Corp. v. Niagra Asset Corp.*[17] In *Resolution Trust,* the court had to determine whether mortgage 2 had priority over mortgage 3. Mortgage 3, which was originally executed to lender 3, was assigned to lender 4. The court found that, among other things,[18] because there was a change in parties, it could not presume that mortgage 3 was a renewal of mortgage 1. It follows that mortgage 3 did not retain priority over mortgage 2.

D. Change in Securities: New Consideration / Different Debt

Ordinarily, the mere substitution of one form of security for another can be part of a mortgage renewal, which does not result in a loss of priority. Sometimes, however, a change in a security indicates to the court that the parties intended to extinguish the original lien, which can cause a mortgage to lose its priority. For instance, in *Travers v. Stevens*,[19] the fact that the new mortgage was not secured by the identical property securing the original was considered by the court as a factor indicating that the new mortgage was not a renewal.[20]

Similarly, where a new mortgage is for a different debt than an earlier mortgage, it does not operate as a renewal of the original mortgage.[21] In *Smith v. Metzler*, the court dealt with renewal versus extinguishment in the face of new consideration and a change in parties. There, the borrowers bought real property, assuming the payment of a mortgage, mortgage 1, held by lender 1. The borrower then executed and delivered a second mortgage, mortgage 2, to the seller, to secure the rest of the purchase price.[22] Mortgage 1 clearly had priority over mortgage 2, as it was recorded before mortgage 2. However, when mortgage 1 had $2,000 left to be paid, the borrower executed and delivered a new mortgage, mortgage 3, to lender 1 for $12,000, which was assigned to a different lender, lender 2. This amount was then delivered to the borrower in the form of cash and securities.[23]

The Court had to determine whether mortgage 3 was a renewal of mortgage 1, and whether it had priority over mortgage 2. Although the borrower used part of the money and security from mortgage 3 to pay off mortgage 1, mortgage 3 was not considered a renewal of mortgage 1 because it secured an additional principal amount that was entirely different, and much larger, than the debt that had to be satisfied.[24] Accordingly, mortgage 3 was considered an entirely different obligation, and it did not retain mortgage 1's priority over mortgage 2.[25] It bears mentioning that mortgage 3 could have established a right of subrogation to mortgage 1 to the extent the money was used to satisfy mortgage 1 ($2,000).[26] In other words, $2,000 of the $12,000 debt secured by mortgage 3 could have had priority over mortgage 2.

E. Mistake in Fact / Fraud

A mistake of fact is defined as, "a mistake about a fact that is material to a transaction."[27] During the process of a mortgage transaction, a party may make a mistake that affects a lender's knowledge of other encumbrances on the property. A lender, for example, may perform a negligent title search, or a prior lender may record improperly. In addition, a borrower may make fraudulent representations that induce a lender to complete the transaction. If a lender does not know about an intervening lien, he may argue that he was not put on notice of that lien, which, as mentioned earlier, is an argument that may be made by a lender claiming superior priority. Depending on the mistake, or the reasons that the lender was not on notice, a mistake in fact and/or fraud may affect a court's decision in determining priority.

In Florida, the lender has an affirmative duty to search for other encumbrances on a property prior to executing a mortgage.[28] This is largely because Florida is a notice state. No mortgage of real property is effective in law against subsequent lenders unless and until it is recorded, and the act of recording that mortgage puts all subsequent lenders on notice[29] that there is an encumbrance on that property.[30] Therefore, if an intervening lien, mortgage 2, is recorded according to the law in Florida, and a Florida court must determine whether mortgage 3, a refinancing of mortgage 1, has priority over mortgage 2, an argument made by mortgage 3's lender that he did not know about mortgage 2 will likely be unsuccessful.[31]

Although a court may not lend much weight to mortgage 3 lender's lack of knowledge/notice argument, if the lender is claiming a right of subrogation, whether he had notice *may* be irrelevant in determining his priority. In other words, even if a lender does not know about another lien because he performed a negligent title search, a court may find that this fact has no bearing on priority. In *Suntrust Bank v. Riverside Nat'l Bank of Fla.*,[32] the court had to determine the priority between mortgage 2 and mortgage 3, where mortgage 3 refinanced and satisfied mortgage 1. In that case, mortgage 3's lender assumed its mortgage was the first mortgage because its title search failed to discover mortgage 2. The court held that a refinancing lender is subrogated to the priority of mortgage 1, even where it had actual knowledge of the intervening lien.[33] However, Florida courts disagree on this issue. Some courts steadfastly honor the more traditional law that when a lender is on notice of a second lien, subrogation is not available to give that lender the first lien's priority.[34] As the law in Florida is unclear,[35] it is best for lenders to perform a diligent title search when modifying a mortgage or lien.

