

LIABILITY SECTION

Winter 2011

MAIN OFFICE:

First Central Tower
360 Central Avenue,
11th Floor
St. Petersburg, FL 33701
P: 727.821.2080
F: 727.822.3970
www.abbeyadams.com

TAMPA OFFICE:

5001 West Cypress Street
Tampa, FL 33607
P: 813.223.7800

FLORIDA "SUPER LAWYERS"

We congratulate these attorneys who have been named Florida "Super Lawyers." These lawyers were selected through an extensive process of balloting, blue ribbon panel review and independent research. Only 5% of Florida lawyers have received this distinction.



David J. Abbey



Jeffrey M. Adams



Robert P. Byelick



John D. Kiernan



C. Bryant Boydston

IN THIS ISSUE:

Firm News.....	2-3
Auto Insurance Section.....	4-6
Developments in Personal Injury Defense	6
Offers of Judgment.....	7-8
Developing Story: Physician Fraud.....	8-9
The Final Word (For Now) on Provider Write-Downs	9-10
Business Law Corner.....	10
What's New in Employment Law.....	11
Did You Know: Your Non-Binding Arbitration May Become Binding.....	11



FIRM NEWS



Robert P. Byelick has been selected as Chairman of the volunteer Baseball Group "Clutch Hitters of Tampa Bay." The 80-member group of business leaders supports the Tampa Bay Rays' efforts to remain in the area. He

was recently quoted in a related Tampa Bay Business Journal article: "We consider helping the Rays to be business retention, the same as with other business."

Bob Byelick is the Chairman of the Fischer-Carr Scholarship Committee of the Kiwanis Club of St. Petersburg. This year, the Committee raised over \$50,000.00 at its Annual Birthday Bash which will provide thirteen 6th grade students from low income families with free college tuition upon successfully graduating from high school. This brings the total to 188 students since 2004. David Abbey also serves on this Committee.



David J. Abbey attended the Florida Trucking Association Annual Membership Conference held July 28 – 31, 2011 at The Breakers in Palm Beach. This Firm represents motor carriers and their drivers in tort litigation and motor

carriers as employers in employment litigation and workers' compensation claims. The Keynote Address was offered by Barbara Windsor, the ATA Chairman and President & CEO Hahn Transportation, Inc. ATA Chief Economist, Bob Costello provided an optimistic outlook for the trucking industry in the coming years. FDOT Secretary Arianth Prasad commented on the challenges it faces developing and maintaining Florida's roads.



Allison G. Mawhinney attended the Defense Research Institute's 2011 Appellate Advocacy conference held at the J.W. Marriott in Orlando. This Firm represents civil litigants, employers and carriers in a broad array of

appellate matters including medical malpractice, auto negligence, premises liability, and workers' compensation appeals.



Jeff Adams was recently re-elected to the Board of Directors for the Florida Defense Lawyers Association (www.fdma.org). Jeff was a featured speaker at the 2011 Florida Liability Claims Conference held at Disney.

Bob Byelick and **Jeff Adams** attended the recent 2011 Florida Insurance Fraud Education Committee (FIFEC: www.fifec.org) Conference in Orlando.

Abbey, Adams hosted its annual law firm Evening at the Ballpark this fall, and was recognized by the Tampa Bay Rays for its fan loyalty. We will be back next season to support the home team!

Years of Service

Abbey, Adams would like to recognize the following individuals for their many years of loyalty and service to the Firm. Congratulations and many thanks to **Jessica Bergin** for 21 years with the Firm and **Ingrid Saylor** and **Nicki Wagner** for 20 years with the Firm.



Alexis Upton joined the firm in June 2011 and practices in various areas of civil defense litigation. Prior to joining the Firm, Ms. Upton served as an Assistant State Attorney for the Sixth Judicial Circuit in Pinellas County, Florida for

approximately 4 years. Alexis tried over 35 jury trials over the course of her employment at the State Attorney's Office.



Michael Auchampau joined Abbey Adams in February 2011. Michael has handled the defense of workers compensation cases throughout the State of Florida and represents employers and insurance carriers in

employment law-related matters.



