

The Florida Law Practice

LINK

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Minimize Potential Liability in Negligent Hiring and Retention Lawsuits

by Jennifer A. Dietz, Esq.

A review of recent case filings indicates that service industries increasingly are being sued under the negligent hiring and retention doctrines. In these lawsuits, plaintiffs are seeking to hold companies directly liable for employees who commit torts against their coworkers or third parties.

For example, a Pennsylvania jury recently awarded over \$365,000 to a customer injured by a bouncer who was hired despite having very little experience and a history of unruly behavior. Similarly, an Alabama jury awarded a plaintiff \$29 million based

on theories of vicarious liability and negligent retention after one of the defendant's delivery drivers caused a fatal automobile accident while high on methamphetamines. In that case, the plaintiff successfully argued at trial that the defendant had negligently retained the driver when it did not drug test him and continued to employ him despite receiving complaints alleging erratic behavior.

A Florida jury awarded \$687,500 to a cyclist who was struck from behind by the employer vehicle which was operated by its employee. Plaintiff alleged negligent hiring and en-

trustment because the employee's driving record revealed extensive citations and convictions prior to the accident. The employer had failed to investigate the employee's driving history. In March 2003, another Florida jury awarded \$9 million to a mentally-retarded adult living in a facility owned and operated by defendant. The plaintiff was knocked to the ground and suffered severe injuries. The Plaintiff alleged negligent hiring and retention of the employee of the facility.

When a Buffalo Rock Company's employee's truck struck plaintiff's

See "Potential Liability," page 9

A Guide to Chapter 7 Trustee Elections

by Camille J. Iurillo and Sabrina C. Beavens

It is not uncommon for non-bankruptcy attorneys and their unsecured creditor clients to conclude that when a customer files a Chapter 7 bankruptcy it is not worth the time and expense to seek bankruptcy counsel because the recovery is undoubtedly going to be small for most creditors. However, in many cases, the opportunity to choose the person appointed to oversee the case, the Chapter 7 Trustee, is overlooked by unsecured creditors without consideration of whether another professional may be better suited for the particular

case in order to maximize creditor recovery. For example, does the case involve a specialized industry requiring expertise to properly liquidate the debtor's inventory? Is the case similar to a prior bankruptcy where that trustee may reduce the learning curve and more efficiently administer the estate? Does the client (and similarly situated creditors) have an unfavorable opinion of the trustee's work in the prior case? In such instances, creditors have the ability to request a trustee election and nominate a candidate, however this process is rarely

invoked. The framework below is provided as an overview for clients and practitioners who may be unfamiliar

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Message from the Chair

by Frank Maloney



Building on the accomplishments of our immediate past chair Kirk Kirkconnell, we at the GPSSF Section are looking forward to a great new Bar year for 2011 – 2012.

- Eugene Shuey will again chair our *Ethics Today and the Florida Bar* to be held this fall in Tampa.

- U of F Professor Michael Olexa will be presenting the *Florida Agriculture Law Update* at the Florida Farm Bureau Building (our host) in Gainesville in conjunction with the Florida Gators versus Furman football game weekend.

- Jack Merritt, a past GPSSF Chair, is chairing our very successful annual *Florida Law Update* with a literal, “who’s who” of presenters at the Bar Convention, June 2012.

- In conjunction with other sections of the Florida Bar there will be a Comparative Law Symposium in London May 19 to 26, 2012. Mark your calendars, this CLE event will compare Florida and UK’s legal systems,

and be chock full of fun in England.

Teresa Morgan and Peggy Hoyt are working to make our *Solo and Small Firm Conference* one of the best in the nation. They along with Florida Bar Director of Programs, Terry Hill, were guests of the Missouri Bar to that Bar’s Solo and Small Firm Conference, which is the best attended in the United States. They returned with many good ideas which will be implemented at our conference that will be shifted from our previous spring offering to Fall 2012. Camille Iurillo will continue as the chair for sponsorships.

U of F Dean Linda Calvert Hanson, our chair elect, continues working with the law students throughout our state and informing them of the benefits of Florida Bar and particularly of the GPSSF Section. In the current economy a very large number of our new law school graduates are finding themselves practicing solo or in small firms.

Kevin Johnson continues to improve our outstanding GPSSF web site where solo and small firm lawyers can blog together to keep abreast of matters of interest. He is also exploring a list server for those lawyers.

Our Executive Council remains committed to Florida’s solo and small firm lawyers and will be taking time from their very busy schedules to attend quarterly meetings on ways we can continue to serve our constituency.

