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KD in the Community

EDITOR
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IN THIS ISSUE

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Laurie J. Adams, of the West Palm Beach office, and her son Ryan Martino, co-captains of Ryan's Raiders, were among the top fundraising teams in the Walk to Cure Diabetes in West Palm Beach. As a result of generous help from family, friends, and the corporate sponsorship of Kubicki Draper, Ryan's Raiders' donation will assist the Juvenile Diabetes Research Foundation (JDRF) in their extensive search for a cure and for more effective treatments for Type 1 Diabetes.

Jennifer L. Feld, of the West Palm Beach office, was appointed Co-Chair of the Personal Injury sessions for the 2016 Palm Beach County Bench Bar Conference. The Bench Bar Conference attracts hundreds of Florida Bar attorneys and offers a unique forum to discuss pressing issues with Palm Beach County's judiciary. Attending the Bench Bar Conference provides an opportunity to both interact with judges and network with other attorneys from diverse practice areas. The Conference was held in February, and was attended by over 900 Palm Beach County attorneys. As Co-Chair of the Personal Injury sessions, Jennifer represented the firm in its expertise in defense of personal injury cases. Her planning on both of the Personal Injury sessions led to an educational and vigorous discussion of the current state of discovery and disclosure, as well as non-binding arbitration, and summary jury trials in the 15th Circuit and in the 4th District. The discussions allowed for attorneys, both plaintiff and defense, to provide much needed feedback to the Circuit Court Judges in attendance.

(Left to Right) Panelist Gary Lesser, Judge Lisa S. Small, Judge Meenu Sasser, Co-Chair Scott Perry, Moderator Laurie Adams, Co-Chair Jennifer Feld, Moderator Scott Murray, Chair Poorad Razavi.

Laurie J. Adams, of the West Palm Beach office, moderated the Personal Injury sessions at the 2016 Palm Beach County Bench Bar Conference. Judicial Panelists included Judge Lisa S. Small, Judge Meenu Sasser, Judge Donald W. Hafele, and Judge Edward Artau from the 15th Circuit, as well as Judge Dorian K. Damoorgian from the 4th District Court of Appeal. Session topics focused on motion practice, attorney's fees, CME billing, expert discovery, non-binding arbitration, summary jury trials, ethical conduct, and sanctions. Laurie helped guide the discussion while offering insight on these important topics. While Laurie always maintains a vigorous representation for her clients, her role as moderator exemplified the firm's excellent reputation for respect and collegiality amongst local attorneys and judges in Palm Beach County.

Legal Implications of Contracting without a License in Florida

By Kenneth "Jayme" Idle

on behalf of Kubicki Draper's Construction Practice Group

During my first year of practice, a seasoned construction litigation attorney told me: "Every time you receive a new construction case, check everyone's licensing, first thing." As it turns out, following this simple advice can save a client significant time, and in many cases, a small fortune, usually in the form of unspent attorneys' fees. This article explains how Florida's unlicensed contractor statute can affect a construction claim for better or worse.

Currently, Florida has a robust construction industry due to its continually growing population and great weather that allows year-round construction activities. To ensure the welfare and safety of the public and that quality construction services are provided, Florida requires many different types of contractors to be properly licensed.

Florida Department of Business and Professional Regulation

Florida Statute Chapter 489 provides the statutory authority for the state to enforce its rigid contractor licensing requirements. The Florida Construction Industry Licensing Board which is part of the Florida Department of Business and Professional Regulation (DBPR), is responsible for licensing and regulating the construction industry. Anyone has the ability to check the licensing status of any contractor in Florida, through the DBPR's website (www.myfloridalicense.com/dbpr/). The website also provides information related to any complaints or disciplinary proceedings brought against a contractor.

Florida Statute Chapter 489.128 Original Version and Amendments

Over the years, the Florida legislature has revised and amended Chapter 489 to comport with constantly evolving issues related to the construction industry. Several key changes and additions to the statute have arisen from the detrimental affects of unlicensed contracting throughout the state. In 1992, after Hurricane Andrew ravaged Southern Florida, there was an instant need for contracting services to repair and rebuild the damaged areas. Unfortunately, many unscrupulous individuals and companies preyed upon the hurricane victims by offering unlicensed construction services that ultimately resulted in unregulated and shoddy work.

The first version of Chapter 489.128 enacted by the legislature in 1991, provided contracts "performed in full or in part" by an unlicensed contractor "shall be unenforceable in law" and that courts had the discretion to extend the rule to equitable remedies. The original version included a "cure provision" that provided if the unlicensed contractor "obtains or reinstates" the license, the statute no longer applies.

Over the years, the legislature has fine-tuned the statute which is now more rigid and unforgiving than its original version. Some of the notable changes are as follows. The 2000 amendment changed the language so that contracts were unenforceable at law or equity, as opposed to the court having discretion. The 2003 amendment eliminated the "cure provision," meaning that it was irrelevant whether the contractor obtained or reinstated their license after-the-fact. Additionally, the 2003 amendment eliminated the requirement that the contract be "performed in full or in part" by the unlicensed contractor. This change broadened the statute's scope in that the subject contract only needed to be "entered into" as opposed to it also being performed by the unlicensed contractor. The 2005 amendment provided the only party to lose their contract enforcement rights was the unlicensed contractor. The other involved parties' enforcement rights were unaffected, provided the other parties were also properly licensed, if required.

Florida Statute Chapter 489.128 Current Version

The more rigid and current version of Chapter 489.128 states: "As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity by the unlicensed contractor."

For the purpose of applying Chapter 489.128, the statute defines an individual as "unlicensed" if the individual does not have a license required by Chapter 489, concerning the scope of work to be performed under the contract. The statute defines a business organization as "unlicensed" if it does not have a primary or secondary qualifying agent in accordance with Chapter 489 concerning the scope of work to be performed.

The current statute further provides that a contractor will be considered "unlicensed" only if the contractor was unlicensed on the "effective date" of the original contract for the work. If no effective date is stated in the contract, then the date the last party executed the contract will be used. Should the contract not establish a date, then the date of first furnishing of labor, services, or materials will be used.

