ActionLine

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Happy New Year

As I close out my year as Chair of the RPPTL Section, I feel the same sense of closure and opportunity for renewal that the end of a calendar year brings. Many of us look forward to the beginning of a new year as a time for reflection about what our lives brought us in the past year and the opportunity to make hopeful promises for the new year to come. Perhaps it is best just to have a gentle optimism that good things will happen. However, the end of this particular phase in my professional life has brought new motivation for some specific goals.

By
Melissa Jay
Murphy

Section Chair
2007 - 2008

Chair's Column

The past year has been a successful one for the Section. Credit goes to those of you who volunteer so much of your time to serve the Section. It is impossible to express my thanks individually to each of you who have made this year so productive and personally rewarding.

I was impressed by the way in which all of our committees responded throughout the year. The work that you do at the committee level is so impressive – both in on-going projects and in your availability to respond to requests from our Legislation Committee for review of bills submitted this past session. And our Amicus Committee was wonderful – they gave us such wise counsel throughout the year when requests were made for the Section to weigh in on various issues.

I have been gratified by how many of you participated in the CLE programs sponsored by the Section this past year. I have been a speaker in the past and I know the time commitment that it takes. Several of you also volunteered to update chapters in various CLE publications. Thank you!

You have also stretched in new ways – the Mentoring Program is off the ground and the Diversity Committee has reached out to a new group of attorneys.

I have had many opportunities to represent the Section…. appearing before the Board of Governors to report on Section activities, attending a governmental agency hearing on title insurance, and taking phone calls from citizens with legal problems and referring them to a Section member who could assist them. I also responded to calls from reporters seeking information about current issues "within our purview." I never did get my big TV break – I guess CBS will find someone else to take Katie's place.

It is indeed "good to be Queen." But I am looking forward to relinquishing my crown to Sandy Diamond, stepping down from the podium and looking ahead. With great trepidation, I am openly stating my goals for the next year.

First of all, I am going to re-introduce myself to my partners. I think my key still works and they haven't changed my workstation password. I promise to cover those Friday afternoon closings without a complaint! I promise to take a Realtor© to lunch once a week! Best of all, I promise to collect some fees next month.

Next, I need to re-introduce myself to my clients. I hope they haven't all had to file bankruptcy because of the real estate market. They have been very patient with me and I'm quite grateful… but they need to take my picture down from the dart board in their office. Geez.

I am going to contact the legal services office in Gainesville and volunteer to do one case this year.

I am going to keep up with my reading, re-join the Condominium and Planned Development listserve and… that's enough right there.

And I am going to try to treat every person with the courtesy and professionalism they deserve. I have been inspired by all of you – your knowledge, your professionalism, your respect for the law, your respect for each other– it has given me renewed enthusiasm for the practice of law. Dare I say it? Yes, I am going to try and get rid of that pesky 10 pounds…

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

ABOUT THE COVER:

The sun is setting on another RPPTL Section year. Many members work long hours to make the Section succeed. [Photo courtesy of John Neukamm].

IN THIS ISSUE:

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The deadlines for all submissions are as follows:

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Fall 2008	July 31, 2008
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For GENERAL INQUIRIES about the RPPTL Section, contact Carmalita Hawkins at The Florida Bar at 800-342-8060 extension 5619, or at *chawkins@flabar.org*. Carmalita is the Section's program administrator and can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

"Act of God" or Force Majure

Interpretation in ILSA Cases as applied in *Stein v. Paradigm Mirsol, LLC*

By Sheryl A. Edwards, Esq., The Edwards Law Firm, PL, Sarasota, FL

The term "act of God" is utilized in modern society in a number of different contexts. In religious circles, it is something akin to the parting of the Red Sea or the creation of Adam and Eve. At home, its reference is often compared to getting your children to clean their rooms, mow the lawn or finish their homework.

However, in a legal context, the term has a number of applications, from its use in the Uniform Commercial Code to its use in negligence actions to its use in construction contract litigation, where the contractor is obligated to pay delay damages to the owner for failing to complete the project within the timeframe stated in the contract.

Recently, the term "act of God" has taken on new importance in a relatively new context as a result of the recent downturn in the real estate market. A commonly utilized exemption to the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701-1720 ("ILSA"), allows developers of larger condominium projects to escape certain disclosure requirements if the developer includes a two-year completion clause in the form agreements utilized to sell individual units. This two-year completion clause must be **unqualified**, except that delays in performance by the developer are allowed if the delays are legally recognized as defenses to contract actions in the jurisdiction where the building is to be constructed. The event causing the delay is typically identified in the form agreement as an "act of God" or "force majure."

However, the interpretation of these terms has recently given rise to much litigation, as proposed new construction condominium purchasers seek to terminate purchase agreements for units where the contract was executed more than two years prior to completion of the unit. Although a few cases have been decided which would provide guidance in the application of the terms "act of God" or "force majure" in ILSA cases, a noteworthy analysis has been published in the recent decision rendered by the U.S. District Court for the Middle District of Florida on February 7, 2008 in *Stein v. Paradigm Mirsol, LLC*, 2008 WL 344492 (M.D. Fla. Feb. 7, 2008).

The Interstate Land Sales Act

The Interstate Land Sales Full Disclosure Act is an anti-fraud statute which requires a developer of large scale residential developments to file a "Statement of Record" with the U.S. Department of Housing and Urban Development ("HUD") consisting of a Property Report and the Additional Information and Documentation ("AID") to provide full disclosure about the project to potential purchasers. The Property Report must be distributed to each purchaser located within the United States. These disclosures are lengthy, tedious and often expensive to procure. In a hot real estate market, as was in Florida for a good majority of this decade, the time to draft and have these documents approved by HUD is something that developers have understandably tried to avoid.

ILSA provides for several exemptions from the disclosure requirements, the most common of which requires a developer to include in its form sales agreement a clause that obligates the developer to complete construction of the residential unit within two years from the date the purchaser signs the sales agreement. This exemption, commonly known as the "improved lot" exemption, must not allow non-performance by the developer at its discretion.[1]

> ***"Since litigation filed by buyers to cancel their purchase agreements has been extremely limited in the past several years, there were virtually no published decisions in Florida addressing acts of God or force majure as a defense to the two-year completion clause under ILSA."***

The ramifications for a developer's non-compliance with the ILSA disclosure requirements can be significant. If a developer does not deliver the Property Report prior to a purchaser's execution of the contract or otherwise comply with the requirements of an exemption, the purchaser may terminate the contract and receive a return of the deposit and all other funds paid to the developer under the contract, such as upgrade charges, change orders or other extras.[2]

When real estate prices were rapidly increasing earlier this decade, there was not much litigation relating to this clause, even if developers exceeded the two-year time frame. Buyers could always resell their contracted unit at a profit upon completion or give it back to the developer before closing, since the developer would likely resell the unit at a higher price than contracted with the original buyer. Speculators often welcomed delays in projects because their purchase price was locked-in while the prices they

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could sell at later would continue to increase as the delays got longer. As long as the values in the real estate market were rising, developers did not receive many complaints about delays in construction since profits on reselling the units were virtually guaranteed.

However, in today's real estate market, where prices are falling at an almost unprecedented rate, many buyers are seeking to cancel their contracts for the developer's failure to deliver the unit within the required two-year completion date stated in the contract. Most often, developers are defending these actions based on the "act of God" or "force majure" provision within the two-year completion clause, citing the many hurricanes that Florida and the nation have suffered over the last several years which caused labor and material shortages and delays.

Since litigation filed by buyers to cancel their purchase agreements has been extremely limited in the past several years, there were virtually no published decisions in Florida addressing "acts of God" or "force majure" as a defense to the two-year completion clause under ILSA. However, on February 7, 2008, the U.S. District Court for the Middle District of Florida rendered its decision in *Stein v. Paradigm Mirasol, LLC* interpreting and applying these terms in the context of the "improved lot" exemption under ILSA and giving new hope to purchasers seeking to cancel their purchase transactions.

The Stein Case

On or about March 9, 2005, Alan and Karen Stein executed a contract for purchase and sale of a condominium unit at Miromar Lakes Condominium near Ft. Myers. During the contract term, the Steins delivered to the escrow agent $179,180 in deposits and $26,190 in unit upgrade charges, all but $89,590 of which was utilized in the construction of the condominium. On January 16, 2007, less than two years from the date of their execution of the contract,[3] the Steins provided written notice to the developer that they were terminating their contract for the developer's failure to comply with ILSA, challenging the two-year completion clause utilized by the developer in the contract for application of the "improved lot" exemption.

The two-year completion clause in the Stein Contract was as follows:

> Construction of the condominium unit will be complete and ready for possession within two (2) years from the execution of this Purchase Agreement in compliance with the Interstate Land Sales Full Disclosure Act; provided, however, that Seller shall not be responsible for any delay caused by acts of God, weather conditions, restrictions imposed by any governmental agency, labor strikes, material shortages or other delays beyond the control of the Seller and the completion and occupancy date shall be extended accordingly.

At issue in *Stein* was whether the "act of God" or "force majure" language contained in the two-year completion clause rendered the developer's obligation illusory. If the provision was determined to be illusory, the "improved lot" exemption to the ILSA would not apply requiring the developer to make the required Property Report disclosures. Since the developer admittedly did not deliver the report to the buyer, all funds tendered to the developer by the buyer (whether held in escrow or disbursed for construction) would be returned to the buyer.

The Stein Court's Analysis

As the plaintiff, Stein argued that the "provided, however" language following the two-year requirement results in a contract which did not actually obligate the developer to complete the condominium within two years. The developer-defendant argued that a force majeure clause is permitted under Florida law and does not undermine the obligation to complete the condominium within two years.

In its analysis, the court stated that although force majure clauses are generally lawful in Florida, they may also render the two-year provision illusory based on the degree by which the clause undermines the two-year requirement. In *Stein*, the two-year completion period could be extended "for any delay caused by acts of God, weather conditions, restrictions imposed by any governmental agency, labor strikes, material shortages or other delays beyond the control of the Seller . . ." Interpreting this clause, the court stated,

> [D]elay for acts of God has a well established and limited definition that does not render the Agreement illusory. The other exclusions, however, are broad enough to seriously undermine the obligation to complete the condominium within two years. This provision does not limit the permissible delays to those justifiable under an impossibility of performance, but allows exclusions for far less compelling reasons, culminating in the catchall "other delays beyond the control of the Seller."

Citing *Hardwick*[4] and *Schatz*,[5] the court focused its analysis on "impossibility of performance" principles and concluded that the provision in the Agreement extending the completion period for delays not qualifying under Florida's impossibility of performance principles rendered the developer's obligation to complete the condominium within two years illusory. With this determination, the court found that the developer did not comply with the "improved lot" exemption from the ILSA required disclosures. Since the developer did not deliver a Property Report to the Steins, as required by ILSA, the court ordered the developer to return all deposit and upgrade funds to the Steins.[6]

The Court's analysis and holding in *Stein* is important because it establishes a published opinion that is arguably the most advantageous for purchasers in its analysis of "acts of God" and "force majure" clauses in the context of ILSA. It is also important because it seemingly distinguishes the terms "acts of God" and "force majure" which are often considered synonymous.[7]

While there have been some recent cases interpreting the "improved lot" exemption and the specific language contained in the "two-year" clause, none have been as favorable to a purchaser's efforts to receive a return of deposits for the developer's failure to comply with ILSA. *Stein* is also important because, when applied in conjunction with other case law, it opens the door for purchasers in closed transactions to seek rescission of their purchases, so long as their challenge is filed within three years of contract execution. Other ramifications of an after-closing ILSA challenge are sure to become more prevalent, such as the use of an ILSA violation defense in mortgage foreclosure applications, which may then bring a title insurance claim, etc.

Stein also gives support to cases filed by buyers where the "improved lot" exemption was utilized by the developer, but the developer completed construction within the two year period. Based on the court's holding in *Stein,* the analysis is not on whether the developer actually completed construction within two years, but whether the contract sufficiently obligated the developer to do so. This language will also have application both in challenges to transactions that have closed and those that have not been finalized.

While the *Stein* case is arguably the most significant decision in this area of law in quite some time, it is not to be construed to endanger all contracts attempting to establish the exemption. Rather, it amplifies the importance of the specific language of each particular two-year clause in each separate contract. Thus, practitioners are advised to thoroughly examine both the two-year clause and the damages provision.

Although more cases interpreting the "improved lot" exemption are certain to be published in the near future, practitioners drafting purchase agreements for projects governed by ILSA may be wise to begin their contemplation on whether to limit extensions to the two-year completion clause in future purchase and sale agreements to only those circumstances defined as "acts of God" or whether to restructure and restrict the force majure provisions in those agreements to those circumstances that would be determined to render performance impossible.

In the short term, however, the *Stein* decision is certain to be one of the most cited cases in this area of law, and will certainly increase the number of new cases filed seeking to challenge the "improved lot" exemption in purchase and sale agreements both in cases where the developer was able to deliver substantial completion of the unit within the two-year completion period and in those where it did not deliver the unit on time.

Endnotes:

1 *See* 15 U.S.C. §1702(a)(2).

2 15 U.S.C. §1703(e).

3 The developer delivered a substantial completed unit within the two-year completion period, and thus, the Court did not evaluate any delays in construction, as is the case with many ILSA "improved lot" contract cases.

4 *Hardwick v. Newbern,* 711 So. 2d 35 (Fla. 1st DCA 1998); review denied 727 So. 2d 908 (Fla. 1998).

5 *Schatz v. Jockey Club Phase III, Ltd.,* 604 F. Supp 537 (S.D. Fla. 1985).

6 The court also examined the contract's default provisions and determined that the developer's limitation of damages to exclude special damages also rendered the contract to be illusory. However, this analysis is outside of the scope of this article.

7 *See e.g.* paragraph 11(c) of the Florida Association of Realtors' Residential Sale and Purchase Agreement ("FAR-9"),
"An 'act of God' or 'force majure' is defined as hurricanes, earthquakes, floods, fire, unusual transportation delays, wars, insurrections and any other cause not reasonably within the control of the Buyer or Seller and which by the exercise of due diligence the non-performing party is unable in whole or in part to prevent or overcome."

Inclusionary Housing: A Challenge Worth Taking

By Jaimie Ross, Esq., Affordable Housing Committee Chair, and Uma Outka, Esq., on behalf of the Affordable Housing Committee of the RPPTL Section

Inclusionary housing ordinances (often called inclusionary "zoning" ordinances) are land use regulations that require affordable housing units to be provided in conjunction with the development of market rate units. The intent of these ordinances is two-fold: (1) to increase production of affordable housing in general and (2) to increase production in specific geographic areas that might otherwise not include affordable housing.

Inclusionary housing in the City of Tallahassee was recently challenged by the Florida Home Builders Association as an unlawful taking, a violation of substantive due process, and an unlawful tax.[1] On November 20, 2007, the Circuit Court of the Second Judicial Circuit granted summary judgment in favor of Tallahassee on all three counts. The trial court found the inclusionary housing ordinance to be a land use regulation under the city's police power and not a taking of any type. The court recognized that the inclusionary housing ordinance provides a number of benefits to developers. In exchange for requiring 10% of the units to be affordable, the Tallahassee ordinance provides a 25% density bonus as well as housing design flexibility, including relief from set back and minimum lot size requirements.

