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LEGAL UPDATE

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Liability

Get Ready for the New ADA Regulations by K. Stuart Goldberg, Esq.



Stuart Goldberg

The new ADA regulations take effect across the nation on March 15, 2012 and will add new requirements for office buildings and public places. The Americans with Disabilities Act was enacted in 1990, with a goal of dramatically improving the ability of people with disabilities to have access to employment opportunities, governmental functions and public places by removing barriers to their mobility. The ADA is divided into three Titles: Title I applies to employment, Title II applies to government buildings and facilities, and Title III applies to places of public accommodations, including commercial facilities and private businesses. While disability is broadly

defined in the Act, this article summarizes the regulations governing Title III, addressing the accessibility requirements for people in wheelchairs, with difficulties walking, and with visual impairments.

The ADA was amended in 2008. The Americans with Disabilities Act Amendments Act (ADAAA) required the Department of Justice (the Department), which is the federal agency primarily responsible for implementing and enforcing the law, to upgrade its regulations. The Department finally amended its regulations implementing Title III on March 15, 2011, with the requirement businesses comply with the new regulations by March 15, 2012.

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Overhauling Current PIP Law FS §627.736 by Andrew Chiera, Esq.



Andrew Chiera

The Senate approved a Final Amended version of House Bill 119 on March 19, 2012 that will become effective upon the signature of the Governor. This summary focuses on the amendments to 627.736(1) and (4) - (11). While much of the revised statutory scheme is pro-insurer, the much-hoped for cap on Plaintiff attorney's fees was not incorporated into the final/passed version.

Initial and Follow-Up Services

Beginning with the amendment to (1)(a), the new PIP statute requires coverage for 80% of all reasonable expenses for treatment related to a motor vehicle accident if and only if the individual receives initial services and care within 14 days of the crash. Initial services may be provided by doctors licensed under chapter 458 or 459, as well as chiropractors licensed under 460. Follow up services are only compensable upon referral by a provider

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Overhauling Current PIP Law FS §627.736 cont.



Andrew Chiera

and must be consistent with the underlying medical diagnosis. Physical therapists may provide the follow up services upon proper referral, but massage or acupuncture (compensable under the current statutory scheme) are not reimbursable.

"an insured's refusal to submit to or failure to appear at two examinations raises a rebuttable presumption that the insured's refusal or failure was unreasonable". Thus, it will be imperative to make sure your IME requests are sent properly to all possible addresses for the claimant and to document and maintain receipt of the notices meticulously. Arguably, if you get two IME no-shows and you have proof of service, you would have a claim that is properly postured for summary judgment. This will force the Plaintiff to file something in opposition (if possible) in an attempt to create a genuine issue of material fact. Hopefully the rebuttable presumption will cut down on the necessity for/ frequency of jury trials on IME no-show cases.

Emergency Care Coverage

Additionally, beginning January 1, 2013, "Emergency Medical Condition" shall be defined as a medical condition manifesting itself by acute symptoms severe enough that, without immediate medical attention, it could result in jeopardy to the patient's health, impairment to bodily functions, or dysfunction of any bodily organ or part.

If a physician licensed under 458 or 459, dentist, physician assistant, ARNP determines that the injured person had an emergency medical condition, then care for such services is capped at \$10,000.00. However, reimbursement is limited to \$2,500.00 if any authorized provider determines that the injured person did not have an emergency medical condition. This means that if a chiropractor evaluates a patient who presents for treatment within 2 weeks of an accident complaining of soreness/pain which is determined to not be an "emergency medical condition", reimbursement for any subsequent care is capped at \$2,500.00.

Keep in mind that this provision of the new PIP statute describes required benefits, and therefore although it is advisable to amend your policies to reflect this new provision, it is arguable if an amendment is necessary. It will be interesting to see how many initial evaluators determine that their patients are not suffering from emergency medical conditions given this new cap.

Failure to Appear at Examination

Perhaps the second most important amendment to the PIP statute is in subsection (7), which now applies if a person unreasonably refuses "or fails to appear at an examination". Even more importantly,

Itemized Explanation Of Benefits Identifying Alleged Error

With regard to the amended subsection (4), the new statute provides that if the insurer pays only a portion of a claim or rejects a claim due to an alleged error in the claim, the insurer must provide an itemized explanation of benefits identifying the error. The person making the claim - without waiving any other legal remedy for payment - then has 15 days to submit a revised claim which will be considered a timely submitted claim. Note that there does not appear to be any private remedy or cause of action available to an insured or their assignee for failure to provide the explanation.