We as a Section are extremely lucky that Ricky Libbert will continue to be our Bar staff liaison. With her services our section will grow and prosper, we are thankful to Ricky.



SAVE THE DATE!

The London Symposium: The GPSSF Section’s Comparative Law CLE A Joint, Multi Florida Bar Sections and British Legal Event May 19-26, 2012

Comparative law topics to include: perspectives on criminal law, civil litigation, family law, real property and probate law, international law, legal education and newer lawyers, the courts and the judiciary and law practice management.

Nine hours of CLEs plus tours to England’s courts and Inns, countryside excursions and a chance to experience London’s best. Additional details will be forthcoming in August, but mark your calendars now for a great educational and travel experience.

2011 Solo and Small Firm Conference

Lawyers from solo and small firms gathered in Weston, Florida on April 1-2 to learn how to become an Extraordinary Lawyer using the skills and tools highlighted at the 2011 Solo and Small Firm Conference. With the theme of "Creating a Dream Practice in a Challenging Economy", speakers focused on the fact that lawyers in solo and small firms not only practice law but also own and operate a business.

The engaging and informative group of speakers focused on strategic planning for your practice (and your life), how to use all the new gadgets and apps effectively and ethically, information management, the ethics and security issues associated with a "virtual" law practice, social media advantages and pitfalls, and leveraging your marketing dollar. **Teresa Byrd Morgan**, CLE Chair of the GPSSF Section, was instrumental in the development of this highly successful conference.

Speakers included **Steven P. Riley, Steven W. Tepler, Nicole Black, Adriana Linares, Richard Granat, Kevin D. Johnson, Randal Borkus, James R. Collins, Jr., Richard C. McCrea, Richard Georges, and Margaret "Peggy" Hoyt**. A special thanks to Steve Reilly for his inspirational presentations and guidance throughout the conference, and to Adriana Linares for providing assistance at her "Technological Help" booth.

To keep the mind and body in top shape to absorb all the information presented, the sponsors provided a wonderful array of foods and drinks during both days. The speaker luncheon was sponsored by **Florida Lawyers Mutual Insurance Company** and the continental breakfast and breaks were sponsored by **LexisNexis, Bank of America, Iurillo & Associates, P.A., Kirkconnell Lindsey Snure & Yates, P.A., Thompson Sizemore Gonzalez & Hearing, P.A., Sabadell United Bank, Von Ahn Associates** and **The Florida Bar Membership Benefits Insurance and Retirement Program**. The reception on Friday evening was well attended and provided everyone a relaxing moment to mingle, network and win prizes. It was sponsored by **The Florida Bar**

Young Lawyers Division and **Roy Esh and Richard Steiner, CFP of Northwestern Mutual**.

In addition to earning CLEs, conference participants had the opportunity to visit with exhibitors and interact with their colleagues. To stimulate interaction among participants, **Jack Bettman** once again provided a list of intriguing questions for groups to answer as a team effort. To promote interaction with the exhibitors, Jack Bettman and **Damon Glisson** developed a card game wherein conference attendees "drew" their poker hands by

visiting with the exhibitors.

On Saturday morning, a separate program was available for paralegals and was organized by **Priscilla Warren**, with **Laney Lyons** and **Margie Averill** as speakers. **Linda Hanson** moderated a separate panel discussion for law student attendees entitled "The Extraordinary New Associate: Landing and Keeping a Dream Job".

We want to extend a big **THANK YOU** to the Sponsors and Exhibitors. Their support is key in providing this conference for Bar members in solo and small firms!



Robbed of his motor skills by
cerebral palsy from birth,
Julio was then
deprived of his educational rights

when his school told him it couldn't provide the
accommodations he needed
to function in the classroom.

... Almost

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2011 Solo & Small Firm Conference Sponsors and Exhibitors

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2011 Solo & Small Firm Conference



LexisNexis was a sponsor and exhibitor at the conference.



Teresa Morgan, CLE Chair for GPSSF



Jack Bettman urging attendees to mingle and network at the conference.



The doctor is in! Adriana Linares at her Technology Help booth.



Steve Reilly, featured speaker



Florida Lawyers Mutual Insurance Company sponsored lunch on Friday.



The winning hand was drawn by Mario Quintero, Jr. (left) with Damon Glisson.

