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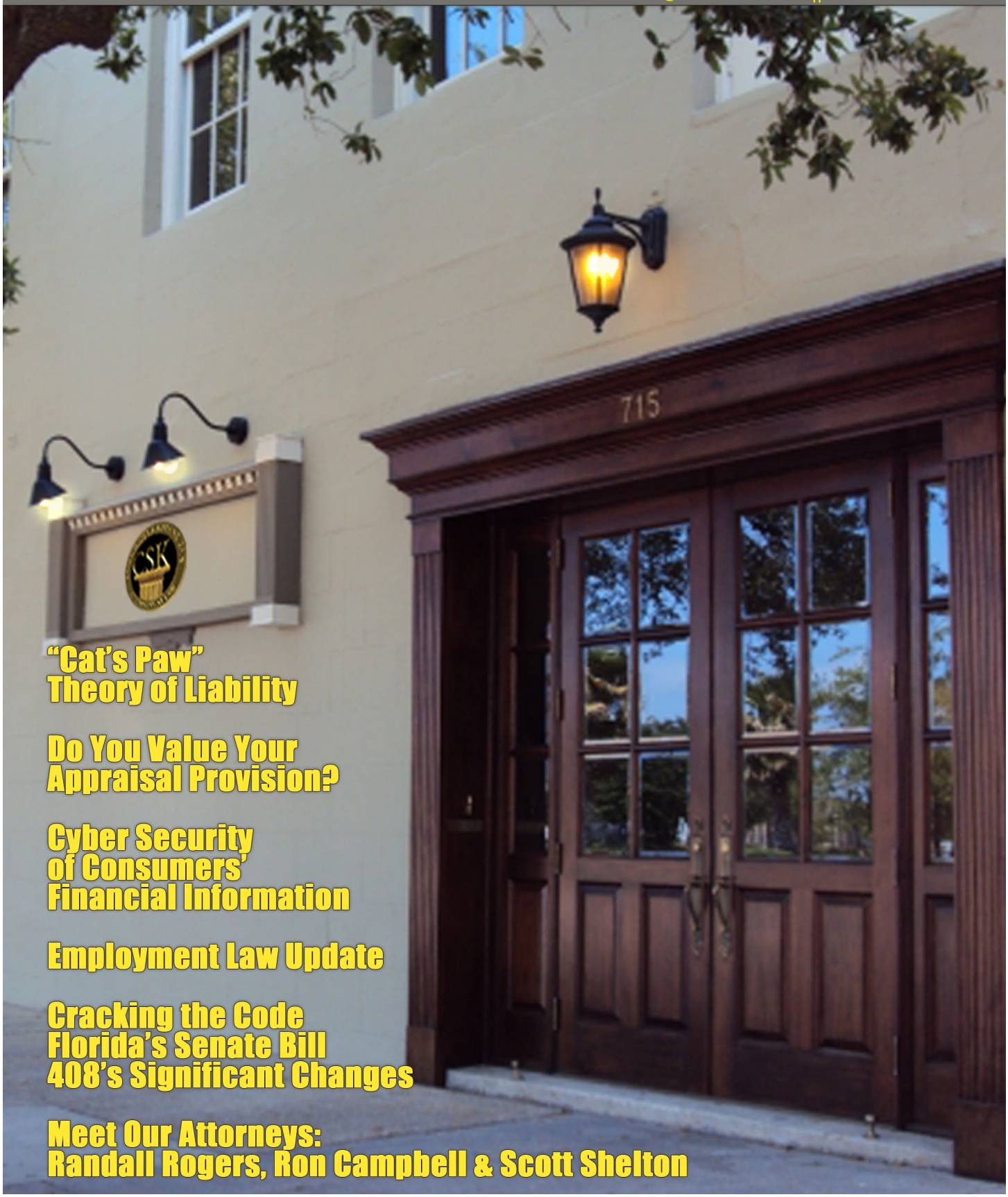

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"CAT'S PAW" THEORY OF LIABILITY

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Recently, the Supreme Court issued an opinion upholding the US "cat's paw" theory of employer liability, under which an employer may be liable for discrimination in an adverse employment decision against an employee where the ultimate decision maker is unbiased and has no discriminatory motives. *Staub v. Proctor Hospital,* 131 S.Ct. 1186 (2011). Under this theory, the discriminatory motive of a non-decision maker is imputed to the decision maker, and employer, where the discriminator has some significant influence that leads to the adverse employment action. *Id.*

The term "cat's paw" is derived from the Aesop's fable, "The Monkey and The Cat," where a devious monkey induced a cat to pull roasting chestnuts from a fire for both he and the cat to share. In doing as asked, the cat burned its paws, while the monkey ate the chestnuts from the cat unscathed, leaving her with nothing to eat. The moral of the story being, do not be fooled into performing or accomplishing another's tasks. In employment discrimination cases, a "cat's paw" scenario is presented when a biased employee or manager, who lacks decision making power, dupes a formal decision maker into making an adverse employment decision.

This "scheme" may subject the employer to an employment discrimination action, and is likely to occur where there is simply a "rubber stamping" without a complete investigation, which is necessary for the employer to *purrr-tect* itself from employment discrimination liability.

In *Staub*, Plaintiff, working as an angiography technician, sued his former employer alleging discrimination under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"),[1] asserting that two of his supervisors, Janice Mulally and Michael Korenchuk, were hostile towards his military obligations.[2] *Id.* at 1189-90. Plaintiff also alleged that in January 2004, Mulally issued him a disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient, which included a directive requiring him to report to Mulally or Korenchuk when his cases were completed. *Id.* at 1189. Upon receipt of a report from Korenchuk, indicating Plaintiff failed to comply with the above-mentioned directive, the company's Vice President of Human Resources ("V.P.") made the decision to terminate Plaintiff. *Id.* Plaintiff did not contend that the V.P. was motivated by hostility; however, he did assert that both Mulally and Korenchuk's actions were motivated by anti-military hostility, and that their actions led to his eventual termination. *Id.* at 1190.

A jury initially ruled in favor of Plaintiff, finding that Plaintiff's military status was a motivating factor in the decision to discharge him, only to be reversed by the Seventh Circuit. *Id.* Ultimately, the Supreme Court reversed the Seventh Circuit's decision, incorporating the tort law concept of proximate cause. *Id.* at 1191-93. The Court held that "if a supervisor performs an act motivated by anti-military animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Id.* at 1194. Additionally, an employer would be liable only when the supervisor acts within the scope of his employment, or when acting outside the scope of his employment and liability would be imputed to the employer under traditional agency principles. *Staub v. Proctor Hospital,* 131 S.Ct. 1186, 1194 (2011); *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 758 (1998).

