





May You Live in Interesting Times!

Whether a curse or a blessing, whether of eastern or western origin, these words certainly apply to lawyers, especially in the State of Florida, and absolutely right now.

There is a Chinese curse which says "May he live in interesting times." Like it or not we live in interesting times. They are times of danger and uncertainty; but they are also more open to the creative energy of men than any other time in history.²

This second quote sums up our charge in the face of change. In these changing times I am proud to lead the Real Property, Probate and Trust Law Section, embarking on its sixty-first year, because we are composed of women and men taking up the challenge of these interesting times, dedicated to the

hard, but incredibly satisfying task to promote the many facets of legal professionalism. Observe your peers in the Section successfully focus their creative energies, plowing the road of success in the many different ways that success is measured.

What is this challenge? Providing valuable counsel to our clients while retaining professionalism. This should read familiar, it is our creed, and has been from the earliest times.

Why is this challenge perceived differently today? The difference is not just because we are the center of attention. Time altered the landscape. You do not have to be an "old timer" to recognize that the Internet has revolutionized person to person communication through email, blogs, and seemingly every week a new platform.

As lawyers, our value has always been our store of information, our knowledge, and the ability to apply that information to ever changing fact situations. We have seen how the Internet has changed information transmittal businesses around the world. Consider travel agents, book sellers, and brokers of all types, and realize that those that remained in business did so by excelling at a specific core function and emphasizing customer service.

One expanding example of how the Internet impacts our practices, whether any lawyer understands how the Internet works, is the daily arrival of clients with forms and other tidbits printed from the Internet. Internet information competes for

our clients' eyes and ears, but is frequently posted by those without any responsibility to our clients.

We can quip that the Internet's hucksters are good for business. Each of us can attest to the legal morasses clients have fallen into by following the "free information" posted from the Internet. The pitfalls of public forms even drew commentary from the Florida Supreme Court which is important to recall:

While I appreciate that there are many individuals in this state who might have difficulty affording a lawyer, this case does remind me of the old adage "penny-wise and pound-foolish." Obviously, the cost of drafting a will through the use of a pre-printed form is likely substantially lower than the cost of

hiring a knowledgeable lawyer. However, as illustrated by this case, the ultimate cost of utilizing such a form to draft one's will has the potential to far surpass the cost of hiring a lawyer at the outset. In a case such as this, which involved a substantial sum of money, the time, effort, and expense of extensive litigation undertaken in order to prove a testator's true intent after the testator's death can necessitate the expenditure of much more substantial amounts in attorney's fees than was avoided during the testator's life by the use of a preprinted form.

Aldrich v. Basile 136 So. 3d 530, 538 (Fla. 2014) (Pariente, J. concurring).

While not every Internet form leads to a Supreme Court decision, many see the Internet as fundamentally

undermining professionalism, the Armageddon of the law. Some run around like Chicken Little proclaiming that the legal profession will fall without providing direction.

Your RPPTL Section peers have, on their own and in their own determined fashion, responded to these changes. In doing so, the Section provides members not just a place of solace, but a broader zone reinforcing the values that motivate with direction. Remarkably, whether in a solo practice or in a firm of whatever size, the Section is a home where we establish relationships with peers from all parts of our large and diverse state, nation-wide, and even world-wide.



CHAIR'S COLUMN

By Michael Gelfand Section Chair, 2015- 2016

continued, page 5



This newsletter is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a SERVICE to the membership.

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ABOUT THE COVER:

View towards Fontainebleau Hotel and Collins Avenue

Photo by Michael J. Gelfand

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Get Included in ActionLine!

Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments.

ARTICLES: Forward any proposed article or news of note to Silvia Rojas at srojas@thefund.com. Deadlines for all submissions are as follows:

ISSUE	DEADLINE		
Spring	January 31		
Summer	April 30		
Fall	July 31		
Winter	October 31		

ADVERTISING: For information on advertising, please contact Kathrine Lupo at Kathrine@koontzassociates.com.

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Kelly Nicole Catoe at kcatoe@hnh-law.com.

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5625, or at mobos@flabar.org.

Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

Chair's Message, from page 3

Many of us refer to our relationships through the RPPTL Section as part of our families. Through these relationships we build ties and trust that allow us to inquire and respond to each other without fear that a question or answer will bring derision. We can and do actively learn from our fellow Section members, not as competitors, but just as Olympic marathoners from the same country whose pursuit of excellence brings out the best from everyone on the field of professionalism. We learn from each other how to provide a value added product, and especially in this busy time with information overload, how to effectively communicate to our clients the importance of that value.

At the RPPTL Section's core are our committees. The committee chairs and members do more than the hard work we report in the substantive articles that grace these pages. Through the hundreds that volunteer in our committees and on our projects our collective professionalism assists the Section, the Bar, and the community beyond. If you have not joined a committee, then check them out at www.RPPTL.org, contact the chair of the committee of your choice, and dive in.

The professionalism of Section members extends beyond the tangible work of the committees addressing products for clients and proposed legislation drafted to help perfect the application of the law. Professionalism extends to how we carefully convey the lessons we have learned to the next generation and beyond. Beyond the committees that undertake this role, watch how our past Section chairs continue to contribute after passing the torch to the next Section leader.

As an example of how our past chairs are passing the torch, inculcating the next generation with professionalism through intelligence, energy and grace, without fear of new technology nor a fear of constantly changing legal and regulatory environment, observe Section Past-Chair **Melissa Murphy.** Melissa relocated to The Fund to personally lead transactional attorneys into the twenty-first century though Internet, videos, email as well as old fashioned seminars.

In this way, lawyers have endured over the centuries because of their professionalism, their creed which involves challenging the status quo for what is right and good. Consider the drafters of the Declaration of Independence, the Constitution, and the Gettysburg Address, were lawyers who became "game changers." Closer to today, consider Thurgood Marshall, who with the NAACP Legal Defense Fund challenged the long term, inbred racism of our country. Through his legal training, he led one of the most successful and relatively peaceful revolutions in world history, though that fight is not complete, and lawyers continue to step up to lead the effort for equality and justice.

It is in this environment that many of us, whether a recent graduate, in midcareer stride, or nearing retirement, recall the "hero" of Harper Lee's *To Kill a Mockingbird*. Atticus Finch is recalled for a calm and steady voice instructing respect for fellow man, and the rule of the law as the ultimate protector

of individual rights and society. The projection of Atticus Finch helped to propel many to the law, and to the creed of professionalism which is to ensure not only our own personal success, but also to safeguard the rule of law that protects all of us as citizens.

Recalling the past is especially important in these changing and challenging times. RPPTL Section member, and Florida Bar Immediate Past President, **Greg Coleman** personally led a state-wide education campaign identifying threats to professionalism. Similarly, current Bar President **Ray Abadin** is seeking to identify how we can respond to changing dynamics. There will be debates on what these changes portend, but many will expect and rely upon the Section's members to keep the debate focused on what ensures professionalism, including protection of and value to Florida clients.

Change and challenge is also returning the topic of civil rights to the front page, though it was not ever off the table for many. Protection of civil rights is not just an issue for a particular group, but is a broad societal issue as we are measured by how we treat each other. As we consider our daily role of assisting our clients, we cannot lose sight of the larger context. As leaders in our communities we must consider how we can assure that each individual is treated appropriately regardless of a status or a circumstance of birth, whether stopped for a traffic offense, entering a school, or being served in a business. Just as we demand a client's rights to transfer property by sale or devise, regardless of race, creed, color, national origin, religion, preference, or marital status, we should not sit ideally by when those next to us are wrongfully denied their rights.

These changes and challenges are some of the reasons why the RPPTL Section is journeying to Berlin, Germany. To repeat another saying, it is true "Those who cannot remember the past are condemned to repeat it."

As we address change within our profession we must grapple with and understand what has occurred and what is occurring beyond our desks and homes. In Germany, how for two consecutive generations did the failure of attorneys and jurists to enforce the rule of law help propel the unthinkable? Consider if Germany had in the 1930's and 1940's legal professionals on par with the Federal trial judges of the U.S. South in the 1950's and 1960's, such as Alabama's U.S. District Judge Johnson who withstood taunts and threats to issue pathfinding civil rights decisions. Would history have been different?

Remaining cognizant of the world beyond our desks, each of us individually and together as a Section will be better able to evaluate the changes affecting our desks, and react in a better way. Many of the issues will seem to be bigger than us, but the issues really are not. As part of our training, when we perceive wrongs, respond. If it is a big issue that appears intractable, then at a minimum we have a duty speak and educate if we

Chair's Message, from page 5

cannot determine a better way to affect a more direct impact.

Recognizing the "bigger picture" has led to the RPPTL Section's extraordinary success, whether proposals for legislative enactments, executive regulatory action or as an amicus cited in court decisions. This recognition will assist as we address change and challenges. The newly refined integrity bylaw proposals are an example of how we adapt when there is change. Our thanks to past chair Margaret "Peggy" Rolando for appointing the drafting committee and past chairs, Jerry Aron, Fletcher Belcher, and Sandra Diamond for their initiative and time addressing how to balance our personal clients' interests and our interest for a better State of Florida. Sandy also serves with past chair Laird Lile on the Bar's Board of Governors helping to ensure that the perspective of RPPTL practitioners is seriously considered.

This same perspective has assisted us as we have approached issues in both Divisions, whether guardianship, homestead status or real estate transaction trust accounts. Thus, I am thankful to all of the past chairs with whom I have worked and whose successes we can strive to emulate, and particularly thank immediate past chair **Michael Dribin** for reinforcing the

need for "doing the right thing" substantively and procedurally, and demonstrating repeatedly how to do so, and his promise to continue to do so. Similarly past-chair **Roland "Chip" Waller** continues to lead by example, that proposals must be read and understood (REALLY!), that questions need to be asked even if some may think the answers are obvious, and being silent when there is uncertainty just for unanimity is not necessarily a virtue.

I would be remiss if not digressing and thank Council members, **Mike Bedke** and past chair **Peggy Rolando**, for their successful efforts to draft speakers for the Berlin meeting, past chair **George Meyer** chairing the Meetings Planning Committee to help ensure that this and all meetings are a success and Chair-Elect **Deborah Packer Goodall** for her constantly level headed counsel.

Best to all for a great year!

Endnotes

- 1 Attributions run the gambit from Confucius in ancient times to "Junior Soprano" in modern times.
- 2 $\,$ Sen. Robert F. Kennedy (N.Y.), University of Capetown, Capetown South Africa (June 6, 1966).
- 3 Santayana, George, *The Life of Reason* (1905, Charles Scribner & Sons).

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Changes from the 2015 Legislative Sessions

By Peter M. Dunbar, Esq. Dean, Mead & Dunbar, Tallahassee, Florida



P. DUNBAR

The 2015 Regular and Special Sessions of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The Section is particularly appreciative of the Members of the House and Senate that sponsor initiatives this year, and these members are acknowledged below with the legislation that passed

during this past Session.

All of the bills from this year's Regular Session appear in chronological order by bill number with a brief summary along with the applicable Chapter Law citation for each initiative. The final status and full text of each enrolled bill, including the legislative staff reports and Chapter Law citation, are available on the legislative web sites (www.leg.state.fl.us; www.flsenate.gov; www.myfloridahouse.com).

Legislation Containing Section Positions And Initiatives

Guardianships: CS/CS/CS/HB 5 by Representative Passidomo contains the RPPTL Section's guardianship initiatives dealing with the payment of examiners' fees and attorneys' fees in guardianship proceedings. Other issues in the bill come from the working group assembled by Representative Passidomo that included stakeholders from both RPPTL and Elder Law. *(Chapter 2015-83, Laws of Florida.)*

Guardianships—Public Records Exemptions: CS/HB 7 by Representative Passidomo and Senator Stargel contains the RPPTL Section's public records exemption for settlements entered into by a guardian on behalf of a ward. **(Chapter 2015-84, Laws of Florida.)**

Construction Defects: CS/CS/CS/HB 87 by Representative Passidomo provides additional requirements for a notice of claim for construction defects; expands the claims to insurers; provides that completion of the building includes the issuance of a temporary certificate of occupancy; provides that the claims negotiation process is deemed confidential and revises the requirement for the production of records related to defect claims. **(Chapter 2015-165, Laws of Florida.)**

Uniform Transfer to Minors: HB 283 by Representative Berman and Senator Joyner is a RPPTL Section initiative that revises the Uniform Transfer to Minors Act that will allow persons to establish accounts for minors which remain in a custodial status until the minor reaches the age of 25 years. **(Chapter 2015-140, Laws of Florida.)**

Landlord-Tenant (Transient Occupancy): CS/CS/HB 305 by Representative Harrison removes "transient occupancy" from the landlord-tenant regulation under Chapter 83, and permits

the removal of an unwanted occupant of a residence by law enforcement officials. The Section has provided technical assistance on the legislation at the request of the sponsors. (Chapter 2015-89, Laws of Florida.)

Guardianship—Developmentally Disabled: CS/CS/HB 437 by Representative Adkins proposes new procedures for the case plan of any child who is developmentally disabled or incapacitated; requires additional reporting by APD; and provides for the criteria in the appointment of guardian advocates. The Section had technical concerns with the legislation, but the issue has been corrected by amendment. **(Chapter 2015-112, Laws of Florida.)**

by Representative McGhee is a bill on behalf of the Business Law Section of the Florida Bar providing for clarification of operational procedures for LLCs; reinstatement requirements after dissolution or revocation; and restrictions on the duties of managers and members of an LLC. The legislation also provides that a limitation on persons authorized to transfer property contained in the articles of organization is not notice of such limitation to others. The legislation is consistent with the prior policy of the RPPTL Section on the subject. (Chapter 2015-148, Laws of Florida.)

Condominiums—Termination: CS/CS/CS/HB 643 by Representative Sprowls and Senator Latvala modifies §718.117, Fla. Stat. of the Condominium Act relating to condominium terminations. The legislation imposes new restrictions on the termination of condominiums created by the conversion of existing improvements under Part VI of the Act; clarifies the methodology for determining market value of condominium units; and requires first mortgages to be fully satisfied prior to termination of the condominium. **(Chapter 2015-175, Laws of Florida.)**

Ad Litem: CS/CS/HB 775 by Representative Powell and Senator Latvala is the RPPTL Section's initiative that affirmatively permits the appointment of an ad litem representative by a Circuit Judge in designated circumstances when service is obtained constructively. **(Chapter 2015-95, Laws of Florida.)**

Rental Agreements—Foreclosure Notice: CS/CS/HB 779 by Representative Jones is an initiative from the Public Interest Law Section of the Florida Bar requiring notice to be given to a residential tenant after issuance of the certificate of title in a foreclosure proceeding. The notice provisions provide that a 30-day termination period shall be available to the tenant before the rental agreement can be terminated and possession of the property given to the new title owner. (Chapter 2015-96, Laws of Florida.)

Changes from the 2015 Legislative Sessions, from page 7

Community Associations: CS/CS/HB 791 Representative Moraitis and Senator Ring is the omnibus community association bill for the 2015 Session. Among the provisions in the legislation are the following changes:

Proxies and Records: The legislation will permit the use of copies, facsimiles or other reliable reproductions of proxies for voting at meetings of the membership as permitted by statute, and it provides that all "written" records maintained by a community association are official association records.

Electronic Voting: The legislation will permit the use of electronic voting in condominiums, cooperatives and mandatory homeowners associations.

Posting Notices: The legislation permits the posting of meeting notices on "association property," as well as on the common elements of a condominium, and it clarifies the categories to be used for the condominium association budget.

Bulk Buyers: The sunset of Part VII is extended to July 1, 2018.

Homeowners' Associations Act: The legislation formally names Chapter 720, F.S., the "Homeowners' Association Act," and it expands the definition of "governing documents in a homeowners' association to include the community's rules and regulations. (Chapter 2015-97, Laws of Florida.)

Estates and Tax Apportionment: CS/CS/SB 872 by Senator Hukill and Representative Moraitis contains the Section's tax apportionment initiative, as well as the Section's probate initiatives. The legislation updates the apportionment of estate taxes under the IRS Code; it clarifies the factors that a court may use in awarding fees in trust and estate litigation; it provides for a 3-month exception bar for making objections to the validity of a will; it clarifies the duties of a personal representative who becomes ineligible to serve; and it clarifies existing case law to permit objections after a notice of administration in certain circumstances. (Chapter 2015-27, Laws of Florida.)

Health Care Surrogates: CS/CS/CS/HB 889 by Representative Wood and Senator Joyner is the legislation containing the Section's health care surrogacy initiatives that provides more flexibility and choices for a health care surrogate; provides more access to patient records in a HIPAA compliant manner; and closes a gap in the current law regarding the designation of a health care surrogate for minors by parents and legal guardians. **(Chapter 2015-153, Laws of Florida.)**

Trust Accounts—Electronic Notice: CS/HB 961 by Representative Bronson authorizes the posting of documents to an electronic account or website; provides the authority

of a recipient for the posting; requires the posting to remain accessible to the recipient for a specific period of time; and establishes the time when notice of the posting is deemed received by the recipient. (Chapter 2015-176, Laws of Florida.)

Initiatives Of Interest

Service Animals: CS/HB 71 by Representative Smith requires public accommodations to permit the use of service animals by individuals with disabilities. The legislation specifies the conditions where a service animal may be removed or excluded, and it provides for penalties for the misrepresentation of the use of a service animal. **(Chapter 2015-131, Laws of Florida.)**

Farms—Civil Liability: CS/SB 158 by Senator Evers provides an exemption from civil liability for a farm owner who permits a person to gratuitously enter the farm to remove farm produce or crops left in the field, unless the farm owner has be grossly negligent or fails to warn of a dangerous condition known to the owner. **(Chapter 2015-38, Laws of Florida.)**

Terminal Conditions—Experimental Treatment: CS/CS/ HB 269 by Representative Pilon authorizes experimental drug treatments for the terminally ill; provides procedures to govern the process; and limits the liability for treating physicians and drug manufacturers. The POLST provision in the legislation has been modified based upon the Section's concern. **(Chapter 2015-107, Laws of Florida.)**

Mobile Homes: CS/CS/HB 307 by Representative Chris Latvala revises the Mobile Home Act to provide education programs for association directors; provides revised procedures to govern rental increases and lifetime leases; and revises operational procedures governing mobile homeowners associations. **(Chapter 2015-90, Laws of Florida.)**

Ad Valorem Tax Exemption—Military Housing: CS/CS/HB 361 provides an exemption from ad valorem taxes for leaseholds and appurtenant improvements on federal government properties used for military housing. The exemption does not apply to transient public lodging establishments defined by Chapter 509. (Chapter 2015-80, Laws of Florida.)

Private Property Rights: CS/CS/CS/HB 383 by Representative Edwards amends the Bert Harris Private Property Rights Act to provide for settlement agreements between property owners and governmental entities; provides intent concerning governmental exactions; and creates a cause of action for unconstitutional exactions by local government. **(Chapter 2015-142, Laws of Florida.)**

Timeshares: CS/CS/HB 453 by Representative Eisnaugle contains American Resort Development Association (ARDA) backed revisions to Chapter 721. The legislation revises numerous statutes within Chapter 721 including amendments to timeshare instruments; public offering statements; the

Changes from the 2015 Legislative Sessions, from page 8

relationship between the owners' association and the managing entity; and the provisions relating to reservation systems and multisite timeshare plans. (Chapter 2015-144, Laws of Florida.)

Value Adjustment Board—Joint Petitions: CS/HB 489 by Representative Sullivan modifies the filing process for an owner of multiple tangible personal property to permit the owner to file a single, joint petition if the property appraiser determines that the accounts are substantially similar. (Chapter 2015-115, Laws of Florida.)

Notaries: CS/SB 526 by Senator Grimsley amends Chapter 117 and authorizes the administration of oaths by "reliable electronic means" that would include the signing or transmission of a document in a manner compliant with the criminal justice information security system. **(Chapter 2015-23, Laws of Florida.)**

Amusement Machines—Timeshares and Hotels: CS/ HB 641 by Representative Trumbull authorizes electronic amusement games for family entertainment centers including timeshares and hotel game rooms. The legislation was amended prior to final passage to specifically authorize "timeshare facilities defined in §721.05 (17), Fla. Stat." to operate amusement games and machines. (Chapter 2015-93, Laws of Florida.)

Transitional Living Facilities—Client Personal Affairs: CS/SB 682 by Senator Grimsley creates the licensure and regulatory format for transitional living facilities. New §400.9981, Fla. Stat. defines the restrictions and limitations on facilities employees to act on behalf of clients as an attorney in fact, manage funds and property of a client, and receive funds as a client's payee when appropriately bonded. An employee or representative of a facility may not act as a guardian, trustee or conservator for a client or client's property under the legislation. (Chapter 2015-25, Laws of Florida.)

Condominiums—Corrections to 718.116: SB 702 by Senator Simmons is a Reviser's bill correcting parts of the Florida Statutes, and Section 89 of the legislation republishes §718.116 (6), Fla. Stat. to include paragraphs (c) and (d) that were inadvertently omitted in the passage of Chapter 2014-146, *Laws of Florida*. **(Chapter 2015-2,** *Laws of Florida***.)**

Drone Surveillance—Real Property: CS/CS/SB 766 by Senator Hukill limits a person, state agency or political subdivision from using a drone to capture images on privately-owned property or images of the owner or occupant of the property. **(Chapter 2015-26, Laws of Florida.)**

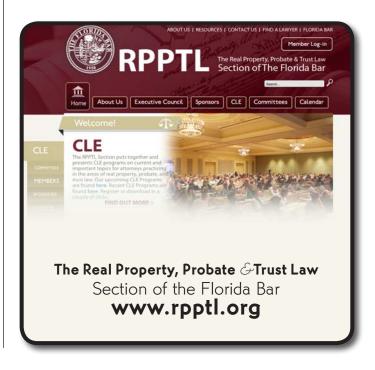
Title Insurance: CS/HB 927 by Representative Hager provides for surcharge assessments to provide funding for the Insurance Regulatory Trust Fund and revising requirements for the payment of excess surcharges. **(Chapter 2015-154, Laws of Florida.)**

Residential Building Permits: CS/HB 1151 by Representative Ingoglia creates the option for a master building permit program for residential construction of repetitive structures for single-family and townhome properties. **(Chapter 2015-156, Laws of Florida.)**

Growth Management: CS/SB 1216 by Senator Simpson revises the growth management standards and policies under Chapter 163; it effectively eliminates the DRI process and provides that digital orthophotography may be the basis for a conservation easement; and provides for the issuance of consumptive use permits to an approved master development for the same time period as the approved master development order. It also provides for the geographical areas for regional planning councils and coordination of planning between the councils. **(Chapter 2015-30, Laws of Florida.)**

Special Session 2015A - Legislative Initiative

"Common Elements"—Ad Valorem Taxes: HB 33A by Representative Gaetz is the omnibus tax-cut bill from the Special Session that concluded the budgeting process for the coming fiscal year. Section 1 of the bill modifies the definition of "common elements" found in Section §193.0235, Fla. Stat., for ad valorem tax purposes and includes property used exclusively within a subdivision at least 10 years within the definition and authorizes taxes and assessments to be allocated to individual subdivision lots. The bill also extends tax credits for low income housing developments to housing opportunities for persons with special needs, and it expands sales tax exemptions to agricultural land owners for irrigation equipment; repair of farm power equipment; stakes used in agricultural production; and aquaculture production. (Chapter 2015-221, Laws of Florida.)



Legislator Supporters of the Real Property, Probate and Trust Law Section During the 2015 Legislative Session

By Brittany O'Connor Finkbeiner, Esq. Dean, Mead & Dunbar, Tallahassee, Florida



REP. PASSIDOMO

Representative Kathleen Passidomo, leading up to the 2015 Regular Legislative Session, assembled a working group on guardianship issues that included stakeholders from both the RPPTL and Elder Law Sections of the Bar. The resulting legislation was her bill, House Bill 5, which contained the Section guardianship initiatives dealing with the payment of examiners' fees and attorneys' fees in

guardianship proceedings. She also sponsored House Bill 7, a Section initiative providing for a public records exemption for settlements entered into by a guardian on behalf of a ward. She also sponsored House Bill 87 on Construction Defects. Representative Passidomo chairs the Civil Justice Subcommittee, is Vice Chair of the Judiciary Committee, and also serves on the Insurance and Banking Subcommittee, the Transportation and Ports Subcommittee, and the Veteran & Military Affairs Subcommittee. She has been a member of the Florida House of Representatives since 2010.

Representative Passidomo is a Section member and is Board Certified in Real Estate. She is a partner in the law firm of Kelly, Passidomo & Alba, LLP in Naples. Her practice centers on real estate, corporate law and business law.



REP. BERMAN

Representative Lori Berman sponsored House Bill 283, the Uniform Transfer to Minors Act to allow persons to establish accounts for minors that remain in a custodial status until the minor reaches the age of 25 years. She serves on the Civil Justice Subcommittee; the Finance and Tax Committee; the Health and Human Services Committee; the Joint Committee on Public Counsel Oversight; and the Rules,

Calendar and Ethics Committee. Representative Berman is the Chair of the Women's Legislative Caucus and has been a member of the Florida House of Representatives since 2010.

She is an attorney and Section member who has served as in-house counsel to a federal savings bank and has practiced in the areas of commercial litigation, regulatory real estate law, and estate planning. Representative Berman has her LL.M. in Estate Planning.

Representative John Wood sponsored the Health Care Surrogates bill, House Bill 889 and estoppel letter



REP. WOOD

legislation that did not pass, House Bill 611. He has served in the Florida House of Representatives since 2008 and currently serves as the Chair of the Insurance and Banking Subcommittee and as a member of the Appropriations Committee, Civil Justice Subcommittee, Joint Select Committee on Collective Bargaining, Judiciary Committee, and Regulatory Affairs Committee.

Representative Wood is an attorney and Section member, realtor, and CEO of John Wood Enterprises, a Housing and Agriculture Company.



REP. SPROWLS

Representative Chris Sprowls sponsored the Condominium Termination bill, House Bill 643. He is serves as a member of the Government Operations Subcommittee, the Health and Human Services Committee, the Health Innovation Subcommittee, the Health Quality Subcommittee, and the K-12 Subcommittee. He was elected to the

Florida House of Representatives in 2014.

