FACAP 2019 - CASE LAW UPDATE
BETH BLECHMAN AND GINA G. SMITH
FLORIDA DEPARTMENT OF FINANCIAL SERVICES
OFFICE OF THE GENERAL COUNSEL
FALSE CLAIMS & CRIMINAL LAW UNIT

COURSE OVERVIEW: This course is intended for those in the public and private sector, including criminal and civil investigators, adjusters, analysts, experts and attorneys, who investigate and litigate suspected arson and insurance fraud matters to ensure they are apprised of the latest relevant laws and court decisions. Both potential future statutory revisions and recent case law developments relating to insurance company and law enforcement arson and insurance fraud investigations and the use and admissibility of evidence obtained in those investigations will be discussed and analyzed.

❖ CRIMINAL AND CIVIL CASES

▪ EXPERT WITNESS TESTIMONY

DeLisle v. Crane Company, 258 So.3d 1219 (Fla. 2018) – On October 15, 2018, the Florida Supreme Court ruled that Florida state courts must apply the *Frye* "general acceptance" standard for determining whether expert testimony should be presented to a jury. This ruling resolved the controversy over whether the *Daubert* "reliability" standard, utilized in federal courts for 25 years, would supplant the *Frye* standard in Florida. *Daubert* is still the standard in all federal courts.

❖ CIVIL

▪ ASSIGNMENT OF BENEFITS CASES

Restoration 1 of Port St. Lucie, Etc. v. Ark Royal Insurance Co. **255 So.3d.344 (4th DCA 2018)** – The Fourth District Court of Appeals affirmed the trial court's dismissal of the Restoration 1 Complaint and held that the language of the assignment of benefits provision in the insurance contract at issue was enforceable as to the following clause:

> No assignment of claim benefits, regardless of whether made before a loss or after a loss, shall be valid without the written consent of all "insureds," all additional insureds, and all mortgagee(s) named in this policy.

Following a water loss, Restoration 1, pursuant to an AOB assigning any and all insurance rights to it, submitted a clean-up invoice to Ark Royal for $20,305.74. Ark Royal refused to recognize the AOB because it did not have all required signatures. Restoration 1 sued for breach and a declaratory action and lost. The appeals court addressed the issue of whether common law or public policy prohibits an assignment of benefits provision in an insurance contract that requires the consent of all insureds and the mortgagee before any assignment, and determined neither prohibited the provision. In ruling in favor of Ark Royal, the Fourth District conflicted with a Fifth District Court opinion which held the opposite in *Security First Insurance Co., v Florida Office of Insurance Regulation*, 232 So3d.1157 (2017), namely, that such a requirement or restriction on an assignment was invalid.

The conflict has been certified to the Florida Supreme Court (2018 WL 6819077; Case No. SC 18-1624) to resolve. Notably, the 4th DCA opined that public policy concerns were best left to the legislature.

Robinson v. Safepoint Ins. Co., 255 So.3d 508 (Fla. 3d DCA 2018) -- The Robinsons appealed from the trial court's final order granting Safepoint's motion to dismiss the Robinsons' complaint for breach of contract with prejudice for perpetrating a fraud on the court. Safepoint had evidence the Robinsons lied during their deposition that they contacted the water remediation company after the reported date of loss, their phone records showed the restoration company contacted them 10 days before the reported date of loss. The appellate court ruled that although Safepoint's unauthenticated submissions supported the contention that the Robinson's may have attempted fraud on the court, before the ultimate sanction of dismissal may be imposed, the trial court must conduct the evidentiary hearing requested by the Robinsons.

- **ASSIGNMENT OF BENEFITS LEGISLATIVE PROPOSALS**

In December 2018, the Insurance Information Institute issued a white paper entitled "Florida's Assignment of Benefits Crisis", which discussed how we got to where we are regarding the AOB issues. The Institute's representatives recently testified at the Florida Senate Committee Hearing on SB 122 and specifically noted that while other states have assignment of benefits, no other state has the problems that Florida has, i.e., runaway litigation, and places blame squarely on the one-way attorney's fees and inflated claims.

