KUBICKI DRAPER

THE KD QUARTERLY

SPRING 2014

KD *in the Community*

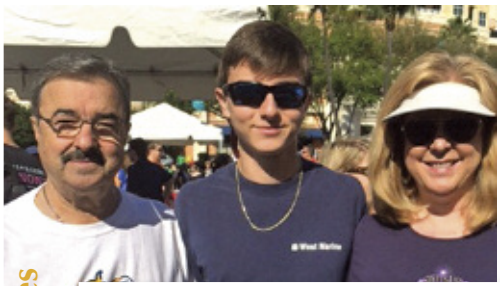

Dress for Success®

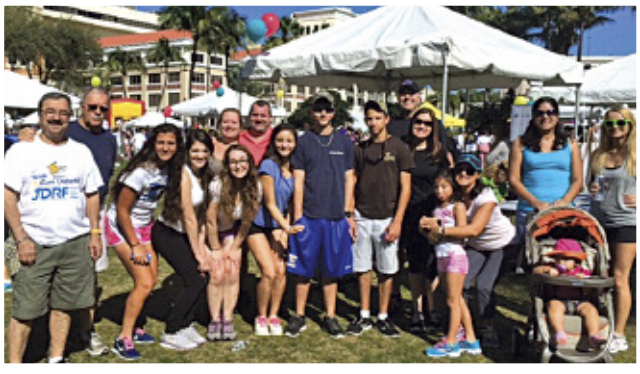
This spring, the KD West Palm Beach, Fort Lauderdale and Miami offices hosted a Dress for Success® Collection Drive. **Alicia Zweig**, of our West Palm Beach office, took the lead in organizing KD's contributions in collecting suits, accessories and shoes for women in the community. Dress for Success® provides professional attire to promote the economic independence of disenfranchised women. Also, "In Jacob's Shoes®," in its continued partnership with Dress for Success®, collected shoes from our offices to sort, pre-treat and distribute them to the women of Dress for Success®. Formed in loving memory of Alicia's brother, Jacob, In Jacob's Shoes® provides new and gently used shoes, school supplies, athletic shoes and athletic equipment to children in need. For more information about Dress for Success® and In Jacob's Shoes®, please visit www.dressforsuccess.org and www.injacobsshoes.org.


Crimestoppers Ride

Frank Delia and **Jeremy Slusher**, both of our West Palm Beach office, participated in the *Cruisin' for Crimestoppers* motorcycle ride -- a 100 mile charitable ride to raise funds for Crimestoppers of Palm Beach County.

Laurie Adams, of our West Palm Beach office, and her son Ryan Martino, co-captains of Ryan's Raiders, won the Golden Sneaker Award for the fourth year in a row, in the Walk to Cure Diabetes in West Palm Beach. Thanks to extensive help from family and friends, and the corporate sponsorship of Kubicki Draper, Ryan's Raiders' donation will assist JDRF in their search for a cure and more effective treatments for Type 1 Diabetes.



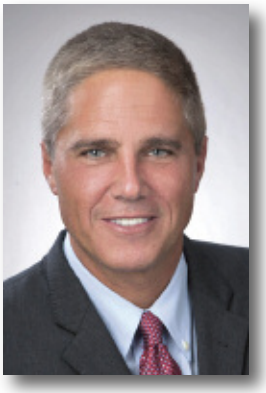

Walk to Cure Diabetes

Frank Delia, and several other members of our West Palm Beach office, participated in Junior Achievement's Job Shadow Program via Leadership Palm Beach. The program's goal is to teach students about the professional work environment and the importance of professionalism in developing a career. For the second year now, Frank invited a few High School Seniors from local academies to visit our West Palm Beach office and introduce them to the legal profession. Our attorneys and staff took time to speak to the kids about what they do, gave them advice on how to get there, and even provided some life advice as well.

Job Shadow Program

EDITOR
Bretton Albrecht

IN THIS ISSUE



SPOTLIGHT ON:

Scott McMahon

J. Scott McMahon, a Shareholder in the Tampa office, is an "AV" rated defense attorney who has been practicing for nearly 26 years. Scott has found his niche as a specialist in transportation, motor carrier, brokerage and cargo litigation. His practice includes drafting all manner of commercial agreements between brokers, carriers, and shippers. He also covers all aspects of the inland transportation of cargo which includes defending motor carriers, transportation brokers, and logistics providers in catastrophic bodily injury cases, large cargo loss claims under the Carmak Amendment, and beyond.

In an industry with an ever-expanding and constantly changing legal and regulatory landscape, Scott stays on the cutting edge, so he can advise his clients and help them find practical solutions and real answers to complex problems and questions.

Scott is an active member of several key organizations devoted to transportation law. A few examples include the Transportation Law Association (TLA), a vital organization dedicated to staying ahead of the constant changes in the law, where Scott serves on the cargo committee and is also a member of the brokerage and logistics committee. In addition, Scott is very involved in the Transportation Intermediaries Association (TIA) and the Transportation and Logistics Council (TLC), the premiere organizations for third-party logistics professionals as well as the Trucking Industry and Defense Association (TIDA) and the Conference of Freight Counsel (CFC).

Scott is often asked to speak at seminars and to prepare significant publications for these organizations, which he also does for his private company clients in the transportation industry and their insurance carriers. His presentations and articles are far too numerous to list, but can be provided upon request. Most recently, Scott presented on "Regulatory/Developments Impacting Trucking Companies, Brokers and Logistics' Providers," at the 40th Annual Conference of the TLC, a nonprofit corporation dedicated to serving the interests of the brokerage, motor carrier and shipping community through education and representation in issues relating to the transportation of goods. Scott was asked to lead the discussion panel on this "hot topic," which focused on broker and logistics provider exposure to liability for the negligence of motor carriers and their drivers. This has become a major area of nationwide concern and litigation. Scott's article in this issue of the KD Quarterly expands on this topic, providing insight into the issues and advice on how brokers can reduce their exposure and liability.

