

Florida Insurance Agency Law: Beware the “Independent” Agent

By Gary Guzzi, Esq., gary.guzzi@akerman.com

One issue that commonly arises in insurance coverage matters, and especially in rescission cases, is whether an insurance carrier will be bound by or liable for the knowledge or actions of the individual who sold the insurance policy. Traditionally, a carrier could generally rely upon a salesperson’s status as an independent agent/broker to prevent the salesperson’s knowledge or actions from creating liability for the carrier. Case law in Florida, however, has created a good deal of uncertainty regarding this issue.¹

In many rescission cases, an issue arises as to whether the salesperson was aware of the true facts concerning an alleged misrepresentation. For instance, an insured may claim that although she did not disclose the existence of a particular medical condition on the application, she informed the salesperson of the condition. The insured may claim that the salesperson

knew that the insured’s household included a teenage driver not listed in the automobile insurance application. The insured may claim that the salesperson had previously sold to the insured a life insurance policy still in existence, but not disclosed in the new application.

Under Florida law, where an insurer is aware of the true facts at the time it issues the policy, it is estopped from rescinding the policy based on a claim that those facts were not disclosed during the application process. *Almerico v. RLI Ins. Co.*, 716 So. 2d 774 (Fla. 1998). Moreover, where the salesperson is considered to be a legal agent of the insurer and is acting within the scope of that authority, the legal agent’s knowledge is imputed to the carrier. *See, e.g., id.; Johnson v. Life Ins. Co. of Ga.*, 52 So. 2d 813 (Fla. 1951); *Wimberg v. Chandler*, 986 F. Supp. 1447, 1452 (M.D. Fla. 1997); *Gonzalez v. Great Oaks Cas. Ins. Co.*, 574 So. 2d 1182 (Fla. 3d DCA 1991). Accordingly, should the insured claim that the salesperson was aware of the true facts, even though the written application contained a misrepresentation, the critical issue then becomes whether the salesperson is the legal agent of the insured, the carrier, or both.

Florida law draws a distinction between insurance salespersons who sell insurance for only one insurer, as opposed to those who sell for multiple carriers. A captive

salesperson, who sells for only one carrier, will generally be deemed to be a legal agent of that insurer. *See, e.g., Almerico*, 716 So. 2d at 776. Therefore, where the actions or knowledge of the salesperson in question are those of a captive agent, the carrier will generally be liable for such actions or knowledge and the agency analysis need not proceed any further. An independent insurance broker who is free to sell insurance from several different insurers, however, is usually deemed to be the legal agent of the insured. *Id.*; *T&R Store, Fixtures, Inc. v. Travelers Ins. Co.*, 621 So. 2d 1388 (Fla. 3d DCA 1993); *AMI Ins. Agency v. Elie*, 394 So. 2d 1061, 1062 (Fla. 3d DCA 1981). In the absence of special circumstances, the broker will be considered the legal agent

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of the insured as to matters connected with the application and the procurement of the insurance, despite the fact that the broker receives a commission from the insurer. Steele v. Jackson Nat'l Life Ins. Co., 691 So. 2d 525 (Fla. 5th DCA 1997); Couch on Insurance (3d ed. 1995) § 45:4; 16 Appleman, Insurance Law and Practice § 8730 (1981) (general rule is that notice to or knowledge of broker as to facts or matters pertaining to risk or coverage, while imputable to insured, is not imputable to insurer).²

Nevertheless, even where the salesperson is an independent broker, the agency analysis does not end there. Instead, a determination must be made whether, despite the salesperson's status as an independent broker, a legal agency relationship has been created either through actual agency, apparent agency or statutory agency. If any of these three bases of agency are present, the salesperson will be deemed to be the legal agent of the carrier and the salesperson's actions or knowledge will generally be imputed to the carrier.

The elements necessary to establish an actual agency relationship are: (1) acknowledgement by the principal that the agent will work for him; (2) acceptance by the agent of the undertaking; and (3) control over the agent's actions by the principal. See Villazon v. Prudential Health Care Plan, Inc., 843 So. 2d 842 (Fla. 2003); Banco Ficohsa v. Aseguradora Hondurena, 937 So. 2d 161 (Fla. 3d DCA 2006). Typically, actual agency issues are resolved through an analysis of the written agreement between the salesperson and the carrier that outlines the authority granted to the salesperson to act on behalf of the carrier. See Amstar Ins. Co. v. Cadet, 862 So. 2d 736, 741-42 (Fla. 5th DCA 2003).

