

NEWSLETTER

ALABAMA LAW UPDATE

DOES THE “YOUR WORK” EXCLUSION MEET INSURERS’ EXPECTATIONS FOR CONSTRUCTION DEFECT CLAIMS IN ALABAMA?



**John McClurkin,
Esq.**

Vernis & Bowling of
Mobile/Southern
Alabama, LLC

In a lawsuit brought against a contractor alleging construction defects resulting in a loss and need for repairs, the following question regarding coverage inevitably arises:

Are the costs to repair the building due to construction defects covered under the Commercial General Liability policy?

The answer (as is typical with these types of coverage questions) is: *it depends*. That is, it depends on the actual language of the exclusion provision as interpreted by the subject jurisdiction when considering the policy language as a whole, and the specific damages requested, based on the allegations

within the complaint. This article focuses on the current viewpoint in Alabama, in light of a recently narrowed application of the typical ISO “Your Work” exclusion language.

First and foremost, the “Your Work” exclusion’s true purpose is to bar coverage for the costs to repair an insured contractor’s defective work.¹ This is because a CGL policy is not meant to be a surety bond. A liability carrier does not act as a “silent partner” of an insured contractor’s business venture. Indeed, such an insurer does not warrant the quality of its insured’s work, nor does it expect to reimburse for repairs to its insured’s faulty work. Hence, this exclusion was born.

In Alabama, as in most other states, exclusions within CGL policies are implicated only when there is first determined to be an “occurrence” as defined in the policy.

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ANNOUNCEMENTS

Robert C. Bowling and G. Jeffrey Vernis, Managing Partners, were both selected as **Top Lawyers—Insurance Litigation Defense** in the South Florida Legal Guide, January 2017 edition.

Vernis & Bowling is listed as one of the **Top Corporate Giving/Corporate Foundations** in the South Florida Business Journal.

Vernis & Bowling’s Atlanta, GA office has expanded and moved into a new, larger office space on Perimeter Park Drive.

GET TO KNOW JOHN McCLURKIN

Managing Attorney, Mobile, AL

Family: Married to Kristy, with three daughters **Favorite TV Show:** Futurama

Favorite Place: Hilton Head, SC

Favorite Hobby: Golf

Favorite Restaurant: Gambino's in Fairhope, AL

Favorite Book: The Andromeda Strain

Best Thing About Being an Attorney:

Attacking an adverse witness on the stand during trial

Favorite Sports Team: Atlanta Braves

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ALABAMA LAW UPDATE

DOES THE “YOUR WORK” EXCLUSION MEET INSURERS’ EXPECTATIONS FOR CONSTRUCTION DEFECT CLAIMS IN ALABAMA? **Continued from p.1**

This becomes a two-pronged test that first looks at the allegations of the complaint to assess whether an “occurrence” is invoked within the meaning of the policy, before looking at the applicable exclusions.² This first prong can become a significant barrier for insureds even before getting to the “Your Work” exclusion.

For example, in 2014 the federal district court interpreting Alabama law in FCCI Ins. Co. v. Capstone Process Systems, LLC, *supra*³, held that the insured contractor’s faulty installation of a rubber that failed and resulted in loss of use of the customer’s machine, was not an “occurrence” because the failure did not lead to any additional harmful condition.⁴ The court went on to explain that under Alabama law, faulty workmanship may lead to an “occurrence” if it subjects personal property *or other parts of the structure* to continuous or repeated exposure to some other general harmful condition,⁴ and as a result of that exposure, personal property or other parts of the structure are damaged.⁵ Whether poor workmanship leads to an occurrence depends on the “nature of the damage” that results from the faulty work.⁶

This brings us to the recent Alabama Supreme Court holding in Owners Ins. Co. v. Jim Carr Homebuilder, LLC, 157 So. 3d 148, 155 (Ala. 2014). Here, the Court attempted to clarify (and in doing so, broaden) the definition of “occurrence” and narrow the application of the “Your Work” exclusion provision. In the underlying case, the homeowner had sued the general contractor for faulty construction of the roof, which led to leaks and ongoing water damage to the underlayment and attic.

The carrier in this coverage action argued that faulty workmanship performed as part of a construction project might result in an “occurrence” only to the extent that the defective work results in property damage to real or personal property that is *not* part of that construction. That is, the carrier tried to argue that the house as a single structure was the “product”, and so a defect to a portion of it – such as the roof – which resulted only in damage to other portions of the construction – such as the attic, the walls, or other parts of the house structure (i.e. the product as a whole), and not any damage to personal or other property beyond the original construction, would not amount to an “occurrence.” The Court disagreed.

In doing so, the Court pointed to the definition of “occurrence” within the CGL policy which simply states; “an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured”. This is the standard ISO definition.

This definition does not reference or limit the nature or location of the property damaged, and so the Court refused to look at policy exclusions when assessing the first prong of whether the allegations of the complaint trigger an “occurrence.” Essentially, it has now ruled that an “occurrence” as defined, does not distinguish between damage to the insured’s work and damage to some third-party’s work or property. As such, damage to the insured’s “work product” other than the defective workmanship (i.e. damage to other parts of the same structure built by the insured due to a defect in another part of the structure) equates to an “occurrence” under standard GCL policies.

Once an “occurrence” has been established, the analysis then moves to the application of the “Your Work” exclusion. This provision often aligns with the simple notion that CGL carriers intend to insure their contractors for losses to other property resulting from negligent construction during ongoing work, and to terminate this exposure once the work has been completed. In doing so, the “Your Work” exclusion often incorporates a companion “Completed Operations Hazard” exclusion.

Specifically, the exclusion typically states that insurance does not apply to “Damage To Your Work ... ‘Property damage’ to ‘your work’ arising out of it or any part of it *and included in the ‘products-completed operations hazard’* (emphasis added).” As the emphasized passage makes clear, in order for the “Your Work” exclusion to apply, the damage must not only be to “your work,” but also must be “included” in the “products-completed operations hazard.”

The question then becomes: What is typically “included” in the “products-completed operations hazard”? Generally speaking, products that have left the insured’s possession or work that has been completed are included in the hazard. However, often, as in Owners Ins., the provision does not specifically include bodily injury or property damage arising out of “products or operations for which the classification, shown in the Declarations, states that products-completed operations are included.”⁷

So, one must look to the Policy’s Declarations to see if damage to the insured’s completed work is covered by the Policy or is excluded. If the Declarations show coverage for “products-completed operations,” then the “Your Work” exclusion does not apply. As is often the case, the Declarations page of the policy in Owners Ins. did indeed have coverage up to \$2,000,000 for both “Bodily Injury Products/Completed Operations” and “Property Damage Products/Completed Operations” (a total of \$4,000,000).

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NORTH CAROLINA LAW UPDATE

THE POTENTIAL EFFECTS OF A NEW ADMINISTRATION ON WORKERS' COMPENSATION



Nicole Tackett, Esq.
Vernis & Bowling of Charlotte, LLC

At first glance, it would seem as though the federal government would have little to no impact on workers' compensation laws as these laws are state regulated. However, a new administration's policies on immigration, as well as their changes to healthcare and government programs, could have a surprising impact on the workers' compensation industry.