Additional Penalties

In addition to the unenforceable contract penalty, an unlicensed contractor also faces other severe sanctions and punishments for engaging in unlicensed contracting: 1) First offense is a criminal misdemeanor and second offense is a third degree felony, punishable by up to a $5,000 fine and 5 years in prison; 2) Forfeiture of the unlicensed contractor's lien and bond claim rights; and 3) In cases involving injury to consumers, treble damages (or triple actual damages) may be sought against the unlicensed contractor. These severe penalties illustrate the legislature's intent in protecting the state's citizens and businesses from the perils of unlicensed contracting.

continued on page 3

Real World Scenarios for Application of Florida Statute Chapter 489.128

In Florida, it is not uncommon for developers and general contractors to create a single-purpose entity (SPE) for the construction of large projects. The SPE can provide potential limits on liability and other advantages with administering the project. Most times, these developers and general contractors are sophisticated, experienced, and careful to ensure that the SPE is properly licensed. However, sometimes they are not, as evidenced by my own experience and through factual scenarios in case law. Whether it is a timing issue, clerical issue, or pure ineptitude, the risks of failing to properly license the SPE through a qualifying agent prior to entering into a construction contract can spell disaster for a general contractor, or conversely, could spell good fortune for a subcontractor.

Prior to the elimination of the Chapter 489.128 "cure provision," a contractor had the time and ability to correct a licensing violation should it have been discovered after entering into the contract. However, with the elimination of the "cure provision," the current statute is unforgiving. Should the opposing party establish that the SPE was not properly licensed through a qualifying agent at the time the contract was entered into, then the offending unlicensed contractor will have no ability to enforce the terms of the contract and will have additionally forfeited its rights to any lien or bond claims related to the work stemming from the contract.

As a practical example, imagine an SPE entering into multiple subcontracts with subcontractors for a large construction project. Typically within those subcontracts are contractual indemnity provisions in favor of the SPE. Should the SPE be deemed unlicensed pursuant to Chapter 489.128, then any potential future contractual indemnity claims by the SPE against the subcontractors would be unenforceable, assuming the involved subcontractors were properly licensed themselves or performed work not requiring licensure.

Another likely scenario could involve a project owner's failure to pay the SPE. Should the SPE be deemed unlicensed pursuant to Chapter 489.128, it would be precluded from foreclosing a construction lien on the project. Depending on the solvency of the project owner, the lack of lien rights could cause the SPE, and its affiliate entity and individuals, to suffer a devastating financial blow.

Situations like the ones above is why a construction litigation practitioner should verify the contractor licensing status for all parties involved in the dispute at the outset. I have witnessed a construction related dispute that had the potential of lasting months, or even years in litigation, be resolved in a few days because a contractor was not properly licensed. Conversely, I have witnessed a protracted construction related dispute proceed in litigation for years prior to the subcontractors discovering the general contractor was unlicensed at the time the subcontracts were entered into and were therefore unenforceable.

Licensure Exemptions

Despite the rigidness of the unlicensed contractor statute, other sections of Chapter 489 include exemptions that may exempt an otherwise unlicensed contractor from some of the penalties set forth in the statute. Two notable exemptions are known as the "Big Boy" Exemption and Developer Exemption.

The Big Boy Exemption is found in Chapter 489.119(7) and states that a contracting entity with a net worth of at least $20 million that employs a licensed contractor responsible for obtaining permits and supervising the entity's contracting activities on property owned by the entity or its parent, subsidiary, or affiliate, is exempt from licensure, and thus its construction contracts would be enforceable. For instance, this exemption could arguably apply to a subcontract entered into between a large unlicensed developer and subcontractor, so long as the above conditions are satisfied. As a practical matter, should it be discovered that a party to a construction contract is lacking the requisite licensure status, an inquiry into the offending entity's business background and operations as set forth above is necessary to determine whether the exemption applies.

The Developer Exemption is found in Chapter 489.105(6) and applies to either an individual or entity that offers to sell or sells completed residences on property on which the individual or entity has any legal or equitable interest if the services of a licensed contractor have been or will be retained for the purpose of constructing or completing such residences. Although this exemption seemingly applies only when an otherwise unlicensed individual or entity is entering into contracts to sell completed residences on their own property, unlicensed developers have argued its application to enforce subcontract agreements related to the actual construction of the residences and not just the sale of them. Unfortunately, the case law regarding the interpretation and application of this exemption is lacking, so it is unclear whether the argument would succeed.

One of the main differences between the Developers Exemption and the Big Boy Exemption is that the former only requires the licensed contractor to be "retained" by the entity claiming the exemption, whereas Big Boy actually requires the entity to "employ" the licensed contractor. This difference could become important when an entity claiming an exemption has difficulty establishing whether a licensed contractor was actually "employed" by the entity. Arguably, it would require less to prove through evidence, that a licensed contractor was merely "retained" as opposed to being "employed." Although no Florida case law exists on the interpretation of this fine point, I have recently witnessed this exact argument put forth by a seemingly unlicensed contracting entity.

Conclusion

Based on the foregoing, it is apparent no one should assume someone or some entity is a properly licensed contractor. The range of offenders is wide – from the sole individual who intentionally poses as a licensed contractor, knowing full-well they are not, to the large general contractor company that did not properly have a qualifying agent for its SPE at the time it entered into a $20 million construction contract. As a practical matter for litigating construction related claims, it is necessary to evaluate and verify the contractor licensing status for all relevant parties at the outset of the claim. The information that may be discovered could have the potential to resolve the claim at a very early stage.

SPOTLIGHT ON :

Sean-Kelly Xenakis

Sean-Kelly Xenakis, a shareholder in the Tampa Office, has a rather unusual name, a hyphenated first name and a last name starting with an "X." Certainly not a combination you see every day.

Sean grew up in a small town in Pennsylvania, near the Pocono Mountains, along the shores of the largest nature lake found in the State. It was there, that Sean was raised by his mother, who worked full time. Looking back, it is easy for Sean to see where his mother garnered the fortitude to take on all obstacles she faced under such circumstances – she was raised by a Sicilian mother and Irish father in a large Catholic family with nine children.

It was also during those early years when Sean was exposed to the first fatherly influence in his life, a role taken on by his grandfather, Joseph Kelly. Joseph was an IRS Agent, who taught him about honesty and core principles in life. Fortunately, as Sean and his sister grew older, their mother found love again, marrying Randy Xenakis, who accepted Sean and his sister as his own. Sean learned through Randy's influence, how to grow to become a man and what it meant to be a "Dad." Based on his childhood experiences, Sean is often heard saying, "anyone can be a father, but it takes a special man to be a Dad." From those life experiences with both men, when Sean became of age, he made the decision to change his name, in an act of paying tribute to both men in his life who helped mold him into the man he is today.

Sean works every day to sharpen his persuasion skills in order to clearly advocate his presentation of the facts and evidence at trial. In fact, he compares trial work to athletics in that practice and hard work, play an integral role in being successful.

