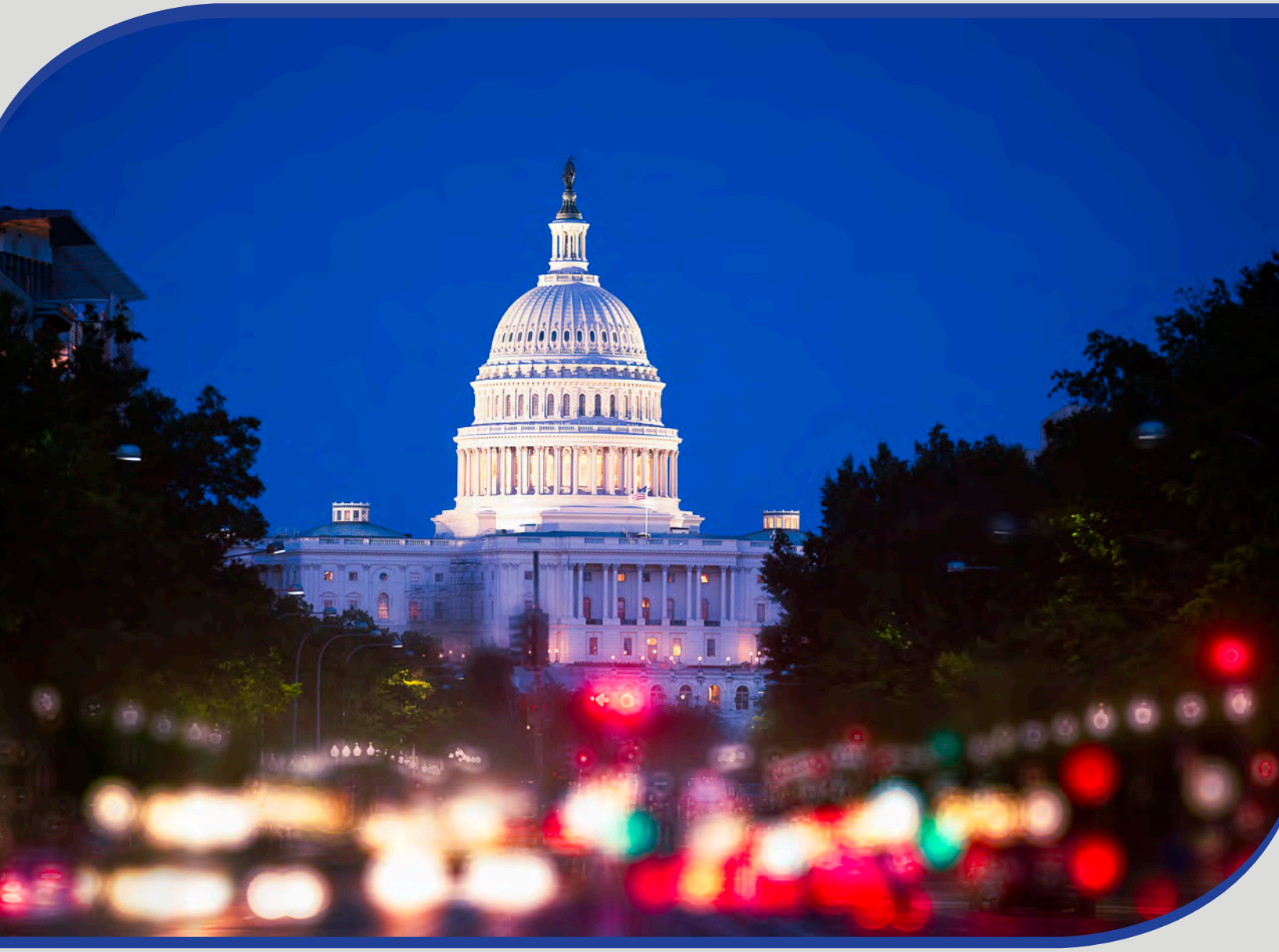
# QUARTERLY
## Newsletter

COLE, SCOTT & KISSANE, P.A. | WINTER 2016



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

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## Don't forget to check out CSK's

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In addition, a new vCard feature has been added to the website. You will see a link to "Download VCF" under every attorney's profile. Clicking on this will download all of the attorney's contact information into Outlook or smartphone contacts.

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Title VII of the Civil Rights Act of 1964 provides specific provisions that protect gender identity and gender expression, and provide legal protection for transgender individuals.

✓ TRUE X FALSE

- The first ten readers to respond correctly will receive a $10.00 Starbucks gift certificate.
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## A Note from the Editors


Dear readers,

We are proud to present the 2016 Winter Edition of the CSK Quarterly. Thank you for your continued interest and feedback.

In this Edition, we share cutting-edge insights into emerging legal trends and legal strategies for defending claims. We have included articles covering a variety of topics in the areas of labor and employment law, PIP, fraud, and contracts. Specifically, our attorneys have addressed claims practices with the emergence and potential increase of transgender discrimination claims, how courts apply the PIP deductible to bills submitted by hospitals and other non-emergency physician providers, when the court's sanction of dismissing a claim for fraud is appropriate, and new strategies for defending assignment of benefits claims in losses that involve homestead exempt properties.

This Edition also includes the first installment of the CSK Spotlight. In each Edition, we will dedicate this section to highlighting one of our various practice groups and the legal services they provide. This first CSK Spotlight features our Appellate and Legal Issues Group.

We hope that our collective efforts have once again resulted in a high quality publication that you will find enjoyable and informative. If you have any areas of interest you would like for us to explore in future editions, we invite you to contact us. We look forward to receiving your suggestions and requests.

Lastly, congratulations to the winners of our last Quarterly Trivia Contest. We encourage you to participate in this Edition's Trivia Contest for your chance to win a $10 gift card.

On behalf of all of us at CSK, we wish you, your colleagues, family and friends a happy and healthy holiday season.

*Linda C. Sweeting and Lissette Gonzalez*


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

## CSK SPOTLIGHT: The Appellate and Legal Issues Group

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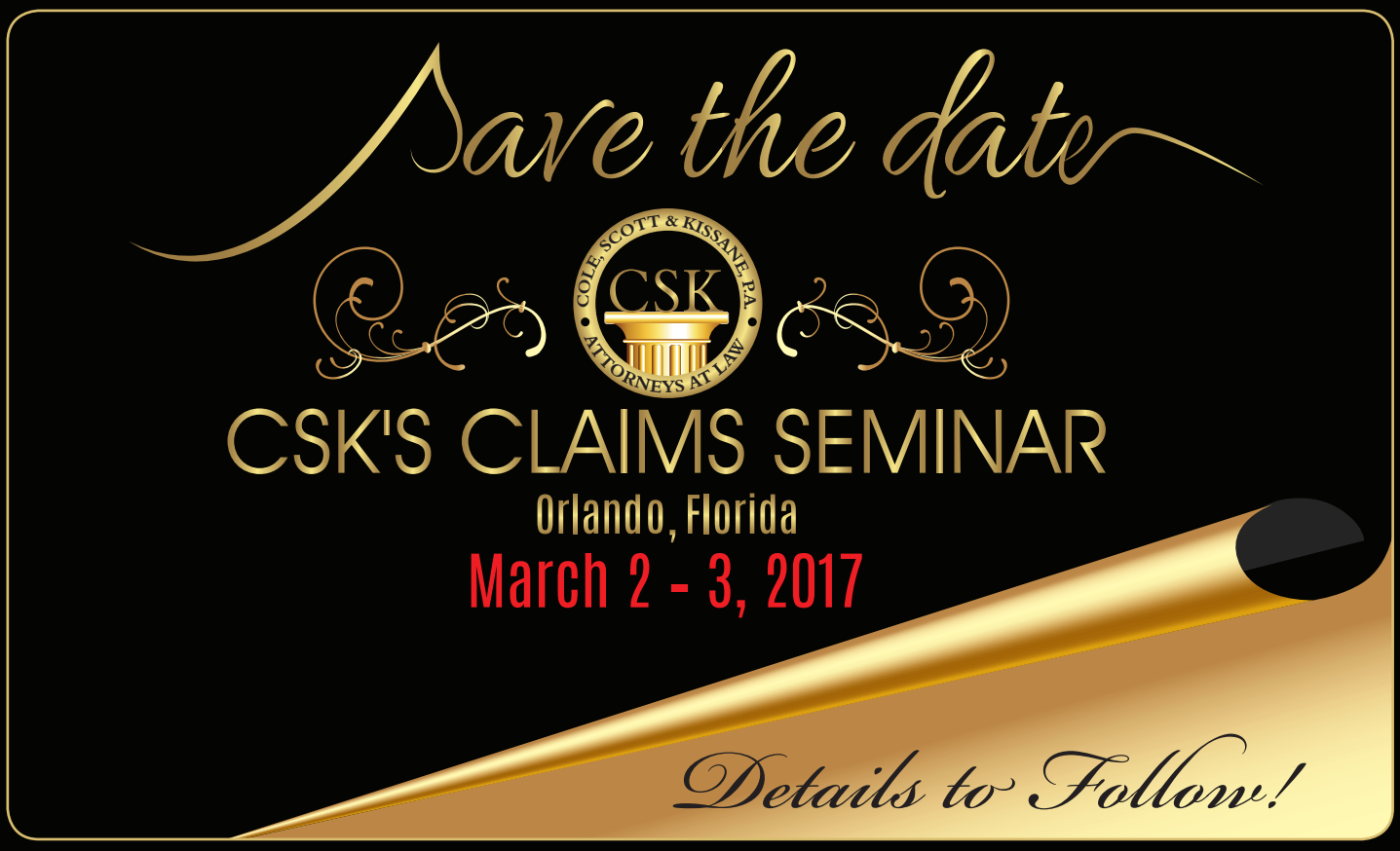

# TRANSGENDER DISCRIMINATION CLAIMS

By Eric B. Moody

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

Transgender discrimination has increasingly become a topic of concern for employers and insurance professionals who handle these claims.[1] At the state level, some legislative bodies have even further confounded the issues surrounding equal protection for the transgender population by enacting anti-transgender laws. One recent example occurred in North Carolina when its state legislature enacted the "Bathroom Bill." The Bill restricts transgender individuals to utilizing public restrooms that correspond to the sex listed on the individuals' birth certificates. Such legislation poses the probability---if not certainty---of an increasing number of transgender discrimination claims.

Despite increased awareness in recent times, it is likely that employers and communities still fail to recognize the number of transgender individuals who live and work in the United States. In June 2016, the Williams Institute at the U.C.L.A. School of Law released a survey, estimating that approximately 1.4 million adults in the United States identify themselves as transgender.[2] Notably, the 2016 estimate of the transgender population was double the estimate that the Williams Institute reported in April 2011.[3] In addition, the Williams Institute's 2016 estimate reported that about 100,300 adult Floridians identify as transgender, which is approximately 0.66% of Florida's total adult population. Florida has the sixth highest percentage of adult residents who identify as transgender.

## LEGAL PROTECTION OF TRANSGENDER INDIVIDUALS

In the employment law realm, the primary source of federal law that addresses workplace discrimination is Title VII of the Civil Rights Act of 1964 ("Title VII").[4] Presently, Title VII does not expressly protect transgender employees from discrimination. However, the United States Equal Employment Opportunity Commission ("EEOC") makes clear that it interprets Title VII to protect transgender employees. In fact, the EEOC continues to expand protection for transgender employees against discrimination. In addition, cities and counties in Florida have started enacting codes that specifically protect transgender employees.

