

ActionLine

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

No Free House: Bartram v. U.S. Bank

Attorneys Face Difficult Ethical Challenges In Trying To Protect Clients From Financial Elder Abuse/Exploitation

IRS Issues Welcome Guidance On Portability Planning

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Generosity Of Spirit

I wrote my first Chair's column about gratitude. I wrote my second column about realistic optimism. I opted to write this – my penultimate column – about generosity of spirit. I am inspired to write about this topic at a time when there doesn't seem to be enough kindness and compassion in the world. A time when people are too busy looking at their screens to take time to make eye contact with another person. A time when people often don't speak because it is so much easier to send an email or a text message. In the hustle and bustle of our electronic, instant-response lives, we sometimes forget to stop and take the time to make a human connection and to help someone less fortunate than we are.

For as long as I can recall the Florida Bar has put a strong emphasis on pro bono work and on professionalism. In fact, the Florida Bar Center for Professionalism was created in 1996 and was renamed in 2005 as the Henry Latimer Center for Professionalism. Henry was an attorney with whom I had the privilege to work for many years. Lat, as he was lovingly called, truly believed in giving back to his community and to his profession. He would go to the warehouse stores and buy palettes of water and loaves of bread and then go home and make as many peanut butter and jelly sandwiches as he could. He would then drive around communities in need and find people to feed. He would teach English to the custodians who cleaned our offices at night. He never missed the chance to stop by my office to see how I was doing and to ask about my family. He was a mentor to countless lawyers. Hardly a day went by that he wasn't working on some pro bono matter. I remember being at his funeral and, one after another, people stood up to tell a story about how he had changed their lives for the better. To me, he was a role model and a truly generous man.



Chair's Column

By Deborah Goodall
Section Chair, 2016- 2017

Before I became the Chair of this fine Section, I used to give presentations on ethics and professionalism on a fairly regular basis. That meant that I frequently had the opportunity to read the Creed of Professionalism and the Oath that each of us, as Florida lawyers, takes when we are admitted to the Bar. In gathering my thoughts for this column, I took the opportunity to read both the Creed and the Oath again and I have included each here in the hope that you will do the same. Both the Creed and the Oath contain provisions regarding generosity. In the Creed we commit to further our profession's devotion to public service and to the public good. In the Oath we promise that we will never reject, from any consideration personal to ourselves, the cause of the defenseless or oppressed.

Access to legal services is a problem for a very large percentage of Florida's population. According to statistics reported on the Florida Bar Foundation website, it is estimated that our current legal aid system reaches only about 10 percent of low-income people with legal needs.

If you are a member of the Section, it means you have been blessed with a wonderful brain and opportunities to pursue a career in law – and those are gifts that are meant to be shared. A wonderful thing about being a RPPTL and practicing in the fields of real property, construction law, probate, estate planning, and guardianship is that just about every person you encounter might need your help. Whether you are asked to prepare a will, draft a health care surrogate or living will, assist a homeowner in a foreclosure proceeding, help with a landlord dispute, serve as guardian ad litem, work on clearing title to real estate, or resolve a dispute with a contractor, there are countless opportunities to volunteer your legal services. Many legal aid organizations will even provide free training and CLE credits if you will commit to taking a pro bono case.

The Section in collaboration with Florida's Legal Aid organizations has begun a project called the No Place Like Home Program. This program is designed to perfect legal title to residential real property at limited or no cost to Floridians whose family home has been passed down from generation to generation, often without the proper legal documentation being recorded in the process. Frequently probate actions and quiet title proceedings are required to clear the title. So, whether you are a dirt lawyer or a death lawyer, there is an opportunity for you. Additional information about the program can be found at our website http://www.rpptl.org under the At Large Member section.

If you simply do not have the time to devote to a pro bono client, you can always provide financial support to The Florida Bar Foundation or any one of the many regional legal aid organizations. Funding for legal aid is at a critically low level and the need for pro bono legal services is increasing. Consider making a pledge to the Foundation or to your local legal aid organization.

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Photo by Silvia Rojas

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

ARTICLES: Forward any proposed article or news of note to Wm. Cary Wright at cwright@carltonfields.com. Deadlines for all submissions are as follows:

ISSUE	DEADLINE
Spring	January 31
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PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Kelly Nicole Catoe at kcatoe@hnh-law.com.

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.
Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

Whether you are a young lawyer with student loan debt or a not-so-young lawyer with a booming practice or a seasoned veteran perhaps contemplating retirement, there is something that you can do to nurture your generosity of spirit. Take on a pro bono case from legal aide. Or take on a client who might not be able to afford your fees but who really needs your expertise. Or volunteer to be a mentor to a young lawyer. The Young Lawyers Division has revamped the Lawyers Advising Lawyers service to provide lawyers access to an attorney advisor. See http://lawyersadvisinglawyers.com/. Visit the website to find out more about the program or to sign up to volunteer to be an advisor.

There is a quote that is often attributed to Winston Churchill although the official Winston Churchill website indicates that there is no proof that he ever said it and it is this: "We make a living by what we get, but we make a life by what we give." Give back. Enjoy sharing your talent and your gifts with others. It is an honor and a privilege to be an attorney. It is our duty to help those who cannot afford access to our justice system. We have the freedom to choose how we wish to fulfill that duty but I hope you will consider taking one of the many paths available to you.

Creed of Professionalism

I revere the law, the judicial system, and the legal profession and will at all times
in my professional and private lives uphold the dignity and esteem of each.
I will further my profession's devotion to public service and to the public good.
I will strictly adhere to the spirit as well as the letter of my profession's code of
ethics, to the extent that the law permits and will at all times be guided by a
fundamental sense of honor, integrity, and fair play.
I will not knowingly misstate, distort, or improperly exaggerate any fact or opinion
and will not improperly permit my silence or inaction to mislead anyone.
I will conduct myself to assure the just, speedy and inexpensive determination of
every action and resolution of every controversy.
I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will
at all times act with dignity, decency, and courtesy.
I will respect the time and commitments of others.
I will be diligent and punctual in communicating with others and in fulfilling commitments.
I will exercise independent judgment and will not be governed by a client's ill will
or deceit.
My word is my bond.

Oath of Admission to The Florida Bar

I do solemnly swear:
I will support the Constitution of the United States and the Constitution of the
State of Florida;
I will maintain the respect due to courts of justice and judicial officers;
I will not counsel or maintain any suit or proceedings which shall appear to me to
be unjust, nor any defense except such as I believe to be honestly debatable
under the law of the land;
I will employ for the purpose of maintaining the causes confided to me such
means only as are consistent with truth and honor, and will never seek to mislead
the judge or jury by any artifice or false statement of fact or law;
I will maintain the confidence and preserve inviolate the secrets of my clients,
and will accept no compensation in connection with their business except from
them or with their knowledge and approval;
To opposing parties and their counsel, I pledge fairness, integrity, and civility,
not only in court, but also in all written and oral communications;*
I will abstain from all offensive personality and advance no fact prejudicial to the
honor or reputation of a party or witness, unless required by the justice of the
cause with which I am charged;
I will never reject, from any consideration personal to myself, the cause of the
defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God.

*Amended September 12, 2011 to add civility pledge.

No Free House: *Bartram v. U.S. Bank*

By David W. Rodstein, Esq., Rodstein Law, Tamarac, Florida


D. RODSTEIN

On November 3, 2016[1], the Florida Supreme Court released its opinion in *Bartram v. U.S. Bank, N.A.*[2], a case in which 51 lawyers, 4 parties, and 12 amici curiae battled over a complex and nuanced issue. The question for the parties was whether the owner of a home in St. Johns County would get out from under a $650,000.00 mortgage to U.S. Bank.

The complex legal question in *Bartram* that will have far reaching implications[3] is: Will the acceleration of a mortgage, effected by the filing of a foreclosure suit, result five years later in a statute of limitations bar, such that another foreclosure suit based on a post-dismissal default is impossible? The Supreme Court answered that question in *Bartram* with a qualified "No." Future causes of action based on post-dismissal defaults are not *necessarily* barred by the statute of limitations.[3]

Bartram holds that a subsequent foreclosure case will not be barred where: (1) the complaint alleges that a default occurred after the dismissal of the first case, (2) the subsequent case is filed within five years of that alleged default, and (3) the mortgage to be foreclosed contains a reinstatement provision. If one or more of these elements is missing, the Court could reach a different conclusion.

The discussion below outlines the legal issues implicated, summarizes the facts, describes the Supreme Court's holding and rationale, and examines several areas of uncertainty that remain after *Bartram*.

The Law

The question presented by *Bartram* involves multiple legal principles that the parties attempted to fit together for the Supreme Court like the pieces of a puzzle. These principles are presented below in an order intended to assist the reader, not the order of their importance in the opinion.

The first and simplest puzzle piece is the statute of limitations itself. The statute of limitations on a mortgage foreclosure is five years.[4] Like all statutes of limitation, the five year period "runs from the time the cause of action accrues."[5] Accrual is fundamental to any statute of limitations analysis,[6] but it was barely discussed in the parties' briefs and was not discussed by the Supreme Court in *Bartram*, presumably due to the complexity and nuance of other pieces in the puzzle.

The second puzzle piece is acceleration. Acceleration is a contractual provision that requires the borrower to pay part or all of the loan balance upon the happening of a defined event.[7] As with any other contractual provision, acceleration clauses are "to be construed in accordance with the intention of the parties as disclosed by the ordinary meaning of the words used and the circumstances of the parties."[8]

The third puzzle piece is reinstatement. The mortgage at issue in *Bartram* is the standard Fannie Mae/Freddie Mac residential mortgage, which contains a provision for the borrower to "reinstate" the mortgage following acceleration. The borrower can reinstate by paying all arrearages and meeting other requirements. Doing so returns the mortgage to an installment contract, and the borrower can go forward paying according to the original pre-acceleration payment schedule.

The final, critical puzzle piece is the Florida Supreme Court's 2004 opinion in *Singleton v. Greymar Associates*.[9] *Singleton* held that res judicata did not bar a second foreclosure case based on the same mortgage as a previously dismissed foreclosure case. *Singleton* explained that the dismissal of the first case restored the parties back to "the same contractual relationship with the same continuing obligations."[10] Therefore, defaults not litigated in the first case were not precluded by res judicata from being raised in the second case. The Supreme Court reasoned in *Singleton* that "the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action."[11] Whether the reasoning of *Singleton* – a res judicata case – also applies to the statute of limitations became the central issue in *Bartram*.

The Facts

Lewis Bartram defaulted on his mortgage by failing to make the monthly payments beginning in January, 2006. U.S. Bank, N.A. ("U.S. Bank") filed a foreclosure case on May 16, 2006. U.S. Bank's foreclosure case was involuntarily dismissed on May 5, 2011 for failure to appear at a case management conference. Notably, U.S. Bank never filed a second foreclosure case.

On April 1, 2011 – a month before the dismissal of U.S. Bank's case – Patricia Bartram filed her own foreclosure case on a different mortgage, naming as defendants: Lewis Bartram, U.S. Bank, and others.

In 2012, after U.S. Bank's foreclosure had been dismissed, Lewis Bartram filed a crossclaim against U.S. Bank in Patricia's foreclosure case. Lewis Bartram's crossclaim sought to strip U.S. Bank's mortgage from the property. Lewis Bartram argued that the statute of limitations barred U.S. Bank from ever bringing another foreclosure action. He said the Bank's 2006 foreclosure filing irreversibly accelerated the mortgage loan and started the five-year statute of limitations running on the accelerated debt. He argued that since five years had passed since acceleration, U.S. Bank's mortgage could never be foreclosed, and it was a cloud on his title that should be removed.[12]

The trial court agreed, quieted title in Lewis Bartram, and canceled the note and mortgage.

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District Court Reverses, Citing *Singleton*

U.S. Bank appealed the final order canceling its note and mortgage to the Fifth District Court of Appeal. The Fifth District viewed *Singleton's* acceleration analysis as controlling on the statute of limitations issue in *Bartram*. The Fifth District reasoned that "if a 'new and independent right to accelerate' exists in a res judicata analysis [in *Singleton*], then there is no reason it would not also exist vis-à-vis a statute of limitations issue [in *Bartram*]. A 'new and independent right to accelerate' would have to mean that the new defaults presented new causes of action, regardless of the fact their due dates had been accelerated in the prior suit."[13] The Fifth District reversed the judgment canceling the note and mortgage in *Bartram* and certified a question of great public importance to the Florida Supreme Court.[14]

Supreme Court Agrees: *Singleton* Controls

The Florida Supreme Court agreed that the statute of limitations would not bar subsequent foreclosure actions on U.S. Bank's mortgage, under the conditions presented in the certified question. The core holding of the Supreme Court's opinion provides clear guidance for future cases on the same facts. Unfortunately, other dicta in the opinion left confusion for cases with any variation from those facts.

The Supreme Court agreed with the Fifth District that *Singleton's* "subsequent default" analysis controlled the statute of limitations question and allowed for another acceleration after dismissal of the first case.

> [W]ith each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage.
>
> Consistent with the reasoning of *Singleton,* the statute of limitations on the balance under the note and mortgage would not continue to run after an involuntary dismissal, and thus the mortgagee would not be barred by the statute of limitations from filing a successive foreclosure action premised on a "separate and distinct" default.[15]

The Supreme Court reasoned that the dismissal of the first case resulted in an automatic revocation of the acceleration effected by the first case.

> [A]fter the dismissal, the parties are simply placed back in the same contractual relationship as before, where the residential mortgage remained an installment loan, and the acceleration of the residential mortgage declared in the unsuccessful foreclosure action is revoked.[16]

This automatic revocation of acceleration occurs whether the first case was dismissed with prejudice or without prejudice. As a result, any post-dismissal default creates a new cause of action. "[I]t is entirely consistent with, and follows from, our reasoning in *Singleton* that each subsequent default accruing after the dismissal of an earlier foreclosure action creates a new cause of action, regardless of whether that dismissal was entered with or without prejudice."[17] Therefore, the statute of limitations does not bar future causes of action which arise after the dismissal of a foreclosure action until five years after each cause of action accrues.

"[T]he effect of the involuntary dismissal is revocation of the acceleration, which then reinstates the mortgagor's right to continue to make payments on the note and the right of the mortgagee, to seek acceleration and foreclosure based on the mortgagor's subsequent defaults."

Acceleration: What Does It Do?

The crux of the borrower's[18] argument in *Bartram* was that acceleration prevented any future payments from coming due: "Because the accelerated debt was never reinstated, Bartram could not have committed a post-acceleration periodic payment default, since his only payment obligation after acceleration was payment of the entire debt."[19]

The lender[20] attacked that fundamental assumption: "Until it has been determined [in a final judgment] that the acceleration was proper, the installment nature of the obligation remains."[21] If the installment nature of the obligation remains, then new payment obligations continue to arise, the lender argued.