Notice of Suspected Fraud

Furthermore, if the insurer has a reasonable belief that a fraudulent insurance act has been committed, it has to notify the claimant in writing within 30 days after submission of the claim that same is being investigated for suspected fraud. The claim also has to be reported to the Division of Insurance Fraud. If the insurer provides the required notice, it then gets an additional 60 days to conduct its fraud investigation. However, no later than 90 days after the claim is submitted, the insurer must deny or pay the claim. PIP logs are now required to be maintained and if litigation is commenced, it has to be provided to "the insured" (what about their assignee?) within 30 days after receiving a request for same.

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Overhauling Current PIP Law FS §627.736 cont.

Participating Physicians Fee Schedule

The legislature did not change the "permissive" language set forth in (5), but it did attempt to clarify what constitutes the "participating physicians fee schedule". The applicable fee schedule is that which is in effect on March 1 of the year in which the treatment/services are provided, and it remains in effect for the rest of that year even if the schedule is subsequently changed by Medicare/Workers' Compensation.

An insurer is not prohibited from using the Medicare coding policies and payment methodologies, including applicable modifiers, to determine the appropriate amount of reimbursement, so long as the policy/methodology does not constitute a utilization limit.

Notably, effective 7/1/12, an insurer may limit payment pursuant to the applicable fee schedule if and only if the insurance policy includes a notice at the time of issuance (or renewal) that the insurer "may limit payment pursuant to the schedule of charges" specified in the amendment. Interestingly, current binding case law out of the 11th Circuit Appellate Court has concluded that a policy which states payment "may" be limited to the fee schedule is ambiguous and therefore the fee schedule does not apply. Any form approved by the office satisfies the requirement and if the provider submits a charge which is less than the fee schedule, the insurer "may" pay the amount of the charge submitted.

New subsection (5)(h) discusses entities which must be licensed clinics and exceptions thereto. We encourage you to carefully review this section (see page 45 of the new statutory scheme). Subsection (6) was also amended significantly and now in any dispute between the insured/their assignee and the insurer, upon request the insurer must notify the insured/assignee that the policy limits have been reached within 15 days after the limits have been reached. We anticipate that all Assignments of Benefits will now contain such a request, so the best practice is to notify the insured and all assignees once the policy limits are reached.

627.736(6)(g) as amended now requires insureds and omnibus claimants to submit to an examination under oath if the policy includes such terms. Most significantly, compliance with this new subsection is a condition precedent to receiving benefits. However, in order to limit the frequency of such EUO's, if an insurer has a general business practice of requesting the EUOs without a "reasonable basis" it becomes subject to 627.9541 (unfair methods of competition and unfair or deceptive acts or practices).

New subsection (8) was supposed to contain the cap on attorney's fees, but there are merely guidelines contained within the amended scheme that fall far short of a hard line limit.

Finally, effective December 1, 2012 627.736(16) is amended to allow a notice, documentation, transmission, or communication required or authorized under 627.730 - 7405 to be transmitted by secure electronic data transfer which is consistent with state and federal privacy and security laws.

On Page 4 of this legal update, Daniel Fox, PIP Attorney in our Miami office discusses the effect of §627.7311 on PIP Policies including a new requirement that Insurers pass on savings to their insureds.

About Andrew Chiera, Esq.



Andrew Chiera

Andrew Chiera, Esq., works out of the Boca Raton office and has represented PIP clients in Miami-Dade, Palm Beach, Lee, Collier and Broward Counties. Andrew has conducted and defended countless depositions, regularly prepared adjusters for depositions, conducted examinations under oath, and prepared/argued numerous Motions for Summary Judgment. He is very familiar with all judges in the tri-county area. For assistance with PIP matters or questions about the Florida Motor Vehicle No-Fault Law, please contact Andrew at T:561.226.2527 or e-mail ACHiera@LS-Law.com.

Effect of §627.7311 on PIP Policies

by Daniel Fox, Esq.



Daniel Fox

One of the most contested issues arising out of the 2008 amendment to the Florida Motor Vehicle No-Fault Law was the application of the 2008 amendments to insurance policies. In an effort to prevent future litigation regarding the application of the new amendments, the Florida Legislature created §627.7311 – Effect of Law on

Personal Injury Protection Policies – which explicitly provides that:

“The Legislature intends that these provisions and procedures [§§627.730 – 627.7405] **have full force and effect regardless of their express inclusion in an insurance policy form, and a specific provision or procedure authorized in §§627.730 – 627.7405 shall control over general provisions in an insurance policy form. An insurer is not required to amend its policy form or to expressly notify providers, claimants or insureds in order to implement and apply such provisions and procedures.**”

In exchange for the many pro-insurer changes established in House Bill 119, the Legislature is requiring that the insurance carriers pass on the savings to the insureds. Specifically, by September 15, 2012, the Office of Insurance Regulation shall submit a report regarding the savings expected from the enactment of House Bill 119. Further, by October 1, 2012, each PIP insurer shall make a rate filing with the Office of Insurance Regulation reflecting a 10% reduction from the current base rate for PIP insurance. If the rate filing does not reflect the 10% reduction, then the insurer must provide a detailed explanation as to why it failed to achieve a 10% reduction.