First and foremost, a stricter stance on immigration could result in fewer undocumented immigrants residing in the United States, and therefore, fewer illegal employees. Currently, illegal employees make up a significant percentage of the American workforce. According to research results released on November 3rd, 2016 by the Pew Research Center, as of 2014, the United States work force included eight million unauthorized immigrants.

In 1986, President Ronald Regan signed The Immigration Reform and Control Act ("IRCA") which makes it illegal for employers to employ undocumented workers. Under the IRCA, employers who fail to confirm their employees' status prior to employment, face serious fines. Despite this legislation, and enforcement measures such as workplace raids, and significant penalties for law-breaking employers, illegal immigrants have remained desirable employment candidates for American employers and their numbers have grown. According to the LA Times, undocumented immigrants currently constitute 10% of the workforce in California alone.

Most states allow undocumented workers the right to receive workers' compensation benefits if injured on the job. The reasoning behind this rule is that if an employer is willing to hire an illegal alien, the employer should also have to bear the consequences if the illegal alien suffers an on-the-job injury versus passing the responsibility along to taxpayers. A large number of workers' compensation claims involve illegal aliens due to the high percentage of undocumented workers living here, and to the fact that many of them work in strenuous jobs where the risk of injury is high, such as agriculture and construction.

Workers' compensation claims involving illegal aliens are typically more expensive than regular workers' compensation claims. There are many reasons why. As mentioned above, undocumented workers typically perform jobs where the risk of dangerous accidents and severe injury is high. Not only are the injuries

themselves expensive, but claim handling is expensive as well. Due to language barriers, employers often have to assign nurse case managers to coordinate medical treatment and translators to attend medical appointments. Transportation is frequently an issue, therefore carriers must provide transportation to and from medical appointments. In cases where the injured worker cannot return to his or her pre-injury job due to permanent restrictions, it is difficult, if not impossible, to place them in a suitable job with a new employer due to their illegal status.

Theoretically, if fewer illegal aliens are coming into the country, there should be a corresponding decline of undocumented workers in our workforce. As a result, we should then see a decrease in the number of workers' compensation claims filed by illegal workers.

Additionally, the illegal workers who remain in our country may in turn be afraid to report claims for fear that doing so will result in deportation. If the federal government tightens its stance on immigration, it's also possible that State legislators will follow their lead enacting legislation that does not allow for illegal workers to draw workers' compensation benefits. This type of legislation has typically failed in the past, but that might change under a new administrations leadership.

"We should then see a decrease in the number of workers' compensation claims filed by illegal workers..."

While a potential drop in workers' compensation claims may sound like good news to employers and insurance carriers in light of the number and expense of illegal immigrant claims, the fear of reporting has several employee advocacy groups worried. Undocumented employees work in low-wage industries where wage-theft (not being paid minimum wage, overtime, or provided breaks) and unsafe working conditions are common. These workers will not only be less likely to file a worker's compensation claim, they will also be less likely to file any complaint about workplace safety or unfair wages, thus changing the dynamic between employers and employees. Employee advocacy groups fear that this power—"I will have you deported if you complain or file a claim"—will encourage unfair working conditions and practices, thus re-creating "sweat shop-like" working environments in industries where undocumented employees make up a large percentage of the workforce.

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VERDICTS & DISPOSITIONS

G. Jeffrey Vernis and Susan Kent (Palm Beach, FL) (Auto/Fraud) secured a dismissal of a lawsuit for fraud on the court. Plaintiff claimed he was injured when an insured hit him with her car while she was pulling into a parking space in front of a supermarket. Just prior to her arrival at the store, the insured lost consciousness due to a medical emergency. The insured's car then went up on the sidewalk in front of the market, hit a sign, and travelled out into the parking lot before it came to rest in some landscaping. The Firm obtained video surveillance of the incident from the supermarket and it showed, fortunately, that the insured's vehicle never hit or injured anyone. After obtaining sworn videotaped testimony from the plaintiff that he had been hit by the insured's car, Attorneys Vernis and Kent sent the supermarket's videotape to plaintiff's counsel. Upon receipt of the video, plaintiff's counsel withdrew. After an evidentiary hearing before the Court, the Firm then secured a dismissal of the suit based on fraud.

ANNOUNCEMENT:
Vernis & Bowling is listed as one of the Top Corporate Giving/Corporate Foundations in the South Florida Business Journal

Michael Barratt (Birmingham, AL) (Premises Liability) obtained a Summary Judgment in the case of *Clemons v. Running Creek & Kenneth Umstead*. In this premises liability claim, the plaintiff claimed that she broke her arm and injured her neck and shoulder after falling down the stairs of a wooden porch that was attached to a rental property she was visiting. She alleged that her fall was the result of a loose board on the steps and she sued the landlord for negligence and wantonness. As a result of the fall, the plaintiff required emergency surgery to her broken arm and her physician suggested the need for a total shoulder replacement.

During deposition, the defendant testified that he did not construct the porch and steps, nor did he perform any repairs to the porch at any time during the lease. Michael Barratt argued that the defendant did not have a duty to the plaintiff to inspect or repair any latent or hidden defect and was entitled to judgment as a matter of law. The Court

entered an Order granting the Summary Judgment and stated:

“Upon consideration of the motion, the opposition filed in response thereto, and the arguments and contentions of counsel in support of and in opposition to the motion, defendant is entitled to Judgment as a matter of law as to the claims asserted by the plaintiff.”

T. Daniel Webb (Jacksonville, FL) (Workers' Compensation) prevailed in a significant workers' compensation ruling. The claimant asserted that his seizure condition was caused by an electrocution while on the job as a correctional officer. The Employer/Carrier, the State of Florida, denied compensability of the condition and denied that he was suffering from seizures. The claimant's authorized treating physician testified that the claimant was suffering from seizures and that it was caused by the work accident. The Employer/Carrier's IME physician testified that it is unlikely that the claimant is suffering from seizures and that, even if so, the electrocution would not be the major contributing cause of the condition. The Judge of Compensation Claims (JCC) ordered an Expert Medical Advisor (EMA) due to the divergent opinions of the two physicians. The EMA determine that the claimant was suffering from seizures and that the work accident was the major contributing cause of the condition. Notwithstanding this opinion, which creates a rebuttable presumption of correctness, the JCC ruled in favor of the Employer/Carrier, citing the failure of the EMA to review the full medical treatment records, including important testing, and the EMA's reliance primarily on the claimant's narrative in coming to his opinion. All claims for treatment, temporary indemnity benefits, and payment for past medical care were denied.

Steven Sundook (Ft. Myers, FL) (Premises Liability) obtained a Summary Final Judgment in the case of *Martin v. Jacaranda Commons LLC*. In this premises liability, personal injury case, the plaintiff claimed to have tripped on a concrete area, located between an asphalt parking lot of a Publix Shopping Center, and the sidewalk in front of the grocery store. Plaintiff claimed to have injured her knee, ankle, neck and back. It was successfully argued that the area the plaintiff identified as what she believes caused her to fall is so open and obvious that under the Florida law, summary judgment should be granted.