Representative Sprowls is an attorney. Before becoming a House member, he successfully prosecuted a number of high profile cases as an Assistant State Attorney for Pasco and Pinellas Counties. He is now a Special Prosecutor in the Gang Unit of the State Attorney's Office.



REP. POWELL

Representative Bobby Powell sponsored the Section's initiative, House Bill 775, affirmatively permitting the appointment of an ad litem representative by a Circuit Judge in designated circumstances when service is obtained constructively. Representative Powell is the Democratic Ranking Member on the Transportation and Ports Subcommittee

and also serves on the Agriculture and Natural Resources Appropriations Subcommittee, Economic Affairs Committee, and the Economic Development and Tourism Subcommittee. He has been a member of the Florida House of Representatives since 2012. Representative Powell works as an urban and regional planner and is a member of the American Institute of Certified Planners and the American Planning Association.

Legislator Supporters of the RPPTL Section During the 2015 Legislative Session, from page 10



REP. MORAITIS

Representative George Moraitis, Jr. sponsored this year's omnibus Community Associations bill, House Bill 791. He also sponsored Senate Bill 872, which contains the Section's tax apportionment and probate initiatives. He has been a member of the Florida House of Representatives since 2010 and has been involved in a number of successful Section initiatives. He is Vice Chair of both the Local Government

Affairs and Transportation and Economic Development Appropriations Subcommittees and also serves on the Civil Justice Subcommittee, Finance and Tax Committee, and the Transportation and Ports Subcommittee.

Representative Moraitis is a graduate of the United States Naval Academy and served in the United States Navy for seven years. During his military service, he earned the Navy Commendation Medal, Navy Achievement Medal, Navy Expeditionary Medal, and the Arctic Service Ribbon. Representative Moraitis is a Section member and practicing real estate attorney at Moraitis, Cofar, Karney & Moraitis in Fort Lauderdale.



REP. ROBERSON

Representative Ken Roberson sponsored House Bill 825, which contained the Section's initiative to complete authorizing legislation for the creation and regulation of family trust companies in Florida. He is the chair of the Health Innovation Subcommittee and also serves on the Appropriations Committee, Government Operations Subcommittee, Health and Human Services Committee,

and Health Care Appropriations Subcommittee. He has been a member of the Florida House of Representatives since 2008 and is the current Chair of the Charlotte County Delegation.

Representative Roberson is a funeral director who holds certification as a Certified Cemetery Executive from the International Funeral and Cemetery Association. He is a former Chairman and current member of the State Board of Funeral Directors & Embalmers and a former non-lawyer member of The Florida Bar 20th Judicial Circuit Grievance Committee.



REP. RODRIGUEZ

Representative Jose Javier Rodriguez co-sponsored the Guardianship bill, House Bill 5. He has been a member of the Florida House of Representatives since 2012. He is the Democratic Ranking Member on the Finance and Tax Committee and also serves on the Agriculture and Natural Resources Appropriations Subcommittee; the Judiciary Committee; the Justice Appropriations Subcommittee; and the

Rules, Calendar and Ethics Committee.

Representative Rodriguez is an attorney and graduate of Harvard Law School. He is also a member of the Cuban American Bar Association. Prior to beginning his legal career, he was a volunteer with the United States Peace Corps.



REP. MCBURNEY

Representative Charles McBurney has been integral in guiding the Section's initiatives through the process as the Chair of the Judiciary Committee. Additionally, he is Vice Chair of the Select Committee on Redistricting; and also serves on the Appropriations Committee; the Rulemaking Oversight and Repeal Subcommittee; and the Rules, Calendar, and Ethics Committee.

He has been a member of the Florida House

of Representatives since 2007.

Representative McBurney is a business attorney in Jacksonville. His family has a long history of public service in both the Florida House of Representatives and the United States Congress. He is the Chairman of the Duval County Legislative Delegation and former President of the Florida Association of Tiger Bay Clubs. He has received numerous awards for his public service, including The Florida Bar Business Law Section Distinguished Legislator Award and The Florida Bar Legislative Award.



SEN. HUKILL

Senator Dorothy Hukill sponsored Senate Bill 102 on Digital Assets, and has sponsored a number of other Section initiatives over the years. She is Chair of the Finance and Tax Committee, Vice Chair of the Communications, Energy, and Public Utilities Committee; and sits on the Appropriations Committee; Appropriations Subcommittee on Transportation, Tourism, and Economic Development; the Banking

and Insurance Committee; the Fiscal Policy Committee; and the Joint Committee on Public Counsel Oversight. She has been a member of the Florida Senate since 2012 and was a member of the Florida House of Representatives from 2004-2012. She is also the former Mayor of the City of Port Orange.

Senator Hukill is a practicing attorney and Section member in Daytona Beach. Her practice focuses on business, real estate, and probate law.

Senator Arthenia Joyner has sponsored numerous Section bills over the years, including the Senate companion to House Bill 283, the Uniform Transfers to Minors Act in 2015. She has been a member of the Florida Senate since 2006 and is the current Minority (Democratic) Leader. Prior to becoming a Senator, she was a member of the Florida House of Representatives from 2000-2006. She serves as the Vice Chair of the Appropriations Subcommittee on Criminal and

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SEN. JOYNER

Civil Justice and is also a member of the following committees: Appropriations, Health Policy, Higher Education, Judiciary, Rules, and the Joint Legislative Budget Commission.

Senator Joyner is a practicing probate attorney from Tampa. She has received a number of awards throughout her legislative career including The Florida Bar

Legislative Award in 2013.



SEN. LATVALA

Senator Jack Latvala was involved in several successful Section initiatives and bills of interest in 2015. He was the Senate sponsor for the Ad Litem bill, House Bill 775; the Condominium Termination bill, House Bill 643; and House Bill 307 revising the Mobile Home Act. He is the Chair of the Appropriations Subcommittee on Transportation, Tourism, and Economic Development and also serves on the

Committees on Appropriations, Commerce and Tourism, Governmental Oversight and Accountability, Regulated Industries, and Rules. He is the Chair of the Pinellas Legislative Delegation and was a member of the Florida Senate from 1994-2002 and from 2010 to the present.

Senator Latvala is the CEO of GCI Printing Services, Inc. in Largo. He is a former Senate Majority Leader and has received multiple awards for his leadership, including awards from Associated Industries of Florida and Disabled American Veterans. His son, Chris Latvala, is a current member of the Florida House of Representatives.



SEN. RICHTER

Senator Garrett Richter sponsored the Senate version of the Family Trust Companies bill, Senate Bill 568. He is currently serving as the President Pro Tempore of the Florida Senate and served in the Florida House of Representatives from 2006 to 2008. He is the Chair of the Ethics and Elections Committee, Vice Chair of the Banking and Insurance Committee, and also sits on the Appropriations

Committee, the Appropriations Subcommittee on Health and Human Services, the Commerce and Tourism Committee, the Regulated Industries Committee, and the Rules Committee.

Senator Richter is the President of First National Bank of the Gulf Coast. He served in the U.S. Army and the U.S. Air Force Reserves. Awards for his military service include the Vietnam Bronze Star and Combat Infantry Badge.



REP. LATVAL.

Representative Chris Latvala sponsored House Bill 307, revising the Mobile Home Act. He was elected to the Florida House of Representatives in 2014 and serves on the Business and Professions Committee, the Criminal Justice Subcommittee, the Education Committee, the Highway and Waterway Safety Subcommittee, and the Justice Appropriations Committee.

Representative Latvala worked as a Legislative Aide for Representative Hooper before running for office himself. He is the Vice President of GCI Printing Services, Inc. in Largo. His dad is State Senator Jack Latvala.



SEN. RING

Senator Jeremy Ring sponsored the Senate version of the Community Associations omnibus bill. He is Chair of the Governmental Oversight and Accountability Committee; is Vice Chair of the Judiciary Committee; and also serves on the Appropriations Committee; the Appropriations Subcommittee on Education; the Children, Families and Elder Affairs Committee; and the Commerce and

Tourism Committee. He has been a Florida Senator since 2006.

Senator Ring is an entrepreneur from Broward County. He is the co-founder of SUPERB (Students United with Parents and Educators to Resolve Bullying) and has served on multiples boards of directors, including for the Florida Ocean Sciences Institute and the National Jewish Democratic Committee.



SEN. STARGEL

Senator Kelli Stargel was the Senate sponsor for the companion to House Bill 7 creating a public records exemption for settlements entered into by a guardian on behalf of a ward. She has been a Florida Senator since 2012 and previously served in the Florida House of Representatives from 2008-2012. She is the Chair of the Higher Education Committee and is a member of the Appropriations Subcommittee

on Education; the Fiscal Policy Committee; the Judiciary Committee; the Military and Veterans Affairs, Space, and Domestic Security Committee; the Regulated Industries Committee; and the Joint Committee on Public Counsel Oversight.

She is an investment property manager in Polk County and mother of five. She has received multiple awards for her public service, including the United States Digital Learning Association Eagle Award and the Friend of Free Enterprise Award.

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Senator Miguel Diaz de la Portilla was the Senate sponsor for the Guardianship bill, House Bill 5. He is the Chair of the Judiciary Committee and also serves on the Appropriations Subcommittee on



Condominium Terminations Updated

By Alex Dobrev, Esq., of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, Florida; Steven H. Mezer, Esq., of Becker & Poliakoff, Tampa, Florida; and Christopher N. Davies, Esq., of Cohen & Grigsby, P.C., Naples, Florida

Condominium terminations are governed by Fla. Stat. §718.117, which allows for termination in cases of economic waste or impossibility, as well as "optional" terminations upon requisite approval of the membership. The law was substantially re-written in 2007 and amended by CS/CS/CS/HB 643, now known as Chapter 2015-175, Laws of Florida. The Condominium & Planned Development Committee of the Section was substantially involved in these efforts.

The most significant substantive changes involve "bulk owners" in residential condominiums. A bulk owner is defined as a single holder of voting interests or an owner together with a related entity or entities that would be considered an insider¹ holding such voting interests. If at the time the plan of termination is recorded at least 80 percent of the total voting interests are owned by a bulk owner, additional conditions and limitations are placed on any such termination in an effort to protect minority owners.

Changes Specific to Bulk Owners

Right to Lease Former Unit

If the former condominium units are offered for lease to the public after termination, each unit owner in occupancy immediately before the recording of the termination plan is entitled to lease his or her former unit and remain in possession of the unit for 12 months following the termination (on the same terms as the units are being offered to the public). Note that in order to take advantage of this provision, the unit owner must make a written request to the termination trustee within 90 days of the recording of the termination plan, and must sign a lease within 15 days of being presented with such lease. Failure to do either of the foregoing will result in a waiver of the right to retain possession.

Relocation Payment for Homestead Property

If a unit is granted homestead exemption status as of the date of the recording of the plan of termination, the unit owner must be paid a relocation payment in an amount equal to one percent of the termination proceeds allocated to the owner's former unit. Such relocation payment is to be paid by the entity or related entities owning at least 80 percent of the total voting interests (i.e., to be paid by the bulk owner). The relocation payment is in addition to the termination proceeds a unit owner will receive for such owner's former unit.

Fair Market Value Compensation

All unit owners (other than the bulk owner) must be compensated for their units at no less than 100 percent of the fair market value.² Fair market value is to be determined by an independent appraiser selected by the termination trustee

and as of a date not more than 90 days prior to the recording of the plan of termination.

Certain Original Purchasers Entitled to Price Paid

If a unit owner: (1) is an original purchaser (i.e., the owner who purchased from the creating developer); (2) rejected the plan of termination; (3) has been granted a homestead exemption for the particular unit or is an owner-occupied operating business; and (4) is current in payment of assessments and other monetary obligations to the association and any mortgage encumbering the unit as of the date the plan of termination is recorded, then the fair market value paid to the unit owner must be at least the original purchase price paid for the unit.

Mortgage Satisfaction

A plan of termination must provide for the payment of a first mortgage encumbering a unit to the extent necessary to satisfy the lien, but the payment may not exceed the unit's share of the proceeds of termination under the plan. If the unit owner is current in the payment of assessments, other monetary obligations to the association, and any mortgage encumbering the unit, then the receipt of the unit's share of the termination proceeds or the outstanding balance of the mortgage, whichever is less, shall satisfy the first mortgage in full.

The statutory language distinguishes between satisfaction of a first mortgage lien, subject to a cap of moneys allocated to the unit per the plan, and a full satisfaction of the mortgage (not just the lien against the unit) when certain additional conditions are met (essentially in instances where the owner in question "did everything right"). Presumably, in the first instance, the lender will still have a claim against the owner for any deficiency, whereas in the second, the lender will be deemed to have accepted the distribution allocated to it pursuant to the plan in full satisfaction of its borrower's obligations. In either case, the payout would be limited to the fair market value of the unit as previously addressed above or the original purchase price amount for certain homestead owners.

Disclosures

When a plan of termination is presented to the unit owners for consideration, the plan must contain certain disclosures in a sworn statement: (1) the identity of any person or entity that owns or controls 50 percent or more of the units and, if owned by an entity, a disclosure of the natural person or persons who manage or control the entity, and/or the natural person or persons who own or control 20 percent or more of the bulk owner; (2) the dates on which each unit was acquired by the

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bulk owner, and the total amount of compensation paid to each prior owner (regardless of whether or not it was attributed to the purchase price of the unit); and (3) the relationship of any board member to the bulk owner or to any person or entity affiliated with the bulk owner. Additionally, if the required disclosures are not made or are misleading, incomplete or inaccurate, then the plan will automatically be voided.

Board of Directors

If the board members were elected by the bulk owner, the unit owners other than the bulk owner may elect at least one-third of the members of the board before the approval of any plan of termination.

Changes not Specific to Bulk Owners

The 2015 revisions also introduced some technical changes applicable to all terminations:

10 Percent Rejection

The threshold of the rejection needed to thwart a termination is changed from "no more than 10 percent" to "10 percent or more" of the voting interests. This small change means that going forward exactly 10 percent opposition will be sufficient to stop a termination attempt.

Termination Following a Conversion

A residential condominium that was created by conversion may no longer undertake an optional plan of termination until 5 years after the recording of the declaration of condominium unless there are no objections to the plan of termination.

Post-Rejection Waiting Period

If 10 percent or more of the voting interests reject a plan of termination, another optional plan of termination may not be pursued for 18 months, which is an increase from 180 days.

Voting Interests and Termination

The total voting interests of the condominium include all voting interests. No voting interest of the condominium may be suspended during the consideration of a plan of termination.

Condominiums that are 75 Percent Timeshare

Condominiums in which 75 percent or more of the units are timeshare units (which were formerly exempted from these provisions) are now subject to the optional termination provisions discussed herein.

Objecting to Plan of Termination

A unit owner desiring to reject a plan of termination must do so in person or by proxy or by delivering a written rejection to the association at or before the meeting. If a plan of termination is approved by written consent or joinder without a meeting of the unit owners, any unit owner desiring to object must do so in writing within 20 days after the association has notified the non-consenting owners that the plan has been approved by written action in lieu of a unit owner meeting.

Right to Possess After Termination

Unless the plan of termination expressly provides otherwise, all leases, occupancy agreements, subleases, licenses, or other agreements for the use or occupancy of any unit or common elements of the condominium shall automatically terminate on the effective date of the termination. If the plan expressly authorizes a unit owner or other person to retain possession of any portion of the former condominium property, the plan must specify the terms and conditions of the possession.

Amendment or Withdrawal of Plan of Termination

Unless otherwise provided in the plan of termination, at any time before the sale of the condominium property a plan may be withdrawn or modified by the affirmative vote or written agreement of at least the same percentage of voting interests in the condominium as that which was required for the initial approval of the plan. A plan that is withdrawn will not be subject to the same waiting requirements as a rejected plan. If a scrivener's error is discovered, the termination trustee may also unilaterally record an amended plan or amendment to the plan of termination to correct such error.

Allocation of Proceeds

Unless the declaration provides for the allocation of proceeds, the plan of termination may require separate valuations of the common elements. Absent provisions to the contrary in the plan of termination, it is presumed that the common elements have no independent value but rather that their value is incorporated into the valuation of the units.

The holder of a lien that encumbers a unit at the time the plan is recorded must deliver a statement confirming the outstanding amount of any obligations within 30 days of the written request made by the termination trustee requesting such information.

The termination trustee may setoff the termination proceeds of any unit by the following amounts including attorneys' fees and costs:

- Unpaid assessments, taxes, late fees, interest, fines, charges and other amounts associated with the unit and which are owed to the association.
- Costs of clearing title to the owner's unit (including locating lienors, obtaining statements, paying mortgages and other liens, judgments and encumbrances and filing suit to quiet title).
- Costs of removing the owner or the owner's family, guests, and occupants in the event that such person or persons fail to vacate a unit as required by the plan.
- Costs related to any owner's breach of the plan.
- Costs related to the storage or removal of any property remaining in a unit so that the unit may be delivered vacant.
- Costs related to the appointment and activities of a receiver or attorney ad litem acting for any owner in the event that the owner is unable to be located.

Right to Contest a Plan of Termination

The "right to contest" provision is amended such that a unit owner or lienor may contest a plan of termination by initiating a petition for mandatory nonbinding arbitration (in lieu of a summary proceeding in court). Such contest is limited to: (1) the fairness and reasonableness of the apportionment of the proceeds from the sale among the unit owners, (2) that the liens of the first mortgages of unit owners other than the bulk owner have not or will not be satisfied to the extent required by law (see Mortgage Satisfaction above), or (3) that the required vote to approve the plan was not obtained. A unit owner or lienor who does not contest the plan within 90 days is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property.

If the arbitrator determines that the plan was not properly approved, or that approval procedures were not followed, the arbitrator may void the plan or grant other relief that it deems just and proper. If the arbitrator finds that the required disclosures were not made or are misleading, incomplete or inaccurate, the plan will automatically be voided. Any challenge to the plan, other than a contention that the required vote was not obtained, does not affect title to the condominium property or the vesting in the trustee, but rather will only be a claim against the proceeds of the plan.

Finally, the bill expands the definition of "dispute" in Fla. Stat. § 718.1255(1), to include a disagreement regarding a plan of termination, so that such disputes may be handled through the Division of Condominiums, Timeshares and Mobile Homes' arbitration process including a complaint being filed for a trial de novo.



C. DAVIES

Christopher N. Davies focuses his legal practice on advising condominium, cooperatives and homeowner associations in the Southwest Florida region. Chris is a Director at Cohen & Grigsby, P.C. and leads the condominium, cooperative and homeowner association law practice group. He is the immediate past Co-Vice Chair of the Florida Bar Condominium and Planned Development Committee and a member of the Real

Property, Probate and Trust Law Section of The Florida Bar. Chris is a graduate of Tulane University School of Law, where he earned both his Juris Doctorate (J.D.) and Master of Law (LL.M) degrees.



A DOBREV

Alex Dobrev is a real estate partner at Lowndes, Drosdick, Doster, Kantor & Reed who focuses on condominiums and distressed properties acquisitions, operations and disposition strategies/due diligence, particularly complex residential, office, commercial and mixed use projects. Alex also serves as a vice-chair of the Florida Bar Condominium and Planned Development Committee. Alex is a graduate of Duke University

and Georgetown University Law Center and has been recognized as a "Florida Rising Stars 2011" by Florida Super Lawyers, Orlando Business Journal's "10 Businessmen to Watch 2010," Florida Legal Elite "Up & Comer" 2011-2012 by Florida Trend Magazine, and as one of "The Best Lawyers in America 2013-2016."



S. MEZER

Steven Mezer received his B.A. from the University of Miami and his J.D. from Stetson University College of Law. He is Board Certified in Real Estate Law and is a member of the Executive Committee of the Real Property, Probate and Trust Law Section. He chairs the Condominium and Planned Unit Development Committee of The Florida Bar's RPPTL Section and is chair of the Common Interest Ownership Development Committee of the

ABA. He is a Fellow of the American College of Real Estate Lawyers. Steven Mezer serves on the steering committee and is an editor for Florida Condominium and Community Association Law, 3rd Ed. The Florida Bar.

Endnotes

- 1 Fla. Stat. § 726.102(8), Fla. Stat. defines "Insider" as including: (a) if the [owner] is an individual a relative of the [owner] or of a general partner of the [owner], a partnership in which the [owner] is a general partner, a general partner in a partnership, or a corporation of which the [owner] is a director, officer, or person in control; (b) if the [owner] is a corporation a director of the [owner], an officer of the [owner], a person in control of the [owner], a partnership in which the [owner] is a general partner, a general partner in a partnership, or a relative of a general partner, director, officer, or person in control of the [owner]; (c) if the [owner] is a partnership a general partner in the [owner], a relative of a general partner in, a general partner of, or a person in control of the [owner], another partnership in which the [owner] is a general partner, a general partner in a partnership, or a person in control of the [owner]; (d) an affiliate, or an insider of an affiliate as if the affiliate were the [owner]; and (e) a managing agent of the [owner].
- 2 "Fair market value" is the price that a seller is willing to accept and that a buyer is willing to pay on the open market in an arms-length transaction, based on similar units sold in other condominiums, including units sold in bulk purchases but excluding units sold at wholesale or at distressed prices. Units acquired in bulk following a bankruptcy or foreclosure shall not be considered. See Sec. 718.117(3)(c)3, Fla. Stat.



Updating Florida's Uniform Transfers to Minors Act

By Keith B. Braun, Esq., Comiter, Singer, Baseman & Braun, LLP Palm Beach Gardens, Florida

Florida's Uniform Transfers to Minors Act (the "Act") has recently been amended.¹ As readers are aware, the Act, which was adopted in 1985 and is based upon the model Uniform Transfers to Minors Act adopted by the National Conference of Commissioners of Uniform State Laws, allows for the creation of a custodianship to hold assets received by a minor (defined as an individual who has not attained age 21)² via a gift, bequest or other transfer.

The custodian, "acting in a custodial capacity, has all the rights, powers and authority over custodial property that unmarried adult owners have over their own property" Further, the custodian is permitted to "deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to the duty or ability of the custodian personally or of any other person to support the minor, or to any other income or property of the minor which may be applicable or available for that purpose."

Prior to the recent amendment (the "Amendment"), the Act provided for the termination of the custodianship:

- (1) at age 21 where the custodianship is created by a gift or exercise of power of appointment or a fiduciary pursuant to an authorizing provision in a will or a trust,⁵ and
- (2) at age 18 where the custodianship is created by an obligor (including a pension plan or a person who owes the minor a liquidated debt) or a fiduciary pursuant to a will or a trust without an authorizing provision.⁶

In the instances described in (1) above where the custodianship would otherwise have terminated when the minor attained age 21, the Amendment authorizes the transferor to create a custodianship which terminates when the minor attains age 25. In addition, in recognition of the fact that many Floridians have funded revocable trusts and, therefore, make gifts from assets held in such revocable trusts, the Amendment provides that a transfer by a gift from a revocable trust during the grantor's life is treated as having been made directly by the grantor.⁷ This change is consistent with federal tax law, which treats such gifts as having been made by the trust grantor.⁸

As of the beginning of this year, at least seven states – Alaska, California, Nevada, Oregon, Pennsylvania, Tennessee, and Washington – have amended their Uniform Transfers to Minors Acts in order to permit a custodian to hold assets until age 25 under certain circumstances. With this Amendment, Floridians now have the option when making lifetime and death time gifts of continuing the advantages of the statutory protections of the Act for beneficiaries until age 25, rather than being forced to bear the expense and complexity of

establishing formal trust arrangements in order to protect such beneficiaries.

Note, however, that the Amendment does not authorize the creation of a custodianship for a person who has attained the age of 21. Under the Act, a custodianship may only be created for a person who is a minor, which as noted above, is a person who has not attained age 21.

In addition, to ensure qualification of gifts for the annual exclusion from the federal gift tax,⁹ where a custodianship is created by a gift or by the irrevocable exercise of a general power of appointment, the minor is granted an absolute right to compel the immediate distribution of the entire custodial property when the minor attains age 21. The transferor may provide that the minor's right to compel immediate distribution will terminate upon the expiration of a fixed period (of at least 30 days) that begins with the custodian's delivery of a written notice to the minor. The written notice must be delivered at least 30 days before, and not later than 30 days after, the date the minor attains age 21.

The Amendment absolves a financial institution from liability for delivering custodial property to a minor upon attaining age 21 where the custodianship is created by gift or irrevocable exercise of a general power of appointment.¹⁰

No change was made to the provisions of the Act which apply to custodianships created by an obligor, a conservator or a fiduciary pursuant to a will or trust which lacks an authorizing provision (other than a transfer from a revocable trust), i.e. such custodianships will continue to terminate at age 18.

Finally, the changes made by the Amendment became effective on July 1. 4

Keith B. Braun is a board certified Wills, Trusts and Estates Lawyer and has practiced for over 30 years, primarily in the areas of estate planning and probate and trust administration. He received his law degree from the University of Pennsylvania Law School and is a partner of the Palm Beach Gardens law firm of Comiter, Singer, Baseman & Braun, LLP. He was the member of the Uniform Transfers to Minors Act Subcommittee of the Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Law Section of the Florida Bar that drafted the proposal which formed the basis of the Amendment.

Endnotes

- 1 Ch. 2015-140, Florida Statutes, signed by the Governor on June 11, 2015.
- 2 Sec. 710.102(11),F.S.
- 3 Sec. 710.115(1), F.S.
- 4 Sec. 710.116(1), F.S.
- 5 Sec. 710.123(1), F.S.
- 6 Sec. 710.123(2), F.S.
- 7 Sec. 710.105, F.S.
- $8\,$ Sec. 2035(e) of the Internal Revenue Code of 1986, as amended (the "Code").
- 9 Sec. 2503(c) of the Code.
- 10 Sec. 710.108(c)(5), F.S.

Eviction of a Commercial Tenant Does Not Preclude the Landlord's Ability to Accelerate Rent

By Matthew S. Sackel, Esq., Shutts & Bowen LLP, West Palm Beach, FL

Contrary to common thought, eviction of a commercial tenant does not (a) constitute termination of a commercial lease agreement under Florida law, or (b) preclude the landlord from exercising the option to accelerate rent payments under the terms of the lease, in the absence of any relevant modifying provisions in the lease agreement or evidence of the landlord's retaking possession for its own use.