The Supreme Court seemed to accept the borrower's definition of acceleration (i.e., installment nature of the loan terminates) in its formulation of the holding. "[T]he effect of the involuntary dismissal is revocation of the acceleration, which then *reinstates* the mortgagor's right to continue to make payments on the note and the right of the mortgagee, to seek acceleration and foreclosure based on the mortgagor's subsequent defaults."[22]

However, elsewhere in the opinion the Court seemed to accept the lender's premise that the installment nature of the loan continued throughout the foreclosure case. "Stated another way, despite acceleration of the balance due and the filing of an action to foreclosure [sic], *the installment nature of a loan secured by such a mortgage continues* until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of 'deceleration' or otherwise."[23]

In its bottom line analysis, the Court seemed to hedge on whether acceleration had even occurred through the Bank's filing of the foreclosure complaint. "Thus, *even if the note had*

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been accelerated through the Bank's foreclosure complaint, the dismissal of the foreclosure action had the effect of revoking the acceleration."[24] The Court seemed satisfied that its conclusion would be the same whether (a) acceleration occurred upon the case being filed and was revoked upon the case being dismissed, or (b) acceleration was never actually completed because no final judgment was entered. Although the answer to the certified question was the same under either analysis, the practical implications of applying one analysis versus the other is important and may be the controlling question in another case with a different factual history.

The Reinstatement Provision

A key fact in *Bartram* was the particular wording of the mortgage's reinstatement provision. The Court's treatment of that provision obviated the need for a more decisive approach to the acceleration issue.

Although the Court said that its conclusion was "buttressed" by the reinstatement provision – and not driven by it – the Court quoted from and emphasized a key portion of that provision.

> Our conclusion is buttressed by the reinstatement provision of the Residential Mortgage that by its express terms granted the mortgagor, even after acceleration, the continuing right to reinstate the Mortgage and note by paying only the amounts past due *as if no acceleration had occurred.* Specifically, the reinstatement provision in paragraph 19 of the Bartram's form residential mortgage gave Bartram "the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of … (c) entry of a judgment enforcing this Security Instrument," as long as Bartram "(a) pa[id] the Lender all sums which then would be due under the Security Instrument and Note as if no acceleration had occurred."[25]

A key fact in Bartram was the particular wording of the mortgage's reinstatement provision… "Our conclusion is buttressed by the reinstatement provision of the Residential Mortgage that by its express terms granted the mortgagor, even after acceleration, the continuing right to reinstate the Mortgage and note by paying only the amounts past due as if no acceleration had occurred."

The Supreme Court's emphasis on the words "*as if no acceleration had occurred*" signifies the special importance of that phrase to the Court's analysis. The italicized phrase suggests that the contractual acceleration under this mortgage has an ephemeral quality, which prevents it from producing the finality that Lewis Bartram argued acceleration must produce.

On the other hand, the Court suggested that *any* reinstatement provision which provides the borrower with a "continuing right to cure" might also be sufficient.

> … as the Real Property Law Section of the Florida Bar has explained, "[t]he lender's right to accelerate is subject to the borrower's continuing right to cure." In the absence of a final judgment in favor of the mortgagee, the mortgagor still had the right under paragraph 19 of the Mortgage, the reinstatement provision, to cure the default and to continue making monthly installment payments.[26]

In a case where the mortgage at issue has a different reinstatement provision from the one in *Bartram* – or no reinstatement provision at all – the Supreme Court may reach a different conclusion on the same statute of limitations issue.

Unclear: Does Second Case *Have* to Be Based on a Post-Dismissal Default?

Another key to the *Bartram* holding was the assumption that "the foreclosure action was premised on a default occurring *subsequent* to the dismissal of the first foreclosure action."[27] The Court stated that this assumption was "critical to [its] analysis."[28] The certified question presented by the Fifth District included this assumption as a hypothetical fact – that the second case was premised on a default occurring after dismissal of the first case. That fact was purely hypothetical because the bank never filed a second foreclosure case. Therefore, whether this post-dismissal timing factor will truly be critical in future cases is questionable.

The Fifth District's certified question assumed that the second case was based on a post-dismissal default, and the Supreme Court adopted that assumption. Although it said that a post-dismissal default was critical, the Supreme Court did not state that it would reach the opposite conclusion if the second case had been premised on a default occurring before dismissal of the first case. In effect, the Supreme Court limited its holding to the facts presented in the certified question and avoided rendering what would have been an advisory opinion about a different hypothetical case – one based on a pre-dismissal default.

The most likely basis for requiring a default "subsequent to the dismissal" is a carry-over from the res judicata analysis of *Singleton*. The reasoning expressed by most other courts to consider this question suggests that is the case. Indeed, the

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Supreme Court spent more than four pages of its opinion citing and describing those opinions.[29] Unfortunately, blending the res judicata analysis of *Singleton* into the statute of limitations issue in *Bartram* creates confusion and can lead to incorrect results.

While res judicata may be implicated in a subsequent foreclosure case if the first case is dismissed *with* prejudice, res judicata is not implicated at all if the first case is dismissed is without prejudice. The Supreme Court recognized in its *Bartram* opinion that a dismissal without prejudice would not prevent the subsequent case from alleging the same default as the first case (see above). However, the Court did not attribute that distinction to the res judicata principles that it rests on. Rather, the Court implied that result is based on something about the statute of limitations that it had under consideration. The author of this article respectfully submits that the post-dismissal default requirement is not at all related to the statute of limitations and suggest that it is important for the Florida Supreme Court to clarify that point when the opportunity presents itself.

The judicial doctrine of res judicata and the legislative bar of the statute of limitations serve different purposes. Res judicata seeks to prevent multiple lawsuits, conserve judicial resources, and promote reliance on adjudications.[30] By contrast, the statute of limitations seeks to protect defendants from unfair surprise and stale claims.[31] Owing to their different purposes, the two defenses have different elements. Furthermore, different exceptions apply to res judicata and to the statute of limitations. Accordingly, the analysis of each defense should be applied independently of the other. This will encourage precise legal analysis, will promote the reliability of the judicial process, and will help ensure correct outcomes in actual controversies based on their merits.

Finally, even the *Singleton* res judicata analysis does not justify requiring the default alleged in the second case to have occurred after the dismissal of the first case. In *Singleton*, res judicata did *not* bar the second case even though the second case alleged a default which occurred *before* the dismissal of the first case. The dismissal of the first case in *Singleton* occurred on July 14, 2000,[32] and the second case was based on an April 1, 2000 default – before the dismissal.[33] Thus, the presumed requirement of a post-dismissal default was not met in *Singleton*.

For all these reasons, it is questionable whether the Supreme Court would actually hold a subsequent case to be barred, either by the statute of limitations or by res judicata, merely because the default alleged in the second case occurred before the dismissal of the first case. As described below, the Supreme Court has upcoming cases on its docket that present this exact question.

Unclear: Is Judgment Amount Reduced by Amounts in Payments Older than Five Years?

Although the "with or without prejudice" distinction makes no difference in cases based on a *post-dismissal* default, the Supreme Court signaled that the distinction may matter when it comes to the amount of the final judgment in the subsequent case. Unfortunately, the Court's dicta on this issue appear to be in conflict.

On the one hand, the Court stated: "Whether the dismissal of the initial foreclosure action by the court was with or without prejudice may be relevant to the mortgagee's ability to collect on past defaults."[34] This dictum suggests that a dismissal with prejudice could require a reduction in the amount due on a foreclosure judgment in a second case, even though the second case was not barred by the statute of limitations.

On the other hand, the Court stated: "Once there were future defaults, however, the Bank had the right to file a subsequent mortgage foreclosure action – and to seek acceleration of *all sums due* under the note – so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default."[35] This latter dictum suggests that the amount to be included in the final judgment can include "all sums due," as long as the second case is not barred by the statute of limitations.

For the following reasons, this author argues that under a statute of limitations analysis the Court's second statement about "all sums due" is correct. The first statement may be correct under a res judicata analysis, but not under the statute of limitations question presented in *Bartram*.

The amount due on a mortgage is equal to the unpaid principal balance, plus the unpaid interest and other contractually authorized charges. This calculation does not depend on when in the series of Periodic Payments the amortized principal and interest would have been paid. Thus, this dictum that the judgment in a second case can include "all sums due" appears to be correct.

This dictum also comports with the plain language of Fla. Stat. § 95.11(2)(c) and Chapter 95 in general. The statute of limitations makes no reference to payments, to amounts due, or to remedies. It refers only to the accrual of a cause of action and the period of time within which the action must be brought. In harmony with the statutory language, the Supreme Court has stated that statutes of limitation are only procedural bars, and "their expiration does not affect the underlying substantive rights of the parties."[36] The amount due on a mortgage is a substantive right of the lender and a substantive obligation of the borrower. Therefore, in a case not barred by the statute of limitations, the amount of the foreclosure judgment should not be affected by the statute of limitations.

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Nevertheless, the Supreme Court's first statement implies that the statute of limitations can reduce the amount of a foreclosure judgment where the dismissal of the first case was *with* prejudice. "Whether the dismissal of the initial foreclosure action by the court was with or without prejudice may be relevant to the mortgagee's ability to collect on past defaults."[37]

While this statement may have support in the law of res judicata in an appropriate case, its unqualified inclusion in *Bartram* is likely to create confusion in statute of limitations cases. If the first case adjudicated that certain payments were made, then res judicata would preclude re-litigating that issue. The amount due on a judgment in the second case would therefore be calculated on the basis that those payments were made. However, foreclosure defendants are expected to take an expansive view of this dictum and use it to argue that any dismissal with prejudice of a foreclosure case requires a deduction from the judgment amount for all payments that came due prior to dismissal of the first case. Indeed, a similar argument is pending before the Supreme Court in *Bollettieri Resort*, discussed below. As discussed below, that argument seems contrary to the law and would be supported only by this dictum from *Bartram*.

Reconciling these competing dicta is likely to be the subject of future litigation, unless the Supreme Court uses one of the other statute of limitations cases currently on its docket to clarify the point.[38]

Unclear: What Constitutes A Post-Dismissal Default?

Since the Supreme Court stated that the post-dismissal default was "critical," it is worth considering the real world implications of that requirement and how it would be applied. The Supreme Court stated that "if, in the month after the dismissal of the foreclosure action, Bartram began to make monthly payments on the note, the Bank could not have subsequently accelerated the entire note until there were future defaults."[39] This dictum anticipates another hypothetical fact not presented by the facts of *Bartram* – that Lewis Bartram began making payments after the dismissal of the first foreclosure case. He did not. The Court's analysis of this hypothetical question suggests a doubtful conclusion that may lead to additional confusion.

Based on this dictum, borrowers who have a foreclosure case against them dismissed might resume sending monthly payments one at a time and expect to avoid another foreclosure. However, the Fannie Mae mortgage at issue in *Bartram* – and present in the majority of residential mortgages – provides that "payments shall be applied to each Periodic Payment *in the order in which it became due*."[40] Therefore, if Lewis Bartram made a monthly payment immediately following the May 5, 2011 dismissal of the bank's foreclosure case, that payment would have been applied to the January 1, 2006 Periodic Payment – the Periodic Payment that "became due" before any others. His next monthly payment would have been applied to the February 2, 2006 payment since it "became due" next in time. If Mr. Bartram continued submitting one monthly payment at a time, with each payment being applied in arrears, he would not fulfill the June 1, 2011 payment obligation (the one arising next after dismissal) for a very long time. Would the Supreme Court consider nonpayment of the June 1, 2011 Periodic Payment to be an event of default? Although it seems clear that nonpayment of any Period Payment should be an event of default, the Court's dictum raises serious doubt and is likely to spawn further litigation.

Conclusion

Despite a measure of confusion created by dicta that was based on hypothetical facts, *Bartram* clearly holds that the dismissal of a foreclosure action entitles the mortgage holder to accelerate and foreclose again within five years of a post-dismissal default. Whether the second case *must* be based on a post-dismissal default remains uncertain for the time being.

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David gives accredited CLE seminars including: "When is it too late to foreclose a mortgage?" and "Evidence in Foreclosure Cases." He published book chapters on: Default, Acceleration, Statute of Limitations, and Statute of Repose in Florida Foreclosure Law, ed. Heidi Basset, http://www.lawjournalpress.com/player/eBook_391_Florida_Foreclosure_Law_2016.html.

David chairs the RPPTL Subcommittee on Legislation and Government Regulation of Lending. He is committed to pro bono service and is a Justice Teaching educator.

Endnotes

1 On March 16, 2017, the Supreme Court denied three Motions for Rehearing, which made the Court's November 3, 2016, opinion final.

2 *Bartram v. U.S. Bank Nat. Ass'n*, 41 Fla. L. Weekly S493, – So. 3d – (Fla. Nov. 3, 2016).

3 A putative federal class action alleged in 2014 that there were 50,000 mortgages affected by this issue at that time. Since then, multiple mortgage servicers have requested that cases affected by the issue not be filed or not be prosecuted to final judgment. Even if the number alleged in the putative class action was exaggerated, and assuming some attrition in the ensuing two years, there likely remain hundreds of cases affected by this issue. *See Torres v. Countrywide Home Loans, Inc.*, Case No. 14-20759-CIV-KMW, 2014 WL 3742141 (U.S. S.D.Fla. July 29, 2014).

4 Fla. Stat. § 95.11(2)(c).

5 Fla. Stat. § 95.031.

6 *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996).

7 *Reed v. Lincoln*, 731 So. 2d 104, 105 (Fla. 5th DCA 1999) (quoting Black's Law Dictionary 12 (6th ed.1990)).

8 *Baader v. Walker*, 153 So. 2d 51, 54-55 (Fla. 2d DCA 1963) (quoting 59 C.J.S. Mortgages § 495(3) at page 784).

9 *Singleton v. Greymar Associates*, 882 So. 2d 1004, 1005 (Fla. 2004).

10 *Singleton* at 1007.

11 *Id.* at 1008.

12 *Id.* at 1009.

13 *Id.* at 1013-1014.

14 *Bartram at 2.* The Florida Supreme Court rephrased of the certified question slightly, to read as follows:

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DOES ACCELERATION OF PAYMENTS DUE UNDER A RESIDENTIAL NOTE AND MORTGAGE WITH A REINSTATEMENT PROVISION IN A FORECLOSURE ACTION THAT WAS DISMISSED PURSUANT TO RULE 1.420(B), FLORIDA RULES OF CIVIL PROCEDURE, TRIGGER APPLICATION OF THE STATUTE OF LIMITATIONS TO PREVENT A SUBSEQUENT FORECLOSURE ACTION BY THE MORTGAGEE BASED ON PAYMENT DEFAULTS OCCURRING SUBSEQUENT TO DISMISSAL OF THE FIRST FORECLOSURE SUIT?