Consequently, this decision is likely to increase employer accountability for the actions and recommendations of lower-level non-decision making supervisors. As such, in order to be *purrr-tected*, employers must be alert and undertake investigations to ensure that adverse employment actions are taken only after an independent, objective evaluation of all factors. This may require employers review prior discipline imposed and closely scrutinize the reasons given by supervisors for the suggested employment action. The challenge for employers is that it seems to be practically impossible to review an employee's performance without seeking input from that employee's supervisor. The "cat's paw" theory highlights the importance of employers conducting diligent and independent investigations prior to terminating employees, as merely undertaking a "paper review" of an informer's recommendation, without performing an independent investigation, will not be sufficient to shield an employer from liability if the recommendation is racially motivated. The decision presumably raises the bar for employers hoping to avoid liability for employment decisions prompted by discriminatory animus, even when an unbiased decision maker made the final call after an impartial investigation.

In the wake of The Staub decision, although increasing employer accountability, the Court did provide some guidance on how an employer may avoid liability in "cat's paw" cases,

explaining that if the employer's investigation results in an adverse employment action for reasons unrelated to the supervisor's original biased action, the employer will not be exposed to liability. *Staub,* 131 S.Ct. at 1193. Additionally, requiring the Plaintiff to establish that the non-decision maker (the individual alleged to have discriminatory motives) actually intended to cause the adverse employment action certainly raises the bar for Plaintiffs attempting to avoid summary judgment. Furthermore, the Supreme Court did not address whether an employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the employment decision. *Id.* at 1194. Such decision may provide employers with a defense if it is a co-worker's alleged discriminatory intent that is at issue.[3]

1 The purpose of USERRA is "to ensure that persons who serve or have served in the Armed Forces, Reserves, National Guard or other "uniformed services:" (1) are not disadvantaged in their civilian careers because of their service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service." *See* 38 U.S.C. § 4301.

2 While employed by Proctor, Plaintiff was a member of the United State Army Reserve, which required him to attend drill one weekend per month and train full time for two to three weeks per year. *Staub,* 131 S.Ct. at 1189.

3 The Court noted that Plaintitiff took advantage of Proctor's grievance process, yet expressed no view as to whether Proctor would have an affirmative defense if he did not.

DO YOU VALUE YOUR APPRAISAL PROVISION?

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Insureds have increasingly used Florida's informal mediation program, set forth in §627.7015, *Florida Statutes*, as a defense to an insurer's request to demand appraisal under the insurance policy. The statute provides that if an insurer fails to abide by certain notice requirements contained in the statute, the insured shall not be required to submit to, or participate in, any contractual loss appraisal process as a precondition to legal action for a breach of contract against the insurer for its failure to pay the policyholder's claims covered by the policy.[1]

According to the statute, for personal lines and commercial residential policies, at the time a first-party claim is "filed," an insurer shall notify all first-party claimants of their right to participate in the statutory mediation program.[2] The statute defines the term "claim" as "any dispute between an insurer and an insured relating to a material issue of fact."[3] The failure to meet the notice requirements of the statute has been successfully used by insureds to argue that their insurer waived its right to invoke appraisal.

However, the statute lists the following exceptions in which an insurer is not required to give notice of the mediation program:

1. Where the insurer has a reasonable basis to suspect fraud;
2. Where there is no coverage under the policy based on the agreed facts as to the cause of the loss;
3. Where the insurer has a reasonable basis to believe that the claimant has intentionally made a material misrepresentation of fact that is relevant to the claim, and the entire request for payment of a loss has been denied on the basis of the material misrepresentation; or,
4. Where the amount in controversy is less than $500, unless the parties agree to mediate a dispute involving a lesser amount.[4]

In *Florida Ins. Guar. Ass'n, Inc. v. Shadow Wood Condominium Ass'n*, Florida's Fourth District Court of Appeal discussed the applicability of the statute, in the context of a successor to an insolvent insurer who appealed an order denying its request to compel appraisal.[5] In its affirmance of the lower court's order, the Fourth District held that the insolvent insurer failed to comply with the notice requirements of the statute, and the insured – a condominium association – was not required to submit to the loss appraisal process.[6] The Court emphasized the legislative purpose behind the statute in arriving at its ruling as follows:

> There is a particular need for an informal, nonthreat-

> ening forum for helping parties who elect this procedure to resolve their claims disputes because most homeowners' and commercial residential insurance policies obligate insureds to participate in a potentially expensive and time-consuming adversarial appraisal process prior to litigation. The procedure set forth in this section is designed to bring the parties together for a mediated claims settlement conference without any of the trappings or drawbacks of an adversarial process.[7]

Separately, the statute states that "[t]he department shall adopt by rule a property insurance mediation program to be administered by the department or its designee," and "shall prepare a consumer information pamphlet for distribution to persons participating in mediation."[8] The Department of Financial Services has implemented Florida Administrative Code Rule 69J-166.031. The Rule requires that the insurer give notice within five (5) days of the insured's "filing" a first-party claim. Although "filing" is not defined in the statute or the rule, the Court's ruling in *Shadow Wood* suggests that the time period may start at the time the insurer first receives notice of the insured's claim.[9] Thus, based upon the language of the Rule promulgated by the Department of Financial Services pursuant to the statute, insurers should provide the statutory notice within ***five (5) days*** of receiving notice of the insured's claim.[10]

Rule 69J-166.031 of the Florida Administrative Code sets forth the following notice requirements:

> 1. The Notice shall be in writing and shall be legible, conspicuous, printed in at least 12-point type, and printed in typeface no smaller than any other text contained in the notice.
>
> 2. The first paragraph of the Notice shall contain the following statement: "The Chief Financial Officer for the State of Florida has adopted a rule to facilitate the fair and timely handling of residential property insurance claims. The rule gives you the right to attend a mediation conference with your insurer in order to settle any claim you have with your insurer. An independent mediator, who has no connection with your insurer, will be in charge of the mediation conference. You can start the mediation process after receipt of this notice by calling the Department of Financial Services at 1(877)693-5236. The parties will have 21 days from the date of the notice to otherwise resolve the dispute before a mediation hearing can be scheduled."
>
> 3. The Notice shall include detailed instructions on how the insured is to request mediation, including the address, phone number, and fax number for requesting mediation through the Department.
>
> 4. The Notice shall state that the parties have 21 days from the date of the notice within which to settle the claim before the Department will assign a mediator.
>
> 5. The Notice shall include the insurer's address and phone number for requesting additional information.
>
> 6. The Notice shall state that the Administrator will select the mediator.
>
> 7. The Notice shall refer to the parties' right to disqualify a mediator for good cause and paraphrase the definition of good cause as set forth in paragraph (7)(e) of the Rule.
>
> 8. The Notice Shall indicate that the insured is to notify the mediator 14 days before the mediation conference if the insured will bring representation to the conference, unless the insurer waives the right to the notice of representation.