In some cases, a lender may not be on notice of an intervening lien due to fraud committed by the borrower. For instance, if mortgage 3's lender is induced into renewing a mortgage by a borrower who falsely represents that mortgage 2 had been paid and discharged, mortgage 3 will normally retain prior-

ity over mortgage 2. Fraud was crucial to the court's decision in *Godwin*, which gave mortgage 4 priority over mortgage 2. As previously mentioned, Mr. Godwin misrepresented to mortgage 4's lender that there were no other encumbrances on his property.[36] As a result of this fraud, as well as a failure to locate any other liens or mortgages on the property, mortgage 4's lender advanced Mr. Godwin money to pay off mortgage 1. The Court decided that due to Mr. Godwin's false representations, among other things, mortgage 4 had priority over mortgage 2.[37]

F. Equities in Favor of Subsequent Lenders

Regardless of whether a court is deciding priority based on mistake in fact, fraud, a change in security, or a change in party, the final and most important determinant in a court's decision of priority is whether an intervening lender would be adversely affected by a modified lien.[38] That is, if a modification puts an innocent intervening lender in a worse position, a court will likely find that the innocent intervening lien has priority over the modified one. A lender must be careful in a situation where an intervening lender claims his rights were prejudiced by a mortgage modification made without his consent. The best approach for a lender to take when he wants to modify the terms of the loan, and there is an intervening lender, is to obtain the informed written consent of that lender as well as a confirmation that the intervening lien remains subordinate prior to execution of any modification.

III. Future Advances

A future advance mortgage is defined as "A mortgage in which part of the loan proceeds will not be paid until a future date." Under Florida Statute § 697.04, future advances do not, in theory, affect the priority of a mortgage. The issue of future advances, however, is pertinent because when a future advance clause does not meet statutory requirements, any future advance made in the course of the lender/borrower relationship may be subordinated to junior liens.

While the law on modification has not changed significantly since the 1930s, the Florida law on future advances appears to have become a bit more flexible. One example is, prior to the enactment of Florida Statute § 697.04, there was a distinction between obligatory and optional future advances such that those that were made at the option of the lender did not have priority over intervening encumbrances. Today, however, future advances are protected regardless of whether they are obligatory or optional, so even future advances made at the option of the lender maintain priority over junior liens.[39]

Similarly, older Florida case law found that the maximum amount of the loan must be specified in the mortgage.[40] Thus, if the future advances exceeded the maximum amount of the mortgage, any amount in excess would be subordinated to junior encumbrances. This is expressly set forth in § 697.04. However, in 1967, Florida adopted the Uniform Commercial Code, and the UCC provision on the same issue does not require a stated maximum of future advances in the mortgage on personal property.[41] This concept is applicable to construction loans as well. Florida Statute §697.04 makes it clear that advances made under a construction loan agreement in a mortgage to enable completion of the project are secured by the original mortgage.[42] The statutory approach, in the author's view, will govern.

Another area that has evolved is the expression of the future advance. Although § 697.04 provides that in order to secure a future advance, the mortgage must expressly say so on its face,[43] Florida courts have found that if an advance and a mortgage are similar types of obligations, or relate to the same transaction, it is sufficient to show that the parties *intended* to secure the advance by the prior mortgage.[44] Similar to modification law, the parties' intent will be a pivotal factor in a court's decision as to whether a future advance retains the mortgage's priority.[45] Even though courts may find that the parties intended to secure a future advance without explicitly stating it, it is best for lenders to clearly include a future advance clause in the mortgage.[46]

Even where there is a clear future advance clause set forth in the mortgage, a court still may find that the advances made do not have priority over junior liens. For instance, in *US v. Crestview*,[47] the future advance clause found in the mortgage gave the lender the option of making advances "necessary for the security or title"[48] of the mortgaged property. The lender then advanced the borrower funds to settle an unrelated civil suit. The court found that this advance was not within the provisions of the agreement, thus any intervening encumbrances had priority over that advance.[49] Another situation where a lender might find his future advance becomes junior to an intervening encumbrance is where lender 1 agrees with lender 2 that he will not make any advances to the borrower under the mortgage. If lender 1 then breaks that promise, a court may find that the funds advanced do not retain the priority of the original mortgage.[50]

IV. Recommendations

It is critical for lenders to heed the mistakes that were made in the past. What did we learn from the 1930s? Be cautious and prudent when conducting a loan modification. A lender has to be aware of any rights a junior lender may have, and he has to know what steps need to be taken to ensure his lien retains priority.