Having lost its challenge, the Home Builders recently appealed the decision to the First District Court of Appeal.[2] In an *amicus curiae* brief filed in support of the City of Tallahassee, 1000 Friends of Florida[3] set forth the land use planning context for inclusionary housing ordinances.

Inclusionary Housing Implements Planning Laws

The 1985 Growth Management Act requires every Florida jurisdiction to ensure the provision of housing for its entire current and anticipated population.[4] State law mandates that local governments manage growth through comprehensive land use plans that include "efficient provision of transportation, water, sewage, schools, parks, recreation facilities, housing, and other requirements and services…."[5]

Every comprehensive plan in the state must include a housing element consisting of "standards, plans, and principles to be followed in," among other things, "the provision of adequate sites for future housing, including affordable workforce housing… for low-income, very low-income, and moderate-income families…. "[6] In addition, the housing element must address the "creation and preservation of affordable housing to minimize the need for additional services and avoid the concentration of affordable housing units only in specific areas of the jurisdiction."[7] The policies, goals and objectives in the housing element are to be implemented via land development regulations, such as zoning or other housing-related ordinances.[8]

Local governments are not expected to build affordable housing, but they are required to create an environment in which the private sector will do so. To that end, local governments frequently provide contributions to developers seeking state and federal funds, reduce, waive or pay impact fees, expedite permitting, and, increasingly, adopt regulatory approaches such as inclusionary zoning. Beyond financing, land use regulations and regulatory incentives are local governments' primary tools for facilitating private sector development of affordable housing. An inclusionary housing ordinance is an example of precisely the sort of land development regulation that localities can and should use to implement housing element requirements.

"State law mandates that local governments manage growth through comprehensive land use plans that include 'efficient provision of transportation, water, sewage, schools, parks, recreation facilities, housing, and other requirements and services...'"

Lessons From California

Over 170 local inclusionary housing ordinances have been adopted in California. A recent report commissioned by the Non-Profit Housing Association of Northern California found that over 80,000 Californians are now living in mixed-income neighborhoods thanks to inclusionary housing.[9]

Like Florida, local jurisdictions in California must have a housing element in their comprehensive plans. In fact, enforcement of the housing element requirement in California has led directly to the adoption of inclusionary housing ordinances. In 2001, the Public Interest Law Project of California brought litigation against the City of Folsom for failing to have adequate sites for affordable housing. To resolve the lawsuit, the City of Folsom entered into a settlement agreement to adopt an inclusionary housing ordinance.[10] Since then, the Public Interest Law Project has resolved litigation via settlement agreements requiring the adoption of inclusionary housing ordinances with the cities of Buellton, Benicia, Healdsburg, Alameda, Winters, Los Altos, and the Town of Corte Madera.[11]

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Several lawsuits alleging an inclusionary housing ordinance to be an unconstitutional taking and violation of substantive due process have been filed by California's home builders trade association (Building Industry Association), but none has been successful.[12] The totality of these cases makes clear that inclusionary housing ordinances are not unlawful takings and do not violate substantive due process, provided they are well crafted.

Two key provisions for a well-crafted ordinance are (1) developer incentives to offset costs associated with requiring the development affordable housing and (2) a process for obtaining relief from application of the ordinance based on a showing that unreasonable hardship will result, despite the incentives. To date, there are no reported cases finding that a particular development was entitled to relief from an inclusionary ordinance, but the opportunity for the local government to grant a waiver, reduction, or some relief from the operation of the ordinance is considered key to surviving an unlawful takings claim.

Off-Setting Developer Costs

The monetary value of land is in large part determined by local land use laws. When land is zoned agricultural, for example, it has far less monetary value than if it were rezoned to respond to the market demand for residential or commercial use. Whether to rezone, and how to rezone, is the province of local government. So, for example, when local government rezones a mobile home park for more intensive residential or commercial uses, it creates wealth for the owner of the property by virtue of the land use change. The same goes for any "greenfield" development in need of a land use or zoning change to be developed for profitable uses.

When the inclusionary housing requirement is tied to the land use change, the costs to the developer for delivering the affordable unit must be evaluated by first recognizing the value added from the change in land use and then deducting additional costs, if any, from including affordable units within the mix of housing which can now be

developed. This analysis should make clear that when tied to a rezoning for more profitable use of the property, the inclusionary requirement creates no economic deprivation for the developer.

If, however, the inclusionary housing requirement is to apply to land that is already zoned for residential use, the local government will need to provide developer incentives to offset additional costs for providing the affordable housing. Typically, an increase in density is that economic incentive. An increase in density is of particular value when the developer is permitted to develop additional market rate units as well as the affordable units on the same land that would otherwise have not permitted the additional units, but for the density bonus. The density bonus in effect creates free land for the owner/developer. Expedited permitting, flexibility in design, and relief from standard set-backs may also off-set developer costs.

K2 Urbancorp, a market rate developer in Tallahassee, provided an example from its "Evening Rose" development to support the amicus brief filed by 1000 Friends of Florida in the home builders' case against the city. Although K2 Urbancorp received its development approvals prior to the ordinance taking effect, the company voluntary agreed to comply with the inclusionary housing ordinance. In fact, K2 Urbancorp went further to include more than the ten percent affordable units called for by the ordinance. If the city ordinance is so detrimental to developers, why would K2 Urbancorp voluntarily participate, and at a level that exceeds what the ordinance requires?

There are two reasons: First, the ordinance provides significant benefits for developers. K2 Urbancorp realized economic benefits in the form of expedited processing, density bonuses, and other entitlements that helped it achieve its development goals. Second, with a little creativity, K2 Urbancorp was able to design the inclusionary units so that, despite the price restrictions on those units, the company will suffer no economic loss.

K2 Urbancorp can build an estate home on one lot and five inclusionary units on another of the same size for the same overall cost and maintain the same overall profit margin. K2 Urbancorp has not had to raise prices on its market rate units in order to incorporate the inclusionary units and is able to offer an attractive and varied assortment of sizes and price points. K2 Urbancorp considers this variety, intermingling large estate designs and smaller inclusionary units, as a selling point – Evening Rose will be a more genuine "neighborhood" than the cookie-cutter housing developments that have become commonplace in Florida. K2 Urbancorp's compliance with the inclusionary housing ordinance has been a net positive economic benefit and reinforces the trial court's conclusion in the Tallahassee case that "the density bonuses and other incentives received by developers may

continued, next page

Funding for Public Guardianships: Pooled Special Needs Trust

By Michelle R. Hollister, Esq., Executive Director, Statewide Public Guardianship Office, Tallahassee, FL

The Florida Public Guardianship Pooled Special Needs Trust is a mechanism for funding public guardianships. The unique benefit to this special needs pooled trust is that the retained monies will be used to fund public guardianship in Florida. The co-trustee, the Center for Special Needs Trust, will be able to provide the Foundation for Indigent Guardianship, Inc. with the specific county in which the retained funds originated so that the Statewide Public Guardianship Office can ensure that those monies return to that community for public guardianship. The Foundation for Indigent Guardianship, Inc. is the direct support organization for the Statewide Public Guardianship Office. Created in 2005, the Foundation's sole purpose is to raise monies for public guardianship in Florida. The Foundation's first project was establishing the special needs pooled trust.

Another advantage to the Foundation's trust is that Berkshire Trust Advisory serves as Trust Protector of the Florida Public Guardianship Pooled Special Needs Trust. The trust is the only pooled trust in the State of Florida to have the added safeguard of a watchdog over the trust, specifically seeking to maintain public benefits and security for the trust's disabled participants. The first contribution from the trust was presented to the Statewide Public Guardianship Office in August 2007.

Anyone who is interested in learning more about this trust is encouraged to contact Cathy Harrelson, FIG trust consultant, at (727) 374-6312 or toll-free at (888) 612-4448.

Inclusionairy Housing

from preceding page

increase rather than decrease the value of the developer's property."[13]

Conclusion

Adequate housing for all Floridians, from those who have extremely low incomes to low paid professionals, is essential for the health, safety, and welfare of Florida's residents and its economy. Land use laws can and should be used to encourage the development of affordable housing so that businesses are able to recruit and retain employees by boasting vibrant communities with a range of housing choices.

Adoption of inclusionary housing ordinances logically flows from the implementation of the housing element of Florida's comprehensive plans and the authority and responsibility that lies with our local governments for regulating land use. Inclusionary housing ordinances will withstand legal challenge provided they are well crafted. A well crafted ordinance includes developer incentives to offset potential financial burdens and the opportunity to obtain a waiver from the application of the ordinance.

It is time for blanket opposition to inclusionary housing to end and for the public and private sectors to come together on this important issue. Characterization of these policies as "takings" obscures the fact that inclusionary housing ordinances can balance competing interests and in fact allow for compliance by a developer without economic deprivation of any kind. Local governments should have no fear of a takings challenge. On the contrary, adoption of an inclusionary housing ordinance may be a challenge, but it is one worth taking.

Jaimie Ross, Esq., is the Affordable Housing Director at 1000 Friends of Florida, jaimieross@aol.com. Uma Outka, Esq., is the Legal Director at 1000 Friends of Florida, uoutka@1000fof.org.

Endnotes:

1 *Fla. Home Builders Ass'n v. City of Tallahassee*, No. 37 2006 CA 000579 (Fla 2d Cir. Ct. Nov. 20, 2007).
2 *Fla. Home Builders Ass'n v. City of Tallahassee*, No. 37 2006 CA 000579 (Fla 2d Cir. Ct. Nov. 20, 2007), *appeal docketed*, No. 1D07-6413 (Fla. 1st DCA Dec. 12, 2007).
3 1000 Friends of Florida is a Tallahassee-based not-for-profit corporation created in 1986 whose purposes include monitoring and ensuring proper implementation of the State's growth management laws; advocating for sustainable development, affordable housing, and protection of natural resources; and providing education and support for public participation in growth management.
4 §163.3177(3)(f), Fla. Stat. (2007).
5 §163.3161(3), Fla. Stat. (2007) (emphasis added); *see generally* Ch. 163, Part II, Fla. Stat. (2007).
6 §163.3177(3)(f), Fla. Stat. (2007).
7 §163.3177(3)(g), Fla. Stat. (2007).
8 §163.3202, Fla. Stat. (2007).
9 Non-Profit Housing Association of Northern California, "Affordable By Choice: Trends in California Inclusionary Housing Programs" (2007).
10 *Hallfeldt v. City of Folsom*, Cal. App. Dep't Super. Ct., Sacramento, Case No. 01CS01149 (2001).
11 Interview with Michael Rawson, Co-Director of the California Affordable Housing Law Project (which conducts housing litigation for the Public Interest Law Project of California).
12 *See Homebuilders Ass'n of N. Cal. v. City of Napa,* 90 Cal.App. 4th 188 (2001); *N. State Building Industry Ass'n v. County of Sacramento* (Sacramento County Super. Ct., No. C052814); *Building Industry Ass'n v. City of San Diego* (San Diego Super. Ct., No. GIC 817064).
13 *Fla. Home Builders Ass'n v. City of Tallahassee*, No. 37 2006 CA 000579 at 7 (Fla 2d Cir. Ct. Nov. 20, 2007).

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First Remote Computer-Video Hearing Held at South County Courthouse

This article, circulated by the RPPTL Circuit Representatives for the 15th Judicial Circuit of Florida, describes the First Remote Computer-Video Hearing held at the Palm Beach South County Courthouse. This pilot project was tested by Judge Phillips before being put into practice in conjunction with a hearing on a case over which he presides.

February 13, 2008, was a miserable, blustery, rainy day at the South County Courthouse in Delray Beach. Soaked litigants and their attorneys clamored to get in the door, through security, and hustle to hearings. In the midst of the mess, attorney Jay Kauffman made a bit of Palm Beach County legal history, when he fired up a laptop computer at his office in Boca Raton, and participated in the County's first pre-scheduled computer-video hearing with Probate and Guardianship Judge John Phillips, working from his courtroom in Delray Beach.

Both participants appeared on their computer screens simultaneously, as the ex parte Petition in question was presented for consideration, argued, and approved. Attorney Kauffman presented his proposed Order to Judge Phillips via email, and watched him review and modify it on the computer screen. Judge Phillips then printed the Order at his desk, signed it, and attached it to the Court's paper file. A conformed copy of the Order was instantly emailed to Attorney Kauffman, and the hearing was concluded. The business part of the hearing was completed in less than 10 minutes, leaving time for the participants to talk informally on the computer-video connection while Kauffman's partner, James Herb, celebrated in the background. Kauffman didn't drive, park, get wet, wait in line, pass security inspection, or drag paper files around in a briefcase. He just appeared at his necessary Court hearing efficiently and simply from his office. Attorney Jay Kauffman is more than mildly enthused:

"It used to take me over an hour to appear at even the briefest hearing, most of that being travel time. Judge Phillips and his staff have worked diligently to create a streamlined procedure for computer-based videoconference hearings that will benefit my practice and my clients' bottom line. I am not a computer expert by any means, yet the system took me very little time to learn and is easy to use. The ability to see each other is invaluable. By e-mailing a proposed order beforehand, the judge has the flexibility to edit the document based on his ruling, sign it electronically, and e-mail me a signed copy right then and there, making the process extremely efficient. I am sure that many judges, lawyers and clients will find these procedures valuable.

"To paraphrase a popular television commercial: Saving an hour by not traveling to the courthouse - *$300*; Receiving a signed edited order from the judge that day - *Bonus*; Seeing the judge and opposing counsel at a hearing while still in my office (or at the beach) – *Priceless."*

Judge Phillips is also excited about the possibilities computer-video hearings offer to attorneys in our Circuit:

"Attorneys often come to the Courthouse for routine non-evidentiary hearings, spending time on the road, parking, getting through Courthouse security, and waiting behind other attorneys for their hearing. It seemed we could accomplish many fairly routine matters with Computer technology, saving a lot of aggravation, fees, and Courthouse trips. Judge Peter Evans (my technology guru) and I envisioned a hearing system using cheap, easily available technology most attorneys already have: a laptop computer with accessory camera, and a cell phone. Court Administration assigned a fantastic technical team, including Noel Chessman, Mary McCain and Matt Dreiss, to assist us with the technical end of the project. The South County Probate and Guardianship Bar volunteered to pioneer the concept. Since early 2008, about 20 attorneys have attended training in use of the technique. All have been very positive about the experience. Now, we're 'rolling it out' with specially-set non-evidentiary hearings, and we'll see how it goes. We will work out any 'bugs' at South County, then try it in the other Probate and Guardianship divisions, and hopefully develop a worthwhile tool that can be used by many divisions of the Court throughout our Circuit.

"Attorneys can attend these hearings from any place in the world, needing only a high-speed internet connection for the laptop computer and a cell phone hookup. We can conduct a hearing with three parties and the Judge onscreen at once, all visible on each participants' computer screen, and audible to each other. We can look at documents together, conduct verbal argument of a motion, and craft a written Order while all parties are on-screen at the hearing. A court reporter can attend the hearing at the Courthouse, and see and hear the participants with a big monitor we've dedicated for that purpose. I'm hopeful this technique will open a lot of opportunities for attorneys to improve the quality of their practice and their lives, with less cost, less stress and more productive use of time. The Court system should see lower traffic volume at the Courthouse, more productivity, and lower costs per case, which has become of utmost importance in light of funding decreases.