It was argued that a “new wave” of appellate decisions

which encourage trial courts to grant summary judgments in situations like this case applied. The courts in those cases hold that where a condition is so open, so obvious, so common, ordinarily innocuous, it cannot be held as a matter of law to not constitute a hidden dangerous condition. In one of the cases involving a mat a plaintiff tripped over the Appellate Court pointed out,

"If the mat was dangerous at all, which we do not decide, the danger was not latent or concealed, but patent and obvious, and the ordinary use of her senses by the appellant would have disclosed it to her."

Attorney Sundook argued that he passed a dozen similar obvious obstacles in the three blocks walking to the courthouse from his car.

Plaintiff's counsel argued that the difference in color was not "dramatic" enough, and that despite it arguably being obvious, the concrete was still a dangerous condition.

We are moving for attorney fees based upon the filing of a proposal for settlement. Plaintiff has appealed the summary judgment, which we believe will be affirmed on appeal.

Terry Dixon (Deland/Central FL) (Premises Liability)

obtained a Defense Verdict in the case styled *Mitchell, Tamika v. Chick-fil-A*. In that case, the Plaintiff alleged that as she walked into the ladies' restroom she slipped and fell in a large puddle of water. The Plaintiff claimed that as a result of her fall she suffered injuries to low back, right leg, right ankle and right foot. Store surveillance from that day showed the Plaintiff and two male friends walking into the restaurant and heading to the respective restrooms. For obvious reasons, the video did not show the fall. However, the video did show the Plaintiff limping upon exiting the restroom and one of her male friends, along with a Chick-fil-A employee assisting her out to her vehicle.

Unfortunately, the video also contradicted restaurant employees' testimony regarding the frequency of inspections and showed that no employee entered the restroom to check it for over 25 minutes after learning of the Plaintiff's fall.

At trial, while denying liability, we conceded the injuries to the Plaintiff's leg, ankle and foot, and disputed the relationship of her low back injury to the subject incident. We then set about proving that the Plaintiff's testimony regarding what occurred was not credible and she, therefore, could not meet her burden of proof. In doing so, we were able to show that during her deposition the Plaintiff made 5-7 representations that were ultimately proven to be false. We also were able to impeach her testimony at trial on 2-3

occasions. Plaintiff counsel attempted to overcome the credibility issues by focusing on the restaurant's failure to check the restroom for over 25 minutes after being told of the fall, which was contrary to the restaurant's standard procedure regarding the frequency of inspections. However, it appears that the jury accepted our position that said failure was due to the restaurant management focusing on addressing the Plaintiff's injuries and all of the in-store surveillance video showed an extremely clean restaurant.

The jury deliberated for 30 minutes and returned with a defense verdict.

Christopher Blain and Ryan Sainz (Tampa, FL) (Auto Liability-Wrongful Death)

obtained a Defense Verdict on a wrongful death matter. The facts of this case involved a motor vehicle

where our client struck a pedestrian. Policy limits in were \$100k. There was evidence that the pedestrian was under the influence of marijuana at the time of the impact as well as other matters which strengthened our argument as to the contributory negligence of the deceased. Liability and damages were highly contested in this matter.

Additionally, the beneficiary of the estate was an 11 year old child which added a heightened variable of sympathy to the presentation of the case. The week before trial Plaintiff disclosed that they had an independent witness who saw the entire collision. At trial, this witness testified that our client ran a red light prior to hitting the deceased. The credibility of this witness was a difficult hurdle to overcome considering that he was employed by Hillsborough County Fire Rescue on the date of the incident and was recently retired after 30 years of service. This witness was essentially unknown to all parties until Plaintiff discovered him 3 weeks before trial. He was not listed in the police reports and all of the investigating officers concluded that there were no witnesses to this accident.

This version of events was entirely contradictory to our

"The beneficiary of the estate was an 11 year old child which added a heightened variable of sympathy..."

Verdicts & Dispositions, Continued

clients version of events. It was our clients position that he not only did not see the pedestrian prior to the impact due to it being nighttime, poor lighting in the area and the deceased wearing all black. He also testified that the traffic signal was green at the time that he proceeded through the intersection. At the end of the case, opposing counsel requested from the jury to award **\$3.1 million**.

In light of the testimony of the independent witness, we were still able to obtain an **absolute defense verdict** with the jury finding **no liability** as to our client after deliberating for under an hour.

Kristin Stocks (Ft. Myers, FL) (Premises Liability–Fraud) successfully argued a Motion to Dismiss for Fraud on the Court in a trip and fall personal injury action. The fraud was initially discovered by paralegal Donna Woods. The Court agreed with Ms. Stocks’ arguments, and specifically determined by clear and convincing evidence that the **“Plaintiff intentionally and in a calculated way attempted to interfere with the judicial system’s ability to adjudicate a matter”**. The Plaintiff brought the action in Collier County Florida Circuit Court in *Finer v. Staples the Office Superstore Inc.* She alleged that she entered the Naples store, tripped and fell over a back to school display, which was partially constructed and blocking an aisle. There were

“Plaintiff intentionally and in a calculated way attempted to interfere with the judicial system’s ability to adjudicate a matter...”

no witnesses or video surveillance of the incident. Plaintiff gave no indication at the time of how or why she fell. She was taken to a local hospital by ambulance and released. In the ER, she claimed neck, low back, left hip and left knee pain.

Within a week, Plaintiff initiated chiropractic treatment at Naples Injury Treatment Center, a

facility well known in personal injury litigation for referring patients/litigants to the same neurology, orthopedic, and pain management providers located in Lake Worth Florida. Those medical providers, not coincidentally are all in the same county in which Plaintiff’s law firm is located. Plaintiff’s treatment was surprisingly minimal compared to

other cases involving the same doctors and lawyers – 3 months of chiropractic treatment, an MRI, one visit with pain management (Dr. Stuart Krost), and one consultation with a surgeon (Dr. Thomas Roush).

In answers to interrogatories and under oath at her deposition, Plaintiff admitted to a prior motor vehicle accident in 1999 in which sustained injuries primarily to her neck. Without naming any of the treating providers, she indicated that treatment consisted of minimal physical therapy which quickly resolved all symptoms. She did not list any other providers in answer to the standard interrogatory question regarding all medical providers for the past 10 years. She also claimed an aversion to narcotic pain medication, and to not taking any pain medication for injuries claimed from the Staples fall stronger than Aleve. She was prescribed some medication, so her pharmacy records were subpoenaed. Plaintiff actually presented well at her deposition. She is an educated, well-dressed woman in her 50s. She seemed truthful and believable.

