KUBICKI DRAPER

THE KD QUARTERLY

SUMMER 2014

KD *in the Community*

In May 2014, attorneys from Kubicki Draper's Tampa office attended "Cocktails for a Cause," the fourth annual fundraiser for the Lawyers' Autism Awareness Foundation (LAAF). LAAF raises money to fund grants for autism therapies for needy individual families throughout the Tampa Bay region. The Foundation also holds a sensory friendly Santa event and resource fair each December, where children on the autism spectrum and their families can enjoy visiting with Santa Claus, doing crafts and opening holiday gifts in a welcoming, sensory-friendly environment. The Foundation was co-founded in 2011 by Tampa shareholder **Jorge Santeiro, Jr.**, who has a son on the autism spectrum. Kubicki Draper has been a steadfast supporter, sponsoring LAAF each year since its inception.

Chelsea Winicki, of our Jacksonville office, served on the board for this year's "Rendezvous on the River," a charity event presented by the Jacksonville Bar Association's Young Lawyers Section to benefit "Dreams Come True." Kubicki Draper also proudly served as a sponsor. Dreams Come True grants the wishes of terminally ill children in the Jacksonville area by bringing together people from a variety of professions in support. In addition to Rendezvous on the River, Chelsea also served on the committee for the Arts Supplies and Toiletries Drive. The drive sought to obtain donations of art supplies for a Jacksonville elementary school and toiletries for a local community center in Jacksonville that provides basic services to those in need, in the form of food, clothing, and basic necessities. The toiletries drive was also a great success and the Kubicki Draper Jacksonville office pitched in to make a great donation for the event.

KD *News*

Congratulations to KD members who were selected for inclusion in this year's Florida Super Lawyers and Rising Stars lists:

Florida 2014 Super Lawyers: Sharon C. Degnan, Caryn L. Bellus, Daniel Draper, Jr., Brad J. McCormick, Carey N. Bos, Angela C. Flowers, Betsy E. Gallagher

Florida 2014 Rising Stars: Joshua E. Polsky, Bretton C. Albrecht, Steven W. Cornman, Jr., Nicole M. Ellis, Michael F. Suarez, Nicole L. Wulwick, Kenneth "Jayme" Idle, Stuart C. Poage, Frank Delia, David Drahos, Christin Marie Russell

Betsy Gallagher, of the Tampa office, was selected Florida "Legal Elite" in the area of appellate practice.

Harold Saul, of the Tampa office, has been selected one of "Tampa's Top Rated Lawyers of 2014" by Legal Leaders.

EDITOR
Bretton Albrecht

IN THIS ISSUE

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SPOTLIGHT ON:

Michelle Krone

Michelle Krone, a Shareholder in the Ft. Myers office, loves a challenge. This is one of many reasons she found her calling in construction law, a challenging and complex area of litigation. Michelle is the Co-Chair of the firm's Construction Practice Group and is Board Certified in Construction Law by The Florida Bar. Board Certification recognizes an attorney's special skill, proficiency and experience in a specific area of law, as well as their professionalism. Michelle acquired her Board Certification in 2005, the first year it was offered, making her one of the first Board Certified women construction lawyers in the state.

Michelle was encouraged to pursue the Certification by one of her mentors, Larry Leiby, author of the Florida Construction Law Manual. Although Michelle gained experience in several areas, ranging from products liability to personal injury and automobile cases, she fell in love with construction law due to its complexities and challenges, and she was drawn to the technical side of the practice. Michelle's father is an electrical engineer who worked for many years with Motorola. From an early age, she was exposed to a technical environment, watching and helping her dad put together circuit boards, learning how to code, and watching him invent a myriad of electronics. Michelle was also greatly influenced by her mom, who always encouraged her to try new things, to be fearless, and to push herself to be the very best in everything she did. Her encouragement not only endured through law school, but also years earlier, before law school was even a glimmer in Michelle's eye. Her encouragement took her love for dance and cheerleading to a whole new level, which landed Michelle a place on the Miami Dolphins' cheerleading squad for the 1990-1991 season, which is just another reflection of her positively competitive spirit.

Michelle brings the same passion, drive, and determination to all her cases. In an area with endless complexities, subspecialties, and expansive multi-party litigation, Michelle makes sure her clients do not get "lost in the shuffle."

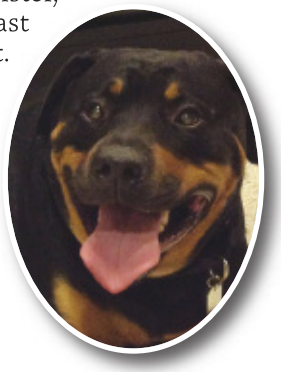
Michelle is proactive and works to find creative solutions and achieve results in the most efficient way, whether that means actively initiating settlement negotiations with the other parties, or battling it out in court.

An "AV" rated lawyer, Michelle has been with the firm for almost 15 years and has practiced exclusively in the area of construction law for over a decade. She represents owners, contractors, subcontractors and design professionals in virtually all aspects of construction litigation, transactions, construction-related products' liability, and disciplinary matters. She has handled several complex matters over the years and has represented many different design/builders, general contractors, design professionals and subcontractors including excavation and groundwork, masonry, windows, waterproofing, electrical, plumbing, stucco, roofing, HVAC and shell/slab. Michelle has also represented contractors in Chinese drywall litigation. She is experienced in multi-party arbitrations and mediations, is well versed in the coverage issues that can affect her clients, and has presented construction law lectures at several continuing education seminars.

