Current Florida Law on Triggers of Coverage for Construction Defect Claims Under Standard CG 001 CGL Policies

“Second-Guessing” Immunity for Trial Attorneys

PIP and the Use of the Medicare Fee Schedule: Flag on the Play

“This is Not the Policy I Ordered”- New Concerns for Insurance Agents with Respect to the Pending Transfer of Citizens Insureds to Non-Admitted Carriers
The Florida No Fault Statute requires insurers to reimburse what percentage of reasonable expenses for medically necessary treatment?

Is it:

A. 50%
B. 75%
C. 80%
D. None of the above.

The first ten readers to respond correctly will receive a free CSK Backpack. Please respond by e-mail to Quarterly.Trivia@csklegal.com. Please remember to include your name and address with your entry.
CURRENT FLORIDA LAW ON TRIGGERS OF COVERAGE FOR CONSTRUCTION DEFECT CLAIMS UNDER STANDARD CG 001 CGL POLICIES

By George Truitt, Esq. and Daniel Duello, Esq.

There are four coverage trigger theories governing when “property damage” caused by an “occurrence” triggers a duty to indemnify the insured under a standard CG 001 insurance policy. They are: (1) exposure, (2) manifestation, (3) continuous trigger, and (4) injury-in-fact. AUTO OWNERS INS. CO. v. TRAVELERS CAS. & SURETY CO., 227 F. Supp. 2d 1248 (M.D. Fla. 2002).

Historically, there has been a conflict between Florida state courts and Florida federal courts applying Florida law about which trigger theory controls. State courts have applied the manifestation theory. For instance, in TRAVELERS INS. CO. v. C.J. GAYFER’S & CO., INC., 366 So. 2d 1199 (Fla. 1st DCA 1979), the First District Court of Appeal opined that “occurrence” is commonly understood to mean the event in which negligence manifests itself in property damage. On the other hand, Federal courts have applied the injury-in-fact theory. In TRIZEC PROPERTIES, INC. v. BILTMORE CONST. CO., INC., 767 F.2d 810 (11th Cir. 1985), for example, the Eleventh Circuit Court of Appeals found there was no requirement that damages “manifest” themselves during the policy period. Instead, the Eleventh Circuit found it is damage itself which must occur during the policy period for coverage to be effective. Although this is a very significant issue, the Florida Supreme Court has not addressed it.

Recently, one federal court – the Middle District of Florida – held that the manifestation theory controls, diverging with prior federal circuit and district court holdings. That case was MID-CONTINENT CAS. CO. v. Siena Home Corp., 5:08-CV-385-OC-10GJK, 2011 WL 2784200 (M.D. Fla. July 8, 2011). However, subsequent decisions by the same court are far less definitive. See, for example, AXIS SURPLUS INS. CO. v. CONTRAVEST CONST. CO., 6:11-CV-320-ORL-28, 2012 WL 2048303 (M.D. Fla. June 5, 2012), and AMERISURE MUT. INS. CO. v. SUMMIT CONTRACTORS, INC., 8:11-CV-77-T-17TGW, 2012 WL 716884 (M.D. Fla. Feb. 29, 2012).

The MID-CONTINENT case is also interesting because it raises the issue of when a “manifestation” occurs. The Middle District held that the manifestation occurs when the “property damage” caused by the defective work is “discernible and reasonably discoverable,” and not when the damage is actually discovered.

Below is a compilation of recent decisions and the key language from each on the trigger of coverage:

<table>
<thead>
<tr>
<th>CASE</th>
<th>DATE/COURT</th>
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<tr>
<td>Axis Surplus Ins. Co. v. Contravest Const. Co., 6:11-CV-320-ORL-28, 2012 WL 2048303 (M.D. Fla. June 5, 2012)</td>
<td>June 5, 2012 / Middle District of Florida</td>
<td>Injury-in-fact? Case does not squarely address the issue</td>
<td>Criticizing the Gayfer’s decision as incorrectly understood to adopt manifestation trigger theory when issue was not squarely before the court and recognizing that TRIZEC Court squarely addressed the trigger issue. However, the court did not address the issue because duty to defend existed under either theory based on allegations of complaint.</td>
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<td>Amerisure Mut. Ins. Co. v. Summit Contractors, Inc., 8:11-CV-77-T-17TGW, 2012 WL 716884 (M.D. Fla. Feb. 29, 2012)</td>
<td>Feb. 29, 2012 / Middle District of Florida</td>
<td>Recognizing manifestation theory but referencing injury-in-fact holding</td>
<td>“Florida courts follow the general rule that the time of “occurrence” within the meaning of an “occurrence” policy is the time at which the injury first manifests itself. See Gayfer’s. The insurance policies do not require that the negligence which results in the property damage must have occurred during the policy period, but the property damage must have occurred during the policy period. See TRIZEC.”</td>
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<tr>
<td>Mid-Continent Cas. Co. v. Siena Home Corp., 5:08-CV-385-OC-10GJK, 2011 WL 2784200 (M.D. Fla. July 8, 2011).</td>
<td>July 8, 2011 / Middle District of Florida</td>
<td>Manifestation theory clearly recognized.</td>
<td>In Florida, the “occurrence” and resulting coverage of “property damage” under a Commercial General Liability (“CGL”) insurance policy is the “manifestation” of the damage, not when the alleged negligence occurred or the moment that the resulting injury or damage itself first occurred. . . . The Court concludes that the “manifestation” of the “occurrence” of property damage, for purposes of determining coverage of the Mid-Continent policies in this case, is the time that such damage was discernible and reasonably discoverable either because it was open and obvious or upon a prudent engineering investigation, and not the time of actual discovery where the two circumstances come about in sequence at different times.</td>
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Perhaps the most important issue related to the trigger theory is the effect on the ability of a claimant to stack policy limits for successive policy periods when a continuing or progressive loss spans multiple policy periods. Under the injury-in-fact theory, absent exclusionary language to the contrary, multiple, primary policies can be stacked because each policy during which “property damage” caused by defective construction actually occurred provides coverage for the damage occurring during that period.

Under the manifestation theory, a strong argument can be made that only one policy is implicated – the policy in effect when the damage to property other than the insured’s work first manifested. The issue has not been addressed by any Florida or Florida federal court. Neither court has addressed whether different policies could be implicated for different damages manifesting themselves during different policy periods, e.g. water intrusion around or through windows during one policy period and settlement cracking during a successive policy period.

The recent Axis case has caused some commenters to proclaim that the manifestation theory’s days are numbered, and to embrace, instead, the injury-in-fact theory to allow more insurance policies to be triggered by latent property damage. See The Manifestation Rule in Florida: Has Death Knelled?, Fla. Bar Journal, July/August 2013.

We are not as optimistic. The trigger of coverage is “property damage” caused by an “occurrence,” and not the “occurrence” itself. For instance, if an insurance company provides consecutive CGL policies to a window installer whose windows are improperly installed, the policies triggered are those in effect when property other than the windows is damaged by improper installation, and not necessarily those in effect when the windows are installed.