Within this continuing trend, employers will likely see an increase in transgender discrimination claims. There are two keys to handling, minimizing, and preventing transgender discrimination claims. First, to determine the full extent of the exposure, employers and claims professionals should identify the law under which the claim is being brought, and other potentially applicable laws. Second, employers must take steps to minimize the risk of continued discrimination or retaliation based on such claims.

## APPLICABLE LAWS

Employees have multiple avenues for bringing transgender discrimination claims. These include Title VII claims and claims based upon state laws, such as the Florida Civil Rights Act of 1992 ("FCRA").[5] In addition, there may be county or municipal laws that protect transgender individuals.

As employers know, Title VII protects employees from discrimination by an employer based on sex, race, color, national origin, or religion.[6] However, despite protecting "sex," Title VII does not expressly protect gender identity or gender expression.[7] Based upon this omission, courts have previously held that an individual's status as a transgender person was not protected by Title VII.[8]

Recently, however, there has been a shift toward greater protection for transgender employees. In 2011, the Eleventh Circuit held that the Equal Protection Clause of the Fourteenth Amendment protects a transgender employee's status as a transgender person.[9] Moreover, courts have consistently held that Title VII protects employees against discrimination based on sexual stereotyping and failure to conform to gender norms, such as how a person of a certain sex should dress or behave.[10] Transgender discrimination claims are tied into gender norms because a person is considered transgendered under the law "precisely because of the perception that his or her behavior transgresses gender stereotypes."[11] In a practical sense, what this means for employers is that any discrimination against a transgender employee could likely be covered by Title VII.

Through its enforcement of Title VII, the EEOC has also taken the position that it affords transgender employees protection from discrimination.[12] In fact, the EEOC's website specifically states that it protects employees from discrimination based on gender identity.[13] From its inception, courts have broadly interpreted Title VII to provide protection to employees and its reach continues to expand. Therefore, it is likely that courts will continue to follow the EEOC's lead in expanding protections to transgender employees.

Similar to Title VII, the FCRA does not expressly address transgender employees. Moreover, Florida courts have yet to weigh in on the issue. However, because the FCRA is patterned after Title VII, federal case law interpreting Title VII is applicable in the context of the FCRA.[14] It is, therefore, prudent for employers to assume that the FCRA will likely afford protection to transgender employees.

Beyond the federal and state laws, employers and claims professionals must also be aware of laws at the municipal and county levels that may afford transgender employees

protection. In Florida, many counties and cities maintain their own anti-discrimination laws, although the level of protection afforded to transgender employees, specifically, varies from municipality to municipality. Some county codes, such as the Hillsborough County Code, mirror or adopt the protections available under Title VII and the FCRA.[15] Other county codes, such as the Miami-Dade County Code, include specific protections for transgender employees, including protection of employees' gender identity and gender expression.[16] There is often a lower threshold for employers to fall under these municipal level anti-discrimination laws, so a county or city anti-discrimination code or ordinance can potentially offer a transgender employee relief that may not otherwise be available under Title VII or the FCRA.

Upon receiving a transgender discrimination claim, it is advisable to check for all applicable county and city level anti-discrimination codes. This will help to fully evaluate the claim, particularly when the claim may not be covered by Title VII or the FCRA. Staying up-to-date is critical throughout the claims process because changes in municipal laws typically do not receive the publicity that changes in federal or state laws do. Further, municipal level anti-discrimination laws may have unique processes or criteria for handling discrimination claims or may offer different forms of relief to the employee.

In addition to Title VII, the FCRA, and relevant municipal codes, other laws may also apply, depending on the specific circumstances of the claim. For instance, the Family Medical Leave Act may apply where the alleged discrimination involves an employee attempting to take leave for gender reassignment surgery or for other treatment based on a gender dysphoria or gender identity disorder. As another example, the United States Department of Labor's Occupational Safety and Health Administration recently issued a guide to employers regarding restroom access for transgender employees.[17] Accordingly, understanding the wide variety of laws that may be involved in a transgender discrimination claim is critical when evaluating the claim.

## MINIMIZING CLAIM EXPOSURE

Gender issues in the workplace can be a particularly touchy subject. In fact, claims of transgender discrimination come with a high potential for subsequent retaliation claims. Title VII protects employees who engage in protected activity from retaliation, such as protesting discrimination or filing a charge of discrimination with the EEOC.[18] Employers should therefore attempt to work with the transgender employee who is making the discrimination claim to devise a plan to prevent additional or future claims of discrimination or of retaliation. In doing so, there are three primary areas that the employer typically needs to address.

First, the employer should be sensitive to the fact that transgender employees may want access to the restroom of the gender with which they identify. If other employees object, the employer should also be sensitive to their needs. This is because courts have generally held that allowing an employee access to a restroom based on gender identity does not constitute harassment of the objecting employees.[19] Ultimately, an employer should initiate a collaborative effort in an attempt to meet everyone's needs.

In this regard, secondly, the employer should consider implementing employee education regarding the protections afforded to transgender employees. As part of any education, an employer should reiterate the employer's anti-discrimination and anti-harassment policy. The employer should allow the transgender employee to decide the employee's attendance at transgender education training. It may be helpful for the transgender employee to assist in allaying co-worker's concerns. However, the employer must be sensitive and should certainly avoid putting the transgender employee in an uncomfortable position.

Third, employers should address and refer to the transgender employee properly. Transgender employees may opt to use a new name as part of the transition to their preferred gender. Employers should use the transgender employee's preferred name and title, and should ensure that employees do the same.

## CONCLUSION

With transgender discrimination issues making headlines and the requirement for workplace protections increasing, employers will likely see an increase in transgender discrimination claims. When evaluating a transgender discrimination claim, employers and claims professionals should first determine what laws may apply to the employee and which laws are relevant in evaluating their exposure. Employers should next take proactive measures to stop the discrimination and prevent retaliation. Taking these steps will allow employers and claims professionals to fully assess existing claims and help minimize the potential for future and additional claims.

(Endnotes)

1 The United States Equal Employment Opportunity Commission defines "transgender" as follows: "Transgender" refers to people whose gender identity and/or expression is different from the sex assigned to them at birth (e.g. the sex listed on an original birth certificate). The term transgender woman typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female. Likewise, the term transgender man typically is used to refer to someone who was assigned the female sex at birth but who identifies as male. A person does not need to undergo any medical procedure to be considered a transgender man or a transgender woman. U.S. Equal Opportunity Comm'n, Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964, https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm (last visited October 18, 2016).

2 Andrew R. Flores, Jody L. Herman, Gary J. Gates & Taylor N.T. Brown, *How Many Adults Identify as Transgender in the United States*, June 2016, http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

3 Gary J. Gates, *How many people are lesbian, gay, bisexual, and transgender?* April 2011, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

4 42 U.S.C. § 2000d et seq.

5 § 760.01, Fla. Stat.

6 42 U.S.C. §§ 2000e–2000e-17.

7 Miami-Dade County's Municipal Code provides definitions of the terms "gender identity" and "gender expression": *Gender identity* shall mean a person's innate, deeply felt psychological identification as a man, woman or some other gender, which may or may not correspond to the sex assigned to them at birth (e.g., the sex listed on their birth certificate). *Gender expression* shall mean all of the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, grooming, mannerisms, speech patterns and social interactions. Social or cultural norms can vary widely and some characteristics that may be accepted as masculine, feminine or neutral in one culture may not be assessed similarly in another. Miami-Dade County, FL., Municipal Code § 11A-2(12), (13).

8 *See, e.g., Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (holding that "Title VII is not so expansive in scope as to prohibit discrimination against transsexuals").

9 *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

10 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

11 *Glenn*, 663 F.3d 1312.

12 *Lusardi v. Dep't of the Army,* Appeal No. 0120133395, 2015 EEOPUB LEXIS 896 (E.E.O.C. 2015) (holding that Agency restrictions on transgender female's ability to use a common female restroom facility constituted disparate treatment on the basis of sex and that the restroom restrictions combined with hostile remarks, including intentional pronoun misuse, created a hostile work environment on the basis of sex).

13 U.S. Equal Opportunity Comm'n, https://www.eeoc.gov/eeoc/ (last visited October 18, 2016).

14 *See Florida Dep't of Cmty. Affairs v. Bryant*, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

15 Hillsborough County, FL. Code of Ordinances § 30-19(b)(1).

16 Miami-Dade County, FL., Municipal Code § 11A-2(12), (13).

17 Occupational Safety and Health Admin., U.S. Dep't. of Labor, *Best Practices: A Guide to Restroom Access for Transgender Workers*, https://www.osha.gov/Publications/OSHA3795.pdf (last visited October 18, 2016) (providing "[a]ll employees, including transgender employees, should have access to restrooms that correspond to their gender identity").

18 42 U.S.C. § 2000e–3.

19 *Cruzan v. Special School District # 1*, 294 F.3d 981 (8th Cir. 2002); *see also Lusardi*, 2015 EEOPUB LEXIS 896 ("[S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort.").

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Sheila Gonzales-Jonasz and Trelvis Randolph on their election to the American Board of Trial Advocates. ABOTA is a prestigious organization whose primary mission is the preservation of the civil jury trial system.

# MDFAWL's

## 2016 Installation Awards Dinner

CSK was a proud sponsor of the 2016 Installation Awards Dinner for the Miami-Dade Chapter of the Florida Association for Women Lawyers. MDFAWL is a volunteer bar association dedicated to actively promoting the advancement of women in the legal profession, expanding the leadership role of its members in the community at large, and promoting women's rights. The Association installed Miami Partner, Jennifer Ruiz, to its Board of Directors, and also honored CSK with a "Friend of FAWL" award.

*Pictured from left to right: Miami Partners, Jennifer Ruiz, Kathryn Ender and Temys Diaz.*

# APPLICATION OF THE PIP DEDUCTIBLE TO BILLS SUBMITTED BY HOSPITALS AND OTHER NON-EMERGENCY PHYSICIAN PROVIDERS

By: Stephen M. Rosansky

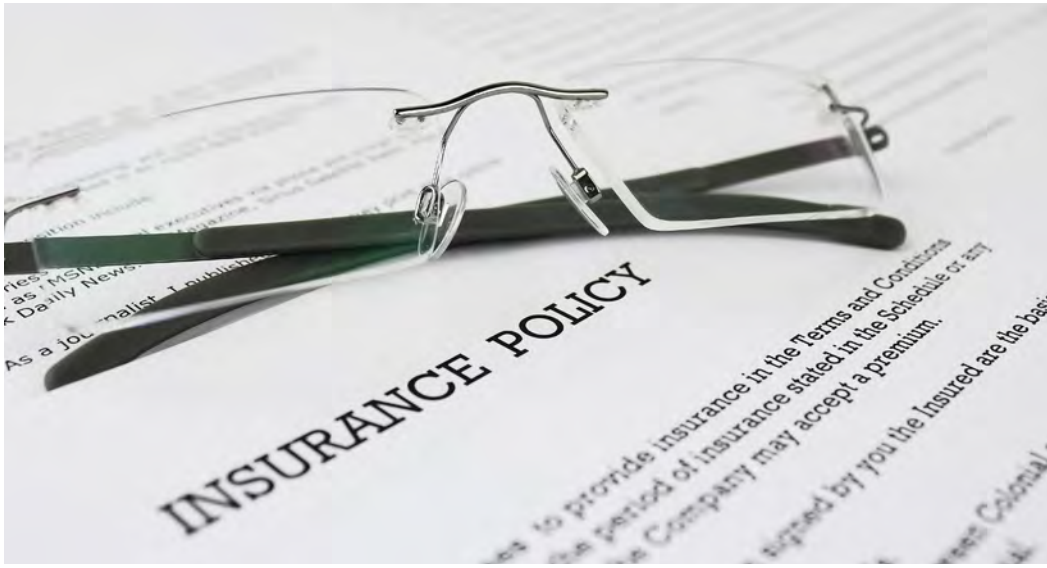
Stephen M. Rosansky is a Partner in the firm's Personal Injury Protection and Auto-Glass groups.