First and foremost, a lender must perform a diligent search for *any* other encumbrances. This may require reviewing the mortgage, deeds of trust, notes, security agreements, UCC financing statements, personal and corporate guarantees, assignments of rents and title policies, along with other relevant documents. Real Estate attorneys, in the author's view, are best suited to conduct these searches. Second, any modification should reference the original mortgage. That way there is no question of the relation between the two. Third, and crucial to both modification and future advances, a lender should make the parties' intent exceedingly clear in the mortgage. This can be one of the most essential components to include in a modification, as a court will look at the intent of the parties if other problems arise. Thus, if a lender and borrower agree that a modification will retain the first lien, this should be clearly stated in the mortgage. A "whereas clause" is probably the best approach in this regard.

Fourth, if a lender wants to be subrogated to the rights of the original mortgage, the new mortgage should be executed or recorded simultaneously with the discharge of the original. Fifth, a lender should be wary of a change in parties. While this does not always lead to the loss of priority, it may influence a court's decision. Sixth, there should not be a drastic change in securities. If a new loan is secured to pay off an original mortgage, and the new lender wants to step into the shoes of the original lender, he should not lend the borrower money in excess of what is needed to pay off the original mortgage. In addition, the lender must examine the extent of the property that secures the mortgage. If the property is not identical to that which secured the original mortgage, a court may find that the new mortgage is not a renewal.

Finally, the most important, and oftentimes overlooked principle that we learned from the 1930s, is that courts will always consider whether a loan modification prejudices the rights of an intervening lender. If a junior lender is worse off because of the modification, and he did not agree to the modification, it is most likely that a court will not allow a loan modification to retain the priority of the original mortgage. A prudent lender, therefore, will obtain written consent of the intervening lender as well as a confirmation that the intervening lien remains subordinate prior to execution of any modification.

In these complex and trying times, the lender must err on the side of caution. If she reviews all necessary documents, is cognizant of all the parties' rights, and does not proceed with haste, the lender should be able to protect a mortgage's priority, and perhaps do so without the need of protracted litigation.

(Endnotes)

1 Florida statutes provide the specific guidelines for the recording of the mortgage and its assignments. It is critical for a lender to comply with the Florida statutes if a lender wants to maintain the priority of its lien. *See* Fla. Stat. §§ 695.01, 695.25, 695.26, 701.02 (2008).

2 *Gabel v. Drewrys, Ltd.* 68 So. 2d 372 (Fla. 1953). A subsequent lender is put on notice in three ways: actual notice, constructive notice and inquiry notice. Actual notice may be expressed or implied. A lender is put on constructive notice when the lien is recorded. A lender is put on inquiry notice where other lenders would have inquired as to certain events from the facts available at the time of the transaction. *Sapp v.* Warner, 141 So. 124 (Fla. 1932); *Mortgage Investors of Washington v. Moore,* 493 So. 2d 6 (Fla. 2d DCA 1986); *Sheres v. Genender*, 965 So. 2d 1268 (Fla. 4th DCA 2007).

3 Where a court finds that there is a renewal, or the extension of the maturity of a loan, the transaction will not affect the priority. Where a court finds that an original mortgage was extinguished, the modified mortgage could lose priority to junior liens.

4 *Id.*

5 145 So. 883 (Fla. 1933).

6 *Id.* at 884 (emphasis added).

7 *Id.*

8 The doctrine of equitable subrogation "provides that when loan proceeds are used to satisfy a prior lien, the lender stands in the shoes of the prior lienor, if there is no prejudice to other lienors." *Suntrust Bank v. Riverside National Bank of Florida*, 792 So. 2d 1222, 1223 (Fla. 4th DCA 2001).

9 *In re Gordon*, 164 B.R. 706, 708 (S.D. Fla. 1994). As will be discussed below, Florida courts differ on where a lender who knew about an intervening encumbrance is entitled to equitable subrogation.

