

VOLUME 10, ISSUE 4

OCTOBER — DECEMBER 2011

### Liability

#### Recent Case Law Assists in Utilizing Evidence of a Favorable Safety Record at Trial by Thomas J. Gibbons, Esq.



Thomas Gibbons

Evidence as to the lack of prior incidents can carry significant weight with a jury. Consider a landowner that has owned and operated a retail store on an accident free basis for the last five (5) years. On a daily basis, that translates to 1,825 days without a single occurrence. When broken down further, that evidence becomes even more impressive. Assuming a daily headcount of 100 customers, that means that 182,500 individuals walked through that area without incident. If the headcount increases tenfold, that number jumps to almost two (2) million. Given its potential effect, Florida

Courts are careful to admit evidence as to the lack of prior incidents. The introduction of such evidence often depends upon whether the lack of prior incidents occurred under substantially similar circumstances. See *Ashby v. Consul Aluminum Corp.*, 458 So.2d 335 (Fla. 1984). (affirming the trial court's decision to exclude evidence concerning the accident-free history of a product given the Defendant's failure to establish a showing of "substantially similar conditions" prior to the subject occurrence).

Read More . . . P. 3

### Medicare

#### General Liability Medicare Set-Asides by Reinaldo (Rey) Alvarez, Managing Attorney.



Rey Alvarez

On September 30, 2011, the Centers for Medicare and Medicaid Services (CMS) issued a Memorandum entitled Medicare Secondary Payer – Liability Insurance (Including Self Insurance) Settlements, Judgments, Awards, or Other Payments and Future Medicals –Information.

The Memorandum appears to be the beginning of mandatory General Liability Medicare Set-Asides. The Memorandum indicates that Medicare's interests will be satisfied if the beneficiary's treating physician certifies in writing that the beneficiary's medical treatment is completed as of the date of the "settlement" and that future medical items and/or services for the injury will not be required.

The Memorandum goes on to read that if the treating physician makes such a certification, there will be no need to submit a General Liability Medicare Set-Aside to CMS. CMS also indicated that they will not provide the settling parties with confirmation that Medicare's interests have been satisfied. A close reading of this Memorandum indicates that it only

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## Medicare continued

by Rey Alvarez, Managing Attorney.

applies to Medicare Beneficiaries. It only applies if the beneficiary's treating physician certifies in writing that the beneficiary's medical treatment is completed as of the date of the 'settlement' and that future medical items and/or services for the injury will not be required. An IME can not provide that certification.

While the Memorandum appears to be a good read, it may be difficult to get a plaintiff's treating doctor to certify in writing that the plaintiff's medical treatment is completed as of the date of the 'settlement' and that future medical items and/or services for the injury will not be required. What about flare ups, palliative care, etc... We will need to see how this plays out with doctors and CMS.

The Memorandum does not really provide earth shattering information. I would venture to guess that it is common knowledge that if a treating physician feels that the plaintiff's medical care and treatment is over and that no future care is needed, that a set-aside will not be required. However, if one is to read between the lines of this Memorandum, it would appear that Medicare Set-Asides for General Liability settlements are going to be required and that CMS is attempting to carve out cases that will not need to be sent to CMS for their review and approval. CMS appears to be dipping their toes in the water to see how hot the water is before jumping in.

In addition to the Memorandum addressed above, CMS will soon have an option available to pay a fixed percentage of certain physical trauma-based liability cases with settlement amounts of \$5,000 or less. The details of this option have not been released yet, but they will be available soon.

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## Medicare

**Changes New Timeline for Reporting General Liability Settlements, Judgments, Award or Other Payments** by Rey Alvarez, Managing Attorney.

On September 30, 2011, the Centers for Medicare and Medicaid Services (CMS) issued an Alert that

outlined some important changes to the reporting of General Liability Total Obligation to the Claimant (TPOC).

