DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

TEAM FLORIDA WAVE

March 2000

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Volume 3 Director: Paul Jacobson

From the Desk of

Luis Figueroa

The first quarter of the year 2000 is almost over. I want to bring you up to date on where we are in addressing the goals set forth in our last edition.

Communication continues to be improved with the claims customers and our clients. I continue to attend meetings of the Florida Claims Leadership team as a representative of the Florida Trial Division. I have also been invited to attend the Florida Cabinet meeting in April. I have traveled to Scottsdale to meet with the Florida claims representatives. In each of our offices, we held joint claims and trial division meetings to roll out the aggressive discovery program in all of the locations we service. Carol Spelzhausen, the Claims Manager for the Orlando office, participated in fourth quarter audits of the Orlando Trial Division Office. Lynette Belforti, Claims Manager for the West Palm Beach office, attended the Southeast Trial Division's Regional meeting and spoke about cooperation between Trial Division and Claims and the importance of that relationship in successful litigation management. Bob Costello, the Acting Managing Claims Counsel, attended the Regional meeting and discussed alternative fee arrangements, Claims Legal MBO's, NCPCP retention, and intranet suit reviews. Anthony Gonzalez, Lead Attorney for the Tampa Bay office, has been invited to participate as a member of the Florida OCE Task Force.

In addition to face-to-face meetings to discuss the issues of the case with our clients, we have created a brochure that is mailed to the client with our introductory letter explaining the litigation process in laymen's terms. Our clients have reflected favorably to these mailings finding them helpful.

In 1999 our customer and client surveys demonstrated overall satisfaction with our offices.

Team Florida Wave is a publication by Law Offices of Figueroa, Gonzalez, Hoecker & Owens*, (Nationwide® Insurance Company's Florida Trial Division), 13923 Icot Boulevard, Suite 815, Clearwater, FL 33760, (727) 530-9896. If you

would like to discuss any of the articles with an attorney, please feel free to contact our office.

*Employees of Nationwide® Mutual Insurance Company.

However, there is still room for improvement. My team leaders and I will meet with all personnel in our Florida offices to target areas for improvement in 2000.

1999 was a challenging year. Our overall efforts in 2000 will insure our continued position as vendor of choice for all of our claims customers.

NEW ADDITIONS TO THE FIRM!

Welcome to **Andrea D. Cleary** the newest attorney addition to our Orlando office. Andrea attended the State University of New York at Buffalo and received her B.A. in English Literature in 1985. She went on to study at Pace University School of Law acquiring her J.D. in 1993 and achieved the American Jurisprudence Award.

Andrea has been a member of the Paul C. Perkins Bar Association and the Central Florida Association of Women Lawyers since 1994.

Insurance defense has been Andrea's specialty since she passed the Bar in 1994. She joined the Law Offices of Figueroa, Gonzalez, Hoecker & Owens in February 2000.

Born in Kingston, Jamaica, Andrea now resides in Oviedo, Florida with her husband George.

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Our newest paralegal, **Michael R. Sullivan**, is working with Andrea Marcus in our West Palm Beach team.

Michael attended the State University of NY at Farmingdale, New York where he achieved an AAS degree in Chemistry Technology. He went to Hofstra University in Hempstead, NY and finished with a BA in History. At Indian River Community College in Fort Piece, Florida, Michael received his AS degree in Legal Assisting Technology. He has been a NALA Certified Legal Assistant (CLA) since May 1994.

Michael started his legal career in probate and guardianship, then worked in general litigation, corporate law, and wrongful death.

He joined the Law Offices of Figueroa, Gonzalez, Hoecker & Owens in February 2000.

Born in Huntington Station, Long Island, NY, he now resides in Stuart, Florida and has a son named Ryan.

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Nancy Turner has returned to the Law Offices of Figueroa, Gonzalez, Hoecker & Owens as a paralegal working with Anthony Gonzalez and Doug Saltarelli.

Nancy achieved her A.S. in legal assisting from Hillsborough Community College in 1998. She completed her

A.A. in liberal arts from Hillsborough Community College this year. She is a member of Phi Theta Kappa and a NALA Certified Legal Assistant.

Born in Tampa, Florida, Nancy still lives in Tampa with her husband Terry. She has a daughter named Angela.