Michelle earned her B.A. in criminal justice from Florida Atlantic University in 1996, where she was on the Dean's List and President's list. She earned her J.D. from St. Thomas University School of law in 1999, where she made the Dean's List, served as an SBA senator and received the "Book Award" in Torts.

Michelle is a member of the Defense Research Institute (DRI), the Association of General Contractors, The Florida Bar Real Property/Construction Law Section, and the Women's Construction Litigation Alliance (WCLA), where she serves as a Southeast Regional Associate. She is also involved in the Lee County Habitat for Humanity. Michelle was recognized in the Gulfshore Business Magazine, February 2010, edition of "Legal Eagles," in the inaugural list of "go-to" lawyers. (See http://www.gulfshorebusiness.com/June-2010/Legal-Eagles/).

A Chicago native, Michelle has called Florida home since she was the age of three and has one sister, Kimberley, who resides on the East coast of Florida but remains close in her heart. Michelle loves the outdoors and especially being on the water. Anyone who knows Michelle also knows about her love for animals. She supports many local and national charities devoted to saving the lives of animals and has a special place in her heart for Rottweilers, especially her Rottie, Diesel.



New Additions to the Firm

We are pleased to announce the arrival of:

Jason S. Stewart and **Adam M. Friedman,** Associates, Ft Lauderdale
Jerrod M. Paul, Associate, Miami
Dana Feurtado, Associate, Orlando
Christopher J. Saba and **Karly R. Christine,** Associates, Tampa

POLICY INTERPRETATION: Are we all on the same page?

By Nicole Ellis

One of my favorite new commercials features Discover Card where the customer wants "frog" protection and the company representative is discussing "fraud" protection. At the end of the commercial, both the customer and the company representative are convinced they are "on the same page." They clearly are not. Certainly with insurance policies, being "on the same page" is extremely important. Policy analysis is vital in any loss and case. It should be done first at the claim level to avoid unnecessary litigation costs. The focus should be on reading the policy and court interpretations of policy language, keeping in mind the appropriate burdens, in order to be on the same page.

Insurance policy interpretation is generally a question of law. Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn from, the issue is ordinarily one to be determined by the Court. ***Volusia County v. Aberdeen at Ormand Beach***, 760 So. 2d 126, 131 (Fla. 2000). In interpreting insurance contracts, the Court must follow the generally accepted rules of construction, meaning that insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage. ***Swire Pacific Holdings, Inc. v. Zurich Ins. Co.***, 845 So. 2d 161, 165 (Fla. 2003). The Court's task is simply to apply the plain meaning of the words and phrases used to the facts before it.

When the Court is analyzing an insurance contract, it is necessary to examine the contract as a whole, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others. The purpose of the type of insurance obtained can also be taken into consideration. Ambiguous coverage provisions are construed strictly against the insurer that drafted the policy and liberally in favor of the insured. Ambiguous exclusionary clauses are construed even more strictly against the insurer than coverage clauses---thus, the insurer is held responsible for clearly setting forth what damages are excluded from coverage under the terms of the policy.

How is plain meaning determined, and what is ambiguous? If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous. *Id.* at 165. Plain meaning refers to the principle that insurance contracts must be read in light of the skill and experience of ordinary people and given their everyday meaning as understood by the man on the street, not insurance professionals.

When interpreting insurance policies, Courts may consult references commonly relied upon to supply such accepted meanings of words. Courts will look at both legal and non-legal dictionaries. In the absence of ambiguity, the words and phrases utilized in an insurance policy are to be given their plain or everyday meaning.

A lack of definition of an operative term in a policy does not necessarily render the term ambiguous and in need of interpretation. When the insurer has not defined a term in a policy, the common definition of the term should prevail. ***Libel v. Nationwide Ins. Co. of Florida***, 22 So. 3d 111, 115 (Fla. 4th DCA 2009).

It is helpful to look at some examples of Court decisions interpreting policies, defining terms, and ambiguity. In ***Swire Pacific Holdings, Inc. v. Zurich Insurance Co.***, 845 So. 2d 161 (Fla. 2003), the Florida Supreme Court addressed the meaning of "physical loss or damage" and "ensuing loss" within a design defect exclusionary clause with an ensuing loss exception. There, the insured builder/owner of a new condominium expended money to alter building plans and for construction to bring a building into compliance with government building codes. The insured then submitted a claim to its insurer to recover the money. The design defect provision of the insurance policy excluded loss of damage caused by fault, defect, error or omission in design plan or specification. However, the exclusion did not apply to "physical loss or damage" resulting from such fault, defect, error or omission in design plan or specification. The insurer denied coverage on the ground that the insured's claim dealt with the cost of correcting a design defect and not any physical loss or damage resulting from the defect. The Florida Supreme Court agreed with the insurer's interpretation of the policy, holding, "the only reasonable definition for the term 'physical loss or damage' as used in the ensuing loss provision of the clause is damage that occurs subsequent to, and as a result of, a design defect." *Id*. at 166. (emphasis in original)

