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ON APPEAL

Walton Lantaff Prevails for Tenant Burned by Landlord After Homestead House Fire

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The Third District Court of Appeal issued a written opinion in the case of *Jorge Artiles v. Yurisbel Pino* this winter, affirming the summary judgment granted in favor of Mr. Pino by the trial court. Walton Lantaff Schroeder & Carson LLP represented Mr. Pino on both the underlying summary judgment and on the subject appeal.

Ian Ronderos from the Miami office obtained the underlying summary judgment. This summary judgment was protected by lead appellate counsel Michele Ready also from the Miami Office, with help from Mr. Ronderos.

The *Artiles* appeal addressed a dispute arising out of a landlord's claim against a tenant for damages arising out of a candle fire that occurred during the tenant's occupancy of the landlord's property.

Please see HOUSE FIRE on page 2

SAVVY CONTRACTS

Getting What You Bargain For... A Buyer's Guide to Purchasing Art

For some time now Miami has been developing into an art mecca, with myriad fairs, galleries, art walks and events, as well as a growing roster of high-quality home-grown and transplanted artists. As more and more buyers flock to Miami because it is one of the world's top art marketplaces, the total amount and dollar value of sales increases exponentially.

Yet, each sale is opportunity for dashed expectations, lasting bitterness and, whether warranted or not, litigation.

Michael Galex, Esq.

Please see CAVEAT on page 7

ON APPEAL

Representing Tenant in Homestead House Fire, Walton Lantaff Wins With Tenacity, Legal Research

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HOUSE FIRE, from page 1

Walton Lantaff was assigned by the tenant's carrier to represent the tenant. The trial court granted Mr. Ronderos' motion for summary judgment on the grounds that the landlord, who lost the subject property through foreclosure, had assigned any and all claims arising out of said property, pursuant to the terms of his mortgage.

Ian Ronderos, Esq.

Michele E. Ready, Esq.

The mortgage specifically stated that if the mortgagee acquired the property by foreclosure or otherwise, the landlord assigned his rights to proceeds from any insurance policies covering the subject property to the mortgagee.

The landlord argued that the mediated settlement agreement with his mortgagee modified the mortgage. The Third DCA disagreed and sided with the well-reasoned and well-written arguments of Ms. Ready and Mr. Ronderos. Ms. Ready's thorough research and grasp of the law proved particularly decisive.

Accordingly, the Third DCA affirmed the summary judgment and ruled that the landlord did not have the right to pursue an action against the tenant.

Rising Stars

It was a special night for Junior Partner Sara Sandler (Ft. Laud) as she was honored by the Daily Business Review as one of 2015's Rising Stars in South Florida's legal community. Sandler was recognized for her commitment to the law and her community. She was joined at the awards ceremony by her mentor, Senior Partner Jack Joy (Ft. Laud), and Ft. Lauderdale Associates Aaron Warren, Oliver Sepulveda, and Cassandra Shanbaum.

FORT LAUDERDALE - 4TH DISTRICT

4th DCA Upholds Victory Against Plaintiff Who Attempted to Alter His Medical Records

Junior Partner Sara Sandler (Ft. Lauderdale) and Associate Aaron Warren (Ft. Lauderdale) obtained a victory in the Fourth DCA when the appellate court upheld a trial court's ruling to allow the defense's medical expert to testify with regard to the reasonableness of certain medical charges incurred by the plaintiff and further upheld the trial court's admission of evidence that the plaintiff attempted to alter his medical records.

