ActionLine

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

A Tribute To Deborah Packer Goodall

Real Estate Valuation In Construction Defects Litigation: Additional Roles For The Appraiser And New Valuation Methods

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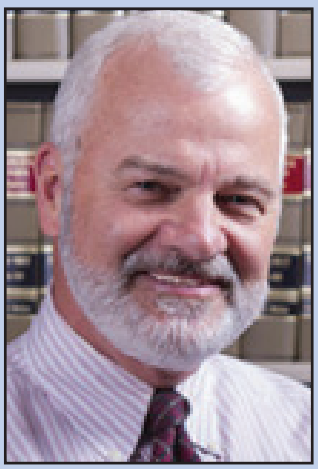

Chair's Column

By Andrew M. O'Malley
Section Chair, 2017- 2018

Article I of the RPPTL Section's bylaws establishes the three primary purposes of the Section, one of which is to "inculcate in its members the principles of duty and service to the public." The Section has a distinguished history of honoring that directive through innovative projects designed to provide legal assistance to those in need.

In the late '90s, when a legal document "mill" purporting to provide wills and estate planning documents was held to be engaged in the unauthorized practice of law, and it was apparent that the documents were seriously deficient, Section members provided pro bono services to the victims. When small, non-profit affordable housing developers with tight budgets were unable to build much needed low-income residences due to legal expenses that often were the equivalent of much larger well-capitalized projects, the "Attorneys for Affordable Housing" project, initiated in 2002, established a partnership with the Florida Housing Coalition to provide pro bono representation to small, qualifying non-profits engaged in rehabilitation or development of low income housing. Dozens of affordable housing projects throughout Florida came to fruition as the result of receiving free legal assistance with financing, land use and title issues.

In 2007, as the tsunami of foreclosures associated with the "Great Recession" hit Florida homeowners, the Section initiated the Florida Attorneys Saving Homes ("FASH") project. FASH, a collaboration between the Section, Florida Legal Services, Inc. and legal aid non-profits throughout the state, provided pro bono counsel to low-income families whose residences were at risk. FASH attorneys provided representation to thousands of homeowners not only in foreclosure proceedings but in connection with understanding and qualifying for the various mortgage refinancing programs available at the state and federal level. Families that would otherwise have lost their homes or been victimized by the many unscrupulous "foreclosure relief" companies that sprang up to take advantage of the calamity, instead received capable, ethical, pro bono representation.

Recently, the Section has initiated a new project titled "No Place Like Home" ("NPLH") designed to provide pro bono assistance to low-income homeowners experiencing title issues with their residences that may impact their ability to obtain financial assistance in the event of a natural disaster.

Disaster relief is a significant issue that impacts everyone in the U.S., but especially those of us in Florida where each hurricane season holds the potential for catastrophe. History tells us that title problems are a significant barrier in disaster recovery efforts and that such title issues disproportionately affect the most vulnerable among us who may be residing in homes still titled in the name of long deceased relatives that never went through probate or which have other types of title defects. In an examination by the American Bar Association of efforts to provide legal assistance in the aftermath of Hurricane Katrina titled "10 Years After Hurricane Katrina: Lessons Learned and Opportunities for Change," lesson number 1 includes "the need to obtain clear title to one's property in order to collect benefits." Access to emergency relief grants and loans may be unavailable to repair damaged homes if the residents cannot establish clear title. The same article observes that "even with an outpouring of help from sympathetic pro bono attorneys and law students without the infrastructure of a disaster-specific legal services plan, the response was largely reactive and underscored the value of planning ahead."

Through our duty and service to the public, our Section recognizes the value that we bring in being forward-thinking, creative, and in providing remedies to clear titles for the poor in advance of the inevitable disaster that will make rapid access to relief funds critical to recovery. Our Section has adopted NPLH with plans to roll it out across the entire State of Florida. NPLH is designed for pro bono attorneys to clear the titles to the homes of low-income individuals and families. It is primarily a prevention program to remove defects and perfect titles so that low-income residents can repair and rebuild their homes and communities after a disaster.

The outcomes and benefits of such a proactive pro bono project are evident – providing low-income residents with clear title allows access not only to disaster-related relief, but also to community development funds and property tax exemptions

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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 Wm. Cary Wright at cwright@carltonfields.com. Deadlines for all submissions are as follows:

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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.

designed to benefit vulnerable homeowners at any time. It helps safeguard homes that are oftentimes the only asset held by low-income families. The assistance helps maintain the integrity of entire communities.

Since the adoption, NPLH pilot projects are being established in different judicial jurisdictions throughout the state. These include: Bay Area Legal Services (13th Circuit/Hillsborough); Legal Aid of Manasota (12th Circuit/Sarasota and Manatee); Legal Aid Society of Palm Beach County (15th Circuit/Palm Beach); Legal Aid Service of Broward County (17th Circuit/Broward); and Legal Services of North Florida (1st Circuit along with several other north Florida Circuits.) Volunteer attorneys will have access to the expertise of full time legal aid attorneys and will receive training, guidance and support.

Bay Area Legal Services recently submitted a project grant proposal on behalf of our Section and the pilots to the federal Legal Services Corporation. The Pro Bono Innovations grant seeks to fund a coordinator as well as bring additional resources into our developing partnership with the legal aid organizations in order to fully implement No Place Like Home. Overall, feedback was that the initial application scored very well and is a strong application because of the partnership with our Section. No Place Like Home has moved into the final round of proposals.

No Place Like Home, as a joint collaborative between our Section and legal aid organizations across Florida, is innovative and will ultimately serve the entire state. Our project/Florida model will provide a replicable blueprint for other states to follow. Please join us as we build this groundbreaking initiative. Assistance is needed for quiet title, probate and related proceedings. If you are practicing in one of the pilot jurisdictions, please register as a volunteer with Katherine Frazier, the director of the Section's At Large Members, at katherine.frazier@hwhlaw.com. The sign-up materials are available on the RPPTL Section Website, www.rpptl.org under Committees/At Large Members.

Letter From The Editors

Dear Readers

The Editors are very excited to share several new features to *ActionLine*, including the addition of this Letter from the Editors section. In each *ActionLine* edition going forward, the Editors plan to share a brief statement (in this Letter from the Editors format) in order to highlight one or more of the articles in the magazine, to share new developments and features in the magazine, or to offer other editorial commentary.

To start, the Editors are pleased to share several new developments in *ActionLine*.

First, we have a new Production Assistant/Copy Editor who has been hired by the RPPTL section to assist in the production of *ActionLine*.

Second, we have a new Co-Editor in Chief this year. Please welcome Mike Bedke with DLA Piper in Tampa who joins Jeff Baskies of Katz Baskies & Wolf in Boca Raton as Co-Editors-in-Chief this year. Mike and Jeff wish to thank Cary Wright of Carlton Fields in Tampa for his hard work and dedication to the publication. Everyone is excited for Cary's expanded role with the RPPTL section. We also thank Cary for agreeing to stay active in *ActionLine*, serving as Co-Editor-in-Chief this year.

Third, please enjoy the new "State Tax Case Summaries" feature starting on page 52. We hope to regularly present this new feature.

Fourth, to increase the focus of *ActionLine* on our RPPTL section and its members and activities, please note that in this issue of *ActionLine* we have introduced a new feature column: the Section Spotlight. We hope to continue to bring you the same level of quality substantive articles, while adding certain content concentrated on our RPPTL section and its members. Going forward, we hope to add additional feature articles and further center attention on the RPPTL section.

Finally, in launching the new Letter from the Editors column, the present Editors of *ActionLine* wish to recognize and publicly thank all of the present and former editors-in-chief, coordinators, editors, authors, contributors and photographers who have helped with *ActionLine* all these years. For everyone who has helped in the past, and for all of you who still help and will help in the future, please accept our heartfelt thank you.

The Editors

A Tribute To Deborah Packer Goodall

By Jane L. Cornett, Esq., Becker & Poliakoff, P.A., Stuart, Florida

Debbie's recommendation and advice for future Chairs was "Rely on the expertise and help of others." What great advice for us all, and how fortunate we members of the Section are to have so much expertise offered by folks like Debbie.

Deborah Packer Goodall of Goldman Felcoski & Stone P.A. located in Boca Raton, served as Chair of the Real Property, Probate and Trust Law Section of the Florida Bar for the 2016-2017 term.

A 1990 graduate of the University of Miami College of Law, Debbie first practiced for a brief time in New York but then saw the light and returned to Florida in 1993. Shortly after returning to Florida, she started her more than twenty (20) year commitment to the Real Property, Probate and Trust Law Section. Debbie's introduction to RPPTL was through her first attendance at an attorney trust officer liaison conference. Her first committee assignment was probate law, but that was just the first of many. A RPPTL experience that stood out in Debbie's memory was serving as a Vice Chair of the Legislative Update and working with an amazing group of women on that demanding job. Like the Section Chairs before her, Debbie served in several different positions on the Executive Committee. Debbie expressed particularly fond memories of serving as the Secretary for the Executive Council as that gave her an opportunity to learn more about the substantive work of the Real Property division.

Debbie's goal for her year as Chair was to bring focus to the RPPTL family. This included encouraging participation among the many members of our Section, fostering a spirit of comradery and congeniality among the members of the Executive Council, and making spouses and children feel more involved and included at Section meetings. When one reflects back upon Debbie's year, not only did she manage to accomplish those goals, but she did so all while overcoming many unanticipated events that arose during her year as Chair.

A major unanticipated event was Hurricane Matthew. Debbie outlined in great detail everything that happened during that hurricane which coincided with the Section meeting at Disney World in her ActionLine Article in the Winter, 2017 edition, which can be reviewed online at the Section's website. Another unexpected challenge was an extremely active legislative session with issues popping up on an almost daily basis. Debbie described it as a "very tough legislative session." With an extensive variety of very important issues, both relative to legislative positions being advocated by the Section and those opposed by the Section, Debbie marveled at how many people were willing to drop everything and help on a moment's notice.

A major development this year was the introduction, passage and recent veto of electronic will legislation. The Section was made aware of the proposed electronic will legislation in November, and it was a wild ride throughout the entire legislative session and in the weeks that followed. Upon learning about the legislation, the Section immediately assembled a task force to attempt to work with the proponents of the bill to develop revised legislation that the Section could support. Despite those efforts, the legislation that ultimately passed the house and the senate did not resolve the Section's concerns for many of the reasons cited in Governor Scott's veto memorandum. Debbie believes the Section will continue to work towards finding a positive solution to balancing the protection of the citizens of the state of Florida with the advancement of technological methodology in the execution of electronic wills.

When asked about the best part of serving as the Chair, Debbie cited the chance to work with the other eleven (11) devoted officers on the Executive Committee as well as the countless dedicated members of the Executive Council. Debbie praised their spirit of teamwork, collaboration, courteousness, and willingness to work hard. Because all Executive Council members and committee members are volunteers, Debbie recognized the sacrifices each member makes. Time spent working on matters for the Section is time away from offices and time away from families. Debbie wanted to be sure the families of all of these hard-working members knew they too were appreciated. Thus, for Debbie, another highlight was the opportunity to plan meetings and functions which placed great focus on the RPPTL family. The Bonita Springs Annual Convention was the best attended event in the history of the Section!

When asked about the downside of being the Chair, Debbie commented with both irony and humor about the major interruptions to the meeting schedules in Orlando, Key West and even Bonita Springs due to Mother Nature. Of course,

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Orlando had Hurricane Matthew. Key West had record winds that cancelled the Saturday dinner event as part of the holiday boat parade. In Bonita Springs, unexpected thunder storms caused the last-minute relocation of our Welcome Reception with over 500 persons expected to arrive in a matter of hours. Debbie commented that Mary Ann Obos, our incredibly talented Section administrator, was always ready to tackle whatever problems arose and always did so with a smile on her face.

Debbie's recommendation and advice for future Chairs was "Rely on the expertise and help of others." What great advice for us all and how fortunate we members of the Section are to have so much expertise offered by folks like Debbie.

Debbie's professional accomplishments outside of the Section have also been widely recognized as she has been the recipient of a number of accolades, including being a Fellow of the American College of Trust and Estate Council, listed in Florida Trends Legal Elite and named Best Lawyers by Woodward/White for many years. Debbie comes from a firm with a long tradition of devotion to the Section in that three (3) of her law partners are former Chairs of the Section. Her partners recognize the amount of time and energy that must be devoted to serving as a Chair and provided the needed support during her year as Chair.

Despite all the challenges that popped up during the course of her year as Chair, Debbie hoped that she had been able to accomplish her goal of fostering and promoting the ideals of our RPPTL family. She now looks forward to an opportunity to get back into Committee work and even though she's headed to the back row, she has no intentions of retiring and resting on her laurels. We all owe Debbie an immense debt of gratitude for her year as Chair as well as her many years of service to the Section. Welcome to the back row, Debbie. May you enjoy many, many more years of involvement with the RPPTL family.

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The Florida Bar's Real Property Probate and Trust Law Section (aka RPPTL) 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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Real Estate Valuation In Construction Defects Litigation: Additional Roles For The Appraiser And New Valuation Methods

By Grant W. Austin, M.S., MAI, CMRS, American Valuation, Inc., Orlando, Florida

This paper addresses the typical roles and valuation methods of real property appraisers in construction defects litigation plus the addition of new analytical methods that will strengthen the construction litigator's case. While appraisers are regularly retained to provide opinions on the damage or impairment to a property, their timely retention can also assist with an evaluation of many other critical elements in the construction litigator's case. The author discusses each potential real property value impact of a construction defect (cost to remediate, delay damages, diminution in market value, marketability, stigma) and the available valuation methods. Experienced construction litigators will find new valuation methods that may prove to be valuable tools in their practice.

Introduction

Conveniently for Florida's construction litigators, construction defect claims are "as common as crabgrass;"[1] however, they are unquestionably a complex specialty for both the attorney and the real property valuation expert. While this paper presents no theoretical breakthroughs, it is the single most comprehensive review of the real property valuation tools available to the construction litigator and his/her appraiser. While all readers will be familiar with the sales comparison, income capitalization and cost approaches utilized by appraisers, this paper emphasizes a multitude of supporting methods that are available to strengthen the construction defect case. This paper begins with Florida's definition of a construction defect, examines the multiple roles of the appraiser beyond forming an opinion of value, and then addresses each potential appraisal issue in a construction defect case (e.g., delay damages, diminution in value, loss of use) together with the research and valuation methods that are available to produce credible, reliable, and admissible opinions.

Definition of Construction Defect

In Florida, a construction defect is defined as:

a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from:

1. defective material, products, or components used in the construction or remodeling;
2. a violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84;
3. a failure of the design of real property to meet the applicable professional standards of care at the time of governmental approval; or
4. a failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction at the time of construction.[2]

Roles of the Real Property Valuation Expert

The primary role of the real property appraiser is in the context of litigation against design professionals, contractors and subcontractors, suppliers, manufacturers, or any other party responsible for damage to the subject property. Other roles of the appraiser in construction defects matters include: to support casualty loss deductions for income tax purposes, to support property tax assessment reductions, and for purposes of litigation against sellers or agents for lack of disclosure.

When there is an experienced construction litigator and an appraisal expert with specialty experience in construction litigation, the scope of work will likely go beyond the standard "before" and "after" damages report and may expand to include:

1. examination of contractor cost estimates to restore a property to its undamaged condition as a check on appropriateness and reasonableness;
2. assist in the notice of claim to describe the defects;
3. initial inspection for construction defects within the applicable time period in compliance with Florida's Construction Defects Statute, Chapter 558, Florida Statutes;
4. assist in the written request for permissible records per Fla. Stat. §558.004(15), consistent with the observed conditions at the site inspection, and other facts that

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might assist in the research and analysis required for the case;

5. consult with the attorney to evaluate the cost-effectiveness of pursuing settlement or litigation, and for recipients to understand their potential exposure in litigation;
6. assist in the development of the pre-suit discovery list;
7. assist in responses to interrogatories;
8. review of opposing expert report/file for strengths and weaknesses;
9. contribute to case strategy given the issues, and research and valuation methods;
10. assist in explaining how the opposing expert's testimony does not meet each separate admissibility requirement of qualification, reliability, and helpfulness;[3]
11. assist in preparation of opposing expert deposition questions;
12. development of trial exhibits; and
13. assist in preparation of direct examination and cross-examination of opposing expert.

Appraisal Issue and Applicable Valuation Method(s)

Whether property owners suffer from completion damages, delay damages or defective performance damages, it is the role of the attorney to direct the appraiser to the legally applicable type of damage that needs to be quantified.

This section is organized by appraisal issue (i.e., completion damages, delay damages, diminution in value, loss of use) and includes a brief description of the valuation issues and an explanation of the possible valuation method(s).

1. **Completion damages (cost to remediate or repair).** These costs are typically provided by a general contractor and/or a construction specialist, and while they are often utilized as stand-alone expert reports, they can be incorporated into an appraiser's analysis wherein the appraiser adds a market-derived factor that is very often overlooked in cost/damage estimates - "entrepreneurial incentive." The term "entrepreneurial incentive" is defined as the "amount that an entrepreneur expects or wants to receive as compensation for providing coordination and expertise and assuming the risks associated with the development of a project."[4] Although this amount is a fundamental component of total cost to repair or remediate, it is sometimes not included. The amount of the entrepreneurial incentive will vary with property type, risk, and expertise required and can be supported through the appraiser's market research.
2. **Delay damages.** These damages can be both a component of a construction expert's analysis (as typically supported by the critical path method[5]) and the appraiser's analysis. The appraiser's analysis might include support for lost profits, loss of use of sale proceeds, excess operating costs, increased financing costs, costs for alternative facilities, increased insurance premiums, and additional administrative costs. Any one of these costs might be a stand-alone value estimate or included as an element(s) in the appraiser's Income Approach (either as a line item expense in the direct capitalization approach or in the discounted cash flow method) or Cost Approach for the valuation of the damaged property.
3. **Diminution in value.** In construction litigation cases, the appraiser is most often retained to provide an opinion on value diminution. The undamaged or unimpaired value is typically the starting point for this analysis as it provides a basis from which to apply deductions for diminution. The basic "before" and "after" valuation equation is: Before condition *minus* After condition = Diminution in value. Diminution in value can be divided into two categories of loss groups.[6]

Category I of losses is specific to the unique characteristics of the subject property and, in the valuation of the "after" condition, might include the cost to repair, additional vacancy and collection loss, increased financing and insurance costs, increased marketing costs, buyer contingency (buyer's risk discount for taking the risk of cost overruns), entrepreneurial incentive, and monitoring costs if associated with contamination.

Category II of losses are not derived from the subject property but are derived from market sources (e.g., comparable sales and rentals, case studies, surveys). The focus of this category of losses is on the potential damages of impaired marketability, stigma, and loss of use. Each of these losses is discussed below.

Impaired marketability refers to impairments in how a property is expected to be sold or leased under current and anticipated market conditions.[7] Proof of the existence of a marketability impairment or lack thereof can be derived from the following valuation methods:

a. Paired data is a quantitative technique used to identify and measure the impact of a single property characteristic on value, rent, or for a marketability impairment, the number of days on the market. The process involves the comparison of properties (the sale, resale or leasing of the same or similar properties) that are nearly identical except for the characteristic of interest such as days on the market. For a marketability analysis, the number of days on the market is then due to the single property characteristic. It is appropriate to analyze a sufficient number of data pairs to provide credible evidence of value diminution (or lack thereof);[8] and

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b. A formal survey of market participants familiar with the market area of the subject property and the property type who can be asked about the subject's marketability. When properly structured, administered, and analyzed, formal survey methods can be valuable tools in understanding the opinions of real estate market participants.[9]

Stigma is another Category II loss in value. There are numerous acceptable definitions of stigma, including: (a) something that detracts from character or reputation that impairs value, (b) a value damage even after repairs have been made, especially in cases involving numerous construction defects, mold damage, or termite infestation,[10] (c) an intangible psychological impact on value or marketability because of increased risk or future uncertainty,[11] and (d) "an adverse public perception regarding a property; the identification of a property with some type of opprobrium (environmental contamination, a grisly crime), which exacts a penalty on the marketability of the property and hence its value."[12]

While it appears that stigma damages are recoverable in Florida, "as an element of the diminution in market value when reparation is either impracticable or exceeds the overall diminution in value; however, such damages are not recoverable in addition to the repair cost when the diminution in value exceeds the repair cost."[13] That being said, valuation methods and not legal standards are the focus of this paper.

Proof of the existence of stigma or its absence can be derived from the following valuation methods and, in a litigation environment, it is recommended that multiple methods be applied:[14]

a. Quantitative analysis comprises several tools including the traditional study of sales data, paired sales analysis (described previously), grouped data analysis, secondary data analysis, statistical analysis (statistical inference and regression modeling[15]), cost-related adjustments (cost-to-cure, depreciated), and capitalization of income differences. During the sales verification process, anecdotal evidence from knowledgeable parties to transactions might provide valuable insight about the market reaction to the detrimental condition, whether the property sold for less than an undamaged property or experienced a longer marketing time because of its history or reputation.

b. Qualitative analysis includes trend analysis, relative comparison analysis, and ranking analysis.

c. The income approach,[16] which is sensitive to changes in cost/risks (and an increased capitalization rate), may have factors to consider, including additional vacancy, additional cost of financing, insurance, and monitoring.

d. Case studies involve the comparison of properties with the attribute of interest (e.g., mold, asbestos, geotechnical problems) with otherwise similar properties lacking that attribute. Case studies may be individual properties or multiple property case studies involving the analysis of a group of relatively homogeneous damaged properties, which are compared to a group of undamaged properties to derive differences in prices. A graphical/visual analysis of the data can be helpful in explaining the mathematical relationships and a graphical time series analysis can explain the data and market behavior relative to critical events in the case such as discovery of the cause of the detrimental condition.

e. Formal survey techniques in the valuation of real property were first presented in two papers by Mclean and Mundy where they propose the use of Contingent valuation and conjoint analysis as valuation tools.[17] The use of formal surveys was first linked to the appraisal body of knowledge by this author (and his co-author Dr. Allen) in 2001.[18] Since that time, a large body of academic and professional papers have addressed the strengths and weaknesses of survey methods that are designed to derive a measurement of market value or value diminution percentage versus surveys designed to show a causal link between a property impairment and the loss in market value via quantitative studies (e.g., paired sales analysis or regression analysis), and survey design criteria for its admissibility.[19]

f. Focus groups can be used to support a causal link between property market valuations and perceptions of market participants.[20]

Loss of use. In a delay case or for a construction/damages case where the property cannot be occupied, a common valuation methodology is to use the lease or rental rate of the property as a proxy for determining the damage caused by the loss of use.[21] Therefore, due to a construction defect whereby the property must be vacated while the repairs are underway, the loss of use damages would be equivalent to the cost of renting a comparable, substitute property. Similarly, in a delay case, the "owner is also entitled to damages for delay in the completion of the improvement measured by its rental value during the period of delay."[22] There are well-established methods within the appraisal body of knowledge to derive a credible and admissible opinion on market rent.[23]

Conclusion

This paper provides insight into the multiple roles of a real property valuation expert knowledgeable in construction

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defect cases. The appraiser's specialty knowledge can be widely applied to advance many elements of the litigator's case. The sales, income and cost valuation approaches serve as the foundation of the real property valuation and these approaches can be strengthened in construction defect valuation assignments by using appropriate research and advanced analytical tools.