"The business and entertainment world has routinely used these techniques for years, now it's our turn to step into the 21st Century. Wednesday, February 13, 2008, Jay Kauffman took one small step for a lawyer, and a giant leap for attorneys Circuit-wide. Congratulations, Jay. " Probate and Guardianship attorneys interested in participating in this South County pilot project are invited to contact Judge Phillips' Judicial Assistant, Harriet S. Merlin at 561-330-1750, for more information regarding training sessions and hearing dates.

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Pain After the Passion

By Richard M. Langhorne, CRE FRICS
First Vice President, CBRE Restructuring Services Group

The following article provides insight into the current state of various real estate segments and discusses several key factors affecting market turnarounds.

Two years ago when I started writing reports about the coming collapse in certain Florida real estate markets, many people had thought I overreacted or was exaggerating. Sadly, our estimates in 2006 and 2007 as to the depth and breadth of the real estate meltdown in Florida have turned out to be extremely conservative. Now, circumstances as they unfold before our eyes seem surreal, such that a presenter of such information can be misperceived by audiences. This is largely a result of the velocity of change. One thing is certain in the Florida real estate meltdown: the velocity of change far exceeds everyone's expectations.

> ***"Our estimates in 2006 and 2007 as to the depth and breadth of the real estate meltdown in Florida have turned out to be extremely conservative."***

Burn Rate

There has been a lot of question about the impact of monoline insurers[1] and the distressed property market. In late 2007 and early 2008 it became apparent that mortgage insurers were having difficulty raising capital to maintain AAA ratings due to the deterioration of insured loan portfolios. In order to maintain liquidity in capital markets, the ratings of mortgage insurers must be reliable.

For example, institutions like Fannie Mae and Freddie Mac have guaranteed mortgage-backed loan portfolios in an amount that is estimated to be in the trillions, but have only a small portion of capital to back up those guarantees. Now that millions of consumers are defaulting on the loans backed by these policies, the mortgage insurers do not have enough capital to cover the policies. Rapid increases in default numbers have also driven real estate prices down, making it difficult to slow down or stop the rapid deterioration of their balance sheets.

In the first quarter of 2008, Fannie Mae has reported losses of approximately $2.2 billion. This is in addition to the over $3 billion in bad loans they were forced to set aside in 2007. In an effort to keep their current rating they announced that they will cut their dividend and raise additional capital.

If monoline/mortgagee insurers do not take similar action they will ultimately have their credit rating downgraded, making it even more difficult to raise additional capital further adding to the velocity of downward change in the capital markets.

Recently one of the largest mortgage insurers failed to raise the announced needed capital by approximately 50%. At the end of the quarter it had a loss that was three times larger than what was projected. This burn rate of balance sheet deterioration may accelerate and disrupt capital markets beyond any previously anticipated levels.

These events have caused an increase in the cost of bond insurance.

Balance Sheet Consequences

Many institutions are placing loans for sale to clear up balance sheet issues. On examination of some of these loan pools, the assets which are collateral for the loans are so geographically distant from vibrant markets that their recovery timeline cannot be rationally projected. Mortgage and note purchasers have projected capital returns and hurdle rates for internal rates of return. When the timeline for recovery is dramatically extended, the impact to present value for loan acquisition is harsh.

When bids for loans in these circumstances come in below "ask pricing", trades will probably not occur. If the trades do occur the impact to the institution's balance sheet would be so severe that the enterprise could not withstand the loss without raising replacement capital at prohibitively high rates. In the alternative, keeping the bad loans on the balance sheet will cause equally severe long-term consequences to the institution.

The amounts of write-downs of some companies are larger than the total value of some major regional banking institutions.

Opportunity Funds

There is an enormous supply of capital resting in opportunity funds which, for the most part has not been put into play, primarily because of the difficulty in determining correct price points. Said another way, the ability to project recovery time frames and price point recovery levels has become so difficult that opportunity funds cannot make aggressive offers. The conservatism on behalf of opportunity funds puts additional downward pressure on markets which may exacerbate circumstances in an already deteriorating market.

In Martin County the residential land inventory is projected to take 104.4 months to be absorbed, Lake County at 87.2 months, and Brevard County at 84.2 months.

Anxiety Attack

When anxiety or fear is introduced to the market place, it generally has an impact on the velocity of change, its amplitude, and time for a market to reach a logical correction. A logical correction is at a price point that takes into account

continued, next page

Pain After the Passion

from preceding page

the velocity of change, its price amplitude and time on the market. Fear or emotional anxiety introduced to the real estate equation can create illogical correction components because it aggravates all bad cases exponentially.

There is a belief by most that the current situation will come to an early end separate and apart from the housing market.

In all markets where there has been overbuilding in housing there is an increase in unemployment due to loss in construction jobs. In Lee County, in the first quarter of 2008, approximately 8,000 construction jobs were lost and a total of 16,000 were lost overall. In Miami-Dade County the construction job loss for the first quarter appears to be approximately 17,000 jobs. This impacts housing occupancy and retail. It also dramatically impacts the service industry such as title insurance companies, mortgage companies, and any support service business to the real estate industry. This has put pressure on suburban office markets where low-rise office buildings are experiencing tenants just leaving in the night with no warning. Additionally this puts significant pressure on restaurants and normal retail services. Restaurant failures have increased.

Large retailers are also experiencing reduced gross revenues. One large apparel retailer has announced the closing of more than 100 stores. Other retailers in similar categories will be closing equal numbers of stores. This will create large numbers of dark spaces in regional malls which will *feed the emotional and fearful reaction* to the consequences of the housing market.

Class A new high-rise office buildings will also be under pressure due to lack of pre-leasing. The desire to secure large tenants will create downward pressure on rents. As large credit-worthy tenants relocate from older Class A buildings, there will be significant downward pressure on rents in the older buildings creating unanticipated price and category differentiations within the office class.

Retail Implications

Restaurant chains and larger retailers are beginning to suffer from the contraction in consumer spending and the reluctance to use discretionary income on these goods and services. Decreasing consumer confidence is also causing a contraction in consumer spending, particularly on impulse buys. Rising fuel costs are putting further pressure on retailers.

During the 10-year run-up in corporate and real estate values, capital was overly abundant and accessible to both business and the real estate industry. In the case of retail, this abundance of capital allowed businesses to expand beyond what could be rationally managed. The change in economic environment is causing a significant amplified impact to those businesses that merely postponed the confrontation of their internal realities because of abundant near-term capital.

Starbucks warned its second quarter earnings would fall short of analysts' expectations due to the weak US economy and the cost of its turnaround plan. The coffee retailer said that the California and Florida markets that were hit particularly hard by the housing downturn have typically accounted for 32% of the company's US retail revenue.

Another example would be Office Depot which has reduced its store openings by 50%. Home Depot has announced layoffs of 1,300 people in connection with the closure of 15 stores and plans to reduce the number of new store openings. Linens 'n Things recently filed for Chapter 11 protection. They currently operate about 589 stores and plan to close 120 of those stores.

It is important to realize that California and Florida are two states which are among those most influencing the housing market downturn.

Municipal Services

It is also important to realize that as distressed and failed real estate projects trade at lower price points, real estate tax assessments and collections will be slightly reduced. This will create loss of revenues for municipalities who will then be forced to reduce services. Security and other costs for services will be shifted to property owners who already are faced with downward pressure on rents.

Condominium Associations

Many mature condominium projects together with rental projects that have been converted to condominium use are experiencing unprecedented delinquency in association fee payments. This lack of liquidity among condominium homeowner associations is putting pressure on the physical assets. Broward County residents are mowing the grass and tending to the landscaping because of insufficient funds in one association. In Miami a high-rise project has elevators out-of-service along with other physical plant items which remain unserviced due to lack of funds. Stress in condominium associations will further impact marketability of existing residences in an already oversupplied market.

We are beginning to see very prestigious condominium projects offering units for bulk-sale at their hard construction costs irrespective of costs to finance, design, develop and land costs. In other situations, we observe developers placing condominium units in the rental markets at price points between $1.50 and $2.00 a square foot per month. Essentially, this is changing these assets from condominiums for owner-occupancy to income producing assets. The result is a change in value of hundreds of dollars per square foot. This change in value in some cases can be as much as 50% from the original offering sales price.

Property Reset Values

Due to the oversupply of new residential condominiums, existing projects suffer further pressure. Previously successful and mature high rise luxury condominium projects are experiencing significant numbers of foreclosures with additional units for sale. As oversupply of new condominiums and discounted bulk sales occur, it is likely that the market value for some existing mature high-rise luxury condominium units will be less than their loan value. This may cause an entire market place value reset.

Lack of Financing for Bulk Sales

For the last year bulk sales of unsold converted condominiums or unsold new condominiums on a bulk basis have been deemed a potential exit strategy. Changes in regulatory guidelines and banking underwriting have made conventional financing for such transactions more difficult and in some cases near impossible. This severely narrows the exit strategy for investors and diminishes the number of likely investors.

'Pain after the Passion' is a registered Term of Art on CBRE Restructuring Practice Group.

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Endnote:

1 Monoline insurers, also referred to as monoline insurance companies, are institutions which provide insurance for bonds sold in public markets essentially allowing credit enhancement. Generally they guarantee the timely repayment of bond principal and interest when an issuer defaults. They are so named because they provide services to only one industry.

Sweeping Changes to the Medicaid Laws in Florida

By Lisa B. Goddy, Esq., Wollman, Gehrke & Solomon, P.A., Naples, FL

Sweeping changes have taken place with new Medicaid eligibility rules recently adopted by Florida. The Deficit Reduction Act of 2005 ("DRA") signed into law by President Bush on February 8, 2006 contains the most dramatic changes to the Medicaid system in over 15 years. These changes successfully closed many "loopholes" practitioners used in Medicaid planning, particularly those relating to gifting techniques.

What is Medicaid?

Medicaid is a needs-based federal program administered by the states. Assuming an individual meets certain medical and rigorous financial eligibility requirements, Medicaid will pay for long term nursing home care. However, the DRA now makes it harder for an individual to meet those eligibility requirements and qualify for Medicaid.

"The Deficit Reduction Act now makes it harder for an individual to meet eligibility requirements and qualify for Medicaid."

This article highlights some of the dramatic changes of the DRA and how they are implemented in Florida. Although several states implemented the DRA retroactively, Florida adopted a prospective application of the DRA effective November 1, 2007. Therefore, pre-DRA rules apply to gifts made before November 1, 2007, and the new DRA rules apply to gifts made on or after November 1, 2007. Unfortunately, there are still many unanswered questions as to the actual application of the DRA in Florida.

Delay of Start Date for Transfer Penalty Periods:

To qualify for Medicaid, an individual cannot simply give away his or her assets. There are certain transfer penalties based on the value of the gift or transfer. The transfer penalty period is determined by dividing the value of the gift by the average monthly cost of nursing home care set by the state ($5,000 in Florida[1]). The quotient derived is the number of months for which the applicant is ineligible for Medicaid assistance.

Under the old law, the transfer penalty period began in the month the gift was made. Under the new law, the start date was postponed until some future event, which makes this rule one of the hardest provisions of the DRA to fully grasp. In other words, if an applicant makes a gift on or after November 1, 2007, the transfer penalty period will not begin until the latest of the following dates: (a) the date the individual would be eligible for Medicaid (but for the penalty period imposed); (b) the first day of the month in which the individual transferred the asset; or (c) the first day following the end of an existing penalty period.[2] Typically, the latest of these dates will be the date of the Medicaid application when the applicant would be eligible but for the ineligibility due to the gift.

For example, in November 2007, John Smith made a gift to his daughter that would result in a two month penalty period. He applies for Medicaid in December 2007. The transfer penalty would start in December if he meets all eligibility requirements but for the penalty period. December (not November) starts the clock running, and he would not be eligible to receive Medicaid until February 2008.

Partial Month Transfer Penalty Periods:

The DRA contains another new twist regarding the calculation of the transfer penalty period, which is the elimination of the "rounding down" technique. Under the old rule, any transfer penalty period that resulted in a fractional month would be rounded down to the nearest whole month. Under the new rule, the penalty period is calculated to the nearest day (rather than the month), and multiple gifts are now added together to arrive at one total in determining the penalty period.[3]

For instance, John Smith is admitted to the nursing home in January 2007. He makes a gift to his daughter of $10,000 on November 15, 2007 and another gift of $8,500 on December 12, 2007. He applies for Medicaid in December 2007. Since multiple gifts are now combined, the total transfer is $18,500. The penalty period makes him ineligible for Medicaid for 3.7 months ($18,500 divided by $5,000 = 3.7 months). Instead of rounding down to the nearest whole month (i.e., 3 months), the fractional month is converted into days; Mr. Smith would be ineligible for Medicaid for a period of 3 months and 21 days. The penalty period would start on December 1, 2007 (the month he was eligible but for the transfer penalty) and run through March 21, 2008.[4]

Five Year Look Back Period:

Under the old law, outright gifts were subject to a three year look back period, and gifts to or from certain trusts were subject to a five year look back period. The DRA changed the look back period so that all gifts whether outright or in trust will be subject to a five year look back period. Confusing as it seems, under Florida's adopted rule, it appears as if the three year look back period is still in place, and the five year look back period may not be phased in until December 2010.[5]

Home Equity Cap:

Under the old law, the applicant's home, regardless of value, was exempt so long as it was the principal place of residence for the applicant or his or her spouse. However, under the new law, the equity in the home is now considered a countable asset to the extent the equity exceeds $500,000 (less any mortgages and other encumbrances). The DRA gave the states the option to raise the cap to $750,000, but Florida chose not to do so. There is, however, an exception to the home equity policy. The cap does not apply if the applicant's spouse, or a child of the applicant who is either under 21, blind or disabled, resides in the home.[6]

Restrictions on Annuities:

Annuities are commonly used as Medicaid planning techniques, but the DRA has now placed certain restrictions on the use of annuities. Balloon annuities for single applicants are considered countable assets if purchased on or after November 1, 2007. On the other hand, immediate annuities purchased on or after November 1, 2007, assuming they meet certain criteria, are still viable planning techniques for both the applicant and the community spouse. In other words, if an immediate annuity makes equal periodic payments over the actuarial life expectancy (or shorter period) of the applicant, it will not be considered a gift by the applicant. However, the annuity must also meet the new beneficiary designation requirement. The State of Florida must now be named as a remainder beneficiary of the annuity up to the amount expended by Medicaid.[7] The State of Florida is named as primary beneficiary except when the applicant has a spouse, minor child or disabled child. In that case, the State of Florida is named as secondary beneficiary.

Purchase of Life Estate Interest:

The purchase of a life estate in another's home remains a viable planning technique under the DRA. Under the new law, the applicant can purchase a life estate in another's home, and the purchase will not be treated as a gift for Medicaid eligibility purposes if: (a) the home is the applicant's primary residence; (b) the applicant has resided there for at least one year; and (c) the purchase price is evaluated according to the Social Security life estate tables.[8] If the applicant has not lived in the home for at least one year, the full purchase price paid for the life estate is a transfer for less than fair value regardless of the value of the life estate or the length of time the applicant has lived in the home.

Time will tell as to how the various changes will be administered in Florida under the new DRA rules. Because of the prospective application of the DRA in Florida, proper planning will require consideration of both the old and the new rules. We will have to wait and see how the implementation of the new rules unfolds throughout the State of Florida. However, one thing is certain: the adoption of the new rules closed the door to many Medicaid planning techniques.