Missouri Bar Solo and Small Firm Conference Summary

by Peggy R. Hoyt

We (Frank Maloney, Teresa Morgan, Terry Hill and I) recently attended the Missouri Bar Solo and Small Firm Conference on Wednesday June 8 – Saturday June 11, 2011, at the Tan-Tar-A Resort in Lake of the Ozarks, Missouri. In attendance were more than 1,000 members of the Missouri Bar Association, primarily solo and small firm practitioners. Each attendee could earn their entire year's worth of required CLE credits, including ethics. The cost for the multi-day program was approximately \$229, and included all meals (breakfast, lunch and dinner) and receptions for the conference period.

The Tan-Tar-A Resort is a family oriented lake front resort conveniently located to most of the Missouri membership. Although not a new resort, and needing some updating, the members felt this was a more than appropriate venue for the program. Family attendance was encouraged and the resort had a number of lake front pools, an indoor water park, playground, boat rentals, horseback riding and golf.

Bar members were anxious to share with us their Solo Small Firm Conference experience and we learned a lot of valuable tips for use in future programs. One discovery was the Missouri Bar requirement regarding in-person participation at CLE events. In Florida we can earn all of our CLE through recorded or online presentations. In Missouri, only a small portion of their CLE credits may be earned remotely, requiring attendance at live programs for the majority of their credits. We feel this is one reason why Missouri has been so successful in encouraging attendance. We also heard from a number of people about the importance of the personal contacts, networking and the relationships that had been developed over the years. In fact, their Thursday night dinner program is a family picnic and reunion. The entire conference had a reunion type atmosphere – with lots of collegiality.

In addition to attracting a large number of attendees, the organization does a fabulous job of attracting exhibitors and sponsors. Every event, reception and meal was sponsored by

a member of the Bar or an exhibitor. As a result of the long-standing sponsorship relationships, the Bar is able to provide fun programs as well as meals, alcohol and entertainment.

Most impressive were the number of law students in attendance. The students wore shirts specifically identifying them as students and giving attendees an opportunity to interact with them. Most were students of a class in Entrepreneurship offered at one of Missouri's four law schools. We had an opportunity to visit with them during the lakeside cruise and at various events throughout the weekend. Each indicated this was a valuable learning experience for them, despite the fact attendance was required as part of their coursework. The students were sponsored by individuals or law firm scholarships at no cost to the student.

As a team, we were able to gather a significant number of ideas to improve our future events. One suggestion came from our own Terry Hill. Why not consider holding our Solo and Small Firm Conference in connection with the Mid Year Bar Meeting? This makes perfect sense – the dates and the locations are established well in advance, the leadership of the Bar will be present, and the timing of the event will certainly attract additional participation. We will also be able to avoid the necessity of separately negotiating with venues and incurring expenses for large blocks of room.



Our Scouting Team

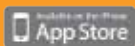
Another excellent suggestion and one we've discussed is the adoption and implementation of a Listserv available to all members. More than a few people we talked to felt like this was one of the most important tools available to the Solo and Small firm practitioners – a great way for them to interact when not at the conference, share information, make requests for referrals, etc. The Listserv was also used extensively to generate enthusiasm for the conference, giving those who weren't planning on attending the suggestion that they were missing much more than CLE. We are anxious to implement our own Listserv for members and get our members talking to us and to each other. It will be a valuable tool for promoting not just the Solo and Small Firm Conference but other happenings and events within the Section. Stay tuned as we explore the ideas we learned and implement them for future success.

The Florida Law Practice LINK is prepared and published by The Florida Bar General Practice, Solo & Small Firm Section.

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POTENTIAL LIABILITY

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car, thereby killing plaintiff, the jury awarded \$2 million to the plaintiff's estate. The estate alleged negligent hiring, training and supervision on the part of Buffalo Rock Company. The estate's liability theory was that the employee, who had a history of traffic violations, was speeding at the time of the accident and had just received his CDL license.

In 2006, a Florida jury awarded \$2,075,000 to a Honduran immigrant who was assaulted by two employees of defendant marketing company. The plaintiff claimed that the decedent was violently shoved to the ground, where he sustained a fatal injury. The plaintiff asserted that the defendant's employees were negligently hired, trained, retained and supervised. Discovery showed that one of the employees did not appear for his training session on the morning of the altercation. His coworker at the time of the altercation was also his "trainer" and immediate supervisor. The "trainee" reportedly told his trainer that he worked nights as a bouncer in South Beach and he claimed to have been a member of the special forces in the military. A witness to the altercation testified that at the scene of the altercation the employee stated that he had used a special forces' attack on the decedent.

In 2007, a Florida jury returned a verdict of \$1 million each to two

female employees against a large financial institution based upon the negligent supervision and retention of a male employee. The facts in the case showed that a male employee had been peeping through the ceiling of the women's restroom, had made videotapes of women in the restroom and had shared this information with other employees.