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Endnotes

1 *Padgett v. Phariss*, 63 Cal. Rptr. 2d 373, 374 (Ct. App. 1997). Although this court was referring to planned developments in California, it is equally applicable to Florida's quantity of construction defects claims.

F.S. §558.002(5).

2 Refer to the Eleventh Circuit Court of Appeals addressing the "gatekeeper" role in *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

3 *The Appraisal of Real Estate* (13th ed.) (2008). Chicago, IL.: Appraisal Institute, (p. 388).

5 For the basics on the Critical Path method see: Lehman, D. D. (2015, January). Construction Basics: An Overview of CPM Scheduling and Delay Claims. *Under Construction, a newsletter of the ABA Forum on Construction Law*, 17, No. 1. Retrieved April 18, 2017, from http://www.americanbar.org/publications/under_construction/2015/january_2015/construction_basics.html.

6 Arens, S. B. "The Valuation of Defective Properties: a Common Sense Approach," The Appraisal Journal (April 1997): 143-148.

7 "Marketability study" is defined in the 13th Edition of The Appraisal of Real Estate as: "1. A microeconomic study that examines the marketability of a given property or class of properties, usually focusing on the market segments in which the property is likely to generate demand. Marketability studies are useful in determining a specific highest and best use, testing development proposals, and projecting an appropriate tenant mix. 2. Analysis of how a particular property is expected to be sold, absorbed, or leased under current and anticipated market conditions; includes a market study or analysis of the general class of property being studied" (p. 183).

8 Flynn, J., et al. "A Survey Approach for Demonstrating Stigma Effects in Property Value Litigation," The Appraisal Journal (Winter 2004): 35-44.

9 Allen, M. T. & Austin, G. W. "The Role of Formal Survey Research Methods in the Appraisal Body of Knowledge," *The Appraisal Journal* (October 2001): 294-403.

10 *See e.g., Orkin Exterminating Company, Inc. v. DelGuidice*, 790 So. 2d 1058 (Fla. 5th DCA 2001).

11 *See* Sanders, M. V. "Post-Repair Diminution in Value from Geotechnical Problems," *The Appraisal Journal* (January 1996): 59-66.

12 Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 4th ed. (Chicago: Appraisal Institute, 2002), 277.

13 *See* Reis J. W. "Measure of Damages in Property Loss Cases," *The Florida Bar Journal* (October 2002): 32; Albert, T., Collison, H. W., & Tate, G. W. "Recovering 'Stigma' Damages in Mold-related Construction Defect Cases: Making the Property Owner Whole," *The Florida Bar Journal* (June 2005): 78; Fisk, E. S. (2005). Stigma Damages in Construction Defect Litigation: Feared by Defendants, Championed by Plaintiffs, Awarded by (Almost) No Courts—What Gives?" *Drake Law Review*, Retrieved April 10, 2017, from https://lawreviewdrake.files.wordpress.com/2015/07/lrvol53-4_fisk.pdf.

14 For stigma that may be caused by environmental (contaminant) risk, the reader is referred to Stigma, Environmental Risk and Property Value: 10 Critical Inquiries by R. Roddewig in The Appraisal Journal (October 1996): 375-387.

15 It is beyond the scope of this paper to address statistical techniques such as linear regression analysis and multiple regression analysis, however, appraisers and attorneys are cautioned that very few appraisers have the expertise to withstand the exclusion of an appraiser's statistical testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (/case/daubert-v-merrell-dow-pharmaceuticals-inc) (1993) and when utilized in a valuation assignment, a qualified statistician should be retained to work with the appraiser in the analysis of the data.

16 The income approach is a method of valuing the present value of future benefits of property ownership. There are two methods of income capitalization: direct capitalization and yield capitalization.

17 McLean, D. G., & Mundy, B "The Addition of Contingent Valuation and Conjoint Analysis to the Required Body of Knowledge for the Estimation of Environmental Damage to Real Property," *Journal of Real Estate Practice and Education*, 1, no. 1 (1998): 1-19; Mundy, B. & Mclean, D. "Using the Contingent Valuation Approach for Natural Resource and Environmental Damage Applications," *The Appraisal Journal* (July 1998): 290-297.

18 *See* Footnote #8, *supra*.

19 *See* Roddewig, ed., *Valuing Contaminated Properties: An Appraisal Institute Anthology*. (Chicago: Appraisal Institute, 2002; Flynn, J., MacGregor, D. G., Hunsperger, W., Mertz, C. K., & Johnson, S. M. "A Survey Approach for Demonstrating Stigma Effects in Property Value Litigation," *The Appraisal Journal* (Winter 2004): 35-33; McMeekin III, J. C., Ehmann, J., & Mapes, A. S. "Stigma Damages and Diminution of Property Claims in Environmental Class Actions," *Environmental Claims Journal* (24(3) 2012): 260-287. For two authoritative legal references for the design of surveys for admissibility see: Federal Judicial Center, *Manual for Complex Litigation*, 3d ed. (Washington, DC: Federal judicial Center, 1995), available online at http//fjc.gov.; McCarthy, J. T. *McCarthy on Trademarks and Unfair Competition*, 4th ed. (Eagan, MN: Thomson/West 2003).

20 Throupe, R. "The Use of Focus Groups for Property Valuation Research," *The Appraisal Journal* (Fall 2011): 301-313.

21 Bell, R. "Project Delay Economics," *The Appraisal Journal* (Fall 2011): 292-300.

22 *Marshall v. Schultz*, 438 So. 2d 533 (Fla. 2d DCA 1983).

See The Appraisal of Real Estate (13th ed.) (2008). Chicago, IL.: Appraisal Institute.

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Tax Apportionment Issues When Drafting For Blended Families

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It is ironic that the estate of acclaimed author, Thomas L. Clancy, Jr. (the "Decedent"),[1] would be embroiled in litigation due to the provisions of an "inartfully written will."[2] The case of *Bandy v. Clancy*[3] highlights certain tax apportionment issues that should be considered when drafting estate planning documents for blended families.

Decedent was survived by his wife, Alexandra M. Clancy ("Mrs. Clancy"), a minor child of the marriage ("Daughter"), and four adult children from Decedent's first marriage ("Older Children").

The Decedent's Will, which consists of a Last Will and Testament dated June 11, 2007 (the "Original Will") and two codicils, provides that Decedent's residuary estate should be divided into three shares as follows: (1) the marital share for the benefit of Mrs. Clancy ("Marital Share"); (2) the non-exempt family share for the benefit of Mrs. Clancy and Daughter ("Family Share"); and (3) the share for the benefit of the Older Children ("Older Children's Share").

The Original Will directs that the Marital Share should fund the Marital Trust. Following the funding of the Marital Trust, one-half of the balance of the residuary estate should fund the Family Share passing to the Family Trust, and the remaining one-half should fund the Older Children's Share passing to trusts for the benefit of the Older Children.

For reasons beyond the scope of this article, the Family Trust, on the terms provided in the Original Will, did not qualify for the federal marital deduction.[4] In a second codicil amending the Original Will (the "Second Codicil"), the terms of the Family Trust were amended to allow the trust to qualify for the marital deduction as qualified terminable interest property under Section 2056(b)(7) of the Code.[5]

Additionally, the Second Codicil amended the Original Will to provide that notwithstanding any provision in the Will to the contrary, neither the personal representative of the Decedent's estate nor the trustee shall have or exercise any authority, power or discretion over the Marital Share or Family Trust to cause Decedent's estate to lose the benefit of the marital deduction ("Savings Clause").

The terms of Decedent's Original Will provide that all "estate, inheritance, legacy, succession, and transfer taxes (including any interest and any penalties thereon) lawfully payable with respect to all property included in" Decedent's gross estate or taxable in consequence of Decedent's death (the "estate tax") shall be paid out of Decedent's residuary estate, except that the Marital Share should not be charged with or reduced by any estate tax ("Tax Clause").

The Second Codicil did not amend the Tax Clause even though the Family Share now qualified for the marital deduction.

Following Decedent's death, a dispute arose regarding whether the Family Share was liable for any portion of the millions of dollars of federal estate tax charged to the Decedent's residuary estate.[6] As Decedent's Will does not specify whether the Family Share should be funded from the Decedent's residuary estate *before or after* payment of the federal estate tax and the Tax Clause did not expressly except the Family Share from liability, the Older Children argued that the Family Share should be funded from the residuary estate *after* payment of the federal estate tax. Conversely, Mrs. Clancy argued that the Family Share should not be reduced by the payment of the federal estate tax because the Decedent intended to maximize the amount of the marital deduction as evidenced by the provisions of the Savings Clause.[7]

To support their position, the Older Children argued that the Tax Clause served as a clear direction against apportionment;[8] therefore, the Maryland apportionment statute was inapplicable in resolving the conflict. Mrs. Clancy did not challenge this position. Accordingly, the construction of the Decedent's Will was determinative in resolving the issue. Mrs. Clancy filed a petition for the construction of the Decedent's Will.

As with Florida law,[9] in construing the Decedent's Will, the Maryland court looked to its "four corners" to discern the Decedent's intent.[10] In rendering its ruling, the court found the Savings Clause to be a valid" interpretive aid savings clause." An interpretive aid savings clause is designed to clarify a testator's intent in the event of an ambiguity.

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The court concluded that the Savings Clause controlled over the Tax Clause for the following reasons: (1) by its express terms, the Decedent's Will states that the Savings Clause would apply despite "[a]nything in [the] Will to the contrary notwithstanding"; and (2) the Savings Clause prohibited the personal representative of Decedent's estate and the trustee from taking any action or exercising any authority that would reduce the effectiveness of the marital deduction.

Based on its construction of the Savings Clause and its conclusion that Decedent intended to maximize the marital deduction, the court rendered judgment in favor of Mrs. Clancy. As a result of the court's decision, after payment of the estate tax apportioned against the Older Children's Share, the trusts for the benefit of the Older Children would be funded with approximately $4 million less than the amount claimed by the Older Children during the litigation.

Although the court issued a judgment against the Older Children, upon closer inspection, the minor Daughter may be the most vulnerable beneficiary. For example, with respect to the Family Share funding the Family Trust, Mrs. Clancy was merely successful in delaying the imposition of the federal estate tax. Upon Mrs. Clancy's death, the remaining principal of the Family Trust passing to Daughter will be subject to the federal estate tax.[11] Further, Daughter's remainder interest in the Family Trust is subject to Mrs. Clancy's power to invade the principal. Therefore, in addition to being reduced by the federal estate tax, Daughter's interest in the Family Trust would be reduced by principal distributions made to Mrs. Clancy during her life. On the other hand, the Older Children have immediate access to funds bequeathed to their separate trusts.

The litigation arising in *Bandy v. Clancy* serves as a reminder that tax apportionment provisions play a crucial role in a testator's estate plan. The tax apportionment provisions must be analyzed and discussed in any instance in which the testator's estate may be subject to the federal estate tax, and the beneficiaries will not equally inherit the property subject to the tax.[12] This instance arises frequently in blended family situations as the testator commonly desires to separate the interest of various family members to ensure that children of a prior marriage immediately benefit upon testator's death or to avoid family disharmony triggered by the notice and reporting obligations to remainder beneficiaries when the surviving spouse is the lifetime beneficiary.[13]

A poorly drafted tax apportionment provision may expose the drafting attorney to a malpractice claim. In *Bandy v. Clancy*, in addition to seeking construction of the Decedent's Will, Mrs. Clancy petitioned the court for the removal of the personal representative for the specific purpose of pursuing a malpractice claim against the drafting attorney. As judgment was rendered in her favor, Mrs. Clancy's malpractice claim was rendered moot.

Although the mere practice of law carries exposure to malpractice claims, the drafting attorney should consider taking the following actions to mitigate exposure to such claims when drafting tax apportionment provisions[14]: (1)

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review all operative documents governing the transfer of property at testator's death (*i.e.,* the testator's last will and testament, trusts created by the testator, and all amendments to the foregoing documents) to verify the consistency of directions for the payment of the tax; (2) include an express direction[15] against apportionment in the governing instrument if the testator desires to "opt-out" of the Florida apportionment statute (*i.e.,* the testator may desire the payment of the estate tax from the testator's residuary estate); (3) evaluate the extent to which lifetime gifts reduce the available federal estate tax exemption and increase the estate tax exposure of beneficiaries inheriting at the testator's death; (4) include an interpretive aid savings clause to document testator's intent with respect to the payment of the tax; and (5) discuss with the testator (and document the discussion) the impact of the tax apportionment provisions on the *net value* of the property received by beneficiaries under the governing instrument and beneficiaries inheriting property passing outside of the governing instrument.[16]


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Endnotes

1 In a New York Times article, *Tom Clancy, Best-Selling Master of Military Thrillers* (October 2, 2013), author Julie Bosman describes Mr. Clancy's book, "The Hunt for Red October", as "one of the greatest genre novels ever written." Many of Mr. Clancy's books (The Hunt for Red October, Patriot Games, Clear and Present Danger, *etc.*) were made into Hollywood blockbuster movies.

2 See decision of Chief Judge, Lewyn Scott Garrett of the Orphans' Court for Baltimore City, Estate Number 101962, entered on August 21, 2015.

449 Md. 577, 144 A.3d 802 (2016). The Maryland Court of Appeals upheld the decision of the Orphans' Court.

3 The marital deduction is only allowed in limited instances when the testator leaves his surviving spouse an interest in terminable interest property – one such instance is when the interest qualifies as "qualified terminable interest property." Under the terms of the Original Will, during her life, Mrs. Clancy was not the only beneficiary of the principal of the Family Trust. Discretionary distributions of trust principal could be made to Daughter. Further, Mrs. Clancy's interest in the Family Trust terminated upon her remarriage. For these primary reasons, Mrs. Clancy's interest did not meet the requirements of "qualified terminable interest property." *See* Code §2056(b)(7) and Treasury Regulation §20.2056(b)-7. As used herein, the term "Code" refers to the Internal Revenue Code of 1986, as amended.

4 The Second Codicil removed Daughter as a trust beneficiary during Mrs. Clancy's life and deleted the divestment provisions that applied upon Mrs. Clancy's remarriage.

5 Decedent died in 2013 when the applicable exclusion amount under Code §2010(c)(3), as adjusted for inflation, was $5,250,000. Under Mrs. Clancy's interpretation of the Second Codicil, the estate tax liability would be $11.8 million as opposed to $15.7 million under the Older Children's interpretation of the Second Codicil.

6 A marital deduction is only allowed for property passing to the surviving spouse. To the extent a portion of the Family Share was used to pay the estate tax, it would reduce the amount passing to the Family Trust. Only the net amount (after payment of estate tax) passing to the Family Trust is eligible for the marital deduction. *See* Code §2056(b)(4)(A).

7 Generally, with apportionment, each recipient receiving property subject to the federal estate tax must pay its proportionate share of the tax.

See §732.6005(1), Florida Statutes, providing that the intention of the testator as expressed in the will controls the legal effect of the testator's dispositions.

See Orphans' Court analysis citing *Gordon v. Posner,* 142 Md. App. 399, 410 (2002) and *Gideon V. Fleichmann*, 193 Md. 203, 207 (1949).

8 *See* Code §2044. If the Court would have sided with the Older Children, this would have meant that the Family Trust would be subject to the federal estate tax on two occasions – at Decedent's death and at Mrs. Clancy's death.

9 If the beneficiaries inherit property subject to the estate tax equally, then the allocation of the estate tax is less likely to result in litigation as the estate tax liability is shared equally by them.

10 Under Florida law, "qualified beneficiaries" of a trust include the current and remainder beneficiaries. *See* § 736.0103(16), Florida Statutes. A qualified beneficiary of a trust is entitled to notice and other reporting requirements under Florida law. *See* § 736.0813, Florida Statutes.

11 Even though *Bandy v. Clancy* involved a dispute regarding the liability for payment of the federal estate tax, the same issues may arise with respect to the federal generation-skipping transfer tax. The tax provisions governing the payment of the estate tax and the GST tax are generally addressed in the same provision by the drafting attorney.

12 *See* § 733.817(4), Florida Statutes.

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Title Problems Third Party Purchasers Face At Foreclosure Auctions

By Jordana Sarrell, Esq., Sarrell, Sarrell & Bender, P.L., Boca Raton, Florida

Title attorneys often receive a title commitment with a number of problems or receive a call from a client that a property acquired at the foreclosure auction is riddled with title defects. Most of the time, with the right knowledge and diligence, buying a property at the foreclosure auction with defective title can be avoided. With the right tools, a sophisticated investor can use a risk/benefit approach by calculating the cost and time of clearing the defects against the benefit of the value.

This article addresses some of the more unusual or unexpected title defects that arise when a third party seeks to purchase the foreclosed property (Third Party Purchaser). These defects are usually not anticipated by Third Party Purchasers, yet from the title attorney's perspective, these tend to be the most common defects requiring a reforeclosure to clear title.

Issue 1: Deceased Individuals. Very often, it is the interests of a deceased person that is being foreclosed. If a foreclosure is initiated against a decedent and there are no probate proceedings, then the estate must be named as a defendant *in addition to* the "unknown heirs, devisees, grantees, assignees, lienors, creditors, trustees and/or other claimants claiming by, through, under or against the Estate of the decedent." The procedures are set out in F.S. §§ 49.021, and 49.071, and 49.08 for actions against decedents with unknown heirs, devisees, beneficiaries or claimants. Once the Third Party Purchaser has determined that the unknown estate interests are properly named in the original foreclosure action, the Third Party Purchaser must then check the foreclosure case docket to ensure that the Plaintiff (lender) has appointed an Administrator Ad Litem.

An Administrator Ad Litem must be appointed by the court to represent the interests of the decedent and unknown defendants. Further, a genuine diligent search must be executed and evidenced by an Affidavit of Diligent Search and Oath of Administrator Ad Litem. Furthermore, a Notice of Action must be published in a newspaper in compliance with the rules regarding constructive service set forth in the statute.[1] The foreclosing plaintiff's failure to appoint the Administrator Ad Litem is one of the most common causes for the necessity to reforeclose.

Issue 2: The Common Name. During the initial foreclosure action, the plaintiff may be foreclosing on a property owned by an individual with a common name, for example, John Smith. When instituting the initial foreclosure action, the plaintiff will check the public records for other individuals and entities that have an interest in John Smith's property. The name search of that individual will likely yield a number of judgments and/or liens, many of which may be false positives. The Plaintiff in the foreclosure action may not have named all those interests as Defendants to be eliminated in the initial foreclosure action. As such, the Third Party Purchaser will receive a title commitment, from their real estate attorney, an authorized title agent of a title insurer and/or underwriter, wherein the requirements to insure calls for a release of a judgment or a non-identity affidavit attesting to the fact that the individual named in the foreclosure is not the same individual in the un-named judgment or lien. It would be prudent to steer clear of those common names to avoid this issue popping up upon resale of the property. That being said, most Third Party Purchasers are not so prudent, and the title attorney for the Third Party Purchaser is faced with overcoming this title requirement. There are a number of ways to eliminate this title commitment requirement, but the easiest way is to use a skip trace service and acquire the Defendant's social security number and date of birth to clear the judgment or lien. Once the title attorney has compiled sufficient evidence that the Defendant and the named individual on the judgment or lien are not the same, it is easy to procure underwriting approval to remove the requirement.

Issue 3: The U.S. Government. When the IRS or other United States governmental agency holds a lien or judgment against a borrower in a mortgage foreclosure action that is inferior to the mortgage, the lender must name the proper governmental lien holder as a defendant in the action. Here is the catch: the IRS is given an extended period to exercise the right of redemption. Such extended redemption period is 120 days from the date of issuance of the Certificate of Title. A responsive pleading from the U.S. does not act as a waiver of the right of redemption and the U.S. is not required to plead the right to preserve it.[2] As such, title cannot be assured until such period expires. Most purchasers at auctions buy the properties as an investment property to rehab and flip. For these purchasers, time is money. So the stalling of a sale due to an extended period of redemption creates an unhappy investor.

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Liens held by the Small Business Administration (SBA), Farmers Home Administration (FHA), criminal restitution liens and other various federal liens have interests that provide redemption rights following the issuance of title for one (1) year.[3]

Issue 3: The Code Lien – Municipalities do not have Superpowers. Up until a few years ago, municipalities had the ability to enact ordinances providing their liens the same status and priority as real estate taxes. The Supreme Court of Florida declared those ordinances invalid holding that Chapter 162 of the Florida Statutes does not provide for the priority of code enforcement liens. Pursuant to the ruling in *City of Palm Bay v. Wells Fargo Bank, N.A.*, a Court concluded that the "super priority" ordinances in municipal codes were invalid.[4] This was a game changer in the distressed real estate world. A mortgage foreclosure action could foreclose out municipal code liens. Moreover, any liens recorded in between the Lis Pendens in a mortgage foreclosure and the issuance of the Certificate of Title were rendered unenforceable. Thus, the Third Party Purchaser only needed to ensure that the code violation that was subject to the unenforceable lien had been corrected and record evidence of such compliance.

Then last year, the Fourth DCA released an opinion which provided that liens recorded after the judgment in a mortgage foreclosure action were enforceable.[5] This opinion opened up the floodgates of litigation and compromised the integrity and validity of the Lis Pendens statute. On rehearing, the Fourth DCA issued an opinion which superseded and withdrew the prior opinion. The holding specifically acknowledged that liens recorded between entry of final judgments in mortgage foreclosures and the issuance of the Certificate of Title in a judicial sale were discharged and recognized the practical problems the prior holding created which if left in place would cause hardships and problems with lending, title insurers, property owners and purchasers at judicial sales.[6]

As such, Third Party Purchasers must verify whether code liens recorded after the Lis Pendens and prior to the issuance of the Certificate of Title have brought the subject violation into compliance and procure evidence of the same from the governing municipality or county in order to have the property insured.

Issue 4: The Borrower. Objections to foreclosure sales cause delays to the issuance of the Certificate of Title, when timely filed, and thus issuance of the writ of possession cannot be executed until the objection is overruled and certificate of title has issued. Even when untimely filed, an objection or motion to stay a writ will be entertained by the courts. Foreclosure court is akin to the Wild West: there are no rules. A very simple way to evaluate the risk is to review the docket. Has the Borrower fought the foreclosure vigorously? If yes, then the chances that they are going to object to the sale and cause a delay in the issuance of the Certificate of Title and taking possession of the property are high. Even worse, they may file a frivolous Notice of Appeal. For investors that do not have the time, money or patience to deal with these matters, they need to check the docket and make a decision whether the benefit of the purchase the property outweighs the risk of battling it out for possession and title.