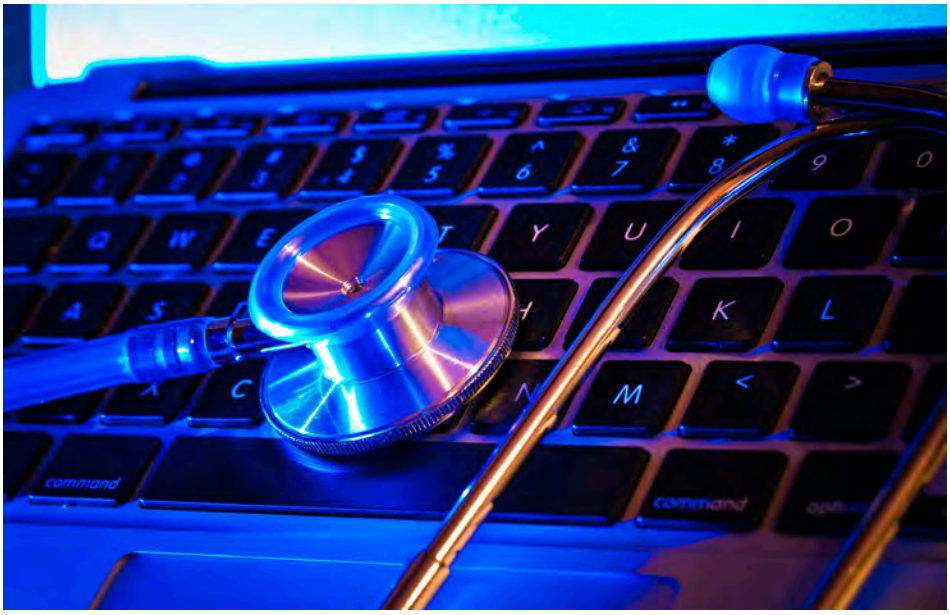
Sara Sandler, Esq.

Aaron Warren, Esq.

At the trial, the trial court permitted testimony of the defense's medical expert to challenge the reasonableness of the medical charges from plaintiff's treating doctors.

On appeal, Appellant/Plaintiff asserted that the admission of this testimony was in error as the trial court did not apply a Daubert analysis before admitting the testimony. Daubert requires that the trial court make the following inquiry: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and, (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Attorneys Sandler and Warren argued that, while a Daubert analysis was not necessary, as the defense expert was testifying as to the reasonableness of charges for a service and not providing scientific testimony, the trial court did, in fact, conduct a Daubert review of the defense expert by questioning the defense's expert on his qualifications and confirming that the methodology he used to determine the reasonableness of the charges was reliable and based on a competent and established analysis.



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In perhaps one of the most gutsy moves by an appellate attorney, the Appellant/Plaintiff also challenged the trial court's ruling to allow evidence to come in at trial that the Appellant/Plaintiff attempted to have one of his treating physicians alter his medical records and did, in fact, succeed in deleting medical records himself by accessing the physicians records.

During the discovery phase of trial, counsel for Appellant/Plaintiff inadvertently included an email between the attorney and the Appellant/Plaintiff noting that the Appellant/Plaintiff had "eliminated" a certain record from his file (which indicated that he was seeing the doctor for weight loss and not for accident-related injuries) but that he was unsuccessful in getting the doctor to delete the word "degenerative" from his records.

Upon deposing the doctor, it was further discovered that the Appellant/Plaintiff had actually managed to gain employment with the doctor as an office manager, which provided him access to the doctor's electronic records keeping system. The doctor testified that the Appellant/Plaintiff did take the office computer home with him on at least one occasion in order to learn how to use the office's system. The Appellant/Plaintiff then abruptly quit one week after he was employed.

On appeal, Appellant/Plaintiff argued that it was prejudicial to allow this evidence to be submitted to the jury. Attorneys Sandler and Warren argued that these records were directly related to the central issues at trial: causation and damages. Further, since Appellant/Plaintiff sought to recover the doctor's bill as part of his damage claim in the subject case; and since Appellant/Plaintiff refuted the doctor's records which indicated that Appellant/Plaintiff treated with the doctor for purposes of weight loss, the jury was entitled to hear this evidence to weigh the Appellant/Plaintiff's credibility.

In entering its *per curiam affirmance*, the Fourth DCA agreed that the trial court properly allowed the defense's expert to testify and properly allowed for the admission of evidence regarding the deletion and attempts to delete the medical records.

Case Closed: The Current in Florida Workers' C

Unresolved attorney's fee liens can derail a settlement of future benefits in Florida workers' compensation cases, and even expose an Employer/Carrier to civil liability. This article discusses the various manifestations of these liens, how lienholders perfect their liens, how Employer/Carriers can proactively identify and resolve any fee/cost liens, so as to close the file and protect it against future claims.

Robert Strunin, Esq.

Michele E. Ready, Esq.