Thereafter, by January 1, 2014, each PIP insurer shall make a rate filing with the Office of Insurance Regulation reflecting a 25% reduction from the base rate for PIP insurance as of July 1, 2012. If the January 1, 2014 rate filing does not reflect a 25% reduction, then the insurer must submit a detailed

explanation as to why it failed to achieve said 25% reduction.

Please note, if an insurer fails to provide its detailed explanation regarding its failure to achieve the specific reduction along with either the October 1, 2012 or January 1, 2014 rate filing, the insurer shall be required to stop writing new PIP policies in Florida until such explanation is provided.

On January 1, 2015, the Office of Insurance Regulation will publish a comprehensive PIP data call to help evaluate market conditions, as well as the impact of market reforms made by the amendments in House Bill 119. The data call will include information relating to the number of PIP claims, the type/nature of PIP claimants, amount of the PIP benefits paid, the amount of expenses incurred, the type/quantity of, and charges for, medical benefits, both Plaintiff and Defense attorney fees for PIP suits, information related to premiums for PIP coverage, licensed drivers and accident, as well as fraud and enforcement.

Other Areas Impacted by the Amended Law

Aside from the amendments to the Florida Motor Vehicle No Fault Law [§627.736], the Legislature set forth amendments that relate to the areas surrounding the Florida Motor Vehicle No-Fault Law. Amendments that were approved by the Florida Legislature via House Bill 119 are summarized as follows:

Written Reports of Crashes

First, the Legislature amended F.S. §366.066 – Written Reports of Crashes. Based upon the new amendments, a Long Form report **must** be completed by the officer who investigates a motor vehicle crash that results in death, personal injury, or even complaints of pain or discomfort by any individuals involved in the crash; rendered a vehicle inoperable so as to require a tow truck/wrecker; or involves any commercial vehicle. Further, the new amendment sets forth specific information that must be included on the Long Form report, e.g., date, time, location of

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Effect of §627.7311 on PIP Policies cont.



Daniel Fox

the accident, a description of the vehicles involved, names and address of all drivers, passengers and witnesses, as well as the name of the insurance companies for each of the parties involved. If an accident takes place on a public roadway but does not meet any of the requirements herein that require a Long Form report, the investigating officer must complete a short form report or an exchange of driver information.

Unfair Claim Settlement Practice Stipulation

The Florida Legislature also amended §626.954 to include as an unfair claim settlement practice instances in which an insurer who fails to pay PIP benefits within the time period prescribed by §627,.736(4)(b) with such frequency that it is perceived as a general business practice. This unfair claim settlement practice could result in the insurer's paying of restitution, including interest, for the time period within which the insurer failed to pay claims as required by law, as well as any other penalties allowed by law. Most importantly, this unfair claim settlement practice could result in the suspension of the insurer's certificate of authority.

Fraud Prevention

One major focus of the Legislature's amendments in House Bill 119 was on the ongoing and prevalent issue of insurance fraud. In attempt to combat insurance fraud, §626.989 has been amended to provide that any person or entity commits a "fraudulent insurance act" if the person (1) knowingly submit a false, misleading or fraudulent application for a health care clinic license/exemption, with the intent to use said license/exemption to provide services or seek reimbursement under the Florida PIP Statute or (2) knowingly presents a claim for PIP benefits, knowing that a false, misleading or fraudulent application/document was submitted; this portion was also codified in the criminal context via §817.234(1)(a)(4).

In fact, Florida Statute §400.991 was amended to require each application for a health care clinic

license/exemption include a statement putting the individual/entity applying for said license/exemption on notice of same. More importantly, anyone found guilty of insurance fraud under §817.234 for an act relating to a personal injury protection policy shall lose, "his or her license to practice for five (5) years and **may not** receive reimbursement for personal injury protection benefits for ten (10) years."

The most significant statutory change related to fraud prevention is the creation of Florida Statutes §626.9895 – The Motor Vehicle Insurance Fraud Direct-Support Organization. The new statute allows the Division of Insurance Fraud of the Department of Financial Services to create an, 'Automobile Insurance Fraud Strike Force,' whose purpose is to support the prosecution, investigation, and prevention of motor vehicle insurance fraud."