To get away from the cold winters of the Northeast, Sean headed south to Florida after his high school graduation to attend Rollins College in Winter Park, Florida, where his dad and uncle are alumni. After two years at Rollins, Sean was in need of a big school college experience so he moved to Tallahassee to attend Florida State University. While attending FSU, Sean became keenly interested in studying the criminal mind with the goal of working for The Federal Bureau of Investigation. As graduation with a Psychology degree approached, Sean had the option of working towards a Ph.D. in forensic psychology or to attend law school. He chose the latter. As happenstance would have it, his college roommate was from St. Petersburg, Florida which drew Sean's attention to Stetson University College of Law. It also did not hurt that a beach was just minutes from campus, a fact Sean routinely pointed out to his friends back in the Northeast. While at Stetson Law School, Sean was introduced to trial advocacy which lead to him seeking work as a prosecutor at the State Attorney's Office upon graduation.

It was not long before Sean realized that his competitive nature lent itself to the world of trial work and litigation. Following his time at the State Attorney's Office, Sean joined a law firm where he litigated and took a variety of cases to trial. Those experiences allowed for a smooth transition when beginning his journey at Kubicki Draper in 2005, first as an associate and now as a shareholder in the Tampa office.

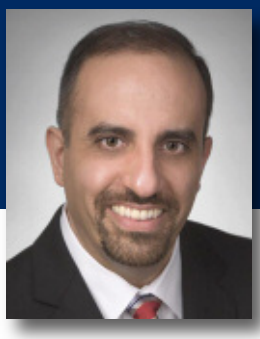
Sean believes his love for the law and trial work is fueled by his desire to tell a story in a manner that allows a jury to relate to his clients' experiences. Additionally, his love for investigation lends itself to analyzing all aspects of his cases in an effort to find the evidence he needs to fully and properly represent his clients.

Throughout his career, Sean has handled cases in many different areas of the law, ranging from intellectual property, bodily injury, construction defect, wrongful death, product liability, professional negligence, insurance coverage, divorce, and criminal. Sean strongly believes the best advice he was given many years ago as a young lawyer was to develop his listening skills. Whether it is listening to a client, an opposing party, opposing counsel, or co-workers, the ability to listen is one of the most important skills an attorney can acquire.

As life would have it, Sean met his now wife Christina, during his final year of law school. Their relationship began as a simple friendship but quickly grew into a strong love for one another. Christina had deep seeded roots in St. Petersburg, Florida and made it clear of her desire to stay in the Tampa Bay area. Thus, one could say that Sean's goal of joining the FBI was replaced by a love story that brought Austin and Annika into this world. Austin, their nine year old son, enjoys every sport imaginable which keeps both Sean and Christina on the go, especially with Sean's love of coaching baseball and soccer. Annika, Sean's seven year old daughter, enjoys soccer as well, however, her true passion is fashion which frequently leads to her painting her father's toenails with the latest hot colors. As one would expect, you will rarely find Sean wearing flip-flops or sandals.

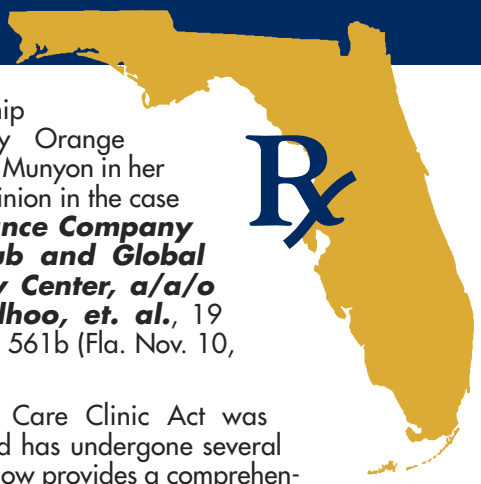
As a self-described workaholic, it leaves little down time after coaching youth sports and spending time with the family. However, when the opportunity presents itself, Sean can be found at a golf range searching for a swing or on an actual golf course wishing he brought a chainsaw, scuba gear, or a beach towel. Fortunately, in recent years, his son Austin has been teaching him the simplicity of the game when played correctly between the ears.

As those close to Sean know, he is a very private and humble person which is in stark contrast to the stereotypical trial lawyer persona. Thus, we appreciate him taking the time to share his story.



A User's Guide to the Florida Health Care Clinic Act, Florida Statute §§ 400.990 to 400.995

By Eric V. Tourian, Esq.



In an effort to provide a basic framework for analyzing a Personal Injury Protection ("PIP") claim in light of the requirements of Florida's Health Care Clinic Act, what follows is a brief catalogue – followed by a flowchart – which broadly outlines the parameters of how the Act can impact a health care clinic's bills for No Fault insurance reimbursement.[1] Familiarity with the provisions of the Act are important, as a clinic which violates one or more of the Act's provisions can be considered to have "unlawfully rendered" treatment, thereby making such treatment not reimbursable for purposes of No Fault, pursuant to Florida Statute § 627.736(5)(b)1b.[2]

For example, shortly before Christmas 2015, the owner of an Orlando area chiropractic clinic pled guilty to the charge of operating a health care clinic without a license/insurance fraud.[3] After entering his plea, the "owner" was adjudicated guilty, fingerprinted, sent to the Orange County Jail for sixty days, ordered to pay restitution to five different insurance companies, and placed on five years of felony probation.[4] The presiding judge also ordered that the Defendant not be allowed to work in Health Care during the entire period of his probation in addition to other penalties.[5]

The clinic's owner fraudulently represented that his clinic was "wholly owned" by a licensed physician.[6] In doing so, the Defendant ran afoul of Florida's "Health Care Clinic Act," Florida Statute Sections 400.990 to 400.9905.[7] This statute and in addition to its criminal penalties, provides for administrative penalties and injunctive enforcement.[8] Since this clinic was not in compliance with the Act, as it did not "lawfully render" treatment, all of its bills for treatment were also not reimbursable under PIP insurance.[9]

As in the case described above, the most common violations of the Act tend to occur when a clinic owner falsely represents that his or her clinic is "wholly owned" by a health care provider. While the topic of what constitutes a "wholly owned" clinic could be the subject of another article, the interested reader can review the ownership factors outlined by Orange County Circuit Judge Munyon in her concise and lucid opinion in the case of ***Allstate Insurance Company v. Daniel Schleub and Global Physical Therapy Center, a/a/o Ghanshyam Budhoo, et. al.***, 19 Fla. L. Weekly Supp. 561b (Fla. Nov. 10, 2011).[10]

The Florida Health Care Clinic Act was enacted in 2003 and has undergone several amendments which now provides a comprehensive, rather complex, regulatory regime which applies to all health care providers who provide health care and submit bills to insurance companies for reimbursement.

