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WORKER'S COMPENSATION: STATUTORY EMPLOYERS: STUDENT BITTEN BY DOG WHILE VOLUNTEERING AT VETERINARY CLINIC IN HER HIGH SCHOOL; APPEALS: APPLICATION OF INCORRECT LEGAL STANDARD: ORDER DETERMINING THAT SCHOOL BOARD WAS NOT THE STATUTORY EMPLOYER OF STUDENT REVERSED BECAUSE APPELLATE COURT COULD NOT DETERMINE WHETHER JCC APPLIED THE CORRECT LEGAL STANDARD: EXISTENCE OF WRITTEN CONTRACT IS NOT ESSENTIAL TO EXISTENCE OF STATUTORY EMPLOYMENT RELATIONSHIP: ADVERTISEMENTS MAY CREATE A CONTRACT WITH THE PUBLIC

Mitchell v. Osceola County School Board, ___ So. 3d ___, 40 Fla. L. Weekly D608 (Fla. 1st DCA August 23, 2015)

The appellate court reversed an order finding that the school board was not the statutory employer of a high school student because the appellate court was unable to determine whether the Judge of Compensation Claims (JCC) applied the correct legal standard. The student was bitten by a dog while volunteering at a veterinary clinic in her high school. The school board prepared a pamphlet promoting the clinic. A non-profit company ran the clinic, but it did not provide worker's compensation insurance. The student sought worker's compensation benefits from the school board, but the JCC concluded that the school board was not her statutory employer because it did not have a written contract with a third party to provide veterinary services. Under Section 440.10(1)(b), Florida Statutes, if a contractor delegates performance under a contract to a subcontractor, the employees of the contractor and the subcontractor "shall be deemed to be employed in one and the same business or establishment," and the contractor is responsible for securing worker's compensation insurance for all employees except employees of a subcontractor who has secured the required coverage. Under the facts of the present case, it was conceivable that the school board was a contractor, the non-profit company was a subcontractor, and the student was an employee of the non-profit company and a statutory employee of the school board. The mere fact that the school board did not have a written contract with a third party to provide veterinary services was not determinative because "a contract may arise from an offer contained in an advertisement." In this case, it was possible that the brochure provided by the school board created a contract with the public that the school board fulfilled through the non-profit company. The court distinguished its opinion in *Rabon v. Inn of Lake City, Inc.,* 693 So. 2d 1126 (Fla. 1st DCA 1997), which "held that the definition of 'statutory employer' under section 440.10(1)(b) requires a contractual obligation, not an obligation under statutory or common law." Although the school board's general obligation to provide educational services "derives from constitutional or statutory law, rather than a contract," this case dealt with the obligation created by a "published . . . advertisement offering veterinary services, to be accepted by members of the public." The appellate court reversed and remanded for reconsideration of the student's employment status based upon the correct legal standard.

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INSURANCE: HOMEOWNERS' INSURANCE: PREMIUMS: LOSS MITIGATION CREDITS: CLASS ACTIONS: CLASS ACTION FOR DECLARATORY RELIEF BASED UPON INSURER'S FAILURE TO HONOR FOR FIVE YEARS UNIFORM MITIGATION VERIFICATION INSPECTION FORMS: APPELLATE COURT AFFIRMS DISMISSAL BASED UPON FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES; APPEALS: STANDARD OF REVIEW: ABUSE OF DISCRETION, RATHER THAN DE NOVO, STANDARD OF REVIEW APPLIES TO ORDER DISMISSING COMPLAINT FOR DECLARATORY RELIEF

Asseff v. Citizens Property Insurance, ___ So. 3d ___, 40 Fla. L. Weekly D610 (Fla. 1st DCA March 10, 2015)

Although Uniform Mitigation Verification Inspection Forms provide that they are valid for a period of five years unless material changes have been made to the structure, the plaintiffs' insurer conducted its own inspections of their homes before five years elapsed, resulting in the loss or reduction of premium credits. As a result, the plaintiffs filed a class action for declaratory relief challenging the insurer's failure to honor their verification forms for a full five years. The trial court dismissed the action based upon the plaintiffs' failure to exhaust administrative remedies under Section 627.371, Florida Statutes, and the appellate court affirmed. The statute authorizes insureds to challenge rates charged, rating plans, rating systems, or underwriting rules followed or adopted by insurers, and "a premium discount is 'inextricably linked to the rate charged.'"

