2016

Alphabet Soup Left on the Stove Too Long Spells Disaster: DME, EMC, and EUO

Presented by: Vivianne A. Wicker, Esq. and Joseph P. Glace, Esq.

Friday, May 20, 2016 | 7:00AM – 5:00PM
Orlando World Center Marriott

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Is the new Personal Injury Protection Statute a success?

The proverbial pot of personal injury protection soup was stirred by the Florida Legislature. Some crooked avenues were closed, but other swindling highways were exposed.

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Join us as we explore the deviously lucrative practices of DME and EMC, while we identify valuable tools in the defense arsenal such as EUO.

Durable Medical Equipment

- Charging an Arm and a Leg to Help your Arm and your Leg

DME

- DME stands for Durable Medical Equipment within the PIP Statute but could easily stand for **Doctors Making Extra**

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Florida Statute 627.736(5)(a)1.

- 1. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
- f. For all other medical services, supplies, and care, 200 percent of the allowable amount under:
- (I) The participating physicians fee schedule of Medicare Part B, except as provided in sub-sub-subparagraphs (II) and (III).
- (II) Medicare Part B, in the case of services, supplies, and care provided by ambulatory surgical centers and clinical laboratories.
- (III) The **Durable Medical Equipment** Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.

BEST return on investment EVER to Exist

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Tell your banker, your financial advisor, and your stock broker you're fired

Forget Stocks

Forget Casinos

Forget the Power Ball

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As soon as you see the insane returns, you will only want to invest in DME

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Why is DME so Lucrative?

Simple Answer

Price Gouging

You Would Think the Durable Medical Equipment was Gold-Plated and Made you Coffee in the Morning

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Cervical Collar

- Actual cost for cervical collar on-line is $3.50
- Provider charged $464.68
  - 13,277% increase!

Back Brace

- Actual cost for back brace on-line is $15.16
- Provider charged $785.86
  - 5,184% increase!

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TENS Unit

- Actual cost for TENS unit on-line is $16.95
- Provider Charged $785.00
  - 4,631% increase!

Can you believe it?

Believe it Because the Scheme Gets Even Better

One medical provider
(believed De Facto Owner of the clinic) owns the DME supply company which invoices the medical provider!!!

If the price gouging was not enough . . .

- Every Patient

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No Matter What Age

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No Matter Extent of the Accident

No Matter Severity of the Injury

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Every Patient is Prescribed a Cervical Collar

Consequences for Price Gouging Medical Clinics

- Clinic Investigated by Wicker Smith
- Leads to Arrest and Charges of Three Individuals

THE PIP SOURCE

DIVISION OF INSURANCE FRAUD | www.MyFloridaCFO.com/fraud

March 2016
Volume 6 - Issue 9

Since January 2012, the clinic billed nearly $1.5 million in claims while operating unlicensed.

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DIF Arrests Doctor, Owners in Miami Unlicensed Clinic Scheme

Six subjects were arrested by the Division of Insurance Fraud (DIF) following a 14-month investigation into straw ownership and insurance fraud. Ivan Riano, 38, and Mariagny Jacomino, 31, husband and wife, were identified as the true owners of Care Resources Group, LLC, a PIP clinic in Miami. Riano and Jacomino paid Dr. Mario Torres, 61, to be the straw owner to avoid licensing of the clinic by the Florida Agency for Health Care Administration (AHCA). Since January 2012, the clinic billed nearly $1.5 million in claims while operating unlicensed.

DIF launched the investigation, dubbed Operation Full Circle, into this clinic after an insurance carrier had obtained an affidavit from Dr. Mario Torres that he was not the true owner of Care Resources Group. After a series of interviews regarding the ownership of the clinic, and a closer look into the clinic's financial records, DIF learned that Riano and Jacomino were the true owners.

The investigation went on to reveal that Riano and Jacomino used a check cashing store to cash more than $518,000 in payments from insurance carriers and law firms, including 11 instances of structuring where checks were cashed in excess of $10,000 in an attempt to evade proper reporting. Riano and Jacomino also created and used two shell corporations, M J Billing and Medical Plus Equipment Rental, to launder monies received by Care Resources Group.

Also charged as part of the scheme were Enrique Iglesias, 41, owner/manager of Convenient Check Cashing Corporation and his employee Alejandro Casanova, 37, for their involvement in cashing checks, laundering proceeds from the clinic and failing to maintain proper records.

A tow truck operator, Julio A Gomez Lopez, 42, was also arrested for soliciting accident victims and referring them to Care Resources Group.

Charges against these subjects include organized scheme to defraud, unlicensed clinic, insurance fraud, grand theft, solicitation and patient brokering.

Additional arrests are anticipated.

Care Resources Group, located at 7480 SW 40 Street, Suite 660, in Miami, was originally incorporated in November 2008.

The PIP Source Newsletter is now available online each month at www.MyFloridaCFO.com/fraud. You can find each new issue posted at our website by the third week of each month. Previous issues are also available. If you prefer to receive the PIP Source by e-mail or have comments you wish to share, contact us at our new e-mail address at ThePIPSource@MyFloridaCFO.com.