From left to right: Pace Mawhinney, Allison Mawhinney, Michael Auchampau, Alexis Upton

Abbey, Adams sponsored the Community Law Program's "Celebration of Equal Access" and Volunteer Appreciation Dinner on September 27, 2011. President-elect of the Florida Bar, Gwynne Young, gave the keynote address and commended the local Bar on its service to the community.

FIRM NEWS

AUTO INSURANCE SECTION

AUTO INSURANCE SECTION:

Family exclusion in auto policy deemed unambiguous:

State Farm Mut. Auto. Ins. Co. v. Menendez, 2011 WL 3715044 (Fla. 2011).

After a hiatus from addressing “household exclusions” in auto liability policies, the Florida Supreme Court has recently reaffirmed the exclusion is not ambiguous and will operate to bar coverage for liability claims by an “insured” or resident relative of an “insured” as that term is defined in the policy.

This opinion arose from a motor vehicle accident in which a State Farm insured allowed a non-resident relative to drive her vehicle. The permissive driver was involved in an accident which caused injuries to the vehicle passengers. The injured passengers were non-resident relatives of the named insured and resident relatives of the permissive driver. The passengers brought a declaratory action seeking a determination the State Farm policy provided coverage for their claims against the named insured. The policy in question included a “household exclusion” barring coverage for liability claims brought by any insured, or any resident relative of an insured. Hence, State Farm argued the policy did not provide coverage for the passengers’ claims since the permissive driver qualified as an “insured” under the policy and the injured passengers were resident relatives of the driver. The trial court entered summary judgment in favor of the passengers.

On appeal to the Third DCA, the Court determined the household exclusion clearly barred coverage for any claims that might be raised by the permissive driver

but held the exclusion was ambiguous as applied to the passengers. The Florida Supreme Court quashed the decision of the Third DCA to the extent it found the household exclusion ambiguous and stated “that the household exclusion provision in the policy issued to Mendez unambiguously applied to claims by members of the household of a permissive-driver insured.” *Id.* at 1.

Title is not dispositive of ownership:

Mary Jo Bowen v. Mary Gregory Taylor-Christensen, et al., 2011 WL 3754623 (Fla. 5th DCA 2011).

The Fifth DCA recently reaffirmed the principle that beneficial interest, as opposed to title, is the bellwether of ownership. While changing a tire on the side of I-95, Mary Jo Bowen’s husband was struck by a vehicle purportedly owned by Robert Christensen and operated by his ex-wife, Mary Gregory Taylor-Christensen. Ms. Bowen, as personal representative of her husband’s estate, brought suit against Mr. Christensen as the co-owner of the vehicle that struck her husband. Ms. Bowen appealed the final judgment entered against her on her claim for Mr. Christensen’s vicarious liability.

Mr. Christensen and his ex-wife separated in 1999. Four years later, he bought his ex-wife a car which she drove during the fatal accident. Mr. Christensen testified he intended the car to be a gift for his ex-wife and they both signed all paperwork relating to the vehicle purchase. The title identified “Mary Taylor-Christensen or Robert Christensen” as the owners. Mr. Christensen drove the car once, the day after it was purchased, and was never behind the wheel again. In the ensuing two years, Mr. Christensen never had access to the car, never had a key, never insured it, and never had it registered. Hence, Mr. Christensen denied any vicarious liability for the accident on the basis he

had no “beneficial ownership interest” in the vehicle. The trial court agreed and entered final judgment accordingly.

The Fifth DCA agreed with the reasoning of the trial court, finding title alone does not trigger liability. Rather, beneficial ownership of a vehicle is the key to vicarious liability. Whether a title-holder possesses mere naked title or is the beneficial owner of the vehicle hinges on whether the titleholder had control and authority over the use of the vehicle. If the evidence establishes the title-holder has beneficial use of the vehicle, then the trial court is authorized to rule as a matter of law, the titleholder is liable under the dangerous instrumentality doctrine. In this case, Mr. Christensen made a gift to his wife and relinquished all access, use and control of the car immediately after purchase. Thus, the Fifth DCA affirmed the judgment of the trial court, finding the trial court properly declined to direct verdict as mere title was not enough to make Christensen liable under the dangerous instrumentality doctrine.

“Out-of-State” Anti-Stacking Provision May Not Be Enforceable:

Rando v. GEICO, 39 So. 3d 244 (Fla. 2010).