Scott explains that "the value of these industry organizations and the importance of keeping up with the changes in the law cannot be overemphasized." Maintaining a nationwide presence in these industry organizations augments Scott's mission, which is to provide all of his clients with timely and valuable advice. This also assists his clients by presenting them with practical and cost-effective solutions to the unique situations that constantly arise in the ever-changing transportation industry.

Born and raised in Indiana, Scott is a Midwesterner at heart. He earned his Bachelors Degree in business from Indiana University, and his Juris Doctor from Valparaiso University School of Law, where Scott served on both the Law Review and Moot Court. Scott started his practice in Chicago, Illinois by clerking for a Federal Judge and then working with a major commercial litigation firm before moving to Florida in 2000.

Scott is a most proud father of two boys and an avid fan of "all things Chicago," including the Bulls, Blackhawks, and (even) the Chicago Cubs. But think twice about teasing him, as he is also a black belt in To-Shin Do, a Japanese inspired mixed-martial art that has been described by some as a modernized version of ninjutsu. Scott was drawn to To-Shin Do by the discipline, ethics, focus, and determination it fosters, qualities he says are equally important in all areas of his life, including the practice of law.

SCOTT HAS A KNACK AND A DETERMINATION FOR FINDING ANSWERS TO COMPLEX LEGAL QUESTIONS AND SOLUTIONS TO DIFFICULT PROBLEMS. THESE ARE JUST A FEW OF THE THINGS THAT MAKE TRANSPORTATION LAW A PERFECT FIT FOR HIM.

PRESENTATIONS & Speaking Engagements

Ken Oliver, of the Ft Myers office, recently gave a presentation on Ethical, Legal, and Practical Considerations for the Insurance Defense Attorney to the Lee County Bar Association, Tort Practice Section.

J. Scott McMahon, of the Tampa office, recently presented on "Regulatory/Developments Impacting Trucking Companies, Brokers and Logistics' Providers," at the 40th Annual Conference of the Transportation and Logistics Council (TLC).

Jarred Dichek, Brad McCormick and **Charles Watkins**, of the Miami office, visited Gainsco to present "Fraud, Can We Prove It".

Michael J. Carney, of the Ft. Lauderdale office, and **Jeffrey DeFelice** and **Deborah Bergin** of the Orlando office presented a seminar on fraud and abuse to Hartford.

Michael Clarke and **Luis Mendez-Aponte**, of the Miami office, recently presented a seminar on EUO and IME no-shows to Gainsco.

THE FOG OF THE UNKNOWN:

Opportunities, Expectations and the Affordable Care Act

By Jorge Santeiro, Jr.

"[A]s we know, there are known knowns; there are things we know that we know. There are known unknowns; that is to say, there are things that we now know we don't know. But there are also unknown unknowns – there are things we do not know we don't know."

Former United States Secretary of Defense, Donald Rumsfeld.

The Patient Protection and Affordable Care Act (Pub. L. 111-148), more commonly known as the "Affordable Care Act" or "Obamacare," was passed to a chorus of considerable fanfare and controversy on March 23, 2010. It was subsequently modified on March 30, 2010, by the Health Care and Education Reconciliation Act (Pub. L. 111-148).[1] In 2012, the United States Supreme Court upheld the constitutionality of the majority of the provisions of the ACA in *National Fedeation of Independent Business v. Sebelius*.[2] This article will examine some of the effects the ACA may have on personal injury litigation in Florida as well as some opportunities for reform as the ACA's major provisions are implemented. However, as a caveat, and to paraphrase the former Secretary of Defense: There are some effects from this legislation and the ensuing regulations that we know; many that we know we don't know; and many others that we do not know we don't know. Thus, this article is simply a starting point for evaluating a few of the potential implications of the ACA on personal injury litigation in Florida.

Relevant Major Provisions of the ACA

This is not an exhaustive list of the ACA's major provisions, but rather a summary of those that are most likely to either affect personal injury litigation in Florida or provide opportunities for future reform. Such provisions include:

- **Guaranteed Issue.** Prohibits insurers from denying coverage to individuals due to pre-existing conditions.
- **Mandates.** The *Individual Mandate* requires most individuals not covered by an employer sponsored health plan, Medicaid, Medicare or other public insurance programs (such as Tricare) to secure an approved private-insurance policy or pay a penalty (Section 1501). The *Employer Mandate* applies to businesses which employ 50 or more people but do not offer health insurance to their full-time employees. Such employers will pay a tax penalty if the government has subsidized a full-time employee's healt care through tax deductions or other means.
- **Expanded Medicaid Eligibility**. Eligibility will now include individuals and families with incomes up to 133% of the federal poverty level, including adults without disabilities and without dependent children.[3]
- **Medicare Payment System Reform.** Medicare reimbursements are being restructured from fee-for-service to bundled payments, which is expected to result in overall lower reimbursements to Medicare providers.

What the ACA Does Not Do

Tort Reform. The ACA does not mandate or require tort reform, although it encourages states to develop and test alternatives to the existing civil litigation system as a way of . . . encouraging the efficient resolution of disputes, increasing the availability of prompt and fair resolution of disputes, and improving access to liability insurance, while preserving an individual's right to seek redress in court." Sec. 6801.

Medicare Liens. The ACA does not directly affect the manner in which Medicare or CMS collects or enforces liens against primary payors, such as liability and workers' compensation carriers, under the Medicare Secondary Payor Act. However, there is an unknown in this area, as the ACA does require health care providers who participate in Medicare to "report and return" any overpayment within 60 days of the identification of the overpayment. Social Security Act, 42 U.S.C. Section 1128J(d). Under the ACA, the retention of an overpayment after the 60-day deadline is a false claim and subjects the provider to severe penalties, including *qui tam* actions and civil monetary penalties. 31 U.S.C. Section 3729(a)(1)(G), 31 U.S.C. Section 3720 et seq.