Let's face it, accidents happen. But, when they do, we hope for a host of reasons that the injuries are not severe enough to warrant a visit to the hospital. For insurers, this concern goes beyond the concern for the claimant's physical well-being. Rather, the insurer must also concern itself with how to tender Personal Injury Protection benefits to those providing medical services in a hospital setting. In particular, insurers must decide whether they are obligated to apply 100 percent of the contracted for Personal Injury Protection ("PIP") deductible to the full amount of charges that a hospital (Chapter 395 provider) submits, or whether they should apply 100 percent of the contracted for PIP deductible to the adjusted amount of the total charges.

The fact is that there is no binding statewide appellate authority on this issue. In addition, courts throughout Florida are split on the issue. As such, from a defense perspective, this article discusses how the issue should be resolved based upon legislative analysis and a statewide canvass of all relevant, recently published opinions.

I. **"Nay, whoever hath an *absolute Authority* to *interpret* any written, or spoken Laws; it is *He*, who is truly the *Lawgiver*, to all Intents and Purposes; and not the Person who first wrote, or spoke them."**[1]

Legislative intent guides a court's construction of a statute.[2] "To discern legislative intent, a court must look first and foremost at the actual language used in the statute."[3] "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statutes must be given its plain and obvious meaning."[4] Courts cannot construe an unambiguous statute in a manner that would "extend, modify, or limit, its express terms or its reasonable and obvious implications" because




"[t]o do so would be an abrogation of legislative power."[5] Moreover, when two statutes relate to the same object or subject, the Florida Supreme Court has repeatedly urged Florida Courts to "read statutes relating to the same subject or object *in pari materia*, in order to harmonize the provisions and give effect to the Legislative intent."[6]

The clear and unambiguous language of the relevant statutes, when read together, firmly establishes that an insurer is not required to apply PIP deductibles to 100 percent of whatever the face amount of the provider's bill may be. Instead, an insurer may apply the deductible to the eligible and "reasonable" amounts of an insured's medical expenses.

The relevant statutory language is found within the "Deductible Statute", or §627.739(2), Florida Statutes, which states as follows:

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, and $1000. The deductible amount must be applied to 100 percent of the expenses and losses ***described in s. 627.736***. After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits ***described in s. 627.736(1)***. However, this subsection ***shall not be applied to reduce*** the amount of any ***benefits received in accordance with s. 627.736(1)(c)***.[7]

From a straightforward reading of the Deductible Statute, it appears that the contracted for PIP deductible should be applied to 100 percent of the expenses and losses described in the "PIP Statute", or §627.736, Florida Statutes. Importantly, several sections of the PIP Statute describe expenses as those that are lawfully rendered; ***reasonable in charge***; related and medically necessary. Yet, the plaintiff bar, and those courts that find the provider's arguments persuasive, refuse to parse the language of the statute. They merely stop on the surface, reading the language to mean only those benefits that are described in subsection one (1) of the PIP Statute, or 80 percent of the total amount submitted. The plaintiff bar's proposed method of applying the PIP deductible, however, is arguably inconsistent with the legislative intent.

Providers urge that the Deductible Statute requires that the deductible be applied to 100 percent of the expenses and losses described in the PIP Statute. This position is inapposite to the clear and unambiguous language of the PIP statute's archetypal requirement that medical benefits are defined as "reasonable"

benefits. Not only would such an interpretation render portions of the PIP Statute meaningless,[8] but it also disregards established principles of statutory construction.

Indeed, as noted in the Preface to the Florida Statutes, "a cross reference to a specific statute incorporates the language of the referenced statute as it existed at the time the reference was enacted."[9] In this case, the Deductible Statute states that the deductible must be applied to 100 percent of the expenses and losses "***described in s. 627.736.***" Therefore, by its very own language, the Deductible Statute contains a descriptive reference to the entire PIP Statute, not just the provisions "cherry-picked" by the provider. Accordingly, by expressly referencing the entire PIP Statute, it was arguably the Legislature's intent to incorporate the "reasonableness" limitation on expenses and losses.

Although there are many published opinions on the general issue of proper application of the deductible, only one case involves a hospital's submission of bills. Nevertheless, the majority of the decisions support the position that an insurer must apply 100 percent of the contracted for deductible to the reasonable amount of the charges as opposed to the face value of the bills submitted.[10] The following is a review of the most recent, persuasive and informative cases.

## II. While Legislative Intent is the Polestar that Guides the Court's Construction of Statutes, Not All Courts Arrive at the Same Destination.

There is, perhaps, no more difficult task that judges perform than that of construing or interpreting statutes. There are also few tasks more difficult. This is the case for several reasons. Statutes are made up of words. Words are, by their nature, at best imprecise approximations of the ideas they are intended to convey. A word almost always has more than one meaning. Moreover, statutes are often a group product, and the members of the group may not have shared the same understanding regarding the words used. If all of this were not enough, legislative bodies frequently draft statutes using general, rather than specific, language because they cannot agree on the full reach of the statute. Or, even if they can, they wish to leave room for interpretive growth in order to cover those potential future situations that cannot be clearly foreseen. This is why not all courts, while guided by the same "polestar", arrive at the same destination. As for the courts' interpretation of the Deductible Statute, this has certainly been the case.

A recent county court decision out of the Eleventh Judicial Circuit, *Royal Care Medical Center (a/a/o Samantha Gonzalez) v. Esurance Property and Casualty Ins. Co.*, held that where the PIP policy clearly elects to pay pursuant to the permissive statutory fee schedule, the insurer properly applied the fee schedule to bills before applying the deductible.[11] In the case, the court reasoned that the defendant properly applied its policy deductible to plaintiff's medical bills by first applying the Medicare Fee Schedule reductions as elected by the subject policy of insurance, and by then applying the deductible. The court reasoned that the deductible only applies to losses covered under the policy of insurance, not simply the total bills submitted.[12]

Therefore, the insurer should first determine which bills are deemed reasonable, related and necessary under the policy of insurance, and then apply the deductible. If the insurer has properly elected to pay pursuant to the applicable fee schedules as described in the PIP Statute, then the insurer may first apply the fee schedules to the submitted bills, and then apply the deductible.[13] Moreover, courts have held that the PIP Statute and the Deductible Statute must be read together, in *pari materia.* By applying the Medicare Fee Schedule limitations prior to the application of the policy deductible, defendant has complied with the Deductible Statute and applied the deductible to 100 percent of the expenses and losses as described in the PIP Statute.[14]

The courts of Pinellas County reached a similar holding in the case of *Bayfront Health Education and Research Org. Inc. v. Progressive Am. Ins. Co.*[15] In *Bayfront Health Education and Research Org. Inc.*, the court found no merit to the argument that the insurer was required to apply the deductible to 100% of medical provider's billed expenses, and expressed the following rationale in reaching its decision:

> Section 627.739(2), Fla. Stat. states 'The deductible amount must be applied to 100 percent of the expenses and losses described in §627.736.' ***As §627.739(2), Fla. Stat. refers to the 'expenses and losses described in §627.736,' this Court must look to §627.736 to determine the expenses and losses described***. Section 627.736 describes the payable expenses as 'reasonable expenses for medically necessary medical, surgical, X-ray, dental and rehabilitative services. . .' and payable losses as 'any loss of gross income and loss of earning capacity per individual from inability to work. . .' As such, the statute requires the deductible be applied to 100 percent of the reasonable expenses for medically necessary medical, surgical, etc. services and loss of gross income and loss of earning capacity related to the accident. ***If the insurer, Defendant, reduced the medical expenses to a "reasonable" amount, then the deductible should be applied to 100% of the reasonable amounts, not necessarily the amount billed by the medical provider***. While the Plaintiff argued that §627.739(2), Fla. Stat. requires that the deductible be applied to '100% of all expenses and losses,' ***it fails to reference the remaining part of the statute that states 'described in §627.736.'*** Plaintiff argues the deductible should be applied to 100% of *all expenses billed* by the medical provider. (emphasis added) Plaintiff suggests that the Legislature's amendment to §627.739, in 2003, supports this argument. However, Plaintiff is incorrect; prior to 2003, the deductible was being applied after the reasonable expenses were reduced by the 80% P.I.P. coverage. See *Bankers Ins. Co. v. Arnone,* 552 So. 2d 908 (Fla. 1989). Now, the insurer is required to apply the deductible to 100% of the reasonable expenses (not necessarily the billed expenses), before the expenses are reduced for the 80% P.I.P coverage. As such, Plaintiff's argument fails as it relates to §627.739(2), Fla. Stat.[16]

Based upon the two cases discussed above, we see that courts in Florida are finding that simple statutory construction of the PIP Statute and the Deductible Statute requires an insurer to apply 100 percent of the elected deductible to the "reasonable amount" of medical expenses. In determining the reasonable charge, the insurer may have elected to apply the fee schedule methodology of payment or the fact intensive methodology. However, regardless of the methodology used, it comes down to whether the insurer determined what the "reasonable amount" was before applying the deductible to said amount.

## III. Alas, All Ships May Enter the Same Harbor.

We may yet gain closure on this issue as the Fourth District Court of Appeal has accepted jurisdiction and will hear the appeal of *Care Wellness Center, LLC (a/a/o Virginia Bardon-Diaz) v. State Farm Mutual Automobile Insurance Company*, wherein the Seventeenth Judicial

Circuit has certified the following as a question of great public importance: "Pursuant to Fla. Stat. §627.739, is an insurer required to apply the deductible to 100% of an insured's expenses and losses prior to applying any permissive fee schedule payment limitation found in §627.736(5)(a)1, Fla. Stat. (2013)?"[17]

*Care Wellness Center, LLC (a/a/o Virginia Bardon-Diaz)* arose out of an automobile accident in which Virginia Bardon-Diaz sustained injuries and sought treatment, making a claim for PIP benefits under a policy of insurance that had a limit of $10,000 in PIP benefits with an elected $1,000 deductible. Following the motor vehicle accident, Ms. Bardon-Diaz treated at various medical providers, including three prior to Care Wellness, LLC. The insurer reduced the bills of these three providers according to the fee schedules contained in subsection (5)(a)1 of the PIP Statute and applied the reduced amount to the deductible. Thereafter, the defendant received bills from Care Wellness, LLC, which the PIP carrier likewise reduced and then applied entirely to the remaining deductible.

Care Wellness, LLC disputed the reduction and application of the deductible. The provider filed, in part, a request for declaratory relief on the pure legal question of whether it was appropriate for the insurer to make fee schedule reductions to bills that are applied to the deductible. Care Wellness, LLC sought a declaration that both the policy and relevant statutes limit the applicability of the fee schedules to bills that are actually reimbursed, that the injured insured's deductible should have been completely satisfied prior to receipt of Care Wellness's first bill, and that the insurer erred by failing to reimburse its bills. The insurer's position, in summary, is that since the policy of insurance permits it to reimburse providers in accordance with the fee schedules, it may reduce all bills (including those falling under the deductible or outside of policy limits) to the fee schedule rates. The county court agreed with plaintiff's position, finding that neither the statutes nor the policy permitted the insurer to make fee schedule reductions to bills that are applied to the deductible.