Endnotes:

1 Fla. Admin. Code Ann. r. 65A-1.716(5)(d)
2 DCF Transmittal #P-07-10-0015 (October 31, 2007)
3 Fla. Admin. Code Ann. r. 65A-1.712(3)(g)
4 DCF Transmittal #P-07-10-0015 (October 31, 2007)
5 DCF Transmittal #P-07-10-0015 (October 31, 2007)
6 Fla. Admin. Code Ann. r. 65A-1.712(5)(a)
7 Fla. Admin. Code Ann. r. 65A-1.712(3)(b)
8 Fla. Admin. Code Ann. r. 65A-1.712(3)(d)

Visit the Section website: www.rpptl.org.

Proper Care and Feeding of Trust-Owned Life Insurance

By Richard M. Flah, CLU and Lori W. Denison, CLU, Flah & Company, West Palm Beach, FL

Trust-owned life insurance ("TOLI") is a universally accepted and widely utilized estate planning tool. The tax-preferred, leveraged transfer of wealth is extremely attractive, provided both the trust and policy are properly crafted and administered.

Attorneys agree to serve as TOLI trustees *not* because it generates an attractive revenue stream but rather as an accommodation to a valued client. The mechanics of sending Crummey notices and making premium payments are straight forward. But who is systematically confirming carrier and policy suitability, measuring the insurance policy's performance, benchmarking the policy against alternate investments, and recommending (and documenting) appropriate changes? In our experience, these functions are seldom being performed by anyone.

> ***"The responsibility for policy review and maintenance rests squarely with the trustee, who has a fiduciary duty to ensure that maximum benefit inures to the trust beneficiaries in keeping with sound investment practices established under Florida Statutes, Section 518.11."***

The grantor and trustee might suppose the insurance retailer is providing ongoing monitoring and service; however, this is rarely the case. In fact, it is estimated that between 70% and 95% of TOLI policies are "orphaned," meaning there is no active servicing agent.[1] The responsibility for policy review and maintenance rests squarely with the trustee, who has a fiduciary duty to ensure that maximum benefit inures to the trust beneficiaries, in keeping with sound investment practices established under Florida Statute Section 518.11 (Prudent Investor Rule).

A documented and well-executed TOLI administration process will enhance the trustee's relationship with the grantor, improve the likelihood of a positive result for the trust beneficiaries, and therefore minimize the chances of a dispute. This should include:

- ***An insurance policy management statement.*** This document, analogous to an investment policy statement for more traditional investment assets, may be the most important paper a trustee has on file. This statement serves as the trustee's roadmap for policy selection and management and should document the grantor's:
    - **Intention for** the life insurance
    - **View of** the beneficiaries' needs
    - **Time horizon.** Will insurance be needed for a specified period, only until life expectancy, forever?
    - **Risk tolerance**. How much emphasis should be placed on guarantees? Is variable life a suitable trust investment? If so, what is a reasonable rate-of-return expectation, and who will manage the policy's underlying fund selection and allocation?
    - **Anticipated funding stream.** Will premiums be continuous and predictable? Will the funding source cease to exist at some point? Will the death benefit of a grantor, spouse, or Crummey beneficiary trigger unanticipated gift taxes on future contributions?
    - **Understanding of** what is "guaranteed" and what is based on "hoped for" policy pricing assumptions.
    - **Preference for restorative action** should the policy under-perform. Would additional premiums be considered? Should the death benefit be reduced? Is a life settlement an option?

Documenting reasonable expectations at the outset should prevent disappointment down the road.

- ***A review of the trust document.*** A new trust should anticipate future changes, e.g., provide a mechanism to collapse a small trust and give the trustee the ability to resign at any time.[2] Wording may be included to memorialize the grantor's intentions. If the trust is already in existence, the trustee should confirm it has been administered according to its terms, that Crummey notices have been handled properly, and gift tax returns have been filed as appropriate.
- ***An analysis of the proposed or existing carrier.*** In the current environment (demutualizations, merger & acquisition activity, class action lawsuits and federal investigations), insurance carrier ratings do not tell the whole story. In fact, top tier ratings were awarded to several carriers in the 1990s, just weeks before their demise! An understanding of carrier financial trends and ratios is more valuable than a ratings snapshot.
- ***An analysis of the proposed or existing policy.*** At a minimum, two sets of illustrations should be reviewed: one that projects values at the carrier's current "hoped-for" pricing assumptions, and a second based on less optimistic assumptions. It is amazing how few clients realize that the insurance carrier can and does, at its discretion without notification, modify interest crediting rates,

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Trust-Owned Life Insurance

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dividends, and even policy charges. These modifications are made based on the carrier's investment performance, expenses, claims experience, and profitability targets.

The trustee and grantor should discern how a change in assumptions affects the policy's longevity. If the illustrations indicate that the policy is likely to expire before the insured, immediate restorative measures are in order. One option for an existing policy (rarely explored by an agent conducting a "free" review) is to explore whether the issuing carrier will facilitate a no-commission "internal exchange" for a more competitive, newer generation policy.

- **An update on any changes in the insureds' health status.** The insured's health status may directly impact how the policy is funded. For example:
- If the insured remains in excellent health, an increase in premiums or a decrease in death benefit may be warranted if the illustration indicates that the policy will lapse somewhere around "average" life expectancy.
- If the insured has quit smoking since the policy was issued, a significant rate reduction may be available.
- If the insured is in less-than-average health, funding a policy to continue to or beyond age 100 may be a waste of premium dollars.
- If the insured is in extremely poor health, paying any premiums may be ill-advised. A trustee once called to notify us that our client had passed away, and assured us that the annual premium was paid the week before so the insurance would not be in danger of lapsing. Sadly, the trust wasted $120,000; the death benefit would have been identical without the extra premium payment.

The insured's current health status also dictates what other options might exist, e.g., a more competitive offering from a different carrier or a life settlement.

The modest TOLI administration fee a trustee generally charges is insufficient to cover the cost of performing the above duties. Fortunately, Florida Statute Section 518.112 allows the trustee to delegate these "investment functions" to the following investment agents:

- Beneficiaries (primary or contingent interest)

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The Only Constant Is Change

The life insurance industry has undergone tremendous change over the past several years. The following factors continue to impact life insurance policy performance and value:

(1) **Lower investment yields:** Carriers have consistently lowered the dividend and interest rates credited to traditional policies. If expectations were based on higher dividend/interest rates, premiums projected to "vanish" likely will not.

(2) **Carrier merger, acquisition and demutualization activity:** Changes in carrier structure or focus have impacted performance of old "blocks" of policies. Stock companies are beholden to both stockholders and policyholders, adding pressure that didn't exist when they were "mutually" owned by their policy owners. The need to meet quarterly earnings targets has resulted in fierce competition for market share and lower prices for new customers, sometimes at the expense of old customers. In an effort to cut costs, carriers have divested themselves of business that they don't feel was "core strength."

(3) **Longer life expectancies:** Mortality experience and estimates have lowered life insurance premiums:

a. In the past, most insureds were lumped into a "standard" underwriting class. Now there are "non-tobacco," "preferred" and "elite" underwriting classes that lower rates for healthier individuals.

b. Until last year, policies were priced based on a 28-year old mortality table. All products must be re-priced by the end of 2008 using the new 2001 Mortality Table, which reflects longer life expectancies and spreads mortality risk out over 120 years. Most 'death benefit' oriented policies have already been re-priced, with the result being lower rates, especially for individuals under age 70.

c. Underwriting guidelines are far more liberal than they were in the past. For example, an insured with recent heart or cancer history who would historically have been considered uninsurable might even qualify for standard rates if the right agent is managing the underwriting process.

(4) **The emergence of a robust secondary market:** A property owner benefits whenever there are two or more willing buyers. The issuing carrier no longer dictates what a policy is worth; institutional investors are anxious to buy life insurance policies. Before canceling or "exchanging" a policy, a life settlement valuation should be sought. The true fair market value could be a multiple of the cash surrender value.

- Spouse, ancestor or descendant of said beneficiaries
- Any person or entity nominated by the majority of beneficiaries
- Another investment agent, if the trustee exercises care in the selection and in establishing the scope and terms of the delegation. Beneficiaries must be notified of the delegation.

While delegating investment authority shifts the burden elsewhere, many trustees are concerned that the trust beneficiaries are not in any better position to perform these functions satisfactorily. The individual best equipped to accept the delegation of investment authority, in most cases, is the insurance retailer who is selling (or sold) the policy. However, since most insurance retailers do not believe it is their responsibility to provide the ongoing maintenance required of a TOLI policy, it is critically important to confirm the retailer's ongoing role before the policy is purchased.

Ask the insurance retailer to confirm that he or she will:

- Accept the delegation of investment functions
- Provide a written servicing agreement to systematically review the insurance policies (as outlined above) and recommend any changes.
- Present a sample of the review deliverable that the trustee can expect to receive.

For existing policies, there is little to gain from consulting the original agent if he or she has not been proactive in delivering reviews and insights on a regular basis. The trustee should seek the assistance of an independent insurance specialist who is well regarded by other professional advisors, and whose firm is adequately staffed to skillfully execute these duties… you and the grantor may be leaning on them for the next 20+ years!

Trust litigation is a major growth industry and TOLI an immense target. To protect your clients, their trustees, and their beneficiaries, ensuring that an administration process is in place will add real value and deepen your client relationships. In the event of a TOLI dispute hearing, it will also insure you are all sitting on the same side of the table.

***Richard M. Flah**, CLU and **Lori W. Denison,** CLU are principals of Flah & Company, a 28-year-old, independent West Palm Beach firm specializing in the sale, preview, review and rescue of significant life insurance assets.*

Endnotes:

[1] Whitelaw and Reis, "Managing Trust-Owned Life Insurance Revisited" Trusts and Estates (April 1999), 38, citing statistics on page 39.

[2] Stephan R. Leimberg & Albert Gibbons, "Performing Due Diligence With Respect to Life Insurance Trusts is Crucial!", Estate Planning, (May, 2003), 248.

Managing Shared Assets

By Lee S. Hausner, Ph.D., Christina Lunsford and Douglas K. Freeman, J.D., LL.M.

The Family Shared Asset

Financially successful families enjoy the economic and emotional benefit of accumulated wealth. Much of this wealth will be, or has already been, transferred from the wealth creator to, or put under the control of, younger generations. It may consist of a variety of business, investment, and personal use assets, including:

- Operating business
- Vacation property
- Investment real estate
- Farm and ranch land
- Personal residences
- Collections, including antiques, artwork, automobiles, boats and airplanes
- Family foundation

"Family Shared Assets are assets in which two or more family members (or trusts created for their benefit) own, control, and enjoy economic benefits from the asset."

"Family Shared Assets" (or just "Shared Assets") are assets in which two or more family members (or trusts created for their benefit) own, control, and enjoy economic benefits from the asset. All who have an economic interest have a stake in the outcome; this may include family members, but also former family members (ex-spouses) or even outside third parties. We call these individuals (or entities, such as trusts) the "Stakeholders."

With all the obvious advantages of inheriting or controlling wealth, there are equally obvious challenges, including:

- Who has the right to use the asset? Who decides if there are competing requests for the use of the asset? Should rent or other fees be paid by Stakeholders who use the asset?
- How is income shared? Who decides if, when, and to what extent income is distributed?
- Who pays for the operating expenses and the capital improvements? What happens if one or more of the family owners fails to do so?
- Who pays for damages to the asset, especially if a family member was the cause of the damage? What are the consequences to the family member for failure to pay for the repair?
- Who has the power to decide to sell the asset? Encumber the asset? What if there is disagreement among the Stakeholders?
- What if an owner wants to sell his or her share? Is it permitted? Who sets the price and terms? Does the family want or will they accept a non-family buyer or transferee?
- What if one or more current owners want to acquire the interest of others? Is that permitted? Who sets the price and terms?

For these reasons, thoughtful families develop a comprehensive agreement amongst all Stakeholders.

Family Shared Asset Ownership Plan

The Family Shared Asset Ownership Plan focuses on the long range goals, dreams, needs and expectations of the family owners and Stakeholders, including children and in-laws, and perhaps adult grandchildren, each of whom has an interest in or expectation of equity in, income from, or use of a Shared Asset. If these voices are not heard, the family may experience anything from internal discord to public fighting and even litigation.

The Plan articulates the collective vision of these Stakeholders, and establishes the process, policies, and procedures to be followed in the operation of the Shared Asset. It sets realistic expectations, defines responsibilities, and assures accountability. It does not, nor can it, assure the continued financial success or economic benefit of the Shared Asset. That achievement is, of course, the common goal of many of the stakeholders. But it will give those who chose to continue the Shared Asset the best chance to do so, while helping to reinforce the bonds of family and perpetuate the legacy of the wealth creator.

The Plan addresses the critical elements that determine the use, enjoyment, and generational transition of the Shared Asset, including:

- Ownership – today, tomorrow and over time
- Governance – policies and procedures that determine long term decision-making with respect to the Shared Asset
- Management – day-to-day operations of the Shared Asset
- Compensation – of those who manage and maintain the Shared Asset
- Profit allocation – economic return to owners
- Communication – to all Stakeholders on information, decisions, and performance
- Withdrawals and removals – who stays and who leaves the ownership group
- Allocation of risks and rewards – economics usually

continued, next page

Managing Shared Assets

from preceding page

reflect a fair risk/reward ratio

- Conflict resolution – disagreements can be managed

Every Plan, whether in business or in families must establish recognizable milestones and benchmarks by which the success of the Plan can be measured. Furthermore, the Plan must have regular periods of review and assessment, which may be shorter in the early years (e.g. three years) and extend longer (e.g. five years), after the routine, procedures, and systems have been tested and matured.

The Plan must contain a procedure by which it may be changed and how and by whom such change will be implemented.

Please note, that when the Shared Asset is a family business, there will undoubtedly be many unique characteristics of the relationship. The Family Shared Asset Ownership Plan can, but often does not, include the family business. A separate strategic plan for the family business is recommended in that event.

At Gibraltar Private, we are concerned not just with the tax and economic consequences of estate planning, but with the impact of that planning on the lives of those for whom the funds were intended to benefit. Our advisors see the results of both effective and ineffective planning. We are pleased to offer you our insight, experience, and perspective.

Construction Law Institute a Success!

By Scott P. Pence, Esq., Carlton Fields, P.A., Tampa, FL

On March 7 & 8, 2008 at the Rosen Centre in Orlando, the Construction Law Committee sponsored the inaugural Construction Law Institute in conjunction with the 4th annual Construction Law Certification Review Course which was sponsored by the Construction Law Review Course Committee. The two advanced level seminars were preceded by a golf tournament and reception on March 6th.

Both seminars were an overwhelming success, each selling out all available seats for attendees, with approximately 350 combined attendees, and all exhibitor sponsorship availability sold out as well.

As part of the Construction Law Institute, the first lifetime achievement award was presented to **Larry Leiby** by the Construction Law Committee for his exemplary service and lifetime contributions to construction law in Florida.

The Construction Law Committee and the Construction Law Review Course Committee would like to thank all of its sponsors:

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January 31, 2008 RPP&TL AL Spring 2008

January 10 - 13, 2008 Executive Council Meeting

New Year Kicks Off in Key West

By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, FL

It is difficult to imagine a more attractive or romantic setting than Key West in January. The Casa Marina Resort, located right on the Atlantic coast, provided a relaxing and beautiful setting for three days of Real Property, Probate and Trust Law Section Committee and Executive Council meetings. Downtown Key West on Duval Street was an easy walk away, especially with the constant ocean breezes to keep everyone comfortable.

