KUBICKI DRAPER

THE KD QUARTERLY

WINTER 2015

KD *in the Community*

For the third consecutive year, **Charles Watkins** and **Peter S. Baumberger**, of the Miami office, participated in the annual Teachers Law School at Miami Dade College. The American Board of Trial Advocates (ABOTA) sponsors these events across the country to advance civics education. This year, Charles and Peter recruited Florida Supreme Court Justice Fred Lewis, along with local Judges Peter Lopez and Dennis Murphy. The event was a great success, with almost 200 Miami-Dade teachers in attendance.

Last November, several of our Miami attorneys attended the Kozyak Minority Mentoring Picnic in Hialeah, Florida, and once again, the firm sponsored this important event. Our tent was visited by dozens of students seeking guidance, direction and opportunity, as well as judges including Supreme Court Justice Quince, Judges Jennifer Bailey, Bertila Soto, Peter Lopez, Ronald Dresnick and others from the 11th District who stopped by to speak with students. Our attorneys were worked over pretty hard but thoroughly enjoyed the giving back experience.

David Miller, of the West Palm Beach office, and his wife, Michele, were married in November. While on their honeymoon in Kauai, they adopted Kierra and Kisa - 2 puppies from the Kauai Humane Society for a day and took them on a field trip to the beach. When they're not practicing law, David and Michele love to devote their time volunteering at the Humane Society, both in Florida and Hawaii.

Congratulations

TO OUR NEWEST SHAREHOLDERS

Rebecca Kay, Robyn Lustgarten, Joshua Polsky, Scott Rosso
Fort Lauderdale

Nicole Ellis, Jennifer Remy-Estorino
Miami

Karl Labertew
Pensacola

Bryan Krasinski, Kara Carper
Tampa

Melonie Bueno, David Drahos
West Palm Beach

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IN THIS ISSUE

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Triggering Florida's Statutory Warranty in Condominium Construction Defect Litigation

by KD's Construction Group

Developers, contractors, subcontractors and suppliers are required by law to provide various implied warranties for condominium construction pursuant to Florida Statute Section 718.203. These warranties include, but are not limited to, each condominium unit, structural components of the building, the roof, mechanical and plumbing elements, and other improvements to the condominium.[1] The warranty for these items begins to run from the date of completion of construction of the building or improvement, and is typically either for three years or one year.[2] The Statute goes on to define "completion" as the issuance of a certification of occupancy ("CO") for the entire building or improvement or the equivalent authorization issued by the governmental body having jurisdiction.[3]

So, if the statutory warranty runs from issuance of the certificate of occupancy and the warranty expires three years (or one year) from that date, then it should be obvious that no warranty claim may be made for defects occurring or discovered thereafter, right? Not necessarily. In many cases, this issue is the subject of much debate, because Plaintiffs often allege many defects to be latent. Latent defects are those that are "generally considered to be hidden or concealed defects which are not discoverable by reasonable and customary inspection, and of which the owner has no knowledge." ***Alexander v. Suncoast Builders, Inc.***, 837 So. 2d 1056, 1058 (Fla. 3d DCA 2002).

Nevertheless, a strong argument can be made that to bring a claim for breach of the statutory warranty, the alleged defect must manifest, i.e., become evident in some way, during the statutory warranty period. The Florida Supreme Court has specifically stated that the warranty "guarantees" provided by this Statute apply to defects that occur during the lifetime of the warranty, i.e., within three years of the date of completion of construction of the condominium or improvement. ***Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Ass'n***, 658 So. 2d 922,924 (Fla. 1994). The statement that the warranty applies to defects that "occur" during the life of the warranty arguably implies that the defect must manifest itself during that period of time.

Similarly the Second District Court of Appeal has touched on this issue, albeit likely as dicta, in ***Dubin v. Dow Corning Corp.***, 478 So. 2d 71 (Fla. 2d DCA 1985), where the Court noted, in an express contractual warranty case, that the "breach" of the warranty occurs when the defect is or should be discovered. Also, in ***Wright v. Fidelity & Casualty Company of New York***,139 So. 2d 913 (Fla. 1st DCA 1962), he Court found that since there was no record evidence the alleged defects occurred within the contractual warranty period, it could not be held as a matter of law that the contractor failed to cure the alleged defects under the warranty clause of the contract. Though not directly addressing the issue, these cases provide support for the position that defects, to be covered by the statutory warranty, must manifest, i.e., "occur" or be "discovered," during the warranty period.