It is not entirely clear under the current set of regulations whether and to what extent primary payors, such as liability and workers' compensation insurers, or individual Plaintiff/Medicare beneficiaries, will be affected by the "overpayment" provisions of the ACA. However, this provision may be used to encourage plaintiff's attorneys to promptly resolve Medicare liens when cases are settled or risk potential penalties for retaining a Medicare overpayment.

What We May Expect as Major Provisions are Implemented

To underscore the uncertainty that the ACA will have on the world of insurance claims and litigation, in an article published in March 2013 in *The Insurance Journal*[4] with a target audience of property & casualty actuaries, the authors concluded that the ACA could significantly affect property & casualty insurance, "although as of now it is hard to tell what impact the reforms will have on liability

[1]The Patient Protection and Affordable Care Act and Health Care and Education Reconciliation Act will be collectively referred to as "the ACA."

[2]132 S.Ct. 2566 (2012).

[3]After *National Federation of Independent Business v. Sebelius*, states may opt out of the Medicaid expansion, and several have done so. As of this writing, Florida has not implemented Medicaid expansion. See http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-State/florida.html.

[4]How Obamacare Could Affect P/C Insurance, The Insurance Journal, March 28, 2013.

continued on page 4

and costs. . . . The changes could either increase or decrease liability and costs in medical malpractice and workers' compensation but the impact will differ by state as both lines are sensitive to state laws and regulations."[5]

Some of the primary considerations the authors took into account were the individual and business mandates, which, once fully implemented, should result in an increase in the number of people who have health insurance. The mandates are intended to result in nearly-universal coverage. Section 1501, the individual mandate, requires that most Americans maintain "qualified" health insurance coverage, with a number of categories of exemptions. Nonexempt individuals who do not comply with the mandate are subject to a "penalty of the greater of $695 per year up to a maximum of three times that amount ($2085) per family or 2.5% of household income."[6]

While the authors commented on medical malpractice and workers compensation and did not address any particular states, the impact in Florida may be significant. A large increase in the number of litigants with health insurance may lead to a reduction in the number of plaintiffs that treat under letters of protection (LOPs) and their accompanying grossly inflated medical charges. More Plaintiffs treating through health insurance rather than under an LOP also means that under Florida's collateral source statute,[7] a larger percentage of gross medical billing amount should be subject to post-verdict set-offs under *Goble vs. Frohman*.[8] Additionally, as the insured population presumably increases, one of the primary rationales for treating patients under an LOP will vanish; namely, doctors that treat patients under LOP will no longer be able to justify LOPs as a mechanism to provide health care for those who cannot afford coverage.

In the medical malpractice arena, the authors of the Insurance Journal article speculate that an increase in those covered by health insurance may "reduce medical malpractice liabilities if new insureds are able to visit doctors earlier than they would have without insurance and receive earlier treatment. Early treatment could lead to better medical outcomes and thus help prevent the adverse outcomes that can trigger malpractice lawsuits."[9] Conversely, the increase in the insured population could raise medical malpractice liability, "as more patients per unit exposure would imply more potential risk. Too, a physician shortage could impact the frequency of medical errors."[10] The potential of a doctor shortage was also cited as a risk for increased costs in the workers' compensation arena "if a doctor shortage delayed treatment and a return to work." However, on the other hand, costs may be reduced for comp carriers if "greater access to health care created a healthier workplace" and "if research created greater agreement on what are now questionable treatments."[11]

Changes to the Medicare reimbursement scheme for medical providers may also affect auto liability carriers, as "uncertainty exists if decreases to provider fees in the health care system will require the providers to shift shortfalls to third party payors so as to remain financially sound."[12] In other words, an across-the-board decrease in Medicare reimbursements may push some providers away from Medicare and into opening and operating more PIP clinics or into other litigation related work.

As of the writing of this article, the mandates have not been fully implemented. Under new rules announced in February 2014, medium sized employers with 50 to 99 workers will be given until 2016, two years longer than originally envisioned under the ACA, to implement the mandate before facing fines.[13] Large employers with 100 workers or more are now only required to offer insurance to 70 percent of their employees, rather than 95 percent as originally provided, by 2015.[14] However, even while the mandates are being implemented, uncertainty will continue to prevail as "weak enforcement mechanisms and a slew of exemptions means the requirement to have health insurance under Obamacare packs less of a punch than many Americans assume."[15] Thus, secondary effects resulting from the ACA's aspirational "near universal" health coverage may not be felt for some time. Still, other effects, such as the fallout from reduced Medicare reimbursement to health care providers, may be felt much sooner.

Opportunity for Reform: Florida's Collateral Source Statute

Florida's collateral source statute, §768.76, Fla. Stat., requires trial courts to reduce jury awards post-verdict by the amount paid to or for the benefit of the plaintiff from a collateral source.[16] Evidence of the collateral source payment is inadmissible at trial. Further, in most cases involving past medical payments by health insurers, plaintiffs are allowed to present the full amount of their medical charges regardless of the amounts actually paid by the collateral source payor pursuant to contractual discounts, and any adjusted amounts are reduced by the judge post-verdict.[17] Similarly, evidence of future ***earned*** medical benefits (such as health insurance) may not be introduced to reduce future medical benefits.[18] In the case of medical benefits that were ***unearned*** by the Plaintiff (such as free government health plans including in most cases Medicare), plaintiffs are permitted to present to the jury only the amounts actually paid by the third-party payor.[19] Evidence of future ***unearned*** medical benefits (such as Medicare benefits) may be introduced to reduce future medical benefits.[20]

[5] Id.

[6] ACA Section 1501.

[7] Section 768.76, Florida Statutes.

[8] ***Goble v. Frohman***, 901 So. 2d 830 (Fla. 2005).

[9] How Obamacare Could Affect P/C Insurance

[10] Id.

[11] Id.

[12] Id.