The elements necessary to establish an apparent agency relationship are: (1) a representation by the principal; (2) the injured

party justifiably relied on that representation; and (3) the injured party changed position in reliance upon the representation and suffered detriment. National Indem. Co. of the South v. Consolidated Ins. Servs., 778 So. 2d 404, 407 (Fla. 4th DCA 2001). Apparent agency issues usually arise in the context of a salesperson who allegedly provides advice or guidance to the applicant/insured with respect to application-related issues. See Steele, 691 So. 2d at 528.

Finally, statutory agency, pursuant to Fla. Stat. § 626.342, will be found where, under the totality of the circumstances, the insurer cloaks the salesperson with sufficient indicia of agency to induce a reasonable person to conclude that there is an actual agency relationship (such as where the insurer provides the salesperson with literature, brochures, blank forms, applications, binder forms, stationery, business cards, letterheads, signs, corporate seals, receipts or other similar documents and the carrier accepts business from the salesperson), unless the insured knew or was put on notice of inquiry regarding limitations that may have been placed on the broker's actual authority. Almerico, 716 So. 2d at 783; Cadet, 862 So. 2d at 741. Statutory agency issues typically arise where the salesperson's agency agreement does not create an agency relationship and the salesperson does not necessarily make a specific representation to the applicant/insured, but the documents, signs and other writings cause the applicant/insured to believe that a legal agency relationship between the salesperson and the carrier exists. *Id.*

In applying these standards to factual scenarios, courts across Florida have taken different approaches. Some courts have seemingly applied a "bright-line" test with respect to statutory agency, see Straw v. Associated Doctors Health & Life, 728 So. 2d 354 (Fla. 5th DCA 1999) (mere fact that the insurer had provided the salesperson with blank applications and training manuals was sufficient to confer agency status on the salesperson.); Guarente Desantolo v. John

Alden Life Ins. Co., 744 So. 2d 1123 (Fla. 4th DCA 1999), while other courts have been more willing to analyze other factors under the "totality of the circumstances" test to conclude that there was no agency relationship, see Cadet, 862 So. 2d at 74 (despite carrier furnishing salesperson with carrier's materials and carrier's acceptance of business from salesperson, no statutory agency relationship existed because language in application placed applicant on notice to inquire as to limitations placed on salesperson's authority).

One court found that a salesman's alleged explanation to an applicant that the applicant need not disclose certain medical history could not be imputed to the carrier because no apparent agency relationship existed due to language in the application that placed the applicant on notice to inquire as the limitations on the salesman's authority. See Steele v. Jackson Nat'l Life Ins. Co., 691 So. 2d 525 (Fla. 5th DCA 1997). However, in two subsequent cases, a state court and a federal court reached different conclusions regarding whether a paramedic examiner can be deemed to be the legal agent of the carrier based upon the paramedic's actions or information provided to the paramedic during the exam. Compare Casamassina v. The United States Life Ins. Co. in the City of New York, 958 So. 2d 1093 (Fla. 4th DCA 2007) (holding, without explanation, that the paramedic examiner was the legal agent of the carrier simply because the examiner had assisted the applicant with completing a portion of the insurance application) with Joseph v. Zurich Life Ins. Co. of Am., 159 Fed. Appx. 114 (11th Cir. 2005) (alleged statement to paramedic examiner about medical history that was not disclosed in written application could not be imputed to carrier to avoid rescission of the policy). Simply put, current Florida law regarding insurance agency has created uncertainty with respect to whether a salesperson or other individual involved in the application process will be deemed to be the legal agent of the insurance carrier.

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The practical effect of this legal uncertainty is that carriers that utilize independent brokers in their distribution channels will be unable to operate their business models based upon an assumption that they will be insulated from liability due to a broker's knowledge of true facts acquired during the application process. In addition, carriers involved in litigation may not be able to conclusively assert that the actions or knowledge of an independent broker cannot be imputed to the carrier. An insured or beneficiary who can discover sufficient facts during the litigation discovery process regarding agency-related factors may be able to prolong litigation and defeat pre-trial motions that would otherwise stop the insured/beneficiary from proceeding to a jury trial. A salesperson's status as an independent broker, rather than a captive agent, certainly will provide significant support in asserting such a defense, and in appropriate cases may be sufficient to avoid liability for the salesperson's actions. Carriers must be aware, however, that under Florida law, the mere fact that a salesperson is independent will not, in and of itself, automatically result in the carrier divesting itself of the acts or knowledge of the salesperson.