10 Remember, mortgage 3 was a renewal of mortgage 1 and has priority over mortgage 2. *Godwin*, 145 So. 883.

11 Mortgage 4's lender was the Federal Loan Bank of Columbia, the bank that initially filed the complaint. *Id.*

12 The Court considered this to be fraud perpetrated on the lender by Mr. Godwin. *Id.* at 885.

13 *Id.* at 886.

14 As will be discussed *infra*, prejudicing rights of a third party are likely to be viewed as a novation.

15 Priority is not given to intervening judgments and/or liens where the parties intend to renew an old debt.

16 *Resolution Trust Corp. v. Niagra Asset Corp.*, 598 So. 2d 1074 (Fla. 2d DCA 1992).

17 *Id.*

18 The court also took into account that mortgage 3 exceeded the amount of mortgage 1, and the intent of the parties was not disclosed in the new mortgage. *Id.* at 1077.

19 145 So. 851 (Fla. 1933).

20 *Id.*

21 *Smith v. Metzler*, 139 So. 823 (Fla. 1932)

22 *Id.*

23 *Id.* at 823.

24 Borrower only had $2,000 left to pay off on mortgage 1, and he used mortgage 3 to secure a debt of $12,000 in cash and securities. *Id.*

25 The fact that there was a change in parties (lender 1 assigned mortgage 3 to lender 2) was also important to the court's decision that mortgage 3 was not a renewal of mortgage 1. *Id.*

26 *Id.* Similarly, an Alabama Supreme Court has held where the renewal mortgage is for a larger amount than the original mortgage, the lien of the new mortgage, in the amount by which it exceeded the original mortgage and thus secured a new debt that was not provided for in the first mortgage, was subordinate to the intervening lean. *Berry v. Bankers Mortgage Building* & Loan, 168 So. 427 (Ala. 1936).

27 Blacks law Dictionary.

28 *See First Federal Savings Loan Ass'n of Miami v. Fisher*, 60 So. 2d 496 (Fla. 1952).

29 A lender does not have to have "actual" notice that an encumbrance exists, if it is his duty to know, and he did not use the means available to acquire the knowledge (such as searching the records in the office of the Clerk of Circuit Court), he is under constructive notice, which would cause a subsequent lender to lose priority. *Id.* at 499 (citing *Sapp v. Warner,* 141 So. 124 (Fla. 1932)).

30 Fla. Stat. § 695.01(1) (2008).

31 Florida courts do not require lenders to search beyond the records in the Clerk's office to find whether there are encumbrances on the property. *Pierson v. Bill*, 189 So. 679, 682-83 (Fla. 1939). If, however, the record of a mortgage containing a description of the property covered is so defective that the court is required to reform it, the record is not considered sufficient notice to subsequent lenders. *Air Flow Heating & Air Conditioning, Inc. v. Baker*, 326 So. 2d 449 (Fla. 4th DCA 1976). Lender, beware! Even if mortgage 2's lender did not record its mortgage, or did so improperly, a lack of knowledge argument may still be unsuccessful if mortgage 2's lender can prove that the lender knew about mortgage 2 through some other means.

32 792 So. 2d 1222 (Fla. 4th DCA 2001).

33 Please note that mortgage 3 satisfied the requirements for subrogation – it was used to pay off the mortgage, it was the parties' intent to subrogate mortgage 3 to the rights of mortgage 1, and there was not a change in parties, nor a change in security. *Id.* at 1225. The dissenting opinion of this case stated that this decision would allow a windfall to negligent lenders. *Id.* at 1227 (Farmer, J., dissenting).

34 *Picker Financial Group v. Horizon Bank*, 293 B.R. 253, 256 (M.D. Fla. 2003).

35 The Florida Supreme Court has to declare that there is no consequence for a lender's failure to check the record. *Id.* at 262.

36 *See supra* note 14.

37 *Godwin*, 145 So. 883.

38 *See e.g. Id.* at 885 (stating that the doctrine of equitable subrogation is used to remedy from fraud or mistake, but is not allowed if it works any injustice to the rights of others); *See also Suntrust*, 792 So. 2d 1222; *McAdow v. Smith*, 172 So. 448 (Fla. 1937).

39 *Silver Waters Corp v. Murphy*, 177 So. 2d 897 (Fla. 2d DCA 1965); *Simpson v. Simpson*, 123 So. 2d 289 (Fla. 2d DCA. 1960).

40 Fla. Stat. § 697.04(1)(b)(2008); *See e.g. Guaranty Title & Trust Co. v. Thompson*, 93 Fla. 983, 113 So. 117 (Fla. 1927).