[13] Juliet Eilperin and Amy Goldstein, *White House delays health insurance mandate for medium-sized employers until 2016*, The Washington Post, February 10, 2014.

[14] Id.

[15] Kate Pickert, *The Obamacare Mandate Won't Pack Much Punch*, Time.com, March 31, 2014

[16] Section 768.76, Florida Statutes (2013).

[17] ***Goble v. Frohman***, 901 So. 2d 830 (Fla. 2005)

[18] *Allstate Insurance Co. v. Rudnick*, 761 So. 2d 289 (Fla. 2000).

[19] *ThyssenKrupp Elevator Corp., v. Lasky*, 868 So. 2d 547 (Fla. 4th DCA 2004)

[20] *Florida Physician's Insurance Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984).

continued on page 5

Unless Florida's collateral source statute is amended, it will likely be difficult to convince courts that evidence of a plaintiff's ACA plan should be admitted as a collateral source.[21] It will also likely be difficult to convince trial courts to limit plaintiffs' presentation of damages to the amount actually paid as with cases involving Medicare, since beneficiaries of ACA plans pay premiums and therefore benefits under the ACA will be "earned."[22]

As of yet, there do not appear to be any reported Florida cases where it was argued that a plaintiff's enrollment in an ACA plan should limit presentation past or future medical damages to amounts actually paid, but arguments to limit future medical damages in the wake of the passage of the ACA are already being made in other jurisdictions.[23] In at least one reported case, a California court rejected a defendant's argument that the plaintiff's coverage under the ACA be admitted as evidence to reduce future damages on the basis that "such evidence, standing alone, is irrelevant to prove reasonably certain insurance coverage…because it has no tendency in reason to prove that specific items of future care and treatment will be covered, the amount of that coverage, or the duration of that coverage."[24]

Implementation of the ACA, particularly the mandates, creates an opportunity to reform Florida's collateral source statute. The Florida Justice Reform Institute, which was created by the Florida Chamber of Commerce in 2005, has proposed changes to Florida's collateral source statute to bring it into line with the goals of the ACA.[25] The combination of mandates and fixed costs for health insurance under the ACA undercuts many of the policy arguments that currently allow plaintiffs to present the full amount of their medical charges to juries in most situations, as opposed to the amounts actually paid or allowed by health care providers.[26]

Once the mandates are fully implemented, all Americans except those who qualify for an exemption will be required to purchase insurance with certain minimum qualifications and at fixed costs. Therefore, the cost of medical care, premiums and deductibles will be known to those that are insured under an ACA plan. As for those who are not exempt but decide to forgo health insurance, the amounts that their medical care ***should have cost*** if they had followed the law, including premiums and deductibles, would similarly be known. Furthermore, juries will know that most, if not all, Americans should be required to carry coverage due to widespread publicity about the law. Therefore, most of the justifications for the present version of the collateral source statute will disappear.

The Florida Justice Reform Institute proposes that the revised collateral source statute should (1) "allow jurors to learn of the plaintiff's insurance coverage, including premiums, copays, and deductibles paid by the plaintiff" and (2) "compensate plaintiffs for all expenses necessary to secure and maintain coverage for the treatment" by reimbursing them for premiums paid and any actual co-pays or deductibles. In the case of future medical care, plaintiffs should be reimbursed future premiums above the most affordable plan required by the ACA - the "bronze plan."

The collateral source rule is at odds with the goals of the ACA, as it discourages the exact behavior that is encouraged by the ACA, namely, purchasing health insurance. With the passage of the ACA, "the collateral source rule allows willfully uninsured claimants to hide their lack of health coverage during trial and during the calculation of damages."[27] One of the justifications for the current rule is that defendants should not benefit from a claimant's decision to purchase insurance. However, when fully implemented the ACA will make the purchase of health insurance mandatory for most Americans, thus rewarding a plaintiff for the decision to buy health insurance becomes less important.[28] To the contrary, allowing the current collateral source statute to remain in its current form will reward "willfully uninsured claimants with full damages for their decisions to forgo coverage." Changing Florida's statute would align with the goals of the ACA by "dissuading individuals from refusing to obtain insurance coverage and to ensure that willfully uninsured individuals do not receive damages that an insurance plan otherwise would have covered."[29]

It is nearly impossible to predict whether the Florida Legislature will amend the collateral source statute and, if it does, what form it will take. In the meantime, in any cases where the plaintiff is covered by an ACA plan, discovery should be sent to determine the amount of premiums paid, the amounts paid for claim-related medical care, and any adjusted amounts, justas in any case involving collateral sources. Close attention should also be paid to any changes to the law or the regulations that would open the door to arguments that medical payments under ACA plans should be treated as an unearned benefit such as Medicare benefits.

Conclusion

Passage of the ACA has fostered uncertainty as to how it will affect personal injury, medical malpractice and workers' compensation claims and litigation. In the short term, the answer appears to be that it will have little direct effect but perhaps some tangible side-effects as the business model for many of our colleagues in the medical profession will necessarily change. In the long term, the ACA may have indirectly created significant tort reform. Hopefully, answers will start becoming apparent as the law is implemented and more unknowns become known.

[21] *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So. 3d 1084, 1087 (Fla. 1st DCA 2010) ("[I]t is relatively clear that our supreme court intended to limit abrogation of the evidentiary portion of the collateral source rule to cases where the benefits received to reduce the cost of medical care were not earned (or paid for) in some way by the plaintiff.").

[22] *Id; see also Durse v. Henn*, 68 So. 3d 271 (Fla. 4th DCA 2011) (Because the plaintiff "earned" the benefit of the negotiated amounts, he was entitled to present the full amount of damages to the jury).

[23] Bruce G. Fagel, *The Collateral Source Rule under the Affordable Care Act – The need to prevent a double discount of plaintiff's future medical-care cost damages*, Plaintiff Magazine, January 2014.