Assuming a defect covered by the statutory warranty must manifest itself during the warranty time period, there is often a quandary many Plaintiffs find themselves in when asserting a statutory warranty claim. This quandary flows from the interplay between the implied statutory warranty and the four-year statute of limitations governing construction defects. See §95.11(3)(c), Fla. Stat. Notably, this statute of limitations contains a latency section which states that, if the action involves a latent defect, the statute then runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. *Id*. More specifically, it has been held that it begins to run on the date there is notice of an invasion of a legal right or a person has been put on notice of his right to a cause of action. See ***Kelley v. School Board of Seminole County***, 435 So.2d 804 (Fla. 1983); see also ***Snyder v. Wernecke***, 813 So.2d 213 (Fla. 4th DCA 2002).

Since some Plaintiffs initiate statutory warranty-based construction defect actions many years after the issuance of the CO, they are often forced to argue that the complained-of defects were latent, seeking to trigger the latency exception to the construction defect statute of limitations.[4] Notably, there is no express latency exception in the warranty statute. To get around this quandary in cases where suit is filed more than four years after the expiration of the statutory warranty period, Plaintiffs may allege the defects were latent and only discovered within four years prior to the lawsuit (to fall within the statute of limitations), while at the same time pleading the defects existed at the time construction was completed (to show the defects are within the warranty). Notably, such allegations require the Plaintiff to admit the defect's manifestation/discovery did not occur during the statutory warranty period because, if it did, the statute of limitations would likely be violated.

Faced with this scenario in a recent case, we successfully moved to dismiss the statutory warranty count, citing the above cases and arguing that the complaint's allegations showed the defects did not manifest during the three-year statutory warranty period. We emphasized that, unlike the statute of limitations, the warranty statute simply contains no latency exception. Therefore, it only makes sense that, to maintain a breach of statutory warranty claim, the defect must occur, i.e., manifest or be discovered, during the warranty period. We asserted that to hold otherwise would render the statutory warranty period meaningless.

Thus, in our view, in any case where it can be shown that an alleged defect may have manifested/been discovered after the warranty period, a strong argument can be made that any statutory warranty claims should be dismissed.

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[1] *The statutory warranties are not identical for developers, contractors and suppliers, and the construction items warranted by developers appear to be larger in scope than those warranted by contractors and suppliers.*

[2] *For developers, this warranty period is generally three years or one year after owners other than the developer obtain control, but no later than five years. It should be noted that not all warranties for items covered by this statute are for three years, and warranties for some items are less than three years. See §§718.203, Fla. Stat.*

[3] *In jurisdictions where no certificate of occupancy or its equivalent is issued, completion generally means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.*

[4] *It should be noted that the filing of a Chapter 558 Notice tolls the statute of limitations for construction defects. See §558.004, Fla. Stat.*

SPOTLIGHT ON:

Jarred Dichek & Michael Walsh

Jarred Dichek and Michael Walsh share a passion for PIP/SIU/Fraud defense. As a result of their unified efforts and teamwork mentality, they have become an integral part of the Kubicki Draper team in defending PIP/SIU/Fraud cases.

Jarred Dichek and Michael Walsh work as a team, together with other KD attorneys, to provide statewide representation in all aspects of PIP/SIU Fraud. They also routinely present together at conferences and seminars statewide on current trends and defense strategies. Despite their similarities and teamwork, there is one thing they don't see eye to eye on: who has a better sports city -- Boston or New York?

Jarred, a shareholder in the Miami office, was born and raised in Bronx, New York, and attended the prestigious Bronx High School of Science. Jarred headed to Florida for college, where he attended the University of Miami. While at the University of Miami, Jarred studied accounting and was determined to be an accountant. However, after one year of accounting, Jarred felt he was not challenged enough. Following his mother's advice, Jarred decided to pursue law school, which turned out to be a natural fit. After graduating law school at Nova Southeastern University, Jarred served as in-house counsel for a major insurance company. There he handled personal injury protection cases exclusively until he was promoted to the SIU litigation division. It was in this area of law where he finally found the challenge he was looking for. While he enjoyed the daily challenges of litigating PIP cases, fighting the never-ending battle of insurance fraud stirred a passion in him. Jarred has been handling SIU focused cases ever since. Serving as in-house counsel provided Jarred with a great understanding of the inner workings of insurance companies and has allowed him to litigate with that knowledge in mind. He understands results are important, but so are cost-effective ways of obtaining the results.

