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New Law Regarding Condos and Homes Effective October 1, 2004 By Christopher B. Hopkins

Do not be surprised if you walk in your neighborhood or condominium and see a defibrillator. Yes, a machine to get your heart started again. In a new law effective October 1, 2004, the Legislature has passed a reform bill affecting home and condominium associations that makes broad changes from arbitration to rental restrictions, flag displays and even meeting notices. For owners, associations, property managers and the unaware, these changes could cause heart trouble.

The new laws include over 100 pages of revisions, primarily to Chapter 718 (Condominiums) and Chapter 720 (Homeowners' Associations). Almost all legal commentators agree that the new provisions – such as new rules on resurrecting inactive associations – simplify the process. That said, there are a number of industry associations that question the strategy and wording of other sections, including the controversial law lifting rental restrictions on condos.

So what are the significant changes? For condominium owners, some of the new laws include: (1) associations are immune from liability for providing information to purchasers and lienholders, (2) immunity from liability for defibrillators (and no need for medical insurance), (3) specific notice before voting on retrofitting common areas with fire sprinklers, (4) creation of a Condominium Ombudsman to be liaison for individuals, groups, and government, (5) requiring "question and answer"-style form for disclosure of information to prospective purchasers, (6) creation of Advisory Council on Condominiums, (7) expanded requirements on mediation and arbitration, and (8) prohibition of restrictions on rentals.

For homeowners, be aware of new regulations regarding (1) notice before assessments or rule changes, (2) creation of procedures for reviving an inactive homeowners' association, (3) prescribing rights of owners to attend meetings and place items on agenda, (4) prescribing rights to display flag and security service signs, (5) prevention of association fines from becoming a property lien, and (6) mandatory arbitration of owner-association disputes.

The changes are expected to have a number of effects in the private sector. Prospective buyers now can more freely obtain additional information about the property without the association risking civil liability. It is unclear whether the availability of defibrillators will lead to more or less litigation exposure. Most of the changes involve preventing or reducing the potential for litigation.

CSK provides legal representation for owners, brokers, agents, managers, and associations in a wide array of real estate issues. Please feel free to call us regarding any of these recent changes or for a copy of the new law.

Extending the Limitations Period to File
Actions Under the Florida Civil Rights Act
By Scott H. Jackman

The Florida Civil Rights Act (the Act), chapter 760, Florida Statutes, protects employees from discrimination, harassment and retaliatory conduct by employers. Its counterpart at the federal level is Title VII of the



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U.S. Civil Rights Act of 1964, as amended.¹ In terms of the elements of damages an aggrieved employee can recover, the state and federal laws are very similar, both providing for back pay, reinstatement of employment and an award of attorney's fees. However, the federal and Florida statutes differ as to the limitations period within which a plaintiff must bring a cause of action. Florida courts have had some difficulty interpreting the Act's language regarding limitations of actions, allowing some plaintiffs to bring lawsuits well beyond the time provided for in the statute.

Under the Act, it is an unlawful employment practice to discharge any individual based on that individual's race, color, religion, sex, natural origin, age, handicap or marital status. An aggrieved employee has one year from the date of an alleged violation in which to file a charge. Thereafter, the Florida Commission on Human Relations (Commission) will conduct an investigation and issue a determination as to whether "reasonable cause" exists that an unlawful employment practice occurred. The Commission must make a reasonable cause finding within 180 days of receiving the charge. An employee then has one year from the date of the reasonable cause determination in which to file a civil complaint. If the Commission makes a "no cause" determination, the charge will be dismissed, and the employee has 35 days in which to request an administrative hearing or the claim is thereafter barred. If a hearing is held, an administrative law judge may find for the employee and the Commission could adopt the judge's recommended order and award affirmative relief. However, it is when the Commission fails to make a determination in the first instance, either of reasonable cause or no cause, that confusion can occur.

