Legal update

Bell & Roper, P.A.

February/March 2010 Edition

2707 E. Jefferson Street • Orlando, Florida 32803 • PH: 407-897-5150 • FX: 407-897-3332
www.bellroperlaw.com

Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell & Roper, P.A.

PRE-SUIT NOTICE AMENDMENT TO PIP STATUTE NOT RETROACTIVE

By Mary Grace Dyleski

In *Menendez v Progressive Express Ins. Co.,* 35 Fla. L. Weekly S81 (February 4, 2010), the Supreme Court of Florida reviewed the decision of the Third District Court of Appeal (Monroe County) related to its reversal of a judgment in favor of Plaintiff in a PIP action.

At issue was the statutory pre-suit notice provision, which was incorporated into the PIP Statute via amendment in 2001. The Third District concluded that the pre-suit notice provision could be applied retroactively to the insured's claim because it was "merely procedural," and did not unconstitutionally alter any existing rights. The Supreme Court took jurisdiction to resolve conflicts between the Third District's opinion and that of the Supreme Court in *State Farm Mut. Auto. Ins. Co. v Laforet, 658 So.2d 55 (Fla. 1995), and Young v Altenhaus,* 472 So.2d 1152 (Fla. 1985), as well as decisions from the First DCA.

The Supreme Court concluded that the amendment which created the statutory pre-suit provision constituted a substantive change to the statute, and thus could not be applied retroactively to insurance policies issued before the effective date of the amendment. Consequently, the Supreme Court quashed the decision of the Third District.

In its analysis, the Supreme Court

See NOTICE on Pg. 2

Sexual Harassment/Flirtation by Supervisor

By Michael H. Bowling

Corbitt v. Home Depot U.S.A. Inc., 21 Fla. L. Weekly Fed. C2019 (11th Cir. 2009).

The Eleventh Circuit's opinion on this Title VII sexual harassment appeal is rather ordinary in all but one respect. The Plaintiffs, Corbitt and Raya, brought suit against Home Depot alleging that they were subjected to sexual harassment by Cavaluzzi and that when they complained about same they were terminated. The Court's opinion recited the long settled Title VII standard for hostile work environment harassment caused by a supervisor which requires that the employee produce evidence: (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create

See CORBITT on Pg. 3

In This Issue:

Legislature to Consider Increasing Sovereign Immunity Cap

By Joseph D. Tessitore

We have seen over the last couple of years annual proposals to modify Florida's limited waiver of sovereign immunity. Specifically, plaintiff attorneys would like to see the cap on tort recoveries increased from the current limits of $100,000.00 per person/$200,000.00 per incident. Currently, Senator Mike Bennett, a republican from Bradenton, and Representative Peter Nehr, a Republican from Tarpon Springs, have proposed identical bills amending section 768.28, Florida Statutes.

The two proposed bills would permit subdivisions of the state (municipal corporations) to settle cases above the sovereign immunity cap, up to the amount of available insurance, without an act from the legislature and without waiving the cap. This provision was already part of the existing law, but they have proposed specific language referencing up to the amount of insurance available.

The proposed bills have a few new provisions that would have a significant impact on sovereign entities and their insurers if passed into law. Under these bills the cap on damages would be increased to $250,000.00 per person, with no cap on the number of claimants per incident, and the cap would be adjusted annually by the average of the CPI and the CPI medical component. If such an adjustment had been instituted at the start of the year 2000, the cap on damages for 2009 would have been $351,952.00 per person. Finally, the proposed bills would grant plaintiff attorneys an additional 5% in fees for appeals or any post judgment actions, which would include pursuit of claims bills.

If passed into law, I think these changes would result in more lawsuits, higher settlements, higher jury verdicts, and more attorneys' fees. This would most likely lead to higher insurance premiums and higher costs for sovereign immune entities. In this time where governmental entities are dealing with significant budgetary constraints it is surprising that the legislature would consider legislation that would place further strain on governmental budgets. If you don't want to see these changes go into effect I encourage you to contact your representative and senator, along with the sponsors of these bills, to voice your opinions.

Author can be reached at jtessitore@bellroperlaw.com

NOTICE Continued from Pg. 1

traced the general law that a statute in effect at the time an insurance contract is executed governs substantive contractual issues. The court also noted, that the statutory scheme of Florida's Motor Vehicle No-Fault Law is intended to provide "swift and virtually automatic payment so that the injured insured may go on with his life without undue financial interruption." (*citing Ivey v Allstate Ins. Co.,* 774 So.2d 679 (Fla. 2000.) Although the Supreme Court recognized that the Florida Legislature intended for the pre-suit notice provision to be applied retroactively, the Court was required to consider whether the statutory provision impaired a vested right, created a new obligation, or imposed a new penalty. (*citing Laforet*).

In agreeing with the insured that the amendment could not be applied retroactively, the Court concluded that the most problematic provisions are those which (1) impose a penalty, (2) implicate attorney's fees, (3) grant an insurer additional time to pay benefits and (4) delay the insured's right to institute a cause of action. Because the 2001 amendment to the PIP statute allowed the insurer to avoid an award of attorney's fee, it constituted a substantive change to the statute in effect at the time the insured's policy was issued. The Supreme Court further concluded that the amendment which permitted delayed payment from the insurer, and postponed the insured's ability to bring suit, constituted another substantive change.