Jarred has been with Kubicki Draper for almost eight years and has continued his fight on fraud. He currently handles PIP SIU cases, and SIU cases concerning property claims, auto claims, and health care claims. He handles both small individual SIU cases and complex fraud projects involving hundreds of claims and has been successful in getting many withdrawn. One of the things Jarred likes most about handling fraud is that no two cases are the same. "Just when you think you have seen it all, you come across something new and shocking." Jarred joined the Florida Insurance Fraud Education Committee (FIFEC), became a board member and has risen to become the co-chairman of FIFEC. As part of FIFEC, he gets to interact with and has built strong relationships with Special Investigators from many insurance companies, prosecutors, police officers, and the Department of Insurance Fraud. Jarred is also a member of the Claims Litigation Management (CLM) Fraud Section. When Jarred is not delving into a new fraud investigation, he is keeping up with his sports teams. An avid sports fan, he remains loyal to his New York teams, but has also adopted the local Miami teams – especially the Miami Hurricanes. Jarred also enjoys reading, traveling and outdoor activities. He is currently training for the Miami Half Marathon.

Michael Walsh, a shareholder in the Ft. Lauderdale office, is originally from Worcester, Massachusetts, just outside of Boston. He attended the University of Massachusetts at Amherst (UMASS) and followed in the footsteps of his older brother by majoring in sports management/business. Michael had his heart set on one day becoming a sports agent, à la "Jerry Maguire," and one day hearing the classic quote: "show me the money." But, in discussing careers with a friend following graduation, the topic of law school came up, with his friend suggesting, "Mike you love to argue about anything, why not law school." It was at that moment Michael realized he wanted to pursue a career in the legal field and began his quest. After graduating from UMASS, Michael moved to Miami to attend law school. While there, he worked as a clerk at a large national law firm which reassured him of his passion for the law. Michael continued pursuing that passion and graduated from St. Thomas University School of Law in 1997. Upon graduating, Michael applied for a job at Kubicki Draper and landed a position in the Miami office.

As a young associate, Michael jumped in head first and began to accumulate a lot of experience in the courtroom, as well as taking depositions. It was during this time that Michael gained experience with and developed a passion for defending cases involving fraud/SIU issues. Michael started out handling mainly workers' compensation cases that had aspects of fraud, such as medical fraud and false claims by workers. As a first year lawyer, Michael's very first bench trial was a workers' compensation fraud case, which he won. From then on, he knew those were the types of cases he wanted to focus on. Since that time, Michael transitioned his practice and developed a large division focusing on PIP litigation including a specialization in cases involving SIU/Fraud, staged accidents and medical/billing fraud with the goal being to recoup large sums of monies paid by insurance companies on such claims. Michael's experience, litigation skills and specialized knowledge, together with his confidence and love for this work allow him to provide a cost-effective, yet aggressive and tactical defense in all aspects of PIP/SIU cases. He and his team handle a wide range of PIP cases from low exposure to complex fraud.

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ADA Title III:
It's All About the Fees

by KD's Hospitality Group

If your business or your insured's business has ever been hit with a suit claiming a violation of Title III of the Americans with Disabilities Act ("ADA"), then you have been down this bumpy road. A quick internet search yields colorful results about these so-called "drive-by" and "extortion" lawsuits. Although there has been talk about amending the ADA to add a notice-and-cure provision or to make it less attorneys-fee driven, so far business owners and insurers have enjoyed no such luxury. In fact, recent changes to the law's regulations heighten the standards for compliance, and lawsuits enforcing its provisions show no sign of slowing down. More than 1 in 5 of all ADA lawsuits filed against businesses in 2013 were filed in the Southern District Court of Florida (the federal court that covers from Ft. Pierce to Key West).[1] According to the Wall Street Journal, there were 55% more ADA lawsuits filed nationwide between January 1, 2014 and June 30, 2014 than over the same period in 2013.[2]