In general, a de novo standard of review applies to orders dismissing a complaint, but an abuse of discretion standard of review applies to orders dismissing a complaint for declaratory relief because of the "considerable deference" extended to trial judges in such matters.

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CREDITOR'S REMEDIES: HOMESTEAD: PROCEEDS FROM SALE OF MARITAL HOME DID NOT LOSE THEIR HOMESTEAD STATUS WHEN THEY WERE DEPOSITED IN A SEGREGATED INVESTMENT ACCOUNT

JBK Associates, Inc. v. Sill, ___ So. 3d ___, 40 Fla. L. Weekly D616 (Fla. 4th DCA March 11, 2015)

After the dissolution of his marriage, the marital home was sold and the judgment debtor placed his share of the proceeds in three segregated accounts: a cash account and two

investment accounts in securities, mutual funds, and unit investment trusts. The judgment creditor tried to garnish the investment accounts, but the trial court dissolved the writs based upon the homestead exemption, and the appellate court affirmed. If the proceeds from the sale of one homestead are held for reinvestment, with a reasonable time, in another homestead, the funds retain their homestead character unless they are comingled with other funds or they are held for general purposes. In addition, because the homestead exemption exists "to 'protect the family' [and] to 'provide it a refuge from the stresses and strains of misfortune,'" the exemption may be lost if the proceeds from the sale of the homestead are placed in a risky investment. In this case, "[t]here was no evidence that the securities in [the debtor's] account were particularly risky and the funds were kept 'separate and apart' from [the debtor's] other funds."

To read more briefs in the Creditor's Remedies category of the Kashi Law Letter, please click here, http://www.kashilawletter.com/category/creditors-remedies-2/.

TORTS: MOTOR VEHICLE NEGLIGENCE; INSURANCE: UNINSURED MOTORIST COVERAGE; CIVIL PROCEDURE: PROPOSAL FOR SETTLEMENT: PROPOSAL FOR SETTLEMENT WAS AMBIGUOUS AND UNENFORCEABLE BECAUSE THE AMOUNT OF THE PROPOSAL IN WORDS WAS DIFFERENT FROM THE AMOUNT IN NUMERALS

Government Employees Insurance Company v. Ryan, ___ So. 3d ___, 40 Fla. L. Weekly D617 (Fla. 4th DCA March 11, 2015)

The plaintiff in an action for uninsured motorist benefits served a proposal for settlement that stated the amount of the proposal was "One Hundred Thousand Dollars ($50,000)" and that "[t]he total amount of this settlement shall not exceed $50,000." The discrepancy between the amount of the proposal set forth in words and numerals rendered it ambiguous and unenforceable.

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REAL ESTATE: MORTGAGE FORECLOSURE: STANDING: NOTE WITH UNDATED BLANK ENDORSEMENT, FILED AFTER COMMENCEMENT OF LAWSUIT, FAILS TO ESTABLISH STANDING: ASSIGNMENT ONLY OF MORTGAGE FAILS TO ESTABLISH STANDING

Tilus v. AS Michai LLC, ___ So. 3d ___, 40 Fla. L. Weekly D618 (Fla. 4th DCA March 11, 2015)

The plaintiff filed the original note with an undated, blank endorsement more than one month after it filed the action to foreclose on the mortgage. The plaintiff also filed an assignment, but the assignment was limited to the mortgage and did not include the note. As a result, the appellate court reversed final summary judgment of mortgage foreclosure based on the plaintiff's failure to prove that it possessed standing when the action was filed. An undated, blank endorsement, filed after the commencement of the lawsuit, fails to establish standing

when the lawsuit was filed. Furthermore, the assignment of a mortgage, regardless when it is filed, fails to establish standing if it does not include an assignment of the note. The mortgage follow the assignment rather than the other way around. "[A]n assignment of the mortgage without an assignment of the debt creates no right in the assignee."