Pursuant to the August 17, 2011 MMSEA Section 111 User Guide, TPOC refers "to the dollar amount of a settlement, judgment, award, or other payment in addition to/apart from On Going Responsibility of Medicals (ORM). A TPOC generally reflects a "one-time" or "lump sum" payment of a settlement, judgment, award, or other payment intended to resolve/partially resolve a claim. It is the dollar amount of the total payment obligation to or on behalf of the injured party in connection with the settlement, judgment, award or other payment."

Instead of being bombarded with thousands and thousands of TPOC settlements, judgments, awards or other payments at the beginning of next year, CMS is utilizing a tier level approach. Given these new changes, it is imperative that TPOC settlements be watched closely and that they are reported correctly. The new timeline is shown on page 6.

According to the August 17, 2011 MMSEA Section 111 User Guide, the current minimum thresholds are as follows:

- Prior to January 1, 2013, settlements \$5,000 and under;
- January 1, 2013 through December 31, 2013 settlements \$2,000 and under;
- January 1, 2014 through December 31, 2014 settlements \$600 and under;
- No threshold January 1, 2015 and subsequent.

**For example**, let's assume that two cases settle on October 4, 2011, one for \$101,000 and one for \$90,000. Using the matrix on page 6, the case that settled for \$101,000 will need to be reported during the first quarter of 2012 (i.e., January 2012). The case that settled for \$90,000 will not need to be reported at all. However, had the case for \$90,000 settled on or after April 1, 2012, then it would need to be reported during the 3<sup>rd</sup> quarter of 2012 (i.e., July 2012). General Liability TPOC settlements may be reported earlier if wanted. Penalties for late reporting are still in effect. [Read More . . . P. 6](#)

## Liability continued.



Thomas Gibbons

Most recently, in *Lewis v. Sun Time Corp.*, 47 So.3d 872 (Fla. 3<sup>rd</sup> DCA 2010), the Third District Court of Appeals affirmed the trial judge ruling which permitted the defendant (hotel-restaurant) to introduce evidence that there had been no prior falls over the buildings 70 plus year history. In that case, the plaintiff filed suit for injuries and damages after falling down a rain soaked exterior stairway while leaving the Waldorf Hotel in Miami Beach, FL.

The jury found for the defendant and on appeal, plaintiff argued that evidence as to the lack of prior accidents should not have been permitted absent a showing that (1) it was raining and the stairs were wet; (2) stairs were polished and lacked non-skid strips; (3) no hotel employees present to warn people; and (4) no caution signs or mats covering the stairs.

While the issue was not raised at the trial level, the Third DCA stated that the “exactly identical circumstances cannot be realized and are not required.” *Id* at 875 The Court further noted that even if there were variations in the circumstances surrounding the steps and their use over that time period; the basic dimensions, configuration, composition, and dangerous character, or lack thereof, of the steps had remained constant throughout. *Id*

Apart from its holding, the *Lewis* opinion also provides an in-depth discussion as to reasoning or logic behind the introduction of such evidence noting that:

“[I]t would seem perverse to tell a jury that one or two persons besides the plaintiff tripped on defendant's stairwell while withholding from them the further information that another thousand persons descended the same stairs without incident.”  
*Id* at 873 [Citing to 1 *McCormick on Evidence* § 200]

The *Lewis* opinion also cites to several key Florida decisions which have approved or otherwise upheld the admissibility of evidence regarding the lack of prior incidents, including:

- *Springtree Props., Inc. v. Hammond*, 692 So.2d 164, 165 (Fla.1997) (Florida Supreme Court holding that evidence of prior substantially similar accidents is a factor to be utilized in determining the extent of a duty owed by a party);
- *Cent. Theatres v. Wilkinson*, 154 Fla. 589, 18 So.2d 755 (1944) (evidence as to the lack of shooting accidents admissible);
- *State, Dep't of Transp. v. Patterson*, 594 So.2d 830, 831 (Fla. 4th DCA 1992) (evidence as to the lack of bicycle accidents in a tunnel admissible despite incomplete records); Jury entitled to consider that the records it still maintained revealed no bicycle accidents in the tunnel prior to the present accident.”);
- *Doe v. U.S.*, 718 F.2d 1039, 1043 (11th Cir.1983) (applying Florida law and approving evidence that for a number of years before the incident, there had never been a crime against a person committed on the premises).

