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9150 South Dadeland Boulevard
Suite 1400
P.O. Box 569015
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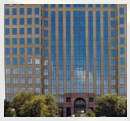

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Alejandro Perez
Angelica Velez (Layout)

AMBIGUITY OF FLORIDA STATUTE § 718.116 AND ITS IMPACT ON COMMUNITY ASSOCIATIONS' ABILITY TO COLLECT UNPAID ASSESSMENTS

By Ashley Poulter

Recently, there has been an increase in litigation surrounding the interpretation of Florida Statute § 718.116 (2010)[1], which may have a serious impact on a community association's ability to collect unpaid assessments. Florida Statute § 718.116(1)(a) provides:

> A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. that came due up to the time of transfer of title. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.[2]

The principal controversy surrounding this statute is whether the Florida legislature intended to make a purchaser who acquired the property via foreclosure (*i.e.*, not subject to the first mortgage) jointly and severally liable with the previous owner for all unpaid assessments. Purchasers who acquire their property through a foreclosure sale assert that the foreclosure judgment forecloses, and thus bars any claim for unpaid assessments against them. In addition, foreclosure purchasers take the position that had the legislature intended for owners who acquire title through foreclosure sale to be liable for a previous owner's assessments, the legislature would have included the italicized language of the first sentence of the statute in the second sentence.[3]

It is questionable whether courts will follow the reasoning and statutory interpretation of the foreclosure purchasers. The more compelling position taken by community associations, and reflected in the legislative amendments to section 718.116, is that the second sentence of section 718.116(1)(a) unequivocally states that all unit owners, without exception, are jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title.[4] Nevertheless, even if the second sentence of section 718.116(1)(a) does not unequivocally state the obligations of unit owners for past due assessments, reading the first and second sentence of section 718.116(1)(a) as a congruous paragraph demonstrates the legislature's intent that the italicized portion of the first sentence be incorporated by reference into the second sentence because the two sentences are grouped together in a single-section paragraph.[5] Community associations take the position that had the legislature intended for a unit owner who purchased property from a foreclosure sale be exempted from liability for past due assessments, then the legislature would have so stated or included the second sentence in its own section.

Legislative changes made to section 718.116(1)(a) support the community associations' position that all purchasers, including purchasers who acquired their property via foreclosure sale, are jointly and severally liable with the previous owner for unpaid assessments. In 1991, the legislature amended section 718.116 to provide that "a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title."

Furthermore, the July 1, 2010 amendments made to section 718.116 evince the legislature's desire to protect a community association's ability to collect past due assessments from foreclosure sale purchasers. The amendment to section 718.116(b)(1) allows an association to collect assessments from a first mortgagee, its successor, or an assignee from the twelve months immediately preceding that person's acquisition of title.[6] Before the amendment, a community association could only collect past due assessments from a first mortgagee, its successor or assignee from the six months immediately preceding that person's acquisition of title.[7] This change demonstrates the intention of the legislature to increase the liability of foreclosure purchasers for past due assessments, not release them from liability.

Finally, foreclosure purchasers are also taking the position that they are not successors or assignees to the property's first mortgage. Thus, they assert that they are not liable for the prior owner's assessments pursuant to section 718.116(1)(g) which states, "[f]or purposes of this subsection, the term 'successor or assignee' as used with respect to a first mortgagee includes only a subsequent holder of the first mortgage."[8] In contrast, community associations maintain that whether the foreclosure purchasers are successors or assignees to the first mortgage is irrelevant for the purpose of interpreting section 718.116(1)(a) because the language "successor or assignee" is not used in section (1)(a) of the statute.[9] Therefore, section 718.116(1)(g) does not absolve foreclosure sale purchasers of joint and several liability for the unpaid assessments pursuant to section 718.116(1)(a).[10]

As the number of purchasers who acquire their property through foreclosure sales increases, we anticipate that litigation will continue to arise under this statute. Should the courts find that section 718.116 absolves foreclosure sale purchasers from liability for unpaid assessments, this may have a serious

impact on community associations' ability to obtain a significant amount of unpaid assessments due from previous owners of the property. Ultimately, however, we are hopefull that the courts will find the community associations' position compelling, and, in time, the legislature will clarify any ambiguity.

(Endnotes)

1 § 718.116, Fla. Stat. (2010).
2 § 718.116(1)(a), Fla. Stat. (2010) Emphasis added).
3 *Id.*
4 *Id.*
5 *Id.*
6 § 718.116(1)(b)(1), Fla. Stat. (2010).
7 § 718.116(1)(b)(1.), Fla. Stat. (2009).
8 § 718.116(1)(g), Fla. Stat. (2010).
9 § 718.116(1)(a), Fla. Stat. (2010).
10 *Id.*

DEFAMATION IN A CYBER WORLD

By Daniel A. Kirschner

The Internet is a powerful medium of communication in which information can easily be accessed by millions of people worldwide through a global network of computers. Information on the Internet can be disseminated via email, posted on newsgroups, discussed in chat rooms or displayed on home pages in various formats such as sound, video or text. Unlike traditional forms of media, the Internet is unique in that publishers and editors are primarily absent in cyberspace. The birth of the Internet created tension when courts attempted to apply traditional defamation law to this burgeoning new world. To better protect internet service providers ("ISPs") and website operators from third-party claims for defamation committed on the Internet; Congress enacted section 230 of the Communication Decency Act ("CDA").[1] The creation of section 230 provides federal immunity to providers and users of an interactive computer for defamatory content made by a third party on the website.

Subsection (c) of the CDA, known as the "Good Samaritan" provision, states that "no provider or user of an interactive computer shall be treated as the publisher or speaker of any information provided by another information content provider."[2] This section also states that no provider of an interactive computer shall be liable for any action that is taken voluntarily and in good faith to restrict access to inappropriate material, whether or not such material is constitutionally protected.[3] Due to potential liability faced by ISPs and website operators, interactive service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers and websites to avoid any such restrictive effect.[4] In doing so, Congress made a policy choice to remove the Internet from traditional defamation law. This choice holds the original publisher liable for his defamatory speech, but shelters publishers and distributors from any liability for speech that did not originate with them.

By enacting section 230, Congress created a federal immunity to any cause of action that would make service providers and websites liable for information originating with a third party.[5] In addition, Congress sought to remove any disincentives tort liability might have on Internet providers and encourage them to self-regulate any offensive material over their services.[6]

Courts have typically applied section 230 broadly, and, in some instances, provided immunity in cases that did not involve self policing. In *Zeran v. American Online, Inc.*, the court made it clear that section 230 grants publishers immunity from traditional publisher liability.[7] Specifically, section 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions are barred.[8] The court found that section 230 creates a blanket immunity protecting ISPs from any liability resulting from defamatory statements by a third-party using their service. The blanket immunity provided by section 230 was further expanded in *Blumenthal v. Drudge,* where the court found the interactive computer service was nothing more than a provider of an interactive computer service on which the third party made the defamatory remarks.[9] The court relied on the statutory language of section 230, which clearly states that such a provider shall not be treated as a "publisher or speaker," and therefore, may not be held liable in tort.[10]

The blanket immunity provided by section 230 is not without limits. In many cases, the courts have continued to find that the ISPs and websites are "information content providers," thereby denying them immunity. In *Anthony v. Yahoo! Inc.,* the court found that Yahoo! was not absolved from liability under section 230 for assisting a third-party in distributing misrepresentations.[11] Although a third-party created the defamatory content, Yahoo! was not entitled to immunity because Yahoo! assisted in the transmission of the defamatory content. Similarly, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the court found that the Defendant was an

"information content provider" and immune from liability under the CDA.[12] The Ninth Circuit repeatedly stated throughout its *en banc* opinion that the Roommates.com website required its users to provide certain information as a condition of its use and was, therefore, an information content provider.

Section 230 provides a valuable and necessary resource for protecting internet service providers and websites from the unpredictable behavior of the billions of users of the Internet. ISPs and websites need to assume some responsibility for the content posted on its website, but it is unrealistic to require all content to be monitored. Further, without section 230, the courts would be inundated with lawsuits against ISPs and websites. In turn, to avoid litigation, websites would likely restrict all third party content, consequently limiting forums available to express one's thoughts.

