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In This Issue

Navigating Florida's Treacherous Legal Waters

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Florida has sparkling aquamarine water that washes up on white sandy beaches, glitzy Miami Beach hotels, gigantic cruise ships, fabulous golf courses generously endowed with soothing palm trees, and popular tourist destinations like Disney, the Everglades and the Florida Keys. The State also harbors a multitude of ways for its 90 to 100 million annual visitors to find trouble and trauma in paradise.

The Sunshine State has over 1,000 boating accidents each year, its major interstate roadway (I-95) has been designated by the National Highway Traffic Safety Administration as the most dangerous road in the country, the cruise ships leaving Florida are floating cities which expose passengers to crime and often inadequate security, and the consumer watchdog group, Public Citizen, consistently ranks Florida as one of the worst states in the country when it comes to disciplining bad doctors. Yet, each year, millions of New Yorkers visit Florida and comprise more than 10% of the state's annual influx of tourists. About 50,000 New Yorkers actually move to the orange capital of the world every year. Millions of "snowbirds" go back and forth between their homes in each state.

Given the New York – Florida connection, chances are that you have or will have native New York clients who suffer an injury due to negligence that occurred in Florida. When that happens, how will you ensure that they receive the best possible representation while, at the same time, making sure that you discharge your independent legal and ethical obligations to those clients?

Navigating Florida's treacherous legal waters in order to protect the rights of your clients when they are negligently harmed, somewhere between the Panhandle and the Keys, is no breezy task. The rights, remedies and procedures that will determine the viability and outcome of a negligence case in Florida differ markedly from those to which New York trial lawyers are accustomed.

So, notwithstanding your exceptional skill in a courtroom, your capacity to charm and persuade juries from the Bronx to Brooklyn, from Manhattan to Queens and from Nassau to Suffolk, not to mention your prodigious knowledge of New York law, you realize that your client needs a comparably skilled advocate who has a mastery of Florida law and a successful history with its juries and adjusters.

Needless to say, referring your client to a carefully selected trial lawyer from "New York South" is an inarguably indispensable first step in the process of achieving justice for your subtropical clients. However, in order to protect both yourself and your client, it is imperative that you have at least a basic familiarity with the quintessential disparities between what your clients will encounter when seeking justice in the Sunshine State as opposed to the Big Apple.

The Standard Florida Representation Agreement

When your client is referred to Florida counsel, she will be presented with a representation agreement and a fee structure that differs quite significantly from those which you present to your local clients.

Pursuant to Florida Bar Rule 4-1.5, in a complex personal injury, medical malpractice or product liability case, a party may petition a court to increase the standard attorney's fee at the outset of the case. In an appropriate case, courts will typically approve these petitions. However, absent prior court approval, pursuant to Rule 4-1.5, any contingency fee proposal that exceeds the following sliding fee schedule is presumed to be excessive:

1. Before an answer is served or an arbitrator is appointed:
   a. 33 1/3 % of any recovery up to $ 1 million; plus
   b. 30 % of any recovery between $1 and $2 million; plus
   c. 20 % of any recovery in excess of $ 2 million.
2. After an answer is served or an arbitrator is appointed:
   a. **40% of any recovery up to $1 million**
   b. 30 % of any recovery between $1 and $2 million; plus
   c. 20 % of any recovery in excess of $ 2 million.

In complex and catastrophic cases, courts will often approve fees in excess of the percentages typically charged on sums recovered over $1 million. Nevertheless, fees in excess of 40% are likely to be deemed excessive.

Representation agreements in medical malpractice cases can be particularly daunting to clients if not properly explained by Florida counsel. During the tort reform battles of 2004, the Florida Medical Association and the major professional liability carriers spent millions on billboards and TV commercials to pass an amendment to the Florida Constitution designed to limit attorneys' fees in

medical malpractice cases to 30% on the first $250,000 recovered and to only 10% on any sums recovered in excess of $250,000. Fortunately, the Supreme Court of Florida (the State's highest court) seemed to understand that this interference with the attorney-client relationship was quite transparently designed to prevent clients injured by medical negligence from securing competent representation. Consequently, the Florida Supreme Court, when presented with the opportunity to address this issue, held that the client may agree to a contract consistent with those which would be permissible in any other negligence case if a client signs an "Amendment 3 Waiver" containing the express language required by the Florida Bar and the Florida Supreme court. *In Re: Amendment to the Rules Regulating the Florida Bar – Rule 4-1.5 (f) (4) (B) of the Rules of Professional Conduct, No. SC05-1150 (Fla. Sept. 28, 2006).*

Note, however, that where the defendant is the state or local government, attorneys may not charge more than 25% of the gross recovery. Fla. Stat. § 768.28(8) (2016).

