FORAN GLENNON PALANDECH PONZI & RUDLOFF PC

Legal Reflections

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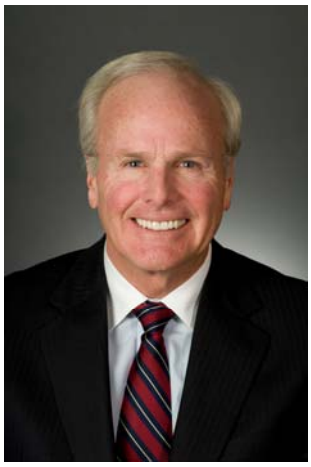
FORETHOUGHT

by G. Edward Rudloff, Jr., Esq.



G. Edward Rudloff, Jr.

Happy Holidays, Friends.

There has been an air of excitement around here over the last six months following the merger of Rudloff Wood & Barrows LLP with Foran Glennon Palandech & Ponzi PC. The new firm, Foran Glennon Palandech Ponzi & Rudloff PC, is one born of optimism for the future. We look forward to providing our clients with top quality legal services coupled with a cost effective approach on an expanded national and international platform. With about 35 attorneys based in offices in Chicago, Newport Beach, and the San Francisco Bay Area, the firm offers our existing and future client base expertise in the areas of property and casualty coverage, bad faith defense, the defense of errors and omissions claims against the medical industry, insurance brokerage, and architectural and engineering community, construction, product liability, casualty defense, along with a healthy dose of high end subrogation practice.

A merger is like a marriage. Its success is dependent upon common goals and objectives and a focused vision of the future. The synergism of the players is equally important. In our case, both merging firms had spent a number of years working together on matters of large, complex litigation, including the successful defense of the market of property insurers in the County of Los Angeles Northridge Earthquake litigation.

The "former" Foran Glennon was created in 2001 as a spinoff of a large Chicago based law firm and celebrates its tenth anniversary next year. Those of us in the Bay Area office of FGPPR began working together more than a quarter of a century ago in several large San Francisco firms before organizing RWB in 1998.

Our plan for the future includes growth. Our enthusiasm is boundless. From the mid-west and the west, we look east to the prospects of opening potential offices with a FGPPR presence in all quarters of the geographic United States.

Meanwhile, the new firm continues with our quarterly luncheon seminars originated several decades ago by our San Francisco lawyers. On November 12, an audience of roughly thirty clients, friends, and local FGPPR attorneys, were treated to a very well presented, informative discussion on the subject of Builders Risk Loss and Subrogation. Our speakers were Peter Evans of Evans Adjusters, Trevor Crossley of Madsen, Kneppers & Associates, Inc. and our own managing partner, Jim Glennon, of the Chicago office. Jim has an illustrious history of success in subrogation matters; Trevor is a construction consultant par excellence; and Peter is at the top of the game in large loss adjusting, appraisals, and expert witness work. We welcome our clients to attend (or present) at our future seminars. If you wish to be on our list of invitees, just be in touch with us and we will make the arrangements.

Well, friends, enough for now. Enjoy this new and different edition of the *FGPPR Legal Reflections*. In it, we publicize our recent trial successes, along with some of our other professional and personal accomplishments. As always, our thanks to Rose Njugu for her fine efforts in editing this issue.

Be safe during the upcoming holidays. Health and happiness to you and your families along with prosperity in 2011.

FGPPR 2011 AND BEYOND

By James B. Glennon, Esq., President

James B. Glennon

With the addition of G. Edward Rudloff, Jr. and Marjie D. Barrows and the other fine professionals in the Emeryville, California office, Foran Glennon Palandech Ponzi & Rudloff is about 35 lawyers strong with offices in Northern California, Southern California and Chicago. Together, we have been overwhelmed by the support and well-wishes received from so many of our friends and clients.

The merger of our practices will allow all of us to continue to provide comprehensive litigation services to our clients in a cost effective manner and better serve our clients' needs throughout the United States and internationally.

In 2011, FGPPR celebrates its tenth anniversary. We owe our continued success to our various clients and thank them for their confidence and support. As we approach our tenth anniversary, we look forward to continued joint success with our clients and the further growth and expansion of FGPPR.