The county court's ruling, as important as it is to the parties involved in the dispute, has far greater import to the rest of the community. In fact, the court found that the issue presented is one of great public importance affecting the uniform administration of justice. Indeed, two circuit courts, sitting in their appellate capacity, are in conflict over this issue, and several county courts have diverged on this same issue.[18] This divergence of opinions has created a tremendous amount of uncertainty for insureds, insurers, and medical providers. Accordingly, the County Court of the Seventeenth Judicial Circuit certified the question to the Fourth District Court of Appeal as a matter of great public importance.

Until this conflict of law is resolved, the issue of how insurers may apply the PIP deductible remains uncertain. However, the lawyers at CSK remain watchful. Once the appellate court resolves this conflict, CSK will promptly inform you of the decision by e-blast.

(Endnotes)

1 Benjamin Hoadly, Lord Bishop of Winchester, The Nature of the Kingdom, or Church, of Christ (March 31, 1717), *in* Sixteen Sermons , 1754, at 291.

2 *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008) (citing *Bautista v. State*, 863 So.2d 1180, 1185 (Fla. 2003)).

3 *Id.*

4 *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (Fla. 1931)).

5 *Id.* (quoting *Am. Bankers Life Assur. Co. of Fla. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968)).

6 *Geico v. Virtual Imaging Servs., Inc.*, 90 So. 3d 321, 323 (Fla. 3d DCA 2012); *see also Florida Dep't of Highway Safety v. Hernandez*, 74 So. 3d 1070, 1075 (Fla. 2011); *Hill v. Davis*, 70 So. 3d 572, 577 (Fla. 2011).

7 § 627.739(2), Fla. Stat. (emphasis added).

8 Courts are "required to give effect to 'every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage." *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007) (quoting *Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So.2d 360, 366 (Fla. 2005)). A "basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *Id*. The plaintiff bar's proposed method of deductible application would render portions of the PIP Statute meaningless and disregard the explicit "reasonable" and "allowable" reimbursement methodology set forth therein.

9 Preface at viii, Fla. Stat. (1995); *Golf Channel v. Jenkins*, 752 So. 2d 561, 564 (Fla. 2000) (quoting Preface at viii, Fla. Stat. (1995)); *see also Overstreet v. Blum*, 227 So.2d 197 (Fla. 1969); *Hecht v. Shaw*, 151 So. 333 (Fla. 1933); 48A Fla. Jur. 2d Statutes § 12 ("Where a statute adopts a part of or all of another statute by specific or ***descriptive reference*** thereto, the effect is the same as if the provisions adopted were written into the adopting statute.") (emphasis added).

10 For a list of cases reviewed with analysis, please feel free to contact the author directly.

11 22 Fla. L. Weekly Supp. 948a (Fla. 11 Cir. Ct. Jan. 21, 2015).

12 *Id.; see also General Star Indem. v. W. Fla. Village Inn*, 874 So. 2d 26, 33-34 (Fla. 2d DCA 2004) (discussing the functional purpose of a deductible – to apply only to losses covered under the policy of insurance).

13 *Id.*; Order Denying Plaintiff's Motion for Summary Judgment, *New Medical Group, Inc. a/a/o Elisa Collazo v. United Auto. Ins. Co.*, Case. No. 11-01871 SP 26 (Fla. 11th Cir. Ct. Mar. 15, 2013) (denying summary judgment where plaintiff was alleging defendant improperly applied its policy deductible).

14 22 Fla. L. Weekly Supp. 948a; *see also Goldcoast Physicians Center, Inc. (a/a/o Charles Bradford) v. Garrison Prop. & Cas. Ins. Co.*, 20 Fla. L. Weekly Supp. 711a (Fla. 17th Cir. Ct. Apr. 29, 2013); *Gen. Star. Indem.*, 874 So. 2d at 34.

15 22 Fla. L. Weekly Supp. 934a (Fla. 6th Cir. Ct. Feb. 20, 2015).

16 *Id.* (emphasis in original).

17 23 Fla. L. Weekly Supp. 985a (County Court, Broward, May 12, 2016). A similar appeal is currently pending in the Fifth District Court of Appeal.

18 *Compare Progressive American Insurance Co. v. Chambers Medical Group, Inc. (a/a/o Sheila Wilcox)*, Case No. 2015 AP 000850 NC (Fla. 12th Cir. Ct. App. Div. Feb. 23, 2016), *with Garrison Property and Cas. Ins. Co v. New Smyrna Imaging, LLC (a/a/o Megan McClanahan)*, 23 Fla. L. Weekly Supp. 708a (Fla. 18th Cir. Ct. App. Div. Jan. 12, 2015).

# CSK Participates in Back to School Drives


**Bonita Springs**

CSK's Bonita Springs office participated in A Mom's Helping Hand of Southwest Florida's Back to School Supplies drive. A Mom's Helping Hand is a charitable organization that helps the area's less fortunate children. CSK collected back to school supplies and made a generous cash donation for this cause.

**Miami**

CSK's Miami office participated in a Backpack School Supplies Drive. CSK, along with the South Florida Chapter of the Association of Legal Administrators, donated school supplies and backpacks to underprivileged students in two local schools, one in Miami-Dade County and the other in Broward County.

# THE PROPRIETY OF DISMISSAL AS A SANCTION FOR FRAUD IN FLORIDA:

## HAS PLAINTIFF SET IN MOTION AN UNCONSCIONABLE SCHEME CALCULATED TO INTERFERE WITH THE ADMINISTRATION OF JUSTICE

By: Daniel M. Schwarz

Daniel M. Schwarz is a member of the Appellate and Legal Issues practice group.

Insurance carriers employ a number of tools to combat the prevalence of insurance fraud in personal injury claims, including education to adjusters regarding how to identify and respond to fraud, industry-wide seminars from law firms and insurance organizations, and dedicated special investigative units ("SIU") to probe the existence of fraud, which can support prosecution where the fraud amounts to a crime.[1] Florida courts can impose harsh sanctions against those who abuse the system through fraudulent activities, such as financial sanctions, partial dismissals, and even dismissal of an entire claim; however, the burden of proving fraud and the reality of obtaining sanctions can make for a difficult argument. This article provides a general overview of the standards and criteria that Florida courts apply when determining whether dismissal of an entire personal injury claim is an appropriate sanction in cases in where plaintiffs have made fraudulent representations.

Occasionally, the fraudulent nature of a personal injury claim does not become apparent until the matter is in litigation — when defense counsel can begin to investigate and evaluate the nature of a plaintiff's claim through the discovery process. Florida law provides that when a plaintiff lies to the court on matters central to the claim, which impede the ability to defend or undermine the truth-seeking function of the court, dismissal of the claim may be appropriate.[2] The basis for keeping clearly fraudulent claims entirely out of court is that "a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted."[3] That said, while the tools for dismissal are readily available in the law, proving that dismissal is the appropriate sanction in any particular case is not a simple undertaking. Because Florida's Constitution guarantees access to courts,[4] Florida courts grapple with whether dismissing all or part of a claim for fraud is an overly harsh remedy.


In Florida's "fraud upon the court" jurisprudence, the Fifth District Court of Appeal's decision in *Cox v. Burke* was among the first in Florida to set forth a standard to assist parties and courts in determining when a plaintiff's fraud is sufficiently pervasive to warrant dismissal of the entire claim.[5] In *Cox*, the Fifth District sought to strike an appropriate balance. The Fifth District explained that courts must weigh the policy condemning fraudulent claims with the competing policy favoring adjudication of a plaintiff's claim on its merits:

> The requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." When reviewing a case for fraud, the court should "consider the proper mix of factors" and carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system. Because "dismissal sounds the 'death knell of the lawsuit,' courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious." The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. Because dismissal is the most severe of all possible sanctions, however, it should be employed only in extreme circumstances. [6]

Certainly, despite the apparent stringency of this standard, there are numerous examples of Florida courts finding a personal injury plaintiff's fraudulent conduct during discovery sufficiently egregious to dismiss the entire action. In one recent case, *Diaz v. Home Depot USA, Inc.*, the plaintiff in a premises liability action alleged she had suffered permanent injuries to her neck and shoulder and sought both economic and noneconomic damages.[7] At her deposition, the plaintiff denied that she had previously suffered any injury to her neck or back and that she had been involved in a prior slip-and-fall or motor vehicle accident.[8] The defense, however, obtained medical records revealing that the plaintiff had been involved in a motor vehicle accident necessitating medical treatment nine months prior to the incident at issue. In those records, the plaintiff had complained of pain to her neck and back. Seven months before the incident at issue, the plaintiff had again visited the hospital, after falling backwards onto concrete, asserting pain to her neck and back. Finally, eight months after the incident, the plaintiff was involved in a second motor vehicle accident following which, among other things, she reported to a nurse that she had suffered chronic neck pain for years.[9] Because the evidence demonstrated that the plaintiff had set in motion an unconscionable scheme calculated to interfere with the court's ability to adjudicate the matter, the Third District Court of Appeal determined that clear and convincing evidence supported the lower court's decision to dismiss the plaintiff's case.[10]

In another commonly-cited case, *Morgan v. Campbell*, the plaintiff similarly denied that she had experienced neck or back pain before the accident at issue.[11] Although she admitted she had previously seen a chiropractor to treat her scoliosis, she denied that the chiropractor had treated her for neck or back pain; however, the defense discovered that the chiropractor had treated her for complaints of neck and back pain and that the plaintiff had also seen another chiropractor whom she had failed to disclose.[12] The Second District Court of Appeal upheld the lower court's dismissal of the claim, finding that the plaintiff's "false testimony was directly related to the central issue in the case — whether the accident in question caused her neck and low back injuries," and that the plaintiff's contention that she "forgot" about the prior treatment to her back and neck was not credible.[13] In upholding the dismissal, the Second District crafted some useful language for the defense to utilize in future cases. Specifically, the court made note of the plaintiff's "half-truths" and declared that "[r]evealing only some of the facts does not constitute 'truthful disclosure'" upon which the process of civil litigation depends.[14]

On the other hand, there is no shortage of Florida appellate decisions that reversed lower courts' orders to dismiss for fraud upon the court where the strict standard of finding clear and convincing evidence of an unconscionable scheme was not satisfied. For example, in *Gautreaux v. Maya*, the plaintiff allegedly suffered from continuing migraine headaches as a result of a motor vehicle accident.[15] The plaintiff testified that she had never had headaches before the accident; however, medical records revealed that years before the accident, the plaintiff had "frequent headaches" and a history of chronic migraine headaches. The plaintiff explained her earlier testimony by stating that the question had confused her and that she once had experienced a really bad headache.[16] The Fifth District Court of Appeal reversed the lower court's dismissal of the case, finding that "[t]he facts of this case do not meet the narrow, stringent standard required for dismissal for fraud on the court," as the facts revealed only a "testimonial discrepancy." According to the Fifth District, the plaintiff's misrepresentation "did not rise to the level of 'the most blatant showing of fraud, pretense, collusion, or other similar wrong doing."[17]

A different variety of cases where the evidence may not sustain a dismissal for fraud is where the alleged fraud is not central to the main issues in the case. In *Suarez v. Benihana National of Florida Corp.*, the defendants identified numerous discrepancies between a plaintiff's deposition testimony in a negligent security case and his testimony in a former deposition in the related criminal case. The discrepancies arose when the plaintiff testified on the issues of whether he drank alcohol the night of the incident, whether he used profanity in speaking to his attackers, whether he was punched or "pat on the chest" first, whether he punched the attacker back, how he verbally responded to the attacker's instruction to him to cross the street, and whether he was willing to fight the attackers.[18] The Third District Court of Appeal reversed the lower court's dismissal for fraud, finding the discrepancies between the depositions insufficient to support dismissal:

> While there are certainly inconsistencies and contradictions in the deposition testimony given by [plaintiff] in 2007 and 2011, the record simply fails to demonstrate clearly and convincingly that Appellants "collusively engaged in a scheme designed to prevent the trier [of fact] from impartially adjudicating this matter through lies, misrepresentations, contradictory statements and otherwise hiding the truth." More importantly, we disagree with [defendant's] assertions and the court's conclusion that the contradictions and inconsistencies go "to the very heart of the claims" against [defendant], justifying dismissal of the action with prejudice.
>
> . . . .
>
> Even if the record in this case could give rise to some inference of willful or intentional conduct, the nature and substance of the inconsistencies and contradictions required the trial court to consider some lesser sanction, reflecting the proper balance of competing interests and appropriately tailored to address the party's conduct and the resulting prejudice.[19]

Cases like *Gautreaux* and *Suarez* show that notwithstanding the defense's best efforts, Florida courts may permit a plaintiff to have his or her day in court even where evidentiary discrepancies constitute lies or are otherwise pervasive.[20] Indeed, notably, in cases where the evidence of a fraudulent scheme is not deemed clear and convincing, Florida courts have pronounced that, short of evidence of a "deliberate scheme to subvert the judicial process," a plaintiff's "[m]isconduct that falls short of the rigors of this test, including inconsistency, poor recollection, dissemblance, [and] ***even lying*** may be well managed and best resolved by bringing the issue to the jury's attention through cross-examination…."[21] Invariably, seizing on the stringency of the standard as demonstrated by such caveats, plaintiffs oppose motions to dismiss for fraud upon the court on the basis of poor memory, forgetfulness, or language barriers (in cases where the plaintiff does not speak English or is a non-native speaker). Such arguments are best combated by cross-examining the plaintiff at an evidentiary hearing on the defense's motion to dismiss for fraud on the court. Effective cross-examination of the plaintiff in such cases may demonstrate, based on other case-specific evidence, that the assertions of misunderstanding or forgetfulness are not credible.

Adjusters and SIU professionals should also be aware of an important offshoot of cases where courts may find the evidence of fraud insufficient to dismiss a claim. These are cases in which the defense attempts to prove that the plaintiff committed a fraud on the court by contradicting his or her reports of injuries with surveillance video. Specifically, Florida's appellate courts are not inclined to uphold dismissals for fraud upon the court where the only evidence of fraud amounts to discrepancies between the extent of a plaintiff's injuries complained of and the plaintiff's physical capabilities as shown by surveillance. For example, in *Guillen v. Vang*, the Fifth District reversed a trial court's finding that the plaintiff perpetrated a fraud on the court by performing activities, as depicted in a surveillance video, that he allegedly claimed he could not perform in his deposition testimony.[22] The Fifth District held:

> We do not believe that the surveillance DVD constitutes clear and convincing evidence that Guillen has "'sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.'" We believe that any discrepancies between Guillen's testimony and the surveillance DVD are best resolved by a jury.[23]

In working with defense counsel, being familiar with the legal standard for dismissal for fraud — vague and subjective as it may be — can be useful to claims adjusters and SIU professionals. Depending on the quality and quantity of the misrepresentations and omissions at issue, the defense team should decide whether to pursue a full-scale motion to dismiss for fraud upon the court versus seeking lesser discovery sanctions. In certain cases, lesser

discovery sanctions may be the more appropriate and viable avenue, including dismissal of only portions of the claim. Ultimately, if the adjuster and defense counsel decide that pursuing dismissal for fraud is not the best defense, then using the misrepresentations and omissions for cross-examination and impeachment at trial may be the most effective tactic.

CSK is devoted to assisting its partner carriers with investigating and aggressively combatting fraudulent claims. Yet, it is important to keep in mind that, given the current law in Florida, the defense sometimes maintains more credibility with the court in recognizing when seeking dismissal of an entire action may not be appropriate. Where omissions are isolated or not central to the claim or where there are potentially believable explanations for the plaintiff's testimonial discrepancies, the plaintiff's misrepresentations may be most effectively presented in cross-examination and impeachment during trial.

In sum, Florida courts have not crafted an objective test that draws the definitive line between situations where the plaintiff's misrepresentations or omissions warrant dismissal and those where the misrepresentations (or even lies) provide mere fodder for cross-examination and impeachment. Florida's standard for dismissal of claims where the plaintiff has arguably committed fraud upon the court requires egregious inconsistencies and blatant misrepresentations that bear on issues central to the plaintiff's claims. Thus, the success of motions to dismiss for fraud upon the court continues to rest on the quality of defense counsel's advocacy in convincing a trial judge, and likely an appellate panel, that clear and convincing evidence of the requisite "pattern" or "scheme" of fraud exists in a given case.

Over the years, CSK has successfully defended numerous matters involving claims of fraud, including several more-recent decisions.[24]

(Endnotes)

1 Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies, 46* U. Miami L. Rev. 907, 934 (1992).

2 *See, e.g.*, *Ramey v. Haverty Furniture Cos.*, 993 So. 2d 1014, 1018 (Fla. 2d DCA 2008) ("[A] trial court has the inherent authority to dismiss an action as a sanction when the plaintiff has perpetrated a fraud on the court. 'Such power is indispensable to the proper administration of justice, because no litigant has a right to trifle with the courts.'") (internal citations omitted).

3 *Andrews v. Palmas De Majorca Condo.*, 898 So. 2d 1066, 1069 (Fla. 5th DCA 2005) (citation omitted).

4 Art I., § 21, Fla. Const. ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.").

5 706 So. 2d 43 (Fla. 5th DCA 1998).

6 *Id.* at 46 (internal citations omitted). It is interesting to note that in *Cox*, the Fifth District declared that where the question of whether dismissal was the appropriate sanction is a "close" one, if the dismissal is appealed, the appellate court should not find an abuse of discretion. *Id.* at 47. Since *Cox*, the law has evolved to provide that the appellate court will apply a "narrowed" abuse of discretion standard of review to a lower court's ruling on a motion to dismiss for fraud. The standard is "narrowed" to the extent that the appellate court must assess whether there is competent, substantial evidence to support the lower court's finding of "clear and convincing evidence" of fraud.

7 41 Fla. L. Weekly D1625 (Fla. 3d DCA July 13, 2016).

8 *Id.*

9 *Id.*

10 *Id.* For other relatively recent appellate decisions upholding dismissals for fraud upon the court in personal injury actions, see *Middleton v. Hager*, 179 So. 3d 529 (Fla. 3d DCA 2015); *Jimenez v. Ortega*, 179 So. 3d 483 (Fla. 5th DCA 2015); *Herman v. Intracoastal Cardiology Ctr.*, 121 So. 3d 583 (Fla. 4th DCA 2013); *Faddis v. City of Homestead*, 121 So. 3d 1134 (Fla. 3d DCA 2013); *Wenwei Sun v. Aviles*, 53 So. 3d 1075 (Fla. 5th DCA 2010) ("The case before us is not one of poor recollection or dissemblance; it is one where the three claimants over a span of six years lied repeatedly about Mr. Sun's employment and his abilities to perform even the most basic functions of daily life."); *Williams v. Miami-Dade Cnty. Pub. Health Trust*, 17 So. 3d 859 (Fla. 3d DCA 2009); *Bass v. City of Pembroke Pines*, 991 So. 2d 1008 (Fla. 4th DCA 2008); *Ramey*, 993 So. 2d 1014; *Saenz v. Patco Transp., Inc.*, 969 So. 2d 1145 (Fla. 5th DCA 2007); *Papadopoulos v. Cruise Ventures Three Corp.*, 974 So. 2d 418 (Fla. 3d DCA 2007); *Austin v. Liquid Distribs., Inc.*, 928 So. 2d 521 (Fla. 3d DCA 2006); *Hutchinson v. Plantation Bay Apts., LLC*, 931 So. 2d 957 (Fla. 1st DCA 2006); *McKnight v. Evancheck*, 907 So. 2d 699 (Fla. 4th DCA 2005); and, *Piunno v. R.F. Concrete Constr., Inc.*, 904 So. 2d 658 (Fla. 4th DCA 2005).

11 816 So. 2d 251, 252 (Fla. 2d DCA 2002).

12 *Id.* at 252-53.

13 *Id.* at 253.

14 *Id.* at 254.

15 112 So. 3d 146, 148 (Fla. 5th DCA 2013).

16 *Id.* at 148-49.

17 *Id.* at 150 (citation omitted).

18 88 So. 3d 348, 351 (Fla. 3d DCA 2012).

19 *Id.* at 353.

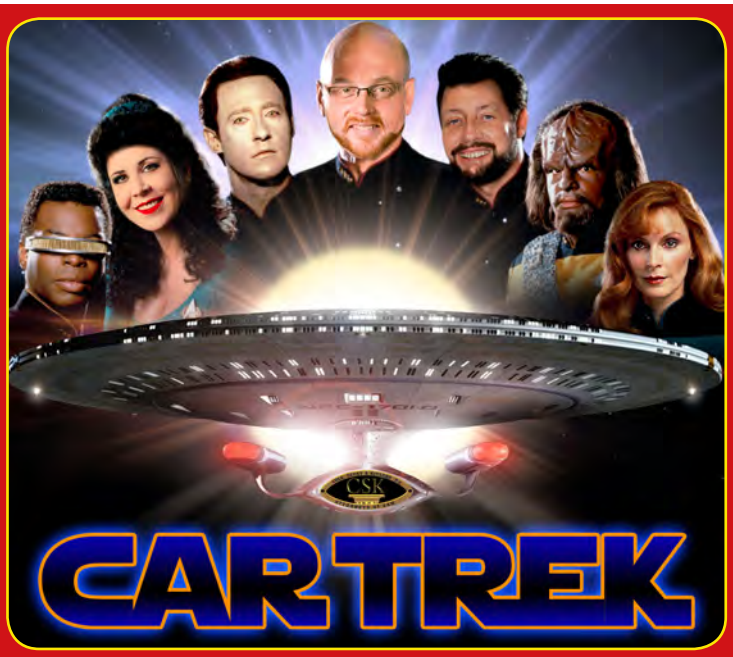
20 For other relatively recent cases reversing dismissals for fraud upon the court in personal injury actions, see *Bolera v. Papa*, 142 So. 3d 918 (Fla. 4th DCA 2014); *Bosque v. Rivera*, 135 So. 3d 399 (Fla. 5th DCA 2014); *Chacha Transp. USA, Inc.*, 78 So. 3d 727 (Fla. 4th DCA 2012) (holding that order of dismissal for fraud upon the court must include express written findings demonstrating that lower court balanced the equities); *Gilbert v. Eckerd Corp. of Fla., Inc.*, 34 So. 3d 773 (Fla. 4th DCA 2010); *Laurore v. Miami Auto. Retail, Inc.*, 16 So. 3d 862 (Fla. 3d DCA 2009); *Villasenor v. Martinez*, 991 So. 2d 433 (Fla. 5th DCA 2008); *Ibarra v. Izaguirre*, 985 So. 2d 1117 (Fla. 3d DCA 2008); *Granados v. Zehr*, 979 So. 2d 1155 (Fla. 5th DCA 2008); *Kubel v. San Marco Floor & Wall, Inc.*, 967 So. 2d 1063 (Fla. 2d DCA 2007); *Gehrmann v. City of Orlando*, 962 So. 2d 1059 (Fla. 5th DCA 2007); *Howard v. Risch*, 959 So. 2d 308 (Fla. 2d DCA 2007); *Myrick v. Direct Gen. Ins. Co.*, 932 So. 2d 392 (Fla. 2d DCA 2006); *Cross v. Pumpco, Inc.*, 910 So. 2d 324 (Fla. 4th DCA 2005); *Canaveras v. Cont'l Grp., Ltd.*, 896 So. 2d 855 (Fla. 3d DCA 2005); *Rios v. Moore*, 902 So. 2d 181 (Fla. 3d DCA 2005).

