ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

The Construction Lawyer's Guide to Chapter 558, Florida Statutes – A Practical Checklist

Getting Family Help When Representing the Disabled or Diminished Client: The Ethical Questions

Florida Fair Foreclosure Act – Legislative Attempt to Expedite Foreclosure Proceedings

Vol. XXXVII, No. 3 www.rpptl.org Spring 2016

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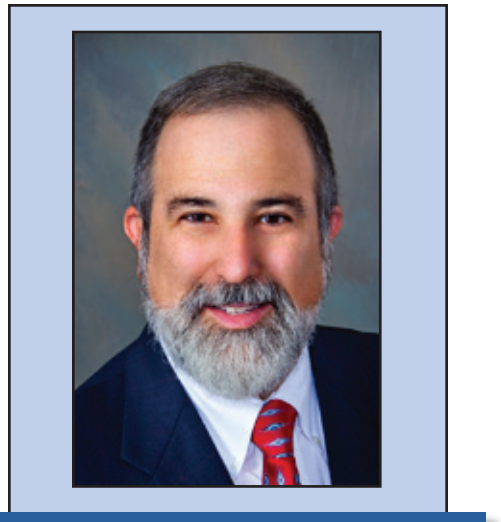

Chair's Column

By Michael Gelfand
Section Chair, 2015- 2016

Why are you a RPPTL? Why am I a RPPTL? Each of us was drawn to the RPPTL Section, and we remain a member, because the Section balances four pillars of excellence: Ethics and Competency; Professionalism; Education; and Position Advocacy.

Refined by our esteemed immediate past chair **Michael Dribin** of Miami, the RPPTL Section mission is effectively implemented by our committees. Coordinating Continuing Legal Education efforts are co-chairs **Robert "Bob" Swaine** (Real Property) and **William "Bill" Hennessey** (Probate and Trust). Legislative efforts are coordinated by co-chairs **Tae Kelley Bronner** (Probate and Trust) and **Steven H. Mezer** (Real Property). They and the committees they chair are constantly in action, especially at this time of the year.

You, yes you! Attend a committee meeting? Another boring meeting? Not if it is a RPPTL Section committee. Why? Ask committee members why they enthusiastically look forward to meetings. What they gain is much more than what they are requested to give.

If it is so great, why must I ask? Many members do not realize the great practical practice and professional pointers handed down at each meeting, and how the committees have improved by experience; thus, this broadcast, an invitation, not an inquiry. You owe it to yourself to be involved at some level in a committee, even if just attending a meeting. You will not bemoan the calendar when you see a RRPTL Section meeting scheduled.

Just like the panoply of ice cream flavors, the RPPTL Section has at least one committee that addresses your practice area, and another committee addressing issues in which you are interested.

Please ask committee members why after dipping their toe into water, they dive in. Many jumped into more than two committees! Helpful and invigorating are two of the most frequent descriptions of committee meetings, engaging through discussions, projects, and presentations. You need to observe the meetings to understand the enthusiasm they bring to the table, and how it positively infects others.

Be a star through a committee. Submit practical articles for ActionLine, and more researched pieces for the Florida Bar Journal. Just like a bit of exercise, these efforts will make your practice feel better.

The foundation for the Education and Legislative Committees is set by each Division. The Real Property Division, directed by **Andrew O'Malley**, includes committees that have been or are undertaking the following: the Condominium & Planned Development, chaired by **William "Bill" Sklar** scheduled a full-day update in April, and proposed an estoppel letter compromise and text updating the Marketable Record Title Act; and the Construction Law Committee, chaired by **Hardy Roberts**, is drafting cures for notices of commencement start/stop issues and solutions to open building permit issues.

The Construction Law Institute presents a 21 hour course in the spring, chaired by **Reese Henderson**, during which Construction Law Certification, chaired by **Deborah Mastin,** leads an exam review. Development and Land Use Planning, chaired by **Vinette Godelia**, took the lead with Professionalism and Ethics, chaired by **Larry Miller**, drafting the Section's response to the proposed Rule 4.4.2 rule change.

Real Estate Certification Review, chaired by **Jennifer Tobin**,

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.

ABOUT THE COVER:

View of the Intracoastal from the Boca Raton Resort and Club

Photo by John Neukamm

IN THIS ISSUE:

Our Mission 3

The Construction Lawyer's Guide To Chapter 558, Florida Statutes A Practical Checklist 6

Gasparilla 10

Material Alteration or Necessary Maintenance: a Condo Quandary 11

Can Johnson v. Davis Rights Be Waived? 16

Let's Be Clear – Not all Liens Survive a Tax Deed Sale 20

Getting Family Help When Representing the Disabled or Diminished Client: The Ethical Questions 23

RPPTL Section Executive Council Meeting Boca Raton Resort & Club, Boca Raton — November 11 – November 14, 2015 27

RPPTL Section Executive Council Meeting, ... 28

PHOTOS: RPPTL Section Executive Council Meeting 29

Roundtables 30

Injury is Nearly a Fact, While Rip and Tear is No Longer a Wild Card 35

Florida Fair Foreclosure Act – Legislative Attempt To Expedite Foreclosure Proceedings 39

Another Amazing RPPTL Event Inspiring the Next Generation of Lawyers 41

Florida Bar Board Certification Dates To Remember 42

Practice Corner: Witnesses and a Notary are not Necessary for the Execution of a Florida Irrevocable Trust (but why would you do this?) 43

Practice Corner: What to do When you Discover an Error in a Recorded Deed? 44

Real Estate Case Summaries 45

Probate Case Summaries 50

What's Happening Within the Section 55

Actionline Bulletin Board 56

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 5626, 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.

prepared a two day review course. Real Estate Structures and Taxation, chaired by **Cristin Keane**, drafted a bill to address the documentary stamp act relief for inter-marital transfers. Real Property Litigation, chaired by **Susan Spurgeon**, proposed legislation addressing issues concerning the termination of notices of commencement, stale mortgages, the repeal of the $100 cost bond for foreign plaintiffs, and authentication of electronic certified copies. Residential Real Estate and Industry Liaison, chaired by **Salomé Zikakis**, coordinated with others on estoppel letter legislation, produced a record-setting webinar on new regulations, and proposed retainer language for real estate closings. Title Issues and Standards chaired by **Chris Smart** addressed changes to issues regarding agency and power of attorneys, conveyances and bankruptcy.

Directed by **Debra Boje**, the Probate and Trust Division committees have been or are progressing on just as many areas. One of the many jewels in the Probate and Trust crown is the Attorney Trust/Officer Liaison Conference chaired by **Laura Sundberg** which produced its 34th (!) Conference in August, and is producing the 35th in June.

Halloween brought Estate and Trust Tax Planning, chaired by **David Akins**, with legal "Tricks, Treats and Really Scary Things." Guardianship, Power of Attorney & Advance Directives chaired by **Hung Nguyen**, webcasted a "Guardianship, Powers of Attorney and Advance Directives" seminar. Probate Law's 2015 Annual Seminar was chaired by **John Moran**.

"Adventures in Wonderland" kicked off the year by Guardianship, Power of Attorney & Advanced Directives, chaired by **Hung Nguyen** and **Darby Jones**. Probate & Trust Litigation and Trust Law, chaired by **Jon Scuderi** and **Angela Adams**, respectively, present a Symposium. Probate & Trust Litigation will be reviewing attorney's fees. Wills, Trusts and Estates Certification Review, chaired by **Jeff Goethe** provides its annual exam review. Estate & Trust Tax planning, chaired by **David Akins**, and Asset Protection chaired by **George Karibjanian**¸ present an Estate and Trust Planning update in October. Probate Law, chaired by **John Moran**, plans a 2016 update/overview.

General Standing committees, directed by chair-elect **Deborah Packer Goodall**, have also been out in the forefront, assisting Legislation and Member Communications & Information Technology, but also helping reinforce professionalism. **Larry Miller** chairing Professionalism and Ethics continuously reviews rule proposals from The Florida Bar, imparts practice pointers, furnishes ethics information for substantive seminars, and produces informative, practical skits.

Amicus co-chaired by **Robert "Bob" Goldman, John Little, Kenneth Bell** and **Gerald Cope** continually produce works of textual art, brief and succinct. Florida Bar Journal articles are shepherded by **Jeffrey Goethe** (Probate Trust) and **Doug Christie** (Real property).

William "Bill" Parady fine-tunes and updates www.RPPTL.org, protecting and spreading our brand, as well as overseeing list serves and our app (ably assisted by our tech whiz lawyer to be "intern," **Steven Goodall**). **Lynwood Arnold** and **Jason Ellison**, co-chairing Membership & Inclusion, look to the next generation, and seek to meet Section members' expectations.

The Ad Hoc Leadership Academy chaired by **Kristopher Fernandez** (Real Property) and **Brian Sparks** (Probate and Trust), and Fellows, chaired by **Ashley McCrae,** have both beaten the bushes, seeking outstanding applicants for their respective programs, to help ensure a vibrant pool of new Section leaders.

Addressing substantive issues: **Shane Kelle**y (Probate and Trust) and **Patricia Jones** (Real Property) chair Homestead Issues Study, advancing its proposed legislation; **Jeffrey Dollinger** (Real Property) and **George Karibjanian** (Probate and Trust), chair Ad Hoc Study on Same-Sex Marriage Implications, identifying issues for legislative update, and produced a seminar on this changing area of the law. Packaging all the legislative efforts, **Jim Robbins**, chairs the July Legislative Update.

Sponsor Coordination helps allow our programs to be affordable and is chaired by **Wilhelmina Kightlinger**. Make certain you thank our sponsors by ordering their products and services. This funding assists **Robert Freedman**, Section Treasurer, as he chairs Budget, helping ensure funding for our operations.

Laura Sundberg has and continues to chair Convention Coordination, organizing a magnificent Orlando windup for the year. Past Section chair **George Meyer** helps ensure that we get what we pay for at venues, chairing Meeting Planning.

Last, but certainly not least, there is ActionLine, extraordinarily chaired by **Silvia Rojas**, producing this publication, an outstanding product. If there were awards for voluntary bar section publications, then ActionLine would win hands down!

There is not enough space to list the vice-chairs and committee members participating in these efforts, each ensuring the success of each program, gaining more than they give. Each committee also considers proposed legislation from other sources, a tidal wave of items much too great to catalogue here.

Every Section member not only has an opportunity to participate, but should be involved in committee efforts. If you are not involved, then join our committees. Committee listings and information are located at www.RPPTL.org. Check out our website for continually updated information, including recent court decisions, new laws, and meeting information.

Have a great day!

Endnotes

1 RPPTL Section By-Laws, Art 1, §2(c).

The Construction Lawyer's Guide To Chapter 558, Florida Statutes *A Practical Checklist*

By Steven B. Lesser, Esq. and Michele C. Ammendola, Esq.
Becker & Poliakoff, P.A., Fort Lauderdale, Florida

This checklist will assist counsel when evaluating compliance with Florida's Construction Defects Statute, Chapter 558, Florida Statutes ("FCDS"). These issues arise frequently and must always be considered when claims for defective design/construction are pursued and defended. First conceived in 2003, the FCDS has undergone several revisions and constantly poses new legal challenges for property owners, contractors, design professionals and developers seeking to comply with this pre-suit process. *Practice Tips* have been included for consideration.

---

1. When does the FCDS apply?

(a) The FCDS does not apply unless substantial completion of the building or improvement has been achieved.[1]

(b) It applies to all residential and commercial projects such as those described below, but excludes public transportation projects.[2]

- Residential Construction;
- Single Family Homes;
- Condominium units and defects in common areas and improvements that are owned or maintained by an association;
- Mobile Homes, Manufactured or Modular Homes, Duplexes;
- Remodelling & Fixtures;
- Commercial or non-residential properties.

(c) The FCDS is not applicable to emergency repairs performed to protect the health, safety and welfare of the claimant or others.[3]

Practice Tip: Retain an engineer or design consultant to confirm that the repairs are of an emergency nature. Document by digital photographs and/or video to confirm the conditions. This documentation can be used to demonstrate that the repairs were necessary and satisfy the health, safety, welfare exception.

(d) The FCDS applies to any claim for construction defects arising from improvements made after October 1, 2009, unless the parties have agreed in writing to opt out of these requirements.[4]

Practice Tip: A sample opt-out provision to be included in a contract is provided below. Since other FCDS notices require conspicuous font, the opt out provision should also be conspicuous:

THE OWNER AND CONTRACTOR AGREE TO WAIVE ALL REQUIREMENTS ASSOCIATED WITH CHAPTER 558, FLORIDA STATUTES, ARISING FROM WORK PERFORMED RELATIVE TO THIS CONTRACT.

2. How Are "Construction Defects" Defined?

Construction defects include deficiencies in design, materials, construction, observation of construction, surveying, planning, repair alteration, supervision, remodeling, and building code violations giving rise to a cause of action under Sec. 553.84, F.S.[5]

3. Who Receives the Notice of Claim?

(a) Potential recipients of the notice of claim are "contractors," which include those "legally engaged" in the business of designing, developing, constructing, manufacturing, repairing or remodeling dwellings and any attachments thereto.

(b) The statutory definition of "contractors" includes developers, subcontractors, suppliers and design professionals, such as architects, interior designers, landscape architects, engineers, or surveyors.[6]

(c) It should be noted that a contractor, subcontractor, supplier or design professional, or a surety is not a claimant under the statute[7] or by case law, so the FCDS does not apply to them as claimants.[8]

4. Notice of Claim Requirements

(a) The notice of claim must specifically reference Chapter 558, Florida Statutes.[9]

(b) The defects must be described with "reasonable detail."[10]

(c) Multiple defects may be included in one notice of claim.

(d) The claimant may only pursue those construction defects included in the notice of claim as well as any construction defects reasonably related to or caused by the construction defects previously noticed.[11]

(e) Amend the notice of claim to identify additional or new construction defects as they become known to the claimant.

Practice Tip: At inception of the process, thoroughly investigate the property to include all alleged defects in the notice of claim. These efforts will avoid the necessity to issue supplemental notices which will "restart the clock" on the statutory time frames because of the newly alleged defects. Supplemental notices of claim can delay the overall resolution of all defect issues.

5. Service of the Notice of Claim

(a) The FCDS requires that the claimant "serve written notice of the claim on the contractor."[12]

(b) Serve a notice of claim upon those parties responsible for the defects.

(c) The claimant accomplishes proper "service" by any one of the following:[13]

(i) Delivery by certified mail with a United States Postal Service record of evidence of delivery;

(ii) Attempted delivery to the last known address of the addressee; or,

(iii) Hand delivery or delivery by any courier with written evidence of delivery.

6. Tolling of the Statute of Limitations

A claimant's service of the written notice of claim tolls the applicable statute of limitations relating to the contractor and any bond surety.[14]

Practice Tip: This is one of the key benefits of the FCDS. If you are running up against the expiration of the statute of limitation, serving a notice of claim is an easier option to toll the statute of limitation as opposed to acquiring a tolling agreement or initiating a lawsuit or arbitration proceeding.

7. Inspection of the Premises and Destructive Testing

(a) If the notice of claim involves an association representing 20 parcels or fewer, FCDS provides for 30 days to inspect for construction defects.[15]

(b) If the notice of claim involves an association representing more than 20 parcels, the FCDS provides for 50 days to inspect.[16]

(c) This also includes "reasonable inspection" of the dwelling of each unit subject to the claim for defects.

Practice Tip: There is no duty for the claimant to arrange for a "guided tour" by an engineer or consultant but it is recommended to avoid a later challenge from the recipient of the notice of claim that the alleged defect could not be located and available for inspection. A claimant's failure to provide access to inspect may bar the right to later pursue the claim in litigation or arbitration.

(d) A claimant is not required to perform destructive or other testing before providing a notice of claim; a visual inspection is sufficient. However, destructive testing of the premises is also allowed via written request and mutual agreement.[17]

(e) The written request for destructive testing must describe the proposed testing. The request should also identify:[18]

(i) Who will perform the test;

(ii) A list of testing locations and testing methods;

(iii) The anticipated damage to the test site and surrounding areas;

(iv) The anticipated time needed to perform testing;

(v) Who will be responsible for repairing tested areas; and

(iv) Who will assume financial responsibility to cover the cost of testing and repairs.

Practice Tip: Consider entering into a written destructive testing and repair protocol agreement prior to allowing the destructive testing to take place. This agreement should set forth the above parameters for testing as well as memorialize the rights and duties of all participating parties to the testing.

8. Obtain Construction Documents and Maintenance Records

(a) The FCDS permits the claimant and recipient to obtain certain records. The permissible records are described below. To obtain the records, the written request must include a specific reference to Sec. 558.004(15), F.S., otherwise the request for records is unenforceable.

(b) Upon written request, claimants must produce maintenance records and other documents related to the discovery, investigation, causation and extent of alleged defects identified in the notice of claim.[19] These documents can be valuable to enable recipients of a notice of claim to formulate potential defenses such as claimants' lack of maintenance, failure to mitigate damages, abuse, misuse, environmental causes, casualty losses, normal wear and tear, or acts of third parties.

Practice Tip: Maintenance records become relevant in condominium defect claims where Chapter 718, Florida Statutes, provides that a failure to perform routine maintenance is a defense to a claim for breach of the statutory implied warranties.[20]

(c) Broad categories of documents must be produced by both claimants and recipients such as: "All documents

related to the discovery, investigation, causation, and extent of the alleged defect."[21] This can include expert reports. In addition, the recipient can be required to produce all its maintenance records.

Practice Tip: As discussed above, in a condominium defect dispute, the fact that the developer failed to perform routine maintenance can be instrumental in holding a developer responsible for a defect arising from its own failure to maintain. This approach could also counter any claim by the developer that the claimant failed to perform routine maintenance.

(d) Ramifications of non-production: A failure to comply with pre-suit discovery can leave contractors exposed to court sanctions, after a construction defect lawsuit is filed.[22]

9. Limitations on Document Production and Options

(a) The FCDS does not require production of design plans and specifications.

Practice Tip: Claimants should obtain these documents from governmental agencies, including local building and zoning departments, to ascertain deviations from properly permitted plans and specifications as a basis to maintain the existence of an alleged defect. This avenue of production becomes significant since recently the FCDS was revised to eliminate any requirement to produce design plans and specifications.

(b) On public projects, obtain design plans, specifications and other documents by using Florida's public records laws or "Sunshine Laws."[23]

Practice Tip: Use the public records laws to acquire these documents. Because governmental agencies have no financial stake in the construction process or the litigation, actual records may be produced which otherwise may have been claimed as privileged or destroyed by those actually involved in the design and construction of the project.

10. Written Responses Under Chapter 558, Florida Statutes

(a) Contractors must issue a written response to the notice of claim within 45 days for an association presenting 20 parcels or fewer, and 75 days for a claim involving an association representing more than 20 parcels.[24]

(b) The written response to a notice of claim must accept or dispute each and every defect reported.[25]

(c) The response may be accompanied by an offer to repair all or portions of the alleged defects. The repair offer should contain a detailed description of repairs to be made, locations where repairs will be performed, and a timetable to complete repairs.

(d) The response may also include an offer to pay money for some or all of the defects.

(e) The contractor may dispute the claims in whole or in part.

(f) The contractor may respond by any combination of the foregoing options.

(g) Partial settlements are permitted.

(h) The claimant has 45 days to accept or reject a timely settlement offer before it may initiate an action for construction defects.[26] The FCDS is silent as to what happens if the claimant takes longer than 45 days to accept or reject the settlement offer. Nevertheless, the contractor can move to stay the claimant's lawsuit until it tenders its formal acceptance or rejection of the offer.[27]

Practice Tip: Even if a partial settlement is proposed, nothing prevents the parties from agreeing to participate in a mediation to arrive at a global settlement of the entire matter.

11. The Role of Consultants in Pre-Suit Construction Defect Claims

Practice Tip: Although not required by statute, Florida licensed consultants (e.g., engineers, architects, design professionals or licensed contractors) should be involved as early as possible in the FCDS process. Note that in condominium turnover matters, a properly licensed consultant must have prepared the report when seeking relief from a developer.[28]

Practice Tip: The following issues should be thoroughly explored with the consultant both at the outset of the construction defect claim, and throughout the FCDS process:

(a) Has the consultant reviewed the documents on file with the building department to make sure they conform with the plans furnished to the property owner?

(b) Has the consultant evaluated all components of construction in light of any applicable requirements in contract documents and state statutes, building codes, and any applicable implied or express warranties?

(c) Does the consultant's report include a repair methodology for each defective condition, and a cost estimate for completing the repairs? This information will enable the owner to evaluate the cost-effectiveness of pursuing resolution through settlement or litigation. It will also enable developers and contractors to understand their potential exposure in litigation.

12. Be Specific When Reporting Defects

The FCDS was recently amended to require that claimants provide more specific information as to the locations of the defects throughout a building.[29] As a result, the consultant's report should identify the locations of each and every example of each defect as thoroughly as possible.

Practice Tip: In light of these more stringent reporting requirements, consider the following:

(a) The consultant's retainer agreement should require the report to comply with the requirements of the FCDS so that the report can ultimately be attached to the notice of claim and withstand judicial scrutiny.

(b) Require that the written report be accompanied by

digital photographs or videos of the alleged defective conditions with a log showing the location of the condition. Doing so will assist both the claimant and the recipient of the notice of claim in understanding the extent and nature of each defect.

(c) For each defect discovered, the engineer's report should specify whether the defective conditions are the result of building code violations, deviations from the project plans and specifications, design errors, or failures to comply with industry standards and good workmanship practices.

(d) The report should describe the widespread nature of the defects. For example, if the engineer is investigating claims of stucco defects, the report should describe the elevations and floors from which any stucco samples were taken, as well as the locations of all stucco cracks seen during the investigation.