Under the Act, charges are "dual-filed" with both the Commission and the Equal Employment Opportunity Commission (EEOC) pursuant to "work sharing" agreements between the agencies. Dual-filed charges may be investigated by one or the other or both agencies. The problem with this is that, in cases where the EEOC takes a more active role in the investigation, the Commission may not issue any determination at all. And where the Commission fails to make any determination within the 180-day deadline, the statute is not clear as to what affect this has on the limitations period for filing complaints under the Act, and the courts have stepped in to clarify this uncertainty.

One possible scenario is where the Commission does make a reasonable cause determination, but does so after the 180-day deadline. In the case of *Joshua v. City of Gainesville*, 768 So.2d 432 (Fla. 2000), the Florida Supreme Court ruled that the Commission's failure to make the determination within the prescribed 180-day time limit meant that plaintiff was relieved of the one-year statute of limitations period under the Act and had the full four-year limitations period for general torts in which to file the complaint. The *Joshua* court noted ambiguity in the Act in sections regarding investigating charges and procedures for filing complaints. On the one hand, section 760.11(4) provides that, when the Commission finds reasonable cause, the aggrieved employee has the option of filing suit (within one year of the determination) or seeking an administrative hearing. However, 760.11(8) provides that, if the Commission fails to make a determination, the employee may proceed as if the Commission had made a reasonable cause determination. The question in *Joshua* was whether, under this second scenario, the employee then was bound by the one-year limitations period as if the Commission had made a reasonable cause determination.

The employer in *Joshua* argued that the Commission's failure to make a determination within 180 days of receiving the charge meant that the employee had to proceed as if the Commission had made a reasonable cause determination and, therefore, had only one year from the 180-day mark in which to file the complaint. However, the Court rejected this argument, ruling that due process concerns and the legislative intent behind the statute that administrative remedies be exhausted before suits were filed meant that aggrieved employees should have the benefit of some type of notice on the charge from the

Commission within the required 180 days. Absent that notice in a timely manner, the Court ruled that the employee could not be held to the one-year filing deadline. So, even if the Commission issues a reasonable cause determination, if it does not do so within 180 days of the filing of the charge, the employee will have four years instead of one in which to file a complaint.

Another scenario is where the Commission will not make any determination of the merits of the charge, and the EEOC will conclude that it was *unable* to make a determination that a violation had occurred. Under these circumstances, the Florida Supreme Court again held that the plaintiff was relieved of the one-year statute of limitations period under the Act and had the full four-year limitations period in which to file the complaint. *Woodham v. Blue Cross and Blue Shield of Florida, Inc.*, 829 So.2d 891, 897 (Fla. 2002). In *Woodham*, the Court ruled that the EEOC's "unable to conclude" determination could not be equated with a "no cause" determination by the Commission required to bar the employee's suit under the Act. Here, in the absence of a determination by the Commission, an equivocal response from the EEOC was insufficient to impose the Act's one-year filing deadline.

But what if the EEOC does make a definitive determination, whether it be reasonable cause or no cause and an outright dismissal, and issues a right-to-sue letter?² Would the Commission's failure to issue its own determination still defeat the Act's one-year limitations period, even in the face of a definitive cause finding by the EEOC? We have found no Florida rulings addressing this specific situation, but the likelihood is that the employee will be permitted the four-year filing deadline anytime the Commission fails to issue a determination within the 180-day deadline.

This result is suggested by the ruling of the 5th Circuit Court of Appeals on facts very similar to those above. In *Vielma v. Eureka Co.*, 218 F.3d 458 (5th Cir. 2000), the court addressed the issue whether the EEOC's dismissal of the charge and issuance of a right-to-sue letter started the limitations period running on the employees state law claims under the Texas civil rights statute. Under the Texas statute, the employee had 60 days from the date of a reasonable cause finding of the state commission on human rights in which to file the complaint, which the employee missed by nearly two months. The employee had dual-filed a charge of discrimination with the EEOC and the Texas Commission on Human Rights. The EEOC subsequently dismissed the charge and issued a right-to-sue letter, but the employee's subsequent state-court claim was ruled time-barred for failure to file within 60 days of receipt of the right-to-sue letter.