After a tenant's breach of a lease, the landlord has three options: (1) terminate the lease and retake possession of the premises on his or her own account; (2) retake possession of the premises on account of the tenant; or (3) do nothing and hold the tenant liable for each rent installment as it becomes due. By evicting the tenant, the landlord selects either option (1) or (2). One difference between these two alternatives is the landlord's intent to take possession on the landlord's own account or on account of the tenant.

When the landlord takes control of the leased premises on its own account, the lease is terminated along with the tenant's obligation to pay future rent.³ In these circumstances, acceleration of rent payments under the lease agreement⁴ is not available because it would result in the landlord recovering "a double remedy."⁵ In contrast, when the landlord takes possession on account of the tenant, the lease agreement does not terminate.⁶ A default under Sec. 83.232, Fla. Stat., determines only possessory rights, not damages.⁷

Typically, eviction does not terminate the lease in the absence of the landlord's affirmative act of termination.⁸ For example, in *2408 W. Kennedy*, the bankruptcy court held that issuance of the final judgment for possession and a writ of possession did not terminate the lease.⁹ Moreover, the "terms of a written commercial lease are controlling in determining whether a termination has occurred and those terms may not be rewritten by the Courts." Accordingly, the courts are likely to consider the terms of the lease and enforce a provision specifying that the landlord's entry and taking possession of the premises after the tenant's default does not terminate the lease.¹¹

Acceleration of Rent is Typically Permitted

There was conflicting authority, which has since been indirectly overruled, as to whether regaining possession terminates the landlord's ability to accelerate rent payments under the lease agreement. In *Coast Federal Sav. & Loan v. DeLoach*, the Second District Court of Appeal stated that "[b]y retaking possession either for his own account or for the account of the lessee, a lessor loses the right to recover the full amount of remaining rental due on the basis of the acceleration clause." The court cited *Geiger Mutual Agency* The court cited *Geiger Mutua*

and *Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Enterprises, Inc.*, ¹⁴ in support of this proposition.

However, Geiger and Jimmy Hall's do not support the court's holding. While the Fourth District Court of Appeal held in Geiger that the landlord could not accelerate rent payments, the court also said the landlord took possession on his own account in that case.15 In Jimmy Hall's, an earlier Second District Court of Appeal panel actually allowed acceleration of rent payments after the lessor took possession of the premises on account of the lessee, as long as the rent collected for reletting was applied to the amount due under the original lease. 16 The court in Coast Federal Savings and Loan Association did not decide whether acceleration was appropriate, but remanded the case to determine whether the lessor actually retook possession of the premises.¹⁷ Moreover, the statement in Coast Federal that retaking possession on account of the tenant precludes acceleration is inconsistent with the Florida Supreme Court's conclusion in Kanter v. Safran,18 where the Court held the lease agreement did not terminate upon acceptance of the surrender of the premises if the landlord took possession on account of the tenant, and that the landlord may collect the difference between the amount received from reletting and the amount stipulated in the original lease for the remainder of the term.19 While Kanter did not address acceleration, and stated that the landlord may collect the difference in rent at the end of the leasing period, if the lease agreement is not terminated, the acceleration clause should remain enforceable.20

Kanter, Geiger, and Jimmy Hall's all stand for the proposition that the landlord cannot recover the rent payments from the defaulting tenant, acquire possession, relet the premises, and keep the rent payments from the original and new tenants.²¹ However, pursuant to the Second District Court of Appeal



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decision of *Horizon Med Group, P.A.*, there is authority to permit this provided the court retains jurisdiction to compel a future accounting to avoid the inequity of the landlord keeping rent from both the original and new tenants.²² Accordingly, when the landlord takes possession on account of the tenant, it is proper for the court to allow acceleration of the rent payments and enter judgment for the landlord as long as the court reserves jurisdiction for an accounting of the rents received from reletting the premises to a third party, if any such rents are collected.²³

Courts Look to Use of the Premises to Determine if Acceleration is Appropriate

The landlord's actual use of the premises determines the remedies, and the nature of the repossession is usually a question of fact.²⁴ The courts consider both statements and conduct of the parties in determining whether the landlord took possession of the premises on account of the landlord or the tenant, and whether the lease was terminated. The following cases illustrate the factors courts consider when determining the actual uses of the premises:

In Jimmy Hall's Morningside, Inc., the landlord wrote to the tenants that it was retaking possession and it would credit the tenants with the rent collected subsequently and hold the tenants responsible for the deficiency.²⁵ Thereafter, the landlord accelerated the rent payments.²⁶ The Second District Court of Appeal held that the trial court erred in issuing the judgment in favor of the landlord for the full sum of accelerated payments without providing for an accounting to determine any amounts received from reletting the premises.²⁷

In *CB Institutional Fund VIII*, the landlord provided an affidavit stating that it took possession on account of the tenant in support of its motion for summary judgment.²⁸ Because the affidavit was not rebutted, acceleration of the rent payments under the lease agreement was appropriate.²⁹

In *Hyman v. Cohen*, the Florida Supreme Court held that the landlords terminated the lease and took possession of the hotel on their own account when the tenant turned over possession following the notice to pay rent or move out, the landlords rented the premises to a corporation they formed for that purpose, and the landlord never advised the tenant that they were doing so on the account of the tenant.³⁰

Accordingly, in the absence of a lease provision to the contrary, the landlord's retaking possession of the premises, without more, will not terminate the lease nor preclude acceleration of the rent payments due thereunder. Whether the landlord intends to take possession on account of the landlord or the tenant must be established based upon evidence of a landlord's statement or conduct in order for the court to determine whether the lease would be considered terminated and the acceleration unavailable. Notably, a landlord that obtains a damages judgment against a former tenant that includes accelerated rent should provide the

tenant with the opportunity to request an accounting in the event the landlord re-lets the vacant premises. Therefore, it may be appropriate to include language along the lines of the following in a final judgment for damages: "This Court reserves jurisdiction pursuant to the holding in *Horizon Medical Group, P.A. v. City Center of Charlotte County, Ltd.*, 779 So. 2d 545 (Fla. 2d DCA 2001), for an accounting in the future should the plaintiff obtain rent which could serve as a setoff."

Conclusion

Because eviction of a commercial tenant does not (a) constitute termination of a commercial lease agreement under Florida law or (b) preclude the landlord from exercising the option to accelerate rent payments under the terms of the lease, landlords can comfortably obtain a judgment for eviction and acceleration of damages provided they include the necessary language entitling the tenant to the right to request an accounting.

Matthew Sackel is a partner in the Litigation Department of Shutts & Bowen's West Palm Beach office where he counsels financial institutions, corporations and individuals in a variety of commercial disputes ranging from real estate litigation and partnership disputes to guardianship proceedings. Additionally, Mr. Sackel handles complex Landlord/Tenant matters and frequently represents clients in general commercial litigation matters. He also has extensive trial and appellate experience.

Mr. Sackel serves on the Board of Directors of the Legal Aid Society of Palm Beach County and has been recognized for his volunteer pro bono efforts.

Endnotes

- 1 E.g., Williams v. Aeroland Oil Co., 20 So. 2d 346, 347-48 (Fla. 1944); In re 2408 W. Kennedy, LLC, 512 B.R. 708, 712-14 (Bankr. M.D. Fla. 2014) (applying Florida law).
- 2 In re 2408 W. Kennedy, LLC, 512 B.R. at 712-14.
- 3 *Id.; Geiger Mut. Agency, Inc. v. Wright*, 233 So. 2d 444, 447 (Fla. 4th DCA 1970) ("ejectment" of the tenant terminated the lease when the landlord resumed exclusive possession of the premises "for his own use").
- 4 The general rule is that acceleration is only available when there is a lease provision providing for it. *Nat'l Adver. Co. v. Main St. Shopping Ctr.*, 539 So. 2d 594, 595 (Fla. 2d DCA 1989) (citing *Williams v. Aeroland Oil Co.*, 20 So. 2d 346, 347-48 (Fla. 1944)).
- 5 Geiger Mut. Agency, 233 So. 2d 444, at 447.
- 6 In re 2408 W. Kennedy, LLC, 512 B.R. at 712-14; see also Kanter v. Safran, 68 So. 2d, 553, 557-58 (Fla. 1953) (upon relinquishment by the lessee, the lessor may accept surrender of the premises, reenter, and relet on account of the lessee without terminating the lease agreement).
- 7 See Famsun Invest, LLC v. Therault, 95 So. 3d 961 (Fla. 4th DCA 2012); Misha Enterprises v. Gar Enterprises, LLC, 117 So. 3d 850 (Fla. 4th DCA 2013).
- 8 In re 2408 W. Kennedy, LLC, 512 B.R. at 712-14; see also In re PAVCO Enterprises, Inc., 172 B.R. 114, 117 (Bankr. M.D. Fla. 1994) ("Considering the three options of a landlord, it is clear that regaining the premises is not tantamount to termination of the lease"); In re Florida Lifestyle Apparel, Inc., 221 B.R. 897, 899 (Bankr. M.D. Fla. 1997) (applying Florida law and holding that where the lease agreement allowed the landlord to retake possession of the leased premises without terminating the lease, and where the landlord expressed no intention to terminate, the lease agreement survived); In re Spice Modern Steakhouse, Inc., 6:11-BK-15109-ABB, 2011 WL 5563545, at *2 (Bankr. M.D. Fla. 2011) (same).
- 9 512 B.R. at 713.
- 10 In re Spice Modern Steakhouse, Inc., 2011 WL 5563545, at *2 (citing Rodeway Inns of America v. Alpaugh, 390 So. 2d 370, 372 (Fla. 2d DCA 1980)).

LITIGATION





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Eviction of a Commercial Tenant, from page 19

- 11 See id.; Vareka Investments, N.V. v. Am. Inv. Properties, Inc., 724 F. 2d 907, 912 (11th Cir. 1984) (the court properly accepted the parties' stipulation that the lease did not terminate when the lease agreement provided that upon default the landlord could retake possession and re-let the premises on account of the tenant).
- 12 362 So. 2d 982, 984 (Fla. 2d DCA 1978).
- 13 233 So. 2d 444.
- 14 235 So. 2d 344 (Fla. 2d DCA 1970).
- 15 233 So. 2d at 447.
- 16 235 So. 2d at 346.
- 17 362 So. 2d at 985; see also Grove Restaurant and Bar, Inc. v. Razook, 571 So. 2d 596 at 597-98 (Fla. 2d DCA 1990) (citing Coast Federal and remanding for a factual finding of whether a constructive eviction occurred).
- 18 In Kanter v. Safran, 68 So. 2d 553 (Fla. 1953), the Florida Supreme Court found that the lessee's written relinquishment of possession of the motel and the lessor's written refusal and notice that if the lessee's conduct necessitated retaking possession, such retaking would be on the lessee's account constituted an express surrender and that the lessor took possession of the premises on account of the lessee. Furthermore, the lessor's repairs were not inconsistent with the intention to relet on account of the tenant.
- 19 Kanter v. Safran, 68 So. 2d, 553, 557-62 (Fla. 1953).
- 20 See id.; Jimmy Hall's Morningside, 235 So. 2d at 346.
- 21 Kanter, 68 So. 2d at 557; Geiger Mut. Agency, 233 So. 2d at 447; Jimmy Hall's Morningside, 235 So. 2d at 346.

- 22 Horizon Med. Group, P.A. v. City Ctr. Of Charlotte Cnty., Ltd, 779 So. 2d 545 (Fla. 2d DCA 2001).
- 23 Jimmy Hall's Morningside, 235 So. 2d at 345-46; Quintero-Chadid Corp. v. Gersten, 582 So. 2d 685, 689 (Fla. 3d DCA 1991); Horizon Med. Group, P.A. v. City Ctr. of Charlotte Cnty., Ltd., 779 So. 2d 545, 546 (Fla. 2d DCA 2001); Bucky's Barbeque of Fort Lauderdale, LLC v. Millennium Plaza Acquisition, LLC, 67 So. 3d 1207, 1210 (Fla. 4th DCA 2011); Siboni, Hamer & Buchanan, P.A. v. N.W. Third St. P'ship, Inc., 84 So. 3d 477 (Fla. 5th DCA 2012); see generally CB Institutional Fund VIII v. Gemballa U.S.A., Inc., 566 So. 2d 896, 896 (Fla. 4th DCA 1990) (distinguishing Geiger and finding that when the evidence of landlord taking possession on account of the tenant was not refuted, acceleration was appropriate); Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd., 636 So. 2d 838, 840-41 (Fla. 2d DCA 1994) (the fact that the landlord accelerated the rent, took possession, and relet the premises would not make the final judgment against the tenant improper).
- 24 Bucky's Barbeque of Fort Lauderdale, LLC, 67 So. 3d at 1209.
- 25 235 So. 2d at 345.
- 26 ld.
- 27 ld.
- 28 566 So. 2d at 896.
- 29 ld.
- 30 73 So. 2d 393, 396-97 (Fla. 1954).

Review Your Lender Closing Instructions Carefully

Representatives of the title insurance industry regularly meet with officials from the Florida Office of Insurance Regulation ("OIR") and the Florida Department of Financial Services ("DFS") regarding the regulation of the industry. These meetings focus primarily on forms, rules, and related industry matters.

At a recent meeting, OIR officials focused comments on Sec. 626.9541(1)(a), F. S. That provision reads in pertinent part, "(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.—The following are defined as unfair methods of competition and unfair or deceptive acts or practices: (a) *Misrepresentations and false advertising of insurance policies.*—Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any...statement...which: 1. Misrepresents the benefits, advantages, conditions, or terms of any insurance policy."

OIR noted that some lender's general closing instructions require the title agent to make assurances about coverage that may not comply with Florida law, specifically Sec. 627.777, F.S., or Chapter 69O-196, F.A.C. Affirmative coverage was cited as an area of concern.

For example, one major lender requires in their general lender closing instructions the following:

Express affirmative coverage against loss is required in connection with each exception which adversely affects the property, such as easements, encroachments, violations of restrictions, common walls, overhang of eaves, porches, decks, roofs, etc.

OIR officials indicated that the title agent that assents to such a closing instruction and agrees to give affirmative coverage over any easement otherwise excepted on Schedule B is possibly misrepresenting the terms of the policy that will ultimately be issued to the lender because such coverage cannot be given. While the facts of a given title will control the final analysis, rarely are those available at the time the general loan closing instructions are presented. There was further discussion about the possibility that the requesting lender may violate the statute my making an inappropriate demand.

While we are unaware of any specific instances of enforcement by OIR or DFS against title agents or attorneys, OIR has taken this position against casualty insurance agents that alter a homeowner policy binder or Evidence of Property Insurance ("EPI") to indicate to the lender that the policy covers "full replacement costs" or similar words that misrepresent the actual coverage.

The practice take away should be apparent. Pay attention to both general and special loan closing instructions and negotiate adjustments as appropriate. Failure to do so may result in substantial penalties under Sec. 626.9521, F.S. to both you and the requesting lender.

James C. Russick V.P. Florida State & Gov't Affairs Counsel Old Republic National Title Insurance Company

New CFPB Disclosure Lets Buyers "Know Before They Owe"...But Will It Really Help Buyers At The Time Of Contract Signing?

By G. Thomas Ball, Esq., BakerHostetler, Orlando, Florida



T. BALL

The Realtor/Attorney Joint Committee (the "Committee") of The Florida Bar and Florida Realtors® is responsible for maintaining the standard form Residential Contract for Sale and Purchase commonly known as the "FR/BAR Contract" (the "Contract"). The Committee monitors laws, decisions, and customs and practices of the real estate industry and promulgates modifications to the Contract deemed

necessary to address such changes.

The purpose of this article is to discuss the latest Contract modifications made by the Committee in response to new mortgage disclosure rules enacted pursuant to the mandate by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Under Dodd-Frank, the Consumer Financial Protection Bureau ("CFPB") was created and charged with the regulation of all residential mortgage transactions in the United States and with integrating the mortgage disclosure rules existing under Regulation X of the Real Estate Settlement Procedures Act of 1974 ("RESPA") and Regulation Z of the Truth in Lending Act of 1968 ("TILA") into a single rule (the "Final Rule"). The Final Rule will govern the submission, processing and closing of all federally-related mortgage loan applications for residential properties submitted on or after October 3, 2015 (the "CFPB Effective Date").

Although the mortgage loan disclosure requirements of the Final Rule ("CFPB Requirements") discussed in this article specifically govern and regulate mortgage lenders, they will, nevertheless, affect all sellers, buyers, lenders and others providing services in residential transactions requiring federally-related mortgage loan financing ("Loan"). In response to the imposition of CFPB Requirements on mortgage lenders in particular, the Committee has obtained the approval of The Florida Bar and Florida Realtors® to make modifications to the Contract that will be promulgated in September 2015 in time to be used in transactions by the CFPB Effective Date (the "2015 Contract Changes").

This article is not intended to be a comprehensive review of CFPB Requirements. However, to best understand the 2015 Contract Changes, it is helpful to briefly review the purpose of the Final Rule and certain CFPB-mandated timeframes, established by CFPB Requirements, for delivery of the required Loan disclosures.

Legislative History of Loan Disclosures

Since the adoption of TILA and RESPA, Congress has enacted numerous amendments to these Acts as well as promulgated additional new legislation, including Dodd-Frank, that attempt to provide homebuyers with accurate and timely information regarding Loan closing costs and charges, as well as affording buyers some protection from predatory lending practices. The history of these legislative efforts demonstrates an underlying belief by Congress that, if buyers are provided with advance knowledge of settlement costs, they will have real choices among federally-related mortgage lenders, will have a real opportunity to review the final terms of the lender's Loan and compare to other credit terms, and will have a commercially reasonable opportunity to then make a choice whether or not to proceed with a particular lender's offering.

Affirming this belief is Dodd-Frank's mandate that the mortgage disclosures under TILA and RESPA be integrated under the Final Rule to ensure that "...consumers are provided with timely and understandable information to make responsible decisions about financial transactions..." As further indication of this belief, the Final Rule states "... the redesigned disclosure forms may improve the ability of consumers to shop for and compare mortgage terms across loan offers..." and "...may reduce the magnitude and frequency of changes in costs between application and consummation..."

A glaring weakness in Congress's legislative scheme has always been, and continues to be, that most homebuyers, before initiating negotiations in earnest with any lender, have already become contractually committed to a seller and to contract-specific performance time periods, and generally do not have time or money to apply for and pursue to conclusion more than one application for a Loan prior to the time they are required to close their desired purchase. Practically speaking, there remains considerable doubt that a homebuyer's ability to shop and choose among alternative mortgage lenders will be materially enhanced by delivery of a more robust and possibly more accurate disclosure of mortgage terms 3 days prior to a Contract's required closing date ("Closing Date").

CFPB Requirements

CFPB Requirements mandate that the following events take place in connection with the application, processing and closing of Loans. These events will have the greatest impact on the terms and conditions of the Contract, especially the provisions dealing with financing and the Closing Date; Closing Date extensions; dates for completion of deliveries, inspections,

New CFPB Disclosure Lets Buyers "Know Before They Owe"..., from page 22

title, survey and other examinations; and satisfaction of other contingencies in anticipation of closing.

- **1. Loan Application.** To complete a Loan Application ("Application"), the buyer must submit to the originator the following 6 pieces of the buyer's "financial information":
 - a. Borrower's name;
 - b. Borrower's monthly income;
 - c. Borrower's social security number to obtain a credit report;
 - d. Property address;
 - e. Estimate of property's value; and
 - f. Mortgage loan amount sought.
- 2. Loan Estimate. Within 3 business days after receiving a completed Application, the originator must deliver or place in the mail to the buyer a Loan Estimate. The mailing of the Loan Estimate must be made at least 7 days prior to consummation of the Loan. The originator must make the terms of the Loan Estimate available for 10 business days after buyer's receipt for the buyer to provide notice that buyer intends to proceed with the Loan ("Notice to Proceed").
- 3. Notice to Proceed. The Notice to Proceed is not required by the Final Rule to be in writing, and receipt of the Notice by the originator does not trigger a date by which the originator must deliver further disclosures and documents, nor does it affect the date by which "consummation" of the Loan must occur. However, receipt of the Notice to Proceed does permit the originator to commence charging the applicant processing fees and other costs. If the buyer takes longer than 10 business days to deliver the Notice to Proceed, the originator may choose to amend its Loan Estimate before proceeding with that buyer, and the receipt of such amendment would commence another 10 business day period for the buyer to consider whether to proceed.
- **4. Closing Disclosure.** The new Closing Disclosure form combines and replaces the TILA disclosure and the RESPA HUD-1 disclosure/settlement statement. The Closing Disclosure is regulated only by the requirement that it be delivered at least 3 days prior to "consummation" of the Loan. Earlier delivery is not regulated.

To ensure its timely delivery by mail, the Closing Disclosure must be placed in the mail 7 days prior to the date of consummation. With respect to the calculation of timely mailing and delivery, (i) the date of mailing is not counted, (ii) delivery is presumed to occur on the 3rd business day after the date of mailing, and (iii) the day of delivery is counted as one of the 3 business days prior to closing.

The Final Rule does not impose a deadline by which buyer, after receiving the Closing Disclosure, must act to either "accept" or "reject" the Loan; however, the originator may choose to impose a deadline for buyer's completion of "consummation." In practice, the buyer will most likely be

facing an impending Closing Date under the Contract with limited options available if he or she rejects the Loan with 3 or fewer days left before closing.

5. Amended Closing Disclosures. It is possible that changing facts and circumstances may require that the Loan Estimate and, in turn, a new Closing Disclosure be re-issued. In such event, the Loan Estimate must be provided (mailed) to the buyer at least 4 business days prior to "consummation," and the Closing Disclosure must, again, be delivered at least 3 business days prior to "consummation."

The following events will require the re-issuance of the Closing Disclosure and the re-commencement of the 3 (or 6 if mailed) business-day waiting period:

- 1/8th of 1% change in APR (and 1/4th of 1% change for loans with irregular payments or periods);
- Change in type of loan product requested by buyer; or
- Imposition of prepayment penalty provision by lender.

No deadline is mandated by which the lender must re-issue a new Closing Disclosure.

6. Business Days: For all time periods under the Final Rule, "business days" are calculated by including Saturdays but not Sundays or national holidays.

General Observations and Assumptions Relating to CFPB Requirements

In considering what Contract modifications to make to address CFPB Requirements, the following facts and assumptions were followed:

- The Final Rule combines TILA and RESPA notice requirements
- The Contract should continue to limit a lender's ability to unilaterally extend the Contract Closing Date.
- Cash transactions (i.e., no buyer financing contingency exists) are not governed by the CFPB and should not be affected by any Contract modifications made solely to comply with CFPB Requirements or by a unilateral decision by the buyer to seek financing after execution of the Contract.
- To avoid or minimize the need to amend or republish the Closing Disclosure form, lenders will most likely not commence the process of preparing the Closing Disclosure until lender has received all buyer charges, costs and other information needed to complete the form ("Closing Information").
- To ensure that delivery of the Closing Disclosure can be made at least 3 business days prior to the Closing Date, all closing Information will need to be known by the buyer's lender at least 10 calendar days prior to the specified Closing Date.

2015 Contract Changes

Early in its deliberations over the effects of the Final Rule, the Committee concluded there were some obvious modifications to the Contract that should be implemented prior to the

New CFPB Disclosure Lets Buyers "Know Before They Owe"..., from page 23

CFPB Effective Date and that further modifications may be required later after lingering issues and interpretations of other provisions were resolved.

Commencing at some point prior to the end of September 2015 and possibly continuing for some months thereafter, real estate licensees and attorneys will be in a state of transition that may require them to monitor client and customer contractual timeframes under both the pre-2015 Contract form and under the 2015 Contract Changes. The pre-September 2015 form of the Contract should not be used if the buyer may, or is reasonably expected to, make application for financing on or after the CFPB Effective Date because that form does not provide for the adjusted performance timeframes provided by the 2015 Contract Changes. Practitioners may choose to commence use of the 2015 Contract prior to the CFPB Effective Date but should ensure they and their clients and customers fully understand the effect of the 2015 Contract Changes.

Conclusion

The CFPB's desire to provide homebuyers with, hopefully, more accurate and timely loan information and afford buyers protection from predatory lending practices is to be commended. Below is a summary of the Committee's 2015 Contract Changes that address the new CFPB timelines. The entire Contract, its "AS IS" version and the Comprehensive Riders incorporating the 2015 Changes may be accessed at the RPPTL Section's website.

The new forms and timelines will undoubtedly be met with criticism by the sophisticated and seasoned veteran buyers who have grown accustomed to TILA and RESPA requirements and forms. For the first time buyers and others less sophisticated, they may quickly realize that for them to have real choices among lenders will take more than simply receiving "final disclosure" of the terms and costs of their "loan "commitment" just 3 days before their contracted Closing Date.

It is likely that more adjustments to CFPB Requirements and forms of disclosure, as well as to the FR/BAR Contract, will be needed in the coming months. As the Committee works with this changing environment, your suggestions and comments are welcome and may be emailed to the following address with the following subject-line description: tball@bakerlaw.com. Subject: FRBAR 2015 Changes.

Summary of 2015 Changes to Contract and Riders: 2015 CONTRACT PROVISIONS – MODIFICATIONS TO THE STANDARD CONTRACT FORM

5. EXTENSION OF CLOSING DATE: Subparagraph (a) was changed by eliminating reference to TILA and substituting "CFPB Requirements" as a reason for extending the Closing Date and by providing for an extension period of 10 days rather the 7 days previously provided.

Rationale For Change: To recognize that requirements for delivery of TILA and RESPA notices and disclosures have now been combined under CFPB regulations and to provide for a limited one-time extension of the Closing Date to meet Closing Disclosure delivery requirements.

8. FINANCING:

Subparagraph (a) was amended by adding the following: If Buyer obtains a loan for any part of the Purchase Price of the Property, Buyer acknowledges that any terms and conditions imposed by Buyer's lender(s) or by CFPB Requirements shall not affect or extend the Buyer's obligation to close or otherwise affect any terms or conditions of this Contract.