41 Fla. Stat. § 671 (2008); *Mason v. Avdoyan*, 299 So. 2d 603 (Fla. 4th DCA 1974).

42 § 697.04.

43 *Id.*

44 *Garnder v. Guldi*, 724 So. 2d 186 (Fla. 5th DCA 1999).

45 *Uransky v. First Federal Savings & Loan Ass'n of Ft. Myers*, 342 So. 2d 517 (Fed. 11th Cir. 1976). Florida courts have held, since the 1930s, that a mortgage cannot secure future advances unless the parties *intended* to do so. *Bullard v. Fender*, 192 So. 167 (Fla. 1939).

46 Please note that a mortgage to secure future advances, at any particular time, is a lien only for the amount which the borrower actually owes the lender at that time and not for the principal amount stated in a mortgage. *Johnson v. Fl. Bank at Orlando*, 13 So. 799 (Fla. 1943).

47 513 So. 2d 179 (Fla. 1st DCA 1987).

48 *Id.* at 180.

49 *Id.*

50 *See NCNB Nat'l. Bank of Fla. v. Barnett Bank of Tampa, N.A.*, 560 So. 2d 360 (Fla. 2d DCA 1990).

SUCCESS STORIES

In April, ***Bryan Rotella and Dan Shapiro*** obtained a complete defense verdict after a two day ambulance related motor vehicle accident trial in Hillsborough County. Amber Zinn claimed that a privately owned ambulance company was negligent in failing to call off an ambulance crew from responding to an emergency. As a result, Ms. Zinn claimed the responding ambulance was behind her at a red light with its lights and sirens on which, caused her to run the red light and drive into oncoming traffic. Along with an "ambulance phobia", Ms. Zinn alleged she suffered a rotator cuff tear and soft tissue injuries of the neck and back. The jury was not persuaded that the ambulance dispatcher and/or crew had any knowledge the emergency the crew was en route had been called off at the time of the accident, as no credible evidence was provided depicting same. Rather the ambulance company's records depicted a reasonable clear time line explaining the crew's actions and supporting the correct verdict. The jury also appeared swayed that Ms. Zinn's action in running the red light was the true cause of her accident.

In February, ***Paula Parisi and Aram Megerian*** of the Tampa office obtained a complete defense verdict after a seven day medical malpractice trial in Manatee County. Connie Hendry alleged she suffered permanent nerve damage in her right arm and hand following voluntary blood donation at a Florida Blood Services blood bank. She demanded $1 million dollars for her injuries. The jury saw through her contrived story of a nurse shoving the needle in and out of her arm due to a myriad of inconsistencies in her case. Of course, video surveillance of Ms. Hendry using her right arm and hand in various activities further supported the correct verdict.

Richard Cole and Brandon Waas recently received a dismissal with prejudice in a hotly contested real estate malpractice lawsuit in Broward County, in which the Plaintiffs alleged fraud, misrepresentation, slander of title, and other equity-related claims such as rescission and reformation of a listing contract and declaratory relief related to the sale of their $4.2 million home. The evidence indicated that the Plaintiffs improperly withdrew from the listing contract prior to its expiration. Upon the filing of a counterclaim for civil conspiracy and anticipatory breach of contract, the Plaintiffs agreed to the dismissal their claims.

Richard Cole and Brandon Waas recently received final summary judgment in a real estate malpractice lawsuit in Miami-Dade

County, in which the Plaintiffs alleged fraud and misrepresentation in connection with their purchase of a $2 million home in Marathon, Florida. The Plaintiffs alleged that the Defendant real estate broker made misrepresentations about the habitability of the downstairs enclosure within said property. The Plaintiffs' demand never came below $500,000.00, relative to the loss of use of approximately 1000 square feet of living space at the property. The summary judgment motion was based, in part, upon the lack of detrimental reliance exhibited by the Plaintiffs.

Michael Brand and Cassidy Dang recently tried a fractured neck case in which the plaintiff fell two floors from her balcony in an apartment rented to her by the defendant. Plaintiff claimed, and the evidence showed, that when she touched the railing on the first time she used her balcony, the entire railing, with the plaintiff, fell to the ground. The evidence indicated that the railing was either improperly secured or that it had been unscrewed. The plaintiff suffered a fractured neck, broke four teeth and one finger. The jury found both the plaintiff and defendant 50% at fault and, after reduction, awarded $145,000.