Parents who purchase auto insurance for their out-of-state children may be entitled to UM coverage not only under their own policies but under those of their children. In *Rando v. GEICO*, 39 So. 3d 244 (Fla. 2010), the Florida Supreme Court considered the following question certified from the 11th Circuit Court of Appeals: Whether an auto policy which was executed, issued and delivered in Florida for a car that is registered and garaged out-of-state to be principally operated by an out-of-state resident may properly include an anti-stacking provision as permitted under the laws of that state.

The Randos lived in Delaware where they initially purchased a single GEICO policy. When they moved

to Florida, their daughter and one of their vehicles stayed in Delaware. Mr. Rando contacted GEICO and requested the family’s policy be changed to reflect the fact that two cars would now be garaged in Florida, and the third, registered in Delaware, would remain in that State with its primary operator, Mr. Rando’s daughter. GEICO therefore issued a new Delaware-rated policy for the daughter’s vehicle and amended the pre-existing policy to reflect Mr. and Mrs. Rando’s change of residency. The Delaware policy identified Mr. Rando and his wife as the named insureds and their daughter as the primary operator. In addition, the Delaware policy expressly indicated the vehicle was principally garaged in Delaware.

When Mr. Rando was involved in a serious accident in Florida, he sought coverage under both the Florida policy and Delaware policies. GEICO paid the stacked limits of the Florida policy but denied coverage under the Delaware policy citing its anti-stacking provision. The provision in question was authorized under Delaware law. The Randos filed suit against GEICO and the Middle District granted summary judgment to the insurer. The Randos appealed and the 11th Circuit Court of Appeals certified the above question to the Florida Supreme Court.

The Florida Supreme Court determined that the disputed policy, executed in Florida, albeit to insure a risk centered in Delaware, was required to comply with Florida law pursuant to Florida choice of law principles. Florida law required GEICO to obtain its insureds’ informed consent under §627.727(9) Fla. Stat., in order to prohibit stacking of multiple UM policies. Since GEICO failed to obtain such consent, the anti-stacking provision of the Delaware policy was deemed invalid and unenforceable.

AUTO INSURANCE SECTION

DEVELOPMENTS IN PERSONAL INJURY DEFENSE

This case demonstrates that even a policy rated for another state, covering an out-of-state vehicle and driver, may be subject to Florida law if it is executed in Florida. With policyholders routinely purchasing coverage for college-bound children or other out-of-state family members, this case illustrates the importance of accounting for potential conflicts of law from the outset.

DEVELOPMENTS IN PERSONAL INJURY DEFENSE

Medical billing experts

State Farm Mut. Auto. Ins. Co. v. Bowling, 2011 WL 2652340 (Fla. 2d DCA 2011).

Insureds facing personal injury claims received a favorable outcome in the case of *State Farm Mut. Auto. Ins. Co. v. Bowling*, 2011 WL 2652340 (Fla. 2d DCA 2011). The defense bar has fought an uphill battle concerning the admissibility of expert testimony to challenge a plaintiff's medical bills. The *Bowling* Court considered precisely this issue and reversed a trial court's order precluding testimony from a medical bill examiner. At trial, the defense sought to introduce testimony from a billing expert that plaintiff's medical bills included a variety of entries for treatment not reflected in the records. The expert testified — of \$278,000 in medical bills — \$111,000 was not supported by the medical records. Plaintiffs sought to exclude the testimony arguing the expert was unqualified to render an opinion as to the reasonableness of the bills and that the testimony would not assist the jury. The trial court granted the motion determining "the testimony of the witness will not assist the jury in determining whether Mr. Bowling's medical bills are reasonable; and that [the expert] was not 'qualified to render an opinion as to the reasonableness of those bills.'" *Id.* at 1.

The Second DCA disagreed and determined the medical billing expert's "testimony would have assisted the jury in determining whether Mr. Bowling's medical bills, on which he based his claim for damages, accurately reflected the treatment he was documented to have received. This issue was directly relevant to whether Mr. Bowling's claimed medical expenses were reasonable and necessary." *Id.* at 2.

Further, the Court found the expert was qualified to render the disputed opinion in light of her specialized knowledge and training concerning medical bill coding and supporting medical record documentation.