We start with the maxim that "the best file is a closed file." A file cannot truly be closed until all aspects of Fla. Stat. §440 are resolved. Most cases typically involve "one claimant, one attorney." But what are the consequences if the claimant discharges one or more attorneys prior to the conclusion of the case? Plenty… if the prior attorney(s) files a lien alleging he/she is entitled to fees or costs(or both) for work done on the file prior to resolution of issues or the entire case.

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Are you seeing more lien litigation?

Claimants' attorney fees and costs are codified in Fla. Stat. §440.34; various amendments over the years have led to the present controversy between the claimant's Bar and Employer/Carriers. Presently, anticipation (and anxiety) is unprecedented pending the Florida Supreme Court's decision on the constitutionality of the 2009 amendment to §440.34 limiting fees to a statutory percentage of benefits obtained as opposed to an hourly rate as argued in *Castellanos v. Next Door*, Inc.. The 2009 statutory fees reduced the cost of claims; and we have seen, perhaps not coincidentally, an increase in the number of contentious lien battles. Litigation arises most often when a case is settled without resolving a prior attorney's lien.

In most situations, the claims professional administering a file will know a lien is pending. Typically, when there is a change in counsel, the new attorney will notify the Employer/Carrier; or, if the matter is pending before the Judge of Compensation Claims, a formal stipulation for substitution of counsel reserving on attorney's fees and costs and establishing a lien is included in the Order approving the substitution. (Rule 60Q-6.104, F.A.C.) Care should be taken by the claims professional and defense counsel, if any, to note the identity of the discharged attorney and to inquire of that individual as to what type of lien is asserting. The lien could be for an Employer/Carrier-paid fee based upon benefits secured as a result of filing a Petition, a quantum meruit lien (or "charging lien"), or a fee based upon all benefits paid after overcoming a denial of compensability. Understanding the different types of liens will enable the claims professional to identify liens which is the first step at resolving the lien.

Liens for E/C-paid fees/costs

Generally, the claimant is responsible for his/her attorney's fees and costs unless certain exceptions as enumerated in Fla. Stat. §440.34(3) are met. But what happens if an attorney is discharged prior to resolution of past or pending issues or in the event of a Fla. Stat. §440.20(11)(c) settlement of future benefits? The discharged attorney may file a lien for any E/C-paid fee that would have been due during his/her representation of the claimant. Recently, Florida's 1st District Court of Appeals has held that these fees associated with prevailing on claims raised via a Petition for Benefits are subject to dismissal for lack of prosecution pursuant to Fla. Stat. §440.25(4)(i). *Limith v. Lenox on the Lake*, 163 So. 3d 616 (Fla. 1st DCA 2015).

t State of Lien Resolution Compensation Claims

Robertson Adams

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Quantum meruit liens (charging liens)

If the claimant discharges an attorney without cause, and no benefits were secured, the attorney would be entitled to a "charging" lien for an attorney fee under the equitable theory of quantum meruit ("what one has earned") Quantum meruit fees have been long recognized in Florida and were generally paid by the claimant.

Most often, lien problems arise when a subsequent attorney settles the entire case and fees are paid; if known liens are not protected, the employer/carrier could be "on the hook" to the former attorney or attorneys. Perfection of a quantum meruit lien requires only timely notice to the affected parties. *Zaldivar v. Okeelanta Corp.*, 877 So. 2d 927 (Fla. 1st DCA 2004) The lien "ripens" when there are settlement proceeds to which the lien can attach.

If the attorney's lien has ripened, and he was provided notice of the settlement, then failure to resolve or prosecute the lien can result in dismissal of the lien through the application of the equitable doctrine of laches (but not a motion for lack of prosecution, as the quantum meruit lien is not a "claim" for attorney's fees raised by petition). *Limith v. Lenox on the Lake*, 163 So. 3d 616 (Fla. 1st DCA 2015).

'Total benefits secured' liens

This type of lien is based upon the concept that "benefits secured" can be calculated on the basis of the total benefits secured as a result of a denial of compensability. §440.34(3)(c), Fla. Stat. (2009)

In these situations, because the full amount of the benefits to be paid in the future may be unknown, the court has held that the Claimant's attorney must be allowed to decide when he or she will have the quantum of the fee determined. *Zaldivar v. Fla. Transp. 1982, Inc.,* 19 So. 3d 1093 (Fla. 1st DCA 2009).