The Florida Legislature enacted this statute with the goal of countering the following problems and achieving the following goals among others:

Motor vehicle fraud and abuse (other than in the hospital setting);

Inappropriate medical treatments;

Staged accidents;

Solicitation of accident victims;

Falsification of records;

To address insurance fraud; and

To restore health to the PIP insurance market.[11]

The Florida Legislature's goals as stated at the inception of the Act in 2003, remain unmet and unfulfilled,[12] and therefore, the Florida Health Care Clinic Act remains extremely relevant.

However, anyone who has spent time litigating can attest, that enforcement of, and reference to, the Florida Health Care Clinic Act remains spotty at best. In the view of this writer, there are at least two reasons for this fact. First, the Florida Health Care Clinic Act is a "dense," complicated statute, and second, when a health care provider's treatments are challenged on the basis of an alleged Health Care Clinic Act violation, the providers often mount a ferocious challenge to such a claim or defense.

continued on page 6

[1] This analysis does not apply to "cash only" clinics which are not subject to the Health Care Clinic Act per Fla. Stat. § 400.9905(4) (2015); *See* the statements of Florida Senator Eleanor Sobel in Tim Elfrink, *Biogenesis Scandal: Florida Bill Would Regulate Booming Anti-Aging Industry* Miami New Times (March 23, 2015), available at http://www.miaminewtimes.com/news/biogenesis-scandal-florida-bill-would-regulate-booming-anti-aging-industry-7549345.

[2] *See* Fla. Stat. § 400.9935(3) (2015), § 460.4167.

[3] ***State of Florida v. Fortunard Deiuveillant Fonrose***, Orange County, 2015-CF-001919-B-O.

[4] *Id.* at Order of Probation and Judgment, Dec.18, 2015.

[5] *Id.* at Plea Form, Dec. 18, 2015.

[6] *The Pip Source*, 5 Fla. Dep't of Ins. Fraud 9, Mar. 2015 available at http://www.fldfs.com/Division/Fraud/Resources/documents/PIP_Source_Mar15.pdf.

[7] ***Fortunard Deiuveillant Fonrose***, Orange County, 2015-CF-001919-B-O (the Defendant specifically pled no contest to violating Fla. Stat. § 400.9935(4) "operating a clinic without a license" a Third Degree Felony and Fla. Stat. § 777.011 "scheme to defraud of $50,000 or more" a First Degree Felony).

[8] *See* ***Y.H. Imaging, Inc., a/a/o Cesar Alonso v. Progressive Am. Ins. Co.***, 23 Fla. L. Weekly Supp. 563b (Fla. May 29, 2015).

[9] *See*, e.g., ***Fortunard Deiuveillant Fonrose***, 2015-CF-001919-B-O, at Restitution and DNA Orders, Dec. 18, 2015.

[10] Other Florida cases examining violations of the HCCA are ***Imperial Fire & Cas. Ins. Co. v. Magic Hands Solution, Inc.***, Miami-Dade County, 2014-2211-CC-24(01); ***Progressive Am. Ins. Co. v. Best Med. Healthcare Solution***, LLC, 22 Fla. L. Weekly Supp. 238b (Fla. July 29, 2014); ***Febre's Med. Ctr. a/a/o Ivan Rodriguez v. MGA Ins. Co.***, 20 Fla. L. Weekly Supp. 1234a (Fla. Aug. 15, 2013); ***GEICO Gen. Ins. Co. v. United Health***, 22 Fla. L. Weekly Supp. 39a (Fla. June 18, 2013); ***State Farm v. Advantage Med. & Charles Hirt, M.D.***, 15 Fla. L. Weekly Supp. 1094a (Fla. Apr. 17, 2007). Federal court cases of interest are ***United States v. Janio Vico***, No. 15-CR-80057, 2016 WL233407 (S.D. Fla. 2016); ***State Farm v. B&A Diagnostic, Inc.***, 104 F. Supp. 3d 1366 (S.D. Fla. 2016); ***State Farm v. Med. Serv. Ctr. of Florida, Inc.***, 103 F. Supp. 3d 1343 (S.D. Fla. 2015); ***State Farm v. A&J Med. Ctr.***, 20 F. Supp. 3d 1363 (S.D. Fla. 2014); ***State Farm Fire & Cas. Co. v. Silver Star Health & Rehab.***, 739 F.3d 579 (11th Cir. 2013); ***State Farm Mut. Auto. Ins. Co. & State Farm Fire & Cas. Co. v. Altamonte Springs Diagnostic Imaging, Inc., et. al.***, No. 6:1-CV-1373, 2011 WL 6450769 (M.D. Fla. Dec. 21, 2011).

[11] 2003 Fla. Sess. Law Serv. 411, Sec. 1.

[12] Fraudulent clinics continue to operate unabated. *The Pip Source*, 6 Fla. Dep't of Ins. Fraud 8, Feb. 2016, available at http://www.myfloridacfo.com/division/fraud/resources /documents/PIP_SourceFeb16.pdf.

Just a moment's reflection will uncover why a health care provider would not want to be found in violation of the Health Care Clinic Act – i.e. if a court were to find that a clinic was operating in violation of the Act, then, it could find that all of the treatments – in the context of a No Fault claim – which the clinic rendered during the entire time that it was in violation of the Act, constitutes unlawful treatment and that treatment modalities are therefore not reimbursable.[13]

A BRIEF GUIDE TO ANALYZING A NO FAULT INSURANCE CLAIM IN LIGHT OF THE HEALTH CARE CLINIC ACT[14]

While a comprehensive explanation of the Health Care Clinic Act as it relates to the Florida No Fault Statute is beyond the scope of this article, the following written and visual algorithms which are based upon close reading of the text of the Act and of relevant court rulings which interpret the Act, should provide a starting point for the analysis of a potential clinic violation involving the question of whether a clinic is licensed, should be licensed, or whether the medical director of a clinic is in fact performing all of his or her statutory duties.

STEP ONE

QUESTION:

Does the clinic provide health care services to individuals and then tender charges for reimbursement?[15]

ANSWER:

If yes, then continue to step two.