CHIEF FINANCIAL OFFICER
JEFF ATWATER

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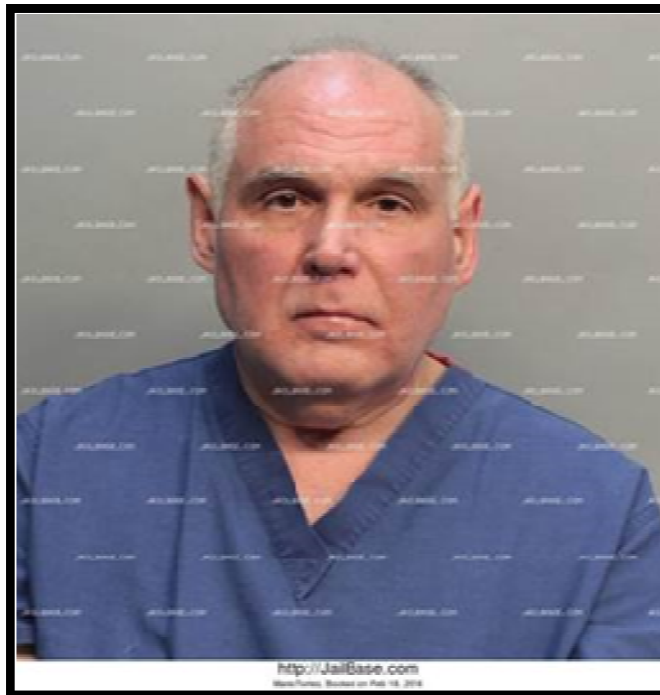
Care Resources Group

- "Straw Owner" Mario Torres M.D., "Office Manager" Mariagny Jacomino, and Jacomino's Husband/Tow Truck Driver, Ivan Riano, were all arrested on multiple charges: Insurance Fraud, Straw Ownership of a PIP clinic, Fraudulent Insurance Acts, Structuring Transactions to Evade Reporting, Organized Fraud, and Grand Theft.

"Straw Owner"

- Mario Torres – Treating Doctor – "Straw Owner"-Arrested on 905 COUNTS



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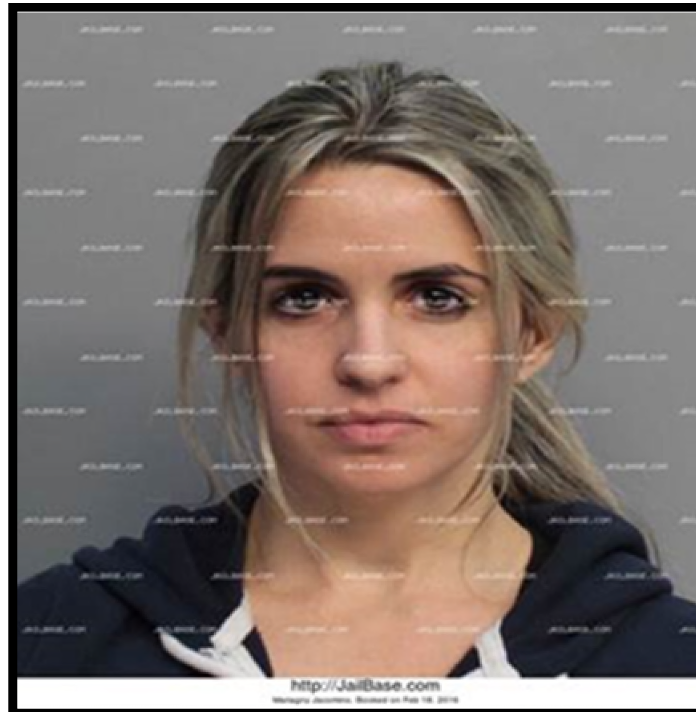
"Office Manager"

- De Facto Owner/Office Manager/Owner of DME Supply Company-Arrested on 917 COUNTS



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“Tow Truck Driver”

- Tow Truck Driver/Husband of Mariagny Jacomino-the “Office Manager”-Arrested on 907 COUNTS

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Explanation of the Scheme

- The true owners of the clinic were Office Manager Mariagny Jacomino and her husband, Ivan Riano. They were operating Care Resources without obtaining the proper licensing because they had Dr. Mario Torres as the sole owner of the clinic on paper in order to obtain their exemption from AHCA. Dr. Torres would hold himself out as the owner while running his own private family practice.

Confession

- Dr. Torres later signed an affidavit stating that he is not the owner of Care Resources and does not expect to receive any payment for services billed under his name. Prior Plaintiff's attorneys for Care Resources gave sworn statements indicating that indeed, Dr. Torres was the "paper owner" of Care Resources and that Jacomino and Riano were the "true owners."

Turn the Invoices into Cash

- Riano would cash the checks made payable to Care Resources at "Convenient Check Cashing." The law requires that only the owner of the company handle the transaction. Riano cashed checks totaling over $518,000 on 68 different transactions. The owner of the check cashing store – Enrique Iglesias – and Riano would break up the transactions each day so that the deposit did not cross the $10,000 reporting requirement threshold.