The Legislature has authorized the 'Strike Force' to employ specific investigators and prosecutors to combat motor vehicle insurance fraud. The board of directors of the Motor Vehicle Insurance Fraud Direct-Support Organization shall consist of eleven members, including a CFO, state attorneys, representatives of local law enforcement, motor vehicle insurers, and health care providers who regularly make claims for No-Fault benefits, and private attorneys for both claimants and insurers. As a business expense, insurers are authorized to contribute financially to the Motor Vehicle Insurance Fraud Direct-Support Organization.

New Clinic Definitions

The Florida Legislature also amended the statutes to reflect new definitions related to the Florida Motor Vehicle No-Fault Law. First, any entity/medical provider seeking reimbursement under the Florida Motor Vehicle No-Fault Law shall be deemed a clinic. Further, said clinic must be licensed, pursuant to the requirements set forth in §400.9905(4)(a-l) or have an AHCA license, unless said entity is wholly owned by a physician licensed under chapter 458 (Medical Doctor), chapter 459 (Osteopathic Doctor),

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Effect of §627.7311 on PIP Policies cont.

466 (dentist), 460 (chiropractor), an entity owned by any of the aforementioned physicians and the spouse/parent/child/sibling of the physician; a hospital or ambulatory surgical center, an entity that wholly owns or is wholly owned by a hospital, or a facility that is (1) affiliated with an accredited medical school and (2) provides training to medical students, residents or fellows.

As of January 1, 2013, §627.732 defines "Entity Wholly Owned" as any entity, with the exception of hospitals, where licensed health care practitioners are the business owners of all aspects of the business, and said practitioners are reflected on the title/lease of the facility, filing taxes as the business owners, account holders for the entity's bank account, listed as principals on all incorporation documents, and have ultimate authority over all personnel and compensation decisions. For further information regarding the effect of §627.7311 on PIP Policies, please contact Daniel Fox, Esq.

About Daniel Fox, Esq.



Daniel Fox

Daniel L. Fox, Esq., works out of the Miami office. He devotes his practice to Auto, Bodily Injury, PIP, Coverage, General Liability and Premises Liability matters. Daniel is a member of the PIP Team and has conducted numerous depositions and examinations under oath and prepared/argued Motions for Summary Judgment. He is very familiar with the judges in Miami-Dade and Broward Counties. Daniel Fox and Andrew Chiera recently co-developed a new seminar on "PIP Deposition Dos and Don'ts" that is designed to increase adjuster competence in preparing for and excelling in depositions. The new seminar is available to clients of Luks, Santaniello. For assistance with PIP matters or questions about the Florida Motor Vehicle No-Fault Law, please contact Daniel at T:305.377.4137 or e-mail DFox@LS-Law.com.

Verdicts & Summary Judgments by Office

Appellate Division South

Doreen Lasch, Junior Partner of Luks, Santaniello, Petrillo & Jones obtained a Final Judgment on March 27, 2012 in favor of Defendant in a bad faith claim styled Nereida Herrera, individually and as assignee of Osvaldo Sanchez v. United Automobile Insurance Company. Plaintiff alleged that United Auto breached its duty of good faith to its insured in its handling of both plaintiff's bodily injury and property damage claims resulting from a motor vehicle accident in which United Auto's insured, Sanchez while under the influence, struck plaintiff's vehicle.

In the underlying case, the jury entered a verdict for \$138,000 for bodily injury and \$5,000 for property damage. Insured had property damage coverage of \$10,000 but had no coverage under the policy for bodily injury liability. In the bad faith action, plaintiff contended that even if there was no coverage for bodily injury (which had already been determined by the court in a declaratory action), United Auto acted in bad faith by not paying the property damage claim until after a judgment was entered, and by not settling plaintiff's bodily injury claim pre-suit for the amount of the insured's \$10,000 property damage coverage. Plaintiff also alleged that United Auto breached its duty to its insured to inform him of all settlement opportunities, advise him that he had no bodily injury coverage and inform him of the risk of an excess judgment.

The Court granted Judgment in favor of United, finding that there was no bad faith on the bodily injury claim since there was no bodily injury coverage under the policy, there was no bad faith on the property damage claim since the property damage verdict was within the insured's property damage coverage, and that United otherwise acted in good faith toward its insured in its claim handling and in the defense provided to its insured.

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Get Ready for the New ADA Regulations cont.



Stuart Goldberg

The ADA's regulations and the ADA Standards for Accessible Design were originally published in 1991. While the updated 2010 Standards retain many of the original provisions in the 1991 Standards, they do contain some significant differences. These new standards are the key for determining if a business's facilities are accessible under the ADA. However, they are applied differently depending on whether a business is altering an existing building, constructing a new facility, or removing architectural barriers that have existed for years.