Issue 5: The Bankruptcy Abuser; In a Bankruptcy Minute. The bankruptcy abuser who uses bankruptcy as a delay tactic can invalidate your sale if the Suggestion of Bankruptcy was filed even one (1) minute prior to the sale. If the Suggestion of Bankruptcy was filed one (1) minute after issuance of the Certificate of Sale by the Clerk of Court, the Third Party Purchaser is in luck. If the sale is valid, a Motion for Relief from Stay to move forward with *IN REM* foreclosure proceedings and to be permitted to obtain title and possession of the property should be filed with the Bankruptcy court. If the sale was held in violation of the automatic stay, then the sale will be vacated and the Third Party Purchaser will need to take steps to ensure their funds are returned in a timely manner.

Issue 6: The First Mortgage is the Second Mortgage and the Second Mortgage is the First Mortgage? When a first mortgage and second mortgage are issued simultaneously on closing day, it is possible that an error is made and the second mortgage gets recorded first. As we know, in Florida, first in time, first in right. Thus, the question becomes is the second mortgage really the first mortgage? Technically, yes. But if you see the Second-First (the real first mortgage) foreclosing, check the complaint and Final Judgment for "equitable subrogation."

Buying a Property at the Foreclosure Auction Title Review Checklist

1. Establish the Chain of Title:
    a. Verify the vesting information on the deed.
    b. Make sure you are purchasing a 1st mortgage.
    c. Make sure the proper Borrowers are named; the "Unknown Spouse" of an individual should always be named and served to eliminate their interest due to Florida's strict homestead protection laws.
    d. Confirm all inferior/junior liens are named in the foreclosure.
    e. Check if the HOA/COA is named (master association, sub association, property owner's association).
    f. If the IRS or USA is named (not including HUD and VA), take note of the extended period of the right to redeem the debt as it will cloud your title.[7]
    g. Code Liens: Were they recorded prior to or after the Lis Pendens? If prior, the municipality or county must be named to have their interest eliminated; if after Lis Pendens, then once the property is purchased, the Third Party Purchaser must bring the

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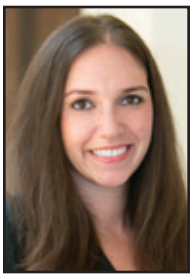
property into compliance and obtain an affidavit of compliance from the governing entity, and the lien becomes unenforceable.

2. Name Search: Conduct a public records search on the names of the borrowers to ensure that any judgment against the individual, which does not contain the legal description, has been named and eliminated in the action (common examples include IRS liens, domestic support liens, other monetary judgment liens).
3. Verify the legal description is correct in the Lis Pendens and Final Judgment as well as the prior deed vesting title into the Borrower. If there is an error in the prior deed's legal description, check the foreclosure docket for the Complaint to see if a count for reformation of the deed was included (which would fix the error in the legal description).
4. Review the foreclosure docket:
   a. Unknown heirs, devisees, etc. of an Estate of a Decedent (Was an Administrator Ad Litem appointed?);
   b. Service Issues;
   c. Contested foreclosures; and
   d. Notice of Sale Published.
5. The Actual Foreclosure Auction: Did Plaintiff put in their minimum bid?
6. Homeowner's Associations/Condominium Associations: Pursuant to Florida Statutes, a Third Party Purchaser is jointly and severally liable with the prior owner for all past due assessments.[8] However, should the Declaration of Covenants, Conditions and Restrictions of a Homeowner's or Condominium Association provide that a purchaser of a property by virtue of a judicial sale is *not* liable for past due assessments, the governing documents of the Association control.[9] There has been a significant amount of litigation on this issue in the last several years, and as a result, this rule is not black and white. This question taps into constitutional impairment of contractual obligations and a number of legal issues that could be the subject of an entirely separate article.
7. Check the real property taxes and confirm whether or not there are delinquent taxes as the Third Party Purchaser is liable for delinquent taxes.
8. Call the local utility company to find out how much is owed. Utilities are unrecorded liens that survive foreclosures.



J. SARRELL

***Jordana Sarrell**, a partner at Sarrell, Sarrell & Bender, P.L., received her law degree from Nova Southeastern University in 2008 and LL.M., in estate planning from the University of Miami in 2009. Jordana's law practice focuses on all aspects of transactional real estate law with a strong emphasis in title and the clearing of title defects. Jordana is a title agent with Old Republic National Title Insurance Company / The Fund and Westcor and the firm handles approximately 300 residential and commercial transactions each year.*

Endnotes

1 Chapter 49, Florida Statutes.

2 *United States v. John Hancock Mutual Life Ins. Co.,* 81 S. Ct. 1 (1960).

3 18 USC §3556; 28 USC §2410.

4 *City of Palm Bay v. Wells Fargo Bank, N.A.,* 114 So.3d 924 (Fla. 2013).

5 *Ober v. Town of Lauderdale By-the-Sea,* Case No.: 4D14-4597 (Fla. 4th DCA August 24, 2016).

6 *Ober v. Town of Lauderdale By-the-Sea, --- So.3d ----,* Case No.: 4D14-4597 (Fla. 4th DCA January 25, 2017).

7 28 U.S.C. Sec 2410(c); 38 U.S.C. Sec 3720(d) and 12 U.S.C. Sec.1701k.

8 F.S. 720.3085.

9 *Pudlit 2 Jointe Venture, LLP v. Westwood Gardens Homeowners Association, Inc.,* 169 So.3d 145 (Fla. 4th DCA 2015).

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Friends Of The Section—2017 Legislative Session

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

During the 2017 Legislative Session, a number of Members of the House and Senate contributed to the passage of Section initiatives in their roles as committee chairs, bill sponsors, and advocates in debate. Legislators who participated in the success of this year's Section bills are acknowledged below, along with a brief biographical profile and list of committee membership.


K. PASSIDOMO

Sen. Kathleen Passidomo

Senator Kathleen Passidomo has sponsored and facilitated the passage of numerous Section initiatives and bills of interest to the Section over the years. This year, she was the Senate sponsor for multiple Section bills, including Senate Bill 724 modifying the elective share process; House Bill 399 on guardianship; and the community associations bill, House Bill 653. She also sponsored Senate Bill 398, revising the procedures for providing estoppel certificates in condominiums, cooperatives, and homeowners associations.

She is the Chair of the Ethics and Elections Committee and Vice Chair of the Health Policy Committee. She also serves on the Commerce and Tourism Committee, the Appropriations Subcommittee on Health and Human Services, the Appropriations Subcommittee on Transportation, Tourism, and Economic Development, the Joint Legislative Auditing Committee, and the Joint Select Committee on Collective Bargaining. She was elected to the Senate in 2016 and before that was a member of the Florida House of Representatives since 2010. Senator Passidomo is a Section member and is Board Certified in Real Estate Law. She is a partner in the law firm of Kelly, Passidomo & Alba, LLP in Naples. Her practice centers on real estate, corporate and business law.


L. BERMAN

Rep. Lori Berman

Representative Lori Berman was the House sponsor for Senate Bill 724, which contained the Section's elective share initiatives. She serves as the Democratic Ranking Member on the Energy and Utilities Subcommittee, the Rules and Policy Committee and also sits on the Appropriations, Commerce, and Health and Human Services Committees. Representative Berman has served as the Democratic Deputy Whip and Chair of the Women's Legislative Caucus. Representative Berman has sponsored and worked on many Section initiatives since becoming a member of the Florida House of Representatives in 2010.

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


C. SPROWLS

Rep. Chris Sprowls

Representative Chris Sprowls is the Chair of the House Judiciary Committee, where he played an invaluable role in the passage of numerous Section bills. In addition to his chairmanship, he is a key member of the House leadership team and also serves as a member of the Appropriations Committee and of the Rules and Policy Committee. He was elected to the Florida House of Representatives in 2014.

Representative Sprowls is a litigation attorney with Buchanan, Ingersoll & Rooney, PC. Prior to his election to the Florida House, Representative Spowls spent seven years as an Assistant State Attorney for Pasco and Pinellas Counties where he successfully prosecuted a number of high profile first degree murder cases.


G. MORAITIS

Rep. George Moraitis, Jr.

Representative George Moraitis, Jr. has been a member of the Florida House of Representatives since 2010 and has been involved in a number of successful Section initiatives. This year, he sponsored the community associations package, HB 653, and the Section's trusts bill. It ultimately passed as an amendment to HB 277 on electronic wills, which was vetoed by the Governor. He actively opposed and voted against the electronic wills initiative throughout the Session. He is the alternating Chair of the Joint Administrative Procedures Committee, Vice Chair of the Appropriations Committee, and also serves as a member of the Civil Justice and Claims Subcommittee, the Insurance and Banking Subcommittee, and the Judiciary Committee.

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


R. SPANO

Rep. Ross Spano

Representative Ross Spano is an attorney and Section member practicing residential and commercial foreclosure defense as well as estate planning, estate and trust administration, and litigation. He is a shareholder at the firm of Spano & Woody, P.A. in Riverview. He has been a member of the Florida House since 2012 and is Chair of the Criminal Justice Subcommittee and Vice Chair of the Judiciary Committee. He also serves on the Children, Families and Seniors Subcommittee, the Justice Appropriations Subcommittee, and the PreK-12 Innovation Subcommittee. Representative Spano was a tireless advocate for increased protections to be included in the electronic wills legislation.


J. FANT

Rep. Jay Fant

Representative Jay Fant helped advance Section legislation this year as Vice Chair of the Civil Justice and Claims Subcommittee. Representative Fant is an attorney and has been a member of the Florida House since 2014. Representative Fant also serves on the Government Accountability Committee, the Insurance and Banking Subcommittee, the Judiciary Committee, the Transportation and Tourism Appropriations Subcommittee, and the Ways and Means Committee.


H. FITZENHAGEN

Rep. Heather Fitzenhagen

Representative Heather Fitzenhagen played a key role in moving the Section's legislative priorities through the process this session as Chair of the Civil Justice and Claims Subcommittee. She is an attorney at the Fort Myers office of Morgan and Morgan practicing in the areas of business law and securities litigation. She was elected to the Florida House in 2012. In addition to her chairmanship, she also serves on the Health Quality Subcommittee, the Judiciary Committee, and the Justice Appropriations Subcommittee.


D. HUKILL

Sen. Dorothy Hukill

Senator Dorothy Hukill has been a friend to the Section throughout her legislative career. This year she assisted in educating other members about the need for additional protections in the electronic wills bill, House Bill 277. She has been a member of the Florida Senate since 2012 and was a member of the Florida House of Representatives from 2004-2012. She is the former Mayor of the City of Port Orange. She is the Chair of the Education Committee, Vice Chair of the Regulated Industries Committee, and sits on the Appropriations Subcommittee on the Environment and Natural Resources, the Health Policy Committee, the Transportation Committee, and the Joint Committee on Public Counsel Oversight.

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


J. LATVALA

Sen. Jack Latvala

Senator Jack Latvala sponsored Senate Bill 1520 on Condominium Termination. He has been involved in numerous other successful Section initiatives and bills of interest during his legislative career, having sponsored at least one bill for the Section during each of his years of legislative service. He is the Chair of the Appropriations Committee and the Alternating Chair of the Joint Legislative Budget Commission. Senator Latvala also serves on the Commerce and Tourism Committee, the Environmental Preservation and Conservation Committee, the Rules Committee, and the Appropriations Subcommittee on the Environment and Natural Resources. He was a member of the Florida Senate from 1994-2002 and is currently serving since 2010.

Senator Latvala is the CEO of GCI Printing Services, Inc. in Largo. He is a former Senate Majority Leader and has received multiple awards for his leadership, including the Champion of Judicial Independence Award from the Trial Lawyers Section of the Florida Bar. He is the Chair of the Pinellas Legislative Delegation. His son, Chris Latvala, is a current member of the Florida House of Representatives.

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R. BRADLEY

Sen. Rob Bradley

Senator Rob Bradley sponsored Senate Bill 1626, which contained the Section's charitable trusts initiative. Sen. Bradley has been a Florida Senator since 2012. He is the Chair of the Appropriations Subcommittee on the Environment and Natural Resources and Vice Chair of the Environmental Preservation and Conservation Committee. He also serves on the Appropriations Subcommittee on Higher Education, the Criminal Justice Committee, the Military and Veterans Affairs, Space, and Domestic Security Committee, and the Rules Committee. He is a managing partner at the firm of Kopelousos, Bradley & Garrison, P.A. in Orange Park and is Board Certified in City, County, and Local Government Law. His practice includes government law, civil litigation, election, campaign and political law, public finance and bonds, and zoning, planning and land use.


B. DIAMOND

Rep. Ben Diamond

Rep. Ben Diamond sponsored the Section's guardianship priority, House Bill 399. He also successfully sponsored the amendment removing the remote presence portions of the electronic wills bill in subcommittee and was an advocate for increased protections in the legislation throughout the process. He led the floor debate and voted against the final electronic wills bill after the remote presence provisions were restored. Rep. Diamond successfully advocated for the veto of the electronic wills legislation.

Rep. Diamond was elected to the House in 2016 and currently serves on the Agriculture and Natural Resources Appropriations Subcommittee, the Agriculture and Property Rights Subcommittee, the Judiciary Committee, and the Natural Resources and Public Lands Subcommittee. He is a longtime, active Section member, and his practice includes guardianship and estate planning as a partner in the firm Williamson, Diamond & Caton in Saint Petersburg.


J. DIAZ

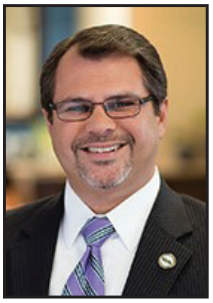
Rep. Jose Felix Diaz

Representative Jose Felix Diaz sponsored two successful Section initiatives this year: House Bill 1237 on condominiums and HB 1379 containing the charitable trusts language. Representative Diaz is a government law attorney with Akerman in Miami and a Section member. Representative Diaz was elected to the House of Representatives in 2010 where he has served as part of House Leadership, including as the Chairman of the Regulatory Affairs Committee. In 2017, he chaired the Commerce Committee and also served on the Appropriations Committee and on the Rules and Policy Committee.


F. WHITE

Rep. Frank White

Representative Frank White was the House sponsor for the condominium termination bill, Senate Bill 1520. He is the CFO and General Counsel of Sandy Sansing Automotive Group in Pensacola. He was elected in 2016 and is a member of the Civil Justice and Claims Subcommittee, the Energy and Utilities Subcommittee, the Health and Human Services Committee, the Health Care Appropriations Subcommittee, the Health Innovation Subcommittee, and the Select Committee on Triumph Gulf Coast.


T. LEEK

Rep. Tom Leek

Representative Tom Leek sponsored the Real Property Improvements bill, House Bill 377. He was elected in 2016 and serves on the Higher Education Subcommittee, the Local, Federal and Veterans Affairs Subcommittee, the Post-Secondary Education Subcommittee,the PreK-12 Innovation Subcommittee, and the Public Integrity and Ethics Committee. He is the president and managing partner of Cobb Cole in Daytona Beach.


B. DONALDS

Rep. Byron Donalds

Representative Byron Donalds was the House sponsor for Senate Bill 398 on estoppel certificates. He was elected in 2016 and is a member of the Agriculture and Property Rights Committee, the Education Committee, the Health Quality Subcommittee, the PreK-12 Appropriations Subcommittee, and the PreK-12 Quality Subcommittee. He is a financial advisor in Naples.

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E. GRALL

Rep. Erin Grall

Representative Erin Grall was a vocal supporter of Representative Diamond's successful amendment to remove a provision related to the remote presence of notaries and witnesses from the electronic wills bill. She also voted against the final version of the bill and advocated for the veto of the bill. She was elected in 2016 and serves on the Civil Justice and Claims Subcommittee, the Energy and Utilities Subcommittee, the Health Care Appropriations Subcommittee, the Joint Committee on Public Counsel Oversight, the Judiciary Committee, and the PreK-12 Quality Subcommittee. She is a litigation attorney and a partner at the Grall Law Group in Vero Beach.


J. GELLER

Rep. Joseph Geller

Representative Joseph Geller was an advocate for the removal of remote notarization and witnesses in the electronic wills bill in subcommittee and voted against the final version of the bill on the House floor. He is a Section member with the firm Greenspoon Marder in Fort Lauderdale. He is the Democratic Ranking Member on the Tourism and Gaming Control Subcommittee and also a member of the Commerce Committee, the Judiciary Committee, the Transportation and Tourism Appropriations Subcommittee, and the Ways and Means Committee. Representative Geller has been a House member since 2014.


S. SHAW

Rep. Sean Shaw

Representative Sean Shaw was an advocate against the remote notarization and witnessing provisions in the electronic wills bill. He is the former Insurance Consumer Advocate of Florida, and is currently an attorney at the Merlin Law Group in Tampa. He was elected to the House in 2016 and serves on the Civil Justice Claims Subcommittee, the Commerce Committee, the Energy and Utilities Subcommittee, the Government Operations and Technology Appropriations Subcommittee, and the Insurance and Banking Subcommittee. Representative Shaw's father, Justice Leander J. Shaw, Jr., was the first African American Chief Justice of the Florida Supreme Court.


D. YOUNG

Sen. Dana Young

Senator Dana Young sponsored Senate Bill 1554 on trusts. She was a House member from 2010-2016 where she served as Majority Leader and was elected to the Senate in 2016. She is the Chair of the Health Policy Committee, Vice Chair of the Appropriations Subcommittee on PreK-12 Education and also serves on the Commerce and Tourism Committee, the Communications, Energy, and Public Utilities Committee, the Regulated Industries Committee, and the Joint Committee on Public Counsel Oversight. Senator Young is an attorney and previously practiced land use law in Tampa.


R. GARCIA

Sen. Rene Garcia

Senator Rene Garcia was the Senate sponsor for the Condominium bill, House Bill 1237. He has previously served as a Councilman for the City of Hialeah and a Florida House member before his election to the Senate in 2010. He is the Chair of the Children, Families, and Elder Affairs Committee and Vice Chair of the Appropriations Subcommittee on Finance and Tax. He is also a member of the Appropriations Committee on General Government, the Banking and Insurance Committee, and the Judiciary Committee. Senator Garcia is a marketing executive in Hialeah.


B. FINKBEINER

Brittany O. Finkbeiner *is an Associate in Dean Mead's Tallahassee office. Her practice focuses on real property, governmental, and administrative law. Prior to going into private practice, Ms. Finkbeiner served as a chief attorney for the Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes. In addition, she's worked at the Florida Department of Economic Opportunity, The Florida Senate Judiciary Committee and as a legislative aide for the Florida Senate.*

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Changes From The 2017 Regular Legislative Session

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

The 2017 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The Section is particularly appreciative of the Members of the House and Senate that sponsored initiatives this year, and these Members are acknowledged below with the legislation that passed during this Session.

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

There were two bills of interest to Section members—one relating to electronic wills and the other relating to community associations—that were vetoed by Governor Scott after they were passed by the Legislature, and those two measures are summarized briefly at the end of this review.

I. Section Initiatives And Technical Assistance

Real Property Improvements—Contract Completion: CS/CS/HB 377 by Representative Leek revises the provisions of Chapter 95 to provide that the completion of a contract relating to the design, planning or construction of improvements to real property shall be the later of the date of final performance of all contracted services or when the final payment for such services becomes due. (Chapter 2017-101, *Laws of Florida*.)

Estoppel Certificates: CS/CS/CS/SB 398 by Senator Passidomo and Representative Donalds revises procedures for providing estoppel certificates by condominium, cooperative and homeowners associations; it requires the delivery of certificates within 10 days of the request; it specifies the information to be contained in the certificate; provides that the certificate must be effective for at least 30 days; and it provides for the fees that may be charged for the certificate. (Chapter 2017-98, *Laws of Florida*.)

Guardianship: CS/CS/HB 399 by Representative Diamond and Senator Passidomo contains the Section's initiatives on guardianship. The legislation includes a provision granting the ability of a guardian to initiate divorce proceedings for the ward; it removes the statutory cap on funeral expenses of the ward; and it creates a notice-and-demand procedure for hearsay and other objections to the reports of an examining committee in guardianship proceedings. (Chapter 2017-16, *Laws of Florida*.)

Elective Share: CS/CS/SB 724 by Senator Passidomo and Representative Berman contains the Section's elective share revisions. These include the manner in which protected homestead is included in the elective share; the time for filing the election for the share; and provisions addressing attorney's fees and unproductive property in an elective share proceeding. (Chapter 2017-121, *Laws of Florida*.)

Condominiums: CS/CS/CS/HB 1237 by Representative Diaz makes a series of revisions to the Condominium Act. The legislation includes a provision that an attorney may not represent both a management company and condominium association; it restricts the individual who may purchase a condominium unit at a foreclosure sale of a condominium lien; it extends records access to a tenant and imposes criminal penalties for the failure to provide records to conceal a crime; it imposes new website requirements on an association containing 150 or more units; it imposes new requirements on the delivery of financial reports; it imposes term limits on board members; it prohibits contracts with certain service providers who have a financial relationship with board members; it provides new conflict of interest standards for officers and board members; it permits the privatization of arbitrators; it creates a new section dealing with fraudulent voting activities; and it creates a new filing requirement of a condominium association to disclose the financial institutions used by the association with the Division of Condominiums, Timeshares and Mobile Homes. (Chapter 2017-188, *Laws of Florida*.)

Charitable Trusts: CS/HB 1379 by Representative Diaz contains several provisions relating to the Florida Department of Legal Affairs. Sections 7 through 12 of the bill revise the provisions of Chapter 736 and substitute the state attorney with the Florida Attorney General in matters relating to charitable trusts. (Chapter 2017-155, *Laws of Florida*.)

Condominium Terminations: CS/SB 1520 by Senator Latvala and Representative White revises the optional termination process for condominiums. Similar provisions also passed in CS/CS/CS/HB 653, and the combined changes in the legislation clarify the public policy basis for condominium terminations; they revise the percentage that may object to the termination from 10% to 5%; they expand the notice requirements for bulk ownership; they revise the statutory content of a plan of termination; and they require filing of a plan with the Division of Condominiums, Timeshares and Mobile Homes before an approved plan can be recorded. (Chapter 2017-122, *Laws of Florida*.)

Community Associations: HB 6027 by Representative Williamson repeals the exemption from financial reporting requirements for communities with 50 units or less and also repeals the restriction on the waiver of financial reporting requirements in Chapters 718, 719, and 720. (Chapter 2017-161, *Laws of Florida*.)

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II. Initiatives Of Interest

Public Records—Attorney Fees: CS/CS/SB 80 by Senator Steube will require a complainant seeking attorney's fees from a public body for the failure to provide public records to show evidence that the complainant gave written notice to the public agency before making a claim for attorney fees for the failure to provide the records can be made. (Chapter 2017-21, *Laws of Florida*.)

Property Taxes—Solar Energy Devices: CS/SB 90 by Senator Brandes extends the tax exemptions for renewable energy improvements to commercial property. The legislation exempts 80% of the just valuation of the improvements to commercial property; it expands the equipment entitled to the tax exemption; and it provides implementing language for the solar energy constitutional amendment granting the exemption. (Chapter 2017-118, *Laws of Florida*.)

Fictitious Name Registrations: CS/CS/HB 169 by Representative White revises the provisions of the Florida Fictitious Name Act to require that a business entity registrant be organized and in active status; it provides that with respect to a general partnership, it is the general partners who are the registrants under the Act; it provides for the reregistration of a fictitious name when a business is sold; and it expands the terms and words that may not be used by a registrant for a fictitious name. (Chapter 2017-47, *Laws of Florida*.)