15 *Bartram* at 18-19.

16 *Id* at 19.

17 *Id.* at 20-21.

18 "Borrower" refers to all parties aligned with the borrower, including the community association, the subsequent owner, and the amicus curiae parties appearing in support of them.

19 Lewis Bartram's Initial Brief, p. 19.

20 "Lender" refers to U.S. Bank and the amicus curiae parties appearing in support of it.

21 U.S. Bank's Answer Brief, p. 13.

22 *Bartram* at 3 (emphasis added).

23 *Bartram* 21-22 (emphasis added), quoting Deutsche Bank Beauvais, 188 So.3d 938, 947 (Fla. 3d DCA 2016)

24 *Bartram* at 23.

25 *Bartram* at 21.

26 *Id.* at 22, internal citation omitted: Brief for The Real Property Probate & Trust Law Section of the Florida Bar at 8, *Beauvais*, 188 So.3d 938 (Fla. 3d DCA 2016), 2015 WL 6406768, at *8.

27 *Id. at 20.*

28 *Id.*

29 *Bartram* at 15-19.

30 *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

31 *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074–75 (Fla. 2001).

32 This fact is not recited in the *Singleton* opinion but is readily ascertainable from the Broward County Clerk of Courts' online docket for Case No. CACE00002317.

33 *Singleton*, 882 So. 2d at 1005.

34 *Bartram* at 20.

35 *Bartram* at 22 (emphasis added).

36 *Allie v. Ionata*, 503 So. 2d 1237, 1241-42 (Fla. 1987).

37 *Bartram* at 20.

38 *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So. 3d 938 (Fla. 3d DCA 2016); *Bollettieri Resort Villas Condo. Ass'n, Inc. v. The Bank of New York Mellon*, 198 So.3d 1140, 1141 (Fla. 2d DCA 2016).

39 *Bartram* at 23.

40 Fannie Mae standard mortgage form, section 2 (emphasis added).

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Attorneys Face Difficult Ethical Challenges In Trying To Protect Clients From Financial Elder Abuse/Exploitation

By Barry A. Nelson and Cassandra Nelson, Nelson & Nelson, P.A., North Miami Beach, Florida

Section 825.101(4), Florida Statutes, defines an elderly person as:

> a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

The financial exploitation of elders has become an all too common phenomenon, especially considering that such exploitation is frequently perpetrated by family members, friends, caregivers, "lovers" or other trusted persons. While there are numerous warning signs of financial exploitation of elders, prevention is difficult, especially in the case of children of the elderly person who are fearful about the balance between protecting their parent and questioning their judgment. Often the elder victim defends the abuser, unwilling to acknowledge that someone they care about may be taking advantage of them; for this reason, even in states such as Florida that have statutory protections, the laws are difficult to enforce without the cooperation of the person who is the subject of abuse.

Such financial exploitation is best combatted before the potential abuser obtains a clear path to financial assets of the elderly client. Protections incorporated into estate plans may be an effective way to prevent such financial exploitation. Estate planners and financial advisors, therefore, need to consider alternatives to help prevent the exploitation before it can occur. However, as noted below, lawyers can find themselves in civil litigation and face ethical charges when trying to be proactive in helping their clients. *Dunn v. Patterson*,[1] is an excellent example of how a well-intentioned lawyer created an estate plan to protect his clients from elder abuse, but later found himself engaged in years of litigation. While ultimately he was cleared, the *Dunn* case provides due warning to attorneys who may otherwise be willing to be proactive in protecting their clients.

What is Financial Exploitation of Elders?

The 2015 U.S. Census reported that Florida has approximately 4 million residents age 65 and older. The percentage of persons 65 and over has grown from 17.3% in 2010 to 19.4% in 2015.[2] As individuals become elderly, many experience a decline in their mental and/or physical capacities, and become unable to care for themselves. As a result, they become dependent on others to care for them. The introduction of third parties increases the opportunity for abuse. In the estate planning context, abuse frequently includes financial exploitation.

On its website, the Florida Department of Children and Family Services (the "FDCF") defines "adult exploitation" in two ways:

> Adult exploitation means a person who stands in a position of trust and confidence with a vulnerable adult knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.
>
> OR
>
> That a person who knows or should know that the vulnerable adult lacks the capacity to consent, obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.[3]

As for a definition of "financial exploitation," the Florida Department of Elder Affairs (the "FDEA"), in its brochure titled "The Power to Prevent Elder Abuse is in Your Hands," describes "Financial" or "Material Exploitation" as the "[i]mproper use of an elder's funds, property, or assets; cashing checks without permission; forging signatures; forcing or deceiving an older person into signing a document; using an ATM/debit card without permission."[4]

The FDEA website and its brochure also list available resources and hotlines to contact in the event of actual or suspected elder abuse. The FDCF investigates abuse and exploitation of elderly and disabled adults. The Adult Protective Investigations Division of the FDCF handles such investigations. When the investigation is complete and the case has been closed with indications of abuse or exploitation, the FDCF must notify and send copies of its case synopsis to both local law enforcement and the State Attorney's Office.[5]

On January 27, 2017, the authors contacted the Adult Protective Investigations Division. The authors informed the Adult Protective Investigator of the focus of this article and asked for input on the number of complaints filed as compared to the FDCF's ultimate ability to enforce a potential action against an alleged abuser. We were advised that only approximately 5% of those reported resulted in prosecution. Without the cooperation of the individual who is the subject of abuse, the laws providing protection are difficult to enforce.

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Frequently, the elder individual who is being abused is unwilling to speak to authorities because he or she believes that the alleged abuser may be the only person that keeps him or her from being placed in a nursing home. As a result, the elder individual is unwilling to acknowledge that someone upon whom he or she is reliant and/or has an emotional attachment, may be taking advantage of him or her.[6]

When investigating potential exploitation, the Adult Protective Service Program is privy to whatever documents the elderly individual and the elderly individual's financial institution(s) will release. Pursuant to Section 415.104(1), Florida Statutes, the FDFS shall, upon receipt of a report alleging abuse, neglect, or exploitation of a vulnerable adult, begin a protective investigation within 24 hours. Currently, Florida has 290 Adult Protective Investigators statewide. The Adult Protective Services Program Office reports that approximately 50,000 elder abuse cases were reported in fiscal year 2015-2016, of which approximately 10,000 reported financial exploitation.

Difficulties When Lawyers Try To Be Proactive

The *Dunn* case exemplifies how a well-intentioned lawyer found himself in six years of litigation.[7] Patterson, an Illinois attorney, represented the Dunns in connection with their estate planning. He suggested an estate planning program that he called the "Peace of Mind Primary Estate Plan" (the "Estate Plan").[8] Each document that Patterson created for the Dunns included a "qualified amendment and revocation" provision, requiring that any amendment or revocation of the documents be executed either with the written consent of Patterson (who was a trust protector) or by order of the court.[9] Patterson advised his clients that the trust protector provision was used to protect the original purpose of the trust from changes made through undue influence or elder abuse.[10] Patterson entered into a written retainer agreement with the Dunns in which the Dunns agreed to pay Patterson $225 per hour, with total fees not exceeding $2,850 without the Dunns' consent.[11]

The Dunns executed their documents on June 12, 2006.[12] Five months later, on November 14, 2006, Patterson received a letter from another attorney, Timothy McJoynt, informing Patterson that he had been retained by the Dunns to modify the Estate Plan and that the Dunns "no longer wanted their ability to revoke or amend their estate planning documents to be contingent on Patterson's approval and, therefore, wished to remove his name from the documents and make other minor amendments."[13] Patterson responded by letter on November 16, 2006 stating, in pertinent part, "For my clients to make any changes in their plan it is necessary for both of them to discuss those changes with me and for me to then determine whether the changes are consistent with the interests and protections embodied in the original plan" and that if the Dunns were unwilling to personally meet with him, their only other alternative was to petition the court for leave to amend the documents. On April 27, 2007, the Dunns filed suit against Patterson, seeking declaratory judgment that Patterson's "qualified revocation and amendment" provisions in the estate plans were void as against public policy.[14]

The Circuit Court found that the "qualified revocation or amendment" provision requiring Patterson's approval was contrary to public policy and void because it ignored the provisions of Supreme Court Rule of Professional Conduct 1.2—that an attorney is obligated to abide by his client's decision so long as the direction given by the client is not contrary to law, unethical, or otherwise in violation of an ethical or legal obligation—and entered judgment on the pleadings ("Rule 1.2").[15]

The Illinois Appellate Court reversed the Circuit Court's decision and found that that Patterson's conduct was not sanctionable.[16] Under Illinois law, provisions requiring a third party's consent to modify a trust are permissible.[17] Thus, the Appellate Court held:

> Provisions in estate planning documents, which limited elderly clients' power to amend or revoke documents by requiring consent of attorney, or alternatively, consent of court, were not void as against public policy or violative of rule of professional conduct requiring attorney to follow clients' instructions, notwithstanding that attorney drafted documents, where attorney did not mislead clients, clients were informed of provisions, attorney did not have financial stake in estate plan, and attorney, following his discharge by clients, sought to meet with them before agreeing to grant or refuse consent.[18]

The Appellate Court noted that the revocation provisions executed by the Dunns were not inconsistent with the duty of an attorney to follow his clients' instructions pursuant to Rule 1.2.[19] Under the assumption that Patterson was terminated as the Dunns' attorney, Patterson was not acting as the Dunns' attorney when he declined to consent to the revocation of the trust and, therefore, did not violate his duty to follow his clients' wishes.[20] The Appellate Court stated that with respect to Patterson's actions in creating the documents and trying to meet with his former clients, "[w]e do not find Patterson's [conduct] sanctionable. Rather, we find it admirable and consistent with the highest ideals of the bar. In light of the obvious expense to Patterson, we will leave it to other estate planners whether they wish to use this particular method of estate planning."[21]

The Illinois Attorney Registration and Disciplinary Administration (the "ARDC") filed a disciplinary action against Patterson approximately 9 months after the Circuit Court determined the qualified amendment provisions drafted by Patterson to be contrary to public policy.[22] While the disciplinary decision was pending, the Illinois Appellate Court

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reversed the Circuit Court's decision.[23] Although two separate counts (Count I and Count II) were brought against Patterson in the disciplinary action, this article addresses only Count II (for Patterson's actions related to the Dunns allegations of overreaching the attorney-client relationship and failure to abide by his clients' decisions concerning the objectives of representation in violation of Rule 1.2). Count I related to another client situation.

The majority of the Hearing Board of the ARDC (the "Hearing Board") found that, by refusing to meet with the Dunns when they obtained new counsel and continuing to bill legal fees to the Dunns after he no longer represented them, Patterson engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; conduct that was prejudicial to the administration of justice; and conduct tending to defeat the administration of justice or to bring the courts or the legal profession into disrepute. The Hearing Board recommended that Patterson be suspended from the practice of law for three months and until he completed the ARDC Professional Seminar. [24] In reaching this conclusion, the Hearing Board noted that Patterson not only failed to meet with the Dunns concerning the proposed changes to the Estate Plan, but also placed numerous conditions on the scheduling of the meeting that effectively prevented the meeting from taking place, such as advising the Dunns' new attorney that he would charge $225 per hour for the meeting and that he would not attend any meeting unless he met alone with the Dunns.[25] The Hearing Board found that, regardless of his trust protector role, Patterson had no basis to refuse to meet with the Dunns in the presence of their attorney and therefore acted unreasonably.[26] The Hearing Board found that, while Patterson might have been entitled to some fee for acting in his capacity as trust protector, he was not entitled to bill the Dunns for legal services after his services were terminated and that, by doing so, Patterson acted dishonestly and in a way that brings the legal profession into disrepute.[27]

Decisions of the Hearing Board in Illinois are subject to appeal to the Review Board of the ARDC (the "Review Board"), so Patterson appealed. The Review Board examined the Hearing Board's holdings, which occurred after the Appeals Court reversed the Circuit Court in the civil case, and reversed the Hearing Board's decision.[28] The Review Board found that Patterson did not engage in misconduct by refusing to meet with the Dunns and their new counsel. Patterson received no response when he (1) wrote to the Dunns, asking them to sign and return an enclosed form stating that it was their intent to discharge him, and (2) advised the Dunns' new counsel that if the Dunns intended to terminate him and release him from liability, they needed to put it in writing. The fact that Patterson "wished to determine that the Dunns were not being taken advantage of without the presence of the person who intended to 'dramatically change much of' what Respondent had put in place to protect them was not unreasonable."[29] The Review Board decision stated that, had Patterson agreed to make such changes without ascertaining that the Dunns were competent and not being unduly influenced, he "might very well have been called to answer" why he had done so.[30] The Review Board also found that the evidence was insufficient to support the Hearing Board's finding that Patterson acted dishonestly in billing the Dunns for the time he expended in his role as their trust protector. In the Review Board's view, "the mere fact that Respondent characterized his time as legal services is not sufficient proof of dishonest intent."[31] Further, in his first communication with the Dunns' new counsel and several times thereafter, Patterson suggested the court approval alternative. Had the Dunns and their counsel taken the court approval route, such additional fees would have been avoided.[32] Based on their findings, the Review Board concluded that Patterson's conduct did not violate Rule 1.2. The Review Board reversed the findings of the majority of the Hearing Board as to Count II, and recommended that Count II be dismissed.

Florida Law

Chapter 825 of the Florida Statutes is titled "Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults." Section 825.103(1), Florida Statutes, entitled "Exploitation of an elderly person or disabled adult; penalties," sets forth the elements of the crime of exploitation of the elderly. Specifically, exploitation of the elderly is committed when anyone who stands in a position of trust and confidence, or has a business relationship, with the elderly person or disabled adult knowingly obtains or uses that person's property for the temporary or permanent use of the offending person or a third person. The crime of exploitation of the elderly can result in a first, second or third-degree felony depending on the value of the property involved.[33]

Florida cases that have addressed section 825.103, Florida Statutes, have largely held the evidence was insufficient to support a conviction of exploitation of an elderly person or disabled adult.[34] In *Franke v. State*,[35] the Florida Supreme Court stated, "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."

Possible Protections

A comprehensive summary of estate planning techniques to better protect elders is beyond the scope of this article. Some techniques that have been used include requiring the consent of family members before a revocable trust can be amended, use of irrevocable trusts, and/or using co-trustees, whether family members or corporate fiduciaries. Each alternative requires the elder to agree to give up a level of control that

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they may be unwilling to do. When estate planning attorneys discuss these issues with clients and suggest safeguards such as those previously noted, the client frequently questions from whom the drafting attorney is trying to protect the client. Our response is "caregivers and others who may develop relationships with them," but we also tell them that we are trying to protect them from "themselves." Most clients respond that they can "take care of that themselves." Yet we find many clients that are in their eighties and succumbing to illness and reduced capacity have third parties taking advantage of them.