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¹Although the term "insurance agent" and "insurance broker" are commonly used to refer to the person who sold the policy, the terms "agent" and "broker" have specialized legal meanings with respect to insurance cases. Accordingly, for purposes of the following discussion, the term "salesperson" will be used to refer to the individual who sold the applicable policy, and the terms "legal agent" and "legal broker" will be used when a legal connotation is required to be applied to those terms. In addition, this article is not intended to analyze a carrier's vicarious liability for the tortious actions of a salesperson, but instead is focused solely on the imputation of the salesperson's knowledge or actions for purposes of a misrepresentation or similar defense.

²In addition, an insurance salesperson can simultaneously serve a dual role as legal agent for both the insurer and the insured. See, e.g., *Almerico*, 716 So. 2d at 776 77.

2008 Florida Legislative Session Ends with More Changes to the Property and Casualty Insurance Statutes

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Before the 2008 Florida Legislative Session officially began, it appeared that there may be wide-sweeping changes for the property and casualty insurance writers in this state. Hearings by the Senate and complex changes recommended by the Banking and Insurance Committee suggested that this Session could lead to some of the most challenging changes for carriers. While many changes were adopted, many of the recommendations were not. We have outlined some of those changes below. We do not anticipate a veto by the Governor of any of these changes but that is always a possibility. Unless otherwise noted, these provisions will take effect on July 1, 2008.

Feel free to contact your Akerman Senterfitt attorney or consultant if you have any questions related to these changes or need assistance with ensuring that you are in compliance. Ed Kutter, Shareholder, edward.kutter@akerman.com and Maria Henderson, Consultant, maria.henderson@akerman.com are also available to assist.

General Insurance Provisions

- If the Office of Insurance Regulation has findings from a market conduct exam that an insurer appears to use unfair claims settlement practices, the Office may issue an order that requires the insurer to file its claims-handling practices and procedures. These filed practices and procedures are public records, similar to rate and rule filings and cannot be considered trade secrets. (§624.3161 F. S.)
- Administrative fines were doubled to \$5,000 for any nonwillful violation and the cap for all nonwillful violations arising from the same action was doubled

to \$20,000. Administrative fines for knowing and willful violations of a lawful order or rule were doubled to \$40,000 for each violation, with an aggregate cap of \$200,000 for all such violations arising out of the same action. (§624.4211 F. S.)

- Insurers are often concerned that Florida's broad public records laws will result in public disclosure of confidential documents that insurers are required to submit to the Office of Insurance Regulation. New provisions designed to provide some degree of protection were created that outline the requirements by insurers who claim that documents required to be submitted to the Office of Insurance Regulation are trade secrets. An affidavit certified under oath must be submitted with the material and must include specific statements. If through a public records request, a document that is noted as a trade secret is requested, the Office will notify the insurer of the request and the insurer has 30 days to file an action in circuit court seeking a determination whether the document in question contains trade secrets. The Office may disclose trade secrets to other governmental agencies. (§624.4213 F. S.)
- If an insurer requests an administrative hearing related to a rate filing, the process is to be expedited and assigned to an administrative law judge who shall commence the hearing within 30 days after receipt of the formal request and enter a recommended order within 30 days after the hearing or 30 days after receipt of the hearing transcript whichever is later. There is intent language that if the insurer requests an expedited appellate review that the First District Court of Appeal will grant that request. Arbitration has been permanently repealed. (§627.062 F. S.)

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- An insurer can include a multiple policy discount when a Citizens policy is also purchased or taken out and serviced by the same agent. (§627.0655 F.S.)
- A new section of code is created to define transparency in rate regulation. (§627.0621 F.S.)

Automobile Insurance

- The fee schedule to be used for personal injury protection coverage is clarified to be the participating physicians schedule Medicare Part B for 2007. (§627.736 F.S.)
- Numerous changes were made to the code relating to the Department of Highway Safety and Motor Vehicles for changes in vehicle driving violations, fines, and other related items, including lowering the blood-alcohol level for which enhanced penalties are imposed. (See Senate Bill 1992 for a comprehensive review.)