Low-Voltage Electric Fences: CS/CS/HB 241 by Representative Williamson provides new, first-time requirements for a low-voltage electric fence that is part of an alarm system. If the property owner uses, or intends to use, this type of security for protection of commercial property or agricultural acreage, compliance requires that warning signs be posted, that a non-electric fence enclose the low voltage fencing, and that the there be a limit on the electric charge emitted. The system cannot be used in residential areas. CS/CS/HB 241 has passed the Legislature and is pending action by the Governor. (Chapter 2017-52, *Laws of Florida*.)

Self-Storage Facilities: CS/CS/HB 357 by Representative Moraitis revises the provisions of Chapter 83 relating to self-storage facilities. The legislation permits a lien sale to be conducted on a public website; it permits a landlord to provide property value limits on property be stored by a tenant; it permits the landlord to tow a boat or motor vehicle of a delinquent tenant from the premises; and it authorizes the landlord to charge the tenant a reasonable late fee. (Chapter 2017-82, *Laws of Florida*.)

Underground Facilities—Damage: HB 379 by Representative Leek imposes new reporting requirements when underground excavation activity on real property results in damage to natural gas facilities or other facilities transporting hazardous substances or materials. (Chapter 2017-102, *Laws of Florida*.)

Notaries Public: CS/HB 401 by Representative Abruzzo expands the list of the types of identification that a notary public may rely upon in notarizing a signature on a document. The new identification may now include a veteran health identification card. (Chapter 2017-17, *Laws of Florida*.)

Property Tax Exemption—First Responders: CS/CS/HB 455 by Representative Metz exempts the homestead property of first responders permanently and totally disabled from injuries sustained in the line of duty from ad valorem taxes. The legislation also extends the exemption to their surviving spouses. (Chapter 2017-105, Laws of Florida.)

Department of Agriculture and Consumer Services: CS/CS/HB 467 by Representative Raburn is the comprehensive package of the Department of Agriculture and Consumer Services. Among its provisions are modifications to the regulatory scheme for surveying and mapping, and Section 3 of the bill provides specifically that the orientation of improved or unimproved real property and appurtenances, including condominiums is considered the professional practice of surveying and mapping. (Chapter 2017-85, *Laws of Florida*.)

Guardianship—Technical: SB 502 by Senator Benacquisto is a statutory revisers bill and Section 45 of the bill makes a technical change in a cross-reference to new section 744.2003 based on the renumbering of the section in Chapter 2016-40, Laws of Florida. (Chapter 2017-3, *Laws of Florida*.)

Accessibility to Accommodations: CS/CS/CS/HB 727 by Representative Leek creates an optional inspection process under the Department of Business and Professional Regulation to allow property owners required to comply with the federal Americans with Disabilities Act ("ADA") to have their premises inspected and certified in compliance by a qualified expert. It also provides for the development and implementation of a remediation plan if modifications to the premises are required in order to comply with the ADA. (Chapter 2017-139, *Laws of Florida*.)

Timeshares: CS/SB 818 by Senator Hutson revises procedures for the extension and termination of timeshare plans; it imposes new requirements on the board of the timeshare associations and new classifications of timeshare association expenses; and it addresses the extension procedures for multisite timeshare plans. (Chapter 2017-22, *Laws of Florida*.)

Real Estate Appraisers: CS/CS/HB 927 by Representative Rommel revises the regulatory oversight of appraisal management committees and appraisers at the Department of Business and Professional Regulation. The revisions conform the regulations to the new federal requirements governing appraisal management committees and appraisers. The legislation also provides for conforming definitions to the current federal law; it provides for "evaluations" consistent with federal law; and it eliminates a current exemption for unqualified persons to engage in appraisal activities. (Chapter 2017-30, *Laws of Florida*.)

Reportable Pollution Release: CS/CS/SB 1018 by Senator Grimsley creates the "Public Notice of Pollution Act" that requires reporting of spills to the Division of Emergency Management at the Department of Environmental Protection

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within 24 hours of discovery of the spill release. The legislation requires the Department to create a website for the posting of notices and requires the Department to promulgate rules to implement the Act. The legislation also provides for site assessment and rehabilitation when the real property contaminated is by petroleum and dry cleaning solvent. (Chapter 2017-95, *Laws of Florida*.)

Unmanned Devices: CS/HB 1027 by Representative Yarborough deals with unmanned drone devices, and Section 8 of the bill creates a partial preemption of local regulation of drones and creates a new regulatory framework for their use at the state level. The legislation also prohibits the use of drones over areas considered "critical infrastructure facilities." (Chapter 2017-150, *Laws of Florida*.)

Multifamily Residential Docks: CS/CS/HB 7043 by the House Government Accountability Committee is a comprehensive bill dealing with vessels and floating structures. Section 1 of the bill grandfathers certain oversized condominium and multifamily residential docking facilities from submerged land lease payments, and Section 2 of the bill provides additional clarity on what is considered commercial versus recreational use of a vessel. CS/CS/HB 7043 has passed the Legislature and signed by the Governor. (Chapter 2017-163, *Laws of Florida*.)

Elder Affairs Rule Ratification: HB 7073 by the House Committee on Children and Families provides for the rule ratification of the new rules of the Department of Elder Affairs relating to professional guardians. (Chapter 2017-165, *Laws of Florida*.)

Increased Homestead Exemption: HB 7107 by the House Ways and Means Committee is the implementing legislation that will take effect upon the passage of HJR 7105 that increases the homestead exemption to $100,000. The legislation will take effect if the voters approve the constitutional amendment proposed in HJR 7105. (Chapter 2017-35, *Laws of Florida*.)

Taxation: HB 7109 by the House Ways and Means Committee is the comprehensive tax package for the 2017 Regular Session. Section 5 of the bill simplifies the annual tax exemption application for not-for-profit senior centers; Section 6 provides an additional tax exemption for low income multifamily housing projects; Section 21 of the bill reduces the sales tax on the leases of real property from 6% to 5.8%; and Section 49 amends s. 733.2121 and revises the process by which a personal representative may serve a notice to creditors on the Florida Department of Revenue. (Chapter 2017-36, *Laws of Florida*.)

III. Proposed Constitutional Amendments

Property Tax Cap—Non Homestead Real Estate: CS/HJR 21 by Representative Burton is a proposed constitutional amendment that will make permanent the 10% cap on assessment increases for non-homestead real estate for purposes of calculating local property taxes. The proposed amendment will appear on the 2018 General Election ballot for consideration by Florida voters.

Homestead Exemption Increase: HJR 7105 by the House Ways and Means Committee is a proposed constitutional amendment that will increase the homestead exemption to $100,000, and it will appear on the ballot in 2018. The proposed amendment will appear on the 2018 General Election ballot for consideration by Florida voters.

IV. Bills Vetoed By The Governor

Electronic Wills: CS/CS/HB 277 by Representative Grant creates the Florida Electronic Wills Act and authorizes the electronic execution and storage of wills. The Section opposes the remote presence provisions that have been included in the bill by amendment, and these provisions have a delayed effective date of April 1, 2018. The bill was also amended to include the Section's trust initiatives that included in CS/CS/HB 481. The remote presence provisions have a delayed effective date of April 1, 2018. (CS/CS/HB 277 was vetoed by the Governor.)

Trusts: CS/CS/HB 481 by Representative Moraitis and Senator Young contains the Section's trust initiatives. The legislation includes a provision to resolve the inconsistency in the current law regarding notices to the Attorney General relating to charitable trusts; it provides for the modernization of the statutory authority for decanting trusts; it clarifies that the settlor's intent is paramount when interpreting the terms of the trust; and it clarifies the duty of a trustee concerning accounting during any period. CS/CS/HB 481 died in the Senate Rules Committee when the Session adjourned, but the legislation passed as an amendment to CS/CS/HB 277. (CS/CS/HB 277 was vetoed by the Governor.)

Community Associations: CS/CS/CS/HB 653 by Representative Moraitis and Senator Passidomo makes a series of revisions to the housing chapters of Florida law (718, 719 and 720) that includes a provision extending the time for a response for records production from 5 to 10 days; it eliminates the auditing exemption for communities of 50 units or less; it eliminates the restriction on the waiver of financial reporting; it clarifies the notice requirements for special assessments; it provides for exemptions for fire sprinkler retrofitting in high rise buildings; and it eliminates the bulk buyer sunset provision from Part VII of the Condominium Act. The legislation also contains the provisions found in CS/CS/CS/HB 1237 and CS/SB 1520. (CS/CS/CS/HB 653 was vetoed by the Governor.)

P. DUNBAR

Peter M. Dunbar *is the Legislative Counsel and Lobbyist for the Real Property, Probate and Trust Law Section of the Florida Bar, and he also serves as the General Counsel for the Florida Conference of Circuit Court Judges. Mr. Dunbar is a Member of the American College of Real Estate Lawyers, and he is an adjunct professor at the FSU College of Law where he teaches Condominium and Community Association Law. He also served 5 terms as a Member of the Florida House and is the author of 3 books on Florida housing laws.*

But It Wasn't My Fault! IRS Penalties On Attorneys Acting As FIRPTA Withholding Agents

By Michael A. Lampert, Esq., Michael A. Lampert, P.A., West Palm Beach, Florida

Over the last year, our office has handled the defense of many attorneys acting as FIRPTA withholding agents facing FIRPTA withholding penalties. These cases have generally occurred due to late submission to the IRS (Service) of the withheld funds. This article briefly addresses the FIRPTA withholding rules, the penalties for violating the rules, and the handling of proposed penalties, and provide some practitioner tips. It is suggested that a tax controversy attorney handle the actual penalty appeal.

A. Under IRC §1445, there is a withholding obligation that is generally imposed on the buyer or other transferee (withholding agent) when a US real property interest (USRPI) is acquired from a foreign person. In order to report and transmit the amount withheld, the taxpayer needs to use Form 8288. This obligation to report also applies to foreign and domestic corporations, qualified investment entities, and the fiduciary of certain trusts and estates. Generally, 15% of the amount realized on the disposition of the USRPI must be withheld. For dispositions that occurred before February 17, 2016, the withholding amount was 10% of the amount realized on the disposition of the USRPI by the transferor. It is possible to obtain a reduction or elimination of this withholding requirement by applying to the IRS for a withholding certificate.

B. The transferee must file Form 8288 and transmit the tax withheld to the Service by the 20th day after the transfer. If an application for a withholding certificate has been submitted to the Service on or before the date of transfer, the transferee is still required to withhold the required 15%. However, if an application for a withholding certificate is submitted to the Service, the time periods change. Under Regulation §1.1445-1(c)(2)(i)(A), the withholding agent/transferee is not required to report and pay over to the Service the withheld amount "until the 20th day following the Service's final determination with respect to the application." The Regulation continues to explain that the final determination "will be deemed to occur on the day when the copy of the withholding certificate or the copy of the notification denying the request for a withholding certificate is mailed by the Service to the transferee." While this extends the time to file Form 8288 and pay the amount determined on the withholding certificate, the original 15% *must* be withheld from the date of the transfer. (NOTE: the instructions for Form 8288 state that "if the principal purpose for filing the application for a withholding certificate was to delay paying the IRS the amount withheld, interest and penalties will apply to the period beginning on the 21st day after the date of transfer and ending on the day full payment is made.")

C. Under IRC §6651, penalties apply for failure to file Form 8288 when due and failure to pay the withholding when due. Additionally, if someone is required to, but fails to, withhold tax under §1445, the tax, including interest, may be collected from them. Under §7202, there is a penalty of up to $10,000 for willful failure to collect and pay the tax. Corporate officers or other responsible persons may be subject to a penalty under §6672 equal to the amount that should have been withheld and paid over to the IRS.

1. Under IRC §6651(a)(1), if there is a failure to file on the date prescribed for the specific tax, "there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent."
    a. This penalty can be abated if the taxpayer can show that the failure is due to reasonable cause and not due to willful neglect.
2. Under IRC §6651(a)(2), if there is a failure to pay the amount shown on the tax return on or before the date prescribed for payment of the specified tax, "there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate."
    a. This penalty can be abated if the taxpayer can show that the failure is due to reasonable cause and not due to willful neglect.
3. Under IRC §6651(f), if the failure to file any return is fraudulent, the taxpayer should substitute "15 percent" for "5 percent" each place it appears, and substitute "75 percent" for "25 percent."

D. It is the use of the reasonable cause exception that has caused most of the penalties we have seen to be abated. In our experience, the Service seems to be open to hearing reasonable cause arguments as to why these penalties should not be imposed. Some of the arguments could include:

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1. If there is a dispute as to when the payment/return was actually sent, it is helpful to remember that IRC §7502 explains that required returns and payments mailed within the allowed time period, if received, are considered timely made regardless of whether the Service receives them within that period. The statute specifically states that "the date of the US postmark stamped on the cover in which such return, claim, statement or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be."

   Practice Tip: Make sure to send the payment/return via certified mail and to physically take the package to the post office and have them put a date stamp on the certified receipt. If any other delivery service is used, make sure it is on the Service's approved list.

   Practice Tip: After the withholding payment clears, put a copy of the cleared check (preferably front and back) into the file. Sometimes the Service will credit the buyer/transferee and the withholding agent with the payment of the withheld funds but not "connect up" the payment to the Seller's income tax return when filed. Having a copy of the properly notated check readily available will make it easier to respond to the Seller's request for back up. It can be helpful to simply send the Seller a file copy of the cleared check upon receipt.
2. Sometimes the Service will mix up the dates if a withholding certificate was requested. For example, we have seen them mix up the withholding notice date with the response date (date submitting of the withheld funds is required). In this case, it is important to remember that the payment and return are not due until 20 days AFTER the withholding certificate is issued or denied. If the taxpayer failed to actually receive a copy of the withholding certificate, this could also be a potential argument for reasonable cause.
3. If you are (or are representing) a withholding agent who is also an attorney or CPA who has timely withheld, but not timely paid, the withheld amount to the Service, it could be helpful to include an argument that the taxpayer never received any benefit from this withheld money as it was kept in the law firm's (or CPA firm's) trust account.

   Practice Tip: If using this argument for an attorney, include Rule 5-1.1 of the Florida Bar Rules regulating attorney trust accounts, providing Florida attorneys are not allowed to receive a benefit from the interest on funds held in trust. This tends to show that there was no added incentive for the taxpayer (the attorney withholding agent) to keep the funds in its trust account.
4. We have had cases where a staff person of the withholding attorney simply did not mail the withholding check to the Service. Once again, in this case use all the information you have to argue that it was reasonable cause (i.e., money was withheld, check was cut to the IRS (U.S. Treasury), the employee was to timely mail the check, but hid the fact it was not, while showing how the withholding attorney/withholding agent appropriately supervised, etc.).

E. The structure of the withholding certificate application process is somewhat faulty. Typically, the seller applies for a withholding certificate, but it is not granted prior to closing. The withholding agent (often the buyer's attorney or the closing title company) holds the withheld amount pending receipt of the withholding certificate. The certificate is issued in full or in part as determined by the Service. However, the Service notifies the seller or the seller's CPA or attorney who handled the filing of the withholding certificate. The escrow agent is often not notified by the actual recipient of the withholding certificate until well after the Service's notification regarding the withholding certificate is sent to the seller/seller's CPA or attorney who prepared and filed for the withholding certificate. The amount due to the Service is late - resulting in a penalty. Fortunately, the escrow agent has the underlying funds, or the escrow agent could be liable for that amount too.

Trap: The first-time abatement of penalty defense does not apply.

Practice Tip: When acting as withholding agent, if someone else filed for the withholding certificate:

- Confirm and obtain a copy of the filing and proof of timely filing.
- Make sure the correct amount is withheld. The amount should be consistent with both the actual transaction and the timely filed withholding certificate request.
- Remind the person who submitted the certificate to immediately inform the withholding agent when the withholding certificate or denial is received.
- Place multiple ticklers to follow up to see if the withholding certificate or denial has been issued by the Service.

These steps can help to avoid a penalty situation and bolster a reasonable cause argument if there is a penalty.


M. LAMPERT

***Michael A. Lamper**t is a board-certified tax lawyer in West Palm Beach where his practice emphasizes tax controversy matters. He received his A.B. degree from the University of Miami, J.D. degree from Duke University and LL.M. degree in taxation from New York University. He is past Chair of the Florida Bar Tax Section, past president of the Palm Beach Tax Institute and served for six years on the Florida Bar Tax Law Certification Committee. He is a Fellow of the American College of Tax Counsel, a member of the South Florida Tax Litigation Association, and past Chairman of the Palm Beaches - Treasure Coast Region Chapter of the American Red Cross.*

SECTION SPOTLIGHT

Congratulations To The 2016-2017 Awards Recipients

At the RPPTL Section's Annual Convention held at Hyatt Regency Coconut Point Resort & Spa in Bonita Springs May 3-June 4, 2017, the Section proudly announced the selection of the RPPTL members to receive the awards of excellence for 2016-17 to be memorialized in the archives of the Section. The awards were presented at the Oscar themed Friday night dinner. Each recipient's award came in the form of a beautiful imprinted crystal obelisk denoting his/her achievement award. Congratulations to the following award recipients:

J. MORAN

CLE Producer of the Year having produced the most profitable CLE for 2016-17, a seminar on the Probate Law and Procedure: **John C. Moran**. **John** has served as Chair of the Probate Law and Procedure Committee since 2013. **John** and the Steering Committee, consisting of Committee vice-chairs M. Travis Hayes and Matthew H. Triggs, were able to assemble a fantastic lineup of speakers for the RPPTL Section's annual "Probate Law" seminar. The seminar was well received by practitioners across Florida. If you haven't seen it, it's still available on demand!

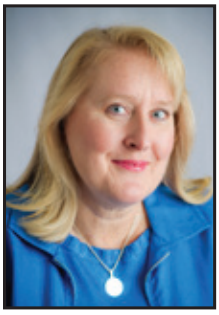
DETZEL/SKLAR

P. ROLANDO

John Arthur Jones Annual Service Award given for dedication and outstanding services to the Section: **Lauren B. Detzel** (Probate & Trust Division) and **William P. Sklar** (Real Property Division). **Lauren** was instrumental in not only leading the charge on the Elective Share but also helping on decanting and with the Section positions against the Uniform Voidable Transactions Act and Electronic Wills. **Bill** was involved in numerous legislative matters this year, including representing the Section at legislative hearings on condominium and homeowners' legislation as well as real property aspects of the proposed electronic wills legislation.

D. BRENNAN

M. GELFAND



A. ADAMS

William S. Belcher Lifetime Professionalism Award in recognition of their lifetime contributions to the Section: **Margaret (Peggy) Rolando** (Real Property Division) **and David C. Brennan** (Probate & Trust Division). **Peggy** was selected for her dedication to the Section as a constant source of support for the current Executive Committee and with the development of the new Real Estate Certification in Condominium and Planned Developments. **David** was selected for his tireless service to all probate practitioners through his dedication to FLEA/FLSSI, probate forms, Probate Team Seminars, Legislative Update Case Law Review (which he humorously presented for many years) and the Guardianship Law Task force. Both are past Chairs of the Section who have continued to promote and serve the Section, inspiring all its members.

Robert C. Scott Memorial Award given to those who exemplify devotion and valuable service to the Section: **Michael J. Gelfand** (Real Property Division) and **Angela M. Adams** (Probate

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& Trust Division). **Michael** is a past Chair of the Section and continues to share his insights and expertise with the Section members. He remains active and involved on numerous fronts within the Section and continues to devote tremendous amount of time to Section initiatives and issues. **Angela,** in addition to her other Section activities, worked tirelessly for years on legislation proposed by the Probate Division but which the Executive Council was not able to give its full support. She was gracious and kind in every respect and in accepting the final decision. She continued her work on other legislation that did garner the support unanimously by the Executive Council of the Section.

B. DIAMOND

S. PENCE

Rising Star Award recognizing members of the Section who demonstrate the potential for future Section leadership: **Benjamin F. Diamond** (Probate & Trust Division) and **Scott P. Pence** (Real Property Division). **Ben** tirelessly has helped both as a legislator and inspiring the youth of our Section through his involvement with the Fellows. **Scott** (Real Property Division) has done exemplary work in managing both the Construction Law Committee and the Insurance & Surety Law Committee as Chair of each.

M. SNEERINGER

At Large Member of the Year Award recognizing an At Large Member who has provided the highest level of service in assisting the Section with its needs: **Michael A. Sneeringer,** here with the then Chair-Elect, Andrew O'Malley**,** has enthusiastically spearheaded many projects for the At Large Members such as drafting the enhanced version of the Welcome Letter to the new members of the Section and coordinating that project as well as the RPPTL website update.

Thank you for your devotion to excellence and tireless work on behalf of the Section and in furtherance of improving the lives of Florida's residents and visitors.

Articles by Silvia B. Rojas on behalf of the Section. Photos by Michael Gelfand.

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RPPTL Section Executive Council Meeting
Hyatt Regency Coconut Point Resort & Spa, Bonita Springs, Florida
May 31-June 4, 2017

Family Fun - Balloons for Charlie and John Moran

Friday Night Awards Dinner

ActionLine Editors, Jeanette Moffa and Sean Lebowitz, attending meetings

New RPPTL secretary, Larry Miller, and Bob Schwartz

Michael Donnelly, Jane Cornett, and Brenda Ezell

Debbie Goodall heads to the back row after a job well done

Photo credits: Michael Gelfand and Silvia Rojas.

View Photo Albums at www.rpptl.org

Tae Kelley and the Section Dunk Tank

Steven Goodall enjoys his new Sweatshirt

Section Fellows Coordinator, Ben Diamond

Mishele Schutz, Silvia Rojas, Melissa Scaletta, Rebecca Wood, and Ben Jepson

Steve Mezer and Mike Dribin

Ashley Gonnelli representing section sponsor, Guardian Trust

Friday Night Awards Dinner - Cookies

Chair-Elect, Debra Boje and Past-Chair Michael Gelfand

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Saturday, June 3, 2017 - 8:00-10:00 a.m.

Hyatt Regency Coconut Point, Bonita Springs, Florida

Prepared by Anne Pollack, Tampa, Florida

Thank you to the Roundtable Sponsor, Fidelity National Title Group

Meeting opened at 8:01 a.m. by Real Property Division Director, Rob Freedman.

Sponsor Recognition. The Division Director thanked the Roundtable Sponsor, Fidelity National Title Group, and recognized Karla Staker representing the sponsor.

Recognition of guests, students, and dignitaries in attendance. The Division Director opened the floor for introductions of the law students and other guests in attendance.

Approval of Summary. The first order of business was the motion to approve the summary of the prior meeting, which motion passed unanimously.