Statutes of Limitation

The last thing any trial lawyer needs is a problem with a limitation period on his client's case. Fla. Stat. § 95.11 (2016) lists, among others, the following limitation periods within which actions must be commenced:

a. **4 years**: An action based on negligence, product liability and most intentional torts
b. **2 years**: Wrongful Death
c. **2 years**: Professional malpractice

More specifically, in medical malpractice cases, the action shall be commenced within two years from the time the incident giving rise to the cause of action occurred or within two years from the time the incident is discovered or should have been discovered with the exercise of due diligence. (Sound familiar?) However, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence that gave rise to the cause of action. Fla. Stat. § 95.11(4) (b) (2016). The four year provision is considered a statute of repose, but it will not bar a cause of action involving a minor on or before her eighth birthday. Finally, where fraud, concealment or misrepresentation prevented the discovery of the injury, the limitations period is extended forward an additional two years from when the injury was or should have been discovered. However, the total period of time for filing suit cannot exceed seven years from the incident giving rise to the claim.

An even shorter time limitations period exists in the context of cruise line negligence cases. Most cruise line companies, including the "big three" – Carnival, Royal Caribbean, and NCL – have forum selection clauses, buried in the ticket documentation, which require that passenger claims of negligence be litigated in the United States District Court for the Southern District of Florida. It is critical to note that these same passenger tickets also contain binding contractual terms that typically provide a **one-year limitations period** for the commencement of actions. These contracts also usually require that a **notice of claim** be served on the cruise line **within six months** of the relevant incident.

Governmental Liability Claims

Notice of Claim – Time Frame

Plaintiffs who have claims against governmental entities must deal with several substantive and procedural hurdles to their claim's viability and prospects for success. First, plaintiffs in general negligence cases must serve a **Notice of Claim** on the relevant state agency and the Department of Financial Services **within three years** of the incident giving rise to their cause of action. The involved agency or the Department then has 180 days to investigate and make final disposition of the claim during which time suit may not be filed. Fla. Stat. § 768.28(6) (2016).

In medical malpractice and wrongful death cases, the notice of claim **must be served within two years** and the relevant agency or the Department of Financial Services will have 90 days to investigate and make final disposition of the claim before suit may be filed. The statute of limitations, however, is tolled during this 90 day investigative period. Fla. Stat. § 768.28(6) (2016).

A failure by the government to respond in writing within the requisite time frame is deemed to be a denial of the claim.

Damage Caps – Partial Sovereign Immunity

A strong negligence claim against the City of New York or another municipal entity in the State is one where coverage is certainly not an impediment to a full and fair recovery. By contrast, Florida plaintiffs who are harmed by a subdivision of the State or a locality have a big problem. It is not so much that they will face a coverage issue but, in their quest for fair compensation, they will likely be stymied by a draconian cap on damages.

The applicable cap on governmental liability cases is $200,000 per claimant and $300,000 per incident. Fla. Stat. § 768.28(5) (2016).

Claim Bill for the Exceptional Excess Damage Case

In cases of devastating injury with truly egregious conduct on the part of the government agency or employee, the legislature might, theoretically, approve a "claim bill" authorizing payment of the judgment or some portion thereof for a sum above the statutory cap. However, obtaining a claim bill to approve an excess verdict is extraordinarily difficult. The claimant must typically hire a lobbyist to assist with procuring the votes for passage of the bill, which must then be signed into law by the governor as would any other bill.

Governmental agencies and municipalities often carry claim bill insurance coverage and, although rarely exercised, have the power to settle cases within the limits

of their coverage without further legislative action. Fla. Stat. § 768.28(5) (2016).

Although the claim bill process can take years and thousands of hours of legal work, attorneys' fees in claim bill cases are still limited to the 25% fee applicable to other governmental liability cases. *Ingraham v. Dade County School Board*, 450 So. 2d 847 (Fla. 1984). Thus far, neither the legislature nor the Florida Supreme Court has been persuaded by the proposition, advanced by the trial bar, that the claim bill process creates a monumental impediment to the pursuit of justice on behalf of victims of governmental negligence or misconduct. The fight, however, goes on.