FGPPR OBTAINS JUDGMENT FOR INSURERS ON $30 MILLION FLOOD AND BAD FAITH CLAIMS

Matthew S. Ponzi

Matthew S. Ponzi, Thomas B. Orlando, partners in FGPPR's Chicago office and Richard Buchanan, Of Counsel to the firm, recently obtained a judgment in favor of FGPPR's clients in what is believed to be the largest insurance coverage dispute arising from the 2008 flooding that devastated Cedar Rapids, Iowa.

Penford Corporation filed suit in the United States District Court for the Northern District of Iowa against units of ACE USA and Chartis, seeking over $30 million in contract and bad faith damages. Penford alleged that the $20 million policy flood sublimits of the insurance policies did not apply to its business interruption and extra expense claims and that alleged delays in payment and the refusal to pay more than the $20 million flood sublimits amounted to bad faith. Chief District Court Judge Linda Reade ordered the parties to present extrinsic evidence of the parties' intent at trial. The jury trial began on August 16, 2010. At the close of Penford's case, Judge Reade granted a directed verdict in favor of the insurers on Penford's bad faith claims. Following the presentation of the insurers' extrinsic evidence case, Judge Reade entered judgment in favor of the insurers on all of Penford's remaining claims.

Thomas B. Orlando

Richard Buchanan

FGPPR SECURES A DEFENSE JURY VERDICT IN PREMISES LIABILITY CASE

By Michael H. McColl, Esq.

Michael H. McColl

The case of *Stein v. Riverside Medical Center* involved a 47 year old woman who was visiting her father in the hospital with her handicapped mother. Ms. Stein and her mother parked in a handicapped spot outside the hospital, which abutted up against an island running through the middle of the parking lot. After their visit, Ms. Stein was walking across the island to her car when she tripped and fell on the curb which surrounded the island, resulting in a severe fracture of her upper left arm.

Opposing counsel argued at trial that the Medical Center was negligent for not maintaining the island properly because the gravel in the island was not level with the curb, thereby leaving a three-inch lip of the curb exposed which was a trip hazard. In making this argument, plaintiff's counsel repeatedly emphasized that such a condition was especially hazardous in the handicapped section of a hospital parking lot.

Plaintiff's fracture required two surgeries and two years to properly heal. Accordingly, she asked the jury for $750,000, which consisted of her medical bills, lost wages, pain and suffering, disability, loss of a normal life and disfigurement.

FGPPR argued that plaintiff was not entitled to recover any money as the accident was solely the result of Ms. Stein failing to keep a proper lookout for where she was walking. In doing so, FGPPR stressed to the jury that Ms. Stein did not need to encounter this island to reach her car, but when she chose to do so, she should have paid attention to where she was walking and had she done so, she would have seen the open and obvious condition of the curb and avoided it.

The jury deliberated for four hours before returning a verdict in favor of Riverside Medical Center. FGPPR learned from speaking to the jury that the jury ultimately concluded that it simply could not assign the requisite 50% of fault to the Medical Center in order to award Ms. Stein any money. Once the jury panel realized that it could not assign that requisite 50% fault to defendant, it agreed that Ms. Stein bore at least 51% of fault and that a defense verdict was required.

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CALIFORNIA COURT UPHOLDS CARRIER'S DENIAL DUE TO LACK OF "ACCIDENTAL DIRECT PHYSICAL LOSS"

By Susanna K. Farber, Esq.

Susanna K. Farber

In *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, the California Court of Appeal, Second Appellate District, affirmed an order granting summary judgment to State Farm General Insurance Company ("State Farm") arising from its denial of a claim for property damage and loss of income brought by its insured MRI Healthcare Center of Glendale, Inc. ("MHC").

State Farm issued a business policy ("Policy") to MHC, an MRI scanning service business. The Policy included first-party insurance coverage for business personal property and loss of income as a result of "accidental direct physical loss."

As a result of storms in the spring of 2005, MHC's landlord was required to repair rain damage to the roof over the room housing MHC's magnetic resonance imaging ("MRI") machine. These repairs could not be undertaken unless and until the MRI machine was demagnetized, or "ramped down." MHC claimed that the MRI machine failed to "ramp up" after it had demagnetized it to allow the roof repairs where the MRI was housed. MHC alleged that this failure constituted "damage" to the MRI machine and resulted in loss business income to MHC. Because the chain of events was set in motion by the spring 2005 storms, MHC claimed the storms were the "efficient proximate cause" of the loss, and, because the storms were covered under the business policy issued to MHC by State Farm, MHC claimed it was entitled to recover both the amount it expended to repair the MRI machine and the income loss sustained while the machine was inoperable.