Report on Inaugural Attorney-Loan Officer ("ALO") Conference Scheduled for July in West Palm Beach, Rob Stern

Rob Stern reported. The Section is starting this new conference for bankers and lawyers to come together to discuss and address issues facing both professions. The first ALO Conference will be held Wednesday, July 26th, at the Kravis Center in West Palm Beach, before the Breakers meeting. Rob asked for people to sign up, get sponsors, spread the word, and provide feedback. Rob thanked the Section for its great support. [Editor's Note: A review of the ALO Conference will be included in the Real Estate Roundtable Summary in the next ActionLine]

Report on "No Place Like Home" Program – Katherine Frazier

Katherine Frazier reported on behalf of the Professionalism and Ethics Committee on the "No Place Like Home" program. It has already begun in the 1st, 2nd, 12th, 13th, 14th, 15th, and 17th Circuits and is ready to kick off in the 2nd, 17th, and 14th Circuits. The program will assist vulnerable low income Florida residents with title issues generally arising after a disaster. They also want to help people before disaster strikes so they can be ready should the disaster happen. Bay Area Legal Services has applied for a $300,000 grant to assist with this program and the City of Sarasota has indicated it will likely pay up to $50,000 for title search and filing fees in Sarasota.

EXECUTIVE COUNCIL ITEMS

ACTION ITEM:

(i) FR/Bar HOA Rider – Salome Zikakis and Fred Jones

The updated FR/Bar contract was approved at the Key West meeting. Once the Riders are approved, the Section can process the copyright approval for the whole package.

Salome Zikakis reported that the HOA Rider was the only remaining rider that needed approval. She stated the Residential Real Estate and Industry Liaison (RREIL) committee discussed and approved the revised HOA Rider. The main issue that arose was that, when applicable, there was no place on the form or the contract to indicate whether there was more than one community association. However, she stressed that, due to timing, the need to get this Rider approved at this meeting was great and that any small tweaks could be made after the fact.

Fred Jones reported that, in drafting, the FR/Bar Joint Committee had to work around the fact that a property could be subject to multiple community associations and assessments. To date, realtors have simply attached an HOA Rider for each association or disclosed multiple associations and assessments on the same form. The FR/Bar Joint Committee felt that these resolutions were working under the current HOA Rider. Fred explained that the only changes to the HOA Rider were to the formatting – the rider is still in the statutory form.

Discussion was had about alternatives for disclosing multiple community associations and assessments. A motion was made to approve the HOA Rider with additional language on page 2 that would allow the parties to indicate if there is more than one community association and, accordingly, more than one HOA Rider to the contract. Discussion was had and motion was amended to approve the HOA Rider as presented by the RREIL Committee with a proviso that the Executive Committee and FR/Bar Joint Committee would work together to try to agree on language addressing the issue of multiple community associations and assessments, but that such language was not a requirement for the approval of the HOA Rider. Amended Motion passed unanimously.

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INFORMATION ITEMS:

(i) Open/Expired Permits - Lee Weintraub

Lee Weintraub reported that the ad hoc committee on Open/Expired Permits has finished the proposed bill related to closing open permits discovered at sale of property. The Building Officials want more changes, but the committee decided to move the bill forward to Tallahassee. They expect the Building Officials to support the majority of the bill, with the exception of the provision that outstanding permits that have not been closed for 5-7 years are automatically closed without ramifications to a purchaser of property. A motion to approve the proposed legislation was made. Motion passed unanimously.

(ii) Unlawful Detainer and Ejectment- Art Menor

Art Menor reported on behalf of the Problem Study Committee about proposed legislation concerning unlawful detainer and ejectment. He explained that, when someone wants to regain possession of property, there are several remedies: eviction, unlawful detainer, and ejectment. While courts seem to understand that eviction applies when there is a landlord/tenant relationship, there has long been confusion by the courts as to what the other remedies are and when to apply them. The objective was to rewrite, clarify, and modernize the statutes concerning unlawful detainer and ejectment. Art presented the proposed bills. A motion to approve both proposed bills was made. Motion passed unanimously. This was the second informational notice and will be an action item at the next Executive Council meeting.

(iii) Notice of Commencement - Art Menor

Art Menor reported. The statute is not clear that the term of a Notice of Commencement can be for less than a year. This bill clarifies that the term may be for shorter than a year, and provides a few additional changes, such as that a Notice of Commencement may not be amended after its expiration. A motion to approve the proposed legislation was made. Motion was approved unanimously.

(v) Lis Pendens - Susan Spurgeon

Susan Spurgeon reported on behalf of the Real Property Litigation committee. In November 2016, the Fourth DCA issued an opinion in *Ober v. Town of Lauderdale Lakes* that would have ended the effectiveness of a *lis pendens* 30 days after a final judgment in a foreclosure case, even if the judicial sale had not yet occurred, leaving superior liens vulnerable to liens recorded after the final judgment. In addition to the committee trying to get legislation passed that would clarify existing law that was contrary to the Fourth DCA's opinion, the Section submitted an amicus brief to the Fourth DCA, explaining that it is almost impossible to have a foreclosure sale in 30 days and that, in a foreclosure action, the *lis pendens* remains in effect through the judicial sale. The court withdrew its opinion and, in January, entered a new opinion providing that the *lis pendens* remains in effect through the judicial sale. Susan explained that, even though the court reversed itself, the committee desires to codify the new opinion. Accordingly, the committee is again proposing legislation that would codify the existing law that the *lis pendens* stays in effect through a judicial sale in a foreclosure action. The Section is aware that some cities support the court's original opinion, so there will likely be opposition to this proposed legislation. A motion to approve the proposed legislation was made. Motion was approved unanimously.

CLE UPDATE

(a) Best Practices Manual – Bob Swaine

Bob Swaine reported. He announced that Steve Mezer will be the new CLE Co-Chair for Real Property for the next Bar Year. Each substantive committee is required to host one "regular, in attendance" CLE or at least 1 hour webinar CLE. The CLE Committee recommends that each committee have a program chair for CLE to help meet this goal.

Bob reported that webinars are doing great and the Section encourages committees to continue using webinars, because they save the Section on costs related to renting space. Additionally, the Section makes money in after-market sales, so there is little reason to host a live seminar.

Bob reported that the Section will have a new technology consultant who will, among other things, assist with coordinating the marketing for CLEs.

The CLE committee created a Best Practices Manual that can be found on the Section website. One should review this manual first when planning a CLE. It outlines hard deadlines and what needs to be included in outlines and materials for CLE approvals. Bob encouraged committees to make sure they are hitting each of the deadlines so the Section can keep things running smoothly. As a rule of thumb, an e-CLE requires that the program be set 8 weeks out; however, Bob confirmed that the Section is able to do quick-turnaround if the circumstance justifies it.

(b) CLE seminars for the 2017-2018 Bar year - Bob Swaine

There is a full calendar of programs planned for the Spring, but there are many openings for the Fall. One expected program is a multi-part series on title insurance endorsements.

REMINDERS FROM MAY 17TH NEW BAR YEAR TRAINING/ TRANSITION SESSION

(a) July 1st deliverables

The Division Director reminded the committee chairs of the necessity for delivery of their response by July 1st with the following information:

(i) Appointment of liaisons

Each committee must have four liaisons – CLE, legislation, technology, and publications. Each technology liaison needs to attend the next Executive Council meeting so they can attend a meeting of the Information Technology Committee to learn what their responsibilities will be.

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(ii) Projects for 2017-2018 Bar year

The Division Director asked that committees let him know what projects they are working on for the upcoming year.

(iii) Use of Fellows

The Division Director asked that committees look into how they can get Fellows to help their committees.

(b) New business items

The Division Director asked that each committee let him know what projects or issues it is interested in working on. He wants to make sure the appropriate committee, and only one committee, is working on an issue to avoid duplicating time and efforts.

COMMITTEE REPORTS:

(a) Commercial Real Estate – Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin D. Schwartz, Co-Vice Chairs.

Adele Stone reported. The goal of this committee is to provide information and CLEs. Because there are only so many committee meetings, but many issues to talk about, the committee intends to have more one-hour lunch and learn CLEs. At this current meeting, Jim Russick spoke about the new ALTA title commitments.

(b) Condominium and Planned Development – William P. Sklar, Chair; Alexander B. Dobrev and Kenneth S. Direktor, Co-Vice Chairs.

Bill Sklar reported. The committee has had two recent in-person meetings. The Committee had a successful annual "Ins-and-Outs of Condominium Law" CLE at the Stetson Tampa campus with over 100 attendees in person or online. The committee has committed to do two eCLEs as well as its annual "Ins and Outs of Condominium Law" course. There will also be a new RP Division committee to plan the review course for the Condominium and Planned Development Law certification exam, and the Chair referenced that Sandra Krumbein and Richard DeBoest will be serving as Co-Chairs of that new committee and that an FAQ on the Condominium and Planned Development Law Certification will be published soon. Bill reminded members of the July 1st through August 31st application window to take the certification test or apply for a grandfathering exemption.

The Division Director reported that the certification review course would take place at the same time as the real estate certification course, likely in the beginning of February.

The Division Director took a moment to congratulate Bill on winning the Section's Annual Service Award.

(c) Construction Law – Scott Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs.

Scott Pence reported. The committee has monthly telephonic meetings and provides one hour of free CLE every month. The committee most recently had a successful CLE on latent defects and water intrusion claims.

The Division Director congratulated Scott on winning the Section's Rising Star award.

(d) Construction Law Certification Review Course – Deborah B. Mastin and Bryan R. Rendzio, Co-Chairs; Melinda S. Gentile, Vice Chair.

Melinda Gentile reported. The Committee is on track to organize speakers and a program for the Construction Law Certification Review Course.

(e) Construction Law Institute – Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Bryan R. Rendzio, Co-Vice Chairs.

Sanjay Kurian reported on the success of the 2017 program. The Construction Law Institute runs concurrent with the Construction Law Certification Review Course. This was the 10th annual program and had over 400 attendees and 35 sponsors. Sanjay congratulated the vice chairs. The program is expected to make a 6-figure profit. They are now planning for 2018 and have a waiting list for sponsors.

(f) Development & Land Use Planning – Vinette D. Godelia, Chair; Julia L. Jennison, Co-Vice Chair.

Vinette Godelia reported. The Committee provides legislative and case law updates. This year, the committee has a new group of CLEs that will be run in coordination with the City, County and Local Government Section. She promoted the committee's Young Lawyer video series, and explained that the program will continue to be updated.

(g) Insurance & Surety – Wm. Cary Wright and Scott Pence, Co-Chairs; Frederick R. Dudley and Michael G. Meyer, Co-Vice Chairs.

Cary Wright reported. The committee holds monthly telephone conferences the third Monday of each month. This past Spring, the committee hosted a mini-series on risk management and insurance issues and will be packaging 2 or 3 of the mini-series into a CLE for the fall.

The Division Director noted that Cary is the Incoming Co-Chair for the Legislative Committee of the Executive Council.

(h) Liaisons with FLTA – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alexandra J. Overhoff and James C. Russick, Co-Vice Chairs.

Melissa reported and announced the new executive director, Scott Merritt, whose first day will be June 1, 2017. Melissa thanked Alex Overhoff, the former executive director, for all her work. The FLTA is active in the legislative arena, was a big part of getting the estoppel bill passed, and has a large legislative agenda for next year. She encouraged attorneys to join FLTA, as there are not many attorney members. Attorney agents should realize they have a great deal in common with title agents in FLTA and should align their interests and make sure their voice is heard. She encouraged attorneys to come to the

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FLTA convention in Lake Buena Vista on November 8-10, 2017.

(i) Real Estate Certification Review Course – Jennifer Slone Tobin, Chair; Manuel Farach, Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs.

Manny Farach reported. The committee is preparing for next year's course and will be looking for past speakers to step up again. The Division Director congratulated Jennifer Tobin for leading this program for the last three years.

(j) Real Estate Leasing – Richard D. Eckhard Chair; Brenda B. Ezell, Vice Chair.

Brenda Ezell reported. The committee picked its liaisons and has planned CLEs for the upcoming year. The committee is planning a CLE on marijuana as it relates to commercial and residential leasing.

(k) Real Estate Structures and Taxation – Michael Bedke, Chair; Cristin C. Keane, Lloyd Granet and Deborah Boyd, Co-Vice Chairs.

No report was provided.

(l) Real Property Finance & Lending – David R. Brittain, Chair; E. Ashley McRae, Richard S. McIver and Robert G. Stern, Co-Vice Chairs.

David Brittain reported. The committee hosted a presentation on swaps and derivatives, provided a review of 2017 legislation of interest to lenders, provided a high-quality case law update, and updated the committee on the attorney-loan officer conference. The committee also discussed pending updates to the 2011 Third Party Legal Opinions Report, on which the legal opinions subcommittee is working.

(m) Real Property Litigation – Susan K. Spurgeon, Chair; Manuel Farach and Marty J. Solomon, Co-Vice Chairs.

Susan Spurgeon reported. The First DCA has invited the Section to be an amicus in *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195 (Fla. 4th DCA 2012). The court is considering rolling back a ruling that required proof of standing at the initial filing of a foreclosure case. The committee discussed this in the 2015-2016 Bar year, and concluded that the 4th DCA was correct – standing is not jurisdictional, but an affirmative defense that can be waived. The committee is looking for guidance from the Section as to whether to submit an amicus. The committee wants to accept the invitation but has not yet discussed what its position should be.

Susan also reported that Sharon Bock, the Clerk and Comptroller for Palm Beach County, attended the committee meeting and talked about the efforts to make court filings available in clerks' websites. The tension is created by the filers and others that want immediate access and the clerks who need time to review and redact appropriate information. According to Ms. Bock, clerks are making a tremendous effort to make the processes and timing uniform and universal for all 67 counties.

Lastly, the committee discussed the issue presented by excess proceeds after a tax deed sale where the first mortgage holder does not claim or waive its interest in the proceeds. Currently, if there are excess proceeds and there is a first mortgage on the property, the clerk cannot disburse any excess proceeds unless and until the first mortgagee claims or waives its interest in the funds. The proposed legislation will be notice-based. The clerk will give notice to all lienholders who will then have 90 days to make a claim to the proceeds. Once that time period expires, the clerk can disburse to claimants or to the Department of Revenue if no claimants stand up. This will be an action item at the next Executive Council meeting.

(n) Real Property Problems Study – Arthur J. Menor, Chair; Mark A. Brown, Robert S. Swaine, Stacy O. Kalmanson, Lee A. Weintraub and Patricia J. Hancock, Co-Vice Chairs.

Art Menor reported. The committee discussed a Section bill related to the stop/start procedures to terminate a Notice of Commencement. The goal of this bill was to eliminate the need to cease construction if parties are obtaining new financing or refinancing mid-construction. It did not pass this year, but the Section will continue to support this legislation in the next session.

The Committee also looked at ADA issues and the problem of plaintiff's law firms teaming with nominally disabled plaintiffs to make serial filings of lawsuits against hotels, shopping centers and commercial property owners for ADA violations. There has been much attention given to this, and most committee members have had a client subject to one of these lawsuits. There was a bill passed this past session that modified the Florida version of the ADA, however property owners are still subject to federal law. The committee also discussed providing a pre-suit notification to the property owner that would give the owner an opportunity to come into compliance before suit is filed and attorneys' fees kick in.

(o) Residential Real Estate and Industry Liaison – Salome J. Zikakas, Chair; Louis E. "Trey" Goldman, Nicole M. Villarroel and James Marx, Co-Vice Chairs.

Salome Zikakis reported on the Committee's effort to elevate the practice of residential real estate law, as it is important to have a competent residential attorney involved in residential real estate transactions. The Committee discussed the use of third party escrow and disbursement agents. This could reduce title agent liability and may be helpful for small players, but still raises some concerns on which title agents and title insurers are working.

(p) Title Insurance and Title Insurance Liaison – Raul P. Ballaga, Chair; Alan B. Fields, Brian J. Hoffman and Melissa N. VanSickle, Co-Vice Chairs.

Raul Ballaga reported. The Committee reviewed recent legislation and what will likely will be addressed in the next session. The Committee is planning a multi-part CLE webinar

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Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, June 3, 2017

Hyatt Coconut Point, Bonita Springs, Florida

Prepared by Elizabeth A. Bowers, Esq., West Palm Beach, Florida

Thank you to the Roundtable Sponsor:

Stout (formerly, 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 8:23 a.m.

Sponsor Announcement. The Division Director acknowledged the sponsor of the Roundtable meeting, Stout (formerly, Stout Risius Ross, Inc.), a valuation company, and Guardian Trust, a professional trust company.

Standing Committee Reports

Asset Protection - George Karibjanian, Chair; Rick Gans and Brian Malec, Co-Vice-Chairs: Mr. Malec reported that the Committee has been working on the Uniform Voidable Transfers Act ("UVTA"). While the Business Law Section tried to put a bill through this year, the bill was not enacted. Mr. Malec reported that we can expect the Business Law Section to introduce a revised bill next year. Ms. Boje stated that an Ad Hoc UVTA Committee will be formed.

Attorney/Trust Officer Liaison Conference - Laura Sundberg, Chair; Stacey Cole, Co-Vice Chair (Corporate Fiduciary), Tattiana Brenes-Stahl and Patrick Emans, Co-Vice Chairs: Ms. Brenes-Stahl reported that the conference will take place at The Breakers, in Palm Beach, from Thursday, August 24th through Saturday, August 26th. She indicated that there were still sponsorship opportunities available.

Digital Assets and Information Study Committee – Eric Virgil, Chair; Travis Hayes and Dresden Brunner, Co-Vice Chairs: No report.

Elective Share Review Committee – Lauren Detzel and Charlie Nash, Co-Chairs; Jenna Rubin, Vice Chair: Ms. Detzel reported that the legislation proposed by the Section was passed, with a couple of modifications. Ms. Detzel stated that there was strong opposition to the sliding scale calculation, so it was removed from the bill. Opponents of the sliding scale calculation had argued that the percentages were too low. The portions of the bill that survived include: (i) a provision eliminating the discrepancy between homestead and tenancy by the entireties property for purposes of the elective share calculation, (ii) a provision requiring interest be paid to a surviving spouse if the elective share is not paid within two years, and (iii) a provision authorizing the trial court to award attorney's fees to either party. Except for the attorney's fees provision, the legislation applies to estates of decedents who die after July 1, 2017. The attorney's fees provision applies to any proceeding that is pending after that date.

Estate and Trust Tax Planning – David Akins, Chair; Tasha Dickinson and Rob Lancaster, Co-Vice Chairs: Mr. Akins indicated that the Committee was in the process of forming a subcommittee to consider whether Florida should statutorily authorize the creation of community property trusts. He also reported that the revised legislation concerning joint ownership of tangible personal property will be an action item at The Breakers meeting. Mr. Akins announced that on December 1 the Committee will be co-hosting a joint seminar with Asset Protection committee.

Guardianship, Powers of Attorney and Advance Directives – Hung Nguyen, Chair; Tattiana Brenes-Stahl, David Brennan, Eric Virgil and Nicklaus Curley, Co-Vice Chairs: Mr. Nguyen reported that several pieces of legislation which originated in the Committee were enacted in the last legislative session, including: (i) legislation removing the requirement that a non-incapacitated spouse must consent to a divorce before a guardian, on behalf of the incapacitated spouse, could initiate a divorce proceeding; (ii) legislation removing the $6,000 cap on a ward's funeral expenses; and (iii) legislation providing that hearsay objections to examining committee members' reports must be made before the incapacity hearing.

Mr. Nguyen stated that he expects the Committee will have information items on the issues raised in *Romano v. Olshen* and *Rothman v. Rothman* soon. He stated that they were also working on a fix to: (i) Fla. Stat. § 744.3701 to address issues regarding confidentiality and (ii) the *Steiner v. Steiner* case.

Finally, Mr. Nguyen mentioned that there is a subcommittee working on the issue raised in *Rene v. Sykes-Kennedy* case, in which the court held that the guardianship court had authority to enter an order allowing the guardian to amend the ward's revocable trust to appoint herself as trustee.

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IRA, Insurance and Employee Benefits – Howard Payne and Kristen Lynch, Co-Chairs; Carlos Rodriguez and Richard Amari, Co-Vice Chairs: Mr. Amari discussed the U.S. Department of Labor Fiduciary Rule that was introduced over a year ago and received over 3,000 comments. Despite efforts to delay the effective date, the rule went into effect on April 10, 2017. Mr. Amari stated that some aspects of the rule needed clarification; accordingly, some members of the Committee are considering whether we need to enact curative legislation.

Principal and Income – Ed Koren, Chair; Pam Price, Vice-Chair: No Report.

Probate and Trust Litigation – Jon Scuderi, Chair; Jim George, Rich Caskey and Lee McElroy, Co-Vice Chairs: Mr. Scuderi discussed several of the Committee's ongoing projects, including, (i) changing the definition of "exploitation" in various parts of the statutes to make the definitions uniform, (ii) investigating the *Parker v. Parker* decision regarding who should have the ability to recover assets for the estate, and (iii) analyzing the different time requirements for challenging a will or a trust.

Probate Law and Procedure – John Moran, Chair; Travis Hayes, Matt Triggs and Amy Beller, Co-Vice Chairs: Mr. Moran stated that the Committee's legislation defining coins and bullion as tangible personal property will be an information item at The Breakers meeting. Mr. Moran also discussed a recent bill offered by a state representative which would prohibit parents from disinheriting their minor children. Mr. Moran stated that this bill would be discussed further at the next meeting. Mr. Moran said his Committee was also working on a review of the legislation regarding electronic wills, which was vetoed by the Governor, but which is expected to be re-introduced.

Trust Law - Angela Adams, Chair; Tami Connetta, Jack Falk and Mary Karr, Co-Vice Chairs. Ms. Adams discussed various parts of the trust legislation introduced in the last session, including: (i) the provision which clarifies that each trustee is entitled to reasonable compensation if multiple trustees are serving; (ii) the provision clarifying that trusts are to be construed and administered in accordance with the settlor's intent, (iii) the provision fixing the *Corya* decision, and (iv) the decanting legislation. Ms. Adams stated that all of the legislation passed except for the legislation regarding the compensation of multiple trustees.

Liaison to ACTEC – Elaine M. Bucher, Mike Simon, Bruce Stone, and Diana Zeydel: Mr. Lile congratulated Keith Braun and Travis Hayes as the newest RPPTL ACTEC Fellows.

Liaison to Elder Law – Charlie Robinson and Marjorie Wolasky: No Report.

Liaison to Tax Section – Lauren Detzel, Cristin Keane, Bill Lane, Brian Sparks and Don Tescher: No Report.

Wills, Trusts and Estates Certification Review Course – Laura Sundberg, Chair; Jeff Goethe, Linda Griffin, Seth Marmor and Jerry Wolf, Co-Vice Chairs: Mr. Goethe reported that the course was held in April and had over 100 attendees.

AD HOC COMMITTEE REPORTS

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair; Sancha Brennan Whynot, Tattiana Brenes-Stahl, Joe Curley, Co-Vice Chairs. Mr. Brennan reported that the Committee is working on its second draft of the new Chapter 744. Mr. Brennan stated that the Committee is finding it difficult to finalize the new legislation because guardianship law is constantly changing.

Ad Hoc Study Committee on Estate Planning Conflict of Interest – *Bill Hennessey, Chair; Paul Roman, Vice Chair*. No Report.