Explaining its interpretation, the Court further held, "the first prong of the exclusionary clause precludes recovery when the loss is caused directly by the design defect. The issue therefore becomes . . . whether Swire repaired a *physical* loss resulting from the design defect so as to escape the exclusionary clause and have reimbursement under the policy . . . Swire's sole claim here is an attempt to recover the expenses incurred in repairing a design defect. No ensuing loss resulted to invoke the exception to the exclusionary provision . . . No loss separate from, or as a result of, the design defect occurred. Therefore, we conclude that . . . Swire is not entitled to recover the expenses associated with repairing the design defect. To hold otherwise would be to allow the ensuing loss provision to completely eviscerate and consume the design defect exclusion." *Id.* at 166-68. (emphasis in original)

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POLICY INTERPRETATION: Are we all on the same page?

In ***Fisher v. Certain Interested Underwriters at Lloyds Subscribing to Contract No. 242/99***, 930 So. 2d 756 (Fla. 4th DCA 2006), the court addressed the meaning of "direct physical loss." This case is an example of when the language used was clear, but purpose of the insurance policy appeared to drive the Court's ultimate determination in interpreting the meaning. The homeowners returned home after a month-long vacation to discover that a water pipe had leaked under the foundation. They discovered that personal property had sustained mold damage. The insurer denied coverage for damage to personal property that did not have direct contact with the discharge of water.

The personal property coverage of the homeowner's policy was "named peril" coverage. The insuring language of the section provided: "We insure for **direct physical loss** to the property described in Coverage C **caused by** a peril listed below unless the loss is excluded in SECTION I - EXCLUSIONS. *Id*. at 758. (emphasis in original) One of the named perils listed included the following: "12. Accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance." *Id.* at 758. The exclusions referred to in Section I did not apply.

The Fourth District Court of Appeal ruled in favor of the insureds, finding the mold damage was a "direct physical loss" caused by a named peril within the meaning of the policy, entitling homeowners to coverage. "In this case, no one disputes that the mold resulted from the discharge of water-a named peril. The question is whether the damage was "direct" or consequential. We hold that the mold damage in this case was a "direct" consequence of a named peril. The discharge of water set into motion a sequence of events proximately resulting in mold damage to the homeowner's personal property . . . It makes little sense to construe the policy so narrowly that the consequential mold damage from the discharge of water is not covered. To do so would require us to turn a blind eye to what common sense dictates." *Id.* at 759.

In ***Libel v. Nationwide Ins. Co. of Florida***, 22 So. 3d 111 (Fla. 4th DCA 2009), the court's interpretation of the policy exhibits the importance of reading the policy as a whole, in combination with the principles behind an "all-risk" policy. In this case, a ruptured water line beneath the insured's home caused soil beneath the home to erode, which in turn caused the foundation to settle, which in turn caused the floor of every room in the home to become separated from the walls of the home. The policy specifically excluded loss caused by earth movement due to natural or unnatural causes. In a separate section, the policy discussed additional causes of loss excluded from coverage. These losses included loss to property resulting directly from continuous or repeated seepage or leakage of water over a period of time from a plumbing system that results in deterioration, rust, mold, or wet or dry rot, as well as loss resulting directly from wear and tear, marring, or deterioration. However, after each of these exclusions the policy states that if the loss caused by the water is not otherwise excluded, the policy covers the cost of tearingout and replacing any part of the building necessary to repair or replace the system or appliance, though the system or appliance from which the water or steam escaped is not covered. *Id*. at 113-14. The policy further stated that under exclusions, any loss that follows is covered unless it is specifically excluded. *Id*. at 113-14.

The trial court determined that the provision of the policy that covered the cost of tearing out and replacing any part of the building necessary to repair the system or appliance did not cover the cost of repairing the rupture water line because the loss was "otherwise excluded" by the earth movement exclusion. On appeal, the insureds argued that if the cost of repairs does not fall within the provisions plain meaning, than an ambiguity exists in the policy, because after the policy states it does not cover a loss that is "otherwise excluded," it goes on to state that the cost of tearing out and replacing any part of the building necessary to repair the system or appliance is covered.

The Fourth District Court of Appeal found that the cost of tearing out and replacing any part of a house necessary to repair the ruptured water line was covered under the policy because the policy language is ambiguous. "In the instant case, the trial court erred by not holding that the Policy covered the cost of repairing the plumbing system. This is because the Policy, by providing that it does not cover damage caused by water from a plumbing system that is otherwise excluded, but then stating that it covers the cost of repairing a system that caused water damage, has created an ambiguity, as two or more reasonable interpretations of these two intersecting provisions are feasible . . . In following the principle that ambiguities in insurance contracts favor the insured and are strictly construed against the insurer, we hold that the cost of repairing the water line was covered by the Policy and reverse the trial court's order to the extent that it held to the contrary." *Id*. at 117. The court further held that such an interpretation is in accord with the principle that an all-risk policy will cover a loss falling within its coverage unless that loss is specifically excluded. *Id* at 117.