Subparagraph (b) was amended by changing the default time for the buyer to obtain a loan commitment ("Loan Commitment Date") from 30 days to 45 days and by providing that an extension of the Closing Date under Paragraph 5(a) as a result of CFPB Requirements would not extend the time for either the seller or buyer to exercise its right of cancelation.

Rationale For Change: To clarify that the closing of cash transactions will not be delayed by CFPB Requirements if the buyer elects to pursue a Loan, to recognize new timelines for lenders' compliance with CFPB Requirements by providing a default of 45 days rather than 30 days for obtaining financing commitments, and to provide that the period for either party to terminate for the buyer's failure to obtain financing is not extended by CFPB Requirements.

9. CLOSING COSTS; TITLE INSURANCE; SURVEY; HOME WARRANTY; SPECIAL ASSESSMENTS:

Subparagraph (c) TITLE EVIDENCE AND INSURANCE was amended by changing the default time for delivery of title evidence from 5 days prior to Closing to 15 days prior to Closing, and naming this time period as the "Title Evidence Deadline."

Subparagraph (d) SURVEY was amended by changing the default time for obtaining a survey from "at least five (5) days before Closing" to "On or before Title Evidence Deadline."

Rationale For Change: To facilitate lender's compliance with new CFPB disclosure timelines by providing for an earlier default date for the delivery and examination of title evidence and survey, to provide for proper calculation of owner's and lender's policies of title insurance, and to recognize that disclosure of such premiums on CFPB forms may differ from Contract provisions and Florida OIR promulgated rates and procedures.

12. PROPERTY INSPECTION AND REPAIR: The default time for the Inspection Period in Subsection (a) INSPECTION PERIOD of the standard form of the Contract was changed from "By the earlier of fifteen days from Effective Date or 5 days prior to Closing Date" to "15 days after Effective Date." Rationale For Change: To facilitate lender's compliance with new CFPB timelines by providing for an earlier default date

New CFPB Disclosure Lets Buyers "Know Before They Owe"..., from page 24

for the completion of inspections. This change will also make the default Inspection Period in the Standard form the same as the default provision in the "AS IS" form.

18. STANDARDS: Standard G. FORCE MAJEURE was amended by eliminating from the definition of force majeure the phrase "any other cause not reasonably within control of Buyer or Seller."

Rationale For Change: To eliminate an overly-broad provision that may allow any lender delay to be interpreted as the basis for extension of the Closing Date.

2015 CONTRACT PROVISIONS – MODIFICATIONS TO THE STANDARD CONTRACT RIDER FORMS

C. SELLER FINANCING RIDER (PURCHASE MONEY MORT-GAGE; SECURITY AGREEMENT TO SELLER)

Rider C Subparagraph II: SELLER FINANCING was amended by inserting the following loan option:

(b) an interest-only mortgage loan that complies with the requirements of Dodd-Frank set forth above, for a term of _____ (if left blank, then 60) months, and requires monthly, quarterly, annual or other periodic interest payments (Permitted for the one property exclusion only); or

Rationale For Change: To clarify interpretations of CFPB restrictions.

F. APPRAISAL CONTINGENCY RIDER: A default time for obtaining an appraisal of 10 days prior to Closing was inserted.

Rationale For Change: To facilitate lender's compliance with new CFPB timelines by providing for an earlier default date for the buyer to obtain an acceptable appraisal and elect to terminate.

H. HOMEOWNER'S/FLOOD INSURANCE RIDER: Default times for obtaining homeowners and flood insurance policies were changed from "the earlier of 30 days after Effective Date or 5 days prior to Closing Date" to "the earlier of 30 days after Effective Date or 10 days prior to Closing Date."

Rationale For Change: To facilitate lender's compliance with new CFPB timelines by providing for an earlier default date for the determination by buyer of acceptable homeowners and flood insurance coverages.

Tom Ball is a partner with BakerHostetler and practices in the areas of business and real estate. He served the firm as Managing Partner of its Orlando office for 23 years. He has been Board Certified in Real Estate since 1987 and has served on the Realtor/ Attorney Joint Committee of the Real Property Probate and Trust Law Section for over 25 years. He presently serves the Joint Committee as Chair of the Contract Sub-committee.

Endnotes

- 1 Pub. L. No. 111-203, 124 Stat.1376 (2010) 12 U.S.C. §§ 5301 5641.
- 2 12 U.S.C. §§ 5481 5603.
- 3 12 U.S.C. §2601.
- 4 15 U.S.C. §1601.
- 5 78 FR 79730 (Dec. 31, 2013. The Integrated Mortgage Disclosures under Real Estate Settlement Procedures Act ("RESPA") (Regulation X) and the Truth in Lending Act ("TILA") (Regulation Z). http://files.consumerfinance.gov/f/201311_cfpb_final- rule_integrated-mortgage-disclosures.pdf.
- 6 80 FR 43911 (June 24, 2015).
- 7 12 CFR §1024.2 (b). Generally, a "federally-related mortgage loan" includes any loan (other than temporary financing, such as a construction loan) that is secured by a first or subordinate lien on residential real property designed principally for the occupancy of one to four families, including a refinancing, and which:
 - is made in whole or in party by any federally insured or federally regulated lender;
 - is made in whole or in part, or insured, guaranteed, supplemented or assisted in any way by the Secretary of HUD or any other officer or agency of the federal government or under or in connection with a housing or an urban development program administered by the Secretary of HUD or a housing or related program administered by any other officer or agency;
 - is intended to be sold by the originating lender to one of the Government Sponsored Enterprise ("GSE") - Fannie Mae, Ginnie Mae or Freddie Mac or a financial institution from which it is to be purchased by Freddie Mac; or
 - is made in whole or in part by any "creditor" (as defined in TILA) who makes or invests in residential real estate loans aggregating more than \$1 million per year.
- 8 See 12 U.S.C. §2607.
- 9 12 U.S.C. §5511(b)(1).
- 10 Final Rule, Page 1324. *See* http://files.consumerfinance.gov/f/201311_cfpb_final-rule_integrated-mortgage-disclosures.pdf. 11 CFR §1026.2(a)(3).
- 12 12 CFR §1026.19(e). The Loan Estimate replaces the good faith estimate form. The originator may, if the applicant agrees, make delivery by fax, email or other electronic means. Receipt is assumed 3 business days after mailing. When consummation of a timeshare Loan occurs within 3 business days of Application, the originator may forgo issuing a Loan Estimate and may issue only the Closing Disclosure. 12 CFR §1026.19(e)(1)(iii)(C).
- 13 12 CFR §1024.7(f) (4).
- 14 "Consummation" means the date the buyer executes the Loan documents and becomes obligated to the lender. Regulation Z currently defines "consummation" as "the time that a consumer becomes contractually obligated on a credit transaction." See 12 CFR § 1026.2(a) (13). (When a borrower becomes obligated under a loan is to be determined under state law. Although not answered by the Final Rule, it is presumed that consummation will occur when the borrower executes and delivers the note or other debt instrument.) "Settlement" means the "process which culminates in the funding, passage of title and "closing" of the transaction. Regulation X defines "settlement" as "the process of executing legally binding documents regarding a lien on property that is subject to a federally-related mortgage loan. This process may be called "closing" or "escrow" in different jurisdictions. See 12 CFR §1024.2(b).
- 15 12 CFR §1026.19(e)(3)(iv)(E). *See* Official Interpretation §1026.19(e) (3)(iv)(E) -2.
- 16 12 CFR §1026.19(f)(1)(ii)(A). In timeshare transactions, delivery must occur no later than consummation.
- 17 12 CFR §1026.19(f)(1)(iii) and (2) (ii). *See* Official Interpretation §1026.19(f)(1)(iii) 2. and (2) (ii) -2.
- 18 12 CFR §1026.19(f)(2)(ii).
- 19 *Id*.
- 20 See 5 U.S.C. §6103. See also CFR §1026.2(a)(6).
- 21 www.rpptl.org

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Tangible Personal Property and the Sale of Real Estate: Sales Tax Liability and Other Concerns

By Cristofer A. Bennardo, Esq., of Bennardo Levine, LLP, Boca Raton, Florida

The common residential real estate transaction in Florida most often includes the sale of real property and its improvements, as well as tangible personal property. Home sales are regularly conveyed with appliances and other minor furnishings. At times, homes sell "fully furnished" and may include tangible personal property of significant value, such as artwork, a car in the garage or a docked boat.

Real estate transaction forms in wide use throughout the state provide that the personal property included in the contract is "included in the purchase price," and "has no contributable value." Documentary stamp tax due on the sale of real estate is paid on the full purchase price, regardless of the inclusion of personal property.

Parties more frequently employ creative terms in negotiation of the real estate contract by assigning separate values to the sale of the real estate and the sale of the tangible personal property. The documentary stamp tax paid by the seller in the transaction is reduced, as it is paid only on the price allocated to the real estate. The buyer appears to have the benefit of a lower reported sale price for the tax collector's eventual valuation and assessment of property taxes. At first light, the separate allocation appears to be globally advantageous. The separate allocation of values, however, presents a number of pitfalls for the seller, buyer, real estate broker, and closing agent if not properly analyzed and contracted. Florida sales tax may be assessed. Criminal liability is also a possibility. Often, the disadvantages in separate allocations outweigh any gain.

Documentary Stamp Tax and Sales Tax

Documentary stamp tax is imposed on the sale of real estate "at the rate of 70 cents on each \$100 or fractional part thereof of the consideration paid, or to be paid." The stamp tax applies to documents transferring any lands, tenements, or other real property, or any interest therein (emphasis added). An interest in real property for purposes of the stamp tax includes interests such as a mobile home when sold in conjunction with the sale of realty, the right granted to a tenant-stockholder to occupy a unit owned by a cooperative corporation, and assignments of a successful foreclosure bid, to name a few. A taxable interest in real property also includes improvements that exist on the land when a deed is delivered.

Sales tax is assessed on the sale of tangible personal property at a rate of six percent (6%) of the sales price of each item or article of tangible personal property sold.⁶ However, the Florida Department of Revenue (the "Department") has long taken the position that if the sale of real property encompasses the transfer of certain items of tangible personal property as part of the real estate deal, the presence of the tangible items

would not trigger sales tax when there is no separation of value between the real property and tangible personal property.

Occasional or Isolated Sale Exemption

Given the much higher rate of tax assessed on the sale of tangible personal property than on the transfer of real property, it would appear that any allocation of the real estate purchase price to tangible personal property should be avoided. However, the Department provides for an exemption from sales tax when the sale of the tangible personal property is "occasional or isolated." The Florida Administrative Code (the "Code") provides that an occasional or isolated sale must occur under the following circumstances:

- 1. The seller must have paid any applicable sales or use tax on such property unless at the time of sale the statute of limitations for assessment of sales and use tax on the property had expired, as provided in §95.091(3), F.S.; and
- 2. Such sales or series of sales occur no more frequently than two times during any 12-month period.⁹

The sale of the personal property subject to the exemption must not involve goods which were previously purchased for re-sale and cannot be conducted "on the same premises in competition with other persons required to pay tax." A number of additional exceptions to the exemptions are provided in the Code which are not frequently encountered in the sale of real estate, and are therefore not discussed here. The two most widely encountered exceptions, however, are the brokered transaction exception and the registered vehicle exception.

Brokered Transactions

Most real estate transactions are conducted through the use of a real estate broker. The Code provides that the sale of tangible personal property "is taxable and is not an occasional sale if ... (e) Such sale is made by or through an auctioneer, agent, broker, factor, or any other person required to be registered as a dealer to collect and remit tax on such sales, as provided in Rule 12A-1.066, F.A.C." In fact, under such a scenario, it is the broker who is required to collect and pay the tax, not the Seller. 12

It is immaterial that the broker's business is primarily the sale of real estate and not tangible personal property. The Code provides that "every agent, auctioneer, broker, or other person who is engaged in any business activity of making sales of tangible personal property...either direct or indirect ...is required to register as a dealer under Chapter 212, F.S.,

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and collect and remit any applicable tax on the total retail sale price of any taxable item of tangible personal property."¹³ The Department provides a very broad application of the broker's "indirect" business of personal property sales under the

exception. The Department characterizes a real estate broker as one who clearly "holds himself out as engaged in business." ¹⁴ Failing to register as a dealer and collect the tax is a first degree misdemeanor in Florida. ¹⁵

To be subject to sales tax under the broker exception rule, however, the Department concludes that the tangible items must be "separately listed and priced apart from the price of the real property." This requires distinction between two scenarios, which were presented to the Department for clarification.

Example A: The total purchase price is \$100,000.00. The real property is contracted at \$98,000.00, and "furniture" (consisting of multiple separate items) is contracted at a total price of \$2,000.00.

Example B: The total purchase price is still \$100,000.00. The real property is contracted at \$98,000.00, but a dining room table and chairs are contracted at \$500.00, a sofa at \$1,000.00, and a television at \$500.00.

The distinction is made where each specific item of personal property is individually priced, as in Example B. Under this scenario, sales tax would clearly be required to be collected by the broker. Under Example A, however, the value of all of the personal property was allocated a single price, without separate itemization. Upon inquiry in July, 1991, for clarification, staff for the Department provided the Florida Realtors (formerly, the Florida Association of Realtors), the above examples and concluded that no sales tax would be due under Example A, since each specific item was not separately priced.¹⁷

The reading of the rule requiring separate pricing for each item is further supported by the plain language of §212.05, F.S., which provides that sales tax is assessed on the sale of tangible personal property at a rate of six percent (6%) of the sales price of each item sold. Again, brokers are required to collect and remit any applicable tax on the total retail sales price of any taxable item of tangible personal property.

Cars, boats and other registered vehicles

A common practitioner pitfall occurs when the allocated value of the tangible personal property in a real estate sale includes cars, boats and other registered vehicles. Sales tax is always due. The Code provides that a sale is not occasional if "such sale involves an aircraft, boat, mobile home, or motor

vehicle of a class or type required to be registered, licensed, titled, or documented in this state." Florida Statutes further provide that such sales shall be subject to the six percent (6%) sales tax rate. 19

"[T]he sale of tangible personal property

[separately listed and priced apart] is taxable...if...made

[directly or indirectly] by or through an auctioneer, agent, broker..."

The artificial allocation of minimal relative price to a considerably valuable vehicle will not escape scrutiny. The law provides that the Department shall adopt a price list for used vehicles and:

If any party to an occasional or isolated sale of such a vehicle reports to the tax collector a sales price which is less than 80 percent of the average loan price for the specified model and year of such vehicle as listed in the most recent reference price list, the tax levied under this paragraph shall be computed by the department on such average loan

price unless the parties to the sale have provided to the tax collector an affidavit signed by each party, or other substantial proof, stating the actual sales price. Any party to such sale who reports a sales price less than the actual sales price is guilty of a misdemeanor of the first degree.²⁰

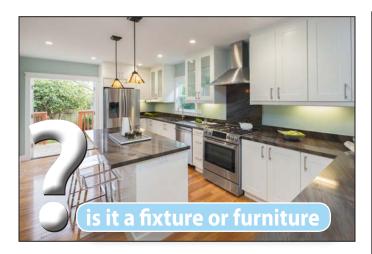
Further, as discussed above, if the real estate sale involves a broker, the obligation to register as a dealer and remit the sales tax of the registered vehicle is with the broker.

Valuation and Form of Property Subject to Tax

The advantages of allocating separate values for tangible personal property in a real estate transaction often do not arise unless a significant value is allocated to the exempt tangible personal property. At times, parties choose to allocate significantly inflated values to the personal property, which has no reasonable relation to its fair market value (for example, an allocation of \$250,000.00 to "kitchen appliances" in a \$1,000,000.00 total sale).

The artificially lower reported sale price for the real estate may result in penalties for the failure to pay the required amount of documentary stamp tax on the real estate. The failure to pay the tax is a first degree misdemeanor, with a civil penalty equal to as much as 50% of the deficient tax, plus the amount of tax owed and interest thereon at a rate of 1% per month.²¹ It may be argued, however, that such misreporting is intentional. Intentional misreporting may be considered fraud, which raises the civil penalty to 200% of the deficient tax, in addition to other penalties under the law for general tax fraud.²² Furthermore, the criminal penalties may apply to all parties assisting in the drafting or execution of documents related to the misrepresentation, including the seller, buyer, closing agent and brokers involved.²³

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Identifying the form of property allocated as "real" or "personal" may also prove problematic. A poorly advised party to a real estate contract may improperly allocate as tangible personal property what which is essentially an improvement to the land. As noted above, documentary stamp tax applies to land, as well as any improvements that exist on the land when the deed is delivered. The Department identifies "personal property" not subject to documentary stamp tax as that property which may be "removed without material or substantial injury to either the real or personal property." Thus, attempts to allocate as tangible personal property items such as, cabinetry, wood work, a water filtration system, or flooring, likely will not pass muster. Such items are subject to documentary stamp tax as improvements to land.

Other Collateral Concerns

The allocation of significant value to the sale of tangible personal property in a real estate transaction presents a number of collateral issues for both seller and buyer. While a seller may escape state-assessed documentary stamp tax, gain on the sale of tangible personal property may still be a taxable capital gain, or even ordinary income, under the federal tax code.²⁵ A poorly drafted allocation provision may mean failure to address warranties or other potential liability issues for the seller of the separately allocated property. Defects in personal property, or unintended inclusion of leased property may create an unexpected seller default and a buyer's ability to cancel a larger real estate transaction.

For the buyer, the allocation of value away from the real estate may result in a lower insurable amount for title insurance on the property, even if a buyer may have asked for the policy amount to include the tangible personal property value amount. Tangible personal property cannot be insured under a real estate title insurance policy. Furthermore, the value insured under a policy is limited to the "value of title insured." The buyer may also have his or her own federal tax concerns at the eventual sale of the property, as a lower basis value may have unintendedly been assigned to the real property interest.

In addition, county property appraisers are aware of contracted methods to alter true values of a transaction. Many counties now provide inquiries after a sale to a buyer requesting information on buyer-paid closing costs and other forms of consideration given, and specifically requesting the disclosure of any tangible personal property that may have been sold with the real estate. Furthermore, there is no rule requiring that valuation of real estate for property tax purposes by the county must be equivalent to the purchase price reported by the owner.

Conclusion

Parties to a real estate transaction are often misinformed regarding the pros and cons of separate allocations of value of tangible personal property. When fully analyzed, tax advantages of separate allocations frequently prove to be minimal relative to unnecessary risks undertaken by all involved. More so, such provisions are at times drafted by non-attorneys, without the proper knowledge necessary to evaluate all of the collateral effects of the allocation. Careful scrutiny must be taken when choosing to separately allocate the value of personal property in a real estate transaction, often considering interests well beyond the scope of the deal at hand.

Cristofer A. Bennardo is a partner with Bennardo Levine, LLP, a full service law firm located in Boca Raton, Florida. Mr. Bennardo is Board Certified by the Florida Bar in Real Estate and is also licensed to practice law in the state of Pennsylvania, concentrating his practice for over 17 years in the areas of real estate, business and estate planning. Mr. Bennardo's real estate practice consists of representative counsel in commercial and residential property transactions and disputes throughout the state of Florida on behalf of buyers, sellers, developers, lending institutions, brokers, contractors, and national investment groups.

Endnotes

- 1 See the FR/BAR Residential Contract for Sale and Purchase, Rev. 2014; and the Florida Association of REALTORS © Contract for Residential Sale and Purchase 13, Rev. 3/2013.
- 2~ Rule 12B-4.012(1), F.A.C. An exception applies only to Miami-Dade County, where the rate of 60 cents is implemented.
- 3 Fla. Stat. § 201.02.
- 4 Rule 12B-4.013(8), (22) and (23), F.A.C., respectively. A mobile home which has been permanently affixed to land and taxed as real property is issued an "RP" series license plate by the appropriate county tax collector. When a mobile home is affixed to realty, bears an "RP" license tag and is sold in conjunction with the sale of realty as a package deal, the transaction constitutes the transfer of an interest in real property and is taxable under Chapter 201, F.S.
- 5 See *Dept. of Revenue v. Young American Builders*, 358 So. 2d 1096 (Fla. 1st DCA 1978), aff'd 376 So. 2d 849 (Fla. 1979).
- 6 Fla. Stat. § 212.05 (emphasis added).
- 7 Technical Assistance Advisement 91A-005, Florida Department of Revenue, January 17, 1991.
- 8 Rule 12A-1.037(1), F.A.C.
- 9 Rule 12A-1.037(3)(b). The Section further defines a "series of sales" as one occurring within 30 consecutive days where no single sale in the series would itself be taxable. For example, a garage sale of other tangible personal property by the owner within 30 days of the sale of the home sold. However, note that under the rule, a garage sale outside of 30 days would qualify as the second sale in a twelve month period. A second garage sale in the same

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twelve month period would remove the isolated sale exemption from the home sale with tangible personal property.

- 10 Rule 12A-1.037(8)(b). One example presented in the Code is when a city designates a specific area where the arts and crafts and other vendors' items are to be sold. A sale of the arts and crafts in this situation would be taxable, even if the sale would otherwise qualify as an occasional sale, since other vendors present are required to pay sales tax. See Rule 12A-1037(5)(d)2.
- 11 Rule 12A-1.037(5)(e), F.A.C.
- 12 See Technical Assistance Advisement 91A-005, Florida Department of Revenue, January 17, 1991, citing Fla. Stat. § 212.05, in which the Department states: "According to the provisions contained [in Fla. Stat. § 212.05], every person is exercising a taxable privilege when he engages in the business of selling tangible personal property at retail in this state. For exercising such privilege, the tax is imposed on the dealer who in turn is required to collect the tax from the purchaser and remit it to the state.»
- 13 Rule 12A-1.066(1)(a), F.A.C. (emphasis added).
- 14 Technical Assistance Advisement 91A-005, Florida Department of Revenue, January 17, 1991. The Department concludes that the definition of a "broker" under Fla. Stat. §. 475.01(1)(c) clearly establishes that a broker is "engaged in business" as defined in Fla. Stat. § 212.02(2).
- 15 Fla. Stat. § 212.07(3) states that: "Any dealer who fails, neglects, or refuses to collect the tax herein provided, either by himself or herself or through the dealer's agents or employees, is, in addition to the penalty of being liable for and paying the tax himself or herself, guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."
- 16 See Technical Assistance Advisement 91A-005, footnote 13.
- 17 The written opinion provided on July 12, 1991 to the Florida Association of Realtors was a "Letter of Technical Advice" ("LTA"), and not a "Technical Assistance Advisement" ("TAA"). LTAs are not binding on the Department and are opinions of the individual staff writer for the Department. TAAs are binding opinions of the Department. As of the date of this article, this author could find no further official statement of the Department clarifying the January 17. 1991 TAA.
- 18 Rules 12A-1.037(5)(f) and (2)(a)(1), F.A.C., and 12A-1.007(11), F.A.C. Sales tax is not due on the sale of a mobile home when the mobile home is otherwise characterized as real property as is defined in footnote 4. Rule 12A-1.007(11) (b), F.A.C. provides that "1. The sale or use of a mobile home which is not classified as real property is considered a sale or use of tangible personal property

and is taxable. A mobile home is tangible personal property if it is located in a mobile home park or other place where the land on which the mobile home is located is not owned by the mobile home owner. 2. If a mobile home is classified as tangible personal property, the sale, including the occasional or isolated sale, the use, consumption, or storage for use in this state is taxable on the full sales price. 3. The sale of a mobile home independent of the realty to which it is affixed at the time of sale constitutes a legal severance of the mobile home from the realty and the sale of the mobile home is taxable as the sale of tangible personal property even though the mobile home may have an "RP" decal affixed thereto at the time of sale."

- 19 Fla. Stat. § 212.05(1)(a)(1)(b).
- 20 Fla. Stat. § 212.05
- 21 Fla. Stat. § 201.17
- 22 Fla. Stat. § 201.17(b)
- 23 Fla. Stat. § 201.17(1). Penalties for failure to pay the tax may be imposed upon "whoever makes, signs, issues, or accepts, or causes to be made, signed, issued, or accepted, any instrument, document, or paper of any kind or description whatsoever, without the full amount of the tax ... being fully paid..." (emphasis added). Inasmuch as the parties are aware of the artificial prices provided, they may be liable under theories of conspiracy to interfere with tax collection or tax fraud.
- 24 Technical Assistance Advisement 88(B)4-014, Florida Department of Revenue, October 17, 1988.
- 25 See U.S. Department of Treasury, Internal Revenue Service. (2014). Publication 544: Sale or Disposition of Capital Assets. Retrieved from http://www.irs.gov/publications/p544/ch02.html. A capital gain or loss will be assessed on the sale or exchange of a capital asset, which includes household furnishings. 26 U.S.C. § 1221 defines "capital asset" as property held by the taxpayer (whether connected or not with his trade or business). A number of exceptions are listed which do not exempt tangible personal property.
- 26 American Land Title Association Form Owner's Policy of Title Insurance, adopted June 17, 2006, defines "Land" as the described land, plus "affixed improvements that by law constitute real property." The extent of liability for loss or damage under the policy "shall not exceed the lesser of (i) the Amount of Insurance; or (ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy." (Emphasis added).

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The RPPTL Section is grateful to all of its sponsors who faithfully support the good work of the Section. In addition to recognizing them in each issue of *ActionLine* as we do, we want to offer information to you in the event you wish to speak with a sponsor about the services it provides. Below are the names of the sponsors and contact information. Again, thank you, sponsors, for supporting RPPTL!

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RPPTL Section Executive Council Meeting Fontainebleau, Miami Beach, Florida June 4 - 7, 2015

By Jane L. Cornett, Esq., Stuart, Florida

The 2015 Annual Convention of the Real Property Probate and Trust Law Section of the Florida Bar took place in the "Sun and Fun Capital of the World", Miami Beach. The location was the Fontainebleau hotel on the Atlantic Ocean. Like all meetings of the Section, the Fontainebleau proved to be a wonderful venue for committee work, learning and socialization with colleagues.

The meetings started bright and early at 8:00 a.m. on Thursday, June 4, 2015. The very last meeting concluded at 5:00 p.m. with twenty-seven (27) different committee meetings throughout the day, covering both dirt and death sides of the law. There was something for every type of legal interest.