Ad Hoc Study Committee on Jurisdiction and Service of Process - *Barry Spivey, Chair; Sean Kelley and Christopher Wintter, Co-Vice Chairs*. No Report.

Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST) – *Jeff Baskies and Tom Karr*, Co-Chairs. Tae Kelley Bronner reported that this Committee's legislation did not go through this year; however, she indicated that the legislation would be reintroduced next session. Because the legislation was finalized, Ms. Bronner reported that the Committee was dissolved.

Ad Hoc Study Committee on Spendthrift Trust Issues – Lauren Detzel and Jon Scuderi, Co-Chairs. No Report.

Adjournment. The next Probate and Trust Law Division Roundtable meeting will be held at The Breakers on July 29.

on title insurance endorsements. It would be a basic seminar to help younger practitioners understand what is insured by those endorsements and what is required to issue them.

(q) Title Issues and Standards – Christopher W. Smart, Chair; Robert M. Graham, Brian J. Hoffman and Karla J. Staker, Co-Vice Chairs.

Chris Smart reported. The Committee meets by telephone conference the 3rd Tuesday of every month. It is constantly updating and adding to the Florida Uniform Title Standards and, currently, is working on Chapter 4. There is a subcommittee working on proposed legislation to cure certain defects in legal descriptions. The Committee also discussed title standards as they relate to limited liability companies. Chris also reported that Melissa Scalletta will be the new Vice Chair of the committee.

CLOSING COMMENTS:

The Division Director asked all members to send Drew O'Malley a congratulatory email on July 1, when his reign as Section Chair begins. He then announced that the Section's Lifetime Achievement Award was given out last night to Peggy Rolando. The Roundtable gave her a standing ovation.

The meeting was adjourned at 9:20 am.

Tax Filing Update

By Angela K. Santos, Esq., Duane Morris LLP, Boca Raton, Florida

Probate, trust and tax practitioners should take note of the new IRS regulations that update the due dates and extensions for filing of certain tax returns and disclosures,[1] and also recently issued guidance permitting certain estates to make a late portability election.[2]

The package of regulations the IRS issued on July 19, 2017, reflect statutory changes enacted in 2015,[3] which adjusted the due dates of various tax returns to ease tax administration. Among the various tax returns and information returns[4] affected are:

- Forms 990, 990-EZ, 990-PF, 990-T (tax exempt series) (automatic six-month extension);
- Form 1041, *U.S. Income Tax Return for Estates and Trusts* (automatic 5½-month extension);
- Form 1065, *U.S. Return of Partnership Income* (due the 15th day of the third month following the close of the tax year, automatic six-month extension);
- Form 1120 (corporate tax return series) (due the 15th day of the fourth month following the close of the tax year, automatic six-month extension, except for C corporations with a June 30 year end, which have a September 15 due date until 2026, with an automatic seven-month extension);
- Form 5227, *Split-Interest Trust Information Return* (automatic six-month extension); and
- Form 8804, *Annual Return for Partnership Withholding Tax (Section 1446)* (automatic six-month extension).

The regulations are effective July 20, 2017, but reflect statutory changes that were generally effective for tax years beginning after December 31, 2015.

The IRS also issued Revenue Procedure 2017-34 that provides a simplified method to obtain an extension of time to elect portability that is available to estates of decedents that do *not* have a federal estate tax return filing requirement under section 6018(a). Estates that have a section 6018(a) requirement to file an estate tax return are not eligible for this relief.

A portability election allows a decedent's unused exclusion amount (deceased spousal unused exclusion amount, or DSUE amount) for estate and gift tax purposes to be available for the surviving spouse's subsequent transfers during life or at death. In order for the surviving spouse to take advantage of the DSUE amount, the decedent's personal representative must elect portability on an estate tax return that is timely filed (including extensions). The election is permissive, not mandatory. Failure to timely elect portability forfeits the DSUE amount.

To qualify for the simplified late portability election, the executor must file a complete and properly prepared Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, on or before the later of January 2, 2018, or the second annual anniversary of the decedent's date of death. The top of the return must state "FILED PURSUANT TO REV. PROC. 2017-34 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)." There is no user fee for relief under this procedure.[4]

Endnotes

1 T.D. 9821, REG-128483-15 (July 19, 2017).

2 Rev. Proc. 2017-34, 2017-26 IRB 1282 (June 9, 2017).

3 Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, P.L. 114-41, and the Protecting Americans From Tax Hikes Act of 2015, P.L. 114-113.

4 The regulations do not address FinCEN 114 (FBAR), since FinCEN published a notice of proposed rulemaking to address the extension of time to file FinCEN Report 114 (81 FR 12613).

Preserving Future Rents In A Commercial Lease

By Scott M. Work, Esq., Clark Partington, Destin, Florida

When enforcing a commercial lease for a landlord, the practitioner should pay special attention to protect the landlord's right to future rents due under the lease. It may be obvious that a tenant will be liable to the landlord for rent payments due while the tenant is in possession of the leased premises. However, when a tenant abandons or is evicted from the premises before the expiration of the lease term, the tenant may also be liable to the landlord for the rent due during the remainder of the unexpired term. The rent due during the remainder of the unexpired term is what is referred to as future rents.

When a tenant defaults before the expiration of the term, the landlord has three alternative remedies: (1) treat the lease as terminated and resume possession of the premises for the landlord's own account or purposes; (2) retake possession of the premises for the account of the tenant, holding the tenant liable for the difference between the future rents due under the lease and what, in good faith, the landlord is able to recover from reletting the premises; (3) stand by and do nothing, and sue the tenant as each rent installment becomes due, or after all installments have become due.[1]

If the landlord desires to pursue future rents, the landlord must pursue either remedy (2) or (3) above, and should not pursue or be found to have pursued remedy (1) above. It is the nature of the landlord's use of the premises after regaining possession from the tenant, whether by eviction or voluntary return, that determines which remedy the landlord has pursued and whether the landlord may pursue future rents.[2] If the landlord resumes possession for the account of the tenant for the purpose of recovering rent due under the lease, then the landlord will be permitted to pursue future rents.[3] If the landlord resumes possession for purposes other than for recovery of the rent due, such as for the landlord's own use, then the landlord cannot pursue future rents.[4] The question of which remedy the landlord has pursued is a factual determination for the trier of fact.[5]

If the landlord pursues or is found to have pursued remedy (1), the tenant will not be liable for future rents due after the landlord retakes possession.[6] The reason for this result is that if the landlord retakes possession for its own use, the courts consider the lease surrendered, which extinguishes the leasehold estate and with it the obligation to pay future rents.[7] The courts have also reasoned that when the landlord retakes possession for its own use, it would result in an inequitable double remedy for the landlord to also obtain a judgment against the tenant for future rents.[8]

If the landlord has retaken possession for the account of the tenant, then the landlord has a duty to mitigate the tenant's damages by making a good faith effort to relet the premises at a fair rental, and the landlord must reduce the amount of future rent owed by the amount of rent received from reletting the premises to a new tenant during the unexpired term.[9] Lastly, if a judgment for future rents is granted, the trial court must reduce the damages for future rents to present value, and the judgment must contain a provision for a future accounting to credit the tenant with any rent paid to the landlord from reletting the premises during the unexpired term.[10]

Endnotes

1 *Williams v. Aeroland Oil Co.*, 20 So. 2d 346, 348 (Fla. 1944).

2 *Colonial Promenade v. Juhas*, 541 So. 2d 1313, 1314-1315 (Fla. 5th DCA 1989); and *Hudson Pest Control, Inc. v. Westford Asset Mgmt., Inc.*, 622 So. 2d 546, 549-550 (Fla. 5th DCA 1993).

3 *Colonial Promenade*, 541 So. 2d at 1314-1315; and *Hudson Pest Control, Inc.*, 622 So. 2d at 549-550.

4 *Colonial Promenade*, 541 So. 2d at 1315.

5 *Hudson Pest Control, Inc.*, 622 So. 2d at 549.

6 *Hudson Pest Control, Inc.*, 622 So. 2d at 549.

7 *Hudson Pest Control, Inc.*, 622 So. 2d at 549.

8 *Colonial Promenade*, 541 So. 2d at 1315.

9 *Quintero-Chadid Corp. v. Gersten*, 582 So. 2d 685, 688 (Fla. 3d DCA 1991); and *Hudson Pest Control, Inc.*, 622 So. 2d at 549.

10 *Quintero-Chadid Corp.*, 582 So. 2d at 688-689; and *N.E.P. Intern., Inc. v. Falls*, 629 So. 2d 1019, 1019-1020 (Fla. 4th DCA 1993).

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An application form will be posted to the RPPTL website soon. For any questions regarding the RPPTL Section scholarships for The Florida Bar Wm. Reece Smith, Jr. Leadership Academy, or to request an application, contact Kristopher E. Fernandez, (813) 832-6340, kfernandez@kfernandezlaw.com, Brian C. Sparks, (813) 222-8515, brian.sparks@hwhlaw.com or Allison Archbold, (941) 957-1900, AArchbold@fergesonskipper.com.

Arbitration Clauses In Construction Contracts: Not A One-Size-Fits-All Solution

By Randy Dow, Esq., Boyd & Jenerette, P.A., Coconut Creek, Florida

The common wisdom is that arbitration provides a swift, private and cost-effective path to dispute resolution. Mindful of this widely held view, some construction attorneys overlook the possibility that their clients might be better served by civil litigation. As a result, many construction companies have learned the hard way that arbitration does not always deliver the promised benefits. Too often, the arbitration process turns out to be more costly and time consuming than anticipated. Other times, the process works "too well," with an adverse result that cannot be appealed. Ultimately, like most things, arbitration is not a one-size-fits-all proposition. This article provides a practical guide for attorneys and their clients to help them determine whether arbitration is the best option. For clients who can benefit from arbitration, this article examines how to maximize the benefits and minimize the risks by selecting a specific arbitration organization and using a customized arbitration clause.

The Benefits and Risks of Arbitration

The often-cited benefits of arbitration include speedy resolution, cost savings, confidentiality, limited discovery, and "expert" panelists. Certainly, arbitration can deliver these benefits. The real issues are the extent of the benefits provided and the risks that come with those benefits. These issues are not unique to construction contracts. However, many construction companies regularly execute substantial contracts in which virtually every detail has been heavily negotiated. Yet, because of the perceived universal benefit of arbitration, little thought has been given to the arbitration clause.

Speed and Cost Containment

We begin our analysis with the promise of speedy resolution and the reality that construction clients may face. Many arbitration clauses hit the brakes on the process before the arbitration even begins. Arbitration clauses can require the parties to engage in informal settlement talks and formal mediation before even initiating arbitration. Once arbitration is underway, the limited availability of motion practice can impede a party's ability to quickly dispense with dubious claims. Next, substantial discovery, including electronic discovery and depositions, may be part of the arbitration process, particularly in complex or high-dollar value disputes, which can further slow the process.

Once the parties have made their way to a final arbitration hearing, clauses which require the arbitration to occur in a remote location can make the process of coordinating a final hearing a daunting task. In addition, some arbitration clauses actually limit the number of days in a row that a final hearing can be conducted. Imagine your client's reaction to the prospect of being required to arbitrate in a distant location and having to coordinate multiple trips to complete your final hearing.

The cost of arbitration often goes hand-in-hand with the speed of arbitration. Even when an arbitration is not bogged down with pre-arbitration conferences and time-consuming discovery, cost considerations can come into play. Filing and administrative fees, particularly for large disputes, can quickly exceed $10,000. Many clients are in for a rude awakening when they are informed that the filing fee alone is $7,500 or more.

The fees paid to the arbitrator, or panel of arbitrators, are an even more significant cost driver. It seems simplistic to observe that judges and juries are free to the litigant. However, when the parties find themselves paying a panel of arbitrators over $100,000 they may become nostalgic for the days of a "free" judge and jury.

Finally, the logistical costs associated with out-of-state travel, rental of hearing facilities, and rental of audio visual equipment, much of which is built into state and federal courtrooms, also add to the arbitration price tag.

To be fair, not all of these schedule-stretching and cost-escalating factors will be present in every arbitration. Indeed, many arbitrations, particularly for smaller disputes, will face few of these challenges. Even an arbitration subject to numerous factors, which increase the cost and slow the progress of the arbitration, may still end up being less costly and faster than civil litigation. In addition, an arbitrator can provide a "date certain" for the final hearing, which is a significant advantage over the uncertainty of a lengthy trial period. Accordingly, with regard to speed and cost, even if arbitration does not always deliver to the degree clients anticipate, it is often still an improvement over civil litigation.

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Confidentiality

For some clients, keeping their sensitive information out of the public realm of civil litigation is paramount. As we move into the world of fully electronic filings, and searchable court dockets and documents, companies with an interest in privacy have a stronger motivation than ever to stay out of court. Put simply, we are fast approaching a world in which anyone, anywhere, can access almost anything filed in state or federal court. Accordingly, a private arbitration may be the last refuge for clients seeking to avoid a public airing of their dirty laundry.

Expert Panelist

Less clear are the benefits of having an "expert" resolve your dispute. The benefits of having a construction attorney, or a non-attorney construction professional resolve your client's dispute can be hard to measure. Is a construction expert really more likely to see the wisdom of your client's position than a jury? Is your opposition's position really so ill-conceived that the expert will not see some wisdom in their position? These are not easy questions to answer particularly at the time of contract formation when the precise contours of a future dispute are unknown. You may select your arbitrator once a dispute arises, but the decision to arbitrate is made when the contract is signed.

In theory, a party with a "technical" claim or defense may prefer the even-handed analysis of a knowledgeable subject matter expert who will not have to be educated during the trial like a lay juror. By contrast, a party with a good story may relish the opportunity to charm a jury panel. But here again, it is unlikely that you will know in which camp your client will fall at the time of contract formation.

Finality – Be Careful What You Wish For

For many clients, the real risk is that arbitration delivers too well on the promise of finality. Florida's Arbitration Code[1] provides a finite and extremely limited list of grounds to vacate an arbitration award. This list includes fraud, corruption or "evident partiality" of the arbitrator. In addition, an arbitration award may be vacated if a party's procedural rights have been violated by an arbitrator exceeding his or her powers, refusing to postpone a hearing despite good cause or refusing to hear material evidence.[2]

Needless to say, all of the grounds set forth in the statute and summarized above are extraordinarily rare. Even the most ardent conspiracy theorist would be hard pressed to identify corruption or fraud in the conduct of most arbitrators. Similarly, rare is an arbitration panel that exceeds its authority or otherwise violates the procedural rights of a party.

Notably absent from this list is anything resembling typical grounds for appellate review of a trial court's decision. Errors of law are not grounds to vacate an arbitration award in Florida or under the Federal Arbitration Act.[3] A lack of substantial competent evidence similarly is not grounds to vacate. Manifest disregard of the law is a common law doctrine often cited as an additional basis to vacate an arbitration award in other jurisdictions.[4] However, that doctrine has been rejected by various jurisdictions, including Florida, which have revised their arbitration codes and failed to codify the doctrine.[5]

For clients, the "right" result is always the one that favors their position. Clients hit with an adverse ruling often find it extremely difficult to accept that arbitration provides them with only one bite at the apple. The sting of arbitration finality can be particularly harsh when a client was denied full discovery. As will be addressed later in this article, typical arbitration rules either expressly limit discovery or provide the arbitrator with the discretion to greatly curtail discovery.

For clients who fear public disclosure, disruption and intrusive discovery, these limitations are significant benefits. Clients with millions of dollars on the line and a sincere belief that they will prevail if only the truth can be uncovered with an appropriate investment of time and money, may take a very different view.

So, Is Arbitration Right For My Client?

Every client is unique, and generalizations can only be useful to a point. However, answering the following questions is a good place to start:

- What size company is my client?
- What types of disputes does my client typically litigate?
- What considerations are most important to my client?

As a rule, larger companies may stand to reap the greatest benefits from arbitration. The privacy of arbitration can be an important consideration for companies that have invested significant resources in their public images. Larger companies also tend to be involved in a greater volume of litigation, and therefore they stand to benefit the most from the cost saving aspects of arbitration. Finally, larger companies typically have the resources to absorb any "bad" decisions rendered and can stomach the harsh reality of arbitration finality.

With regard to the types of disputes a client anticipates, another general rule is that companies with numerous smaller disputes can benefit most from arbitration. The speed and cost savings benefits may be significant in disputes with less than $100,000 at issue, particularly if the process is not bogged down with mandatory disclosures and significant discovery.

There is no doubt that some larger disputes will be resolved more quickly and inexpensively through arbitration as well. However, as the size of the dispute grows, both on an objective scale, and relative to the size of a client's company, the risk of an adverse ruling becomes a significant consideration. A small to mid-size construction company engaged in "bet the company" litigation may find the speed, discovery limitations, and finality of arbitration to be highly undesirable.

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Of course, the overriding consideration is what is most important to your client. Your client may be a small company that puts a premium on privacy, or a huge company that chafes at the discovery restrictions imposed by arbitration. Ultimately, the key is to ensure that the client understands the benefits and risks of arbitration and the practical realities that will flow from arbitration clauses. Predicting the future is a tricky business and anticipating the twists and turns of a future dispute is difficult at best. However, on balance, an informed decision will maximize the likelihood that your client ends up with an acceptable process, even if the outcome is adverse.

AAA, CPR or JAMS?

Deciding that your client wants to include an arbitration clause in its construction contracts (or is at least willing to sign contracts that contain arbitration agreements) is not the end of the analysis. The same considerations that drove your client's decision to arbitrate will impact the selection of an arbitration organization and ultimately the consideration of custom arbitration clauses. As in most transactions, one size may not fit all.

"Ultimately, the key is to ensure that the client understands the benefits and risks of arbitration and the practical realities that will flow from arbitration clauses."

The three most widely used arbitration organizations are the America Arbitration Association ("AAA"), the International Institute for Conflict Prevention & Resolution ("CPR"), and Judicial Arbitration and Mediation Services ("JAMS"). The rules and fee structures of these organizations vary significantly. Those rules and fee structures may align with your client's interests or run contrary to them. Accordingly, identifying an arbitration organization well-suited to your client's needs and including that organization and its rules in your arbitration clause is a critical first step in the process. It is worth noting that parties also have the option of arbitrating with no governing organization at all. The risks and benefits of a completely ungoverned process are beyond the scope of this article.

Once again, cost is an important factor. The different fee structures of AAA, CPR, and JAMS can result in huge cost differentials. All three organizations charge a filing fee and a separate administrative fee. AAA provides a sliding scale for both filing and administrative fees, which start at under $1,000 each. Those fees "slide" up to $7,000 (each) for multimillion dollar claims. CPR has a set filing fee of $1,750 and an administration fee of $8,250 for claims up to $5 million. JAMS has fixed filing fees of $1,200 for two party disputes and $2,000 for multiparty arbitrations. JAMS administration fees are tied to the professional fees of the arbitrators and each party will be charged a fee equal to 12% of the "professional" fees. This means that the fees are driven by the length of the final hearing versus the amount at issue.

The bottom line: CPR is not a good choice for smaller claims. The large upfront administration fee is a real problem. However, the relatively low fixed filing fee means that CPR may be cost competitive for larger disputes. By contrast, AAA's sliding scale means that it potentially offers the most cost-effective option for very small disputes. However, as the value of the claims increase and the hearing times lengthen, the price differential between AAA and JAMS can be minimal. Because JAMS links administration fees to professional fees, an apples-to-apples comparison is impossible.

Another cost-related issue is the number of arbitrators that will hear a dispute. JAMS' rules call for one arbitrator on residential construction disputes and other disputes with an aggregate claim value of under $2 million. For all other disputes, a three-arbitrator panel will be used. Under its Construction Industry Rules, AAA has discretion to appoint a three-arbitrator panel to any dispute. In addition, in any dispute with a single claim exceeding $1 million, a three-arbitrator panel will be used. Finally, CPR calls for three arbitrators in all circumstances. Importantly, all three organizations allow the parties to agree to have any dispute decided by a single arbitrator.

The bottom line: CPR's across-the-board requirement of three arbitrators again makes it a poor choice for the cost conscious, but a good option for those who want a thorough examination of the evidence in a high-value dispute with a prompt decision deadline. AAA and CPR have both tried to strike a balance by allowing a single arbitrator to resolve what they define as "smaller" disputes.

Another consideration impacting both cost and speed is the availability of expedited proceedings. All three organizations offer some form of expedited process. CPR offers a process with compressed timelines, but it still requires three arbitrators and significant discovery. AAA has an aggressive expedited procedure, which virtually eliminates discovery, compresses timelines, and mandates that all final hearings will be completed in one day. However, this procedure only applies to disputes where no claim exceeds $100,000. Finally, JAMS offers a procedure that eliminates depositions, but still mandates a full exchange of documents and electronically stored information ("ESI"). This process also involves a compressed timeline and reduced fees.

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The bottom line: AAA's expedited proceedings option is potentially a huge cost saver for clients with smaller disputes. For clients whose disputes tend to exceed $100,000, CPR and JAMS have options which may offer some cost savings, but the savings are tempered by the limited degree to which the proceedings are truly "simplified."

Finally, let's look at how these organizations approach discovery. CPR has the most open-ended rules, which allow such discovery as the tribunal determines to be "appropriate." JAMS mandates fairly broad discovery, including: (i) an initial exchange of all "relevant" documents *including ESI*, (ii) a duty to update your production as necessary, and (iii) two depositions of opposition witnesses, minimum. By contrast, AAA requires a voluntary production of documents on which the party "intends to rely" and depositions are *not* permitted unless the dispute is large or complex, and even then, only in "exceptional" circumstances.

The bottom line: AAA's discovery limits are highly desirable for clients who fear corporate disruption and disclosure, and may please clients who seek speed and cost containment. Clients who favor a more fulsome discovery process will be more at home with the relatively broad discovery limits of JAMS.

Arbitration Clauses That Meet Your Clients' Needs

Customized arbitration clauses are the final piece of the puzzle. Subject to very few restrictions, such as unconscionability, arbitration clauses are almost infinitely customizable.[6]

Speed and Cost Containment

For some clients, the promise of speed and cost containment is paramount. While it is true that not everything fast is inexpensive, the two often go hand in hand. For these clients, consider arbitration clauses that include the following:

- strict limitations on the time frames for discovery and completion of a final hearing;
- limitations on the nature of permissible discovery, including clauses prohibiting depositions;
- a requirement that the arbitrator issue a final ruling within a specified period of time; and
- a requirement that all proceedings be handled by a single arbitrator.

Limiting Discovery, Disclosure and Disruption

For other clients, the draw of arbitration is the confidentiality of the proceeding, and the limits on discovery and corporate disruption. For these clients, consider arbitration clauses which include:

- provisions limiting or completely barring depositions;
- agreements that internal memos, email or other categories of company documents are considered confidential and not subject to discovery;
- restrictions on "e-discovery" and exchange of ESI; and
- a mandatory venue clause placing the final hearing at a location close to the client's headquarters or the job site.