Many times the lawsuits in a geographic area are filed by one Plaintiff who visits a number of restaurants, retail establishments or shopping centers in a particular neighborhood over a short period of time. For example, in 2014, one individual Plaintiff filed 38 ADA lawsuits in the Middle District Court of Florida (covering roughly Jacksonville to Ft. Myers), and another Plaintiff filed 23 in the Southern District Court of Florida. Although it may seem daunting, business owners can stay ahead of the game – getting compliant and staying compliant is the key. This article will identify the risk factors specific to the retail and hospitality industry, and ways to minimize your and your insured's exposure.

A 25 Year-Old Law.

The Americans with Disabilities Act of 1990, as amended, is a federal statute which prohibits discrimination against individuals with disabilities by various entities. Although the ADA is comprised of five "titles," most private business owners are familiar with Titles I and III, since, unfortunately, those are the provisions most often enforced against them. Title I covers employers with 15 or more employees and prohibits discrimination in the employment context. Title III, which is the subject of this article, covers places of public accommodation.[3] The statute provides an exhaustive list of 12 categories of public accommodations, which includes places of lodging, places serving food and drink, service establishments, sales and rental establishments and places of exercise and recreation, among others. 42 U.S.C.§12181(7).

New vs. Old Construction and the 2010 Standards.

The provisions of Title III apply to all covered businesses as of January 26, 1993. There is no "grandfathering" in for older construction, which means that all covered entities are required to remove architectural barriers which prevent access unless such removal is not "readily achievable." Whether a modification or removal of a barrier is deemed readily achievable is defined in the regulations as "easily accomplishable" and that which does not require "much difficulty or expense." 28 C.F.R. § 36.304(a). Practically speaking, this requires a balancing test against the business' resources, and may entitle a Plaintiff to discover a business' net worth and income, if raised as a defense. Facilities or

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[1] *Amy Shipley & John Maines, South Florida Leads Nation in Controversial Disability Lawsuits, Sun Sentinel, (Jan. 11, 2014), available at: http://articles.sun-sentinel.com/2014-01-11/news/fl-disability-lawsuits-strike-sf-20140112_1_plaintiffs-attorneys-lawsuits.*

[2] *Angus Loten, Disability Lawsuits Against Small Businesses Soar, The Wall Street Journal, (Oct. 15, 2014), available at http://www.wsj.com /articles/disabled-access-new-legal-push-1413411545.*

[3] *Title III of the ADA states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations or any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).*

SPOTLIGHT ***Continued from page 3***

Michael's zeal for PIP/SIU/Fraud work extends beyond the courtroom; he prides himself on staying abreast of all the most recent trends and rulings so he can provide his clients with the specialized knowledge necessary to defend these cases. He became a certified CEU instructor thru the State of Florida Department of Financial Services and often presents to clients and organizations on the most trending topics in PIP Fraud/SIU, deposition tactics, staged accidents and medical billing/coding issues. In particular, Michael presents annually at the Florida Insurance Fraud Education Committee (FIFEC) which attracts hundreds of attendees. This conference allows Michael to not only educate others on important issues involving fraud, but more importantly, continue to educate himself further on the newest trends and meet people who share the same passion for fraud matters.

When not defending cases, Michael enjoys traveling, sports, visiting family in Boston and running. He completed his first full marathon (26.2 miles) 2 years ago in San Francisco, where he ran with a group called Team in Training (TNT) that raises money for blood cancers including Leukemia and Lymphoma. The team's slogan is "Together We Train to Beat Cancer." Even though Michael has lived in Miami for 22 years, he stays true to this Boston roots and remains an avid fan of the Boston Red Sox, New England Patriots and Boston Celtics.

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buildings that were constructed or altered prior to March 15, 2012, generally must comply with the 1991 ADA Standards for Accessible Design. Any new construction or alterations which take place on or after March 15, 2012, generally must comply with the more rigorous 2010 Standards. Full compliance with the 2010 Standards is not required only if the entity can establish that it is structurally impracticable to meet the requirements, which is defined as "those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. § 36.401(c)(1).

The "Motherload."