[24] *Aidan Ming-Ho Leung v. Verdugo Hills Hospital*, 2013 WL 221654 (Cal. Ct. App. 2013).

[25] Florida Justice Reform Institute, Future of Florida Forum, October 9, 2012

[26] Academic arguments have also been put forth that the common law collateral source rule, which developed at a time when health insurance coverage was rare, needs to be reexamined in light of the passage of the ACA. *See, e.g.*, Ann S. Levin, *The Fate of the Collateral Source Rule After Healthcare Reform*, 60 UCLA L. REV. 736 (2013).

[27] Florida Justice Reform Institute, Future of Florida Forum, October 9, 2012.

[28] *Id.*

[29] *Id.*

Broker Exposure for Motor Carrier Negligence Expands by the Millions:

THE HEYL LOGISTICS VERDICT

By Scott McMahon

If you are a freight broker, unless you have been stuck under a trailer bed checking brake pads for the past year, you already know your business recently became infinitely riskier. This is true for brokers, shippers, and those involved in general logistics operations nationwide. This article explores the ramifications for the transportation industry of a wrongful death case where a jury awarded $1.67 million in punitive damages against a freight broker based upon allegations that it was responsible for the actions of a negligent driver of an independent motor carrier. See ***Linhart v. Heyl Logistics, LLC***, CIV. 10-3100-PA (D. Or. 2012). To better understand the ***Heyl*** case, and to help your company avoid a similar level of potential exposure, it is important to first revisit the brokerage liability case of ***Sperl v. C.H. Robinson Worldwide, Inc.***, 946 N.E.2d 463 (Ill. App. Ct. 2011), which involved a $23.8 million verdict levied against CH Robinson and its contract motor carrier.

SPERL: "Control Over the Motor Carrier"

Sperl involved a truck-on-passenger vehicle collision resulting in multiple fatalities. The jury found that the freight broker, CH Robinson Worldwide, Inc., was liable because it exercised "too much control" over the motor carrier's actions by virtue of engaging in the following actions: (1) providing load instructions and dispatching services; (2) re-routing drivers; (3) requiring drivers to check in daily; (4) providing fuel advances and issuing bills of lading to the motor carrier; (5) imposing fines for late deliveries; and (6) representing itself as "a partner" with the motor carriers. The lesson of ***Sperl*** was that freight brokers who get too involved with the details of a driver's day-to-day operations may ultimately face liability for the driver's fault, even where the broker did not contribute in any fashion to the underlying accident or loss caused by the motor carrier and its driver. ***Sperl*** and other similar cases are now routinely employed by plaintiffs' lawyers to add freight brokers, logistics operators, and even shippers as party defendants (with the motor carrier) in catastrophic bodily injury and cargo loss claims in an effort to add a deep pocket to the settlement or judgment fund.

HEYL: "Negligent Hiring of Unqualified Carriers"

In ***Heyl***, the broker, Heyl, contracted with the motor carrier, Washington Transportation, for a California-to-Oregon delivery. The driver, a Mr. Clary, apparently fell asleep at the wheel, purportedly as a direct result of his use of an illegal substance that left him drowsy. His vehicle rear-ended a trailer parked legally on the curb-side of the highway. The decedent, Linhart, had been inspecting his brakes and was killed instantly when Clary's vehicle struck him. The Estate sued the driver as well as Heyl and the shipper and lessor. Ultimately, the shipper and lessor were dismissed. Following a trial on liability and damages, the jury found that Heyl "negligently retained" the motor carrier, and awarded a $1.67 verdict including punitive damages, finding that Heyl had failed to ensure the carrier had liability coverage, had breached its broker-shipper agreement, and engaged in sloppy record keeping. Critical to this outcome in ***Heyl*** was a "shipper-broker" contract where ***Heyl*** assumed duties that very few brokers should ever agree to undertake.

First, Heyl agreed that it would "ensure the motor carrier would maintain insurance coverage under the Federal and State regulations and that the motor carrier would comply with all Federal and State Regulations." In other words, ***Heyl*** guaranteed the motor carrier's statutory and regulatory compliance. As it turned out, the motor carrier's liability insurance and operating authority had lapsed before the accident. Heyl, having agreed to ensure this, was contractually liable for this failure. Second, the evidence showed that Heyl maintained no filing system to confirm background checks of the motor carriers, nor did Heyl ever request a certificate of liability coverage from the particular motor carrier. Had it done so, Heyl would have presumably discovered the motor carrier's liability coverage had lapsed within 6 days of executing the broker-motor carrier contract. Finally, the motor carrier was found to have a "checkered history of noncompliance" with drug and alcohol regulations under the Federal Motor Carrier Safety Regulations (FMCSR). Heyl settled post-verdict for the policy limits in its broker liability policy, in order to avoid an expensive and uncertain appellate process.

Heyl was the first case where the Court permitted, and the jury awarded, punitive damages against a broker based on its alleged negligent retention of a motor carrier, and it was the latest seven-figure verdict rendered against an otherwise exemplary brokerage operation. The implications of ***Heyl*** to the brokerage, motor carrier and transportation industry as a whole cannot be understated. In the end, according to the Court in ***Heyl***, the lack of clarity and muddied facts regarding the defendants' status as brokers, carriers, shippers and/or logistics operations led to this enormous verdict. Brokers that fail to learn from the past, particularly the recent history of decisions such as ***Heyl***, may be doomed to repeat it.

continued on page 7

Avoiding the Pitfalls of *Heyl*

The fate of the broker-defendant in ***Heyl*** was sealed by a vague (yet routinely accepted) template contract that placed inordinate risks upon the broker. In the vast majority of cases, proper contract drafting can avoid the exposure that ***Heyl*** voluntarily assumed, presumably in order to placate a good customer and not make waves. However, the specific terms and respective responsibilities and liabilities set forth within that particular broker-shipper contract precluded ***Heyl*** from having any chance at obtaining a dismissal from the case. In cases involving tragic accidents, its fair to say sympathetic juries tend to have little regard for attorneys they perceive as skating on ice-thin distinctions between "brokers, shippers and motor carriers."