In a world where the Internet is quickly becoming the most commonly used media forum, it is important to know what safe guards are available to websites and internet service providers. As the internet expands in the future, section 230 provides an important safeguard for Internet service providers and websites from a vast amount of litigation for the defamatory comment of third parties.

(Endnotes)

1 47 U.S.C. § 230.
2 47 U.S.C. § 230(c)(1).
3 47 U.S.C. § 230(c)(2)(A).
4 *Zeran v. American Online, Inc.,* 129 F. 3d 327, 330 (4th Cir. 1997).
5 *Zeran,* 129 F. 3d at 330.
6 *Ben Ezra, Weinstein, & Co. v. American On line, Inc.,* 206 F. 3d 980, 986 (10th Cir. 2000).
7 *Zeran v. American Online, Inc.,* 129 F. 3d 327, 330 (4th Cir. 1997).
8 *Zeran ,* 129 F. 3d at 330.
9 *Blumenthal v. Drudge*, 992 F. Supp.44, 52-53(D.D.C. 1998).
10 *Id.*
11 *Anthony v. Yahoo! Inc*., 421 F. Supp.2d 1257 (N.D. Cal. 2006).
12 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157 (9th Cir. 2008).

ROBO-SIGNERS: WILL THEIR ACTIONS HAVE SERIOUS LEGAL CONSEQUENCES, AND, IF SO, FOR WHOM?

By Brett L. Goldblatt

The latest scandal to captivate the nation and further cripple the severely depressed housing market has been dubbed "foreclosuregate."[1] Since the downturn in the nation's economy, millions of Americans have been forced out of their homes by banks, as they have been unable to keep up with their monthly mortgage payments. Now a practice has been uncovered whereby financial institutions were using "robo-signers" to rush through thousands of home foreclosures. A robo-signer is a person who quickly signs hundreds or thousands of foreclosure documents in a month swearing that he or she has personally reviewed the mortgage documents, but has not actually done so.[2] Banks were allegedly hiring hair stylists and Walmart floor workers, individuals who had no formal training, to sign foreclosure affidavits without ever reviewing the documents.[3] The foreclosure documents and affidavits, which were executed by robo-signers, were then used to establish a bank's ownership of a mortgage. By signing the documents, robo-signers were representing that they had personal knowledge of information which they knew absolutely nothing about.[4] Consequently, lenders have begun withdrawing affidavits signed by robo-signers, effectively terminating foreclosure proceedings around the country.[5]

Recent reports reveal that robo-signing was not unique to the foreclosure process. The latest permutation of robo-signing apparently occurred in the processing of mortgage assignments.[6] Mortgage assignments are documents showing a loan's transfer of ownership; transfers that happened repeatedly when Wall Street firms began buying, bundling and securitizing mortgages to sell to investors on the secondary markets.[7] In November 2010, employees at Nationwide Title Clearing, a company specializing in loan transfer and assignment services, testified to signing thousands of documents a day, often posing as executives of other companies.[8] Bank officials allegedly authorized employees at companies such as Nationwide Title Clearing to execute assignments on their behalf using fictitious executive titles.[9] While some argue that the robo-signer scandal is nothing more than an "overblown case of paperwork bungling", the underlying legal issues are far more consequential.[10] Aside from the obvious fact that executing documents under fictitious titles is fraudulent, robo-signing raises complicated issues such as who is the rightful owner of a loan and who has the right to foreclose on the loan.[11]

In *OneWest Bank, F.S.B. v. Drayton, et al*., plaintiff OneWest Bank, F.S.B ("OneWest") initiated a foreclosure action after the defendants defaulted on their residential mortgage.[12] Prior to defendant's default, Erika Johnson-Seck, a Vice-President at OneWest, executed an assignment of the subject mortgage to Indymac Federal Bank.[13] Ms. Johnson-Seck executed the assignment under the title of Vice President of Mortgage Electronic Registration Systems, Inc. ("MERS"). MERS is an organization, similar to Nationwide Title Clearing, specializing in loan transfer and assignment services. Interestingly, Ms. Johnson-Seck later admitted that she was never employed by MERS.[14] After the subject mortgage was assigned to Indymac, Ms. Johnson-Seck re-assigned the mortgage to OneWest. This time, she executed the assignment as the Vice President of Indymac.[15] While Ms. Johnson-Seck was once employed by Indymac, she had no connection to Indymac at the time she executed the aforementioned re-assignment. Recently, Ms. Johnson-Seck was deposed in a Florida foreclosure action (*Indymac Federal Bank, FSB v. Machado*), where she admitted to being a robo-signer. She admitted to executing approximately 750 mortgage documents a week, including sworn

documents outside the presence of a notary public.[16] Moreover, she admitted that she did not even read the documents before signing them.[17]

In light of Ms. Johnson-Seck's testimony in *Indymac Federal Bank, FSB v. Machado*, the Court dismissed OneWest's foreclosure action without prejudice. The Court indicated that it would entertain the foreclosure action again if certain pre-filing requirements were met. First, the Court indicated that OneWest must explain why Ms. Johnson-Seck was executing documents while wearing so many different corporate hats. Further, the court requested Ms. Johnson-Seck's employment history for the past three years in order to determine what her exact role was as Vice President of OneWest.[18] Third, the Court stated that OneWest must review all the documents submitted to the Court in support of its foreclosure action and sign an affidavit verifying the accuracy of these documents.[19] In essence, the Court's ruling indicated that it would not proceed with OneWest's foreclosure action until it made sense of all the mortgage assignments. Specifically, the Court wanted to determine if OneWest legitimately owned the subject mortgage. If OneWest did not legitimately own the subject mortgage, then it would have no right to foreclose on it.

At first, robo-signing appeared to be a practice utilized by banks to speed up foreclosures. As evident from *OneWest Bank, F.S.B. v. Drayton, et al*., assignments were being executed by robo-signers, and consequently, the validity of these assignments are now being questioned. The execution of invalid assignments could affect who has rightful ownership of a mortgage. In light of this, courts are beginning to institute pre-filing foreclosure requirements, mandating that banks establish the validity of their documents and prove that proper protocol was followed prior to instituting a foreclosure action. In turn, this will likely result in the delay of foreclosures as banks attempt to get to the bottom of this robo-signing practice.

The practice of robo-signing could conceivably have ripple effects in the secondary markets. Specifically, it could prove more difficult to bundle and sell mortgages as mortgage-backed securities if the identify of the actual owners of the underlying loans is unclear. Further, financial institutions, such as Nationwide Title Clearing and MERS, could be subjecting themselves to liability based on the practices of robo-signers.

Moreover, lawyers who decide to bring foreclosure actions on behalf of financial institutions that do not have standing (because they do not actually own the mortgage) could be opening themselves up to sanctions from courts. Therefore, attorneys should personally review all relevant foreclosure documents before initiating suit on their client's behalf, in order to ensure that their client is the actual owner of the mortgage.

While robo-signing was first believed to be limited to a few isolated incidents, it has quickly become apparent that this practice was running rampant in the mortgage industry. Although the impact and legal consequences resulting from the actions of robo-signers are still not entirely clear, at the very least, there is indication that courts are not taking this practice lightly.