(e) If any testing or sampling was performed, the consultant should explain the sampling in terms of the size and magnitude of the building from which the samples have been taken.

(f) Has the consultant identified any defective materials? Has the consultant located and reviewed applicable manufacturer specifications and identified the supplier of the materials?

Practice Tip: In light of recent decisions in a condominium setting, the liability of a "supplier" under Sec. 718.203(2), F.S., may be limited. [30]

(g) Does the consultant's report specify which version of the building code applies and which sections of the code were violated?

(h) Does the consultant's report list deviations from plans or specifications?

(i) Does the consultant's report specify which plans and specifications were reviewed?

(j) Does the consultant's report identify which portions of the plan or specifications sections do not conform to the actual construction?

(k) Has the engineer had the opportunity to review the final signed and sealed "as-built" set of plans during its investigation?

Practice Tip: Often, consultants are furnished with a "permitted" set of plans and drawings that do not accurately reflect the changes noted on the subsequent "as-built" set of plans and drawings. When in doubt, the prudent course of action would be to obtain the "as-built" set of project drawings through the FCDS pre-suit discovery, and have the consultant review them as early as possible.

13. Insurance in Pre-Suit Construction Defect Claims

The FCDS now provides that a notice of claim does not constitute a claim for insurance purposes "unless the terms of the policy specify otherwise."[31] The following are some practical considerations when representing claimants or recipients of a notice of claim:

In *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company*,[32] the court determined that an insurer's duty to defend is triggered by a formal "suit" defined as litigation, arbitration or other formal dispute resolution proceeding. The court decided that under the specific language of the standard commercial general liability insurance policy form CG 00 01 at issue, while the FCDS provides a notice and right to cure mechanism for resolving a dispute, it is not the same thing as a formal proceeding which would trigger the insurer's duty to defend.

Many commercial general liability insurance carriers still use the standard form CG 00 01 insurance policy language discussed in *Altman Contractors, Inc.*, to deny coverage to developers, contractors and others.

Practice Tip: In the wake of *Altman Contractors, Inc.*, when securing new or additional insurance coverage for new Florida construction projects, counsel for contractors and developers should consider negotiating better policy terms that would trigger insurance coverage once a notice of claim is served, as opposed to waiting until a lawsuit or arbitration proceeding is filed.

Practice Tip: From the claimant's standpoint, it is imperative to obtain the contractor's and developer's insurance information as soon as possible, to determine whether their policies exclude insurance coverage and/or a defense for pre-suit construction defect claims. This information may be obtained by serving an insurance demand letter upon the contractor and developer, in accordance with Sec. 627.4137, F.S.

14. Use the FCDS to Lead to Settlement Negotiations and Mediation

Practice Tip: Compliance with the FCDS may provide parties with enough information and motivation to participate in a mediation to resolve all disputes.[33]

All parties should take advantage of the Chapter 558, Florida Statutes, provisions for pre-suit discovery to further narrow the issues for settlement purposes and to gain information to assist in defending the claim.

The FCDS can be challenging for counsel representing claimants and recipients of a notice of claim. It is critical to understand the statutory requirements to perfect a claim, as well as what constitutes proper service; how the statute can be used to toll the applicable statute of limitations; and how the failure to investigate a claim may limit those defects that could be pursued in litigation. Be mindful that ignoring a legitimate discovery request may expose your client to sanctions for non-production.

Most importantly, strategically use the FCDS to resolve claims through mediation, and take advantage of the opportunity to assess your client's potential exposure through this process.

S. LESSER

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Endnotes

1 F.S. §558.003.
2 F.S. §558.002(8).
3 F.S. §558.004(9).
4 F.S. §558.005(1).
5 F.S. § 558.002(5).
6 F.S. §558.002(6).
7 F.S. §558.002(3).
8 *Specialty Engineering Consultants, Inc. v. Hovstone Properties Florida LLC*, 968 So. 2d 680 (Fla. 4th DCA 2007).
9 F.S. §558.004(1)(a).
10 F.S. §558.004(1)(b).
11 F.S. §558.004(11).
12 F.S. §558.004(1)(a).
13 F.S. §558.002(9).
14 F.S. §558.004(10).
15 F.S. §558.004(2).
16 *Id.*
17 *Id.*
18 F.S. §558.004(2)(b)
19 F.S. §558.004(15).
20 F.S. §718.203(4).
21 F.S. 558.004(15)
22 *Id.*
23 E.g., F.S. §§ 119.01-.15 (Florida's Public Records Act).
24 F.S. §558.004(5).
25 *Id.*
26 F.S. §558.004(7).
27 F.S. §558.003.
28 F.S. §718.301(7)(In any claim against a developer by an association alleging a defect in design, structural elements, construction, or any mechanical, electrical, fire protection, plumbing, or other element that requires a licensed professional for design or installation under Chapter 455, Chapter 471, Chapter 481, Chapter 489, or Chapter 633, of the Florida Statutes, such defect must be examined and certified by an appropriately licensed Florida engineer, design professional, contractor, or otherwise licensed Florida individual or entity).
29 F.S. §558.004(1)(b).
30 *See e.g.*, *Port Marina Condominium Ass'n, Inc. v. Roof Services, Inc.*, 119 So.3d 1288 (Fla. 4th DCA 2013); *Harbor Landing Condominium Owners Ass'n, Inc. v. Harbor Landing, L.L.C.*, 78 So. 3d 120 (Fla. 1st DCA 2012).
31 F.S. §558.004(13).
32 -- F. Supp. 3d, -- 2015 WL 3539755 (S.D. Fla. June 4, 2015).
33 F.S. §558.005(4).

Gasparilla

RPPTLs Drew O'Malley, Deb Boje, Darby Jones and John Neukamm enjoying the 112th Gasparilla Parade Saturday, January 30, in Tampa.

Material Alteration or Necessary Maintenance: a Condo Quandary

By Daniel J. Lobeck, Esq., Law Offices of Lobeck & Hanson, P.A., Sarasota, Florida

Florida law requires approval under the condominium documents for a material alteration of the common elements or, if the documents are silent, approval by 75% of the unit owners. But case law makes an exception for necessary maintenance or protection. Determining when that exception applies can be a challenging task.

D. LOBECK

One of the most frequent questions asked of condominium association attorneys (after, "Who is responsible for that drywall?") is whether a particular project is a material alteration of the common elements requiring approval under the condominium documents or state law.

Section 718.113(2), Florida Statutes, provides, in part:

> [T]here shall be no material alteration or substantial additions to the common elements or to real property which is association property, except in a manner provided in the declaration as originally recorded or as amended under the procedures provided therein. If the declaration as originally recorded or as amended under the procedures provided therein does not specify the procedure for approval of material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions.

Subsequent subsections of the statute provide special treatment for American and armed forces flags, hurricane shutters and other hurricane protection, mezuzahs and other small religious objects around doors and for solar collectors, clotheslines and other energy saving devices.

The seminal case on material alterations to the common elements is *Sterling Village Condo., Inc., v. Breitenbach.*[1] The court construed an earlier version of the statute,[2] in finding that a unit owner's replacement of a screen enclosure with jalousies was a material alteration, as follows:

> We hold that as applied to buildings the term 'material alteration or addition' means to palpably or perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance.

That rule was later applied, for example, to find that an association's painting of the condominium buildings to change their appearance from clusters of varied colors to all light brown constituted a material alteration of the common elements.[3]

Florida appellate courts have found a maintenance exception to *Sterling Village*, which is the focus of this article.

In *Tiffany Plaza Condominium Association, Inc. v. Spencer*,[4] the court held that the construction of a rock revetment on the beachfront common elements to prevent erosion, although an alteration, was not subject to constraints on alterations in the condominium documents and state statutes if reasonably necessary or beneficial for maintenance purposes. Specifically, an alteration or improvement is not subject to those constraints "when it is reasonably necessary for the maintenance, repair or replacement of a common element." The court also found, "[i]f, in the good business judgment of the association, such alteration or improvement is necessary or beneficial in the maintenance, repair or replacement of the common elements" approval is not required as a material alteration. Among the statutory authority for those conclusions, the court cited Section 718.113(1), Florida Statutes, which provides (then and now) that "[m]aintenance of the common elements is the responsibility of the association." In *Tiffany Plaza,* the association had a right to repair the common element beach if it eroded, the court reasoned, so it had the same right to install a rock revetment if it would prevent that erosion, unencumbered by any requirement for unit owner approval. Significantly, the court remanded to the trial court the determination of whether "the construction of the rock revetment by the association was, in fact, necessary or that it would protect the beachfront from erosion or damage."

The reference to "business judgment" is important in applying *Tiffany Plaza* to other facts, as the courts give deference to the business judgment of a condominium association board of directors in the maintenance of the common elements, except where the decision is arbitrary, capricious or in bad faith.[5]

The court in *Ralph v. Envoy Point*[6] observed that *Tiffany Plaza* did not reach the factual determination of whether the rock revetment in that case was reasonably necessary. However, the *Ralph* court found sufficient evidence in its record to hold that a vertical seawall extension "was necessary to protect the condominium common elements" and as such did not require approval as a material alteration. It is of interest that, in *Ralph*, the Second DCA seems to cast the issue as one of whether the maintenance is reasonably "necessary" whereas, in *Tiffany Plaza*, the same court may have offered an alternative test, and perhaps a more liberal one, of whether it is "beneficial" for maintenance.

In *Cottrell v. Thornton*,[7] the court made it clear that common element repairs do not become subject to approval as material alterations just because they are very expensive. That case involved resurfacing potholed roads, fixing a pool that rose up and cracked because it was built on mucky soil, and repairing canals by draining, scraping and demucking them, and lining them with seabags to make their seawalls secure.

Also, replacing a building material with one which costs much less will not invoke the maintenance exception if it is a material alteration. The court in *George v. Beach Club Villas Condominium Association, Inc.*[8] found that the replacement of deteriorated cedar shingles as a roof material with barrel tiles costing half as much "constituted a substantial and material alteration in appearance" and did not fall within the maintenance exception. The court deferred to "[t]he trial court's conclusion to that effect" because it "was supported by competent, substantial evidence." The court even went so far as to hold, citing *Cottrell*, that "whether the proposed changes were substantial additions or alterations, or necessary repairs, was a question of fact for the trial court."

The wide discretion given to the trial court in determining whether a material alteration deserves the maintenance exception was illustrated (although not given the value of precedent) in the trial court decision of *Wanda Dipaola Stephen Rinko General Partnership v. Beach Terrace Association*.[9] In that case, a unit owner challenged twelve features of a common element construction project by the association because it did not receive the unit owner approval required for material alterations by the declaration of condominium. The parties first arbitrated the dispute with the (then) Division of Florida Land Sales, Condominiums and Mobile Homes as required by Section 718.1255, Florida Statutes. The arbitrator ruled that only "those components of the lobby renovation plan that reflected life/safety code changes did not require approval of the owners" under the maintenance exception.[10] There was also a dispute over whether the declaration required 100% unit owner approval for material alterations or, as the association contended, 75%. The arbitrator ruled for the association on that point and held that all of the alterations had ultimately been approved by a 75% vote. The unit owner filed for a trial de novo in Circuit Court as allowed by the statute.

The trial court appeared to avoid the issue of whether the declaration required a 100% or 75% unit owner vote for material alterations by ruling that all twelve of the changes at issue qualified for the maintenance exception. Its findings in that regard were very expansive and questionable, beyond applicable case law. Worn-out carpet in the multi-purpose room and lounge was allowed to be replaced with tile because another "portion of the lobby" was tiled "and this benefited the future maintenance" and provided more "uniform aesthetics." The replacement of twelve inch tile with eighteen inch tile in the lobby also "benefited future maintenance." The replacement of mailboxes with ones that were larger and a different color was allowed because "they still function as mailboxes." Wood tiles could replace foam ceiling tiles because they "were consistent with the aesthetics of the building and will last longer and be more economical in the long run than their foam counterparts." An "expansion of the manager's office benefitted the manager's ability to run, manage and maintain the Association's common elements." In finding in favor of several modernizations in the renovation project, such as a significant change in lighting fixtures, the court held that it would be "a disservice to the unit owners had the Association attempted to repair the Condominium exactly as it was first constructed in the 1970's."

The unit owner appealed the Final Judgment and the Second DCA, after oral arguments in which deference to the factual determination of the trial court as to whether alterations were for maintenance was a central theme,[11] per curiam affirmed.[12]

Not all extreme stretches of the maintenance exception succeed. In a bankruptcy court case, *In re Bayshore Yacht & Tennis Club Condominium Association, Inc.*,[13] an owner of penthouse units actually argued that the extension of an elevator up one floor to his units somehow was within the maintenance duty of the association and as such was not a material alteration requiring unit owner approval under the declaration, but failed.

As mentioned, a dispute between a unit owner and a condominium association over whether a material alteration of the common elements qualifies for a maintenance exception is first subject to mandatory arbitration before an arbitrator of what is now the Division of Condominiums, Timeshares and Mobile Homes, under Section 718.1255, Florida Statutes. Although arbitration orders are not final agency action or precedent, even in Division Arbitration, arbitrators do in practice seek consistency and cite prior arbitration orders in support of their rulings. As such, arbitration orders do have value in making a case in arbitration and in giving legal precedent.

In one arbitration case, unit owner approval was not required to install a water intrusion detection system after leaks in the condominium plumbing caused approximately $2 million in damages, because that was needed or beneficial for maintenance and protection.[14]

Although an arbitrator has held that discontinuing a facility by ceasing to maintain it to the point that it is inoperable is an alteration subject to approval, rather than an exercise of maintenance judgment,[15] one case holds that an association may cease operating a pool heater within its maintenance judgment discretion without seeking approval as a material alteration.[16] Installing a pool heater, however, has been found to be a material alteration and not maintenance, as it is a permanent physical change.[17]

Arbitrators have upheld as maintenance various alterations needed to comply with applicable building codes, such as a fence around a dumpster,[18] the installation of an engineered life safety system including a generator and fire pump and a structure to house them,[19] and the upgrade of a fire alarm system.[20]

When undertaking various renovations, such as to a clubhouse, and in the process coming into compliance with codes, it has been held that the association is required to minimize the changes otherwise and instruct its engineer to produce a design that is as close as possible to the original design.[21] However, in a somewhat contradictory ruling, it was found that in replacing deteriorated windows, the maintenance exception allows substantial upgrades without approval as alterations because an association "should take advantage of changes in technology ... and improved designs...." In that same case, nevertheless, the arbitrator found numerous common element alterations to require approval, including a change of tennis courts from asphalt to clay (due to a difference in appearance and playing experience) and remodeling the clubhouse to add windows and a kitchen passthrough and to replace a woodburning fireplace with a gas fireplace.[22]

Division Arbitrators have extended the maintenance exception to include security of residents "if there existed a convincing factual predicate that the Board's action was necessary to protect the common elements or inhabitants from a known danger."[23] This has included a fence along a busy bay to prevent vulnerability to unauthorized intrusion, after incidents of potentially serious attacks on persons, trespass on the property and in the pool, to theft of property, and unauthorized fishing.[24] In another case, a chain link fence was allowed between the condominium and an office parking lot after testimony of ongoing problem with vandalism, loitering, and destruction of property with the threat coming from the direction of the office building.[25] However, in another instance an arbitrator declined to allow an association, without a unit owner vote, to replace a cable and post a barrier with chain link fence along a canal because it would change the appearance, if not the function, of the installation and no factual showing was made that the alteration or improvement was necessary to preserve the health and safety of the residents, such as residents falling into the canal.[26]

An arbitrator has declined to extend the security exception to an association's installation of security cameras at a pool area, despite incidents over time of over $2,000 in damages to locks and latches and from theft of two umbrellas, as well as disorderly conduct (all deemed "de minimus harm"), finding also that the cameras would only offer a "speculative deterrent effect" by only recording damage rather than preventing it.[27] In another case, the association argued that its security cameras were necessary because unit owners were using contractors who were not registered with the association, as needed to identify suspects in the event of damage, theft or other incident, but the arbitrator rejected that as insufficient to avoid approval as a material alteration.[28] In an earlier case, an arbitrator held that security cameras installed on buildings by the association were material alterations requiring approval, without discussion of the facts or law.[29]

The painting of the bottom 36 inches of support columns and gutter downspouts bright yellow was held not to qualify for the maintenance exception in the absence of evidence that the painting was necessary to protect and preserve the common elements or enhance the safety of unit owners.[30]

Arbitrators have extended the maintenance exception granting wide latitude to associations to make changes in landscaping without seeking approval as a material alteration, with only a "radical" removal or other change of landscaping falling outside of the maintenance exception.[31] As examples of such exceptions, the removal of lush landscaping at the entrance to the condominium was found to require approval as a material alteration,[32] as well as the removal of two prominent Norfolk Island pine trees due to the setting and the type of trees.[33] Also, in respect of the association's landscaping maintenance discretion, the extension of a sprinkler system into a new area and the addition of flowers and shrubs in that area was deemed to be within the maintenance exception.[34]

The biggest opening which the arbitration orders seem to

provide to associations, together with technology upgrades as mentioned above, is the argument that an increase in durability invokes the maintenance exception, at least where it can be shown that the existing material has created maintenance demands.

On that basis, two arbitration cases have allowed the replacement of Chattahoochee (pebbles in epoxy) decking with paver bricks as maintenance due to their much longer service life.[35] Another allowed that same decking to be replaced with an unspecified superior material as well the replacement of flooring [again, not specified] in the elevator with tile "to increase the durability of the flooring," the replacement of hallway wallpaper that had been susceptible to mold with paint (although the change in color was not allowed without a vote) and the replacement of stained and water-damaged carpet in the community room "with tile, which was a superior flooring style given that the community room and an adjoining hallway were the access points for the community pool."[36]

Acoustical ceiling tiles were allowed to be replaced with drywall as a more durable, cost-effective material, and ceramic floor tiles which could not be cleaned could be replaced with marble. The arbitrator contended that the association should not be required to replace a material that has performed poorly with the identical material.[37] The replacement of deteriorated wood siding with stucco was also held to be maintenance, at least in south Florida where wood siding attracts insects and is vulnerable to frequent tropical rains, and the association was allowed to replace black window frames with white ones because they better dissipate heat, for energy efficiency and protection of the building components.[38]

Although there does not appear to be an arbitration case which finds that replacing a leaking asphalt shingle roof with barrel tiles falls within the maintenance exception, that could be argued under these arbitration cases, even though that may be inconsistent with the Florida appellate case law, including *George v. Beach Club Villas Condominium Association, Inc., supra,* which denied the exception to a roof replacement of cedar shingles with barrel tiles. The arbitration cases also could be cited to deem the recently popular replacement of asphalt paving with paver bricks to be maintenance, although there does not yet appear to be an arbitration case directly on those facts.

Anyone now going to Division Arbitration to seek the maintenance exception, however, may have to deal with a recent Declaratory Statement of the Division which holds certain changes to be material alterations requiring approval, even where the facts would support the maintenance exception under the arbitration cases which precede it.[39] The Declaratory Statement accepts as facts, as presented by the Petitioner association, that the building's proximity to the ocean led to significant moisture and salt water exposure in the entire building, moisture created a problem under the carpeting and with wallpaper delamination and staining, using the same materials as replacements would perpetuate the maintenance problem, and using the same materials in needed replacements would be an extraordinary expense because they could not be located and would need to be custom manufactured. Notwithstanding all of that, the Division concluded that under *Sterling Village, Islandia*, and *George,* all *supra,* the association could not replace the carpeting with terracotta-colored marble or the wallpaper with textured paint of similar color and pattern of the wallpaper without the vote of 75% unit owner approval required by the statute and Declaration. Remarkably, the Declaratory Statement does not even mention the maintenance exception or the case law which establishes it, such as *Tiffany Plaza, Ralph*, and *Cottrell*, all *supra,* nor any of the arbitration orders which apply it.

In light of the uncertainty surrounding the maintenance exception, an association faced with substantial doubt as to whether a project qualifies for such exception may want to seek the approval required by the Declaration or statute to avoid or minimize any legal dispute. Or at least, if an association is challenged by a petition for arbitration, the association might then seek to stay the petition while the association seeks the requisite unit owner approval, as arbitrators have allowed associations to do.[40]

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Endnotes

1 252 So. 2d 685 (Fla. 4th DCA 1971).

2 The 1971 statute, as today, referred to "material alteration or substantial addition." The court inadvertently omitted the word "substantial" in its definition of the phrase.

3 *Islandia Condominium Association, Inc. v. Vermut*, 501 So. 2d 741 (Fla. 4th DCA 1987).

4 416 So. 2d 823 (Fla. 2d DCA 1982).

5 *Hollywood Towers Condominium Association, Inc. v. Hampton*, 40 So. 3d 784 (Fla. 4th DCA 2010); s*ee also Farrington v. Casa Solana Condominium Association, Inc.*, 517 So. 2d 70 (Fla. 3d DCA 1987).

6 455 So. 2d 454 (Fla. 2d DCA 1984).

7 449 So. 2d 1291 (Fla. 2d DCA 1984).

8 833 So. 2d 816 (Fla. 3d DCA 2002).

9 Sarasota County Circuit Court Case No.2004-CA-11283-NC (October 26, 2007).

10 *Wanda Dipaola Stephen Rinko General Partnership v. Beach Terrace Association, Inc.*, Arb. Case No. 2003-09-6775, Summary Final Order (October 21, 2004).

11 Interview with plaintiff's attorney, Mark Hanson, February 5, 2016.

12 *Wanda Dipaola Stephen Rinko General Partnership v. Beach Terrace Association, Inc.*, 3 So. 3d 1260 (Fla. 2d DCA 2009).

13 336 B.R. 866, (Bankr. S.D. Fla. 2006).

14 *Ortega v. Mirador 1200 Condominium Association, Inc.*, Arb. Case No. 2012-02-5636, Final Order (February 5, 2013).