Launder the Cash

- Jacomino created two shell companies – MJ Billing and Medical Plus Equipment Rental in which the funds from Care were laundered as check deposits into the two corporations. The business transactions of these two companies were for non-medical expenses including Neiman Marcus, Artefacto, Sharron Lewis Design, Beauty Supply, Children's clothing, custom jewelry, and for rare trees, among other expenses.

Current Criminal Charges

- Each individual was arrested on over 900 counts including False Insurance Claims, Grand Theft, False Statement on Licensing Application, and Organized Fraud in an amount over $50,000.

- If convicted on all Counts for which the State of Florida filed charges, they each face a maximum punishment of 170 years in Florida State Prison.

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Moral of the Story

- Durable Medical Equipment can be extremely lucrative and is an avenue by which medical clinics may seek to take advantage of the insurance carriers by excessive prescription and excessive charges
- Review prescriptions of durable medical equipment
- Check for cervical collar, back brace, and TENS unit as they appear most common
- Identify over several claimants whether DMEs were prescribed
- Check age, gender, extent of the accident, and severity of the injury to the claimants
- Any prescriptions which apply across the board may be excessive

Emergency Medical Condition

- Back Pain,
- Neck Pain, and...
- Paper cuts???

Florida Statute 627.736(1)(a)3.

- 3. Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. up to $10,000 if a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, a physician assistant licensed under chapter 458 or chapter 459, or an advanced registered nurse practitioner licensed under chapter 464 **has determined that the injured person had an emergency medical condition.**
- 4. Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. is limited to $2,500 if a provider listed in subparagraph 1. or subparagraph 2. **determines that the injured person did not have an emergency medical condition.**

What is an EMC?

- An "emergency medical condition" is defined as "a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in . . . (a) serious jeopardy to patient health, (b) serious impairment to bodily functions, [or] (c) serious dysfunction of any bodily organ or part. § 627.732(16), Fla. Stat. (2013).

Who is permitted to determine whether claimant has an EMC?

- Medical doctors, chiropractors under 458 and 459, dentists under 466, physician assistants under 458 or 459, or an advanced registered nurse practitioner licensed under 464
- Under current case law, only a medical professional who provided, ordered, supervised, or prescribed, the initial services or rendered follow up care from those professionals:
- May determine whether the injured person had an emergency medical condition

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When must the determination of EMC be made?

- Short Answer: Current case law does not seem to impose a limitation on when the determination of EMC must be made

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Facts of Case in Broward

- Accident occurred July of 2013
- September 2013 claimant treated with several medical providers but no opinion of emergency medical condition
- Plaintiff filed pre-suit demand letter December 2013
- Plaintiff filed lawsuit in February 2014
- On March 10, 2014, the insurance carrier received a declaration that the claimant suffered an Emergency Medical Condition
- Eight (8) days later the insurance carrier made payments of more than the $2,500 limit as a result of the opinion of the treating physician from a follow up consultation that the claimant suffered an emergency medical condition

Bottom Line

- Current state of the case law is difficult
- There are several court opinions which provide the determination of EMC cannot be challenged by a medical professional unless they were involved in the initial or follow up treatment for the patient (Independent Medical Examiners or Peer Review Physicians Not Allowed to Contest EMC)
- There does not seem to be a timeline under which the medical professional must make the determination as to EMC

What can we do?

- Under the Florida No Fault Statute there are at least two required legal mechanisms to combat the EMC determination

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EUO

- EUO:
- Examination Under Oath

EUO is Required!!

- The claimant is now required to submit to a properly noticed and coordinated Examination Under Oath under the Current Version of the Florida No Fault Statute effective January 1, 2013.

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Florida Statute 627.736(6)(g)

- (g) An insured seeking benefits under ss. 627.730–627.7405, including an omnibus insured, **must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath.** The scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. **Compliance with this paragraph is a condition precedent to receiving benefits.**

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Compulsory Independent Medical Examination

- In addition to the required examination under oath, the claimant is also required to submit to a properly noticed and coordinated Independent Medical Examination under the Current Version of the Florida No Fault Statute effective January 1, 2013.

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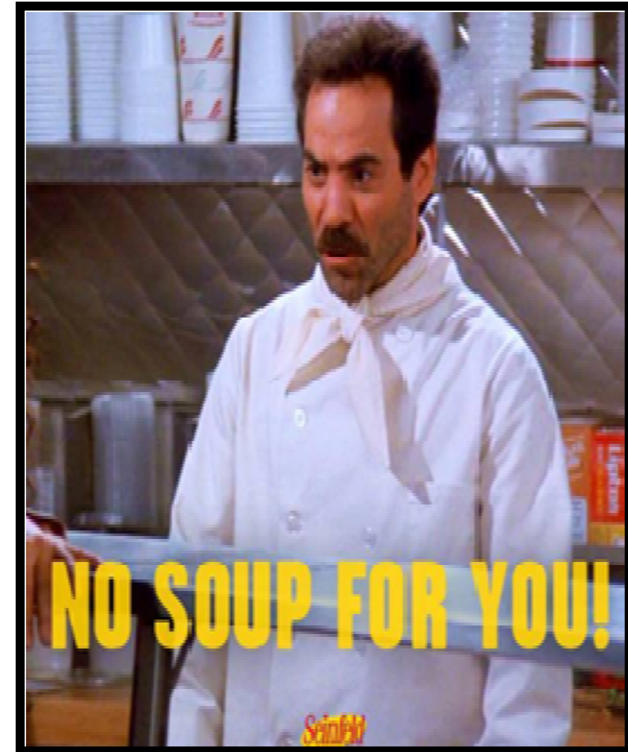
Failure to Attend EUO

- Failure to Attend an Examination Under Oath is a Complete Bar to Payment of PIP claims
- The consequence of failing to satisfy either a Statutory or Policy condition precedent is the same in this instance. Failure to submit to an Examination Under Oath is a complete bar to receipt of benefits.



