

# PIKE & LUSTIG, LLP

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SPRING  
2023

At the Florida law firm of Pike & Lustig, LLP, we have the ability and focus to provide the kind of personalized attention that you may not receive from other firms, where you're only a number. We have the experience and resources necessary to provide the highest quality of representation so that our business and personal injury clients feel our team is fighting for them. Our aggressive and sophisticated-litigation style will assist clients in achieving their goals.



## Florida Tort Reform Bill HB 837 Explained

*By Robert Johnson, Partner*

The largest insurance industry giveaway in Florida's history is now law. HB 837 was rushed through the legislative process and approved by lawmakers 17 days into the 2023 legislative session and signed by Governor Ron DeSantis within one hour of receiving the bill.

The bill, championed by the insurance industry, imposes some of the most significant limits on the ability of insurance policyholders to hold insurance companies accountable across all lines of insurance – auto, health, life, and liability.

The bill replaces Florida's system of pure comparative negligence with a modified comparative negligence regime, shortens the statute of limitations for general negligence actions from four years to two, amends the standard for bad-faith insurance claims, outlines the evidence that a factfinder calculating medical damages in personal injury or wrongful death actions should consider, requires new disclosures about letters of protection used to obtain medical treatment, limits the use of contingency-fee multipliers when calculating attorneys' fees, and replaces joint and several liability with comparative negligence in certain negligent security cases.

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First, HB 837 allows insurance companies to commit bad faith claims handling with little to no repercussions. Now, the law says that negligence alone is insufficient to constitute insurance bad faith. HB 837 creates a safe harbor from bad-faith liability if a liability insurer tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of a claim accompanied by sufficient evidence to support its amount. The bill also repeals sections of the Florida Statutes that previously allowed insureds to recover attorneys' fees when prevailing in certain insurance coverage disputes. This means that insurance companies will deny more claims that should be paid.

Next, Florida has changed from a pure comparative negligence system to a modified comparative negligence system. This means that if a plaintiff bears more than 50 percent liability, the plaintiff cannot recover at all from the defendant. No matter the harm, a defendant can escape liability completely if they are only 49% at fault.

The law further negatively impacts the doctor-patient relationship. HB 837 requires disclosures concerning

the use of letters of protection (LOP) to obtain medical treatment. A LOP is a mechanism by which a plaintiff's medical provider agrees to suspend efforts to collect past medical bills in exchange for a right to payment from any recovery made by the plaintiff in litigation. Significantly, the newly created section voids any attorney-client privilege over communications relevant to a lawyer's act of referring the client for treatment. And, most importantly, the bill will limit what a doctor can charge and get paid when treating the victim of negligence.

Finally, HB 837 restricts a plaintiff's right to recover under a premises liability theory. The act creates a "presumption against liability" for negligent security claims against owners and operators of "multifamily residential property," such as an apartment or condominium community. The bill also creates a new section of the Florida Statutes that replaces joint and several liability with comparative negligence in certain negligent security lawsuits involving injury from a third party's criminal act on commercial or real property.



## Lawyers, Guns, and Money: The Shotgun Pleading Rule and Sanctions Against the Former President of the United States.

By Tim O'Neill, Senior Associate and Trial Attorney

*"I was gambling in Havana, I took a little risk  
Send lawyers, guns and money, dad, get me out of this, ha  
I'm the innocent bystander  
Somehow I got stuck between the rock and a hard place  
And I'm down on my luck, yes I'm down on my luck  
Well, I'm down on my luck"*

**-Zevon, Warren, and Warren Zevon. "Lawyers, Guns and Money." S.n. 1978**

Litigating in Federal Court is not for the faint of heart. If you plan on litigating in the Federal Court system, be sure to inquire about your counsel's experience in doing the same. Failure to understand the nuances of the Federal Rules can have disastrous consequences. Here at Pike & Lustig, LLP, we not only understand those standards, but we also help set them. One example is the case of *Barmapov v. Amual*, \_\_\_ F.3d \_\_\_, 2021 WL 359632 (11<sup>th</sup> Cir. 2021)<sup>1</sup>. I had the pleasure of assisting in the lower court case and drafting one of the Appellate briefs presented to the Eleventh Circuit Court of Appeals in the *Barmapov* matter. *Barmapov* involved the use of shotgun pleadings



or pleadings that are vague and conclusory.