Then the pharmacy records arrived. Paralegal Donna Woods discovered that they painted a very different picture of Plaintiff. They showed she was consistently being prescribed a myriad of medications over 15 years, including the narcotic Hydrocodone, Celexa, and Adderall. Naples neurologist and pain management physician, Dr. Desmond Hussey had prescribed the medications both years before and after the date of the fall at Staples. We then subpoenaed Dr. Hussey’s records, which showed the extent of the Plaintiff’s lies and fraud.

We were legitimately shocked to find some 600 pages of medical records of treatment for neck pain, headaches, vertigo, back pain and ADD from 1999 through 2015. Dr. Hussey was never identified as a prior treating doctor. At her deposition, Plaintiff claimed vertigo as a result of her Staples fall and specifically denied having ever been previously diagnosed with vertigo. Dr. Hussey’s mountain of records showed an appointment three weeks before the Staples fall in which he treated her for **vertigo and wrote a prescription for hydrocodone**.

Dr. Hussey’s deposition was taken. He knew nothing about the Plaintiff’s fall at Staples or any resulting claimed injuries. He treated her for several years before and after the fall for injuries from her prior car accident, including vertigo. He prescribed narcotic pain medication over the course of her treatment, both before and after the Staples fall. The deposition of Chiropractor Michael Sills of the Naples Injury Treatment Center was also taken. He knew nothing about her prior car accident or Dr. Hussey’s years of treatment.

Verdicts & Dispositions, Continued

At the hearing on our Motion to Dismiss for Fraud Perpetrated on the Court, Plaintiff's counsel's argument was that the fraud was not proven by clear and convincing evidence (the higher standard for Motions to Dismiss for Fraud) and that Plaintiff's "inaccuracies" did not go to the "heart of the case." The Court found that fraud on the Court was proven by clear and convincing evidence and dismissed the case with prejudice.

Plaintiff's counsel never believed the Court would actually dismiss the case with prejudice, and continued to demand \$80K to settle the case up to the time of the hearing. He told us his client was offended by being accused of fraud.

We served a \$12,500 PFS. Because of the economic status of the Plaintiff, Staples has agreed not to seek a judgment for fees in exchange for Plaintiff foregoing an appeal.

Jeffrey Alexander (Palm Beach, FL) (Construction Defect) obtained a dismissal of a common law claim for Contribution in a construction defects case. The court agreed that the general contractor, Coastal Construction, could not assert a claim for contribution against its subcontractor. The legislature abolished common law Contribution when it enacted Chapter 768.81, Florida Statutes, the Comparative Fault statute. In short, before the enactment of 768.81, when two or more people or entities became jointly and severally liable for damages, or shared a common liability, a right of contribution existed among them. Under 768.81, the jury now has the ability to apportion fault to parties and non-parties, so there are only very limited circumstances where contribution may still exist. Only narrow exceptions exist in wrongful death and very fact specific instances among fourth party defendants.

Eric Knuth (Miami, FL) (Premises Liability) obtained a Motion for Summary Judgment in the case of *Jackson, Ian Andrew vs. Bike and Roll Miami, LLC*. The Defendant operated a Segway rental shop in Miami Beach. Plaintiff alleged that he suffered a broken ankle after falling from a Segway he rented from the Defendant's store. He claimed it malfunctioned and "threw" him to the ground. Before he operated the Segway, Plaintiff had signed the Defendant's "Contract and Release." This Pre-injury Release included broad language releasing all future injury claims against Defendant. Defendant moved for Summary Judgment, arguing that the contractual release was enforceable under the Florida Supreme Court's recent decision in *Sanislo v. GiveKids the World, Inc.*, 157 So. 3d 256 (Fla. 2015). This recent Supreme

Court decision had addressed a conflict within the Districts regarding the specificity required for a valid pre-injury release. The trial court **granted** Defendant's Motion for Summary Judgment and expressly held that the Release was enforceable under the standard established in *Sanislo*, because the intent of the Release to waive any and all claims was clear and unequivocal and the wording was **clear and understandable to an ordinary and knowledgeable person**.

G. Jeffrey Vernis and Jeffrey Alexander (Palm Beach, FL) (Personal Injury) obtained a Defense Verdict in the case of *Hansen v. Vesely*. This was a personal injury case filed by the Plaintiff against the homeowners after a refrigerator fell over on the Plaintiff while she was cleaning it. In this case, during the kitchen remodeling, a bottom mounted refrigerator was moved out of the kitchen and placed in the family room. The Plaintiff, the Defendant's housecleaner came to the house and began cleaning the refrigerator when it fell on the Plaintiff trapping her and breaking both her legs. The Plaintiff sued the homeowners for negligence and failure to warn. The Plaintiff was given a key to the house, but there was an issue whether the Plaintiff was an invited on the property. The Plaintiff had \$1.3M in past medical expenses and asked for \$293,000 for future medical expenses and an additional \$1.3M (at least) for past and future pain and suffering, requesting a total of \$2.893M. The defense argued that the Plaintiff was not an invitee at the time of the accident, that she failed to observe the open, obvious and conspicuous warnings and she caused the accident due to her own negligence. After deliberations, the jury returned a verdict for the Defendants on all issues. We filed a proposal for settlement and have now filed our Motions to tax attorney's fees and costs.

Michelle Hendrix (Pensacola, FL) (Negligent Security) obtained an order of dismissal in *Duane Jackson v. Area Housing Commission Development, Inc. d/b/a Gonzalez Court Apartments*. Plaintiff filed a complaint against Gonzalez Court Apartments alleging negligent security. The plaintiff was shot while visiting residents of the apartment complex. The plaintiff had stepped outside to talk on the telephone, when a masked man approached him and attempted to rob him. The plaintiff resisted and was shot one time. During the litigation, the plaintiff failed to comply with discovery requests, and a hearing was held on a Motion to Compel discovery. Plaintiff's counsel failed to attend the hearing, and the Motion was granted. The plaintiff failed to comply

Verdicts & Dispositions, Continued

with the order on the Motion to Compel, so a Motion to Dismiss was filed. Shortly before the hearing on the Motion to Dismiss, the plaintiff filed incomplete answers to the discovery requests. The hearing on the Motion to Dismiss was held, and, again, Plaintiff's counsel failed to appear. His office was contacted at least three times during the thirty (30) minutes scheduled for the hearing, and an attorney still failed to attend the hearing or acknowledge that one was scheduled. The Motion to Dismiss was granted and the Court entered a detailed order regarding both the plaintiff's and the attorney's failures to comply with the Court's earlier order and the prejudice that was caused to the defendant due to the willful and deliberate disobedience displayed by Plaintiff's counsel and his client.

Steven Sundook (Ft. Myers, FL) (Wrongful Death), in the case of *Rainey v. Roof*, successfully argued to the Second District Court of Appeal that a dismissal with prejudice he obtained in the trial court, in a wrongful death case on behalf of trustees of a revocable trust, should be affirmed on appeal. The Trust owned the premises where the incident occurred. The decedent was a door to door salesman of food products. He was soliciting customers when the resident of the home approached in his Toyota pickup, took a 9 millimeter firearm out of the glove compartment, and fatally shot the salesman while he was standing in the home's driveway. After the salesman initially fell, he was shot again in the head, "for effect". The facts alleged in the amended complaint concerning the shooting were based on sworn testimony at the shooter's criminal trial, in which the shooter was convicted of second degree homicide.