So what is it that makes ADA such a legal minefield? Fees, fees and more fees! A Plaintiff may recover injunctive relief (an order from the court requiring the business to comply with the law), and his or her attorney's fees and costs, including expert fees. Oftentimes, the Plaintiff's fees can quickly eclipse the cost of actually making the compliant modifications, which is why early resolution is often urged in ADA cases. Although the statute provides that either prevailing party may recover its attorney's fees, a Defendant generally may only recover fees if "the court finds that the Plaintiff's action was frivolous, unreasonable, or without foundation . . . ." Technical Assistance Manual, § III-8.5000. This is a very difficult burden to overcome.

Risk Factors for the Retail and Hospitality Industry.

Some of the most common areas targeted by Plaintiffs at retail establishments, restaurants and other hospitality industry entities include:

- Parking Lots: number, size and location of accessible parking spaces and paths of travel;
- Valet Parking: existence of an accessible passenger loading zone;
- Entrances: maneuvering clearance, door hardware and opening force;
- Restrooms: turning space, accessible water closets (stalls), lavatories (sinks), and mirrors;
- Sales, Service and Check-out Counters: walking surface, counter height/depth and knee/toe space;
- Dining Tables (bars, tables, lunch counters and booths): number, size and location of tables, structural strength, and knee/toe space; and
- Pools: accessible means of entry (e.g., lift, slope, transfer wall).

Additionally, all business owners should be aware of the ADA's provisions with respect to service animals. Only dogs, and in some circumstances miniature horses, are recognized as service animals under the ADA. Generally, a service animal is permitted to accompany a person with a disability in all areas where members of the public are permitted. Only limited inquiries are allowed regarding service animals, and staff may never ask about the person's disability, require medical documentation or documentation about the animal. Every business should have a written policy regarding service animals, and train its employees on this policy, so as to avoid violations of the ADA in this area.

But I'm Just the Landlord But I'm Just the Tenant!

The ADA permits landlords and tenants to allocate responsibility for compliance with the ADA within a lease agreement. However, such an agreement is effective only among the parties – both the landlord and tenant both remain fully liable for compliance with all provisions of the ADA – meaning the Plaintiff can sue either or both the landlord or tenant, and the existence of the agreement is not a defense to the lawsuit.

The Silver Lining.

Certainly, getting in and staying in compliance by way of regular ADA inspections and modification (where necessary) is the best way to avoid a lawsuit. But if your or your insured's business, like thousands of others in Florida, becomes the target of an ADA lawsuit, all hope is not lost. Generally, an ADA complaint will look like a boilerplate document, and will contain a laundry list of alleged violations, sometimes citing items not even available at your location (e.g., a buffet counter at a sit-down restaurant). Notwithstanding, any business faced with an ADA suit should immediately retain an experienced and qualified ADA expert to inspect the property and identify potential violations, and to make recommendations for remediating any violations. The business should then undertake measures to get in compliance with the ADA as quickly as possible.

Under certain circumstances, if a Defendant can remedy all violations, and show there is no reasonable expectation it will re-establish the discriminatory barriers, the Plaintiff's claim may be rendered moot and dismissed by the court, and Plaintiff may not be entitled to attorney's fees. ***Petinsky v. Gator 13800 NW 7th Ave. LLC***, No. 13–21955–CV–KING, 2014 WL 1406439 (S.D. Fla. Apr. 10, 2014) (holding that because Defendant made structural changes and brought the property into compliance with ADA after Plaintiff filed lawsuit, Plaintiff's claim was moot, Plaintiff was not the prevailing party and was therefore not entitled to recover attorney's fees). While the ***Petinsky*** case is the best case scenario (and is rather uncommon), it is also an example of a best practice: identify any possible violations right away, and make the modifications as quickly as possible. Even though a court may not be as swift to deny your Plaintiff all of his or her fees, you can stop the clock ticking on those fees by remedying any violations, and set up an early (and hopefully cost effective) resolution.

APPELLATE

Successful Appeal of Judgment Confirming Appraisal Award in FIGA Sinkhole Case.

