KUBICKI DRAPER

THE KD QUARTERLY

www.kubickidraper.com FALL/WINTER 2020

KD in the Community


Jax 5K Run

Attorneys and staff of the Jacksonville office assembled for one balmy evening to complete a 5k run on Saturday, August 10, 2019 through the Jaguars' stadium. The 5k run, which was held in support of the Jacksonville Jaguars' Foundation, featured a leisurely mile run around the stadium, with a majority of the race up and down the stadium's ramps, and the finish line across the sidelines of the Jaguars' field. The entire team finished strong, and planning for the next run has already begun!


Walk for PKD

Harold Saul, of the Tampa office, attended the Walk for PKD on Saturday, October 19, 2019. This cause is close to Harold's heart because PKD (Polycystic Kidney Disease) is a hereditary disease, which Harold, along with Harold's father, mother, and brother, have all fought. Harold, as well as his father and brother, were fortunate to have received kidney transplants. Harold's team for the Walk is named after his father, Ivan Saul, who passed away in 2007. Ivan was a PKD and transplant pioneer, having been involved in the PKD Foundation since the 1980s. He often raised money for the Foundation, and he would regularly lobby Congress for continued and increased funding for PKD Research. It is in this spirit that Harold's team has been successful, having raised over $250,000 since 2007. We are proud of Harold's commitment to this cause and to finding a cure for this disease. Each year, Harold attends (and encourages others to attend) the Walk for PDK, which includes a number of events and a luncheon, and which took place this year in Fort Desoto Park in South St. Pete with a gorgeous view of Tampa Bay.

new additions

We are pleased to introduce our new team members:

MIAMI:	Associates – **Emily Smith, Alejandro Vargas, Daniel Dresch, Martin Blaya** Shareholder – **Lisa-Ann Terry**
TALLAHASSEE:	Associate - **Jonathan Marcelo**
FORT MYERS:	Associates – **Florence Upton, Lawrence Held, Sameer Islam, Shirlarian Williams**
FORT LAUDERDALE:	Associates – **Dolores Scheller, Nurelys Pereiro**
WEST PALM BEACH:	Associates – **Neil Cherubin, Daniel Walker, Jorge Torres-Puig**
TAMPA:	Associates – **Paige Wojdyla, Chelsie Lyons, Kelsey Early, Andrew Stanco, Kaitlin Mosher, Taylor Ligman**
PENSACOLA:	Associate – **Donovan Lovelock**
ORLANDO:	Associates – **Daniel Blundy, Wallace Richardson**

EDITOR
Raquel Loret de Mola

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Florida Legislature Passes New Law Creating Right of Contribution Among Liability Insurers for Defense Costs

By Sharon C. Degnan

Florida Governor Ron DeSantis recently signed into law House Bill 301, an omnibus insurance reform bill effective July 1, 2019. Among other things, House Bill 301 created Florida Statute Section 624.1055, which gives most liability insurers a statutory right of contribution for defense costs from other liability insurers who also have a duty to defend the insured. Expressly excluded from the provisions of the new statute are motor vehicle liability insurance policies and medical professional liability insurance policies. The statute applies to any claim, suit, or action initiated on or after January 1, 2020.

Section 624.1055 allows a liability insurer who owes a duty to defend an insured and defends the insured a right of contribution for defense costs from any other liability insurer who also owes a duty to defend the insured in that same action. There is no entitlement to recovery of defense costs incurred prior to the other liability insurer's receipt of notice of the claim. Defense costs are to be allocated by the court according to the terms of the applicable liability insurance policies. Section 624.1055 applies to liability insurance policies issued for delivery in Florida or under which an insurer has a duty to defend an insured against claims or actions asserted in Florida, including surplus lines insurance policies.

Prior to the recent enactment of Section 624.1055, a liability insurer's right to contribution of defense costs was essentially prohibited pursuant to Florida case law. *See* **Penn. Lumbermens Mut. Ins. Co. v. Ind. Lumbermens Mut. Ins. Co.**, 43 So. 3d 182, 186 (Fla. 4th DCA 2010) ("[T]here is no right of reimbursement to defense costs between primary insurers of a common insured."); **Cont'l Cas. Co. v. United Pac. Ins. Co**., 637 So. 2d 270, 271 (Fla. 5th DCA 1994) ("[T]he duty of each insurer to defend its insured is personal and does not inure to the benefit of another insurer."); **Argonaut Ins. Co. v. Md. Cas. Co.**, 372 So. 2d 960, 963-64 (Fla. 3d DCA 1979) (same).

Now, through the enactment of Section 624.1055, Florida law regarding the right of contribution of liability insurers for defense costs is more akin to the law in most other states.

more KD in the Community

Our KD family comes together every quarter to make a difference in our local communities. An organization is selected from multiple entries made by staff, and funds are raised by paying to dress down. The organizations that were recently featured include, St. Jude's Children's Research Hospital, submitted by **Justa Rosario** of the Miami office, and Sol Relief, submitted by **William Backer**, of the Tampa office, and Team Rubicon.

St. Jude's Children's Research Hospital focuses on leading the way the world understands, treats, and defeats childhood cancer and other life-threatening diseases. The organization's mission is to advance cures and means of prevention for pediatric catastrophic diseases through research and treatment. Consistent with the vision of their founder, Danny Thomas, no child is denied treatment based on race, religion, or a family's ability to pay.