In reaching its decision, the Second DCA cited constitutional concerns centered on a litigant's 14th Amendment due process rights, including the right to call witnesses. A litigant's interest in that right is particularly compelling when "the witness sought to be excluded is a party's only witness or one of the party's most important witnesses because if the witness is stricken, that party will be left unable to present evidence in support of his or her theory of the case." *Id.* at 3., (citation omitted). Thus, the Second DCA reversed the final judgment entered below and remanded the matter for new trial.

The split opinion was met with motions for rehearing, clarification and motions to file *amicus curiae* briefs which have been granted. Hence, we have yet to receive the final word on this opinion. Nonetheless, the majority's leaning reflects a positive shift in the tide of expert testimony concerning medical bills.

"Expert" Discovery

Katzman, et al., v. Rediron Fabrication, Inc., et al., 2011 WL 3477093 (Fla. 4th DCA 2011).

Defendants in this personal injury action sought

discovery concerning a discectomy performed by Dr. Katzman following a auto accident. Dr. Katzman billed in excess of \$45,000.00 for the procedure, which lasted less than 45 minutes. The defendants sought information regarding the amount Dr. Katzman collected from health insurance carriers for the three years prior to the accident, and what he collected under letters of protection for the same time period.

The Court found that Dr. Katzman was a "hybrid" witness, not just a treating physician. As such, the Court allowed the discovery to examine "whether the expert has recommended an allegedly unnecessary and costly procedure with greater frequency in litigation cases, and whether the expert, as a treating physician, allegedly overcharged for the medical services at issue in this lawsuit." *Id.* at 4. The Court allowed the limited intrusion into the financial affairs of the expert despite the wording of Fla. R. Civ. P. 1.280.

OFFERS OF JUDGMENT

Proposals In Excess of Policy Limits

Gonzalez v. Claywell, 2011 WL 3558161 (Fla. 1st DCA 2011).

The First DCA has determined a proposal for settlement in excess of the offeree's policy limits is invalid. Roger Gonzalez and Dawn Claywell were involved in a motor vehicle accident in which Ms. Claywell was injured. She sued Mr. Gonzalez who was insured under a GEICO policy providing \$25,000.00 in bodily injury liability coverage. Ms. Claywell served upon Mr. Gonzalez a proposal for settlement by which she "offered to settle her lawsuit for \$240,000.00 if Gonzalez's insurance company, GEICO, tendered a check in the amount of \$240,000.00 made payable to

her." *Id.* at 1. Mr. Gonzalez did not accept the offer. Following a favorable judgment, plaintiff sought and was awarded her attorney's fees based upon the offer of judgment.

On appeal, the First DCA reversed the fee award. The Court determined the proposal for settlement was invalid since it would have been impossible for Mr. Gonzalez to meet the conditions of the offer which required him to compel GEICO to pay an excess settlement. "Specifically the proposal required that GEICO, a non-party, tender a check well in excess of the policy limits of \$25,000.00 even though there has been no determination that GEICO is liable to pay more than its policy limits." *Id.* Hence, the offer of judgment was deemed unenforceable and the related fee award was reversed.

Joint Proposals

Andrews v. Frey, 66 So. 3d 376 (Fla. 5th DCA 2011).

Shannon Frey was the active tortfeasor in this case stemming from a motor vehicle accident. Her father, Rudolphe Frey, was the vicariously liable co-defendant. The Freys were sued by Kimberly Andrews and her minor daughter, Kyla Andrews. Shannon Frey served essentially identical proposals for settlement on each plaintiff and required the execution of a full release as to both defendants. The Fifth DCA held that even though the proposals conditioned acceptance on releasing both the Freys, this did not create ambiguity or transform them into joint offers.

The Court explained both plaintiffs had independent control to settle, and neither had an "independent claim against Rudolphe Frey to evaluate or settle." *Id.* at 379. The Court reached this conclusion because the issues of negligence and vicarious liability were not disputed, and there was no independent claim

OFFERS OF JUDGMENT

for separate liability against Rudolphe Frey. The Fifth District ended the opinion by joining the Eleventh Circuit Court of Appeals—in the case of *Auto Owners Ins. Co. v. SE Floating Docks, Inc.*, 632 Fed. 3d 1195 (11th Cir. 2011)—in certifying this question to the Florida Supreme Court: whether the term “joint proposal” in Rule 1.442(c)(3) applies to cases in which acceptance of the offer is conditioned upon dismissal with prejudice of an offeree’s claim against an offeror and a third party.