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Facts of Case in Miami

- EUO requested and scheduled July 16, 2013-claimant was noticed and did not attend
- EUO requested and scheduled August 7, 2013-claimant was noticed and did not attend
- EUO requested and scheduled August 27, 2013-claimant was noticed and did not attend
- Court held an insured's refusal to submit to an Examination Under Oath is considered a material breach of an insured's contract that creates a complete defense to coverage under the policy.

Important to Follow Procedures

- Make sure to contact the attorney, or claimant directly if unrepresented, and confirm they are aware of the date and time for the EUO
- Document the file with the notices, correspondence to the claimant, and identify for the claimant that failure to attend the EUO will preclude payment of any PIP claim submitted on their behalf
- Should the claimant fail to appear for the EUO, document the file with further correspondence to the claimant to identify that as a result of the failure to attend the EUO, payment of any PIP claims was precluded

YOU GET NOTHING! YOU LOSE!
GOOD DAY SIR!
I SAID GOOD DAY SIR!!

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OWNER-OPERATOR VERSUS EMPLOYEE: A DISTINCTION WITHOUT A DIFFERENCE?

Presented by: James R. Brown, Esq. and Constantine "Dean" Nickas, Esq.

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When is a Company Liable for Its Driver's Conduct?

Respondeat Superior

- Imposes vicarious liability upon an employer for the negligent acts of his employees or agents undertaken within the scope of the agent's employment, regardless of the employer's fault.

Respondeat Superior

- Two considerations:
  1. Is the driver an **employee** or an **owner-operator** (i.e., an independent contractor)?
     - An “owner operator” in the trucking industry refers to a self-employed commercial truck driver or small business that operators trucks for transporting goods over highways for its customers.
  2. Was the driver acting within the **scope of his employment** when the alleged negligence occurred?

Defining "employee"

- First, to establish liability on the part of the trucking company, the plaintiff must show that the truck driver is an employee or agent of the company, rather than an independent contractor/owner operator.
- Agency status not defined solely by the terms of the contract between the driver and the company
- Depends on course of dealings between company and driver
- Typically a question of fact for the jury

The Restatement Agency Factors

- The extent of control which, by the parties' agreement, the employer exercises over the details of the work;
- Whether the employee is engaged in a distinct occupation or business;
- Whether the work is usually done under the direction of the employer or by a specialist without supervision;
- The skills required in the particular occupation;
- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work
- The length of time for which the person is employed

The Restatement Agency Factors

- The method of payment, whether by the time or by the job;
- Whether or not the work is part of the regular business of the employer;
- Whether the parties believe that they are creating the relationship of master and servant
- Whether the principal is a business

Agency Factors in the Transportation Context

- Trucking company's "right to control" the details of the driver's work performance (whether exercised or not)
- Control over mode of delivery, work load, substitution of drivers, etc.
- Driver's ability to contract with other trucking companies
- Whether company pays for gas, oil, repairs, etc.
- Compensation structure
- Driver's right to reject assignments or terminate relationship with company

Agency Factors in the Transportation Context

- Use of company logo, uniforms, advertisements, marketing, etc.
  - Rebuttable presumption of agency where company's name appears on commercial vehicle. *Crowell v. Clay Hyder Trucking Lines, Inc*., 70.0 So. 2d 120 (Fla 2d DCA 1997).
- Requirement that driver maintain specific licenses, permits, certifications, etc.
- Requirements that driver attend training courses
- Parties' beliefs as to status of employment relationship
- Wording in the contract between driver and company

“Owner Operator” definition in Workers Compensation Statute

- Fla. Stat. 440.02 provides a five-part test for determining owner-operator status:
  1. A written agreement must exist
  2. Agreement must evidence a relationship by which the owner-operator assumes the responsibility of an employer for the performance of the contact;
  3. Agreement must provide that owner-operator will furnish the necessary motor vehicle equipment;
  4. Agreement must provide that the owner-operator will furnish all costs incidental to the performance of the contract; and
  5. The owner-operator must be paid on commission rather than on an hourly basis.