There are many steps that all brokers, including motor carriers with brokerage divisions, can take to lessen the risk of suffering the same fate, including the following:

1. Do not agree to "ensure motor carrier compliance" with State or Federal regulations. If your current standard agreement contains this language, change it. Agreeing to ensure motor carrier compliance with anything can equate with agreeing to be subject to liability for bodily injury and/or cargo loss claims caused solely by carrier fault. This risk can be eliminated, or at least substantially reduced, by employing different language, such as by simply agreeing to "require" motor carriers to have insurance coverage, which should accomplish the twin goals of satisfying your shippers or consignees, while also protecting you from the reach of a ***Heyl***-type culpability.

2. Do not agree to "ensure carrier performance." As a practical matter, it is impossible for brokers to ensure carrier performance in any event. Yet when things go wrong, as in ***Heyl***, an agreement to ensure carrier performance would likely be enforceable against the broker. Too, the broker's losses for the same will usually fall outside of its contingent cargo or liability insurance coverage.

3. Avoid exercising "too much control" over carrier's drivers. For example, do not represent that you, as a broker, will control or manage the motor carrier's day-to-day duties, reward on-time deliveries, punish late deliveries, or attempt to maintain control over dispatch operations around the clock.

4. Do not express that you are "a partner with the motor carrier." The term "partner," or "joint venture," and the like serve little business purpose, but they do afford a plaintiff's attorney a greater potential to hail your brokerage company into a catastrophic bodily injury or cargo loss case.

5. Maintain electronic files demonstrating searches of the FMSC website to verify motor carrier coverage. Diary all dates when coverage lapses and follow up with the carrier. Heyl's failure to do so, without doubt, made it look sloppy, not to mention even more culpable to the jury--to the tune of $1.67 million in punitive damages.

6. Remove the case to federal court if you can. As a procedural matter, it is usually advisable to be thinking of removing the case to federal court, and be aware that you generally only have 30 days from service of the suit to seek removal from state court to federal court. The advantage of federal court for a broker is clear, as state judges simply will not be as knowlegable about Federal Transportation Law.

The world will never know if ***Heyl*** could have escaped a jury trial and the resulting verdict, had its contracts simply contained better language. Would a jury have even been permitted to consider a negligent hiring claim based only upon the chosen carrier's "checkered driving history"? Given the implementation of CSA 2010, this is now an important legal issue for the motor carrier, shipper, logistics and brokerage industries. Do brokers have a duty to further explore a motor carrier's history under CSA once the FMCSA has already determined and published that a carrier is "operational and roadworthy"? We believe the answer should be a resounding "no." Brokers, shippers and logistics operations should have no duty to research or parse less than pristine driving histories and/or marginal CSA BASICS (Behavior Analysis and Safety Improvement Categories), despite the ***Heyl*** decision. This has become a critical issue for all of our brokerage and motor carrier clients in light of ***Heyl***. Moving forward, it is now up to every broker and its counsel in this brave new world of potential liability to take steps to reduce the broker's risk of getting snared in a trap set by its own contractual obligations.

APPELLATE

Affirmance of Dismissal with Prejudice in Lawsuit Seeking to Hold General Contractor Liable For Subsequent Assault on the Premises.

William ("Bill") Bissett and **Caryn Bellus** of our Miami office, recently secured an appellate affirmance of the dismissal of a unique highly publicized lawsuit which sought to impose liability upon a general contractor for personal injuries occurring on the premises years after construction was completed, based upon allegations that the building was negligently designed and constructed so as to create a foreseeable zone of danger to invitees. The lawsuit was brought by the parents of a teenager who was severely beaten and raped after she was abducted while attempting to return a book at a public library late at night using the external after-hours book drop.

The lawsuit did not name the county which owned and operated the library, but instead, named the general contractor and the architects as defendants. The incident in question occurred some three years after the library first opened. It was alleged in the complaint that various design features of the library's after-hours book drop contained "latent defects and inherently dangerous elements which exposed foreseeable library patrons to serious risk of injury." Plaintiffs alleged that the design and construction violated a Florida law which incorporated certain design standards and concepts known as "Crime Prevention Through Environmental Design." In essence, the lawsuit claimed that the building was designed and constructed in such a fashion that it allowed for criminal acts to be committed outside of public view and in an area of poor illumination.

Bill drafted the motion to dismiss the plaintiffs' amended complaint, and **Peter Murphy**, of our Miami office, argued it. The trial judge agreed with the defendant's arguments based on a lack of duty and foreseeability and the Slavin doctrine, and it dismissed the complaint with prejudice. The trial court recognized that imposing liability on a contractor for injuries caused to invitees by criminal acts committed years later, on premises owned and controlled by others, stretches the concept of duty too far and would be an unreasonable burden on the construction industry and a seemingly boundless theory of liability.

Plaintiffs appealed the trial court's dismissal to the Second District. Bill authored the contractor's appellate brief, and Caryn presented the successful oral argument to the appellate court. The appellate court subsequently issued its decision affirming the trial court's dismissal of the complaint with prejudice.

Successful Petition for Certiorari to Challenge Order which Failed to Disqualify Opposing Counsel based on a Conflict of Interest.

Sharon Degnan, of our Ft. Lauderdale office, recently prevailed on a petition for certiorari in the First District Court of Appeal, in which she challenged an order of the trial court that failed to fully disqualify opposing counsel based on a clear conflict of interest. The First District agreed the subject order materially departed from the essential requirements of law and resulted in irreparable harm that could not be adequately remedied on plenary appeal. Accordingly, the appellate court quashed the trial court's order and directed that plaintiff's counsel be disqualified from further representation in the matter. The appellate court recently denied rehearing of its decision.

Plaintiff's Certiorari Petition Successfully Opposed.