NEWS YOU CAN USE

Check out this web site:

http://www9.biostr-washington.edu/da.html

This is the site for the Digital Anatomist. It provides two and three-dimensional views of body parts and organs--rather like Body Works.

http://www.merckhomeedition.com

This site contains physician-reviewed information on everything from abscesses to zygotes.

http://www.govWorks.com

From this site you can access State and Federal websites to locate information such as lists of insurers, professional regulations, corporations etc.

Food Contamination Cases

Florida courts follow the reasonable expectation test for determining liability in a food contamination case. See Zabner v. Howard Johnsons, Inc., 201 So2d 824 (Fla. 4th DCA 1967). The Court in Zabner held that the question of whether food is fit for the purpose intended, although it contains walnut shells or other substances, must be based on what the consumer might reasonably expect to find in the food served... and what is reasonably expected by the consumer as a jury question in most cases. This certainly is not a strict liability test. However it can be the equivalent of strict liability depending on the nature of the foreign object in the food. For example the Plaintiff in Way v. Tampa Coca Cola Bottling Company, 260 So2d 288 (Fla. 2nd DCA), was entitled to recover against Coca Cola where the Plaintiff discovered a foreign substance in a bottle that resembled a rat with its hair sucked off and the Plaintiff was nauseated and became ill after drinking part of the coke. In such cases, where there is truly a foreign substance in the food or drink, there is almost a certainty that the food preparer would be found liable.

On the other hand, if the object in the food is something that the consumer could reasonably expect to find in that food, then the Defendant may not have liability. For example in Coperwas v. Publix Supermarkets, Inc. 534 So2d 872 (Fla. 3rd DCA 1988), the Plaintiff purchased a can of clam chowder at the Publix Grocery Store and while eating the chowder she sustained injury to her teeth when she bit down on a piece of clam shell. The appellate court found that a directed verdict should have been entered in favor of the Defendant and stated that under the reasonable expectation test an occasional piece of clam in a bowl of clam chowder is so well known to the consumer of such a product that the court could say that the consumer can reasonably anticipate and guard against it. The court compared this to finding a small bone in a fish fillet. Coperwas, 534 So2d at 872.

About the Author: Brent Owens is a board certified civil trial attorney and has been with the Law Offices of Figueroa, Gonzalez, Hoecker & Owens since 1996.

Discovery Directed To Experts

In Elkins v Syken, 672 So 2d 517 (Fla. 1996), the Florida Supreme Court placed limitations on discovery directed to experts. The amendment to 1.280 sets forth the limitations. Recently, in Allstate v Boecher, 733 So 2d 993 (Fla. 1999), the Supreme Court held that the limitations do not apply to **"Parties."** Specifically, the UM carrier was required to disclose the extent of its financial relationship with its experts.

The Court concluded that the concerns in requiring an expert to disclose financial information, does not exist when the information is requested directly from the **"Party."** As a result, discovery requests directed to **NW as a party** requesting information concerning its relationship with its experts must be produced, unless grounds for a motion for protective order exist and can be supported by testimony or affidavit.

In Allstate v Pinder, 1999 WL 1267276 (5th DCA 12/30/99), the 5th DCA held that a UM carrier cannot be made to create lists which do not exist. It should be noted that Allstate was served with a Request To Produce, not interrogatories. If served with interrogatories the UM carrier would have likely had to supply the information as requested.

Finally, in Allstate v Mazzorona, 731 So 2d 38 (Fla. 4th DCA 1999), the 4th DCA held that a **"Party's"** expert cannot be excluded as a result of the "Party's" failure to comply with discovery request, without going through the formality of contempt proceedings.

As a result, discovery requests directed to NW in any first party case must be reviewed carefully and answered timely. If a motion for protective order is warranted, you will need, at a minimum, supporting affidavits.

About the author: Anthony J. Gonzalez is a board certified civil trial attorney and has been with the Law Offices of Figueroa, Gonzalez, Hoecker & Owens since 1992.