15 *See Raska v. The Fountains Assn., Inc.*, Arb. Case No. 93-0364, Summary Final Order (December 23, 1994); *Simkin v. Nine Island Avenue Condominium Association, Inc.,* Arb. Case No. 2013-04-0108, Final Order (May 1, 2014); *see also In Re: Tropic Winds Owners Association, Inc.*, Division Declaratory Statement 2015-032.

16 *Dominske v. Watercrest Owners Association*, Arb. Case No. 2011-00-7995, Final Order of Dismissal (March 8, 2011).

17 *Celentano v. Reflections-OnThe-River Association, Inc.*, Arb. Case No. 94-0162, Summary Final Order (December 16, 1994).

18 *O'Neill v. Coral Isle East Condo. Association., Inc.*, Arb. Case No. 93-0332, Final Order (June 24, 1994).

19 *Schwartz v. Brickell Townhouse Association, Inc.*, Arb. Case No. 95-0222, Final Order (December 2, 1996).

20 *Carr v. River Reach, Inc.*, Arb. Case No. 2003-06-1654, Final Order (May 21, 2003).

21 *Simkin v. Nine Island Avenue Condominium Association, Inc.,* Arb. Case No. 2013-04-0108, Final Order (May 1, 2014); *see also Wheatley v. Regency Towers Condominium Association, Inc.*, Arb. Case No. 2009-05-8441, Final Order (March 1, 2010).

22 *A.N. Inc. v. Seaplace Assn., Inc.*, Arb. Case No. 98-4251, Summary Final Order (November 19, 1998).

23 *Southridge Homeowners Association, Inc. v. Barbieri*, Arb. Case No. 94-0382, Summary Final Order (December 27, 1994). This standard is consistent with case law holding that a condominium association may be liable for damages from criminal conduct only if it is foreseeable, such as from prior criminal acts on the premises. *Admiral's Port Condominium Association, Inc. v. Feldman*, 426 So. 2d 1054 (Fla. 3d DCA 1983); *Vazquez v. Lago Grande Homeowner Association*, 900 So. 2d 587 (Fla. 3d DCA 2004); *Czerwinski v. Sunrise Point Condominium*, 540 So. 2d 199 (Fla. 3d DCA 1989).

24 *Williams v. Sky Harbour Condo. Apartments, Inc.*, Arb. Case No. 93-0334, Final Order (June 24, 1994).

25 *Farnham v. Vista Harbor Association, Inc.*, Arb. Case. No. 97-0214, Final Order (January 27, 1998).

26 *Haines v. The Longwood Condo. Assn., Inc.*, Arb. Case No. 92-0286, Final Order (April 29, 1994).

27 *Dellagrotta v. West Coast Vista Condominium Association, Inc.*, Arb. Case No. 2013-02-7351, Summary Final Order (October 4, 2013). Although the Arbitrator cites two prior arbitration cases as precedent, it would appear that they are of limited or no value, as one involves an association allowing the city to install a camera on the common elements to monitor construction activity on an adjoining lot, and in the other the parties consented to the relief of seeking unit owner approval of the cameras and as such there is no discussion in the Order of the facts or law.

28 *Warner Trust v. Azure at Bonita Bay Condominium Association, Inc.*, Arb. Case No. 2014-04-3034, Final Order (March 9, 2015).

29 *Terry v. Intracoastal Point Condominium Association, Inc.*, Arb. Case No. 2008-06-3347, Final Order (January 12, 2009).

30 *Anderson v. Five Towns of St. Petersburg No. 305, Inc.*, Arb. Case No. 94- 0440, Order on Issue of Law (March 28, 1995).

31 *Girsch v. Whisper Walk Section E Assn., Inc.*, Arb. Case No. 97-0305, Order Dismissing Arbitration Petition (November 26, 1997); *Belardo v. Four Sea Suns Condo., Inc.*, Arb. Case No. 97-2186, Summary Final Order (February 24, 1998); *Katchen v. Braemer Isle Condo. Assn., Inc.*, Arb. Case No. 98-5485, Final Order (August 5, 1999); *Raska v. The Fountains Assn., Inc.,* Arb. Case No. 93-0364, Summary Final Order (December 23, 1994); *Baran v. Ro-Mont South Condo. "K", Inc.*, Arb. Case No. 99-1563, Order on Motion to Dismiss (January 7, 2000).

32 *Simkin v. Nine Island Avenue Condominium Association, Inc.,* Arb. Case No. 2013-04-0108, Final Order (May 1, 2014).

33 *Trio Englewood, Inc. v. Fantasy Island Condo. Assn., Inc.,* Arb. Case No. 98-4670, Order on Motion for Summary Disposition (April 16, 1999).

34 *Cundiff v. Flamingo Cay Apartments Assn., Inc.*, Arb. Case No. 97-0259, Final Order (May 19, 1998).

35 *Bronstein v. Hills of Inverrary Condominiums, Inc.*, Arb. Case No. 94-0147, Summary Final Order (March 24, 1995); *Midman v. Sun Valley East Condo. Assn., Inc.,* Arb. Case No. 99-0537, Final Order (August 26, 1999).

36 *Sweeney v. Golden Horn Association, Inc.*, Arb. Case No. 2006-06-7026, Final Order (June 12, 2008).

37 *Kreitman v. The Decoplage Condo. Assn. Inc.*, Arb. Case No. 98-3495, Amended Final Order (September 14, 1999).

38 *Lamar v. Peppertree Village Townhouse Condo. Assn., Inc.*, Arb. Case No. 00-1849, Final Order (June 1, 2001).

39 *In Re: Cristelle Condominium Association of Broward County, Inc.*, Declaratory Statement 2015-096 (September 11, 2015).

40 Marinelli v. Crescent Royale Condominium Association, Inc., Arb. Case No. 93-0197, Post Conference Call Order (November 5, 1993).

Can *Johnson v. Davis* Rights Be Waived?

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A nagging question is whether sellers may use contractual clauses that seek to lessen or avoid their Johnson v. Davis duties.

N. TALDONE

Thirty years ago, in *Johnson v. Davis*,[1] the Florida Supreme Court created an obligation on sellers of residential real estate to disclose latent defects in their property to buyers. As the volume of residential real estate sales and real estate prices now equal or exceed pre-Great Recession levels in many Florida areas, it is likely that incidences of alleged seller failure to disclose latent defects will also increase. A nagging question is whether sellers may use contractual clauses that seek to lessen or avoid their *Johnson v. Davis* duties. Real estate transactional attorneys, like other transactional attorneys, seek to use exculpatory language whenever possible, limited by certain Florida Statutes.[2] Because the *Johnson v. Davis* cause of action is not statutory, the court cases dealing with exculpatory language have focused on the language of the parties' contract and the nature of the *Johnson v. Davis* cause of action. In *Sanislo v. Give Kids The World Inc.*,[3] the Florida Supreme Court recently reviewed the effect of exculpatory language on claims for personal injury. This article will review the nature of the *Johnson v. Davis* cause of action, the case law dealing with attempts by sellers to avoid their *Johnson v. Davis* duties through contract language, and whether the *Sanislo* decision has any relevance to this strategy.

The *Johnson v. Davis* Cause of Action

A review of the *Johnson v. Davis* decision and its Florida Supreme Court progeny reveals that the cause of action was a unique action based in tort. In *Johnson v. Davis*, the plaintiff-buyers alleged breach of the sales contract, fraud, and misrepresentation against the sellers upon the buyers' pre-closing discovery of roof leaks. The buyers sued for return of their deposit and rescission. The trial court found misrepresentation by sellers but refused to order rescission. The Supreme Court, citing its prior decision in *Besett v. Basnett*,[4] agreed that there had been a misrepresentation that amounted to fraud and ordered the return of the deposit money, but refused to grant rescission. The Court stated:

> [T]he Davises reliance on the truth of the Johnsons' representation was justified and is supported by this Court's decision in *Besett v. Basnett*, where we held "that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him."[5]

The Florida Supreme Court, however, went on to discuss the distinction between misfeasance and nonfeasance. The Court noted that the common law had traditionally provided a remedy in tort only for affirmative conduct and that nonfeasance was not actionable. The court recognized the inequities of a legal system that, on one hand, provided relief to a purchaser induced by misfeasance into completing a transaction, while on the other hand, left a purchaser induced by nonfeasance without a remedy. Determining that misfeasance and nonfeasance should not be treated differently under the circumstances, the Court created a new cause of action when it stated as follows:

> [W]e hold that where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.[6]

In the 1997 case of *Gilchrist Timber Co. v. ITT Rayonier, Inc.*,[7] the Florida Supreme Court reviewed the following question certified by the United States Court of Appeals for the Eleventh Circuit:

> Whether a party to a transaction who transmits false information which that party did not know was false, may be held liable for negligent misrepresentation when the recipient of the information relied on the information's truthfulness, despite the fact that an investigation by the recipient would have revealed the falsity of the information.

The Florida Supreme Court answered the question affirmatively stating the buyer would "not have to investigate every piece of information furnished;" rather, the buyer would need only to investigate "information that a reasonable person in the position of the [buyer] would be expected to investigate."[8] The Court further stated:

> We reaffirm our previous conclusion in *Johnson v. Davis*… that "one should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance"…. This does not mean, however, that the recipient of an erroneous representation can hide behind the *unintentional negligence of the misrepresenter* when *the recipient is likewise negligent in failing to discover the error*.[9] [emphasis added]

In the 2002 case of *MI Schottenstein Homes, Inc. v. Azam*,[10] the Court stated, "In *Johnson v. Davis*, this Court extended the

Besett reasoning from affirmative misrepresentations to the arena of nondisclosure of material facts." The *Besett* reasoning allows the buyer to rely on a fraudulent representation without a duty to make an inspection, unless the falsity is "obvious." Extending that reasoning to *Johnson* means that a buyer likewise has no duty to make an inspection where the allegation is nondisclosure. The buyer merely has to observe what is "readily observable."

The district courts of appeal subsequently have answered two critical questions left open by the above Florida Supreme Court cases. First, the standard for the seller is whether the seller has actual knowledge of the fraud, and not whether the seller should have known of the fraud.[11] Second, there is no state of mind element for the seller.[12] Therefore, the buyer must only prove the following elements: 1) the seller had actual knowledge of the property defect; 2) the defect must materially affect the value of the property; 3) the defect must not be readily observable and was unknown to the buyer; and 4) the buyer must establish that the seller failed to disclose the defect to the buyer.[13] Notwithstanding the foregoing, the Florida Standard Jury Instructions do not contain an instruction for the *Johnson v. Davis* action.

Florida Case Law Construing "As Is" Clauses

Several cases have dealt with language found in the standard Florida Association of Realtors/Florida Bar ("FR/BAR") contract, as amended by the parties to the transaction. Specifically, in these cases, the buyers relied to some extent on paragraph W, reflecting the *Johnson v. Davis* obligation: "Seller warrants that there are no facts known to Seller materially affecting the value of the Real Property which are not readily observable by Buyer or which have not been disclosed to Buyer."

In the 2003 case of *Syvrud v. Today Real Estate, Inc.,*[14] the parties executed an addendum to the then-existing FR/BAR contract which provided "Buyer(s) hereby acknowledge that the property being sold is not new and that the seller(s) and broker(s) make no verbal representations, warranties, or guarantees as to the condition of the property and its [sic] appurtenances and/or fitness for specific purpose." In finding no waiver of the sellers' disclosure duties, the 2nd DCA held that nowhere in the contract was there a provision specifically stating that the buyers waive the sellers' duty to disclose hidden defects materially affecting the value of the property as required by *Johnson v. Davis*. The court found that the provision in the addendum should be interpreted as an "as is" clause, i.e., that the sellers were selling the property in "as is" condition and that the buyer was accepting the property in its existing condition.

In the 1999 case of *Pressman v. Wolf*,[15] typed onto the line describing personalty was the following representation by the seller: "central a/c-heat, refrigerator, washer/dryer, hot water heater, stove top, existing fixture. ALL IN "AS IS" CONDITION."

Paragraph N of the contract was modified by an agreed crossing-out of any warranty that "the septic tank, pool, all major appliances, heating, cooling, electrical, plumbing systems and machinery are in WORKING CONDITION." The contract further provided for inspection rights and a limitation of liability, including that the buyer waived all defects not declared and reported less than 10 days prior to closing. The 3rd DCA reversed the trial court's entry of post-trial judgment for the buyer and rejection of a directed verdict for the seller stating: "Here, the parties closed on a contract that featured a prominent "as is" clause. The buyer closed while possessing inspections that patently warned of latent defects to the pool and of an air conditioning system that had not been tested, and in fact received some credits for these matters at closing. She freely elected to close on the purchase contract and is now bound by its terms."

In the 2000 case of *Carrero v. Porterfield,*[16] the Carreros sued the appellees alleging fraud in the inducement as a result of undisclosed, alleged latent defects with termite problems, septic tank deficiencies, and plugged pool deck drains. The trial court dismissed the complaint, which alleged a *Johnson v. Davis* cause of action, relying on *Pressman*. The 2nd DCA affirmed per curium. In a dissenting opinion, Judge Altenbernd opined that 1) *Pressman* was distinguishable because, in *Pressman*, the case had been tried and the defects determined to be patent; and 2) Florida law did not allow a buyer's waiver of contractual warranties to operate to bar a claim under *Johnson v. Davis*.

The vitality of *Pressman* and *Carrero* is questionable because the portion of the *Pressman* decision stating that statements by the seller regarding matters of public record could not be the basis for a *Johnson v. Davis* claim was specifically disapproved by the Florida Supreme Court in *MI Schottenstein Homes v. Azam* in 2002.

There had been previous cases similar to *Syvrud*[17] and subsequent to *Syvrud*[18] holding that "as is" clauses do not waive *Johnson v. Davis* rights without any detailed analysis of contract language.

Thus, as of the present, no district courts of appeal decision has dealt with whether a buyer may waive *Johnson v. Davis* rights in the purchase documents through exculpatory language that specifically provides that "Buyer waives the Sellers' duty to disclose hidden defects materially affecting the value of the property" or words to that effect.

The *Sanislo* Decision

In the 2015 case of *Sanislo v. Give Kids the World Inc.*,[19] Stacy and Eric Sanislo filed a negligence action against Give Kids the World after Stacy Sanislo suffered personal injuries during her family's vacation. Give Kids the World, Inc., is a not-for-profit corporation that provides storybook vacations to seriously ill children and their families. The Sanislos applied for their vacation with Give Kids the World by filling out and signing a "wish request form" containing an exculpatory clause. After their application was granted, the Sanislos signed another

liability release form containing a similar exculpatory provision upon arriving at their resort in Central Florida. The exculpatory language in those forms stated in pertinent part as follows:

> I/we hereby release Give Kids the World, Inc. and all of its agents, officers, directors, servants, and employees from any liability whatsoever in connection with the preparation, execution, and fulfillment of said wish, on behalf of ourselves, the above named wish child and all other participants. The scope of this release shall include, but not be limited to, damages or losses or injuries encountered in connection with transportation, food, lodging, medical concerns (physical and emotional), entertainment, photographs and physical injury of any kind….
>
> I/we further agree to hold harmless and release Give Kids the World, Inc. from and against any and all claims and causes of action of every kind from any and all physical or emotional injuries and/or damages which may happen to me/us….

During their vacation, Stacy Sanislo suffered injuries to her back and hip when a pneumatic lift on a horse-drawn carriage collapsed while she and her family posed for a photograph. The Sanislos claimed in their suit against Give Kids the World that the injuries were caused by Give Kids the World's negligence. Give Kids the World asserted the defense of release based upon the exculpatory clauses in her wish request and liability release forms, and eventually moved for summary judgment. The trial court denied that motion and, following a jury trial, entered a judgment against Give Kids the World and in favor of the Sanislos in excess of $70,000.00.

On appeal, Give Kids the World argued that the trial court erred in denying its motion for summary judgment because the exculpatory clauses were unambiguous, consistent with public policy, and therefore enforceable. In opposition, the Sanislos claimed the clauses were ambiguous and therefore unenforceable because they did not specifically release Give Kids the World from its own negligence. The 5th DCA agreed with Give Kids the World.

Ruling 4-3, the Florida Supreme Court affirmed and held that exculpatory clauses are not per se unenforceable to bar a negligence action merely because they do not specifically mention the releasee's negligence. The Florida Supreme Court explained that the exculpatory clauses "clearly convey that Give Kids the World would be released from any liability, including negligence, for damages, losses, or injuries due to transportation, food, lodging, entertainment, and photographs." In reaching its conclusion, the majority stated:

> [T]he courts' basic objective in interpreting a contract is to give effect to the parties' intent. Further, as the U.S. Supreme Court has observed, contract interpretation is largely an individualized process 'with the conclusion in a particular case turning on the particular language used against the background of other indicia of the parties' intention….As a result, we are reluctant to hold that all exculpatory clauses that are devoid of the terms 'negligence' or 'negligent acts' are ineffective to bar a negligence action despite otherwise clear and unambiguous language indicating an intent to be relieved from liability in such circumstances. Application of such a bright-line and rigid rule would tend to not effectuate the intent of the parties and render such contracts otherwise meaningless.

Therefore, *Sanislo* does not address whether parties to a contract may waive claims for affirmative misrepresentation or nondisclosure and therefore does not directly change the landscape for attempts to waive *Johnson v. Davis* duties.

Post-Sanislo Exculpatory Clauses In Real Estate Contracts

Those seeking to use *Sanislo* as support for a waiver will argue that *Sanislo* confirms that there should be no blanket prohibition against *Johnson v. Davis* waivers. Rather, it depends on the particular exculpatory language and the circumstances. However, there are several reasons why *Johnson v. Davis* waivers should be viewed differently than waivers of liability for engaging in a sports or recreational or similar activity. First, the *Johnson v. Davis* cause of action was created as a matter of policy to abrogate *caveat emptor*. Second, a seller who intentionally lies on a disclosure form should be prohibited from relying on the buyer's waiver, because a party may not waive intentional torts they have suffered or will suffer.[20] Third, even though the *Johnson v. Davis* disclosures do not have to be in writing, the seller's conduct occurs during a real estate transaction where there are likely many representations, both oral and written, and many omissions. Courts need to determine, among other things, whether the seller's alleged non-disclosure relates to a material fact. This is a fact-intensive analysis that the courts may have difficulty in deciphering the parties' intent.

Because the *Johnson v. Davis* cause of action extends to unintentional and merely negligent behavior, the question becomes whether such unintentional conduct by the seller can be waived. Nothing in *Sanislo* says the buyer cannot waive *Johnson v. Davis* rights. Certainly, seller's counsel, with an absent-minded client who just plain forgot about a massive water heater leak ten years prior, may argue that there is no operative public policy. However, as noted above, *Johnson v. Davis* is unique in not requiring any particular state of mind on the part of the non-disclosing seller. Permitting effective use of exculpatory language for unintentional/negligent conduct while prohibiting the same exculpatory language from absolving a seller who intentionally lied would add a state of mind element where there is currently none. Also, even though a seller's conduct may be unintentional, the failure to disclose makes the seller's written disclosures misleading, which the law considers fraud.[21]

One reason exculpatory clauses may not have been used in residential transactions is because they would have to be placed in an Addendum to the standard FR/BAR contracts and would by their very nature be very conspicuous. Buyers would then have a good reason to hire counsel to review the entire contract and to have home inspectors do more than merely "eyeball" the premises. On the other hand, exculpatory clauses could be inserted by developers and builders quite easily because they create their own contracts and buyers expect such contracts to be unalterable.

With regard to whether a developer can rely on exculpatory language in a declaration of covenants to bar *Johnson v. Davis* claims, in addition to the other arguments against such application noted above, reliance on exculpatory language in a declaration of covenants would also face arguments that the declaration of covenants was recorded months (or years) before the home was built (or the surrounding land contaminated with a toxic substance) and that the buyers did not sign a document containing the exculpatory language, even though it was in their chain of title. As Justice Pariente stated in *MI Schottenstein Homes v. Azam*, "(T)he fact that a purchaser may be charged with constructive knowledge of information within a chain of title is a different inquiry from whether the purchaser knows of the falsity of the representation or whether the falsity is obvious to the purchaser…." Also, the *Sanislo* situation where the exculpatory language seeks to waive future liability for future participation in an event is distinguishable from a waiver of future wrongdoing by a developer that has not even broken ground on the subdivision yet. The developer would have to prove that, in such circumstances, the buyer made an informed decision to waive the buyer's *Johnson v. Davis* rights. Further, exculpatory language in a declaration of covenants is also different from exculpatory language in an "integrated" transactional document that is signed by the buyer.[22] The key difference is that there is actual knowledge in the transaction while only constructive knowledge from the recording of the declaration.

In conclusion, buyers of previously owned homes will probably not face issues of exculpatory language with regard to their *Johnson v. Davis* rights. Rather, the future cases will more likely deal with attempts by developers and builders to use such language. Courts should continue to reject a seller's use of exculpatory language to waive *Johnson v. Davis* rights or at least wait to review such clauses in the context of post-trial motions where there is a full record developed of the parties' intent.

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Endnotes

1 480 So. 2d 625 (Fla. 1985).

2 Florida statutes prohibit the use of exculpatory clauses in certain transactions such as residential lease agreements that disclaim or limit a landlord's liability to a tenant for breach of the implied warranty of habitability (Fla. Stat. § 83.47 (1977), condominium documents that disclaim liability for breach of the statutory implied warranties of fitness and merchantability to a purchaser of a new condominium (Fla. Stat. § 718.303(2)(2000), agreements that waive the right to assert a construction lien law claim in advance of improving real property (Fla. Stat. § 713.20(2) (2001) and Fla. Stat. § 725.06(1) (2001), and indemnification provisions in construction contracts that encompass claims or damages resulting from gross negligence, willful, wanton, or intentional misconduct, or for statutory violations (Fla. Stat. § 725.06(1) (2001).