(Endnotes)

1 Bryce Covert, Robo-signer, New Deal 2.0 (October 20, 2010), available at http://www.newdeal20.org/2010/10/20/robo-signer-23851/.
2 *OneWest Bank, F.S.B v. Drayton, et al*., 2010 WL 4187065 at *1 (N.Y. Sup. 2010).
3 David Streitfeld, *JP Morgan Suspending Foreclosures*, NYTimes.com (Sept. 29, 2010)., available at http://www.nytimes.com.
4 Robbie Whelan, *GMAC Spotlight on 'Robo-Signer'*, WSJ.com (Sept. 22, 2010), available at http://wsj.com.
5 *Id*.
6 Marian Wang, *Ahead of Congressional Hearings, Robo-Signer Scrutiny Spreads*, ProPublica (Nov. 16, 2010), available at http://www.propublica.org.
7 *Id.*
8 *Id.*
9 *Id.*
10 Michelle Conlin, *Robo-Signers: Mortgage experience not necessary*, Yahoo News (Oct. 12, 2010), available at http://news.yahoo.com.
11 *Id*.
12 *OneWest Bank, F.S.B v. Drayton, et al*., *supra* note 1.
13 *Id.*
14 *Id*. at 2,3.
15 *Id.*
16 *Id.* at 3.
17 *Id.*
18 *Id.*
19 *Id.*

THE NOT SO "GRAVE" RESULTS OF THE GRAVES AMENDMENT FOR RENTAL CAR COMPANIES

By Laura Maynard Sacha

Just prior to publication, the Florida Supreme Court issued an opinion affirming the Fourth District's ruling in Vargas v. Enterprise Leasing Co., 36 Fla. L. Weekly S187a (Fla. 2011). The law in Florida is now settled: The Graves Amendment, 49 U.S.C § 30106, pre-empts Florida Statute § 324.021(9)(b)2 (2007), thereby insulating rental car companies from vicarious liability while engaged in the trade or business of renting or leasing motor vehicles. In affirming, the Florida Supreme Court also upheld that Florida Statute § 324.021(9)(b)2 is not a financial responsibility law and that the Graves Amendment violate the Commerce Clause of the United States Constitution.

The Graves Amendment appears clear on its face, but due to its financial impact, the law has been repeatedly challenged on various grounds since its enactment on August 10, 2005. The Graves Amendment is part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU").[1] This federal law was designed to abolish the states' ability to impose vicarious liability on businesses engaged in renting or leasing motor vehicles. Thus, under the Graves Amendment, rental vehicle owners, as lessors, are insulated from liability that occurs while the vehicle is being used during the lease period, provided the lessor is not guilty of criminal wrongdoing or negligence.[2]

The challenges to the Graves Amendment in Florida have arisen precisely because the application of the federal law changed the landscape of Florida's Dangerous Instrumentality Doctrine and the application of the vicarious liability laws.[3] Whether the Graves Amendment will continue to shield businesses leasing cars in Florida may soon be decided by the Florida Supreme Court.[4] As of the preparation of this article, the Court had not yet rendered an opinion on the certified question that has been fully briefed and argued before it: Whether the Graves Amendment, 49 U.S.C. § 30106, preempts § 324.021(9)(b)(2), Florida Statutes (2007)?

State versus Federal Laws

Florida's Dangerous Instrumentality Doctrine ("Doctrine"), codified as § 324.021(9)(b)(1), Fla. Stat., stems from the concept of vicarious liability and assumes that a motor vehicle is a "dangerous instrumentality."[5] The Doctrine imposes strict liability on the owner or lessor of a motor vehicle who voluntarily entrusts the vehicle to an individual whose negligent operation of it causes injury.[6] An owner who gives authority to another to operate the owner's vehicle, by either express or implied consent, has a nondelegable obligation to ensure that the vehicle is operated safely.[7]

The Doctrine, as applied to motor vehicles, is unique to Florida and has been applied with very few exceptions.[8] The Florida Supreme Court, in 2000, noted that "if Florida's traffic problems were sufficient to prompt its adoption in 1920, there is all the more reason for its application to today's high-speed travel upon crowded highways."[9] In 1999, the Florida Legislature codified § 324.021(9)(b), Fla. Stat., creating an exception to the Doctrine, thereby limiting the amount that a short-term lessor of automobiles (less than one year) is liable.[10] As a result of the exception, a short term lessor is liable only up to $100,000.00 per person and up to $300,000.00 total for bodily injury and up to $50,000.00 for property damage, with an additional $500,000.00 allowed if the lessee is uninsured.[11] That law remained undisturbed until the federal Graves Amendment was codified in 2005.

The Graves Amendment states that a rental car company will not be held liable for the tortious actions of the driver of a car that the company owns, rents, or leases to an individual, regardless of whether the driver is an insured motorist, so long as the rental car company is not negligent or guilty of criminal wrongdoing.[12] Case law has focused on whether section (b)(2) of the Graves Amendment, which details the "financial responsibility laws" applicable to business entities engaged in the trade or business of renting or leasing motor vehicles, preempts state laws that impose liability on owners or lessors of vehicles up to certain amounts listed in the pertinent state statutes. Although "financial responsibility" is left undefined in the Graves Amendment, nothing in this portion of the Code supersedes any law of any State regarding imposition of liability on such businesses for failure to meet the financial responsibility or liability insurance requirements under State law.[13]

In Florida, the Fourth District Court of Appeal has noted that "the common usage of financial responsibility thus means an insurance equivalent, that level of security required to pay for damages arising from motor vehicle accidents, as a condition of acquiring a driver's license or registering a vehicle. . . ."[14] Furthermore, the District Courts of Appeal in Florida have all reached decisions holding that the Graves Amendment preempts § 324.021(9)(b), Fla. Stat., thereby insulating rental car leasing companies from any liability so long as they are not negligent or engaged in criminal wrongdoing during the leasing process.

The Effect of the Graves Amendment through Florida Case Law

Prior to the enactment of the Graves Amendment, Florida courts applied the Doctrine with few exceptions to protect allegedly injured plaintiffs.[15] Furthermore, a United States District Court for the Southern District of Florida Judge held that the Graves Amendment was unconstitutional because it exceeded Congress's powers under the Commerce Clause.[16] This Court reasoned that "state laws are not to be preempted by a federal statute unless it is the clear and manifest purpose of Congress to do so."[17] However, on appeal to the Eleventh Circuit, the judgment entered against the rental car lessor was vacated and remanded with instructions to enter judgment in favor of the car rental lessor consistent with the decision reached in *Garcia v. Vanguard Car Rental USA, Inc.*[18]

The *Garcia* decision has influenced the Florida District Courts of Appeal to consistently hold that the Graves Amendment preempts the Doctrine.[19] When *Garcia* was before the Fourth District, the District Court held that section 324.021(9)(b)(2), Fla. Stat., was not a financial responsibility law because it did not impose liability on car rental companies for failing to meet financial responsibility or liability insurance requirements under state law.[20] Administrators and personal representatives of estates of two people killed in a three-car accident involving a rental car brought a wrongful death claim against Vanguard Car Rental USA, which filed a declaratory action and motion for summary judgment.[21] Further, the *Garcia* Court held that the Graves Amendment was a valid exercise of Congress's Commerce Clause power,[22] thereby negating any constitutional arguments made by plaintiffs. In *Garcia v. Vanguard Car Rental USA, Inc.*, the Eleventh Circuit affirmed that decision.[23]

In *Vargas v. Enterprise Leasing Co.*, the Fourth District Court of Appeal held that the federal Graves Amendment preempted the state "financial responsibility" statute.[24] Thus, in *Vargas*, the state law requiring rental car companies to be financially responsible for up to an additional $500,000.00 if one of their cars is driven by an uninsured or underinsured motorist having less than $500,000.00 in combined insurance limits, was preempted by the federal Graves Amendment.[25] The sole count against Enterprise Leasing asserted that it was vicariously liable under the Doctrine.[26] The Circuit Court granted Enterprise Leasing's motion for summary judgment, holding that the Graves Amendment preempted this section of the Florida Statutes.[27] In affirming, the Fourth District Court of Appeal concluded that the state statute was neither a "financial responsibility law" nor a "liability insurance requirement,"[28] which would bring it within a savings clause of the Graves Amendment.[29]

Conclusion

The Graves Amendment has thus far achieved its purpose of protecting rental car companies from vicarious liability in Florida. The majority of Florida's intermediate appellate courts have reached the conclusion that the Graves Amendment preempts the Doctrine.[30] The Fourth District followed the *Garcia* Court's

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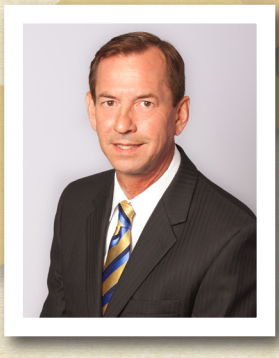

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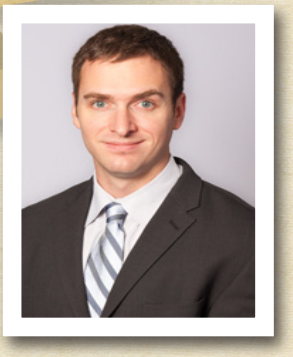