Trial Exhibits

Do not underestimate the importance of good demonstrative blow-ups of trial exhibits. Recently I tried a case where a Plaintiff slipped and fell on berries from a tree. Plaintiff's husband took photographs of the area two hours after the incident. Plaintiff's counsel argued at trial that the tree was constantly dropping berries. We had the Plaintiff's photographs enlarged and blown up and they showed no skid mark from a slip on the pavement. In addition, the blown up pictures emphasized the fact that there were minimal berries on the sidewalk. What the Plaintiff's attorney thought would be his best evidence actually worked to our advantage! The distribution of berries and lack of skid marks that would have been otherwise difficult to see in the actual photographs were clearly demonstrated by the blow-up. With the blow-up we were able to make our point and argue to the jury that the Plaintiff's physical evidence supported our case and not the Plaintiff's case.

Obviously there is a cost inherent in preparing blow-ups, diagrams, and trial transcripts. Again, I cannot over-emphasize the effect these documents have on a jury.

- Preparing a large exhibit that consists of the important trial testimony with all the relevant statements highlighted is an effective and persuasive visual for the jury to study.
- A freeze-frame of a good surveillance tape likewise has great jury impact.
- A color coded large exhibit of prior accident treatment dates compared with treatment from the current accident leaves no room for the jury to doubt when the most concentrated treatment of the plaintiff's injuries occurred.

There are many services such as Trial Graphix that will assist you in preparing unique and effective

demonstrative aids.

An exact blow-up of the verdict form presented to the jury for consideration is a great aid to the jury. It gets the jury's attention and directs them to what their duties will be in the jury room.

About the author: Eric Hoecker is a board certified civil trial attorney and he has been with the Law Offices of Figueroa, Gonzalez, Hoecker & Owens since 1994.

Change in the PIP Statute

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Style: Warren v. Busch Junction

Attorney: Tomas Gacio

Adjuster: Lisa Hunt

Venue: Hillsborough

Injuries: Lumbar disc bulge with low back nerve injury

Offer: $7,500

Demand: $25,000

Verdict: $ Zero defense verdict

Style: Fina v. Obermeier

Atty: Tomas Gacio

Adj: Ralph Warner

Venue: Hillsborough

Injuries: Soft tissue neck and back with right knee sprain; left carpal tunnel release surgery w/projected right carpal tunnel release

Offer: $10,000

Demand: $25,000

Verdict: $964.95

The rest of the story:

Submitted by Brent Owens, Esq. with apologies to Paul Harvey.

Johnson v. Packaging Distributors, Inc.

Trial Results

The five-day trial of this case concluded on the evening of Friday, February 11, 2000. The Jury was out for five hours and awarded

- $21,687 for past medical expenses, to which we will receive a $10,000 PIP set off, for a net of $11,687 to the Plaintiff.

The Jury awarded

- $0 for future medical expenses
- $0 for past wage loss and
- $0 for future wage loss and
- found no permanent injury.
- In addition we have an expired Offer Of Judgment/ Proposal of Settlement in the amount of $50,000,
- therefore Brent has filed a motion to tax attorney's fees and costs which will let us recover Nationwide's expenditures in these areas.

In closing arguments, the Plaintiff's attorney requested a total of $1,297,000 of economic damages as follows:

- $53,000 for past medical expenses,
- $764,000 for future medical expenses, $80,000 for past wage loss and
- $400,000 for future wage loss.

The Plaintiff's attorney did not suggest a specific number for non-economic pain and suffering and consortium damages, but suggested it should be a large award based on the significant injuries.

Liability had been admitted in this serious head-on truck versus van accident case. There was a major impact with $17,000 of damage to the Plaintiff's van. The Plaintiff had prior significant injuries to her neck and low back that was alleged to be from a 1992 workers comp accident and was the quintessential "eggshell Plaintiff." The Plaintiff's attorney argued significant aggravation to her neck and back, including herniated discs at both areas, and $764,000 of future medical expenses (over her 36 year remaining life expectancy). Our defense position was that there was a temporary aggravation and that the Plaintiff returned to her "base line" pre-accident status with only normal continued degeneration to her neck and back from the 1992 accident. The Plaintiff had been the CFO of a property development company and had been earning $100,000/year, but had quit prior to our accident. The Plaintiff's credibility was thrown in doubt after Brent found an old resume in the work comp file, which reflected that she had a BA in accounting from California State University; the Plaintiff only went through 8th grade. Brent was also able to demonstrate that the Plaintiff overused narcotic pain medications (before our accident) because she had been obtaining multiple Rx's for the narcotics from separate doctors, without their knowledge of the additional Rx's.

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