Dunn demonstrates how one attorney tried to be proactive and is a lesson of the potential consequences of providing legal advice especially where the lawyer is the one who serves as trust protector. For those who wish to avoid the potentially litigious effects of *Dunn*, other methods can be utilized to substantially reduce the risk of financial exploitation. At the first client-attorney meeting, most estate planning attorneys request that their potential new client complete a financial data sheet. In addition to this standard form, clients should be requested to identify family history of Alzheimer 's disease and dementia. The form should ask the client to state when his/her family member was diagnosed with the condition and how progressive the disease was. The estate planning attorney's client software should identify clients with a family history of Alzheimer's and dementia. Such clients should consider creating a panel of advisors and physicians to meet with periodically to evaluate them. The panel could consist of two or more of a psychiatrist or psychologist, a physician, the client's attorney, one or more family members, an attorney who does not represent the client, and the client's accountant ("the Panel").

Annually, the Panel will assess the client's mental capacity. If the client decides that he or she wishes to amend or re-write his or her estate planning documents, the client will have to appear before the Panel where the Panel will assess the client's capacity and determine if the client should be permitted to make the requested change and/or bring an action to have a guardian appointed. We understand that this is just one of many potential alternatives but it appears that the use of a Panel, rather than an attorney or family member, may be a way to avoid litigation as described in *Dunn*. Of course each Panel member will want to be compensated, indemnified and held harmless for his or her actions.

Conclusion

Planning to avoid financial exploitation is difficult. Based upon *Dunn*, a lawyer who makes an effort to try to reduce the potential of financial exploitation may find himself or herself in a field of landmines. As medicine and technology increase the average life expectancy, the percentage and population of elderly individuals will continue to rise. As a result, the Florida Bar and other state bar associations should consider ways to create techniques and clarify ethical actions to combat the threat of financial exploitation and alter the Rules of Professional Responsibility so that practicing lawyers can be proactive in their attempts to help their clients without risking disciplinary action.



B. NELSON

***Barry Nelson**, a managing partner of Nelson & Nelson, P.A., is a Florida Bar Board Certified Tax and Wills, Trusts & Estates Attorney with an emphasis of integrating Estate Planning and Asset Protection. Mr. Nelson has been named as a Band 1 Florida estate planning attorney in Chambers USA: America's Leading Lawyers for Business since 2010 and has been included in Best Lawyers in America since 1995. He has been named as a Top 100 Miami Florida Attorney since 2012. Mr. Nelson is a Fellow of the American College and Trust Counsel and served as its Asset Protection Committee Chair from 2009-2012. He served as an adjunct professor for the University of Miami School of Law LL.M. in Taxation program (1998-2009) and served 3 years as founding chairman of the Florida Bar's Asset Preservation Committee.*



C. NELSON

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Endnotes

1 395 Ill. App. 3d 914 (2009).

2 *Welcome to QuickFacts Florida*, United States Census Bureau, http://www.census.gov/quickfacts/table/ PST045216/12.

3 *What is Adult Abuse?*, Florida Department of Children and Families, http://www.myflfamilies.com/service-programs/adult-protective-services/what-is-adult-abuse; see also Florida Statutes Section 825.103 (1).

4 *The Power to Prevent Elder Abuse Is in Your Hands*, Department of Elder Affairs, http://elderaffairs.state.fl.us/doea/elderabuseprevention/Elder%20Abuse%20Brochure%20-%20English2015.pdf; See also Florida Statutes Section 415.

5 Nicole Orr, *Investigating Elderly Exploitation*, Legal Advisor (2012), http://www.sao10.com/legal_advisor/ redacted/ 2012/ March2012.pdf.

6 R. Craig Harrison, *Protecting the Elderly From Financial Exploitation: The Dilemma and Solution, Part II*, 88-AUG Fla. B.J. 48 (2014), http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/445ef3f18dbdb84e85257d01005009b0!OpenDocument&Highlight=0,disability*.

7 Patterson was in litigation, declaratory and disciplinary, from April 27, 2007 to May 7, 2013. See Exhibit 1 for a timeline of events.

8 *Dunn v. Patterson*, 395 Ill. App. 3d 914 (2009).

9 *Id*. at 915.

10 *Id*. at 916.

11 *In re: Lawrence Francis Patterson*, Attorney Number 2153718, Case Number 08PR0074 (Filed July 20, 2011), https://www.iardc.org/rd_database/rulesdecisions.html.

12 *Id*. at 9.

13 *Supra* note 8, at 916.

14 *Id*. at 917.

15 *Id*. at 919.

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Community Association Board Members Can Be Considered Limited Purpose Public Figures In Defamation Cases

By Howard J. Perl, Esq., Becker & Poliakoff, Fort Lauderdale, Florida

There is a growing body of case law around the country which would make it more difficult for an allegedly defamed community association board member to successfully pursue his or her day in court. Is a community association board member an average, private citizen or is a community association board member really a special category of public figure open to more scrutiny?

Can a community association board member be considered a limited purpose public figure and therefore held to the higher standard of actual malice when bringing a defamation claim in Florida? If so, what are the criteria for establishing a community association board member as a limited purpose public figure for defamation purposes?

To state a cause of action for defamation in Florida, a plaintiff must allege that: 1) the defendant published a false statement; 2) the statement was made about the plaintiff; 3) the statement was made to a third party; and 4) the falsity of the statement caused injury to the plaintiff.[1]

There are two basic types of figures in regard to defamation cases –private figures and public figures. Those who are not classified as public figures are considered private figures.[2] Assuming the four prongs needed to file a cause of action are met, defending a defamation lawsuit filed by a public figure is typically much easier than defending one filed by a private figure. There are two types of public figures recognized under defamation law: "public officials or public figures" and "limited-purpose public figures."[3]

All-purpose public figures are private individuals who occupy "positions of such persuasive power and influence that they are deemed public figure for all purposes. . . . They invite attention and comment."[4] Examples of such figures would include President Trump, Governor Scott, Bill Gates, Paris Hilton, any candidate for elected public office, etc.

The second category of public figures is called "limited-purpose" public figures. These are individuals who are not typically known outside their own sphere of friends, colleagues and their industry or community, but who "have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved."[5] A limited-purpose public figure is either one who voluntarily becomes a key figure in a particular controversy or one who has gained prominence in a particular, limited field, but whose celebrity has not reached an all-encompassing level. Such figures include a retired general who advocated on national security issues;[6] a nationally known college football coach accused of fixing a football game;[7] and would include local newscasters, local civic leaders and elected school board officials in regard to school board issues.

To support a claim for defamation, a private figure need only show negligence by the alleged defaming party, while a public figure must show "actual malice." Actual malice in the defamation context is defined as publishing a statement while either knowing that it is false or with reckless disregard as to the statement's truth or falsity. Not only are "public officials" subject to the actual malice standard in a defamation suit, but so are "limited purpose public figures."[8] Whether or not a defamation plaintiff is a limited purpose public figure is a matter of law for the court to decide.[9]

No Florida appellate court case has ruled precisely on whether a community association board member is a limited purpose public figure as a matter of law. However, jurisdictions outside of Florida have applied the limited purpose public figure status to community association board members. A New Jersey Court ruled that a "person invites the application of the actual malice standard by voluntarily and knowingly engaging in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny."[10]

In that case, a townhouse owner brought action against his homeowners association alleging that the association lacked authority to enforce parking regulations, defamed the owner, and wrongfully removed him from the association's architectural advisory committee. The issue in regard to the defamation revolved around the owner's board candidacy. The board disseminated information about all the candidates to unit owners concerning the November 30, 1999 board election. This information for the six candidates for the three available seats contained a description of the candidates' past or current violations of the association's rules; whether the violations were "resolved or unresolved"; and whether the candidates were in "good standing and entitled to vote." The information stated that three of the candidates had not committed any violations; it also indicated that two others had violated rules, both of which were "resolved." As for the plaintiff, the information mentioned his "parking of commercial vehicles on Links 'property,' including driveway ... 1997–1999," and indicated that these violations were not resolved. The owner alleged that the information provided to the membership was defamation by the Association. The court stated:

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As a candidate for election to the association's board of directors, plaintiff thrust himself into a spotlight which justified viewing him as a public figure for the limited purpose of his candidacy. A prime example of this type of public figure can be found in *Lawrence v. Bauer Publ'g*, supra, where our Supreme Court held that the president of a privately-organized taxpayers association became a limited purpose public figure by "inject[ing] himself into the forefront" of a public controversy about what his organization believed was an excessive appropriation for a city firehouse and which formed the background for the alleged defamation. In a similar vein, candidates for public office, who never achieve the status of public official because of lack of success at the polls, nevertheless take on the garb of public figures for the limited purpose of their candidacy. This not only includes candidates for public office on a national level, but also candidates for public office on a local level (for such offices as sheriff, school board, city council, doctor seeking appointment to medical board; citations omitted).

We conclude that plaintiff, as a candidate for the board of directors of the association, should be deemed a limited purpose public figure since he was a candidate for a position essentially indistinguishable from a member of a town's governing body. The board of this association performs many quasi-municipal functions in order to provide the owners with what they sought upon purchasing their townhouses —a stable, planned environment. Accordingly, the application of the actual malice standard is appropriate in these circumstances so there may be the opportunity, in the community, for free and robust communications regarding an individual's candidacy to the body which governs life in the community.[11]

Based on the above analysis, the New Jersey community association board member candidate was deemed to be a limited purpose public figure.

A "significant factor" in the public figure analysis "is whether an individual's position makes one a public figure because the individual invites public attention and comment by virtue of the position and the nature of the business."[12] In *Bossert*, the plaintiff was deeply involved in high profile civic affairs within his homeowners' association. The court stated:

In the present case, appellant was chairperson of the Civic Committee. The Civic Committee, which was partially funded with money from the community association, was in the process of separating itself from the community association. Appellant thus freely chose to participate in a leadership capacity in an organization which was involved in the community and was funded in part with money derived from the community. Appellant's high-profile community volunteerism is commendable. But it necessarily placed him in the status of a limited purpose public figure.[13]

Is a community association board member an average, private citizen or is a community association board member really a special category of public figure open to more scrutiny?

The scope of the "public controversy" in such a setting includes the Plaintiff's "credibility and honesty" in his public role, just as a real "public official" submits to scrutiny of his or her fitness for office.[14] For instance, in a California case, over the course of several years, there was an ongoing dispute regarding the quality of services provided by the association's general manager.[15] Each side published newsletters, one in favor of the manager and one against the manager, alleging that the manager was incompetent and complaining about his management policies. When a new Board was elected, the manager tendered his resignation and filed a defamation lawsuit against numerous owners who submitted negative letters about him to the newsletter, the Board members and the Journalism Club, which was a private homeowners club that published its newsletter to the community and local businesses. The Court provided that:

> Although the allegedly defamatory statements were made in connection with the management of a private homeowners association, they concerned issues of critical importance to a large segment of our local population. For many Californians, the homeowners association functions as a second municipal government.[16]

Similarly, in a New Jersey case, a candidate in a run-off election for a seat on a condominium association board of directors brought defamation claims against the opposing candidate, author of an e-mail message sent to opposing candidate, and three supporters of opposing candidate, relating to the e-mail message accusing plaintiff of dishonesty and lack of integrity when selling one of his condominium units, which message was posted by one of opposing candidate's supporters on an online message board accessible only to unit owners and residents, and which message allegedly was included in flyers handed out by the other two supporters of opposing

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candidate.[17] The court held that a member of a community association board is a public figure as a matter of law because he "thrust himself into a spotlight which justified viewing him as a public figure for the limited purpose of his candidacy."[18]

It is likely that given the well-established body of Florida community association case law, Florida appellate courts will render similar rulings when the question of a board member's insulation from defamation is presented. As in California, Florida laws governing community associations contain provisions that "parallel" the "open meeting laws regulating government officials, agencies and boards," and the "statutory schemes" governing local governments. These parallels to open government in California were a factor in the California Court's determination that association board members were limited purpose public figures. There is no reason to believe that such parallels in Florida community association law would not lead to the same conclusion in Florida, as in California. Florida community associations mandate open governance meetings, with notice, agenda and minutes requirements, and strictly limit closed executive sessions.[19] Community association unit owners "comprise a little democratic sub society."[20] As in New Jersey, Florida community associations "perform many quasi-municipal functions."[21]

In analyzing whether a defamation plaintiff is a limited purpose public figure, a "court must (1) isolate the public controversy, (2) examine the plaintiff's involvement in the controversy, and (3) determine whether the alleged defamation was germane to the plaintiff's participation in the controversy."[22] Applying this analysis, a court could almost always find a board member of a community association to be a limited purpose public figure in the context of statements made between and among residents, management and perhaps even vendors of the community association about the plaintiff's conduct as an elected board member, to the extent the conduct was germane to the governance of the association, including the plaintiff's general fitness to be a director in the association.

A trial court in Miami-Dade County ruled accordingly.[23] In that case, a community association board member alleged that defamatory statements were made about him in a letter that was sent to the membership. The alleged defamatory statements included allegations that the board member disrupted board meetings and had to be restrained by the police at board meetings. The defendants argued that under the facts of the case, the board member was a limited purpose public figure in regard to whether or not the actual malice standard would apply. Upon filing a Motion for Partial Summary Judgment, the trial court agreed that the community association board member was a limited purpose public figure in regard to the alleged defamatory statements and the actual malice standard would apply. That ruling was not appealed, and the case is still pending.

To determine if the community association board member was a limited purpose public figure, the court engaged in a three-step process.[24] The court first began by determining that a "public controversy" existed.[25] The public controversy must arise out of a matter of public interest or concern. The court stated:

> At the most rudimentary level, a community association is a "democratic sub society;" and as such, any action that arises out of its board of directors is inherently an interest, concern or controversy to its residents. *White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 350 (Fla. 1979) (quoting *Hidden Harbor Estates, Inc. v. Norman*, 309 So. 2d 180,181-82 (Fla. 4th DCA 1975).

The court went on to state "[i]n a community association setting, if the plaintiff has chosen to run for elected office and serve as an elected officer, he or she is the equivalent of a public official for purposes of the public figure determination."