The Plaintiff alleged in amended complaint that the shooter, who was also a trustee of the revocable family trust which owned the home where the shooting occurred, "was an employee or agent of the TRUST, acting in his capacity as such with respect to all acts and omissions alleged in this amended complaint". Attorney Sundook successfully argued that the shooter was not an employee or agent of the trust; that he was a co-trustee of an estate planning document, and regardless of his personal motivation or reasons for shooting the salesman, his duties and powers as trustee did not in any way involve any of the circumstances surrounding the tragic shooting.

The Plaintiff argued on appeal the allegations that the shooter was motivated by a desire to protect the property (in light of the trustees' duty to maintain and "manage" the property) were well pled allegations, and whether he was so motivated as alleged, was a question for a jury to determine or at least should be tested by discovery and a motion for summary judgment. Attorney Sundook argued that the conclusion alleged in the amended complaint that the shooting was motivated by the shooter's duties as trustee, was not supported by any allegations of ultimate fact, that the trust document itself determined the duties of a trustee, and to allege that the shooting occurred to protect the property pursuant to the trust, was absurd and should be decided as a matter of law.

The trial court dismissed the complaint with prejudice. The Second District Court of appeal, after hearing oral argument, affirmed the dismissal in a per curiam affirmance released on March 11, 2016.

Jeffrey Alexander (Palm Beach, FL) (Construction Defect) obtained a Summary Judgment in a construction defects claim. The firm represented National Millworks, a subcontractor of Coastal Construction. National Millworks contracted with Coastal Construction to install interior doors and shower inserts at the Edge Condominium construction project in West Palm Beach, FL. After turnover, the Plaintiff Condominium Association sued for a wide variety of construction defects and relied on two turnover reports performed by two separate engineers, only one of which filed earlier implicated any work done by National Millworks. We successfully demonstrated to the judge that although the Plaintiff association did not withdraw their claims relative to our scope of work, the Association was estopped from bringing any claims against National Millworks for their scope of work, and that claims relating to National Millwork's scope of work were essentially moot, and that there were no claims to pass through to Coastal Construction. As the prevailing party, we are entitled to reasonable attorney fees and costs for the successful prosecution of the matter through summary judgment. Jurisdiction is reserved on the amount.

Eric Knuth (Miami, FL) (Personal Injury) obtained a Defense Verdict in a personal injury case. This matter involved an incident at the Chuck E. Cheese restaurant in Kendall, Florida (near Miami). The plaintiff, a woman in her late 30's, and her 15-year-old son were seated in a free-standing booth located near a wall. The son, who weighed

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Verdicts & Dispositions, Continued

more than 180 pounds, leaned the booth backwards while stretching back over the back of the booth, lifting the front edge of the booth off of the floor. He continued to lean the booth until it fell backwards with the two of them in it. Chuck E Cheese surveillance video footage captured the incident. Mother and son filed a lawsuit against Chuck E Cheese, claiming that the booth was subject to the Florida Building Code and that it was unsafe because it was not bolted to the floor or the wall and could easily be tipped back. It was Chuck E Cheese's position that the booth was not subject to the Florida Building Code, that it was safe and the son's tipping it backwards was unforeseeable and unreasonable. Most importantly, this was the first time ANY patron at ANY location had ever tipped a booth over onto the floor.

Mother and son both claimed to have suffered sprain / strain injuries. The son settled early, for \$5,000. From 2012 – 2016, the mother was the sole plaintiff. The plaintiff mother works as the paralegal / legal assistant for the attorney who filed the lawsuit and who represented her throughout the case and at trial. We believe this factor was very damaging to her credibility. Though plaintiff had limited treatment for neck and shoulder pain over the years, including a nearly 14 month gap of treatment, she eventually had a 2 level fusion at C5-6 and C6-7 and under went a shoulder impingement repair surgery. Plaintiff boarded \$310,000.00 in past medical bills. Strategically, little was done in defending the medical claims at trial as we told the jury during Voir dire this case was about liability and that needed to be addressed before any decision about damages was made. X-rays done on the day of the incident in the emergency room revealed significant pre-existing changes in the cervical spine. The opinion of our medical expert was that plaintiffs surgeries were the natural progression of these pre-existing degenerative conditions. Throughout the years, we had attempted to settle with the mother. Going into trial, our last settlement offer was \$100,000. Plaintiff's last demand was \$825,000. Plaintiff asked jury for a minimum of \$850,000.00. The jury was out for 2 1/2 hours and found no negligence on the part of Chuck E Cheese. Because of the proposal for settlement, Plaintiff must pay Chuck E Cheese's costs and attorneys' fees from 2012 through 2016.

G. Jeffrey Vernis and Susan Kent (Palm Beach, FL) (Auto Liability) secured a Final Summary Judgment for a client who was a general contractor in the case *Labonte v. Auto Owners*. The daughter of a company employee caused an accident while driving the insured's company truck. As a

result of the accident, plaintiff developed neck, mid back and low back pain, knee pain, headaches, arm and shoulder pain, confusion and slurred speech. She also developed drop foot and difficulty walking such that she had to, thereafter, use a cane, walker or wheelchair to ambulate. Plaintiff was diagnosed with multiple cervical, thoracic and lumbar herniations and after extensive therapy and pain management failed to resolve her pain she had both lumbar and thoracic surgery, incurring more than \$600,000 in medical bills. Plaintiff, who was a 35 year old certified nurses' aide, was also unable to return to work after the accident and she is now disabled. Mr. Vernis was able to establish, as a matter of law, that the girl's use of the truck constituted conversion and therefore that the insured was not liable to the plaintiffs for their injuries.

Ashley Landrum (Palm Beach, FL) (Fair Housing) obtained an Order of Dismissal in a U.S.D.C Southern District of Florida case for fair housing violations and claims of intentional infliction of emotional distress. The case was filed by a well-known animal loving Plaintiff's Attorney on behalf of her client a condominium unit owner against the Condo, Association Director, and another unit owner. Plaintiff alleged that the Individual Director violated the Federal and Florida Fair Housing act by harassing, interfering, and retaliating against her when her emotional support animals accompanied her into an elevator. Plaintiff alleged that Individual Director yelled at her to get off the elevator, demanded she use the service elevator because of her pets, and alleged falsity of her application for occupancy because she stated she had no pets. Plaintiff also included a cause of action for intentional infliction of emotion distress. We filed a Motion to Dismiss for failure to allege a cause of action for FHA violations and IIED on behalf of the Individual Director. The Judge dismissed all Counts against the Individual Director with Prejudice, after hearing the argument of Counsel.