However, the 5th Circuit Court held that the EEOC's determination did not start the clock running on the filing deadline for the employee's claims under state law. The court specifically found that the EEOC's notice was insufficient to trigger the Texas statute's limitations period for filing the complaint. The court held that the limitations period could only start upon receipt from the state commission of a notice of a right to file a civil action, regardless of the EEOC's determination. Other jurisdictions also have reached a similar result. See *Kelly v. Allied Healthcare Prods, Inc.*, 1996 WL 787420 (E.D. Mo. 1996); *Oliver v. New York Tel. Co.*, WL 173471 (W.D.N.Y. 1993); *Mitchell-Carr v. McLendon*, 980 P.2d 65 (N.M. 1999).

In unlawful employment practice cases filed pursuant to the Act, no matter what determination the EEOC may render, employers should mark their calendars for 180 days from the date the charge was filed. If the Commission has not issued a determination by that time, the employee likely will not be bound by the Act's one-year filing deadline and will have four years in which to file a lawsuit. For more information and to obtain copies of the cases cited herein, contact Scott Jackman at jackman@csklegal.com.

¹ It also should be noted that a plaintiff can bring claims under both the state and federal statutes in the same state court lawsuit.

² Under Title VII, filing the charge with the EEOC is a procedural condition precedent to filing a complaint. An aggrieved party may proceed to file suit after the EEOC makes a determination one way or the other, as long as suit is filed within 90 days of that determination.

More About Attorneys Fees¹
By Betsy Gallagher

Talk about hot topics! There is nothing more infuriating than the trial courts' practice in certain jurisdictions of this state of automatically awarding a multiplier to attorney's fee awards in first party cases, especially in actions for no-fault (PIP) benefits. The notion that no competent lawyer would take any case for PIP benefits without the application of a multiplier is pure fiction. Here is a summary of the factors that should be applied in determining the amount of a fee award, as well as some of the more current issues being addressed in this area.

A. The Lodestar

The Florida Supreme Court announced the factors to be considered in setting a reasonable attorney's fee in its seminal decision in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1148 (Fla. 1985). The lodestar is determined by multiplying the number of hours reasonably expended by the reasonable hourly rate.

B. The Multiplier

Here is the obvious: There must be a contingent fee contract. See *D.H. Blair & Co. Inc. v. Johnson*, 697 So.2d 912 (Fla. 4th DCA 1997). If there is no contingent fee contract, a party is not entitled to the application of a multiplier. Although a court must technically consider whether a contingency risk multiplier is appropriate if the prevailing attorney has been retained on the basis of a pure contingent fee contract, this does not mean that an attorney is automatically entitled to a multiplier. See *Florida Patient's Compensation Fund v. Rowe*, *supra*.

Here are the factors the court must apply to determine whether a multiplier, between 1.0 and 2.5, is appropriate in tort and contract cases:

- (1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of non-payment in any way; and (3) whether any of the factors set forth in *Rowe* are applicable, especially the amount involved, the results obtained and the type of fee arrangement between the attorney and his client. Evidence of these factors must be presented to justify the use of a multiplier. [*Standard Guar. Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990).]

The application of a multiplier should be the exception and not the rule: *Bell v. U.S.B. Acquisition Co., Inc.*, *supra* at 413 (Overton, S.J., specially concurring, stating: "The multiplier is not automatic and exists and can be used only when its purpose is clearly stated in the record."). However, in *Palma*, the supreme court stated: "The application of a contingency risk multiplier is discretionary with the trial court." *Id.* at 833. Therefore, the abuse of discretion standard applies on appeal.

However, the courts have established certain areas where multipliers are not to be applied. These areas include: _____

1. Run of the mill PIP cases: *U.S. Security Ins. Co. v. LaPour*, 617 So.2d 347 (Fla. 3d DCA 1993) (C.J. Schwartz).
2. Cases where incentive is not needed to obtain counsel or where counsel has been obtained in the first place: *Sarkis v. Allstate Ins. Co.*, 863 So.2d 210 (Fla. 2003) (multipliers are not applied in cases

where fees are awarded pursuant to the proposal for settlement statute, section 768.79); *Bell, supra* (no multiplier applied where buyer and seller in a million-dollar sale of a cement plant would have no difficulty finding attorneys to represent them); *Matetzschk v. Lamb*, 849 So.2d 1141, 1145 (Fla. 5th DCA 2003) (no multiplier applied in a rear-end collision with a financially responsible defendant where any lawyer in Brevard County would take the case).