Motor Vehicle Cases – A Few Words About Coverage, UM and Bad Faith

Florida does not, for most vehicle operators, have "mandatory minimums" for bodily injury coverage. In order to lawfully operate a motor vehicle, the registered owner must only have purchased $10,000 in Personal Injury Protection (No Fault), including a $5,000 death benefit. Fla. Stat. § 627.736 (2016). The car must also have $10,000 in property damage coverage. Additional financial responsibility requirements are imposed on a vehicle operator only where he was previously convicted of a DUI. Fla. Stat. §324.023 (Fla. 2016).

Given this imperiling state of affairs, New Yorkers who drive vehicles in Florida are, therefore, well-advised to carry uninsured/underinsured motorist coverage.

Underinsured Motorist Claims in Florida and First Party Bad Faith

In a practical sense, the first step in pursuing a Florida uninsured/underinsured motorist claim is similar to that which would be followed in New York. Counsel will provide the UM carrier with documentation of liability and damages and will demand a tender from the UM carrier where the value of the plaintiff's damages exceeds the available coverage. If the tortfeasor has coverage but is underinsured and tenders his inadequate coverage, plaintiff's counsel will receive a consent and waiver of subrogation from the UM carrier. Thereafter, the procedure in Florida UM claims diverges from New York in a variety of significant ways.

It is imperative to preserve the viability of a potential first party bad faith insurance claim against the UM carrier. Florida imposes a statutory duty on the UM carrier to attempt "in good faith to settle claims when, under all circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests." Fla. Stat. § 624.155(1)(b)(1) (2016). The damages an insured can recover in a UM bad faith action "shall include the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state." Fla. Stat. § 627.727(10) (2016).

When, pursuant to Florida Statute § 624.155, the plaintiff files a "civil remedy" notice with the Florida Department of Insurance alleging that the insurer failed to act in good faith or failed to tender policy limits when doing so was warranted, the insurer has 60 days to remedy the violation in order to avoid exposure to a bad faith claim. If the insurer fails to respond, entirely, to the Civil Remedy Notice, bad faith is presumed. *Fridman v. Safeco Ins. Co. of Illinois*, 185 So. 3d 1214 (Fla. 2016).

When a UM carrier fails to tender, the plaintiff can sue them directly in an action in which the plaintiff must prove (1) the tortfeasor's liability, (2) the extent of plaintiff's damages, (3) that the tortfeasor lacked sufficient coverage to compensate the plaintiff, and (4) that the UM carrier is legally obligated to pay the available insurance benefits. In a UM action, the primary issues in dispute are the tortfeasor's liability and the plaintiff's damages, but the insurance carrier steps into the shoes of the tortfeasor and is the named defendant. *See Allstate Ins. Co. v. Boynton*, 486 So. 2d 552 (Fla.1986).

If the plaintiff obtains an excess verdict after the insurer failed to timely tender coverage within the 60-day safe harbor period triggered by service of a civil remedy notice, a bad faith action will lie and the plaintiff may amend her complaint to allege bad faith. Furthermore, the jury's findings on liability and damages in the underinsured motorist action will be binding in any subsequent bad faith litigation. *See Fridman,* 185 So. 3d at 1219.

In the *Fridman* case, as a consequence of a motor vehicle collision with clear liability, the plaintiff suffered multiple cervical herniations with resulting radiculopathy, an L5-S1 herniation displacing the S1 nerve root and right carpel tunnel syndrome. *Id.* at 1216. Safeco tried to tender the insured's $50,000 policy limits, for the first time, 4 years after the accident and on the eve of trial. *Id.* at 1217. When the plaintiff rejected its wholly inadequate offer, Safeco sought to enter a confession of judgment for $50,000 which the trial court denied but the appellate court granted after the plaintiff obtained a $1 million jury verdict. *Id.* The Florida Supreme Court justly concluded that the carrier was too late. *Id.* at 1228.