Helpful Case Law

- Additional recommended reading for discussion of agency factors in the transportation context:
  - *Carlson v. FedEx Ground Package Systems, Inc*., 787 F.3d 1313 (11th Cir. 2015).
  - *Del Pilar v. DHL Global Customer Solutions* (USA), Inc., 993 So. 2d 142 (Fla. 1st DCA 2008).
  - *Crowell v. Clay Hyder Trucking Lines, Inc*., 700 So. 2d 120 (Fla. 2d DCA 1997)
  - *Keith v. News & Sun Sentinel Co*., 667 So. 2d 167 (Fla. 1995).
  - *Justice v. Belford Trucking Co., Inc*., 272 So. 2d 131 (Fla. 1972).
  - *Miami Herald Pub. Co. v. Kendall*, 88 So. 2d 276 (Fla. 1956)

Defining Scope of Employment

- After agency is established, plaintiff must prove that the driver's alleged negligent act fell within the scope of his employment.
- In order for an employee's conduct to fall within the scope of employment for purposes of establishing vicarious liability, it must:
  - Have been the kind the employee or agent was employed to perform
  - Have occurred within the time and space limits of the employment; and
  - Have been activated at least in part by a purpose to serve the employer or principal

Defining Scope of Employment

- Additional factors to consider:
  - Whether the employee stepped aside from his employment to perform an act which the employer did not authorize or expect him to perform
  - Whether there was a slight deviation or departure from the employment
  - Whether there was a clear cut deviation from the employer's business to perform a nonessential, purely personal errand
  - Whether the employer could have foreseen the employee's conduct
- Typically, tortious or criminal acts are not considered within the scope of employment, but this is not a bright line rule.

Defining Scope of Employment

- Truck driver rear ends a car while making a delivery.
    - Employer will likely be liable because truck driver is acting within the scope of his employment.
- Truck driver leaves work early to go to a baseball game and hits another car on the way to the stadium.
    - Employer probably will not be liable because driver was not acting within the scope of his employment.

Negligent Hiring/Retention/Supervision

- Elements of proof:
  - The employer was required to investigate the employee but failed to do so;
  - An investigation would have revealed the unsuitability of the employee; and
  - It was unreasonable to hire the employee in light of the information the employer should have known.

Negligent Hiring/Retention/Entrustment

- *Clooney v. Geeting*, 352 So. 2d 1216 (Fla. 2d DCA 1997)
  - Where theories of negligent hiring, negligent supervision, and negligent entrustment impose no additional liability on the defendant in a motor vehicle accident case (i.e., if the defendant admits ownership and vicarious liability for driver), a trial court should not allow them to be presented to the jury.
  - Rationale based on prejudicial effect of evidence of driver's past driving history being presented to jury.
- *But see Trevino v. Mobley*, 63 So. 3d 865 (Fla. 5th DCA 2011)
  - Arguably limited *Clooney v. Geeting's* holding where a negligent entrustment claim could impose additional liability on the defendant.

Vicarious Liability of Vehicle Lessors

- Florida's Dangerous Instrumentality Doctrine
  - Owner of vehicle traditionally held strictly liable for injuries caused by vehicle's operation.
- The Graves Amendment, 49 U.S.C. 30106
  - Federal amendment that preempts Florida's dangerous instrumentality doctrine, eliminating vicarious liability for both short and long term lessors of commercial vehicles.
  - *See Rosado v. DaimlerChrysler Financial Serv. Trust*, 112 So. 3d 1165 (Fla. 2013) (long term lessors); *Vargas v. Enterprise Leasing Co*., 60 So. 3d 1037 (Fla. 2011) (short term lessors).

Punitive Damages

- In order for an employer to be held vicariously liable for payment of punitive damages due to the actions of its employee drivers, there must be a showing that:
  - The employer actively and knowingly participated in the conduct;
  - The managers of the employer knowingly condoned, ratified, or consented to such conduct; or
  - The employer engaged in conduct that constituted gross negligence that contributed to the loss, damages, or injury suffered by the claimant.

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2016

Broker/ Shipper Liability and Other Hot Topics in Trucking Cases

Presented by: Michael E. Reed, Esq., and Kurt M. Spengler, Esq.

Friday, May 20, 2016 | 7:00AM – 5:00PM
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Money at Stake

Nationwide

- **$281M** – Dimmit County, TX, Dec. 2013
- $178M – Los Angeles County, CA, Oct. 2013
- $165M – Santa Fe, NM, Jan. 2015
- $116M – Iberville Parish, LA, Aug. 2012
- $90M+ – Orleans Parish, LA, Dec. 2013
- $58M – Sante Fe NM, March 2013
- $42M – Cuyahoga County, OH, March 2014
- $40.175M – GA Circuit Court, Sept. 2011
- $36M – Riverside County, CA, June 2012

Florida

- $15M – Hillsborough County, FL, Sept. 2005
- $12+M – Manatee County, FL, April 2008
- $7.35M – Osceola County, FL, Sept. 2013
- $6+M – Palm Beach County, FL, Sept. 2008

Rapid Response Cases

- Immediate response to accident scene
- Independent adjuster – photograph scene and vehicles, canvas area for traffic cameras/surveillance cameras that might have caught incident, talk to highway patrol, locate witnesses
- Accident reconstructionist – examine scene, conduct site inspection, inspect vehicles, download ECM
- Drug tests – within 8 hours
- Interview of driver and witnesses
- Spoliation letter to potential claimants
- Obtain phone records, mileage logs, drug tests, employment records, background checks, license records, crash report
- Coordinate cooperation with any criminal investigations