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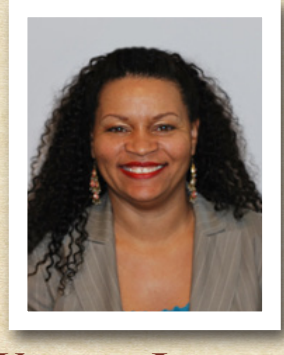

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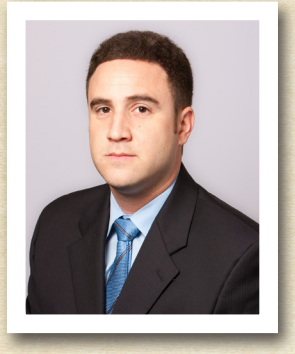
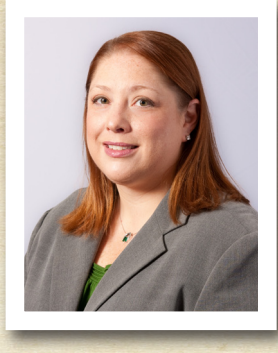


Daniel Klein
Miami



Beth Koller
Forth Lauderdale

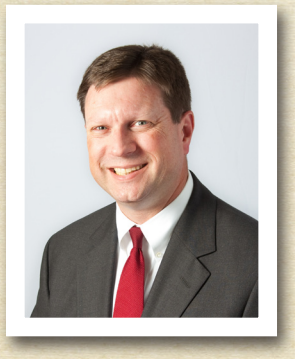
Armando Rubio
Miami

David Salazar
Miami

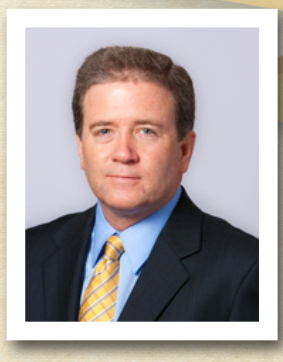
Sherry Schwartz
West Palm Beach

Scott Shelton
Tampa

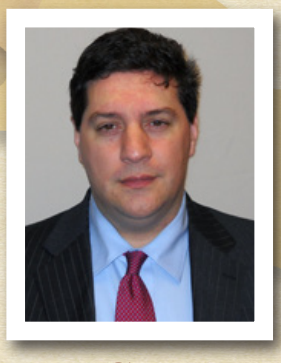
RTNERS



Bill Davis
Orlando



Ben Esco
Miami



Vince Gannuscio
Tampa

Sheila Gonzales-Jonasz
Miami

Jana Leichter
West Palm Beach

Paula Parisi
Tampa

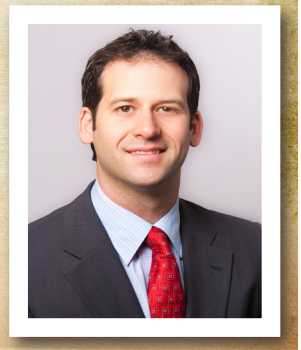
Edward Polk
Miami

Randy Rogers
Jacksonville

Patrick Snyder
Jacksonville

George Truitt
Miami

Brandon Waas
Miami



Hal Weitzenfeld
Tampa

rationale but cited that the facts were virtually identical to *Vargas*.[31] The Fourth District certified the question regarding whether the Graves Amendment preempts section 324.021(9)(b)(2), Fla. Stat., to the Florida Supreme Court, as did the Second[32] and Fifth[33] Districts. As of publication of this article, the Florida Supreme Court has not yet rendered an opinion.[34]

The results of the Graves Amendment are not so "grave" for lessors of rental cars in the current legal environment. Currently, lessors are protected in Florida but await the Florida Supreme Court's decision on this matter. Of course, if the Florida Supreme Court rules against preemption, defendants may request the matter be heard by the Eleventh Circuit, which has clearly ruled that the Graves Amendment preempts Florida state law.[35] But should the Florida Supreme Court affirm the District Courts of Appeal in determining that the Graves Amendment preempts the Doctrine, it will shore up existing precedent and force plaintiffs to seek alternatives such as filing direct negligence claims against rental car companies for lack of maintenance, repair, and other defective conditions. We will also likely see a rise in negligent entrustment claims against rental car companies. How "grave" the Graves Amendment will be remains to be seen.

(Endnotes)

1 *Garcia v. Vanguard Car Rental USA, Inc.*, 10 F. Supp. 2d 821 (M.D. Fla. 2007).
2 *Kamarsingh v. PV Holding Corp.*, 983 So. 2d 599 (Fla. 3d DCA 2008).
3 *See Susco Car Rental Sys. of Fla. v. Leonard*, 112 So. 2d 832 (Fla. 1959); *Lynch v. Walker*, 159 Fla. 188, 31 So. 2d 268, 271 (Fla. 1947) *overruled in part on other grounds by Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984); *Poole v. Enterprise Leasing Co. of Orlando*, 2006 WL 1388442 (2006).
4 *See Vargas v. Enterprise Leasing Co.*, 993 So. 2d 614 (Fla. 4th DCA 2008); *Tocha v. Richardson*, 995 So. 2d 1100 (Fla. 4th DCA 2008); *West v. Enterprise Leasing Co.*, 997 So. 2d 1197 (Fla. 2d DCA 2008); *Karling v. Budget Rent A Car Sys., Inc.*, 2 So. 3d 356 (Fla. 5th DCA 2009).
5 *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 445 (Fla. 1920).
6 *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000).
7 *Id. citing Hertz Corp. v. Jackson*, 617 So. 2d 1051, 1053 (Fla. 1993).
8 *Id. citing Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990).
9 *Id.*
10 § 324.021(9)(b)(2), Fla. Stat. (2007).
11 *Vargas v. Enterprise Leasing Co.*, 993 So. 2d 614, 617 (Fla. 4th DCA 2008).
12 49 U.S.C. § 30106(a) (2005).
13 49 U.S.C. § 30106(b)(2) (2005).
14 *Vargas v. Enterprise Leasing Co.*, 993 So. 2d 614, 619 (Fla. 4th DCA 2008).
15 *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000) *citing Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990).
16 *Vanguard Car Rental USA, Inc. v. Druin*, 521 F. Supp. 2d 1343, 1347 (S.D. Fla. 2007).
17 *Id.*
18 *Vanguard Car Rental USA, Inc. v. Druin*, 2009 WL 995141 (2009) *citing Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008).
19 *Garcia v. Vanguard Car Rental USA, Inc.*, 510 F. Supp. 2d 821, 825 (M.D. Fla. 2007).
20 *Id.*
21 *Id.* at 824.
22 *Id.* at 834.
23 *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008).
24 *Vargas v. Enterprise Leasing Co.*, 993 So. 2d 614 (Fla. 4th DCA 2008).
25 *Id.* at 619.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* at 618.
30 *See St. Orange v. White*, 988 So. 2d 59 (Fla. 1st DCA 2008); *Blanks v. Enterprise Leasing Co. et al.*, (Fla. 3d DCA 2009); *Vargas v. Enterprise Leasing, Co.*, 993 So. 2d 614 (Fla. 4th DCA 2008); *Karling v. Budget Rent A Car Sys.*, 2 So. 3d 354 (Fla. 5th DCA 2008); *Garcia v. Vanguard Car Rental USA, Inc.*, 510 F. Supp. 2d 821, 825 (M.D. Fla. 2007).
31 *Tocha v. Richardson and Dollar Thrifty Auto. Group, Inc.*, 995 So. 2d 1100, 1102 (Fla. 4th DCA 2008).
32 *West v. Enterprise Leasing Co.*, 997 So. 2d 1197 (Fla. 2d DCA 2008).
33 *Karling v. Budget Rent A Car Sys., Inc.*, 2 So. 3d 356 (Fla. 5th DCA 2009).
34 *Vargas v. Enterprise Leasing Co.*, 28 So. 3d 46 (Fla. 2009).
35 *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008).