In 2000, there were 1300 AOB lawsuits in Florida. In 2013 there were more than 79,000, and by November 2018, that number grew to 135,000. As a direct consequence of the abuse, insurance rates have risen and Florida's insurance premiums are some of the highest in the US. It is spreading; it began in South Florida, moved into the Tampa and Orlando areas and now has moved northward up into Duval county. AOBs are found in personal injury claims, homeowner's property claims and windshield repair claims. As in the past 6 legislative sessions, there are a number of bills aimed at curbing AOB abuse, including the following

SB 122: Attorney Fee Awards Under Insurance Policies and Contracts; revises certain attorney fee provisions in the Florida Insurance Code to specify that an insured or beneficiary entitled, under certain circumstances, to attorney fees under an insurance policy or contract must be a named insured or named beneficiary; providing that such right to attorney fees may not be assigned or extended by agreement, except to certain persons, etc.

HB 301: Revises circumstances under which civil actions against insurers are prohibited; …

SB 904/HB 359: Defines "assignment agreement"; specifies assignee requirements; requires assignee to meet certain conditions prior to filing suit; provides acceptance of assignment agreement constitutes waiver of certain claims.

SB 754/HB 323: Windshield Glass; prohibits motor vehicle repair shops or their employees from offering anything of value to a customer in exchange for making an insurance claim for motor vehicle glass replacement or repair, including offers made through certain persons, etc.

- **CONSTITUTIONAL AMENDMENT 6, ART. V SEC. 21**

While this amendment was most widely known for "Marsy's Law", the crime victim's rights provision, and to a lesser extent, increasing judges' mandatory retirement age from 70 to 75, there was a third

provision that requires judges and hearing officers to interpret statutes and rules instead of deferring to governmental agencies' interpretations of their own statutes and rules. The provision now reads:

> SECTION 21. Judicial interpretation of statutes and rules.—In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

The effect of this change was evident in *Kanter Real Estate, LLC. v Dept. of Environmental Protection, et al, -- So. 3d – 2019 WL 436613 (Fla. 1st DCA 2019)*. DEP denied a permit to drill an exploratory oil well in an environmentally degraded property in the Florida Everglades. On February 5, 2019, the First District overturned the denial. Significantly, the ruling was affected by the amendment in that prior to the Amendment, the Court would have afforded considerable deference to DEP's interpretations of statutes and rules and affirmed such interpretations unless clearly erroneous. That is no longer the case and courts now must apply a *de novo* review, in other words, make its own interpretation without any special deference to the agency's interpretation.

- **JUDICIAL HELLHOLES UPDATE 2018-2019**

This annual report, published by the American Tort Reform Foundation, documents places where civil court judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally to the disadvantage of defendants. Last year, Florida ranked first; this year, it is second only to California. The article cites unsound decisions from the Florida Supreme Court, lack of legislative reforms, the continuing AOB crisis and no-fault PIP system abuse. The fall from first to second was not attributed to any improvement in Florida, but rather from the volume of problems in California. Specifically cited: The Florida Supreme Court's *DeLisle v Crane* decision which officially made the *Frye* the standard for admissibility of expert testimony, thus weakening the standard from *Daubert* and potentially expanding liability.

Further in *Harvey v Geico General Insurance Co*., 259 So. 3d 2018 (Fla. 2018), the Florida high court allowed bad faith liability despite the policyholder's own actions or inactions resulting in an excess verdict. In a wrongful death case, Geico tendered the $100,000 policy limits to the deceased's estate, which returned the check, sued the policyholder and won an $8.47 million judgment against him. The insured then sued Geico, alleging that it did not tell him that the estate had asked for a statement of his financial resources, and had the estate received information that he did not have significant assets, the case may have settled for policy limits. Although the district court found Geico negligent in handling the claim, it found its actions did not cause the excess judgment. However, the Supreme Court reinstated the verdict despite a lack of evidence that the insurer had engaged in bad faith in processing the claim. The Court said the inquiry is a totality of circumstances standard, namely, whether the insurer diligently and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment.