Best practices for resolution

Typically, Florida workers' compensation cases settle at mediation. The claims professional or defense counsel should provide notice to any prior attorneys of the mediation conference and invite them to participate; in that fashion, the attorney's claim will be made known and can be dealt with and resolved in writing in the mediation agreement. In reality, some attorneys will not participate and will not provide lien information to the parties or the mediator. In those cases, provisions should be made in a mediation agreement as to which party (claimant or employer/carrier) will be responsible for any known asserted liens. Once a settlement is reached, any liens have ripened as the Florida appellate court pointed out in *Zaldivar v. Okeelanta Corp.* At this point, the E/C can compel the lienholder to file a Verified Motion for Attorney's Fees pursuant to 60Q-6.124(4) F.A.C.. Thus, prior to disbursement of settlement proceeds, any unresolved lien/attorney fee issues should be brought to the before the JCC and resolved through an appropriate Final Order.

Recent administrative rule changes

Prior to amendments to the Florida Administrative Code which took effect 11/1/06 (and strengthened effective 11/10/14), there was no statutory or procedural requirement that a lien be adjudicated. This left open issues which could not be forced to be heard by the Judge of Compensation Claims unless the attorney brought the claim before the JCC… with the result being employer/carrier claim files were left open. The Florida procedural rules (Rule 60Q-6.124(4) and (as of 11/10/14) subsection (5), F.A.C.) require the filing of a verified fee petition upon appropriate motion, (generally by employer/carrier) to adjudicate the lien. An appropriate motion filed with the OJCC and served upon all parties and attorneys, including those attorneys asserting liens which have

Please See LIENS, Page 11

Volunteers gather at Miami-Dade Fair and Expo for Feed Starving Children.

Miami Office Community Service Event

The Miami Office volunteered to be part of Feed My Starving Children's mobile pack event which was held in January at the Miami-Dade Youth Fair Grounds.

Feed My Starving Children is a non-profit organization that is committed to eliminate starvation in children worldwide.

The approach is to find volunteers in a community to hand pack meals specifically formulated for malnourished children and then they ship the meals in boxes to partners around the globe.

A group of Walton Lantaff staffers and lawyers went out to the Youth Fair one night in January and participated in this event.

The Youth Fair expo buildings were used for the event and Walton Lantaff has a special connection to the Youth Fair in that a prior partner, George Orr, was President of the Youth Fair for many years.

Hundreds of people attended the event in January volunteering their time and labor to pack meals.

The mobile pack event is a huge production that travels around the country. Some of the lawyers carried bins of rice and soy to tables and other Walton Lantaff members worked the meal packing tables in an assembly line fashion.

The food consists of vitamins, dehydrated vegetables, soy and rice which goes into a bag that has to be sealed. Thirty six packets were boxed up.

It was an amazing experience and very rewarding! We encourage you to find a mobile pack event near you to participate in this worthy cause.

Orlando Honors

The Orlando Regional Chamber of Commerce has recognized Walton Lantaff Schroeder & Carson LLP as its Member of the Month. If you're in need of legal guidance in the Orlando area, please contact Jim Armstrong, *jarmstrong@waltonlantaff.com.*

Doing the Right Thing!

Miami Partner Tom Falcon attended the "Do The Right Thing" awards ceremony, which was sponsored by Walton Lantaff.

Tom, top left, has assisted the organization locally.

Art-buying Rules Are Clear. But is Your Invoice?

CAVEAT, from page 1

Whether a $30 million Warhol or an inexpensive piece from THE up-and-coming artist *du jour*, buyers and sellers risk their relationships when one side feels it did not get what it thought it bargained for. Often the buyer feels like the loser, creating ripe conditions for lawyers to be turned loose, flurries of correspondence, threats of lawsuits and counterclaims, and, ultimately, damaged reputations and ruined relationships. As a reminder, recall that just over a year ago a court rejected Ronald Perelman's fraud and deceptive practices lawsuit against mega-art dealer Larry Gagosian arising from the sale of artworks by Cy Twombly, Jeff Koons, and other high-priced artists. And those two are experienced art market players.