3 157 So. 3d 256 (Fla. 2015).

4 359 So. 2d 995 (Fla. 1980).

5 480 So. 2d at 628.

6 *Id.* at 629.

7 696 So. 2d 334 (Fla. 1997).

8 *Id.* at 339.

9 Id.

10 813 So. 2d 91, 95 (Fla. 2002).

11 In *Jensen v. Bailey*, 76 So. 3d 980 (Fla. 2d DCA 2012), the appellate court concluded that a homeowner must have "actual knowledge" of the defective condition in order to be held liable for its nondisclosure. In this specific decision, the court rejected the plaintiff's claim that the homeowner "should have known" about the defect and was therefore liable to the buyer for damages. *See also Slitor v. Elias*, 544 So. 2d 255, 258-59 (Fla. 2d DCA 1989) ("Buyer of a house must prove the seller's knowledge of a defect which materially affected the value of the house."); *Billian v Mobil Corp.*, 710 So. 2d 948, 988 (Fla. 4th DCA 1998) ("*Johnson* creates a duty to disclose where a seller *knows* of certain facts under circumstances giving rise to the duty." (emphasis added)); *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 674 (Fla. 1st DCA 1993) (quoting *Slitor*, 544 So. 2d at 258, for the proposition that "*Johnson* does not convert a seller of a house into a guarantor of the condition of the house").

12 *MI Schottenstein Homes, Inc*., 813 So. 2d at 95.

13 *Jensen*, 76 So. 3d at 983.

14 858 So. 2d 1125 (Fla. 2d DCA 2003).

15 732 So. 2d 356, 358 (Fla. 3d DCA 1999).

16 752 So. 2d 699 (Fla. 2d DCA 2000).

17 *See Levy v. Creative Constr. Servs. Of Broward, Inc.* 566 So. 2d 347 (Fla 3d DCA 1990); ("[W]e discern no "as is" contractual exception to the duty imposed on the seller herein by the *Johnson* decision."); *Rayner v. Wise Realty Co. of Tallahassee*, 504 So. 2d 1361, 1364 (Fla. 3d DCA 1987) ("[W]e find that the "as is" provision in this real estate contract does not act as a bar to Rayner's claim of fraudulent nondisclosure.")

18 *Solorzano v. First Union Mortg. Corp.,* 896 So. 2d 847, 848 (Fla. 4th DCA 2005) (finding that the description of the property as "not new" and the disclaimer of any representations, warranties, or guarantees concerning it are characteristic of an "as is" transaction).

19 *Sanislo,* 157 So. 3d at 256 (Fla. 2015).

20 An exculpatory clause cannot relieve a defendant from liability for an intentional tort. *Windstar v. WS Realty, Inc.*, 886 So. 2d 986, 987 (Fla. 2d DCA 2004) ("Fraud is an intentional tort and thus not subject to the cathartic effect of exculpatory clauses"); *Fuentes v. Owen*, 310 So. 2d 458 (Fla. 3d DCA 1975) (same). A claim for intentional or knowing failure to disclose material facts is an intentional tort. *Gutter v. Wunker*, 631 So. 2d 1117, 1118 (Fla. 4th DCA 1994); *Vokes v. Arthur Murray*, 212 So. 2d 906 (Fla. 2d DCA 1986); *Cruise v. Graham*, 622 So. 2d 37, 40 (Fla. 4th DCA 1993).

21 See *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972) for a discussion of fraud by non-disclosure in the securities fraud context.

22 *See, e.g., Peebles v. Sheridan Healthcare, Inc.*, 853 So. 2d 559 (Fla. 4th DCA 2003) (in case dealing with allegations of oral misrepresentations predating the parties' closing of their transaction, court reverses jury verdict where the closing documents disclosed the material information alleged to be misrepresented and there was an integration clause in the documents); *Berg v. Capo,* 994 So. 2d 322 (Fla. 3d DCA 2007) (in case dealing with oral misrepresentations predating the parties' closing of the transaction, where the stock purchase agreement contained "both an integration clause and a clause mutually releasing the parties", the appeals court affirms trial court's grant of summary judgment and rejects the claim of affirmative fraudulent misrepresentation and conspiracy claim because of alleged conflict by transaction attorney). In *Hadsock v. Lennar Homes, LLC*, No. 12-CA-7588, the trial court dismissed a complaint alleging, among other claims, a *Johnson v. Davis* cause of action against a builder where there was an exculpatory clause in a recorded declaration of covenants and a disclosure of a landfill therein, and the landfill was the gravamen of the wrongdoing. The Second District Court of Appeals affirmed per curium. *Hadsock v. Lennar Homes, LLC,* 151 So. 3d 1245 (Fla. 2d DCA 2014).

Let's Be Clear – Not all Liens Survive a Tax Deed Sale

By Paul A. Krasker, Esq. and Megan F. Schmidt, Esq.,
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With the foreclosure market in a downturn, many real estate investors are considering tax deed sales as an alternative or supplement to their portfolio. This leaves both real estate and homeowners/condominium association ("Association") attorneys addressing niche issues with tax deeds for the first time without realizing they have some very special features regarding lien extinguishment.[1] Most governmental liens and rights of redemption survive, and like foreclosure sales, the Association declarations remain binding on the new owners. However, unlike foreclosure sales, Association liens for past due assessments, as well as liability for past due assessments not yet subject to a recorded lien, are fully extinguished by the issuance of a tax deed. This area has been heavily litigated and is now clearly delineated, but it can be beneficial or detrimental to your client depending on how it is addressed.

Background

No lien created by a right, interest, restriction, or other covenant survives the issuance of a properly sold tax deed, except a lien of record held by a municipal or county governmental unit, special district, or community development district.[2] The survival of the governmental lien on the property is inevitable regardless of how the purchaser proceeds with title post-sale, and the tax deed purchaser is responsible for the payment of liens of government units not satisfied in full by the excess proceeds of the sale should they wish to have marketable/insurable title.[3] The only investors that may be able to evade the payment of the governmental liens are those who purchase properties obtained by escheatment tax deed from the county.[4] Three years after the parcel is offered for initial public tax deed sale, it escheats to the county, free and clear, and all tax certificates, accrued taxes, and liens of ***any*** nature against the property are deemed canceled as a matter of law.[5] The exception is that sale by escheatment tax deed does not affect the liability of any past or future owner or governmental entity, for the results of its actions that create or exacerbate a pollution source.[6]

Outside of the municipal and county liens, in some instances when the United States holds a lien, there are additional allowances designated by federal code or mandate.[7] For example, the Internal Revenue Service (IRS) has a 120-day right of redemption from the date of the tax deed sale, in the event it holds a federal tax lien on the property.[8] The Small Business Administration (SBA) claims a 1-year right of redemption on properties on which it holds a mortgage lien.[9] In order for the United States to effectuate its right of redemption, it is required to pay (i) the actual amount paid by the purchaser at the sale, (ii) interest from the sale date, and (iii) the amount equal to the excess of the expenses necessarily incurred in connection with the property, over the actual income from the property plus a reasonable rental value.[10] These federal rights cannot be extinguished purely by notice of the tax deed sale. They only expire with the allotted time, or with the express relinquishment of said right of redemption by the Federal Agency.[11]

With regard to Association liens, the courts were required to reconcile the stark contrast between the statutes addressing liability for Association assessments with the extinguishment of these same liens based on the issuance of a tax deed. Under Florida law and most Association declarations, upon the purchase of a piece of real property, a parcel owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title.[12]

During the course of litigation on the issue, the Association attorneys previously presented varying public policy arguments, most prominently seeking to protect distressed Associations in a recession. In addition, they attempted to align the liens with the protected covenants that survive the sale, which limit the use of the property and run with the land.[13]

Ultimately, the courts harmonized the conflict by turning to the foundation of statutory construction, plain language. First, the Association statutes impose liability for past due assessments in relation to property acquired by "transfer of title."[14] However, it is well-settled law that a tax deed does not represent a transfer of title, but constitutes the commencement of a "new, original, and paramount title," so the liability is not imposed.[15] Second, the tax deed statutes specifically address the survival or extinguishment of liens and encumbrances after issuance of a tax deed, and any conflict must be resolved in their favor as the more specific statute.[16]

The combined effect of the tax deed statutes is to preserve the validity of covenants that control the use of the property, but extinguish any covenant that creates a lien or requires a grantee to "expend money for any purpose" for debts that precede the issuance of the tax deed. Both the lien and the grantee's liability for the preexisting debt are extinguished upon issuance of the tax deed.[17] Therefore, while a purchaser of real property is generally jointly and severally liable for outstanding assessments, this is not the case where such outstanding assessments are extinguished by a properly issued tax deed.[18]

Practice Tips for Real Estate Attorneys

In the case of the aforementioned governmental units, the survival of their liens on the property is unavoidable. However, once the clerk has paid out the surplus funds, and the purchaser has cured any outstanding violations on the property, then depending on the specifics of your client's purchase, it may be worth an attempt to negotiate the remaining fines or the amount of the lien with a county official or a special magistrate (considerations in negotiations include issues such as the amount already paid, governmental lien amount still owed, property value, expected turnaround time in capital, etc.).

The procedures for these types of negotiations vary greatly by county and more by the specific municipal entity that holds the lien, and then the outcomes can vary just as much. However, they can be extremely beneficial in those cases of grossly high liens accrued by the prior owner. These will have to be addressed prior to providing clear title to a new buyer anyway, no matter what route the tax deed purchaser proceeds with title post-sale.

There are still instances where an Association has recorded a claim of lien for past due assessments after the tax deed sale or, in the alternative, the Association may attempt to include incorrect amounts for past due claims in the estoppel letter.[19] Many real estate investors will just pay them, or negotiate them down while thinking they are not extinguished like a normal foreclosure sale.[20] Do not let your client waste capital by paying these unnecessary costs, and unnecessarily decrease their return on investment.

We have only come across a few reasons for these inappropriate actions: 1) there is an error in the Association paperwork/system somewhere; 2) the Association did not inform its attorney the property was sold at tax deed sale; and 3) the Association attorney or representative has never worked with a tax deed before. Reasons #1 and #2 can usually be cured by a quick phone call or email to the Association attorney or representative who recorded the lien or provided the letter. They tend to be more than happy to record a Release of Lien in the public record or correct the clerical error to avoid paying attorney's fees. However, when you realize you are facing Reason #3, the summary information provided in the Background section of this Article and the statutes/case law cited therein should alleviate the need for any further discourse, threatened litigation, or summary administration (in the case of an improper estoppel letter).[21]

Practice Tips for Association Attorneys

Once the property is sold at tax deed auction to a third party, the Association's claim of lien against the property for past-due assessments and the tax deed purchaser's liability for the debt are both extinguished, but all is not lost. There is still the potential the Association may be able to recover some or even all of the debt owed.

In the event the Association holds a money judgment against the prior owner, it maintains the ability to collect from the person individually or record a certified copy of the judgment to create a lien on an alternative piece of property owned by that person.[22] Additionally, if the property is purchased at a tax deed sale for a price in excess of the statutory minimum bid, the Association has the ability to make a claim on the tax deed surplus funds for the amount owed. Once the governmental liens are paid in full, the clerk will disburse the excess proceeds to other interested parties based on priority.[23] If there is no senior lien holder, like a first mortgage holder, or if that priority party does not make a claim, the Association could potentially fall in first position for the surplus funds. The clerk may initiate an interpleader action against the lienholders to determine the proper disbursement.[24] The specific procedure, time frame, and form vary by county, but the money is usually there.

The purchaser is liable for all of the assessments accrued after the tax deed sale, and starting fresh with this relationship is usually the best option for the Association. Any actions towards the tax deed purchaser for back-due assessments will only open the Association up to liability for costs and filings for attorneys' fees in the end to clear up the issue.

Conclusion

Tax Deeds create an opportunity: for the community to help property values by bringing a piece of property back to life; for the government to collect liens and have the property taxes paid again; and for Associations to collect active assessments. They are also a niche market with very interesting potential for a real estate investor under the correct guidance.[25]

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Endnotes

1 *See generally* Ch. 197, Fla. Stat. (2015) (governing tax deed sales).

2 § 197.552 and §197.573(2), F.S.

3 Fla. Admin. Code R. 12D-13.065(2).

4 § 197.502(8), Fla. Stat. (2015).

5 *Id*.

6 § 197.502(8)(a), Fla. Stat. (2015).

7 28 U.S.C. § 2410 (2015).

8 26 U.S.C. § 7425(d) (2015).

9 Menton, Michael P., *The SBA's Right of Redemption Following Non-Judicial Foreclosures: Lenders, Fear Not,* SPEAK Stay in the know with SettlePou, http://www.settlepou.com/news-blog/detail/the-sbas-right-of-redemption-following-non-judicial-foreclosures-lenders-fe. This blog is an interesting evaluation of the SBA's redemption statute's application to

non-judicial sales. However, without Florida case law specifically either way, to date the SBA claims the statute fully applies. Many times the SBA is very cooperative regarding the right of redemption based on substantial payment of the amount owed from the tax deed surplus funds.

10 28 U.S.C. § 2410(d)(1-3) (2015).

11 26 U.S.C. § 7425(b),(d) (2015); I.R.M. 5.12.5.9 (2015).

12 § 720.3085(2)(b), Fla. Stat. (2015); § 718.116(1)(a), Fla. Stat. (2015).

13 *See* § 197.573(2), Fla. Stat. (2015).

14 § 720.3085(2)(b), Fla. Stat. (2015); § 718.116(1)(a), Fla. Stat. (2015).

15 *Sugarmill Wood Oaks Vill. Ass'n v. Wires*, 766 So. 2d 487, 489 (Fla. 5th DCA 2000); *Blume v. Giles*, 143 Fla. 615 (1940); *see also* Dean v. Kane, 106 Fla. 814 (1932), as applied in *Cricket Props., LLC v. Nassau Pointe at Heritage Isles Homeowners Ass'n*, 124 So. 3d 302, 307 (Fla. 2d DCA 2013).

16 *Suntrust Banks of Fla., Inc. v. Don Wood, Inc.*, 693 So. 2d 99, 101 (Fla 5th DCA 1997). *See also Adams v. Culver*, 111 So. 2d 665, 667 (Fla. 1959).

17 *Lunohah Investments, LLC v. Gaskell,* 158 So. 3d 619, 621 (Fla. 5d DCA 2013); *A to Z Props., Inc. v. Fairway Palms II Condo. Assoc., Inc.*, 137 So. 3d 453 (Fla. 4th DCA 2014).

18 *AL & ML, LLC. V. Stoneybrook West Master Ass'n,* No. 2011-CA-6631 (Fla. 9th Cir. Ct. Apr. 3, 2012); *St. Lucie Consulting, Inc. v. John Wells*, No. 2010-CA-002847 (Fla. 19th Cir. Ct. May 20, 2011).

19 § 718.116(8), Fla. Stat (2015); § 720.30851, Fla. Stat (2015).

20 § 720.3085(2)(b), Fla. Stat. (2015); § 718.116(1)(a), Fla. Stat. (2015).

21 § 51.011, Fla. Stat. (2015); § 718.116(8)(b), Fla. Stat (2015); § 720.30851(2), Fla. Stat (2015).

22 § 55.10, Fla. Stat. (2015).

23 § 197.582(2), Fla. Stat. (2015); Fla. Admin. Code R. 12D-13.065(1).

24 § 197.582(3), Fla. Stat. (2015).

25 Once the property is purchased, the title issued by tax deed can be passed in limited ways itself: 1) wait out the four year statute of limitations imposed by § 95.192, Fla. Stat. (2015); 2) Quiet Title Action; or 3) consult with a service company specializing in clearing tax deed titles.

Getting Family Help When Representing the Disabled or Diminished Client: The Ethical Questions

By Lawrence J. Miller and Sean M. Lebowitz, Boca Raton, Florida

The answers to many ethical questions we face in the practice of law are presented in a confluence of applicable rules, opinions and judgments. Properly dealing with your client's diminished capacity (a "diminished client") can be a singularly difficult enough issue. Prior articles in ActionLine have dealt with diminished clients. However, this article focuses on the interaction with the diminished client's family. In such situations, the issues and questions can confound and thereby render resolution more difficult. In this article we briefly set out the ethical questions, how they arise and seek to provide a path to some of the solutions when seeking or receiving family assistance in this delicate area.

The Florida diminished client defined?

Rule 4-1.14[1] addresses a Florida lawyer's duty to a "Client with Diminished Capacity," but it provides no definition of what actions, conduct or mental state might be deemed to be "diminished capacity." In fact, the same is true under Florida Guardianship statutes (Chapter 744 of Florida Statutes), which also provide no definitional guidance for the terms "capacity" or "incapacity." Case law provides some evidentiary guidance based on the specific facts of a given reported case, but no diagnostic conclusions or specific road signs actually appear by rule, statute or case law. Perhaps by way of illustrative overstatement, we are in some instances left to our own devices to "know incapacity when we see it."[2]

Rule 4-1.14's language suggests that diminished capacity arises when "a client's ability to make adequately considered decisions in connection with the representation is impaired," but no additional specific guidance is set out. Once counsel deems a client to be diminished, a series of duties and suggested courses of conduct are suggested.

Counsel's Duties When Representing a Diminished Client

In the first instance, Rule 4-1.14(a) directs counsel in a diminished client setting, "as far as reasonably possible" to "maintain a normal client-lawyer relationship with the client." The Rule's comment provides additional guidance by stating that regardless of client capacity, attention and respect must be provided by the attorney to and for that client and that in some diminished client situations, the "lawyer often must act as de facto guardian." Rule 4-1.14(b) permits the lawyer to even seek appointment of a guardian or to take other protective action with respect to the diminished client when "the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

Included in a review of counsel's duties in this setting is the apparent conflict between the precatory language of Rule 4-1.14(b) of the applicable Florida rule and the more mandatory direction of Florida Bar Ethics Opinion 85-4 (October 1, 1985, revised August 24, 2011), in which a client in a divorce case became mentally ill during the pendency of the dissolution action, which then raised the duty for lawyer to take steps to safeguard the client's interest. The discussion of this dichotomy is beyond the scope of this article, but needs to be reviewed when client capacity concerns arise. In all cases, counsel's reasonable pursuit of protective measures may lead to additional questions. Matters kept in mind must include the understanding that disclosure of a diminished client's condition in pleadings or otherwise to third persons can negatively impact the client and that legal proceedings involving the client's mental status and capacity can detrimentally impact the client's well-being. Additionally, inherent in the lawyer's stated duties may be the need to gain more information on the diminished client's condition and capabilities. Such additional information or even initial client introduction, engagement and discussion may include consultation with medical and treatment professionals or others.

The Role of the Diminished Client's Family

With that background, now enter the diminished client's family.

Protection and concern for the client suspected of diminished mental capability should suggest direct consideration of sources of information regarding the client's condition. The most obvious introduction of the family into this "mix" is when a member of the diminished client's family joins the client in the initial client introduction, discussion or meeting. Of course, not all family involvement arises at the outset of the engagement. Frequently, family input and involvement arises well after the individual client contact and representation have commenced. In either instance, the boundaries of counsel's interaction with the family must be considered and circumscribed.

Clarity in Identifying the Client

In the first instance, counsel must be clear in identifying the client and avoiding family confusion as to who the lawyer actually represents. If the diminished party is the "client," it must be clearly understood that the other family members are not the "client." Counsel must keep in mind that in representing the diminished client, only the client can actually make the necessary decisions and not the family.[3] While such distinctions should be kept in mind, the practicality of the situation may dictate a course that cannot wait for nuanced fact finding and distinctions. A substantial diminution in client capability may be so obvious as to reasonably dictate only one course, which is seeking court direction through a guardianship or finding the party appointed as attorney-in-fact to proceed with immediate

and aggressive protection. Pristine record keeping or notes indicating the basis for action will go a long way in bolstering the reasonableness of counsel's actions when and if later examined. When diminished capacity situations are, however, less dire or develop incrementally during representation, duties of loyalty to the client and avoidance of the family's misunderstanding of counsel's role will assist in avoiding crippling and dilatory allegations of conflict during or after such representation. Included in this cautionary approach must be a clear understanding of client identity regardless of whom or which party may be paying the diminished client's attorney fees or costs.[4] More directly, once family involvement and input are evident, express oral and written statements to both the client and assisting family members as to their respective roles in the relevant legal matter should be made as early as possible. There are no "usual" sorts of disclosure statements. However, and while your disclosure statements should be your own, disclosure statements can be aimed as follows:

> "While I appreciate and may seek your input and assistance in protecting your mother's legal rights, you must at all times understand that she is my client and that each and all of you are not. That is not to say that your input and involvement are not helpful to me or my law firm when trying to represent your mom and to protect or enforce her rights. However, I may or will be limited by Florida ethical and evidentiary rules as to the content of what I may be able to discuss with you or impart to you during our representation. In short, your mother is the client."

Counsel's conduct should not depart from such a statement as representation continues.

To Share or Not to Share

More specifically, counsel should keep in mind that, while discussion and disclosure with the diminished client's family may be two-way, the ethical and legal treatment of such matters may be different. Family members may be able to provide counsel with information that could not ethically be provided by counsel to those family members in the same setting. For instance, the doctor's last report about "Mom" may be provided to you as "Mom's counsel," but the reverse might not be permitted.