Summary of Changes

- Adoption of the 2010 ADA Standards for Accessible Design. The Department adopted revised ADA design standards that include the relevant chapters of the Access Board's 2004 ADA/ABA Accessibility Guidelines implementing the Architectural Barriers Act and the private sector model codes that are adopted by most States.
- Effective Date. The rule became effective March 15, 2011. As of March 15, 2012, compliance with the 2010 Standards is now required for new construction and alterations and barrier removal. In the period between September 15, 2010 and March 15, 2012, covered entities could choose between the 1991 Standards and the 2010 Standards. Covered entities that should have complied with the 1991 Standards during any new construction or alteration of facilities or elements, but did not do so by March 15, 2012, must comply with the 2010 Standards.
- Element-by-Element Safe Harbor. The rule includes a general "safe harbor" under which elements in covered facilities that were built or altered in compliance with the 1991 Standards would not be required to be brought into compliance with the 2010 Standards until the elements are subject to a planned alteration. A

similar safe harbor applies to elements associated with the "path of travel" to an altered area.

- Wheelchairs and Other Power-Driven Mobility Devices. The rule adopts a two-tiered approach to mobility devices, drawing distinctions between wheelchairs and "other power-driven mobility devices." "Other power-driven mobility devices" include a range of devices such as the Segway® PT that are not necessarily designed for individuals with mobility impairments, but which are often used by individuals with disabilities as their mobility device of choice. Wheelchairs (and other devices designed for use by people with mobility impairments) must be permitted in all areas open to pedestrian use. "Other power-driven mobility devices" must be permitted to be used unless the covered entity can demonstrate that the class of devices cannot be operated in accordance with legitimate safety requirements. The rule also lists factors to consider in making this determination.

So what happens if you don't comply with the ADA, the ABA or the ADAAG, which makes it even harder to do business in an increasingly competitive environment? If the Department of Justice elects to pursue you, it may seek administrative remedies, civil fines and injunctive relief. However, the Department has limited resources and has thus far focused its efforts on state agencies and on large projects like airports.

Since the government lacks the resources to enforce the law, the ADA contemplates individuals who have been denied access will seek remedies on their own. A person who has been denied meaningful access to a public accommodation may file suit in federal district court to enjoin a property owner from discriminating against a person with a disability by removing the barriers which prevented the person from enjoying equal access to all facilities within the commercial place.

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Get Ready for the New ADA Regulations cont.

Although prevailing Plaintiffs can not recover damages, they can recover their costs, including expert witness fees. The duty to comply with the ADA is “non-delegable”, a landlord can be sued because its tenant is in violation and a tenant can be sued because its landlord does not provide adequate accessibility in the property’s common areas (typically parking).

The new ADAAG regulations cover every aspect of a building from its parking lots to its entrances, drinking fountains and rest rooms. Some major changes include the preference for van accessibility in parking areas and re-designs in accessible bathrooms. With respect to the need for van accessible parking, Figure 1 illustrates the formula for calculating the number of ADA accessible spaces a facility requires.

Figure 1

Required Minimum Number of Accessible Spaces by Total Parking in a Lot

Total Parking In a Lot	Required Minimum Number of Accessible Spaces
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1,000	2% of Total
1,001 and over	20 plus 1 for each 100 over 1000

Under the old regulations, at least one in eight of the accessible spaces had to be big enough for a van. Under the new regulations, the van accessible ratio is

increased to one in six. States are allowed to enact their own more stringent requirements. Florida, a state with a large elderly population and not much public transportation, requires all ADA parking spots be van accessible.

New Construction

In new construction, a property owner is not required to fully meet the requirements of these guidelines when it is structurally impracticable to do so. Full compliance is structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

However, an owner must still comply with the requirements to the extent it is not structurally impracticable to do so. Any portion of the building or facility which can be made accessible must comply to the extent it is not structurally impracticable. The term impracticable is not easy to define, and apparently means a level of difficulty somewhere between impractical and impossible.

Existing Facilities:

Element-by-Element Safe Harbor

If your property was built or altered in the past twenty years in compliance with the 1991 Standards or you removed barriers to specific elements in compliance with those Standards, then you do not have to make further modifications to those elements to comply with the 2010 Standards. This “safe harbor” provision is applied on an element-by-element basis and is important to understanding the transition from the 1991 Standards to the 2010 Standards (even though the latter take effect 2012). The following examples illustrate how the safe harbor applies:

The 2010 Standards lower the mounting height for light switches and thermostats from 54 inches to 48 inches. If your light switches were already installed at 54 inches in compliance with the 1991 Standards, then you are not required to lower them to 48 inches.

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Get Ready for the New ADA Regulations cont.