Keep in mind that in considering the aforementioned cases, it is important to remember that each policy is different, contains different language, and has different endorsements and limitations. How the above cases apply to other situations depends on facts, circumstances, and applicable policy language.

Additionally, evaluating a claim and ultimately whether to pay the claim should not only include a thorough reading of the policy, but also some thought as to the applicable

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Intent Requirement in Statutory Rescission Renders Two Different Results in Recent Fidelity Cases

By Lucretia Pitts Barrett

An insurer has a right to rescind an insurance policy based on a material misrepresentation in the insurance application by the insured. In general, to prove the right to rescind an insurance policy, the insurer must prove that there was a material misrepresentation of a fact or statement of the application that if known to be false by the insurer, the insurer would not have bound the insurance policy. Florida, Missouri, and North Carolina are examples of states whose misrepresentation in the application statutes follow this general rule of proof.[1]

However, some state statutes, such as Tennessee, Louisiana, and District of Columbia, require an additional element of intentional misrepresentation.[2] Proving intent of a person or entity is a more difficult standard of proof and may determine the success or failure of a claim or defense of the right to rescind by an insurer. The difficulty of the high standard of proof of intent was demonstrated in two recent fidelity cases where the insurers asserted the right to rescind the policy for material misrepresentation in the application.

Kurtz v. Liberty Mutual Ins. Co.

In ***Heide Kurtz v. Liberty Mutual Ins. Co***., Case No. CV 11-7010 DMG (C.D. Cal. April 14, 2014), Namco Financial Exchange Corp ("NFE") applied for a crime policy with Liberty Mutual and excess policies with Zurich American Ins. Co., Axis Ins. Co., and Twin City Fire Ins. Co. An application question for all insurers was:

> *"Are proceeds from 1031 transactions held in bank accounts segregated from those of your operating funds?"*

NFE responded "no." [3] Liberty Mutual declined to issue the crime policy to NFE because NFE's response indicated that it lacked internal controls to reduce the theft risk of the client funds in NFE's possession. In August of 2007, NFE forwarded a new application and answered Question Three in the affirmative. The crime policy and excess crime policies were issued.

After a $35 million fidelity claim was made on NFE's misappropriation of its clients' 1031 funds, the insurers rescinded the policies based on NFE's representation of separate accounts in the application for insurance. The California federal court granted the insurers' motion for summary judgment on their rights of rescission. The court applied California's statute on rescission, which states that

> *"[i]f a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false."*

Cal. Ins. Code § 359.

The court reasoned that NFE provided a material, false statement in its affirmative response to the application question, because the uncontroverted facts were that NFE did not have a separate account for its clients' 1031 funds. The insurers testified that if they had known that NFE did not have a separate account, they would not have issued the crime policies. The court applied a subjective standard to determine that the failure to separate client funds from business funds was a direct risk to the employee theft or dishonesty insurance. Furthermore, when NFE's trustee argued that the insurers failed to prove intentional misrepresentation, the court held that California "uniformly hold[s] that an insured's misrepresentation or material facts on an insurance application is sufficient to deny coverage even if negligent or unintentional." Citing to ***Nieto v. Blue Shield of Cal. Life & Health Ins. Co.***, 181 Call. App. 4th 60, 75-77, 103 Cal. Rptr. 3d 906 (2010).

FDIC (Wheatland Bank) v. OneBeacon Midwest Ins. Co.

In ***The Federal Deposit Ins. Corp., as receiver for Wheatland Bank v. OneBeacon Midwest Ins. Co.***, 2014 WL 1292833 (N.D. Il. March 31, 2014), Wheatland Bank

[1] "(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and is not a warranty. A misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.

(b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss." Fla. Stat. § 627.409 (2014). See also Georgia Statute § 58–3–10 (2013); Revised Statute Missouri §§ 376.580, 376.800 (2013).

[2] "No written or oral misrepresentation or warranty made in the negotiations of a contract or policy of insurance, or in the application for contract or policy of insurance, by the insured or in the insured's behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless the misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increases the risk of loss." Tennessee Code § 56–7–103. See also District of Columbia Code § 31–4314; Louisiana Revised Statute 22:860.

[3] NFE was a 1031 Exchange company, which held its client's property sale proceeds until the client could find a replacement property to purchase or if no property was found to return the funds to the client. This process allowed the clients to defer capital gains tax under the Internal Revenue Code Section 1031.

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applied for a financial institution bond with OneBeacon and responded in the negative to two application questions:

• Question 64 – "Does any director/trustee or officer have any knowledge of any fact, circumstance or situation involving the Financial Institution, its subsidiaries, or any past or present director/trustee, officer or employee, which would reasonably be expected to give rise to a future liability or bond loss?"

• Question 65 – "Are there any claims or potential claims that have not been reported to the insurer involving the Financial Institution, any subsidiaries, or any Insured Person resulting from their activities as such?"

In Illinois,

"No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company."

215 ILCS 5/154. Furthermore, "the Illinois Supreme Court has held, however, that the insurer must show an 'actual intent to deceive' if the insured has made its misrepresentations on 'knowledge and belief." Citing to ***Golden Rule Ins. Co. v. Schwartz***, 786 N.E.2d 1010, 1016-17 (Ill. 2003).