Caryn Bellus, of our Miami office, and **Sharon Degnan**, of our Ft. Lauderdale office, recently opposed a petition for writ of common law certiorari filed in the Third District Court of Appeal by Plaintiff, who was seeking to avoid financial discovery ordered by the trial court. Our appellate team opposed the petition, arguing to the appellate court that the financial discovery was warranted and fully relevant to the issues in the case, which included an enormous lost wage claim. In short, they successfully argued that Plaintiff cannot maintain such a claim and then stonewall discovery into his personal finances.

TRIALS, MOTIONS, MEDIATIONS

Complete Defense Verdict in Rear-End Collision Case.

Jorge Santeiro, Jr., and **Karina Perez**, of our Tampa office, obtained a complete defense verdict in a rear-end collision case involving four vehicles. Jorge and Karina represented the rear driver (and his employer), whom Plaintiff alleged was inattentive and hit the third vehicle in the chain so that it was propelled into the stopped vehicle ahead, causing a chain reaction crash and totaling the accident vehicles. Plaintiff, who was a passenger in the third vehicle, underwent separate neck and shoulder surgeries and managed to amass over $150,000.00 in medical bills. He also had a recommendation for future surgery. During the five-day trial, Jorge and Karina broke down Plaintiff's case through skillful cross-examination and evidentiary arguments. Despite the Plaintiff asking for $750,000.00 in closing arguments, the jury found no liability and entered a complete defense verdict.

Complete Defense Verdict in Automobile Negligence Case with Punitive Damages Claim.

After a six-day trial in an automobile negligence suit (with a punitive damages claim), **Joe Carey**, of our Orlando office, obtained a complete defense verdict. Defendant was not charged with DUI at the accident scene and passed a field sobriety test, but discovery and credit card statements showed that he had consumed a number of pints of beer that evening. Plaintiff's toxicologist therefore opined the Defendant was intoxicated at the time of the crash. Accordingly, the Judge allowed the suit to be amended to add a claim for punitive damages. To make matters worse, Joe's expert changed his opinion on the eve of trial and concurred that the defendant's blood alcohol level was beyond the legal limit.

Plaintiff reported no injury at the scene, but was seen for a right rotator cuff injury 3 months later. He also claimed disc injuries to the lumbar and cervical spine, and a closed head injury. The right shoulder injury required surgery and the past and future medical expenses totaled $150,000.00. The jury demand at trial was in excess of $750,000.00. Fortunately, the defense had surveillance video showing the plaintiff lifting and installing tile. Joe also had some strong medical experts testify on causation. Ultimately, as a result of Joe's preparation of the case, presentation of witnesses, and skillful cross-examination and arguments, Joe persuaded the jury to reject Plaintiff's case, and the jury returned a complete defense verdict.

TRIALS, MOTIONS, MEDIATIONS

Final Summary Judgment in Negligent Procurement/Coverage Case.

Grayson Miller, of our Pensacola office, obtained a final summary judgment in a case involving an insurance coverage dispute. Plaintiff alleged that she was supposed to be added as an additional insured on her grandmother's policy and that the insurance agent and insurance carrier negligently failed to make the addition to the policy as requested. Grayson both successfully drafted and argued the summary judgment motion and persuaded the judge that there was no genuine issue as to any material fact and that, as a matter of law, Plaintiff was not covered under the policy as an additional insured. The trial court ultimately agreed and entered final summary judgment in favor of the defense.

Final Summary Judgment in Construction Defect Case.

Michelle Krone and **Michael Valverde**, of the Fort Myers office, prevailed on a Final Summary Judgment Motion in a construction defect case. The claim against our client was brought by a general contractor in a third-party complaint alleging common law indemnity and contribution. The case involved renovations to a single-family residence in Fort Myers and the construction of an addition that nearly tripled the size of the home. During the renovations and construction, a fire occurred that required remediation and reconstruction of most of the residence. Our client performed interior faux painting on the residence and fire remediation services related to the work after the fire. The general contractor who was sued, in an overzealous effort to cast blame elsewhere, brought a third-party claim against our client based on allegations that the company saturated the interior walls with water as part of its fire remediation services, allegedly contributing to the extensive mold that was already in the residence. Originally, the third-party complaint contained a single count of contribution.

While the homeowners themselves recognized the futility of an action against our client, the general contractor would not be dissuaded despite aggressive discovery and an early proposal for settlement. As expected, the general contractor rejected the proposal as well as several subsequent attempts at settlement for the same nominal amount. The same nominal offer was also made directly to the homeowners, who accepted the offer in exchange for a full scope-ofwork release as to our client, and their work on the project. A motion for final summary judgment was then filed on the contribution count. The general contractor then filed an amended third-party complaint adding an additional count of common law indemnity. In response, Michele and Michael filed an amended motion for final summary judgment, and successfully argued that, regardless of the amendment to the third-party complaint, our defendant was entitled to summary judgment as a matter of law. The trial court agreed and granted the defense motion.

Final Summary Judgment in Construction Lien Case.

Rich Cartlidge, of our West Palm Beach office, obtained a final summary judgment in a construction lien case. The Plaintiff had recorded a construction lien against our client's property and filed a foreclosure action as a result. Rich challenged the lien, arguing that the plaintiff contractor, who had installed concrete flooring, had no right to a lien because he did not have the specialty license required by Palm Beach County. A recent amendment to the relevant statute, which amended the statute to only apply to preclude the lien when a "State" license is required for the work, posed an obstacle to this argument. However, Rich maintained that the County license requirement was implemented by way of a special act of the State Legislature and, therefore, constituted a "State" license. Rich successfully advanced this argument at the hearing against a well known construction lawyer from Boca Raton. After taking the matter under advisement, the Court was persuaded by Rich's argument and entered summary judgment in favor of the defense.

Partial Summary Judgment on Key Legal Issues Yields Favorable Settlement for Nominal Amount in Federal Products Liability and Negligence Case.