One major pending issue is whether an attorney fee multiplier should be applied in cases where fees are awarded pursuant to section 627.428. In this regard, the Fifth District Court of Appeal certified the following question to the Supreme Court of Florida as one involving a matter of great public importance: "May a multiplier be applied to enhance an award of attorney's fees granted under a fee-shifting statute such as section 627.428 (2002)?" *Holiday v. Nationwide Mutual Fire Ins. Co.*, 864 So.2d 1215 (Fla. 5th DCA 2004) (on certified question to the Supreme Court, but the Court has not yet decided whether to accept or reject jurisdiction).

C. Fees for Getting Fees

State Farm Fire & Cas. Co. v. Palma, supra, is the seminal case on this issue. Time spent litigating the issue of the attorney's entitlement to recover fees is compensable; time spent litigating the correct amount of fees to be awarded is not compensable because the client has no interest in the issue. *Id.* at 833. See also *Crittenden Orange Blossom Fruit v. Stone*, 514 So.2d 351 (Fla. 1987) (a party is entitled to fees for litigating entitlement to attorney's fees).

One of the more recently litigated issues is whether the time spent litigating the necessity of a multiplier is an "amount" issue or an "entitlement" issue. The Fifth District Court of Appeal held that the "time litigating the appropriateness of a fee multiplier goes to the amount, and as a result, is not recoverable under *Palma*." *Allstate Indem. Co. v. Hicks*, 29 Fla. L. Weekly D1974 (Fla. 5th DCA Aug. 27, 2004). The Fifth District has certified this question to the Supreme Court of Florida as one involving an issue of great public importance, but the Court has not decided whether it will accept or reject jurisdiction of this issue. The same issue has been certified to the Second District Court of Appeal in *State Farm Mutual Auto. Ins. Co. v. Trevino*, Case No.: 2D04-2315 as involving an issue of great public importance.

Conclusion

As many have learned the hard way, attorney's fee claims, more often than not, far exceed the value of the results obtained for the client. The best defense in these claims requires a good working knowledge of the controlling statute and case law.

CSK SUCCESS STORIES

Scott Fischer and Barry Postman of CSK West Palm Beach earned a defense verdict in the case of *Salame v. Lake Worth Marathon* in Palm Beach County. The action arose from the Plaintiff's fall at the Defendant's property, a gas station in Lake Worth, Florida. As a result of the fall, the Plaintiff suffered multiple fractures to his right leg that allegedly left him permanently unable to walk. The Plaintiff argued that the fall was the result of oil that had been left on the property. The Plaintiff sought damages in excess of \$1,000,000. Among the defenses raised were that the fall was the result of the Plaintiff's prior medical conditions, including deformities to his feet, as well as the argument that the Defendant's policy of regularly inspecting and maintaining its property was reasonable. For more information, contact Scott Fischer at fischer@csklegal.com or Barry Postman at postman@csklegal.com.

Gene Kissane and Jonathan Midwall of the CSK Miami office recently obtained a complete defense verdict in the case of *Ronald Rupe v. The Ernest Hemingway House Museum*, in Key West, Florida. The Plaintiff, a computer programmer from Texas, sued the Ernest Hemingway House Museum for injuries allegedly sustained when he slipped and fell while visiting the Museum.

¹This is the third of a series of articles on attorney's fees printed in the CSK Quarterly. See *Proposals for Settlements - What's All the Fuss?* (Oct. 2003); *Attorney's Fees and Costs on Appeal* (April 2004).