The Axis court did not explicitly reject the manifestation theory. The Court, though skeptical of the logic in Travelers v. Gayfers, 366 So.2d 1199 (Fla. 1st DCA 1979), avoided the issue by holding that the insured was owed a defense under either the manifestation or the injury-in-fact theory. A strong argument policy argument can be made that limiting coverage to the period during which the damage to property other than the insured’s work is first discovered promotes mitigation of damages. Otherwise, a claimant could be rewarded with stacking liability coverage for refusing to repair its property in a timely fashion.

Given the uncertainty surrounding the trigger theory, with increasing frequency carriers endeavor to avoid stacking of coverages with “continuous and progressive injury or damage” and “known injury or damage” exclusions.

There is currently one Florida case addressing the enforceability of these types of exclusions. In Mt. Hawley Insurance Co. v. Dania Distribution Centre, Ltd., 2013 USApp (Fed) NP, 513 Fed.Appx. 890 (11th Cir. 2013), the Eleventh Circuit Court of Appeals enforced a “continuous and progressive injury or damage exclusion” endorsement to preclude recovery of a $19 million Coblenz judgment against Mt. Hawley.

Florida courts reach the issue of which trigger theory applies because there is no explicit language in the standard policy defining the trigger. “Occurrence” is defined simply as an accident. “Property damage” caused by an “occurrence” is defined generally as physical injury to tangible property during the policy period.

In general, Florida courts enforce clear and unambiguous coverage provisions, conditions, and exclusions in the insurance contract. Thus, one option is to define the triggering event to eliminate any ambiguity in the covered event – “property damage” caused by an “occurrence” during the policy period. It would be wise to define manifestation to occur when the damage to property other than the insured’s work is actually discovered, rather than when it could reasonably have been discovered. Pinning the trigger to when damage is actually discovered provides a more easily-identifiable trigger, thereby avoiding or minimizing the “battle of the experts” that can result in an inordinate amount of time and money being spent to simply determine whether the subject policy provides coverage.

Defining the trigger to identify the event that creates coverage for “property damage” caused by an “occurrence” and excluding coverage for “continuous and progressive injury or damages” and “known injury or damage” are two effective strategies to hedge the risk created by this uncertainty in Florida law. With the explosion of construction defect and coverage litigation in the last two decades and another building boom on the horizon, the Florida Supreme court should resolve the issue in the relatively near future.
“SECOND-GUESSING”  
IMMUNITY FOR TRIAL ATTORNEYS  

By Blake Sando, Esq. and Kelly Dunberg, Esq.

Legal malpractice lawsuits often focus on the plaintiffs second-guessing the strategic and tactical decisions made by their own counsel in a prior proceeding and claims of damages when such decisions do not result in their favor. To combat the propensity of such lawsuits made on “judgment” calls and to protect the good-faith decisions of lawyers, Florida law has long established that the doctrine of judgmental immunity insulates attorneys’ good faith decisions in “unsettled” areas of law from legal malpractice claims. Recently, the doctrine of judgmental immunity has been confirmed and expanded to include the good faith and tactical decisions that attorneys make at trial, as demonstrated by the decision of the United States District Court for the Southern District of Florida in Inlet Condominium Association v. Childress Duffy, Ltd., Inc., et al., Case No. 12-21711-CIV.

In Florida, the doctrine of judgmental immunity provides that while an attorney may be held liable for damages incurred by a client based on the attorney’s failure to act with a reasonable degree of care, skill, and dispatch, an attorney is not an insurer of the outcome of a case. In the seminal case of Crosby v. Jones, the Florida Supreme Court explicitly recognized that under the doctrine of judgmental immunity, good faith tactical decisions or decisions made on a fairly debatable point of law are not actionable, even if they later turn out to be incorrect. If an attorney acts in good faith and exercises an honest and informed decision in providing professional advice, “the failure to anticipate correctly the resolution of an unsettled legal principle does not constitute culpable conduct.” As such, the doctrine of “judgmental immunity is premised on the understanding that an attorney who acts in good faith and makes a diligent inquiry into an area of law should not be held liable for providing advice or taking action in an unsettled area of law.” Quite simply, an attorney is not liable for legal malpractice simply for losing an issue in a case or rendering advice in an unsettled area of law which later proves to be wrong. The Florida Supreme Court in Crosby stated as follows:

As a matter of policy, an attorney should not be required to compromise or attenuate an otherwise sound exercise of informed judgment with added advice concerning the unsettled nature of relevant legal principles. Under the venerable error-in-judgment rule, if an attorney acting in good faith exercises an honest and informed discretion in providing professional advice, the failure to anticipate correctly the resolution of an unsettled legal principle does not constitute culpable conduct ... In short, the exercise of sound professional judgment rests upon considerations of legal perception and not prescience.

In order to assert the defense of judgmental immunity, an attorney must show that: (1) the legal authority supporting the cause of action was “unsettled” or “fairly debatable;” and (2) the attorney acted in good faith and made a diligent inquiry into the unsettled area of law. An issue of law is “unsettled” when it has not been determined by the state’s court of last resort and, as a result, well-reasoned lawyers may have reasonable doubts. In recent years, Florida courts have applied the defense of judgmental immunity in legal malpractice lawsuits, including, but not limited to, the following “unsettled” areas of law: the execution and preparation of a written release of individual defendants in an automobile accident lawsuit, even though the trial court subsequently dismissed the remaining defendant based on the release; the filing of a wrongful death claim resulting from medical malpractice and compliance with the medical malpractice statute of limitations; the remedy of specific performance; and the failure to have a guardian appointed.
in relation to a minor services contract. The determination of whether an area of law is "unsettled" is a question of law and therefore may be decided by the court via a dispositive motion.

Most recently Cole, Scott & Kissane, P.A. was successful in asserting the defense of a judgmental immunity in Inlet Condominium Association v. Childress Duffy, Ltd., Inc., et al., a legal malpractice case in which the Plaintiff was seeking over $1.5 million in alleged damages. In Inlet, the Southern District of Florida granted final summary judgment in favor of the Defendant, holding that the Plaintiff’s claims against the Defendant attorneys were barred by the doctrine of judgmental immunity. The Plaintiff brought a legal malpractice lawsuit against the Defendant after the trial court in the underlying first party property lawsuit struck Inlet’s claim for a $1.5 million elevator modernization contract at trial because the Defendant attorneys allegedly failed to call an elevator expert to opine that the elevator replacement was caused by hurricane damage.