The Barmapov opinion was cited by United States District Court Judge Donald M. Middlebrooks in the matter of *Trump v. Clinton*, No. 22-14102-CV, 2023 WL 333699, at \*26 (S.D. Fla. Jan. 19, 2023) where the court concluded sanctions were appropriate, “Plaintiff Donald J. Trump and Plaintiff’s lead attorney—Alina Habba and Habba Madaio & Associates—are jointly and severally liable for \$937,989.39.”

## An Overview of the Shotgun Pleading



According to the Eleventh Circuit, a shotgun pleading lacks sufficient clarity to allow the adversary fair notice of the claims or defenses against them. A shotgun pleading will therefore violate FRCP 8(a)(2), FRCP 10(b), or both, and it is described as “calculated to confuse the enemy” and the court.

The Eleventh Circuit identifies four types of shotgun pleadings:

1. A complaint with multiple counts that incorporate the allegations of every preceding one;
2. A complaint with conclusory, vague, or immaterial facts not connected to a specific claim;
3. A complaint that does not separate each claim into a different count; and
4. A complaint with multiple claims against multiple defendants without specifying which defendant is responsible for an act or omission or which defendant a claim is against.<sup>2</sup>

Judge Middlebrooks found that the *Trump* Complaint violated most of the rules cited above:

The deliberate use of a shotgun pleading is an abusive litigation tactic which amounts to obstruction of justice. See *Davis v. Coca Cola Bottling Co. Consol.*, 516 F.3d 955, 982 n.66 (11th Cir. 2008), abrogated on other grounds by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). This case involved three categories of shotgun pleadings condemned by the Eleventh Circuit: \* \* \* See *Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021); \* \* \* The 819 paragraphs of the 186-page Amended Complaint are filled with immaterial, conclusory facts not connected to any particular cause of action.

*Trump v. Clinton*, 2023 WL 333699 at \*4.

<sup>2</sup> See Don't Pull the Trigger on a Shotgun Pleading—Here's Why.  
<https://fiabizlaw.org/member-articles/dont-pull-the-trigger-on-a-shotgun-pleading-heres-why/>

Should you find yourself or your business in the position to litigate in Federal Court, please ensure that the lawyer you hire has the requisite experience to represent you. In the Trump matter, the former President of the United States and his counsel were sanctioned nearly a million dollars for claims that never made it passed the initial pleading phase of the case. There is no need to “gamble in Havana” with your legal matter. Call the experienced litigation team and Pike and Lustig, LLP to assist you.

## The FTC’s New Proposed Rule- Are Non-Compete Agreements Down for the Count?

By Meagan McCarthy, Attorney



A new proposed rule by the Federal Trade Commission (FTC) has thrown a curve ball to business owners who ask their employees to sign non-compete agreements. For those unfamiliar with the practice, a non-compete agreement is a binding contract between an employer and employee (or independent contractor) that bars the employee from entering into competition with their employer after the employment period is over. Non-compete agreements, although varied, typically impose restrictions related to time, location, and types of work the former employee may engage in. The agreement will also define the damages that an employer is entitled to if the former employee breaches the agreement.

The new rule would ban employers from imposing or maintaining non-compete agreements on their employees and independent contractors. The proposed rule would also require employers to rescind existing non-compete agreements and communicate to former employees that the agreements are no longer in effect. The new rule, if adopted, would have sweeping effects on both businesses and workers. The FTC estimates that 18% of the workforce, or 30 million Americans, are currently subject to non-compete agreements.

After opening up the rule to public comment, the FTC was inundated with feedback. So much so, that the agency extended the deadline for public comment to April 19. Per

FTC rules, after the closure of the public comment period, there is a mandatory 180-day notice period. That means that the rule cannot go into effect until mid-October of this year, at the earliest.

However, with the announcement of the proposed rule, many business owners are worried about the future and looking for ways to protect themselves from unfair competition. After all, the best offense is a good defense. So, what can business owners do to keep their eye on the ball?