Would-be buyers need to understand how Florida law affects art transactions. Buying art is a commercial transaction governed by fairly well-established legal rules. The vast majority of dealers are honest and understand and follow these rules. Nonetheless would-be buyers are always best-served by knowing their legal rights and obligations. To help with this, and in celebration of Miami's local artists, assume here that Buyer wants to buy an original painting by Miami-based artist Jenny Brillhart from Dealer

Google Images

Caveat Emptor and Express Warranties

"*Caveat emptor*" means "let the buyer take care." This legal principle requires Buyer to inspect the painting he wants to buy. He must inspect it for any obvious problems and, generally, ensure the painting is in fact the original Jenny Brillhart painting he believes he is buying. Yet, as with many legal rules, *caveat emptor* is not at far reaching as it once was as it has been modified over the years. One of the most important modifications is the "express warranty."

In making a sale, dealers, like in our example, will almost always make statements about the quality of the artwork at issue, the materials used, and, most-importantly, the pedigree, marketability and expected future success of the artist. Any would-be buyer must listen closely to exactly what the dealer says, and ask any questions considered important, to ensure a full and complete understanding of the artwork offered for sale. Further, most art purchases are not documented beyond a one-page invoice detailing price, payment terms, delivery date, and the title and author of the artwork.

But this invoice gives our Buyer the greatest assurance that he is actually buying an original Jenny Brillhart painting: the "express warranty." Florida statutory law specifically states any written invoice provided by an art dealer in a sale to a non-art dealer buyer is an "express warranty" that the artwork is by the artist identified in that invoice. An "express warranty" is the dealer's explicit promise that the artwork is what the dealer says it is. So in our example, if Dealer's invoice unconditionally states the invoiced artwork "is an original Jenny Brillhart painting," Florida law holds that Dealer has expressly promised this to Buyer. Further, this law also states this "express warranty" is "presumed to be part of the basis of the transaction." This is important because, if the work is not in fact "an original Jenny Brillhart painting," Dealer breached the sales contract, and must both refund the purchase price and pay any resulting attorney's fees and costs Buyer incurred. Further, Dealer may also be criminally liable.

Exception to the "Express Warranty" Rule

As with most legal rules, there are exceptions to the above-listed rules. While difficult, it is not impossible to escape an express warranty in an art sale as Florida law allows the parties to limit or negate an express warranty of the provenance of artwork. An express warranty does not exist where the sales invoice contains a conspicuously written disclaimer that is not "separate and apart" from the language that created the express warranty in the first instance.

In our example, Dealer's limiting language must "clearly and specifi-

Please See CAVEAT, Page 11

Subrogation Claims: Tactics Used to Defeat Them and Effective Countermeasures

Subrogation is an increasingly interesting and challenging field. Subrogation plaintiffs' attorneys face new and diverse challenges in pursuing their claims on behalf of their clients, who are usually insurance carriers. As most subrogation plaintiffs are insurers, many subrogation plaintiff's attorneys, are also insurance defense lawyers. This places the subrogation practitioner in the unique position of encountering legal cases from the opposite perspective (i.e., the plaintiff's) from which he or she is used to encountering them (i.e., the defendant's). It can be quite rewarding to assume the initiative in the litigation lifecycle and land—rather than parry—the blows. When switching perspectives, the subrogation practitioner needs to be particularly vigilant against the traps and tricks that defense attorneys may cast in their path.

This discussion will focus on some of the defensive trends that defense attorneys may utilize in their attempts to defeat a subrogation claim. In Florida, "[s]ubrogation is the substitution of one person in the place of another with reference to a lawful claim or right." *State Farm Mut. Auto. Ins. Co. v. Johnson*, 18 So. 3d 1099, 1100 (Fla. 2d DCA 2009) (citing *West Am. Ins. Co. v. Yellow Cab Co. of Orlando, Inc.*, 495 So. 2d 204, 206 (Fla, 5th DCA 1986)). As subrogation places the insurance carrier in the place of the party that originally possessed the cause of action, it is, in a sense, a legal fiction. The insurance carrier possesses all the rights and obligations of the party originally possessing the cause of action, as if it was the actual party pursuing the subject claim.