Although the Plaintiff argued that the doctrine did not apply since there was no “unsettled” area of law with respect to calling experts in a first-party property case, the Inlet Court found otherwise and stated “there is no established method of prosecuting a first-party hurricane claim,” explaining that “the working up and trying of a case, in many respects, are matters of tactics, strategy, and professional discretion and judgment.” The court further ruled that “it is not ‘settled’ that a litigant must ‘retain, list, and call’ an expert in a particular field what attempting to link causation to an element of damages.” The court found that the tactical decisions of the Defendant attorneys could not be “understated” relative to their proffer of a world-renowned wind expert in lieu of an elevator expert in order to prevent Inlet to cross-examination and a potential policy exclusion based on the extensive documentation of the pre-existing condition of the elevators. Accordingly, the Inlet court thus concluded that the Defendant attorneys’ tactical decisions in an unsettled area of first-property hurricane claims were “what tactical decisions are made of” and were thus exactly the type of decisions to which the protection of judgmental immunity should be afforded.

In light of the Southern District’s recent application of the doctrine of judgmental immunity, it appears that the scope of judgmental immunity has now been expanded to protect attorneys’ well-reasoned and informed decisions in retaining, listing and calling particular witnesses and experts at trial; however, it is important to note that the doctrine of judgmental immunity is not applicable in the defense of every legal malpractice case, as Florida courts have limited the applicability of judgmental immunity in their interpretation of debatable and unsettled areas of law. For instance, the Fourth District Court of Appeal reversed a summary judgment entered in favor of a defendant attorney involving an untimely appeal, holding that the “mere ‘ambiguity of a rule’ of procedure, without more, does not equate to the somewhat more amorphous realm of ‘fairly debatable’ or ‘unsettled area of the law’ to which the doctrine of judgmental immunity is applied.” In addition, the application of the doctrine of judgmental immunity has been limited in legal malpractice lawsuits concerning settlement. In Sauer v. Flanagan and Maniotis, P.A., the plaintiff filed suit against her attorneys for failing to properly advise and inform her of the risks involved in rejecting a settlement offer. The Sauer Court held that the doctrine of judgmental immunity did not bar the plaintiff’s legal malpractice lawsuit, stating that there is “no basis for concluding that an attorney is insulated from liability for failing to exercise ordinary skill and care in resolving settlement issues.” Therefore, the reach of the doctrine of judgmental immunity does have limits relative to procedural matters and settlement decisions. Despite these limits, trial attorneys subject to a legal malpractice claim can now take comfort in the fact that they will have a defense to the claim based on good faith tactical decisions that were made in the course of litigation and, in accordance with the recent decision in Inlet, the former client may have a more difficult time second-guessing such trial decisions.

(Endnotes)

1 See, e.g., Weekley v. Knight, 156 So. 625 (Fla. 1934); Riccio v. Stein, 559 So. 2d 1207 (Fla. 3d DCA 1990).
2 Crosby v. Jones, 705 So. 2d 1356, 1358 (Fla. 1998); see also Proto v. Graham, 788 So. 2d 393, 395 (Fla. 5th DCA 2001).
3 705 So. 2d at 1358.
4 Id. (emphasis added).
5 Id.
6 See id.
7 Id. (quoting Davis v. Damrell, 119 Cal. App. 3d 883 (1981)).
8 See Haisfield v. Fleming, Haile & Shaw, P.A., 819 So. 2d 182, 185 (Fla. 4th DCA 2002).
9 Id.
10 Crosby, 705 So. 2d 1356.
11 Pronto, 788 So. 2d 393.
12 Haisfield, 819 So. 2d 182.
14 See Crosby, 705 So. 2d at 1358; see also Haisfield, 819 So. 2d at 185.
16 Id.
17 Id. at 11.
18 Id.
19 Id.
20 Id. at 11-12.
21 DeBiasi v. Snaith, 732 So. 2d 14, 16 (Fla. 4th DCA 1999).
22 748 So. 2d 1079, 1080 (Fla. 4th DCA 2000).
23 Id. at 1082.
The ever-changing world of PIP is unpredictable. Frequent legislative changes, coupled with an oftentimes inconsistent and limited body of case law, constantly changes the way insurers defend PIP claims. In an arena that has become more about attorney’s fees in nominal breach of contract actions than about the swift and efficient resolution of insurance claims for insureds, insurers are faced with the complex task of defending within the confines of a confusing and offense-driven league.

One such changing area involves the use of the Medicare fee schedule to adjust Florida PIP claims. Both the courts and the legislature have changed the rules, causing Florida PIP insurers to re-evaluate their policy language and their claims handling.

The Florida No Fault Statute requires that insurers reimburse eighty percent of reasonable expenses for medically necessary treatment. The 2007 amendment provided a framework for evaluation of reasonableness when paying claims. Section 627.736(5)(a), Florida Statutes provides:

(Emphasis added).

Additionally, the 2007 amendment provided insurers with an option to limit reimbursement as set forth in section 627.736(5)(a)(2), Florida Statutes.

2. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:

a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.

b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital’s usual and customary charges.

c. For emergency services and care as defined by s. 395.002(9) provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient receiving such treatment or his or her guardian has countersigned the properly completed invoice, bill, or claim form approved by the office upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian. In no event, however, may such a charge be in excess of the amount the person or institution customarily charges for like services or supplies. With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

(Emphasis added).
services rendered by a physician or dentist, the usual and customary charges in the community.

d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.

e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services.

f. For all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers’ compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers’ compensation is not required to be reimbursed by the insurer.

(Emphasis added).

The Florida Supreme Court recently released a game-changing decision in Florida PIP law. In Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc., 2013 WL 3332385 (Fla. 2013), the Court held that Florida PIP insurance policies must give notice to policyholders that claims will be calculated using the Medicare fee schedule limitation set forth in section 627.736(5)(a)(2), Florida Statutes, in order to use the Medicare fee schedule when adjusting Florida PIP claims.

Over the last few years, most Florida PIP carriers have been using the Medicare fee schedule without specific policy reference, instead usually relying on a clause that generally purports to incorporate the provisions of the Florida PIP Statute. Generally, the language in most PIP policies states that the carrier will reimburse a reasonable amount for medically necessary services in accordance with the Florida No Fault Statute. The advantage of this approach was that there would be no need to rewrite the policy for specific statutory references as the statute was amended.

In Geico, the pertinent portions of the policy language at issue provided:

Under Personal Injury Protection, the Company will pay, in accordance with, and subject to the terms, conditions, and exclusions of the Florida Motor Vehicle No-Fault Law, as amended, to or for the benefit of the injured person:

(a) 80% of medical expenses; and

(b) 60% of work loss; and

(c) Replacement services expenses; and

(d) Death benefits.

“medical expenses” is defined as “reasonable expenses for medically necessary medical, surgical, x-ray, dental, ambulance, hospital, professional nursing and rehabilitative services for prosthetic devises and for necessary remedial treatment and services recognized and permitted under the laws of the state for an injured person.”

The Court found that because the policy did not make specific reference to use of the Medicare fee schedule, the language was insufficient to put insureds on notice of Geico’s intent to limit payment by utilizing the permissive fee schedule as set forth in section 627.736(5)(a)(2), Florida Statutes. This decision approves the similar result of the 4th DCA in Kingsway Amigo Ins. Co. v. Ocean Health, Inc., 63 So. 3d 63, Fla. 4th DCA 2011.

