

## Litigating in Florida: Updates and Recent Decisions

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### Florida Tort law: Insurance Broker Liable for Supplying False Information Under Restatement of Torts Section 552

The Fourth District Court of Appeal recently reversed the trial court's dismissal of negligence and fraud claims in *Liberty Surplus Insurance Corp., Inc. v. First Indemnity Insurance Services, Inc.*, 4D08-2671, 35 Fla. L. Weekly D497a (Fla. 4th DCA 2010), ruling that an insurance broker may be liable to an insurance company that suffers a loss due to the broker's false representation or omission under Section 552 of the Second Restatement of Torts.

In 2003, a local law firm submitted an application for legal malpractice insurance coverage to an agent who in turn forwarded it to a broker, First Indemnity Insurance Services, Inc. The application included many supplements, listing all disciplinary proceedings, professional liability claims, and lawsuits involving the firm and its members over the last five years. After the application had been rejected by several insurance companies, First Indemnity submitted the application with only 3 of the 14 claims supplements to Liberty Surplus Insurance Corporation, Inc. Liberty issued the policy. In 2005, a claimant filed a class action lawsuit against the law firm seeking \$500 million in damages. Shortly thereafter, First Indemnity submitted a policy renewal application, which included all supplements, which alerted Liberty to the previously undisclosed information. Liberty settled the class action brought against the law firm for \$3 million and brought a lawsuit against First Indemnity. The trial court dismissed

Liberty's claim, holding that according to *Empire Fire & Marine Ins. Co. v. Koven*, 402 So. 2d 1352 (Fla. 4th DCA 1981), an insurer cannot bring an action in tort against the agent of the insured. The Fourth District Court of Appeal reversed and remanded.

Two principal holdings mark this decision. First, the appellate court denied First Indemnity's contention that it could not be liable for nondisclosure of information, as opposed to affirmative misrepresentation. The court found that its "failure is tantamount to supplying false information."

Second, the appellate court held that an insurance broker is liable for its own negligence in supplying false information on which an insurer relies in issuing a policy. The court recognized the general rule that the insurance broker is the agent of the insured, not the insurer, but held that the rule did not preclude Liberty's claims. The court reasoned that *Koven* did not involve a broker's tortious conduct, and since "every person must so reasonably act or use that which he or she controls as not to harm another," an agent can be individually liable to the insurer for his or her tortious conduct. The court also held that Section 552 of the Restatement (Second) of Torts, adopted by the Florida Supreme Court in *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334 (Fla. 1997), applies to insurance brokers.

According to Section 552, "[o]ne, who in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies

false information for the guidance of others in their business transactions" is liable if the recipient of the information justifiably relies on the misrepresentation and suffers loss. In line with the numerous decisions of other courts, the appellate court held that Section 552 applies not only to such professionals as accountants and title agents, but also to the insurance brokers. The court also emphasized that First Indemnity's failure to disclose is equal to supplying false information, since the Florida Supreme Court in *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), stated that "concealment and affirmative representations . . . [b]oth proceed from the same motives and . . . have the same result." Based upon this analysis, the appellate court reversed the trial court's dismissal of the action, holding that the complaint properly stated a cause of action for negligence and fraudulent misrepresentation.

### Businesses Should Be Mindful of U.S. Supreme Court's Recent Simplification of Federal Diversity Jurisdiction Analysis

The Supreme Court of the United States recently issued an opinion with far-reaching implications to corporate litigants. The case of *Hertz Corp. v. Friend*, issued February 23, 2010 (Slip Opinion), addressed the often-presented issue of determining a corporate party's "citizenship" for purposes of diversity jurisdiction under 28 U.S.C. § 1332. The case was filed in California State Court, but Hertz sought to remove the matter to federal district court. The Respondents contested removal, asserting that Hertz was a citizen of California for purposes of diversity jurisdiction

because of Hertz's significant business activities within California.

While the district Court and Ninth Circuit Court of Appeals found that the level of Hertz's business activities within California were significant enough to satisfy the "principal place of business" standard for citizenship under section 1332, the Supreme Court ruled that a "nerve center" standard should be applied when federal courts tackle the question of the state of which a corporate party was a 'citizen' for purposes of diversity. This "nerve center" standard, which focuses on the location from which the corporation's core executive and administrative functions are primarily carried out, should be easier to apply than the variety of tests that have proven less predictable. The "nerve center" standard should provide more certainty to regional or national corporations regarding whether they may reasonably expect to enjoy the protections that federal court removal was designed to provide.

The Supreme Court examined the Congressional origins of the "principal place of business" test, and noted the legislative intent to limit the number of diversity cases; the "principal place of business" standard also reflected a desire to prevent manipulation of federal court jurisdiction by corporate

parties seeking to claim diversity of citizenship strategically rather than with true factual basis, e.g., where a corporation is formed and 'headquartered' in one state but its true *principal* place of business rests in another state.

For years, the question of a corporate entity's citizenship for diversity purposes was subjected to a wide variety of tests, factors and considerations by federal courts. Many courts embarked on factually sensitive and detailed analyses of a corporation's business activities in a particular State, using non-uniform criteria designed to 'weigh' a corporation's business activities in one State versus its activities in other States, to then determine the State in which the corporate party's activities predominated. Not only were such tests rife with significant subjectivity, leading to great uncertainty as to whether federal court diversity jurisdiction would 'stick,' but no process existed thereafter to guard against inconsistent 'citizenship' decisions within the federal court system concerning the same corporate party, even among federal districts within one state.

This condition undercut a corporate party's ability to gauge whether conducting business in a given state exposed the corporation to potentially

unfriendly state court systems, without a meaningful chance to remove litigation to federal court. The notion of being hailed into state courts, across several different states, certainly poses substantial unknown risks to any business.

The Court's decision should help businesses better assess the probabilities of securing federal court diversity jurisdiction if sued within a state in which the businesses operate -- the "nerve center" test will generally provide businesses with a simpler formula to establish its 'citizenship' for purposes of section 1332 jurisdiction. Because the "nerve center" test should result in more consistent and singular determinations of citizenship, it should have the ultimate effect of increasing access to the federal courts under diversity jurisdiction. ■

*\*Courtesy of Berger Singerman's Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

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