For Justa, St. Jude's is special because her granddaughter, Jaymarie, was born with cancer. Having experienced first hand what is involved in treating and caring for a child with cancer, Justa and her family understand and appreciate the need for places like St. Jude's and their trained staff. Now that her granddaughter is a little cancer survivor, their family participates annually in the St. Jude's Walk held in Orlando. In addition to walking each year in celebration of Jaymarie, Justa and her family also attend to support other families still facing the challenges of childhood cancer. The firm was happy to help collect funds to donate to St. Jude.

Sol Relief and **Team Rubicon** were selected to support the Bahamian people with the immense devastation caused by Hurricane Dorian. Sol Relief was submitted by William Backer, of the Tampa office, who helped organize supply donations in Tampa, which were flown to the Bahamas through Sol Relief. This organization has done great work with getting supplies and food to victims of past hurricanes, including Hurricanes Irma and Maria. To date, Sol Relief has collected and distributed more than 33,500 pounds of relief supplies, made 43 flights, and made 160 evacuations.

Team Rubicon is a disaster-response nonprofit organization made up of 70 percent veteran volunteers. This group of retired veterans' sole mission is to help in times of disaster. The organization goes in and assists with clearing roads, saving people, and making it easier for relief efforts to access impacted areas.

Altogether, Kubicki Draper collected money which was divided between these two organizations to address critical needs to the islands: search and rescue efforts, clean up, and humanitarian aid.

In addition to our team's donations, our Miami office participated in the Datran Center's donation drive to help bring supplies and food items to those affected by Hurricane Dorian. The Datran Center had a great turnout, and although we know the recovery efforts for the impacted areas will take months, if not years, Kubicki Draper is happy to have been a part of the relief efforts, and we continue to keep the Bahamian people in our prayers.

KD news

above: Marsha Moses, Karun Rivero and Harold Saul

We were happy to be a sponsor at the Hillsborough County Bar Association (HCBA) Diversity & Inclusion Networking Social recently. **Marsha Moses**, of the Tampa office, serves as a cochair of the HCBA and helps organize various events, such as this one, throughout the year. In addition to Marsha, **Harold Saul, Chelsie Lyons** and **Karun Rivero**, also of the Tampa office, attended the networking social, which connects law students with attorneys, judges, and members of local legal organizations in a casual, friendly, and low-pressure environment. To learn more about the HCBA's Diversity Committee, please contact Marsha Moses at mmm@kubickidraper.com.

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Samuel Gilot, of the Tallahassee office, helped coach The Florida State University College of Law Trial Team to first place in the 2019 Mockingbird Challenge National Trial Competition held October 9-12 in Montgomery, Alabama. ***Read more:*** https://news.fsu.edu/news/business-lawpolicy/2019/10/15/fsu-college-of-law-trial-team-wins-national-competition/

SPOTLIGHT ON

Jennifer Remy-Estorino

Jennifer Remy-Estorino is a Shareholder in Kubicki Draper's Miami office. Jenny's career began while working in house for one of the largest insurance carriers in the U.S. While Jenny has focused her career on trial practice, she also has experience in appellate law, writing appellate briefs and petitions, and arguing before the Third District Court of Appeal before joining Kubicki Draper in July 2008.

From a young age, it was clear to everyone that Jenny's vivacious personality and thoughtful expressiveness would someday serve as some of her best assets in her future career; and she dreamed of a career in law or theater. As a young woman, Jenny obtained her undergraduate degree in Broadcast Journalism from Florida International University where she further refined her communication skills and her ability to captivate her audiences in a coherent and engaging way. While a career in journalism appealed to Jenny, she was determined to capitalize on these skills to pursue her childhood dream of becoming a successful attorney. Jenny proceeded to obtain her Juris Doctorate degree from Florida International University as a part of the University's 2005 graduating inaugural class.

Jenny's talents have clearly served her well; she takes pride in the fact that she has successfully developed a diverse legal practice over her past eleven years at Kubicki Draper while defending a wide-range of cases in both state and federal court, including: automobile negligence; premises liability; construction defect; intellectual property; insurance bad faith/coverage disputes; negligent security; commercial litigation; and first-party property cases.

Jenny attributes her professional success to her personality and ability to communicate and work with her clients and opposing counsel: "the key is to initiate and maintain an open line of verbal communication."

According to Jenny, this open line of communication and her attention to detail enable her to spot issues early on and work with others to quickly resolve (what could otherwise be) stressful situations that often arise during litigation. Along these lines, Jenny, who is Cuban American, further uses her bilingual capabilities as another tool to assist her Spanish-speaking clients navigate through the litigation process as well as an avenue to develop relationships.

When Jenny leaves the office at the end of each day, her work for the day is far from over. Jenny and her husband, Julio, are parents to two small children: Madison, who is three and a half years old, and Jacob, who is one and a half years old. For Jenny, nothing is more important than maintaining a healthy work-life balance, which, she confesses, "is a juggling act." Jenny is able to make it work because she has established a resilient support system and is dedicated to surrounding herself with strong relationships with her family and friends. With Jenny's mindset, drive, and talent, her success comes as no surprise to anyone.