Employers should take steps to protect confidential information. Particularly sensitive information, such as customer lists, should be shared on a need-to-know basis. Employers can also use technology, such as password protection and tracking software, to ensure confidential information is not being shared without their consent.

In addition to the above steps, the attorneys at Pike & Lustig can help business owners create employment agreements, such as non-disclosure agreements (NDAs), to protect trade secrets. Notably, the proposed FTC rule would not invalidate these agreements. In the event non-compete agreements become illegal, a well-drafted non-disclosure agreement will be essential for all employers.

In addition to preparing employment agreements, the attorneys at Pike & Lustig are also experienced litigators in a range of business disputes. Regardless of whether a business is in the major or minor leagues, Pike & Lustig is the law firm employers want in their corner.

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## How to Set Up an LLC for Your Business

*By Jesse Fulton, Associate*



When contemplating the start of a business, careful thought and consideration must be given at the outset as to the structure of the new business. This is because the business structure chosen influences everything from daily operations to taxes to personal liability exposure. Amongst the various business structures available to entrepreneurs, one of the most commonly utilized structures is a Limited Liability

## Company (hereinafter, “LLC”).

Setting up an LLC is fairly simple and straightforward.<sup>3</sup> There are three (3) general steps that must be accomplished to set up an LLC: (1) Choosing your LLC name, (2) Designating a Registered Agent, and (3) filing the LLC’s Articles of Incorporation.

With respect to selecting a name for the LLC, the best place to start (other than coming up with LLC name options) is to begin with a search of the state records to ensure no one else has a business with the name you desire to use. Pursuant to Florida law, the name of the business must include the words “limited liability company” or the abbreviation “LLC” or “L.L.C.”

The next step requires designation of a Registered Agent. A Registered Agent is either an individual or a legal service firm that accepts official mail and correspondence on behalf of the business. Florida allows an owner or employee to act as the registered agent. The only requirements are that the person be a Florida resident who is 18 years or older and has a physical address within the state. Although the business address can be listed as the registered office address, an LLC cannot be its own registered agent.

Once you have a name and a registered agent, the final step is to file all necessary documentation with the Florida Division of Corporations, which in this case is normally the Article of Incorporation. The Articles of Incorporation establish your authority to operate as an LLC in Florida. This can be done electronically through Sunbiz.org, or you can complete and mail in paper form. It costs \$100 to file the LLC’s Articles of Incorporation, plus an additional \$25 to designate a registered agent. There are other options available that carry additional fees.

After submitting the requisite forms and obtaining confirmation that the LLC has been accepted and established, the next step to consider is whether the LLC will be controlled by an Operating Agreement. Although Florida law does not require an LLC to have an operating agreement, it is strongly recommended that the members of your LLC adopt a written Operating Agreement to lay the foundational groundwork for the organization.

The Operating Agreement establishes the LLC’s purpose and the role/duties of each member. It ensures that the rights and responsibilities of each member are understood from the outset. A properly drafted Operating Agreement should include information such as:

- Names and addresses of each member.
- Each member’s duties to contribute value (monetary or services) to the LLC.
- Each member’s ownership interest in the company, including LLC property and profit share.
- Provisions for the distributions to members of LLC profits.
- The procedure for admitting new members.



- Voting procedures and voting requirements.
- Transferability of LLC interests to third parties.
- Dissolution terms and procedure.

If an LLC chooses not to employ an Operating Agreement or if the Operating Agreement is silent on a particular matter, the LLC is governed by default rules and regulations of the Florida Revised Limited Liability Company Act. Provisions in an LLC Operating Agreement supersede corresponding statutory default rules, which further support the creation and adoption of an Operating Agreement that accomplish the goals of an LLC and its members. A properly drafted LLC Operating Agreement reduces the likelihood of unanticipated consequences imposed by statutory default rules.

In short, an Operating Agreement allows you to establish control over how you want your business to be operated. Although it is optional, every business should strongly consider adopting an Operating Agreement, which serves as an instruction manual dictating the governance and operation of the LLC. The Operating Agreement can help reduce member disputes, outline the rights and duties of the LLC members, outline how decisions are to be made.