As all legal fictions, subrogation relies upon a set of technical rules—actually two sets. Defense attorneys often attempt to attack the technical sufficiency of the carrier's subrogation rights, so it is important to understand the technical requirements of subrogation. The seminal subrogation case in Florida is *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999). *Dade County Sch. Bd.* sets forth the two types of subrogation and the legal requirements for both. The two types of subrogation are (1) contractual or conventional subrogation and (2) equitable subrogation.

As to the first type of subrogation, "[c]onventional or contractual subrogation arises from a contract between the parties establishing an agreement that the party paying the debt will have the rights and remedies of the original creditor." *Id.* at 646, (citing *Boley v. Daniel,* 72 So. 644, 645 (Fla. 1916) (finding that conventional subrogation arises when a party having no interest in the matter pays the debt of another and by agreement is entitled to the rights and securities of the creditor who has been paid)); (also citing *Phoenix Ins. Co. v. Florida Farm Bureau Mut. Ins. Co.*, 558 So. 2d 1048, 1050 (Fla. 2d DCA 1990)). Regarding the second type of subrogation, A cause of action for equitable subrogation arises where: (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party." *Johnson*, 18 So. 2d at 1100-01 (citing *Dade County Sch. Bd.*, 731 So.2d at 646). Furthermore, for equitable subrogation "[i]n tort cases, the party seeking subrogation must have obtained a release for the other party responsible for the debt." *Johnson*, 18 So. 2d at 1101.

A prudent defense counsel will cast his ever scrutinizing and unforgiving eye upon the basis of your carrier's subrogation claim, which is what provides your carrier with carrier to assert its subrogation action. If your subrogation action is a contractual subrogation claim, it is very important to make sure that the contract that transfers subrogation rights from the subrogor (i.e., the party originally possessing the action) to the subrogee (i.e., the party receiving the subrogor's rights to proceed against the liable parties) is not just technically sound, but also extremely clear. This document is often a release or mediation settlement agreement.

Some subrogation counsel come into

ELEMENTS OF EQUITABLE SUBROGATION

The five elements of equitable subrogation are:
(1) Made the payment to protect its own interest,
(2) Did not act as a volunteer,
(3) Was not primarily liable for the debt,
(4) Paid off the entire debt, and
(5) Works no injustice to the rights of a third party by its equitable subrogation claim.

Source: Columbia Bank v. Turbeville 143 So. 3d 964 (Fla. 1st DCA 2914) that is citing Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 646 (Fla. 1999). This (Dade Cnty. Sch. Bd.) is the seminal case on the matter, and which was successfully litigated by Jack Joy, Esq..

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the case after the underlying claim between the subrogee and subrogor is settled and the document transferring subrogation rights is already prepared. However, some subrogation counsel are actually also the insurance defense counsel that settled the underlying case. If an attorney is not just the subrogation attorney, but the underlying defense attorney as well, he or she is in the unique opportunity to ensure that the insurance carrier's subrogation rights are perfected properly. In this case, the attorney should insist that the document specifically state that the subrogor is transferring primary subrogation rights to the insurance carrier up to the amount of the insurance company's payment. It is important to note that the insurance carrier's rights are primary, because the subrogor will retain the right to pursue the subrogor's cause of action to recover any amounts above the insurer's payment in settlement of the underlying claim. Insisting on primary subrogation rights means that your insurance carrier possesses the right to recover its subrogation interest first out of any verdict, before the subrogor can claim entitlement to any funds.

For instance, assume that an insured files a first party property insurance claim with his or her carrier, claiming entitlement to $400,000, and the insurance carrier settles the first party property claim with its insured for $200,000 and a transfer of subrogation rights. If the insurer and its insured then obtain a verdict in the amount of $250,000 from the tortfeasors that caused the loss, the use of the term "primary subrogation rights" indicates that the insurance carrier will get its $200,000 subrogation interest before the insured is entitled to recover from the $250,000 verdict. Otherwise, the defense counsel or the subrogor himself or herself may claim that the subrogor is entitled to be paid first under the "made whole" doctrine, which states that the insured is entitled to be made whole before the carrier can recover. The "made whole" doctrine may be contracted around and the use of the term "primary subrogation rights" is extremely important in this regard, as it clearly expresses the parties intent to allow the insurer to recover its subrogation interest before the insured or subrogor.