In Kingsway, the court held that insurance companies are required to give notice to the insured of the intent to use fee schedules at the time of policy issuance or renewal. The court held that the 2007 amendment of section 627.736, Florida Statutes contained both a mandatory and permissive method of paying claims. Section 627.736(5)(a)(1), Florida Statutes set forth a mandatory reimbursement of 80% of all reasonable expenses. However, an insurer could elect to limit its reimbursement as set forth in section 627.736(5)(a)(2), Florida Statutes. The court held that because the election was permissive, the insurer must clearly and unambiguously identify which payment method it will elect. Id. at 65.

The Florida legislature has also addressed the Medicare fee schedule notice issue. The 2012 amendment to section 627.736(5)(a), Florida Statutes provides:

5. Effective July 1, 2012, an insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant
to the schedule of charges specified in this paragraph. A policy form approved by the office satisfies this requirement. If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer may pay the amount of the charge submitted.

(Emphasis added).

While the most recent PIP statute amendments codified this requirement as of July 1, 2012, the decision in Geico v. Virtual Imaging, will apply to all cases for policies that have taken effect since January 1, 2008. Most carriers have already changed their policy language in response to the Kingsway v. Ocean Health, decision and the new statute change.

The CSK team has been at the forefront of this issue by assisting a number of Florida PIP carriers and out-of-state carriers with evaluation of the language of their Florida PIP coverage. CSK is assisting many insurance companies as they grapple with the game-changing actions of the courts and legislature. We believe careful evaluation of policy language, an aggressive defense strategy, and a current knowledge of the playing fields will keep insurers in a game winning position.

(Endnotes)

1 The policy language at issue in Kingsway v. Ocean Health, provided:

“The Company will pay in accordance with the Florida Motor Vehicle No Fault Law, as amended, to or for the benefit of the injured person:

1. 80% of medical expenses;

Medical expenses means those expenses that are required to be reimbursed pursuant to Florida Motor Vehicle No Fault Law, as amended, and that are reasonable expenses for medically necessary services.”

“THIS IS NOT THE POLICY I ORDERED”- NEW CONCERNS FOR INSURANCE AGENTS WITH RESPECT TO THE PENDING TRANSFER OF CITIZENS INSURED TO NON-ADMITTED CARRIERS

By Blake Sando, Esq.

Recently, the Florida Legislature passed new legislation in an effort to decrease the number of policyholders that are insured with Citizens’ Property Insurance Corporation, which is the insurer of last resort in Florida. According to the legislature, the motivation for the new law arises from concerns that the number of Citizens policyholders had previously reached an all-time high, $1.5 million,1 and that Citizens would potentially not be able to cover such exposure from a future catastrophic storm, without levying additional taxes and assessments.

On May 29, 2013, Governor Rick Scott signed SB 1770 into law,2 which is codified in Sec. 627.3518, Fla. Stat. As a result, the state-run insurance company started transferring many of its 1.2 million homeowners’ insurance policies to non-admitted private insurance carriers3 endeavoring to decrease costs to the state.4 The new law mandates that Citizens must establish a clearinghouse program5 which enables the state-run insurer to enter into contracts6 with private market insurers to facilitate the transfer of their insurance policies to the private insurance sector.7

Although well intentioned, the new law may potentially lead to an escalation in claims against insurance agents, as Citizens, the largest residential property insurer in the State of Florida, depopulates an estimated 400,000 insurance policies.8 The reason for this is that the process by which Citizens will transfer insureds to new insurers does not require the express consent (either written or verbal) of the insured to occur. Instead, the only obligation for the insured is to “opt-out,” if the insured does not want to be transferred to the carrier in the private market. This means that the process by which an agent typically explains policies to the insured and by which the insured agrees to such coverage by signing a written proposal and application will not be provided for under the new law.

Under Florida law, an insurance agent or broker has a fiduciary relationship with an insured and therefore can be sued for breach of fiduciary duty.9 Claims for breach of fiduciary duty
commonly arise when a policyholder alleges that the insurance agent or broker did not inform them about specific coverage options or that the residence/business would not be covered for the subject loss. In light of the new legislation, uninformed policyholders may seek to blame the insurance agent for failing to explain the changes in the insurance coverage. Moreover, if a policyholder files a claim which is denied by the insurance company due to lack of coverage, an insured may bring an action against his/her agent whose alleged negligence caused the insured to become embroiled in litigation to secure coverage and incur attorney’s fees and costs. As part of the pending transfer, Citizens policyholders can anticipate receiving notification from Citizens that their homeowners’ insurance policies may be transferred to an insurance carrier in the private market. Upon receipt, the Citizens policyholder will have two options: (1) remain with Citizens; or (2) accept coverage from one of the private insurance companies to which Citizens transfers its policies. If the policyholder fails to respond to the notification, his/her homeowners’ insurance policy will be automatically transferred to the private insurer. Policyholders who “opt-out” and remain with Citizens may face more restrictive coverage options. Further, policyholders that opt to transfer their policies to the private insurance carriers may encounter differing or reduced coverage. Either way, insurance agents may have cause for concern if policyholders are not knowledgeable regarding the differences in coverage between the policies. Often, when an insurance company denies a claim asserted by the policyholder, the policyholder blames the insurance agent for failing to procure coverage. As a result of Citizens’ mass transfer of their insurance policies, there may be an increase in actions filed against insurance agents. Even if an insurance agent initially procured the requested insurance properly, the transfer to a new carrier may alter that coverage, which could ultimately expose the insurance agent to liability for failure to procure and/or advise the policyholder of the lack of coverage. For example, in one such case that has already been filed, an insurance agent procured homeowners’ insurance coverage with a carrier that ultimately issued mass cancellation policies for many of its insureds as the insurer eliminated its Florida client base. After the insurance policy was transferred by the insurance carrier to another insurance carrier, the new policy had differing insurance coverage. As a result, after the policyholder experienced interior water damage, the new insurance carrier denied the claim due to lack of water damage coverage under the policy. The policyholder sued the insurance carrier for breach of contract and the insurance agent for negligence in failing to procure water damage coverage, which would have been provided under the prior insurance policy. After much litigation, the matter was able to be resolved in the insureds’ favor. Generally, in Florida, an insurance agent’s obligation to its client ends after procurement of the insurance policy; however, in cases where a policyholder’s insurance policies are transferred to a new carrier before the end of the policy period, there may be a debatable point of law with respect to whether the insurance agent has a duty to advise the policyholder of the differences in the policies. In order to protect themselves against potential claims relating to coverage from a transferred insurance policy, it would be advisable for insurance agents to make efforts to inform policyholders in writing that the coverage may differ from the prior insurance policy. Given the rise in lawsuits being filed against insurance agents, there are some measures that may help protect insurance agents and brokers from potential lawsuits regarding Citizens’ transfer of insurance policies. Although there is no legal obligation to do so, insurance agents can contact all Citizens’ policyholders and inform them of the new legislation, which may affect premiums and coverage. Second, it would be preferable
for insurance agents to obtain written consent from each Citizens’ policyholder, acknowledging that the policyholder agrees to the change in insurance carrier and realizes that the coverage may not necessarily be the same as under the prior policy. This can be achieved by insurance agents inviting Citizens’ policyholders to review their new insurance policies with the insurance agent and discuss any changes or additional coverage that may be available. After discussing the changes and/or additional coverage that may be available, insurance agents can send written correspondence to the policyholder documenting that discussion. In addition, an agent should attempt to maintain a complete client file, documenting all communications with the client contemporaneously and memorializing any change in coverage or rejection of coverage. Generally, the more complete and well documented an insurance agent’s file, the easier it is to defend, should litigation occur.