Personal Injury Protection/No Fault Threshold

Although the language differs from that which is enshrined in New York law, Florida has a threshold requirement too. It is enunciated in Florida Statute § 627.737(2) (2016) and permits a party to recover non-economic damages in tort when they suffer from a bodily injury, sickness or disease arising out of the ownership, maintenance, operation or use of a motor vehicle that results in (a) significant and permanent loss of an important bodily function; (b) a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; (c) signifi-

cant and permanent scarring or disfigurement; or (d) death. The no-fault law rewards automobile owners for carrying PIP coverage by exempting them from liability for noneconomic damages, except in cases involving permanency or death. *See Dukakis v. State Farm Mut. Auto. Ins. Co.*, 623 So. 2d 455 (Fla. 1993).

Wrongful Death

Florida's Wrongful Death Act, Fla. Stat. §§ 768.16 – 768.26, provides its highest level of protection to surviving spouses and children under the age of 25 who, for purposes of the Act, are deemed to be "minors." Survivors who hold one of these two statuses can recover a full panoply of economic and non-economic damages under the Act. Certain other survivors, such as adult children, can also receive a full measure of wrongful death damages when there is neither a surviving spouse nor a surviving "minor child" so long as the claim does not arise out of medical negligence. Surviving parents of an adult decedent, however, can only recover in cases that do not involve medical malpractice where there are no other survivors. Fla. Stat. § 768.21 (2016). Regrettably, siblings are, under the Act, virtually left out in the cold and have no claim other than one for support and services if they prove that they were wholly or partly dependent financially on the decedent.

Unlike New York, wrongful death plaintiffs in Florida do not seek to recover for the decedent's mental anguish from the time of injury until death. Instead, when the survivors hold one of the enumerated statuses under the requisite circumstances listed above, they can recover for their own past and future mental pain and suffering, among other elements of cognizable damage. Spouses can, for instance, also recover for loss of the decedent's companionship and protection. Fla. Stat. § 768.21(2) (2016). Minor children, and all children of the decedent in the absence of a surviving spouse, can recover for lost parental companionship, instruction and guidance. Fla. Stat. § 768.21(3) (2016).

In medical malpractice cases, however, only surviving spouses and children under the age of 25 can recover any damages beyond economic damages. Fla. Stat. § 768.21(8) (2016). As manifested by this and many other limitations on recoveries, it is clear that, for many years, the Florida Medical Association and the professional liability insurance industry has all too often had their way with the Florida legislature.

Medical Malpractice

When a person is a victim of malpractice in Florida, she may not simply file suit. She must first comply with the provisions of the state's presuit screening process. Florida Statutes §§ 766.106 and 766.203 mandate that parties conduct an investigation into the medical care rendered to ensure that reasonable grounds exist for pursuing litigation. This involves obtaining affidavits attesting to the existence of medical negligence and causation of injury from experts who must be qualified in accordance with stringent and idiosyncratic statutory criteria. The experts must also practice in the same specialties as the prospective defendants. Fla. Stat. §766.203 (2016). Once a "verified medical opinion" from an appropriate expert is served on a potential defendant with a "notice of intent" to make a claim letter, this triggers a 90-day presuit investigative period during which an unsworn exchange of discovery may take place.

This presuit period is, in some respects, a dress rehearsal before the lawsuit. The legislature purportedly envisioned it to serve as a tool to discourage the pursuit of frivolous claims and the settlement of legitimate ones. Although some claims certainly do settle during this presuit period, the complex presuit rules present an array of procedural pitfalls to success for all but the most seasoned practitioners. Even inadvertent non-compliance with the rules can result in the striking of claims or defenses raised in any later filed lawsuit.

At the end of the 90-day presuit period, a potential defendant may (a) reject the claim by providing a countervailing expert affidavit, (b) offer to settle, or (c) request an arbitration at which liability will be deemed to be admitted. The statute of limitations is tolled during the 90-day presuit period. Thereafter, the plaintiff has another 60 days or the time that was remaining on the natural statute of limitation, whichever is greater, to file suit. Fla. Stat. § 766.106

(2016); *Hankey v. Yarian*, 755 So. 2d 93, 97 (Fla. 2000).

If, at the conclusion of the presuit period, the potential defendant requests arbitration, non-economic damages will be capped at $250,000. Where the plaintiff rejects a defendant's offer to arbitrate, damages are still capped but increase to a maximum of $350,000. Once an arbitration offer has been made, damages for lost wages and earning capacity will be reduced to 80% of their actual value. Although other medical malpractice damage caps in Florida have been recently deemed unconstitutional as violating equal protection, the illusory benefit of an imputed admission of liability in a streamlined arbitration proceeding has, thus far, preserved the existence of these unjust caps.