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TORTS: MEDICAL MALPRACTICE: NURSING NEGLIGENCE; CIVIL PROCEDURE: MANDATORY NONBINDING ARBITRATION: PARTIES ARE ENTITLED TO AN EXTRA FIVE DAYS TO REQUEST TRIAL DE NOVO IF ARBITRATOR'S DECISION IS SERVED BY MAIL

Harold v. Sanders, ___ So. 3d ___, 40 Fla. L. Weekly D619 (Fla. 2d DCA March 11, 2015)

The parties to an action for medical malpractice and nursing negligence submitted to mandatory nonbinding arbitration. The trial court entered judgment based upon the arbitration award twenty three days after the decision was mailed to the parties. The appellate court reversed because the judgment was entered prematurely. Under *Fla. R. Civ. P.* 1.090 (now *Fla. R. Jud. Admin.* 2.514(b)), the parties were entitled to an extra five days to request trial de novo because the arbitration decision was served by mail.

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REAL ESTATE: COMMISSIONS; CIVIL PROCEDURE: PROPOSAL FOR SETTLEMENT: PROPOSAL FOR SETTLEMENT FROM DEFENDANT TO PLAINTIFF WAS NOT AMBIGUOUS BECAUSE A RELEASE WAS NOT ATTACHED AND CONFIDENTIALITY WAS REQUIRED

Russell Post Properties, Inc. v. Leaders Bank, ___ So. 3d ___, 40 Fla. L. Weekly D619 (Fla. 3d DCA March 11, 2015)

The realtor filed an action to determine the amount of the commission he was entitled to receive from the bank, and the bank filed a proposal for settlement. The trial court awarded attorney's fees and costs to the bank based upon the proposal, and the appellate court affirmed. The proposal was not ambiguous because a release was not attached and confidentiality was required. The proposal stated: (1) it was made in the action; (2) applied to all claims made or that may have been made by the plaintiff against the defendant; (3) upon receipt of the settlement funds, the plaintiff would dismiss with prejudice any and all claims it may have against the defendant and execute a general release in favor of the defendant; and

(4) the time limitation for accepting the offer complied with the applicable statute and rule.

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ATTORNEY'S FEES: VALIDITY OF CONTINGENT FEE AGREEMENT; CIVIL PROCEDURE: DECLARATORY JUDGMENT: PREMATURE ACTION: ACTION TO DETERMINE VALIDITY OF CONTINGENT FEE AGREEMENT WAS PREMATURE BECAUSE IT WAS FILED BEFORE THE CONTINGENCY OCCURRED

CK Regalia, LLC v. Thornton, ___ So. 3d ___, 40 Fla. L. Weekly D625 (Fla. 3d DCA March 11, 2015)

An action for declaratory relief to determine the validity of a contingent fee agreement was properly dismissed with prejudice as premature because the action was filed before the contingency occurred and a fee arguably would have been earned.

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TORTS: FRAUD: UNDUE INFLUENCE: EQUITABLE RESCISSION; CIVIL PROCEDURE: PERSONAL JURISDICTION: ALLEGATION THAT FOREIGN DEFENDANT WAS SUI JURIS WAS INSUFFICIENT TO PLEAD A PREDICATE FOR PERSONAL JURISDICTION: ALLEGATION THAT CONTRACT WAS FRAUDULENTLY ASSIGNED TO A THIRD PARTY DID NOT ALLEGE A BREACH OF CONTRACT IN FLORIDA: COMPLAINT DID NOT ALLEGE SUFFICIENT MINIMUM CONTACTS WITH FLORIDA: PLAINTIFF'S FAILURE TO FILE SWORN PROOF IN OPPOSITION TO DEFENDANT'S SUFFICIENT AFFIDAVIT REQUIRED DISMISSAL; APPEALS: RECORD ON APPEAL: TRANSCRIPT OF HEARING WAS UNNECESSARY BECAUSE FACTS WERE NOT IN DISPUTE AND DE NOVO STANDARD OF REVIEW APPLIED

Rollet v. de Bizemont, ___ So. 3d ___, 40 Fla. L. Weekly D627 (Fla. 3d DCA March 11, 2015)