Finding that a public controversy existed, the court next evaluated whether the plaintiff played a central role in that public controversy. The plaintiff must have either "been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.[26] Under the facts of the case, the court determined it was evident in the record that the plaintiff was intimately involved in the controversy, by "purposely trying to influence the outcome."[27]

Limited purpose public figures can also be discerned if they have "thrust themselves to the forefront of particular public controversies."[28] The court stated that the plaintiff voluntarily decided to run and serve for an elected position on the association board of directors. By choosing to do this, the plaintiff thrust himself to the front of the controversy. Even if the plaintiff was involuntarily caught in the controversy, "unless he rejects any role in the debate, he too has 'invited comment' relating to the issue at hand."[29]

Finally, the court must determine if the alleged defamation was "germane" to the plaintiff's involvement in the controversy.[30] The court found that it was axiomatic that the alleged defamation was germane to the plaintiff's participation in the controversy as the alleged defamation was based on the plaintiff's activities at board meetings.

The court ruled that there was no genuine dispute of material facts as to the determination that the plaintiff is a limited purpose public figure, and the actual malice standard applied in regard to the defamation cause of action.

If a Florida community association board member brings an action for defamation can he or she expect to be challenged on the grounds that he or she is a limited purpose public figure? It appears the answer is "yes." For this reason, it is important to discuss with board members the difference between the actual malice standard as applied to a limited purpose public figure

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and the defamation standard as applied to private figures early on in representation of the community. Far too many directors may be unaware that their service on the board may expose them to more than just the usual criticism.


H. PERL

***Howard J. Perl** is a shareholder in the Becker & Poliakoff's Ft. Lauderdale office. Mr. Perl is involved in all aspects of community association law, including transactional, mediation, arbitration, construction defects, and litigation. Mr. Perl holds the AV Preeminent rating from Martindale-Hubbell. An active member of the Community Associations Institute (CAI), he has been designated a Professional Community Association Manager (PCAM®) since 1995. Mr. Perl retired as a Major in the Army Reserves after 33 years of service, and was deployed to Iraq in support of Operation Iraqi Freedom from July 2005 to July 2006.*

Endnotes

1 *Valencia v. Citibank International*, 728 So. 2d 330, 330 (Fla. 3d DCA 1999). *See also Miami Herald Publishing Company v. Ane*, 423 So.2d 376, 388 (Fla. 3d DCA 1982), affirmed, 458 So.2d 239 (Fla. 1984):

> Without dispute, the plaintiff Ane was a private individual who was neither a public official nor a public figure. Under the First Amendment and applicable Florida law, he was entitled to recover in his libel action if he established at trial that the defendant Miami Herald published (1) false and defamatory statements of and concerning him, (2) without reasonable care as to whether those statements were true or false, (3) resulting in actual damage to himself.

2 *See generally Gertz v. Robert Welch Inc.*, 418 U.S. 323 (U.S. 1974) (differentiating private individuals from public officials and public figures).

3 *Little v. Breland*, 93 F.3d 755 (11th Cir. 1996).

4 *Gertz,* 418 U.S. 323.

5 *Id*.

6 *Secord v. Cockburn*, 747 F.Supp. 779 (D.D.C. 1990).

7 *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

8 *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841 (Fla. 4th DCA 2002).

9 *Id*.

10 *Verna v. The Links at Valleybrook Neighborhood Ass'n, Inc.*, 852 A.2d 202, 213, 371 N.J. Super. 77, 95-96 (N.J. App. 2004).

11 *Id*.

12 *Bossert v. Schamber*, 2001 Westlaw 1357018, *5 (Cal. App. 2d Nov. 06, 2001).

13 *Id.*

14 *Id*.

15 *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468 (Cal. App. 2000).

16 *Id.* at 479 (citations and internal quotation marks omitted).

17 *Gulrajaney v. Petricha*, 885 A.2d 496, 381 N.J. Super. 241, 256-57 (N.J. App. 2005).

18 *Id.*

19 *Fla. Stat.* § 718.112 (2016).

20 *White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 350 (Fla. 1979), quoting *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. 4th DCA 1975).

21 *Verna v. The Links at Valleybrook Neighborhood Ass'n, Inc.*, 852 A.2d 202, 214, 371 N.J. Super. 77, 98 (N.J. App. 2004).

22 *Silvester v. Am. Broad. Companies, Inc.*, 839 F.2d 1491, 1494 (11th Cir. 1988).

23 *Gill v. Eden Roc, et al*, Case No. 12-20653 CA02, 11th Judicial Circuit, Miami-Dade County, Florida.

24 *Friedgood v. Peters Pb. Co.*, 521 So. 2d 236, 239 (Fla. 4th DCA 1988).

25 *Gertz*, 418 U.S. at 345.

26 *Waldbaum v. Fairchild Pub'n, Inc.*, 627 F.2d 1287,1297 (D.C. Cir. 1980); *see Silvester*, 839 F.2d at 1496.

27 *Silvester*, 839 F.2d at 1496.

28 *Gertz*, 418 U.S. at 345.

29 *Waldbaum*, 627 F.2d at 1298.

30 *Gertz*, 418 U.S. at 345; *Friedgood*, 521 So. 2d at 239; *Silvester*, 839 F.2d at 1497.

Ethical Challenges in Protecting Against Financial Elder Abuse/Exploitation, from page 16

16 *Id*. at 925.

17 *Supra* note 11, at 11.

18 *Supra* note 8, at 914.

19 *Id*. at 921.

20 *Id*.

21 *Id*.

22 *Supra* note 11.

23 The disciplinary action was filed on July 31, 2008. The declaratory action was ultimately resolved on November 18, 2009.

24 *Supra* note 11, at 1-2.

25 *Id*. at 34.

26 *Id*.

27 *Id*.

28 *In re: Lawrence Francis Patterson*, Attorney Number 2153718, Case Number 08PR0074 (Filed May 7, 2013), https://www.iardc.org/rd_database/rulesdecisions.html.

29 *Id*. at 15.

30 *Supra* note 8, at 923, 919.

31 *Supra* note 34, at 16.

32 *Id*.

33 *Id*.

34 See *Everett v. State*, 831 So. 2d 738 (2002); *Ellison v. State*, 983 So. 2d 1205 (2008).

35 188 So.3d 886 (2016).

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An Explanation Of The Escheat And Unclaimed Funds Process And Procedure

By Jacqueline I. Kurland, Esq., Assistant Attorney General,
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What the layman thinks: "The State tries to take all of your assets when you die,""Nothing goes to the State unless you die without a will," and "If you die without a will, then the State takes everything."

What many attorneys think: "Escheat takes place only if there is no will," "If I don't know who some of the beneficiaries are or where they are located, their shares of the estate will go to the other beneficiaries."

What an informed attorney knows: "These are all common misconceptions about the escheat and u*nclaimed funds laws in the State of Florida*."

There is much confusion about the escheat laws and when they come into play in a particular estate. Unfortunately, this confusion is not limited solely to lay people, but includes attorneys and other professionals as well. To many attorneys, escheat is a concept they vaguely remember studying in law school. As a result, many estates are improperly distributed to individuals not entitled to them rather than being properly distributed to the State of Florida. Furthermore, individuals trying to claim funds previously escheated to the State of Florida, as well as many of their attorneys, do not know how to do so successfully.

Escheat - Historically

An escheat is historically a reversion of land ownership back to the lord when the immediate tenant dies without heirs.[1] It is a common law doctrine from the feudal system in English law. As stated by Chancellor James Kent:

> But, as the feudal tenures do not exist in this country, there are no private persons who succeed to the inheritance by escheat; and the state steps in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.[2]

Brief Overview

An escheat ensures that all or a portion of an estate is not left in limbo and without an owner if the proper heirs or beneficiaries of a decedent's estate cannot be identified or located. If either of these situations arises, the law provides that the affected share of the decedent's estate escheats to the State of Florida. The State then holds the funds for a period of time for a valid claimant to step forward and claim the funds. If no valid claims are timely asserted regarding a previously unidentifiable or unlocatable heir or beneficiary, then the State's rights to the funds become absolute and the funds become part of the State School Fund.

Property escheats to the State only as a last recourse. The State is *not* an heir or beneficiary in property that escheats, however. The State's role is that of the sovereign.[3] The State acts more like a trustee or guardian, merely holding escheated funds until one or more claimants come forward and prove their entitlement, at which time they will receive their shares of the escheated funds from the State.

No Identifiable Heirs or Beneficiaries – Fla. Stat. § 732.107

Florida law provides that "When a person dies leaving an estate without being survived by any person entitled to a part of it, that part shall escheat to the State."[4] This most commonly occurs when an individual dies intestate without relatives who are legally entitled to inherit in the absence of a will.

Just because an individual is a relative of the decedent does not mean he or she is entitled to inherit from the decedent's estate. The relationship between the relative and the decedent in an intestate estate must be within a certain degree of consanguinity. The relatives entitled to inherit in the absence of a will (or a valid dispositive provision of a will) are limited to the surviving spouse, descendants, descendants of parents, grandparents, descendants of grandparents, and kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died entitled to the estate.[5] If none of these individuals exist, then the funds of the estate escheat to the State of Florida.

While escheats most often are seen in intestate estates, they also occur in testate estates. Under Fla. Stat. § 732.101, those parts of the estate not effectively disposed of by a will pass to the decedent's heirs under the laws of intestacy. For example, if testator John Blackacre provides in his will that the residue of his estate be distributed to his daughter, Mary Whiteacre, the usual situation is that when John dies, the residue of his estate would pass to Mary. If Mary predeceases John, then the residue of his estate would pass to her descendants, per stirpes. However, what if Mary dies leaving no descendants? In that case, as most probate attorneys know, the residue of John's estate passes according to the laws of intestacy as outlined in Fla. Stat. § 732.103. But if John has no heirs within the statute's lines of consanguinity, the residue of John's estate would escheat to the State.

Unlocatable Heirs or Beneficiaries – Fla. Stat. § 733.816

As opposed to the escheat situation that arises when heirs to an estate cannot be identified, there is a different escheat to the State that may occur when an heir or beneficiary has been identified but cannot be located. *continued, page 22*

In all situations in which there is unclaimed property held by the personal representative that cannot be distributed or paid because of the inability to find the lawful owner (heir or beneficiary), the personal representative will be directed by the court to sell the property and deposit the proceeds (and any other affected cash in hand) with the clerk of court, who deposits the funds in the registry of the court. If the amount involved does not exceed $500, the clerk posts a notice for 30 days at the courthouse door giving the amount involved, the name of the personal representative, and the other pertinent information that will put interested persons on notice. If the value of the funds is over $500, the clerk publishes the notice once a month for two consecutive months in a newspaper of general circulation in the county. After the expiration of the notice period, the funds are deposited with the Chief Financial Officer of the State of Florida.[6]

The Chief Financial Officer deposits the funds received to the credit of the State School Fund.[7] All interest and all income that may accrue from the money deposited with the State School Fund belongs to the fund, although some attorneys and laymen object to this as being unfair to valid claimants.[8] This means that if a previously unlocatable heir or beneficiary comes forward and files a valid claim for his or her share of an estate, that individual will only receive the amount initially deposited, without interest.

At any time within ten years after the deposit with the Chief Financial Officer, a person claiming entitlement to any part of the deposited funds as a previously unlocatable heir or beneficiary may reopen the administration to assert entitlement to the proceeds.[9] This is done by the submission of a written petition to the court that directed the deposit of the funds, with informal notice to the Department of Legal Affairs (representative for the State of Florida).[10] After proof of entitlement, the person entitled to the funds may obtain a court order directing the payment of the funds to that person.

Once a claimant receives a court order directing the payment of the funds to that person, then he or she needs to file a claim with the Department of Financial Services (DFS), complete with the court order and all other documentation required by DFS. Under the authority of Fla. Stat. § 717.1242, DFS then makes its own determination of whether the claimant is in fact entitled to the funds. All funds deposited with the Chief Financial Officer and not claimed within ten years from the date of the deposit escheat to the State for the benefit of the State School Fund.

The Logistics

When there are no known heirs or beneficiaries or there is a question as to whom the rightful heirs are, or in the situation where one or more of the heirs or beneficiaries cannot be located, the personal representative files a Petition to Determine Beneficiaries with the court. The Florida Probate Rules require that the petition be filed within one year after letters have been issued to the personal representative.[11] This is usually the point when the Department of Legal Affairs is given informal notice of the possible escheat to the State. If the personal representative fails to institute the proceeding within one year, it may be instituted by the Department of Legal Affairs. Each year the probate courts are required to furnish to the Department of Legal Affairs a list of all estates being administered in which no person appears to be entitled to the property and the personal representative has not instituted a proceeding for the determination of beneficiaries.[12] If the personal representative is aware that there is a question regarding whether an heir relationship to the decedent exists, then the personal representative should file a Petition to Determine Beneficiaries and follow through with a search for heirs.

When there are no known heirs of a decedent, the personal representative files a Petition to Determine Beneficiaries. The State has the burden of showing that there are no legal heirs or beneficiaries in order for any share of the estate to escheat.[13] Although the State has the burden this duty is usually done by the personal representative since he or she has access to the estate's money and can pay to have it proven. The personal representative either engages a reputable company to perform a genealogical search to identify and locate heirs or does the heir search himself or herself. Practical methods of finding heirs include birth certificates, marriage applications or licenses, death certificates, military records, governmental records (such as Social Security information and U.S. Census records), family records, and court records.[14]

The heir search company's genealogical report is filed with the court, along with any affidavits of heir search or affidavits of diligent search. The State's burden is met when it shows that after diligent search, valid heirs or beneficiaries for all portions of an estate cannot be identified and found. If no heirs can be identified and located, then the court will enter an order declaring that all of the funds from the estate shall escheat to the State of Florida. At that point, the burden of proof shifts to the claimants to prove their particular relationship to the decedent makes them an heir or beneficiary entitled to a portion of the escheated estate.[15]

Property that escheats to the State must be sold as provided for in the Florida Probate Rules.[16] After the court has ordered the personal representative or an institution holding the funds to do so, the funds of the estate are deposited into the court registry to hold for a while in case the heir or beneficiary comes forward. Once the funds are deposited with the court registry, the clerk of the court publishes notice once a month for two consecutive months (or, if the funds do not exceed $500, posts a notice for 30 days).[17] After the expiration of six months from the posting or first publication, the clerk is required to deposit the funds with the Chief Financial Officer of the State of Florida (after first deducting the clerk's fees and the costs of publication).[18] The State then holds the funds of the estate

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for ten years to see if any heirs or beneficiaries come forward to claim them. If no claim is timely asserted, the State's rights to the proceeds becomes absolute.

Disbursement of Escheated Funds by the State

After escheated funds from an estate have been deposited with the Department of Financial Services (DFS), then at any time within ten years after the payment to the Chief Financial Officer, a person claiming to be entitled to part or all of the funds may reopen the administration and assert entitlement to the funds.[19] This occurs when either an unknown heir or beneficiary is identified or a previously unlocatable heir or beneficiary is located.