Similar allegations of negligent hiring, retention and supervision can be found in a Georgia case involving Domino's Pizza where a rear-end collision resulted in an award of \$50,000 to plaintiff. Negligent hiring, training and retention was the theory of plaintiff's case where a DeKalb County garbage collector was thrown from the back of the garbage truck by the driver. The plaintiff subsequently died from his injuries and his estate was awarded \$5,110,391 against DeKalb County. Another Georgia jury awarded plaintiffs \$4,500,000 where a trucker drove negligently on the interstate and caused a collision to occur. The plaintiffs claimed that the trucker's employer was negligent in entrusting the truck to him, and for failing to properly train and supervise him.

Ultimately, the continued expansion of state law authorizing causes of action against employers for negligent hiring and retention provide a strong motivation for employers to conduct thorough background checks on applicants, and to closely monitor behavior of current employees. At a minimum, employers should:

- Carefully review all applications to ensure that there are no apparent indications of a propensity to engage in illegal or improper conduct and to ensure that there are no apparent discrepancies that could put the employer on notice that the applicant was not entirely truthful when filling out his or her application.

- Question applicants about any gaps in their employment history.

- Attempt to contact prior employers regarding relevant tendencies and propensities.

- When applicable, find out why an applicant has refused to grant permission to contact previous employers.

- Implement and publicize procedures for employees, customers and vendors to report instances of improper conduct by employees.

- Follow-up on and document all reports of improper conduct.

- Exercise a zero-tolerance policy when it comes to abusive, belligerent or combative employees or employees who engage in a pattern of harassing conduct.

- Train supervisors in proper recruiting, interviewing, and selection techniques.

- Exercise a zero-tolerance policy when it comes to the retention of managers who refuse to adequately investigate and handle instances of improper employee conduct.

- Subject to applicable limitations under state and federal laws, conduct thorough background checks for all managers and supervisors, particularly if they will be supervising teenagers.

TRUSTEE ELECTIONS

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with the process and therefore hesitant to move for an election.

Election Requirements

The election of a Chapter 7 Trustee occurs at the meeting of creditors (§ 341 meeting). A creditor moving for an election should contact the U.S. Trustee's office in advance of the meeting of creditors and notify them of the election. The U.S. Trustee will then attend the meeting of creditors and conduct the election.

11 U.S.C. § 702 is the framework for

the election of a Chapter 7 Trustee. Under section (a) of this statute, only unsecured creditors which hold allowable, undisputed, fixed and liquidated claims are eligible to vote. 11 U.S.C. § 702(a)(1). Further, creditors whose interests are materially adverse to other unsecured creditors or who are insiders may not vote. 11 U.S.C. § 702(a)(2) and (3). A secured creditor may vote its deficiency claim, provided the claim is not contingent and unliquidated.

Pursuant to Fed. R. Bank. P. 2003(b)(3), a creditor in a chapter 7 "is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the

Code unless an objection is made to the claim or the proof of claim is insufficient on its face." *In re Blanchard Mgmt. Corp.*, 10 B.R. 186, 188-189 (Bankr. S.D.N.Y. 1981).

In order for an election to be held, at least 20% of qualified creditors holding § 702(a) claims must move for an election and vote. 11 U.S.C. § 702(b) and (c). The candidate receiving the majority in claim amount of the votes of creditors is elected. *Id.*

The Election

In a case where a trustee election is anticipated, the U.S. Trustee's office presides over the meeting of creditors. The job of the U.S. Trustee is to conduct the election and prepare

continued...

TRUSTEE ELECTIONS

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a report for the court. If there is a dispute regarding the election, the matter is decided by the bankruptcy judge, not the U.S. Trustee.

Generally speaking, the U.S. Trustee will begin the meeting of creditors by identifying him/herself and the interim trustee who will also be present. Some Trustees will then explain the purpose of the meeting of creditors (examining the debtor), however others will cut to the chase and ask if any party requests an election.

Presuming your client does not attend the meeting of creditors, bankruptcy counsel must be prepared to respond to the following questions directed toward qualifying your client's vote:

1. Does your firm regularly represent [x] creditor requesting the election?

- If not, you will need an executed proxy and Power of Attorney per Fed. R. Bank. P. 2006.

2. Did your firm solicit the creditor in order to represent the creditor for purposes of this election?

3. Has the creditor filed a Proof of Claim in the case? (If not, be prepared to hand the Trustee a completed and signed Proof of Claim with all attachments.)

- If so, is the claim secured, unsecured or bifurcated?