If no, then stop your analysis; the Act does not apply to "cash only" facilities.[16]

STEP TWO
STEP TWO, PART A

QUESTIONS:

1) Is the entity wholly owned by a licensed medical doctor or doctor of osteopathy?; or 2) is the entity wholly owned by a medical doctor or a doctor of osteopathy and the doctor's spouse, parent, child or sibling?; or 3) is the entity wholly owned by a licensed dentist?; or 4) is the entity wholly owned by a licensed dentist and the said dentist's spouse, parent, child or sibling?; or 5) is the entity wholly owned by a licensed chiropractor?; or 6) is the entity wholly owned by a licensed chiropractor and the chiropractor's spouse, parent, child or sibling, AND does a licensed physician who is also an owner of the entity supervise the entity's business activities AND is the licensed physician also responsible for the entity's compliance with all federal and state laws AND does the physician only supervise services encompassed within the scope of his or her license?[17] If yes, then stop your analysis; the Act is satisfied. If no, then proceed to Step Two, Part B.

STEP TWO
STEP TWO, PART B

QUESTIONS:

1) Is the clinic licensed by the Florida Agency for Healthcare Administration?;[18] and 2) does the clinic have a licensed M.D., D.O., D.C., or DPM as its medical director?;[19] and 3) does the medical director only supervise services provided within the scope of his/her licensure?;[20] and 4) does the medical director supervise a maximum of five clinics with a cumulative total of no more than 200 employees and persons under contract with the clinics at any given time?;[21] and 5) are all the clinics supervised located within two hundred miles of each other?[22]

If yes, then has the Medical Director complied with all of the statutory requirements of the duties of a Medical Director as enumerated in Fla. Stat. §400.9935 AND has the Medical Director complied with all of the statutory requirements of his/her duties as the clinic's Records Custodian as enumerated in Fla. Stat. § 456.057 AND has the Medical Director complied with all of the requirements of a Medical Director as outlined in Florida Administrative Code Rule 59A-33.008?

ANSWER:

If yes, then the clinic may be compliant with the Health Care Clinic Act and the treatments rendered and billed-for may be lawfully rendered and otherwise reimbursable.

If no, then it is possible that the clinic may have been operating in violation of one or more terms and conditions of the Florida Health Care Clinic Act, and it is possible that the billed-for treatment may not have been lawfully rendered and are therefore not reimbursable.[23]

The flowchart on the following page sets forth the above decision-making process in further detail. I would invite you to utilize the flowchart in your own analysis of a potential Health Care Clinic Act violation.

If you should have any questions about this information and/or would like a copy of the flow chart, please contact Eric V. Tourian, evt@kubickidraper.com.

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[13] Fla. Stat. § 400.9935(3) (2015), § 460.4167, § 627.736(5)(b)1b.

[14] This algorithm/decision making process can be used to analyze billing for treatments which were rendered on, and after January 1, 2013, as this is the effective date of the last sentence of Fla. Stat. § 400.9905(4)(n) which was added by 2012 Sess. Law Serv. 197, Sec. 2, and which states "Notwithstanding this subsection, an entity shall be deemed a clinic and must be licensed under this part in order to receive reimbursement under the Florida Motor Vehicle No-Fault Law, ss. 627.730-627.7405, unless exempted under s. 627.736(5)(h)." A more complicated algorithm/decision making process is required in order to analyze whether treatments rendered prior to January 1, 2012, were "lawfully rendered." This author has also completed a flowchart analyzing such treatments, but due to its length and complexity, it is not included in this article. A copy of my flowchart analyzing the legality of pre-January 1, 2012 treatments in relation to the HCCA is available upon request.

[15] Fla. Stat. § 400.9905(4) (2015).

[16] *Id.*; Elfrink, *supra* note 1.

[17] Fla. Stat. § 400.9905(n) (2015), § 627.736(5)(h).

[18] Fla. Stat. §§ 400.9905(n) (2015), 400.991(1)(a), § 627.736(5)(h).

[19] Fla. Stat. § 400.9905(5) (2015), § 627.736(5)(h).

[20] Fla. Stat. § 400.9905(5) (2015).

[21] Fla. Admin. Rule 59A-33.013.

[22] *Id.*

[23] Fla. Stat. § 400.9935(3) (2015), § 400.9935 (4)(a)-(e), § 627.736(5)(b)1b.

Does the entity provide health care services to individuals and also tender charges for reimbursement for such services?

NO

Stop. Facility is not a clinic and HCCA does not apply.

YES

Do the following apply?

Is the entity wholly owned by a licensed medical doctor or doctor of osteopathy?

OR

Is the entity wholly owned by a licensed medical doctor or a doctor of osteopathy and the said doctor's spouse, parent, child or sibling?

OR

Is the entity wholly owned by a licensed dentist?

OR

Is the entity wholly owned by a licensed dentist and the said dentist's spouse, parent child or sibling?

OR

Is the entity wholly owned by a licensed chiropractor?

OR

Is the entity wholly owned by a licensed chiropractor and the said chiropractor's spouse, parent, child or sibling?

AND

does a licensed physician who is also an owner of the entity supervise the entity's business activities and is the licensed physician also responsible for the entity's compliance with all federal and state laws and does the physician only supervise services encompassed within the scope of his/her license?

YES

HCCA is likely satisfied for purposes of PIP reimbursement and no clinic license is required.

NO

Does Clinic Meet The Following Requirements?

Is clinic1) licensed by Florida's Agency for Healthcare Administration AND 2) have a licensed M.D, D.O., D.C., or D.P.M. as its clinic medical director AND 3) does the medical director only serve as the clinic's director if the services provided are within the scope of his/her licensure?

NO

HCCA is likely violated and treatments are likely not lawfully rendered and not reimbursable for purposes of PIP.

YES

HCCA is likely satisfied for purposes of PIP reimbursement.