Once repairs to the roof were complete, the MRI did not immediately ramp back up. MHC sought damages from State Farm for costs incurred to repair the MRI and for income loss sustained while the machine was inoperable. State Farm denied the claim and MHC filed suit against State Farm for breach of contract and for breach of the implied covenant of good faith and fair dealing. The parties filed cross motions for summary judgment and the superior court granted State Farm's motion, finding that any loss MHC suffered from the ramping down of its MRI was deliberately done by MHC and therefore not an "accidental direct physical loss" under the Policy.

The Court of Appeal agreed and held that although the policy did not define "accidental direct physical loss," the term "accidental" in an insurance policy typically means "unintended and unexpected by the insured." Further, the Court held that the term "contemplates an actual change in insured property … occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." The Court held that because ramping down of the MRI machine was an intentional act, and the machine's failure to ramp back up was an expected, although unwelcome, result of the ramp down, that MHC did not suffer an "accidental direct physical loss."

MHC further argued that that the rainstorm, a covered peril, was the efficient proximate cause of the loss. However, the Court found that the ramping down of the MRI machine itself was the sole, and predominating, cause of MHC's loss, and thus the "efficient proximate cause standard" was not relevant, as the "efficient proximate cause standard" only comes into play in determining whether coverage exists when both excluded and covered perils interact to cause a loss.

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FGPPR WELCOMES ITS NEWEST ASSOCIATE JENNIFER N. WAHLGREN

Jennifer N. Wahlgren

The firm warmly welcomes Ms. Jennifer N. Wahlgren as its newest associate attorney. Ms. Wahlgren will be located in the San Francisco Bay Area office.

Jennifer is a graduate of the University of California, Hastings College of the Law where she was the Senior Articles Editor of the Hastings Women's Law Journal.

Jennifer did her undergraduate work at the University of California, Berkeley, where she graduated with high honors in English and Philosophy.

Jennifer also has an accounting background having taken post-graduate courses at UCLA preparatory for studying for the California CPA examination.

Jennifer's work will focus on property and casualty coverage matters both in claims and litigation.

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IS THERE HOPE FOR THE COMMUNITY ASSOCIATION DOUBLE-TEAMED BY PROPERTY DEFECTS AND AN INSOLVENT BUILDER-DEVELOPER? YOU BET THERE IS!

By Douglas J. Palandech, Esq. and George D. Pilja, Esq.

Douglas J. Palandech

Courts have traditionally held that the implied warranty of habitability extends only from the builder-developer to the home purchaser. While a purchaser of a home and the builder-developer directly negotiate their deal, the law additionally imposes an implied obligation that the premises are "habitable." Because the purchaser is in privity of contract with only the builder-developer, the purchaser's historical remedy for the breach of the implied warranty of habitability resided exclusively against the builder-developer.

In such a restrictive legal environment, what becomes of the aggrieved home purchaser's remedy for a property defect when the builder-developer is insolvent? Put simply, the remedy, just like the builder-developer, is gone with the wind. This situation has become increasingly widespread over the years as builder-developers have routinely formed separate "single purpose" legal entities to manage each construction project, with little or no capital reserves or other significant assets. Once the project is ended, so is the single purpose builder-developer entity, along with its financial viability and the damaged homeowner's prospect for recovery of damages due to a defect in the property.

In some instances, a design professional or a subcontractor engaged by the builder-developer by reason of its workmanship (or lack thereof) may have created the complained of defect. But because of the lack of contractual privity between the purchaser on the one hand, and the design professional or the subcontractor on the other hand, the purchaser could not assert the implied warranty of habitability against the design professional or the subcontractor. The result: the design professional and the subcontractor are out of the legal reach of the purchaser. So where in this scenario has the law left the aggrieved home purchaser faced with an insolvent builder-developer? Essentially, alone to bear the financial burden of the property defect, with no chance for recompense.

Cause for Concern? Take a deep breath: The law in Cook County, Illinois currently favors the aggrieved home owner in this situation.