21 *Perrine v. Henderson*, 85 So. 3d 1210, 1212 (Fla. 5th DCA 2012) (emphasis supplied); *see also Bologna v. Schlanger*, 995 So. 2d 526, 528 (Fla. 5th DCA 2008).

22 138 So. 3d 1144 (Fla. 5th DCA 2014).

23 *Id*. at 1145; *see also Amato v. Intindola*, 854 So. 2d 812, 816 (Fla. 4th DCA 2003) ("The fact that a surveillance tape shows discrepancies usually affects the jury's view of the case, but in this case it does not merit a dismissal with prejudice to appellant's case."); *Jacob v. Henderson*, 840 So. 2d 1167, 1170 (Fla. 2d DCA 2003) ("'In all but the most extreme cases, our system entrusts juries with the ultimate decisions as to whether claimed injuries are genuine or not. Our experience has demonstrated that juries deserve this trust and that they are well able to discern the truth and to render judgment accordingly.'") (quoting *Francois v. Harris*, 366 So. 2d 851, 852 (Fla. 3d DCA 1979)). *But cf. Jimenez*, 179 So. 3d at 488 ("Even when confronted with video surveillance showing him performing tasks he claimed he could not do, Ortega continued to perjure himself and exaggerate his claims. His conduct cannot be countenanced.").

24 *See, e.g., Diaz v. Home Depot USA, Inc.,* 196 So. 3d 504 (Fla. 3d DCA 2016); *Lester v. Progressive Express Insurance Co.,* No. 1D15-5500, 2016 Fla. App. LEXIS 17396 (Fla. 1st DCA Nov. 18, 2016); *Austin v. Niko Petroleum,* No. 3D15-2196, 2015 Fla. App. LEXIS 17274 (Fla. 3d DCA Oct. 21, 2015); *Lorenzo v. Harris, 151 So. 3d 1257 (Fla. 3d DCA 2014); Handel v. Nevel,* 147 So. 3d 649 (Fla. 3d DCA 2014); *Hadfeg v. Hialeah Rey Pizza, Inc.,* 149 So. 3d 19 (Fla. 3d DCA 2014).




# 2016 FIFEC CONFERENCE

CSK was a sponsor at the 2016 Florida Insurance Fraud Education Committee (FIFEC) Conference in Orlando, Florida. CSK Partners, Gregory J. Willis, Brooke L. Boltz and Stephen M. Rosansky, presented cutting-edge coverage and fraud issues.

# POTENTIAL NEW STRATEGIES FOR DEFENDING ASSIGNMENT OF BENEFITS CLAIMS IN LOSSES THAT INVOLVE HOMESTEAD PROPERTY

By: George Hooker

George Hooker is a Partner in the firm's First Party Property group.

In recent years, assignment of benefits claims have become one of the biggest problems facing homeowners' insurance carriers in Florida. This is evident from the substantial rise in the number of lawsuits filed in these types of claims each year. In fact, in some instances, there may be multiple assignments for a single occurrence and several lawsuits per claim. The practical result is that insurers are forced to defend distinct lawsuits against numerous plaintiffs, with the corresponding exposure to an attorney's fee judgment in each,[1] all arising from the same claim or event.

So far, insurers have had little success in Florida courts putting an end to this abuse of the claims process. For example, in *Accident Cleaners, Inc. v. Universal Ins. Co.,* the Fifth District Court of Appeal held that as long as a homeowner has an insurable interest in the property at the time of the loss, then the post-loss assignment is valid.[2] In another case, *One Call Prop. Servs. v. Sec. First Ins. Co*., the Fourth District Court of Appeal held that standard anti-assignment and loss payment provisions in an insurance policy do not preclude an assignment of post-loss benefits, even when payment is not yet due.[3] Then, in *Security First Ins. Co. v. Dep't of Fin. Servs*., the First District Court of Appeal upheld Florida's Office of Insurance Regulation's refusal to allow a carrier to revise its policy forms to explicitly prohibit the post-loss assignment of benefits.[4]

Despite these setbacks, however, a recent decision of the Fourth District Court of Appeal in *One Call Property Services, Inc. v. St. Johns Ins. Co., Inc*.[5] may point to potential new defense strategies in some cases. Specifically, in cases in which the assignor experiences a loss to a homestead property, Florida's Constitution may afford a defense.[6] The Florida Constitution defines a "homestead property" as the principal place of residence consisting of up to one-half acre within a municipality and up to 160 contiguous acres outside a municipality that are owned by a natural person.[7] This definition is construed liberally in favor of finding that a particular property is, in fact, a homestead property.[8] Second homes, income property, and property owned by corporations are not considered homestead.[9] Therefore, insurers can only assert this potential defense in breach of assignment of benefits claims that involve a homestead property.

In *One Call*, the Fourth District Court of Appeal affirmed the trial court's finding that an assignment of benefits for insurance proceeds was unenforceable because it inappropriately attempted to divest the insured's constitutionally-protected homestead property rights.[10] One Call Property Services performed water mitigation services at the insureds' home.[11] The insureds submitted a claim under their homeowner's insurance policy to St. Johns Insurance Company, but St. Johns denied the claim.[12] One Call then filed suit against St. Johns, under an assignment of benefits, for the payment of its outstanding invoice.[13] The trial court ultimately granted summary judgment in favor of St. Johns, finding that the assignment of benefits was invalid as it sought to divest the insureds of constitutionally-protected proceeds from homestead property through an unsecured agreement signed by only one of the insureds.[14]

Citing the decision of the Third District Court of Appeal in *Quiroga v. Citizens Prop. Ins. Co*.[15], the trial court ruled that an unsecured agreement cannot divest a homeowner of homeowner's insurance proceeds. The trial court also noted that only one insured/homeowner executed the assignment of benefits.[16] In addition, it found that the assignment of benefits and One Call's actions in attempting to adjust the loss on behalf of the insureds violated Florida's public adjuster statute, § 626.854(1), Florida Statutes.[17] Ultimately, the Fourth District Court of Appeal agreed that the assignment of benefits was invalid; therefore, the company did not have standing to maintain the lawsuit.[18]

However, it is important to note limitations in the *One Call* decision. Importantly, the Fourth District Court of Appeal's decision was *per curiam* affirmed (or without a written opinion).[19] Moreover, to date, only one of Florida's five District Courts of Appeal has directly ruled on the issue. Also, in cases in which the insurer has made partial payment of claims, the argument that the assignment is an unsecured agreement and invalid is not as strong. In partial payment cases, the insurer has arguably accepted the assignment of benefits as valid and

enforceable. Therefore, a defense based upon the assignment being unsecured and invalid is potentially waived in partial payment cases.

It is likely that assignees of such agreements will argue that finding some assignment of benefits enforceable, while finding others unconstitutional, is inconsistent and inequitable. However, Florida courts have consistently held that the homestead protection is not based upon principles of equity.[20] The public policy in favor of protecting homestead property rights extends not only to the property itself, but also to any insurance proceeds resulting from a covered loss.[21] As such, in defending its case, an insurer should look to rely on the homestead status of the property at the time of loss. The fact that the definition of homestead property is liberally construed in favor of finding that a particular property is a homestead will also assist insurers in making this argument.

In defending against an assignment of benefits claim that involves homestead property, an insurer should consider the facts of each case and the applicability of these three potential arguments that the assignment of benefits: 1) is an unsecured agreement divesting the insured of his/her homestead property rights; 2) was not executed by all insureds; and, 3) violated Florida's public adjuster statute.

In light of *One Call*, an insurer may now not only defend assignment of benefits claims in cases that involve homestead property, but may also seek early resolution of claims by moving for summary judgment. If an insurer is able to unequivocally show that the loss occurred to homestead property, then there is a strong argument that the assignment of benefits is an unsecured agreement.[22] As such, Florida's right to own property as homestead may ultimately offer carriers some relief from the deluge of assignment of benefits claims and the multiple exposures to attorney's fee judgments insurers now face for the same occurrence.

(Endnotes)

1 *See* § 627.428(1), Fla. Stat. ("Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary…the trial court or… the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit….").

2 186 So. 3d 1 (Fla. 5th DCA 2015).

3 165 So. 3d 749 (Fla. 4th DCA 2015).

4 177 So.3d 627 (Fla. 1st DCA 2015).

5 183 So. 3d 364 (Fla. 4th DCA 2016) (hereinafter "*One Call*").

6 Fla. Const. Art. X, § 4(a) reads in part: "There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person: (1) a homestead."

7 *Id.*

8 *Synder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997).

9 *See, e.g., In re Tucker*, 22 Fla. L. Weekly Fed. B 37 (Bank. S.D. Fla. Apr. 21, 2009) (finding that property held by a corporation could not be considered homestead).

10 *One Call Property Services, Inc. v. St. Johns Ins. Co., Inc*., Case No. 13-000868-CA, 2014 WL 7496474 (Fla. 19th Cir. Ct. 2014), *aff'd by One Call.*, 183 So. 3d 364.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 34 So. 3d. 101 (Fla. 3d DCA 2010) (holding that an attorney's motion to impress charging lien on insurance proceeds was correctly denied).

16 *One Call Property Services, Inc.,* 2014 WL 7496474.

17 Defining a "public adjuster" as "any person, except a duly licensed attorney at law as exempted under s. 626.860, who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims. The term also includes any person who, for money, commission, or any other thing of value, solicits, investigates, or adjusts such claims on behalf of a public adjuster." § 626.854(1), Fla. Stat.

18 *One Call Property Services, Inc*., 2014 WL 7496474.

19 A per curiam affirmance or "PCA" is an affirmation of a lower court's ruling without the preparation of a written opinion and which does not carry with it any binding authority. *See Dep't of Legal Affairs v. Dist. Ct. of Appeal, 5th Dist.,* 434 So. 2d 310, 311 (Fla. 1983).

20 *See Pub. Health Trust of Dade County v. Lopez,* 531 So. 2d 946, 951 (Fla. 1990) (citing *Bigelow v. Dunphe,* 143 Fla. 603 (Fla. 1940)); *Pierrepont v. Humphreys (In re Newman's Estate),* 413 So. 2d 140, 142 (Fla. 5th DCA 1982) ("The homestead character of a piece of property . . . arises and attaches from the mere existence of certain facts in combination in place and time.").

21 *See Cutler v. Cutler*, 994 So. 2d 341, 343 (Fla. 3d DCA 2008).

22 Arguing a violation of section 626.854(1) would likely be a more difficult argument to make as in most instances, a company traveling under a purported assignment of benefits would likely be able to produce some evidence showing that they were not acting as a public adjuster in order to overcome summary judgment.

# LOTUS VILLAGE WOMEN'S SHELTER GROUNDBREAKING

CSK is pleased to announce our participation in the development of Lotus Village, which will provide shelter, a clinic and a wellness center. The Lotus House Women's Shelter is an organization that provides state-of-the-art shelter facilities and supportive services to nearly 500 homeless individuals and families. Lotus House is an organization dedicated to improving the lives of homeless women, youth and children. They provide sanctuary, support, education, tools and resources that empower them to heal, learn and grow. The facility broke ground on September 16, 2016 in Overtown, Florida with the help of many other supporters and sponsors. With the construction of Lotus Village, the organization will be able to provide a holistic neighborhood health clinic, children's day care and wellness center, and shelter and dining facilities to families in need of a safe haven. CSK Partners, George Truitt and Kevin Schumacher, received special recognition for their help on the project.