As to the content of what may be disclosed or discussed with non-client family members, Rule 4-1.14 provides authority to share with appropriate parties certain aspects of the diminished client's condition or capability when such sharing will assist in assuring or protecting said client's rights. However, gratuitous or other disclosure to third persons (including the diminished client's family members) of that condition or your strategies in proceeding on your client's behalf should be carefully guarded and possibly avoided as potentially impinging on the attorney-client privilege under Florida Evidence Code Section 90-502 or violating Rule 4-1.6 (Confidentiality of Information). This position may be somewhat different when one of the family members is an appointed fiduciary, such as the diminished client's attorney-in-fact under a Durable Family Power of Attorney. The ACTEC Commentaries regarding Model Rule of Professional Conduct 4-1.14 (on which Rule 4-1.14 is based) indicate that counsel may represent both the diminished client and that client's fiduciary unless there is a significant risk that the representation of one will be materially limited by the lawyer's responsibilities to the other. In any event, it would appear that the safest approach, while keeping in mind the diminished client's best interests, would probably be to avoid representing both parties in such a situation. Again, in such instances, you are permitted to take "reasonably necessary protective action."[5] In doing so, you may consult with individuals or entities that have the ability to take action for the client's protection. Consultation cannot, however, avoid the careful analysis of what can or should be disclosed when such protection is necessary.

Anecdotally, in diminished client settings, some practitioners have suggested that a breach or overstepping of confidentiality and privilege boundaries can be avoided by joint representation of both the diminished client and his/her family members. However, this approach has a number of accompanying and troubling issues. The diminished client's ability to recognize technical legal distinctions may be paramount in undertaking such an approach. In such instances, a divergence of loyalty, as mentioned in both the ACTEC and Model Rule commentaries cited above, can provide a confounding and disqualifying chill on overall representation when a conflict is later alleged (including allegations made by a later-appointed guardian). Issues concerning the diminished client's understanding of their counsel's loyalty and the gray areas of joint representation should probably dictate separate and distinct representation. Again, and though such joint representation is not specifically precluded, a later-realized divergence of interest between family members and the diminished client can form the basis of inescapable allegations of ethical breach and yield detrimental results to the diminished client's best interests.

Conclusion

Clearly defining your relationship with the diminished client and establishing the parameters of that relationship with involved family members, and then guarding appropriate boundaries of confidentiality, loyalty and protection, is the methodology that is both suggested and mandated by applicable ethical rules. In all instances, protection of the diminished client and said client's rights, well-being and assets are paramount. Sharing information and gaining guidance from members of the diminished client's family may be profoundly helpful, but ethical and other constraints may

dictate that in many instances, the direction or flow of such information is only one way for counsel to assist the diminished client. Regardless of the situation, gathering and recording facts that give rise to the need to seek family assistance must be part of the approach. The family's deep concern and insistent participation cannot hide the clarity of counsel's duty in this tenuous situation.


L. MILLER

Lawrence J. Miller *is a shareholder in the Boca Raton firm of Gutter Chaves Josepher Rubin Forman Fleisher Miller, P.A. His practice focuses on estate, trust and guardianship litigation and administration, including multi-state and multi-jurisdictional disputes and contests. He is currently a Fellow, Litigation Counsel of America, Chair of the Professionalism and Ethics Committee of the RPPTL Section of The Florida Bar and remains active in its Probate and Trust Litigation, Probate Law and Procedure, Trust Law and Guardianship and Power of Attorney Committees.*


S. LEBOWITZ

Sean M. Lebowitz *is a partner at Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A. in Boca Raton, Florida. He earned his undergraduate degree from Binghamton University (SUNY), summa cum laude, and his law degree from the University of Florida, cum laude. Sean practices exclusively in the areas of probate and trust litigation, guardianship litigation, probate and trust administration and guardianship administration. He recently completed his Fellowship of the Real Property, Probate and Trust Law Section of the Florida Bar, and now serves as an Executive Council member*

Endnotes

1 For all purposes of this article, references to a "Rule" shall be to the Florida Rules of Professional Conduct (the "FRPC").

2 *See, e.g., Jacobellis v. Ohio,* 378 U.S. 184 (1964) (Stewart, J., concurring). Prior articles in this publication have also reviewed this issue. *See*, J. Rubin "What Attorneys Should Know When Dealing With Client Capacity Issues," ActionLine, Winter 2014.

3 *See* FRPC 4-1.7 (Conflict of Interest; Current Clients).

4 *See* FRPC 4-1.7 (Interest of Person Paying for a Lawyer's Service) (commentary).

5 *See* FRPC 4-1.14.

RPPTL General Sponsors

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 Boca Raton Resort & Club, Boca Raton November 11 – November 14, 2015

By Erin H. Christy, Esq., Williams Parker, Sarasota, Florida

The fall meeting of the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar was held November 11 through 14 at the elegant Boca Raton Resort and Club in Boca Raton, originally designed by renowned architect Addison Mizner.

Committee meetings were underway by noon on Thursday and continued throughout the afternoon until members gathered at the Venetian Terrace for a welcome reception hosted by sponsors JP Morgan and Old Republic Title. Networking and good conversation continued in the hospitality suite until the late hours.

As member Mike Bedke says, "it's only impressive to stay up late if you can get up early." The Friday morning Reptiles Run took our wellness-minded members up the tree lined Boca Raton Resort porte cochere and through the surrounding neighborhood dotted with Mediterranean and Spanish Colonial Revival homes reminiscent of Mizner's mark on south Florida. Runners were back and ready to work when meetings started Friday morning at 8:00 a.m.

Friday was full of the usual, but always exciting, meetings and included both Real Property and Probate Roundtable meetings from 3:00-5:00 p.m. This allowed just enough time for the second greatest show on earth, Pete Dunbar and the PAC meeting, before members attended a reception sponsored by Wells Fargo Private Bank in the picturesque Cloister Garden. Members then sat down to an exquisite dinner in the Cathedral Room, a dramatic setting in the Resort's signature Cloister building. Through the room's soaring coffered ceiling, gold-leafed pillars, and striking stained glass windows, members were transported to the Gilded Age and a post-Civil War era when those with wealth flaunted it. Modern day Mizners are ideal clients for our dinner sponsors First American Title Insurance Company and Regions Private Wealth Management. After dinner, members again retired to the hospitality suite in the Commodore Lounge.

Saturday morning found some sleeping until the 7:30 a.m. Executive Council meeting. Spouses Breakfast began while the Reptile Run kicked off again at 6:30 a.m. Everyone recovered and were in their places for the Executive Council Meeting which took place from 9:00 a.m. until around 12:00 p.m. in the Addison Ballroom. After the conclusion of the meeting, Executive Council members joined their families and connected with friends to enjoy all the amenities the Resort has to offer.

Saturday's dinner ended the formal schedule and was held at the Sundy House, a quaint restaurant located in a Victorian B&B found on the National Register of Historic Places. A special thank you goes to our fellow Boca Raton RPPTL members. They were all gracious hosts on behalf of their beautiful community.

The upcoming meeting of the Executive Council is June 1-5, 2016 at the Loews Portofino Bay Hotel in Orlando Florida. We hope if you are in the area you can join us and attend any committee meeting that interests you.

RPPTL Section Executive Council Meeting, Boca Raton Resort and Club

November 11-15, 2015

Michael Gelfand giving due praise to Mary Ann Obos for her services to the Section and very glad she is back from maternity leave.

Lee Weintraub reporting on open and expired permits at the Title Insurance & Title Insurance Liaison committee meeting

Kathy Neukamm with Alex Overhoff and Jim Russick holding their delicious variety of ice cream and gelatos.

Pre-meeting discussion between Chris Fernandez and Brian Hoffman

Michael Gelfand providing guidance at the Real Property Finance & Lending committee meeting

Brian Hoffman placing a topic for discussion at the committee meeting

Bob Graham addressing the RPPTL PAC

RPPTL Chair Michael Gelfand with mom, Shirley Gelfand

Art Menor leading discussions at the Real Property Problems Study Committee meeting

Carlos Batlle from J.P.Morgan Chase thanking the Section for its contributions to the practice of law

On the way to an adventure in dining - Chris & Susan Fernandez, Bill Parady and Salome Zikakis, and Kathy & John Neukamm

Mark and Cathy Brown with Roger and Melinda Larson enjoying the Thursday night reception.

Florida Gators during a break from enjoying the football game at the hospitality suite

Gayle Sklar and Sheri Freedman during a well appointed Friday night dinner.

Steve Goodall showing the elders how to hold the clicker for the RPPTL Executive Council meeting

Friday evening pre-dinner greeting and meeting

View photo albums at **www.rpptl.org**

Travis Hayes reporting on proposed digital assets legislation

Debbie Goodall thanking one of the committees during the Executive Council meeting

Photos by John Neukamm and Silvia Rojas

Roundtables

Friday, November 13, 2015
Boca Raton Resort & Club
Boca Raton, Florida

Prepared by Jennifer Anne Pollack., Esq., Tampa, Florida, and Eamonn Gunther, Esq., Boca Raton, 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

Thank you to the Roundtable Sponsor, Fidelity National Title Group

Meeting was called to order at 3:00 p.m. by the Real Property Law Division Director, Drew O'Malley.

Sponsor Announcement: The Division Director then thanked the Roundtable Sponsor, Fidelity National Title Group and Pat Hancock gave the sponsor message.

Introduction of Guests: Melissa Murphy introduced several members of The Fund that were in attendance. Len Prescott introduced several members of First American Title Insurance Company that were in attendance, including Margaret Redman from the company's home office in California.

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

Informational and Administrative Matters

Open and Expired Permits Task Force - Lee A. Weintraub and Michael Tobin, Co-Chairs: Robert Graham presented on the behalf of the Task Force. The Task Force was formed to address several issues surrounding open and expired permits, including the need for owners and closing agents to have a way to close open and expired permits. The Task Force worked with RPPTL committees, as well as outside groups, such as the Building Officials Association of Florida ("BOAF"). BOAF disagreed with the initial proposed bill; however, by the end of the last day of the committee meetings, members of the Task Force and several members of BOAF had a conference call about the issues and, ultimately, agreed to work together to find a way to resolve the issues, specifically including the needs of closing agents and owners to close permits. BOAF would like to focus on amending building codes instead of a statutory fix. The Task Force has agreed to consider this idea if the BOAF will agree to enforcement rights in the statute, but it may prove to be too cumbersome to fix building codes in every jurisdiction.

See "Real Property Division," next page

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION Roundtable

Thank you to the Roundtable Sponsor: Stout Risius Ross, Inc.

The Director of the Probate and Trust Law Division of the Real Property, Probate and Trust Law ("RPPTL") Section of the Florida Bar, Debra Boje, called the meeting to order at 3:00 p.m.

Sponsor Announcement: The Division Director acknowledged the sponsor of the Roundtable meeting, Stout Risius Ross, Inc. ("SRR"), which has been an ongoing sponsor of the Section for many years. SRR is one of the largest business valuation companies in the nation. SRR acknowledged growing concern from clients concerning possible changes to Section 2704 of the IRS Code; and, also, concerns from clients regarding the reduction in production, especially in the area of drilling and mining. SRR is responding to these client concerns with conversations about the effects of these changes and ways to plan for the different impact that these changes can have on their current situation.

Recognition and Introductions: The Division Director acknowledged new Executive Council members and a few visitors. The Division Director also made a request for more article submissions to ActionLine and noted that Jeff Baskies, Esq. is the new ActionLine liaison.

Action Item

Trust Law - Angela Adams, Chair: Angela Adams reported on the Committee's action item regarding changes to F.S. § 736.0708(1) clarifying the law on trustee fees when multiple trustees are serving. Under the proposed new statute each trustee is entitled to reasonable compensation and the total amount charged as between multiple trustees can be more than what is considered reasonable for just one trustee. Under the *West Coast Hospital* case multiple trustees were required to share one fee, unless special circumstances existed. The proposed amendment to the statute would clarify that multiple trustees may receive more than a single fee.

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

The Task Force plans to report back with its progress at the February 2016 RPPTL meeting.

Daubert Task Force - Manuel Farach reported that the legislature adopted the Daubert evidentiary standard in Florida. There is a move (mostly among the trial lawyers) to have the Florida Supreme Court hold that evidentiary standards are rules of court and thus within the purview of the Court, and that the Frye standard should be adopted as the evidentiary standard in Florida. The Daubert Task Force was formed to investigate, develop and present the Section's position to the Florida Board of Governors.

Year-End Committee Chair Reports

The requests for these reports have been distributed by the Division Director to the chairs of each committee. In addition to providing great information about what each committee has done for the year, the Executive Council ("EC") uses these reports to make suggestions for appointments to leadership positions in each committee and the EC.

Legislative Protocols and Timing

The Division Director and Steve Mezer spoke about the 2017 legislative session. RPPTL has instituted a two-meeting process prior to any legislation going to vote at the EC level. At the first EC meeting, the proposed legislation should be circulated and discussed at the committee meeting level and then brought to the appropriate Division at the Roundtable as an informational item. At the second EC meeting, the legislation would go to vote before the appropriate Division at Roundtable and, if approved, would then be brought before the EC as an informational item. Assuming the proposed legislation, and any revisions thereto, is still approved by the appropriate Division, then, at the next (third) EC meeting, the legislation can be brought before the EC for an approval vote.

Additionally, prior to presenting the legislation at the committee level, the bill proponents must work with the RPPTL Legislation Committee to obtain initial approval to present the legislation. This means that, for 2017 legislation, all legislative proposals will have to be ready as an informational item at the Roundtable meetings at the February 2016 EC Meeting, so that the proposed legislation can go before the EC as an informational item at the May 2016 EC Meeting, and then up for an approval vote by the EC at the July 2016 EC Meeting.

Please note the following reminders:

- The legislative process memo is available on the RPPTL website and Steve Mezer and Tae Bronner are available to assist with questions.
- When responding to bills, an explanation of the reason for your response is necessary, as is the need to keep comments to lawyerly and technical advice. Political or self-serving reasons and comments are not helpful.

See "Real Property Division," next page

PROBATE & TRUST DIVISION

Committee Reports

Estate & Trust Tax Planning – David Akins, Chair: David Akins reported on the Committee's successful joint seminar with the Asset Protection Committee and thanked many of the Executive Council members who spoke and participated in the seminar. David also reported on committee activity concerning its ongoing study relating to possible changes to F.S. § 689.151 regarding the unities necessary for the creation of tenancy by entirety interests in certain types of assets.

Probate & Trust Litigation - Jon Scuderi, Chair: Jon Scuderi reported that the Committee is helping to draft the Daubert Report, along with various other members from other committees that are also assisting in the effort. The Committee is drafting a whitepaper relating to the recent senate and house resolution to limit the amount of terms served by an appellate judge. The Committee is also working on addressing HB 557 which aims to expand the standing one may have to bring an action against the abuser of a vulnerable adult.

Probate Law and Procedure - John Moran, Chair: John Moran reported on the upcoming seminar put on by the Committee, scheduled for December 4, 2015. John also reported on the status of the Committee's Will Depository project.

Digital Assets and Information Study - Eric Virgil, Chair: Eric Virgil reported that Senator Hukill's Bill (Bill 494) was introduced to the Senate Judiciary Committee. If the Bill passes it will be effective July 2016 and should reflect, for the most part, the form and content of the Bill as submitted.

Elective Share Review Committee - Lauren Detzel and Charlie Nash, Co-chairs: Lauren Detzel and Shane Kelley reported on homestead issues as it relates to the elective share statutes. The Committee is expecting to have a draft Bill, revising the elective share statutes, by February or June, 2016. The Committee would like to get the Bill considered for the 2017 legislative session. One of the revisions to the statutes will include changes to the interplay between a homestead asset and the elective share calculation. These revisions to the statute are prompted by the disparity that results in the value of the elective share when the homestead is titled in a tenancy by the entirety verses when it is protected homestead and titled in the decedent's sole name. Under the tenancy by the entirety scenario, one half of the value of the homestead is included in the elective share calculation and one half of the value is also counted toward satisfying the elective share. Under the latter scenario, the elective share calculation excludes the value of the homestead and its value does not enter into satisfaction of the elective share.

Asset Protection – George Karibjanian, Chair: George Karibjanian reported that the Committee continues to

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

Section Website and Committee Webpages

The Division Director commented that the RPPTL website and committee pages are a great resource and that committees should be using the pages and uploading content to them.

Salome Zikakis shared the following regarding committee websites:

- Committee Chairs have authority to attach agendas, minutes, set up tabs, and delegate authority to one other person. Contact Neil Shoter or Bill Parady with any questions. Once you attach agendas and other items as exhibits, they are accessible through the RPPTL App.
- Regarding listserves, the webmaster has to do this. There is a tutorial on the RPPTL website regarding this topic.
- Committees can also use GoToMeeting and GoToWebinar to have committee meetings. There is information on the RPPTL website concerning this topic, as well.

Rob Freedman announced that we would continue to use the RPPTL App at future meetings. The goal is for the App to be available at least two days prior to each RPPTL meeting.

Committee CLE/Publications Objectives

Bob Swaine presented on CLEs. Each substantive committee is required to produce a CLE at least once a year, which can be an in-person CLE or via webinar or live video feed. Committees should plan at least two months out so that materials can be put together and the CLE can be well-marketed. The producing committee should be prepared to help publicize it to garner greater support and attendance.

Regarding Publications, Silvia Rojas presented on ActionLine. She continues to encourage members to write articles for ActionLine and the Florida Bar Journal and reminded the Division that ActionLine article deadlines for upcoming ActionLines are posted on page 4 of the ActionLine. Doug Christie advised the Division that RPPTL puts forth ten articles for the Florida Bar Journal (five from the Real Property side and five from the Probate side) per year. Members interested in contributing articles should review the Florida Bar Journal's website for guidelines, criteria and procedures.

Committee Reports

Development and Land Use Planning - Vinette Godelia, Chair: The Committee had a successful committee meeting with a speaker on Affordable Housing. The Committee is also going to create short video primers on some basic development and land use issues.

Insurance and Surety - Wm. Cary Wright and Scott P. Pence, Co-Chairs: They meet the 3rd Monday of each month at noon and have a CLE portion on each call. This spring they will be doing a series on risk management issues.

See "Real Property Division," next page

PROBATE & TRUST DIVISION

discuss the Berlinger decision, which is being studied by the Ad Hoc Spendthrift Committee. George advised that an update was given at the Committee meeting on the Biel Reo, LLC, decision and possible conflicts with Florida's Uniform Fraudulent Transfer Act ("UFTA"). George also reported on the Committee's continued review of the Uniform Voidable Transfers Act ("UVTA") and the comments to the UVTA. In its study of the UVTA, the Asset Protection Committee is also working with the Homestead Issues Study Committee (a General Standing Division committee) to consider possible conflicts in the enforcement of foreign judgments resulting from UVTA cases and how enforcement of these judgments affect Florida homestead. George reported that the Committee is working with the Business Law Section to discuss some of these issues and concerns.

Attorney/Trust Officer Liaison Conference - Laura Sundberg, Chair: Debra Boje congratulated Laura Sundberg on the success of ATO this year. Laura attributed the success to the great work of the Committee and the fantastic line-up of speakers at the Conference. ATO participants enjoyed the benefits of the new App feature. Laura reported that the Section had national level speakers this year and the Committee is hard at work, already, to come up with a great agenda for next year. The next ATO Conference is scheduled for June 23-26, 2016, at The Breakers.

Guardianship, Power of Attorney & Advance Directives - Hung Nguyen, Chair: Hung Nguyen reported that the Bill relating to the appointment of health care surrogates for minors passed and became effective October 31, 2015. There are several CLE seminars taking place regarding overall guardianship law aimed at keeping people informed as to the many recent changes in the law in 2015 and those changes scheduled for 2016. The Committee is also working on numerous projects including proposed changes to F.S. § 744.441 relating to funeral expenses; proposed legislation to address the decision in the *Shen v. Parks* case dealing with admissibility of examining committee reports; a study of the *Olshen v. Romano* case, which involves allowing the ward to access tenancy by the entirety funds to cover guardianship expenses over the objection of the spouse; and a study regarding how divorce occurs within the context of a guardianship. Finally, the Committee is studying the concept of licensing of professional fiduciaries.

Wills, Trusts & Estates Certification Review Course - Jeffrey Goethe, Chair: Jeffrey Goethe reported that the annual course is scheduled for April 8 and 9, 2016. It was a challenge to replace Professor Powell, but the Committee has successfully lined up a great group of speakers, including Professor Calfee and Professor McCouch from University of

See "Probate & Trust Division," next page

Roundtables, from page 32

REAL PROPERTY DIVISION

Real Estate Certification Review Course - Jennifer Tobin, Chair: The Real Estate Certification Review Course is scheduled for February 19-20, 2016, at the Rosen Shingle Creek Resort in Orlando.

Real Property Finance & Lending - David Brittan, Chair: The Committee voted to refer the bill on authorization of sales of property by receivers in impending foreclosure cases to the legislative committee.

Residential Real Estate and Industry Liaison (RREIL) - Salome Zikakas, Chair: A subcommittee is still working on the issue of retainer letters and is requesting input from members. Discussion was had that the retainer letter needs to include a statement whereby the client consents to a title insurer's audit of the attorney trust accounts and that it needs to address the ethical considerations of who the attorney is representing in each transaction. Fred Jones reported that the 2015 FR/BAR Residential Contract and Riders are on the Committee website.

Title Insurance & Title Insurance Liaison - Raul Ballaga, Chair: Discussion was had about HB413/SB548 that increases the single-risk limit on title insurers.

General Standing Committee Report

Membership & Inclusion Committee: Lynwood Arnold and Jason Ellison Co-Chairs: Lynwood Arnold reported. Lynwood asked all Committee Chairs to encourage newer members to join this Committee, as there are a lot of opportunities and needs for getting new members involved.

Adjournment

The next Real Property Division Roundtable meeting will be held at 3:00 p.m. on Friday, February 26, 2016, at the Tampa Marriott Waterside. There being no further business to be discussed, the Division Director adjourned the Roundtable meeting at 4:45 p.m.

PROBATE & TRUST DIVISION

Florida. Many other qualified speakers, including members of the Executive Council, have also volunteered to speak. There will be an ethics component to the course, and flyers will be available as of January 2016.