In the landmark decision of *Minton v. Richards*, 116 Ill.App.3d 852 (1st Dist. 1983), the Appellate Court for the First District of Illinois created an important exception to the application of the implied warranty of habitability solely to the builder-developer. The Court in *Minton* recognized the growing problem of the lack of an available remedy for an aggrieved home purchaser for construction defects when the single purpose contracting builder-developer is insolvent. By doing so, the Court held that when an innocent home purchaser has no recourse against an insolvent builder-developer for latent construction defects caused by a subcontractor, the implied warranty of habitability applies to the subcontractor. The Court's decision in *Minton* thus created a real remedy for the aggrieved home buyer in Cook County against the responsible subcontractor when the buyer cannot recover from the builder-developer.

Furthermore, the aggrieved home purchaser in Cook County now has a legal foothold to pursue a design professional when no recourse is available from an insolvent builder-developer. In *Board of Managers of 1111 S. Wabash Condominium Association v. 1111 South Wabash, LLC, et al.* (July 8, 2009), the Circuit Court of Cook County, Illinois initially refused to extend the implied warranty of habitability to apply to a design professional, such as an architect, when no relief can be had from the builder-developer. However, on reconsideration and relying in part upon *Minton*, the Court reversed its 2009 decision and ruled on May 4, 2010, that the implied warranty of habitability does apply to a design professional when the builder-developer is insolvent.

George D. Pilja

This law is not, however, without limits in Illinois. Although the Illinois Supreme Court has not directly addressed the issue, at least one Illinois Court does agree with *Minton*. In *Lehmann v. Arnold*, 137 Ill.App.3d 412 (4th Dist. 1985), the Illinois Appellate Court for the Fourth District refused to extend the implied warranty of habitability beyond the builder-developer merely because the builder-developer went bankrupt. The Fourth District encompasses Central Illinois. Additionally, in *Paukovitz v. Imperial Homes, Inc.,* 271 Ill.App.3d 1037 (3rd Dist., 1995), the Illinois Appellate Court for the Third District of Illinois has declined to extend the implied warranty of habitability to apply to a supplier of materials for a home. The Third District encompasses the area north of Central Illinois and south of the near Chicago suburbs. Moreover, some perceive that the Cook County Circuit Court wrongly reversed its decision in *1111 S. Wabash*. That decision may be appealed.

Nevertheless, the *Minton* and *1111 S. Wabash* decisions provide some legal authority for community associations and homeowners in the Chicagoland area to obtain financial redress for complained of property defects, where there is no chance for recovery from an insolvent builder-developer. It is especially important for community associations, as not-for-profit entities with very limited resources, to be mindful of this law when faced with the grim combination of costly property defects and bankrupt builder-developers.

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ANNOUNCEMENTS

Doug Allen and Doug Palandech are Published in the IADC Committee Newsletter

Doug Allen, a senior associate in FGPPR's Chicago office and Doug Palandech, a senior partner in the Chicago office, were published in the August 2010 issue of the International Association of Defense Counsel's Professional Liability Committee Newsletter. In the issue, Messrs. Allen and Palandech discussed an Indiana Supreme Court landmark ruling, given in *Indianapolis-Marion County Public Library v. Charlier Clark & Linard,* which upheld the trial and appellate courts' preclusion of tort recovery against design professionals by a project owner for damages associated with alleged design and construction defects.

Ed Rudloff Co-Authors a Chapter in Property Insurance Law Book

Ed Rudloff, senior partner in the San Francisco Bay Area office, is a co-author of a chapter in an upcoming book published by the California Continuing Education of the Bar entitled *Property Insurance Law*. Ed is a co-author of the chapter called "Subrogation." The book is intended for publication and release in 2011.

Marjie D. Barrows and Kathleen M. DeLaney to Author a Chapter in Appleman

Marjie D. Barrows and Kathleen M. DeLaney, partners in FGPPR's San Francisco Bay Area office, have been invited to co-author a chapter in the new edition of the venerable *Appleman* treatise, *Appleman on Insurance Law Library Edition*. *Appleman on Insurance* is one of the most comprehensive and prestigious treatises in the field of insurance law, and it is regularly cited by state and federal courts nationwide. It includes leading cases from all jurisdictions, and it covers all aspects of insurance law, including personal insurance, casualty insurance, commercial insurance, state funds, no fault insurance, commercial insurance bonds and liquidation. The new treatise is scheduled for publication in 2011.