In conclusion, if an insurer values its appraisal provision and wants to preserve its right to make use of the provision, the insurer must timely provide sufficient statutory notice to its insureds pursuant to §627.7015, *Florida Statutes*, and Rule 69J-166.031, F.A.C. (2009).

1 §627.7015(7), *Florida Statutes*

2 §627.7015(2), *Florida Statutes*. The alternative procedure for the resolution of disputed sinkhole claims, as set forth in §627.7074, *Florida Statutes*, supersedes the alternative dispute resolution process §627.7015, *Florida Statutes*. *See* §627.7074(3), *Florida Statutes* (3).

3 §627.7015(9), *Florida Statutes*.

4 §627.7015(9)a-d, *Florida Statutes*.

5 26 So. 3d 610 (Fla. 4th DCA 2009).

6 *Id.* at 611.

7 *Id.* at 612-13. *See also, QBE Ins. Corp. v. Dome Condo. Ass'n*, 577 F. Supp.2d 1256 (S.D. Fla. 2008) (holding that the statute puts the responsibility of notification on the insurer).

8 §627.7015(2), (8), *Florida Statutes*.

9 *See Shadow Wood*, 26 So. 3d at 613, fn.2 (stating that the insolvent insurer did not give the statutory notice at the time the insurer filed its claim, shortly after Hurricane Wilma, and noting that the successive insurer failed to give notice when it took over the claim from the insolvent insurer).

10 However, under Rule 69J-166.031, F.A.C. (2009), an insurer is not required to provide statutory notice when no payment has been made for a covered loss because the insurer concludes the amount of covered loss is less than the insured's deductible.

CYBER SECURITY OF CONSUMERS' FINANCIAL INFORMATION

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With the rapid growth of the use of technology in business comes great risk to consumers private information, and a concomitant risk to many of the businesses that are charged with the protection of that private information. In recent years, the Federal Government has enacted regulations, albeit vague in form, in an attempt to manage these risks. One such act, entitled the Gramm-Leach-Bliley Act (GLBA), or the Financial Services Modernization Act, was enacted by Congress in 1999 in an effort to provide a forward-looking framework within which "financial institutions" must proactively protect consumers' nonpublic financial information.[1]

Financial institutions are required by the GLBA to "establish appropriate standards" to safeguard customer's personal financial information, in order: "(1) to insure the security and confidentiality of customer records and information; (2) to protect against any anticipated threats or hazards to the security or integrity of such records; and (3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer."[2]

In response to this directive, the Federal Trade Commission (FTC) promulgated the Safeguards Rule, which requires financial institutions subject to FTC jurisdiction to adopt safeguards against disclosure of customers' personal information.[3] The FTC's Safeguards Rule is intentionally broad to allow flexibility for the broad range of businesses covered by the Rule. It provides a "framework for developing, implementing, and maintaining the required safeguards, but leaves each financial institution discretion to tailor its information security program to its own circumstances."[4] The Rule requires each covered financial institution to implement steps including, but not limited to, designating employees to coordinate the safeguards in order to ensure accountability; identifying and assessing the risks to customer information in each relevant area of the company's operation; and designing and implement information safeguards.[5]

1. CAUSES OF ACTION

Plaintiffs have attempted to bring suit under the GLBA for businesses' alleged violations of the GLBA. However, it has been consistently held that the GLBA does not provide for a private right of action.[6] In fact, by its very terms, the GLBA can only be enforced by "the Federal functional regulators, the State insurance authorities, and the Federal Trade Commission."[7] Courts have held that, although the GLBA does not provide for a private cause of action, it does set forth identifiable standards, the breach of which may be used to satisfy an element of a common law negligence *per se* cause of action.[8]

Although case law indicates that a Plaintiff may bring an action in negligence *per se* based upon an alleged violation of the GLBA, defense counsel may defend against such a claim by utilizing a Motion for Summary Judgment establishing that the covered financial institution had written security policies in place to protect consumers' financial information. In *Guin v. Brazos Higher Educ. Serv. Corp., Inc.*, No. CIV. 05-668 RHK/JSM, 2006 WL 288483 (D. Minn. Feb. 7 2006), Plaintiff alleged that Defendant owed a duty under the GLBA to secure Plaintiff's private information, and the duty was breached by allowing an employee to keep nonencrypted private data on his laptop. The court found that Plaintiff did not present sufficient evidence to support the claim that Defendant had breached a duty established by the GLBA, based upon the fact that Defendant had "written security policies, current risk assessment reports, and proper safeguards for its customers' personal information as required by the GLB Act."[9]

A negligence *per se* claim may also be defended against through a Motion to Dismiss based upon the Economic Loss Rule, which states that purely economic losses are not recoverable in negligence absent personal injury or property damage. A recent landmark case involving corporate giant TJ Maxx involved claims of negligence, which the court dismissed based upon the economic loss rule.[10] In that case, TJ Maxx issued credit cards to consumers, who then used those cards to purchase goods at TJ Maxx stores. TJ Maxx discovered that hackers had stolen personal and financial information of consumers who used the credit cards. The Plaintiffs formed a class action lawsuit against TJ Maxx to recover their costs and alleged various counts, including negligence.[11]

The Plaintiffs argued that their claims were not barred by the economic loss rule because they experienced property damage in that the compromised credit cards could no longer be used and that card verification codes were lost. The court disagreed with Plaintiffs' position on the basis that the cost of replacement cards is an economic loss, and dismissed the negligence count.[12] Thus, to the extent the state recognizes the

economic loss doctrine, actions based upon the theory of negligence per se may be disposed of at the Motion to Dismiss stage.