While there is never a guaranty that a policyholder will still not attempt to blame an insurance agent if they are not covered for a loss following the pending transfer, prudent insurance agents can seek to minimize their potential exposure to lawsuits by following good practices, including these suggested measures.

(Endnotes)


3. Another issue may arise regarding surplus lines carriers with respect to potential insolvency. For instance, if Citizens transfers insurance policies to surplus lines carriers, which are not backed by the Florida Insurance Guaranty Association, should insolvency occur, coverage to policyholders will not be provided by the State of Florida.


5. See Florida Statutes Sec. 627.3518(3) (2013).

6. See Florida Statutes Sec. 627.3518(3) (c) (2013).

7. See Florida Statutes Sec. 627.3518(2) (2013).


11. See Cat’N Fiddle v. Century Ins. Co., 213 So. 2d 701, 704 (Fla. 1968)


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This book is about the legal issues that arise repeatedly in litigating homeowners’ and condominium association lawsuits in Florida. Homeowners’ and condominium associations are common forms of community living in Florida, and the law regulating their operation touches on the lives of each of the owners and residents who own property and live within their purview. The book covers a broad range of topics because practice in this area of the law is multifaceted. Attorneys that practice community association law regularly prosecute and defend against claims that sound in the law of contracts, real property, civil rights, and more. Each of these topics is discussed to provide the reader with a set of practical tools that may be used to approach community association disputes. Students of this area of the law will also benefit from detailed discussion of the Florida statutes regulating community associations and construing case law.
Joy G. Zubkin, of Cole, Scott & Kissane’s Orlando office, obtained a Final Summary Judgment in a hotly contested Negligence Per Se and General Negligence claim with significant damages. The lawsuit involved a homeowner’s liability claim where our client constructed a massive concrete block mailbox within the right of way adjacent to his home that was struck by a plaintiff who was trying to avoid a dog in the roadway. Joy successfully defeated Plaintiff’s claims of negligence per se and off-road hazard by showing that the ordinance in question was not enforced and that the off-road hazard cases were distinguishable based on lack of foreseeability, which also defeated the general negligence claim.

The demand was for $300,000, with significant prior back problems and surgery. Joy had filed a valid Proposal for Settlement of $2,500. A claim for attorney’s fees is now pending against the Plaintiffs and their attorney. Thanks also to Chris Wasula, Esq., was able to find excellent case law to support the facts of our case.

Barry Postman and Joshua Goldstein, of Cole, Scott & Kissane’s West Palm Beach office, obtained a complete defense verdict in this declaratory judgment and injunctive relief case involving the interpretation of an Association’s governing documents. The Plaintiffs filed the action challenging the Association’s authority and action in building a maintenance facility on a common area which was located near several recreation amenities.

The Plaintiffs contended that the Association did not have the authority through their representational voting structure to construct the maintenance facility. Moreover, the Plaintiffs contended that the Association needed the consent of all homeowners within the community and that the facility diminished their easement rights. The Plaintiffs requested that the maintenance facility either be destroyed or repurposed into a club house or other recreation related building.

The court found that the Association had the authority to construct the maintenance facility and issued final judgment in favor of the Association.

Barry Postman and Brian Rubenstein, of Cole, Scott & Kissane’s West Palm Beach and Tampa offices, obtained a complete defense verdict in an employment law case involving a former tenured professor and Dean of the School of Social Sciences at Bethune-Cookman University alleging breach of contract and tenure policy, whistleblower and defamation claims. Summary Judgment was granted on the whistleblower claim a couple weeks before trial and the court granted directed verdict in favor of the University and its former President on the defamation claim after the close of evidence at trial. After the completion of a five day jury trial, the jury also returned a defense verdict in the University’s favor on the breach of contract claim. The Plaintiff’s sought damages in excess of one million dollars at the trial.

The Plaintiff’s position at trial was that he was entitled to continuous employment absent termination for adequate cause based on the University’s tenure policy in its Faculty Handbook, which the Court interpreted was part of his Employment Contract. He further alleged that he was entitled to due process before being terminated pursuant to the University’s Faculty Handbook. The plaintiff argued that he was denied due process and the University did not follow its policies resulting in alleged wrongful termination. Barry and Brian were able to successfully argue that the University did follow its policy in suspending and terminating the professor for adequate cause after allegations of sexual harassment against the Dean and three other professors in the School of Social Sciences were brought to the University’s attention.

Steve Jacobs, of Cole, Scott & Kissane’s Orlando office, obtained a complete dismissal of a consumer’s claims against Honda after a full arbitration hearing and vehicle inspection in a Florida Lemon Law case.


Brooke Boltz, of Cole, Scott & Kissane’s Tampa office, obtained a unanimous, favorable finding in a Lemon Law case. The consumer alleged that a clicking noise in the braking system was so annoying that the resale value had been substantially diminished. Brooke successfully demonstrated that the click was a product characteristic of the braking system and did not substantially impair the use, value or safety of the vehicle. The three member arbitration panel agreed unanimously and found the vehicle was not a Lemon.

Russell Mootry v. Bethune-Cookman University and Trudie Kibbe Reed | Venue: Volusia County


Joy G. Zubkin, of Cole, Scott & Kissane’s Orlando office, obtained a Final Summary Judgment in a hotly contested Negligence Per Se and General Negligence claim with significant damages. The lawsuit involved a homeowner’s liability claim where our client constructed a massive concrete block mailbox within the right of way adjacent to his home that was struck by a massive concrete block mailbox within the right of way adjacent to his home that was struck by a massive concrete block mailbox within the right of way adjacent to his home that was struck by
Michael Brand and Eric Tinstman, Cole, Scott & Kissane’s Miami office, obtained a complete defense verdict after a four day trial in a premises liability trip and fall case. The Plaintiff was a New Year’s Eve guest at the Delano Hotel on Miami Beach. At approximately 4:00 a.m., she sustained a spiral comminuted ankle fracture, requiring two surgical procedures and extensive post-operative therapy, at a total cost of merely $100,000. The Plaintiff’s engineering expert contended that the exterior stone walkway surface violated several Miami Beach Code Provisions and Life Safety Codes. The Defendant did not offer a retained expert on liability, but instead established a perfect safety record and reasonable inspection and maintenance procedures through its own security employees, maintenance employees, and managerial personnel. The evidence established that nearly 1.5 million guests, had frequented the rear patio and walkway areas without accident or injury involving the alleged uneven surfaces.