Property Insurance

- A new provision was created that requires any insurer planning to non-renew more than 10,000 residential property insurance policies in Florida within a 12 month period to give notice in writing to the Office of Insurance Regulation 90 days prior to the issuance of the non-renewal notices. (§624.4305 F.S.)
- The unfair claims settlement practice statute was expanded to include the failure to pay undisputed amounts of partial or full benefits owed under a first-party property insurance policy within 90 days after the notice of a residential property claim. (§626.9541 F.S.)
- In rate proceedings, the following are findings of fact in determining whether an insurer's rates, rating schedules, rating manuals, premium credits, discount schedules, surcharge schedules, or other changes for property insurance comply with the law:
 - whether a factor or factors used in a rate filing or applied by the Office is consistent with standard actuarial techniques;

- whether a factor for underwriting profit and contingencies is reasonable or excessive;
- whether the cost of reinsurance is reasonable or excessive. (§627.0612 F. S.)
- Property insurance rate filings seeking an increase over the previously approved filing must be done on a "file and use" basis until December 31, 2009. A rate may not be disapproved as excessive solely on the basis that the insurer obtained catastrophic insurance to cover the insurer's estimated 250-year probable maximum loss or any lower level of loss. Projected hurricane losses must be estimated using a model approved by the Florida Commission on Hurricane Loss Projection Methodology. (§627.062 F. S.)
- Final agency action as it relates to insurance rate-making is vested in the Office of Insurance Regulation and the Financial Services Commission and processes, standards, and guidelines of the Florida Commission on Hurricane Loss Projection Methodology do not constitute final agency action nor are subject to Chapter 120 Administrative Procedure Act. The Commission shall adopt findings as to the accuracy or reliability of methods, principles, standards or models related to probable maximum loss. Insurers are required to employ, without modification, models found by the Commission to be accurate or reliable. (§627.0628 F. S.)
- The Office of Insurance Regulation shall develop and make available a proposed method for insurers to establish discounts, credits, or other rate differentials related to hurricane mitigation measures correlating to the numerical rating pursuant to the uniform home grading scale adopted by the Financial Services Commission. Rules to use the new methodology must be in place by November 11, 2011. (§627.0629 F. S.)
- Insurers are required to give written notice of cancellation, nonrenewal or

termination at least 180 days prior to the effective date of the cancellation, nonrenewal or termination for residential property that has been insured by the carrier for a least a five-year period immediately prior to the written notice. (§627.4133 F. S.)

- A seller of a property in the wind-borne debris region is required to inform the purchaser of the windstorm mitigation rating of the structure in the contract for sale or as an attachment to the contract for sale. There is a provision for rule-making by the Financial Services Commission. (§689.262 F.S.)
- Residential property insurers may have access and use the public hurricane loss projection model for the purpose of calculating rate indications. By January 1, 2009, the Office shall establish a fee schedule for access and use of the model. (§627.06281 F. S.)
- The Chief Financial Officer shall provide a report on the economic impact to Florida of a 1 in 100 year hurricane by March 1 of each year.
- The authorization for the Florida Hurricane Catastrophe Fund coverage for limited apportionment companies and companies participating in the Insurance Capital Build-up Incentive Program is extended to May 31, 2009. (§215.555 F.S.)
- If an insurer issues a policy that does not include wind coverage, the insurer must provide notice to the mortgageholder or lienholder to that effect. (§627.712 F.S.)

Citizens Property Insurance

- Allows for "non-homestead" property meeting all other requirements to be insured through Citizens. Increases the cap on residential property eligibility in the program from \$1M to \$2M. Eliminates the restriction that properties insured by Citizens be located beyond 2,500 feet landward of the coastal construction control line unless the property meets the requirements of the

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code-plus building standards developed by the Florida Building Commission. Effective January 1, 2010, property that is insured through Citizens located in the wind-borne debris region and with an insured value of \$500,000 or more must receive from the seller a written disclosure of the windstorm mitigation rating based on the uniform home grading scale. Reduces the maximum assessment percentage from 10% to 6% for Citizens policyholders. Allows for a 15% of premium surcharge to be levied at renewal against Citizens policyholders to offset deficits. Requires Citizens to make an actuarially sound rate filing beginning on July 15, 2009 and each year thereafter. The effective date of the first filing must be no later than January 1, 2010. This effectively extends the rate freeze until that time. Insurers are no longer required to purchase any unsold Citizens bonds. Citizens can release confidential contents of an insured's file. An insured who has filed suit against Citizens has the right to discover the contents of his or her claim file where that same discovery would be available from a private insurer. (§627.351 F. S.)