# Race FOR THE Cure

CSK was a proud sponsor of the 2016 Susan G. Komen Race for the Cure in support of the fight against breast cancer. CSK staff and family members, some of whom are cancer survivors, participated in this event. CSK is an annual sponsor of the Race for the Cure.


# CSK SUPPORTS THE LEUKEMIA & LYMPHOMA SOCIETY

CSK employees and their families in the Miami, Ft. Lauderdale and West Palm Beach offices attended a Marlins game held on July 10, 2016 as part of CSK's fundraising efforts for the Leukemia and Lymphoma Society. Over 600 employees and family members attended the game to watch the Marlins play against the Cincinnati Reds.

CSK continued its fundraising efforts for this cause by attending a Miami Dolphins game held on September 25, 2016 in Hard Rock Stadium against the Cleveland Browns. CSK was honored as the Team of the Game.

CSK's Miami office also organized a team of walkers 80+ strong who participated in this year's Light the Night Walk.


## TRIAL SUCCESSES

**Thomas Scott, Scott Cole and Brian Dominguez**, of CSK's Miami office, successfully obtained final summary judgment in favor of our client in a $10 million dollar (plus interest) bad faith case in the United States District Court for the Southern District of Florida. This lawsuit was the biggest bad faith case currently pending against our client.

**Lee Cohen, Ian Koven,** and **Dax Dietiker**, of CSK's West Palm Beach office, successfully obtained final summary judgment in a traumatic brain injury case. At the time of the accident, our client had its tractor-trailer parked on the side of the roadway. The plaintiff alleged that the driver negligently parked the tractor-trailer and obstructed the plaintiff's view of the co-defendant's vehicle. While driving his motorcycle, the plaintiff impacted the side of the co-defendant's vehicle at full speed. Plaintiff asserted a vicarious liability claim against our client based upon allegations of an alleged agency with the truck driver, which our client disputed. The court granted final summary judgment in favor of our client based on CSK's argument that, even if an agency relationship existed, it was an independent contractor relationship, at most. Therefore, CSK argued that our client could not be held vicariously liable for the actions of the tractor-trailer driver, with which the court concurred.

**Shelby Serig**, of CSK's Jacksonville office, successfully obtained final summary judgment in a pregnancy and disability discrimination case before the U.S. District Court for the Middle District of Florida. The plaintiff alleged that the employer terminated her when she became pregnant. As a consequence of the pregnancy, the plaintiff further alleged that her employer perceived her as "disabled". The plaintiff brought multiple claims pursuant to both federal and state statutes. As to the plaintiff's pregnancy discrimination claims, CSK successfully proffered legitimate, non-discriminatory business reasons for terminating her employment, which the plaintiff failed to refute. In addition, as to the plaintiff's disability claims, CSK argued that her pregnancy did not constitute an impairment under the relevant statutes as the plaintiff never reported any pregnancy-related complications or medical restrictions. The court agreed with CSK and entered final summary judgment in favor of our client.

**Scott Bassman** and **Craig Minko**, of CSK's Fort Lauderdale East office, successfully obtained a directed verdict in favor of our client, a condominium association. The plaintiff, a painting contractor, brought suit against our client for tortious interference with his business relationship with a general contractor. Plaintiff claimed that he had a long-standing business relationship with a general contractor, but that the association's Board intentionally interfered with and destroyed his business. The plaintiff's pretrial demand was in the amount of $800,000. At trial, CSK moved for a directed verdict at the close of the plaintiff's case. The court agreed and entered a directed verdict in favor of our client. The plaintiff now faces entry of a potential fee judgment as a result of a rejected proposal for settlement and separate motion for section 57.105, Florida Statutes, sanctions.

**Julie Ireland**, **Jim Sparkman**, and **Danni Balczon**, of CSK's West Palm Beach office, successfully obtained a complete defense verdict in a slip and fall case. The plaintiff slipped

and fell in a shopping plaza parking lot, resulting in a knee injury and surgery. During trial, the plaintiff and his former boss testified that the subject parking lot was always littered with trash and debris. However, the jury found that our clients, the plaza owner and property manager, had no actual or constructive knowledge of the dangerous condition prior to the plaintiff's fall. During closing, the plaintiff asked the jury for damages in the amount of $165,000. After only forty minutes, the jury returned a complete defense verdict.

**Scott Shelton** and **Melissa Crowley**, of CSK's Orlando office, successfully obtained a final summary judgment in a dram shop case. CSK's client was a country club. A patron of the country club caused a fatal automobile accident after allegedly consuming extensive amounts of alcohol during a round of golf. The plaintiff estate alleged that our client improperly trained its employees, negligently overserved the patron, and was on notice of the patron's alleged habitual addiction to alcohol. In fact, the patron admitted to playing the course and drinking alcohol approximately 60-70 times before the incident. CSK argued that there was no record evidence to establish that the patron was habitually addicted to alcohol and no circumstantial evidence establishing that our client had any knowledge of the alleged addiction. The court agreed and entered final summary judgment approximately one month before trial. The plaintiff now faces a potential judgment for fees as a result of a rejected proposal for settlement.

**Dan Shapiro** and **Michelle Bartels**, of CSK's Tampa office, obtained a favorable verdict following a three-day trial in a premises liability case. The plaintiff was a business invitee at our client's dock. He sustained an injury to his foot that required emergency medical treatment. Following treatment in the hospital, he developed a significant infection, which required an additional surgery and three weeks of antibiotics. After extensive treatment, the infection resolved, but the plaintiff was left with ongoing and permanent neuropathy in his foot. The plaintiff argued that our client negligently maintained the dock, should have been aware of the dangerous condition on the dock, and should have warned the plaintiff. CSK argued that the dock was properly maintained, that the plaintiff had been to the dock on seventy-five prior occasions and never complained about the condition, and that the plaintiff was himself negligent. The plaintiff asked the jury to award $483,934.70 in past medical expenses, and past and future pain and suffering. After deliberating for about four hours, the jury returned a verdict of only $13,000 in past medical expenses and found the plaintiff 80% at fault. The plaintiff now faces a potential fee judgment as a result of a rejected proposal for settlement.

**Haldon Greenberg**, of CSK's Fort Lauderdale West office, successfully obtained final summary judgment in favor of our client in a case involving a fight at a construction site. CSK successfully proved that the plaintiff was a trespasser on the construction site and was in the commission of a felony when our client, an employee, discovered the plaintiff and his friends attempting to take a construction vehicle for a joy drive. When asked to leave, our client escorted the plaintiff and his friends to the edge of the property, and a fight broke out between our client and the plaintiff. Relying on section 768.075, Florida Statutes, and supporting case law, CSK successfully argued that immunity applied to both the employer and our client, the employee. The court agreed and entered final summary judgment in favor of our client. The employer joined in the motion; and the court also entered final summary judgment in favor of the employer.

**Justin Sorel** and **Olga Butkevich**, of CSK's West Palm Beach office, successfully obtained final summary judgment in a slip and fall case. The plaintiff claimed that she slipped and fell in a bathroom stall while helping a patient from her wheelchair onto the toilet. The plaintiff alleged that our client failed to reasonably maintain the subject area free from dangerous conditions and failed to warn of such dangerous conditions. She also brought a separate claim asserting that our client was negligent for failing to provide her with another employee to help in transferring the patient from the wheelchair to the toilet. As a result of the alleged fall, the plaintiff claimed extensive injuries to her back, as well as lost wages and loss of future earning capacity. CSK sought final summary judgment based on Florida's slip and fall statute. In addition, CSK sought summary judgment based upon the standard of care required at the facility, or that our client owed no duty to provide an aid to assist in transferring a patient to the bathroom. The court agreed and granted final summary judgment in our client's favor.

**Jonathan Vine** and **Nina Schmidt**, of CSK's West Palm Beach office, successfully obtained a dismissal with prejudice in a professional negligence case. The plaintiff brought suit against our client alleging professional negligence and negligent misrepresentation stemming from a residential appraisal that our client prepared in 2006. CSK moved to dismiss on the grounds that the claims were barred by the applicable statute of limitations. The court agreed and dismissed the action, with prejudice, finding that the statute of limitations barred both the professional negligence and negligent misrepresentation claims.

**Julie Ireland**, of CSK'S Bonita Springs office, and Gregory Willis, of CSK's Fort Lauderdale West office, successfully obtained a defense verdict in a PIP case involving the reasonableness of the plaintiff/insured's charges. The dispute arose following an automobile accident in which the plaintiff suffered a broken toe and knee contusion. The plaintiff's providers referred the plaintiff for two follow-up appointments, to obtain an x-ray and to tape her broken toe (which the insured referred to as a closed reduction surgical procedure). The provider submitted charges of $675 to our client, making claims for the insured's PIP and Med Pay benefits. Pursuant to its policy language and the applicable statute, our client paid $597.52, or the equivalent of 200% of the Medicare Part B fee schedule. After just over one hour of deliberation, the jury returned a verdict that the plaintiff's charges were not reasonable, and that the $597.52 amount that our client paid was the reasonable amount for the office visits and x-ray. The plaintiff now faces a potential fee judgment as a result of a rejected proposal for settlement.

**Frank Cole**, of CSK's Jacksonville office, successfully obtained final summary judgment in a wrongful death premises liability case. The plaintiffs' decedent, an excavator operator, died when the wall of the sand pit collapsed on his machine. A mining company employed the decedent. Our client was the land owner and lessor of the property being mined. Plaintiffs alleged that our client knowingly allowed an inherently dangerous condition to exist by permitting the mining company to create twenty-

five foot vertical walls of unstable sand and clay. The plaintiffs' demand was in the amount of $5,000,000. CSK moved for final summary judgment, arguing that the mining company and the property owner, although owned and managed by the same individual, were separate and distinct legal entities. CSK further argued that our client had fully divested itself of any possessory interest or control over the property through the lease entered into with the mining company. The court agreed and entered final summary judgment in favor of our client. The plaintiff now faces entry of a potential fee judgment as a result of a rejected proposal for settlement.

**Claire Hurley** and **Paul Dozois**, of CSK's West Palm Beach office, successfully obtained a dismissal with prejudice in favor of our client, a physician. The plaintiff accused our client of a civil rights violation under 42 U.S.C. § 1983. Specifically, the plaintiff asserted that our client violated his constitutional rights by failing to inform him of the side effects of certain medications. After removing the case to federal court, CSK moved to dismiss, arguing that the plaintiff failed to make a showing that our client acted under the color of state law. The court agreed and granted CSK's motion to dismiss, with prejudice.

**Brooke Boltz** and **Justin Bleakley**, of CSK's Orlando office, successfully obtained a full defense verdict following a three-day PIP trial. The plaintiff/insured claimed that she was involved in an automobile accident at a convenience store. There were no witnesses to the accident. Six days after the alleged accident, the insured began treating with a chiropractor and incurred bills exceeding $10,000. Our client, the insurer, hired an accident reconstruction expert who opined that the insured's claim of an alleged accident was false. The credibility of the insured was the focus of the entire trial and CSK's cross examination of the insured successfully exposed all of the false and misleading statements concerning the accident claim. After approximately one hour, the jury returned a complete defense verdict.