The *Lewis v. Sun Times* opinion makes it clear that evidence as to the lack of prior incidents is admissible without the necessity of establishing identical or near identical surrounding circumstances.

Moreover, such evidence may be admissible even over an extended period of time, i.e., 70 years and/or where the records as to the accident history are not complete (See *State, Dept. of Transp. V. Patterson*, 594 So.2d 830 (Fla. 4<sup>th</sup> DCA 1992)).

For further information, please contact Thomas Gibbons, Esq., at 954.761.9900 or e-mail TGibbons@LS-Law.com.

## Liability continued.

### Household Exclusion Provisions in Automobile Insurance Policy Bars Coverage for Injury Claims of a Member of Permissive Driver's Household

Recently, The Florida Supreme Court resolved an auto insurance policy coverage exclusion conflict between *State Farm Mutual Automobile Insurance Co. v. Menendez*, 24 So.3d 809 (Fla. 3d DCA 2010) and *Linehan v. Alkhabbaz*, 398 So. 2d 989 (Fla. 4th DCA 1981). The



Katherine Kmiec

Supreme Court unanimously reversed the Third District Court of Appeal's decision that a household exclusion provision in Menendez's State Farm auto insurance policy was ambiguous and could not eliminate coverage for bodily injuries suffered by members of the household of a permissive-driver insured. The Supreme Court expressly approved the Fourth District Court of Appeal decision in *Linehan*, that a similar household exclusion provision did bar coverage for the injury claims of a member of the permissive driver's household. *State Farm Mut. Auto. Ins. Co. v. Menendez*, 36 Fla. L. Weekly S469 (Fla. 2011).

State Farm issued an automobile insurance policy to Menendez in which Menendez was the only named insured under the policy. The policy incorporated household exclusion language, which stated there was no coverage for "any bodily injury to ... any insured or any member of an insured's family residing in the insured's household." This exclusion is commonly included in automobile insurance policies as a preventative measure to reduce the risk of fraud against insurers by members of the same household.

Menendez gave her granddaughter Fabiola G. Llanes, permission to drive her vehicle, which was insured under the State Farm policy in question. Llanes and her passengers (Menendez and Llanes' parents) were then injured in an accident with another car. The Llanes family did not live with Menendez. In the trial court Menendez sued State Farm seeking a declaratory judgment that State Farm's policy covered the Llaneses' bodily injuries, and joined the Llaneses as indispensable parties to

her claim. State Farm filed a counterclaim against Menendez and cross-claimed against the Llaneses, seeking to deny coverage.

State Farm, the Llaneses, and Menendez each filed a motion for summary judgment, and the trial court granted final summary judgment in favor of the Llaneses and Menendez, finding ambiguity over whether the household exclusion precluded coverage for the household members of a permissive driver. The Third District Court of Appeal affirmed the decision, concluding the household exclusion was ambiguous regarding coverage of the parents' bodily injuries. State Farm appealed to the Florida Supreme Court.

The specific conflict issue addressed by the Supreme Court was whether the household exclusion barring coverage for "any *bodily injury* to" "any *insured* or any member of an *insured's* family residing in the *insured's* household" unambiguously eliminated coverage for bodily injuries suffered by the members of the household of a permissive-driver insured.

In reversing the Third District Court of Appeal's decision, the Supreme Court noted the language of Menendez's State Farm policy clearly and consistently defined and distinguished the terms "insured" and "named insured." Justice Charles T. Canady, writing for the high court, said that distinction undermined the Third District's conclusion that the household exclusion is ambiguous. Justice Canaday also noted that the household exclusion provision of the State Farm policy used the broader term 'insured,' which included permissive-drivers. As a result, the Supreme Court held that State Farm's household exclusion unambiguously precluded any claims for bodily injuries filed by household members of a permissive driver.