The subsequent administration of the estate is opened under the same case number in the same county as the original probate.[20] In addition to a petition to reopen the estate, the claimant must file a written petition to determine that he or she is the rightful heir or beneficiary and entitled to the funds held by DFS.[21] Informal notice must be provided to the Department of Legal Affairs, the legal representative of the State.[22] An attorney from the State of Florida Office of the Attorney General will then handle the matter. Once the estate has been reopened, then the alleged heir or beneficiary must prove that he or she is a legitimate heir or beneficiary. In the instance of an unidentified heir or beneficiary, the individual may have to have another genealogical report prepared to trace his or her lineage to the decedent.

In order to accomplish all of this, the following forms (or similar ones) may be used:

- Petition to Reopen Estate and for Order Appointing Personal Representative;
- Petition to Reopen Estate and for Declaration of Entitlement to Funds Held by Florida Department of Financial Services, Unclaimed Property Division;
- Petition to Determine Beneficiaries; and
- Petition to Obtain an Order Directing Payment of Escheated Funds.

The State of Florida, acting through DFS, cannot determine entitlement to part or all of the funds of an estate until after they receive a claim from the alleged heirs or beneficiaries, supporting documentation proving entitlement, and a court order instructing it to distribute the funds to the now identified and located heirs or beneficiaries. The claim form can be found at *FLTreasureHunt.org*, which is the Web site of the Division of Unclaimed Properties. The court order is merely one document DFS requires in order to make such a determination. Although this may seem like a duplication of work and efforts, it is the law according to the interpretation by DFS of Fla. Stat. § 717.1244.

Summary

The purpose of an escheat is to provide a place for a decedent's funds to rest until a proper owner is found. The State of Florida is *not* an heir or beneficiary in estates that escheat. It is an interested party in escheat cases because if the court determines that part or all of an estate escheats to the State, then DFS would be responsible for holding escheated funds: (i) until a claim on the funds is made and proven valid by a claimant (in which case the funds are paid to the claimant); or (ii) ten years (after which, if no claimant has come forward, the funds are permanently deposited with the State School Fund).

There are four possible stages at which escheat is involved in an estate: (i) when heirs or beneficiaries (or some of them) cannot be identified during the course of the initial probate administration; (ii) when at least one heir or beneficiary cannot be located during the course of the initial probate administration; (iii) when an individual comes forward in a subsequent administration and files a claim with the court that he or she is a previously unidentified heir or beneficiary; and (iv) when an individual comes forward in a subsequent administration and files a claim with the court that he or she is a previously unlocated heir or beneficiary.

It is up to the court to determine if there is an unidentifiable or unlocatable heir or beneficiary whose share of the decedent's estate shall escheat to the State of Florida. The State then holds the funds for up to ten years for a valid claimant to step forward and claim the funds. If no valid claims are timely asserted, then the State's rights to the funds shall become absolute and the funds become part of the State School Fund.[4]



J. KURLAND

Jacqueline I. Kurland *is an Assistant Attorney General with the State of Florida, Office of the Attorney General and is responsible for handling all escheats for the State of Florida, Department of Legal Affairs. Miss Kurland has written articles and given many seminars on wills, trusts, estate planning, elder law, and probate issues. Miss Kurland has passed the C.P.A. exam and has an LL.M. degree in taxation.*

Endnotes

1 *Black's Law Dictionary* (10th ed., 2014).
2 4 James Kent, *Commentaries on American Law*, pages 423-423 (George Comstock ed., 11th ed. 1866).
3 *27A Am. Jur. 2d Escheat § 4.*
4 Fla. Stat. § 732.107(1) (2016).
5 Fla. Stat. § 732.103 (2016). Under Fla. Stat. §732.107(1) (2016), descent is per stirpes, whether to descendants or to collateral heirs.
6 Fla. Stat. § 733.816(1) (2016).
7 Fla. Stat. § 732.107(2) (2016).
8 Fla. Stat. § 733.816(2) (2016).
9 Fla. Stat. § 733.816(3) (2016).
10 *Id.*
11 Fla. Prob. R. 5.386(a).
12 Fla. Prob. R. 5.386(b).
13 *In re Estate of Faskowitz*, 941 So. 2d 390 (Fla. 2d DCA 2006).
14 *Practice Under Florida Probate Code*, (Eighth Edition, The Florida Bar, 2014).
15 *In re Tim's Estate*, 180 So. 2d 161 (Fla. 1965).
16 Fla. Stat. § 732.107(2).
17 Fla. Stat. § 733.816(1) (2016).
18 *Id.*
19 Fla. Stat. § 732.107(3) (2016) and Fla. Stat. § 733.816(3) (2016).
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Brushing Up On The Lis Pendens Bond, A Powerful Tool For The Property Holder In A Real Property Dispute

By Dane R. Ullian, Esq., Gould Cooksey Fennell, P.A., Vero Beach, Florida

A lis pendens is an easy, effective way for a purported purchaser, trust beneficiary, or other remote claimant to bind real property and thereby leverage a seller. Although a lis pendens does not technically enjoin a sale, a purchaser of property subject to a lis pendens essentially buys the litigation and the attendant risk of loss. Therefore, under most circumstances, a rational purchaser will decline to close on real property until the lis pendens is removed.

But the leverage that a lis pendens creates comes with risk to the claimant: a lis pendens bond. A lis pendens bond provides much more than security for a property holder. The bond forces a claimant to put "skin in the game" and subjects the claimant to a possible judgment for consequential damages arising from the lis pendens, which damages may include attorneys' fees and prejudgment interest. Where a lis pendens bond is required, the bond also likely serves as a cap on the property holder's consequential damages. Because lis pendens and lis pendens bond issues are often addressed on an emergency basis early in litigation, a working knowledge of the basic process can be invaluable to securing the best result for a client.

This article discusses the circumstances under which a property holder can secure a bond, the procedure for determining the bond amount, damages for an unjustified lis pendens, and the availability of interlocutory appeal for lis pendens bond rulings.

A Claimant Files a Notice of Lis Pendens

A claimant can file a notice of lis pendens on an ex parte basis.[1] Unlike an injunction, the claimant need not make any showing whatsoever to encumber real property in the first instance. Unless the property holder files a motion to dissolve, the lis pendens will be effective for at least one year. At a hearing on a motion to dissolve, however, the claimant bears the burden of proving the propriety of the lis pendens.

The standard to preserve a lis pendens is low. A claimant must show either that the litigation is based on a duly recorded instrument or that there is a fair nexus between the litigation and the encumbered real property.[2] A claimant shows a fair nexus by, for example, pleading with specificity that (1) the claimant has a contract to purchase the real property, (2) the claimant is a beneficiary of a trust that is misappropriating the real property, or (3) the claimant has a claim for an equitable lien against the real property. The claimant need not prove a likelihood of success on the merits of its case, but the case cannot be patently frivolous. Therefore, in many cases, a meritless lis pendens will cloud title for at least one year.

Moving for a Lis Pendens Bond

In conjunction with the initial motion to dissolve lis pendens, a property holder should move for an order requiring the claimant to post a lis pendens bond. A lis pendens bond is available whenever the lis pendens is not based on a "duly recorded instrument" or a statutory construction lien. The "duly recorded instrument" language has been interpreted fairly narrowly in the lis pendens context.

In *American Legion Community Club v. Diamond*, the Florida Supreme Court considered whether a claim that a deed was void because it was executed in violation of a corporation-grantor's bylaws was based on a duly recorded instrument.[3] The Court held that the claim was based not on the duly recorded deed but on the unrecorded corporate bylaws. Likewise, in *Betsy Ross Hotel v. A.G. Gladstone Associates*, the Third District Court of Appeal gave meaning to the word *duly* in "duly recorded instrument" and held that a joint venture agreement that failed to meet the statutory execution requirements for recorded documents was not "duly recorded" when it was stapled to a properly executed and recorded unilateral memorandum of agreement.[4] The content of the memorandum was irrelevant to the dispute, and the claimant could not circumvent the execution defect by attaching the joint venture agreement to a properly executed and recorded instrument. More recently, the Third District Court of Appeal has suggested that an action involving a duly recorded instrument is based on the duly recorded instrument only if the instrument itself "provides adequate notice to a good faith purchaser that there is a cloud on the title."[5] Given this narrow construction of "based on a duly recorded instrument," a lis pendens bond is at least arguably available in most lis pendens cases that do not involve statutory construction liens.

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Proving the Necessity and Amount of a Lis Pendens Bond

Although a lis pendens bond is available for any lis pendens not based on a "duly recorded instrument" or a statutory construction lien, the property holder must make a showing that a bond is necessary and must substantiate the bond amount. A property holder is not entitled to a lis pendens bond as a matter of course. Rather, the Florida Supreme Court holds that "it is within the trial court's discretion to determine whether to require the lis pendens proponent to post a bond."[6] Occasional appellate cases have suggested that a lis pendens bond is mandatory, but the cases should instead be read as holding that, where a property holder makes a sufficiently compelling showing, a trial court abuses its discretion if it fails to require a bond.[7]

The showing required to establish the need for a lis pendens bond and to establish an appropriate bond amount are inextricably linked. A property holder establishes the need for a lis pendens bond upon showing that "damages will likely result to [the property holder] in the event the notice of lis pendens is unjustified."[8] If the trial court elects to require a bond, "[t]he amount should bear a reasonable relationship to the amount of damages which the property-holder defendant demonstrates will likely result if it is later determined that the notice of lis pendens was unjustified."[9] Thus, a property holder must demonstrate—in an evidentiary hearing[10]—the likelihood of damages and the approximate amount of damages anticipated.

A lis pendens is an easy, effective way for a purported purchaser, trust beneficiary, or other remote claimant to bind real property and thereby leverage a seller.

The lis pendens bond amount has tremendous significance. A high bond amount can effectively end the litigation for an undercapitalized claimant. If the claimant posts a bond, the property holder has security against which to recover compensation for losses attributable to a wrongful lis pendens. But the security comes at a cost: the lis pendens remains effective, and the property holder's potential lis pendens damages are capped at the bond amount.[11] A poor showing in the lis pendens bond hearing can echo for the remainder of the litigation.

A few federal cases applying Florida law have stated that the appropriate amount for a lis pendens bond is the value of the encumbered real property.[12] This proposition, however, is contradicted by the Florida Supreme Court's requirement that a lis pendens bond amount bear a reasonable relationship to the amount of damages the property holder will likely suffer as a result of the lis pendens. Even when a lis pendens scuttles a sale, the property holder does not lose the entire value of the real property. Rather, the property holder's damages will be limited to provable consequential damages such as transactional costs, carrying costs, depreciation or lost profits, and costs to obtain dissolution of the lis pendens.[13]

The Fourth District Court of Appeal, adopting the reasoning of a California lis pendens case, has repeatedly held that "the proper method of measuring damages for wrongful filing of lis pendens [is] the difference between the fair market value at the time of the filing of the lis pendens and the fair market value at the time of its termination, plus any consequential damages, including attorney's fees."[14] Absent evidence of extraordinary circumstances, there is no basis to conclude that, during the effective life of a lis pendens, the value of the encumbered real property will depreciate to $0. Therefore, imposing a lis pendens bond for the full value of the encumbered real property, while expeditious, deviates from the Florida Supreme Court's standard for a proper lis pendens bond amount.

Interlocutory Appeals Involving Lis Pendens Bonds

The losing party on a motion to dissolve lis pendens and on a motion to set lis pendens bond suffers a meaningful tactical defeat in litigation. If a frivolous lis pendens remains undisturbed, particularly absent a satisfactory bond, a claimant can hold real property hostage with expensive, protracted litigation. Likewise, a meritorious claim to real property loses much value if the lis pendens is dissolved. By the time the claimant receives his or her paper judgment, the real property may be in the hands of a bona fide purchaser. Even a claimant subjected to an excessive lis pendens bond (such as for the full value of encumbered real property) may, if he or she cannot afford to post the bond, effectively lose the case before reaching the merits. Thus, with a lis pendens in particular, interlocutory appeal is vital.

In a few enumerated instances, interlocutory appeals are available of right. For all other interlocutory orders, the aggrieved party must resort to common law certiorari. An order involving a lis pendens is not listed among the enumerated instances in which an interlocutory appeal is available of right, and historically, courts have reviewed orders regarding a lis pendens under the certiorari standard. A few cases from the Third District Court of Appeal, however, have held that a lis pendens is analogous to a temporary injunction (which is appealable of right under Rule 9.130(a)(3)(B)) and therefore subject to interlocutory appeal of right. This reasoning has not been adopted by other district courts and appears to have been receded from by some of the most recent lis pendens

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cases from the Third District Court of Appeal.[15] Thus, a party who wishes to appeal an interlocutory order involving a lis pendens should generally rely upon certiorari jurisdiction.

An appellant on certiorari review bears the burden of showing "a departure from the essential requirements of law causing material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal."[16] Few lis pendens cases engage in meaningful analysis of the material injury/no appellate remedy element of certiorari review. The element appears to be treated as a given. Certainly, wrongful dissolution of a lis pendens "deprive[s] [a claimant] of its status as a secured creditor in th[e] litigation, which is a material injury that cannot be remedied on direct appeal."[17] Likewise, the perpetuation of a wrongful lis pendens, "because [it] operates as a cloud on the title and prevents an owner from selling or dealing with it," is a material injury not remediable on appeal.[18]

It is less clear how the material injury/no appellate remedy analysis applies to lis pendens bond appeals. Nevertheless, numerous appellate cases grant certiorari relief as to orders requiring a lis pendens bond, discharging a lis pendens bond, and declining to impose a lis pendens bond.[19] These cases impliedly hold that imposition or denial of a lis pendens bond causes material injury for which there is no adequate remedy on direct appeal. Thus, irrespective of the basis for appellate jurisdiction, interlocutory review is broadly available for orders dissolving or declining to dissolve a lis pendens and for orders requiring or declining to require a lis pendens bond.

