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**PALM
BEACH
COUNTY**

Spring 2002

BOCA RATON / FT. LAUDERDALE / MIAMI / ORLANDO / TALLAHASSEE / TAMPA / WEST PALM BEACH

**Commercial
Property Owners
and Tenants
Beware**

STEVEN PARRISH

**Costly ADA "Public
Accommodation" Lawsuits**

Over the last few years, thousands of lawsuits under the Americans with Disabilities Act ("ADA") have been filed (unfairly in our judgment) against commercial property owners and tenants. The lawyers filing these cases have taken advantage of a legal loophole in the ADA which allows persons with disabilities to file claims for supposed ADA violations without

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REAL ESTATE LAW:

**Using Enforceable
Exculpatory Language**

CLIFFORD HERTZ and STACEY HALPERN

Learn what Florida courts consider when deciding exculpatory claims and what you can do to protect your business

Many businesses and individuals use exculpatory contractual language, such as indemnification clauses and hold-harmless agreements, in order to protect themselves against future liability. However, as Florida law generally disfavors the use of such exculpatory language, drafters of these contractual provisions must become skilled artisans in order to navigate through the intricacies of Florida law. Even the most carefully drafted exculpatory language can

be voided as shown in University Plaza Shopping Center, Inc. v. Stewart, 272 So. 2d 507 (Fla. 1973) in which an indemnification clause in a lease could not protect a landlord from liability to a Tenant when a gas line exploded under the leased premises.

Florida courts consider multiple factors in deciding whether to enforce exculpatory clauses, including but not limited to:

EXCULPATORY continued on page 3

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SPOTLIGHT:

The Importance of Uninsured Motorist Coverage

JEFFREY GORDON, BOARD CERTIFIED CIVIL TRIAL ATTORNEY

Many vehicle owners believe that they have “full coverage” on their automobiles. This belief may be based on what vehicle owners think their insurance agent told them. Unfortunately, sometimes vehicle owners find out too late that what they thought was “full coverage” is something significantly less than that.

Many accidents in Florida involve vehicle owners that do not carry Bodily Injury insurance or that carry limits of Bodily Injury insurance lower than the damages sustained by the victims of an accident. When a vehicle does not carry any Bodily Injury insurance, that vehicle is known as an “unin-

If an occupant of a vehicle is injured in an automobile collision caused by an uninsured motorist, the only remedy would be a judgment personally against the vehicle owner or driver, which may not prove to be worth anything if the owner or driver has no assets.

Many victims of automobile accidents unfortunately find out the hard way that what they thought was “full coverage” was not. If the owner/driver of a vehicle which caused an accident has no Bodily Injury coverage, and the injured victim carries no uninsured motorist coverage, there could be no recourse for the injured party.

Uninsured motorist coverage is



this coverage are on top of the premiums for basic Personal Injury Protection, Collision and Bodily Injury. Many unknowingly decline the uninsured motorist coverage without really meaning to do so. This has significant and far-reaching consequences.

All insured vehicle owners should check the declarations page of his or her automobile insurance policy to make sure uninsured/underinsured motorist coverage is included. If this coverage is not listed on the declarations page of the insurance policy, the automobile owner does not have this coverage. The uninsured motorist coverage is the only coverage that protects you and your family. **BC**

For more information, contact Jeffrey Gordon, who specializes in personal injury litigation, at Broad and Cassel's West Palm Beach office at 561-832-3300 or by email at jgordon@broadandcassel.com.

MANY UNKNOWINGLY DECLINE THE UNINSURED MOTORIST COVERAGE WITHOUT REALLY MEANING TO DO SO. THIS HAS SIGNIFICANT AND FAR-REACHING CONSEQUENCES.

sured” vehicle. When a vehicle carries Bodily Injury limits that are less than the damages sustained by a victim, that vehicle is called an “underinsured” vehicle.

an additional coverage that must be offered to all owners of vehicles under Florida law. In order to decline this coverage, it must be done in writing. The premiums for

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ADA *continued from cover*

providing any prior notice of a problem to the property owner or tenant. As a result, the landlord has no opportunity to correct an ADA violation of which he has no prior knowledge. While the named Plaintiffs in these lawsuits cannot recover monetary damages, the lawyers can collect their “reasonable” attorney fees if they are able to prove a violation of the ADA.

The result is what Congressman Mark Foley and others have called, “Legal Extortion.” Knowing that most businesses cannot afford a prolonged proceeding in federal court, these lawyers file lawsuits first and often require payment of \$3,000 to \$10,000 in attorney fees and costs to quickly settle the case after the Defendant agrees to make relatively simple and inexpensive modifications to the property.