Thursday and Friday were both jam-packed full of committee meetings of all kind and shape. The Section's new Program Administrator, **Carmalita Hawkins**, was introduced to those in attendance and began getting to put faces with names.

Tae Bronner helped **Chair Melissa Murphy** put together an enjoyable weekend for everyone. On Friday, spouses and guests rode the Old Town Trolley to the Butterfly Conservatory, to see over 50 different species of butterflies from around the world. After a tour of Key West, the group stopped at the Hemingway House, home to one of America's most respected authors, Ernest Hemingway. Friday night's reception and dinner was downtown at the A&B Lobster House, with a great view of the boat dock.

Saturday kicked off with roundtable breakfast meetings for "dirt" and "death" and then the Executive Council Meeting was called to order at 10:30 am by our fearless leader, Melissa Murphy. The treasurer's report revealed that once again, this Section is in very sound financial standing and the meeting soon moved into Real Property and Probate Action Items.

The Real Property Section presented six specific items, three of which were from the Condominium and Planned Development Committee, one from the FAR/Bar Liaison Committee, one from the Landlord/Tenant Committee and one from the Title Insurance Committee. The Title Insurance Committee proposal produced a very lengthy discussion concerning proposed amendments to Florida Statute Chapter 637 and the Committee's proposal to create a "title insurance czar." (Greater details of the Executive Committee meetings can be read in the minutes which are posted on the Section's website after each meeting.)

Following the Real Property Section issues, the Electronic Recording Advisory Committee provided a draft of its final report, helping us all to get ready to move into the 21st century and the possibility of electronic recording. Executive Committee members present were also treated to the Florida Senate Interim Project Report on Florida Construction Lien Law, which ended with a list of 11 recommendations for future consideration. Considering the fact that this is the only class in which I ever received a "C" at U of F Law School, I always appreciate anything that helps me understand Construction Lien Law.

Next up was the Probate and Trust division with one action item relative to Florida Statute 732.402, the exempt properties statute.

The action items under the General Standing Committee section of the agenda included six different proposals, one of which generated some really vigorous discussion. **John Little** of the Amicus Committee discussed in great detail the *Magee* amicus brief. At the conclusion of a very interesting and substantive debate, based on a head count of those present, appearance by the Amicus Committee was approved.

The meeting wound up with reports from 21 different standing committees.

As is obvious from this short recap, the Executive Council meetings are stuffed with actions, activities and topics of interest.

The meeting also included a very nice variety of social activities including a scavenger hunt through downtown Key West by golf cart. Everyone who was interviewed after attending the scavenger hunt reported having a great time.

Photos begin on next page

New Year Kicks Off in Key West

Joan Lange, Suzanne Hearn, and Chris Middlebrook pose for a photo.

Charlie Robinson, George Lange, and Mark Middlebrook relax after a busy day of meetings.

RPPTL members stay busy during committee meetings.

Deborah Russell, Judge Martin and Nancy Hayes enjoy the A&B Lobster House reception.

Kristen Lynch, Tae Bronner, and Melissa Murphy.

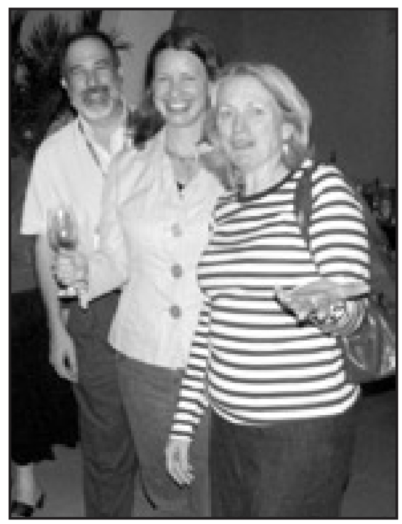
The Neukamms and Meyers prepare for the scavenger hunt!

New Year Kicks Off in Key West

The Dunbars and the Diamonds enjoy the Old Town Trolley on Friday night.

The Executive Council meeting.

The roundtable breakfast gives Executive Council members an opportunity to discuss pending issues.



Scavenger Hunt participants...

"See you next time!"

Photos by John Neukamm

Helping Your Clients with Charitable Giving

Focus on: Planned Giving and Retirement Accounts

By Bruce Marger, Esq., Trenam Kemker, St. Petersburg, FL

Often, one of your greatest opportunities to assist your clients in maximizing the personal benefits of giving occurs when they are making other major business, personal, and financial decisions, such as:

- estate planning;
- writing or revising a will;
- sale of a business or other major asset;
- retirement planning;
- at times of a financial windfall, such as a merger or acquisition.

In many of these situations, an opportunity exists to help your clients through planned giving.

"Clients can use assets held in an individual retirement account (IRA), 401(k),403(b) or similar account to start a fund at the community foundation at the time of their deaths."

Planned Giving 101

Planned giving refers to several gift techniques that typically involve your client retaining a portion of, or an interest in, the asset the client is giving to charity. Some people consider charitable distributions under a will or trust, life insurance and retirement plan beneficiary designations, and other direct, but deferred, gift arrangements as also being planned gifts.

Direct contributions to local or national charities may be considered, but do not usually provide any future ability in the donor or his or her family to assist in the charitable direction. A charitable remainder trust is an exception.

One of the simplest and most important things you can do to help your clients enjoy the benefits of planned giving is to ask them the giving question: "Are there charitable or community needs you would like to support?" Helping your client make planned gifts is a way to ensure that his or her charitable intentions are carried out and will outlive him or her. You need not be an expert to make these opportunities available. Your local community foundation can help you sort through the numerous options available to your clients.

Planned gifts can provide your clients with many benefits. These benefits can include an immediate charitable income tax deduction (even though the charity may not receive any property until some future date), avoidance or deferral of capital gains taxes on appreciated property used to fund the gift, retained and possibly increased income to your client or others he or she cares about, possible assistance in asset diversification and, last but not least, support for charitable causes.

Planned Giving Through Retirement Plans

Attracted to the tax-deductible contributions, many individuals have amassed significant wealth in their pension plans and individual retirement accounts. Income tax-deferred retirement accounts allow assets to grow on a tax-deferred basis; however the participant incurs ordinary income taxation on withdrawals. Roth IRAs are an exception.

If, after death, the retirement account benefits are paid to anyone but the account owner's spouse, those benefits may be subject to estate taxation as well (if the owner's estate is above a certain value). While there is an income tax deduction for estate taxes on the withdrawals, the combination of the two taxes is substantial. If, however, your clients leave tax-deferred retirement accounts to a charitable organization at death, they can transfer these assets without incurring any taxation.

One simple way to implement your client's philanthropic wishes is for your client to name the local community foundation a beneficiary of his or her retirement plan. Retirement assets can be gifted easily to a community foundation at death. This can be done by designating the community foundation as the beneficiary for the retirement asset. Tax savings can be significant. The spouse must waive designation in writing on defined benefit plans.

For example, if your client were to give a $100,000 IRA to his or her children at death and another $100,000 of assets to the community foundation, the children would have to pay income taxes on the IRA (in addition to any estate taxes that might be owed). By giving the IRA to the community foundation and the other assets to the children, all of the income taxes are avoided on the IRA. This income tax benefit can be important when planning the distribution of your clients' pension, profit sharing, Section 401(k) and Section 403(b) plans and IRAs.

Clients can use assets held in an individual retirement account (IRA), 401(k), 403(b) or similar account to start a fund at the community foundation at the time of their deaths. Many donors choose to donate all or part of their retirement plan to the community foundation to set up a donor advised fund, naming their children as the advisors. This arrangement allows children to participate in distributing a larger pool of charitable funds than would have been available if the money had been left to them outright.

Important Details About Giving Through Retirement Plans

- Changing the beneficiary of a retirement fund can be as easy as filling out a form - especially for IRAs. Your client will not have to rewrite his or her will or add a codicil to exercise this option.

- If an account owner wishes to pass the account on without having it be taxed at all, he or she may designate the community foundation as the primary beneficiary. This means that the account will pass directly to the community foundation at the owner's death, not to a spouse or child. Please note the spousal waiver requirement for defined benefit plans.
- If both spouses wish to use their retirement accounts to benefit the community foundation after both spouses die, they can both name the community foundation as the contingent beneficiary of their retirement accounts. This means that when the first spouse dies, that spouse's retirement account will pass to the living spouse. The living spouse will incur income tax on withdrawals but not estate tax. When the second spouse dies, the accounts will pass to the community foundation without any taxation.
- Alternatively, your client may also designate the community foundation for a percentage of the assets that remain in the plan at death.

Getting Help With Planned Giving

There are a number of different planned gift options, each of which is useful in certain circumstances. The goal is to find the planned gift that is most advantageous to your clients, to their families, and to the causes they support.

The staff of community foundations – with years of legal and financial planning experience – can provide assistance to help you create planned gifts that are right for your clients.

For More Information

Log onto www.communityfoundationsfl.org for more information or to connect to a community foundation near you.

Homeowners' Associations in Florida:
Issues and Analysis for the Real Estate Developer

By Solomon Genet, Esq., National Title Insurance Company, Miami, FL and Ben Solomon, Esq., Solomon & Furshman, LLP, North Bay Village, FL

Introduction

The population of Florida has nearly doubled since 1980.[1] As the population continues to grow, real estate developers build more homes and create more communities, many of which are (or will eventually be) governed by a homeowners' association (an "HOA"). There are currently more than 11,000 HOAs in Florida.[2]

An HOA is a not-for-profit corporation created pursuant to Florida Statutes, Chapter 617 and regulated under Chapter 720 for, among other reasons, the purposes of owning, managing, maintaining, repairing and/or replacing the common property of a community.[3] Such common property is deeded to the HOA by the developer prior to the turnover of the association from the developer to the homeowners[4] (the "Turnover"). The HOA is governed by the recorded HOA documents (collectively, the "HOA Documents") which typically include the declaration of covenants and restrictions (the "Declaration"), the articles of incorporation of the HOA, the by-laws of the HOA, and any rules and regulations that may have been promulgated.

Drafting HOA documents is a complex area of the law and form documents not tailored to the specific community and circumstance may be insufficient.

The HOA Documents, in conjunction with statutory requirements, determine the breadth and scope of the HOA's authority and role.[5] This includes, among other rights, the right to make assessments, assert liens for non-payment of monies due and owing to the HOA, and assert general management and control of the common property.[6] Developers can take advantage of the available contractual latitude of the HOA Documents which, if drafted properly, can provide significant protection and rights to the developer. After all, the HOA Documents are executed by the developer and drafted and recorded by the developer's attorney.

In this article, we will examine HOAs with attention to: (i) the preparation and meaning of the HOA Documents; (ii) what membership in an HOA means to homeowners; (iii) Florida appellate case law relevant to issues that drafters of HOA Documents should consider; and (iv) the developer's role with regard to the HOA and the HOA Documents.

The HOA and HOA Documents

An HOA is a regulated entity, subject to Florida Statutes, Chapter 617, which governs not-for-profit corporations, and Chapter 720, which specifically governs HOAs. As a general rule, the parcels are owned in fee simple by the homeowner and typically improved with a residence. As mentioned, the HOA itself owns the common property (also known as "common areas"), upon which developers often construct certain common infrastructure such as recreational facilities (*i.e.,* a pool, tot lot, clubhouse), common open spaces, roadways and parking areas.

The HOA Documents are recorded in the public records of the county in which the community is located prior to any homeowner closing on a home and, as such, become "title documents" (also known as "covenants running with the land") which subject the home to the terms of the HOA Documents and bind each homeowner to comply with the terms of the same. In other words, each homeowner agrees to and accepts the terms of the HOA Documents by closing and accepting title to his or her home.

The HOA Documents generally encumber both the individual residences and the common property. Although each set of HOA Documents is unique, most contain: (i) provisions explaining the rights and obligations of HOA membership including, without limitation, the obligation to pay assessments;[7] (ii) use restrictions on the HOA and the homeowners with regard to use of the homes, the lots, and the common property; (iii) the developer's rights with regard to the HOA, the homeowners, and the community as a whole; and (iv) a copy of the articles of incorporation and by-laws of the HOA, which are typically recorded in the public records as exhibits to the Declaration, and the rules and regulations of the HOA, which are typically unrecorded.

Drafting and Interpreting HOA Documents

The drafting of HOA Documents is critically important to creating the rights and obligations of developers, the HOAs, the homeowners and even municipal governments and agencies that may have rights memorialized within the HOA Documents (*i.e.,* the applicable water control district, city and/or county). Careful drafting, as well as the HOA's record of enforcing the covenants and restrictions contained in the HOA Documents, can have a significant impact on the outcome of a case relating to the interpretation of the language of the HOA Documents.

HOA Documents are the subject of voluminous case law in Florida, specifically with respect to the enforcement of the restrictive covenants contained therein. Certain restrictive covenants are disfavored under Florida law, and particularly where ambiguous, the same have been strictly construed against those who assert the power to limit and/or restrict the homeowner's free use of his or her real property.[8] However, if the restrictive covenants set forth in the HOA Documents are unambiguous, clearly evidencing the intent of the parties, the covenants will typically be enforced according to their terms.[9]

In *Wilson v. Rex Quality Corp.,*[10] the disputed restrictive covenant stated that a commercial sign could not be displayed "on any lot." The HOA sued for enforcement of the restrictive covenant, arguing that the defendant/homeowner was in violation of the provision where such defendant/homeowner parked a vehicle on the lot which contained an advertisement painted thereon. The appellate court disagreed, reversing the trial court's ruling, interpreting the text "on any lot" literally, and suggested that the covenant could have been written to restrict signs from being displayed "on any lot or vehicle," but was not. The *Wilson* court reasoned that giving the words their "ordinary and obvious meaning," the restrictive covenant only relates to signs posted on the lots, and not any vehicle parked on the lot.

In *McMillan v. Oaks of Spring Hill Homeowner's Ass'n, Inc.,*[11] an HOA brought an action against homeowners who had placed a prefabricated shed on their property in violation of the restrictive covenants contained in the HOA Documents. In its review of the facts, the court noted that: (i) the HOA Documents stated that no sheds (or other lean-to or detached buildings) are permitted to be "erected" upon any lot; (ii) the homeowners were placed on notice by the HOA that placing a pre-constructed shed on their lot would violate the HOA Documents; and (iii) despite the foregoing, the homeowners placed a pre-constructed shed on their lot.

After the trial court granted the HOA's motion for summary judgment, the homeowners appealed, arguing that they had not "erected" a shed on their lot, but rather, had "placed" a pre-built shed on the same. The Fifth District Court of Appeal of Florida found that while Florida law makes clear that restrictive covenants should be narrowly construed, such restrictive covenants should not be construed in such a way that would defeat their plain and obvious intent. Accordingly, because the plain and obvious purpose of the restrictive covenant in the instant case was to keep sheds out of the community, the court affirmed the decision of the trial court and granted the HOA's request for an injunction requiring the homeowners to remove their shed.