Recovering Damages Against a Lis Pendens Proponent

Upon dissolution of a lis pendens, the property holder will frequently seek to recover damages against the lis pendens bond or, if no bond was required, directly against the claimant. Courts have used varied terms to describe the circumstances under which a property holder can recover damages upon dissolution. In many cases, the court will state that damages are available to compensate for the harm caused by an *unjustified* or *wrongful* lis pendens. While this language suggests some sort of intent component, courts do not appear to inquire into the claimant's state of mind. It is more frequently implied than stated, but courts appear to believe that demonstrable damages are available any time a lis pendens is dissolved because the dissolution itself constitutes a judicial determination that the notice of lis pendens was wrongfully filed.[20]

The standard for proving damages in a lis pendens case is no different than in any other action for consequential damages. The property holder must show that the wrongful lis pendens caused the damages.[21] When the property holder seeks damages based on a lost sales opportunity, "a wronged seller must show a diligent yet unsuccessful attempt to resell the property after the buyer breached the agreement."[22] This requires a ready, willing, and able buyer under a bona fide contract that declined to proceed due to the notice of lis pendens. Interestingly, even where a lis pendens scuttles a bona fide sale, a property holder's damages may be set off partially or completely by an increase in the property's fair market value during the life of the lis pendens. Reasoning that the lis pendens prevented sale at a lower price and therefore benefits the wrongfully encumbered property holder, numerous Florida cases hold that an increase in market value can be a setoff for damages for a wrongful lis pendens.[23]

Attorneys' fees incurred to defend against a wrongful lis pendens are recoverable against a lis pendens bond as consequential damages.[24] It is less clear whether attorneys' fees are recoverable even if no lis pendens bond was posted. *S&T Builders*, in which the Florida Supreme Court clarified that attorneys' fees are recoverable consequential damages, considered attorneys' fees in the context of setting a lis pendens bond amount and therefore did not resolve whether attorneys' fees are recoverable when no bond is posted. Among the appellate courts to consider whether attorneys' fees are recoverable for a wrongful lis pendens absent a lis pendens bond, there is a split. The Third and Fourth District Courts of Appeal, relying on a Florida Supreme Court case in the injunction context, hold that a property holder may recover attorneys' fees discharging a wrongful lis pendens notwithstanding the absence of a lis pendens bond.[25] In *Tampa Bay 1 v. Lorello Cypress Family, L.P.*, the Second District Court of Appeal, relying at least in part upon a now-overruled case, held otherwise.[26] *Tampa Bay 1* predates *S&T Builders* but was not expressly considered by the Florida Supreme Court. Thus, for the time being, there is a split between the District Courts of Appeal regarding whether attorneys' fees are recoverable upon successfully dissolving a lis pendens for which no bond was posted.

Conclusion

The lis pendens is a powerful tool for a claimant in litigation. As a counterbalance, courts have developed a comprehensive scheme to protect property holders. A working knowledge of the procedure and the consequences of a lis pendens and lis pendens bond can enable an attorney—whether for the claimant or for the property holder—to avoid dangerous pitfalls and to maximize the likelihood of a positive outcome for the client.



D. ULLIAN

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Endnotes

1 *See* Fla. Stat. § 48.23.

2 *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 (Fla. 1993).

3 *See Am. Legion Cmty. Club v. Diamond*, 561 So. 2d 268 (Fla. 1990).

4 *See Betsy Ross Hotel v. A.G. Gladstone Assocs.*, 833 So. 2d 211, 214 (Fla. 3d DCA 2002).

5 *100 Lincoln Rd. SB, LLC v. Daxan 26 (FL), LLC*, 180 So. 3d 134, 137 (Fla. 3d DCA 2015); *see also Van Coppenolle v. Falcone*, 802 So. 2d 462, 463 (Fla. 4th DCA 2001) (holding that a lis pendens based on a marital settlement agreement that was adopted by a recorded judgment is not based on a duly recorded instrument "[b]ecause the recorded judgment would not put third parties on notice that petitioner has a claim against any identifiable property").

6 *Med. Facilities Dev. v. Little Arch Creek Props.*, 675 So. 2d 915, 916 (Fla. 1996).

7 *See Empire Ocean Residence Realty, LLC v. CDR Creances, S.A.S.*, 44 So. 3d 179, 180 (Fla. 4th DCA 2014) (reversing a trial court's decision not to require a lis pendens bond because "the petitioners showed that they will likely suffer damages from the lis pendens [and] demonstrated the amount of the potential damages"); *Hotel Eur. v. Aouate*, 766 So. 2d 1149, 1152 (Fla. 3d DCA 2000) (stating in *dicta* that "the trial court was obligated as a matter of law to require Aouate to post a bond to maintain the lis pendens" but later noting that "a property holder's right to a bond for a notice of lis pendens is conditioned upon his or her demonstration of a *potential* loss or damage he or she will likely incur if the notice of lis pendens is unjustified" (emphasis in original)).

8 *Med. Facilities Dev.*, 675 So. 2d at 916.

9 *Id.* at 918 n.2.

10 *See Santa Catalina Townhomes, Inc. v. Mirza*, 925 So. 2d 1147, 1148 (Fla. 4th DCA 2006) ("[T]he trial court is authorized to require a lis pendens bond, after affording the parties an evidentiary hearing on the issue of whether the holder of the property is likely to incur damage, and the amount thereof, if the lis pendens notice is unjustified."); *Betsy Ross Hotel*, 833 So. 2d at 212 ("Before setting bond the court is to afford the parties an evidentiary hearing on the issues of whether the property holder would likely incur damage if notice of lis pendens was unjustified, and the amount of such damages.").

11 *See S&T Builders v. Globe Props.*, 944 So. 2d 302, 305 (Fla. 2006) (citing *Parker Tampa Two, Inc. v. Somerset Dev. Corp.*, 544 So. 2d 1018, 1019 (Fla. 1989)).

12 *See, e.g. Pierre v. Charles*, 2014 U.S. Dist. LEXIS 149257, at *7 (S.D. Fla. Oct. 20, 2014); *Frank v. Ocean 4660, LLC*, 2011 U.S. Dist. LEXIS 123934, at *14 (S.D. Fla. Oct. 26, 2011).

13 *See Haisfield v. ACP Fla. Holdings, Inc.*, 629 So. 2d 963, 966–67 (Fla. 4th DCA 1993).

14 *FCD Dev., LLC v. S. Fla. Sports Comm'n, Inc.*, 37 So. 3d 905, 909 (Fla. 4th DCA 2010) (quotation marks omitted); *see also S&T Builders v. Globe Props., Inc.*, 909 So. 2d 375, 376 (Fla. 4th DCA 2005); *Haisfield*, 629 So. 2d at 965.

15 *See, e.g. 100 Lincoln Rd. SB, LLC*, 180 So. 3d at 136; *Nobe Bay Holdings, LLC v. Garcia*, 140 So. 3d 693, 694 (Fla. 3d DCA 2014); *Empire Ocean Residence Realty, LLC*, 44 So. 3d at 180.

16 *100 Lincoln Rd. SB, LLC*, 180 So. 3d at 136 (quotation marks and alterations omitted).

17 *Phoenix Walls, Inc. v. Liberty Pasadena, LLC*, 980 So. 2d 1286, 1286 (Fla. 2d DCA 2008).

18 *Tetrault v. Calkins*, 79 So. 3d 213, 215 (Fla. 2d DCA 2012) (quotation marks omitted).

19 *See Nobe Bay Holdings, LLC*, 140 So. 3d at 695; *Empire Ocean Residence Realty, LLC*, 44 So. 3d at 180; *Haven Ctr., Inc. v. Meruelo*, 995 So. 2d 1166, 1168 (Fla. 3d DCA 2008).

20 *See S&T Builders*, 944 So. 2d at 305 ("'Implicit in the trial court's ruling dissolving an injunction is that this injunction was wrongfully issued, which thus gives rise to attorney's fees and costs as damages.'") (quoting *Town of Davie v. Sloan*, 566 So. 2d 938, 939 (Fla. 4th DCA 1990)) (alterations omitted).

21 *See Levin v. Lang*, 994 So. 2d 445, 446 (Fla. 3d DCA 2008).

22 *FCD Dev., LLC*, 37 So. 3d at 910 (quotation marks omitted).

23 *See id.*; *Levin*, 994 So. 2d at 447; *Haisfield*, 629 So. 2d at 966.

24 *S&T Builders*, 944 So. 2d at 305.

25 *See Abner v. Johnson*, 56 So. 3d 137, 139 (Fla. 4th DCA 2011); *McMillan Miami, LLC v. Krystal Capital Managers, LLC*, 1 So. 3d 312, 314 (Fla. 3d DCA 2009) (citing *Provident Mgmt. Corp. v. City of Treasure Island*, 718 So. 2d 738 (Fla. 1998)).

26 *Tampa Bay 1 v. Lorello Cypress Family, L.P.*, 821 So. 2d 434, 437 (Fla. 2d DCA 2002).

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New Annual Reporting For Foreign-Owned Disregarded Entities

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

Effective as of December 13, 2016, the U.S. Treasury Department and Internal Revenue Service issued final regulations requiring (1) domestic disregarded entities (2) that are wholly owned, directly or indirectly, by a foreign owner (3) with a "reportable transaction" between the entity and its foreign owner or other related parties, and (4) having a taxable year beginning after December 31, 2016, and ending on or after December 13, 2017, to file Form 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business) that identifies the foreign owners and certain related party transactions, and to maintain detailed records of such transactions. Such disregarded entities, referred to as a "reporting corporation," will be treated as a domestic corporation for the limited purpose of reporting and recordkeeping requirements under Section 6038A of the Internal Revenue Code.

Prior to these regulations, such disregarded entities were generally not required to file any U.S. tax or information returns. The new reporting requirements are an effort to respond to the increasing global concern of tax evasion and money laundering, and in particular that the U.S. is a tax haven for foreign nationals to avoid disclosure of assets in the United States to their home country tax authorities. According to the preamble of the regulations, the information collected "will enhance the United States' compliance with international standards of transparency and exchange of information for tax purposes and will strengthen the enforcement of U.S. tax laws." Hence, expect that the ownership and related party transaction information collected by the IRS on Form 5472 will be shared with foreign country governments pursuant to information-sharing agreements.

The final regulations significantly expand the class of reportable transactions that trigger a Form 5472 filing obligation, including (without limitation), property sales, leases, loans, assignments, and amounts paid or received in connection with services, formation, dissolution, acquisition and disposition of the entity, with no de minimis exception. For example, simply funding a disregarded LLC will trigger a Form 5472 filing obligation. In addition, even disregarded entities that have no U.S. assets or U.S. source income will be obligated to file Form 5472 and report ownership information if it has a reportable transaction.

Form 5472 will be used to collect various types of information about the foreign-owned disregarded entity, including total assets of the entity, the direct and ultimate indirect foreign owners of the entity, and related party transactions. Reporting corporations will be required to obtain a U.S. tax identification number (ITIN, or an employer identification number (EIN)) in order to file Form 5472. Therefore, the reporting corporation will need to file a Form SS-4 to get an ITIN/EIN. Form SS-4 requires the applicant to disclose the name and taxpayer identification number (SSN, ITIN, or EIN) of the responsible party of the entity that controls, manages, or directs the applicant entity and the disposition of its funds and assets. Therefore, the responsible party must have a SSN, ITIN, or EIN, or otherwise apply for one.

Notably, if a disregarded foreign-owned entity liquidates (or otherwise terminates its taxable year) before December 13, 2017, such entity need not file Form 5472. Furthermore, if a disregarded foreign-owned entity has no reportable transaction in the year, then such entity need not file Form 5472 for such year.

Failure to timely file Form 5472 or maintain the records required by the regulations can result in substantial penalties against the entity, including a $10,000 penalty against the entity for each violation, and potential criminal penalties.

Foreign-owned disregarded entities and their foreign owners should promptly consider the impact of these new reporting and record maintenance requirements, as well as whether a change to their structure is warranted or desired and can be effected before the December 13, 2017 reporting deadline.

Endnote

1 T.D. 9796, 81 FR 89849 (Dec. 13, 2016).

Applying The Marketable Record Title Act

By Scott M. Work, Clark, Partington, Hart, Larry, Bond & Stackhouse, P.A., Destin, Florida

For many of us that have tried to tackle an issue under the Marketable Record Title Act (MRTA), Chapter 712, Florida Statutes, it can be challenging. MRTA involves difficult concepts and uses uncommon terminology that can make it confusing. However, a number of decisions interpreting MRTA by the Florida Supreme Court and the District Courts have shed considerable light on its operation and effect. At its most basic, determining whether MRTA applies to a given title document can be broken down into a few steps.

The first step is determining the "root of title" for the subject property. The root of title is defined in Fla. Stat. § 712.01(2), as the most recent applicable title transaction that is at least thirty years old from the date of the transaction or lawsuit in which you are attempting to apply MRTA. Most often, the root of title will be a deed or similar document. In a situation where the root of title is not a deed, the practitioner should make sure that the document purporting to be the root of title is a "title transaction." "Title transaction" is defined in Fla. Stat. § 712.01(3), as a recorded instrument or court proceeding which affects title to the subject property and sufficiently describes the subject property so that one can identify its location and boundaries.

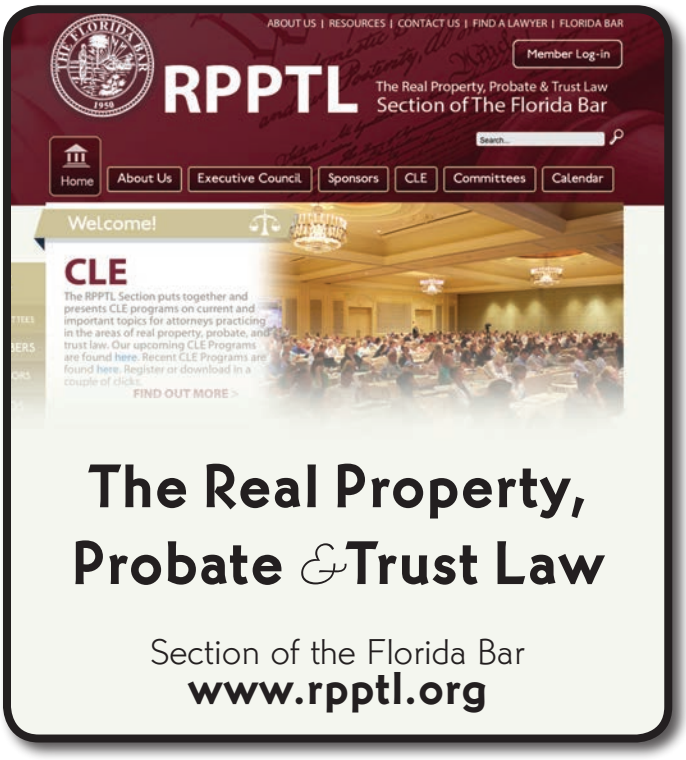
The next step is to determine what interests or matters may be extinguished by MRTA. Subject to the exceptions found in Fla. Stat. § 712.03, MRTA generally extinguishes "all estates, interests, claims, or charges whatsoever . . . that occurred prior to the effective date of the root of title." Put another way, except for the interests excepted in Fla. Stat. § 712.03, interests that are older than the root of title are extinguished by MRTA and interests created after the recording date of the root of title are not extinguished.