#### **Recommendations**

The Florida Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Menendez*, 36 Fla. L. Weekly S469 (Fla. 2011) is certainly a step in the right direction for insurers, but whether or not injuries to household members of permissive drivers would be

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## Liability

### Recommendations continued

excluded under *your* policy is largely a question of definitions. Is there no distinction in your policy between “named insured’s” and “insured’s”? Have you defined a “permissive driver” in your policy? Do the definitions in your policy regarding permissive drivers conflict in any way? If the answer to any, or all of these questions is no, then you may want to consider changes to the definitions in your policy in order to take advantage of this recent ruling.

### About Katherine Kmiec



Katherine Kmiec

**Katherine (Kate) Kmiec** is an associate in the Orlando office and was admitted in 2001, Florida. Prior to joining the firm, Kate spent over five years on active duty in the United States Navy’s Judge Advocate General Corps. Kate practices in the areas of personal injury, products liability, premises liability, automobile liability, motor carrier liability, homeowner and condo owners’ association, professional liability and contract matters. She can be reached at T: 407.540.9170 ext. 15 or e-mail [KKmiec@LS-Law.com](mailto:KKmiec@LS-Law.com).

### About Rey Alvarez



Rey Alvarez

**Rey Alvarez** is the Managing Attorney for the Medicare Lien Negotiation, Set-Aside and Workers’ Compensation Department. He works out of the Miami office located on 150 West Flagler Street. He has more than ten years experience in preparing Medical Cost Projections, Medicare Set-Asides and Conditional Payment Lien negotiations with CMS. He is a member of the Florida Defense Lawyer’s Association (FDLA). Rey can be reached for questions regarding WC or Medicare Compliance at T: 305.377.9900 ext. 306 or e-mail [RALvarez@LS-Law.com](mailto:RALvarez@LS-Law.com).

### About Thomas Gibbons



Thomas Gibbons

**Thomas Gibbons** is an associate in the Fort Lauderdale office and was admitted in 2001, Florida and 1992, Illinois. Thomas has been practicing for 19 years in civil trial litigation. He handles general liability, vehicular liability, premises liability, negligent security, wrongful death, construction litigation, and E&O professional liability matters. Thomas can be reached at T: 954.761.9900 or e-mail [TGibbons@LS-Law.com](mailto:TGibbons@LS-Law.com).

### New Member—Miami Office



Heather Calhoon

**Heather M. Calhoon** has joined the Miami office as an Associate. Heather was admitted in 2001 and concentrates her practice in civil litigation matters involving catastrophic personal injury and wrongful death. She was named a Florida Rising Star in the area of Civil Litigation Defense by Florida Super Lawyers magazine in 2010. Heather can be reached at T: 305.377.8900 or e-mail [HCalhoon@LS-LAW.com](mailto:HCalhoon@LS-LAW.com).

### New Member—Fort Lauderdale Office



K. Stuart Goldberg

**K. Stuart Goldberg** has joined the Fort Lauderdale office as an Associate in the litigation practice group. Stuart was admitted in 1984, Florida and 1978, Ohio. He has worked in virtually every area of Insurance Defense. Stuart represents clients in the transportation industry, including trucking, taxis and public livery operations. He can be reached at T: 954.761.9900 or e-mail [SGoldberg@LS-Law.com](mailto:SGoldberg@LS-Law.com).

## Medicare continued.

New Timeline for Reporting By TPOC Amount		
TPOC AMOUNT	TPOC DATE ON OR AFTER	SECTION 111 REPORTING REQUIRED IN THE QUARTER BEGINNING
TPOC over \$100,000.	October 1, 2011	January 1, 2012
TPOC over \$50,000.	April 1, 2012	July 1, 2012
TPOC over \$25,000.	July 1, 2012	October 1, 2012
All TPOC over minimum threshold.	October 1, 2012	January 1, 2013

To read the CMS Memos and Alerts regarding these important changes, please visit:

- <https://www.cms.gov/COBGeneralInformation/Downloads/FutureMedicals.pdf>
- <https://www.cms.gov/MandatoryInsRep/Downloads/RevNGHPTimelineTPOC.pdf>

or contact Rey Alvarez, Managing Attorney for further information. Rey can be reached at T: 305.377.9900 ext. 306 or [RALvarez@LS-Law.com](mailto:RALvarez@LS-Law.com).