Under Illinois' intentional misrepresentation statute and common law, the issue before the court on OneBeacon's motion for summary judgment on its right to rescind the policy was whether Wheatland Bank intended to deceive OneBeacon in response to questions on its knowledge and belief in the application.

The relevant facts to the two application questions involved Michael Sykes, an executive of Wheatland Bank, and an owner of Mezzanine Finance LLC ("MFL"). Sykes proposed that Wheatland Bank issue loans to two real estate development projects, the Pendolino and Village Walk projects. Regarding the Pendolino project, MFL made a second-lien loan to the Pendolino project on the same day that Wheatland Bank closed its loan to the Pendolino project. Sykes disclosed the MFL loan in the Pendolino project to one of the members of Wheatland's Loan Committee five days before the Loan Committee **ex post facto** approved the loan. The events of the Pendolino loan occurred eight months prior to Sykes executing the application for the fidelity bond. Regarding the Village Walk project, MFL had issued a second-lien loan on the project prior to Sykes proposing that Wheatland issue a loan. The MFL loan to Village Walk was past its maturity date and MFL had issued a default letter imposing late fees and default interest prior to Sykes' proposal to Wheatland. Wheatland closed on the Village Walk loan a month Sykes executed the application for the fidelity bond.

The court denied OneBeacon's motion for summary judgment on its right to rescind because it determined that there were issues of fact to be weighed by the jury regarding Sykes intent to deceive OneBeacon at the time of the application. The court reasoned that regarding the Pendolino loan, Sykes could have reasonably believed that his disclosure of the MFL loan prior to the Committee's **ex post facto** approval precluded any potential claim for fraud or dishonesty. Also, the court determined that the Village Walk loan occurred after the application and any intent to deceive by not updating his answer was weak in light of Sykes' optimistic belief that the Village Walk loan was a good fit for Wheatland Bank. Once again applying a subjective standard, the court concluded that the reasonableness of Sykes' belief regarding the loans was an issue for the jury to determine.

Conclusion

When the state statute requires proof of intentional misrepresentation, evidence of the false statement in the application is insufficient to support a rescission of the policy. In these intent states, an insurer must also prove that the insured intended to misrepresent or deceive the insurer in its response.

Policy Interpretation continued from page 4

burdens of proof. A person seeking to recover on an insurance policy has the burden of proving a loss from causes within the terms of the policy. ***East Florida Hauling, Inc. v. Lexington Inc. Co.***, 913 So. 2d 673, 678 (Fla. 3d DCA 2005). In an action on an insurance policy, the plaintiff must establish a prima facie case bringing him within the terms of the contract. ***U.S. Liability Ins. Co. v. Bove***, 347 So. 2d 678, 680 (Fla. 3d DCA 1977). In fact, as a condition precedent to any recovery against the insurer, claimant would have to prove that her claim against insured was within coverage of policy. ***Gilman v. U.S. Fidelity and Guar. Co.***, 517 So. 2d 97, 98 (Fla. 1st DCA 1987). The insured likewise has the burden of proving that the loss occurred within the policy period, as well as the burden of establishing amount of his loss up to face amount of policy. The bottom line is the burden is on the insured to prove that the insurance policy covers a claim against it However, once a person seeking to recover on an insurance policy establishes a loss from causes within terms of policy, the burden is then on the insurer to establish that loss arose from a cause that is excepted from policy. **Bove**, 347 So. 2d at 680. This is extremely important to consider in evaluating a claim, because the question is not one of whether the loss is one insured against, but rather an exclusion to such a loss. Further, if evidence raises a question as to whether the entire claim is beyond coverage of policy, the burden is upon the insurer to show that there is nocoverage. The burden comes back around to the insured to prove an exception to an exclusion contained within the insurance policy. ***Florida Windstorm Underwriting v. Gajwani***, 934 So. 2d 501, 506 (Fla. 3d DCA 2005). But with liberal construction of a policy in favor of the insured when there is an ambiguity, and the burden to prove excluding coverage, a careful reading, application to the facts, and consideration of the burdens of proof, can save valuable time and money.

APPELLATE

U.S. 11th Circuit Affirms Summary Judgment of No Coverage in UM Stacking Case.

Angela Flowers, of the Ocala office, and **Bretton Albrecht**, of the Miami office, obtained an affirmance of a final summary judgment of no coverage in a UM case. This pivotal case, ***Brannan v. GEICO Indem. Co.***, 13-15213 (11th Cir. 2014), involved complex UM stacking issues, in addition to negligent procurement and related claims. Plaintiff claimed that the $300k UM policy on his automobiles, which were not involved in the accident, should be "stacked" with the $10k UM policy on the motorcycle he was riding at the time of the accident. However, only the Motorcycle Policy contained "stacked" UM coverage, and the Auto Policy was non-stacked. Angela and Bretton therefore argued that only the Motorcycle Policy provided UM coverage "whenever or wherever" Plaintiff was injured, and the more restrictive Non-stacked Auto Policy did not apply because he was not injured in one of his autos.