The Plaintiff claimed to have sustained severe injuries to his back and neck due to the force of the fall. He also claimed to have sustained permanent scarring and nerve damage to his right arm, which was caught on a hurricane shutter bracket during his fall. Among the defenses raised were that the condition was open and obvious and that the Plaintiff was responsible for his own actions. Following four days of lay and expert testimony, the jury returned a zero verdict. The Plaintiff's last demand prior to trial was approximately \$500,000.

Christopher Hopkins of CSK's West Palm Beach office successfully defended a local nurse in a complaint on her license before the Department of Health. A patient had filed a professional complaint alleging that the nurse had given her medication out of a container that another patient had turned in to the doctor's office. There was no allegation that the provided medication caused harm but it was alleged that there was a violation of nursing and pharmaceutical standards. No probable cause was found and the matter was dismissed without notation on the nurse's license.

In September 2004, Luba Zeldis of CSK West Palm Beach won a dismissal of an employment claim before the EEOC in a central Florida case where an employee had filed a discrimination complaint. The EEOC accepted Mrs. Zeldis' argument that there was no discriminatory treatment.

Dan Shapiro and Scott Jackman of the CSK Tampa office recently obtained an order recommending dismissal of a former employee's sexual harassment and retaliatory discharge claim against a nursing home. The plaintiff filed a complaint alleging sexual harassment by a supervisor and retaliatory conduct by the facility and its owner because she was fired after rejecting the supervisor's advances. The plaintiff sought damages for back pay, pain and suffering, punitive damages and attorney's fees. The claim was brought pursuant to Title VII of the Civil Rights Act, as well as the municipal codes of a southwest Florida county and one of the cities therein.

Dan and Scott filed a Motion for Final Summary Order, arguing that the plaintiff's complaint was time-barred because the city that investigated the claim and filed the complaint failed to meet the deadlines contained in their own city code. In a detailed Recommended Order, an administrative law judge for the Department of Administrative Hearings rejected the city's argument that it somehow could avoid its own limitations requirements by attempting to apply them selectively. The judge agreed with our argument that to construe the meaning of the code's filing requirements to allow for filing a complaint more than three years after the initial charge had been filed would lead to an absurd result.

Betsy Gallagher was appointed Chairman of the Editorial Board of the Trial Advocate Quarterly - the publication of the Florida Defense Lawyers Association. Betsy also recently was elected to the Executive Committee of the Appellate Section of the Florida Bar. She authored: "Ten Signs You Need an Appellate Lawyer," which was published in the May 2004 volume of the Florida Bar Journal. Not surprisingly, Betsy was also listed in Florida Trend Magazine as one of the Legal Elite practicing in the area of Appellate Practice.

Christopher Hopkins of CSK West Palm Beach was appointed to the Editorial Board of the *Trial Advocate Quarterly*.

We are pleased to announce that Dan Shapiro, Aram Megerian and Barry Postman have received the prestigious "AV" rating from Martindale Hubbell. The AV rating is Martindale Hubbell's highest rating and is a symbol of excellence in the practice of law and ethics.

Additional congratulations go to Aram on his acceptance into the Tampa Inns of Court. Inns of Court are an amalgam of judges, lawyers, and in some cases, law professors and law students. Members regularly meet to discuss issues related to the practice of law and to develop higher levels of excellence, professionalism, and ethical awareness.

MEET ONE OF OUR LAWYERS

- Scott H. Jackman-



Prior to returning to college, Scott served four years in the United States Air Force, working with aircraft-mounted electronic countermeasures equipment designed to detect and defend against anti-aircraft missile systems. After returning to his hometown of Palm Beach Gardens, Florida, Scott worked for more than eight years in electronic instrumentation of jet engines for a major defense contracting company before returning to college. Scott earned a Bachelor of Science degree in Journalism in 1997 and his Juris Doctor in 1999, both from the University of Florida.

Since joining the Firm in January of 2002, Scott has focused primarily in the areas of personal injury, premises liability, medical and professional liability and employment discrimination law. Scott is a member of the Florida and Hillsborough County Bar Associations. His interests beyond law include surfing and the beach, drawing and design and music from a bygone era.

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