If the attorney was not the underlying defense counsel who settled the matter or did not draft the most lucid contractual subrogation document, all is not lost. A lack of inclusion of the terms "subrogation," "primary," or "transfer" in the subrogation contract is not fatal. Florida does not require the use of magic terms. In Florida, "[w]hen interpreting a **contract**, a court should give effect to the plain and ordinary meaning of its terms." *Golf Scoring Systems Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 829 (Fla. 4th DCA 2004) (citing *Volusia County v. Averdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 132 (Fla. 2000)). Indeed, Florida courts have refused to require parties to utter the "magic words" in order to make a contract enforceable. *See Crawford v. Baker*, 64 So. 3d 1246, 1256 (Fla. 2011) (addressing the interpretation of a marriage settlement agreement upon a deferred compensation fund, the Supreme Court of Florida ruled that "magic words are not required"). A lack of the magic words will not doom a contractual transfer of subrogation rights, but it does increase the likelihood of defense counsel filing a Motion for Summary Judgment alleging that the release, mediation settlement agreement, or

Please See SUBROGATION, Page 10

GET TO KNOW WALTON LANTAFF

Join Us in Congratulating Our New Junior Partners

SHAWN DEVNDORF, ESQ. is a junior partner in the firm's Miami office. Mr. Devendorf focuses his practice on real estate matters, including title searches, procurement of title insurance, and conducting real estate closings. He is a member of Attorney's Title Insurance Fund, Inc. He also represents insurance companies in matters involving insurance coverage disputes, premises liability, and medical malpractice. J.D. Univ. of Miami, 2001.

MICHELE BACHOON, ESQ. is a junior partner, in the firm's West Palm Beahc office. Her primary area of practice involves workers' compensation. Prior to joining the firm, Ms. Bachoon practiced labor and employment law, primarily dealing with discrimination cases and claims for unemployment compensation. During law school, Ms. Bachoon interned at the Miami-Dade State Attorney's Office in the juvenile division. She also interned with the Supreme Court of Florida. Ms. Bachoon was also a member of the International Human Rights Law review. J.D. Saint Thomas University School of Law, 2008.

LINDA MURALT, ESQ. is a junior partner, in the firm's Tampa office. Her primary areas of practice involve all areas of workers' compensation defense, insurance defense liability litigation, family law, and probate including Wills, Trusts, Estates, and Guardianships. Prior to joining the Firm, Ms. Muralt worked in the insurance industry for 18 years in sales, underwriting, service, and adjusting of medical as well as property and casualty claims. She has litigation related experience on complex matters in personal injury, contract law, real estate, family law, and probate. J.D. Stetson Univ., 2006.

SUBROGATION from Page 9

other document failed to properly subrogate the insurer.

Another trap that defense counsel may rely upon is seeking to compel the subrogating carrier to substantiate the payment that it made to the insured or subrogor. The defense counsel may argue to the court that if insurance carrier X paid Y amount of money to party Z, then carrier X needs to substantiate or otherwise link payment Y to a specific set of damages or an estimate in said amount. This is incorrect. A subrogee steps into the shoes of its subrogor. Its damages are the damages of it subrogor. As long as the insured or subrogor has damages equal to or in excess of Y, the carrier's damages have been substantiated. Through subrogation, the subrogee has essentially bought an interest in the amount of Y in Z's action. Carrier X's damages are equivalent to party Z's damages, pursuant to substitution of the carrier for the subrogor.

As noted above, equitable subrogation has five elements and the additional requirement to get a release from the subrogor in favor of the tortfeasor. These elements and the release requirement provide defense counsel multiple prongs from which to attack a subrogation claim. Fortunately, equitable subrogation is based on the policy that no person should benefit by another's loss, and it "may be invoked wherever justice demands its application, irrespective of technical legal rules." *West Am. Ins. Co.,* 495 So.2d at 207 (citing *United States Fidelity and Guaranty Co. v. Bennett*, 119 So. 394 (Fla. 1928)). The *West* decision is extremely helpful to carriers asserting a subrogation claim, especially as judges typically do not like granting summary judgment against parties with an otherwise valid claim on the grounds of a technicality. *West* allows courts to make the equitable decision and allow a subrogation claim to proceed in such a circumstance.