The U.S. 11th Circuit agreed, and rejected Plaintiff's arguments in opposition. The Court explained that just because the motorcycle was the only vehicle in the Motorcycle Policy did not make the stacked coverage illusory. Rather, the stacked coverage for the Motorcycle Policy would follow Plaintiff and was available to "stack" onto any other available coverage. But since he was injured while operating the motorcycle, there was nothing else to "stack." Accordingly, the Court concluded that Plaintiff got exactly the coverage he asked and paid for, and he was not entitled to anything more. The decision contains some great explanations regarding the broader benefits that "stacked" UM coverage provides to an insured, even when a stacked policy lists only one vehicle, and will be very useful in defeating allegations we see in many cases regarding such coverage being illusory.

Plaintiff Barred from Attempting to take a "Second-Bite at the Apple."

Caryn Bellus and **Bretton Albrecht**, of the Miami office, obtained an affirmance of a defense summary judgment in ***Tawes v. Waugh Custom Homes, Inc.***, 135 So. 3d 294 (Fla. 1st DCA 2014). The plaintiff sued a number of defendants for water intrusion/damage as a result of alleged defects in the construction of his home. Our client, from whom plaintiff had purchased windows, maintained throughout that its windows were well-built and that any problem must have come from defective installation or problems caused by other subcontractors. Nevertheless, our client made a business decision to settle plaintiff's claims. After the settlement, plaintiff tried to file suit a second time. **Steve Cozart** and **Grayson Miller**, of the Pensacola office, obtained a summary judgment holding that plaintiff's second suit was barred by the settlement, and plaintiff appealed. On appeal, Caryn and Bretton successfully persuaded the appellate court that plaintiff's second lawsuit was clearly barred as a matter of law, and the appellate court affirmed the defense summary judgment.

Affirmance of Defense Summary Judgment in Negligence/Mold Suit Against Condo Association.

Bill Bissett, of the Miami office, obtained a "Per Curiam" affirmance of a defense summary judgment in ***Atanda v. Advanced Construction Services***, 3D13-1981 (Fla. 3d DCA 2014), a case where plaintiff was alleging that a roofing company hired by our client, the condominium association, performed negligent roof repairs and that the condominium association was also separately negligent in failing to timely and properly respond to the situation, which plaintiff alleged resulted in constant leaks and significant moisture intrusion into the condominium building and the unit where the plaintiff and his two daughters lived. Plaintiff claimed these leaks caused toxic mold growth which resulted in various medical problems to the plaintiff and his daughters, destroyed all of his personal property, which he had to dump due to mold growth, and even further, allegedly rendered his unit uninhabitable, which he claimed eventually caused his loss of the unit to foreclosure and the value of the unit. In the trial court, **Steve Cornman**, also of the Miami office, chipped away at the claims, obtaining various partial summary judgments, until eventually a final summary judgment and dismissal was entered for the defense and subsequently appealed by plaintiff. Bill took up where Steve left off and persuaded the appellate court there was insufficient evidence to support the plaintiff's claims. Because the affirmance was entered "per curiam," it basically eliminates plaintiff's ability to validly support a motion for rehearing and it hampers, if not forecloses, his ability to seek further review in the Florida Supreme Court.

Affirmance of Amended Final Judgment Obtained in Complex Commercial Real Estate Case.

Angela Flowers, of the Ocala office, obtained an affirmance of an amended final judgment following a bench trial in ***Brassboys Enterprises, Inc. v. Lakeside Babe, LLC***, 138 So. 3d 1046 (Fla. 5th DCA 2014), a complex commercial real estate case involving the long term lease of land. Angela persuaded the appellate court that the trial court correctly found that plaintiff failed to prove entitlement to eviction and was otherwise estopped from evicting the defendant, our client. Angela likewise persuaded the appellate court that the trial court correctly declared the rights of the parties under the subject ground lease to include, by oral modification, an additional restaurant parcel located outside the boundaries described in the ground lease.

Plaintiff's Emergency Certiorari Appeal of Order Allowing Financial Discovery Successfully Opposed.

Caryn Bellus and **Sharon Degnan**, of the Miami and Ft. Lauderdale offices, persuaded the Third District Court of Appeal to deny a plaintiff's emergency petition seeking a writ of certiorari to quash an order denying plaintiff's motion for a protective order as to certain financial discovery. In filing the emergency appeal, the plaintiff alleged he would suffer irreparable harm if the order denying his motion for a protective order as to the financial discovery were quashed. However, the appellate court denied plaintiff's petition, agreeing with Caryn and Sharon's arguments that the high threshold required for obtaining certiorari review was not met, especially in this case, where plaintiff placed his finances squarely at issue by his extravagant future loss of earning capacity claim.

TRIALS, MOTIONS, MEDIATIONS

Rare "No Cause" Ruling Obtained from the FDHR.

Christin Russell, of the West Palm Beach office, obtained a rare "no cause ruling" from the Florida Department of Human Resources as a result of her very well written response to plaintiff's sexual discrimination claim. Christin's client is a very large national restaurant chain, who fully expected to lose the ruling because of the rarity with which they are granted, and the particular facts of the case. Plaintiff's only remedy now is to file an administrative appeal.

Pivotal Summary Judgment Obtained Declaring Lee County Lien Statute 2000-439 Unconstitutional.