The jury returned a complete defense verdict on liability issues. The economic damages had been stipulated to. The Plaintiff asked the jury for approximately $500,000 in total requested damages.

Benjamin Esco, of Cole, Scott & Kissane’s Miami office, obtained a complete defense verdict after a four day trial in a premises liability trip and fall case. The Plaintiff was a New Year’s Eve guest at the Delano Hotel on Miami Beach. At approximately 4:00 a.m., she sustained a spiral comminuted ankle fracture, requiring two surgical procedures and extensive post-operative therapy, at a total cost of merely $100,000. The Plaintiff’s engineering expert contended that the exterior stone walkway surface violated several Miami Beach Code Provisions and Life Safety Codes. The Defendant did not offer a retained expert on liability, but instead established a perfect safety record and reasonable inspection and maintenance procedures through its own security employees, maintenance employees, and managerial personnel. The evidence established that nearly 1.5 million guests, had frequented the rear patio and walkway areas without accident or injury involving the alleged uneven surfaces.

The jury returned a complete defense verdict on liability issues. The economic damages had been stipulated to. The Plaintiff asked the jury for approximately $500,000 in total requested damages.

Dan Shapiro and Erin Slattery, of Cole, Scott & Kissane’s Tampa office, obtained a complete defense verdict in a negligence case. The Plaintiff alleged that he was injured when he assisted a tow truck driver in backing his vehicle off the back of a flatbed truck late at night; the vehicle slid off the truck and impacted the ground, causing the Plaintiff to suffer neck and other injuries. Dan and Erin were able to show the accident was solely due to the Plaintiff’s failure to follow the tow truck driver’s instructions. They also showed that the Plaintiff sought no medical treatment for nearly four months after the accident, and that his complaints were therefore not related to this accident. As a result of the verdict, their client is entitled to an award of costs and possible attorney’s fees against the Plaintiff.

Vincent Gannuscio, of Cole, Scott & Kissane’s Tampa office, obtained an order granting summary judgment in favor of his client in this personal injury case. The Plaintiff, a pedestrian, was hit by a drunk driver who earlier had visited the Defendant’s night club, causing the Plaintiff to lose a leg and suffer life-threatening injuries. The Plaintiff alleged that Defendant was responsible for serving alcohol to the patron despite at least one prior instance of intoxication, and then requiring him to leave in his own vehicle. Vincent successfully demonstrated to the court that the evidence the Plaintiff presented did not satisfy the requirements for liability under Florida’s “dram shop” law, Fla. Stat. Sec.768.125 by presenting more than 40 affidavits and depositions of our client’s employees, all of whom testified they did not know the driver to be someone “habitually addicted” to alcohol as required by the Statute. He also demonstrated to the court that the driver was accompanied by at least two other people, either one of whom could have driven, and that nobody forced the drunk driver to get behind the wheel at the time of the accident, which occurred at least 1½ hours after leaving the premises.

Dan Shapiro and Rhonda Beesing, of Cole, Scott & Kissane’s Tampa office, obtained a defense verdict in this medical malpractice case. Dr. Sponaugle and Florida Detox performed a hospital based procedure known as rapid anesthesia assisted detoxification on the Plaintiff, 53-year-old John Westerfield, to assist Mr. Westerfield with detoxing from opiates. The procedure involved placing Mr. Westerfield under anesthesia to assist him in physically detoxing from opiates in a matter of hours instead of days; however Mr. Westerfield was required to be medically and psychologically stable before undergoing the procedure. After the rapid detox procedure, Mr. Westerfield experienced a seizure, became unresponsive, suffered a cardiac arrest, was hospitalized and diagnosed with, among other things, an anoxic brain injury. He and his wife filed suit against Dr. Sponaugle and Florida Detox, Inc. alleging that Dr. Sponaugle failed to conduct appropriate cardiac clearance among other standard of care violations. Dr. Sponaugle defended the case by asserting that proper medical and psychological screenings were performed, but that Mr. Westerfield himself caused the cardiac arrest by taking barbiturates and benzodiazepines in amounts not ordered by Dr. Sponaugle. As a result of Mr. Westerfield’s anoxic brain injury, the Plaintiff claimed in excess of $6 million in economic damages, including past and future medical care and treatment, past lost wages and future loss of the ability to earn income. The Plaintiff also requested the jury award non-economic damages for Mr. Westerfield’s loss of enjoyment of life and a loss of consortium claim by Mrs. Westerfield. The parties agreed that the catastrophic injury cap applied. The jury was out for less than an hour before returning a complete defense verdict.

Patricia Westerfield individually and as Guardian and Conservator for John Westerfield v. Marvin Sponaugle, MD, & Florida Detox, Inc. Venue: Pinellas County
Vincent Gannuscio and Erin Slattery, of Cole, Scott & Kissane’s Tampa office, obtained a highly favorable verdict in a rear-end automobile accident case. All doctors, including the defense CME doctor, concluded that the Plaintiff had suffered some injury as a result of the accident. As a result, the Plaintiff argued that she was entitled to all past medicals, for which the Plaintiff requested she be awarded just over $28,000, as well as future medicals of $4-5k per year.

Vincent was able to show the jury that there was no activation of any latent condition caused by the accident, that her complaints and diagnoses were consistent with a soft tissue injury and the lack of radiating pain or loss of range of motion at the conclusion of her treatment showed that the original injury had healed. The jury came in at a verdict of $16,431.28, representing a little over half of the past medical expenses. The jury awarded nothing for future medicals, and no permanent injury.

Gregory Lower, of Cole, Scott & Kissane’s Jacksonville office, obtained a denial of benefits in a workers’ compensation case.

The claimant was a patrol officer for the City of Jacksonville since 1973. She had been diagnosed with high blood pressure since the 1990’s. While on light duty in the Teleserve Unit of the Sheriff’s office, the claimant developed dizziness and nausea. She went to Baptist Medical Center and her blood pressure reading was 162/97. The emergency room doctor advised the claimant to take time off to recuperate.

The claimant filed a Petition for Benefits seeking compensability of her hypertension pursuant to Ch. 112.18 F.S. (“heart/lung bill”). That statute presumes heart disease, hypertension or tuberculosis to be accidental and suffered in the line of duty if a law enforcement officer, corrections officer or firefighter with any Florida state, municipal or county government passes a pre-employment physical indicating the disease was not present; the claimant had a covered condition and the condition resulted in disability.

Gregory successfully argued that the claimant’s dizziness/nausea was more likely related to vertigo than hypertension and that the claimant failed to establish a disability related to the hypertension. As such, the Judge of Compensation Claims denied the claim for compensability of the hypertension and requested benefits.