In *Bessemer v. Gersten,*[12] the Florida Supreme Court ruled that a developer's recreation assessment lien could take priority over a property owner's homestead rights. In Bessemer, the developer had filed a Declaration which stated that: (i) purchasers of homes within the HOA would have to pay a monthly recreation assessment fee; and (ii) the developer "shall have a lien upon such owner's lot for the aforesaid amount of $10.00 per month until such amount is paid …" The Florida Supreme Court held that this language served as acquiescence by the homeowner of the receipt of title subject to a pre-existing lien, and as such, had priority over the homeowner's constitutional homestead rights.

Limitations on the Enforcement of HOA Documents

Notwithstanding express language in the HOA Documents, Florida courts have determined that an HOA can, in effect, waive its rights to enforce the restrictive covenants contained in its own HOA Documents through certain courses of action, or by the failure of the HOA to act at all. In *Woodlands Civic Assoc. Inc. v. Darrow,*[13] an HOA brought an action to enforce a deed restriction limiting the use of a specific lot within the HOA subdivision (being used for a chiropractic office) to residential purposes, relying on the plain language of the restriction, which stated as follows: "[n]o lot shall be used except for residential purposes."

However, the appellate court, affirming the trial court's ruling, soundly rejected the HOA's argument, relying upon the equitable principles of waiver. The court recited certain of the underlying facts, including that the immediate prior owner of the property had: (i) used the property for business for years; (ii) advertised the property for sale as a commercial location; and (iii) renovated the building's exterior for commercial use, all in an open and obvious fashion without any objection by the HOA. Further, the lot owner made additional commercial improvements to the property for two months without any HOA complaints. The *Darrow* court reasoned that "the instant facts present a classic case of waiver so as to estop [the HOA] from enforcing its deed restrictions against [the lot owner]."[14]

While the HOA Documents covenants govern the homeowners, they are not enforced without regard to their reasonableness. Courts have held that if an HOA restrictive covenant is unreasonable or arbitrary, or if it is implemented in an unreasonable or arbitrary manner, it shall not be judicially enforced.[15] For example, in *Robertson,*[16] the Florida Fifth District Court of Appeal dealt with a situation where the Master Declaration which governed the HOA stated that all roofs were required to have grey, asphalt shingles. The homeowner built a house with a brown roof, for which the homeowner had received no HOA approval. The HOA sued for violation of the HOA Documents.

In reversing the trial court's award of summary judgment in favor of the HOA, the appellate court queried whether the roof color requirement was reasonable, identifying that there was no record evidence on this point. Further, the court was interested in whether other houses were exempted from this requirement, and/or otherwise in compliance with the required color scheme. The court determined that because there was no evidence provided as to the "reasonableness" of the restrictive covenant, no evidence showing that the other homes in the subdivision were in compliance (or required to be in compliance), and no evidence showing whether other homes were exempted from such covenant, summary judgment was inappropriate. Accordingly, the case was remanded to the trial court to determine whether this restrictive covenant was reasonable and whether the same was being consistently obeyed and enforced throughout the subdivision.

Similarly, in *Payne v. Cudjoe Gardens Property Owners*

continued, next page

from preceding page

Assoc., Inc.,[17] the subdivision in question was governed by an HOA whose governing HOA Documents subjected each property to certain set-back restrictions. The homeowners in question failed to submit their building plans to the HOA for approval, and the HOA sued for an injunction requiring compliance with the HOA Documents. The trial court granted the HOA's motion for summary judgment requiring compliance with the restrictive covenant; however, on appeal, the homeowners presented evidence that numerous other homeowners within the subdivision had violated (or were currently in violation of) the restrictive covenant at bar.

Accordingly, the Third District Court of Appeal of Florida reversed the trial court's award of summary judgment, finding that additional evidence was required in order to determine: (i) how many other property owners were in violation of this requirement; (ii) whether these violators received variances to exempt them from this requirement; and accordingly, (iii) whether the enforcement of this provision against the homeowner/defendant in the instant case was arbitrary or unreasonable. The court made clear that where evidence may exist which would demonstrate that an HOA was enforcing a restrictive covenant arbitrarily and unreasonably (*i.e.,* enforcing such restrictive covenant against some, but not all, homeowners without justification), no decision to uphold the enforcement of such restrictive covenant would be made upon motion for summary judgment, as such decisions regarding genuine issues of material facts require a finding by a judge or a jury upon presentation of all of the evidence.

If the HOA documents are not drafted carefully in order to protect the developer, are not customized to fit the particular community, or are not drafted with a comprehensive understanding of Florida law, the HOA documents can become problematic for the developer.

It is important to note that although the developer typically has the unilateral right to amend the HOA Documents prior to the Turnover, after the Turnover the HOA Documents typically require approval by 66% of the Board and, in many cases, 75% of the total voting membership.[18] As such, problems with the HOA Documents and/or undesired provisions can be very difficult to delete or modify after the Turnover occurs.

The Obligation to Pay HOA Assessments and Fines

As previously noted, each homeowner is legally obligated to make assessment payments to the HOA and there is typically no defense for the failure to do so (except bankruptcy), including the failure of the HOA to properly maintain the buildings and/or common property. In *Abbey Park Homeowners Ass'n v. Bowen,*[19] the court held that the HOA's failure to maintain the HOA's common property was not a defense to the homeowner's failure to pay fees that were due and owing. The appellate court reasoned that because the homeowner's obligation to pay the fees, as set forth in the applicable HOA Documents, "was conditioned solely on her acquisition of title," the defense of the HOA's failing to maintain the common property failed as a matter of law.[20]

Contrary to the homeowner's (almost) unconditional obligation to pay assessments to the HOA as noted above, the right of the HOA to impose and collect fines against homeowners is conditioned on both the current language of Florida Statutes, Chapter 720 and the provisions of the HOA Documents. In *Zerquera v. Centennial Homeowners' Assoc.*,[21] the Florida Third District Court of Appeal concluded that the homeowner purchased a home subject to the HOA Documents, which did not provide that the fines assessed by the HOA for violation of the applicable restrictions and covenants would be treated as assessments (which were explicitly a "continuing lien on the property"), but did give the HOA the ability to amend the HOA Documents in a reasonable manner. Two years later, the HOA amended the HOA Documents, setting forth expressly that the fines would be considered assessments, and thus become a continuing lien on the property.

Subsequently, four years later, the homeowner was fined $200 for violating certain HOA restrictions, and upon non-payment, the HOA moved to foreclose against the homeowner's property. The homeowner objected, stating that he took ownership of the home prior to the amendment to the HOA Documents permitting a foreclosure based upon a fine for a violation. Attorney's fees and costs requested by the HOA in the foreclosure action by this point exceeded $30,000. The *Zerquera* court rejected the homeowner's argument, finding in favor of the HOA, reasoning that the homeowner had sufficient constructive notice that the fine constituted a "continuing lien." Thus, the foreclosure could proceed against the homeowner's homestead because, among other reasons, the homeowner had notice that the HOA Documents could be modified.

Developer's Rights Under the HOA Documents

Developers (also referred to as "declarants" under certain HOA Documents) are the creators of the HOA Documents, and execute the same[22] prior to their recording in the public records. Many of the developer's rights are memorialized in the HOA Documents including, without limitation, easement rights, development rights, marketing rights, and the right to control the HOA prior to the Turnover. If the Documents are drafted properly, the developer has the unilateral right to amend the HOA Documents any time prior to the Turnover. In fact, if the developer's lawyer drafts quality HOA Documents, they can be very effective in protecting the rights of the developer.

The HOA Documents should always provide the developer with all of the legal rights it needs to successfully develop the community, including keeping control of the HOA until Turnover. The HOA Documents should also include effective disclaimers of liability to the HOA and the homeowners regarding the property, in favor of the developer, and properly disclose each homeowner's obligations with regard to the HOA, the home, and the community. However, if the HOA Documents are not drafted carefully in order to protect the developer, are not customized to fit the particular community, or are not drafted with a comprehensive understanding of Florida law, the HOA Documents can become problematic for the developer.

For example, in *Hill v. Palm Beach Polo, Inc.*,[23] a homeowner sued the developer of a residential real estate development claiming that the developer had exceeded its authority under its own HOA Documents when it attempted to amend the assessment provisions of such HOA Documents. The Fourth District Court of Appeal summarized the relevant provisions of the HOA Documents by stating that, as drafted, the HOA Documents provided the developer the authority to "alter, modify, change, revoke, rescind, or cancel any or all of the restrictive covenants contained herein." All other changes to the HOA Documents required a two-thirds vote of the HOA's board of directors and voting members.

In its analysis of the case, the court noted that pursuant to Florida law, the term "restrictive covenant" is understood to mean "an agreement between landowners that their property will be used only for specified purposes or in a specified manner."[24] The Court further noted the analysis in the *Bessemer* case, which provided that assessments imposed by a developer upon lots within a subdivision constitute "affirmative restrictions." Accordingly, the court held that the developer could not amend the assessment provisions of its HOA Documents because the same did not provide the developer with the authority to amend such affirmative restrictions, but rather, only provided the developer the power to amend the restrictive covenants.

Conclusion

This article is intended to provide some basic knowledge and understanding regarding HOAs in Florida. While not completely exhaustive, it has stressed the importance of carefully drafting HOA Documents. It is a complex area of the law and form documents not tailored to the specific community and circumstance may be insufficient to properly protect the interests of the developer and/or the HOA.

As the number of HOAs continues to grow in Florida, so will the need for lawyers versed in HOA law who are able to understand and interpret their clients' HOA Documents and give good counsel relating to the same. Additionally, title agents, lenders, and purchasers should make sure to carefully review the applicable HOA Documents prior to closing on a property, in order to fully understand the legal effect against the property.

Endnotes:

1 U.S. Census Bureau, 1980 Census of Population, Vol. 1, Chap. A, Part 11 (1982); University of Florida, Bureau of Economic and Business Research, Florida Population Estimates for Counties and Municipalities April 1, 2007.
2 2008 1st Qtr Florida Community Association Reference Directories (www.sunshinelist.com). This figure does not include the additional registered condominium associations in Florida.
3 One of the main distinctions between an HOA and a condominium association, pursuant to Chapter 718, Florida Statutes, is that the HOA actually owns the common property used by the homeowners, as opposed to a condominium where each unit owner owns an equal undivided fractional interest in the common elements; the condominium association does not own any real property, but does manage and maintain the same.
4 Transition of HOA control from the developer to the homeowners pursuant to Florida Statutes, Section 720.307 typically occurs three months after 90 percent of the parcels, in all phases of the community that will ultimately be operated by the HOA, have been conveyed to members.
5 *Highland Lakes Property Owners Association, Inc. v. Schlack,* 724 So.2d 621 (Fla. 5th DCA 1999).
6 *Palm Beach County v. Cove Club Inv. Ltd.,* 734 So.2d 379 (Fla. 1999).
7 The payment of these assessments by each homeowner is secured by a lien right in favor of the HOA pursuant to the terms of the Declaration and Florida Statutes.
8 *Shields v. Andros Isle Property Owners Assoc., Inc.,* 872 So.2d 1003 (Fla. 4th DCA 2004) (citing cases).
9 *Id.*
10 839 So.2d 928 (Fla. 2d DCA 2003).
11 754 So.2d 160 (Fla. 5th DCA 2000).
12 381 So.2d 1344 (Fla. 1980).
13 765 So.2d 874 (Fla. 5th DCA 2000).
14 *Id.* at 876.
15 *Robertson v. Countryside PUD Residential Homeowner*, 751 So.2d 674 (Fla. 5th DCA 2000) (citing cases).
16 *Id.*
17 837 So.2d 458 (Fla. 3d DCA 2003).
18 However, the approval requirements to amend HOA documents varies and sometimes is as low as a majority of the board and 75% of the votes present at a properly noticed meeting at which there is a quorum of members.
19 508 So.2d 554 (Fla. 4th DCA 1987).
20 *Id.*
21 752 So.2d 694 (Fla. 3d DCA 2000).
22 All other land owners and other entities with an interest in the property (including the developer's lender) must also "consent" or "join in" the Declaration prior to it being recorded in the public records by the developer.
23 717 So.2d 1080 (Fla. 4th DCA 1998).
24 *Boyer, Florida Real Estate Transactions,* Section 111.01, at 111-5 (1997 Ed.).

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_____ Set of 25 FAR/BAR CONTRACTS - $50.00 per set
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"As Is"	Homeowners' Association/Community Disclosure
Assumption of Existing Mortgage(s)	Insulation Disclosure for New Residence
Back-up Contract	Kick Out Clause
Buyer's Attorney Approval	Lead-Based Paint Disclosure
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Evidence of Title (ABSTRACT)	Rezoning Contingency
Evidence of Title (SOUTH FLORIDA CONTRACTS)	Right to Inspection and Right to Cancel
Existing Tenant(s)	Sale of Buyer's Property
US Department of VA/FHA	Seller Financing
Foreign Investment in Real Property Tax Act ("FIRPTA)")	Seller's Attorney Approval

Order Sub-Total	$____________
Sales Tax 6.5%	$____________
Shipping & Handling	$ 8.00
TOTAL	$____________

Firm:____

Attn: ______________________________ Attorney Bar #: ______________

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

City/State/Zip:____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

Phone: (_______)______________________ Fax: (_______)______________________

E-mail address: ____

METHOD OF PAYMENT

I have enclosed check #______________, in the amount of $______________, on _____ / _____ / _____
or
Please Circle One: VISA or MASTER CARD Amount to be charged $______________

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

FLSSI USE ONLY

SHIP DATE ____/____/____ LB_____ $________ # __ __ __ __ __ __ __ __

AUTHORIZATION DATE ____/____/___ # __ __ __ __ __ __ __

Office October 24, 2007

Real Estate Case Summaries

By Stephen E. Silkowski, Esq., Jacksonville, FL and
Gerardo Rodriguez-Albuzi, Third-Year Law Student, University of Miami School of Law, Miami, FL

As it relates to pre-existing debt, a mortgage dragnet clause will not be enforced against a third party, unless the dragnet clause specifically identifies the pre-existing debt to be included within its terms or unless it can be shown that the third party otherwise had notice that the specific pre-existing debt was to be included within the grasp of the dragnet clause.

Starlines International Corp. v. Union Planters Bank, N.A, 976 So.2d 1172 (Fla. 4th DCA 2008).

The mortgage note in question here clearly contained a "dragnet clause" that in pertinent part stated, "As security for the payment of this Note,… Borrower hereby grants to Bank a security interest in any and all collateral pledged to the Bank… The Collateral shall also serve as security for all other liabilities… due or to become due which may be hereafter contracted or acquired, of each Obligor… to Bank, whether such liabilities arise in the ordinary course of business or not."

After the mortgage was recorded, Starlines purchased a one-half interest in the real property secured by the mortgage. Starlines was aware that Note 2 above was secured by the Mortgage but was unaware that Note 1 was also secured by the mortgage by way of the dragnet clause. In addition, the original mortgagor represented to Starlines at the time of the purchase that the real property provided security only for Note 2 and that there was no pre-existing debt secured by the mortgage.

The Borrowers defaulted on Note 1, and the Bank initiated this action against the Borrowers. In response to the complaint filed by the Bank, Starlines alleged that its interest was not inferior to that of the Bank, and that as a subsequent purchaser without notice, its interest in the real property was superior to that of the Bank.