Bill Bissett, of the Miami office, successfully appealed a final judgment confirming an appraisal award in ***Florida Ins. Guar. Ass'n v. de la Fuente***, 2D13-3543 (Fla. 2d DCA 2015), which involved a sinkhole loss. The trial court had compelled FIGA to participate in an appraisal and thereafter entered a final judgment confirming the appraisal award in favor of the insureds. On appeal, Bill argued reversal was required because the trial court erred by applying the statutory definition of "covered claim" in effect when the insurance policy was issued to determine the scope of FIGA's liability, rather than the more restrictive definition in effect when the insurer was adjudicated to be insolvent. The appellate court agreed and reversed the amended final judgment and the order confirming the appraisal award. (It is anticipated that the appellee may seek review in the Florida Supreme Court).

Successful Appeal of Attorney's Fees Award.

Michael Clarke and **Betsy E. Gallagher**, of the Tampa office, successfully appealed a final judgment awarding Plaintiff attorney's fees in the case of ***Paduru v. Klinkenberg***, 1D12-5712 (Fla. 1st DCA 2014). The fees were awarded based on a pre-trial proposal for settlement (PFS). On appeal, Michael and Betsy argued that the PFS was invalid because it was ambiguous and contained contradictory terms that negated the Defendant's ability to independently evaluate the offer. They contended that, consequently, Plaintiff was not entitled to attorney's fees. The appellate court agreed, finding that the Plaintiff's PFS was invalid and failed to strictly comply with the statutory requirements. The court therefore reversed the fee award.

TRIALS, MOTIONS, MEDIATIONS

Favorable Verdict in Truck vs. Automobile accident involving two lumbar surgeries

Yvette M. Pace, of the Orlando office, obtained a favorable verdict in a motor vehicle negligence case involving a semi-tractor trailer and an automobile, wherein the Plaintiff underwent two lumbar surgeries. The accident occurred in the parking lot of a car wash - the Plaintiff was exiting the tunnel of the car wash, and the driver of the semi was backing up. The semi-tractor's driver didn't see the Plaintiff and struck the front of her vehicle with his trailer. The Plaintiff treated with a chiropractor, several pain management doctors and two orthopedics. She received several lumbar injections, and underwent a discectomy and a lumbar fusion. The Plaintiff retained radiologist, Dr. Michael Foley, who testified that Plaintiff suffered an annular tear to her L5-S1, as a result of the subject accident. The Defendant's medical expert, Dr. Paul Maluso, testified that Plaintiff did not sustain a permanent injury, and that any treatment after treating with the chiropractor was not reasonable or necessary. The accident occurred in January of 2010, and the Plaintiff continued to treat up until the date of trial. The Plaintiff's past medical expenses were $265,000.00, with most of the medical expenses outstanding. At trial, the Plaintiff asked for all outstanding medical expenses, $300,000.00 in past pain and suffering and $950,000.00 in future pain and suffering. The Plaintiff requested the jury to award a total of $1.5 million. In the end, the jury awarded Plaintiff $2,000.00 in past medical expenses. The jury also found the Plaintiff 50% at fault for the accident, and concluded she did not suffer a permanent injury as a result of the subject accident. Since a Proposal for Settlement was served on the Plaintiff early in the case, the Court awarded attorney's fees and costs in favor of the Defendant. Thus, final judgment was in favor of the Defendants.

Favorable Result at Trial in Premises Liability Case.

Harold A. Saul and **Joseph W. Etter, IV**, of the Tampa office, obtained a favorable result at trial in a premises liability case. An employee of the property owner asked the Plaintiff, who was both a friend and an air conditioning technician, to take a look at a leaky air conditioner on the roof. While using a ladder that the employee had placed against the building earlier in the day, Plaintiff fell and suffered a collapsed lung, ruptured spleen, 7 broken ribs and an alleged disc herniation in his neck resulting in over $120,000 in medical bills and a 5-day hospital stay. The Plaintiff claimed the employee was holding the ladder at the time he fell, but the employee testified he was entering the office at the time and was not holding the ladder. Plaintiff made a significant demand and refused to negotiate. At trial, Harold and Joe argued the Plaintiff was the sole cause of the accident and disputed the amount of damages claimed. After a three-day trial, the jury found the employee 50% negligent and Plaintiff 50% negligent. After reduction for Plaintiff's comparative fault and collateral source setoffs, the jury's net verdict for the Plaintiff was substantially less than the last settlement offer made by Harold and Joe.