Getting it "Right"

For clients who believe the truth is on their side and no stone should be left unturned, completely different clauses must be considered. These clients should consider arbitration clauses which:

- expressly entitle parties to take depositions and serve written discovery requests;
- provide for mandatory early exchange of all relevant ESI, including emails and project documents;
- allow the parties to take arbitration "appeals" through the internal appeals processes provided by arbitration organizations; and
- mandate a three-arbitrator panel for all arbitrations regardless of size.

While these clauses provide a good starting point, they are just the tip of the iceberg. Your client's specific goals and needs, and of course the willingness of the other party to agree, are the only real restrictions. The most important thing to remember is that a form arbitration clause is very likely not the best way to meet your client's needs. Fortunately, even after a dispute arises, the parties can agree to modify the standard rules and procedures.

Does your client need the most exotic and self-serving arbitration clause imaginable? Of course not. If so, it likely would face stern resistance in contract negotiations. However, simple modifications can go a long way. Selecting the "right" arbitration organization and then supplementing that organization's default rules with one or two contractual revisions may result in a vastly different arbitration experience for your client.

R. DOW

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Endnotes

1 Fla. Stat. § 682, et seq.

2 §682.13 Fla. Stat. (2017).

3 9 U.S.C. §10 (2017).

4 *See e.g. Wachovia Securities LLC v. Vogel*, 918 S. 2d 1004 (Fla. 2d DCA 2006).

5 Fla. Stat. § 682.013 (2017) (establishing effective date of July 1, 2013 for revised Florida Code).

6 Fla. Stat. § 607.1801; *Murphy v. Courtesy Ford, L..L.C.*, 944 So. 2d 1131 (Fla. 3d DCA 2006) (arbitration clause must be procedurally and substantively unconscionable to be unenforceable).

Probate And Trust Case Summaries

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The language regarding notice in Fla. Stat. § 736.1005(1) is interpreted to mean that an applicant must serve his application for attorney's fees contemporaneously with the filing of the application with the court.

In re Guardianship of Bloom, 2017 WL 2270124 (Fla. 2d DCA 2017).

Marshall Bloom, beneficiary and former personal representative of the estate, challenged the circuit court's order denying his motion for attorney's fees. An earlier appeal rejected Marshall's arguments of "common fund rule" but there was a remaining argument presented in the fee motion which needed to be addressed.

Prior to the first appeal, Marshall filed a motion in circuit court to disqualify Marc J. Soss as trustee and to appoint an independent trustee. The circuit court granted the motion. Marshall then sought an award of his attorney's fees by filing a motion and memorandum of law posing three bases for recovery. The circuit court rejected his three arguments.

The Second District Court of Appeals applied a de novo standard with this second appeal, quickly dispensed with the first two arguments in Marshall's fee petition and examined the third basis which concerned the circuit court's finding that there was no statutory or contractual basis for the fees. The court referenced Fla. Stat. § 736.1005, which states that "[a]ny attorney who has rendered services to a trust may be awarded reasonable compensation from the trust." The court did not decide whether an award would be proper in the instant case but did provide a clarification of the statute's clause concerning notice of the motion. In interpreting the statutory wording, the court referred the rules of statutory construction for guidance and held that the section required an applicant to serve his application for attorney's fees contemporaneously with the filing of the application with the court.

In determining reasonable compensation to guardianship attorneys, the order on the fee application must contain express findings regarding the reasonableness of the number of hours and hourly rate that the award is based upon.

Meyer v. Watras, 2017 WL 1929699 (Fla. 4th DCA 2017).

Appellant served as counsel for the guardian of an incapacitated minor and appealed the circuit court's final order that awarded fees for less than what was requested in three separate petitions. One prior petition for fees was previously granted and three subsequent petitions were presented at an evidentiary hearing with experts testifying that a request for $250,000 in attorney's fees for just over two years in a guardianship worth approximately $400,000 appeared excessive. The circuit court detailed several concerns, which included, but were not limited to, time expended on medical malpractice and foreclosure matters, time spent in converting the guardianship into a trust, charging for meetings between lawyers and paralegals of the same firm, and unclear billing entries. The circuit court awarded approximately half of what was requested in the first petition, denied the second petition entirely based upon its finding that the fees were incurred subsequent to the appellants withdrawing as counsel, and awarded appellant's fees and reimbursements for hiring an expert in the third petition.

The Third District Court of Appeals reviewed the orders under an abuse of discretion standard, and stated that in determining reasonable compensation to guardianship attorneys, the order must contain express findings regarding the reasonableness of the number of hours and hourly rate. Appellants argued that the circuit court failed to consider the nine factors in Fla. Stat. §744.108(2) in the first petition. The appellate court found that an express reference of the statute was not necessary but that the lower court's order lacked factual findings of rate and hours, and such a finding is critical when reducing the requested fee by such a large amount. The appellate court also found that the circuit court made a mistake about the dates on the second petition and took special care in noting that the order on the third petition contained all of the required statutory elements. The appellate court affirmed the order on the third petition and reversed and remanded the other two.

Courts will enforce the terms of a settlement agreement as such are favored but will also allow the guardian to access the guardianship estate after the death of the ward notwithstanding the absence of express terms permitting it in the agreement.

Bivins v. Guardianship of Bivens, 2017 WL 1908386 (Fla. 4th DCA 2017).

Oliver Bivins had a professional guardian appointed on his behalf, and litigation ensued for years between the ward's guardian and the ward's child, Julian. The guardian and Julian entered into a Global Settlement Agreement wherein Julian could purchase property in New York subject to the sales proceeds being divided to certain law firms as potential payment for professional fees and holding funds in escrow for distribution to as follows: 1. the law firm of Ciklin Lubitz and

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O'Connell, as closing agent would hold in trust monies due to the firm of Levine & Susaneck and funds for guardianship administration expenses, 2. fees to the law firm of Beys Stein Mobargha and Berland, LLP pursuant to a court order (but no additional funds to be held in escrow) and 3. remaining funds to be transferred to a trust. When the ward died, Julian, as temporary administrator of his father's estate, received a final report from the guardian that Ciklin Lubitz & Connell held an additional $400,994.35 from the sale of the property and that Beys Stein Mobargha & Berland, LLP held funds from the sale in the amount of $72,433.94. The guardian held approximately $155,000 in a checking account from funds unrelated to the sale.

Julian moved for release of all the ward's monies within control of the guardian and whatever funds were "held back" by the various attorneys. The circuit court allowed all funds to remain in their respective holdings except for the $400,994.35. The Fourth District Court of Appeal examined two issues: whether a trial court could act contrary to the settlement agreement and whether the ward's estate should take control of the property pursuant to Fla. Stat. § 733.607(1). The appellate court found that in addition to the courts having favorable positions on settlement agreements and their enforcement, nothing in the Global Settlement Agreement provided that Beys Stein could hold any of the proceeds in escrow. Pursuant to Fla. Stat. § 744.108(1), the guardian can retain funds to pay final costs of administration while applying for discharge, regardless of the death of the ward. The court reiterated its holding *Romano v. Olshen,* 153 So. 3d 912, 920 (Fla. 4th DCA 2014), wherein the guardianship statutes contemplate that a guardian will perform services and access the estate even after the death of the ward. Therefore, the court affirmed the retention of funds by the guardian while winding up the guardianship.

Failing to read the petition to determine incapacity to the AIP prior to the deadline, but after counsel was served with an emergency petition for substitution by the AIP's chosen counsel, did not establish that the required notice was not read to the AIP. The failure to file a single examining committee report until one day after the 15-day filing period is insufficient to warrant dismissal of a petition to determine incapacity without leave to amend.

Sarfaty v. M.S., 2017 WL 1927718 (Fla. 3d DCA 2017).

Gilberto Safarty appeals the dismissal of his petition to determine incapacity of his brother (M.S.), without leave to amend. The verified petition alleged that M.S.'s cognitive deficits left him susceptible to exploitation and undue influence, namely, by a power of attorney executed by him in favor of four family members. Attorneys for the petitioner promptly notified the agents under the power of attorney (mother and sisters) and aides of M.S. in less than ten days from service of the circuit court's order appointing the examining committee and court-appointed counsel. The other family members immediately retained counsel and made an appearance in the case. The attorneys purporting to be appearing on behalf of those same family members moved to be substituted for the court-appointed attorney representing M.S. The court-appointed attorney filed objections to the substitution based on M.S.'s medical history, allegations in the petition and uncertainty as to who retained the services of private counsel. The court granted the motion for substitution of counsel and a joint motion for continuance of the incapacity hearing.

A week later, M.S.'s private counsel filed a declaration that the petition for determination of incapacity was adversarial and to dismiss the petition for procedural reasons. He also filed a notice to require in-person testimony of the examining committee members, and a motion to strike all three reports which recommended a limited guardianship. A non-evidentiary hearing was held on the motion to dismiss (after being amended) with the movant emphasizing the failure of the court-appointed counsel to read the petition and form notice to M.S. and that the examining committee members did not file their reports within the requisite fifteen day period under Fla. Stat. §744.331(3)(e). Petitioner's counsel argued that M.S.'s private attorney stepped in the matter early enough, but the circuit court held that the proceedings needed to begin again and that the Petitioner would not be allowed to amend the petition.

The Third District Court of Appeals applied the de novo standard of review and analyzed the basis of the lower court's dismissal, which included an alleged failure of due process to M.S., untimely filing of the committee reports and an objection made by court-appointed counsel that the substituted counsel may have been prejudicial to M.S. The court held that these reasons failed to establish legal sufficiency. The court found that substitution of counsel was requested days within the court-appointed attorney's receipt of the order appointing her. There was a stipulation by all parties to a continuance on the original hearing, and M.S.'s strict reliance on time and notice requirements were not persuasive as his family and his own private counsel could have asked the court to defer the committee reports or expedite them. Instead, counsel sat with M.S. as each committee member assessed him. The court further provided that there is no Florida case holding that the timing set forth in the statute cannot be waived by the AIP and distinguished the differences between the case at-hand from prior holdings in cases where there was failure to appoint independent counsel until a final hearing. The dissenting opinion is met with a response by the court which simply states that no fundamental error occurred to warrant a dismissal of the petition without leave to amend and the petition and its attachments were sufficient to allege incapacity of M.S.

Real Property Case Summaries

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Third-party purchaser at foreclosure sale is not entitled to surplus proceeds from foreclosure sale pursuant to Fla. Stat.§45.032, in order to satisfy subordinate liens which encumber the property.

Rodriguez v. Federal National Mortgage Ass'n., Inc., 2017 WL 2730090 (Fla. 5th DCA, June 23, 2017).

At the time the Plaintiff, Federal National Mortgage Association ("FNMA"), filed its action to foreclose its first mortgage on property owned by the Defendants, it did not join multiple subordinate lienholders. The property was ultimately sold to third-party purchaser, Luzupozo, LLC ("Luzupozo"), at the foreclosure sale. FNMA's final judgment was satisfied in full by the foreclosure sale proceeds and there remained surplus proceeds.

In accordance with Fla. Stat. §45.032, the Appellant property owners, through their assignee, timely submitted a claim on the surplus proceeds within sixty (60) days of the Clerk's issuance of the Certificate of Disbursements. Additionally, more than sixty (60) days after the issuance of the Certificate of Disbursements, Luzupozo filed a motion asking the court to release the surplus proceeds to pay off several liens on the property which it claimed were inferior to FNMA's mortgage. The trial court granted Luzupozo's motion and ordered the surplus proceeds disbursed to pay-off the inferior liens.

Appellants appealed the order providing for disbursement of the surplus proceeds.

The Fifth District Court of Appeal noted that a rebuttable presumption is created under Fla. Stat. §45.032, that the owner of record at the time of the filing of the lis pendens is entitled to the "surplus funds after payment of subordinate lienholders who have timely filed a claim." Importantly, Fla. Stat. §45.032(1)(b), defines "subordinate lienholder" as "the holder of a subordinate lien shown on the face of the pleadings as an encumbrance on the property." In this matter, no subordinate lienholders were named in the foreclosure proceeding and, thus, there were no subordinate lienholders entitled to make a claim on the surplus proceeds.

The court found that because the legislature has set forth a statutory procedure for disbursement of surplus proceeds, the trial court is not free to deviate from such procedure absent express authority, which is absent here. The court unequivocally stated that there is no statutory mechanism which provides for disbursement of surplus proceeds, or the benefits therefrom, to a third-party purchaser. The Fifth District Court of Appeal reversed the order of the trial court, required the surplus proceeds be deposited back with the clerk of court, and remanded the case to the trial court for entry of an order consistent with its opinion.

Intervention into pending litigation is appropriate where, although intervener has the right to file a separate action, the lawsuit could affect the validity of a pending contract for the sale and purchase of real property.

Symcon Development Group Corp. v. Passero, 2017 WL 2374431 (Fla. 4th DCA, May 31, 2017).

The underlying lawsuit involved a claim by Bindu Passero ("Passero") that her brother, Anand Amarnath ("Amarnath") unduly influenced their father after he suffered from a stroke in order to obtain a quitclaim deed which conveyed property to Amarnath. Passero alleged that absent the quitclaim deed the property would have passed to both Passero and Amarnath upon the death of their father.

Appellant, Symcon Development Group Corp. ("Symcon") filed a motion to intervene into the lawsuit as a result of a pending contract to purchase the property from Amarnath and alleged that it would be "'affected in a direct and immediate manner'" by the trial court's decision in the lawsuit. The trial

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court denied the motion finding that Symcon's interest was "'merely indirect, inconsequential, or contingent,'" that Amarnath could defend its interest, and that Symcon had the ability to bring a separate suit to protect its interests in the property. Thereafter, Symcon filed a motion for reconsideration which the trial court also denied, citing the fact that Amarnath no longer wished to proceed with the sale and that Symcon had initiated separate litigation to enforce its contract.

The Fourth District Court of Appeal recognized that Rule 1.230, Fla.R.Civ.P., provides for persons claiming an interest in pending litigation to intervene, and that the Supreme Court of Florida has held that intervention under this rule is appropriate where the intervener's interest in the litigation is "'of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.'" *Miracle House Corp. v. Haige*, 96 So. 2d 417, 418 (Fla. 1957) (internal citations omitted).

The Fourth District Court of Appeal found that the result of the pending litigation would certainly affect the validity of Symcon's contract to purchase the property since it would directly affect Amarnath's ownership interest in the property. If Passero prevailed in her claims, Amarnath would no longer have the ability to convey the property pursuant to the terms of the contract. As such, Symcon would "either gain or lose by direct legal operation" of the judgment, and should be entitled to intervene.

The court also pointed out that the original reason the trial court denied intervention to Symcon, that Amarnath could adequately defend its position, is at odds with its reasoning for denying the motion for reconsideration, that Amarnath no longer wished to honor the Symcon contract. Further, the trial court's determination that Symcon's ability to file a separate suit should preclude intervention is similarly flawed in that the purpose of the rule allowing for intervention "is to avoid a multiplicity of lawsuits." *Id.* at 418.

Strict compliance with the notice requirements of Fla. Stat. §720.305(2)(b), by a homeowners' association is a condition precedent to imposition of fines and perfection of a lien to secure such fines.

Dwork v. Exec. Estates of Boynton Beach Homeowners Assoc., Inc., 2017 WL 2264635 (Fla. 4th DCA, May 24, 2017).

Appellant property owner resides in a development governed by Appellee, a homeowners association ("HOA"). The HOA's governing documents require property owners to maintain their roofs, driveways, and fences in good repair. Over the course of several years, the HOA notified the Appellant on multiple occasions that his property was in violation of these requirements. Ultimately, the HOA sent a certified letter to the Appellant requiring that he correct the violations on his property within thirty-one (31) days. The Appellant failed to respond and the HOA sent a second certified letter providing an additional fifteen (15) days to bring the property into compliance. Again, the Appellant failed to respond.

As a result of the Appellant's failure to respond or otherwise correct the violations, the HOA sent a final letter by regular and certified mail notifying the Appellant that a hearing would be held in thirteen (13) days at which the fine committee would consider his violations. At the hearing, the fine committee imposed fines for three (3) separate violations on the Appellant's property, and the HOA board approved the committee's decision. The HOA sent another letter to Appellant advising him of the imposition of the fines in the amount of $25.00 per day for each of the violations until his property was brought into compliance.

Several months later, the HOA demanded payment from the Appellant for the accrued fines and advised that a lien would be recorded against his property. When the Appellant again failed to respond, the HOA notified the Appellant that a lien was being recorded on the property and the HOA recorded the lien for the full amount due.

The HOA filed the instant lawsuit to foreclose its lien and for damages. The trial court entered judgment denying foreclosure of the lien due to the failure to provide fourteen (14) days notice of the fine hearing as required by Fla. Stat.§720.305(2)(b), but entered judgment in favor of the HOA for money damages and attorneys' fees and costs reasoning the "equities of this cause [were] with [HOA] and against [appellant]."

The Fourth District Court of Appeal analyzed Fla. Stat.§720.305(2)(b), which provides that a "fine or suspension may not be imposed without at least 14 days' notice[…]and an opportunity for a hearing before a committee." The court determined that the notice provision of Fla. Stat.§720.305(2)(b), is protective in nature, is a condition precedent to the perfection of a lien and, the failure to provide fourteen (14) days notice, is a violation of a homeowners' due process rights.

The HOA argued that substantial compliance should be sufficient since the Appellant was not prejudiced by the lack of one day's notice. The court, however, found that the statute is clear and unambiguous and, thus, strict compliance is required for liens which are purely creatures of statute. As such, the court had no discretion to reduce the amount of notice a homeowner is entitled to receive based upon lack of prejudice or substantial compliance.

Due to the failure to provide adequate notice under Fla. Stat. §720.305(2)(b), the HOA failed to properly impose the fines against the Appellant. As such, while the trial court was correct is denying foreclosure of the lien, its judgment for damages in favor of the HOA was reversed, and the case remanded to the trial court for entry of judgment in favor of Appellant.

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Where foreclosure action is dismissed for lack of standing, mortgagee cannot seek prevailing party attorneys' fees from plaintiff when it successfully argued plaintiff was not a party to the mortgage contract which provides for attorneys' fees.

Nationstar Mortgage, LLC v. Glass, 2017 WL 2664696 (Fla. 4th DCA, June 21, 2017).

Lender filed appealed of trial court's dismissal of its foreclosure complaint for lack of standing. Borrower filed a motion for appellate attorneys' fees pursuant to the reciprocal provision of Fla. Stat. §57.105(7), and a provision in the mortgage providing for an award of attorneys' fees and costs.

Section 57.105(7), provides that when a contract sets forth a contractual obligation for one party to pay attorneys' fees, even if the provision is one-sided, it shall be considered reciprocal in nature to benefit both parties. The Fourth District Court of Appeal noted that fee statutes must be strictly construed and the plain language of Fla. Stat. §57.105(7), requires: (1) that the party seeking fees must prevail, and (2) that the party from whom fees are sought must have been a party to the contract which contained the fee provision.

Here, the Borrower successfully argued in the trial court that the Lender did not have standing under the mortgage contract, but also attempts to argue on appeal that she is entitled to attorneys' fees under that same contract. The Fourth District Court of Appeal, citing the Third District Court of Appeal's opinion in *Bank of New York Mellon Trust Co., N.A., v. Fitzgerald*, 215 So. 3d 116 (Fla. 3d DCA 2017), determined that it is improper to rely on the reciprocal provision of Fla. Stat.§57.105(7), to claim an entitlement to attorneys' fees when the trial court has determined that no contract existed between the parties.

A foreclosing lender is required to establish standing at the inception of the suit and standing cannot be acquired after the suit is filed. *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170,173 (Fla. 4th DCA 2012). The Fourth District Court of Appeal determined that when the plaintiff fails to establish its ability to enforce the note and mortgage, none of the provisions of the note and mortgage are enforceable, including the attorneys' fees provision. As such, the Borrower is not entitled to an award of attorneys' fees.

The Fourth District Court of Appeal also determined that the appellate court was not the appropriate forum to determine whether the Borrower was entitled to appellate costs, but denied the motion without prejudice, allowing the Borrower to refile the request in the circuit court.

Bride is entitled to compensatory damages for actual costs incurred by hotel venue's unilateral decision to move reception from ballroom to hotel lobby in breach of the parties' contract, but is not entitled to incidental damages for costs incurred regardless of reception location.

Deauville Hotel Management, LLC v. Ward, 2017 WL 2348626 (Fla. 3d DCA, May 31, 2017).

Kemesia Boota Ward ("Bride") signs contract with Appellant, Deauville Hotel Management, LLC ("Hotel") to hold her wedding reception in its ballroom. Contract does not specify the name or location of the room in which the reception would be held, and specifically includes provisions which allow for the Hotel to reassign the hotel space as needed and, in the event the requested space is unavailable, "to work with [Bride] to arrange alternative space at the prices set forth [in the contract]."

Nine (9) days before Bride's wedding, the City of Miami ("City") cited the Hotel for failure to comply with building codes and prohibited the Hotel from using its three (3) ballrooms, including the ballroom requested by Bride. The Hotel did not inform Bride of the change in venue and directed its staff to continue preparation for Bride's reception. From the time the City initially closed the ballrooms through the day of Bride's wedding, the Hotel made multiple attempts to work with the City to obtain access to the ballrooms so that the reception could proceed as planned, to no avail.

Bride and her groom were notified hours before their wedding that the selected ballroom was unavailable. After the off-site ceremony, the reception was set up in the lobby of

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the Hotel resulting in multiple issues. In particular, the lobby was significantly smaller than the ballroom, offered no privacy to Bride and her guests (Hotel guests were walking through the reception in their bathing suits and participating in the reception) and the disc jockey was told to lower the volume of his music multiple times.

The Bride sued the Hotel for ruining her wedding. The lawsuit consisted for three (3) counts: (1) breach of contract as to Bride, (2) breach of contract as to third party beneficiary groom, and (3) intentional infliction of emotional distress. After a jury trial, the jury awarded Bride $23,000, for breach of contract, awarded the groom $2,500, for breach of contract as a third party beneficiary, and awarded $5,000, for intentional infliction of emotional distress as a result of the Hotel's "extreme and outrageous conduct." The trial court denied Hotel's motion for directed verdict, and the Hotel appealed.

First, Hotel argued that it should not be liable for breach of contract to Bride because the contract did not specify the ballroom where the reception would take place and allowed for the Hotel to reassign the space as needed. The Third District Court of Appeal determined that Hotel's argument was a narrow reading of the contract. In fact, the court held that the contract unambiguously held that an "assigned, committed, and reserved function space" would be provided and further provided if the original function space was unavailable, the Hotel would work with Bride to find an alternative space. As such, the only questions for the jury were whether the original ballroom was, in fact, assigned to Bride, and whether the lobby space provided without consultation was "comparable" to the original space.

The Third District Court of Appeal determined that the jury's verdict on the breach of contract claim was supported by evidence at trial. The Hotel's computer system, forms submitted by the parties, and correspondence reflected that the original ballroom was assigned and reserved for Bride. Further, the jury's determination that the lobby was not a comparable space was supported by pictures depicting both the original ballroom and the lobby, as well as witness testimony stating the room was cramped, there was no ocean view, there was no room for a head table, among other issues.