The report also criticized the Supreme Court when it reversed an appellate court ruling which had reduced a $20 million verdict to $2 million holding that there is no cap on non-economic damages in a wrongful death action. The Court also held that businesses that merely rent equipment in Florida should be exposed to greater liability.

The Legislature was criticized for failing to enact PIP reform or do anything to curb the AOB crisis.

❖ CRIMINAL

▪ ARSON AND INSURANCE FRAUD

***Key v. Secretary, Department of Corrections*, 2018 WL 4214150 (N.D. Fla. 2018)** – As part of his writ of habeas corpus petition stemming from his convictions for drug, child abuse and principal to first degree arson of a dwelling charges, Key claimed his trial counsel was ineffective for failing to object to the first degree arson jury instructions which did not require the State to prove that Key knew or had reasonable grounds to know that the structure was occupied by a human being. In rejecting Key's argument, the federal court pointed out that the trial court read the Florida Standard Jury Instruction for first degree arson in violation of section 806.01(1)(a), Florida Statutes, which does not require such proof. ("Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damage … [a]ny dwelling, *whether occupied or not*, or its contents … is guilty of arson in the first degree …")

***Lee v. State of Nevada*, 415 P.3d 22 (Nv. 2018)** – After pleading and being convicted of first degree arson, arson with intent to defraud and insurance fraud, stemming from her setting an unoccupied pet store on fire, Lee sought post-conviction relief. The court rejected her argument that she could not be convicted of first degree arson for an unoccupied structure as the Nevada arson statute makes arson of such a structure first degree arson whether occupied or not. It similarly rejected her double jeopardy argument for the arson, burning to defraud and insurance fraud convictions. Just as in Florida, each of these offenses requires proof of different elements and the insurance fraud occurred at a different time than the arson offenses. (P.S. No pets were killed or injured in the fire!)

***State v. Ferrer*, 818 S.E.2d 697 (N.C. Ct. App. 2018) –** A North Carolina appellate court held that a restauranteur, although convicted of arson for burning his restaurant in order to collect insurance proceeds, was not guilty of insurance fraud. Although the state offered evidence that the defendant had made a false statement denying involvement in the fire to the landlord's insurance carrier that covered the structure of the building, it offered no evidence that he made a false statement to his *own* insurance carrier that protected the contents of the restaurant. Instead, the contents carrier had apparently relied upon the defendant's statements to the structure carrier. Investigators should remember that an insurance fraud conviction may require evidence of a false statement to the insurance carrier to which the defendant has filed or intends to file a claim, not merely a false statement to <u>any</u> insurance carrier.

***State of South Carolina v. Rose*, 814 S.E. 529 (S.C. App. 2018)** -- After Rose reported armed men invaded her home and set fires on her porches, law enforcement determined Rose had fabricated the incident. She was convicted at trial of third degree arson, burning to defraud an insurer and making a false insurance claim. On appeal, she claimed the denial of her motion to suppress the accelerant-detecting K-9's alerts (on Rose's slippers in a bedroom as well as multiple areas around the house) and laboratory testing results (positive for ignitable liquid) was erroneous, arguing the canine's use was unreliable. The court disagreed, finding under *Daubert* that the K-9 handler had the requisite knowledge, training and skill, and the evidence regarding the K-9's alerts and related lab tests was reliable.