The plaintiff brought an action for equitable rescission of an assignment of a contract for the purchase of a condominium unit in Florida. The parties were citizens of France residing in Dubai. The appellate court reversed an order denying the defendant's motion to dismiss for lack of personal jurisdiction. The complaint alleged that the defendant was sui juris, but this allegation was insufficient to plead a predicate for in personam jurisdiction. Although both parties signed a contract for the sale and purchase of real estate in Florida and a copy of the

contract was attached to the complaint, the complaint did not allege that the defendant breached the contract; rather, the complaint alleged that the defendant fraudulently assigned the contract to a third party, but the complaint did not allege that the assignment occurred in Florida. The complaint did not allege sufficient minimum contacts to satisfy due process. Furthermore, the defendant filed an affidavit verifying his lack of contact with the State of Florida, but the plaintiff did not file a counter affidavit or other sworn proof to the contrary. This factor, standing alone, was sufficient to require dismissal. Affirmance was not required by the absence of a trial transcript. "In the instant case, the absence of a counter-affidavit or other sworn proof from [the plaintiff] left the trial court with only the unrebutted affidavit of [the defendant]. As there were no disputed issues of fact for the trial court to resolve, and only legal argument to be presented at the hearing, [the court's] *de novo* review [was] unimpeded by the absence of the hearing transcript."

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ADMINISTRATIVE LAW: APPEALS: SECOND TIER CERTIORARI: CIRCUIT COURT, SITTING IN ITS APPELLATE CAPACITY, DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW, RESULTING IN A MISCARRIAGE OF JUSTICE, BY DISMISSING A TIMELY APPEAL BECAUSE THE APPELLANT SHOULD HAVE FILED A PETITION FOR CERTIORARI

Villa Lyan, Inc. v. Perez, ___ So. 3d ___, 40 Fla. L. Weekly D630 (Fla. 3d DCA March 11, 2015)

The circuit court, sitting in is appellate capacity, dismissed the petitioner's appeal from an administrative order because the petitioner should have filed a petition for certiorari rather than an appeal. The district court granted second tier certiorari and quashed the order of the circuit court. A timely appeal may not be dismissed because a petition for certiorari, rather than an appeal, should have been filed. The circuit court failed to apply the correct law, resulting in a miscarriage of justice.

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REAL ESTATE: MORTGAGE FORECLOSURE: SHORT SALE; CIVIL PROCEDURE: INTERVENTION: SHORT SALE PURCHASER OF PROPERTY ENTITLED TO INTERVENE IN FORECLOSURE ACTION

Bymel v. Bank of America, N.A., ___ So. 3d ___, 40 Fla. L. Weekly D637 (Fla. 3d DCA March 11, 2015)

Although the bank approved the short sale of property in foreclosure to a specific purchaser and approved the settlement statement, when the deal closed, the bank refused to accept the

proceeds of the sale and failed to dismiss the foreclosure action, discharge its lis pendens, and record a satisfaction of mortgage. As a result, the purchaser moved to intervene in the foreclosure action, but the trial court denied his motion. The appellate court reversed because the bank had knowledge of and approved the sale to, but failed to take the actions reasonably to be expected by, the purchaser.

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INSURANCE: INSOLVENCY PROCEEDINGS; CIVIL PROCEDURE: DISCOVERY: APEX DOCTRINE: TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY ORDERING INSURANCE COMMISSIONER TO SUBMIT TO DEPOSITION TO ANSWER HYPOTHETICAL QUESTIONS WHETHER HE WOULD HAVE RECOMMENDED INSTITUTING INSOLVENCY PROCEEDING ONE YEAR EARLIER IF ACCOUNTING FIRM PREPARED ACCURATE FINANCIAL STATEMENTS: THIS EVIDENCE COULD BE FURNISHED BY EXPERTS OR LOWER LEVEL EMPLOYEES: ASKING AGENCY HEADS TO ANSWER HYPOTHETICAL QUESTIONS VIOLATES SEPARATION OF POWERS AND COULD DISTRACT PUBLIC OFFICIALS FROM THE PERFORMANCE OF THEIR DUTIES; APPEALS: CERTIORARI

Florida Office of Insurance Regulation v. Florida Department of Financial Services, ___ So. 3d ___, 40 Fla. L. Weekly D638 (Fla. 1st DCA March 12, 2015)