Recent Cases Expanding Broker & Shipper Liability

- ***Sperl v. C.H. Robinson Worldwide, Inc.***, 946 N.E.2d 463 (Ill. App. 3d 2011) – C.H. Robinson, a broker, was found to be vicariously liable for the driver's negligent operation of a tractor-trailer.
  - Court determined that there was sufficient evidence to find that CHR controlled the driver's work performance, and therefore the jury's finding of an agency relationship was appropriate.
    - CHR used fines to ensure compliance with their guidelines
    - CHR was in transportation logistics business, which factored into the nature of work performed consideration since it was very similar to the driver's line of business
    - CHR provided materials for delivery
    - If successful delivery, CHR would have directly deposited payment into driver's account
    - CHR required constant communication with the driver

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Recent Cases Expanding Broker & Shipper Liability

- Lessons from ***Sperl***:
  - The use of a system of fines to ensure compliance was a substantial factor in the *Sperl* decision
  - The broker was found liable via an agency relationship
  - Payment should have been made to the carrier that hired the driver instead of directly to the driver
  - Brokers must maintain the distinction between themselves and carrier to avoid an agency relationship and liability arising therefrom
  - Drivers making direct contact with the brokers may create greater risks of liability for the broker
  - While many brokers now closely supervise info related to insurance, operations, commodities transported, training, management, evaluations, and other information, too much supervision can blur the lines and resemble an agency relationship

Recent Cases Expanding Broker & Shipper Liability

- ***Linhart v. Heyl Logistics, LLC***, No. 10-3100-PA, 2012 WL 325844 (D. Ore. Feb. 1, 2012) – Court ruled that Heyl was a broker of the load and therefore not the employer of the driver
  - However, the court found that this did not eliminate Heyl's potential vicarious liability for the actions of the driver related to the allegedly negligent hiring of the subcarrier that did not have federal operating authority or insurance

Recent Cases Expanding Broker & Shipper Liability

- ***Schramm v. Foster***, 341 F. Supp. 2d 536 (D. Md. 2004) – imposed new diligence requirements for shippers and brokers hiring a motor carrier:
  - Check safety statistics and evaluations on FMCSA's Safe State Database of the carriers with whom they contract
  - Maintain internal records of the persons with whom they contract to ensure they are not manipulating business practices to avoid unsatisfactory Safe State ratings

Claims of Broker or Shipper Liability

- Plaintiffs' lawyers are trying to expand liability to the broker
- Federal Preemption
- Effective Expert Witness Testimony

49 U.S.C. § 14501(c)(1)

- "A state or local government may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."

- Purpose: deregulate the industry

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State & Local Legislation

- ***Rowe v. NH Motor Transp. Ass'n***, 552 U.S. 364 (2008) – state enforcement actions having connection with carrier rates, routes, or services are preempted, even if effect is indirect

- ***American Trucking Ass'ns, Inc. v. City of Los Angeles***, 133 S. Ct. 2096 (2013) – City packing and placard displays were preempted by federal law

- Courts broadly define "price, route, and service" of a motor carrier when analyzing preemptive effect of § 14501

Expert Witnesses

- Plaintiffs' experts argue the broker should have investigated the carrier's safety record before contracting
- 4 generally accepted industry practices:
  - Broker obtains copy of carrier's operating authority
  - Broker obtains copy of carrier's insurance certificate
  - Broker verifies the DOT and FMCSA safety rating of the carrier
  - Broker enters written contract with carrier
    - Contract generally places burden of safety compliance on motor carrier

Expert Witnesses

- Experts will explain info maintained by FMCSA and industry requirements
  - Broker only required to look at 4 DOT and FMCSA safety ratings: satisfactory, unrated, conditional, and unsatisfactory
    - Unless unsatisfactory, expert can explain
- Plaintiffs' experts may argue brokers should consult the FMCSA's Safety Measurement Systems (SMS)
  - Defense experts must explain flaws of SMS
    - SMS measures relative safety fitness, ignores FMCSA's stated inability to draw conclusions about overall safety

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Expert Witnesses

- Prerequisites:
  - Able to overcome *Daubert* challenges
  - Possess persuasive credibility with court and jury
  - Possess extensive experience as FMCSA employee, enforcement officer of FMCSA regulations, or transportation company compliance employee

Carrier Liability for Medical Qualifications of Driver

- 49 C.F.R. §§ 391.41-49.
- ME certificate required for drivers certifying themselves as operating commercially interstate non-excepted and intrastate non-excepted pursuant to 49 C.F.R. § 383.71(b).
- Valid medical certificate required if vehicle weighs more than 10,000 lbs.
- Carrier-employer must receive a copy of ME certificate
- Certificate valid for 2 years
- If variance, copy must be provided to State Driver Licensing Agency

Carrier Liability for Medical Qualifications of Driver

- No independent discretion:
  - Vision, hearing, insulin-dependent diabetes, epilepsy, drug use, and alcoholism
- Discretionary:
  - Blood pressure, psychosis, hand & finger impairments, and amputations
    - Driving record may be considered in determining qualification

Carrier Liability for Medical Qualifications of Driver

- Even with certificate, no driving permitted with disqualifying medical condition
- Carrier-employer must comply and ensure employees are in compliance
  - Failure may be basis for civil liability
  - *See, e.g.*, *N. Am. Van. Lines, Inc. v. Emmons*, 50 S.W.3d 103 (Tex. Ct. App. 2001); *High v. Parker*, 507 S.E.2d 530 (Ga. Ct. App. 1998); *Matthews v. Greyhound Lines, Inc*., 882 F. Supp. 146 (D. Ariz. 1995).