***Lindo v. Nielsen, Secretary of DHS*, 2018 WL 2021289 (S.D. Florida 2018)** – After her application for naturalization was denied based on her plea and conviction of grand theft in violation of section 812.014, Florida Statutes, and third degree insurance fraud in violation of section 817.234(1)(a)1 in 2005. Petitioner, a citizen of Jamaica and permanent U.S. resident, was denied citizenship on the basis that she was permanently ineligible because she lacked the request good moral character having been

convicted of an "aggravated felony" on or after November 1990 under the Immigration and Naturalization Act, which includes in its definition a theft offense or an offense that involves *fraud or deceit in which the loss to the victim or victim exceeds $10,000*. Finding that Petitioner's convictions resulted from a fraudulent auto theft claim for her Lexus which was found in her possession a year after State Farm paid her over $20,000, the court upheld DHS' denial of her naturalization application.

- **CONSTITUTIONAL ISSUES**

  - **Cell Site Data**

***Carpenter v. United States*, 138 S. Ct. 2206 (2018)** – SCOTUS held that an individual has a legitimate expectation of privacy in the record of his/her physical movements as captured through cell-site location information (CSLI) which implicates Fourth Amendment protections. *To obtain CSLI data from a third-party provider, the Government must secure a search warrant based on probable cause*. In *Carpenter*, the Government obtained the cell-site records for a robbery suspect pursuant to a court order issued under the Stored Communications Act, upon a showing of reasonable grounds to believe the records are relevant and material to an ongoing investigation. However, SCOTUS found that the court order process is not a permissible mechanism for accessing *historical* cell-site records.

CSLI is different from other types of business records in third-party hands as it chronicles a person's physical presence every day, every moment, over years, whether the person has chosen to be in a public or private space. Given the pervasiveness of cell phones today and the fact that there is no way to avoid leaving a trail of one's location data short of disconnecting from the network, the majority reasoned: "… in no meaningful sense does the user voluntarily 'assume the risk' of turning over a comprehensive dossier of his physical movement." The court noted that its opinion is narrow, and did not extend to real-time CSLI, tower dumps, conventional surveillance like security cameras or other third-party records that might reveal location information

  - **Rental Car Passenger**

Byrd v. United States, 138 S.Ct. 1518 (2018) – In vacating the denial of his motion to suppress heroin seized from a rental vehicle defendant was driving, SCOTUS held that defendant's violation of a rental car agreement signed by his wife and the fact he was not listed as an authorized driver on the rental agreement did not eliminate any reasonable expectation of privacy he had in the vehicle. The case was remanded back to the Third Circuit to determine whether law enforcement had probable cause to conduct a warrantless search.

  - **Nebbia Holds**

Casiano v. State, 241 So.3d 219 (Fla. 2d DCA 2018); Fleury v. State, 254 So. 3d 975 (Fla. 4th DCA 2018) – A "Nebbia hold", named for the United States v. Nebbia decision, 357 F.2d 303 (2nd Cir. 1966), permits a court to hold a defendant who has posted bail to be detained so the court can determine if the bail is adequate to ensure the production of the defendant. 357 F. 2d 303, (2d Cir. 1966). Article I, section 14 of the Florida Constitution provides that the accused has a right, with a few exceptions, to pretrial release on reasonable conditions. One of the exceptions is if no release condition can assure the presence of the accused at trial. Further, Florida Rule of Criminal Procedure 3.131 provides that release conditions be determined by the time of the first court appearance. One of the factors the court can consider in setting conditions is the source of the funds used to post bail.

In *Casiano*, the court set bail at the first hearing and granted the State's motion to order defendant held pending a *Nebbia* hearing. The defendant objected, claiming the State had failed to file a proper pretrial

detention motion under the rules of criminal procedure. The Second District Court of Appeal agreed and held that under Florida's Constitution, courts lack authority to detain an accused for the purpose of inquiring into the source of funds used to post bail. Any such inquiry is to ensure the bail is sufficient to secure the defendant's appearance, not to deny a pretrial release. Thus the State could have requested a bail modification by showing good cause pursuant to Florida Rule of Crim.Pro. Rule 3.313. This decision was contrary to *Parrino v. Bradshaw*, 972 So. 2d 960 (Fla. 4th DCA 2007) that while a first appearance court could consider defendant's source of funds to post bail, the purpose of inquiry into the source of the funds is to set a bail amount and not to impose a pretrial detention.