The Florida Department of Financial Services (DFS), as the receiver of three insolvent insurance companies, sued an accounting firm for failing to prepare accurate financial statements. The Department alleged that if the Office of Insurance Regulation (OIR) had received accurate financial statements, it would have provided the Department with the recommendation to initiate delinquency proceeds one year earlier, which would have avoided harm to the insurance companies and consumers. Based on these allegations, the trial court ruled that the accounting firm was entitled to depose the Commissioner of Insurance, who is the head of OIR, but the appellate court granted OIR's petition for certiorari and quashed the trial court's order. The Apex doctrine prevents litigants from deposing high ranking government or corporate officials unless no viable alternative exists. Although no Florida court has adopted the Apex doctrine when discovery has been sought from high ranking corporate officials, it has been applied to high ranking government officials to avoid deterring people from accepting positions as public servants and violating the separation of powers doctrine. The court concluded that the Commissioner's testimony was unnecessary because the evidence in question could be supplied by expert witnesses on insurance insolvency and "subordinates within OIR who work on recommendations concerning insolvency referrals." In addition, posing hypothetical questions to high ranking government officials could detract from their ability to perform their public duties and violate the separation of powers between the three branches of government.

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APPEALS: TIMELINESS: NOTICE OF APPEAL FILED MORE THAN THIRTY DAYS AFTER JUDGMENT WAS FILED WITH CLERK OF LOWER TRIBUNAL WAS UNTIMELY

Hunt v. Wells Fargo Bank, N.A., ___ So. 3d ___, 40 Fla. L. Weekly D641 (Fla. 1st DCA March 12, 2015)

The appellate court dismissed an appeal as untimely because the notice of appeal was filed more than thirty days after the judgment was filed with the clerk of the lower tribunal.

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REAL ESTATE: MORTGAGE FORECLOSURE: FORGED SIGNATURES ON LOAN DOCUMENTS: ATTORNEY'S FEES: DEFENDANTS WERE NOT ENTITLED TO ATTORNEY'S FEES BASED UPON THE LOAN DOCUMENTS BECAUSE THE DEFENDANTS WERE NEVER A PARTY TO THOSE DOCUMENTS: DEFENDANTS WERE NOT ENTITLED TO ATTORNEY'S FEES BASED UPON SECTION 57.105(7), FLORIDA STATUTES, BECAUSE THEY WITHDREW THEIR CLAIM FOR FEES BASED ON THE STATUTE: DEFENDANTS WERE NOT ENTITLED TO FEES BASED UPON THE INEQUITABLE CONDUCT DOCTRINE BECAUSE THE TRIAL COURT FOUND THAT THE BANK'S LAWYER DID NOT ENGAGE IN IMPROPRIETIES OR UNETHICAL CONDUCT, AND THE TRIAL COURT WAS NOT CONVINCED THAT THE BANK DID ANYTHING WRONG

The Bank of New York Mellon v. Mestre, ___ So. 3d ___, 40 Fla. L. Weekly D642 (Fla. 5th DCA March 13, 2015)

After an evidentiary hearing, the trial court in a mortgage foreclosure struck the bank's pleadings with prejudice because the defendants' signatures did not appear on the mortgage. The trial court also awarded substantial attorney's fees to the defendants, but the appellate court reversed. Attorney's fees could not be awarded based on a contract because the defendants never entered into a contract with the plaintiff. Attorney's fees could not be awarded under Section 57.105(7), Florida Statutes, because the defendant's withdrew their request for fees based upon this statute, and it was doubtful that the statute applied to a contract that never existed. Attorney's fees could not be awarded "under the inequitable conduct doctrine because the trial court specifically found no 'improprieties or unethical conduct by Bank's counsel and expressly declined to impose sanctions against Bank because the court was not convinced that Bank 'was to blame."

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INJUNCTIONS: DOMESTIC VIOLENCE: PETITION FOR INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE FAILED TO STATE A CAUSE OF ACTION BECAUSE IT CONTAINED ONLY VAGUE ALLEGATIONS OF CIRCUMSTANCES UNDER WHICH THREATS OF PHYSICAL HARM WERE MADE OR WHETHER RESPONDENT MADE THE STATEMENTS TO PETITIONER AND FAILED TO ALLEGE SUFFICIENT FACTS TO SHOW THAT PETITIONER HAD REASONABLE CAUSE TO BELIEVE HE WAS IN IMMINENT DANGER OF BECOMING VICTIM OF DOMESTIC VIOLENCE, PARTICULARLY BECAUSE PETITIONER WAS INCARCERATED IN FLORIDA, AND RESPONDENT RESIDED IN OHIO: TRIAL COURT DID NOT ERR BY FAILING TO CONDUCT EVIDENTIARY HEARING BECAUSE ALLEGATIONS OF PETITION DID NOT ENTITLE RESPONDENT TO RELIEF