The GDPR: Catering to Privacy in the Hospitality Industry

By Raquel L. Loret de Mola
On behalf of Hospitality and Retail Practice Group

Introduction

The European Union's (EU) "General Data Protection Regulation" (GDPR), which went into effect on May 25, 2018, requires businesses to carefully manage/prevent misuse of their customer data. The GDPR places stringent requirements on how businesses interact with their customers and further requires them to be extremely sensitive to their customers' privacy rights. Notably, the GDPR implicates businesses that are based solely in the U.S. as well: regardless of where your business may be headquartered, if your clientele is EU-based, then GDPR compliance is triggered. For our purposes, the GDPR applies to all travel agencies, tour operators, hotels, motels, inns, clubs, bed-and-breakfasts, Airbnbs, car rental agencies, restaurants, aggregators, and other travel and hospitality groups that operate in Europe or outside of the EU and actively maintain data on EU residents. For hospitality businesses, this data can be encompassed within a membership, client/prospective client database, etc.

The GDPR's basic goals are as follows: if the business has a legitimate reason to collect, process, or transfer an EU resident/customer's "personally identifiable information" (PPI), or information that could be used to identify or single out an individual, then these customers must be notified in clear, unambiguous terms. Further, businesses must inform their EU resident/customers as to everyone that is using their PPI and why; and if the customer instructs them to stop – they must stop! Finally, if the EU resident/t customer requests to access, correct, delete, or transfer their PPI, businesses are required to assist with their request.

Significantly, noncompliance with the GDRP can result in tremendous fines (reaching $20 million or four percent of the business's worldwide revenues for the preceding year, whichever is higher), operational setbacks, and reputational damage. Consequentially, hospitality businesses must be prepared to address GDPR requirements through their policies, procedures, and technology if their business maintains PPI on and markets their services to EU residents.

Background of the GDPR

Prior to the adoption of the GDPR, the EU regulated data privacy pursuant to Directive 95/46/EC. Directives are EU legislation requiring the member states to meet a certain goal, while allowing each member state to implement their own laws in order to the meet that goal. The Directive resulted in twenty-eight different data-protection laws throughout the EU. In order to harmonize these various laws, and respond to technological advances while offering greater privacy rights and protections to EU residents, the GDPR came into being. Although many aspects of the Directive continue on through the GDPR, there are key distinctions that will impact U.S. businesses, including those within the hospitality industry. The extent of the GDPR's impact is dictated by how the business is defined: is it considered a data controller or processor (or both)?

Controller vs. Processor

As a preliminary matter, it is important to note that businesses can weave in and out of the controller/processor roles, and how they categorize themselves is irrelevant for compliance purposes. Fortunately, the GDPR provides some guidance to aid in the assessment as to how businesses are defined under the Regulation for compliance purposes. Simply stated, controllers control: Article 4 of the GDPR defines a "controller" as "the natural or legal person…which, alone or jointly with others, determine the purposes and means of the processing of personal data." In other words, controllers determine why and how consumers' PPI is used, and even though they do not necessarily store or process the PPI, they are still responsible for the maintenance thereof. For example, a hotel that collects the preferences and contact information from its guests is considered a controller regardless of whether it stores the PPI on its own or through an external vendor.

Article 4 of the GDPR further defines a "processor" as "a natural or legal person…which processes personal data on behalf of the controller." So, processors are advised by controllers as to how to store, manage, or otherwise manipulate the PPI (which is oftentimes stored on a thirdparty server) and have no right to determine the purpose for which the PPI will be used. Examples of processors within the hospitality industry may include the following: external payroll processors; market research firms; affinity programs that sell to member bases, such as hotel rewards programs; and aggregators that market their own and others' products and services to the consumer (such as Expedia, Kayak, Travelocity, etc.).

The GDPR provides additional guidance as to businesses' obligations and responsibilities under the Regulation. Controllers have various obligations under the GDPR. Controllers have to be able to justify processing PPI for that processing to be lawful, and they have to provide proper notification to their customers at the time of data collection. Generally, a controller must process PPI in accordance with one of the legal grounds set forth in Article 6 of the GDPR, which includes: the EU resident has given consent; it is necessary for performance of a contract or compliance with a legal obligation; it is necessary for protecting the EU resident's "vital interests"; it is being carried out in the public interest or in the exercise of official authority; or it is necessary for "the legitimate interests pursued by the controller or a third party except where those interests are overridden by the interests or fundamental rights and freedoms of the [EU resident]." The GDPR requires controllers to maintain records regarding the PPI that the business controls or processes, including why they are controlling/processing it, where it goes, how long it is kept, what third parties do with the PPI, etc.

continued on page 5

Furthermore, at the time that their EU resident/customer's data is collected, controllers must notify the customer of the following: the identity of the data controller; the purpose and legal basis for processing the data; the recipients of the data; and whether the data is intended to be transferred out of the country, and if so, provide information on the security of the data in transit; the storage period; their rights to access, rectify, erase, transfer, or restrict the processing of personal data; the rights to withdraw consent and complain to supervisory authorities; and whether the information provided will form part of a profile.