As subrogation is a legal fiction based upon technicalities, defense attorneys tend to attack the technicalities establishing the legal fiction or the effects produced by it (i.e., the damages aspect discussed above). In thwarting these attempts, it is important for the subrogation practitioner to know the technical aspects perfecting a subrogation claim and never forget that the subrogee possess all the legal rights of the subrogor.

GET TO KNOW WALTON LANTAFF

Get to Know These New Associates

GABRIELLA BRAGA (Miami) practices worker's compensation defense and insurance defense litigation. J.D. *magna cum laude*, Univ. of Miami.

EDWARD IBEH (Ft. Lauderdale) practices Worker's Compensation and Municipal Liability. J.D. from Univ. of Miami. Also experienced in Insurance Defense and Entertainment Law.

PATRICIA SIERRA (Miami) practices property insurance defense and civil litigation. J.D. Univ. of Florida. Clerked for Judge Frances S. King in 5th Circuit, Marion County.

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cally" tell Buyer that Dealer "assumes no risk, liability, or responsibility for the authenticity or authorship of" the artwork. The written invoice would have to contain a written disclaimer, apparent to anyone who looks at it, that, despite anything to the contrary, Dealer actually disclaims any and all risk, liability or responsibility if the painting is not actually "an original Jenny Brillhart painting."

Opinions and Puffery

"Puffery" or "puffing" is a statement of opinion by a seller as to an artwork's value or aesthetics. When our Dealer tells Buyer that a particular Jenny Brillhart painting (perhaps the most expensive in stock) "is the best example of Ms. Brillhart's distinctive style," this is probably merely Dealer's statement of her own opinion as to the merits of the painting at issue. Such a statement most-likely cannot be construed as a warranty, or promise, of any type.

If, however, Dealer goes beyond exaggerating the quality of the painting, or jumps from aesthetic or qualitative opinions to opinions about the authenticity of the painting, Dealer is beyond puffing to get the sale and into fact-based promises about the painting itself. This is especially true when Dealer has superior knowledge about the painting. These situations are more along the lines of express warranty, which benefits Buyer under Florida law.

The foregoing legal rules aside, buyers will continue buying what they love and dealers will continue selling. Some will also sell and buy with an eye towards investment and turning a profit. Whatever your motives, be sure to enjoy the art. – *by Michael Galex, Esq.*

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not been resolved, is the preferred vehicle to "force close" the pending lien.

Prior to Rule 60Q-6.124(4) becoming effective on 11/1/06, there was no mechanism to require that an attorney asserting a lien file a Verified Petition to adjudicate the lien. Thusly, liens could remain indefinitely "in limbo."

These new procedural amendments, especially the 2014's amendment, give strong ammunition to the Employer/Carrier to require the filing of a verified motion for attorney fees and costs even if entitlement is disputed, upon presentation of appropriate facts.

Additionally as the *Limith* court indicated, if the fee is petition-based, a motion to dismiss for lack of prosecution can be filed so that attorney's fees do not keep the file open indefinitely, tolling the statute of limitations.

CONCLUSION

If, as part of the negotiation of the settlement, the Employer/Carrier agrees to be responsible for liens of prior attorneys, prompt resolution of the lien should be made before the Judge of Compensation Claims. The attorney claiming the lien has the burden of proof that he/she was either discharged without cause (which gives rise to the basis for the "charging"/quantum meruit liens noted above), or proving up that an E/C-paid fee is due for securing benefits on behalf of the Claimant.

Furthermore, the best protection against future civil lawsuits for tortious interference with a business relationship is to require the lienholder to resolve his lien prior to the JCC approving the current attorney's fees and costs for underlying settlement.

Because the lien is now ripe, and attached to the settlement proceeds, all the parties to the settlement (claimant, claimant's current attorney, and the Employer/Carrier) have an obligation to the prior attorney(s) to protect their lien. – *By Robert Strunin, Esq. and Michele E.* Ready, *Esq.*

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