Barker v. Sierra Title, LLC | Venue: First District Court of Appeal

Shelby Serg, of Cole, Scott & Kissane’s Jacksonville office, and Scott Cole, of the firm’s Miami office, obtained affirmance on appeal of an order denying the Plaintiff’s motion to amend her complaint to bring claims against Sierra Title, LLC, the Third Party Defendant.

At the trial court level, the Plaintiff attempted to amend her Complaint to bring claims against the Third Party Defendant after the applicable Statute of Limitations had expired. The Third Party Defendant argued that the proposed amended claims were time barred. Furthermore, the relation back doctrine did not apply where the Plaintiff’s proposed amended claims arose out of a different transaction, occurrence or conduct than the original underlying claim.

The Plaintiff’s proposed amended claims also arose out of a transaction to which the Plaintiff was not a party. The Third Party Defendant argued that it owed no duty to Plaintiff in connection with transactions to which the Plaintiff was not a party, regardless of whether the Plaintiff could foreseeably be harmed by faulty handling of such transaction.

George Truitt and Gregory Willis, of Cole, Scott & Kissane’s Miami office, obtained a complete defense verdict after a 7 day jury trial in Miami-Dade County. Cole, Scott, & Kissane, represented a geotechnical engineer who was sued for professional malpractice by the developer landlord of a CVS site in Miami. When the developer turned the site over, CVS discovered that the site was not prepared in accordance with the terms of the ground lease. The defects included improper demucking of the site, neglecting to fill areas below the water line with gravel, and backfilling the site with material for the building pad and parking area that was materially different from the specifications.

CVS claimed the developer landlord was in breach and threatened to cancel the lease. After negotiations, CVS re-excavated, demucked, and backfilled the entire site, incurring more than $500,000 in costs. The developer reimbursed CVS for the cost of reworking the site and sued the engineer for alleged deviations in the testing and inspection services.

We were able to establish that the developer knowingly eliminated the gravel and changed the fill to a lesser quality material without CV’s knowledge or consent. We were also able to establish that the developer and contractor disregarded the Quality Assurance plan recommended by the engineer. After two hours of deliberation, the jury found that the engineer did not breach the standard of care.

The plaintiff demanded nearly $500,000 for the diminished value of its ground lease. Our client had offered $125,000 in a proposal for settlement more than one year before the trial commenced. The plaintiff continues to hold the lease and the income stream from the lease for settlement. The Plaintiff was not a party, regardless of whether the Plaintiff could foreseeably be harmed by faulty handling of such transaction.

Joe Kissane and Blake Cole, of Cole, Scott & Kissane’s Jacksonville office, obtained a complete defense verdict after a four-day jury trial in Pinellas County. Cole, Scott & Kissane, represented an automobile insurance carrier who was sued for bad faith and fraud arising from the way the company handled a claim that resulted from a December 20, 2004 accident.

The December 20, 2004 accident involved
t company’s insured striking a motorcyclist. The insured was intoxicated at the time and motorcyclists sustained serious injury. The insured did not report the accident to the company. However, the claimant motorcyclist retained counsel and that attorney reported the claim eight days after the accident. One day after the claim was reported, the attorney sent the carrier a 20 day time limit demand with multiple conditions. The company’s response was timely and met all conditions, but claimant’s counsel refused to accept the tender because the company sought to obtain salvage of the claimant’s motorcycle, which the plaintiff claimed was a counter offer. The underlying case proceeded to trial and resulted in a $1.1 million verdict against the insured, who had a $10,000 bodily injury policy.

The plaintiff also obtained a $275,000 attorney’s fees and cost judgment against the insured in the underlying case. The $1.1 million judgment and the $275,000 attorney’s fees and cost judgment had been accruing interest since 2008.

The plaintiff sought damages for common law bad faith and for fraud and deceit. The plaintiff sought to establish that the company had failed to accept a reasonable settlement offer, that the company had a business practice of misrepresenting coverage available under the policy, and that the company committed fraud in misrepresenting coverage and attempting to obtain salvage of the claimant’s motorcycle.

The medical malpractice statute of limitations had expired on the Plaintiff’s claim against our client. Therefore, this dismissal was entered with prejudice.

Lee Cohen and Ryan Fogg of Cole, Scott & Kissane’s West Palm Beach office, obtained a Defense Verdict in this Slip and Fall personal injury case. The Plaintiff alleged that he slipped and fell while descending stairs at the Poppleton Creek Condominium complex. The fall caused him to lose consciousness and suffer multiple cervical disc herniations. The Plaintiff underwent a triple cervical disc fusion surgery and claimed to be permanently impaired from the injury. His total medical bills were approximately $300,000, which were all covered by letters of protection.

At trial, the Plaintiff argued that the stairs had not been cleaned or maintained for almost 5 years and that, as a result, mold had grown on the stairs, which caused the Plaintiff to fall. The Plaintiff’s case was aided by the fact that a previous resident who had walked up and down the stairs multiple times. Thus, there was no duty on the part of our client to warn the Plaintiff of the condition.

We were able to establish that there was no reasonable opportunity to settle the underlying claim based, in part, on the conduct of the claimant and his counsel during the claims handling period. We were also able to establish that the demand letter was silent on the issue of salvage and that the company handled that aspect of the claim in accordance with industry standard. We were also able to highlight the proactivity of the company during the claims handling period.

On behalf of our client, we filed a $50,000 Proposal for Settlement very early on in the litigation. The jury deliberated for two hours and ten minutes before returning a complete defense verdict on both bad faith and fraud.

Lee Cohen and Ryan Fogg of Cole, Scott & Kissane’s Miami office, successfully obtained a dismissal of the medical malpractice action that had been filed against our client. The Plaintiff, who received physical therapy services in Homestead, Florida, claimed that his ankle was re-fractured while performing exercises at our client’s facility. We disputed this claim and asserted that the Plaintiff and his lawyers failed to satisfy necessary pre-suit requirements under Chapter 766, as a pre-requisite to a Complaint for Damages for medical malpractice. In connection with this defense, we filed a Motion to Dismiss for our client and argued our position before the Honorable Beatrice Butchko. During the hearing, the Plaintiff’s counsel contended that her client satisfied the requirements of 766.102 (2009), by supporting her client’s claim with a pre-suit affidavit by a podiatrist with expert knowledge of ankle conditions. The Plaintiff’s counsel cited to legal opinions that relax the “similar specialty” requirement contained within the statute. Judge Butchko, however, found the legal opinions provided to her by the Plaintiff’s counsel to be based upon facts dissimilar to the facts in our matter. She also considered the Plaintiff’s expert’s affidavit and found that the Plaintiff’s expert failed to aver that he had expert knowledge of the prevailing standard of care applicable to physical therapists. Therefore, Judge Butchko granted our Motion to Dismiss.

We also sought lost profits based on the deviation from standard management practices.

In the end, the jury deliberated for about an hour and a half and awarded our client every penny that we asked for. The jury found that each of the other two partners breached the contract, breached their duties of care and loyalty, and breached their fiduciary duties. The total amount of the award was $150,775.00. We also filed a $50,000 Statutory Proposal for Settlement and should be able to recover a substantial amount of attorneys’ fees and, of course, tax costs, which are substantial after 14 months of litigation.