Insurance carriers have been at war with Lee Memorial Health System for the past three years in cases where LMHS has been actively filing lawsuits against carriers for alleged lien impairment for issuing settlement drafts without making LMHS a payee on the check. In a recent showdown, **Valerie Dondero**, of the Miami office, took on LMHS and prevailed after a four-hour summary judgment hearing. Valerie persuaded the trial judge that the Lee County Lien Statute 2000-439 is unconstitutional, which successfully defeated the claims of LMHS. The main issue was the applicability of the Florida Supreme Court's decision in ***Shands Teaching Hosp. & Clinics, Inc. v. Mercury Insurance Co.***, 97 So. 3d 204 (Fla. 2012), which held a virtually identical lien law to be unconstitutional. LMHS attempted to distinguish the Supreme Court case from the local lien law because of a distinction that LMHS is a public hospital, whereas the hospital involved in the Supreme Court case was not. LMHS argued that it is a public hospital and its contracts for patient care are by default a public contract, and therefore these "public contracts" are not in violation of Article III, §11(a)(9), Fla. Const. Valerie responded that the Florida Supreme Court has rejected that reasoning and LMHS enters into a variety of public and private contracts. The trial judge agreed with Valerie's arguments, granting summary judgment for the insurer in this case, and indicating that he will reverse his prior rulings to the contrary in other cases.

Dismissal With Prejudice for Lack of Personal Jurisdiction in Copyright Infringement Action in Federal Court.

Jennifer Remy-Estorino and **Peter Baumberger**, of the Miami office, obtained a dismissal with prejudice based on a lack of personal jurisdiction in an alleged copyright infringement action in federal court. Specifically, this federal lawsuit in the Middle District Court of Florida arose out of claims for alleged copyright infringement under the Copyright Act. The Plaintiff, a website software/video technology company, alleged copyright and trademark infringement claims against twenty-one Defendants, including one count of copyright infringement against our client, a California company. The Plaintiff alleged that the Defendants used the purported infringing software codes to operate their websites and advertise their products and/or services and misused and distributed the software and derivative works thereof, which are the subject of U.S. Copyright Registrations. Jenny and Pete moved to dismiss, arguing there was no basis for the Court to exercise general or specific personal jurisdiction over our client. They further argued that Plaintiff failed to allege sufficient material facts to establish personal jurisdiction over their client, a nonresident of Florida, under any provision of the Florida long arm statute. Moreover, they argued Plaintiff's allegations were devoid of any facts to satisfy the due process requirements of the Fourteenth Amendment to the United States constitution, including facts which would establish minimum contacts with the state of Florida. The court agreed and granted dismissal with prejudice.

Motion for Summary Judgment Granted in a Premises Liability Case.

Yvette Pace, of the Orlando office, recently obtained a summary judgment in a premises liability case. The Plaintiff allegedly slipped and fell on what she claimed was a decorative lava rock in a parking lot as she was walking to her vehicle. The lava rock came from a nearby planter, which was on the property owned and maintained by the Defendant, Yvette's client. The Plaintiff claimed that as a result of the fall, she fractured her ankle, and underwent three surgeries, including removal of hardware. The claimed medical expenses were in excess of $100,000.00. Yvette moved for summary judgment, arguing that her client, the Defendant property owner, could not be held liable because a rock in a parking lot is not a dangerous condition as a matter of law and, further, is an open and obvious condition which the Plaintiff should have seen and avoided. The trial court agreed and entered summary judgment in favor of the Defendant property owner. A proposal for settlement was filed early on in the case, and Yvette will be moving for attorney fees and costs.

Order of Dismissal Obtained in Slip and Fall Case.

Chelsea Winicki, of the Jacksonville office, obtained an order of dismissal in a slip and fall case. Plaintiff filed a negligence action against our Defendant, a gas service station, alleging he slipped and fell and sustained injuries to his lower back as a result of the fall. Plaintiff ultimately underwent extensive surgeries under letters of protection and incurred over $400,000.00 in medical bills. Chelsea moved to dismiss on two main grounds. First, she moved to dismiss for fraud based on Plaintiff's deposition testimony and his failure to admit to prior extensive treatment on the exact same portions of his back that he now alleged were from this accident. Plaintiff even denied his prior surgical recommendation and his prior injections that were just a few months prior to the alleged slip and fall in this case. Chelsea also moved to dismiss based on the fact that Plaintiff died from a heart condition following his deposition, and, while Plaintiff's counsel moved to substitute the estate for Plaintiff, Plaintiff never even set up an estate. Therefore, the court ruled in our favor and dismissed the case.

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TRIALS, MOTIONS, MEDIATIONS

Directed Verdict on Future Medical Expenses Claim.