2. DAMAGES/EXPOSURE

The GLBA does not specify fines to be imposed upon violation of the Act. However, potential exposure for businesses can be significant, as evidenced by the multimillion dollar settlement resulting from the TJ Maxx case. The Plaintiffs settled with TJ Maxx for compensation to those injured, agreeing to implement a credit monitoring plan, institute identity theft insurance, and providing $6.5 million in attorneys' fees and costs. TJ Maxx settled with 41 state Attorneys General for $9.75 Million and an agreement to fund state data protection and prosecution efforts. The details of the information security program adopted by TJ Maxx are stringent, and require detailed levels of security.[13]

In 2005, the first two instances of the FTC's enforcement of the Safeguards Rule resulted in non-monetary settlements. In these cases, the FTC issued a Complaint charging two mortgage companies with violation of the FTC's Safeguards Rule for not having reasonable protections for consumers' private information. The parties thereafter executed an Agreement Containing Consent Order, where the companies agreed to implement an assessment and report from a third-party professional, using procedures and standards that set forth security program safeguards appropriate for the businesses' size and function.[14]

Thus, potential exposure for businesses in failing to implement security measures could entail significant monetary settlements/damages, as well as significant costs in implementing security plans that are likely more stringent than if implemented without the intervention of lawsuits and settlements. The aforementioned discussion demonstrates the potential exposure to lawsuits, damages, and settlements under the emerging cyber security laws, and highlights the importance of proactively implementing security measures to protect not only consumer nonpublic information, but the time and resources of all involved.

1 Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 and 15 U.S.C.). The GLBA applies to "customers," including "any person (or authorized representative of a person) to whom the financial institution provides a product or service, including that of acting as a fiduciary." The "financial institutions" consist of "any institution engaged in the business of providing financial services to customers who maintain a credit, deposit, trust, or other financial account or relationship with the institution."

2 15 U.S.C. §6801(b).

3 16 C.F.R. §314, Standards for Safeguarding Customer Information; Final Rule.

4 16 C.F.R. §314.4.

5 *Id*.

6 *See* 15 U.S.C. §6805; *Dunmire v. Morgan Stanley DW, Inc.,* 475 F.3d 956, 960 (8th Cir. 2007) ("[n]o private right of action exists for an alleged violation of the GLBA"); *Lentz v. Bureau of Med. Econ. (In re Lentz)*, 405 B.R. 893, 899 (Bankr.N.D.Ohio 2009) ("courts have consistently held there is no private right of action created by Congress in the GLBA"); *French v. Am. Gen. Fin. Servs. (In re French),* 401 B.R. 295, 310 (Bankr.E.D.Tenn.2009) ("[by its very terms, the Gramm-Leach-Bliley Act does not provide a private right of action").

7 15 U.S.C. § 6805(a).

8 *See Nicholas Homes, Inc. v. M & I Marshall & Ilsley Bank, N.A.*, 2010 WL 1759453 (D.Ariz., Apr. 30, 2010) ("The Court agrees that, although the GLBA does not provide for a private cause of action, it also does not preclude a common law cause of action."), and *Basham v. Pacific Funding Group,* 2010 WL 2902368 (E. D.Cal., July 22, 2010) ("[T]he violation of a statute can be used to satisfy an element of a negligence cause of action.").

9 *Guin v. Brazos Higher Educ. Serv. Corp., Inc.*, No. CIV. 05-668 RHK/JSM, 2006 WL 288483, at *4 (D. Minn., Feb. 7, 2006).

10 *In re TJX Companies Retail Security Breach Litigation*, Civil Action No. 07-10162-WGY (D. Mass., Dec. 18, 2007).

11 *Id.*

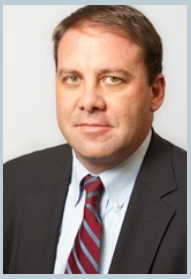
12 *Id.*

13 Tara M. Desautels and John L. Nicholson, Pillsbury Winthrop Shaw Pittman LLP, TJ Maxx Settlement Requires Creation of Information Security Program and Funding of State Data Protection and Prosecution Efforts (2009), http://www.pillsburylaw.com/siteFiles/Publications/7F4F43B367B5276B0CFA6D13CFF4044C.pdf.

14 http://www.ftc.gov/opa/2004/11/ns.shtm.

MEET ONE OF OUR ATTORNEYS

RANDALL ROGERS



Randall "Randy" Rogers is the Managing Partner of the Pensacola office and practices in the areas of general civil litigation, insurance coverage, legal malpractice, insurance bad faith, construction defects, architects and engineers errors and omissions, products liability and personal injury/wrongful death litigation.

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EMPLOYMENT LAW UPDATE

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On January 11, 2011, the U.S. Equal Employment Opportunity Commission ("EEOC") reported that the filing of Charges alleging discrimination and/or retalition with the federal agency nationwide hit an unprecedented level of 99,922 during fiscal year (FY) 2010, which ended Sept. 30, 2010. While the number of Charges have increased, the EEOC reports that the amount of pending Charges has only increased approximately 1%, meaning that the EEOC is processing Charges more efficiently. The Miami District Office of the EEOC has seen such an increase in Charges, that it has been transferring claims to the EEOC's San Juan, Puerto Rico office for investigation.

According to the 2010 data released by the EEOC, all major categories of charge filings in the private sector increased.[1] These include charges alleging discrimination under Title VII of the Civil Rights Act of 1964, as amended; the Equal Pay Act; the Age Discrimination in Employment Act; the Americans with Disabilities Act; and the Genetic Information Nondiscrimination Act (GINA).

Fiscal year 2010 marks the first time that the EEOC was enforcing the GINA, and received 201 charges under this statute. Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information.[2] Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history).[3]

Also, in 2010, for the first time ever, the EEOC reported that retaliation claims under all statutes surpassed race discrimination claims as the most frequently filed Charge. Historically, race had been the most frequently filed charge since the EEOC became operational in 1965. This is important, as retaliation charges can be some of the most difficult charges to defend.

The 2010 year-data also showed that the EEOC filed 250 lawsuits.[4] Moreover, the EEOC secured the highest level of monetary relief ever obtained in any given fiscal year, over $404 million in monetary benefits from employers, through its combined enforcement, mediation and litigation programs. The mediation program showed particular gains, ending the year with a record 9,370 resolutions, which is an increase of 10% from 2009.

Federal and state employment laws are unique and complex. Employees are filing EEOC Charges in record numbers. Thus, it is important for employers to be knowledgeable about the substantive law, while remaining proactive as to preventing such claims from being filed. Employers should ensure that they have internal policies in place to deal with claims of discrimination. Management training is also an essential element of prevention.

1 www.eooc.gov.
2 42 U.S.C. § 2000ff.
3 *Id*.
4 www.eooc.gov.

MEET ONE OF OUR ATTORNEYS

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He practices in the areas of civil litigation and insurance defense. Mr. Campbell earned his Bachelor of Arts degree from the University of Florida.

After completing his undergraduate studies, Mr. Campbell earned his Juris Doctor degree from Fordham University School of Law in New York.