GOOD NIGHT, SLEEP TIGHT, BUT THE BEDBUGS STILL BITE

By Brian J. Aull

Masked in the shadows of homes and hotels, bloodthirsty vermin wait for darkness to fall, so that they can prey on human flesh. What sounds like fodder for a Hollywood thriller is all too real. America is faced with a "recent plague"[1] that is "becoming an epidemic."[2] Tiny parasitic insects that live in bedding, sheets, mattresses and furniture have been taking a bite out of the condominium and hotel businesses. Pests that once were mostly an afterthought, known more for their inclusion in a children's rhyme than as a threat to sleeping family members, are back in the public consciousness in a big way. So much so, that *New York Magazine* has decried that we are "living in the age of bedbugs."[3]

The bedbug infestation has reached such a degree of proliferation that the first North American Bed Bug Summit was held in Rosemont, Illinois on September 21, 2010.[4] With paranoia and stigma riding the coattails of the bedbugs into the spotlight, lawsuits too, have followed. Courts across the country have had to determine factual and legal thresholds for lawsuits involving bedbugs. Most of the recent cases have sounded in negligence.

Plaintiffs in Florida have sought damages under theories of both gross negligence and simple negligence.[5] Under Florida law, to show gross negligence, a

plaintiff must demonstrate three elements: 1) a composite of circumstances exist which together constitute a clear and present danger; 2) awareness by the defendant of such danger; and 3) a conscious, voluntary act or omission by the defendant in the face thereof which is likely to result in injury.[6] Florida courts have held that a swarm of bed bugs lying in wait under the covers can constitute a triable issue of fact concerning a "clear and present danger of insect attack."[7] Courts have looked to a variety of factors in determining whether a defendant is aware of the danger of lurking bed bugs, taking into consideration: prior recent tenant complaints of an insect infestation in the property,[8] logs or records detailing complaints of bed bugs in units in the same building as the property,[9] and complaints by the Plaintiff himself over the course of multiple days staying in the property.[10] The third element is met when evidence can show that a manager or proprietor ignores the bedbugs and continues to put customers into contact with them.[11]

Courts in Florida have also recognized that Plaintiffs can bring bedbug related claims under a theory of simple negligence.[12] Simple negligence consists of a duty of care owed by the defendant to the plaintiff, a breach of that duty, proof that the breach was the cause of the injury to the plaintiff, and proximately caused damages.[13] A hotel owes its business invitees: 1) the duty to exercise reasonable care in maintaining its premises in a reasonably safe condition; and 2) the duty to warn of concealed perils that are or should be known to the landowner and that are unknown to the invitee and cannot be discovered through the exercise of due care.[14] Tiny though they may be, a family of bedbugs tucked away in the nooks and crannies of a hotel room can qualify as a concealed peril that cannot be discovered through the exercise of due care by a patron.[15]

Through these two vehicles of liability, plaintiffs across the country have won some sizable verdicts and settlements after receiving bedbug bites and the occasional rash. In Alabama, a plaintiff negotiated a $9,800 settlement award after a four year old child received insect bites on her arms, legs and torso while at the defendant day care facility.[16] In Mississippi, $4,000 was awarded by a jury to a plaintiff who suffered an allergic reaction to bedbug bites she received in her room at the defendant resort.[17] While in New Jersey, two plaintiffs who suffered multiple injuries, including insect bites after sleeping on a bed purchased from the defendant's store, received a total verdict of $49,000.[18]

However, the risks to a hotel or resort can prove to be far greater that this sampling of verdicts and settlements. In a case cited throughout bedbug litigation, an Illinois court held that evidence supported finding that a hotel chain's conduct was willful and wanton in failing to avoid a known risk of bedbug infestation, and thus supported a finding of gross negligence and an award of punitive damages to the hotel guests who were bitten by bedbugs: where the hotel chain refused a recommendation of a hired exterminator to spray every room, where the hotel chain refused a hotel manager's recommendation to close the hotel while every room was sprayed, and where the hotel chain placed guests in rooms known to be infested with bed bugs.[19] The jury found $5000 in general damages and $186,000 in punitive damages. The judgments were upheld.[20]

Bedbugs have taken a bite out of the retail market as well. In July 2010, Hollister, Abercrombie and Fitch and Victoria's Secret were forced to close stores in New York City when the tiny bloodsuckers moved in.[21] The stigma associated with an infestation can be particularly damaging with bedbugs. Dr. Susan Jones, an associate professor of entomology at Ohio State University explains why: "Ticks and mosquitoes bite us when we're outside, in their world, but bedbugs invade the safety and sanctity of our homes. We see our homes as a sanctum. Bedbugs hide in our spaces and come out at night to feed on us. They are an insect that only consumes blood and prefers human blood."[22]

Despite the recent media reports, a well prepared defense team can mount successful challenges to bedbug plaintiffs. There is not a presumption of negligence merely because bedbugs are found in a hotel or store.[23] Negligence must be proved. The nexus between duty and liability is proof of negligence.[24] Negligence in this context requires not only proof of the condition which caused the injury but that the condition was known or should have been known by the landlord prior to the occurrence, so that he had an opportunity to correct it.[25] Even knowledge of a prior bed bug infestation in another apartment or hotel room does not necessarily impute knowledge of a similar condition elsewhere on the property.[26] While the best defense to bedbug litigation is an aggressive policy of pest control prevention, and immediate remedial efforts upon the discovery of the vampiric visitors, the law does not impose strict liability on landlords, and the negligence standard places a seasoned defense team in a much more tenable position. The potential damage to a business from a bedbug claim could be staggering. As such, defense teams should place a strong emphasis on confidentiality agreements in settlement, and stiff penalties for violations of such an agreement.

These tiny insects are not known to carry any diseases, and their bite typically does not even rouse a sleeping person from their slumber, yet they have certainly left a mark on the psyche of the nation and its juries. While a prompt and fair evaluation of a bedbug case can certainly mitigate the potential issues faced by hotels, resorts, retailers, multiunit buildings and their insurance providers, the bedbugs have announced their presence on the litigation scene, and they are ready to dine on sleeping invitees and unprepared litigants alike.

(Endnotes)

1 Hager, Emily (August 20, 2010). "What Spreads Faster Than Bedbugs? Stigma". *The New York Times*.

2 Jacobs, Andrew (November 27, 2005). "Just Try to Sleep Tight. The Bedbugs Are Back". *The New York Times.*

3 Robertson, Lindsay (August 21, 2009). "We Are Still Living in the Age of Bedbugs". *New York Magazine.*

4 CTV.ca News Staff (November 27,. 2010). "Landlords, tenants seek solutions in bed bug fight." *CTV Toronto.*

5 *Livingston v. H. I. Family Suites, Inc.*, 2006 WL 1406587 (M. D. Fla. 2006).

6 *Dent v. Florida Power & Light Co.,* 633 So.2d 1132, 1134 (Fla. 4th DCA, 1994) (citing *Sullivan v. Streeter,* 485 So.2d 893,895 (Fla. 4th DCA 1986).

7 *See Livingston v. H. I. Family Suites, Inc.*, 2006 WL 1406587 (M. D. Fla. 2006).

8 *Id.*

9 *Id.*

10 *See Prell v. Columbia Sussex Corp,* 2008 WL 4646099 (E. D. Pennsylvania 2008)

11 See *Livingston v. H. I. Family Suites, Inc.*, 2006 WL 1406587 (M. D. Fla. 2006).

12 *Id.*

13 *See Eppler v. Tarmac America, Inc.,* 752 So.2d 592, 594 (Fla.2000).

14 *See St. Joseph Hospital v. Cowart*, 891 So.2d 1039, 1040 (Fla. 2d DCA 2004).

15 *See Livingston v. H. I. Family Suites, Inc.*, 2006 WL 1406587 (M. D. Fla. 2006).

16 *Wyatt, Pro Ami, Slaton v. Heritage Christian Academy; Heritage Assembly,* 2003 WL 25693187 (Ala. 2003)

17 *Elgandy v. Boyd Mississippi, Inc.*, 2003 WL 24571854 (Miss. 2003).

18 *Huynh v. J.C. Penny Co., Inc.,* 2008 WL 4145883 (N.J. 2008).

19 *Matthias v. Accor Economy Lodging, Inc; Motel 6 Operating LP,* 2003 WL 25147946 (N.D. Ill. 2003).