- The Citizens Property Insurance Corporation Mission Review Task Force is created to analyze and compile data and to develop a report by January 31, 2009 outlining statutory and operational changes needed to restore it to its original role as a residual market.



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The "Bring-Your-Guns-To-Work Law": Right to Bear Arms Trumps Workplace Safety as of July 1, 2008

By Michelle Napier Boyd, Esq.
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Governor Charlie Crist signed a new bill into law which many are calling the "Bring-Your-Guns-To-Work Law". The actual title of the bill is the "Preservation and Protections of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008." The new law makes it unlawful for employers and businesses to prohibit employees, customers or other lawful guests from bringing their lawfully possessed guns to work so long as the guns are locked in (or to) their private vehicles.

The Act focuses on protecting the constitutional right to possess and keep legally owned firearms within private vehicles for self defense and other lawful purposes, and provides that citizens of Florida do not lose this right by virtue of becoming a customer, employee, or guest of any employer or business establishment within the state.

The new law has spurred concern among employers due to the rising threat of violence in the workplace from distressed employees and customers. Businesses want employees, customers and guests to feel safe on their premises; however, the new law forbids employers from prohibiting individuals from possessing firearms in locked vehicles parked on their property as a means of providing a safe workplace.

Employers Beware.

The Act not only allows employees, customers and guests of a business to bring firearms onto an employer's property, but also prohibits employers from inquiring about the presence of a firearm inside a vehicle, from searching a vehicle to ascertain the presence of a firearm, from "taking action" against an employee based upon a statement concerning the individual's possession of a firearm within a vehicle, and from preventing entrance to the employer's parking lot because the employee's, customer's, or guest's vehicle contains a legal, out-of-sight firearm.

Pursuant to the Act, employers cannot terminate or discriminate against employees for exercising their right to keep and bear arms, or exercising their right to self defense, as long as the firearm is never exhibited on company property for any reason other than lawful defensive purposes. Employers can still

prohibit employees, customers or other guests from bringing firearms inside the building and from actually brandishing or carrying a gun anywhere on the premises unless the gun is being used for lawful defensive purposes. Employers can also prohibit employees from having guns inside their vehicles to the extent the guns are not lawfully possessed or are not locked inside (or to) the vehicle. However, it is nearly impossible for an employer to know whether or not an individual is lawfully carrying a gun as employers cannot ask the employee this question according to the Act, and since concealed weapons records are secret under state law providing employers no way of verifying the permits.

Moreover, employers cannot get around the law by conditioning employment on whether or not an individual holds a license to carry a gun, or by conditioning employment on the employee's agreement not to keep a gun locked inside (or to) his or her vehicle.

Don't go searching.

The new law states that a search of a vehicle in an employer's parking lot to ascertain the presence of a firearm within the vehicle can only be conducted by on-duty law enforcement personnel based upon due process and must comply with constitutional protections.

Exemptions.

The Act exempts certain businesses from its restrictions including schools, correctional institutions and other business dealing with national defense or nuclear powered electricity generation.

Revise your policy.

Employers who have a workplace safety policy in place prohibiting employees from bringing firearms anywhere on the employer's premises will need to revise that policy in order to comply with the law. While there may be a court challenge to this law, it is currently scheduled to take effect July 1, 2008.

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Texas Supreme Court Approves the Use of Insurance Defense Staff Attorneys

By Katherine E. Giddings, Esq.,
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The Texas Supreme Court, in a 7-2 decision, has resoundingly approved the use of insurance defense staff attorneys (“staff attorneys”) to defend covered claims, after considering a hard-fought challenge to the use of such attorneys by the Texas Unauthorized Practice of Law Committee. Before this issue reached the Texas Supreme Court, two intermediate Texas appellate courts and several prior Texas ethics opinions had previously concluded that the use of staff attorneys is appropriate in the absence of any actual conflict of interest between the insured and the carrier.