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CRACKING THE CODE
FLORIDA'S SENATE BILL 408'S SIGNIFICANT CHANGES

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On May 17, 2011, Governor Rick Scott signed Senate Bill 408 (the "Bill") and significantly changed the landscape of sinkhole claims. Although prior versions of the Bill sinkhole carriers to offer sinkhole coverage, the final version requires homeowners' insurers to provide coverage for sinkhole loss. Fla. Stat. § 627.706(1)(b). Therefore, insurers cannot ignore the vast amount of amendments by simply nonrenewing sinkhole coverage. However, insurers can restrict sinkhole loss coverage to the principal building as defined in the policy. Fla. Stat. § 627.706(1)(c). The Bill specifically attempts to address insurers' concerns regarding insuring sinkhole loss in Florida, including the issues associated with defining the minimal nature of the damage required for coverage, and partially amending some of the Neutral Evaluation procedures. This article analyzes pertinent portions of the Bill and assesses its impact on the current landscape of sinkhole litigation.

THE "STRUCTURAL DAMAGE" DEFINITION

In the Bill, sinkhole loss is only verified if a professional engineer or geologist issues a written report and certification stating that, among other things, "*structural damage* to the covered building has been identified within a reasonable professional probability," and "the cause of the *structural damage* is sinkhole activity within a reasonable professional probability." Fla. Stat. § 627.7073(1)(a)(1-2) (emphasis added). The following provisions of Fla. Stat. § 627.7076(1), in pertinent part, clarify the terms "structural damage":

> (2) As used in ss. 627.706-627.7074, and as used in connection with any policy providing coverage for a catastrophic ground cover collapse or for sinkhole losses, the term:
>
> * * *
>
> (d) "Primary structural member" means a structural element designed to provide support and stability for the vertical or lateral loads of the overall structure.
>
> (e) "Primary structural system" means an assemblage of primary structural members.
>
> * * *
>
> (k) "Structural damage" means a covered building, regardless of the date of its construction, has experienced the following:
>
> 1. Interior floor displacement or deflection in excess of acceptable variances as defined in ACI 117-90 of the Florida Building Code, which results in settlement related damage to the interior such that the interior building structure or members become unfit for service or represents a safety hazard as defined within the Florida Building Code;
>
> 2. Foundation displacement or deflection in excess of acceptable variances as defined in ACI 318-95 or the Florida Building Code, which results in settlement related damage to the primary structural members or systems from supporting the loads and forces they were designed to support to the extent that stresses in those primary structural members or primary structural systems exceeds one and one-third the nominal strength allowed under the Florida Building Code for new buildings of similar structure, purpose, or location;
>
> 3. Damage that results in listing, leaning, or buckling of the exterior load bearing walls or other vertical primary structural members to such an extent that a plumb line passing through the center of gravity does not fall inside the middle one-third of the base as defined within the Florida Building Code;
>
> 4. Damage that results in the building, or any portion of the building containing primary structural members or primary structural systems, being significantly likely to imminently collapse because of the movement or instability of the ground within the influence zone of the supporting ground within the sheer plane necessary for

> the purpose of supporting such building as defined with the Florida Building Code; ***or***
>
> 5. Damage occurring on or after October 15, 2005, that qualifies for "substantial structural damage" as defined in the Florida Building Code. (emphasis added).

As discussed below, this definition provides the foundation for some of the more significant changes in how Florida requires insurers to investigate sinkhole claims. Ultimately, the applicability of this provision will hinge on insurers' particular policy language and the outcome of insureds' potential arguments related to waiver, ambiguity, and retrospective application of the statute. By using language such as "physical damage" rather than structural damage, many insurers' sinkhole provisions provide greater coverage than the Bill requires. Accordingly, until insurers revise their policies to mirror the Bill, Plaintiffs' attorneys will argue the "structural damage" portions of the Bill are irrelevant to these policies. With time, however, the Bill's clarification of "structural damage" should provide insurers relief against the previously unsettled definition.

NEUTRAL EVALUATION

The Bill includes substantial changes and clarifications to the Neutral Evaluation procedure. Prior to the Bill, when the parties initiated the process, they each had three strikes to attempt to obtain the neutral evaluator of their preference. In addition, the Neutral Evaluation process was limited to determining causation and the subsurface stabilization repair protocol. As noted below, the Bill attempts to expedite Neutral Evaluation as well as provide the process with a more comprehensive reach.

Regarding the timing issue, Fla. Stat. § 627.7074(7)(b) provides that, if the parties cannot agree to a neutral evaluator in 14 days, the department will appoint a neutral evaluator. In addition, (7)(b) limits the parties' strikes "without cause" to 2. Furthermore, rather than the prior language arguably requiring the neutral evaluation to occur within 45 days of the request, Fla. Stat. § 627.7074(7)(c) provides "[t]he neutral evaluator shall make reasonable efforts to hold the conference within 90 days after the receipt of the request by the department." Further, "[f]ailure of the neutral evaluator to hold the conference within 90 days does not invalidate either party's right to neutral evaluation or to a neutral evaluation conference held outside this timeframe." "Regardless of when noticed," any court proceeding is stayed until 5 days after the filing of the neutral evaluator's report with the court. Fla. Stat. § 627.7074(10). Ultimately, the legislature appears to be clarifying the scheduling issues associated with Neutral Evaluation to avoid insureds' attempts to avoid later submissions based solely on timing technicalities.

The Bill also allows Neutral Evaluation to stretch across all repair components of a sinkhole loss claim. Fla. Stat. § 627.7074(2) adds above ground repairs as a component the neutral evaluator must determine. In addition, the neutral evaluator must determine whether sinkhole activity caused "structural damage" under the clarified definition discussed below. Fla. Stat. § 627.7074(12). The legislature also provided the neutral evaluator's report and testimony shall be admitted in any subsequent action, including litigation. Overall, it appears the Legislature has added a more comprehensive approach to neutral evaluation and clarified how it should be applied in litigation.

INVESTIGATING AND PROVIDING COVERAGE FOR SINKHOLE CLAIMS

The Bill provides a new time limitation for filing sinkhole claims. Pursuant to Fla. Stat. § 627.706, insureds must report sinkhole claims "within 2 years after the policyholder knew or reasonably should have known about the sinkhole loss." Fla. Stat. § 627.706(5). For existing claims, insurers can anticipate that insureds and their representatives will argue this limitation is not consistent with the policy's requirement for "prompt notice." Accordingly, until policies have been renewed to mirror this language, this provision might not have much significance as it could be construed as providing a different standard than the policy. In addition, the "reasonably should have known" language will be difficult to define considering most reported sinkhole claims result in engineers finding multiple causes of damage. Nevertheless, to some extent, the ultimate aim of this provision is to allow insurers to restrict insureds from backdating their sinkhole claims.