Improper Closing Arguments

City of Orlando v. Carmen Pineiro, as Personal Representative, etc., 66 So. 3d 1064 (Fla. 5th DCA 2011).

In the course of an alleged high-speed pursuit involving the Orlando Police Department, the fleeing criminal collided with another motorist resulting in fatal injuries to the motorist. His estate settled a civil lawsuit against the fleeing motorist, and the case proceeded to trial against only the City of Orlando. The Fifth District Court of Appeal ordered a new trial finding that plaintiff’s counsel’s objected-to arguments during closing went too far. Plaintiff’s counsel argued that unless the City was found responsible for the accident, the City would be “laughing” at their verdict. The Court also found improper a series of arguments concerning the value of the decedent plaintiff’s life. The Fifth District held that the argument should have been limited to the elements of damages in a wrongful death trial. Plaintiff’s counsel’s argument which went way beyond those elements was held to have deprived the City of Orlando of a fair trial. Although not grounds for reversal, the Court also spent time discussing unobjected-to comments made by plaintiff’s counsel in the trial. The Court criticized plaintiff’s counsel’s analogy involving a professional basketball player, accusing defense counsel of “doing whatever it takes” to win, and accusing the testifying

officers of having no remorse or not apologizing, as all being improper. The Court also held that the evidence of the criminal defendant’s guilty plea to the crime of DUI manslaughter and his conviction should have been admitted in the trial. One of the witnesses who testified for the plaintiff had been arrested by the Orlando Police Department on prior occasions. Those arrests did not result in a felony conviction for a crime of dishonesty. The Fifth District suggested those arrests were appropriate topics to expose the witness’s bias against the Orlando Police Department.

DEVELOPING STORY

PHYSICIAN FRAUD

State Farm Mut. Auto Ins. Co. v. Kugler, 2011 WL 4389915 (S.D. Fla. 2011).

State Farm has brought suit alleging twelve defendants conspired to defraud the insurer and other similar insurers “by performing medically unnecessary diagnostic tests and surgical procedures on persons involved in automobile accidents.” *Id.* The patients were referred to the medical providers by certain “favored personal injury attorneys.” *Id.* State Farm alleges the medical providers ordered medically unnecessary discograms and discectomies for which the insurer, in its capacity as PIP, UM or BI carrier, was fraudulently induced to pay in excess of \$13,000,000.00. Percutaneous lumbar discectomies performed by the defendants were reported to comprise 30% of all such procedures performed at every ambulatory center in Florida from 2005 to 2008. *Id.* While the final resolution of this case remains to be determined, the defendants’ motion to dismiss based upon State Farm’s purported failure to state claims under RICO, Florida’s Deceptive and Unfair Trade Practices Act, and Florida common law fraud and

unjust enrichment theories was denied in its entirety by a recent Order from the Southern District.

THE FINAL WORD (FOR NOW) ON PROVIDER WRITE-DOWNS

Over the course of the last decade, the defense bar has fought introduction of the full amount of medical bills incurred by personal injury plaintiffs. This is because medical bills are so often reduced by the medical provider him/herself by accepting an amount far below the amount of the bill in full satisfaction of the so-called debt. For example, in *Cooperative Leasing, Inc. v. Johnson*, 872 So. 2d 956 (Fla. 2d DCA 2004), the Second DCA considered whether it was proper for a plaintiff to admit the full amount of medical bills into evidence even though providers accepted lesser amounts from Medicare in full payment of those bills.

The Second DCA determined the “trial court should have granted the appellant’s motion in limine and prohibited Johnson from introducing the full amount of her medical bills into evidence. *Id.* at 959. The plaintiffs’ bar has attempted to limit the application of this case by pointing to the fact the adjustments at issue were based on Medicare reimbursement rates beyond which a provider may not seek recovery from the patient, or any other source.