The Thursday evening event was held at the Perez Art Museum Miami ("PAMM"). The museum is located on the shores of Biscayne Bay, right in the heart of downtown Miami with spectacular views in all directions. The Section provided bus transportation to the museum. The reception itself was on the top level of PAMM on a covered veranda with an outstanding view of Miami Beach, the Port of Miami and downtown Miami (we took lots of photos!). Guests attending the reception had the option of a tour with very knowledgeable docents, or to wander at will. The food was described as "heavy hors d'oeuvres," but it was an outstanding spread with all kinds of delicious edibles. The art work was spectacular as were the drinks and food. The buses returned everyone safely to the Fontainebleau and the oceanfront hospitality room was open until 11:30 p.m. where some very yummy desserts were provided.

Friday morning started bright and early at 6:30 a.m. with the "Reptile Run" led by Mike Bedke. "Thereafter at 8:15 a.m., members attended a very interesting CLE entitled, "Florida, Same-Sex Marriage, RPPTL and the U.S. Supreme Court Finality, Futility or Both?" The seminar ended in time for the annual meeting and luncheon and a return performance by the "Certainly Not Ready for Prime Time Players" (a/k/a Eric Virgil and Rob Freedman). Eric and Rob humorously reviewed the Section year and made presentation of some very "special" Section awards.

After the luncheon, committee meetings continued with another eleven (11) committees meeting. Remember that all committee meetings are open to all Section members.

The Friday evening reception was at the poolside at the Fontainebleau. The weather was perfect and the special entertainment arranged by Chair, Michael Dribin, was certainly something no one had ever seen before at a Section meeting. There were two very well presented performances by a group



of synchronized swimmers. Those of us who are old enough to remember this kind of entertainment being a little more common place, experienced very pleasant "flashbacks." The reception was followed by a great dinner at the hotel with the hospitality room open until midnight.

Saturday morning also started bright and early with the reptile run at 6:00 a.m. The separate Roundtable meetings for Real Property and Probate & Trust divisions began at 8:00 a.m., including a very hardy breakfast. The Executive Council Meeting began at 9:45 a.m. and Florida Bar President Greg Coleman addressed the Council.

Saturday afternoon was free time so folks could relax at the pool or beach or take advantage of some of the shopping and spa opportunities in the area.

The concluding event Saturday evening was a dinner at Smith & Wollensky's on South Beach. As Smith & Wollensky's brag on their website, "The Miami skyline and crystal waters of the nearby Government Cut Channel set the backdrop for a lunch or dinner replete with timeless glamour." Mike Dribin advised he had chosen this location since it was on South Beach so those attending could spend the later evening enjoying all that South Beach has to offer.

Once again it was a weekend chocked full of learning, working and time with colleagues in the fields of real estate, probate and trust law. If you haven't attended one of the meetings in the past, you really should give it some consideration especially when the meeting is held in your area. The schedule of future meetings is posted on the RPPTL website.

RPPTL Section Executive Council Meeting Fontainebleau Miami Beach, Florida

June 4-7, 2015



RPPTL Section Executive Committee

Mike Gelfand flanked by Sofia Lopez and Selia Ruiz at the Thursday evening reception



Section members and guests at the Perez Art Museum



Executive Committee meeting



Angela Adams addressing the Trust Law Committee



RP Litigation w/ Susan Spurgeon at the podium



The synchronized swimmers enjoyed by all



Peggy Rolando, Lori Dribin, and Debra Boje beneath the lights of Downtown Miami



Rick Taylor addressing the Executive Council



Shane Kelley addressing the RP Roundtable



Chip Waller addressing the RP Roundtable on homestead



Showing off the name tag banners picked from the Florida Bar Foundation booth



Past Section Chairs Bruce Stone and Bob Goldman welcome Mike Dribin to the Back Row



Elaine Bucher holding her Robert C. Scott Memorial Award on stage with Mike Dribin

Section members and spouses out on the town



Pat Hancock and Karla Staker from Fidelity National with Deborah Russell at the Sponsor's Reception



Section member Jason Ellison with a few of the law students attending the Convention



Mike Dribin, Debbie and Steven Goodall, Bob Swaine and Stuart Altman enjoying the reception

Roundtables

Saturday, June 6, 2015 Fontainebleau Florida Hotel Miami Beach, Florida

Prepared by Brian M. Malec, Esq., Orlando, Florida, and Jane L. Cornett, Esq., Stuart, Florida

The following briefly identifies for future reference some notable presentations at the Division Roundtables.

Highlights of the Meeting of the RPPTL Section REAL PROPERTY DIVISION Roundtable

The Division Director, Drew O'Malley, opened the meeting by thanking the sponsors and encouraging everyone to eat more of the generous breakfast buffet. He requested that guests stand and be recognized. Present was Cecilia Ruiz, a second year law student from Barry University.

The first order of business was the approval of the minutes of the prior meeting which were passed unanimously.

The Division Director then proceeded first with some important "housekeeping" items.

Committee Goals/ Administration

Legislation Committee. Rob Freedman reminded everyone that the legislative session will begin in January and the new Chair of the Legislative Committee will be Steve Mezer. Since the session is beginning so early, work will need to be accomplished over the summer which has not been the process in the past. The committee liaisons need to be prepared for emails and to give quick responses to proposed legislation. Rob reminded all committees to be sure to appoint an official liaison for legislation publications.

Publication-ActionLine/Florida Bar Journal. Silvia Rojas, Editor-in-Chief of ActionLine, reported that the next deadline for submission of articles is July 31st. Silvia reminded everyone that, as always, we're looking for authors of scholarly articles.

CLE Liaisons. Robert (Bob) Swaine reminded everyone that each committee chair should appoint a CLE contact person. Bob said this is a good place for the newer, younger members to get involved.

Committee Action Plans

The Division Director reminded everyone that each committee needs a Committee Action Plan and this was a reminder for the chairs to plan their year which starts now. He mentioned that chairs of the committees might be underutilizing their vice-chairs and should get them more involved.

The next issue was not on the agenda and it had to do with the website. The Division Director commented that the content on the committee websites is "phenomenal." He did note that some committees need to post their committee schedules.

See "Real Property Division," next page

Highlights of the Meeting of the RPPTL Section PROBATE AND TRUST DIVISION Roundtable

The Director of the Probate and Trust Law Division, Debbie Goodall, called the meeting to order at 8:00 am.

Sponsor Announcement. The Division Director thanked SRR for sponsoring the Roundtable and for its longstanding support of the Section. Tobin Reiff and Miranda McCray were present on behalf of SRR.

Recognition and Announcements: The Division Director acknowledged this was her last meeting as Director of the Probate and Trust Law and thanked Chair Michael Dribin for his leadership, guidance and training. She also expressed her heartfelt gratitude to all of the committee chairs, vice-chairs and members for their hard work and dedication over the past two years. She congratulated Debra Boje as the incoming Division Director. The Division Director then announced the list of outgoing and incoming Committee Chairs and she thanked Travis Hayes for his dedicated service in summarizing the Roundtable meetings for the past year and announced that Eamonn Gunther has been assigned to the task for this year.

Information Items

Estate & Trust Tax Planning. Rick Gans reported that proposed legislation relating to the creation of tenancy by the entireties ownership in personal property is now believed to be in final form. Under the proposed statute, an individual will be able to create tenancy by the entireties ownership in personal property without the unities of time and title as to certain personal property.

Probate & Trust Litigation. Tom Karr reported on proposed legislation to clarify F.S. §736.0802(10) on payment of attorney fees and costs from a trust when there is a breach of trust claim against the trustee. The changes are intended to clarify the notice and evidence required, but are not intended to change the underlying policy of the statute. The latest revision provides that if no notice is given, there will be an automatic disgorgement of fees paid from the trust even if the end result is that there was no breach of trust. The revisions also

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

The next item, also not on the agenda, was a lengthy presentation from Shane Kelley from the Probate and Trust Division (the Division Director asked all real estate reptiles to be kind.) Shane gave an extensive and detailed discussion about a committee which he has chaired on homestead. The Homestead Issues Study Committee has been working for four (4) years on the issue of revocable trusts and has coordinated with both probate and real estate committees. The issue for probate is the rights of the spouse and minor children to an exemption of homestead property held in trusts from the claims of creditors. Another issue is how does title pass when the grantor of the revocable trust passes away? The Committee has been coordinating these issues with the constitutional rights of a spouse and minor children to have that property pass to them and to be exempt from creditor claims. To approach this, the Committee has proposed legislation to confirm the creditor exemption and to allow the probate court to have jurisdiction over property even though it is not part of the probate estate. The logic of the Committee is that if it is an improper devise of homestead, then it ends up being handled under the Probate Code as intestate property. The proposal of this Committee is to clarify that title vests immediately upon the death of the grantor. The Committee feels this is in line with the goal of the constitutional protection of families. There was a lengthy discussion about the proposed legislation and a number of revisions and tweaks were suggested. Shane advised that these proposals will be presented at the Executive Council meeting on Saturday as an information only item and much discussion is expected.

Action Items

Residential Real Estate & Industry Liaison (RREIL) Committee - Salome J. Zikakis, Chair: This Action Item was presented by Tom Ball, Chair of FR/BAR Contract Subcommittee of the Florida Realtor-Attorney Joint Committee. Discussed were the proposed changes to address requirements of the Consumer Financial Protection Bureau ("CFPB") and implementation of new Closing Disclosures and TRID rules and policies. The Committee motion was to accept 2015 edits to the FR/BAR Residential Contract, specifically changes to section 9(c) of the Contract and Section II of the Seller Financing Rider. The changes are to deal with CFPB Requirements that go into effect August 1st*. There was a Committee motion to adopt the proposed changes. There was no one opposed and the item passed unanimously.

Real Property Litigation Committee - Susan K. Spurgeon, Chair: Susan presented three (3) proposed revisions to the Florida Statutes relating to the ability to e-file certified documents (F.S. § 90.902), the statute of repose (F.S. § 95.281) and non-resident cost bond (F.S. §§ 57.011 and 559.715). The motion to support the statutory revisions was unanimously approved.

See "Real Property Division," next page

PROBATE & TRUST DIVISION

clarify what constitutes a reasonable basis to conclude that a breach of trust exists and the use of summary judgment or an evidentiary hearing to make the determination of reasonable basis.

Probate Law & Procedure. John Moran and Patrick Mize reported on the status of the proposed revisions to F.S. §731.106(2) as it relates to real property owned by a nondomiciliary. Prior to 1974, the common law in Florida was that Florida law applied to real estate in Florida owned by a nonresident decedent. Section 731.106, Florida Statutes, appears to codify the common law, but the statute is specific as to the disposition of property by Will. In Saunders v. Saunders, 790 So.2d 1253 (Fla. 1st DCA 2001), the wife of a non-domiciliary decedent applied to the Court for her share as a pretermitted spouse of testator's Florida real estate. The First DCA upheld the lower court's denial of the wife's petition, ruling that the law of the testator's domicile applied to the Florida real estate and not Florida's pretermitted spouse rule, because the testator's Will did not specify that Florida law applied. The subcommittee concluded based on their research that the legislature did not intend to overrule common law when it enacted F.S. §731.106. Accordingly, the subcommittee drafted revisions to F.S. §731.106(2) to clarify that real property in Florida is always controlled by Florida law irrespective of whether or not the non-domiciliary's Will specifies that Florida law controls the Florida real estate.

Committee Reports

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair: Sancha Whynot reported that the Committee continues to work on a comprehensive rewrite to the guardianship statutes. A full update will be provided at the next meeting.

Ad Hoc Study Committee on Estate Planning Conflict of Interest – Bill Hennessey, Chair: Bill Hennessey reported that the Section's legislative proposal regarding mandatory disclosures to a client when a lawyer serves as a fiduciary was unable to get a house sponsor for the 2015 session, but it will be resubmitted in 2016. Bill Hennessey is working with the Florida Bar on the proposed Bar Rule that will go hand in hand with the statute.

Ad Hoc Committee on Personal Representative Issues – Jack Falk, Chair: Jack Falk reported that the committee's proposal regarding various personal representatives' issues (SB 872) passed the Florida legislature and will become law effective July 1, 2015. The statutory revisions address issues such as (1) the obligations of a personal representative who becomes disqualified to act during the administration, (2) the removal of a personal representative who was not qualified to act at

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

Information Only

Real Property Problems Study Committee - William Theodore Conner, Chair: Ted reported on a proposal concerning mortgages to be issued during the course of construction and interruption of construction pursuant to Chapter 713, Florida Statutes (Florida's construction lien law). Ted asked for and received a strong voting support of the proposal and reported that the final proposal will be presented at The Breakers. Ted also reported on a proposed change to portions of Chapter 82, Florida Statutes, dealing with unlawful detainer in order to address the problem with squatters in vacant property. The goal is to make the law more workable and to modernize.

Title Insurance and Insurance Liaison - Raul Ballaga, Chair: Raul reported on a proposed rule that was published July 9^{th} in Tallahassee and the period for comment is now open. The Rule by the Department of Financial Services relates to unlawful inducements to the issuance of title insurance.

There being no further reports, the meeting was concluded at 9:40 a.m. 4

* Note: Extended to October 3rd, 2015



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the time of appointment, and (3) the period for challenging the qualifications of the personal representative. The Division Director reminded everyone that FLSSI forms need to be updated and reiterated the importance of remembering to report any statutory changes to FLSSI to ensure the forms are updated.

Asset Protection Committee – Brian Sparks, Chair: Brian Sparks reported that the Committee discussed at length proposals regarding creditor protection for discretionary trusts arising from *Berlinger v. Casselberry*, 133 So.3d 961 (Fla. 2d DCA 2013). Brian reminded us of the CLE in Tampa on October 23, 2015 sponsored by the Asset Protection, Estate & Trust Tax Planning, and IRA, Insurance & Employee Benefits committees. Brian also reported that the Committee is analyzing how to deal with the Uniform Voidable Transfers Act that contains provisions of concern to asset protection planners. Several states have passed the Uniform Act. There is information on the Act posted on the Committee page of the RPPTL website.

Attorney/Trust Officer Liaison Conference – **Laura Sundberg, Chair:** Stacey Cole read a report from Laura Sundberg that the Conference set for August 27th - 30th is really coming together and many members, including Tae Kelley Bronner, Stacey Cole and Deb Boje, have been instrumental in helping to get everything in place to make this year's ATO a success! Stacey reminded everyone to make their reservations at The Breakers. The Division Director sent all best wishes to Laura and thanked all for helping to keep things on track for a great program.

Digital Assets and Information Study Committee – **Eric Virgil, Chair:** Eric Virgil reported that the Committee's proposed legislation regarding digital assets came to a halt when some questions and suggested revisions were raised during the legislative session. Martha Edenfield suggested the bill be brought back during the next legislative term after the Committee has a chance to address the legislature's questions and recommendations. The Division Director thanked the Committee members for going to Tallahassee to testify before the legislature.

Elective Share Review Committee – Lauren Detzel and Charlie Nash, Co-Chairs: Lauren Detzel reported that some revisions to the elective share statute are drafted, but others are still in process. The Committee currently is considering a graduated elective share of 10% for a marriage of 5 years or less; 20% for 6 to 10 years; 30% for 11 to 24 years; and 40% for a marriage of 25 years or more. Jack Falk reported that the Committee is also looking at whether and how a surviving spouse should be able to recover attorneys' fees incurred in an elective share proceeding from the estate because fees in an elective share proceeding can be so substantial that the litigation erodes the elective share. Lauren said the

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Committee plans to consult with the Family Law Section once the committee has a complete proposal.

Estate & Trust Tax Planning – Elaine Bucher, Chair: Elaine Bucher reported that revisions to the Estate Tax Apportionment Act and Uniform Transfers to Minors Act passed the legislature and were signed into law. The Family Trust Company bill, which passed during the 2014 legislative term, becomes effective October 2015, but the glitch bill did not pass this legislative session due to the early adjournment of the legislature but will be reintroduced in the next session. Elaine also reported that the Ad Hoc Decanting Subcommittee is considering the Uniform Decanting Act, among other state decanting statutes, and plans to have proposals to revise Florida's decanting statute for discussion at the next meeting.

IRA, Insurance & Employee Benefits – **Howard Payne and Lester Law, Co-Chairs.** Howard Payne reported the Committee discussed Social Security benefits and informed the members that if you wait until age 70 to collect social security, you gain 8% per year for each year after age 62. A married couple can maximize benefits by having the older spouse elect the spousal benefit at age 66 and the younger spouse wait until age 70 to collect benefits. Howard reported that Social Security has a 2 million dollar surplus as of 2013. Howard informed that the Committee is discussing the benefits associated with long term care. Finally, the Committee discussed issues involving miscalculations of required minimum distributions and how to handle situations where the plan administrators do not want to admit mistakes.

Guardianship & Power of Attorney – Hung Nguyen, Chair: Hung Nguyen reported on the passage of many bills impacting guardianship this year. Hung reported that the Committee voted to draft a proposal to revise F.S. §744.441(16) to remove the \$6,000 maximum for funeral bills of a ward and maintain a reasonableness standard. The Committee is also considering proposed legislation regarding a guardian's access to joint accounts that a ward has with the ward's spouse in light of the ruling in Romano v. Olshen, 153 So.3d 912 (Fla. 4th DCA 2014). Hung also reported that a subcommittee was created to study physician orders for life sustaining treatment ("POLST"). In addition, the Section drafted a white paper to oppose Senate Bill 1052 with respect to the portion relating to POLST. Senate Bill 1052 did not pass in this legislative session but that the Section would continue to review the concepts and the issues. Hung also reported that the Committee is prepared to review and provide input on any possible proposed legislation authorizing the creation of new regulations for professional guardians.

Probate & Trust Litigation – Tom Karr, Chair: Tom Karr reported that the Committee discussed revisions to the lost and destroyed will statute, and hopes to have a draft to present

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at the next meeting. Tom expressed his *Farewell* as chair of the Committee. Those present at Tom's last Probate & Trust Litigation Committee meeting will forever remember his solo performance, as he concluded the meeting, with the famous Frank Sinatra song "My Way."

Probate Law & Procedure – **John Moran, Chair**: John Moran reported that the Committee debated policy issues of the harmless error statutes with respect to wills and options for potentially drafting a harmless error statute in Florida. The Committee concluded that they want to see at least substantial compliance with will execution requirements, even in the face of harmless error. The Subcommittee plans to draft a substantial compliance type statute for the group to discuss at the next meeting.

Trust Law - Angela Adams, Chair: Angela Adams reported that the Florida Banker's bill regarding the electronic service of trust accountings via email passed the legislature and is scheduled to be signed by the Governor. If it is signed, the bill is will become effective July 1, 2015. The Committee also approved a proposal to amend F.S. §736.0708 to clarify that when multiple trustees are serving, each trustee can receive reasonable compensation for his services and the total paid to all trustees may exceed what would be reasonable compensation for one trustee. Next, the Committee is analyzing possible revisions to F.S. §736.0105(2)(c), which requires that a trust and its terms be for the benefit of the beneficiaries. Lastly, Rick Gans was appointed as chair of a subcommittee to analyze potential legislation originating from outside the Section that would permit the creation of Tenancy by the Entireties Trusts in Florida.

Ad Hoc Study Committee on Spendthrift Trust Issues – Lauren Detzel and Jon Scuderi, Co-Chairs: Co-Chairs Lauren Detzel and Jon Scuderi reported on the work of the Committee studying the issues involved in spendthrift trusts in light of the ruling in *Berlinger v. Casselberry*. There is currently disagreement among the Committee as to whether the 2007 revisions to F.S. §736.0504 were intended to overrule or codify the holding in *Bacardi v. White*. There was considerable discussion concerning the impact of the ruling and possible solutions.

Homestead Issues Study (General Standing Committee) – Shane Kelley, Chair: Shane Kelley reported on proposed revisions to Florida statutes dealing with homestead titled in a revocable trust, which are intended to create parity in the transfer of homestead under a will and revocable trust and to create a method for obtaining a determination of homestead for property owned in a revocable trust. Shane reported that certain members of the Real Property Division have expressed concerns with the proposal and that those are being discussed.

There being no further reports, the meeting was adjourned at 9:45.

A Tribute to Michael A. Dribin



Some forty years ago when Michael A. Dribin first arrived in Miami from Chicago, having recently graduated from Loyola University of Chicago, it is likely that he never anticipated that forty years later, he would spend the year as the Chair of the Real Property, Probate and Trust Law Section of the Florida Bar and return with the Section to Loyola.

Despite all the many, many hours that are dedicated by a Section Chair, when asked about his experience, Michael said, "I am very pleased with the past year and I think we got some good things done."

The accomplishments to which Michael cited included important legislative action on the probate side such as House Bill 5, which brought about significant reforms in the guardianship area. Michael pointed out that there were all kinds of special interest groups throughout the state trying to influence the outcome of this legislation. Fortunately, the final product, in Michael's opinion, is a very good product representing a win for the citizens of Florida. Michael points out that the final product was a compromise hammered out by dedicated Section leadership, including Bill Hennessey and Hung Nguyen. There was also a broad range of legislation passed impacting the practice of real property law, including construction defects and condominium termination.

Michael also spoke proudly of some other proposed legislation which, although not passed during this recent session, laid the foundation for some important work in the future. One issue that made progress, but still needs more attention, is legislation to allow fiduciaries access to electronic records. Michael was especially proud of the progress on this issue since it was the work of the Digital Assets and Information Study Committee, which he had asked be established when he was Probate and Trust Law Director several years ago. This committee will continue to move forward on this important topic and is optimistic about its passage in 2016.

Another important committee that did groundbreaking work was the Ad Hoc Study Committee on Same Sex Marriage Issues. This committee has Co-Chairs from both the probate and real estate side. The committee members worked very hard to draft important legislation on the topic. However, proposals were placed on hold when same-sex marriage came under review by the U.S. Supreme Court. Despite the temporary postponement, Michael is confident that the committee made great progress in setting up a good basis for drafting statutory amendments to those statutes currently

in conflict with the U.S. Supreme Court ruling. As we can all understand, the issue of same-sex marriage is something that will have extensive reverberation throughout the probate, trust, estate and real estate worlds.

Michael also cited to the committee that focused on Florida Bar Rule 4-4.2 concerning communication by attorneys with local government officials. The Professionalism and Ethics Committee is actively involved in this issue and it is still very much a work in progress.

Michael further praised the Integrity Awareness Committee, established by Past Chair Peggy Rolando, which finalized its report on recommended bylaws changes addressing and clarifying the rights and obligations of Executive Council members and committee members when potential conflict of interest issues arise. The report was approved by the Executive Council and is in the process of being approved by The Florida Bar.

Another item that Michael pointed to with pride was progress in the relationship between the Section and the Florida Bar. Concerns have arisen in the past related to frequent turnover in Bar staff working with the Section, allocation of expenses by the Bar, and issues relative to CLE programs, as well as communication generally between the Bar and the Section. Michael reported progress in all of these areas and especially praised our Treasurer, Katherine Frazier, who worked extensively with the CFO for the Florida Bar, Marcy Jackson, in implementing a less discretionary process for allocation of Bar overhead to the sections. This allows the Section to have much greater predictability in establishing its budgets as part of its planning process. Michael expressed appreciation for the willingness of the Bar to listen to the comments presented and to work towards a true sense of partnership between the Section and the "Big Bar."

Michael spoke with understandable pride of the meetings and events that have been held during his leadership, and was especially proud of the meeting in his home town of Chicago. Despite his constant worries about weather, Michael pointed out that every one of the events during his tenure was free of rain. Weather was a particular concern in Miami Beach where Michael had scheduled a surprise program by a group of very proficient synchronized swimmers. When the storm clouds hovered, Michael worried all day because a storm would have put an end to that special treat, but fortunately, the weather was clear and the show went on without a glitch. (This author has attended many, many Section meetings and I can honestly say that I have never before seen synchronized swimming).

When asked to comment on the best thing during his year of his chairmanship, Michael praised the amazing willingness of volunteers from the Section to work hard, especially during the legislative session. Michael felt the work and contribution of all the Section committees were valuable. He never failed

Spotlight on the Homestead **Issues Study Committee**

By Michael A. Sneeringer, Esq., Akerman LLP, Naples, Florida





he Homestead Issues Study Committee was created as a General Standing committee of the RPPTL Section in 2011. The Committee is co-chaired by Shane Kelley and Patricia P. Jones. The Committee is comprised of respected lawyers from both the Real Property Law Division and Probate and Trust Law Division, including some of the Section's past chairs. This approach was necessary as homestead involves issues and pitfalls of concern to lawyers from both disciplines. While the Committee was formed to review current issues relating to the homestead laws in Florida and to work to continually improve those laws for the residents of Florida, it has spent the last few years specifically focusing on the issues of homestead property owned in and devised through revocable trusts upon the death of the homestead owner. The result is a

comprehensive proposal that represents the joint effort of both the real property and probate and trust attorneys.

The Committee identified two main issues that needed to be immediately addressed when a titleholder dies with the homestead property in a revocable trust, specifically: (1) whether the exemption from forced sale pursuant to Article X, Section 4 of the Florida Constitution inures to homestead heirs who are either outright beneficiaries of homestead property pursuant to the testamentary provisions

of a revocable trust or are beneficiaries of ongoing trusts into which the homestead property passes upon the death of the settlor of a revocable trust; and (2) the timing and method of the passage of title to property titled in a revocable trust at the time of the settlor's death and what parties (the trustee or the beneficiaries) have the responsibilities for paying the expenses related to the property during the initial trust administration, insuring the property from loss, and maintaining the property during the initial trust administration.

During the most recent Executive Council Meeting of the RPPTL Section on August 1st, 2015, the Executive Council unanimously approved a motion to adopt as a Section legislative position (and expend Section funds in support of the position): to amend §§ 736.0103 and 736.0201, F.S.; create new statutes under Ch. 736, F.S.; add a definition of "homestead heir"; provide that the exemption from forced sale under Article X, Section 4 of the Florida Constitution inures to homestead heirs who receive the homestead property either outright or as beneficiaries of ongoing or continuing trusts created under the decedent's revocable trust; and add specific rules regarding the expenses during the initial trust administration and passage of title to homestead property devised by the terms of a revocable trust.

For more information regarding the recently approved legislative position or Committee in general, interested persons are encouraged to view the Legislative Position Request Form (the "White Paper") by visiting the Committee's webpage available through the Committees, "General Standing," web link on the Section's website: www.rpptl.org.