Favorable Result at Trial in Auto Negligence Case.

Kendra Therrell, of the Fort Myers office, obtained a favorable result at trial in an automobile negligence case in which the liability of the Defendant was undisputed. Her client, a 16-year-old who had only been driving for a few days, pulled out in front of the Plaintiff, resulting in a "T-bone" collision. Plaintiff was treated consistently with neck and back pain for two and a half years and alleged more than $54,000 in past medical expenses with a recommendation for a future surgery. The Plaintiff, a young single mother, cried on the witness stand as she described the pain and discomfort she has on a daily basis which limits her activities of daily living and ability to interact with her children. Plaintiff asked the jury for an award in excess of $500,000. However, Kendra countered Plaintiff's evidence and arguments and submitted to the jury that a far lower amount, such as $30,000, would be reasonable. The jury awarded the past medical damages, but declined to award the future medical treatment and pain and suffering. After set-offs, the final judgment will be approximately $40,000, which is $10,000 less than the defense had offered to settle early on in the case.

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TRIALS, MOTIONS, MEDIATIONS

Dismissal Obtained in Auto Negligence Case for Plaintiff's Fraud on the Court.

Karina Perez, of the Tampa office, secured a dismissal with prejudice for Plaintiff's fraud on the court in an automobile negligence case. The case arose from an accident between Plaintiff and our client, who allegedly ran a stop sign and broadsided Plaintiff's vehicle. Plaintiff was claiming over $230,000, in economic damages. Through her investigation, Karina learned Plaintiff had been involved in two other automobile accidents—which Plaintiff had failed to disclose in discovery. Moreover, Plaintiff failed to disclose that, in connection with one of those other two accidents, she had been arrested for insurance fraud and charged with staging the accident. Karina moved to dismiss this case, arguing Plaintiff's failure to disclose this information in discovery amounted to fraud on the court. The motion included references to Plaintiff's confession in the staged accident case. After a hearing, the trial court dismissed Plaintiff's claims with prejudice.

Summary Judgment in Lien Impairment Lawsuit.

Kendra Therrell and **Amanda Hutchison**, of the Fort Myers office, prevailed in obtaining a final summary judgment in favor of our client in a lien impairment lawsuit filed by a health care facility. In prior cases, the same trial judge had found the lien impairment statute to be unconstitutional as a special law which pertains to the creation, enforcement, extension, and/or impairment of liens based on private contracts. In this case, Kendra and Amanda further persuaded the trial court to hold the lien law unconstitutional on additional grounds, including that it is a special law pertaining to the regulation of occupations which are already regulated by a state agency, in violation of Article III, §11(a)(20) of the Florida Constitution; the subject lien law impairs the obligation of contracts between the insurer and its insured, in violation of Article I, §10 of the Florida Constitution; and further, if the constitutionality ruling is overturned on appeal, the damages sought by the health care facility would be limited or reduced to the applicable underinsured motorist coverage policy limits. (The healthcare facility will likely appeal the ruling).

Summary Judgment in Construction Defect Case.

Karl W. Labertew, of the Pensacola office, represented the homeowners' association in a multiple party construction defect case involving a high-rise development condominium unit on Pensacola Beach. The Plaintiff claimed over $4,000,000 in damages and had refused to negotiate a settlement. Since the case's inception, Karl strategically whittled away at Plaintiff's claims with an eye towards seeking summary judgment. Karl was initially able to get some of the equitable counts dismissed via multiple motions to dismiss, leaving the remaining negligence and building code claims. Karl then moved for final summary judgment based on a statute of limitations defense, arguing the Plaintiff had actual knowledge of water intrusion into her unit more than 4 years before filing suit. The issue was highly contested, to the point where the Court entered a separate scheduling order just to deal with the summary judgment deadlines and allowed Plaintiff's counsel to conduct additional depositions and discovery. After a three hour hearing, the trial court granted the motion for summary judgment based on the statute of limitations. The defense will next be seeking attorney's fees under a proposal for settlement served early in the case.

Dismissal Obtained for Fraud on the Court in Premises Liability Case.