As for processors, one of their key obligations under the GDPR includes their duty to notify the controller of a breach and to implement appropriate security measures. As a threshold matter, the GDPR broadly defines "personal data breach" as "a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed." Article 33 of the GDPR further requires processors to "notify the controller without undue delay after becoming aware of a personal data breach." In all likelihood, the processor's obligations do not end there: their contractual obligations will likely require them to provide the controller with information regarding the breach so that they may assist the controller in satisfying its GDPR compliance obligations. With respect to implementing appropriate security measures (which is really to be performed in conjunction with the controller's oversight), the GDPR provides some flexibility and allows processors to consider the state of the art, costs of implementation, nature, scope, context, and purposes of processing, as well as any potential risks.

Taking Steps towards GDPR Compliance

Hospitality businesses should consult with counsel who has dealt with GDPR compliance and work with them to identify the various departments within the business that utilize customers' PPI, including IT, marketing, human resources, etc. From there, interviews must be conducted of key personnel within those departments to ascertain what PPI is collected/why, how are the customers notified, who has access to the PPI, where does the PPI go/how is it stored, how long is it stored, is it deleted, etc. All of this information must be documented, and these records must be maintained and consistently updated (particularly since a GDPR authority may request them at any time). Once this information is compiled and assessed, hospitality businesses should have some insight as to areas of high risk; these areas need to be prioritized for compliance. Then, counsel, in conjunction with a technology specialist, particularly one who is well-versed in IT-risk advisory, cyber security, digital forensics, and technology-systems design, can assist the business in implementing company-wide policies, procedures, technological programs, and security, and in providing education and training to their staff. Additionally, counsel should be prepared to assist the hospitality business in drafting the requisite notice to provide to their EU customers, which will need to advise them of their various above-referenced rights under the GDPR, e.g. their rights to consent/withdraw consent, to delete their PPI, etc., and include a specifically-delineated checklist with "opt-in" boxes where their consent is explicitly required. Notably, consent must be clear, unambiguous, easily accessible, and require the customer to take affirmative action to agree to each item, i.e. there can be no "agree to all" boxes. It is important to note that GDPR authorities can easily access such notices: they could serve as their first "tip" that a business is not in compliance with the Regulation; therefore, it is imperative for these notices to be properly prepared by an experienced attorney.

Conclusion

Total GDPR compliance may take time for some hospitality businesses depending on finances, labor, resources, etc., but prioritizing areas of high risk is a great place to start. The GDPR is here to stay, and it may ultimately become the global standard for data-privacy jurisprudence and lead to the implementation of similar privacy laws throughout the world, including the U.S. Indeed, the California Consumer Privacy Act (CCPA), which was adopted on June 28, 2018, establishes one of the most comprehensive data-privacy regulations in the U.S. to date. The CCPA regulates companies "doing business" in California, and is considered by some to be the U.S. counterpart to the GDPR. Of course, it seems inevitable that other states may also implement their own data-protection laws in the future. In any event, in light of the technology driven world we live in today, data-protection laws appear to be catching fire. Accordingly, it is vital for hospitality businesses to take the necessary steps towards compliance, including, but not limited to, retention of legal counsel that understands the needs of the company and GDPR requirements, so that hospitality businesses can move forward with a well-considered, comprehensive compliance strategy.

For questions about this topic, please e-mail:
KDHospitalityRetailPracticeGroup@kubickidraper.com.

APPELLATE

Affirmance of New Trial Where Wrong Standard was Applied in Denial of Motion to Remove Juror for Cause in a UM Action.

Angela Flowers, of the Ocala office, prevailed in obtaining an affirmance of an order granting a new trial in a UM action against an insurance carrier. During voir dire, the venire included two "Mr. Johnsons": potential Jurors 13 and 17. Juror 13's answers revealed his fiancée had a pending insurance claim against Defendant insurance carrier, while Juror 17 expressed a bias in favor of Defendant and was stricken for cause by Plaintiff. Defense counsel did not challenge Juror 13 at that time, but before the jury was sworn in, defense counsel realized that he had confused the two "Mr. Johnsons." He brought the matter to the court's attention requesting that Juror 13 be stricken for cause. The judge proceeded to question Mr. Johnson, who indicated he would have difficulty being neutral, but thought that he could be fair. The judge declined to strike him "for cause," but ultimately, Defendant successfully moved for a new trial.

On appeal, Plaintiff argued the trial court erred in granting a new trial because Defendant had waived the issue since defense counsel did not request additional peremptory challenges. In response, Angela argued that the trial court did not abuse its discretion, the issue was preserved by a contemporaneous objection, and a request for additional peremptory challenges would have been futile in light of the judge's ruling that he would only strike the juror if he found "for cause" grounds existed. The appellate court agreed and affirmed the order granting a new trial.

Appellate Win in a UM case of First Impression!

The case, involving a minor plaintiff who is the daughter of the plaintiff attorney, and who suffered serious injury to her knee, low back and neck, began at KD when **Sharon Degnan**, in the Orlando office, and **Laurie Adams** and **Melonie Bueno**, in the West Palm Beach office, were asked to take over the defense of a UM case that was set for trial, had a pending summary judgment motion filed against the insurer, as well as several discovery sanction hearings coming up. While it originally looked bleak, Sharon successfully developed and raised a UM coverage defense of first impression in Florida, to which multiple trial judges agreed, as well as the Fourth District Court of Appeal– that a plaintiff is not entitled to UM coverage when a vehicle is used as a premises.