## Verdicts & Summary Judgments by Office

### Tallahassee Office

- **Crystal Nevcherlian (Appellant) v. Mercury Insurance Group (Appellee)**, Motor Vehicle Accident Claim for UM Benefits, Florida Fifth District Court of Appeal, Volusia County, James P. Waczewski, Junior Partner. The Appellate Court affirmed the trial court's judgment in favor of our client, the UM insurer, on the merits and our motion for appellate attorneys' fees, September 27, 2011.

### Fort Lauderdale Office

- **Florida Dept. of Transportation (FDOT) (Appellant) v. Lorenzo (Appellee)**, Wrongful Death Action arising from allegedly negligent design and construction of roadway, District Court of Appeal, Fourth District, Doreen E. Lasch and Daniel J. Santaniello. The Appellate Court reversed a **\$1.4 million** jury verdict against the FDOT, August 10, 2011.

### Boca Raton Office

- **Cristian Vargas v. United Automobile Insurance**, PIP case **seeking in excess of \$150K in fees**, Lee County, Daniel Santaniello and Andrew Chiera, Defense Verdict, August 31, 2011.

### Orlando Office

- **Antonio Diaz v. Palmas, Inc., and Walt Disney World**, Bodily Injury Alleged Food Poisoning at Restaurant, Orange County, **\$1.7 million demand at trial**, Paul Jones and Thomas Farrell, Defense Verdict, October 10, 2011.

## Announcements



On October 16, 2011, Members of the Luks, Santaniello Orlando office participated in the Susan G. Komen Race for the Cure 5K walk at the University of Central Florida. From Left to Right:

**First Row:** Tamara Gonzalez, Barbara Nieves, Kate Kmiec, Paul Jones.

**Second Row:** Kerri Torres, Jacqui Bishop, Eddie Fulcher, Joe Scarpa, Doug Petro, Dina Piedra.

### American Academy of Disability Evaluating Physicians (AADEP) Conference

Daniel Santaniello and Rey Alvarez will present with Anthony Dorto, M.D., at the AADEP Conference January 2012 on Florida Impairment Rating Guidelines. Dan and Rey will provide the legal perspective.

### A.M. Best Insurance Law Podcast

Daniel Santaniello and Rey Alvarez were featured in an A.M. Best Insurance Law Podcast discussing Medicare Compliance in General Liability Settlements. The podcast, Episode 57 was aired August 30, 2011. A link to the podcast is available on the LS-Law.com home page.

### Florida Bar Workers' Compensation Section

Rey Alvarez's article on "Minimizing the Cost to Fund a Medicare Set-Aside" was recently published in the Florida Bar Workers' Compensation Section 'News & 440 Report'. The article is available on the LS-Law.com home page.



Luks, Santaniello was an exhibitor at the 66th Annual FWCI Workers' Compensation Educational Conference held August 21 - 24, 2011 in Orlando. Rey Alvarez, WC Managing Attorney shared his common sense tips with attendees on how to minimize the cost to fund a Medicare Set-Aside that may help reduce a settlement substantially. Sherri Bauer, Firm Administrator, Paul Jones, Orlando Partner and Maria Donnelly, Client Relations (shown here) spoke with clients and attendees at the conference. From Left to Right:

**First Row:** Sherri Bauer, Paul Jones and Maria Donnelly.

### FDLA Issue of Trial Advocate Quarterly

Dan Santaniello and Rey Alvarez co-authored a Florida Defense Lawyers Association (FDLA) Medicare White Paper in June 2011 that will be published in an upcoming FDLA issue of 'Trial Advocate Quarterly'.

### Seminars CEU and CLE

For information about our seminars, please contact Client Relations, MDonnelly@LS-Law.com.

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