Under Fla. Stat. § 627.707, the legislature altered insurers' minimum obligations with respect to handling sinkhole claims.[1] Unlike under the previous version of the statute, when appropriate the insurer can deny a claim without conducting full sinkhole testing. Fla. Stat. § 627.707(1) requires insurers to inspect the property to determine if there is structural damage that "may be the result of sinkhole activity." If not, the insurer may be able to deny the claim. However, if the insurer confirms structural damage exists but cannot identify a cause of the damage other than potential sinkhole activity, the insurer must conduct the full sinkhole testing previously provided for in Fla. Stat. § 627.707. See Fla. Stat. § 627.707(2).

If the insured has sinkhole coverage and the insurer denies the claim without performing the full sinkhole testing, then the insured can demand full sinkhole testing. Fla. Stat. § 627.707(4)(b). The insured must make this demand in writing less than 61 days after he or she received the denial. Fla. Stat. § 627.707(4)(b)(1). Contrary to the statute prior to the Bill, the insured may be held liable for the lesser of 50 percent of the actual costs of the analysis or $2,500.00. If the engineer or geologist finds sinkhole loss, then the insurer must reimburse the insured for these costs. Fla. Stat. § 627.707(4)(b)(3).

There are also several changes to the payment requirements indicating the payment and repairs might be required to be based on the *insurer's* expert's report; however, the Bill might need further clarification. If sinkhole loss is verified, then the insurer "shall pay to stabilize the land and building and repair the foundation in accordance with the recommendations

of the professional engineer retained pursuant to subsection (2) … .” Fla. Stat. § 627.707(5). This provision now requires this payment to be “with notice to the policyholder,” rather than “in consultation with the policyholder,” as previously provided. If the property suffers sinkhole loss, the insured “must repair such damage or loss in accordance with the insurer’s professional engineer’s recommended repairs.” The insurer may withhold its total claims payment, not including any subsurface repairs, until the policyholder enters into a contract for the repairs “in accordance with the recommendations set forth in the insurer’s report issued pursuant to s. 627.7073.” Fla. Stat. § 627.707(5)(a). The insured must enter into a contract for stabilization repairs within 90 days after the insurer notifies the insured there is coverage. Fla. Stat. § 627.707(5)(b). This time period can be tolled by the neutral evaluation process. The insured must complete all repairs within 12 months after entering into the contract, unless there is mutual agreement; or the claim is in the process of litigation, neutral evaluation, appraisal, or mediation. Fla. Stat. § 627.707(5)(d).

Despite all of the text related to repairing the property in accordance with the *insurer’s* expert’s recommendations, Fla. Stat. § 627.707(5)(c) does not contain any change to the language that, once the contract is executed, “the insurer shall pay the amounts necessary to begin and perform such repairs as the work is performed and the expenses are incurred.” Accordingly, once payment is required, the limitations on repairing in accordance with the *insurer’s* expert appear to have vanished.

OTHER PROPERTY INSURANCE AMENDMENTS

In addition, the Bill included the following amendments, in pertinent part:

- Clarifying that the statute of limitations under Fla. Stat. § 95.11 begins to run from the date of loss, rather than the date of the alleged denial or underpayment;
- Fla. Stat. § 626.854:
  - limiting public adjuster’s compensation to 20 percent of the additional payment for reopened or supplemental claims on residential policies;
  - limiting compensation to 10 percent for claims during the first 12 months of a declared emergency;
  - defining misleading public adjuster advertising and requiring specific disclaimers in advertisements;
  - requiring insurers to provide 48 hours notice of inspection to insured or public adjuster before scheduling meetings for the inspections;
  - requiring the public adjuster to provide prompt notice and documentation to the insurer;
  - prohibiting insurers from excluding public adjusters from meetings for inspection with the insured;
  - defining limits on public adjusters’ delay obstruction by requiring them to allow reasonable access;
- Fla. Stat. § 626.70132: limiting the time for filing a windstorm or hurricane claim to three years from the date of landfall or date the windstorm caused damage; and
- Fla. Stat. § 627.43141: allowing insurers, with proper notice, to change policy terms at renewal without having to non-renew and reissue a new policy.

CONCLUSION

Overall, the Bill shows the legislature’s agreement with insurers that sinkhole claims are a serious threat to the stability of the Florida homeowners’ insurance market. Although the Bill makes several strides towards that end, there remain many issues that will need to be litigated to determine the Bill’s ultimate impact. The changes to Neutral Evaluation should strengthen the overall impact; however, the limit to two strikes might trouble some insurers. In addition, the statute of limitations for sinkhole claims requires litigating when the insured “should have known” of potential sinkhole activity, thereby placing a difficult burden on insurers to show the insured could comprehend such a science-based determination. As a broader matter, insurers will have to make significant changes to their policy language to ensure they are afforded the protections provided in the Bill. This is especially important considering the wave of counterarguments insureds will raise against insurers’ attempts to apply the new standards to existing and future claims.

Our firm has dozens of attorneys handling thousands of sinkhole claims, and a strong property department handling all aspects of first party property claims. Our attorneys understand the potential impact of the Bill and the necessary tasks required to effectively represent insurers at this extremely important time. Whether an insurer needs to revise its policy language, issue a coverage determination, or defend a lawsuit, our experienced trial and coverage attorneys can help. Should you have any questions regarding the Bill or any other first party property issues, do not hesitate to contact us.

1 Although insurers are still required to offer sinkhole loss coverage, they can require an inspection of the property prior to issuing sinkhole coverage. Fla. Stat. § 627.706(1)(b).

SUCCESS STORIES

Tom Scott and Barry Postman collaborated in obtaining an affirmance by the Fourth District Court of Appeal of a trial court victory against a homeowner objecting to the Association's implementation of a homeowner's improvement program.

Lee Cohen and **Isaac Wannos** obtained a complete defense verdict in the trial of a products liability case. The Plaintiff sliced her hand on a metal shelf resulting in 3 surgeries and $71,000 in medical bills. The Plaintiff sought approximately $700,000 in damages from the jury.

Mike Brand and **Sheila Gonzales-Jonasz** obtained an outstanding result in a slip and fall case wherein the Plaintiff claimed catastrophic injuries which included a knee surgery, multiple disc herniations, and significant psychiatric damages. The Plaintiff sought $500,000 in special damages and an additional $2,000,000 for pain and suffering. The jury returned a verdict of only $30,000, which Plaintiff will not be able to collect as a rejected proposal for settlement completely offsets the verdict and final judgment.