YES

Is the Medical Director fulfilling ALL the statutory duties of a Medical Director per §400.9935:

Agree in writing to accept legal responsibility for the following activities on behalf of the clinic:

- Have signs identifying the medical director or clinic director posted in a conspicuous location
- Ensure all practitioners have a current, active and unemcumbered Florida license.
- Review any patient referral contracts.
- Ensure that all health care practitioners have appropriate certification or licensure for the level of care being provided.
- Serve as the clinic's records custodian per Fla. Stat. §456.057 and perform the following duties as the records custodian:
  - Develop and implement policies, standards and procedures to protect the confidentiality and security of the medical records.
  - Train employees of record owner in the policies, standards and procedures.
  - Maintain a record of all disclosures of information contained in the medical record to a 3rd party including the purpose of the disclosure request.
  - Place an ad in local newspaper notifying patients in writing when terminating practice, retiring or relocating and no longer available to patients, and offer patients the opportunity to obtain a copy of their medical record.
  - Notify the appropriate board office when terminating practice, retiring or relocating and no longer available to patients, specifying who the new records owner is and where medical records can be found.
  - When medical records are turned over to new records owner, the new records owner is responsible for providing a copy of the complete medical record upon written request of the patient or the patient's legal representative.
- Comply with adverse incident reporting requirements.
- Comply with all applicable administrative code rules (i.e. See FAC 59A-33.008)
- Provide day to day supervision of the clinic.
- Conduct systematic reviews of clinic's billing to ensure no fraudulent billing.
- If fraudulent billing found, then take corrective action.
- No self-referral to the clinic if the clinic performs MRI,s X-rays, CAT scans or PET scans.
- Ensure clinic publishes a schedule of charges and schedule must include (effective 7/1/11 per §4 of 2011-122)
  - Prices charged to uninsured person paying for the services in cash, check, credit card, or debit card be posted in a conspicuous place in the reception area.
  - Must include, but not limited to, the 50 most frequently provided services.
  - Schedule must be at least 15 sq. feet or an electronic messaging board of at least 3 sq. feet (effective, 7/1/12, per §3 of 2012-160)

NO

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TRIALS, MOTIONS, MEDIATIONS

Voluntary Dismissal with Prejudice.

Michael J. Carney and **Robyn Lustgarten**, of the Fort Lauderdale office, obtained a voluntary dismissal with prejudice in a case involving a shopping center security guard that was beaten to death in the parking lot of the shopping center when he came across two individuals stealing copper wires. Although the Estate had received worker's compensation benefits, it filed suit against the decedent's employer, a security company, alleging liability under the Florida Statutes, Chapter 440, exception to worker's compensation immunity. Michael and Robyn filed a Motion for Summary Judgment, arguing that the Estate's settlement and release constituted an election of remedies, barring any further action against the security company and that the facts of the case failed to overcome the exceedingly high threshold required to defeat immunity under Chapter 440. On the eve of the summary judgment hearing, Plaintiff's counsel, from a prominent Palm Beach law firm, agreed to dismiss the lawsuit against the security company with prejudice.

Defense Summary Judgment Based on Pre-Suit Settlement.

Bretton C. Albrecht and **Jorge Santeiro, Jr.** , of the Miami and Tampa offices respectively, recently prevailed in obtaining a summary judgment based on a pre-suit settlement. This was a high exposure auto accident case in which the Plaintiff was claiming extensive damages and injuries, including a burst fracture of the lumbar spine which had to be surgically repaired. The trial court had previously denied a summary judgment motion filed by prior defense counsel. The renewed motion filed by Bretton and Jorge set forth additional evidence and grounds establishing there was an offer, a mirror image acceptance, and performance of the terms, thereby creating a binding settlement. The trial court agreed and entered summary judgment for the defendant, granting the renewed motion. The defense will also be seeking attorney's fees under a proposal for settlement.

Denial of Plaintiff's Motion for New Trial.

Valerie A. Dondero and **Nicole Lauren Wulwick**, of the Miami office, received a denial on Plaintiff's Motion for New Trial involving a product liability case that was tried and won with a complete defense verdict this past October. The Judge was not compelled by Plaintiff counsel's arguments or his deficient Motion for New Trial. **Sharon C. Degnan**, of the Ft. Lauderdale office, also assisted in drafting the legal arguments for this case.

The Plaintiff attacked almost all parts of the trial as fundamental error meriting a new trial including but not limited to, the special jury instructions requested by the Defense on product misuse and the Owner-Builder Florida Statute, the order of the verdict form being preceded by the Statute of Limitations question as to the negligence claim, including a Fabre Defendant on the verdict form, disallowing certain evidence from the Florida Department of Agriculture, reading incomplete prior testimony to the jury, denying directed verdicts on the Statute of Limitations issue, and discrediting Defendant's toxicology expert as not being qualified to introduce medical testimony. Nicole successfully argued the Motion to convince the Judge there was no fundamental error to merit a new trial.

Verdict Favorable to the Defense in Car vs. Motorcycle Accident

Harold A. Saul and **Kristin F. Wood**, of the Tampa office, obtained a favorable defense verdict in a case involving a car versus motorcycle accident. The Plaintiff was a very likeable elderly Korean War veteran who was struck by our client who was driving her car to work in broad daylight. Our client never saw the motorcyclist, hitting him broadside without even touching her brakes. Our client's vehicle only came to a stop when she hit a wall on the side of the road after the collision. Even though the Plaintiff admitted partial liability, he argued strenuously that the Defendant was the majority cause of the accident because she was not wearing her glasses despite having an eyeglass restriction on her driver's license. Thus, the Plaintiff argued that had she been wearing her glasses, she would have seen the Plaintiff and at least hit her brakes. The Plaintiff also argued that the Defendant was traveling too fast under the conditions, as the accident occurred in a construction zone. Harold and Kristin argued that the sole cause of the accident was the motorcyclist's actions in violating her right of way.

The Plaintiff required surgery and a hospital stay of almost 30 days plus nearly three months of inpatient rehabilitation resulting in large medical bills. Through a pre-trial Motion in Limine, Harold and Kristin were successful in arguing that the Plaintiff could only board what Medicare paid, which was stipulated as caused by the accident. This was despite Plaintiff presenting several trial court orders where other judges had incorrectly ruled that the recent ***Joerg*** decision applies to the presentation of past medical bills paid by Medicare, not just for future medicals. After three days of trial, the jury found the Plaintiff 90% negligent.

Summary Judgment in Personal Injury Protection Case.

Michael S. Walsh, of the Fort Lauderdale office, successfully argued a Motion for Summary Judgment in an action that arose out of the Insured's automobile insurance policy for a Personal Injury Protection (PIP) claim. The medical provider Plaintiff was not a party to the contract, but rather, the provider asserted standing to sue pursuant to an assignment of benefits agreement from the Insured's carrier. The Plaintiff submitted bills to the carrier for medical services allegedly rendered and the carrier reimbursed the Plaintiff pursuant to the schedule of maximum charges in Florida Statute § 627.736 (5)(a)(1).