Ad Hoc Guardianship Law Revision - David Brennan, Chair: Sancha Whynot gave the report stating that the Committee is engaged in ongoing meetings to address future revisions to the Florida Guardianship Law and it will have more to report as the Committee's work progresses. Sancha thanked the Gunster firm for providing video conferencing at the meetings so that committee members can attend from afar.

Ad Hoc Study Committee on POLST - Jeff Baskies and Tom Karr, Co-Chairs: Tae Kelley Bronner reported on behalf of the Committee. Tae explained that POLST is an acronym for physician ordered life sustaining treatment. Basically, it's an order entered by a physician which order makes determinations of treatment one might receive. Tae advised that the Section was provided a copy of proposed legislation that was being introduced to adopt POLST in Florida. Due to concerns regarding implementation of POLST in Florida, the Section created the Ad Hoc POLST Committee to study the proposed legislation and the POLST movement in general. As a result of the Committee study the Section submitted comments to the proposed legislation.

Ad Hoc Committee on Spendthrift Trust Issues - Lauren Detzel and Jon Scuderi, Co-Chairs: Lauren Detzel reported that the Committee is continuing to study the issues raised in the decision in the Berlinger case.

General Standing Committee Report

Legislation Committee - Tae Kelley Bronner, Chair: Tae thanked everyone for being responsive to her requests for review and comments as to legislation sponsored both by the Section and others.

Adjournment

The next Probate and Trust Law Division Roundtable meeting will be held at 3:00 p.m. on Friday, February 26, 2016, at the Tampa Marriott Waterside. There being no further business to be discussed, the Division Director adjourned the Roundtable meeting at 4:45 p.m.

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Injury is Nearly a Fact, While Rip and Tear is No Longer a Wild Card

By Erin E. Banks, Esq., and J. Derek Kantaskas, Esq., Carlton Fields, Tampa, Florida

Florida courts have long struggled to find consensus regarding the trigger of coverage under the standard language of commercial general liability ("CGL") policies. However, it appears there is a steady movement towards the injury-in-fact theory, as evidenced by the Eleventh Circuit's recent decision in *Carithers v. Mid-Continent Casualty Co.*[1] The *Carithers* decision not only reaffirmed the injury-in-fact trend in Florida, but also clarified that "rip and tear" or "get to" damages may be covered damages under a CGL policy if defective work is required to be removed and replaced in order to repair damage to other property.

Trigger of Coverage

Historically, Florida courts interpreting when "property damage" caused by an "occurrence" triggers coverage under a CGL policy fell within one of four theories: (1) injury-in-fact, (2) manifestation, (3) continuous trigger, or (4) exposure. Although Florida law is not entirely clear, the most recent federal decisions applying Florida law reaffirm the Sunshine State's progression to a full endorsement of the "injury-in-fact" trigger theory.[2]

To fully appreciate the current progression toward "injury-in-fact," it is important to first look back at the history of the courts' trigger analysis. Under the injury-in-fact approach, injury triggering insurance coverage occurs at the moment of actual damage – the date of discovery is irrelevant.[3] Coverage under the injury-in-fact approach requires that the damage occur during the policy period.[4] In contrast, the manifestation theory suggests that property damage under the insurance policy occurs when the damage is discovered. [5]

In *Trizec Properties, Inc., v. Biltmore Const. Co., Inc.,*[6] the Eleventh Circuit adopted the injury-in-fact approach for a policy requiring an insured to cover "property damage … caused by an occurrence" where the underlying complaint alleged that a roof deck had been negligently installed causing water intrusion damage.[7] The policy defined property damage as "physical injury to or destruction of tangible property occurring during the policy period."[8] For coverage to apply, the damage was required to occur during the policy period.[9] Based on this requirement, the Eleventh Circuit adopted an injury-in-fact approach, finding that the policy only required that the damage occur during the policy and there was "no requirement that the damages 'manifest' themselves during the policy period" to trigger coverage.[10]

Similarly, in *Voeller Const., Inc. v. Southern-Owners Ins. Co.*,[11] the Middle District adopted and applied the injury-in-fact theory to a similar policy requiring that damage occur during the policy period to trigger coverage.[12] Moreover, another recent Middle District case, *Trovillion Const. & Dev., Inc. v. Mid-Continent Gas. Co.*,[13] applied the injury-in-fact theory to another standard policy, stating:

> The CGL policies that MCC issued to Trovillion were "occurrence" policies, meaning that the insurance covers "bodily injury" or "property damage" that "occurs during the policy period" and is caused by an "occurrence" that takes place within the coverage territory. Thus, coverage under the MCC policies is not triggered until property damage "occurs." The Florida Supreme Court has not yet clarified when property damage "occurs" for coverage purposes, and trial courts apply varying trigger theories. Some courts apply the injury-in-fact trigger, "under which damage 'occurs' at the moment there is actual damage and the date of discovery is irrelevant." Others apply variations of the manifestation trigger, under which damage occurs when it is discovered or becomes discoverable …. The Court is persuaded by the *Axis Surplus* analysis that the injury-in-fact rule is the most appropriate trigger theory for occurrence policies.[14]

With the backdrop of *Voeller Const.* and *Trovillion,* the Eleventh Circuit's 2015 decision in *Carithers* inches toward, but stops short of, an endorsement of the full progression toward injury-in-fact as the accepted trigger for CGL policies in Florida because it contains clear limiting language to emphasize Florida law is *somewhat* still unsettled.[15] *Carithers* concerned a dispute over the scope of coverage available under a post-1986 CGL policy issued by Mid-Continent Casualty Company ("Mid-Continent") to a homebuilder, Cronk Duch. The policy at issue was nearly identical to the policies reviewed by the *Voeller Const.* and *Trovillion* courts. The Carithers sued their general contractor, Cronk Duch, for construction defects in the Carithers' home relating to faulty electrical systems, incorrect application of exterior brick coatings, improperly installed tile, and a faulty balcony that contributed to extensive water intrusion. Mid-Continent refused to defend Cronk Duch under the CGL policy. As a result, Carithers and Cronk Duch entered into a consent judgment that assigned Cronk Duch's rights to Carithers so the homeowners could pursue the judgment amount from Mid-Continent.

The Eleventh Circuit affirmed the Middle District's granting of summary judgment in favor of the Carithers, finding that the proper "trigger" for determining if property damage "occurred" during the policy period is the date of the *actual* damage ("injury-in-fact"), rather than when the damage is discovered or could have been discovered by reasonable inspection,

as urged by Mid-Continent ("manifestation"). Despite this holding, the question over the proper "trigger" on coverage is still in doubt in Florida, as the Eleventh Circuit limited its decision "to the facts of this case, and express[ed] no opinion on what the trigger should be where it is difficult (or impossible) to determine when the property was damaged."[16] The court creatively held the Middle District "did not err in applying the injury-in-fact trigger in this case" – while not fully approving this trigger as Florida law.[17] The court also held that the uncertainty of the law in this area required Mid-Continent "to resolve this uncertainty in favor of the insured and offer a defense to Cronk Duch."[18]

Even with these recent decisions inching toward a full acceptance of injury-in-fact, it is worth noting, however, that some courts have still relied on the old First DCA's decision in *Travelers Ins. Co. v. C.J. Gayfer's & Co., Inc.*[19] to conclude that Florida still follows the "manifestation approach."[20]

This reliance, however, is likely misplaced because, unlike *Trizec*, the *Gayfer's* court did not address the issue of when damage occurs in order to trigger coverage.[21] Instead, *Gayfer's* examined whether the negligent act that caused the damage must have occurred during the policy period to trigger coverage or if the actual damage had to have happened during the policy period.[22] As the court in *Axis Surplus Inc. Co. v. Contravest Const. Co*.[23] noted in its critique of *Gayfer's:*

> To resolve this issue, the *Gayfer's* court looked at the definition of "property damage" contained in the policy, which stated that "property damage means the physical injury to or destruction of tangible property which occurs during the policy period including the loss of use thereof at any time resulting therefrom, or ... loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period." *Id.* at 1201 n. 1. The court determined that the language of the policy was unambiguous and that the damage itself—not just the negligent act—had to occur during the policy period. *Id.* at 1202 ("We find ... that the phrase 'caused by an occurrence' informs the insured that an identifiable event other than the causative negligence must take place during the policy period."). In explaining its holding, the court stated that "[t]he term 'occurrence' is commonly understood to mean the event in which negligence manifests itself in property damage or bodily injury, and it is used in that sense here." *Id.* at 1202.

Subsequently, some courts adopted *Gayfer's* definition to mean that Florida courts now follow the manifestation theory approach.[24] But, as the *Trovillion* court noted*:*

> Specifically, the court in *Axis Surplus* traced the manifestation lines of cases back to *Travelers Insurance Co. v. C.J. Gayfer's & Co.*, 366 So. 2d 1199, 1200 (Fla. 1st DCA 1979), which reasoned that "[t]he term 'occurrence' is commonly understood to mean the event in which negligence manifests itself in property damage or bodily injury, and it is used in that sense here." *Axis Surplus*, 921 F. Supp. 2d at 1347. Based on this line, several courts have concluded that Florida applies a manifestation trigger theory. *See id.* (collecting cases). **Upon closer review, however, *Gayfer's* is one of many "decisions sometimes cited as following the manifestation rule, and which indeed use a form of the word 'manifest' in their analysis, [but] do not actually follow the manifestation rule as opposed to the [injury-in-fact] rule, because they were not concerned with the latent damages where these two rules diverge.**" *Id.* (quoting *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W. 3d 20, 27 (Tex. 2008)). Rather, these courts distinguish address [sic] the lag between the time of an insured's negligent work and the time of the resulting property damage, not the lapse between the time that property damage first occurs and the time that it first becomes discoverable. *Id.* at 1348. Those cases that have addressed "the latent damages where these two rules diverge" have ultimately applied the injury-in-fact trigger theory, and this Court will follow their lead. *See, e.g.*, *Trizec*, 767 F.3d at 813. [emphasis added][25]

Although Florida law is not entirely clear or settled, a court interpreting coverage under a standard, post-1986 CGL policy might be inclined to follow the injury-in-fact theory as it best comports with the language of most CGL policies and enjoys greater precedential support under *Carithers, Voeller Const.* and *Trovillion*.

Coverage for "Get To" or "Rip and Tear" Damages

In addition to steering Florida jurisprudence towards the "injury-in-fact" harbor, the trial court in *Carithers* also found Mid-Continent liable for the "rip and tear" or "get to" costs to repair a defectively installed balcony (which was not property damage because it was the defective work of a subcontractor) because the balcony had to be replaced in order to repair damage to the garage (which was property damage). Essentially, the Carithers were entitled to the "rip and tear" or "get to" damage of replacing the balcony to get to the property damage (i.e., the damage to the garage).

The Eleventh Circuit held that the district court did not err in awarding damages for the cost of repairing the balcony, finding that under Florida law the Carithers had a right to "the costs of repairing damage caused by the defective work…." The court noted that the parties agreed that the Supreme Court of Florida's two decisions, *United States Fire Insurance Co. v. J.S.U.B., Inc.*[26] and *Auto-Owners Insurance Co. v. Pozzi*

Window Co.,[27] governed the case. According to these cases "faulty workmanship or defective work that has damaged the otherwise nondefective completed project had caused 'physical injury to tangible property' within the plain meaning of the definition of the policy."[28] The Eleventh Circuit stated, however, "there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'"[29] Finally, the Eleventh Circuit articulated an example "where a homeowner purchases tangible property – such as a window – which is defectively installed by a subcontractor, the damage to that tangible property caused by the defective installation constitutes property damage," citing *Pozzi* at 1249.

Applying the analyses set forth in *J.S.U.B.* and *Pozzi*, the Eleventh Circuit found the Carithers could recover for repairing defective work where the repairs were a necessary cost of repairing other work for which there was coverage, holding "[s]ince the district court determined that repairing the balcony was part of the cost of repairing the garage, which was defective work, the Carithers were entitled to those damages."[30]

Although *Carithers* moves one step closer to a full adoption of the injury-in-fact trigger application, litigants will have to rip and tear their way through the next case to find out for sure. What is clear, however, is that the recovery of "rip and tear" damages is no longer as unresolved as it once was.

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Endnotes

1 782 F.3d 1240 (11th Cir. 2015).

2 *Id.*; *Voeller Const., Inc. v. Southern-Owners Ins. Co.*, 2014 WL 1779289 (M.D. Fla. May 5, 2014); *Trovillion Const. & Dev., Inc. v. Mid-Continent Cas. Co.*, 2014 WL 201678 (M.D. Fla. Jan. 17, 2014); and *Axis Surplus Ins. Co. v. Contravest Const. Co.*, 921 F. Supp. 2d 1338, 1348 (M.D. Fla. 2012).

3 *Trizec Properties, Inc. v. Biltmore Const. Co.*, 767 F. 2d 810, 812 (11th Cir. 1985).

4 *Id.*

5 *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 485 F. Supp. 2d 1302, 1309 (M.D. Fla. 2006).

6 767 F. 2d 810.

7 *Id.*

8 *Id.* at 812.

9 *Id.*

10 *Id.*

11 2014 WL 1779289 (M.D. Fla. May 5, 2014).

12 *Id.* at **3-4 (finding allegations in the complaint that physical damage occurred after building was completed and before an inspection of the property, all of which happened during the policy period, was sufficient to establish occurrence for indemnity).

13 2014 WL 201678 (M.D. Fla. 2012).

14 2014 WL 1779289 at **4-5 (internal citations omitted); *See also Axis*, 921 F. Supp.2d at 1346-48 (reviewing the case law supporting both interpretations and concluding that the injury-in-fact trigger better comports with CGL policy language and enjoys greater precedential support).

15 Because the Florida courts have not definitively decided which approach to adopt, the *Carithers* court undertook the common federal court approach of anticipating how the state courts would rule on the unanswered question of law.

16 782 F. 3d 1240, at 1247 (11th Cir. 2015)

17 *Id.*

18 *Id.* at 1246

19 366 So. 2d 1199, 1201-02 (Fla. 1st DCA 1979).

20 *See, e.g., Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d 1248, 1266 (M.D. Fla. 2012) (relying on *Gayfer's* and noting that "Florida courts follow the general rule that the time of occurrence within the meaning of an 'occurrence' policy is the time at which the injury first manifests itself.").

21 *Axis Surplus,* 921 F. Supp 2d at 1348.

22 *Gayfer's,* 366 So. 2d at 1201-02.

23 *Axis Surplus,* 921 F. Supp. 2d at 1347.

24 *Auto Owners*, 227 F.Supp.2d at 1266.

25 *Trovillion* at n. 3.

26 979 So. 2d 871 (Fla. 2007).

27 984 So. 2d 1241 (Fla. 2008).

28 *J.S.U.B.*, 979 So. 2d at 889.

29 *Carithers,* 782 F. 3d at 1249, citing *J.S.U.B.* at 889.

30 *Carithers,* 782 F. 3d at 1251

Florida Fair Foreclosure Act – Legislative Attempt To Expedite Foreclosure Proceedings

By Arlene C. Udick, Esq., The Villages, Florida*
on behalf of the Real Property Litigation Committee

Introduction

The foreclosure crisis substantially increased the caseload for the Florida trial court system, requiring increased judicial resources and supplemental funding from the Florida Legislature.[1] In an attempt to alleviate this crisis, in 2013 the Legislature passed Chapter 2013-137, commonly known as the Florida Fair Foreclosure Act.[2] This article addresses the Supreme Court's response to the procedural aspects of two sections of the Act.[3] Specifically, to implement the Act, the Court adopted Rule 1.115, and modified three existing foreclosure-related forms.[4]

Analysis

The Florida Fair Foreclosure Act created Sec. 702.015, F.S.[5] The legislative intent of the new section was to expedite the foreclosure process by ensuring initial disclosure of a plaintiff's status and the facts supporting that status, thereby ensuring the availability of documents necessary to the prosecution of the case.[6] The new provisions, among other things, detailed the required content of a complaint seeking to foreclose on certain types of residential properties with respect to the authority of the plaintiff to foreclose on the note and the location of the note; authorized sanctions against plaintiffs who fail to comply with the complaint requirements; and provided for non-applicability to proceedings involving timeshare interests.

The Act also amended Sec. 702.11, F.S., the alternative foreclosure procedure. The amendments addressed adequate protection for lost, destroyed or stolen notes in mortgage foreclosure actions and listed the acceptable reasonable means of providing adequate protection, "if so found by the court."[7]

Sec. 702.11(1), F.S., provides some guidance as to what constitutes a reasonable means of providing adequate protection under Sec. 673.3091, F.S.,[8] if so found by the court:

(a) a written indemnification agreement by a person reasonably believed sufficiently solvent to honor such an obligation;
(b) a surety bond;
(c) a letter of credit issued by a financial institution;
(d) a deposit of cash collateral with the clerk of the court; or
(e) such other security as the court may deem appropriate under the circumstances.

The statute further states that "[a]ny security given shall be on terms and in amounts set by the court, for a time period through the running of the statute of limitations for enforcement of the underlying note, and conditioned to indemnify and hold harmless the maker of the note against any loss or damage, including principal, interest, and attorney fees and costs, that might occur by reason of a claim by another person to enforce the note."[9]

Finally, acknowledging the Court's exclusive role in adopting rules of procedure for the court system, the Act requested that the Court amend the Florida Rules of Civil Procedure "to provide expedited foreclosure proceedings in conformity with the act and … develop and publish forms for use in such expedited proceedings."[10]

In response, the Supreme Court of Florida on January 14, 2016, issued final amendments to the Florida Rules of Civil Procedure to implement the Florida Fair Foreclosure Act.[11] These amendments were initiated by the Civil Procedure Rules Committee, which filed a "fast-track" out of cycle report, pursuant to Florida Rule of Judicial Administration 2.140(e), proposing amendments to the Florida Rules of Civil Procedure in response to the legislative change.[12] The Court considered the Committee's report and proposals and on December 11, 2014, the Court issued an opinion adopting the proposals and providing a sixty day comment period.[13] After the comment period expired, the Court adopted the new Rule 1.115 and made the following changes to the Civil Procedure forms.

New Rule 1.115 (Pleading Mortgage Foreclosures). New Rule 1.115 specifically governs pleading requirements in foreclosure actions. The rule incorporates the requirements of Sec. 702.015, F.S., detailing pleading requirements where the plaintiff is the holder of the original note secured by the mortgage, where the plaintiff has been delegated authority to institute an action on behalf of another who is entitled to enforce the note, and where the plaintiff seeks to enforce a lost, destroyed, or stolen note. New Rule 1.115 closely tracks the language of the statute. The first sentence of subdivision (a) of the rule is amended to clarify that the rule is intended to govern foreclosure of a mortgage or lien that is secured by a promissory note on residential real property. Subdivision (d) of the rule is amended to add a reference to Sec. 702.11, F.S., for completeness and clarity of "the adequate protections which must be provided before entry of judgment." Subdivision (d) of the rule addresses lost, destroyed or stolen instruments. In such cases the claimant is required to provide "adequate protection" against "loss that might occur by reason of a claim by another person to enforce the instruments."[14]

Form 1.944(a) (Mortgage Foreclosure). This form is to be used only in mortgage foreclosure cases where the location of the original note is known. The form addresses the issues

of delegated authority to institute a mortgage foreclosure action and certification of possession of the original note. As with new Rule 1.115, the amendments that were made to this form closely follow the requirements for pleading set forth in Sec. 702.015 Florida Statutes (2015).[15] Paragraph (3) (c) has been amended and a new paragraph (3) (d) was added. The amendments provide separate choices where the delegated authority to institute the action comes from the holder of the original note and where it comes from one who is not the holder but who is otherwise entitled to enforce the note.

Form 1.944(b) (Mortgage Foreclosure). This mortgage foreclosure complaint form is for use in mortgage foreclosure cases where the location of the original note is unknown. It incorporates the pleading requirements for such cases set forth in Sec. 702.015(5), F.S. (2015). It also incorporates the requirements of Sec. 673.3091, F.S., (Enforcement of lost, destroyed, or stolen instrument).

Form 1.944(c) (Motion for Order to Show Cause) and Form 1.944(d) (Order to Show Cause). Form 1.944(c) is a motion for an order to show cause for entry of final judgment of foreclosure. Form 1.944(d) is an order to show cause to be issued following the filing of the motion for an order to show cause. These forms are meant to be used in proceedings under Sec. 702.10, F.S. (2015). Paragraph 7 of form 1.944(c) and paragraph 10 of form 1.944(d), referring to homestead status was deleted.

Motion for Re-Hearing

On January 27, 2016, Margery Golant, an attorney from Boca Raton, filed a motion for rehearing of the Supreme Court's decision approving Rule 1.115, Fla. R. Civ. Pro., and forms 1.944(a) & (b). The petitioner expresses concern that the forms are based on the premise that the mortgage subject to the foreclosure is securing a negotiable instrument, and that the form complaints would be inappropriate if the mortgage does not secure a negotiable instrument.

The petitioner is technically correct. Sec. 702.015, F.S., refers to "promissory notes" rather than "negotiable instruments," but then refers to Sec. 673.3011, F.S., which only applies to negotiable instruments. A negotiable instrument is an unconditional promise or order to pay a fixed sum which is payable to bearer or to order; is payable on demand or at a definite time; and which has no undertakings other than the payment of money (with certain exceptions). So in the narrow range of circumstances where one is dealing with a nonnegotiable promissory note, the provisions of Sec. 702.015, F.S., (mirrored in Rule 1.115) are confusing and potentially problematic.

The petitioner's concern is over the forms, rather than the Rule. While the forms are drafted based on a mortgage securing a negotiable promissory note, there is nothing in the forms suggesting that these forms are appropriate in all circumstances. It is not possible to anticipate all possible circumstances. The forms work for a significant majority of foreclosure actions.