William Smith (Birmingham, AL) (Construction) obtained a Defense Verdict in the case of *Doris Swader v. Straight Arrow Development, Inc., Chain Store Construction and TAB Retailing Remodeling, Inc.* Doris Swader, a 71 year old widow, suffered injuries on July 29, 2010 while working at Wal-Mart. Ms. Swader was retrieving clothes hangers from a temporarily relocated fitting room when the fitting room door fell off, causing her to fall and fracture her shoulder.

During the summer of 2010, the Wal-Mart in Ft. Payne was undergoing renovations. Wal-Mart did not close during the

Verdicts & Dispositions, Continued

8 week project and much of the work was done at night. Chain Store Construction was the general contractor and Straight Arrow Development was a subcontractor. TAB Retail was also a contractor hired directly by Wal-Mart to move merchandise while sections of the store were renovated by Chain Store and Straight Arrow. The renovations included the replacement of the fitting rooms. There was a dispute as to which Defendant's scope of work included demolition and replacement of the fitting rooms. Chain Store asserted that the fitting rooms were not part of the general contract. Straight Arrow said the replacement, but not the demolition, of the fitting rooms was included in their subcontract. TAB Retail testified that the fitting

rooms were not part of their contract.

"The Plaintiff brought claims of negligence and wantonness against all Defendants..."

The night superintendent for Chain Store and a subcontractor of Straight Arrow each testified that a few days before the accident, they observed TAB Retail employees moving the existing fitting rooms to a temporary location. It

was undisputed that the fitting rooms were supposed to be demolished and replaced with new fitting rooms. TAB Retail and Wal-Mart (who intervened in the case to recover the workers compensation benefits paid to plaintiff) denied that TAB had anything to do with moving the fitting rooms.

The Plaintiff brought claims of negligence and wantonness against all Defendants, and breach of contract claims against Chain Store and Straight Arrow. The Court dismissed the wantonness claims. Plaintiff incurred medical bills totaling \$14,000 and she sought damages for lost wages, pain & suffering and emotional distress.

After a 1 week trial, the jury returned a verdict for the plaintiff and against Chain Store and TAB Retail for \$400,000 in compensatory damages. The jury returned a defense verdict for Straight Arrow. Thereafter, the Court entered consistent judgments in the record.

Titania Rodolph (Palm Beach, FL) (Auto/PIP) obtained a Summary Judgment in the matter of *Boynton Beach Medical Center a/a/o Marie Louine v. Amica Mutual Insurance Company*. This is a Personal Injury Protection ("PIP") case regarding a young woman allegedly involved in an automobile accident on September 16, 2015. She treated at Boynton Beach Medical Center. The provider filed suit for damages for PIP medical benefits that totaled \$8,240.00. In its pre-suit demand letter, the provider demanded 80% of the amount billed and attached a 5-page ledger of purported bills which noted a "balance due" of \$3,091.20. Although it listed the correct claim number and date of the accident, the demand letter listed the wrong patient's name, and also listed an amount inconsistent with the attached ledger which in itself was not specific (among other things) in identifying the amounts of each bill. In its response to the pre-suit demand, Amica advised that all billed charges for dates of service up to 12/22/15 were paid at 80% in accordance with the policy and the No-Fault Statute, and that payment for the 1/5/16 date of service was denied as benefits were terminated due to the results of an IME of the insured. The provider thereafter filed suit, however filed as assignee of the wrong patient. After realizing the mistake, Plaintiff's counsel amended the complaint to correct the name of the patient/insured.

Defendant moved for final summary judgment, arguing, among other things, that the pre-suit demand letter did not comply with the statutory requirements of Fla. Stat. Sec. 627.736(10)(b)3. Plaintiff's counsel attempted to argue that Defendant waived its right to challenge the sufficiency of the pre-suit demand letter because it never raised it as an issue in its response to the pre-suit demand, and cited certain county-court case law that was not binding or controlling in the 15th Judicial Circuit.

The trial court granted the Defendant's Motion, finding that the "demand letter" was legally defective per *MRI Associates of America, LLC v. State Farm*, 60 So. 3d 462 (Fla. 4th DCA 2011).

R. Gregory Lewis (Charlotte, NC) (Auto) Plaintiffs filed suit in 2015 against the Defendant for motor vehicle negligence arising out of a rear-end collision on 7/18/2013. Plaintiff Virginia Crawley's vehicle was pushed by the collision into a vehicle in front of it at a stop light. Defendant admitted negligence, but denied the extent of injury alleged. At the scene, Plaintiff Virginia Crawley complained of pain in the left wrist and shoulder, and exhibited substantial

Verdicts & Dispositions, Continued

swelling of the wrist. Her husband (who was not involved in the collision) drove her to the hospital where she was diagnosed with wrist and shoulder sprains and discharged with a prescription for Hydrocodone, and a work excuse for 3 days. She followed up with an orthopedic doctor 5 days post-MVA for those same complaints, and was prescribed a wrist splint and a five week course of PT. She followed up one day later (6 days post-MVA) with a chiropractor now complaining of C, T, & L neck & back pain, and underwent a 6 week course of chiropractic care, for a total of 22 visits. The chiropractor sent X-ray films to a radiologist, who diagnosed cervical instability and a 25% impairment rating. She never referenced the spine condition to her ortho, and her chiropractor did not treat the wrist. Released from the ortho at 5 weeks 90% improved with the wrist, and at 6 weeks from the chiropractor 95% improved with the spine, but with a prescription for chiropractic care 1-2 times per month for two years. She did not thereafter treat until visiting a different chiropractic clinic on 1/16/2015 (subsequent to filing the lawsuit and after a gap in treatment of 16 months), and treated through 8/23/2015. She then sought treatment from OrthoCarolina for neck and right upper extremity pain that she related to the doctor as caused by the MVA, but referenced to PT that it arose “insidiously 6 months ago.” She self-discharged from PT after 3 visits. She alleged that she is no longer able to do the things she did before, such as heavy housework and “shooting hoops” with her 12 year old son. Plaintiff Chris Crawley alleged a loss of consortium for having to “pick up the slack at home and not being able to have sex” with his wife.

The defense expert concluded that Plaintiff sustained wrist and shoulder sprains, and “giving the benefit of the doubt,” a neck sprain, with related treatment ending 5 weeks post-accident. Review disputed the subsequent care following 16 month gap in treatment as being unrelated to anything other than “growing older.” IMR accepted \$6188.06 in medical and chiropractic care, and wage loss of \$989.41, with no impairment or future medical treatment.

Plaintiffs alleged special damages of \$9909.34, plus pain and suffering and permanent injury. Defense IMR report accepted special damages of \$7177.47. Top pre-trial offer was a combined \$11,462.61, served as an Offer of Judgment in July, 2015. Lowest demand was a combined \$49,000.00 at mediation.

Verdict: \$3697.21 for Virginia Crawley’s bodily injury claim, and \$1.00 for Christopher Crawley’s loss of consortium claim. Defendant’s motion to recover costs in excess of the verdict is pending.