David Anderson, of the Jacksonville office, recently tried a T-bone collision auto accident case. This was a clear liability case where the defendant failed to even show up for trial. Plaintiff, a 35-year old marathon runner, claimed injuries to her L5-S1 and Sacroiliac Joint. She had two discectomies (surgeries) at L5-S1 and a Sacroiliac Joint fusion with installed hardware. At trial, David skillfully obtained a directed verdict as to Plaintiff's claim for future medical expenses. David argued that the surgical recommendations did not rise to the requisite level of medical certainty. He also successfully moved to exclude the testimony of several treating doctors who opined, on the eve of trial, that plaintiff would require future surgery. Although the jury awarded plaintiff her past medical expenses, it only awarded about a third of that figure for past and future pain and suffering, and it completely rejected her husband's loss of consortium claim. Although Plaintiffs presented a great deal of testimony and evidence about how the accident and injuries had severely and adversely affected their lifestyle, David was able to minimize the impact of that argument, as demonstrated by the low awards for those components of damages, not to mention the zero damages award on the loss of consortium claim and his success in obtaining a directed verdict as to future medical expenses.

Plaintiff Voluntarily Dismisses Negligent Security Claim.

Chelsea Winicki, of the Jacksonville office, persuaded a Plaintiff to voluntarily dismiss her negligent security claim against our client. Plaintiff had sued our client, a bank, alleging she was robbed in the bank's parking lot. Chelsea suspected throughout the initial discovery phase of the case that Plaintiff may have fabricated the entire story regarding the robbery. Chelsea used Plaintiff's deposition to lock her into certain statements, with the goal of later using them to argue her claim was fraudulent. In preparing for Plaintiff's deposition, Chelsea investigated the Duval County Clerk of Court docket and found that Plaintiff had just recently been arrested for Defrauding a Financial Institution and Credit Card Fraud and was currently incarcerated. Plaintiff's counsel contacted us requesting to cancel Plaintiff's deposition and attempted to allege Plaintiff would be out of town. Chelsea advised Plaintiff's counsel that she knew Plaintiff was incarcerated and she would not agree to cancel the deposition, but, rather, would depose Plaintiff in jail. A Motion for Protective Order, regarding Plaintiff's testimony, was filed by Plaintiff's counsel, but then later withdrawn. Plaintiff's counsel ultimately voluntarily dismissed the case after Chelsea insisted on moving forward with Plaintiff's deposition.

PROPERTY LITIGATION CORNER

Florida Legislature Passes Homeowner Claims Bill of Rights

By Jorge Santeiro, Jr.
Co-Chair
Property Litigation Practice Group

On April 30, 2014, the Florida Legislature unanimously approved Senate Bill 708. The bill was approved by Governor Scott on June 13, 2014, and took effect July 1, 2014. See Chapter 2014- 86, laws of Florida.

The new law requires a one-page "Homeowner Claims Bill of Rights" to be provided to any policyholder that files a claim and will reference current Florida law regarding claims handling to provide the policyholder with information of their rights in the claims process. The Bill of Rights will also inform policyholders of what they should expect and provides information on the next steps to take in the process.

The law is also intended to eliminate post-claim underwriting. After the effective date, insurers will have 90 days to complete the underwriting process and will be precluded from denying a claim or canceling a policy based on an insured's credit information after their policy has been in force for 90 days or longer.

The law also requires that mitigation, repair and restoration work paid for by insurance proceeds be performed by an individual or company possessing a valid certification or license. It also contains language to help ensure appraisal umpire impartiality and provides the Department of Financial Services the ability to remove and discipline mediators who engage in inappropriate behavior.

The chapter law can be found at:

http://laws.flrules.org/2014/86.
(Source: Press Release, Florida Department of Financial Services).

Presentations and Speaking Engagements

Several of our attorneys (**Joseph Carey, Michael Carney, Jarred Dichek, Nicole Ellis, Michael Walsh, Charles Watkins**) presented at FIFEC's Annual Conference in Orlando, Florida. FIFEC (Florida Insurance Fraud Education Committee), is a non-profit corporation comprised of special investigative unit investigators, law enforcement personnel, and dedicated individuals whose purpose is to organize and present an annual statewide educational seminar related to deterring, detecting, investigating, and prosecuting insurance fraud. Our team put on a Fraud Mock Trial and also presented a seminar on Important Considerations with Property Damage Claims. Many thanks to all who attended the program.

Brad McCormick recently served as an advisory Board Director to MC Consultants' 8th Annual East Region Construction Litigation & Insurance Coverage Conference which Kubicki Draper proudly co-sponsored. The conference addressed cutting-edge East Region construction defect issues that affect attorneys, carriers, and builders. Brad moderated one of the conference panels: "Winning or Losing? – Choosing and Retaining the Right Expert Consultants".

In addition to the above, many other seminars were presented by our attorneys in the last quarter.
Some of the topics presented were:

- Ethics for the Claims Professional
- Negligent Security Cases
- Brokerage Exposure & Cargo Loss
- Collateral Sources, Liens & Set-Offs
- Foundations of Products Liability: Hot Topics and Defense Strategies
- Swimming Pool Liability
- Premises Liability
- Florida Condo Law
- S.I.U. Tips and Tactics
- Fraud Detection and Claims Management
- Case Law Update – Defending Percutaneous Discectomies
- How to Achieve Maximum Results from the ADR Process
- Appellate Principles in PIP
- PIP Hot Topics
- Bad Faith – Top Ten Pitfalls to Avoid in Florida
- First Party vs. Third Party Uninsured Motorist/Underinsured Motorist

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

For more information, please contact Aileen Diaz at 305.982.6621 / ad@kubickidraper.com

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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.

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