Conclusion

The petitioner's request that the comments to the forms clarify that the forms are only appropriate for negotiable instruments, is unobjectionable. However, the goal of having a final Rule and forms more than 2.5 years after HB 87 passed may far outweigh the petitioner's desire to clarify the scope of the forms.

*Special Thanks to Brian D. Leebrick, Paul A. Blay and Stacy O. Kalmanson for their assistance in preparing this article.

Arlene Udick *practices law in The Villages where she focuses her practice on commercial law and commercial and residential real estate law. Arlene serves on the Executive Council of the Real Property Probate and Trust Law Section of the Florida Bar, is Deputy Director of Communications for the At Large Division of the RPPTL Section, lead ALM for the Fifth Judicial Circuit, and legislative liaison for the Landlord Tenant Committee. Arlene received her B.A. from Merrimack College, and her J.D. from the University of New Hampshire. She is a member of the Marion County Bar Association.*

Endnotes

1 In re: Final Report and Recommendations of the Foreclosure Initiative Workgroup, AOSC13-28 (Fla. 2013).

2 2013 Fla. Laws ch. 2013-137. In addition to the matters discussed in this Article, the Florida Fair Foreclosure Act also created § 702.036, Fla. Stat. (2015); requires a court to treat a collateral attack on a final judgment of foreclosure on a mortgage as a claim for monetary damages under certain circumstances; prohibits a court from granting certain relief affecting title to the foreclosed property; provides for construction relating to the rights of certain persons to seek specified types of relief or pursue claims against the foreclosed property under certain circumstances; amends § 702.10 F.S.; revises the class of persons authorized to move for expedited foreclosure to include lienholders; defines the term "lienholder"; provides requirements and procedures with respect to an order directed to defendants to show cause why a final judgment of foreclosure should not be entered; provides that certain failures by a defendant to make certain filings or to make certain appearances may have specified legal consequences; requires the court to enter a final judgment of foreclosure and order a foreclosure sale under certain circumstances; revises a restriction on a mortgagee to request a court to order a mortgagor defendant to make payments or to vacate the premises during an action to foreclose on residential real estate; to provide that the restriction applies to all but owner-occupied residential property; provides a presumption regarding owner-occupied residential property. The law was approved by the Governor on June 7, 2013 and filed on that same date in the Office of Secretary of State.

3 Id. Art. V, §2(a), Fla. Const., gives the Florida Supreme Court the exclusive authority to adopt procedural rules in all state courts.

4 In re Amendments to the Fla. Rules of Civ. Procedure, No. SC13-2384, 2016 Fla. LEXIS 68, at *1 (Jan. 14, 2016).

5 The provisions of §702.015, Fla. Stat. (2015) apply to cases filed on or after July 1, 2013. 2013 Fla. Laws ch. 2013-137 §8.

6 § 702.015(3), Fla. Stat. (2015).

7 § 702.11(1), Fla. Stat. (2015).

8 § 673.3091(2), Fla. Stat. (2015) provides that a person seeking enforcement of an instrument not in possession of that instrument must prove the terms of the instrument and the person's right to enforce the instrument. The Court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

9 § 702.11(1), Fla. Stat. (2015).

10 2013 Fla. Laws ch. 2013-137 § 9.

11 In re Amendments to the Fla. Rules of Civ. Procedure, No. SC13-2384, 2016 Fla. LEXIS 68 (Jan. 14, 2016).

12 Id. at *1.

13 In re Amendments to the Fla. Rules of Civ. Procedure, 153 So. 3d 258, 259 (Fla. 2014).

14 § 673.3091(12), Fla. Stat. (2015).

15 *Id.*

Another Amazing RPPTL Event Inspiring the Next Generation of Lawyers

A big THANK YOU to all speakers and coordinators at the RPPTL event at Florida International University College of Law on February 18th, 2016, and, especially, for taking the time to inspire the next generation of FIU lawyers!

It was an amazing event with about 30 law students in attendance that were more than thankful for the valuable career advice you shared with them. The event was co-sponsored by the FIU Real Property and Trust Law Society whose board did a fantastic job helping Kym and I with the logistics of the event. Special thanks to Silvia Valdez, Chris Pena and Professor Eloisa Rodriguez-Dodd who helped making this event a great success!

Thank you as well for contributing with the RPPTL Membership & Inclusion Committee's efforts of promoting professionalism, diversity and education among those who will be soon joining the practice of law!

Annabella Barboza, Esq.
Membership & Inclusion Committee
Outreach Law School Program

Photos (top to bottom & left to right:

Guest Speakers: Jorja M. Williams, Raúl Perez Ballaga and Amy B. Beller

Kymberlee Smith addressing the students

Kymberlee Smith, Linda Valdes and Nick Castillo (FIU RPPTL student association), Raúl Perez Ballaga and Annabella Barboza.

Florida Bar Board Certification Dates To Remember

Join the many RPPTL Section Members that are
Florida Bar Board Certified Attorneys in the following fields:

REAL ESTATE LAW
CONSTRUCTION LAW
WILLS, TRUSTS AND ESTATES
Note The Following Dates:

REAL ESTATE CERTIFICATION

May 11, 2017, Examination Applicants:

Filing Period Opens: 9/1/16

Filing Period Ends: 10/31/16

Certifications Hours Needed: 45 Real Estate Certification Hours

Time Frame To Have Acquired Hours: 9/1/13 – 10/31/16

2016 Recertification Applicants:

Filing Period Opens: As Soon As Application Is Posted (Early April 2016)

Deadline To Complete Requirements: 7/31/16

Application Must Be Postmarked By: 8/15/16 (Unless A Request For An Extension Is Filed)

Certifications Hours Needed: 75 Real Estate Certification Hours

Time Frame To Have Acquired Hours: 8/1/11 – 7/31/16 (Certified In 1991, 1996, 2001 Or 2006) Or 11/1/10 – 7/31/16 (Certified In 2011)

WILLS, TRUSTS AND ESTATES CERTIFICATION

May 12, 2017, Examination Applicants:

Filing Period Opens: 9/1/16

Filing Period Ends: 10/31/16

Certifications Hours Needed: 90 Wills, Trusts, And Estates Certification Hours

Time Frame To Have Acquired Hours: 9/1/13 – 10/31/16

2016 Recertification Applicants:

Filing Period Opens: As Soon As Application Is Posted (Early April 2016)

Deadline To Complete Requirements: 7/31/16

Application Must Be Postmarked By: 8/15/16 (Unless A Request For An Extension Is Filed)

Certifications Hours Needed: 125 Wills, Trusts, And Estates Certification Hours

Time Frame To Have Acquired Hours: 8/1/11 – 7/31/16 (Certified In 1991, 1996, 2001 Or 2006) Or 11/1/10 – 7/31/16 (Certified In 2011)

CONSTRUCTION LAW CERTIFICATION

May 11, 2017 Examination Applicants:

Filing Period Opens: 9/1/16

Filing Period Ends: 10/31/16

Certifications Hours Needed: 45 Construction Law Certification Hours

Time Frame To Have Acquired Hours: 9/1/13 – 10/31/16

2016 Recertification Applicants:

Filing Period Opens: As Soon As Application Is Posted (Early April 2016)

Deadline To Complete Requirements: 7/31/16

Application Must Be Postmarked By: 8/15/16(Unless A Request For An Extension Is Filed)

Certifications Hours Needed: 75 Construction Law Certification Hours

Time Frame To Have Acquired Hours: 8/1/11 – 7/31/16 (Certified In 2006) Or 11/1/10 – 7/31/16 (Certified In 2011)

CONDOMINIUM AND PLANNED DEVELOPMENT CERTIFICATION (ANTICIPATED DATES)

Applicant Information To: 3/1/17

Filing Period Opens: 7/1/17

Application Must Be Postmarked By: 8/31/17

Certification Hours Needed: 50 Condominium And Planned Development Certification Hours (Anticipated That Certain Real Property Certification Hours Will Apply, To Be Announced By 3/1/17)

Time Frame To Have Acquired Hours: 7/1/14 – 7/1/17

PRACTICE CORNER

Practice Corner is a new column in Actionline dedicated to short practice pointers for Section members. Each edition will include one article covering real estate law and one article covering probate law. The entries are typically submitted by the Section's Fellows.

Witnesses and a Notary are not Necessary for the Execution of a Florida Irrevocable Trust (but why would you do this?)

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

Fiduciaries and attorneys who practice outside the State of Florida often ask Florida attorneys whether it is required to have witnesses and a notary to a person's signature of an irrevocable trust utilizing Florida as its governing law. The Florida attorney's answer is often "yes, however, I'll have my associate check that for you." Florida law has no such requirement.

To execute a will in Florida, the testator (if female, testatrix) must sign his will in the presence of two disinterested witnesses (among other requirements not described in this article). See § 732.502, Fla. Stat. A notary is only required to make a will self-proved and thus more easily admissible to probate. See § 732.503, Fla. Stat. Florida revocable trusts require the same signature formalities as Florida wills. Sec. 736.0403(b), Fla. Stat. describes that the testamentary aspects of a revocable trust, executed by a settlor who is domiciled in Florida at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will. "Testamentary aspects" means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor's estate.

Professor David F. Powell, of Florida State College of Law, authored two Florida Bar Journal articles in 2006 which discussed some of the rationales behind the provisions included in the Florida Trust Code. According to Professor Powell:

> The decision to restrict §736.0403(2) to revocable trusts follows from the committee's belief that compliance with testamentary formalities is justifiable as a matter of principle only for that class of trusts that operate as will substitutes. Revocable trusts serve that purpose, irrevocable trusts do not. Stated differently, irrevocable outright transfers need not comply with testamentary formalities and the committee could find no convincing justification for treating irrevocable transfers in trust any differently.

See David F. Powell, **The New Florida Trust Code**, Part 1, 80 Fla. Bar J. 24 at note 34 (July/August 2006). See also *Brevard County v. Ramsey*, 658 So.2d 1190, 1194 (Fla. 5th DCA 1995) (no witnesses are required to create a trust in land: "[w]itnesses are not required by the statute when a trust of land is created by written declaration by one authorized by law, in this case the owner. . . . All that is necessary is "some writing" which is signed and which manifests an intent to create a trust. . . .").

However, in contrast to the above authorities, it is the author's custom to have clients execute irrevocable trusts with the same formalities of a will whenever possible. The primary reason for doing so is that by using these formalities, the client is indicating to the world that he meant to sign this trust and if there is any doubt, there are witnesses and notary named on said trust instrument who can vouch for the existence of the trust and signatures on the trust. This may entice contracting parties and banks who come in contact with the irrevocable trust to respect the trust for said contracting and banking purposes.

The downside to including witnesses and a notary may be that there are now points of contact to determine whether the trust was signed properly by the settlor, if at all, as well as the administrative inconvenience of having the settlor arrange a time to sign the trust in the presence of three other people.

What to do When you Discover an Error in a Recorded Deed?

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Certainly, this question appears to be a basic one – you correct the deed by recording a "corrective deed." But usually it is not that easy. A deed cannot simply be corrected on its face and re-recorded if an error is discovered. In accordance with Standard 3.2 of The Uniform Title Standards, marketability of title cannot be achieved by the apparent unilateral action of the grantor. A deed containing an error may in fact be an insufficient transfer of the property or the deficiencies may be such that the Clerk of Court may refuse to accept it for recordation. Sec. 695.26, F.S., should be reviewed for the requirements for a deed to be recordable. If you come across a deed with alterations, it requires a higher level of scrutiny to determine its legitimacy. While some errors found in deeds are considered harmless, others can result in incomplete conveyances or worse, conveyance of the wrong property to the wrong person.

The term "corrective deed" is sometimes misunderstood and frequently misused. A corrective deed is actually a new deed that contains the correct legal description, or contains the missing witnesses or acknowledgment or otherwise corrects the defect which caused title not to pass to the proper party. A true corrective deed must be re-executed, witnessed and acknowledged. For example, in *Connelly v. Smith*, 97 So. 2d 865, (Fla. 3d DCA 1957), the court concluded that an essential omission in a legal description within a deed could not be corrected by re-recording the deed after adding the missing description. Some items that must be addressed through a true "corrective deed" include: insufficient or incorrect legal description, lack of witness, failure to obtain joinder of spouse, and improper acknowledgements.

When correcting a deed, it is extremely important to remember the intent of the deed. It is to transfer a specific parcel of property from its current owner (grantor) to the new owner and requires the grantor's signature, witnessed by two individuals and properly acknowledged by a notary public. If there is an error on the deed that has resulted in an incorrect or improper conveyance, regardless of the intent of the parties, a corrective deed must be obtained. In some instances, where for example, more property was conveyed through an inaccurate legal description it may be necessary to obtain and record two deeds: one to return the property to the grantor and a separate deed to convey the correct property.

There are very limited instances where a "corrective deed" may simply be re-recorded. These include instances where a deed has been recorded in the wrong county or when an Exhibit to the deed has been inadvertently omitted. However, re-recording a deed in the latter instance may require an affidavit that the deed was executed and delivered with the exhibit attached. Additionally, there are instances where an error may be corrected in a subsequent deed. These include minor errors in a legal description which do not affect complete identification of the property and where a curative statute may apply. For example, in certain instances missing witnesses may be cured by Sec. 95.231, F.S. (Limitations where deed or will on record) and Sec. 694.08, F.S. (Certain instruments validated…). Some errors, such as misspelling of names or missing dates, may not require correcting at all.

In summary, when reviewing a chain of title, reviewing a deed, or drafting a deed, it is important to remember that attention to detail is absolutely required. Question and double-check everything. You should never accept alterations on the face of a deed at "face" value. Most importantly for your client, you should properly correct any defects you come across.

Real Estate Case Summaries

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The trial court is unable to grant relief that is not argued in a motion for summary judgment and thereby not before the trial court. Suit may be brought independently for a judgment on a note or mortgage because the agreements are separate. As such, a party may bring suit on a note without foreclosing on a mortgage.

Zander v. Cima, 2105 WL 70746657 (Fla. 2d DCA 2015)

Seller, Zander, entered into a residential purchase and sale agreement with the Cimas, and in that agreement, agreed to hold a mortgage and note on the property for the principal balance for two years, following certain monthly periodic payments to be made and a final balloon payment on the mortgage. The Cimas stopped making payments when the husband and wife commenced divorce proceedings. The trial court entered the first partial summary judgment against Zander, determining that Zander may not proceed on an action on the note without foreclosing on the mortgage as well. This finding, without the benefit of a transcript from the hearing, rested on the argument that Zander improperly failed to meet the requirements of Fla. Stat. § 697.05 (imposing certain requirements related to balloon mortgages), and provided Zander leave to amend the Complaint. Zander filed her Fifth Amended Complaint. Thereafter, despite there being no record that the Cimas filed another motion for summary judgment, the trial court entered, without a hearing, a final judgment in favor of the Cimas, and did not identify any basis for the ruling. At a later hearing, the trial court, although declining to discuss the ruling, stated that trial court determined that the mortgage failed to meet the requirements of Fla. Stat. § 697.05.

The Second District Court of Appeal reversed the trial court in finding that a motion for summary judgment may only be granted upon grounds substantially argued in the motion. The court further held that the trial court›s basis was not raised in a motion for summary judgment and that the trial court was incorrect as a matter of law. The court held that a note and mortgage are distinct agreements, and an action can be brought for judgment on the note without foreclosing on the mortgage. Further, the basis of the argument for the summary judgment was wrong as Fla. Stat. § 697.05 does not apply to first mortgages, unless it relates to a home improvement contract, and as such, did not apply in this instance. Moreover, Fla. Stat. §697.05(4)(g) exempts any mortgage granted to a purchaser by a seller pursuant to a contract to purchase the property where there is a balloon payment at the conclusion of the mortgage that exceeds the amounts of the periodic payments.

The doctrine of res judicata will bar claims that are brought in a separate suit if the claims are essentially connected to an eviction action. An unjust enrichment action may be brought for improvements to the property outside the scope of a lease.

Sena v. Pereira, 179 So. 3d 433 (Fla. 4th DCA 2015)

This case is a dispute over an agreement, a "Contract For Option", that provided the tenant an option to purchase the property. After the expiration of the written lease, the landlord successfully brought an action for eviction, which included among other arguments, that the tenant received written notice terminating a month to month tenancy following the expiration of the lease. As part of the affirmative defenses, the tenant claimed that the landlord breached the option, which the tenant claimed was an essential part of the agreement. Nevertheless, the trial court entered a judgment for eviction, except the trial court did not address the tenant's affirmative defenses. Instead of filing an appeal, the tenant brought a second action for specific performance, fraud in the inducement and unjust enrichment. The trial court granted the landlord's motion for summary judgment on all claims (including recovery of attorneys' fees and costs) based on the doctrine of res judicata because the tenant could have raised the claims during the eviction action.

The Fourth District Court of Appeal affirmed, in part, the trial court's order on the landlord's motion for summary judgment for specific performance of the option contract to purchase the property and for fraudulent inducement claims based on the application of the doctrine of res judicata finding that claims were barred because they could have been raised during the eviction action. The court reversed, in part the trial court's order on the landlord's motion for summary judgment for unjust enrichment finding a genuine issue of material fact in that the landlord may have been unjustly enriched by improvements to the property by the tenant, and that res judicata did not bar the tenant's claim for unjust enrichment. Lastly, the court reversed landlord's award of attorneys' fees and costs pursuant to Fla. Stat. § 57.105 because the tenant's claims were not "so devoid of merit on the facts and law as to be completely untenable."

The Fourth District Court of Appeal determined that the tenant's specific performance claim was barred by the eviction claim. The court explained that the tenant's allegation in the second suit that the option was an essential part of the lease

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transaction could have been raised in the eviction proceedings, and if this argument had been raised, then a judgment for eviction would not have been granted. In applying the transaction test for the doctrine for res judicata cases, the court reasoned that the specific performance claim should have been brought during the eviction action due to the essential connection between the option and the lease. The transaction test for res judicata cases states that there is an identity to each cause of action not only with respect to every question which is decided in an earlier suit, but also with respect to every other matter which parties might have litigated and have determined within the issues framed in the pleadings or incident to or essentially connected with the subject matter of the first litigation.

Similarly, the Fourth District Court of Appeal found that the fraud in the inducement claim was barred because the claim pled in the second suit essentially related to the eviction claim. The claim alleged that the landlord promised the tenant an opportunity to purchase the property despite his intention of not abiding by the agreement, and that the lease, option payments and improvements were the result of reliance on these misrepresentations.

With respect to the unjust enrichment claim, the Fourth District Court of Appeal reversed the trial court because, although there were some allegations that were related to payment involving the eviction action, other allegations stated significant funds were spent on improvements to the property during the tenancy, and the record did not establish that these were payments under the option. Summary judgment was improper as the record does not show if the improvements were part of the lease or option contract.

Further, the summary judgment was reversed on other grounds as the court wrestled with the term "legal possession" in the language of the option and whether the expiration of the lease meant that the tenant was no longer in legal possession. Moreover, the court found that summary judgment was improper because the trial court found that the option was "an agreement to agree" since the document referenced another document that was not provided and possibly never created. However, the court held that the option did not state that the parties failed to reach a second agreement, and therefore, the omitted portion of the agreement could be grounds for dismissal of the cause of action rather than making such agreement an "agreement to agree."

The after-acquired doctrine estopped a third party purchaser from claiming that the mortgage was void ab initio when the property was purchased shortly after the mortgage was executed, resulting in the perfection of the lien to the property purchased, and binding any successors in interest as a covenant running with the land. The exception to the after-acquired doctrine for purchase money mortgages did not apply in this instance as this purchase money mortgage was a different transaction than provided for in the exception.

BCML Holding LLC v. Wilmington Trust, NA, 2015 WL 5603490 (Fla. 3d DCA 2015)

The mortgagor of the property, Malesich, entered into a purchase money mortgage and note on the property covenanting a right to mortgage, grant and convey the property, but he did not own the property at the time the mortgage and note were executed. The property was conveyed 5 days later to Malesich. Then, in 2010, the condominium association initiated an action to foreclose on the property for delinquent assessments and took title to the unit at the foreclosure sale as the highest bidder. Thereafter, in 2012, the condominium association sold the property to BCML Holding, LLC. Then in 2013, Wilmington Trust, NA, successor trustee of the mortgagee, filed suit to foreclose on the mortgage for a default by Malesich. BCML asserted that Wilmington was estopped from bringing the action because Malesich did not own the property when the mortgage was executed and thereby, was void ab initio. BCML also brought a counterclaim for declaratory relief and to quiet title. Following motions for summary judgment on the declaratory and quiet title actions, the trial court held that the after-acquired title doctrine applied as the conveyance of the property cured any deficiency in the mortgage, and granted summary judgment in favor of Wilmington.

The Third District Court of Appeal affirmed the trial court's decision. The doctrine of after-acquired title states "'if a grantor purports to transfer ownership of real property to which he lacks legal title at the time of the transfer, but subsequently acquires legal title to the property, the after-acquired title inures, by operation of law, to the benefit of the grantee.'" The effect is to vest title in the mortgagor as soon as the title transfers as an estoppel by deed to satisfy the granting of the mortgage. This has also been characterized as a doctrine deriving from the covenant or warranty of title made by the grantor when conveying the property. At the time of purchase, Malesich warranted that he was fully seised of the property at the time of execution of the mortgage, and maintained the right to mortgage, grant and convey the property.

The court held that the doctrine of after-acquired title applies to mortgages, and will be held valid on an action to foreclose on the mortgage as the mortgage lien attaches upon the purchase of the property since the mortgage contains full covenants of warranty, and the title acquired after the execution of the mortgage was to the benefit to the mortgagee. Further, the court held that BCML is bound by the mortgage as a successor in interest, and is estopped to

deny the title acquired by Malesich after the mortgage was executed. The court held that the after-acquired doctrine established the mortgage to the benefit of Wilmington, and as such, the mortgage transforms into a covenant running with the land. Once Malesich warranted that he had "lawfully seised of the estate hereby conveyed and has the right to mortgage, grant, and convey" the property, and then acquires the property, the mortgage runs with the land and binds all successors in interest. BCML cannot defeat the mortgage when the mortgage was recorded two weeks after the property was conveyed, and BCML was on notice of same.