The Fifth DCA has since followed *Casiano*. However, the Fourth DCA has "doubled down" on its *Parrino* holding in *Fleury v. State*, 254 So. 3d 975 (Fla. 4th DCA) that a bond source condition imposed by the trial court did not result in unconstitutional pretrial detention. The Fourth DCA also certified the conflict with the Second and Fifth District Courts of Appeal to the Florida Supreme Court. However, the Florida Supreme Court appears reluctant to resolve the conflict, having rejected jurisdiction in the *Casiano* appeal, although it has not yet done so in *Fleury*. At the present time, the Third, Fourth and possibly the First DCAs are upholding *Nebbia* holds, but the Second and Fifth DCAs are not.

- **PATIENT BROKERING**

***State v. Kigar*, No. 2016CF010364 (15th Cir. Ct. Feb. 1, 2019)** – A Circuit Court for the 15th Judicial Circuit in West Palm Beach interpreted Florida's anti-patient brokering statute as requiring a heightened showing of intent (specific versus general intent) on behalf of the accused. Prosecutors charged the defendant with 147 counts of patient brokering, or illegally receiving compensation for referring patients to healthcare providers, in violation of § 817.505, F.S. The defendant signaled his intent to argue at trial that he was not aware that his actions were unlawful, so the state moved to prohibit this defense on the grounds that Florida's anti-patient brokering law only requires a showing of general intent to commit the act, not the specific intent to break the law. While conceding that no such requirement appears in the text of the statute, the court denied the state's motion and interpreted the anti-patient brokering law as requiring specific knowledge that the defendant's acts were unlawful. The State Attorney's Office is appealing the order in *Kigar*.

- **MONEY SERVICE BUSINESSES**

***State v. Espinoza*, -- So.3d --, 2019 WL 361983 (Fla. 3d DCA 2019)** – The Third District Court of Appeal overturned a Miami-Dade Circuit Court ruling and held that the Defendant acted as both a money transmitter and payment instrument seller and as such was required to register with the State of Florida as a money services business. Further, in doing so, it applied Florida's statutes governing money services businesses and money laundering in chapters 560 and 896 of the Statutes to illicit transactions involving the virtual currency known as Bitcoin.

- **626.989, F.S. & HIPAA ISSUES**

***State of Florida v. Robert Laird, Case No. 17-CF-017545 (Hillsborough County Circuit Court)* –** The defendant is charged with insurance fraud for falsely claiming he was injured at a fast food restaurant due to an alleged defective curb and the restaurant's failure to warn him. In fact, the defendant's trip was caused by his grandson darting in front of him. During his treatment for the injury, the defendant made statements to medical providers regarding the true reason for his fall. The restaurant's liability insurer referred the matter to DIFS, and turned over the defendant's medical records, obtained as part of the claim process and in discovery in the subsequent civil suit filed by the defendant against the

restaurant, which the civil judge dismissed for fraud upon the court, to DIFS pursuant to 626.989, Florida Statutes. The defendant filed a motion to suppress the medical records and testimony from medical providers claiming law enforcement (DIFS) violated his Fourth Amendment rights by failing to comply with section 456.057(7)(a)(3), Florida Statutes which prohibits a medical record owner from releasing a person's medical records without written patient authorization, search warrant or court order. The State defeated the motion by successfully establishing that DIFS did not obtain the records directly from the medical providers but from the insurance company pursuant to 626.989, F.S. The insurance company obtained the records from the defendant as part of the insurance claim and civil lawsuit. Accordingly, 456.057(7)(a)(3), F.S. did not apply. Furthermore, there could be no Fourth Amendment violation, which protects citizens from unlawful government intrusion, as the records were obtained by a private entity, the restaurant's liability insurer, the defendant could not meet his initial burden of proving that the government performed a Fourth Amendment search.