A Tribute to Michael A. Dribin, from page 38

to be impressed with the people who work for the good of the Section and the wonderful service they provide to the Bar and the general public.

Michael's wife is a native of Miami Beach and brought our Chair to the area when they married forty-three years ago on June 25th. She has been by his side throughout his tenure as an attorney and Section leader, and has attended all events of the Section.

Michael practices with the Miami firm of Harper Meyer Perez Hagen O'Connor Albert & Dribin, LLP. In addition to his law degree from Loyola University of Chicago, Michael also has an LL.M. degree in taxation from the University of Miami. He

is Board Certified in Wills, Trust and Estates, and has held that position since Board Certification first began in 1986. Michael has also been a fellow of the American College of Trust and Estate Counsel (ACTEC) since 1990.

It is hard to imagine the countless hours that must have been devoted to serving as Chair of the Section for the past year. We all owe Michael a huge debt of gratitude. Be sure to give him a big hug (or at least a hearty handshake) the next time you see him. Welcome to the back row, Michael Dribin!

By Jane L. Cornett, Esq., Stuart, Florida

Changes to the Health Care Surrogate Law

By Elizabeth Hughes, Esq., Miami, Florida

On June 11, 2015, Gov. Rick Scott signed into law Florida House Bill 889 sponsored by Rep. John Wood. HB 889, now known as Chapter No. 2015-153, becomes effective on October 1, 2015 and revises statutory provisions relating to the designation of health care surrogates and creates statutory forms. HB 889 amends Chapter 765, Florida Statutes, entitled "Health Care Advance Directives," which governs health care surrogates, living wills, and scenarios in which there are no advance directives. HB 889 is a Real Property, Probate, & Trust Law Section initiative and the culmination of years of work by the Advance Directives Committee (now defunct and subsumed into the Guardianship & Power of Attorney Committee).

In passing legislation allowing surrogate decision-making in health care environments, the Legislature's original intent was to afford greater independence to those who had lost their ability to make health care decisions on their own. By appointing a surrogate in advance of incapacity, an individual may guarantee that decisions are made by a person of the individual's own selection and without the establishment of a guardianship.

Chapter 765, Florida Statutes, governs our laws on health care surrogates and living wills and delineates the responsibilities and duties of a surrogate who has been designated to make medical decisions for a principal. Under the current law, if the principal's capacity to make health care decisions is in question, the attending physician is required to evaluate the principal's capacity. The surrogate's access to the principal's health care records and medical decision-making authority begins only after it has been determined that the principal lacks capacity.

Incapacity is defined as when the principal is "physically or mentally unable to communicate a willful and knowing health care decision." If a principal's capacity to make health care decisions or to provide informed consent is in question, the attending physician is to evaluate the patient's capacity and record these evaluations in the principal's medical records. Once the principal is determined to be incapacitated, the surrogate's authority commences and remains in effect for the duration of the principal's incapacity.

What is left open under current law is whether the principal may delegate such decision-making authority even if he or she is not statutorily incapacitated. Under the revisions in HB 889, an individual who designates a health care surrogate may now instruct the health care surrogate to make healthcare decisions or receive health information without a determination of incapacity, allow for the principal's health information to be shared with a surrogate prior to incapacity, and provide an avenue for the designation of health care surrogates for minors.

With the new legislation to become effective this October, an individual will be able to designate a health care surrogate who will have immediate access to their health care information, assist with or make health care decisions for them, or both, regardless of their level of capacity.

The new legislation provides Floridians with several choices in designating their health care surrogate. First, the principal may authorize a health care surrogate to make medical decisions or obtain health information only upon a determination of incapacity. Second, the principal may authorize a health care surrogate to obtain health care information regardless of capacity, but only authorize the surrogate to make medical decision upon a determination of incapacity. Third, the principal may authorize the surrogate to access medical information and make health care decisions immediately and without the evaluations of capacity of the principal. Additionally, the new legislation requires that the surrogate be immediately informed of a determination of incapacity of the principal where the principal has implemented an immediately effective designation.

The legislation makes it clear that the decision of the principal is controlling and that the principal retains the ability to modify or revoke these designations as long as the principal has the capacity to do so. A principal with capacity may review the surrogate's actions and remove a surrogate who is not acting in accordance with the principal's interests or expressed desires.

The other major change within Chapter 765 is the ability to provide for a health care surrogate for a minor. Under current Florida law, there is no legal authority to name a health care surrogate to make health care decisions for a minor where the parents, legal custodian or legal guardian of the minor cannot be timely reached by a health care provider. For example, suppose that a child is away at summer camp and the need for consent to a medical procedure arises. If the parents happen to be vacationing in an area where they have no cell reception or e-mail capabilities, it is unclear under current law if anyone has authority to provide such consent. The new legislation provides parents, legal custodians or legal guardians of the person of a minor with the authority to designate a person in advance of their absence to consent to essential as well as non-emergency medical treatment of the minor.

Overall, this legislation will add flexibility to the health care surrogate laws and is a positive change for Floridians.

Changes to the Health Care Surrogate Law, from page 40

Elizabeth Hughes focuses her practice on probate and trust administration, quardianship, and probate, trust, and quardianship litigation. She earned her J.D. from the University of Miami in 2012. Hughes is Of Counsel to the law office of Hung Nguyen in Miami, Florida. She is an active member of the Real Property, Probate, & Trust Law section of the Florida Bar as well as a Member of the Guardianship, Power of Attorney, and Advance Directives Committee. Prior to joining the Nguyen law firm, Hughes worked as a staff attorney for the Eleventh Judicial Circuit, Probate Division.

Endnotes

- 1 Fla. H.R. HB 889 (2015), Final Staff Analysis (June 17, 2015). available at: http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=54039
- Florida Guardianship Practice, §§4.1, (8th ed. 2014).
- 3
- 4 Sec. 765.205 Fla. Stat. (2014).
- Sec. 765.204(2), Fla. Stat. (2014).
- 6 Sec. 765.101(8), Fla. Stat. (2014).
- Sec. 765.204(2), Fla. Stat. (2014).
- 8 Sec. 765.204(3), Fla. Stat. (2014).
- 9 H.B. 889 (2015).

10 Fla. H.R. HB 889 (2015), Final Staff Analysis (June 17, 2015), available at: http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=54039

11 H.B. 889 §10 (2015).

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Trust & Estate Practice

Bad Faith Claims in Florida

By Sanjay Kurian, Esq., Becker & Poliakoff, P.A., Fort Myers, FL



S. KURIAN

The purpose of insurance is to manage risk of catastrophic losses that could cause financial disaster. That is true whether the insurance is for a person or a business. Most individuals deal with insurance in the context of motor vehicles, health or home insurance. Businesses also have general liability, business loss or errors and omissions coverages. In the real property context, policies include property, windstorm, flood, commercial

general liability, builder's risk and business loss. Unfortunately, sometimes insurance carriers do not live up to their end of the insurance contract, resulting in insureds having to bring an action for breach of contract and a subsequent action for bad faith.

This article focuses on the bad faith claims recognized under Florida law. There are two general situations where a party may assert a bad faith claim. First is a first-party claim where an insured makes its own claim for coverage under the policy and the claim has been denied or unresolved. Second is a third-party claim where an insurer fails to settle a claim, or indemnify against a claim, made against an insured by a nonparty to the insurance contract. In this latter case, both the insured and the nonparty would have bad faith claims against the insurer and both are referred to as third-party claims.

Types of Bad Faith Claims

Under common law, only third-party bad faith claims were recognized, rather than causes of action for first-party common law bad faith. Third-party bad faith actions have a long and established pedigree, having been recognized at common law in Florida since 1938.² Third-party bad faith actions arose when the insurance company rejected, without sufficient investigation or consideration, claims presented by third parties against an insured, thereby exposing the insured to judgments exceeding the coverage limits of the policy while the insurer remained protected by a policy limit.³ "Florida courts had refused to recognize the tort of first-party bad faith because the type of fiduciary duty that exists in third-party actions is not present in first-party actions and the insurer is not exposing the insured to excess liability."4This apparent discrepancy existed "notwithstanding that insurers had the same incentive to deny an insured's first-party claim as may have existed with regard to the refusal to settle a claim presented by a third-party against an insured." In either context, the insurer's ultimate responsibility could not exceed the policy limits absent a viable bad faith cause of action.

Modern Florida bad faith law is comprised of this historical common law and a more recent statutory remedy applying

to both first-party and third-party claims.⁶ In 1982 the Florida legislature enacted Sec. 624.155, F.S., which was "designed and intended to provide a civil remedy for any person damaged by an insurer's conduct."⁷ The statutory remedy "essentially extended the duty of an insurer to act in good faith and deal fairly in those instances where an insured seeks first-party coverage or benefits under a policy of insurance."⁸

Statutory Bad Faith Claims

Statutory bad faith claims encompass both first-party and third-party claims. Sec. 624.155, F.S., provides, in part, that "[a]ny person may bring a civil action against an insurer when such person is damaged [by an insurer] not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests"9

This language created statutory first-party bad faith actions and codified prior decisions allowing third parties to bring bad faith actions under the common law. The language of Sec. 624.155, F.S., is clear, unambiguous, and creates a definite civil cause of action for "any person" injured as a result of an insurer's bad faith dealings. 10 The "any person" language includes both first-parties and third-parties. 11

The statute establishes a precondition to a bad faith action, requiring that the insured and third-party must first file a notice with the Florida Department of Financial Services and give the insurer a 60-day cure period. This notice, called a civil remedy notice, must be in writing and set out the facts which the filing party believes supports its claim for bad faith. After receiving the notice, the insurer has the opportunity to cure the alleged bad faith violation. 12 If the insurer pays the damages during the 60-day period, then there is no basis for the bad faith lawsuit.¹³ However, the Florida Supreme Court has found an insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice, after the initiation of a lawsuit against the insured, but before entry of an excess judgment, did not preclude a common law cause of action against the insurer for third-party bad faith.14 The Court's analysis focused on the language of Sec. 624.155, F.S., which states that it did "not preempt any other remedy or cause of action" provided by common law.¹⁵ An insurer's failure to timely respond to a civil remedy notice creates a rebuttal presumption against the insurer as to the validity of the bad faith allegations. 16

The statutory civil remedy does not preempt other remedies or causes of action pursuant to any other statute or the common law.¹⁷ However, a party is not able to recover under both common law and statutory bad faith claims.¹⁸ Further, the statutory section is clear that it should not be construed

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to create a common law cause of action.19

Attempts to distinguish the statutory remedy and pursue a breach "of the covenant of good faith and fair dealing" have been rejected.²⁰ The *Chalfonte* case arose from a claim of loss resulting from Hurricane Wilma. Dissatisfied with its insurer's investigation and processing of the claim, the insured filed a multi-count complaint in Federal District Court including a count for "breach of the covenant of good faith and fair dealing." After trial, the issue was appealed to the Eleventh Circuit Court of Appeals, which certified several questions to the Florida Supreme Court. The Supreme Court noted that Florida law "recognized an implied covenant of good faith and fair dealing in every contract," but concluded that such first-party claims "are actually statutory bad-faith claims that must be brought under Sec. 624.155, F.S."²¹

Third-Party Bad Faith Claims

Insurers are required to act in good faith when defending insureds against third-party claims and courts recognize a common law cause of action for bad faith within the context of third-party actions.²² Third-party bad-faith actions involve claims "in which an insured sues his liability insurance company for bad faith in failing to settle a claim which ultimately results in a third-party judgment against him in excess of the policy limits."23 Even though the alleged bad faith conduct occurred between an insurer and its insured, Florida courts also allowed the injured third party to bring a bad faith action directly against the insurer without requiring an assignment of the cause of action by the insured.²⁴ An insurer, in handling the defense of claims against its insured, "has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business."25 The failure to do so may constitute bad faith which can be asserted by the insured or the injured party.

Florida recognizes claims for third-party common law bad faith. ²⁶ The third-party's claim is not a separate cause of action, but is solely derivative of the insured's claim. An insurer does not owe a common law duty of good faith directly to the injured third-party. ²⁷ An insurer may be held liable for an excess judgment against its insured if, and only if, it has been found to have breached its duty of good faith to its insured. ²⁸

Bad Faith Violations

Sec. 624.155, F.S., provides several statutory sections, the violation of which could constitute bad faith. However, in the real property context, the most common acts giving rise to statutory bad faith causes of action include:

- Not attempting in good faith to settle claims when, under all the circumstances, the insurer could and should have done so, had the insurer acted fairly and honestly to its insured and with due regard for the insured's interests;²⁹
- Making claims payments to insureds not accompanied by a statement setting forth the coverage under which payments

- are being made;30 and
- Except as to liability³¹, failing to promptly settle a claim with a reasonably clear coverage obligation under one portion of the policy, but which the insurer does not promptly settle because they wish to influence settlement under other portions of the policy.³²

The above acts do not need to constitute a general business practice of the insurer.³³ In addition to the statutory grounds, the following may constitute common law bad faith on the part of an insurer:

- Despite absence of a settlement demand, a liability insurer fails to initiate settlement negotiations when liability is clear enough, and damages serious enough, that an excess judgment is probable;³⁴
- Refusing to disclose policy limits to a liability claimant;³⁵
- Failing to advise the insured of settlement opportunities, the probable outcome of the litigation and the possibility of an excess judgment;³⁶
- Failing to investigate the facts, give fair consideration to a reasonable settlement offer under the facts, and settle where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so;³⁷
- Rejecting a reasonable demand for settlement that would release one of two insureds,³⁸ and
- Failing to fully investigate multiple competing claims, keep the insured informed about the claims process, seek to settle as many claims as possible within the policy limits, or minimize the magnitude of possible excess judgments when settling selected claims.³⁹

However, the analysis does take into account more factors than simply the above. Florida courts consider the "totality-of-the-circumstances" when analyzing alleged violations. ⁴⁰ This includes consideration of potential mitigating factors:

- Efforts or measures taken by the insurer to resolve coverage disputes promptly, or to limit any potential prejudice to the insured;
- The substance of the coverage dispute or weight of legal authority on the coverage issue;
- Diligence and thoroughness in investigating the facts specifically pertinent to coverage;
- Whether the insurer was able to obtain a reservation of the right to deny coverage if defense was provided; and
- The claimant's willingness to settle the claim.⁴¹

The above factors are case specific. However, the general theory is that the insurer should settle, if reasonably possible, under the terms of the policy. The timing and amounts of settlement take into account the issues giving rise to the claim as well as the types and amounts of damages.

Bifurcation of Breach of Contract and Bad Faith Claims

Under existing law, pursuing bad faith claims is a bifurcated process. As implied by the statute, bad faith actions do not

Bad Faith Claims in Florida, from page 43

exist in a vacuum. "A necessary prerequisite for any bad faith action is an underlying claim for coverage or benefits or an action for damages which the insured alleges was handled in bad faith by the insurer." The claimant must first obtain a favorable adjudication regarding coverage under the terms of the applicable policy before bringing suit against the insurer for bad faith. The existence of contractual liability and the determination of the extent of contractual damages are elements of a statutory bad faith action and, therefore, must pre-exist the bringing of such an action. Statutory bad faith claims are premature until there is a determination on liability and extent of damages owed on the first-party insurance contract.

Courts have barred an action for bad faith when the complaint fails to allege that the insured's damages have been determined. Some Florida courts hold that a premature bad faith claim must be dismissed without prejudice, while others hold that such premature claims should be abated. Florida courts have found the simultaneous litigation of a coverage action and either a bad faith claim or an unfair settlement practices claim would clearly ... [prejudice an insurer] because evidence of the latter claims could well jaundice the jury's view of the coverage issue. Such simultaneous litigation is also inappropriate because the plaintiff cannot obtain discovery of the insurer's claim file, business policies, or claims practices until after coverage is determined. Attempts to circumvent this general rule, as in the *Chalfonte* case referenced above, have been rejected.

Damages for Bad Faith

The claimant is entitled to an award of damages should it prove the insurer's bad faith conduct. Consequential damages are available in statutory bad faith claims. ⁴⁹ Damages generally include those items which are "reasonably foreseeable" as a result of a violation and can include damages in excess of the policy limits. ⁵⁰ The damage elements can include the claimant's total actual damages, interest on unpaid benefits, costs and attorneys' fees. ⁵¹

Punitive damages can also be assessed in statutory and common law bad faith cases⁵² where the violations are so frequent as to indicate a general business practice.⁵³ Such practice must be willful, wanton, and malicious, or in reckless disregard of the rights of the insured.⁵⁴ Awards for punitive damages are limited to three times the amount of compensatory damages or \$500,000, whichever is greater.⁵⁵ Furthermore, the punitive damages phase of bad faith trials should be bifurcated.⁵⁶

Attorneys' fees are recoverable in statutory bad faith cases. Sec. 624.155(4), F.S., provides that an insurer becomes liable for plaintiff's reasonable attorneys' fees and court costs upon adverse adjudication at trial or upon appeal in a statutory bad faith action. In the common law setting, the damages being sought arise out of the contractual duty of the insurer to defend

the insured against the liability; therefore, attorneys' fees are recoverable pursuant to Sec. 627.428, F.S.⁵⁷ A bad faith claim can be assigned by the insured to the claimant post judgment and the claimant is allowed to recover attorneys' fees in pursuing the claim.⁵⁸

Exemption from Bad Faith

All insurers were presumed to be exposed to claims for bad faith as noted above. However, recently in *Citizens Property Insurance Corp. v. Perdido Sun Condominium Association, Inc.*, the Florida Supreme Court determined that Citizens Property Insurance was not liable for bad faith claims because no exception for such claims existed from Citizens' statutory immunity.⁵⁹ This places Citizens in a different position in regard to insureds than other insurance carriers who may be offering similar property policies.

The Court's determination focused on whether the Legislature intended Citizens, a state-created entity that provides property insurance, to be liable for statutory first-party bad faith claims as an exception to its statutory immunity from suit. The issue came before the Florida Supreme Court from the First District's certification of conflict between its decision in *Perdido Sun* and the Fifth District decision, *Citizens v. Garfinkel*, where Citizens was held statutorily immune.⁶⁰

The First District also passed the following question, which it certified to be of great public importance, to the Florida Supreme Court:

WHETHER THE IMMUNITY OF CITIZENS PROPERTY INSURANCE CORPORATION, AS PROVIDED IN SECTION 627.351(6)(s), FLORIDA STATUTES, SHIELDS THE CORPORATION FROM SUIT UNDER THE CAUSE OF ACTION CREATED BY SECTION 624.155(1)(b), FLORIDA STATUTES[,] FOR NOT ATTEMPTING IN GOOD FAITHTO SETTLE CLAIMS?

The Court answered the certified question in the affirmative, based upon a review of the statutory exceptions to Citizens' immunity. The Court found no support for the proposition "that the Legislature intended for Citizens to be liable for a breach of the duty to act in good faith by allowing its policyholders to bring a statutory first-party bad faith cause of action." The Court then reviewed the listed exceptions, noting that an exception to immunity was not provided and, to the contrary, "the Legislature chose to immunize Citizens for 'any action taken by [it] in the performance of [its] duties or responsibilities under . . . subsection [627.351(6)(s)],' which necessarily includes a breach of the duty of good faith."61 Although the Court specifically found that the statutory bad faith claim did not constitute a willful tort, noting that it was "not a tort of any variety," the concept of Citizens being liable under a "willful tort" exception to statutory immunity remains open.62

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Conclusion

In conclusion, statutory bad faith claims remain viable against most insurers. Similarly, third-party bad faith claims exist where an insurer exposes its insureds to excess judgments and fail to resolve claims properly. The essential basis for such claims boils down to the insurer acting unreasonably to settle claims on behalf of the insured. If an insurer, other than Citizens, acts unreasonably, then it may find itself in a bad faith lawsuit and possibly exposed to actual damages, costs, punitive damages and attorneys' fees.

Sanjay Kurian is a shareholder with Becker & Poliakoff, P.A. He is Board Certified in Construction Law. Sanjay is AV Rated Preeminent by Martindale-Hubbell, rated by Chambers USA in Construction Law, named as a 2015 Florida Legal Elite and 2015 Florida Super Lawyers. Sanjay has substantial experience representing parties in construction and insurance litigation and is a frequent speaker on those issues. He is currently a co-vice chair of the Construction Law Institute, and a member of the Construction Law Committee and the Insurance and Surety Committee. He received the "Rising Star" award from the Construction Law Institute in 2015.

Endnotes

- 1 Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121, 1124 (Fla. 2005).
- 2 See Auto. Mut. Indem. Co. v. Shaw, 184 So. 852 (1938).
- 3 Ruiz, 899 So. 2d at 1124 (citing Stephen F. Ashley, Bad Faith Actions § 1:01 (1995)).
- 4 *Id.* (quoting *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55, 59 (Fla.1995)).
- 5 *Id*.
- 6 § 624.155, Fla. Stat. (2014).
- 7 Ruiz, 899 So. 2d at 1124.
- 8 Id. at 1126.
- 9 *Id.* at 1124; § 624.155(1)(b)(1), Fla. Stat. (2002).
- 10 Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263 (Fla. 5th DCA 1987).
- 11 *Id.* at 266.
- 12 § 624.155(3)(d), Fla. Stat. (2014).
- 13 Talat Enterprises, Inc. v. Aetna Cas. & Surety Co., 753 So. 2d 1278 (Fla. 2000).
- 14 Macola v. Geico, 953 So. 2d 451 (Fla. 2006).
- 15 Id. at 458.
- 16 Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617 (Fla. 1994).
- 17 § 624.155(8), Fla. Stat. (2014).
- 18 *ld*.
- 19 *Id*.
- 20 QBE Insurance Corporation v. Chalfonte Condominium Apartment Association, Inc., 94 So. 3d 541 (Fla. 2012).
- 21 *ld*. at 548-49
- 22 Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980).
- 23 Time Ins. Co. v. Burger, 712 So. 2d 389, 391 (Fla. 1998).
- 24 Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259 (Fla. 1971).
- 25 Boston Old Colony Ins. Co., 386 So. 2d at 785.
- 26 Auto Mut. Indem. Co. v. Shaw, 184 So. 852 (Fla. 1938); Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259 (Fla. 1971).
- 27 Fidelity & Cas. Co. of N.Y. v. Cope. 462 So. 2d 459,461 (Fla. 1985).
- 28 Campbell v. Govt. Employees Ins. Co., 306 So. 2d 525 (Fla. 1974).
- 29 § 624.155(1)(b)1., Fla. Stat. (2014).
- 30 § 624.155(1)(b)2., Fla. Stat. (2014).
- 31 Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1275 (Fla. 2000) (noting that an

insurer may deny a claim based on a good faith evaluation as to what is owed on the insurance contract, even if a court subsequently finds otherwise, and not be liable for statutory bad faith).

- 32 § 624.155(1)(b)3., Fla Stat. (2014).
- 33 § 624.155(1)(b)3., Fla Stat. (2014).
- 34 Powell v. Prudential Property & Casualty Ins. Co., 584 So. 2d 12 (Fla. 3d DCA 1991).
- 35 Id
- 36 Boston Old Colony Ins. Co., 386 So. 2d at 785 (citing Ging v. American Liberty Ins. Co., 423 F. 2d 115 (5th Cir. 1970)).
- 37 Id.
- 38 Contreras v. U.S. Security Ins. Co., 927 So. 2d 16 (Fla. 4th DCA 2006).
- 39 Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555, 560-61 (Fla. 4th DCA 2003).
- 40 State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55 (Fla. 1995).
- 41 Barry v. Geico General Ins. Co. 938 So. 2d 613 (Fla. 4th DCA 2006).
- 42 Ruiz, 899 So. 2d at 1124.
- 43 Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000).
- 44 Mutual Ins. Co. v. The Farm, Inc., 754 So. 2d 865 (Fla. 3d DCA 2000).
- 45 Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617 (Fla. 1994).
- 46 Compare e.g. Liberty Mut. Ins. Co. v. Farm, Inc., 754 So. 2d 865 (Fla. 3d DCA 2000).
- 47 Mainstream Constr. Group, Inc., 864 So. 2d at 1272 (citing Lane v. Provident Life & Accident Ins. Co., 71 F. Supp. 2d 1255 (S.D. Fla. 1999)).
- 48 *Id.* (citing *Old Republic Nat'l Title Ins. Co. v. Home American Credit, Inc.,* 844 So. 2d 818 (Fla. 5th DCA 2003).
- 49 §§ 624.155(4) & (8), Fla. Stat. (2014).
- 50 McLeod v. Cont'l Ins. Co., 591 So. 2d 621, 626 (Fla. 1992).
- 51 State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55 (Fla. 1995).
- 52 Campbell v. Government Employees Ins. Co., 306 So. 2d 525, 531-32 (Fla. 1974) (allowing punitive damages in an automobile liability case); Dunn v. Nat'l Security Fire & Cas. Co., 631 So. 2d 1103, 1108-09 (Fla. 5th DCA 1993); Fla. Stat. § 624.155(5) (2014).
- 53 Fla. Stat. §624.155(5) (2014).
- 54 Id.
- 55 § 768.73, Fla. Stat. (2014).
- 56 WR. Grace & Co. v. Waters, 638 So. 2d 502 (Fla. 1994).
- 57 Campbell, 306 So. 2d at 531.
- 58 Allstate Ins. Co. v. Regar, 942 So. 2d 969, 974 (Fla. 2d DCA 2006).
- 59 Citizens Property Insurance Corp. v. Perdido Sun Condominium Association, Inc. 164 So. 3d 663 (Fla. 2015).
- 60 Perdido Sun Condominium Ass'n v. Citizens Property Insurance Corp., 129 So. 3d 1210 (Fla. 1st DCA 2014). (determining that the "willful tort" statutory exception to Citizens' immunity applied to statutory first-party bad faith claims) certified in conflict with Citizens Property Insurance Corp. v. Garfinkel, 25 So. 3d 62 (Fla. 5th DCA 2009).
- 61 Citizens Property Insurance Corp., 164 So. 2d at 666.
- 62 Id. at 667.

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This annual seminar is scheduled for December 4, 2015 in Fort Lauderdale FL (Live and Webcast) Course No. 2013

As course date gets closer check for full description and registration links under THE "CLE" link in the Section website.