Citing *Nelson v. Dwiggins*, 149 So. 613, 614 (Fla. 1933), the court stated that, "Under Florida law, a 'purchase money mortgage given as part of the transaction in which the premises were purchased is an exception to the general rule that, where a mortgage contains full covenants of warranty, title acquired by the mortgagor after the execution of the mortgage inures to the benefit of the mortgagee.'" The court held that the exception to the after-acquired title doctrine for purchase money mortgages does not extend to this instance. The exception is meant to only apply in cases where the mortgagee, as both the seller of the property and mortgagee, cannot gain a greater title by applying the doctrine because the mortgagee is fully aware of the state of title as the seller of the property. The case at bar is a different transaction since Malesich did not purchase the property from the mortgagee, and thereby, the exception does not apply.

An action based on a right of first refusal recorded in a Declaration of Condominium qualified as an instrument pursuant to the lis pendens statute, Fla. Stat. § 48.23, as the Declaration of Condominium was applicable to the property in the lawsuit.

100 Lincoln RD SB, LLC v. Daxan 26 (FL), LLC, 180 So. 3d 134 (Fla. 3d DCA 2015)

This case involves the sale of 4 commercial units in a multi-use condominium with 625 residential units and 42 commercial units, and whether the condominium association possessed or maintained a right of first refusal to purchase the commercial units. The Third District Court of Appeal denied a Writ of Certiorari to quash a trial court order denying motions to dissolve a lis pendens and to require a bond to be posted for the lis pendens.

Counsel for the buyer, Petitioner 100 Lincoln Rd SB, LLC, originally sent written notice to the condominium association of the transaction and requested the association to waive its right of first refusal, stated in Article XV of its Declaration. In receiving this notice, the association then designated a third party buyer, the Respondent Daxan, in a written assignment of its right of first refusal to purchase the commercial units for the same terms identified by the buyer. Daxan notified the Seller, Walgreens, of the assignment. The seller responded taking the position that the right of first refusal in the Declaration of Condominium did not apply since the Declaration carved out an exception for the right of first refusal for commercial units which could be conveyed without consent of the association, thereby, the initial letter requesting a waiver was a mistake. Following this, Walgreens and 100 Lincoln Rd SB, LLC, accelerated closing and changed the terms of the contract without notice or approval of the association. Three days later, the association recorded a notice that it was exercising its option to purchase the units and assigning that right to the third party buyer, Daxan. On July 3, 2014, the parent company for 100 Lincoln Rd SB, LLC entered into a contract to sell all of its interest in 100 Lincoln Rd SB, LLC to a non-party purchaser. Third party buyer, Daxan, filed suit against the parties for relief to enforce its right to purchase the commercial units. Daxan later filed an amended complaint and recorded a lis pendens containing the legal description of the commercial units.

100 Lincoln Rd SB, LLC moved to dissolve the lis pendens, or in the alternative, require the posting of the bond. The trial court denied the motion finding that the lis pendens was based on a duly recorded instrument: the Declaration of Condominium. The petition of certiorari alleged that the lawsuit was not based on a "duly recorded instrument," and rather Fla. Stat. § 48.23(3) should have been applied requiring proof of a nexus between the plaintiff's claims and the property. The Third District Court of Appeal, in affirming the decision, held the Declaration of Condominium provided adequate notice to a good faith purchaser that there is a cloud of title because the seller was aware of this provision in that it sent a letter requesting a waiver; and Daxan created a cloud of title in exercise of this right. The Court recognized that it has jurisdiction to review the matter for 100 Lincoln Rd SB, LLC via certiorarti for this non-final order, and the court also maintains jurisdiction to review the matter as an appeal of a non-final order.

Notwithstanding the fact that the note was executed only by individuals who had just purchased a l/2 interest in the property, the mortgage could be foreclosed on the entire property, since the owner of the other l/2 interest also signed the mortgage containing plain language that the mortgage encumbered the entire interest in the property.

CITIMORTGAGE, Inc. v. Turner, 172 So. 3d 502 (Fla. 3d DCA 2015)

A bank foreclosed its mortgage that includes another party's 1/2 interest in the real property, but the mortgage was signed by that individual and states that the mortgage may be foreclosed on the entire property. The Turners, the parties who signed the mortgage and note, purchased a 1/2 interest in the property from an entity controlled by J.L. Loper, the

owner of the other 1/2 interest in the property. In purchasing the property, the Turners executed a note and mortgage for the bank. The seller, Loper, also signed the mortgage which identified his entity as a borrower and included a notation "Limited Purpose Execution," Paragraph 13 of the mortgage stated that the mortgage was an encumbrance on the entire property. The trial court entered a final judgment against the bank in favor of the Turners and Loper, finding that the bank failed to establish the limited execution of the mortgage created an encumbrance on the entire property, which included the 1/2 interest in Loper's property.

The First District Court reversed the trial court's judgment in favor of Loper and the Turners by finding that the mortgage encumbered the entire property as the mortgage described the entire legal description for the property and did not exclude Loper's 1/2 interest in the property; Loper was included within the defined term of "Borrower;" and Paragraph 13 identified how the mortgage applied to Loper's interest in the property. The Court reasoned that the "Limited Purpose Execution" notation did not create an ambiguity in the mortgage with respect to whether or not the mortgage applies to Loper's 1/2 interest in the property, because that interpretation would have re-written the contract and rendered Paragraph 13 meaningless. Further, Loper's signature was only needed because the mortgage was being secured by the entire property. The plain language of the mortgage controlled and granted a security interest over the entire interest in the property. The Court affirmed all other issues in the final judgment.

Probate Case Summaries

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Renunciation rule does not apply to trust challenge when beneficiary will receive more than the distributed amounts regardless of whether the instrument is sustained or overthrown.

Gossett v. Gossett, 182 So. 3d 694 (Fla. 4th DCA 2015)

The settlor's son filed a complaint seeking to invalidate the Fourth and Fifth Amended Trusts based on allegations that the Fourth and Fifth Amended Trusts were executed when the settlor lacked capacity or was unusually susceptible to undue influence. Prior to the filing of the complaint, the son had received distributions from the trustee, who was the surviving spouse of the settlor. The son alleged that the distributions were sent to him when he was in a time of financial need, and the surviving spouse intended that he accept them to prohibit him from challenging the validity of the Fourth and Fifth Amended Trusts.

In the second amended complaint, the son renounced any interest he had in the Fourth and Fifth Amended Trusts, but alleged that he did not have an obligation to return the money he already received because he was entitled to an equal or greater amount under any version of the Trust. The surviving spouse moved to dismiss the amended complaint with prejudice, arguing the son refused to do equity by failing to return the distributions before challenging the amendments. The trial court agreed, and granted the motion to dismiss.

On appeal, the Fourth DCA reviewed the history and purpose of the renunciation rule, which requires a beneficiary to renounce his interest by some method or means sufficient in law to operate as a divestiture in order to contest the trust agreement through which he has derived this interest. Citing to *Barnett Nat'l Bank of Jacksonville v. Murrey*, 49 So. 2d 535 (Fla. 1950), the court stated the rationales behind the renunciation rule are: 1) to protect the trustee if the trust is invalidated, 2) to show the suit is sincere, and 3) to ensure the property is available for disposition and free from third party claims. Applying these rationales, the court reasoned the surviving spouse, as trustee, is protected since the son was entitled to more than the distributions made under any of the Amended Trusts; the risk of insincere claims is present in any case, but not any more in this case; and the distribution was free from third-party claims as he was entitled to more than the distributed amount. The court, quoting *Fintak v. Fintak*, 120 So. 3d 177, 185 (Fla. 2d DCA 2013), held, "an individual cannot be estopped from challenging an instrument by accepting that which he or she is legally entitled to receive regardless of whether the instrument is sustained or overthrown." As a result, the Fourth DCA reversed and remanded.

Because a trust instrument must be read as a whole to determine joint settlors' intent, the phrase "death of each" meant death of both trustees, and the surviving settlor's amendment was valid.

Dowdy v. Dowdy, 182 So. 3d 807 (Fla. 2d DCA 2016)

Husband and wife created a family trust for which they were the settlors, initial trustees and initial primary beneficiaries. The trust agreement included provisions for the revocation and amendment of the trust, appointed their children as successor trustees, provided for distributions to the settlors, and provided for the liquidation and distribution to the children after the settlors' deaths.

After the death of the husband, the wife amended the trust, removing some of the children as successor trustees and as beneficiaries. She then sold the trust property, and the title company distributed the proceeds to the wife. One of the disinherited sons filed an action, asserting that wife's amendment was invalid because it was executed after husband's death. The son argued the trust became irrevocable and the son became successor trustee when the husband died. The son sought a temporary injunction to compel preservation of the proceeds of the sale, which was granted by the trial court. The wife appealed.

The trust contained language that allowed for the trustees to invade the principal during the settlors' lifetime for the benefit, support and maintenance of the initial primary beneficiaries, husband and wife, or the survivor. The argument on appeal focused on whether wife was the sole trustee after husband's death, and as such, had the right under the foregoing language to sell the trust property for her own benefit. The son claimed to be successor co-trustee under a provision which stated, "In the event of the death of each of the Initial Trustees [husband and wife], . . . the Settlors nominate and appoint Settlors' son…" (Emphasis added.) The son argued the phrase "death of each" meant the death of either initial trustee, and he was therefore a co-trustee upon husband's death. The appellate court disagreed.

In its analysis, the court reasoned that the trust's failure to assign a specific successor to a particular deceased initial trustee indicated that the succession of trustees occurred

only upon the death of both initial trustees, which was also consistent with the use of the same phrase throughout the trust agreement. Moreover, this interpretation was clearer when viewing the document as a whole to determine the settlors' intent. The court particularly looked at the provision that allowed for the invasion of principal for the benefit of the initial primary beneficiaries "or the survivor." To adopt the son's interpretation would mean that upon the death of one settlor, the survivor's status as a beneficiary would be nullified.

The court held that the phrase "death of each" meant "death of both." As such, son did not succeed husband as trustee when husband died, and wife, as sole trustee and beneficiary, had sole authority and discretion to sell the trust property for her benefit. The trial court's order was reversed.

Lodestar method of calculating fees does not apply to calculation of trustee fees.

Robert Rauschenberg Foundation v. Grutman, 2016 WL 56456 (Fla. 2d DCA 2016)

Artist and philanthropist Robert Rauschenberg devised his residuary estate to the Robert Rauschenberg Revocable Trust, and the Trust's sole remainder beneficiary was the Robert Rauschenberg Foundation. The trustees sought compensation for managing the Trust assets for several years after Rauschenberg's death while its assets were being transferred to the Foundation. During the trustees' tenure, the Trust assets increased from $605,645,595 to $2,179,000,000. The trial court refused to calculate fees using the lodestar method, and awarded $24,600,000 to the trustees for the services. The Foundation appealed.

The Trust did not contain a provision addressing trustee's fees. The parties disagreed on the methodology to be used to calculate fees. The Foundation argued the lodestar method should be used, resulting in a fee award of $375,000. The trustees requested between $51,000,000 and $55,000,000 based on the method set forth in *West Coast Hospital Ass'n v. Florida National Bank of Jacksonville,* 100 So. 2d 807 (Fla. 1958). The lodestar method calculates fees by multiplying the number of hours times an hourly rate. The *West Coast* method awards "reasonable compensation" based on consideration of several factors, including: the amount of capital and income received and disbursed by the trustee; the wages or salary customarily granted to agents or servants for performing like work in the community; the success or failure of the administration of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the fidelity or disloyalty displayed by the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services; and payments made by the cestuis que trust to the trustee and intended to be applied toward his compensation.

The court examined the case law and legislation regarding fees, both attorneys' fees and personal representative fees. For attorneys' fees and personal representative fees in the probate setting, the Florida Supreme Court applied the lodestar method. See *In re Estate of Platt*, 586 So. 2d 328, 336 (Fla. 1991). *Platt* was then superseded by statutory presumptively reasonable percentage fees, currently embodied in sections 733.617 and 733.6171, F.S. However, Sec. 736.0708(1), F.S., provides for trustee fees that are "reasonable under the circumstances," without providing for a methodology to explain what circumstances should be considered.

The Foundation argued the use of the term "reasonable" in the statute suggests a legislative intent to adopt the lodestar method, similar to the calculation for attorneys and personal representative fees. However, looking to the legislative history of Sec. 736.0708, F.S., there is no indication of an intent to apply the lodestar method. Rather, the Senate Staff Analyses specifically reference the *West Coast* factors. The court concluded the lodestar method does not apply to trustee's fees, and the trial court properly applied the *West Coast* factors in awarding the $24,600,000 fee to the trustees.

Personal representative is not permitted to deduct attorneys' fees paid in litigating claims from the surviving spouse's elective share.

Blackburn v. Boulis, 2016 WL 231405 (Fla. 4th DCA 2016)

The probate court allowed the personal representative to deduct from the minimum elective share a proportionate amount for the fees charged by lawyers hired by the personal representative to litigate estate claims. The surviving spouse appealed.

As the surviving spouse's elective share is purely a creature of statute, the court examined the 1998 version of the language of the elective share statute applicable to this appeal. Sec. 732.207, F.S. (1998), provides as follows: "The elective share shall consist of an amount equal to 30 percent of the fair market value, on the date of death, of all assets referred to in Sec. 732.206, F.S. computed after deducting from the total value of the assets: (1) All valid claims against the estate paid or payable from the estate; and (2) All mortgages, liens, or security interests on the assets." The court reasoned that as the statute clearly sets forth only four types of expenses or costs which the probate court is to deduct from the value of the assets in the surviving spouse's elective share, and as attorney's fees are

not included in those four, it was error for the probate court to deduct the attorney's fees from the value of the spouse's elective share. The court reversed and remanded for the probate court to recalculate the elective share, excluding the attorney's fees.

A personal representative is not an indispensable party in a suit to set aside transfers of property made by decedent prior to death.

Parker v. Parker, 2016 WL 404636 (Fla. 4th DCA 2016)

Fifteen days before his death, Decedent and his wife transferred title to seven properties to third parties. Three of the properties were transferred to their son Sean, and four properties were transferred to a LLC which was owned solely by Sean. The couple had another son, Kevin, and Decedent had four children from other relationships.

Seven months after his death, Decedent's four other children sued his wife, Sean, Kevin, and the LLC to set aside the transfers. They alleged tortious interference with an inheritance, unjust enrichment and replevin, seeking to recover the properties. The defendants filed a motion to dismiss for failure to join an indispensable party under Sec. 733.607, F.S., based on the failure to join the estate – the personal representative. The motion to dismiss was granted by the trial court. The parties appealed.

The appellate court looked to the plain language of the statute. Sec. 733.607, F.S., provides, in pertinent part as follows:

> (1) Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except the protected homestead, but any real property or tangible personal property may be left with, or surrendered to, the person presumptively entitled to it unless possession of the property by the personal representative will be necessary for purposes of administration.

The court reasoned that this section provides that a personal representative has rights to property that remains in the Decedent's possession at death; however, in the instant case, the subject properties were not part of the Decedent's estate at the time he died because they had already been conveyed inter vivos to Sean and the LLC. The court cited to numerous decisions in which Florida courts allowed a decedent's children to pursue claims to set aside inter vivos conveyances without requiring that the decedent's estate be joined as a party to the suit.

The appellate court concluded that by requiring the estate to be added, the trial court imposed a requirement beyond that required by the plain language of the statute. Since the Decedent's estate was not so essential to the suit that a final decision could not be rendered without its joinder, the appellate court reversed the trial court's order dismissing the case for failure to join an indispensable party.

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FOR THE SALE AND PURCHASE OF RESIDENTIAL PROPERTY

Approved by The Florida Bar, Real Property, Probate & Trust Law Section and The Florida Realtors

_____ Set(s) of 10 FR/BAR CONTRACTS (Revised February 2016) **$50.00 per set**

_____ Set(s) of 10 FR/BAR "AS IS" CONTRACTS (Revised February 2016) **$50.00 per set**

_____ Package(s) of FR/BAR COMPREHENSIVE RIDERS (Revised September 2015) **$50.00 per package**
(*a package is ten copies of each rider listed below*)

Condominium Rider
Homeowners' Association/Community Disclosure
Seller Financing (Purchase Money Mortgage; Security Agreement to Seller)
Assumption of Existing Mortgage(s)
Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA)
Appraisal Contingency
Short Sale Approval Contingency
Homeowner's/Flood Insurance
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
Defective Drywall
Coastal Construction Control Line
Insulation Disclosure for New Residence

Lead-Based Paint Disclosure (Pre-1978 Housing)
Housing for Older Persons
Rezoning Contingency
Lease Purchas/Lease Option
Pre-Closing Occupancy by Buyer
Post-Closing Occupancy by Seller
Sale Of Buyer's Property
Back-Up Contract
Kick Out Clause
Sellers's Attorney Approval
Buyer's Attorney Approval
Licensee Disclosure of Personal Interest in Property
Binding Arbitration

Order Sub-Total	$_____
Sales Tax 6.5%	$_____
Shipping & Handling	$ 9.00
TOTAL	**$_____**

Firm:_____

Attn:_____ Attorney Bar #: _____

Street Address:_____ (WILL NOT DELIVER TO P.O. BOX)

City/State/Zip:_____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

Phone: (_____)_____ Fax: (_____)_____

E-mail address:_____

METHOD OF PAYMENT

I have enclosed check #_____, in the amount of $_____

OR

Please Circle One: VISA or MASTER CARD Amount to be charged $_____

_____ _____/_____ _____
Card Number Exp. Date Signature of Cardholder (REQUIRED)

Billing Address:_____ _____
Print Name

ACTION LINE MARCH 2016

Florida Lawyers Support Services, Inc.
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PROBATE & GUARDIANSHIP FORMS

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" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2016 FLSSI forms.**

Firm: _____

Attorney Name: _____ **Attorney Bar #:**_____

Physical Address: _____

City/State/Zip: _____

Phone: (_____)_____ E-mail Address: _____

2016 PROBATE FORMS

OPTION #1	**2016 FORMS AND INDEX - .PDF ON DISK**	**$390.10**
OPTION #2	**2016 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH**	**$410.20**
OPTION #3	**2016 NEW & REVISED FORMS ONLY - .PDF ON DISK**	**$178.30**

2016 GUARDIANSHIP FORMS

OPTION #1	**2016 FORMS AND INDEX - .PDF ON DISK**	**$347.10**
OPTION #2	**2016 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH**	**$367.20**
OPTION #3	**2016 NEW & REVISED FORMS ONLY - .PDF ON DISK**	**$214.30**

If you would like to order individual forms, please visit www.flssi.org to download our "long" order form which lists each form for separate purchase.

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METHOD OF PAYMENT

Either mail this form with check to the address listed above or include credit card information and fax to 407.515.1504. Prices include shipping, handling and sales tax. **VISA or MasterCard Only.**

$ _____ _____ ____/____ _____

Charge **Card Number** **Exp. Date** **Signature of Cardholder**

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Credit card billing address (If different from shipping address above) **Printed Name of Cardholder**

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Check # _____ $ _____ Authorization date ____/____/2016 # __ __ __ __ _____

SHIP DATE _____/_____/2016 LB_____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___

AL 2016

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

2016 EXECUTIVE COUNCIL MEETINGS

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

JULY 28, 2016 – JULY 31, 2016

Executive Council Meeting & Legislative Update

The Breakers • Palm Beach, Florida
Reservation Link: https://resweb.passkey.com/go/FLABR16
Room Rate: $218

OCTOBER 5 – OCTOBER 9, 2016

Executive Council Meeting

The Walt Disney World BoardWalk Inn • Lake Buena Vista, FL
Reservation Link: http://disneyurl.com/TheFloridaBarRealPropertyProbateTrustLaw
Room Rate: $249 (single/double occupancy)

DECEMBER 7 – DECEMBER 11, 2016

Executive Council Meeting

The Westin Resort and Marina • Key West, FL
Reservation Link: https://www.starwoodmeeting.com/events/start.action?id=1510057567&key=1AFAC12C
Room Rate: $279 (single/double occupancy)
$319 Partial Ocean View

*Note: Wednesday, Thursday, and Friday nights in the room block are CURRENTLY SOLD OUT. Please email Mary Ann Obos @ mobos@flabar.org to be added to the room block waitlist. Current reservations can be modified by dialing 1-866-360-7395.

2016 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).

The Florida Bar
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Tallahassee, FL 32399-2300

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Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

DOING RESEARCH?

ActionLine article titles going back to 2001 are searchable on a multitude of topics.

BEWARE:

Check grantor's title insurance policy before transferring title by quit claim deed or risk invalidating the policy.

NEW:

FIRPTA withholding requirements change and thresholds increase under HR 2029 commencing Feb. 16, 2016

BOARD CERTIFICATION

recently approved by the Florida Supreme Court for Condominium and Planned Development Law.
Stay tuned for more details!

JOIN YOUR FRIENDS AND COLLEAGUES

at the 35th Annual Attorney/Trust Officer Liaison Conference at The Breakers, Palm Beach, on June 23-26, 2016

NEED CLE CREDITS?

The Insurance & Surety Committee has a telephone conference on the third Monday of each month, beginning at noon, with a 1-hour CLE component.
Just dial-in: 888-376-5050; passcode: 785 421 6320#

If you are working on an interesting case or legal issue that you'd like to turn into an article for *ActionLine*, we would love to publish it for you! No article is too small or too large. (Submission information on page 4 inside.)