The negligence claim against the tortfeasor in the UM case alleged negligent personal training in a Mobile Gym. Without Florida case law on point, Sharon argued that an exclusion in the policy, which excluded from the definition of "uninsured auto" a "land motor vehicle... located for use as a... residence or premises" applied to preclude UM coverage from being owed since the Mobile Gym was not being used as a motor vehicle, but rather as a premises—a gym—while plaintiff was weight training.

Affirmance of Defense Verdict Where Objection to Juror During Jury Selection was not Properly Preserved.

Caryn Bellus and **Barbara Fox**, of the Miami office, obtained an affirmance of a defense verdict in a personal-injury action. On appeal, Plaintiff asserted that the trial court erred by declining her request to strike a juror for cause and by failing to allow an additional peremptory strike, which resulted in the objected-to juror being impaneled. However, Caryn and Barbara argued that Plaintiff failed to comply with the detailed requirements for preserving objections to these types of jury-selection issues, such that the issue was waived, and notwithstanding, the trial court's rulings were not an abuse of discretion. The Fifth DCA decided the case solely based on the briefs and issued a *per curiam* affirmance.

TRIALS, MOTIONS, MEDIATIONS

Summary Judgment where Plaintiff Failed to Prove Storm Created Opening.

Jill Aberbach, of the Fort Lauderdale office, obtained a Summary Judgment in a first-party property case. Plaintiff made a claim to her insurer for a water intrusion into her property from her roof. However, the insurer denied the claim due to wear and tear of the roof. Specifically, the policy requires that there must be a storm-created opening, which allowed water to enter the property for coverage to be triggered. At the hearing, Jill argued that Plaintiff failed to meet her burden that a storm caused an opening, which allowed water to enter the home. The Judge agreed and granted summary judgment.

Summary Judgment and Voluntary Dismissal in First-Party Property Actions.

Kameron Romaelle, of the Ft. Lauderdale office, obtained a Summary Judgment on a first-party property case. Plaintiffs made a claim to their insurer for supplemental damage to their Property as a result of Hurricane Irma. However, it was discovered that Plaintiff had previously been issued payment and entered into a release for the damage to the property as a result of Hurricane Irma. At the hearing, Kameron argued that Plaintiffs' damages had already been addressed by the prior release signed by Plaintiffs and that any damage to the property had accrued at the time the payment was made. As such, the damages were barred due to satisfaction and accord. The Judge agreed and granted summary judgment.

Additionally, Kameron, along with **Earleen Cote**, of the Ft. Lauderdale office as well, took over a first-party case from another firm just six weeks before trial. When our firm received the matter, Plaintiffs' demand exceeded $100,000. After discussing the matter with Plaintiffs' counsel several times, and holding fast on our position that the damage was not covered, Plaintiffs' demand dropped rapidly. Eventually, after hearing Defendant's position, and a couple weeks before trial, Plaintiffs' counsel voluntarily dismissed the action with prejudice.

TRIALS, MOTIONS, MEDIATIONS

Voluntary Dismissal with Prejudice on a Legally-Precluded Claim.

Sha-Mekeyia Davis, of the Fort Lauderdale office, pressured Plaintiffs with Florida Statute section 57.105 in light of a legal issue that precluded Plaintiff's claim. They went to the last day and filed a Voluntary Dismissal with Prejudice.

Voluntary Dismissal with Prejudice on a Frivolous Claim.

Jennifer Feld, of the Tampa office, obtained a Voluntary Dismissal with Prejudice in a Category Three Hurricane Irma AOB case in Brevard County. A restoration company arrived on site 17 days after the storm; conducted 30 days of dry-out, restoration, and mold testing (without any protocol or clearance); and produced a report without date-stamped photos.

In light of these red flags, Jennifer performed a simple docket search on the condominium complex, which revealed that the entire building had been condemned. In response to written discovery, the restoration company responded "unknown" regarding its knowledge of any exterior damage; yet, Jennifer's prudent investigation revealed that they were actually on-site when the Fire Marshal, Chief Building Official, and inspection firm came out to the property to find it in complete disrepair. Consequentially, their counsel quickly agreed to file a Voluntary Dismissal with Prejudice of all claims, including fees, at the deposition of the restoration company's corporate representative.

Defense Verdict in a Questionable Trip and Fall Case.

Peter Baumberger and **Michael Suarez**, of the Miami office, obtained a defense verdict in an extremely contested trip-and-fall case in Miami. Plaintiff alleged that he and his family took a taxi to a restaurant one night, and he tripped over some concrete curbing in a planter area adjoining the parking lot because all the lights were out. Plaintiff claimed that he sustained a tibial-plateau fracture in the fall that necessitated surgery (Plaintiff's medical bills were over $128,000). However, Mike's diligent preparation and attention to detail revealed a note within Plaintiff's medical records from the intake nurse, which indicated that Plaintiff told her that he twisted his leg at 4:00 am while getting ready for work (and not that he fell in a parking lot at midnight). Mike located and deposed the nurse in order to have her authenticate and support what Plaintiff told her. Further, Mike pushed Plaintiff's girlfriend and son in deposition to offer testimony that completely contradicted Plaintiff's story.