- What is the nature of the claim?

- Is the unsecured amount of the claim fixed?

- Is the unsecured claim liquidated?

- Is there an ability for set-off?

4. Is the creditor in any way related, associated, or affiliated to the debtor or would be deemed an insider pursuant to Section 101(31)?

5. Who does the creditor nominate (name, address and telephone number)?

If your client appears with bankruptcy counsel at the meeting of creditor, #1 and 2 are not applicable as the creditor would be directly asked #3-5.

The same questions are asked of the remaining voting creditors. If an eligible person is elected and the election is undisputed, the U.S. Trustee will then file a report with the court stating the election is undisputed per Rule 2003(d). However, if there is a dispute as to an issue(s), the trustee will file a report

with the court describing the dispute(s) and creditors have ten (10) days to file a request for the bankruptcy judge to resolve the dispute. Fed. R. Bankr. P. 2003(d). As a general rule, "...the bankruptcy court may take practical measures to resolve election disputes.... The parameters for resolving the dispute are undefined. Accordingly, the court should adopt the approach that maximizes the estate's recovery and that comports with the Chapter 7 policy of creditor control." *In re Klein*, 119 B.R. 971, 984 (N.D. Ill. 1990) (citations omitted). If no request is filed, the interim trustee will become the permanent trustee.

Examples of Disputes

Although the process, applicable statutes and rules are relatively straight forward, numerous issues can arise which may derail the appointment of your client's choice of trustees. Some of the common disputes follow.

Quorum Requirement

In determining whether the 20% of claims requirement has been met in order to hold an election, there is often a dispute as to how to calculate the total claims in a case. Courts have adopted two opposing formulas. The first looks at the total of the proofs of claim on record as of the date of the meeting of creditors. *In re Lake States Commodities*, 173 B.R. 642, 646-47 (Bankr. N.D. Ill. 1994). The other view looks at the "universe of claims" which includes the proofs of claim on file as of the date of the meeting of creditors, plus the debtor's schedules. *In re Michelex, Ltd.*, 195 B.R. 993 (Bankr. W.D. Mich. 1996). This calculation can become complex and tedious, however the total claims starting point could be important depending on the amount of the claims of the creditors seeking the election.

Materially Adverse Interests

"Materially adverse interests" under Section 702(a) is not defined by the Bankruptcy Code, however legislative history provides that "The application of the standard requires a balancing of various factors, such as the nature of the adversity." *In re Klein*, 119 B.R. at 974 citing S.Rep. No. 95-989, 95th Cong., 2d Sess. 92, U.S. Code Cong. & Admin. News 1978, pp. 5963, 6053. "...[M]aterial adversity is measured by the effect on the creditor body as a whole, particularly

by whether the challenged creditor's interest is such that it would tend to minimize distributions to other creditors from the estate... Further, claims between creditors do not reduce the size of the estate and, therefore, also do not reduce the amount available for distribution to other creditors." *Id.*

If the claim in dispute is large, the election may ride on its outcome. Therefore, bankruptcy counsel will not only analyze your client's claim to determine whether it may be "materially adverse" to the creditor, but also may challenge the claim of another creditor, who is not on board with your client's candidate, as materially adverse to knock out that creditor's vote.

Solicitation of Proxies

In the first discussion with a client about a trustee election, bankruptcy counsel will advise the client about the restrictions on solicitation of proxies. Federal Rule of Bankruptcy Procedure 2006 includes specific procedures and rules on the soliciting and voting of proxies. A well-meaning client may begin a solicitation campaign in violation of the rules which jeopardizes the status of key proxies needed to carry the vote. Rule 2006(f) provides that on motion of a party in interest or the court on its own initiative may determine whether there has been a failure to comply with the rules and, if so, the court may reject the proxy or vacate any order entered as a result of counting the rejected proxy.

Conclusion

In sum, the election of a Chapter 7 Trustee can have a meaningful impact on the administration of the case and ultimate recovery for creditors. We are happy to answer any questions you or your client may have as you consider whether the time of an election and expense of legal advice to make sure the proper procedures are followed in the election process may be worth the investment in a particular Chapter 7 case.

Iurillo & Associates, P.A., located in downtown St. Petersburg, is comprised of **Camille J. Iurillo**, Shareholder; **Gina M. Pellegrino**, Associate and **Sabrina C. Beavens**, Associate. The primary areas of practice of **Iurillo & Associates, P.A.** are Commercial and Bankruptcy Litigation, Debtors' and Creditors' Rights, and Foreclosures / Workouts.