Jason Santiago's Continued Involvement in Professional Development

Jason Santiago, FGPPR's Director of Administration on the West Coast, continues his involvement in professional development through the Association of Legal Administrators. In his role as chair of the Leadership and Management section, Jason also coordinates the delivery of educational opportunities for local law firm administrators. Given the wealth of educational seminars on managing in turbulent times, Jason thought it a timely idea to provide a seminar that would focus more on how leading law firms are positioning themselves for the upturn. Jason's most recent meeting was held in July at the San Francisco office of Seyfarth Shaw and was billed as "Positioning for the Future." The speaker was none other than former Morrison & Foerster Chairman Carl Leonard, who is currently with Hildebrandt Baker Robbins and The George Washington University. Among the law firm administrators in attendance were FGPPR and administrators from other law firms including Skadden Arps, Seyfarth Shaw, Jackson Lewis, Sedgwick Detert and Morrison & Foerster.

FGPPR SELECTED AS A MEMBER OF THE COUNCIL ON LITIGATION MANAGEMENT

FGPPR is pleased to announce that it has been recognized for its professional excellence and integrity and has been selected as a member of the Council on Litigation Management. The Council is a nonpartisan alliance of corporations, insurance companies, law firms and service providers committed to furthering the highest standards of litigation management.

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FORAN GLENNON PALANDECH PONZI & RUDLOFF PC

PRESENTATIONS BY FGPPR

Shortly following the merger, Edward Murphy, a partner in the San Francisco Bay Area office, provided a lively and informative presentation to the East Bay Claims Association entitled "Contractors, Estimates, Overhead and Profit—Making it Work." The luncheon seminar was held in Pleasant Hill, California, and drew nearly 200 claims professionals.

Ed Rudloff was the luncheon speaker at the summer meeting of the Property Claims Association of the Pacific held in Berkeley, California. The presentation was entitled "Experts: Use and Abuse, and Spoliation of Evidence." The retention and work of experts in both claims and litigation settings was thoroughly analyzed. It was so well received that Ed was asked to re-present it in the Fall to the Combined Claim Conference of Northern California in Sacramento. Copies of the power point outline are available to our friends and clients upon request.

Later in the summer, Ed Rudloff and Marjie Barrows teamed up with Terry Paret of Wiss, Janney, Elstner Associates, Inc., to participate in an all day training session in Los Angeles as the guests of the Chubb Group. The presentation included a discussion of the upcoming new building code. It also included a segment on the importance of expert selection and use during both the claims and litigation stages. FGPPR is pleased to participate in industry-wide and intra-company educational seminars.

On November 11, 2010, Thomas B. Orlando, a partner in the Chicago office, presented "Appellate Process Primer" to the Illinois Creditors Bar Association.

FGPPR'S CONTINUED PARTICIPATION IN SPORTS EVENTS

We still swim, run marathons, and participate in triathlons all over the place. For example, Renee Peters, a San Francisco Bay Area office partner, had very busy summer and fall seasons. Renee rode in the "Cycle Oregon Weekend" where the first day she pedaled 100 miles and the second day another "metric century," 100 kilometers. She followed that up with an Olympic distance triathlon relay in Pleasanton, California where she was a cyclist. In November, she concluded the season running the Big Sur Half Marathon down on the Monterey Peninsula.

Ed Rudloff has continued to participate in masters swimming races. In the spring, he made the podium in all of his events at the United States Masters Swimming Short Course National Championships held in the 1996 Olympic pool at Georgia Tech University in Atlanta. By season's end, he was ranked in his age group in the top ten nationally in all freestyle races from 100 yards to 1650 yards, the 100 and 200 yard butterfly, 100 yards backstroke, and all three individual medley events of 100, 200, and 400 yards. He also swam an "open water" season. For the fourth straight year, he won the over 60's nautical mile race from Angel Island in the San Francisco Bay to the City of Tiburon, known as the Tiburon Mile. Over Labor Day, for the fourth straight year, his Olympic Club (San Francisco) relay won the Grand Makule Division of the Maui Channel swim from the Island of Lanai to the Kaanapali coast of Maui. Ed also won the Donner Lake swim up in the Sierra Nevada Mountains during August at distances of one mile, one-half mile, and 500 yards.

♦ *FORAN GLENNON PALANDECH PONZI & RUDLOFF PC wishes its clients and friends a wonderful holiday season and a prosperous 2011*♦