Motions *in limine* were critical; Mike was able to persuade the Judge to exclude photographs depicting subsequent remedial measures, while Pete skillfully persuaded the Judge that the intake note from the nurse should be admitted as an admission by a party opponent. At trial, Plaintiff's girlfriend was initially sympathetic, until her testimony was completely diminished by Mike's impeachment on cross. Mike's direct of the nurse and restaurant owner were likewise superb, while Pete's effective cross of Plaintiff and dismantling of Plaintiff's physician were masterful. The jury came back with the defense verdict in 20 minutes, and a $10,000 proposal for settlement had been served on Plaintiff years prior.

Jury Finds Plaintiff 50% Comparatively Negligent in UM Case.

Gregory Prusak, of the Orlando office, obtained a hard-fought defense verdict after a four-day trial on a UM lawsuit involving an insured who was claiming a four-level, herniated-cervicaldisc injury following a multi-vehicle automobile accident. No injuries were reported at the scene, but the insured's car was totaled, and he proceeded to embark on two and a half years of consistent medical care. Plaintiff's attorney previously rejected the carrier's $100,000 UM limits, filed a CRN, and asserted a pre-trial demand for $500,000. Greg was able to establish through discovery that Plaintiff actually rear-ended a car first in the chain, and he was then rear-ended by the former tortfeasor. While Plaintiff argued that a phantom vehicle cut off the truck in front of his vehicle causing a sudden stop, Greg established that Plaintiff was admittedly travelling at 70 miles per hour and was only a car-and-a-half length behind the truck prior to the collision. Notably, Greg was legally precluded from arguing that the former torfeasor was previously sued by Plaintiff for negligence, and consequentially, both tortfeasor and Plaintiff blamed the accident on the phantom vehicle at trial. Nevertheless, they successfully impeached Plaintiff multiple times at trial, and the testimony from Defendant's CME expert was strong.

During closing, Plaintiff's attorney asked the jury to find 80-90 percent fault on the phantom vehicle and presented a power-point slide on damages in the amount of $1.8 million dollars, which was the demand to the jury. However, during the charge conference, Greg was able to convince the Judge to give a "presumption of negligence" instruction against Plaintiff for his rear-end collision with the truck. Ultimately, the jury returned a verdict finding Plaintiff to be 50 percent at fault and awarded a net verdict of $125,000. With potential set-offs of $25,000, the final judgment was right around the policy limits.

Summary Judgment Entered Where No Evidence of an Agency Relationship.

David Drahos, of the West Palm Beach office, with the invaluable help of **Sharon Degnan** and **Ryan Elias**, in the Orlando office/appellate division, obtained a Final Summary Judgment in a mall-shooting/wrongful-death case. David Drahos was retained to represent the franchisor where the sole owner of a franchisee shot an employee multiple times before killing himself. David successfully argued Defendant's involvement with the franchisee was limited to maintaining uniformity in the standardization of products and services and did not rise to the level of either apparent or actual control. A proposal for settlement was filed early in the case thereby allowing for entitlement to fees and costs.

Reconsideration of Summary Judgment Denied on a "No Peril Created Opening" Roofing Case.

Sarah R. Goldberg, of the Miami office, received great news where the Court denied Reconsideration of its ruling granting an insurance carrier summary judgment on a "No Peril Created Opening Roofing" case. The Judge specifically relied on Defendant's Response memorandum in order to prepare his Order.

TRIALS, MOTIONS, MEDIATIONS

Jury finds Defendant's Son Acted in Self Defense Resulting in Defense Verdict in Complicated Re-trial.

Sean O'Neil and **Kendra Therrell**, of the Jacksonville office, obtained a complete defense verdict in St. Johns County in a complicated re-trial of a very unique premises liability case. In 2013, Sean and Kendra's Texas-based client purchased a home in St. Augustine, Florida via an online auction. Unbeknownst to him, there was a pair of squatters in the home who ultimately agreed to vacate on April 1. On April 3, Defendant's son volunteered to check on the home. Things got out of hand, and the son punched the 73-year old squatter once in the face, breaking a number of bones. The son alleged that it was in self defense, while the squatter alleged that the attack was unprovoked, and that the momentum of the punch caused him to fall into his wife reinjuring her right arm.

The first trial ended in a defense verdict as to Defendant and his son, but the son entered into a high/low agreement, and the verdict was never entered as to him. Plaintiff then requested a new trial as to Defendant only, which was inexplicably granted. Sean and Kendra assumed the defense shortly thereafter. After a three-day trial, the jury found Defendant's son's battery was justified as self defense, awarding Plaintiffs nothing and absolving Defendant of all liability. As an added bonus, Defendant previously filed a proposal for settlement for $500.

Motion for Summary Judgment Entered on First-Party Roof-Leak Claim.

Valerie Dondero and **Nicole Wulwick**, of the Miami office, obtained an Order Granting a Motion for Summary Final Judgment in favor of a homeowner's insurance company two days before they were scheduled to start trial in the case. This was a five-year old lawsuit where Plaintiff claimed a roof leak with interior damage. The insurance company's inspection found "no peril-created opening" and denied coverage. Despite Plaintiff's tactics to change his theories of recovery on the eve of trial, the Judge refused to allow Plaintiff to amend his complaint. As part of the Order Granting Summary Final Judgment, the Court also disqualified Plaintiff's expert.