The following year, the Supreme Court considered application of provider adjustments. In *Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005), the plaintiff introduced and was awarded the full amount of medical bills even though providers accepted less as full payment. After trial, the defendant was granted a set-off of the amounts that were written off by medical providers. The Second DCA, and later the Supreme Court, upheld the set-off on the basis medical expense awards should be reduced to the amount plaintiff is actually required to pay; and courts should permit

these set-offs where the alternative is a windfall to the injured party. In reaching this determination, the *Goble* Court commented provider write-offs qualify as collateral sources under §768.76, Fla. Stat. That determination and the procedural background of the case provided a basis for the plaintiffs’ bar to argue the set-off should be applied post-trial as opposed to being addressed via motion in limine as to the full amount of medical bills.

In the following years, Florida trial courts struggled with the proper treatment of provider adjustments. In 2010, the First DCA in *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So. 3d 1084 (Fla. 1st DCA 2010), provided its answer. The plaintiff prevailed on a claim against Nationwide as UM carrier. Nationwide appealed arguing the trial court erred in permitting plaintiff to introduce the full amount of medical bills when providers accepted lesser amounts from a private health insurance carrier in full satisfaction of the bills.

The First DCA found “the trial court correctly ruled that appellee was entitled to introduce into evidence (and to request from the jury) the gross amount of her medical bills, rather than the lesser amount paid by Appellee’s private insurer in full settlement of the medical bills.” *Id.* at 1087.

More recently, the Fifth DCA reached a similar conclusion in *School Board of Sumter Co. v. Brown*, 54 So. 3d 610 (Fla. 5th DCA 2011). By its *per curiam* affirmance, the Third DCA “conclude[d], as did the trial judge, that the contractual discounts associated with the plaintiff/appellee’s medical bills fall within the statutory definition of ‘collateral sources...’” *Id.* at 611. Similarly, in *Durse v. Henn*, 2011 WL 2622370 (Fla. 4th DCA 2011), the Fourth DCA reversed a trial court’s order precluding an uninsured plaintiff from introducing the full amount of his medical bills at trial where he personally negotiated and his providers

accepted lesser amounts.

Collectively, these cases illustrate Florida courts' unwillingness to consider provider write-offs prior to trial or to limit a plaintiff to presenting only those medical bills for which he or she is actually liable. For this reason, it is important for practitioners to conclusively establish the amount of claimed medical expenses that have been written off in order to preserve his or her client's right to a post-trial set-off of those amounts.

**BUSINESS
LAW CORNER**

BE CAREFUL WITH YOUR BANK DEPOSITS

Many individuals and business people alike do not realize their potential liability to their bank for a dishonored deposit into an individual or business account. With the rise of internet scams and counterfeit checks, this has become an increasing problem for businesses of every type, including law firms and title companies, as well as individuals.

Under the Federal Banking Rules, you as the depositor are responsible to the bank if a check that you deposit turns out to be "bad." There have been many recent examples in which a business, including a law firm, received a check as payment of a bill or an amount collected for a third party to whom the funds will be ultimately transferred. The check appeared genuine, and in some cases was even a bank check, certified check or cashier's check. Upon receiving such a check, you may deposit it into your account. Once the appropriate time has passed, the funds are then disbursed either to the third party for whom you collected the payment, or perhaps to pay bills or payroll for your business. The deposit then turns out to be no good. Even if you had requested that the bank hold this money for a longer than normal time

to be sure it cleared, the bank is not responsible. You are on the hook to the bank to replenish the account in the amount of the shortage caused by the bad deposit.

As you can imagine, this can place your business or firm in an unexpectedly bad position. This is the reason many title companies now insist on money being wired into their accounts before disbursement rather than accepting checks in real estate closings. In fact, even title companies have been victims of scams in which they gave a check to the individuals who were supposed to receive the disbursement from a sale. Unbeknownst to the title company, the individuals holding the checks deposited the funds electronically by taking a snap-shot of the check with a smart phone and forwarding it to the bank. The bank receives the image, and processes the deposit. In this scam scenario, the next day, the individuals return the check to the title company saying they would rather have the money directly deposited into their account. Without realizing the individuals already electronically deposited the funds, the title company gives them a duplicate amount through a wire transfer and the title company is out the money.

In the digital age more than ever, we must be vigilant of the risks involved in accepting money from those with whom we are not familiar, and have not done business on a regular basis. You should discuss with your banker what his or her policy is on these matters and what suggestions they have to help you protect yourself from these types of scams.