Wes Sherman obtained summary final judgment on behalf of an extermination company. The Plaintiff initially filed the action as an untimely negligence claim. The Plaintiff attempted to amend the complaint to restate the cause of action as a breach of contract, alleging that the extermination company had a duty to provide reasonable and acceptable extermination services. On summary judgment, Wes successfully asserted that the restyled action remained a personal injury claim arising out of negligence and was thus barred under the statute of limitations.

Jami Gursky and **Lonni Tessler** obtained a voluntary dismissal in a wrongful death case arising out of an automobile accident. The Plaintiff alleged that, a school hosted a party attended by the at fault driver, a student of school. The Plaintiff claimed that the student left the party intoxicated and caused a head on collision, resulting in the death of both the Plaintiff's son and the student. Jami and Loni filed a motion for summary judgment with a motion for sanctions, showing that the school not only did not sponsor the party but was also unaware of the party. Shortly thereafter, the Plaintiff dismissed the school from the case.

Robert Swift obtained a voluntary dismissal of a negligent security claim against a landowner where a security guard employed by the client's contracted security company allegedly used excessive force in shooting the Plaintiff during a burglary. The action was brought against the landowner under theories of agency and the non-delegable duty to maintain the premises in a safe condition, but Robert was able to use the threat of sanctions to convince the Plaintiff to abandon his claim against the landowner and seek recovery against the security company and the owner of the business operating at the premises.

John Penton obtained a very favorable decision before the Third District Court of Appeal in a slip and fall case. The Plaintiff claimed a shoulder injury after tripping and falling in our client's shopping center parking lot, and sought approximately $4,000,000 in damages. **Mike Brand** and **Trelvis Randolph** successfully challenged the Plaintiff's attention to her own medical care as well as her own negligence in the accident. The jury found the Plaintiff 90% at fault. While the jury awarded future pain and suffering damages, they awarded no damages for future medicals, future economic losses, and loss of consortium. The Third District rejected Plaintiff's request for a new trial due to an inadequate verdict, finding the only jury errors to be the failure to award future economic losses and loss of consortium. Significantly, the Third District left the jury's 90% comparative negligence finding undisturbed, rendering the limited retrial on damages economically unfeasible for Plaintiff.

Mike Brand and **Tullio Iacono** obtained a complete defense verdict in a case where Plaintiff alleged that overgrown hedges

MEET ONE OF OUR ATTORNEYS

SCOTT SHELTON

Scott A. Shelton is a Partner in the firm's Tampa office and will soon be a co-Managing Partner of CSK's Bonita Springs office later this year. His practice focuses on the defense of catastrophic personal injuries and wrongful deaths, premises liability, medical malpractice, construction defects and claims involving defective products including pharmaceutical drugs.

Scott obtained his Bachelor of Arts degree, with honors, from the University of South Florida and his Juris Doctor degree from Loyola University School of Law. During his second year in law school, Scott was selected from approximately three-hundred students to be a member of Loyola's Evidence Moot Court Team. The following year, Scott was selected to be a member of Loyola's National Moot Court Team, the school's highest ranked appellate advocacy team, which resulted in a tuition scholarship. Scott also twice served as a Moot Court legal research and writing teaching assistant and was a recipient of the Clem H. Sherr award. He also worked in the school's Law Clinic where he represented and tried cases for indigent clients in civil and criminal matters.

Prior to joining Cole, Scott & Kissane, P.A., Scott was employed by a prominent civil defense litigation firm located in New Orleans, Louisiana where he focused on serious Maritime claims arising under the Jones Act, the Longshore and Harbor Workers' Compensation Act, and General Casualty litigation. During this time, Scott obtained additional trial experience in federal and state court.

He is admitted to practice before all state courts in Florida, the Middle and Northern District of Florida, as well as all state and federal courts in the State of Louisiana including the United States Fifth Circuit Court of Appeals.

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at our client's shopping plaza, in violation of both Miami-Dade and Florida Department of Transportation regulations, led to a serious automobile accident. As Plaintiff exited the plaza, he was struck by another vehicle and needed to be airlifted to Jackson Memorial Hospital, ultimately requiring hospitalization and in-patient rehabilitation for approximately four months. Plaintiff medical bills were over $600,000 and he remains in a wheelchair to this day. Plaintiffs' counsel asked the jury for over $3 Million to compensate Plaintiff and his wife. The jury returned a defense verdict in an hour.

Jim Sparkman obtained a complete defense verdict in a personal injury accident following a motor vehicle accident. The Plaintiff claimed to suffer a cervical herniated disc, precluding her from working. Plaintiff incurred $21,000 in medical expenses, but the jury returned a complete defense verdict after just 23 minutes of deliberations.

Dan Shapiro and **Rhonda Beesing** obtained summary judgment on behalf of the lessor of a property. The lessor and lessee were sued by the estate of a patron of the lessee's gentleman's club who was shot and killed exiting the club. Summary judgment was granted based upon the theory of caveat lessee because the lessor relinquished all possessory interests in the property once the lessee took control.

George Hooker secured summary judgment for our insurance client in a case where the Plaintiff was seeking to enforce a $250,000 settlement agreement entered into by another insurance company prior to their insolvency. George convinced the court that the settlement agreement was in excess of the applicable coverage limits and thus not a covered claim under Florida law. As a result, our client will have to pay nothing as the applicable policy limits were already paid by the original insurance company prior to their insolvency.

John Penton obtained an affirmance of a summary final judgment in favor of the employer in an employment discrimination appeal. In his appeal to the Eleventh Circuit Court of Appeals, the Plaintiff unsuccessfully claimed to have been unlawfully terminated from his executive position with a women's high fashion shoe manufacturer due to his age.

Vincent Gannuscio and **Brett Berger** obtained a highly favorable verdict in an automobile negligence trial wherein our client had admitted liability for the rear-end collision. The Plaintiff's expert testified that the Plaintiff had suffered a permanent injury as a consequence of the accident and that future surgery was necessary to correct a cervical disc herniation. The defense argued that the Plaintiff merely sustained a temporary muscle strain that required approximately three months of physical therapy. The jury rejected the Plaintiff's case and awarded only one-third of her medical expenses (approximately $11,000).

Dan Shapiro and **Rhonda Beesing** obtained a highly favorable trial result in an automobile negligence case. The Plaintiff sought $4,700,000 in total damages for injuries allegedly caused by the accident in which the Defendant made a left hand turn in front of the Plaintiff's oncoming vehicle. The Plaintiff underwent numerous surgeries and also claimed that future medical treatment and additional surgeries would be necessary. The Plaintiff also sought past lost wages and future lost income. Dan and Rhonda convinced the jury that the Plaintiff was speeding, was not wearing his seatbelt, and would not have sustained many of the injuries had he not been comparatively negligent. Additionally, other claimed injuries were pre-existing or degenerative. The jury agreed, found the Plaintiff 66% at fault for the accident, and awarded $280,000.