Case Study

- Bus accident at 2:00 AM
- Driver weighs over 400 lbs
- Large neck circumference and high BMI, which are potential indicators for Obstructive Sleep Apnea (OSA)
- Clear medical certificate
- Allegation – Driver was statistically likely to have OSA and company should look beyond medical certificate

Legal Issues

- Are plaintiffs entitled to obtain driver's medical records?
- CME of driver?
- Should company scrutinize the examiner?
- Does company need to go beyond the medical certificate?

Derivative Negligence Claims of Negligent Entrustment, Hiring/Retention and Supervision

Elements of Proof

1. Respondeat Superior
2. Negligent Entrustment
3. Negligent Hiring/Retention/Supervision

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Respondeat Superior

- In Florida, employer is vicariously liable if the employee is acting to further employer's interest through scope of employment at the time of the incident.
- An employee acts within the scope of his employment only if (1) his act is of the kind he is required to perform, (2) it occurs substantially within the time and space limits of employment, and (3) is activated at least in part by a purpose to serve the master. *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061 (Fla. 2d DCA 1987).

Respondeat Superior

- Placard liability in Florida:
- If defendant's name appears on a commercial vehicle involved in an accident, there is a rebuttable presumption that (i) the vehicle is owned by the defendant, (ii) the operator of the vehicle is an employee of the defendant, (iii) and was, at the time of accident, engaged in the scope of his employment and in furtherance of his master's business. *Crowell v. Clay Hyder Trucking Lines, Inc*., 700 So. 2d 120 (Fla. 2d DCA 1997); *Carrazana v. Coca Cola Bottling Co*., 375 So. 2d 345 (Fla. 3d DCA 1979).

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Respondeat Superior

- ***Makris v. Williams***, 426 So. 2d 1186 (Fla. 4th DCA 1983) –employer fault is not an element of a respondeat superior claim for compensatory damages
- ***Iglesia Cristiana La Case Del Senor, Inc. v. L.M.***, 783 So. 2d 353 (Fla. 3d DCA 2001) – employer cannot be held liable for the tortious or criminal acts of an employee, unless the acts were committed during course of employment and to further a purpose or interest of the employer
- ***Borrough's Corp. v. Am. Druggists' Ins. Co.***, 450 So. 2d 540 (Fla. 2d DCA 1984) – After deviating from scope of employment, employee may return to acting within scope of employment only by performing something that meaningfully benefits employer's interests.

Negligent Entrustment

Elements:

1. Entrustee incompetent, inexperienced, or reckless;
2. Entrustor knew or had reason to know of entrustee's conditions or proclivities;
3. Entrustment existed;
4. Entrustment created appreciable risk of harm to plaintiff;
5. AND harm to plaintiff was proximately/legally caused by defendant's negligence

Negligent Entrustment

- In Florida, "dangerous instrumentality doctrine" would apply to a negligent entrustment action arising from a trucking accident.
  - ***Salsbury v. Kapka***, 41 So. 3d 1103, 1104 (Fla. 4th DCA 2010) - imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another
  - ***Burch v. Sun State Ford, Inc.***, 864 So. 2d 466, 472 (Fla. 5th DCA 2004) - strict liability applies because vehicle is dangerous when used for its designed purpose

Negligent Entrustment

- ***Burch v. Sun State Ford, Inc.***, 864 So. 2d 466 (Fla. 5th DCA 2004) – "Dangerous instrumentality" doctrine is not limited to negligent operation of a vehicle and reckless driving or other intentional misconduct by an operator does not terminate liability under the doctrine.

- ***Rippy v. Shepard***, 80 So. 3d 305, 307 (Fla. 2012) – the dangerous instrumentality doctrine is not limited to motor vehicles being operated on a public highway and may apply to a motor vehicle operated on private property

Negligent Entrustment

- ***State Farm Mut. Auto. Ins. Co. v. Austin Outdoor Inc.***, 918 So. 2d 446 (Fla. 4th DCA 2006) - Genuine issue of material fact existed as to whether driver of landscaping company's truck involved in motor vehicle accident was operating vehicle with company's permission, or was instead a thief, precluding summary judgment on issue of whether company was liable under dangerous instrumentality doctrine.

- ***Ryder TRS, Inc. v. Hirsch***, 900 So. 2d 608 (Fla. 4th DCA 2005) - To vitiate the initial consent of truck owner as to use of truck by person to whom owner entrusted truck to and deem the truck no longer on the public highways by authority of the owner, for purposes of dangerous instrumentality doctrine, the truck must be shown to have been the subject of a theft or conversion.