"Competence" in Technology: The Rules Get a Reboot

By Jenna G. Rubin, Esq., Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A., Boca Raton, Florida

The Florida Rules of Professional Conduct have always required lawyers to provide "competent" representation to our clients, and most of us have felt confident that we understood what competent representation means. We have to know the law, we need to possess the necessary skills to represent our clients, we have to be thorough and we must

be prepared. But what does it mean to provide competent representation in today's world of Facebook, text messaging, and metadata? The Florida Bar's Board of Governors met on July 24, 2015 to address this issue and approved a proposed amendment to the Florida Rules of Professional Conduct which, if approved by the

Florida Supreme Court, will add a whole new level to the "competency" required in our representation of clients. The proposed changes specifically include competency in the use of technology as part of the definition of competent representation and require lawyers to have an understanding of the risks and benefits associated with the use of technology. The change is unsurprising given the trend within the state toward the promotion of technological advances as seen in several Florida Bar Ethics Opinions, similar changes made in 2012 to the American Bar Association's (the "ABA's") Model Rules of Professional Conduct and the adoption of comparable changes by thirteen other states.

Florida Bar Ethics Opinions

Since 2006 we have seen a series of Florida Bar Ethics Opinions endorsing the requirement of technological competence for lawyers using new forms of technology. The Florida Bar began by publishing Ethics Opinions providing guidance to lawyers storing files electronically and requiring lawyers sending documents electronically to ensure the confidentiality of the information contained in the document, including metadata.

In 2010 and 2013, Ethics Opinions were published which not only endorsed specific areas of technology but also addressed head-on the issue of competency and technology. Florida Ethics Opinion 10-2 dealt with the disposition of electronic devices that contain storage media. The opinion specifically extends the duty of competence to situations where lawyers choose to use devices that contain storage media and states that lawyers using these devices have a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining client confidentiality.

The opinion also states that the lawyer has an affirmative duty to learn whether a device he or she is using has the ability to store confidential information, whether the information can be accessed by unauthorized parties and who can have access to the information. Likewise, *Florida Bar Proposed Advisory Opinion* 12-3, which dealt with the use of cloud

computing, further widened the duty of competence as it relates to the use of technology and stated that Florida Bar Rule of Professional Conduct Rule 4-1.1 ("Rule 4-1.1") and the comment thereto, "means that a lawyer has an obligation to remain current in developments in technology that affect the practice of law."

But what does it mean to provide competent representation in today's world of Facebook, text messaging, and metadata?

ABA's Model Rules of Professional Conduct

The ABA addressed these issues in 2012 in comments to Model Rule of Professional Conduct 1.1 on competence. The comments were changed to include knowledge of the "benefits and risks associated with relevant technology" as part of the definition of what it means to provide competent representation. However, the report which accompanied the proposed change to the definition of competence explained that the addition of knowledge of technology to the definition of competence does not actually impose new obligations on lawyers and rather was meant to "serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent." Professor Andrew Perlman, a professor at Suffolk University Law School in Boston, who served as chief reporter for the ABA commission dealing with these issues, explained that the changes were not meant to impose obligations on lawyers to know everything about all forms of technology. Instead, they were meant to create an obligation of reasonableness on the part of lawyers working in today's high tech environment.

Florida Bar Rules of Professional Conduct

The Florida Bar's Board of Governors has proposed revisions to Rule 4-1.1 which go beyond those included in the ABA's Model Rule 1.1. The revisions were the result of the Florida Bar's Vision 2016 Commission Technology Subcommittee's recommendations to the Board of Governors. The Subcommittee recommended amendments to Rule 4-1.1 that address the need of our lawyers to maintain a minimum level of competence relating to technology,

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because technology is extensively used in the practice of law, and to remind lawyers of their obligations to safeguard the confidentiality of electronically stored information.

The Board of Governors recommended the same change to the comments to Rule 4-1.1 as the ABA did to Model Rule 1.1, which includes in the definition of competence "an understanding of the benefits and risks associated with the use of technology." But the Board of Governors took it a step further than the ABA and also approved the addition of the following sentence to the comments to Rule 4-1.1:

Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.

The proposed amendments to Rule 4-1.1 will be submitted in an omnibus petition to amend the Florida Bar Rules, which will be filed with the Florida Supreme Court in the fall of 2016. Florida lawyers are invited to comment on the proposed revisions, and these comments will be sent to the Florida Supreme Court along with the proposed changes to the rule.

If the amendments to Rule 4-1.1 are approved by the Florida Supreme Court, many lawyers will question the amount of knowledge of technology they will need to maintain in their individual practice. Whether a lawyer can rely on a staff member or younger attorney to deal with these issues is uncertain.

Questions about technology come up in a variety of situations, from the preservation of evidence (including social media), the research and monitoring of jurors, the maintenance of client confidentiality, the use of cloud computing, the dissemination of metadata and the understanding of e-discovery. The answer may vary depending on a lawyer's area of practice and is likely to evolve in today's ever-changing technological environment.

Jenna G. Rubin focuses on probate, trust and guardianship litigation at Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A. in Boca Raton, Florida. She is a graduate of Harvard Law School and Northwestern University and an active member of the Real Property, Probate and Trust Law Section. Jenna is a member of the inaugural class of the Florida Fellows Institute of the American College of Trust and Estate Counsel (ACTEC) and is a a Florida Bar William Reece Smith, Jr. Leadership Academy Fellow.

Endnotes

- 1 Florida Bar Rules of Professional Conduct, Rule 4-1.1 (2013).
- 2 *Id*
- 3 Florida Bar Ethics Opinion 06-01, April 10, 2006.
- 4 Florida Bar Ethics Opinion 06-02, September 15, 2006.
- 5 Florida Bar Ethics Opinion 10-2, September 24, 2010.
- 6 Florida Bar Ethics Opinion 12-3, January 25, 2013.
- ABA Model Rules of Professional Conduct, Comment 8 to Rule 1.1 (2012).
- $8 \quad$ Report to Resolution of American Bar Association, Adopted by the House of Delegates August 6-7, 2012.
- 9 James Podgers, You don't need perfect tech knowhow for ethics' sake—but a reasonable grasp is essential, ABA Journal Daily News (August 9, 2014), http://www.abajournal.com/news/article/you_dont_need_perfect_tech_knowhow_for_ethics_sake--but_a_reasonable_grasp
- 10 Amendment to Florida Bar Rule of Professional Conduct Rule 4-1.1 (Vision 2016 Commission Technology Subcommittee).

Dear Section Members:

RPPTL Section Administrator Mary Ann Obos and husband Jeff are extremely pleased to announce the long awaited arrival of Sebastian Andrew Obos!

Sebastian was born Thursday, August 20th, 2015, at 6:02 p.m. On behalf of the Section, our continued wishes for good health and for a bright and happy future, have been conveyed to the Obos family.

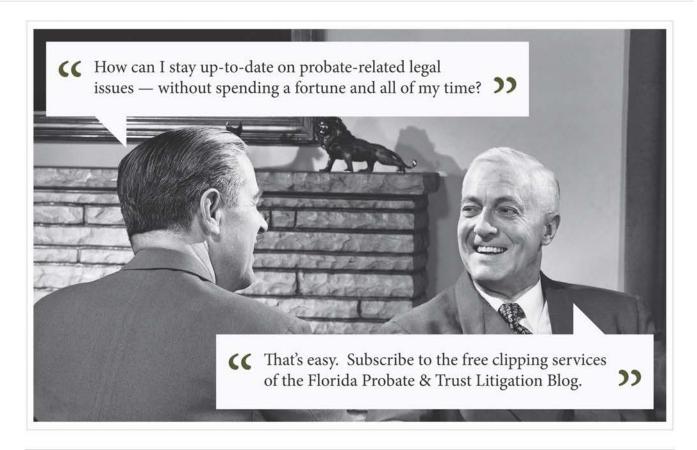
May Ann understandably was not at our Breakers' summer meeting, but plans to return for the Boca Raton Resort autumn meeting.

There is a rumor that Sebastian may attend the Boca Raton meeting at which time "Dirt Division" and "Death Division" lawyers can each convince young Sebastian to join their Division.



Welcome Sebastian!

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Landlord Tenant Legislative Update

By Arlene C. Udick, Esq., The Villages, Florida



A. UDICK

n 2015, the Florida legislature enacted two landlord-tenant related laws: Sec. 82.045, F.S., creating a remedy for unlawful detention by a transient occupant of residential property, and Sec. 83.561, F.S., relating to the termination of rental agreements upon foreclosure. These two laws created new remedies favoring the property rights of owners.

Unlawful Detention by Transient Occupant of Residential Property

An unlawful detainer action involves the removal of an unwanted occupant who occupied residential property with the consent of the owner or lessee but who refuses to surrender possession of the property once the property owner or lessee revoked consent for the guest to remain on the property. The person unlawfully detaining the property is not a tenant and claims no other right or interest in the property.³ Under Sec. 82.091, F.S., if the owner or lessee prevailed in the action, the clerk of court issued a writ of possession to the Sheriff describing the premises and commanding the Sheriff to put him or her in possession of the property. In addition to the time and delay necessary to obtain and serve a writ of possession, the property owner or lessee paid a number of fees and costs, including, but not limited to filing fees, a service charge for summons, sheriff's fee for service and execution of the writ of possession, attorney's fees, etc.

The new unlawful detention by transient occupant law, Sec. 82.045, F.S., provides a quicker and cheaper remedy to remove unwanted occupants from residential properties. It clarifies the law by providing: (1) a statutory definition of the term "transient occupant"; (2) the factors that establish transient occupancy; and (3) what constitutes unlawful detention, thereby rendering statutory application and enforcement clearer.4 The law provides the authority for law enforcement to direct the immediate removal from the property of the transient occupant upon receipt of a sworn affidavit from the owner or lessee and specifies that the person who fails to comply with the officer's direction commits criminal trespass in a structure pursuant to Sec. 810.08, F.S.⁵ In any prosecution of a violation of Sec. 810.08, F.S., whether the defendant was properly classified as a transient occupant is not an element of the offense; the state is not required to prove the defendant was in fact a transient occupant, and the defendant's status as a permanent resident is not an affirmative defense.⁶

The statute also affirms the existing right of the property owner or lessee to effect removal of the unwanted occupant in a civil action for unlawful detainer pursuant to Sec. 82.04, F. S.⁷ If the court determines the defendant is not a transient

occupant but a tenant of residential property governed by Part II of Chapter 83 F.S., the court may not dismiss the unlawful detainer action. Rather, the court must allow the plaintiff time to give the defendant the pre-eviction notices required by Chapter 83 F.S. and amend the complaint to pursue eviction.⁸

The due process rights of all parties are respected regarding both causes of action for wrongful removal⁹ and for removal of a transient occupant pursuant to Sec. 82.04, F.S.¹⁰ This new law is a welcome change for owners and lessees desiring to evict unwanted residential guests.

Tenant-Occupied Residential Property Following Foreclosure Sale

A new section within Part II, Chapter 83 Florida Statutes was created. Sec. 83.561, F.S. provides that a purchaser taking title to a tenant-occupied residential property following a foreclosure sale takes title to the property subject to the rights of the tenant provided in the new section.¹¹

The federal Protecting Tenants at Foreclosure ("PTAF") law expired on December 31, 2014. The PTAF overlaid any state law protections for tenants, providing bona fide tenants with time after foreclosure before having to leave the foreclosed rental property. PTAF required buyers of foreclosed properties to honor the length of the tenant's residential lease or, if there was no lease, give the tenant ninety (90) days' notice to vacate the home.

Under Sec. 83.561, F.S., the tenant may remain in possession of the property for 30 days following the date of the purchaser's delivery of a written 30-day notice of termination.¹² The act provides the form for the Notice to Tenant of Termination:¹³

Notice To Tenant Of Termination

You are hereby notified that your rental agreement is terminated on the date of delivery of this notice, that your occupancy is terminated 30 days following the date of the delivery of this notice, and that I demand possession of the premises on (date). If you do not vacate the premises by that date, I will ask the court for an order allowing me to remove you and your belongings from the premises. You are obligated to pay rent during the 30-day period for any amount that might accrue during that period. Your rent must be delivered to (landlord's name and address).

If the tenant fails to vacate the premises, the purchaser at the foreclosure sale may apply to the court for a writ of possession based upon a sworn affidavit that the 30-day notice of termination was delivered to the tenant and the tenant failed to vacate the premises at the conclusion of the 30-day period. The Writ of Possession shall be served pursuant to Sec. 83.62, F.S., which outlines the procedure for restoring

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possession of the premises to the landlord.¹⁵

Sec. 85.561, F.S., does not apply: 1) if the tenant is the mortgagor or the child, spouse, or parent of the mortgagor in the foreclosure; 2) the tenant's rental agreement is not the result of an arm's length transaction; or 3) the tenant's rental agreement allows the tenant to pay rent that is substantially less than the fair market rent for the premises, unless the rent is reduced or subsidized due to a federal, state, or local subsidy.¹⁶

The purchaser at a foreclosure sale is subject to the provision of Sec. 83.67, F.S., the Prohibited Practices section of the Florida Residential Landlord Tenant Act.¹⁷ The Section prohibits: (1) the termination or interruption, directly or indirectly, of any utility service furnished to the tenant, including, but not limited to, water, heat, light, electricity, gas, elevator, garbage collection, or refrigeration; (2) the landlord from changing the locks in an effort to force a resident to vacate without a writ of possession; (3) the landlord from discriminating against a service member in offering a dwelling unit for rent or in any of the terms of the rental agreement: (4) the landlord from preventing a tenant from displaying one portable, removable, cloth or plastic United States flag; (5) the landlord from removing the outside doors, locks, roof, walls, or windows of a unit except for purposes of maintenance, repair, or replacement; and (6) the landlord from removing the tenant's personal property from the dwelling unit unless such action is taken after surrender, abandonment, recovery of possession of the dwelling unit due

to the death of the last remaining tenant in accordance with Sec. 83.59(3)(d), F.S., or a lawful eviction¹⁸. Until the purchaser assumes an existing rental agreement with the tenant that has not ended or enters into a new rental agreement with the tenant, the purchaser does not assume the obligations of a landlord.¹⁹ Given the complexities of laws relating to foreclosures and landlord tenant, this new Sec. 83.561, F.S. should prove beneficial to the rule of law.

Endnotes

- 1 Chapter 2015-89, Laws of Florida, effective July 1, 2015.
- 2 Chapter 2015-96, Laws of Florida, effective June 2, 2015.
- 3 § 82.02 (1), F.S.
- 4 § 82.045(1) & (2), F.S. (2015).
- 5 § 82.045(3) & (3)(a), F.S. (2015).
- 6 Id
- 7 § 82.045(4) F.S. (2015)
- 8 ld.
- 9 § 82.045(3) (b), F.S. (2015).
- 10 § 82.045(4), F.S. (2015).
- 11 § 83.561(1) F.S. (2015)
- 12 § 83.561(1)(a) F.S. (2015)
- 13 § 83.561(1)(c) F.S. (2015
- 14 § 83.561(2) F.S. (2015)
- 15 § 83.561(1)(d) F.S. (2015)
- 16 § 83.561(3)(a), (3)(b), and (3)(c), F.S.(2015)
- 17 § 83.561(1)(b), F.S. (2015)
- 18 § 83.67(1), (2), (3), (4), and (5) F.S.(2015)
- 19 § 83.561(3), F.S. (2015).

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Real Estate Case Summaries

Prepared by Melissa N. VanSickle - Clark, Partington, Hart, Larry, Bond & Stackhouse,

Tallahassee, Florida

In complaint alleging breach of duty to disclose fact known to sellers and not readily observable by buyers that materially affects the value of the property, it was error for the court to enter judgment in favor of the buyers when the buyers failed to present substantial, competent evidence of a material fact and actual knowledge; argument that sellers' act of filling an area materially affected the value of property for the site of buyers' new home was not supported where buyers' site was different from the portion of filled land; actual knowledge cannot be inferred from expert testimony that muck "could have" been observed if fill dirt were not present.

Eiman v. Sullivan, 40 Fla. L. Weekly D1206b (Fla. 2d DCA May 22, 2015)

The parties contracted for the purchase and sale of a vacant waterfront plot of land for the express purpose of building a new home on the site. Prior to the sale, sellers had filled a cleared area with dirt. The contract with buyers provided that the land was purchased "as is" and allowed a brief period of time for the buyers to conduct any assessment they deemed appropriate. Prior to closing, the buyers visited the land but never performed any assessments on the property. After closing, a pre-construction assessment revealed a layer of "muck" beneath the surface requiring \$65,000 of additional pilings to support a new home. The buyers claim that sellers breached their duty under *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) by failing to disclose a fact known to the sellers and not readily observable to the buyers that materially affects the value of the property.

On appeal from the trial court entry of judgment in favor of the buyers, the 2d DCA determined that it was error to enter judgment for buyers. Buyers failed to present competent, substantial evidence of the existence of a material fact that affects the value of the property. Additionally, even if the muck did constitute a material defect, buyers also failed to present evidence that seller had actual knowledge of the defect.

Buyers claimed that muck underneath the area filled by the sellers materially affects the value of the site of the buyers' new home. However, buyers did not plan to build their home on the portion of land filled by the sellers. The existence of muck under the filled land could not materially affect the value of the site for the buyers' new home because it was an entirely different part of the land. The buyers also failed to present any evidence that the sellers had actual knowledge of the defect. The buyers presented no evidence that sellers observed muck or that the sellers had assessed the subsurface conditions of

the land. The testimony of buyers' expert witness that the muck "could" have been visible if there were no fill dirt on top of the muck did not constitute competent, substantial evidence of actual knowledge. Additionally, even if the sellers had observed muck underneath the filled land, they would not have any knowledge about the subsurface conditions of the area where the buyers intended to build their home.

The 2d DCA reversed judgment in favor of the buyers and remanded with instructions to enter final judgment in favor of the sellers where buyers failed to present competent substantial evidence of a material fact or knowledge on the part of the sellers.

Trial court properly held that a description of an easement was coterminous with the actual dimensions of the easement. In general, the use of the words "over, upon, and across" is unambiguous and states that an easement is coterminous with the area described. Where an easement grant is made in general terms, the easement is construed as permitting any generalized reasonable use. Therefore, where the only express prohibition in the easement document was the use of motorized vehicles, it was error for the trial court to prohibit the benefitted owners from riding horses across the easement.

Condron v. Arey, 165 So. 3d 51 (Fla. 5th DCA 2015)

The easement in this case was created in 1981 reserving a 10 foot strip of land over and across the southern most boundary of an ocean front lot. In 2004, the Condrons acquired the ocean front lot subject to the 10 foot easement and began construction and improvements to the land. The benefitted landowners filed suit seeking injunctive relief, asserting that the Condrons' improvements to the land violated the easement agreement.

The trial court entered partial summary judgment in favor of the benefitted landowners holding that the easement was 10 feet wide and the right of ingress and egress described in the easement documents was coterminous with the 10 foot area set aside for the easement. In its final judgment, the trial court held that any commercial use of the easement was inconsistent with the easement documents, including the use of horses over the easement area.

On appeal to the 5th DCA, the Condrons asserted that the language "over, upon, and across" does not automatically mean that easement rights are coterminous with the described area. An easement must be interpreted by looking at what the original parties and their sucessors in title intended. See

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Diefenderfer v. Forest Park Springs, 599 So. 2d 1309, 1312-13 (Fla. 5th DCA 1992). The court examined several other Fifth Circuit cases interpreting similar language and concluded that the trial court's summary judgment holding was correct. The use of the terms "over," "upon," and "across" unambiguously state that the easement is coterminous with the 10 foot wide easement area described. The intent of the parties was also clearly manifested in the easement documents stating that the easement area is to "remain a private, perpetual and non-exclusive easement for the use and benefit of the [benefited owners]." Because the right was found to be coterminous, there could be no encroachments into the easement area.

The 5th DCA generally affirmed the trial court's final judgment, except for the portion providing that the benefitted owners may not transport horses across the easement. The scope of permitted use of an easement "is defined by what is granted, not by what is excluded." City of Orlando v. MSD-Mattie, LLC, 895 So. 2d 1127, 1130 (Fla. 5th DCA 2005). Where the easement grant is made in general terms, the easement will ordinarily be construed as creating a right of use for all reasonable purposes. The 5th DCA found that the intent of the parties, as ascertained by prior conduct and the language of the easement documents, should govern given the broad language in the easement documents. Though it was clear that the use of motor vehicles was expressly prohibited, the right to use horses over the easement was reasonable given the generalized language of the grant and in considering the use of horses over the easement in the past. Additionally, the description of the easement as a "pedestrian path" should be read to describe the manner in which the easement must be maintained, rather than a strict restriction on use. Therefore, based on the above facts, the trial court's grant of relief in its final judgment was affirmed, except as to the use of horses.

Trial court departed from the essential requirements of law in denial of Petitioner's motion to extend lis pendens. Where Petitioner showed a fair nexus between the legal or equitable ownership of the property and the dispute and good cause for extending the lis pendens, Petitioner's motion to extend should have been granted. Reversed and remanded for determination if a bond is necessary to protect Respondents' interest from possible damages for wrongful extension of the lis pendens.

J.B.J. Investment of South Florida, Inc. v. Timothy W. Maslanka, et. al., 163 So. 3d 726 (Fla. 5th DCA 2015)

Petition for writ of certiorari concerned the trial court's denial of a motion to extend a lis pendens on property owned by Respondents. Petitioners made a loan to Respondents secured by a mortgage on a number of Respondents' properties. The underlying suit involved the mortgage which Petitioner alleged was improperly drafted because it did not encumber one of the properties as the parties intended ("Contested Property").

Petitioner relied on the argument that a court must dissolve a lis pendens that is based on an unrecorded document unless the proponent establishes a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the law suit. Good cause for extending the lis pendens must also be demonstrated. Good cause has been defined as: "a substantial reason, one that affords a legal excuse, or a cause moving the court to its conclusion." Fla. W. Realty Partners, LLC v. MDG Lake Trafford, LLC, 975 So. 2d 479, 481 (Fla. 2d 2007). Here the Petitioner presented substantial evidence that would support its claim for either reformation of the mortgage or for an equitable lien to be placed on the Contested Property. Additionally, Petitioner showed good cause for extending the lis pendens by actively litigating the underlying action. Petitioner made several motions, participated in discovery, and even moved for summary judgment. However, the trial court failed to make any findings relating to the good cause requirement.

Reversing the trial court's denial of Petitioner's motion, the 5th DCA held that the trial court departed from the essential requirements of law and thus caused irreparable harm that could not be corrected on post-judgment appeal. See Taylor v. Steckel, 944 So. 2d 494, 497-98 (Fla. 3d DCA 2006) (affirming order granting motion to extend lis pendens where respondents' interest remained the same as it was on the day the action commenced thus preserving the necessity to protect the pending claims and putting third parties on notice). Here, the dispute over the Contested Property remained the same as it was on the day the action commenced. Therefore, the lis pendens should have been extended to protect Petitioner's rights from being impaired and to protect third parties who might be interested in purchasing the property. Whether Petitioner will prevail on the merits at trial is not the issue. Since a valid cause of action still exists over the title to the property the court should have continued the lis pendens. However, because the wrongful filing of a lis pendens can be damaging, a bond may be required to protect Respondents against any potential damages resulting from its wrongful continuance. See Med. Facilities Dev., Inc. v. Little Arch Creek Props., Inc., 675 So. 2d 915, 917 (Fla. 1996). Therefore, the 5th DCA quashed the trial court's denial of Petitioner's motion to extend the lis pendens and remanded to the trial court the issue of whether a bond is required.

Trial court did not err in giving restrictive covenants the narrowest possible interpretation consistent with its purpose. Court properly concluded that the Unity of Title Covenant was an unreasonable restraint on alienation due to the long term effect on the improvement and marketability of the property.

Vista Golf, LLC v. Vista Royale Property Owners Assoc., Inc., 164 So. 3d 140 (Fla. 4th DCA 2015)

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Vista Golf acquired title to property subject to two protective covenants. The Operation Covenant required that the property be operated as a golf course and the Unity of Title Covenant required the entire golf course to be held, sold, or leased only as a single parcel. Vista Golf appealed the trial court's decision upholding the covenants in part and invaliding the Unity of Title Covenant. Vista Golf asserted that the court invalidated both of the covenants and subsequently rewrote the Operation Covenant and added new requirements. Appellees asserted that the trial court improperly invalidated the Unity of Title Covenant.

The 4th DCA affirmed the trial court's decision in its entirety. Specifically, the 4th DCA found that the trial court did not invalidate the Operation Covenant but interpreted it as a restrictive covenant on the use of the property rather than as an affirmative covenant to actually operate the property as a golf course. The trial court did not rewrite the covenant, but rather gave it a narrow interpretation. Thus, Vista Golf cannot be affirmatively compelled to operate a golf course but may not use the property for any other purpose. Additionally, the 4th DCA affirmed the trial court's conclusion that the Unity of Title Covenant was an unreasonable restraint on alienation due to the long term effect it will have on the improvement and marketability of the property.

Trial court did not err in issuing a temporary injunction prohibiting the performance of certain outpatient procedures on defendant's property in violation of a restrictive covenant in the medical park where defendant's facility was located. Plaintiff demonstrated a substantial likelihood of success on the merits and was not required to prove irreparable harm to obtain an injunction enforcing a covenant on real property. Trial court erred in granting relief for activities that were not included in the complaint nor litigated at trial. Trial court erred by including vague language in injunction and was ordered to strike such language as a matter of law. Neither party is entitled to attorney's fees under contractual agreement.

Planned Parenthood of Greater Orlando, etc. v. MMB Properties, etc., 40 Fla. L. Weekly D 1215a (Fla. 5th DCA May 22, 2015)

MMB Properties ("MMB") filed suit seeking a temporary injunction for violation of a restrictive covenant in the medical park where both parties owned property. The restrictive covenant prohibited property owners in the medical park from using their facilities as an "Out Patient Surgical Center" or "Diagnostic Imaging Center" "unless ancillary and incidental" to the physician's practice. Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood") appeals the nonfinal order granting a temporary injunction prohibiting the performance of abortions or sonograms.