**WHAT'S NEW
IN EMPLOYMENT LAW?**

**Misclassification of Independent
Contractors in the Crosshairs**

The U.S. Department of Labor recently announced the signing of a "memorandum of understanding" with the IRS in which they will now actively share information about businesses that misclassify employees as independent contractors. You can expect to see an increase in enforcement efforts by these agencies.

**Wage and Hour Division "App" for Smart
Phones Tracks Employee Hours**

The U.S. Department of Labor recently launched its first application for smart phones, a timesheet to help employees independently track the hours they work and determine the wages they are owed. It is available in English and Spanish and allows users to track regular work hours, break time and any overtime hours for one or more employers. This new technology can be used by employees when an employer has failed to maintain accurate records. The free app is currently compatible with the iPhone and iPod Touch. For workers without a smart phone, the Wage and Hour Division has a printable work hours calendar in English and Spanish to track rate of pay, work start and stop times, and arrival and departure times. The calendar also includes information about workers' rights and how to file a wage violation complaint.

Facebook Firing

A recent Administrative Law Judge (ALJ) decision concluded that a non-profit corporation unlawfully terminated employees for engaging in concerted, protected activity and ordered all five employees

reinstated with back pay and interest. In *Hispanics United of Buffalo, Inc. v. Ortiz*, employees posted comments on Facebook about a co-worker in response to that co-worker's complaints about the general job performance of other employees. The co-worker complained to management that the employees' comments constituted "cyber-bullying." Management concluded that the comments violated the employer's harassment policy and terminated the employees. After a hearing, the ALJ determined that the Facebook discussion was concerted, protected activity under the NLRA since the discussion involved the terms and conditions of employment. The ALJ further found that the comments were not in violation of the employer's harassment policy.

Although this decision is only the decision of a single ALJ and not a decision of the entire Board, it is important because the NLRA covers both union and non-union employers, and both for-profit and non-profit employers in some cases. All employers, whether union or not, must be careful in taking disciplinary action against employees based upon their comments in social media.

DID YOU KNOW:

**Your "Non-Binding" Arbitration May
Become Binding**

Florida Rule of Civil Procedure 1.820 and Florida Statute §44.103 set forth general guidelines for conducting a "non-binding" arbitration. Litigants beware—when read together, these provisions provide your "non-binding" arbitration decision will become final if you fail to file a "Motion for Trial" within twenty (20) days of the date the arbitration decision is served upon you!

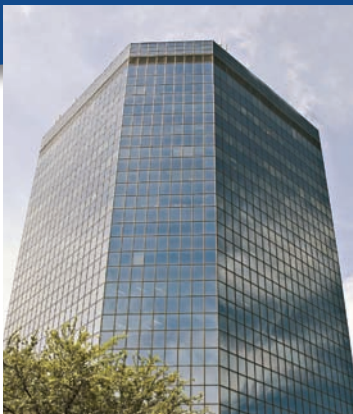
ABBHEY ADAMS

ABBHEY • ADAMS • BYELICK • KIERNAN • MUELLER • MARONE • SAMIS • LLP

ATTORNEYS AT LAW

First Central Tower
360 Central Avenue, 11th Floor
St. Petersburg, FL 33701

PRSR STD
U.S. POSTAGE
PAID
Permit 246
St. Petersburg,
FL 337



If you have an interest in a firm seminar listed, please contact Donna Ernst at:
dernst@abbeyadams.com

Continuing Education Seminars:

The Firm regularly provides seminars on topics of particular concern to its clients. These seminars are approved for continuing education credits for adjusters and some have been approved for continuing education credits for attorneys. They provide an excellent opportunity to discuss emerging areas of the law, including:

- ✓ *Practical Applications of New Law changes to WC Medical Benefits And WC Fraud*
- ✓ *Special WC Issues for the Employer*
- ✓ *Ethical Issues in WC Claims Handling*
- ✓ *Handling the ALE Disaster*
- ✓ *Proving and Defending Pre-Existing Damage*
- ✓ *Premises Liability Primer*
- ✓ *Liens/Subrogation/Reimbursement*
- ✓ *Defending the Questionable Disc Injury Claim*
- ✓ *Defending the TMD Claim*
- ✓ *Comparative Negligence & Joint and Several Liability*