Virtually all persons or entities owning or leasing property where the public is invited to do business are covered by the ADA and are required to make “readily achievable” modifications or

alterations that make their premises accessible to the disabled. However, many of those covered by the ADA are not aware that ADA violations exist until they receive the lawsuit.

A common misconception exists that a modification permitted and approved by the city or county building department complies with the ADA. This is not always the case.

In addition, evolving ADA guidelines mean that structures which were compliant with the ADA 10 years ago may not be compliant with the ADA architectural and accessibility guidelines that exist today.

Broad and Cassel has defended numerous ADA public accommodation lawsuits and can help you reduce or limit the risk of an ADA lawsuit before it is filed. **BC**

For more information, contact Steven M. Parrish, who specializes in employment law and the ADA, at Broad and Cassel's West Palm Beach office or by email at sparrish@broadandcassel.com.

EXCULPATORY *continued from cover*

- the language of the contract;
- the relative bargaining power of the parties;
- public policy considerations;
- statutory constraints; and
- the conspicuousness of the language in the contract.

Florida law prohibits a party from limiting itself from liability for intentional or reckless harm. In addition, contractual language that serves as limitation of liability for a party's own negligence is disfavored under Florida law, unless the intent of the parties is “clear and unequivocal.” See *Banfield v. Songea Louis*, 589 So. 2d 441 (Fla. 4d DCA 1991).

Broad release language such as “indemnify against any and all claims” has been found unenforceable to relieve a party from its own negligence. It is recommended that a contractual provision limiting a party's liability be broadly drafted to protect against future contingencies, yet precisely stated to be enforceable in court. **BC**

For more information, contact Clifford I. Hertz or Stacey Halpern, who practice real estate law at Broad and Cassel's West Palm Beach office, at 561-832-3300 or by email at chertz@broadandcassel.com or shalpern@broadandcassel.com.

West Palm Beach celebrates new office, new partner, new associates

The West Palm Beach office recently celebrated its relocation to downtown West Palm Beach overlooking the inter-coastal waterway, on the fifth floor at One North Clematis. More than 300 clients, colleagues and friends attended the grand opening event held on March 6.

“We moved downtown to be in the heart of the business community. We feel this location is better for our clients who can valet park here and easier for

litigators who can walk to the courthouse. We are also excited to be a part of the expansion occurring in the downtown area,” said Managing Partner Patricia Lebow.

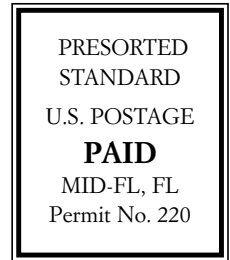
As part of the expansion of the Corporate Practice Group, Kathleen Deutsch, formerly a partner in Broad and Cassel's Miami office specializing in corporate and securities law, has moved her practice to the West Palm Beach office.

Michael Flam was named partner in the firm on January 1, 2002. He is a member of the firm's Real Estate Practice Group.

The West Palm Beach office welcomes lawyers Daniel Miller and Celeste Marcks. As associates with Broad and Cassel, Miller and Marcks are members of the Commercial Litigation Practice Group. **BC**



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The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

Take Advantage of New "Springing" Durable Powers of Attorney

MIKE DRIBIN

Last year, the Florida legislature enacted a significant, highly desirable change to the Florida Durable Power of Attorney statute. This statute generally permits one to grant broad authority to another individual to deal with the financial, tax and other economic affairs of the Grantor (the person giving the authority). It is one of the more standard documents prepared as part of an estate plan.

A common concern of clients was the fact that the documents become effective upon execution.

In other words, if the power of attorney were delivered to the person to whom the power was granted (referred to as the "Attorney-in-Fact"), that Attorney-in-Fact has the legal authority to immediately use the power that is reflected in the power of

attorney. Previously, use of the power of attorney could not be conditioned upon a future event, such as the Grantor becoming incapacitated.

The new legislation, which became effective January 1, 2002, permits an individual to condition the authority to use the power of attorney on the existence of an inability on the part of the Grantor to "manage property." This is defined as the inability to take those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits, and income.

The statute imposes a requirement that an affidavit be executed by the primary physician for the Grantor (the physician who has the responsibility for the treat-

ment and care of the Grantor) that the Grantor's inability to manage property has arisen.

The power to have this condition arise before the Durable Power of Attorney is effective, known as a "springing" power, is a reason to reconsider existing Durable Powers of Attorney for potential revision.

We recommend that each of our clients who has a Durable Power of Attorney, and who wants to specifically have the power "spring" into existence only in the event of an inability to manage property, consider whether he or she desires a new springing power of attorney. **BC**

For more information, contact Mike Dribin, who specializes in probate and trust litigation, by email at mdribin@broadandcassel.com or plebow@broadandcassel.com.