On appeal, the 5th DCA reversed in part and affirmed in part. Planned Parenthood argued that it was error for the trial court to enter the temporary injunction because the restriction does not prohibit certain *activities* but rather prohibits the operation of outpatient surgical *centers*. Planned Parenthood reasoned that because the primary purpose of its facility was not to serve as an outpatient surgical center, the activities performed on its property were not prohibited.

The 5th DCA disagreed and held that the language, though poorly worded, strongly suggests that outpatient surgical procedures beyond those that are ancillary and incidental to a physician's medical practice are prohibited regardless of the primary purpose of the location. Specifically, the language prohibits the property from being used as an outpatient surgical center, which ordinarily means a facility for the purpose of performing certain outpatient procedures and activities, even if performing those procedures is not the primary purpose of the facility. Therefore, MMB had a substantial likelihood of success to prove that Planned Parenthood's use of the facility to perform abortions would be in violation of the covenant.

Planned Parenthood also argued that MMB failed to demonstrate that it would suffer irreparable harm if Planned Parenthood were allowed to continue with its practice. However, injunctions to enforce restrictive covenants on real property do not require a showing of irreparable harm. Further, the trial court did not err in failing to consider Planned Parenthood's alleged irreparable harm if the injunction were granted. Planned Parenthood was aware of the restrictive covenant and proceeded forward at its own peril. Therefore, any hardship suffered because of the injunction is not considered because it could have been avoided by locating its facility somewhere else.

Finally, Planned Parenthood unsuccessfully argued that MMB failed to present evidence that such a limitation will serve the public interest. However, the stated purpose of the covenant was to protect the nearby hospital from certain types of developments. Such a restriction has been held to serve the public interest in *Wood v. Dozier*, 464 So. 2d 1168, 1170 (Fla. 1985). Thus, the 5th DCA found that the injunction was properly issued to prohibit Planned Parenthood from performing abortions in its facility.

The 5th DCA reversed the trial court's order temporarily enjoining Planned Parenthood from performing sonograms because that relief was not sought by MMB in the pleadings nor was it tried. The trial court was also ordered to strike the vague language of the restriction prohibiting Planned Parenthood from performing "other unspecified procedures" because such a provision did not reasonably describe the acts to be restrained as required by law. Finally, neither party was entitled to attorney's fees under the contractual provision for enforcement of the restrictions.

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Grant of summary judgment in favor of appellee, Homeowners Association, impairs appellant, Pudlit 2 Joint Venture's freedom of contract under the Florida Constitution where appellant was an intended third party beneficiary of the contract. Application of Florida Statute rather than Homeowners Association Declaration of Rights unconstitutionally impairs parties' freedom to contract.

Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Association, Inc., 40 Fla. L. Weekly D1248a (Fla. 4th DCA May 27, 2015)

Pudlit 2 Joint Venture ("Pudlit") purchased two properties at foreclosure sales within communities maintained by the Westwood Gardens Homeowners Association ("Association"). After closing, the Association demanded payment for past due Association assessments, including assessments due before Pudlit's ownership. Pudlit filed suit seeking damages for breach of the Association's Declaration of Covenants, Conditions, and Restrictions ("Declaration") alleging that any liens for past due assessments were extinguished by the foreclosure sale pursuant to the Declaration. The Association alleged that Sec. 720.3085, F.S. (2013) amends the Declaration and mandates that Pudlit is jointly and severally liable for unpaid assessments.

The issue is whether the trial court erred in granting summary judgment in reliance on the statute or whether such reliance unconstitutionally impaired Pudlit's contractual rights under the Declaration. The Declaration in this case is in direct conflict with the Florida Statute. The statute provides that a parcel owner is jointly and severally liable with the previous owner for all unpaid assessments up to the time of transfer of title. The Declaration provides that a subsequent owner will not be liable for payment of assessments owed by the prior owner.

The 4th DCA disagreed with the Association's claims that Sec. 720.3085, F.S., amended the Declaration. The Declaration permits automatic amendment by statutory enactment only where "required" by the plain language of the statute. Sec.

720.3085, F.S. clearly does not require amendment as part of the enactment under Chapter 720, which provides that sections "720.301-720.407 are not intended to impair such contract rights" under homeowners association agreements and declarations. Sec. 720.3085, F.S., did not amend the Declaration because the Association did not specifically act to expressly adopt that provision as required by the terms of the Declaration.

The 4th DCA relied on Coral Lakes Cmty. Ass'n v. Busey Bank, N.A., 30 So. 3d 579 (Fla. 2d DCA 2010), in holding that the trial court's grant of summary judgment unconstitutionally impaired Pudlit's rights under the Declaration. A third party beneficiary to a contract possesses the same constitutional right against impairment of contract as the original parties to the contract. In Coral Lakes, the bank instituted a foreclosure action and included the homeowners association as defendant because of liens for unpaid assessments. The HOA argued that Sec. 720.3085, F.S., held the bank jointly and severally liable for the assessments. The trial court disagreed and held that the bank would not be liable for the assessments due to a provision in the HOA declaration similar to that in the present case. The 2d DCA agreed with the trial court in Coral Lakes, holding that the bank was an intended third party beneficiary and therefore, to apply Sec. 720.3085, F.S., would unconstitutionally impair the parties' contractual obligations.

The Declaration in the present case specifically provides that "foreclosure...shall extinguish the lien of such [past due] assessments." This provision expressly creates rights for third party successors-in-interest clearly making Pudlit an intended third party beneficiary. Because such a restriction is reasonable and unambiguous, it will be enforced according to the intent of the parties. Therefore, the 4th DCA reversed the summary judgment entered in favor of the Association and remanded for entry of summary judgment in favor of Pudlit.



Probate Case Summaries

Prepared by Michael A. Sneeringer – Akerman LLP, Naples, Florida

Slayer statute does not bar murderer's child and grandchildren from inheriting, however, undue influence exerted by murderer might.

Fiel v. Hoffman, 40 Fla. L. Weekly D1757a (Fla. 4th DCA 2015).

Husband was murdered by wife (wife also murdered husband's mother). Prior to husband's death, he executed two wills. It was alleged that both wills were procured through the wife's "... duress, threats, physical attacks, home invasions and extortions." The will that wife probated benefited husband's mother and, if she predeceased, wife. If wife predeceased, step-child was to receive \$150,000 and step-grandchildren received the residue, in trust. Step-child was wife's child from a prior marriage; step-grandchildren were step-child's children.

The trial court determined that based upon § 732.802, Fla. Stat. (the "Slayer Statute"), wife was not entitled to participate in the estate; rather, she was treated as having predeceased her husband, which would thus benefit her child and grandchildren. Husband's cousins filed a complaint and an amended complaint to invalidate the will under probate, as well as a prior will that benefitted wife. The will that the cousins sought to probate benefitted husband's mother if she survived him, followed by the cousins if she predeceased. The cousins argued that the two wills were procured by undue influence and that under the Slayer Statute, step-child and step-grandchildren were barred from inheriting. The undue influence claim noted that the entire will was tainted by the wife's actions and, as such, the bequests in favor of the stepchild and step-grandchildren could not be carved out. During a motion to dismiss hearing, the trial court dismissed the Slayer Statute claim and dismissed the undue influence claim.

The Fourth District Court of Appeal ("4th DCA") found that the Slayer Statute did not prevent the step-child and step-grandchildren from inheriting under the husband's will. The court noted that the Slayer Statute is clear and unambiguous; it does not extend the prohibition of receipt of property or other benefits to anyone other than the killer of the decedent. The court cited a line of cases to support its position, including cases from other Florida District Courts of Appeal. See *Chatman v. Currie*, 606 So.2d 454, 456 (Fla. 1st DCA 1992) (". . . section 732.802 does not apply to an innocent contingent beneficiary's entitlement to life insurance benefits . . ."); see also *Lopez v. Rodriguez*, 574 So.2d 249, 250 (Fla. 3d DCA 1991) ("We decline to hold that the legislature intended the statute to deprive an innocent beneficiary to the trust proceeds."). The panel of 4th DCA judges challenged the Florida legislature by stating,

"[T]o interpret the statute to preclude the stepchildren from recovering would require us to add words to the statute, something we cannot do. If the Legislature deems as a public policy matter . . . it can amend the statute to accomplish that result."

The 4th DCA did agree with the cousins that the complaint stated a cause of action for undue influence and should not have been dismissed (it remanded the case for further proceedings). The 4th DCA applied the case of *In re Van Horne's Estate*, 305 So.2d 46 (Fla. 3d DCA 1974), to reach its ruling. In *Van Horne*, the court noted that "... where it is impossible to determine to what extent the specific legacies have been tainted by the undue influence; in such a situation, the whole will must either be refused probate or admitted thereto."

The appellate court also noted that this case reminded it of *Sun Bank/Miami N.A. v. Hogarth*, 536 So.2d 263 (Fla. 3d DCA 1988). In *Sun Bank*, the court entirely invalidated two wills, despite the protest of one of the co-beneficiaries, explaining:

Even if the trial court had not totally invalidated these instruments, this is not a case in which there was no relationship between the party exercising the undue influence and the other beneficiary of the influenced instrument...The evidence indicates that [brother's] actions were undertaken not only to benefit himself, but also to benefit [his sister].

Trial court erred by entering judgment discharging trustee where trustee failed to comply with the notice provisions of § 736.04117, Fla. Stat.

Harrell v. Badger, 40 Fla. L. Weekly D1719a (Fla. 5th DCA 2015).

Decedent's will devised the remainder of her estate to a trust for her adopted son. Upon the adopted son's death, the assets were to be devised to the decedent's other children ("appellants"). The decedent's sisters were the initial trustees of the trust. The adopted son removed the sisters, replacing them with the appellee, the adopted son's neighbor. Appellee approached two individuals ("individuals") with the idea of transferring ("decanting") the trust assets into a "special needs" trust designated to allow the adopted son to qualify for various government benefits with the catch that this "special needs" trust was a "pooled trust" enabling the assets to pass to the other beneficiaries of the pooled trust upon the adopted son's death.

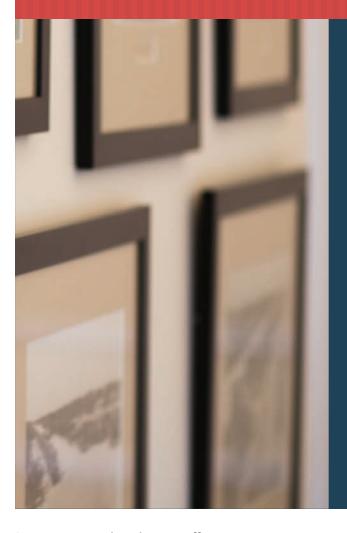


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Appellee benefited from the new trust by receiving distributions pursuant to a "care agreement" that he had with the adopted son, and by selling the decedent's house on behalf of the adopted son, using his wife as the realtor (entitling her to a commission). The individuals transferred the assets to the pooled trust without giving the required notice to the qualified beneficiaries under § 736.04117, Fla. Stat. The individuals ultimately were arrested for their conduct in misappropriation of the funds transferred to the pooled trust. Meanwhile, appellee filed a motion to terminate the pooled trust. He notified the appellants. In providing notice, appellee created a series of uncorroborated accountings. The appellants sued the appellee for a breach of fiduciary duty related to appellee not getting permission to hire his wife as realtor, failing to notify them regarding the sale of the house and cancelling their remainder interest in the trust.

At the trial court level, the appellee countered that his reliance on attorneys, accountants and other experts precluded him from liability. The trial court concluded that the terms of the decedent's will allowed the appellee to invade the trust if it appeared to be in the best interests of the adopted son. The lower court also ruled that the appellee reasonably relied upon his attorney's and the individuals' advice. The trial court also awarded appellee attorneys' fees.

The Fifth District Court of Appeal reversed and ruled in favor of the appellants. Under § 736.04117(4), Fla. Stat, a trustee must notify all qualified beneficiaries of the first trust in writing at least sixty days prior to the effective date of the trustee's exercise of his or her power to invade the trust principal. Under § 736.0103(16), Fla. Stat., the appellants, as presumptive remainder beneficiaries after the adopted son's death, were qualified beneficiaries. Section 736.04117, Fla. Stat. also provides under (a)(1) that decanting is limited to situations where the beneficiaries of the second trust include only beneficiaries of the first trust.

When appellee decanted the trust assets to the pooled trust, he did so in violation of § 736.04117, Fla. Stat. by not giving notice to the appellants and decanting to a new trust where the contingent remainder interests of the appellants were removed. Thus, the appellate court reversed the decision of the trial court and indicated that the trial court abused its discretion by imposing attorneys' fees against appellants.

Trial court erred in ruling that attorney for temporary guardian owed ward no duty under third-party beneficiary theory.

Saadeh v. Connors et. al., 166 So. 3d 959 (Fla. 4th DCA 2015).

Plaintiff, a "wealthy man of advanced years," loaned money to a younger woman, prompting his adult children to file an incapacitation petition. After a hearing on the petition, the court appointed a professional guardian who worked with the attorney that filed the incapacity petition. Three days after the guardian's appointment, two members of the examining committee found plaintiff to be competent. The guardian's attorney and plaintiff's court-appointed attorney submitted an agreed order to the court whereby, in exchange for the dismissal of the guardianship proceedings, the plaintiff would execute a "trust." The agreed order notwithstanding, the parties conducted themselves as if the guardianship proceedings had never been dismissed and litigation continued.

Plaintiff executed an irrevocable trust. At the time, plaintiff was led to believe that he would remain in control of the trust and its contents, including decisions regarding the trust. In actuality, plaintiff had given control to his adult children and incurred negative tax consequences. Plaintiff sued the guardian's attorney and guardian, among others. Plaintiff pled a count of professional negligence and breach of duty against the guardian's attorney. The lower court granted summary judgment in favor of the guardian's attorney determining that the guardian's attorney did not owe a legal duty to plaintiff under the third party beneficiary rule. On appeal, the Fourth District Court of Appeal reversed and remanded for further proceedings.

Plaintiff argued that since his guardianship estate compensated both the guardian and the guardian's attorney, the attorney owed him a duty of care. The court noted that Florida extends the third party beneficiary privity requirement in legal malpractice actions to very limited circumstances, mainly in the area of will drafting, where it can be proven that the intent of the client in engaging the services of the lawyer was to benefit a third party. *Brennan v. Ruffner*, 640 So.2d 143, 146 (Fla. 4th DCA 1994). However, since this was a guardianship action, the court looked to the guardianship statutes to determine whether a duty was owed.

Section 744.331(2)(b), Fla. Stat. states that upon the filing of a petition to determine incapacity, the court must appoint an attorney to represent the alleged incapacitated person. Any attorney representing an alleged incapacitated person may not serve as the guardian of said person or as counsel for the guardian or petitioner under § 744.331(2)(c), Fla. Stat. Further, the court may appoint an emergency temporary guardian to protect the alleged incapacitated person and any property from harm under § 744.3031(1), Fla. Stat. Counsel must be appointed to represent the emergency temporary guardian under § 744.3031(1), Fla. Stat. This has the effect of making the emergency temporary guardian the alleged incapacitated person's fiduciary. *Maxwell v. First Union Bank*, 782 So.2d 931, 933-34 (Fla. 4th DCA 2001).

In developing the reasoning for a duty being owed to plaintiff, the appellate court looked to a prior decision with a situation in the context of an adoption of a minor. In *Rushing v. Bosse*, 652 So.2d 869 (Fla. 4th DCA 1995), the court found

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that attorneys who handled the private adoption proceeding, which removed a child from Florida and the child's relatives, owed a duty of care to the child where the attorneys for the adoptive parents not only counseled the adoptive parents to falsify Florida residency, but also paid money to the mother of the child to induce her to give up any rights to the child. The appellate court noted the similarities between the protection of incapacitated persons in guardianship proceedings and protection of a child in an adoption proceeding in that the "purpose" of both relates to protecting the public welfare.

The appellate court also cited to Attorney General Robert Butterworth's opinion, Fla. AGO 96-94, 1996 WL 680981, for the existence of the duty to the ward by the guardian's attorney. The court noted that the ward's well-being is the essence of the guardianship statutes. If well-being is the essence, plaintiff's cause of action against the guardian's attorney could not be set-aside without an examination of the facts and circumstances to determine whether the guardian's attorney breached a duty which caused damages to plaintiff.

Attorney's fees and costs cannot be awarded, absent a finding of bad faith conduct, where a confidential guardianship file inadvertently received by parties was used to procure additional subpoenas to financial institutions.

Goldman, et. al., v. Estate of Aaron Goldman, 166 So. 3d 927 (Fla. 3d DCA 2015).

Court-appointed Guardian Ad Litem ("guardian") reviewed ward's file containing confidential financial and medical information. Guardian signed a Stipulation of Confidentiality regarding her copy of the file. The court found in 2008 that the file was confidential. However, in 2010, guardian inadvertently sent the file to counsel for appellants. Once the confidential financial information was in their possession, appellants issued ten subpoenas to financial institutions requesting information on the ward's accounts. Also, counsel for appellants filed a petition seeking the court's permission to review the confidential guardianship file. Ward's attorney moved for the imposition of sanctions, contending that the information in the file was obtained in violation of the court's confidentiality agreement. The trial court found that the guardian sent the file inadvertently and not in bad faith. However, the trial court imposed sanctions on the appellants, despite not making findings supporting bad faith conduct on the part of appellants' counsel or appellants themselves.

On appeal, the Third District Court of Appeal reversed the trial court decision and remanded, finding that the sanction must be based on "an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees." See *Moakley v. Smallwood*, 826 So.2d 221, 226 (Fla. 2002). The "amount of

the award of attorneys' fees must be directly related to the attorneys' fees and costs that the opposing party has incurred as a result of the specific bad faith conduct of the attorney..." Id. According to the appellate court, where the disclosure of the guardianship file was inadvertent and accidental, and the trial court did not sanction either of the attorneys involved in the disclosure, sanctions for bad faith conduct were not appropriate.

Decedent's final judgment of dissolution of marriage, followed by his death one month later, preclude his former wife's niece and nephew from benefitting under decedent's pre-existing will.

Carroll v. Israelson, 40 Fla. L. Weekly D1522b (Fla. 4th DCA 2015)

Decedent died one month after divorcing his spouse but prior to changing his will. His preexisting will left his estate to his former spouse and a trust benefitting former spouse's niece and nephew. With the divorce, the decedent's mother became his sole heir. Following the decedent's death, former spouse's brother, a successor personal representative under the will, filed a petition for administration. Mother contended that the devise to the trust for the benefit of the niece and nephew was void under § 732.507(2), Fla. Stat. which states that: "Any provision of a will executed by a married person that affects the spouse of that person shall become void upon the divorce of that person . . . unless the will or the dissolution or divorce judgment expressly provides otherwise." The dissolution judgment did not expressly provide otherwise. Over the mother's objections, the trial court judge sided with the former spouse, holding that, through the "legal fiction" that the former spouse had predeceased the decedent, the trusts for the benefit of the former spouse's niece and nephew were created upon the decedent's death.

On appeal to the Fourth District Court of Appeal ("4th DCA"), the court reversed and sided with the mother, and held that § 732.507(2), Fla. Stat. was triggered by the entry of the final judgment of dissolution of marriage. Since former spouse was alive on the date of dissolution and in complete control of the trust that her niece and nephew were set to inherit, the provision in the decedent's will creating such trusts was voided pursuant to § 732.507(2), Fla. Stat.

The former spouse contended that the second sentence in §732.507(2), Fla. Stat., which reads in part: "[a]fter the dissolution . . . the will shall be administered and construed as if the former spouse had died at the time of the dissolution . . .," properly allowed the trial court to treat her as if she died so that her niece and nephew's inheritance could proceed through the trust. Instead, the 4th DCA found that § 732.507(2), Fla. Stat. becomes operative on the date of dissolution; the post-death legal gymnastics that former spouse sought were not allowed pursuant to the statute. The word "affect" in the first sentence of § 732.507(2), Fla. Stat. was important as the court noted

Probate Case Summaries, from page 58

that a will provision does not need to have a direct pecuniary benefit to "affect" a former spouse within the meaning of the statute; any provision that has an "affect" on the former spouse becomes void upon the dissolution, including a provision that left the residue of the decedent's estate to his former spouse or nieces and nephews should the former spouse predecease.

ailing to file a "pleading" asserting entitlement to fees in trust litigation matter did not waive claim for attorney's fees by party.

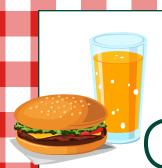
Nathanson v. Morelli, 40 Fla. L. Weekly D1579b (Fla. 4th DCA 2015) affirmed 145 So. 3d 855 (Fla. 4th DCA 2015)

Appellees brought suit against appellant regarding trust assets. Appellant moved to dismiss and requested attorneys' fees at the trial court level. Appellant never filed an answer to the appellees' complaint because the motion to dismiss was never set for court hearing. Instead, Appellant filed a motion for summary judgment which contained a request for fees. The lower court entered final judgment for the appellant which prompted the appellant to file a motion for attorneys' fees.

On the motion for attorneys' fees, the appellees argued that the appellant failed to properly "plead" fees and the lower court agreed.

On appeal to the Fourth District Court of Appeal ("4th DCA"), the court held that the lower court incorrectly concluded that appellant had not properly pled entitlement. Citing case law, the court noted the prerequisites for pleading necessary for a party to recover attorneys' fees, including: (A) the requirement that attorney's fees must be pled; (B) such a pleading must occur in a pleading contemplated by the Florida Rules of Civil Procedure; and (C) pleading specificity is not required.

The appellate court noted two main exceptions to the pleading requirement: (1) where a party has notice than an opponent claims entitlement to attorney's fees and by its conduct acquiesces or fails to object, that party waives any objection to the failure to plead a claim; and (2) for cases dismissed before the filing of an answer, a defendant's claim for attorney fees is to be made in the defendant's motion to dismiss or a separate motion within thirty days following the dismissal of the action. In ruling for the appellant, the 4th DCA noted that both exceptions applied to the appellant's circumstances: the appellees were on notice of the appellant's claim for fees and waived their objection (for example, based upon the request for fees in the motion for summary judgment); and the time period to answer the complaint had not yet matured.



Kozyak Minority Mentoring Picnic



SAVE THE DATE

The 12th Annual Minority Mentoring Picnic will be held on Saturday October 31, 2015 at Amelia Earhart Park located at 401 East 65 Street, Hialeah, FL 33031. This is the ultimate networking event for minority law students, lawyers and judges. Come and meet distinguished members of the community, members of the judiciary, bar leaders and most importantly, young attorneys and law students who need mentors. As usual, the RPPTL Section will be sponsoring the event with another tent this year.

There is always a feast every year with delicious free food and drinks, great music, a volleyball tournament, and a children's play center. The picnic is a family friendly event – bring the whole family, including your kids. As the picnic falls on Halloween this year, there will surely be tricks and treats for everyone. Although the picnic is always free, there is a small \$10 fee per car for parking. For more information on the picnic, visit www.kmmfoundation.org.

RPPTL Section members who would like to help at the Section tent can do so by contacting Hung V. Nguyen at (786) 600-2530 or via email at hung@nguyenlawfirm.net and Jesse B. Friedman at (786) 347-7925 or via email at JFriedman@Nostrojones.com. See you there!



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The FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. Forms carry the Supreme Court required $3" \times 3"$ blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2014 FLSSI forms.

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What's Happening Within the Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys who practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website, including up-to-date news and articles regarding case law and legislative changes, other publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses, and a whole host of relevant links to other real property, probate & trust law websites.

Additionally, the Section is working on human resource pages where searches can be done for out-of-state licensed Section members, law students available for clerkships or special project assistance, and other classifications. Further, each Section committee has listservs that discuss issues and current hot topics available to committee members.

SCHEDULE

2015 EXECUTIVE COUNCIL MEETINGS

NOVEMBER 11 - 15, 2015

Executive Council Meeting

Boca Raton Resort and Club • Boca Raton, Florida Room Rates¹: Cloister Estate Room: \$220.00

Cloister Suite: \$475.00

Yacht Club Waterway Room: \$275.00

Tower Room: \$220.00

Tower Junior Suite: \$260.00 Cut-off Date: October 21, 2015

Reservation Phone: 1-888-557-6375

Reservation Ref Code: Florida Bar Real Property, Probate & Trust Section

Reservation Link: https://resweb.passkey.com/Resweb. do?mode=welcome_ei_new&eventID=13452248

Resort fee: \$20

2016 EXECUTIVE COUNCIL MEETINGS

FEBRUARY 25 - 28, 2016

Executive Council Meeting

Marriott Tampa Waterside • Tampa, Florida Room Rate: \$224

Cut-off Date: January 13, 2016

Reservation Phone: 1-813-221-4900 Reservation Ref. Code: The Florida Bar Real Property

Executive Council Meeting Reservation Link:

https://resweb.passkey.com/go/FloridaBarRealProperty

JUNE 1 - 5, 2016

Executive Council Meeting I RPPTL Convention

Loews Portofino Bay Hotel • Orlando, Florida Room Rate \$219

Cut-off Date: May 2, 2016
Reservation Link: http://uo.loewshotels.com/en/
Portofino-Bay-Hotel/GroupPages/FLBar2016

2015 CLE SCHEDULE:

Check the RPPTL Section website www.rpptl.org under the CLE tab's dropdown menu for topics, dates and locations for upcoming CLE seminars. Check The Florida Bar website www.floridabar.org/CLE for detailed information as it becomes available.

For the most up-to-date information on Section activities, visit the Section website (www.rpptl.org) or The Florida Bar's website (www.floridabar.org).

¹ Boca Raton Hotel & Resort Requested Information and Further Notes: \$20.00 daily resort fee separate and distinct from the sleeping room rate and applicable taxes. Resort fee includes: Round trip Bellman Gratuities; Wireless Internet in Guest Rooms and Public Space (Not Meeting Rooms); Local 800 & Domestic Long Distance Phone Calls; Beach Umbrellas at the Boca Beach Club; Specialty Fitness Center classes including yoga and Pilates; and Unlimited Driving Range Usage and Golf Club Storage. Guests wishing to avoid an early checkout fee should advise the Hotel at or before check-in of any change in planned length of stay. Guests should check with the Hotel to make certain all incidental charges are paid prior to departure.

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