Michael Brand and Daniel Klein recently tried a brain injury case in which they admitted liability after the plaintiff, while riding in an elevator, was struck in the head with a 40 pound piece of granite which fell from the ceiling. The granite had been installed by their client, who had passed away before the trial. The plaintiff claimed that he had been unable to work for the past six years, would never work again and had been significantly brain damaged to the point that plaintiff's own counsel described him as "retarded" to the jury. After a four-day trial on damages only, the plaintiff asked the jury for $5.5 million. The jury awarded a total of $413,000, of which their client was 50% responsible.

Kip Lassner, along with Associates ***Beth Koller and Michael Beane,*** obtained a great victory in the workers' compensation arena by recently trying a multi-million dollar claim wherein we raised a fraud defense. This argument persuaded the Judge of Compensation Claims, who found fraud and thereby cut off benefits to a long-standing claim. The case was sent to CSK to pursue the fraud defense when an issue arose over mileage reimbursements.

Scott Bassman and Dara Jebrock successfully obtained a final summary judgment in a case concerning the validity of an assignment for the exclusive right to use a cabana located within a condominium association's premises which was provided without the condominium association's prior approval. The Plaintiffs alleged that the association tortiously interfered with the Plaintiffs' attempt to convey the subject cabana, should be estopped from claiming the Plaintiffs never possessed the right to use the subject cabana, and sought a declaratory judgment from the court to determine the validity of cabana rights. The central argument raised on behalf of our client was a lack of any documents evidencing the Plaintiffs were ever assigned the exclusive right to use the cabana in the first instance. After the parties filed extensive and comprehensive cross-motions for summary judgment, the court entered an order granting final summary judgment on all claims asserted against our client, the condominium association.

Please join me in congratulating ***Dan Shapiro and Rhonda Beesing*** in obtaining a Directed Verdict today at trial on behalf of Davita, Inc. The case was a medical malpractice/wrongful death case where Plaintiff treated at the dialysis clinic, left on foot immediately thereafter, crossed a major highway and was killed. Plaintiff's counsel alleged that after dialysis, Plaintiff suffered from weakness, daze, confusion and dizziness for hours after the procedure and that Defendant should have known it was dangerous for decedent to leave the facility without transportation. Plaintiff's daughter had called the clinic, prior to his departure, and requested that the clinic call a taxi for Plaintiff subsequent to treatment and the clinic staff allegedly agreed to transport Plaintiff home via a courtesy van. However, Plaintiff left the clinic on his own accord. Amongst other defenses, Dan and Rhonda established that Plaintiff had full mental capacity, was medically stable after his treatment and walked home from dialysis treatments on a regular basis.

Gene Kissane and Daniel Klein obtained a dismissal in a serious personal injury case on behalf of major supplier of traffic control de-

vices and barricades. The Plaintiff, and elderly woman, was injured while walking through a construction zone. She sustained an elbow fracture, which required surgery, and the insertion of an elbow prosthesis. At the completion of the depositions of the Plaintiff and representatives of the Co-Defendant, general contractor, the defense was successful in demonstrating that its client breached no duty owed to the Plaintiff, and just before the hearing on Defendant's Motion for Final Summary Judgment, Plaintiff and Co-Defendant's counsel agreed to a dismissal as to our client only.

Richard Cole and Brandon Waas obtained a dismissal with prejudice in a case where the Plaintiffs alleged slander, tortious interference with an advantageous contractual relationship, the enforcement of Florida Statute 718.303 pursuant to an alleged breach of condominium documents, battery and civil conspiracy. The Plaintiffs alleged that certain defamatory comments were circulated around the subject condominium, which, in turn, caused damage to the building manager's contractual relationship with her employer; additionally, one of the Plaintiffs also alleged that one of the Defendants pointed a firearm at her causing mental anguish. Plaintiffs alleged over $100,000.00 in damages. Upon the filing of several counterclaims and after considerable discovery, Plaintiffs agreed to dismiss the aforementioned claims in their entirety.

Dan Shapiro and Vince Gannuscio obtained a complete dismissal with prejudice in favor of an attorney whose participation in the closing of certain real estate deals resulted in his being accused of professional malpractice, breach of fiduciary duty, and RICO violations. The Plaintiff filed a federal lawsuit accusing the attorney of assisting Plaintiff's former business partner in a scheme to defraud him out of business income by engaging in secret real estate transactions. CSK fought the matter on substantive and procedural grounds, obtaining a district court dismissal of the action. Shortly thereafter, the Plaintiff declared bankruptcy, and the bankruptcy estate refiled the case in the U.S. Bankruptcy Court. CSK attorneys demonstrated to the bankruptcy court that the Plaintiff could not sustain a viable claim against their client, and the court dismissed the case against him in its entirety.