The Decision

The Texas Supreme Court recently considered the use of staff attorneys in *Unauthorized Practice of Law Committee v. American Home Assurance Company*, ---S.W.3d---, 2008 WL 821034 (Tex. Mar. 28, 2008). The case was orally argued before the Court in September 2005.

The majority opinion states: “We hold that an insurer may use staff attorneys to defend a claim against an insured if the

insurer’s interest and the insured’s interest are congruent, but not otherwise. Their interests are congruent when they are aligned in defeating the claim and there is no conflict of interest between the insurer and the insured. We also hold that a staff attorney must fully disclose to an insured his or her affiliation with the insurer.”

The Court concluded that, so long as there is no conflict of interest, the use of staff attorneys is not the unauthorized practice of law. It even recognized that First Amendment rights might be implicated in curtailing the use of staff attorneys, but did not reach any decision on that issue.

The Court provided a three-part test to be used in determining whether an insurer may use staff attorneys to defend claims:

1. Whether the company’s interest being served by the rendition of legal services is existing or only prospective;
2. Whether the company has a direct, substantial financial interest in the matter for which it provides legal services;
3. Whether the company’s interest is aligned with that of the person to whom the company is providing legal services. When the company and its employee or affiliate have common interests, a staff attorney can represent them both

because, for all practical purposes, only one client is involved.

The Court held that the interests conflict when there are coverage questions or when the consequences of the manner in which the defense is rendered affect them differently. The Court refused to impose a blanket rule that a staff attorney can never represent an insured under a routine reservation of rights. But it cautioned that, if a conflict is likely to arise because of such a reservation, then the safer course would be to not use a staff attorney to defend the claim.

The Court also noted that, whether the defense counsel represents both the insurer and the insured as co-clients, is a matter of contract.

Finally, the Court held that the staff attorney must fully disclose to a represented insured the identity of the lawyer’s employer. The Court declined to reach whether it was appropriate to use a law firm type name, stating that issue was not properly before the court.

The two dissenting judges would find the use of insurance defense staff attorneys to be the unauthorized practice of law.

The Texas Supreme Court Unauthorized Practice of Law Committee has filed a motion for rehearing which is still pending before the Court.

Status Of The Law On Staff Attorneys In Other States

In reaffirming the validity of insurance defense staff attorneys, Texas joins the American Bar Association and twenty-four other states that, either through case law or bar ethics opinions, have approved the use of insurance staff attorneys to defend covered claims where the interests of the insurer and its insured are aligned. Only two states have disapproved that practice (Kentucky and North Carolina).

Today it is estimated that more than one-half of all lawsuits involving covered

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claims are defended by staff attorneys. Staff attorneys have defended insurance claims for almost a hundred years. Such representation has proven to be efficient, competent, and economical. Like Texas, states approving insurers' use of staff attorneys to defend claims recognize that, where the insurer has a direct interest in the outcome of the litigation under the insurance policy, and no material conflict of interest exists between the insurer and the policyholder, both insurers and their policyholders benefit from this practice.

For more information on issues related to insurance defense staff attorneys, please contact Katherine E. Giddings at katherine.giddings@akerman.com or 850-425-1626. Ms. Giddings, who is Board Certified in Appellate Practice, is a frequent speaker on staff counsel and other insurance issues, chaired the Florida Bar's CLE Committee on the 2003 Florida Rules of Professional Conduct governing insurance defense staff attorneys, and served on the Florida Bar's drafting subcommittee for the Statement of Insured Clients Rights. She monitors litigation management issues nationally and has facilitated efforts in support of litigation management practices and insurance defense staff counsel offices in at least thirteen states through the filing of amicus curiae briefs on behalf of the insurance industry, state business associations, and related entities. She also provides national consulting services to her insurer clients on litigation management matters and many other insurance issues, with special emphasis in the area of staff counsel operations and issues involving the tripartite relationship among insurers, insureds, and defense attorneys.



FLORIDA COURT FINDS THAT INSURER DID NOT ACT IN BAD FAITH

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In a significant victory for a Firm client, the Southern District of Florida recently entered summary judgment in a favor of an insurance carrier on a bad faith claim.