Next, Hotel argued that the jury awarded excessive compensatory damages which were not supported by the evidence. The jury awarded a total of $25,500, in compensatory damages to Bride and the groom for their respective breach of contract claims. The Hotel argued that Bride only paid $12,985.65, for use of the lobby, food and beverages. Bride and groom argued that the additional compensatory damages are supported by "the incidental expenses for flowers, linens, photography, videography, entertainment, transportation, and cake," which cost $9,500. Bride also argued that the original ballroom cost $15,000, and should be the basis for the award.

The court found that, as to the incidental expenses claimed, Bride used all of these items despite the change in location. Compensatory damages are not to be used as punishment and, thus, Bride was not entitled "'to recover compensatory damages in excess of the amount which represents the loss actually inflicted by the action of [Hotel].'" *MCI Worldcom Network Serv., Inc. v. Mastec, Inc.*, 995 So. 2d 221, 223 (Fla. 2008). As such, since the Bride was able to use all of these items, she was not entitled to get the benefit of these items twice. Additionally, the court determined that when a party entered into a food and beverage contract, as Bride did here, there was no cost for the rental of the original ballroom. Since Bride was not charged for the rental of the ballroom, to award those costs would be a windfall to Bride. *Id.*

Last, Hotel argued that its conduct was insufficient to rise to the level of the outrageous conduct required to support a claim for intentional infliction of emotional distress. In order to support a finding of outrageous conduct, the conduct "must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Clemente v. Horne,* 707 So. 2d 865, 867 (Fla. 3d DCA 1998).

Bride relied upon two cases in support of her claim for intentional infliction of emotional distress. In *Liberty Mut. Ins. Co. v. Steadman*, 968 So. 2d 592 9 Fla. 2d DCA 2007), an insurance company "denied and delayed payment for plaintiff's treatment in an effort to…induce stress that it knew would be detrimental to her health." In *Thomas v. Hosp. Bd. Of Dirs. Of Lee Cnty*, 41 So, 3d 246 9Fla. 2d DCA 2010), a hospital negligently cause the death of a patient, lied to the patient's family about the cause of death, and engaged in a cover-up. The court found, after reviewing the cases relied upon by Bride, that the embarrassment and disappointment of a ruined wedding does not rise to the level of actually causing a death by withholding insurance benefits or covering up a death caused by your own negligence, and thus Hotel's conduct was insufficient to support a claim for intentional infliction of emotional distress.

The Third District Court of Appeal affirmed the trial court's decision denying a directed verdict on the claims for breach of contract, but it reversed the decision denying a directed verdict as to the amount of compensatory damages and the jury's finding on intentional infliction of emotional distress. The case was remanded to the trial court for entry of a judgment in the amount of $12,985.65, on the Bride's breach of contract claim, and $1.00, in nominal damages for the groom's breach of contract claim.

State Tax Case Summaries

Prepared by Barbara Landau, Esq. Associate Professor of Taxation at Nova Southeastern University, Ft. Lauderdale, Florida

Tax exemption for city owned marinas weathers constitutional challenge.

Treasure Coast Marina, LC v. City of Fort Pierce, 2017 WL 2590803 (Fla. June 15, 2017).

City Marina and Fisherman's Wharf Marina (collectively "City Marinas") are City of Fort Pierce and city agency owned and operated marinas. A third marina is privately owned and operated by several entities (collectively "Riverfront"). Riverfront filed suit against City Marinas challenging the real estate tax exemption granted to City Marinas by St. Lucie County. Riverfront argued in the trial court that City Marinas are enterprises competing with private enterprises, are not used exclusively for a municipal purpose, and are not essential to the health, morals and general welfare of Ft. Pierce residents. In other words, Riverfront contended that the City of Fort Pierce failed the real estate tax exemption test under Article VII, Section 3(a) of the Florida Constitution. The trial court ruled in favor of Riverfront, and City Marinas appealed.

The Fourth District Court of Appeal concluded that under *Florida Department of Revenue v. City of Gainesville*, 918 So. 2d 250 (Fla. 2005) and *Islamorada Village of Islands v. Higgs,* 882 So. 2d 1009 (Fla. 3d DCA 2003) City Marinas serve a "municipal or public purpose" and Ft. Pierce is entitled to real estate tax exemptions on the properties. The 4th DCA noted that under *City of Gainesville*, if the City of Ft. Pierce had leased the marinas to a private interest, "a separate and more restrictive" tax exemption test would have applied. The 4th DCA reversed the trial court's judgment in favor of Riverfront, but certified to the Florida Supreme Court the following question determined to be of great importance:

> IN LIGHT OF *FLORIDA DEPARTMENT OF REVENUE V. CITY OF GAINESVILLE,* 918 SO. 2D 250 (FLA. 2005), DOES A MUNICIPALLY OWNED AND OPERATED MARINA STILL QUALIFY AS A TRADITIONALLY EXEMPT "MUNICIPAL OR PUBLIC PURPOSE" UNDER ARTICLE VII, SECTION 3(a) OF THE FLORIDA CONSTITUTION?

The Florida Supreme Court answered the question in the affirmative. The Court explained that its use in *City of Gainesville* of the adjective "essential," when determining if constitutionally protected "municipal or public services" are present, did not narrow the legal standard for a municipal or public service. The exempt municipal purpose functions remain those that "specifically and peculiarly promote the comfort, convenience, safety and happiness of the citizens, of the municipality…." The Court then explained at some length why City Marinas' operation of public marinas constitutes a traditional municipal function and thus enjoys the presumption of exempt status.

The Payment in Lieu of Taxes Agreement between city that provided financing to tax-exempt entity through a bond issue and tax-exempt entity that was otherwise exempt from real property taxes was held constitutional. The Florida Supreme Court confirmed that tax exemptions can be waived. Freedom of contract prevailed and the agreement was not against public policy.

City of Largo v. AHF-Bay Fund, LLC, 215 So. 3d 10 (Fla. 2017).

RHF-Brittany Bay (RHF) and AHF-Bay Fund, LLC (AHF) were tax-exempt organizations under section 501(c)(3) of the Internal Revenue Code. RHF and AHF were both providers "of affordable housing to persons of low to moderate income" as contemplated by Chapter 420 of the Florida Statutes. RHF obtained financing through the City of Largo (the City), and in furtherance thereof, RHF and the City executed a "payment in lieu of taxes" ("PILOT") agreement (the "Agreement"). Pursuant to the Agreement, the City issued income tax exempt bonds (at a lower rate of interest than RHF would have to pay for a conventional loan). In return, RHF promised to make payments to the City equal to the real estate taxes that would have been due "if the [p]roject were fully taxable in accordance with standard taxing procedures."

AHF acquired the property from RHF in 2005. The special warranty deed from RHF to AHF did not mention the Agreement or any covenant running with the land. The Agreement did not mention such a covenant, and while the Agreement itself was not recorded, a simultaneously executed memorandum of agreement was recorded. The recorded memorandum of agreement recited that there was an Agreement available for inspection in the clerk's office that "imposed certain covenants running with the land." AHF claimed that it had no knowledge that a PILOT agreement existed, and there was no exception as to this item in the title insurance policy.

The Agreement recited that it was binding on RHF's successors if certain conditions (not specified in the opinion) were met. After the City did not receive from AHF the annual payment in lieu of taxes for 2006, the City sued AHF and obtained an award for almost $700,000. AHF, which denied liability for the payments, appealed.

Although the Second District Court of Appeal stated at the beginning of its decision that it "[found] no merit to"

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AHF's argument that the covenant did not run with the land, it held that the payments violated public policy and were unconstitutional. However, recognizing that PILOT agreements "similar to the one in this case abound in municipalities throughout Florida," and the potential "magnitude" of its holding, the Second DCA certified to the Florida Supreme Court the following question a matter of great importance:

> DO PILOT AGREEMENTS THAT REQUIRE PAYMENTS EQUALING THE AD VALOREM TAXES THAT WOULD OTHERWISE BE DUE BUT FOR A STATUTORY TAX EXEMPTION VIOLATE SECTION 196.1978, FLORIDA STATUTES (2000), AND ARTICLE VII, §9(a) OF THE FLORIDA CONSTITUTION?

The Florida Supreme Court said "no" and quashed the 2nd DCA's ruling that the payments were unconstitutional. The Court reasoned that even if the "payment in lieu of taxes" was the functional equivalent of the payment of the tax itself, tax exemptions can be waived and that was done here. The parties were free to contract with each other and valid consideration was given by each of the parties. The contract the parties made did not offend public policy.

The Florida Supreme Court declined to address the covenant argument as the "issue [was] beyond the scope of the certified question."

Retroactive denial of property owner's real property tax exemption was upheld. Property owner had, on January 1, only an expectation of exemption, not a vested right.

Sowell v. Panama Commons L.P., 192 So.3d 27 (Fla. 2016).

Panama Commons L.P. ("Property Owner"), a nonprofit entity, owned affordable housing (the "Property") as to which Property Owner had been granted a 2012 real property tax exemption. Property Owner still owned the property as of January 1, 2013. In June 2013, after Property Owner had timely applied for its 2013 exemption, the Florida Legislature repealed the real estate tax exemption for limited-partnership-owned affordable housing "retroactively to the 2013 real estate tax roll." On June 19, 2013, after the retroactive repeal, the county property appraiser denied Property Owner's 2013 exemption application, and Property Owner filed suit challenging the denial. The circuit court held that Property Owner's right to the tax exemption vested on January 1, 2013, and the retroactive denial of the exemption was unconstitutional. The property appraiser appealed, and the First District Court of Appeal affirmed the trial court's decision. The opinion contained noteworthy dissent from Judge Benton. The property appraiser appealed the decision to the Florida Supreme Court.

The Florida Supreme Court, quoting from a large portion of Judge Benton's dissent, reversed and remanded. Real estate tax exemptions "are strictly construed against the persons claiming them," quoting the Court's decision in *Sebring Airport Authority v. McIntyre*, 642 So.2d 1972 (Fla. 1994). The retroactive denial of Property Owner's tax exemption did not violate its due process rights because Property Owner did not have a vested right to the exemption on January 1, 2013, but rather had only an expectation. The right to a tax exemption had not vested before the Legislature acted.

Lessees of city owned property did not owe county real property taxes in the absence of express requirement in the lease to that effect. Further, threat by taxing authority of remedial action under Fla. Stat. §196.199(8)(b) against lessees, such as revocation of corporate charter, or business or occupational license, was improper as to lessees who could not have owed those taxes.

Grove Key Marina, LLC v. Casamayor, 166 So.3d 879 (Fla. 3d DCA. 2015).

Waterfront property was leased by the City of Miami (the "City") to sublessees of Grove Key Marina, LLC, a private, for-profit company (collectively "Lessees"). The 1976 lease agreement between the City and Lessees (presumably the Lessees' predecessor in interest that entered into the 1976 lease was an entity other than an LLC), recited that the leased property was exempt from real estate taxes in accordance with Fla. Stat. §§196.199(2) and 196.012(5). There was no pass-through of tax provision in the lease or any other provision in the lease regarding who had the responsibility for payment of any real estate taxes that might be assessed.

In 1995, Miami-Dade County (the "County") starting to send real estate tax bills to the City, and the City sent the bills to Lessee for payment. Lessees, in turn, returned the bills to the City each year stating that payment of those taxes was the responsibility of the City. The taxes went unpaid from 1995 to 2011.

The evidence showed that in September 2012, after the County had tried to collect the taxes from the City and Lessees, the County threatened Lessees with loss of their occupational licenses and their corporate charters if the taxes were not paid. Lessees then filed suit seeking a declaratory judgment that Lessees could not be held responsible for the taxes, and the City counterclaimed requesting a declaratory judgment that Lessees did owe the taxes. The City also made the County a third-party defendant. At issue in this litigation were only the real estate taxes for 2007 through 2011, as the statute of limitation had run on earlier taxes.

All three parties filed motions for summary judgment. The trial court ruled in favor of Lessees as to liability for the taxes. The City and the County each appealed portions of the trial court's judgment, the City appealed the ruling that it owed the taxes, and the County appealed the ruling that Lessees did not owe the taxes. The Third District Court of Appeal affirmed the trial court, ruling that the City owed the real estate taxes and the Lessees did not. The 3rd DCA relied on Fla. Stat. §196.199(2)

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and *Capital City Country Club, Inc. v. Tucker,* 613 So. 2d 448 (Fla. 1993) and held that the taxes were properly assessed against the City because the property was not being used for an exclusively public purpose and responsibility was on the municipality when the property is leased. According to the 3rd DCA, the City could have avoided the responsibility for payment of the real estate taxes had its lease agreement with Lessees contained a "pass-through" clause requiring Lessees to pay any real estate taxes. It did not, and at most, Lessees' real estate lease would be subject to the intangible tax. The 3rd DCA said that the County should not have "threaten[ed] to revoke the Lessees' business licenses and charters." The 3rd DCA concluded that the County's reliance on the remedial provisions of Fla. Stat. §196.199(8)(b) was misplaced. "The statute cannot be read…to allow remedial action against a lessee who does not in any way owe taxes on property, such as the Lessees in this case."

Sublessee under 99-year lease of real property from Florida county was not the "equitable owner" of the real estate and did not owe real property taxes (even though lease contained an ad valorem tax pass-through provision).

Island Resorts Investments, Inc. v. Jones, 189 So. 3d 917 (Fla. 1st DCA 2016).

Island Resorts Investments, Inc. v. Jones also involved the assessment of real estate taxes on government-leased property, but the property was leased from a Florida county. Island Resorts Investments, Inc. (the "Lessee") is the sublessee of a 99-year lease of 12 acres of real estate owned Escambia County (the "County"). The development sublease agreement provided that Lessee "must...pay all future ad valorem real property taxes, if any, and all other future taxes and assessments imposed on the subleased property." The County, claiming that Lessee was the equitable owner of the undeveloped land, sought to subject the 12 acres to ad valorem property. The trial court agreed with the County, and Lessee appealed.

Lessee denied that it was the equitable owner of the land and took the position that it was only liable for the intangible personal property tax on its leasehold interest under Fla. Stat. §196.199(2)(b). The 1st DCA agreed with Lessee because (1) Lessee could not perpetually renew its lease, (2) Lessee could not purchase the property for a nominal amount at the conclusion of the lease, and (3) the lessor did not hold bare legal title to the property as security for an obligation owed by Lessee. Rather, Lessee, as sublessee, met the Fla. Stat. §196.199(2)(b) requirements for taxation only as the owner of intangible personal property.

Observation: The 1st DCA's comment in *Grove Key Marina, Inc.* regarding the inclusion of a pass-through provision in the lease (there not having been a provision), on the one hand, and the absence of an obligation on the part of Lessee in *Island Resorts Investment, Inc.* to pay any ad valorem taxes (although specifically provided for in its lease with the County), on the other, can be reconciled. In *Grove Key Marina, Inc.*, there was a party responsible in the first instance for the taxes, that party being the City. In *Island Resorts Investment Inc.*, there was no

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party responsible for the underlying ad valorem tax on the County-owned property subject to the land lease, and thus, no ad valorem tax to pass through. See *Garcia v. Dadeland Station Associates, LTD*, 2017 WL 1713306 (3d DCA May 3, 2017).

In the next two cases, the First and Fourth District Courts of Appeal held that Fla. Stat. §194.171(2), which provides that "[n]o action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under section 193.122(2)…," while a jurisdictional nonclaim statute does not apply to tax liens.

Genesis Ministries, Inc. v. Brown, 186 So.3d 1074 (Fla. 1st DCA 2016).

Genesis Ministries, Inc. ("Church") received a real estate tax religious exemption for the years 2005 to 2012. On February 26, 2013 however, the county property appraiser recorded a tax lien against Church's property for the years 2005 to 2012, inclusive, for nearly $298,000, including tax, interest, and penalties. The lien stated that Church "'was not legally entitled'" to the exemption but failed to state why. There was a reference in the recorded Tax Lien to an Exemption Removal Notice, but no such document was attached to the recorded lien nor was an Exemption Removal Notice part of the record on the appeal. Sometime later, however, the property appraiser's attorney sent a letter dated November 15, 2013 that "explain[ed] the factual and legal basis" for the retroactive removal of the exemption.

Church sold the property in August 2014 and then paid the tax "under protest," also, at that time, making its 2013 tax payment and advising that a lawsuit would soon be instituted. On September 9, 2014, Church filed suit seeking a refund. The allegations challenged the removal of the exemption and the back-assessment on various grounds, including violations of the First and Fourteenth Amendments to the United States Constitution and violation of the state constitution and Chapter 761 of the Florida Statutes, the Religious Freedom Restoration Act.

The property appraiser was successful on its motion to have Church's complaint dismissed claiming that the action was time barred by Fla. Stat. §194.171(2) since the action was not filed within 60 days of the recording of the tax lien. Fla. Stat. §194.171(2) provides that "[n]o action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under section 193.122(2)…." The statute also provides that it is "a jurisdictional statute of nonclaim." The 1st DCA concluded that the 60-day requirement in that statute deals only with actions contesting tax assessments, not tax liens. There is no procedure for Church to obtain administrative review of the tax appraiser's decision to deny it a religious exemption under Fla. Stat. §196.011(9) before the tax lien is recorded. Applying the 60-day requirement to tax liens would mean that tax liens could only be contested by filing suit within 60 days of the recording of the tax liens - no notice other than recording being required. The district court "[found] it highly unlikely that the Legislature intended such a draconian result." The 1st DCA concluded that the trial court's dismissal of Church's complaint was improper.

In addition, the 1st DCA noted that Church was not given proper notice of the denial of its religious exemption as required by Fla. Stat. §196.193(5), which according to the statute, renders the denial or even attempted denial of the exemption invalid. The property appraiser argued that the statute only applied to "denials of initial applications for an exemption" or for the type of exemption as to which annual applications are required. The 1st DCA did not agree, holding that "the notice provisions in section 196.193 broadly apply when 'the property appraiser determines that any property claimed as wholly or partially exempt under this section is not entitled to an exemption.'"

The second case, *Miles v. Parrish,* 199 So. 3d 1046 (Fla. 4th DCA 2017), also involved a retroactive removal of an ad valorem exemption - a homestead exemption. On February 20, 2012, the county property appraiser gave notice to Taxpayer in writing that Taxpayer's homestead real estate tax exemption for the years 2005 through 2010 was retroactively revoked and that a tax lien would be filed against Taxpayer's Broward County property if she failed to pay the tax, interest, penalties and costs "within thirty days of the notice." A notice of tax lien was filed after the 30-day period passed. Taxpayer filed suit in circuit court on July 30, 2012, challenging the actions of the county property appraiser. The property appraiser argued that Taxpayer's action was barred by the 60-day nonclaim statute under Fla. Stat. §194.171. The property appraiser argued that the 60-day period began to run on February 20, 2012, the date of the written notice to Taxpayer. The property appraiser also claimed that the February 20 notice was the same thing as "certify[ing] taxes for collection under section 193.122(2)" as required by Fla. Stat. §194.171. The trial court dismissed two counts of the complaint. Taxpayer appealed, and the Fourth District Court of Appeal reversed and remanded the case citing the decision of the 1st DCA in *Genesis Ministries, Inc.* and concluding, as did the 1st DCA, that the 60-day nonclaim statute does not apply to tax liens.

Fourth DCA upholds retroactive disallowance of homestead exemption to Florida spouse of multi-state residence couple where other spouse received a residency based exemption in the other state.

Endsley v. Broward County, 189 So. 3d 938 (Fla. 4th DCA 2016).

Taxpayer's spouse owned an Indiana residence in his sole name and Taxpayer owned the Florida residence in Broward County in her sole name. Taxpayer received a homestead real estate tax exemption from 1986 through 2006. Taxpayer's

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spouse received a residency-based property tax exemption from Indiana for the same period. In August 2006, the Broward County property appraiser, upon learning of the Indiana exemption, retroactively revoked Taxpayer's homestead exemption for 1996 to 2005, based on Article VII, sec. 6(b) of the Florida Constitution. In 2006, Taxpayer's spouse canceled his Indiana exemption, and Taxpayer received a Florida homestead exemption for 2007.

Taxpayer sued the property appraiser challenging the property appraiser's action. Taxpayer and her spouse were found to have enjoyed a happy marriage from 1944 until Taxpayer's spouse died in 2007. The trial court, by summary judgment, ruled for the property appraiser, and Taxpayer appealed. The issue for the 4th DCA was whether a Florida spouse could legally claim a homestead exemption for a Florida residence while the other spouse claimed a similar exemption in another state.

Article VII, section 6(b) of the Florida Constitution allows only one exemption for any individual or family unit regardless of location, even if a homestead is in another state. In 2001, Fla. Stat. §196.031(5) was enacted. The statute prohibits claiming a Florida homestead exemption by a person who also claims a permanent residency-based exemption in another state. The 4th DCA affirmed the trial court.

It should be noted that once Taxpayer lost her homestead exemption, she also lost the re-evaluation protection of the Save Our Homes provision under Article VII, section 4(d)(6) of the Florida Constitution.

Agricultural real estate tax exemption for the birds flies in face of challenge by property appraiser.

McLendon v. Nikolitis, 211 So.3d 92 (Fla. 4th DCA 2017).

Taxpayers raised wild birds for sale. Taxpayers claimed an agricultural real estate tax exemption on the portion of their land used to raise the birds. The Palm Beach County property appraiser denied the agricultural exemption asserting that raising wild birds (aviculture) did not constitute use of the land to produce farm products under Fla. Stat. §193.461(5). (Taxpayer's agriculture classification for the portion of their land used for cattle grazing was not an issue in the tax years involved, 2006-2012). The list of approved farm products in that statute is made expressly non-exclusive. A farm product is defined in Fla. Stat. §823.14(3)(c) as "any…animal…useful to humans." Taxpayers produced unrebutted affidavits to the effect that aviculture is "useful to humans." The real estate tax agricultural exemption for the portion of the land used for aviculture was allowed. Judge Ciklin concurred specially noting the "seemingly absurd" consequences that might result from the 4th DCA's decision, but the statute, while broad, was unambiguous, and any "fix" would be for the legislature, "not the judiciary…." AL

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FEBRUARY 21 - 24, 2018

Executive Council Meeting

Casa Monica Hotel, St. Augustine, FL
Room Rate: $225/ Deluxe King

JULY 25 – 28, 2018

Executive Council Meeting & Legislative Update

The Breakers, Palm Beach, Florida
Room Rate: $225/ Deluxe King

** To be added to the waitlist for this event, please email Whitney Kirk at wkirk@floridabar.org*

Be sure to include in the email the nights for which reservations are needed and your full contact information.

2017 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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PRACTICE CORNER:

Don't miss these short tips to assist in your practice. See page 38-39.

SAVE the DATE

For the **11th Annual Construction Law Institute March 8-10, 2018** at the JW Marriott Orlando Grande Lakes.

BE AWARE

of email phishing/malware schemes affecting **Florida Bar members** See Florida Bar website for additional information.

FinCEN

has expanded its GTOs. For more information Go to www.rpptl.com.

SAVE the DATE!

PROBATE LAW 2017
(COURSE 2574)
NOVEMBER 3, 2017
Fort Lauderdale Riverside Hotel

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 is on page 4.)