Summary Judgment Granted in Trip and Fall Where Restaurant Owner does not own Adjacent Sidewalk.

Kenneth M. Oliver, of the Fort Myers office, received a Summary Judgment win on a case in Naples where an elderly woman tripped over a brick in the sidewalk and shattered her hip. She sued the restaurant-owner Defendant alleging that, since she fell in front of their restaurant, they owed her a duty to maintain the sidewalk in a safe condition. Ken successfully argued the Defendant does not owe any duty to anyone traversing the subject sidewalk since it is not owned by the restaurant. This Motion was granted by a notoriously pro-plaintiff judge. Ken is also pursuing fees and costs against the solvent Plaintiff.

Summary Judgment Entered on Virtual Certainty in Case Involving a Catastrophic Injury.

Michael J. Carney, of the Fort Lauderdale office, obtained a Summary Judgment on virtual certainty in a Polk County case with a $10 million demand and a tough Plaintiff's attorney. Plaintiff had both hands amputated at the wrist in an industrial press; it was a challenging case and a hard-fought battle on summary judgment.

Fraudulent First-Party Claims Leads to Very Favorable Settlement.

Jarred S. Dichek, of the Miami office, received a great result. Jarred was originally assigned an EUO on a water-loss claim in June 2017. While it was clear the claim was suspicious, there was not enough to deny it, and Plaintiff was paid $108,000. Four months later, Plaintiff made a Hurricane Irma claim alleging over $170,000 in damages, but the damage to the roof was not consistent with wind damage. Through EUO's, investigation, and experts, it was determined that the roof damage was intentional and mechanically done, most likely with a hammer. The defense was a difficult one to prove since Jarred had to prove not only that this was a fraudulent claim, but also that Plaintiff participated in the fraud or that it occurred at her direction. Plaintiff has multiple sclerosis and has been diagnosed with severe memory issues related to her disease, which was convenient whenever she was confronted. It was clear that Plaintiff did not go up on the roof to commit the fraud due to her medical condition, and with her lack of memory, it was hard to pin down who had been on the roof or when. A third claim for over $100,000 was subsequently filed by Plaintiff involving a damaged pipe, and it was discovered that the pipe had two pin-point holes in it, which were mechanically done.

The Irma claim went to mediation and Jarred confronted Plaintiff and her attorney with the evidence that had been gathered to support the fraud defense. Plaintiff settled the Irma Claim for $2,500 and the pipe claim for $500. Plaintiff has also been referred to DIF and the Miami Dade Police Fraud Task Force. With the information Jarred and his team were able to provide, they have advised it is likely they will be making an arrest.

Denial of Motion to Stay Pending the Florida Supreme Court Case's Outcome Where Issues are Distinct.

Kara K. Cosse, of the Jacksonville office, obtained a denial of Plaintiff's Motion to Stay pending the Florida Supreme Court case outcome. The Florida Supreme Court was considering the following issue: when an insurance policy includes notification of a fee schedule, can it also conduct a fact-dependent inquiry of reasonableness. In this case, Kara successfully argued that there was no point in waiting for the Florida Supreme Court's decision on the above-referenced (unrelated) issue where the question at issue in Kara's case simply pertained to whether the insurance carrier Defendant's policy properly notified the insured of the fee schedule – a question that had recently been answered by the Second District Court of Appeal. The Judge agreed and set Kara's Motion for Summary Judgment for hearing.

TRIALS, MOTIONS, MEDIATIONS

Voluntary Dismissal with Prejudice in a Category 3 Hurricane AOB Case.

Jennifer Feld, of the Tampa office, obtained a Voluntary Dismissal with Prejudice in a Category 3 Hurricane Irma AOB case in Brevard County, which was set for trial.

While the Board of County Commissioners ultimately deemed the entire building condemned, found the building to be unsafe, a public nuisance, and posed imminent danger to occupants, the dry out company proceeded with its work. Counsel quickly agreed to file a Voluntary Dismissal with Prejudice of all claims, including fees, at the deposition of the Corporate Representative.

Trial Victory in Admitted Liability Case.

Jeremy A. Chevres, of the Miami office and **Florence R. Upton** of the Ft. Myers office obtained a favorable trial result in a high exposure, admitted liability, DUI rear-end vehicle crash case that left one occupant paralyzed. Plaintiff in the instant case was the ex-fiancé of the paralyzed occupant. Plaintiff proceeded on a theory of negligence and negligent infliction of emotional distress. Jeremy successfully argued several critical motions including: (1) Motion for Summary Judgment regarding Plaintiff's Negligent Infliction of Emotional Distress Claims; (2) Motion to Exclude Injuries of Passengers; and (3) Motion to Limit [the ex-fiance's] Testimony to Trial Video Deposition. This resulted in a sterile trial regarding Plaintiff's soft tissue injuries with zero mention of Plaintiff's ex-fiancé's paraplegia. Plaintiff maintained that his case was worth $1.75 million dollars, and in fact, the arbitrator awarded $2,421,505 at non-binding arbitration, which Plaintiff rejected via motion for trial de novo.