Jennifer Feld, of the West Palm Beach office, obtained a dismissal with prejudice for Plaintiff's fraud on the court in a premises liability case. The Plaintiff filed a complaint for negligence arising out of an alleged slip and fall due to an air conditioning leak in a fast food restaurant. As initial discovery began, it became apparent Plaintiff had been treating with numerous providers for an extensive period of time. With over 55 medical providers alone, Plaintiff's medical bills were in excess of $350,000.00. As the subpoenaed records arrived, Jennifer and her team noticed there were two different addresses for the Plaintiff - one in New York, and one Florida. A background check revealed there were two individuals bearing the same social security number. Additionally, one of the medical providers was attempting to collect an outstanding lien from the individual who resided in New York. As the plot thickened, amidst the medical records, Jennifer discovered correspondence referencing the Federal Trade Commission and an FBI investigation for fraud. The Plaintiff's initial deposition was surprisingly rescheduled at the last minute. Once Jennifer obtained a copy of Plaintiff's Federal Indictment, she moved to dismiss for fraud on the court and for sanctions. She also moved to strike the Plaintiff's Proposal for Settlement, on the same grounds. Plaintiff's counsel withdrew from the case instead of dismissing it. At the hearing, Jennifer persuaded the judge that the defense motions should be granted. Thus, the judge granted the motions, dismissed Plaintiff's case with prejudice, and awarded attorney's fees in favor of the defense and against Plaintiff.

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TRIALS, MOTIONS, MEDIATIONS

Favorable Settlement in Wrong-Way Auto Accident Case.

Michael Carney, of the Fort Lauderdale office, tried a case advancing a controversial Ambien-induced "sleep driving" defense, arguing that a wrong-way motor vehicle collision in Broward County was caused by his client's unknowing ingestion of the sleep aid. The accident caused uncontroverted injuries to the Plaintiff, a young mother in her 20s, requiring surgery the defense experts conceded was reasonable and related to the MVA. To make matters worse, the hospital records stated the Defendant said he "ingested Ambien and then went for a drive," which, if true, could be negligence per se. However, Michael argued these records were untrustworthy, because (1) his client had a habit of taking Ambien only much later in the evening, (2) it seemed clear he was "sleep driving" since he was travelling the wrong way on a road he knew well, and (3) Ambien is known to cause somnambulism, which can result in anterograde amnesia, meaning the person cannot form memories during the blackout, and, thus, may try to "fill in the gaps" upon waking with something that did not actually occur. Michael therefore argued that the hospital records should not undermine his client's subsequent sworn testimony that he would have never knowingly driven after ingesting Ambien. Michael also employed an expert with a dual expertise in toxicology and forensic medicine to testify about the effects of Ambien and how it might have affected Defendant's ability to accurately describe his pre-accident activities to personnel at the hospital after the accident. Ultimately, following a seven day trial against what seemed like insurmountable odds, the case settled favorably after the closing arguments but before a verdict was rendered.

Global Settlement Conference

Grayson Miller, of the Pensacola office, recently handled a Global Settlement Conference involving 22 claimants and 9 automobiles. The insured had a Florida minimum policy with $10,000 / $20,000 bodily injury policy limits and $10,000 in property damage policy limits. Two of the claimants were paralyzed and the aggregate medical bills for the injured claimants exceeded $1.2 million. Grayson was able to obtain signed releases from each of the 22 claimants, all within the limits of $20,000 at the Global Settlement Conference and, subsequently, also settled every Property Damage claim within the $10,000 policy limits as well. The settlements absolved the insured and the carrier of multiple potential seven figure claims.

Presentations & Speaking Engagements

Laurie Adams, of the West Palm Beach office, presented at the CLM Bad Faith and Coverage Conference in December of 2014 -- Defending and Defeating Punitive Damages in Extra Contractual Litigation.

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
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Announcements & News...

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We are pleased to announce our team continues to grow:

Kara Cosse, James Eubanks - Associates, Jacksonville
Israel Fajardo - Associate, Miami
Riley Landy - Associate, Tallahassee
Scott Lindquist - Associate, Orlando

On the move in Tallahassee…

Our Tallahassee office has relocated to:
1705 Metropolitan Boulevard, Suite 202
Tallahassee, Florida 32308
Phone: (850) 222-5188
Fax: (850) 222-5108

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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