Bristow v. Bristow, ___ So. 3d ___, 40 Fla. L. Weekly D645
(Fla. 5th DCA March 13, 2015)

The appellate court affirmed an order dismissing a petition for injunction for protection against domestic violence. The petitioner alleged that the respondent, his brother, made statements threatening the petitioner with physical harm, but the circumstances under which the statements were made were extremely vague, and it was unclear "whether [the respondent] even made the statements to [the petitioner]." In addition, the petition did not "allege sufficient facts to show that [the petitioner had] reasonable cause to believe he [was] in imminent danger of being a victim of domestic violence, particularly given the allegations that [the petitioner was] currently incarcerated in Sumter County, Florida, and that the [respondent was] a resident of Ohio." The trial court did not err by failing to conduct an evidentiary hearing because the allegations of the petition did not entitle the petitioner to relief.

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TORTS: DEFAMATION: INTERFERENCE; CIVIL PROCEDURE: VENUE: FORUM NON CONVENIENS: ORDER DENYING MOTION TO DISMISS REVERSED BECAUSE IT FAILED TO SHOW THAT TRIAL COURT ADEQUATELY ADDRESSED KINNEY FACTORS: REMAND FOR ADEQUATE FINDINGS AND CONCLUSIONS UNDER KINNEY

Sybac Solar AG, Co. v. Falz, ___ So. 3d ___, 40 Fla. L. Weekly D655
(Fla. 2d DCA March 13, 2015)

The plaintiff alleged that the defendant, a German corporation, defamed the plaintiff in Germany and interfered with the plaintiff's relationship with his employer. The trial court's order denying the defendant's motion to dismiss based on forum non conveniens merely adopted the plaintiff's response to the defendant's motion to dismiss, but the response failed sufficiently to analyze the *Kinney* factors. The appellate court reversed "[b]ecause the trial court did not engage in its own independent analysis and the argument adopted by the trial court provided an inadequate basis upon which to [make] its ruling." The appellate court remanded with instructions to make adequate findings and conclusions under *Kinney*."

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INSURANCE: HOMEOWNERS' INSURANCE: SINKHOLE: DISPUTES OVER THE SCOPE AND METHOD OF REPAIR ARE SUBJECT TO APPRAISAL: INSUREDS WAIVED APPRAISAL BY WAITING TWO AND ONE-HALF YEARS AFTER FILING SUIT TO DEMAND IT AND CONDUCTING DISCOVERY AND NOTICING CASE FOR TRIAL DURING THAT PERIOD: FIGA MAY NOT BE REQUIRED TO SUBMIT TO APPRAISAL OF SINKHOLE CLAIMS; APPEALS: CERTIFIED QUESTIONS: DOES THE AMENDED DEFINITION OF COVERED CLAIMS APPLY IF THE POLICY WAS ISSUED BEFORE THE AMENDMENT BUT THE INSURER BECAME INSOLVENT AFTER THE AMENDMENT: ARE SINKHOLE CLAIMS AGAINST FIGA SUBJECT TO APPRAISAL

Florida Insurance Guaranty Association, Inc. v. Hunnewell, ___ So. 3d ___, 40 Fla. L. Weekly D661 (Fla. 2d DCA March 13, 2015)

A dispute over the scope and method of repair is subject to appraisal, but the insureds waived their right to appraisal by waiting two and one-half years after filing suit to demand appraisal and by conducting discovery and noticing their case for trial during that period. FIGA may not be required to submit to appraisal of sinkhole claims because it is limited by statute to making payment for the actual cost of repairs. The Second District Court of Appeal certified to the Florida Supreme Court two questions of great public importance: (1) Does the amended definition of covered claim apply if the policy was issued before the amendment but the insurer became insolvent after the amendment, and (2) Are sinkhole claims against FIGA subject to appraisal?

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