20 *Id.*

21 Watson, Bruce (July 27, 2010). "Bedbugs Are Back and They're Bleeding Us Dry." *Daily Finance.*

22 *Id.*

23 *Mitchell v. Capitol Management Corp.,* 2010 WL 4074940 (N.J. Super. A.D. 2010).

24 *Dwyer v. Skiline Apartments,* 123 N.J. Super 48, 52 (App.Div.), *aff'd,* 63 N.J. 577 (1973).

25 *Mitchell v. Capitol Management Corp.,* 2010 WL 4074940 (N.J. Super. A.D. 2010).

26 *Id.*

THE INTERPLAY BETWEEN UNINSURED MOTORIST COVERAGE, WORKERS' COMPENSATION BENEFITS, AND WHEN SUCH BENEFITS ARE AVAILABLE

By David A. Kirsch

Although an uninsured motorist carrier ("UMC") is entitled to set off the payments made by a workers' compensation insurer ("WCI") to the plaintiff from the damages to be paid by the UMC, the determination of how that set off is calculated is crucial for ensuring that the UMC is not providing recovery to the plaintiff that should have been provided by the WCI. By adding a provision to their insurance policies that they will not compensate the claimant for injuries that were compensated *or could have been compensated* by a WCI, UMCs may be in a better position to set off their damages to a plaintiff by the amount that the plaintiff was entitled to recover from the WCI rather than simply what the plaintiff did in fact recover.[1] An insured may have received less than the amount to which she was entitled because she may have settled out of haste in order to receive funds from a WCI or because she choose to receive treatment from a non-workers' compensation doctor. She even may have planned that the UMC would later pay the remainder of her damages up to the point of permissible coverage.

The relationship between uninsured motorist coverage and workers' compensation insurance is governed by Fla. Stat. § 627.727. Section (1) of that statute provides:

> [t]he coverage [provided by the UMC] described under this section shall be over and above, but shall not duplicate, the benefits **available to** an insured under any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; . . . and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section.[2] (emphasis added).

Thus, a UMC is only required to compensate an insured for damages that have not been covered by workers' compensation benefits or similar law. Florida courts have found that payments by a UMC to the insured are to be reduced by the present workers' compensation benefits that have been paid or are due and payable.[3] Thus, an insured may settle for a lower amount to receive funds immediately and then seek full damages from a UMC. Additionally, an insured could seek medical treatment from a non-workers' compensation doctor and then seek have UMC cover those costs when she could have been treated by a doctor who would have been paid for by a WCI. In so doing, the insured would claim that only the amount received, rather than the larger amount that could have been received, should be set off as the higher amount is no longer "available" under Fla. Stat. § 627.727, despite the fact that it had been available.

In *USAA Cas. Ins. Co. v. McDermott*, the Second District Court of Appeals for the State of Florida found that a UMC that provided coverage for a police officer injured in a car accident involving a fleeing suspect was not entitled to set off workers' compensation benefits that were likely payable to the officer in the future.[4] In finding that the UMC was not entitled to a setoff of workers' compensation benefits likely payable in the future, the court noted that the insurance policy did not contain a provision that entitled the UMC to set off such benefits.[5] The court suggested that such a provision would permit the UMC to set off future benefits so long as the provision did not run afoul of the statutory scheme created by Fla. Stat. § 627.727 or run contrary to Florida public policy.[6]

A provision in a UMC's insurance policy that states that the UMC will be entitled to a setoff of the workers' compensation benefits that are or *were* available to the insured may be enforceable because such a provision should be compatible with both Florida statutes and public policy. First, policy language that would permit the UMC to setoff workers' compensation benefits that "were available" would closely mimic the language already present in Fla. Stat. § 627.727. Importantly, the language in Fla. Stat. § 627.727 focuses on availability of the benefits but does not specify when those benefits are to be available, *i.e.* in the past or in the future. There is even an argument to be made that a contract provision would not be necessary to setoff benefits that had been available but not received because of the temporally ambiguous "available" language contained in Fla. Stat. § 627.727. A clear contractual provision, however, would be more likely to succeed than an argument only based on the statutory language.

Next, while there are no Florida cases directly addressing whether public policy would permit such a provision, it has arisen in other jurisdictions. For example, in *Dwight v. Tennessee Farmers Mutual Insurance Co.*, the plaintiff sought payment from a UMC even though she had failed to pursue a workers' compensation claim.[7] The insurance policy

between the UMC and the plaintiff included a provision that compensation under that policy would be reduced by the amount paid or payable under any workers' compensation law.[8] Even though the plaintiff had already waived her workers' compensation claim by the time of the ruling, the court permitted a setoff of the amount that the plaintiff *could* have received from her WCI because those benefits had been available.[9] In explaining the policy because its ruling, the court noted, "[t]he plaintiff's unilateral waiver of benefits may not operate to increase the contractual obligations of the [UMC]."[10]

Moreover, prohibiting UMCs from setting off their damages by the amount that could and should have been paid by a WCI would force UMCs to increase rates for fear that they would be required to cover expenses and risks that they reasonably believed would be covered by WCIs. Such a rule would thereby increase the cost of uninsured motorist coverage, and decrease the availability of uninsured motorist insurance for those individuals who truly need coverage for the expenses it was designed to cover. Thus, it should not be the responsibility of a UMC to cover for expenses that ought to be paid by a WCI. Therefore, it should not violate public policy to require a party to seek the highest amount of coverage possible from a WCI before demanding payment from a UMC. As a result, UMCs should adopt clear language in their policies that provides for a setoff of workers' compensation benefits that both are available and were available in order to increase any potentially obtainable setoff of workers' compensation benefits.

(Endnotes)

1 Although many UMC policies contain a clause that UMCs will not pay for any element of loss if a person is entitled to receive payment for that loss by a WCI, this clause may not be broad enough to cover elements of loss for which a person *had been* entitled to receive payment from a WCI.
2 Fla. Stat. § 627.727 (2010).
3 *See National Union Fire Ins. Co. of Pittsburgh v. Blackmon*, 754 So. 2d 840 (Fla. 1st DCA 2000); *see also Lobry v. State Farm Mut. Auto. Ins. Co.*, 398 So. 2d 877 (5th DCA 1981).
4 *See USAA Cas. Ins. Co. v. McDermott*, 929 So. 2d 1114 (2nd DCA 2006).
5 *See id.* at 1119.
6 *See id.*
7 *See Dwight v. Tennessee Farmers Mutual Insurance Co.*, 701 S.W.2d 621 (Tenn. Ct. App. 1985).
8 *See id.* at 622.
9 *See id.*
10 *Id.*

MEET ONE OF OUR ATTORNEYS

STEVEN WORLEY

Steven Worley is a partner in the firm's Jacksonville office. His practice focuses on the representation of self-insured companies, insurers, and corporations in the areas of general civil litigation, insurance defense and commercial litigation. Mr. Worley has extensive experience with all aspects of discovery, hearings, motions, arbitrations, mediations and trials.

He is a member of The Florida Bar, the Alabama Bar Association, the Duval County Bar Association and the Jacksonville Association of Defense Counsel. Mr. Worley has been rated by Martindale-Hubbell for ethics and legal ability.

SUCCESS STORIES

After several years of very heated litigation and twelve days of bench trial, **Thomas Scott** secured a complete trial victory on behalf of a doctor who was being charged by the Securities and Exchange Commission. The trial court held (in an opinion that was over 60 pages long) that there was no substantial credible evidence to support any claims against the doctor.

Beth Koller secured a defense verdict in favor of the Employer/Carrier in a heavily litigated workers' compensation case involving the overutilization of services. The claimant received multiple injections and blocks for a significant right arm injury. Beth was able to quash any further entitlement to compensation for these procedures after arguing that they were not medically necessary and potentially harmful to the claimant.

Caryn Diamond obtained a dismissal of a lawsuit in the Middle District of Florida alleging breach of contract and violation of the federal Medicare Secondary Payor Act ("MSPA") against our clients. Plaintiffs' claims derived from a purported settlement in an action that was still pending in Miami-Dade County. **Caryn** argued that the case should be dismissed, or in the alternative, stayed, in favor of the concurrent state court action. The federal court initially stayed the case, but later entered a dismissal after concluding that the state court's issuance of an order on a motion to enforce compliance with the MSPA resolved and mooted both claims of the plaintiffs' federal action.