Lee Cohen and Ryan Fogg of Cole, Scott & Kissane's Miami office, obtained a Defense Verdict in this Slip and Fall personal injury case. The Plaintiff alleged that he slipped and fell while descending stairs at the Poppleton Creek Condominium complex. The fall caused him to lose consciousness and suffer multiple cervical disc herniations. The Plaintiff underwent a triple cervical disc fusion surgery and claimed to be permanently impaired from the injury. His total medical bills were approximately $300,000, which were all covered by letters of protection.

At trial, the Plaintiff argued that the stairs had not been cleaned or maintained for almost 5 years and that, as a result, mold had grown on the stairs, which caused the Plaintiff to fall. The Plaintiff’s case was aided by the fact that a few days after his fall, he travelled back to the complex with his best friend to take almost 200 pictures of the stairs, which clearly showed the dirty condition.

After closing arguments the jury deliberated for 45 minutes and found that Poppleton Creek was not negligent. Mr. Fogg and Mr. Cohen were able to argue at trial that the Plaintiff knew about the condition of the stairs because he had previously lived at the complex and had walked up and down the stairs multiple times. Thus, there was no duty on the part of our client to warn the Plaintiff of the condition.

Montez v. Cora Health Services, Inc., et al. | Venue: Miami-Dade

Tullo E. Iacono and John Coleman, of Cole, Scott & Kissane’s Miami office, successfully obtained a dismissal of the medical malpractice action that had been filed against our client. The Plaintiff, who received physical therapy services in Homestead, Florida, claimed that his ankle was re-fractured while performing exercises at our client’s facility. We disputed this claim and asserted that the Plaintiff and his lawyers failed to satisfy necessary pre-suit requirements under Chapter 766, as a pre-requisite to a Complaint for Damages for medical malpractice. In connection with this defense, we filed a Motion to Dismiss for our client and argued our position before the Honorable Beatrice Butchko. During the hearing, the Plaintiff’s counsel contended that her client satisfied the requirements of 766.102 (2009), by supporting her client’s claim with a pre-suit affidavit by a podiatrist with expert knowledge of ankle conditions. The Plaintiff’s counsel cited to legal opinions that relax the “similar specialty” requirement contained within the statute. Judge Butchko, however, found the legal opinions provided to her by the Plaintiff’s counsel to be based upon facts dissimilar to the facts in our matter. She also considered the Plaintiff’s expert’s affidavit and found that the Plaintiff’s expert failed to aver that he had expert knowledge of the prevailing standard of care applicable to physical therapists. Therefore, Judge Butchko granted our Motion to Dismiss.

The medical malpractice statute of limitations had expired on the Plaintiff’s claim against our client. Therefore, this dismissal was entered with prejudice.


Trevor Hawes and Blake Cole, of Cole, Scott, & Kissane P.A.’s Jacksonville office, had a victory after a five day trial in Fernandina Beach, Florida. The matter was a business litigation dispute amongst equal 1/3 owners of an LLC operating a popular bar in downtown Fernandina Beach. Our client came to CSK after discovering that his partners had been spending wildly out of the company accounts. After being confronted, the other two partners voted our client out of Managing Member status and locked him out of the business. On behalf of our client, CSK filed suit against the other two owners and alleged breach of contract (operating agreement), breach of the statutory duties of loyalty and care, and breach of fiduciary duty.

Through discovery, we learned that the spending was even worse than initially thought. It was also discovered that the other two owners were grossly mismanaging the business. The other two owners tried to defend their actions and claim that the funds were salary they earned in working at the bar.

At trial, we sought recovery of our client’s share of all the money that was wrongfully spent.

Victor Dottor v. Poppleton Creek Condominium Association, Inc. | Venue: Palm Beach County

We were able to establish that there was no reasonable opportunity to settle the underlying claim based, in part, on the conduct of the claimant and his counsel during the claims handling period. We were also able to establish that the demand letter was silent on the issue of salvage and that the company handled that aspect of the claim in accordance with industry standard. We were also able to highlight the proactivity of the company during the claims handling period.

On behalf of our client, we filed a $50,000 Proposal for Settlement very early on in the litigation. The jury deliberated for two hours and ten minutes before returning a complete defense verdict on both bad faith and fraud.
They recently participated in a grueling one hour Boot Camp that tested their physical strength and stamina. Special thanks to our own Katie Merwin for organizing the event. Twelve lawyers from our West Palm Beach office participated. Katie is an Associate in our West Palm Beach office who practices primarily in the areas of Civil Rights, Commercial Litigation, and Condominium & Homeowners Association Litigation.

Robert Swift, a Partner in our Orlando office, was recently elected President of the CPCU Society’s Central Florida Chapter. Since 1943, the Society of Chartered Property and Casualty Underwriters has been a community of credentialed property and casualty insurance professionals who promote excellence through ethical behavior and continuing education. The CPCU Society provides resources, educational programs and leadership opportunities that enable individuals to expand their technical insurance skills and business capabilities in order to improve the overall performance of the insurance industry, while adhering to the highest ethical standards.

There are approximately 22,000 members in over 40 countries holding the Chartered Property Casualty Underwriter (CPCU®) designation, which is conferred annually by The Institutes and requires passing rigorous undergraduate and graduate-level exams, meeting an experience requirement, and agreeing to be bound by a strict code of professional ethics. Those who have been conferred the CPCU designation have gained an in-depth, broad based knowledge of risk management and insurance principles. They hold positions such as claims adjusters, underwriters, risk managers, executives, brokers, agents, regulators, consultants, attorneys, and educators.

A CPCU since 2000, Mr. Swift spent over 20 years in the property-casualty insurance industry in various claims and management positions prior to joining Cole, Scott & Kissane’s Tampa office in 2005. He moved to Orlando in 2007 with his lovely wife Jennifer to help open the firm’s Orlando office. At that time, he began his volunteer work with the local CPCU chapter, was elected to the Board of Directors and assisted in growing the Central Florida membership through a monthly speaker program, frequent educational seminars and community involvement. Partnering with insurance and related industry groups, such as Florida Association of Independent Agents (FAIA), Orange County Bar Association, Professional Liability Underwriting Society (PLUS) amongst others, Central Florida CPCU is a lead chapter in promotion of insurance as a career through its scholarship program and community involvement with such charities as Second Harvest, Habitat for Humanity, Relay for Life and others.

Mr. Swift has tried close to 20 cases to verdict in the past 3 years. In addition to all forms of liability matters, Mr. Swift is a member of our insurance coverage and appellate groups, handling significant insurance coverage cases, and assisting our clients through consulting and rewriting various insurance policy forms and endorsements.

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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 28, 2013. Entries must be received by 12:00 p.m. (EST) on January 30, 2014. 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 1, 2014 and notified via e-mail by February 5, 2014. 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 6, 2014 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.

OFFICIAL RULES

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