Other Medical Malpractice Damage Caps

In 2003, the Florida legislature created a complex damage cap system that was predicated on a fictitious "medical liability crisis." Briefly, it imposed different caps on practitioners (e.g., doctors and nurses) versus non-practitioners (e.g., hospitals and surgical centers) and increased or decreased the caps that protected them depending on whether the injury to the plaintiff was fatal or "catastrophic" as opposed to "non-catastrophic." The "practitioner cap" started at $500,000 and doubled to $1 million in catastrophic cases. The "hospital cap" was $750,000 and doubled to $1.5 million. Fla. Stat. § 766.118 (2016).

In what was a landmark victory for victims of malpractice, these caps were thrown out by the Supreme Court of Florida in wrongful death medical malpractice cases in *Estate of McCall v. United States,* 134 So. 3d 894 (Fla. 2014). This medical negligence case involved the death following childbirth of a young mother leaving multiple survivors. The *McCall* court recognized that where there are multiple survivors sharing in a capped award each one is irrationally deprived of compensation commensurate with the damages to which a sole survivor would otherwise be entitled. *See McCall*, 134 So. 3d at 901-902.

Dicta in *McCall* addressed the constitutional infirmities of Florida's medical malpractice caps generally and two separate Florida district courts of appeal thereafter held that damage caps in all medical malpractice cases (those involving either personal injury or wrongful death) were unconstitutional. *See Dist. v. Kalitan*, 174 So. 3d 403 (Fla. 4th DCA 2015); *Port Charlotte HMA, LLC v. Suarez,* 2016 WL 6246703 (Fla. 2d DCA 2016).

On June 8, 2017, in the most significant legal victory in many years for patients injured by medical negligence in the Sunshine State, the Florida Supreme Court definitively ruled that damage caps in personal injury as well as wrongful death medical malpractice cases are unconstitutional. *N. Broward Hosp. Dist. v. Kalitan*, No. SC15-1858 (Fla. June 8, 2017). Regrettably, at least for now, the $250,000 cap which applies in the arbitration context still exists. In time, however, this may fall as well.

Mediation and Offers of Judgment

Lastly, under Rule 1.700 of the Florida Rules of Civil Procedure, the court may order mediation in any litigated civil case. Indeed, it is ordered in every case and a substantial percentage of cases are resolved through the mediation process. Perhaps one of the reasons that cases have a better than 50% chance of resolving at or shortly after mediation – for better or worse – is that Florida has a modified "loser pays" system.

Either the plaintiff or the defendant can serve a settlement proposal, which is actually an offer of judgment, pursuant to Florida Rule of Civil Procedure 1.442 and Florida Statutes § 768.79 (2016). If the offer is not accepted by the offeree within 30 days, it is deemed to be rejected. At that point, if the offeror goes to trial and secures a verdict for a sum that is at least 25% more favorable to the offeror (either 25% higher if the offer was made by the plaintiff or 25% lower if made by the defendant) then, absent "bad faith," the loser shall be responsible to pay the opposing party's reasonable attorney's fees and litigation costs. "The question of whether a settlement proposal was served in good faith turns entirely on whether the offeror had a reasonable foundation upon which to make his offer and made it with the intent to settle the claim against the offeree should the offer be accepted." *Wagner v. Brandeberry*, 761 So.2d 443 (Fla. 2d DCA 2000).

Snowbird Litigation – In Conclusion

Every state has a body of substantive law and procedural rules that are, in some ways, unique but most New York lawyers will never encounter them. On the other hand, there is a good chance that you will be asked to assist a "snowbird" from the Empire State to achieve justice in the Sunshine State. Hopefully, when that time comes, with this preliminary guide in hand, you will have little difficulty navigating through Florida's sometimes unsettling legal seas.

Biography

Robert Boyers is a Past President of the Miami-Dade Trial Lawyers Association, a former Director of the Florida Justice Association and began his 27-year legal career with the firm of Damashek Godosky and Gentile, P.C. in New York City. Mr. Boyers also served as an Assistant District Attorney in Queens County and a Special Prosecutor in Kings County. His firm, Boyers Law Group, represents clients in complex personal injury, medical malpractice and product liability cases throughout Florida. Mr. Boyers is a long time NYSTLA member and supporter.