If they are currently mounted at 60 inches, after March 15 you will have to lower them to 48 inches to comply with the 2010 ADA Standards.

The 1991 Standards require truncated dome surfaces at curb ramps. The 2010 Standards eliminate the requirement. If you already complied with the 1991 Standards, you are not required to remove the truncated dome surfaces. If you are adding a curb ramp after March 15, you do not have to use the now familiar truncated dome surface.

If you alter elements that were in compliance with the 1991 Standards, the safe harbor no longer applies to those elements. For example, if you restripe your parking lot, which is considered an alteration, you will now have to meet the ratio of van accessible spaces in the 2010 Standards. The revised ADA rules and the 2010 Standards contain new requirements for elements in existing facilities that were not addressed in the original 1991 Standards. These include recreation facilities such as swimming pools, play areas, exercise machines, miniature golf facilities and bowling alleys. Because these elements were not included in the 1991 Standards, they are **not** subject to the safe harbor. Therefore, on or after March 15, 2012, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is "readily achievable" to do so.

Readily achievable means "easily accomplishable without much difficulty or expense." This requirement is based on the size and resources of a business. Businesses with more resources are expected to remove more barriers than businesses with fewer resources.

Readily achievable barrier removal may include providing an accessible route from a parking lot to the business's entrance, installing an entrance ramp, widening a doorway, installing accessible door hardware, repositioning shelves, or moving tables, chairs, display racks, vending machines, or other furniture. When removing barriers, businesses are required to comply with the Standards to the extent possible. For example, where there is not enough

space to install a ramp with a slope that complies with the Standards, a business may install a ramp with a slightly steeper slope. However, any deviation from the Standards must not pose a significant safety risk.

The new requirements allow for the use of designs, products, or technologies alternative to those prescribed, provided that the alternatives result in substantially equivalent or greater accessibility and usability. The purpose of allowing for equivalent facilitation is to encourage flexibility and innovation while still ensuring access. However, the Department insists that the responsibility for determining and demonstrating equivalent facilitation rests with the covered entity. The Department will not review requests for equivalent facilitation. Careful consideration must be made before deciding to go "outside the box" in deviating from the Standards. Obtaining legal, architectural and engineering advice during the planning of an alteration will save costs in the long run.

Allowable Tolerances.

Section 104.1.1 of the 2010 Standards provides that all dimensions are subject to conventional industry tolerances except where the requirement is stated as a range with specific minimum and maximum end points. Construction and manufacturing tolerances apply to absolute dimensions as well as to dimensions expressed as a maximum or minimum. When the requirement states a specified range, such as section 609.4 requiring grab bars be installed between 33 inches and 36 inches above the finished floor, that range provides the permissible tolerance.

Section 104.2 of the 2010 Standards provides that where the required number of elements or facilities to be provided is determined by calculations of ratios or percentages and remainders or fractions result, the next greater whole number of such elements or facilities must be provided ("rounding up"). Where the determination of the required size or dimension of an element or facility involves ratios or percentages, rounding down for values less than one-half is permissible.

Get Ready for the New ADA Regulations cont.

Think Positive - New Customers

More than 50 million Americans – 18% of our population – have disabilities, and each is a potential customer. People with disabilities are living more independently and participating more actively in their communities. They and their families want to patronize businesses that welcome customers with disabilities. In addition, approximately 71.5 million baby boomers will be over age 65 by the year 2030 and will be demanding products, services, and environments that meet their age-related physical needs. Studies suggest that once people with disabilities find a business where they can shop or get services in an accessible manner, they become repeat customers.

Our firm may arrange for confidential ADA compliance audits with experienced experts to provide attorney-client privileged inspections and recommendations to correct potential ADA violations before your company is sued and has to defend “drive-by” ADA lawsuits in federal court. For further assistance with your ADA matters or information, please contact Stuart Goldberg, Esq., at 954.847.2926 or e-mail SGoldberg@LS-Law.com.

About K. Stuart Goldberg, Esq.



Stuart Goldberg

Stuart Goldberg, Esq., works out of the Fort Lauderdale office in the litigation practice group. He has been a Civil Trial litigator for over 33 years and has worked with clients in virtually every area of Insurance Defense. Stuart is also a Circuit Court Civil Mediator, RMFM Program Mediator and Circuit Court Arbitrator, Florida Fifteenth

and Seventeenth Circuits. Stuart has substantial civil rights experience defending companies from claims and suits alleging violations of state and federal labor, employment and civil rights statutes, retail premises ADA Federal lawsuits and related discrimination claims. He can be reached at T:954.847.2926 or e-mail SGoldberg@LS-Law.com.

Verdicts & Summary Judgments by Office cont.