In order to highlight the inconsistencies of Plaintiff's testimony and support the defense experts' testimony that Plaintiff exhibited drug-seeking behavior, Jeremy commandeered Plaintiff's bag from behind his counsel's table, placed it on the witness stand, and had Plaintiff line up his 20 prescription pill bottles and describe what each was for. The jury was certainly impacted. Flo Upton handled the punitive damages phase wherein Plaintiff sought additional damages from our client.

Plaintiff boarded $200,000 in past and future medical damages and asked the jury for $12,000,000 in pain and suffering. The verdict was: $25,000 in past medical expenses, no permanent injury, $0 in future medical expenses, $0 in lost wages, and $0 in punitive damages.

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KD speaking engagement

Jennifer Feld, of the Tampa office, was a keynote speaker at the HAWL (Hillsborough Association for Women Lawyers) Membership Luncheon on September 11 at the University Club of Tampa. She presented "Effective Solutions for Supporting & Promoting Women Lawyers" for over 170 attendees and discussed Kubicki Draper's involvement with the Parental Leave Rule.

Pictured left to right:
HAWL President Mamie Wise, Judge Jessica Costello, Jennifer Feld, MDFAWL President Elisa D'Amico and HAWL VP of Programs Melanie Griffin.

presentations | speaking engagements

Our attorneys present continuing education seminars on a variety of topics throughout the year. Below are some of the topics presented by our team in the last few months:

- Florida 5-Hour Law and Ethics
- Defending Automobile Negligence Claims
- Solicitation and Brokering
- Managing the Catastrophic Claim
- Using Social Media to Prove Fraud
- Bad Faith Prevention: Negotiating Single and Multiple Claims
- Effective Solutions for Supporting and Promoting Women Lawyers
- Covenant Not to Compete
- Material Misrepresentation
- Traumatic Brain Injury
- Coverage and Litigation Trends with Additional Insureds in the Southeast
- Managing Pain Management Verdicts: Exploring the Relationship between Psychological Disorders and Pain Complaints
- Proper Defenses to Common Coding Issues and 2% Chiropractic Manipulation Reduction
- How to Effectively Use Appellate Counsel at all Stages of a Claim
- Roofing Construction: Materials and Damages

We welcome the opportunity to host
a complimentary presentation at your office or event
on any topic(s) of your choice.
All presentations are submitted for approval
of continuing education credits.

For more information,
please contact Aileen Diaz
(305)982-6621
ad@kubickidraper.com

Peter Baumberger, Michelle Krone and **Stuart Poage**, of the Miami, Fort Myers, and Tallahassee offices, respectively, recently attended the 2019 CLM (Claims and Litigation Management Alliance) Construction Conference in San Diego, CA. Peter co-presented "Coverage and Litigation Trends with Additional Insureds in the Southeast." The session addressed coverage and litigation trends with additional-insured status and issues that internally affect carriers, such as underwriting and common coverage issues. The panel also addressed badfaith and first-party implications that we are seeing in an escalating fashion. For questions about Peter's topic, please e-mail: construction@kubickidraper.com.

Jennifer Feld, of the Tampa office, spoke as Committee Chair of the FAWL (Florida Association for Women Lawyers) Lactation Task Force at the 2019 Leadership Retreat. She presented on recent Federal and multi-state legislation and ABA Resolution related to courthouse-lactation rooms. Additionally, the Committee revealed its partnership with Mamava, a national corporation. The Committee is also hoping to draft legislation, a "FAWL first", which is subject to approval by the FAWL Board of Directors.

news | announcements

Charles Watkins, of the Miami office, recently attended the National African American Insurance Association's (NAAIA) Annual Conference and Empowerment Summit in Atlanta, Georgia. The NAAIA was organized to create a network amongst African Americans and others employed in or affiliated with the insurance industry. Charles serves as Treasurer of the NAAIA's Florida Chapter, and Kubicki Draper is proud to support all of his efforts to help in the organization's growth. For more information about NAAIA, please visit: https://www.naaia.org/

We are pleased to announce that **Stuart Poage**, of the Tallahassee office, has become a Florida Supreme Court Certified Circuit Court Mediator. His mediation practice will focus on claims involving construction defects, work-zone accidents, and personal-injury matters across Florida. In addition to providing mediation services, Stuart is board certified in construction law by the Florida Bar and is an arbitrator on the American Arbitration Association's construction law panel. Stuart can be reached at (850) 222-5188 or sp@kubickidraper.com.

Congratulations

Congratulations to **Allyson S. Jenks**, of the Fort Lauderdale office, and her husband on the birth of their baby boy, Duke Mark Dettman.

Congratulations to **Lisandra Guerrero**, of the Miami office, and her husband on the birth of their baby girl, Isla.

YOUR OPINION MATTERS TO US.

We hope you are finding the *KD Quarterly* to be useful and informative and that you look forward to receiving it. Our goal in putting together this newsletter is to provide our clients with information that is pertinent to the issues they regularly face. In order to offer the most useful information in future editions, we welcome your feedback and invite you to provide us with your views and comments, including what we can do to improve the KD Quarterly and specific topics you would like to see articles on in the future. Please forward any comments, concerns, or suggestions to Aileen Diaz, who can be reached at: ad@kubickidraper.com or (305) 982-6621. We look forward to hearing from you.

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