At summary judgment, the trial court reasoned that since the mortgage was recorded and expressly referenced Note 2, Starlines was on notice to look at Note 2, which contained the dragnet clause. The trial court stated during hearings on the motion for summary judgment that the mortgage's reference to Note 2 would place third parties on constructive notice and require them to look closely at the terms of Note 2. If Starlines had done that, it would have been put on inquiry notice as to preexisting debts that may be encompassed within the dragnet clause. Thus, according to the reasoning of the trial court, Starlines was on notice and thus found its interest in the real property inferior to that of the Bank.

Case law in Florida on this topic seems to concern the enforceability of dragnet clauses as they may apply to pre-existing debts and obligations. For example, dragnet clauses are unenforceable to secure pre-existing debts and obligations unless the pre-existing debts or obligations are specifically identified by name in the dragnet clause. In so holding, the Third DCA noted that it was falling in line with a number of courts from around the country which had held the same. The Third DCA noted that dragnet clauses could sometimes have unexpected and unintended consequences to unsuspecting borrowers. To prevent such consequences, the Third DCA reasoned that it would be easy to identify specifically all pre-existing debt in mortgage dragnet clauses and held that lenders should be forced to do so should they wish to secure pre-existing debts by mortgages and notes executed at a later date.

On the other hand, the Fourth DCA has held that dragnet clauses are generally enforceable so long as the language of the clause is clear and unambiguous as to the parties' intent to secure pre-existing debt as well as after acquired debt. This case, however, presented a different situation, for in the previous case, this court was considering a case where the lender attempted to enforce the dragnet clause against the borrower, arguing that the borrower knew the dragnet clause existed and that both the lender and the borrower intended the dragnet clause to cover pre-existing and after acquired debt.

On the other hand, this *Starlines* case involved enforcing a dragnet clause not only against the borrower but also against a third party, Starlines, that had no involvement whatsoever with the negotiations that led up to the execution of Note 2 containing the dragnet clause. Further, this case involves a situation where Starlines could not discover that the mortgage also secured Note 1 from reviewing publicly recorded documents. Although the recorded mortgage clearly identified Note 2 and Note 2 contained the dragnet clause, Note 2 was not recorded. There is nothing in Note 2 that indicates that the dragnet clause encompassed Note 1. There was no evidence below that a review of any publicly recorded documents would have revealed that Note 1 was now secured by the mortgage that secured Note 2. Indeed, in this case, there was evidence that Starlines did what it reasonably could do when confronted with the dragnet clause in Note 2: it inquired of the original mortgagor as to whether any pre-existing debt was secured by the mortgage.

Effectively divesting Starlines of its interest would not

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be equitable, and clearly is one of the "unexpected consequences" of dragnet clauses. Therefore, as it relates to pre-existing debt, a dragnet clause will not be enforced against someone other than the borrower unless the dragnet clause specifically identifies the pre-existing debt to be included within its terms or unless it can be shown that the third party otherwise had notice that the specific pre-existing debt at issue was to be included within the grasp of the dragnet clause.

Pretermitted spouse necessary party to specific performance action on homestead sale contract.

Steadly v. Weinberg, 979 So.2d 445 (Fla. 4th DCA 2008).

The issue here involved specific performance of a contract to sell real property that, at the time of contracting, had been seller's homestead. Seller decided not to close the sale because of a lien affecting the property. Seller then married. Several weeks later, buyer filed this action for specific performance but did not join seller's new spouse. Seller moved to dismiss for failure to join an indispensable party. The trial court denied the motion and granted buyer's motion for summary judgment. The district court reversed.

Organic law requires the spouse of the owner of homestead to join in any conveyance. See Art. X, § 4(c), Fla. Const. Buyer argued that when the seller contracts and defaults before marriage, joinder of an intervening spouse would not be necessary in a suit for specific performance. Buyer argued that the contract made before marriage represented a "conveyance" of seller's "beneficial interest" in the property and therefore the subsequent marriage would have no effect for purposes of the homestead law.

Turning to Florida caselaw, a subsequently dead homesteader, for example, had not abandoned the property, but actually resided there at his death. While he had signed a contract to sell, he had not alienated the property as that term is generally defined. Alienate means to convey; to transfer title to property. The simple fact remains that at the time of his death there, the seller's home was still his homestead. He lived there and still had legal title to it, subject to whatever rights the contracting party had. While the court recognized the doctrine of equitable conversion, because of the unique treatment of the law of homestead property, it found that doctrine inapplicable when the potential vendor is physically residing on the property as his home at the time of his death. The court here understood the essential holding of the Supreme Court in the case above to be that the mere execution of the contract did not impair the homestead status.

Here the property was homestead when seller entered into the contract. His marriage occurred before a closing could be held. The property remained homestead, but with a pretermitted spouse now having a beneficial interest in the property. By virtue of the marriage, she became a party whose rights would be affected by a decree ordering specific performance of the contract of sale.

Life tenant without right to rent out property still has duty to pay property insurance.

Schneberger v. Schneberger, 979 So.2d 981 (Fla. 4th DCA 2008).

This appeal emanates from a dispute between a widow and her stepson over the terms of a prenuptial agreement, trust agreement, and will of the deceased husband/father. The parties disputed the wife's responsibility for costs associated with her occupancy of the husband's home, in which she was given a life estate in the prenuptial agreement. She contended that she did not have a true life estate and was not responsible for much of the upkeep, taxes, and insurance. The trial court declared that she received a life estate and was responsible for those costs, and the District Court affirmed the declaratory judgment.

Prior to their marriage, the husband and his future wife, the appellant, had entered into a prenuptial agreement that provided for the wife to have a life estate in the husband's home should he predecease her. She was permitted to reside in the home until her death or remarriage. She could not rent it out. During the marriage, the husband amended his trust, to which he transferred most of his other assets, to provide that his trustee should honor the provisions of the prenuptial agreement. The husband died while still married to his wife. When the home was damaged by hurricanes, the expense of repair and insurance became an issue between the wife and the remainderman, the husband's son by a prior marriage, who was also the trustee of the husband's trust. The wife filed a complaint against the trustee and remainderman to determine who was responsible for the cost of repairs as well as the continuing cost of insurance. The remainderman filed a counterclaim for declaratory judgment as to the same issues.

After a trial, the court declared that the prenuptial agreement, trust, and will were not in conflict. The wife was entitled to a life estate in the property and as such was responsible for those duties of a life tenant, including the responsibility to pay all ordinary and necessary expenses that inure to a homeowner, including taxes, insurance, homeowner's association fees, and general repairs for the upkeep and maintenance of the property. The remainderman was responsible to pay for the hurricane repair costs from the proceeds of the insurance as an extraordinary expense to the property. He was also required to pay the special hurricane assessment by the homeowner's association.

The wife argued here that she did not have a true life estate in that she could not deal with the property as her own by, for instance, renting it, and thus should not have the legal obligation of the expenses of a normal life tenant. The trial court determined the husband had granted the wife a life estate in the residence through the prenuptial agreement until her death or remarriage, subject to a restriction that she could not rent the home or dispose of its contents. Because the agreement was executed with the formalities of a deed, the wife's interest in the property was established in the prenuptial agreement, and that agreement, not the trust, controlled. The wife agreed to a limitation on the general rights of a life tenant, in that she was not entitled to income rights from the property, such as rent. The wife held a life estate in the property, responsible for all those obligations of a life tenant.

In Florida, a tenant for life or a person vested with an ordinary life estate is entitled to the use and enjoyment of his estate during its existence. The only restriction on the life tenant's use and enjoyment is that he not permanently diminish or change the value of the future estate of the remainderman. This limitation places on the ordinary life tenant the responsibility for all waste of whatever character. It is well settled that life tenants are bound in law to pay property taxes during their continuance of their estate. Failure to pay taxes constitutes waste. Therefore, it follows that the wife would have the responsibility to pay all ordinary and necessary expenses that inure to a homeowner, including taxes, insurance, homeowner's association fees, and general repairs for the upkeep and maintenance of the property, and not to dissipate or cause waste to the property.

The trial court had specifically found that the wife, as life tenant, was responsible for the payment of homeowner's insurance. Florida has followed the rule that the duty owed by life tenants to remaindermen is comparable to that of a trustee or quasi-trustee, because the life tenant cannot injure the property to the detriment of the rights of the remaindermen.

Contract clause allowing seller to sue buyer for specific performance at purchase price plus delay damages is an enforceable liquidated-damages provision.

Mineo v. Lakeside Village of Davie, LLC, 33 FLW D102b (Fla. 4th DCA April 16, 2008).

The appellants entered into a contract with Lakeside for the purchase of real property and the construction of a residence. After paying a deposit of $55,900, in addition to $17,000 for extras associated with the building of the house, the appellants decided not to close on the property. The appellants filed suit for the return of their payments when Lakeside refused to return the sums they had paid. Lakeside filed a motion to dismiss the appellants' complaint which was granted with leave to amend. The appellants then filed an amended complaint alleging that the contract was invalid as a matter of law because the default provision of the contract was an unenforceable penalty. Specifically, appellants claimed that because the default provision gave Lakeside the option of retaining the deposit and payment for extras, or enforcing the contract and obtaining damages for delay, it was not meant to fix the seller's damages in the event of default. Lakeside, however, contended that the default provision was enforceable because it did not give Lakeside the option to sue for damages, and therefore the default contract was valid.

In Florida, the law is well-settled that the parties to a contract may agree in advance on an amount to be paid or retained as liquidated damages if the contract is breached. The Florida Supreme Court established a test to determine if a liquidated damages clause will be upheld, or if it will be stricken because it is actually a penalty clause. First, the damages upon a breach must not be readily ascertainable. Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages.

The Supreme Court of Florida held that the default provision in a contract was not enforceable as a liquidated damages clause as a matter of law if there was an option to sue for damages or to retain a deposit. The Supreme Court held that the option granted to the seller either to retain the security deposit as liquidated damages or to bring an action at law for actual damages placed the buyer at a greater risk than the liquidated sum. The ability of the seller to refuse to be limited to the deposit paid by the buyer as a liquidated amount, and to sue for damages, destroyed the character of the forfeiture as agreed damages, and the forfeiture became a penalty. The option to sue for actual damages reflects that the parties did not have the mutual intention to stipulate to a fixed amount as their liquidated damages in the event of a breach. Consequently, the seller was entitled only to the actual damage remedy of having to sue and prove damages.

Suing for actual damages was not a remedy available to Lakeside under the contract here. The default provision in the Lakeside contract did not violate the principle set forth by the Supreme Court simply because it increased the purchase price at which Lakeside could seek specific performance by adding interest to the purchase price. The liquidated damages clause in this contract was enforceable. The buyers' breach of the contract permits the seller to seek specific performance at a purchase price that is certain. The fact that the liquidation clause also permits the seller to be further compensated by adding legal interest to the purchase price for its delay damages (not actual damages) did not result in the liquidation clause becoming a penalty.

Deed that refers to grantee as "trustee" without further reference to the settlors, beneficiaries or trust instrument conveys a fee simple estate under § 689.07(1), Fla. Stats. (2001).

Raborn v. Menotte, 974 So.2d 328 (Fla. 2008).

The United States Court of Appeals for the Eleventh Circuit certified two questions to the Florida Supreme Court: (1) whether a deed which conveyed to a named trustee of a private express trust identified by name and date and containing other information pertaining to the unrecorded trust instrument, the settlors and beneficiaries, under § 689.07(1), Fla. Stat., as existed before its 2004 amendment, conveys in trust to the grantee as trustee only legal title to the property; and (2) should the deed only convey fee simple title, whether as a matter of Florida law the 2004

continued, next page

Real Estate Case Summaries

from preceding page

amendment applies retroactively to the same.

To answer the first question the Court began by construing §689.07(1) as it existed prior to its amendment. Accordingly, "a deed that simply refers to the grantee as 'trustee' conveys a fee simple estate in Florida with three exceptions. These three exceptions are: (1) the deed names the beneficiaries or states the nature and purpose of the trust; (2) the deed expresses a contrary intention; or (3) a declaration of trust is of record." The Court further explained that the Legislature enacted the statute for the purpose of preventing secret trusts to protect those who may subsequently rely on them. Consequently, the Supreme Court answered the first question in the affirmative and, as a result, the second question was rendered moot.

Spotlight on Circuit Representatives Committee

By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, FL

The Circuit Representatives Committee is probably one of the largest within the RPPTL Section and, on a day-to-day basis, may be one of the busiest.

All 20 circuits throughout the State of Florida have at least one representative on the Circuit Representatives Committee, with one exception. Many of the larger circuits have six to nine. By most recent count there were 78 members of this committee, chaired by Peggy Rolando. While the committee members have been given a list of eight specific charges, the meetings are run in such well-organized fashion that they begin on time and end one hour later.

This is not a committee for shirkers as the requirements for participation are clear including regular attendance at Executive Council and Circuit Representative meetings; active involvement in at least one substantive section committee; participation in local bar activities; and, hosting a sponsor at least one event per year. Another vital role played by committee members is communication with Section members and potential members within the individual circuits.

If you had an opportunity to read the open letter from Jon Scuderi and Dennis White, Circuit Reps for the 20th Judicial Circuit, published in the Spring issue of *ActionLine*, you saw a really good example of the kind of communication that takes place (if you missed that article, it was on page 30 and you can still see it on the Section website).

The members of the Circuit Representatives Committee are also involved with the Pro Bono Committee and the Mentoring Committee. The Pro Bono Committee is seeking help from the Circuit Representatives to expand its pool of volunteers and the Mentoring Committee is conducting a six-month pilot project that, with the assistance of the Circuit Reps, will be seeking volunteers to fill mentor positions.

The Circuit Reps are also assisting the Problem Study Committee in assembling information on what are referred to as "hidden liens." The assistance of the Circuit Reps is being sought to solicit answers from each city, county or governmental district within their circuit (such as utility districts) about liens that may not be reflected in the public records and sources of information on obtaining data on those unrecorded liens. Roger Cruce of the Real Estate Problem Study Committee advises that these types of liens are becoming increasing problems for real estate attorneys and title insurers.

The project to discover the hidden liens has been kicked off by our esteemed Chairperson, Peggy, by providing sample letters and questionnaires developed by Roger Cruce and the Real Estate Problem Study Committee. The Circuit Reps have also been sent a list of all municipalities in Florida so that each Circuit Rep will know whom to contact. The current goal is to have this information back to the Problem Study Committee by August.

As you can see, the Circuit Rep Committee is vibrant, current and active. While it is too late to submit your application to be a Circuit Rep for the next Section term, you should mark your calendar to have your application in by February 2009. Not only would you be involved in an active committee, you are enticed to attend the committee meetings in person with the service of very attractive libations at each meeting.

Probate Case Summaries

By Gerardo Rodriguez-Albizu, Third Year Law Student,
University of Miami School of Law, Miami, FL

Estates:

Alternate personal representative under prior will had standing to contest current will where decedent changed her will under suspicious circumstances. Revocation of current will from probate resets the notice period as to all beneficiaries.

Wheeler v. Powers, 972 So.2d 285 (Fla. 5th DCA 2008).

Whether an alternate personal representative under a prior will has standing to contest the current will being probated turns on whether he or she is an "interested person" as defined by the Probate Code. Section 731.201(21), Fla. Stat. (2003), clearly establishes that a personal representative is an interested person. Moreover, the Court determined that the definition had been expanded to include a nominated personal representative from a previous will under *Engelberg v. Birnbaum*, 580 So. 2d 828 (Fla. 4th DCA 1991). In *Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006), the Supreme Court recognized that the definition of an interested person is a fluid concept that "may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings." *Id.* at 507.