Appellate Division North

James Waczewski, Junior Partner of Luks, Santaniello, Petrillo & Jones obtained a favorable decision on appeal on March 30, 2012 in a case styled Engeda Tadesse f/k/a Engedwork Woldemariam, Appellant v. Gulf Coast Transportation, Inc., d/b/a United Cab and Mohamed Moumen, Appellees. Luks, Santaniello handled the appeal only. The Appellate Court affirmed the Trial Court's ruling that the general set off statute applied to set off PIP benefits under the circumstances. After Plaintiff obtained a favorable verdict on a personal injury lawsuit against a taxicab company, the taxicab company moved to set off from the verdict the amounts Plaintiff received in PIP benefits from her insurer. Plaintiff argued that the PIP statute, exclusively, controlled the issue of set offs for PIP benefits, and that under the PIP statute, a taxicab company could not get a set off of PIP benefits for an accident involving a vehicle operated as a taxi. The taxicab company moved for a set off under the general set off statute, however, and the Trial Court agreed that the general set off statute applied under the circumstances. The Appellate Court affirmed.

Orlando Office

Paul Jones, Partner and Katherine Kmiec, Esq., of the Orlando office of Luks, Santaniello, Petrillo & Jones obtained a defense verdict in a premises liability case styled Amber Hofer v. Kristen Costantino and State Farm in Orange County, March 21, 2012. The case involved an automobile accident near the University of Central Florida, where Plaintiff claimed that her car spun around two and a half times after being hit. The Plaintiff was 22 years old at the time of the accident and claimed that she permanently injured her neck and lower back in the impact. The Plaintiff suffered from severe migraine headaches and PTSD as a result of the accident. The Plaintiff underwent nearly eight months of weekly chiropractic care, and was examined by several neurologists and a neuropsychologist. The Plaintiff incurred approximately **\$35,000** in medical bills and demanded **\$255,000.00** at trial. The jury found that Plaintiff was 30% comparatively negligent for her own damages, and found no permanent injury. Post-trial hearings are currently pending. Read More . . . P. 12

Firm News

BestConnect Features Luks, Santaniello

The firm was featured in the Member Spotlight of the March 2012 issue of BestConnect. A.M. Best selected Luks, Santaniello for its timely and notable contributions to the Insurance Industry, including the Medicare Reporting White Paper, a timely Insurance Law Podcast on use of social media in discovery and investigation, an Insurance Law Podcast on Medicare Compliance, several legal updates and law alerts, and speaking engagements to industry associations and clients across Florida.

In order to be considered, a firm or individual must have timely, groundbreaking or professional accomplishments that are of topical interest to the Insurance Industry.

2012 Go-To Law Firm®

Luks Santaniello has been named a 2012 Go-To Law Firm® at the Top 500 Companies for its handling of Florida Commercial Litigation matters. The firm was also named in 2009 and in 2008 by its clients. ALM is a leading provider of legal news and publications. ALM asked General Counsel from the nation's 500 largest corporations which outside law firms they turn to for assistance in various practice areas. As part of the selection process, they also investigated and gathered data on public filings and court dockets. ALM produces this list annually. Only firms identified through this process can be on this list. Law firms cannot pay to be added to the list.

FDLA Young Lawyers Boot Camp



Lynn Abbott

Lynn Abbott, Esq., and Doreen Lasch, Esq., were speakers at the Florida Defense Lawyers' Association "Young Lawyers Boot Camp" on March 9, 2012. The boot camp was held at Nova Southeastern University.

Lynn spoke on case evaluation and conducting & defending depositions. Lynn is a Nova Law graduate and was admitted in 1986, Florida. Her litigation

background extends more than 25 years. She also taught as an Adjunct Law Professor at Nova Southeastern Law School. She devotes her practice to civil litigation matters involving catastrophic personal injury and wrongful death. Lynn can be reached at T: 954.847.2921 or e-mail LAbbott@LS-Law.com.



Doreen Lasch

At boot camp, Doreen Lasch, Esq., presented the case law update to attendees. She was also the session moderator for the ABOTA's (i.e., American Board of Trial Advocates) presentation on Civility Matters. It is a new program by ABOTA that suggests a proper guide of conduct among lawyers. Doreen is also a Nova Law graduate and was admitted in 1991, Florida. She has over 20 years of trial litigation experience and works in the firm's Appellate Division South. Doreen can be reached at T: 954.847.2942 or e-mail DLasch@LS-Law.com.

Titanic Memorial Dedication



Thomas Farrell

Thomas Farrell, Esq., from our Orlando office will attend a memorial dedication in Longford, Ireland for his great uncle James Farrell who was on the Titanic. James Farrell is reputed to be one of the persons in third class who asked that women and children be allowed to go to the lifeboats. The crewmen complied with his request however James died in the disaster. His passage is documented in Encyclopedia Titanica and an upcoming article regarding the dedication is anticipated in the Miami Herald.