Dan Shapiro, Vince Gannuscio, and ***Bradley Martin*** obtained a voluntary dismissal of a personal injury lawsuit against a small trucking company less than one week prior to trial. CSK attorneys aggressively handled the matter throughout the discovery process, and were able to demonstrate a substantial likelihood that the jury would find the trucking company's driver was not at fault for the accident, and that the Plaintiff's claimed injuries were overstated. With trial less than a week away and the defense pressing Plaintiff on both liability and damage issues, Plaintiff agreed to dismiss the matter without payment by the defendant or its insurer.

Dan Shapiro and Vince Gannuscio obtained a complete dismissal with prejudice in a wrongful death lawsuit against a homeowner whose guest had an alleged choking incident in their home. The Plaintiff, the widow of the guest, claimed the homeowners were responsible for the choking by failing to administer the Heimlich Maneuver. CSK attorneys aggressively attacked the viability of this claim, demonstrating that Florida law and public policy could not hold homeowners responsible for the conduct of their guests, and by showing the that the homeowners not only immediately contacted 911 and obtained medical attention, but followed to the letter the instructions given them by emergency personnel. The dismissal was obtained one day prior to a court hearing in which the court was asked to issue an involuntary dismissal.

Jim Sparkman obtained a defense verdict for the firm in Broward County in the matter of Masters vs. Allstar Events. The defense admitted lilabilty for the rearend car accident, but argued that the accident did not cause any injury to the plaintiff. The plaintiff's treating doctor ordered an MRI of the neck which showed a herniated disc. The defense radiologist and orthopedic experts disagreed and opined that the plaintiff did not have a permanent injury. The jury agreed with the defense argument and found that the plaintiff's alleged injuries where not causally related to the accident and awarded zero damages. The defense subsequently filed a motion to tax attorney's fees and costs pursuant to the proposal for settlement filed early in the litigation, and the same has been granted. The plaintiff has made an offer to settle the fee claim which is currently being considered by the client.

Jim Sparkman had another successful trial in Broward in the matter of Morisett vs. Paradise. The case involved an automobile intersection collision and the defendant was a teenage driver. One month before trial the plaintiff returned to the orthopedic surgeon after an 11 month hiatus. The doctor ordered a neck MRI which showed multiple herniated discs, and the doctor ordered a series of epidural injections which the plaintiff underwent. The doctor opined that the plaintiff would eventually need neck and back surgery. Mr. Sparkman argued that the jury should limit its award to one month of treatment in the amount of $7,300 dollars and the jury agreed. The plaintiff's total medical bills were $23,000. The award will be reduced by the pip collateral source setoff and the net judgment will be less than the defense proposal for settlement. A motion to tax attorney's fees and costs is forthcoming.

Barry Postman and Diran Seropian obtained a complete defense verdict in a premises liability case that was tried to a jury in Fort Pierce. As a result of the alleged negligence the Plaintiff suffered a brain injury, extensive medical expenses and made a demand to the jury for 1.5 million dollars.

John Penton and Scott Cole were successful in having a tortious interference with a business and defamation action dismissed with prejudice on the first amended complaint. A plaintiffs' lawyer, who formerly worked for an insurance defense firm defending State Farm and Allstate, brought an action against State Farm, a lawyer, and his law firm, alleging that they had improperly raised conflict of interest arguments in defending a PIP proceeding, costing her business and a client. The Judge agreed with our defense position that all defendants were shielded by the litigation immunity privilege, and dismissed the action with prejudice, finding that the Plaintiff failed to state a viable cause of action.

Daniel Kissane recently obtained a final summary judgment for Swissre/Westport in a federal declaratory judgment action ruling that no insurance coverage existed in a case involving the alleged misappropriation and commingling of funds. In particular, the Court held that the plaintiff''s claim was a "known loss" under the Insurance policy, thereby triggering an exclusion to coverage.