John Penton obtained summary final judgment in a homeowners' association mandatory membership case pending in Fort Myers. The homeowners asserted that the mandatory membership amendment was impermissible under *Holiday Pines v. Werthington*, but the Court found that the Declaration permitted the association to contract for services, including the addition of a club membership.

Scott Jackman obtained a complete defense verdict in a condominium association property damage jury trial. The Plaintiffs sued their condominium association for the association's alleged refusal to reimburse them for their purchase of new sliding glass doors in 2007. The Plaintiffs claimed that their doors had been previously damaged in a 2004 hurricane and that the glass doors had long exceeded their useful life expectancy. The association had the doors inspected and concluded that the doors could be repaired simply by replacing the rollers. The association was required to maintain, repair or replace doors under the Declaration, if necessary, but the owners were responsible for maintaining, repairing or replacing the door hardware and operating equipment, including rollers. Scott was also successful in obtaining a special jury instruction that the Board of Directors' decision was to be deemed presumptively correct if they acted reasonably.

Robert Swift obtained a final summary judgment on behalf of a notary and title company in a case where a home purchaser alleged that her mortgage application and loan documents were fraudulently made and that she would never consummated the transaction if the Defendants had properly performed their jobs. Despite the fact that the notary admitted that she had improperly notarized documents signed outside her presence (a violation of her license reprimanded by the State), Robert showed that there was no nexus between the improper document handling and the damages alleged by the Plaintiff.

Barry Postman and **Michael Shiver** obtained summary final judgment on the basis of horizontal workers' compensation immunity in a closely contested construction-site negligence/personal injury case. Our client, a construction company, was sued for allegedly removing safety railings covering a floor penetration at a condominium work site. The Plaintiff was conducting an inspection of the second floor of a multistory unit when he fell through the unprotected penetration and suffered a compound heel fracture, as well as other serious and permanent injuries. Barry and Michael successfully argued that the construction company could not be sued pursuant to the recent "horizontal immunity" revisions to the Florida Workers Compensation Act.

Greg Willis obtained a complete defense verdict on behalf of our client, a furniture dealer, in a personal injury trial. The Plaintiff purchased a wall unit our client, and while he had the wall unit installed, he requested that the wall unit be left away from the wall to allow him to wire his electronics. When the Plaintiff later attempted to move the unit back against the wall with the help of some friends, a large shelf between the wall unit's towers became dislodged and knocked the Plaintiff unconscious. The Plaintiff claimed a closed head injury and a cervical injury. The Defendant denied negligence and asserted at trial that the Plaintiff failed to look out for his own safety. The jury returned a verdict of no liability. The client is also entitled to attorney's fees based upon a rejected proposal for settlement.

John Penton obtained an affirmance in an equitable subrogation action. The negligent driver's insurer prevailed in the action brought by the insurer of the leasing company, asserting in a summary judgment motion that the Graves Amendment precluded the action. On appeal, however, the Fourth District Court of Appeal affirmed on other grounds, finding that the driver's insurer owed no duty under the law to the leasing company's insurer.

James Sparkman secured a directed verdict in an automobile negligence case. Our client's automobile struck a city bus in which the Plaintiff was a passenger. The Plaintiff claimed to have herniated a disc in his neck, but on the eve of trial, his attorneys withdrew and the Plaintiff also failed to appear for the jury trial. After a jury was sworn, James moved for a directed verdict, and the court granted the motion.

Steven Worley obtained a complete defense verdict in a motor vehicle negligence trial where the Plaintiff claimed debilitating back and neck injuries that precluded him from working. The accident occurred as the Plaintiff attempted to pass the Defendant company's tow truck assisting a broken down vehicle, and Steven put on evidence that the Plaintiff's own impatience caused the accident. Other evidence demonstrated that the Plaintiff's injuries were either pre-existing or unrelated. The Plaintiff had sought $4,000,000 from the jury.

Ben Esco, Brandon Waas and **Erin Hantman** obtained complete defense verdict in a two-and a half week binding arbitration proceeding. This complex commercial case involved a four-plus acre plot of land that was intended to house new administrative office space and an ambulatory center for a hospital, as well as a low-income condominium housing project. A dispute arose when the hospital, who was to bring approximately $165,000,000 in revenue to the project as a long term tenant, allegedly withdrew its intent to occupy the office space. Faced with claims of alleged fraud and misappropriation resulting in alleged financial losses in the millions dollars, Ben, Brandon and Erin managed to secure a complete defense victory.

Greg Willis, Ron Campbell and **Katie Merwin** obtained a directed verdict in a jury trial involving an employment matter. It was a hotly contested case in which the Plaintiff sought well over $400,000 and attorney's fees of $250,000.

Jami Gursky successfully defended a physician during an administrative investigation following an unsuccessfully performed Naltrexone detoxification. The Florida Department of Health's Board of Medicine conducted an investigation to determine whether there was probable cause to take administrative action against the physician's license after his patient died during the detoxification procedure. Though the physician did not perform any laboratory testing before initiating the procedure and was not present throughout any portion of the detoxification that was performed in the home of the patient's fiancé, the Department of Health found no probable cause to further investigate the matter.

John Penton obtained an affirmance in a slip and fall case before the Fourth District Court of Appeal. Plaintiff unsuccessfully claimed that the Defendant hotel had improperly introduced surprise expert testimony when the hotel's expert was permitted to testify over objection at trial that the hotel had passed all initial inspections during construction and all fire code inspections according to the public records. The expert had not reviewed the public records at the time his deposition was taken prior to trial.

Mike Brand and **Sheila Gonzales-Jonasz** obtained an outstanding settlement at the outset of a jury trial. The Plaintiff claimed complete disability and an inability to function due to a back injury with four surgical procedures. After the Plaintiff's cross-examination, she elected to settle the case for an amount significantly less than her requested damages.

Mark Berlick obtained final summary judgment based upon Fla. Stat. §768.075 in an action against an apartment complex involving allegations of negligent security during a shooting. The Court held that Plaintiff's claim was barred by Fla. Stat. §768.075 because the Plaintiff was an undiscovered trespasser, after he closely followed another car through a gate at the front of the complex and did not have express permission from the resident to enter the property.

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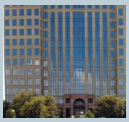

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