Concerned with protecting our client from liability under the MSPA for failing to protect Medicare's interests in satisfaction of its lien(s), **Gene Kissane** and **Alejandro "Alex" Perez** successfully argued, over strenuous objection, that the plaintiff should either provide documentation of a final lien amount accepted by Medicare as full payment so as to enable the issuance of two separate checks to plaintiff and Medicare or alternatively, accept a dual check made out to plaintiff and Medicare. Also critical to this defense were **Michael Brand** and **Sheila Gonzales-Jonasz**.

Benjamin Esco and Aram Megerian obtained summary judgment in favor of a landlord who was sued following the death of an undercover policeman who was shot on the property during a drug sting operation. Despite the landlord's awareness that the property was located in a "high-crime area," the trial court held that the defendant landowner breached no duty to the officer since no similar incidents had occurred in the past and a private non-commercial landlord owed no duty to warn a police officer against potential injury sustained in an attempted arrest on the property.

Anika Campbell obtained a summary judgment on behalf of an escrow agent in a breach of fiduciary duty case involving the purchase and sale of commercial real estate. When the closing failed to occur due to the buyer failing to deliver the escrow funds to the agent, the seller filed a lawsuit against the escrow agent alleging a breach of fiduciary duty in failing to secure the deposit from the buyer and failing to advise the seller that they were not in possession of the deposit prior to closing. **Anika** obtained summary judgment on behalf of the escrow agent by arguing that 1) the express terms of purchase agreement relieved the escrow agent from liability based on the "misdelivery of escrow deposit" and 2) the duty of the escrow agent to exercise due care in disbursing the escrow funds does not commence until actual receipt of the funds.

Benjamin Esco prevailed in the appeal of a summary judgment in favor of a defendant homeowner in a wrongful death motor vehicle accident case. The defendant/homeowner acted as a "designated driver" for his intoxicated brother, who was brought to the defendant homeowner's home and put safely to sleep. Thereafter, the brother woke up, took his keys, and attempted to drive home. The brother caused a fatal collision, killing himself and another driver. The trial court held that the defendant homeowner was immune from liability under the doctrine of social host immunity and the appellate court agreed, holding that the defendant homeowner had undertaken no duty to third parties. Thereafter, plaintiff attempted to appeal this matter to the Florida Supreme Court, where **Benjamin** and **Alex Perez** defeated plaintiff's efforts to establish jurisdiction before the State High Court.

James Sparkman received a favorable trial result in an automobile negligence case where the defendant admitted liability, but contested causation. After presenting its case, the plaintiff sought $132,000 in damages, but the jury, who determined that the plaintiff did not suffer a permanent injury, only awarded $9,000 for past medical bills and $6,000 in future medical expenses, all of which was subject to a $10,000 setoff for prior no-fault payments.

W Scott Mason obtained a summary judgment in a nursing home arbitration based on a statute of limitations argument where he demonstrated that a deceased resident had knowledge of his alleged injuries prior to death.

Scott Shelton obtained a summary judgment in a slip and fall case. While there was some dispute as to whether the plaintiff was an invitee or licensee, the trial court agreed that under either standard, no duty was owed to the plaintiff. Furthermore, the trial court held that any amendment to the pleadings would be futile and dismissed the case.

Trelvis Randolph obtained a summary judgment in a slip and fall case involving a plaintiff who suffered injuries while being brought home by the defendant from an overnight hospital stay. Before they arrived at the home, and unbeknownst to anyone else, the kitchen floor had been mopped by the Defendant's niece as part of a surprise housecleaning gift. The plaintiff went into the kitchen and slipped on the floor. Counsel for plaintiff argued that our client failed to warn about the dangerous condition of the floor before the fall. The trial court disagreed and entered summary judgment for the defendant.

Sherry Schwartz, Jim Sparkman, and Kim Strand achieved a complete defense verdict in an automobile negligence case involving a 23 year-old restaurant server who was involved in a low speed parking lot incident. The plaintiff underwent two low back surgeries and incurred over $400,000 in medical expenses. Plaintiff sought over $600,000 in future medical expenses as well as other damages. After four days of trial, the jury reached its verdict in less than an hour, returning a complete defense verdict.

John Penton prevailed in an appeal in a homeowner's association action where the homeowner had waited more than five years before challenging a mandatory country club membership provision that was added in 2003. The trial court had dismissed the case on statute of limitations grounds, but the appellate court affirmed, holding that declara-

tory relief was unavailable where the statute of limitations for the cause of action had run.

Robert Swift and Maria Morris obtained a complete defense verdict in a homeowners insurance property damage claim where the plaintiff alleged that the insurance carrier did not pay enough money for water damage resulting from a broken pipe. The insurance carrier had paid about $31,000 based on a contractors estimate; however, there was an estimate from another contractor sent by the insurance company for $52,000. Also, the plaintiff presented the jury with an estimate of $61,000 from the public adjuster and $68,000 from their expert contractor. The plaintiff requested the $68,000 based on their expert's estimate, but the jury was convinced by **Robert Swift** and **Maria Morris**' argument that the insurer had sufficiently met its obligation.

Robert "Bubba" O'Quinn obtained a complete defense verdict in a personal injury case involving a wife who became injured when her husband negligently operated a construction vehicle (a Bobcat) used to aid in tree removal. Defendant is a sole proprietor tree removal company and father-in-law to plaintiff. While on a job site where defendant was removing four large trees, plaintiff sustained serious injuries. The case was bifurcated and tried as to liability only, where the jury adjudged the Bobcat operator 80% negligent, plaintiff 20% negligent and defendant 0% negligent. In addition, the operator was deemed to have been acting outside of any agent or employer/employee relationship.

Barry Postman and Michael Shiver obtained a complete defense verdict in a case involving a plaintiff that fell in an elevator that was allegedly mis-leveled and sustained $540,000 in medical expenses. Plaintiff argued that the elevator was not maintained up to code. It was undisputed that at the time of the accident, the elevator was eight inches below level. In addition to the $540,000, plaintiff sought another $100,000 in future medical expenses and approximately $200,000 in pain and suffering. After a five-day trial, the jury returned a zero damages verdict.

Michael Brand and Sheila Gonzales-Jonasz recently tried a construction zone trip and fall where plaintiff alleged that, due to improper safety considerations, the plaintiff was caused to fall, fracturing his knee and requiring two surgeries. After a five-day trial, the jury returned a complete defense verdict.

Michael Brand and Trelvis Randolph received a complete defense verdict in a product liability case after a week-long trial. Plaintiff argued that the defendant's surge suppressor was negligently designed, causing it to overheat and ignite, leading to several hundred thousand dollars in property loss. The 1997 loss was also subject to prejudgment interest, more than doubling the potential damages available if the jury had sided with the plaintiff. The defense successfully argued that the design of the surge protector was state of the art and was not the cause of the fire.

Jonathan Vine and Andrew Loewenstein achieved a dismissal, with prejudice, of State court malicious prosecution and abuse of process claims stemming from an underlying federal securities proceeding. After settling the federal court suit and agreeing to the entry of a consent judgment, the underlying defendant initiated an action against the underlying plaintiff's law firm, unsuccessfully claiming that the first suit ended in a bona fide termination in its favor.

John Penton obtained an affirmance in the appeal of a summary judgment where an insurance agent was sued for negligent misrepresentation, negligence, and vicarious liability based on failure to procure uninsured motorist coverage. The Court held that execution of a form rejecting UM coverage absolved the insurance agency and its agent (as opposed to just the insurance company) of liability for negligently failing to procure UM coverage for that insured because the signed UM rejection form created a conclusive presumption that there was informed, knowing acceptance of the policy's limitations.

Benjamin Esco received a successful written administrative determination from the Florida Commission on Human Rights and a subsequent favorable final trial court ruling on behalf of a condominium association accused of violating the Americans with Disabilities Act for allegedly failing to make a reasonable accommodation to a resident who sought to live with an emotional support dog.