Don Detsky recently obtained a defense verdict in a two day Jury trial in Nassau County, Florida. This was a rear-ender accident which resulted in little damage to Plaintiff's vehicle. In cross examination plaintiff admitted that he still drove the accident vehicle and never had it repaired. He also testified that he had been hit at 40 Mph. A blow up of plaintiff's vehicle was used during closing argument showing the vehicle with almost no damage. Plaintiff was asking for past and future medical bills in the six figure range. Careful cross examination revealed plaintiff's prior accident, prior medical problems and prior care just before the subject accident. After closing arguments the Jury took just 10 minutes to render a Defense Verdict.

Michael Brand and Trelvis Randolph recently tried a case in Miami-Dade in which plaintiff suffered a significant arm injury after falling on their client's premises. Plaintiff's expert opined that the ramp where she fell violated five separate codes and constituted a hidden defect. Plaintiff's treating orthopedic surgeon opined that in addition to the initial open reduction internal fixation surgery already performed, she would need up to eight additional surgeries and plaintiff's economist calculated the economic damages, alone, at $1.4 million. Counsel asked for a similar amount in pain and suffering damages for plaintiff and her husband. After a four-day trial, the jury found their client 10% responsible, the plaintiff 90% at fault and awarded the sum total of $160,000, which was reduced by 90% to $16,000. Plaintiff's pretrial demand was never less than $1 million.

Meet One of Our Lawyers

JOSEPH A. WOLSZTYNIAK

Joseph A. Wolsztyniak is an attorney in the Ft. Lauderdale office who performs work statewide. He was first licensed in the State of Illinois in 1980, in Hawaii in 1992, and in Florida in 2001. He earned his Bachelor of Science in Business from Northern Illinois University in 1974 and his Juris Doctor from John Marshall Law School in Chicago in 1980. He is also licensed in all federal trial and appellate courts in Illinois, Hawaii, and Florida as well as the U.S. Supreme Court and the U.S. Court of International Trade. He was admitted to the Special Federal Trial Bar for the U.S. District Court for the Northern District of Illinois in 1983.

Over the course of his career, Joseph has tried cases in a broad range of legal issues including medical malpractice, construction litigation, commercial banking and financial litigation, and governmental matters, including environmental cases. He has handled complex litigation designated cases in Florida in the areas of products liability, mold infestation, and commercial litigation. While in Hawaii he was Deputy Corporation Counsel and Head of Litigation for Maui County and handled numerous beach quadriplegic injury cases and defended the County in civil rights cases and lawsuits brought under environmental statutes. He was also one of the attorneys who tried the Bishop Trust litigation resulting in a five month trial involving Petitions to Remove several Trustees for financial malfeasance while practicing in Honolulu.

In Florida he handled numerous cases involving construction defects, including the litigation involving Baptist Medical Arts Building in Miami and the Royal Marco Condominiums in Collier County. In Illinois he tried numerous cases defending contractors in both construction defect cases and in prosecuting mechanics' liens. While in Hawaii he handled seven separate lawsuits and arbitrations resulting from litigation on a high end condominium project which resulted in obtaining a reversal of the trial court by the U.S. Court of Appeals for the Ninth Circuit, where the trial court had denied the developer insurance coverage.

MEDICARE COMPLIANCE ALERT

by Alejandro Perez

On May 11, 2009, the Center for Medicare & Medicaid Services issued a Revised Implementation Timeline pushing back the dates for commencement of Mandatory Insurer Reporting under the Medicare Secondary Payer Act. In summary, primary payers must report on all claims involving ongoing responsibility for medical expenses as of July 1, 2009. In all other cases, reporting must commence on January 1, 2010.

Please contact Alejandro Perez, Esq. at our Miami office at ***Alejandro.Perez@csklegal.com*** if you have any questions.

CMS COMPLIANCE DEADLINES

COLE, SCOTT & KISSANE, P.A. CSK ATTORNEYS AT LAW

05/01/2009 - 09/30/2009
Online registration at CMS's mandatory reporting website.

07/01/2009
Test and production Query Function will be available for those primary payers who have completed registration and are in testing status (i.e., Signed Profile Report has been received by CMS).

2009 | **2010**

01/01/2010 - 03/31/2010
Claim Input File testing period for all primary payers.

04/01/2010 - 06/30/2010
All primary payers (liability/self/no-fault/workers' compensation insurers) must submit their first set of "production files" for claims with ongoing responsibility for medical expenses effective July 1, 2009 and for all other claims effective January 1, 2010.

07/01/2010
Full implementation of CMS' electronic reporting system for all primary payers.