This Legal Update is for informational purposes only and does not constitute legal advice. Reviewing this information does not create an attorney-client relationship. Sending an e-mail to Luks, Santaniello et al does not establish an attorney-client relationship unless the firm has in fact acknowledged and agreed to the same.

Verdicts & Summary Judgments by Office cont.

Orlando Office

Paul Jones, Partner and Leena Joseph, Esq., in the Orlando office of Luks, Santaniello, Petrillo & Jones obtained a defense verdict in an automobile accident case styled Donna M. Niederhelman v. Mary J. Tucker in Lake County on March 1, 2012. The Plaintiff was rear ended by the Defendant driver and liability was admitted prior to trial. As a result of the subject accident, the Plaintiff claimed injuries to her left shoulder, neck and back. She underwent chiropractic treatment and received numerous injections to the left shoulder. After a year of conservative treatment, the Plaintiff underwent an arthroscopic subacromial decompression and partial distal clavicle excision of the left shoulder. The Plaintiff incurred approximately **\$50,000** in medical expenses and demanded **\$350,000** at trial. The jury found that the subject accident was not the legal cause of loss, injury or damage to the Plaintiff. The motion for attorney's fees and costs is currently pending.

Paul Jones, Partner and Douglas Petro, Esq., of the Orlando office of Luks, Santaniello, Petrillo & Jones obtained a defense verdict in an automobile accident case styled William G. Bruzon v. Antron L. James in Orange County, January 26, 2012. The case involved an automobile accident where the Plaintiff claimed his vehicle was struck on the driver's side while waiting to cross traffic, but the Defendant claimed that the Plaintiff turned into his path of travel and caused the accident. Plaintiff claimed neck, back and knee injuries, including a torn medial meniscus of the left knee requiring surgery that was confirmed by the Defendant's own expert physician. The Plaintiff requested in excess of **\$464,000** from the jury. The jury found no negligence on the part of the Defendant that was the legal cause of Plaintiff's damages. The jury returned its verdict in favor of the Defendant in less than 30 minutes.

Fort Lauderdale Office

Daniel Santaniello, Managing Partner and Thomas Gibbons, Esq., of Luks, Santaniello, Petrillo & Jones obtained a defense verdict in an automobile accident case styled Kazandra Bern v. Dafne Acevedo and Marcelle Camejo in Miami-Dade County, March 12,

2012. This case involved a head on collision where Plaintiff almost lost her leg. The Defense brought in a 90% Comparative/Fabre. The Plaintiff asked the jury for **\$7.7M** with **\$843K** in undisputed past medical expenses. After set-offs, the net effective verdict was \$65,000. Defendant's vehicle was struck by two (2) vehicles as Defendant entered the intersection of 135th & Biscayne Boulevard. Keilin Perez was initially named as a party Defendant but settled with Plaintiff and was a Fabre Defendant at trial. Both Keilin Perez and the Plaintiff contended that they entered the intersection on a green turn arrow, while Defendant, Dafne Acevedo maintained that she had a green light at all times.

Defendant argued that Plaintiff failed to meet their burden in establishing that Defendant entered the intersection of a red light and/or was otherwise negligent in causing the accident. Defendant introduced testimony from Ms. Perez that she was not a licensed driver and had never received any drivers training or education in the United States. During the cross examination of Plaintiff, Defendant established that Ms. Bern did not apply her brakes, horn and otherwise did not take steps to avoid the accident. Defendant also noted that Plaintiff "inadvertently" testified at her deposition that she had a green light [as opposed to a green turn arrow]. Defendant called an accident reconstruction specialist, Donald Felicella who testified that the evidence was consistent with Defendant's version of the accident. Lastly, Ms. Acevedo unequivocally testified that she had the green light while entering the intersection of 135th and Biscayne Blvd.

Plaintiff underwent a total of 7 surgeries, including a tibioacaneal fusion. The Plaintiff called rehabilitation specialist (life care planner), Larry Foreman, C.R.A. who testified that Plaintiff will need approximately \$300,000 in future medical care over the remainder of her lifetime consisting of office visits, medications, injections and physical therapy. Defendant cross-examined Mr. Foreman as to the reasonableness of his life care plan. Specifically, Defendant noted that Plaintiff's treating physician [Stephen Quinnan, M.D.] previously testified that Ms. Bern is expected to be fully ambulatory and pain-free within the next 12 months. Plaintiff's past and future loss of earnings claim totaled **\$188,684.00**.