Moreover, the Court concluded that "[g]enerally, one has standing when he has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." *Geiger v. Sun First Nat'l Bank of Orlando*, 427 So. 2d 815, 817 (Fla. 5th DCA 1983). And a court must construe all well-pleaded allegations as true in the complaint when determining whether to dismiss a complaint for lack of standing. Since the alternate personal representative allegedly lost standing under the prior will as a consequence of undue influence in the current will, the Court concluded that, under these circumstances, the alternate personal representative was an "interested person" within the meaning of §713.201(21).

The last issue raised was whether the current will in probate should be revoked because timely notice was not provided to a caveator. Relying on Probate Rule 5.260(f) and long standing Florida case law recognizing that the filing of a caveat precludes the admission of a will to probate until the caveator receives statutory notice, and the Court's conclusion that the alternate personal representative had standing to contest the will, the Court held that the current will could not be admitted to probate and had to be set aside to provide notice to the caveator. Moreover, as a result of the aforementioned, the notice period as to all beneficiaries must also be reset.

Objections must conform to the statutory requirements present in the Probate Code to be effective.

Fernandez-Fox v. Estate of Lindsay, 33 Fla. L. Weekly D259a (Fla. 5th DCA Jan. 18, 2008).

The trial court had concluded that a motion to strike and an objection were one and the same. The Fifth District Court of Appeal disagreed, concluding that objections must be made in conformity with the prescriptions of the Probate Code. Section 733.705, Fla. Stat. and Rule 5.496 govern the filing of objections. The Code requires that an objection must be filed within a specified time period, must be properly served on the claimant, and must contain a statement notifying the claimant of the time period limiting the claimant's right to assert an independent action. Moreover, the Court ruled that even assuming a motion to strike could double as an objection, at least in the present case the motion lacked the statutory requirements.

Trial court abused its discretion in denying a request for an enlargement of time based on excusable neglect.

In re Estate of Cummins, 979 So.2d 984 (Fla. 3d DCA 2008).

Florida Probate Rule 5.401(d) sets forth a ninety-day time period for serving a notice of hearing on objections to a personal representative's petition for discharge, final accounting, and plan of distribution. Under Probate Rule 5.402(b) a party may move for an extension of time above and beyond the ninety-day limit for excusable neglect. The Court, after noting that Rule 5.402(b) is almost identical to Florida Rule of Civil Procedure 1.090(b), relied on *State Dep't of Transp. v. Southtrust Bank*, 886 So. 2d 393 (Fla. 1st DCA 2004), which interpreted Rule 1.090(b), to stand for the proposition that a "secretary's oversight is precisely the type of error found to constitute excusable neglect." Thus, according to the Court, the trial court had abused its discretion in denying a beneficiary's request for an enlargement of time under similar circumstances.

Trial court erred in granting summary judgment to defendant personal representative who was a substantial beneficiary under the decedent's will and occupied a confidential relationship. Undisputed facts created a rebuttable presumption of undue influence.

RBC Ministries v. Tompkins, 974 So.2d 569 (Fla. 2d DCA 2008).

continued, next page

Probate Case Summaries

from preceding page

According to *Carpenter v. Carpenter*, 253 So. 2d 697 (Fla. 1971), "if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises." *Id*. at 701. *Carpenter* also provided a non-exclusive list of criteria relevant in determining whether a beneficiary has been active in procuring a will. Moreover, will contestants are not required to demonstrate that all the factors listed are present. Indeed, according to the Court, "it will be the rare case in which all criteria will be present," quoting *Carpenter*, 253 So. 2d at 702.

When a trial court is presented with a rebuttable presumption regarding a material issue and the moving party bears the burden of disproving the presumed fact, the moving party is thereby precluded from obtaining summary judgment. In the present case, because the defendant was a substantial beneficiary under the will and possessed a confidential relationship with the decedent, the rebuttable presumption attached and the trial court erred in granting the defendant's motion for summary judgment.

Trusts:

Trial court did not abuse its discretion in not removing co-trustee as conditions warranting such as provided in the trust instrument were not satisfied. Trial court erred in adjudicating rights in certain other trusts as petitioner did not make a general appearance with respect to those trusts.

Chaffin v. Overstreet, 33 Fla. L. Weekly D762b (Fla. 5th DCA March 14, 2008).

Where a trust instrument specifically provided for the conditions necessary to remove a co-trustee and the petitioner failed to provide the trial court with evidence supporting the presence of such conditions, the trial court did not abuse its discretion in ruling the removal was unwarranted. However, petitioner's due process rights were violated when the trial court adjudicated matters other than the petition to remove the co-trustee regardless of whether the petitioner also sought to be appointed as guardian ad litem and attorney ad litem of a minor beneficiary in certain other trusts. This fact alone did not support the conclusion that petitioner had made a general appearance with respect to those other trusts. Consequently, trial court was without jurisdiction to award the co-trustee respondent monies from these additional trusts to use in obtaining counsel to assist in defense against the allegations of impropriety asserted by the petitioner.

Moreover, the trial court exceeded its authority in imposing judicial supervision over the trust where no evidence was presented to support a finding that petitioner abused his discretion as trustee. The record did not demonstrate that petitioner exceeded the limits conferred upon him as trustee or that he acted with improper motives. Finally, the Court ruled that petitioner had no standing to enjoin the respondent co-trustee from entering property owned by the trust as the trust's language clearly permitted trustees "to have title to and possession of all real or personal property held in these trusts . . . ."

Trial court erred in ordering the trustee to distribute all assets in the trust to the beneficiary plus interests and costs.

Fleck v. Fleck, 33 Fla. L. Weekly D880c (Fla. 2d DCA March 28, 2008).

The trial court had previously determined that the beneficiary was required to return the trust assets which had been distributed to her by the trustee. On appeal, the Court reversed, instructing the court to determine whether the beneficiary had properly requested the distribution of trust assets in accordance with the terms of the trust. The trial court subsequently found that the requests were properly submitted and ordered the trustee to distribute the remainder of the trust assets over to the beneficiary's guardian ad litem plus interest on those funds at the legal rate.

On appeal from this order of the trial court, the Second District Court of Appeal determined that the trial court had erroneously treated the earlier reversal as a money judgment which had been satisfied and then overturned. Rather, the trial court, after making the appropriate findings of fact, should have simply distributed all remaining trust assets to the beneficiary as she had directed pursuant to the provisions of the trust agreement.

New Fellowship Program Open to All Young RPPTL Attorneys!

At its annual Convention in Bonita Springs in May, the Real Property, Probate and Trust Law Section of The Florida Bar adopted a new Fellowship Program, modeled on the successful Fellowship Program of the American Bar Association. Young lawyers who wish to avail themselves of this terrific leadership training opportunity should join the Section and apply for one of the four slots presently available. **The deadline to apply is JULY 21, 2008.**

The mission of the Fellowship Program is to attract and retain young lawyers to the RPPTL Section. One method of achieving this goal is by providing subsidized Fellowships to qualified individuals interested in becoming active in the substantive work of the Section. The Fellowship Program allows these individuals to be substantially involved in the Section work, receive leadership training, and work closely with leading attorneys in their field. It is the desire that through this Program the Section will cultivate and develop future leaders to continue the strong presence of the RPPTL Section as a leader in The Florida Bar. The Fellowship Program is also designed to supplement and support the efforts of the Membership Diversity Committee and the Membership Development Committee of the Section.

The Fellowship Program is open to all lawyers who are members of the RPPTL Section and (a) have been admitted to the bar for fewer than 10 years or (b) are younger than 36 years of age. This program will award a maximum of four Fellowships per year. Applicants should be able to demonstrate that a substantial portion of their practice is focused in the area of Real Property, Probate or Trust law.

Fellowships are provided for a two-year term. The RPPTL Section has over 50 active committees and an Executive Council with more than 225 active members. The Executive Council (and the Section committees) meet on a quarterly basis, beginning in June each year, at locations throughout the State of Florida. The quarterly meetings usually run from Thursday through Saturday and include substantive work and social events for networking. Each Fellow will receive a subsidy of up to $2,500 annually (not to exceed actual out-of-pocket expenses) to help defray the expense of attending RPPTL Section meetings.

Each Fellow will also be assigned a social mentor— who is a member of the Executive Council— to assist the Fellow in maximizing his or her experience as a Fellow and attending RPPTL social events. In addition, each Fellow will be assigned a committee mentor to assist the Fellow's active involvement in the committee that most closely fits the Fellow's practice area with the goal of maximizing his or her professional development through the Program. In return for the RPPTL Section commitments, a Fellow is required to attend a minimum of three Executive Council meetings per year, serve as an active member of either the Membership Development Committee or the Membership Diversity Committee, and be an active member of at least one substantive committee.

As an active member of a substantive committee, the Fellow will be required to complete one substantive work project on behalf of the committee on an annual basis. This project may include writing an article in his or her area of expertise for *ActionLine* (the Section's publication), chairing a subcommittee, or drafting proposed legislation on behalf of the committee. To assure these requirements are fulfilled, each Fellow must submit a work plan to the Fellowship committee by October of each year, which outlines the substantive work project he or she has chosen, and a report at the end of each year.

At the end of the Fellowship term, we are confident all Fellows will find the Program helped them to enhance their development personally and professionally. We also sincerely hope that all Fellows will continue to be actively involved in the RPPTL Section committees and work towards becoming a member of the Executive Council.

The application is included in this issue and is also available through the RPPTL Section website at www.RPPTL.org. All applications should be submitted to RPPTLfellow@flabar.org or by mail to RPPTL Fellowship Program, ATTN: Carmelita Hawkins, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300. The co-chair of the committee that created this program is Tae Bronner. She is available for additional information. You can reach her at tae@estatelaw.com. Her phone number is (813) 907-6643

(Application on next page.)

Application for Fellowship Program

Real Property, Probate and Trust Law Section of The Florida Bar

Name: [First] ____________________[Middle Initial] ______________________ [Last]________________________________

Position ___________________________________

Firm Name____

Street Address____

City _________________________________ State ____________________Zip code________________________________

Telephone No.: ____ Email:________________________________

Law School & Date of Grad: ____ LLM:________________________________

Years admitted to Fla. Bar: __________________________________ Years of Practice:________________________________

Race or Ethnic Heritage or Disability[1]:_____________

Please describe the area(s) of the law in which you focus your practice: ____

____

Please list your employment history for the past 5 years ____

____

How long have you been a member of the RPPTL Section of The Florida Bar?_________

Have you ever been the subject of any disciplinary action by any Bar association? ____________

If yes, please describe in detail the nature of the disciplinary action and the outcome. Attach additional sheets if necessary.

____

____

Please state why you are interested in being appointed as a Fellow for the RPPTL Section. Attached additional sheets if necessary.

____

____

Please describe your involvement in any local, state, voluntary and national level bar association, including any leadership positions you currently hold or have held in the past. Attach additional sheets if necessary.

____

____

Please describe any funding or support (including allowing time to fulfill your obligations as described in the Fellows Memo) that you may receive from your firm or employer, or other organization(s) that would support your activities as a Fellow. Attach additional sheets if necessary.

____

____

Please identify at least two substantive committees that you would be interested in joining as a Fellow:

____

____

Please list the name, email address and phone number for two members of the RPPTL Section who can provide information regarding your professional qualifications and experience:

____

____

Name_________________________________ Email ______________________ Phone________________________________

Name_________________________________ Email ______________________ Phone________________________________

PLEASE NOTE the Fellows will be required to attend a minimum of 3 RPPTL executive council meetings during the Fellowship year.

1 Information requested is optional.

Submit to RPPTLfellow@flabar.org or mail to "RPPTL Fellowship Program," ATTN: Carmelita Hawkins, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

What's Happening Within the Section...

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

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

CLE Course Schedule

[Course Registration: (850) 561-5831]

LEGISLATIVE AND CASE LAW UPDATE SEMINAR
and Executive Council Meeting
July 24-27, 2008
The Breakers, Palm Beach
Reservation Phone # 561-655-6611
Rooms: $168.00 (Superior King), $178.00 (Deluxe Double)
Cut-off Date July 2, 2008

October 31 & November 1, 2008
THE PROBATE TEAM 2008
Caribe Royale Resort, Orlando
Reservation Phone# 877-784-6835
Rooms: $149.00 (Queen Dbl), $159.00 (Std King)
Cut-off Date September 25, 2008
Seminar brochure & registration available August 2008 at www.flssi.org

* * *

Executive Council Meetings

EXECUTIVE COUNCIL MEETING AND LEGISLATIVE UPDATE SEMINAR
July 24-27, 2008
The Breakers, Palm Beach
Reservation Phone # 561-655-6611
Rooms: $168.00 (Superior King), $178.00 (Deluxe Double)
Cut-off Date July 2, 2008

EXECUTIVE COUNCIL MEETING
September 18 – September 21, 2008
Ritz-Carlton, Key Biscayne
Reservation Phone # 305-365-4500
Rooms: $180.00
Cut-off Date: August 18, 2008

EXECUTIVE COUNCIL MEETING
December 4 – December 7, 2008
DoubleTree Hotel, Tallahassee
Reservation Phone # 850-224-5000
Room Rate: $129.00
Cut-off Date: November 3, 2008

EXECUTIVE COUNCIL MEETING / OUT-OF-STATE MEETING
January 29 – February 2, 2009 & February 2 – February 6, 2009
Swissotel Quito, Quito, Ecuador & Galapagos Islands Cruise
Hotel Phone # 593 2 2567 600 ext. 6722
Hotel Fax # 593 2 2568 080
Hotel E-Mail lramirez@swissuio.com
Group Reservation Coordinator: Lorena Ramirez
Rooms: $110.00 USD (Luxury Single)
$130.00 USD (Junior Suite)
$200.00 USD (Business Suite)

EXECUTIVE COUNCIL MEETING / RPPTL CONVENTION
May 21 – May 24, 2009
Renaissance Vinoy Resort, St. Petersburg
Reservation Phone # 727-894-1000
Rooms: $180.00
Cut-off Date: April 23, 2009

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).

ACTIONLINE BULLETIN BOARD

DR-219 FORM WILL BECOME EXTINCT

Effective June 1, 2008, no longer will a DR-219 form be required to be executed and filed with the recording clerk when recording any documents transferring an interest in real property. This form was required by Section 201.22, Florida Statutes, which has been repealed with the passage of House Bill 7019.

– Pat Hancock, Esq., Maitland

NEW FLA. REAL ESTATE LAWS

Real property-related legislation adopted by the Florida Legislature in 2008 and, after signature by the Governor, the corresponding Florida Laws, are posted at www.GelfandArpe.com/statutoryupdate2008.

INCREASE OF COURT CHARGES

CS for SB 1790 amends Fla. Stat. Ch.28 to increase certain court service charges and filing fees. Notably, this bill also adds a new fee of $10.00 for issuance of a summons and a new fee of $295.00 to the filing of a defendant's cross-claim, counterclaim, or third-party complaint. Effective July 1, 2008.

-Jo Claire Spear, Carlton Fields, St. Petersburg, FL

SAVE THE DATE:

"RPPTL Legislative and Case Law Update" CLE Seminar. Live webcast. Friday, July 25, 2008 in Palm Beach at The Breakers.

If you are working on an interesting case or memo of law that you'd be willing 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 inside.)

DEADLINE

for submissions for the next issue of ActionLine is

JULY 31, 2008.

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

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