**Benjamin Esco** and **Elisabeth Espinosa**, of CSK's Miami office, successfully obtained a defense verdict in a premises liability case. The plaintiff, a 56-year-old, disabled retiree, slipped and fell on a stairway leading down from her bungalow door. The 63-year-old stairway did not comply with current codes, showed signs of wear, and did not have safety handrails. As a result of the fall, the plaintiff fractured her foot. She then re-fractured it a month after surgery, which required a more extensive reconstructive surgery. Prior to jury selection, the court conducted an evidentiary hearing on the admissibility of the parties' liability/code experts' testimony. The court excluded the experts' references to all codes, laws and standards. The plaintiff asked the jury for an award of her medical bills, and a total of $160,000 in past and future economic damages. Following a four-day jury trial, the jury returned a complete defense verdict.

**Michael Brand** and **Sarah Egan**, of CSK's Miami office, successfully obtained a favorable result for our client in an admitted liability motor vehicle/pedestrian accident case. The plaintiff claimed that as a result of the accident, he flew over our client's vehicle and suffered a fractured right leg, loss of vision, and injuries to his neck, hip and ankle. The plaintiff also claimed a back injury. However, the court dismissed this claim prior to trial after CSK uncovered that the plaintiff had treated for back pain on at least two prior occasions, which the plaintiff denied during discovery. Both the defense orthopedic surgeon and radiologist agreed with the plaintiff that the accident caused his right leg fracture. The plaintiff asked the jury for $1.6 million. The jury returned a verdict in an hour, finding no permanency and no future medicals. The jury awarded the precise amount that the defense suggested, which was $12,157 for past medicals.

**Daniel Klein** and **Brad Sturges**, of CSK's Miami office, successfully obtained final summary judgment in a slip and fall case at our client's gas station. The plaintiff claimed to have slipped and fallen on oil/gas on the ground in the area of the gas pumps. The court found that the substance was not on the ground long enough to impute constructive knowledge of the substance on our client, and ultimately entered final summary judgment in our client's favor. Based on an expired proposal for settlement, CSK also successfully pursued an award of attorney's fees and costs.

**Jonathan Vine** and **Kali Sinclair**, of CSK's West Palm Beach office, successfully obtained a dismissal, with prejudice, in a class action lawsuit brought under the Fair Debt Collection Practices Act. The Complaint alleged that our client, a law firm, violated 15 U.S.C. § 1692e by including a validation notice in a debt collection complaint. CSK successfully argued that the Complaint failed to state a cause of action because, as a matter of law, the validation notice was not false, deceptive, or misleading to the least sophisticated consumer, and was not, in and of itself, a violation of the FDCPA. The court agreed and dismissed the case with prejudice.

**Wade Adams** and **Joseph Goldberg**, of CSK's Miami office, successfully obtained a favorable verdict following a four-day jury trial in a case arising out of a 2010 pedestrian/vehicle accident. Following the accident, the plaintiff/pedestrian was in a medically induced coma for thirty days. The plaintiff sustained a serious head injury and collapsed lung. He also sustained injuries to his left femur, ribs, clavicle, and nose. His medical bills were in excess of $400,000; and he alleged permanent and on-going medical issues related to the brain injury, including severe depression. The defense medical experts conceded that the treatment was reasonable and necessary, and that the plaintiff's complaints were consistent with his injuries. Therefore, the medicals bills, both past and future, were stipulated to by the parties. Following a four-hour deliberation, the jury returned a verdict finding that our client, the driver, was only 17.5% at fault, resulting in a net verdict of $41,926.50.

**Richard Adams** and **Dennis Egitto**, of CSK's Miami office, successfully obtained a complete defense verdict following a four-day jury trial in a case involving a significant motor vehicle accident in 2011. The plaintiff alleged permanent injuries to his neck, back, and left shoulder as a result of the accident. He also had scheduled a future surgery. The plaintiff's medical bills were in excess of $40,000, with his future surgeries totaling approximately $400,000. CSK successfully argued that the plaintiff's injuries were related to a prior slip and fall accident, which injuries and medical treatment the plaintiff had failed to disclose. CSK was also able to establish that the plaintiff's complaints of shoulder pain did not truly present themselves until approximately two years after the subject accident. The plaintiff asked the jury for $860,000. After less than forty minutes, the jury returned a complete defense verdict.

**Daniel Shapiro** and **Kelly Cook**, of CSK's Tampa office, successfully obtained a complete defense verdict in a negligent security case. The plaintiff claimed our client, a restaurant/bar, failed to provide adequate security or monitoring of patrons leaving the resort that would have prevented a foreseeable attack. The plaintiff argued that after he and his group left the restaurant, other patrons ambushed them. The other patrons argued that it was the plaintiff's group who actively pursued them. As to injuries, the plaintiff alleged a dislocated ankle and ruptured ankle ligaments, for which he claimed over $150,000 in medical bills. Plaintiff's counsel asked the jury for $1.1 million. After fifty minutes, the jury returned with a complete defense verdict. The plaintiff now faces entry of a potential fee judgment as a result of a rejected proposal for settlement.

**George Truitt** and **Kevin Schumacher**, of CSK's Miami office, obtained a favorable award in a hotly contested arbitration matter. The claimant, a well-known commercial real estate broker and experienced plaintiff in commercial real estate and construction defect lawsuits, sought $2 million dollars in construction related damages and close to $1 million dollars in attorneys' fees and costs. He also aggressively pursued fraud theories that, if successful, could have had a devastating impact on our client's ability to perform in the future as a licensed contractor. Following a two-week arbitration, the arbitrator found no fraud on the part of our client.

**Julie Ireland** and **Danielle Balczon**, of CSK's Bonita Springs office, obtained a favorable verdict under Florida's strict liability dog-bite statute. The plaintiff, our client's neighbor's landscaper, filed suit claiming that our client's three German Shepherds attacked him when they escaped onto the neighbor's property. The plaintiff alleged soft tissue injuries to his back and shoulder, and received chiropractic treatment for eleven months. However, he never claimed injuries resulting from a dog bite, only injuries allegedly sustained when the dogs knocked him to the ground. During closing argument, the plaintiff asked the jury for over $150,000. After only thirty-five minutes, the jury returned a verdict of $6,750, which did not even cover his $13,000 medical bills. The award was then reduced to $5,062.50 based on a finding that the plaintiff was 25% negligent for provoking the dogs. The jury did not award the plaintiff any amount for wage loss and loss of future earning capacity, as surveillance video of the plaintiff revealed him moving large rocks, chopping wood, and performing landscaping.

## APPELLATE SUCCESSES

**David Borucke**, of CSK's Tampa office, successfully obtained an affirmance of a court's denial of a medical provider's entitlement to fees and costs when the insurer paid on a PIP claim after the plaintiff filed suit. The Ninth Circuit Court, sitting in its appellate capacity, held that the doctrine of entitlement to fees does not apply to situations where an insurer did not unreasonably withhold payment prior to a medical provider filing suit. The court also held that the PIP Statute limits the obligation of an insurer to provide Personal Injury Protection benefits to $2,500 absent the finding of an emergency medical condition by a medical provider qualified to make that determination under section 627.736(1)(a)(3), Florida Statute.

**Daniel M. Schwarz**, of CSK's Fort Lauderdale West office, successfully obtained a *per curiam* affirmance of a final declaratory judgment in favor of a South Florida condominium association validating the association's adoption of specifications for unit owners' replacements of their units' glass windows and doors. To promote uniformity and comply with the Florida Building Code, the association adopted specifications providing that, if a unit owner wished to replace their original glass windows and doors, the owner must use thicker glass and panels of particular lengths. Dissatisfied with the association's specifications, the plaintiff submitted a non-conforming plan for replacement of his units' windows and doors, which the association rejected. The plaintiff filed suit. After trial, the trial court found the association's specifications complied with the Declaration of Condominium, were consistent with the association's responsibilities of maintenance, did not materially alter common elements such as to require a unit owner vote, and fell within the association's business judgment. The Fourth District Court of Appeal affirmed the trial court's final declaratory judgment.

**Scott Cole**, **Kathryn Ender** and **Lissette Gonzalez**, of CSK's Miami office, successfully obtained an affirmance of a final order of dismissal in favor of our client, a well-known restaurant/bar chain, in a dram shop case. The trial court dismissed the action based on Florida's Dram Shop Statute, as neither bases for liability under the statute existed. The plaintiffs appealed and argued, that our client's liability arose as a result of having undertaken a duty to prevent the intoxicated patron from leaving the premises and, thereafter, failing to follow through, which resulted in the intoxicated patron driving while intoxicated and causing a fatal accident. On appeal, the Fourth District Court of Appeal disagreed and found that our client's actions neither increased the risk of harm stemming from the patron's intoxication, nor created justifiable reliance by the patron. Further, the Fourth District found that its alleged internal policies of "cutting off" patrons did not create a duty to third parties. The Fourth District also noted the negative implications beyond this case that would result if it accepted the plaintiffs/appellants' arguments, as it would discourage restaurants and bars from instituting policies to deter drunk driving and/or overserving patrons in order to avoid any potential liability.

**Melinda Thornton**, **Kathryn Ender** and **Lissette Gonzalez**, of CSK's Miami office, successfully obtained a *per curiam* affirmance of a final summary judgment in favor of our client, the insurance carrier, validating their decision to void the plaintiffs' policy ab initio based on a material misrepresentation in the insurance application. The plaintiffs failed to disclose a prior bankruptcy on their insurance application. Upon discovering the material misrepresentation, our client voided the policy ab initio, as it would not have been issued had it been aware of the bankruptcy. The plaintiffs filed suit. CSK filed a motion for summary judgment, arguing that its decision was proper, there was no dispute that the plaintiffs' misrepresentation was material, and but for the misrepresentation, the carrier would not have issued the policy. The trial court agreed and entered summary judgment in favor of our client. On appeal, the plaintiffs argued that summary judgment was improper because whether or not the alleged misrepresentation was material, and/or whether our client's reliance on it was detrimental in light of its ability to perform a background investigation, was a genuine dispute of material fact for a jury to decide. The Third District Court of Appeal disagreed and affirmed the trial court's final summary judgment.

# PRACTICE AREAS

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

# TRIVIA OFFICIAL RULES

NO PURCHASE NECESSARY. PURCHASE WILL NOT INCREASE YOUR CHANCES OF WINNING. Void where prohibited. This contest is sponsored by Cole, Scott, & Kissane P.A. A total of 10 prizes available to be awarded. No cash prizes. Each prize is valued at $10.00. Odds of winning will depend upon the number of eligible entries received (estimated odds based upon the number of Quarterly readers: 1 in 1000). Contest is open to anyone in the United States who is 18 years of age or older. Employees of Cole, Scott, & Kissane P.A. are not eligible to participate. Contest begins at 12:01 a.m. (EST) on December 8, 2016. Entries must be received by 12:00 p.m. (EST) on January 28, 2016. Entries must also include contestant's name and mailing address. Winners will be chosen according to the first 10 eligible responses received that correctly answer the Trivia Question. If less than 10 correct entries are received, remaining prizes will be awarded at random to other participants.

Entries must be e-mailed to Quarterly.Trivia@csklegal.com. Limit of one entry per household. Winners will be selected on February 6, 2017 and notified via e-mail by February 16, 2017. If you do not wish to receive or if you would like to be removed from subsequent mailings, please call, toll free, at 1-888-831-3732. A list of winners can be obtained after February 31, 2017 via e-mail to: eric.rieger@csklegal.com. Cole, Scott, & Kissane P.A. is not responsible for any lost e-mail or technical problems encountered by contestants in connection with this contest.

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