## In the News

Managing Partner Michael Pike's OpEd on "What Drivers Need to Know When Driving Long Distances" was featured in the South Florida Sun Sentinel Forums.



## \$80 Million: Pike & Lustig Attorneys Obtain One of the Largest Verdicts in Palm Beach County History

Partners Daniel Lustig and Robert "Burr" Johnson represented the parents of a Lake Worth teenager killed by a truck in a lawsuit against the driver of the truck. The \$80 million jury verdict is one of the largest reached in Palm Beach County history.



## Pike & Lustig Attorneys Obtain \$23.8 Million Verdict for Construction Laborer Whose Legs Were Trapped and Crushed by Front Loader in 2016

Managing Partner Michael Pike and Partner Robert "Burr" Johnson represented a 22-year-old construction laborer whose legs were trapped and crushed by front loader in 2016. Pike and Johnson proceeded to trial and a Broward County jury returned a \$23.8 million verdict against the two defendants who chose not to settle.



# In the News

**Michael Pike Appears on CBS12 News** to Discuss Suspended Licenses Following Motor Vehicle Accident: Driver with Suspended License Crashes into Motorcyclist on His Way to Work



**Michael Pike Featured in Boca Tribune as First Speaker for Business Optimization Speaker Series (BOSS)**



## Bluelvy Communications Kicks Off BOSS (Business Optimization Speaker Series) at 1909 in West Palm Beach

West Palm Beach, FL – Bluelvy Communications, a Delray Beach-based public relations and communications agency, has launched Business Optimization Speaker Series (BOSS) just in time for Small Business Month, which is celebrated in May every year. BOSS will be a series of guest speakers that will discuss specific topics in business of which founders and entrepreneurs should be aware. The series will be moderated by Bluelvy Founder and President, Melissa Perlman, and the first event will be held on Thursday, May 4th at 6pm in West Palm Beach at 1909 and feature Michael Pike, Managing Partner of Pike & Lustig.

Michael Pike will be discussing the topic of business equity best practices. Equity is a complex area with many legal considerations. Many owners and entrepreneurs

torney and the Managing Partner of Pike & Lustig, LLP. He is a top-trial attorney and expert storyteller. He is well known among his colleagues for being an aggressive-trial attorney with the ability to relate to a jury and cogently explain the facts of the case he is trying and how the law applies to those facts. Pike has been practicing law for over 20 years and has secured numerous verdicts and settlements on behalf of clients within the areas of business litigation, shareholder disputes, derivative actions, contract disputes, property disputes, real-estate disputes to name a few. During BOSS, Pike will discuss how to create a fair and transparent equity structure that will set businesses up for success.

Upcoming BOSS events will be held at 1909, along with other unique area venues.



# In the Community

Our team is proud to support music in the Village of Wellington! Partner Daniel Lustig and his family spent an afternoon celebrating 10 Years of Village Music!







The team at Pike & Lustig got into the spirit of St. Patrick's Day by celebrating together and dressing in green!





# PIKE & LUSTIG, LLP

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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.

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## Community Leadership



In recognition of Small Business Month, which is celebrated in May, Managing Partner Michael Pike and Attorney Andrew Boloy spoke to a room full of entrepreneurs, business owners and start-ups at 1909 in West Palm Beach. The topic was Business Equity Best Practices and covered a range of subjects, including operating agreements, employee agreements, arbitration and more. 1909 is a co-working space, business incubator and accelerator all in one.

*"My goal was to teach the business owners in attendance about both the importance and intricacies of the documents they may be signing for their future success," Pike said.*

## BUSINESS EQUITY BEST PRACTICES

### FOR FOUNDERS & ENTREPRENEURS

How to Create a Fair and Transparent  
Equity Structure to Protect Your Future,  
Empower Your Employees and Enable  
Growth



**Blue Ivy**  
communications

PRESENTS:

**B.O.S.S**

### BUSINESS OPTIMIZATION SPEAKER SERIES

Join Business Litigation Attorney Michael Pike, Managing Partner of Pike & Lustig, LLP, to learn what equity structure is best for your business.