Jeffrey Alexander, Esq. (Palm Beach, FL) (Construction Defect) obtained a voluntary dismissal after filing a summary judgment in a construction defects case. The firm represented Superior Framing, the framing contractor for the ten three-story buildings, an amenity building and three one-story garages, among other improvements at Three Fountains in Viera, FL. In 2009, after turnover of the development to the Condominium Association, the Plaintiff Association retained an engineering company to inspect the property and publish a deficiency report for purposes of identifying deficiencies and putting the respective contractors on notice of the claim pursuant to Florida Statute section 558. We demonstrated through a motion for summary judgment that the framing scope of work was clearly addressed in the deficiency report for purposes of Florida Statute section 558 in 2009, and that the association was clearly on notice of a violation of their contractual and common law rights, such that the statute of limitations began to run. Counsel for the Association had to agree that the discovery demonstrated that the Association failed to timely pursue its cause of action after litigating against Superior and Auto Owners for over 3 years, and voluntarily dismissed Superior Framing. ❖

CLIENT FEEDBACK

“Terry, you are SO the man!!! So how many Defense Verdict’s is that for you for CFA now?! Thanks again for all you do for our Operators.

— Mark Jeffares, Senior Risk Manager, Chick-fil-A, referring to a Defense Verdict obtained by Terry Dixon (Deland/Central FL)

“Citizens has over a hundred Firms representing them and I can say that thanks to Carl, Vernis and Bowling is one of the few law firms I like to see assigned to any case I am handling.

- James Hetherly, Litigation Specialist, referring to Carl Bober (Broward/Hollywood, FL)

FLORIDA LAW UPDATE

ASSERTIVE EARLY STAGE CONSTRUCTION DEFECT DEFENSE



Terrence L. Lavy, Esq. – Florida Bar Board Certified Specialist in Construction Law

Vernis & Bowling of Ft. Myers / Southwest Florida, PA

The developer of a condominium project has received notice pursuant to Florida Statute Chapter 558 (FS 558 or 558) that there are problems with the construction. Complying with its CGL policy, it promptly turns that information over to its insurer. What happens from here depends largely on the carrier and the contractor.¹ In our situation, the carrier acknowledged the claim but did not participate in the 558 process. The developer has potential exposure under Florida Statute Chapter 718 (condominium warranty). However, because it generally does no actual work on the project, nearly all of that liability passes through to others.

Assertive defense means starting early. FS 558 is at heart, a settlement mechanism to require the parties to talk to each other. However, it is also something more. The claimant is required to provide in “reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect.” What follows is the opportunity for comparatively quick and easy discovery. This includes:

- Access to the property to inspect (including individual units)
- Destructive testing
- Design plans and specifications (including as-built plans)
- Photographs and videos
- Expert reports
- Contracts and subcontracts
- Maintenance records and documents related to the discovery, investigation, causation and extent of the damage. FS 558.004.

There are teeth to the rule. A party that does not comply with these requirements is subject to discovery sanction in subsequent litigation. Even if the matter does not settle pre-suit, the wealth of discoverable information obtainable through the 558 process gives

the assertive defendant the advantage of knowledge of the claims being brought against it merely by participating in the process.

Early mediation is commonly sought to avoid litigation costs. Assertive defense at the 558 stage increases the prospect of successful mediation. In our case, the client was represented by private counsel. However, the full extent of pre-suit discovery was not obtained, which had three effects:

1. It slowed the litigation
2. It increased the expense of the defense
3. It eliminated early mediation as a reasonable prospect

These effects were the result of the fact that the parties were obliged to engage in extensive multi-party written discovery before getting to the meat of the case – depositions of experts and condominium representatives.

Assertive defense also means staying on top of the pleadings to ensure that the proper parties are engaged. Plaintiff named the developer, contractor and design professionals. “The doctrine of constructibility (or the Spearin doctrine) holds a hiring party liable for unanticipated construction costs incurred due to a latent defect in the project plans or specifications.” *Phillips & Jordan v. Dep’t of Transp.*, 602 So. 2d 1310, 1312–13 (Fla. 1s DCA 1992).

In our situation, the developer hired the design team. The general contractor named the relevant trades, with which it had contracts, as third-party defendants. In addition to confirming the proper parties are pled, assertive defense means ensuring that the pleadings are clear. Contrary to myth, for example, FS 718 does not provide for attorney’s fees to the successful claimant. However, the law has not prevented many a plaintiff, including ours, from improperly seeking fees. Aggressive motion practice to prevent such activity is recommended.

Assertive defense means looking into indemnification. We start by demanding contractual indemnification from the contractor and design professionals, as warranted by the contracts. Of course, the standard AIA contracts have such provision and are fully enforceable. *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So. 2d 1072 (5th DCA 2003). Be wary of contracts that hold a party entitled to indemnification for its own negligence (which may run afoul of FS 725.06 and case law, which strongly disfavors such provisions). We also investigate whether the

contracts require the client to be named as an additional insured on the contractor policy – and if so, whether the contractor lived up to that responsibility. In our case, the contractor did comply with the letter, but not the spirit of its contractual duty to add the developer as an additional insured – it named the developer, but the coverage did not include completed operations coverage.

The contractor (or its subs) frequently denies the responsibility to provide defense or indemnification, despite having contract or additional insured status. When this occurs, having that issue front and center from the outset provides leverage to the developer down the line. Fees and costs incurred are recoverable for defending a case where defense was promptly demanded, but improperly denied. This is actionable as a cross-claim and can serve as leverage in settlement negotiations.

Assertive defense in the early stages can also mean choosing sides. Individual cases may vary and it depends on how reasonable we are all willing to be. Occasionally, the developer or builder will side with the plaintiff in the interest of getting out of the case early. This is accomplished by settlement with an assignment of rights to pursue parties further down the food chain. This is not always possible, because there may be personal investment in the litigation if the claimant is a motivated board of lay-persons. Under those circumstances, it may be better to proceed in

either a formal or informal Joint Defense Agreement. These are agreements among parties, who do not all have to be defendants, to share information in the common interest. AG Beaumont 1, LLC v. Wells Fargo Bank, N.A., 160 So. 3d 510, 512 (2nd DCA 2015). Two benefits of such agreements are streamlining discovery and avoidance of finger-pointing which tends to encourage plaintiff to think their case is more compelling than the merits dictate.

These are, of course, a few initial concerns for the strategies in approaching construction defect cases. They are notoriously complex matters, owing largely to the number of parties involved, the extensive scope of damages typically claimed, and the overlapping nature of work between one subcontractor and the next. A complex case can last years and may be extended further if not addressed assertively at the outset. For more ideas addressed to specific issues, please contact myself or your local Vernis and Bowling office. ❖

¹In Altman Contractors v. Crum & Forster, 832 F.3d 1318 (11th Cir. August 2, 2016) the Court of Appeals certified the question of whether a 558 notice constitutes a suit, thereby *requiring* coverage to the Florida Supreme Court. The Supreme Court has not answered the question.