The Plaintiff alleged that the carrier's policy was ambiguous and failed to meet the notice requirement of the PIP statute, allowing them to pay medicals bills pursuant to the schedule of maximum charges. At the hearing, Mike successfully convinced the Court that the Policy terms and conditions clearly and unambiguously elected to utilize the schedule of maximum charges under Florida Statute § 627.736 (5)(a)(1). This was an issue of first impression with the Judge who entered the Order granting the Defendant's Motion for Summary Judgment. Mike has now successfully argued this Motion for Summary Judgment in front of two different Judges in Broward County, Florida.

TRIALS, MOTIONS, MEDIATIONS

Defense Verdict.

Peter S. Baumberger and **Christopher M. Utrera**, of the Miami office, recently obtained a defense verdict after a week long trial in Naples, Florida. This case arose out of a slip and fall at a restaurant that was captured on surveillance film. The claim appeared somewhat questionable because the Plaintiff observed the spill, the mopping up of the spill, and then proceeded to walk through the area after several other individuals walked over it without issue. However, the employee who cleaned the area did not place a warning sign and may have used a damp or wet mop. Fire Rescue was called and the Plaintiff was transported to the hospital. Ultimately, the Plaintiff had cervical surgery to address a very large disc protrusion and surgery was also recommended for the lumbar spine.

During trial, Peter and Christopher were able to seriously question the Plaintiff's lost wage claim, and highlighted numerous inconsistencies regarding the Plaintiff's alleged physical limitations, work restrictions and work history. Additionally, they were able to demonstrate through expert witnesses, how the historical neurological exams did not clearly support consistent positive neurological findings, even though the Plaintiff's cervical MRI showed a large protrusion. However, Peter and Christopher were able to secure testimony from our expert witnesses, as well as the Plaintiff's experts, demonstrating there was at least some evidence of pre-existing injury findings on the cervical and lumbar MRI films.

The jury found the alleged injuries and damages were not caused by the subject fall, and entered a verdict for the Defendant.

Involuntary Dismissal with Prejudice.

William A. Sabinson, of the West Palm Beach office, obtained an involuntary dismissal with prejudice in a case where the Plaintiff was alleging to have suffered significant injury while she was being transported in our client's medical transportation van. Pro se Plaintiff failed to respond to discovery, alleging she never received it, even though the request had been sent to the address she gave the Court when her prior counsel withdrew. After multiple motions to compel discovery responses and deposition dates, and court orders granting same, the Plaintiff filed a response with the Court alleging she never received the discovery requests or or court orders and requested she be given additional time to respond and that the Court rescind its orders. William moved for a subsequent case management conference, at which all parties or counsel were ordered to appear. Despite William having discussed the conference directly with the Plaintiff, she did not appear. As a result, William moved for an involuntary dismissal based upon Plaintiff's willful and contumacious regard for multiple court orders. In a detailed order outlining the Plaintiff's repeated failures to comply with court orders, the Court dismissed the case involuntarily with prejudice.

Final Summary Judgment.

Christin Marie Russell, of the West Palm Beach office, received an Order from a federal court district judge granting a Motion for Final Summary Judgment in favor of the client in an action filed by a former professor of a University who claimed gender discrimination and retaliation under Title VII of the Civil Rights Act of 1964; a claim under 42 U.S.C. § 1983; a claim under Florida Whistleblower Act; and a claim for defamation. The Plaintiff also made claims against university employees. Christin filed numerous motions to dismiss and the Plaintiff was on her fifth Amended Complaint at the time the Court granted Summary Judgment.

Summary Judgment in Products Liability Case.

Robyn Lustgarten and **Michael J. Carney**, of the Fort Lauderdale office, obtained a Summary Judgment in a product liability case. The case involved a man idling in a Ford F-350 jacked up with a lift kit, who ran over a young girl while she had been playing in front of it. The accident led to the amputation of the Plaintiff's leg. The truck in question had been outfitted with aftermarket parts including extended mirrors and an A-pillar gauge pod manufactured by our client. According to Plaintiff, the gauge pod obstructed the driver's line of sight. Robyn convinced the Judge that, despite issues relating to the lack of testing and lack of safety standard compliance, the driver himself had testified that the problem was the mirrors and that only he could determine what the obstruction was.

Verdict Favorable to the Defense.

J. Scott McMahon and **Karina I. Perez**, of the Tampa office, obtained a verdict favorable to the defense in a case involving a motor vehicle accident with admitted liability. The Plaintiff had surgery and rejected policy limits. The independent medical examiner opined that the Plaintiff's surgery was related to the accident, but felt there was no need for any future medical treatment. The defense radiologist contradicted the IME physician disputing causation for the surgery. The defense had to concede that the Plaintiff's surgery was related to this accident, despite prior accidents and injures similar to what the Plaintiff was claiming in this case. In addition, the Plaintiff hired a life care planner who projected high future medical bills as to treatment. Paralegal, **Shelly Ridge**, was able to gather the Plaintiff's medical records and assist with the prior medical history so that Scott could utilize them on cross examination of the Plaintiff and in closing argument.

After a four day trial, the jury awarded less then the past medical bills, some past lost wages, no future wages or medical bills, and found the Plaintiff did not suffer a permanent injury. Due to a large set off for the adjustment of the medical bills, the net verdict is likely to be at or less than policy limits. A Proposal for Settlement had also been filed by Scott and Karina, thus depending on the setoff amount, we may be entitled to attorneys' fees and costs.

Defense Verdict.

Laurie J. Adams and **David M. Drahos**, of the West Palm Beach office, received a complete defense verdict after a seven day trial on liability. Plaintiff was a motorcyclist who argued that Laurie and David's elderly snowbird client crossed the center line while she was driving around a sharp curve. There were no witnesses to the accident. Plaintiff spent two months in a trauma hospital and rehab hospital, underwent nine surgeries and revision surgeries with poor results, and incurred extremely high medical bills from physicians and hospitals.

The defense experts agreed that the Plaintiff was permanently injured with a 22% impairment rating, needed multiple future surgeries, was left with an extremely prominent limp for which he would always need a quad cane, and could not work again as a mechanic. The Plaintiff even called the defense expert witnesses as his own experts on permanency and future medical care.

However, after testimony from multiple accident reconstruction and human factors experts during which Laurie severely discredited a well known accident reconstruction expert and David entirely eliminating Plaintiff's human factor's experts' opinions, the jury returned a no liability verdict in one hour for the defense.

TRIALS, MOTIONS, MEDIATIONS

Summary Judgment in Wrongful Death Case.