John Penton prevailed in a federal Truth-in-Lending Act (TILA) case that was appealed to the United States Supreme Court. Last year, John obtained a reversal of an adverse TILA summary judgment entered for plaintiff in the Middle District of Florida. The Eleventh Circuit Court of Appeals reversed, holding that the federal court could not grant rescission under TILA where this remedy would interfere with a state court foreclosure judgment. The plaintiff petitioned the United States Supreme Court to review the Eleventh Circuit's decision, and after John filed a brief in opposition to the petition, the Supreme Court declined certiorari.

Ron Campbell and Julie Kornfield obtained a complete verdict in favor of their client, a golf and country club, in a breach of contract and promissory note action. The client was able to recover the full amount owed on the promissory note, and is entitled to collect fees and costs.

Kristen Tajak obtained a per curiam affirmance from the Eleventh Circuit Court of Appeals in a matter involving the validity of an exculpatory clause in a commercial lease agreement that covered "personal injury or loss or damage to any personal property arising from any cause whatsoever . . . regardless of whether such loss or damage is caused by the intentional or negligent acts or omissions." The district court held that the language of the exculpatory clause was sufficient to indemnify the lessor against its own negligent acts for any injuries sustained on the leased property.

John Coleman and Colin Riley succeeded in defeating an attempt to amend a nursing home litigation negligence claim to add punitive damages. This victory is significant because this case demonstrates that despite the alleged debilitated health of the plaintiff, the skilled nursing facility was still able to demonstrate that it took reasonable measures sufficient to avoid punitive damages in an area of law where punitive damages arises with some regularity. This case involved an 81-year-old plaintiff who allegedly suffered from numerous health conditions. While at the nursing home for two months, the plaintiff's condition, including some pre-existing wounds, worsened. **John** and **Colin** successfully argued that the skilled nursing facility met the appropriate standard for wound care and the Court denied the motion to amend to add punitive damages.

Rhonda Beesing obtained final summary judgment based upon estoppel principles in an action against a surveyor company involving allegations of professional negligence, general negligence and fraud. The negligent survey allegedly caused set-back violations for a 12,000 square foot home and damages in excess of $1 million.

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Cole, Scott & Kissane, P.A. is proud to announce the launching of its newly designed website. As CSK heads into the new decade, it was important to provide its current and prospective clients a more user-friendly website in order to make information easily accessible to its clients. CSK designed its new website not only with functionality in mind, but also focused its efforts to curtail any compatibility issues with the always-changing technology of the internet.

Visitors of the new CSK website will enjoy easy accessibility to all articles published by CSK attorneys in an easy-to-read format, with several different search options from which to choose, along with all current events related to CSK and the legal community in general. We hope that you enjoy our new website, and our continuing effort to provide better legal services to our clients.

ATTORNEYS

GREG ACKERMAN
JESSICA ANDERSON
JASON ATKINSON
BRIAN J. AULL
GRANT A. BAROS, JR.
SCOTT A. BASSMAN
MICHAEL R. BEANE
RHONDA BEESING
RACHEL K. BEIGE
BRETT BERGER
EVAN BERGER
MARK BERLICK
MASON BINKLEY
BROOKE L. BOLTZ
DAVID P. BRADLEY
MICHAEL E. BRAND
MONETT K. BREWER
J. CHRIS BRISTOW
CHRISTOPHER BURROWS
MELISSA L. BUTTON
DAVID CABALLERO
ANIKA CAMPBELL
RON M. CAMPBELL
SHANNON H. CAMPBELL
ANDREA B. CHIRLS
LEE M. COHEN
BLAKE COLE
RICHARD P. COLE
SCOTT A. COLE
JOHN D. COLEMAN
NINA CONTE
MARCO COMMISSO
DAVID A. CORNELL
LARA DABDOUB
WILLIAM A. DAVIS, JR.
ROBERT DEHNE
JESSICA DEL VALLE
CARYN N. DIAMOND

TEMYS DIAZ
DANIEL DUELLO
ALISON DUNKELBERGER
BENJAMIN M. ESCO
SORENA S. FALLIN
LAURA FARACH
BRIAN FORBES
JOSHUA FRACHTMAN
JONATHAN FEUER
VINCENT GANNUSCIO
ANA GARDINER
J. CODY GERMAN
KEITH E. GITMAN
BRETT GOLDBLATT
JOSHUA GOLDSTEIN
SHEILA M. GONZALES-JONASZ
ELIZABETH GOMEZ-MAYO
JAMI L. GURSKY
ERIN HANTMAN
SAM HARDEN
DAVID HARRIGAN
TREVOR G. HAWES
PETER HOOGERWOERD
CLAIRE HURLEY
TULLIO E. IACONO
JASON ISAAC
SCOTT H. JACKMAN
VALERIE JACKSON
KATTY JULCA
WILLIAM KAROLY, JR.
JEANETTE KERR
DAVID KIRSCH
DANIEL KIRSCHNER
DANIEL J. KISSANE
GENE P. KISSANE
JOSEPH T. KISSANE
DANIEL J. KLEIN
PAUL G. KLUCK

BETH T. KOLLER
JULIE KORNFIELD
JOHN KOZAK
ROSS KULBERG
TAMARA JORDAN
KIP O. LASSNER
YUELING E. LEE
JANA LEICHTER
DANIEL LEVIN
ANDREW LOEWENSTEIN
JUSTIN LUGER
ROBERT MALANI
ROMINA MARCHESE
BRADLEY MARTIN
SCOTT MASON
MILES A. MCGRANE IV
ARAM P. MEGERIAN
KATHLEEN MERWIN
MAX MESSINGER
JONATHAN M. MIDWALL
ABBY MOEDDEL
MARIA MORRIS
ROBERT MORVAY
DENISE P. MURRAY
CRAIG NOVICK
ROCHELLE NUNEZ
KAREN B. O'CONNOR
ROBERT E. O'QUINN, JR.
DEVON OMBRES
NICOLE PANITZ
KEVIN PARDINAS
PAULA PARISI
STEPHANIE PARTLOW
JOHN S. PENTON, JR.
ALEJANDRO PEREZ
PAULA PHILLIPS
BRIAN PITA
EDWARD S. POLK

OLGA PORVEN
BARRY A. POSTMAN
ASHLEY POULTER
TRELVIS D. RANDOLPH
ERIC REISMAN
ADAM E. RICHARDS
ERIC T. RIEGER
ROBERT RIGHTMYER
COLIN RILEY
JILL ROBBE
CHAD ROBINSON
RANDY ROGERS
DRU ERIN ROSCO
DAVID L. ROSINSKY
BRIAN D. RUBENSTEIN
ARMANDO RUBIO
JENNIFER V. RUIZ
GENEVIEVE RUPELLI
LAURA SACHA
STEVEN SAFRA
HENRY SALAS
DAVID SALAZAR
BLAKE S. SANDO
TAWNA SCHILLING
HOWARD L. SCHOLL
SHERRY SCHWARTZ
KEVIN SCHUMACHER
DANIEL SCHUMAN
RYAN SCORDATO
THOMAS E. SCOTT
MELISSA SECRIST
SHELBY SERIG
SAHILY SERRADET
DANIEL A. SHAPIRO
SANJO SHATLEY
SCOTT SHELTON
WESLEY SHERMAN
MICHAEL W. SHIVER

JUSTIN D. SIEGWALD
ANTONIO SIMON
SALLY L. SLAYBAUGH
MICHELLE L. SMITH
JENNIFER SMITH
PATRICK SNYDER
JUSTIN SOREL
JAMES T. SPARKMAN
ERIN SPIRA
KARLY SPIRA
ALAN ST. LOUIS
NOAH STORCH
CLARKE S. STURGE
ROBERT A. SWIFT
LISA M. SZULGIT
KRISTEN TAJAK
TARA TAMONEY
LISA TAORMINA
IVAN J. TARASUK
LONNI D. TESSLER
ERIC TINSTMAN
WESLEY TODD
GEORGE TRUITT
JONATHAN VINE
BRANDON WAAS
NICOLE WALL
JONATHAN WEISS
ISAAC WANNOS
HAL WEITZENFELD
RYAN K. WILLIAMS
GREGORY J. WILLIS
STEVEN L. WORLEY
ROBERT WYKO
JOY ZUBKIN

PAUL A. LESTER
(OF COUNSEL)