Negligent Entrustment

- ***Kumarsingh v. PV Holding Corp.***, 983 So. 2d 599 (Fla. 3d DCA 2008) – Automobile rental company could not be held vicariously liable to motorist who was injured in collision with rented automobile and who filed suit after the effective date of the Graves Amendment, which provides that a lessor of a motor vehicle should not be held liable under state law for harm arising out of use of the vehicle during the lease period if the owner is engaged in the trade of renting vehicles and there is no owner negligence or criminal wrongdoing.

Negligent Hiring/Retention/Supervision

- Florida's test for all three theories: (1) the employer was required to make an appropriate investigation of an employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for the employment in general; and (3) it was unreasonable for the employer to hire, retain or fail to supervise the employee in light of the information he or she knew or should have known. *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002); *Garcia v. Duffy*, 492 So. 2d 435 (Fla. 2d DCA 1986).

- ***Tallahassee Furniture Co., Inc. v. Harrison***, 583 So. 2d 744 (Fla. 1st DCA 1991) –Distinction between these 3 theories lies at the moment the employer becomes aware, or should have become aware, of the information that makes the employee unfit for

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Negligent Supervision

- Negligence: Brokers not subject to standard of care governing carriers
  - Brokers defined separately in 49 U.S.C. § 13102

- If broker can show the carrier was an independent contractor, then broker will likely defeat a negligent supervision claim

Negligent Hiring

- Plaintiff must prove employer knew or should have known at time of hiring of the contractor's character of negligence, recklessness, or incompetency
  - Defendant-broker can use evidence that carrier had operating authority from federal government
  - History of successfully-hauled loads by a carrier for the broker demonstrates competence

Negligent Hiring/Retention/Supervision

- What is a reasonable investigation?
  - ***Jenkins v. Milliken***, 498 So. 2d 495 (Fla. 2d DCA 1986) – the scope of the employment responsibilities will dictate the breadth of the requisite reasonable investigation into the employee's background

- What info should you obtain?
  - ***Williams v. Feather Sound, Inc.***, 386 So. 2d 1238 (Fla. 2d DCA 1980) – If hired to work outside with only incidental contact with others, past employment information and personal data ordinarily sufficient
    - Generally no need to make independent inquiry into employee's past

Negligent Hiring/Retention/Supervision

- ***Clooney v. Geeting***, 352 So. 2d 1216 (Fla. 2d DCA 1977) – If employer admits it is vicariously liable for its driver's actions, a plaintiff may not proceed on negligent employment claims in seeking to impose liability for respondeat superior and negligent employment

Negligent Hiring/Retention/Supervision

- Unclear if a plaintiff can admit a commercial driver's driving record against the employer in support of a punitive damages claim that arises out of a negligent hiring/retention/supervision claim
  - Although the driving record is inadmissible as to the negligence counts, at least one court has alluded to the possibility that the driving record is admissible as it relates to a properly submitted punitive damages claim. *See Clooney v. Geeting*, 352 So. 2d 1216 (Fla. 2d DCA 1977).

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Negligent Hiring/Retention/Supervision

- ***Clooney v. Geeting***, 352 So. 2d 1216 (Fla. 2d DCA 1977) – If employer admits it is vicariously liable for its driver's actions, a plaintiff may not proceed on negligent employment claims in seeking to impose liability for respondeat superior and negligent employment
- ***Tallahassee Furniture Co., Inc. v. Harrison***, 583 So. 2d 744 (Fla. 1st DCA 1991) - Element of foreseeability was established in action for negligent hiring and retention brought by customer violently attacked by employee when customer established correlation between employee's history of unlawful and violent behavior, drug abuse and mental illness and employee's propensity for future dangerousness
- ***Anderson Trucking Serv., Inc. v. Gibson***, 884 So. 2d 1046 (Fla. 5th DCA 2004) - Negligent hiring may encompass liability for negligent acts that are outside the scope of the employment and therefore vicarious liability does not apply

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Negligent Hiring/Retention/Supervision

- ***Island City Flying Serv. v. Gen. Elec. Credit Corp.***, 585 So. 2d 274 (Fla. 1991) - showing of similarity between prior offenses and theft such as would have made theft foreseeable required to prove negligent hiring

- ***Riddle v. Aero Mayflower Transit Co.***, 73 So. 2d 71 (Fla. 1954) - negligent supervision did not apply where an assault was in no way connected with the business of the common carrier

Punitive Damages

- For employer's actions:
  - Employer may be liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the employer was personally guilty of intentional misconduct or gross negligence. §768.72, Fla. Stat. (2007).
    - Punitives generally limited to greater of 3x amount of compensatory damages or $500,000. §768.73, Fla. Stat. (2007).

Punitive Damages

- For Employee's actions:
  - In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the earlier-mentioned criteria AND:
    1. The employer actively and knowingly participated in such conduct;
    2. The managers of the employer knowingly condoned, ratified, or consented to such conduct; or
    3. The employer engaged in conduct that constituted gross negligence and that contributed to the loss, damages or injury suffered by the claimant. §768.72, Fla. Stat. (2007).

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