ALABAMA LAW UPDATE

DOES THE “YOUR WORK” EXCLUSION MEET INSURERS’ EXPECTATIONS FOR CONSTRUCTION DEFECT CLAIMS IN ALABAMA? **Continued from p.2**

The Court, reasoning that the insured bargained for this “products completed operations coverage” given the Declarations of the policy, held that the insured was afforded coverage for the resulting property damage to its work due to faulty construction, despite no allegations of damage to other third-party property.

In light of the courts’ recently broadened definition of “occurrence” and limited application of the “Your Work” exclusion, a savvy plaintiff attorney could take advantage of these nuances by wording the allegations in a manner to ensure trigger of coverage based on the language of the CGL policy. They may try to accomplish this by issuing a “pre-suit demand package” along with a request for a copy of the policy in effect at the time of the alleged occurrence, and then tailor the language of the complaint accordingly. Insurers should be mindful of this tactic and understand the now broadened threshold for invoking coverage in construction defect claims against their insured contractors.

¹Town & Country Property, LLC v. Amerisure Ins. Co., 111 So. 3d 699, 706 (Ala. 2011) (Insurers are not required under Alabama law

to indemnify an insured under a commercial general liability (CGL) insurance policy for the costs of repairing or replacing faulty work).

²For property damage to come under coverage there must be an “occurrence” within the definition of the policy. Id.

³See FCCI Ins. Co. v. Capstone Process Systems, LLC, 49 F. Supp. 3d 995 (N.D. Ala. 2014); citing Town & Country at 705.

⁴FCCI Ins. at 998.

⁵Id. at 999.

⁶Id.

⁷Id. at 156.

NORTH CAROLINA LAW UPDATE

THE POTENTIAL EFFECTS OF A NEW ADMINISTRATION ON WORKERS' COMPENSATION **Continued from p.3**

There is also a possibility that while stricter immigration policies may initially create a dip in illegal alien claim costs, these policies could result in a long term increase in insurance premiums for employers. Undocumented workers may be replaced with trade unions and workers demanding higher pay and benefits. Because higher payroll drives higher insurance premiums, high claims costs will be replaced with higher premium costs. Of course, these costs will ultimately be passed along to the American consumer.

Workers' compensation could also be directly affected by a new administration's changes to healthcare and other government programs. Ending or making hefty changes to the Affordable Care Act (ACA) could make it more difficult for employers to maintain group insurance. If employees cannot afford their own health insurance either through their employers or individually, they are more likely to file workers' compensation claims in order to receive health care for chronic conditions or injuries sustained in non-work accidents. While employers and their carriers can always fight these claims on grounds that the medical conditions are not work-related, they will still bear the expense of litigation and/or settlement.

The same theory holds true if US manufacturing is slowed due to federal trade policies. If manufacturers are unable to obtain parts in order to manufacture goods, production could slow, thus eliminating jobs. Workers faced with the prospect of lay-offs are more

inclined to file workers' compensation claims due to fear of not being able to secure alternate employment and lack of government assistance for the unemployed. In this type of economic scenario, worker's compensation becomes a means to an end—it is simply one way to secure a weekly paycheck.

Another way a new administration could affect workers' compensation claims would be to loosen OSHA rules regarding workplace safety. A decrease in safety rules and enforcement could result in an increase in the number of workplace accidents,

especially “repeat” accidents when incidents are not reported, investigated, and corrected. According to Deborah Axt, co-executive director at the immigrant community-organizing group *Make the Road* New York, if the Department of Labor (DOL) shifts its attention from investigating high violation industries to assisting employers with federal law compliance, enforcement measures against unscrupulous employers will fall on state agencies which are largely understaffed. It can be argued that it will then be much easier for employers to get away with dangerous safety violations. This deviating behavior could negatively impact both illegal and legal workers.

Finally, if Medicare benefits are eliminated under a new administration, this downsizing of benefits could actually have a positive impact on workers' compensation settlements. Federal law requires all parties entering into a final workers' compensation settlement to consider Medicare's interests and to allocate a portion of the settlement funds to be set aside for payment of treatment related to the work-related injury that would otherwise be covered by Medicare. These Medicare “set aside allocations” can be terribly high, particularly if an injured worker requires expensive pain medications or future surgeries. Sometimes, the Medicare set-aside portion of the claim is so high that it precludes settlement of the medical portion of the claim altogether. However, if Medicare benefits are decreased, likewise, we would see a decrease in the amount of settlement funds required to be set aside in consideration of Medicare's interests, thus making it easier to settle workers' compensation claims.

In conclusion, a new administration's domestic and foreign policies can impact workers' compensation laws, claims handling, costs and settlements. Hopefully, these potential changes will even each other out without having long term detrimental impacts on law abiding employers. ❖

“A new administrations domestic and foreign policies can impact workers' compensation laws, claims handling, costs and settlements.”

STAY UP TO DATE

STAY UP-TO-DATE WITH ALL THINGS VERNIS & BOWLING

Michelle Hendrix, Esq. (Pensacola, FL) received an AV-Preeminent **Martindale-Hubbell® Peer Review Rating**. This rating is for a select group of lawyers recognized for their legal ability and professional ethical standards.

Congratulations to **Carol Grego**, Paralegal in the Islamorada/FL Keys office of Vernis & Bowling, who is the recipient of the United Way's 2017 Unsung Hero Award! Carol received this award for her dedication to serving the community and her countless volunteer hours.

Deborah Martin, Esq. (N. Palm Beach, FL) will be speaking on "Residential Property Claim Fraud Panel: Investigating and Presenting Claims for SIU Referral and Criminal Prosecution" at the 2017 FIFEC Conference to be held from June 7-9 in Orlando, Florida.

Attorneys, staff and families from our **Ft. Myers/Central FL** office participated in the Walk to End Alzheimer's. They raised several hundred dollars for this worthy while cause.

Terry Lavy, Esq. (Ft. Myers, FL) will be speaking at the CLM Construction Defect conference to be held October 9-11 in San Diego, California.

The firm's **Broward/Hollywood, FL** office participated in a Thanksgiving food drive, benefitting the SOS Children's Village.

Attorneys, staff and families from our **Deland/Central FL** office participated in the Walk to End Alzheimer's. They raised \$2,800 for this worthwhile cause.

The firm's **Pensacola/NW FL** office packed boxes of gifts, school supplies and hygiene items for Operation Christmas Child. The boxes are distributed to children in war torn and developing nations around the world.

Congratulations to **Deborah Martin, Esq.** in the N Palm Beach, FL office! Deb was recognized by the Florida Insurance Fraud Task Force for her service, dedication and leadership.

Jeffrey Kerley, Esq. (St. Petersburg, FL) will be speaking at the Florida RIMS conference, to be held July 26-28 in Naples, Florida.



OFFICE LOCATIONS

FLORIDA

**Clearwater/
St. Petersburg**
(727) 443-3377

**Deland/
Central Florida**
(386) 734-2505

**Florida Keys/
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(305) 664-4675

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Tampa
(813) 712-1700

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Atlanta
(404) 846-2001

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Birmingham
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**Mobile/
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(251) 432-0337

MISSISSIPPI

Gulfport/Biloxi
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Jackson
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Charlotte
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