Ultimately, the Supreme Court concluded that Section 627.736(11), Florida Statutes (2001) could not be applied retroactively to insurance policies issued before its effective date, because it was a substantive change to the statute.

Author can be reached at mdyleski@bellroperlaw.com

CORBITT Continued from Pg. 1
a discriminatorily abusive working environment; and (5) that there is a basis for holding the employer liable.

The Court restated the settled rule that innocuous statements are not actionable. The Eleventh Circuit repeated its holding in *Gupta v. Fla. Bd of Regents,* 212 F.3d 571, 584 (11th Cir. 2000), that "a man can complement a woman's looks… on one or several occasions, by telling her that she is looking very beautiful, or words to that effect, without fear of being found guilty of sexual harassment for having done so. Words complementing appearance may merely state the obvious, or they may be hopelessly hyperbolic. Not uncommonly such words show a flirtatious purpose, but flirtation is not sexual harassment."

What makes this case interesting is that the flirtatious comments found by the Court not to be sexually harassing were made by a male supervisor to male subordinates. The Court noted that though the male subordinates may have been subjectively more uncomfortable because a gay man was making the flirtatious comments, the rule set out in *Gupta* remained applicable.

Author can be reached at mbowling@bellroperlaw.com

PERILS OF FAILING TO DISCLOSE PENDING LAWSUIT AS "ASSET" IN BANKRUPTCY PROCEEDINGS

By Dale A. Scott

The Eleventh Circuit of Court of Appeals recently upheld the dismissal of an employment discrimination claim, where the plaintiff failed to disclose, as part of separate Chapter 13 bankruptcy proceedings, the existence of the discrimination case. *Robinson v. Tyson Foods, Inc.,* 22 FLW Fed. C521a (11th Cir., Feb. 5, 2010). The district court granted summary judgment for Tyson Foods on the threshold issue of judicial estoppel, reasoning that because the plaintiff failed to disclose her employment discrimination suit as an asset in her bankruptcy proceeding, she had taken inconsistent positions under oath with the intent of misleading the court. Plaintiff contended, however, she did not take inconsistent positions because she did not have a continuing duty to disclose changes in her asset schedule, and claimed she had no reason to mislead the court as she had paid off her debt in full. Upon review, the Eleventh Circuit upheld the lower court's decision and deemed judicial estoppel was properly applied.

Upon consideration of the judicial estoppel concept, the Eleventh Circuit noted its application was necessary to "protect the integrity of the judicial process by prohibiting parties from changing positions according to the exigencies of the moment." Id., *citing New Hampshire v. Maine,* 532 U.S. 742, 749 (2001). Specially, judicial estoppel is designed to "prevent a party from asserting a claim in a legal proceeding that is inconsistent with the claim taken by the party at a previous proceeding." *New Hampshire v. Maine* at 749. The U.S. Supreme Court has recognized three factors which typically impact the decision of whether judicial estoppel applies: (1) whether the present position is clearly inconsistent with the earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position, so that acceptance of the inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and; (3) whether the party advancing the inconsistent position would derive an unfair advantage. Id. at 750-51.

In *Robinson*, the Court first noted plaintiff indeed had a duty to disclose all assets, including a lawsuit seeking monetary compensation, in the separate bankruptcy proceeding. Additionally, by submitting bankruptcy schedules under oath, plaintiff agreed such schedules would be updated. Thus, when she filed her discrimination suit, she had a sworn duty to disclose such suit in her bankruptcy proceeding, and by failing to update her schedule to reflect her pending claim, she represented she had no legal claims to the bankruptcy court while simultaneously pursuing her claims against Tyson Foods. As such, these actions, both taken under oath, were clearly inconsistent.

Continued on Back Page

The lower court and the Eleventh Circuit then considered whether plaintiff's intent, for purposes of judicial estoppel, amounted to "intentional contradictions, not simply errors or inadvertence." In this regard, the Eleventh Circuit noted Robinson certainly had knowledge of her claims, and noted the lower court found Robinson had a motive to conceal her claim because if "she realized any proceeds from her suit prior to the discharge of her bankruptcy… she could have kept the proceeds for herself without them becoming a part of the bankruptcy estate and going to her creditors to satisfy her debts." The Eleventh Circuit further noted the lower court focused on the nine month window between when Robinson brought her claim against Tyson Foods, and when she was dismissed from bankruptcy. Specifically, the lower court found if she had settled during this time period, she would have been able to keep the proceeds from the civil suit, and deny the bankruptcy creditors their opportunity to claim what was rightfully theirs. Upon review of the lower court's reasoning, applying the "clearly erroneous" standard, the Eleventh Circuit found the lower court's opinion did not leave it with "the definite and firm conviction that a mistake had been made[.]"

As such, failure to disclose a civil suit for damages, with regard to a separate bankruptcy proceeding, may be grounds for dismissal of the concurrent civil suit. As such, it is wise to request, from any civil claimant, information as to whether such claimant is involved in any bankruptcy proceeding, and to determine whether, and to what extent, the civil claim has been reported in the bankruptcy proceeding. If not, the civil claim may be subject to dismissal.

Author can be reached at dscott@bellroperlaw.com

BELL & ROPER, P.A.
2707 EAST JEFFERSON STREET
ORLANDO, FLORIDA 32803

February/March 2010