Stuart Poage, of the Tallahassee office, obtained a partial summary judgment on key legal issues and, as a result, obtained a favorable settlement for a nominal amount in a products liability and negligence case brought in federal court. The Plaintiff filed the products liability and negligence claim after he cut his hand on a glass block, causing permanent nerve damage. The case was removed to federal court based on diversity of citizenship. Stuart served a strategic proposal for settlement in an effort to avoid litigation expenses and the uncertainty of trial. In addition, after having Plaintiff evaluated by a neurologist in San Diego (where Plaintiff had moved), Stuart prepared a motion for summary judgment on the issues of past and future lost income/earning capacity and future medical expenses, as Plaintiff had no evidence to support those claims. The federal judge agreed and granted the partial summary judgment as to those issues, thereby limiting Plaintiff to claiming his past medical expenses, which were small in comparison to his other claims. Faced with increasing travel and trial preparation costs, and the fact that the defense proposal for settlement had expired (meaning the defense would recover fees and costs if it prevailed), Plaintiff agreed to settle his claims for a very nominal amount to avoid a potential personal judgment against him for the payment of defense costs and fees after verdict.

Successful Opposition to Plaintiff's Summary Judgment on Novel Grounds in PIP case.

Kara M. Carper, of the Miami office, successfully opposed a plaintiff's motion for summary judgment based on novel grounds in a PIP case. Specifically, plaintiff, an assignee medical provider, argued that, as a matter of law, the defendant insurer could not rely on an insured's misrepresentation in the policy application as a coverage defense, as the plaintiff provider was an "innocent assignee" of the insured. Kara successfully opposed this motion, arguing plaintiff could not create coverage where none exists by creative arguments and attempts to stretch the "innocent insured" doctrine beyond its limits. The trial court agreed, observing that the cases relied on by plaintiff largely involved property losses where coverage was already established and a bad act by one insured, such as a misrepresentation during the investigation of the claim, did not bar an innocent insured's right of recovery. Accordingly, the court denied plaintiff's motion and held the defense is entitled to rely on the affirmative defense of the insured's material misrepresentation in the policy application, which, if established at trial, will void coverage from the inception of the policy.

KD *in the News*

The Claims and Litigation Management Alliance (CLM) has restructured its regional leadership structure into 10 regions across the United States - each region having two chairs. **Brad McCormick**, of our Miami office, has been selected to serve as one of the two chairs in Florida to assist in the development and growth of the CLM, and foster communications throughout the region. Regional Chairs guide the CLM in the achievement of its overall objectives and initiatives and provide a link between the CLM Executive Director, Advisory Board and Local Chapter Leadership. The CLM promotes and furthers the highest standards of claims and litigation management and brings together the thought leaders in both industries. The CLM sponsors educational programs, provides resources, and fosters communication among all in the industry. To learn more, please visit www.theclm.org.

G. William Bissett, Francesca Ippolito-Craven and **Nicole Wulwick**, all of our Miami office, authored the Florida Law Section of the 2014 version of the national reference source "Tort Law Desk Reference: A 50 State Compendium," Aspen Publishers, which provides summaries of laws and citations to controlling statutes and case law to answer vital questions about each state's tort laws.

Michelle Krone, of our Ft. Myers office, was recently appointed by the Women's Construction Litigation Alliance (WCLA) to serve a two-year term as a Regional Associate for the Southeast region, which includes 10 states. WCLA is a non-profit public benefit corporation that supports and encourages women in a wide-range of practice areas involving construction litigation. WCLA holds regional and local educational and networking events. It also presents "Items of Interest" in monthly newsletters and will soon provide this information on its website and through social media. For more information on the WCLA you can contact Michelle at mmk@kubickidraper.com or join WCLA on LinkedIn.

New Additions to the Firm

Ava G. Mahmoudi – Associate, Ft. Lauderdale office

MDA Glow Walk

in the Community

Kendra Therrell, and several other members of our Ft. Myers office, participated in the Muscular Dystrophy Association's Glow Walk to honor adults and children with more than 40 muscle diseases in MDA's program. The walk raised funds to help the Muscular Dystrophy Association foster research and provide vital services to families affected by neuromuscular disease.

Stefanie Capps, of our Ft. Myers office, is President of Southwest Florida Pi Beta Phi Alumnae Club, whose national focus is to increase literacy. She and her sorority alumnae group volunteered at the Galisano Children's Hospital of Southwest Florida -- they read to children in the hospital, donated 50 children's books and decorated the children's playroom as part of the annual Read Across America campaign for Dr. Suess' birthday.

Stefanie is also a member of the Junior League of Ft. Myers (JLFM). She volunteered at the Kids in the Kitchen event, a fair that teaches children, ages 3-12, about the importance of eating healthy while living an active lifestyle. The fair, which is free to all, had activity stations related to general health, nutrition, agriculture, and exercise and fitness. Children participated in these educational activities and were also entered in a raffle for bikes, toys, and other prizes. JLFM's Kids in the Kitchen initiative is nationally recognized. The Junior League of Fort Myers took that program and restructured it to fit the needs of the SWFL community to fight childhood obesity.

LAW OFFICES

KUBICKI DRAPER

Professional Association
Founded 1963

www.kubickidraper.com

CONTACT INFORMATION

New Assignments

Brad McCormick	305.982.6707	bmc@kubickidraper.com
Sharon Christy	305.982.6732	sharon.christy@kubickidraper.com

Firm Administrator

Rosemarie Silva	305.982.6619	rls@kubickidraper.com

Seminars/Continuing Education Credits

Aileen Diaz	305.982.6621	ad@kubickidraper.com

Statewide Coverage in Florida from 11 Offices

MIAMI KEY WEST FORT LAUDERDALE WEST PALM BEACH NAPLES/FORT MYERS
TAMPA OCALA ORLANDO JACKSONVILLE TALLAHASSEE PENSACOLA

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 that 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.