In Maldonado v. The First Liberty Ins. Corp., 2008 WL 1932066 (S.D. Fla. April 22, 2008), First Liberty had issued an automobile insurance policy to the insureds, which provided liability limits of \$25,000 per person. One of the insureds caused an automobile accident that resulted in the death of the other driver. Shortly after the accident, the estate's attorney contacted the carrier and advised that the estate might be willing to settle for the policy limits if the insureds provided asset affidavits. The carrier agreed to tender the policy limits and advised the insureds of the terms of the potential settlement. The insured initially provided asset affidavits, but the estate rejected them as insufficiently detailed and demanded that the insureds complete more detailed affidavits. The carrier forwarded the detailed affidavits to the insureds, advised the insureds as to the estate's demand and advised the insureds as to the benefits of completing the affidavits. The insureds, however, refused to complete the affidavits based upon privacy concerns. When the carrier advised the estate as to the insureds' position, the estate again demanded that the insureds fully complete the detailed affidavits or else the estate would not consider settlement within policy limits. When the insureds refused to do so, the estate withdrew the potential settlement offer, and ultimately obtained a \$3 million consent judgment against the insureds.

The estate then filed a bad faith lawsuit against the carrier, arguing that the carrier

did not fulfill its legal obligations with respect to the settlement negotiations. The estate argued that the carrier could not simply act as a "messenger" between the estate and the insureds with respect to the settlement terms and conditions, but instead had an affirmative duty essentially to attempt to convince the insureds to change their settlement position. According to the estate, such a duty would include hiring a lawyer at the carrier's expense (even before suit was filed) to advise the insured as to the benefits of settling, advising the insured as to the detailed ramifications of an excess judgment being entered (such as a lower credit score, difficulty obtaining a loan or a job, etc.), acting as a mediator between the insureds and the estate to reach a compromise position instead of simply relaying each party's position to the other party, etc. The court rejected this argument, holding that Florida law did not require a carrier to undertake any of these activities. Instead, the court found that Florida law requires a carrier to fulfill those duties set forth in the seminal case of Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980), which requires a carrier to advise the insured of settlement opportunities, advise of the probable outcome of the litigation, warn of the possibility of an excess judgment, advise as to the steps an insured may take to avoid an excess judgment, and to generally act in the insured's best interests rather than in its own interests. Because the carrier had fulfilled these duties, and the insureds had nevertheless failed to submit the affidavits that were required as a condition to potential settlement, the carrier did not act in bad faith as a matter of law. The estate has filed a notice of appeal with the Eleventh Circuit Court of Appeals.

FLORIDA: APPELLATE UPDATE

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The Itnor Corporation, et. al, v. Market International Insurance Company, Ltd., (Fla. 3d DCA, May 21, 2008)

The Third District Court of Appeal affirmed the trial court's final summary judgment holding that an injured independent contractor was barred from coverage under the policy's independent contractor and cross liability exclusions. Insured, Itnor, had a commercial liability policy with Markel. The policy excluded bodily injury arising out of operations performed by independent contractors ("independent contractor exclusion"), and bodily injury arising out of

actions initiated or caused to be brought about by any insured covered by the policy against any other insured covered by this policy ("cross liability exclusion").

The trial court found, and the Third District Court of Appeal affirmed, that Murphy was an independent contractor injured in the course and scope of her employment. The court reasoned that the independent contractor exclusion was plain and unambiguous, and there were no genuine issues of material fact concerning Murphy's status as an independent contractor who was injured in the course of her employment. Under the cross liability exclusions, under which claims brought by one insured against another insured

covered by the same policy are barred, the court reasoned that because Itnor was the named insured, and because Murphy was acting as the real estate manager of Itnor's property, which made Murphy an insured, the cross liability exclusion barred coverage for Murphy's lawsuit against Itnor. Because coverage was excluded under the policy, the court affirmed the final summary judgment in favor of Markel, the insurer.

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Fax: 305.374.5095

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Main: 212.880.3800
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CNL Center II at City Commons
420 South Orange Avenue
Suite 1200
Orlando, FL 32801-4904
Main: 407.423.4000
Fax: 407.843.6610

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Highpoint Center
106 East College Avenue
12th Floor
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Main: 850.224.9634
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TAMPA

SunTrust Financial Centre
401 East Jackson Street
Suite 1700
Tampa, FL 33602-5803
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TYSONS CORNER

8100 Boone Boulevard
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