Jason S. Stewart, of the Fort Lauderdale office, obtained a Final Summary Judgment in a wrongful death action. The case involved an employee of a roofing subcontractor, who had removed his fall protection harness. As a result, he lost his balance, and fell down onto a patio striking his head and rolled into a swimming pool that was partially filled with rainwater. As a result, the man drowned. Jason argued that Workers' Compensation Immunity applied and therefore, the Insured could not be liable. It is important to note that Florida Statute § 440.11, does not extend immunity to building developers who act as their own general contractor in certain instances. Here, the Insured had served in this dual role. However, the Court granted the Motion for Summary Judgment. **Lucas G. Parsons**, of the Ft. Lauderdale office, assisted in the preparation of this Motion.

Voluntary Dismissal with Prejudice.

William A. Sabinson, of the West Palm Beach office, obtained a voluntary dismissal with prejudice on the eve of the Motion for Final Summary Judgment hearing. The Plaintiff was a homeowner in our client's community, where she allegedly fell while walking her dog along a grass swale adjacent to a road that bisects the community. Through extensive discovery and investigation, William was able to establish that Palm Beach County and another property owners' entity within the community were in actual possession of the piece of property on which the Plaintiff fell. William filed a Motion for Final Summary Judgment on the grounds that there was no issue of fact as to our client being in possession of the location where Plaintiff fell, and as such, was not liable to the Plaintiff. The night before the Summary Judgment hearing, Plaintiff's counsel notified that he would not be able to defeat the motion and voluntarily dismissed Plaintiff's case as against our client, with prejudice.

The information provided about the law is not intended as legal advice. Although we go to great lengths to make sure our information is accurate and useful, we encourage and strongly recommend that you consult an attorney to review and evaluate the particular circumstances of your situation.

Partial Summary Judgment in Construction Defect Case.

Christopher M. Utrera, of the Miami office, won a partial summary judgment in a construction defect case on behalf of a Miami general contractor. The Plaintiff, a homeowner, sued the general contractor who constructed her residential home. The Plaintiff's claims primarily focused on her issues with the HVAC system. There were undisputed problems with the HVAC system, however, Christopher took the position that per the terms of the contract, the general contractor was not liable to the Plaintiff for any product defects with the HVAC system and would only be liable for installation defects. Christopher argued that while the Plaintiff alleged both product and installation defects existed, there was no record evidence of installation defects.

The Court agreed with this interpretation of the contract and that there was no record evidence of installation defects. Therefore, Partial Summary Judgment was granted.

Defense Verdict.

Francesca A. Ippolito-Craven, Nicole M. Ellis, and **Ariella J. Gutman**, of the Miami office, obtained a complete defense verdict in a slip and fall case where it was highly speculative as to whether the incident had occurred. The Plaintiff was adamant that she slipped and fell at the client's premises after heavy rain. However, no one at our client's restaurant was aware of the incident. The Plaintiff called Fire Rescue outside of the premises in the parking lot and EMS drafted a report of "no complaints." In addition, the Plaintiff admitted to calling her attorney six minutes after EMS had departed the scene. Furthermore, former employees working on the date of the incident testified on behalf of our client, that no complaints had been reported by the Plaintiff.

Francesca highlighted the holes in Plaintiff's testimony through witnesses and documents obtained, Nicole conducted closing argument, and Ariella assisted in trial motion practice, and preparation of witnesses. This led to a complete defense verdict by the jury and in addition, a Proposal for Settlement had been filed early in the case by the defense.

PRESENTATIONS AND SPEAKING ENGAGEMENTS

Our attorneys give presentations on a variety of topics throughout the year.
Below are some of the topics presented by our team in the last few months.

- Corporate Representative Depositions
- Best Practices to Prevent E and O Claims
- First Party, First Rate Defense
- Florida Adjuster 5-Hour Law and Ethics Update
- Material Misrepresentation
- Personal Injury Protection Hot Topics
- Bad Faith Prevention and Top Ten Bad Faith Pitfalls
- EUO / IME No Shows
- Early Case Resolution
- Effective Mediation Preparation and Strategies
- Alcohol, Cell Phones and the Law
- Collateral Sources
- Low Limit Solutions
- Ethics for the Claims Professional
- Florida Case Law Update
- Loss of Use and Diminution of Value in Automobile Property Claims
- Best Practices in Trucking / Transportation Claims

We welcome the opportunity to host a complimentary seminar at your office or event, on any topic(s) of your choice. All presentations can be submitted for approval of continuing education credits.
For more information, please contact Aileen Diaz at 305.982.6621 / ad@kubickidraper.com.

Announcements & News

New Additions

We are pleased to introduce our new team members:

Lisandra Guerrero, Danielle L. Snyder, and **Scott M. Simon**
Associate Attorneys, MIAMI

Teresa F. Cummings
Associate Attorney, PENSACOLA

Toni M. Turocy
Associate Attorney, ORLANDO

Kenneth M. Oliver, of the Fort Myers office, and **Yvette M. Pace**, of the Orlando office, participated in the Transportation Lawyers Association's Conference. Yvette played the role of a witness at the Mock Trial Presentation on "Fatality on Interstate 10: Tractor-Trailer vs. Horse Trailer."

Jason S. Stewart, of the Fort Lauderdale office, was selected by The National Black Lawyers to be included in the "Top 40 under 40" for the State of Florida in 2016. The award recognizes outstanding black attorneys under the age of 40 who demonstrate superior leadership, reputation, influence, stature, and profile as a black lawyer. Only 40 lawyers from each state or region are selected for membership each year. Selection is based on a multiphase process that includes peer nomination combined with third-party research.

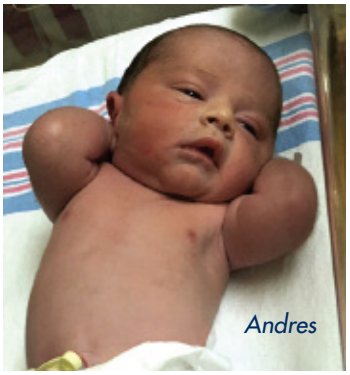
Kubicki Draper was thrilled to be a gold sponsor for the 2016 CLM Annual Conference held at the Hilton Orlando Bonnet Creek, on April 6 - 8, 2016. **Charles Handel Watkins**, of our Miami office, spoke at the conference on "Insurance Fraud – The Future of Fighting Fraud.


Madison

Congratulations to **Jennifer Remy-Estorino**, of the Miami office, and her husband on the birth of their baby girl, Madison Estorino.

Congratulations

Congratulations to **Christopher M. Utrera**, of the Miami office, and his wife on the birth of their baby boy, Andres Alejandro Utrera.


Andres

YOUR OPINION MATTERS TO US.

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

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