If the interest being examined predates the root of title, the next step is to determine if the interest falls within one of the enumerated exceptions in Fla. Stat. § 712.03. Interests which fall within one of the exceptions may not be extinguished by MRTA, even if they predate the root of title.

When determining whether a particular exception applies, it is important for the practitioner to pay attention to the defined terms used in Fla. Stat. § 712.03. For example, Fla. Stat. § 712.03(1), uses the term "muniment of title", which is not defined in Ch. 712, Fla. Stat., but has been defined by the Courts.[1] Thus, the practitioner should test whether the document disclosing the estate, interest, easement or use restriction is also a "muniment of title." Section 712.03(1) and (4), Fla. Stat. also use the term "title transaction," so the practitioner should test whether the document being relied upon also meets the definition of "title transaction."

Endnotes

1 *Florida Dept. of Transp. v. Clipper Bay Investments, LLC,* 160 So. 3d 858 (Fla. 2015) and *Matissek v. Waller*, 51 So. 3d 625 (Fla. 2d DCA 2011).



RPPTL Section Executive Council Meeting
The Walt Disney Board Walk Inn, Orlando, Florida
Thursday, October 6-8, 2016



John Neukamm realizes that Rohan Kelley's lens is bigger than his - pretty much everyone's for that matter



Drew O'Malley, Lanse Scriven and Rohan Kelley at EC meeting



Bob Goldman presents Amicus Update at EC meeting

View Photo Albums at **www.rpptl.org**



Kris Fernandez presents on Leadership Academy at EC meeting



Bre Janson, guest, Debbie Goodall and Deb Boje and at bowling night.

Entry to the BoardWalk Inn (below)



Photos by John Neukamm, Silvia Rojas, Michael Gelfand and Jeffrey Baskies



Pluto visits with Gunster attorneys, Nick Curley and Deb Boje



Salome Zikakis, DALE, Kathy Neukamm, Susan Dunbar, Suzanne Hearn, Sarah Butters and Cindy Basham and CHIP (not Waller).



RPPTL character breakfast



Inside the BoardWalk Inn



The Boardwalk Inn - Lake Buena Vista/Disney



Which One Is Goofy?
Debbie Goodall, Deb Boje and Rob Freedman with Goofy



Rob, Sheri and Alexis Freedman with guest, Gabe



Michael Gelfand applies the "cone of silence"

RPPTL – Disney October 2016

Thursday - 5:00pm – 7:30pm Group Dinner (Salons 4–6)
Friday - 7:30am – 10:00am Group Breakfast (Salons 4–6)
Friday - 11:30am – 1:30pm Group Lunch (Salons 4–6)
Friday - Dinner TBA

Games are available for those who may get bored in Salons 4 – 6 during the day.

All committee meetings on Friday are cancelled.

As of Thursday: Saturday EC meeting will be running as scheduled.

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Thursday, October 6, 2016 - 3:00-5:00 p.m.
The Walt Disney World BoardWalk Inn
Lake Buena Vista, Florida

Prepared by Jennifer Jones Bloodworth, Esq., Winter Park, Florida

**Due to the schedule changes as a result of Hurricane Matthew, most committee meetings were cancelled and no action items were heard at the Roundtable held on Thursday, October 6, 2016. Additionally, the Roundtable meeting was supplemented by a conference call open to all Division members on Friday, October 14, 2016, at 3:00 p.m. This summary includes information from both meetings.*

Thank you to the Roundtable Sponsor, Fidelity National Title Group

Meeting opened at 3:00 p.m. by Real Property Law Division Director, Rob Freedman.

Sponsor Announcement. The Division Director thanked the Roundtable Sponsor, Fidelity National Title Group.

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

INFORMATIONAL AND ADMINISTRATIVE MATTERS:

Agenda items for the next Executive Council Meeting. The Division Director advised that in order for any materials to be included in the Executive Council Agenda for the December meeting, they must be submitted in final form by November 20, 2016.

Real Property Litigation – Susan K. Spurgeon, Chair; Manuel Farach and Marty J. Solomon, Co-Vice Chairs. Discussion was had regarding the potential impact of the recent 4th DCA case, *Ober v. Town of Lauderdale-by-the-Sea* and the importance of revising the statute in 2017 in response to the decision. The Committee will continue working on the revisions in order to have proposed legislation ready for the 2017 Legislative session.

Open/Expired Permits Task Force: Lee A. Weintraub and Michael S. Tobin, Co-Chairs. Lee presented the current status of negotiations on legislation to make it easier to close open and expired permits. The Task Force is aiming to have uncontested proposed legislation for the 2018 Legislative Session. Currently, the contentious items include: (1) the Task Force wants the building code that applied at the time the permit was issued to apply at the time the owner is trying close the permit, while building officials want the current code to apply; and (2) the building officials want the owners to comply with local ordinances as well as the statute, while the Task Force wants to ensure that only the local ordinances that are not in conflict with the proposed legislation will be enforceable. Discussion was had about garnering support for the proposed legislation from different sections of the Florida Bar and different industry groups. Pete Dunbar, Nicole Kibert, and Rob Freedman agreed to assist the Task Force members in getting the proposed legislation in front of the Business Law Section of the Florida Bar, the City, County, and Local Government Law Section of the Florida Bar, as well as various industry groups for engineers and building officials.

Residential Real Estate and Industry Liaison: Salome J. Zikakas, Chair; Louis E. "Trey" Goldman, Nicole M. Villarroel and James Marx, Co-Vice Chairs. Fred Jones presented a summary of the proposed changes to and current negotiations concerning the FRBAR contract. Open items include how to revise provisions affecting the following: (1) municipal lien searches; (2) open permits; (3) financing contingency; and (4) HOA Riders. Fred asked interested Section members to follow up with him and the RREIL committee on how these items currently are handled in the closing process and how the members believe these items should be handled in the closing process. The Committee plans to have a revised FRBar Contract to present to the Executive Council for approval at the next meeting. Salome Zikakas agreed to schedule conference calls and initiate email discussions to address these items in order to obtain a consensus.

Amicus Coordination: Hon. Kenneth Bell, Gerald Cope, Jr., Robert Goldman, and John Little, III, Co-Chairs. Robert

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presented on two cases for which the Section will be submitting amicus briefs. The first is in connection with the *Ober v. Town of Lauderdale-by-the-Sea* case. A draft is expected in the week following this meeting and is due to be filed approximately two weeks after this meeting. The second is in connection with *Save Calusa Trust v. St. Andrews Holdings, Ltd*. The Florida Supreme Court has not yet accepted jurisdiction; however, the Section has filed a notice of intent to file an amicus brief in the event the Florida Supreme Court does accept jurisdiction.

COMMITTEE REPORTS:

Membership and Inclusion Committee: Lynwood Arnold, Jr., Jason Ellison, Co-Chairs. Jason presented on the success the Committee has had with getting law students to attend the Executive Council meetings.

Friday, October 14, 2016 - 3:00-4:00 p.m.

ADDENDUM MEETING - CONFERENCE CALL

Prepared by Anne Pollack, Esq. Tampa, Florida

The call began at 3:03 p.m. by Real Property Law Division Director, Rob Freedman.

Sponsor Announcement. The Division Director thanked the Roundtable Sponsor, Fidelity National Title Group and recognized Pat Hancock representing the sponsor.

Introduction of Guests: The Division Director opened the floor for introductions of the law students and other guests in attendance. None were in attendance.

Breakers Meeting Summary: The Division Director referred to the summary of the prior meeting and explained that because it is a summary, not minutes, it required no approval.

Update on "No Place Like Home" Project, Larry Miller and Mike Bedke. Larry Miller presented on the status of the project. The committee met with At Large Members. They are beginning with four pilot jurisdictions, and will then roll it out state wide. Materials are ready, and efforts to get sign-ups and funding continues. Funding is required for title searches (at cost), filing fees, and any other related expenses required to perfect title. They are looking for corporate sponsors. They are targeting the next group of 3 to 4 jurisdictions, with the assistance of the ALMs, and are looking for Section members (Real Property and Probate) to train, or to be trained, on perfecting title.

INFORMATIONAL ITEMS:

Recommencement of Approved RPPTL Section Position - Assignment of Multiple Tax Parcel Identification Numbers to Multiple Parcels within One Building – Adele Stone. The report explained that this is an issue in Miami-Dade and several other counties. The tax assessor will not give separate folio numbers when there is separation of the land ownership from a portion of the improvement. For example, hotel, retail, and condominiums, will only get one folio number, making it difficult to finance these individual portions. The language proposed in 2014 was approved by the Section, but was too late to get onto the bill. There is hope that it will make it to the upcoming session, and Steve Mezer is working to keep this moving.

DISCUSSION ITEMS:

Open/Expired Permit Task Force – Lee A. Weintraub, Co-Chairs and Michael S. Tobin. Lee presented the current status of the bill drafted to create a procedure for sellers of property to close out building permits that weren't properly closed. The building officials continue to review the proposal, and the biggest issue remains agreeing on a procedure to close out the permits. Once that is finalized, other issues can be discussed. The Florida Homebuilders Association and other groups are also reviewing it. The goal is to discuss this as an information or action item at the next Executive Council meeting. The Division Director expressed his desire to have a joint committee meeting of all committees dealing with this bill at that meeting.

Draft Changes to Lis Pendens Statute in response to *Ober* – Susan K. Spurgeon. Susan provided a status of the Section's response to the recent 4th DCA case, *Ober v. Town of Lauderdale-by-the-Sea*. They are working on legislation (expected to be heard in 2018) to get the Legislature to clarify its intent as to the length of time a lis pendens should remain in effect, through the judicial sale process, and through the issuance of a certificate of title. It is anticipated that cities and counties will oppose the proposed legislation.

Preview of Key West Meeting

(i) RPPTL Position Statement in Opposition to DFS Rule on Unlawful Inducements. Raul Ballaga announced that this has been tabled for now.

(ii) Preview of Changes to FRBar Contract – Fred Jones and Jamie Marx. Fred presented and referenced the materials and explained the multitude of changes being proposed to the FRBar contract. Salome Zikakas explained that the RREILs committee will be discussing revisions to the contract at its meeting, and does not expect it to be ready as an item at the next Executive Council meeting.

Update on Florida Bar Leadership Academy – Kris Fernandez. Kris explained the RPPTL scholarship program for the Florida Bar Leadership Academy. They are looking for people with 3-5 years of practice to attend the academy. The goal is to identify future leaders. Applications for the scholarship will be accepted beginning December 1, 2016. The scholarship is for $3,500 for the year. Section leadership selects the winners.

CLE Best Practices Manual – Bob Swaine. This matter was tabled to the next Executive Council meeting.

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DISCUSSION ITEMS:

COMMITTEE REPORTS:

Real Property Litigation – Susan K. Spurgeon, Chair; Manuel Farach and Marty J. Solomon, Co-Vice Chairs. Susan presented on the two items they are working on. The Committee is working with Dale Bonner, counsel to the Hillsborough County Clerk, on proposed legislation regarding distribution of excess proceeds from a tax sale. The Committee also created a joint subcommittee on remote notaries to consider legislation, like Virginia's, that would allow a notary and person to meet by video conference.

Real Property Finance & Lending – David R. Brittain, Chair; E. Ashley McRae, Richard S. McIver and Robert G. Stern, Co-Vice Chairs. David presented on the recent committee meeting at which Jennifer Tobin gave a presentation on assignments of loan documents without the original note. The Committee discussed other future webinars, and had an extensive discussion on the *Ober* case and its implications.

Real Estate Certification Review Course – Jennifer Slone Tobin, Chair; Manuel Farach, Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs. All speakers are lined up and on track for the January 2017 course in Orlando.

Insurance & Surety – Wm. Cary Wright and Scott P. Pence, Co-Chairs; Frederick R. Dudley and Michael G. Meyer, Co-Vice Chairs. Scott reported and reminded members of the Risk Management CLE series which is intended to cover insurance topics for real property and probate attorneys.

Development & Land Use Planning – Vinette D. Godelia, Chair; Julia L. Jennison, Vice Chair. Vinette reported that the beginner land use videos have been posted to the Committee's website, and the Committee is working with the Section to send out information to the members.

Construction Law – Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs. Scott reported that the planned CLE will be rescheduled to the next Executive Council meeting.

Condominium and Planned Development – William P. Sklar, Chair; Alexander B. Dobrev and Kenneth S. Direktor, Co-Vice Chairs. Alex reported. The Committee has formed an Arbitration Task Force to evaluate issues and propose solutions with respect to condominium-related arbitrations administered by the Division of Condominiums, Timeshares and Mobile Homes. A Condominium Terminations Task Force has also been formed to address concerns raised by legislators about the application of recent (2015) legislative changes to the statutory condominium termination process.

The Meeting was adjourned at 3:45 p.m..

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Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Thursday, October 6, 2016
Disney's BoardWalk Resort, Orlando, Florida

Prepared by Gail Fagan, Esq. Sarasota, Florida

The following briefly summarizes presentations at the Division Roundtable.

Thank you to the Roundtable Sponsors, Stout Risius Ross and Guardian Trust.

The Director of the Probate and Trust Law Division of the Real Property, Probate and Trust Law ("RPPTL") Section of the Florida Bar, Debra Boje, called the meeting to order at 3:30 p.m. Many of the committees did not meet because of Hurricane Matthew.

Sponsor Announcement. The Division Director acknowledged the sponsors of the Roundtable meeting, Stout Risius Ross, Inc. and Guardian Trust.

Committee Reports

Asset Protection – George Karibjanian, Chair: Ms. Boje reported that this Committee's meeting had been cancelled due to Hurricane Matthew. Ms. Boje reported that the Committee continues to review and discuss the Uniform Voidable Transactions Act ("UVTA"). Bill Hennessey reported that he is working on a presentation for the Executive Committee regarding the UVTA legislation.

Attorney/Trust Officer Liaison Conference – Laura Sundberg, Chair: Ms. Boje reported that the Committee is considering moving the next few meetings to August in order to boost attendance.

Digital Assets and Information Study Committee – Eric Virgil, Chair: Ms. Boje reported that this Committee's work has concluded.

Elective Share Review Committee – Lauren Detzel and Charlie Nash – Co-Chairs: Ms. Boje reported that this proposed legislation will be an action item at the Executive Committee Meeting. The legislation will be filed this session.

Estate and Trust Tax Planning – David Akins, Chair: Ms. Boje reported that the Committee is working with the Tax Section to prepare joint comments to the proposed Regulations to Section 2704 of the Internal Revenue Code.

Guardianship, Powers of Attorney and Advance Directives – Hung Nguyen, Chair: Ms. Boje reported that there are new rules coming in for professional guardians. Also, she reported that the Committee is working on legislation responding to certain recent cases.

IRA, Insurance and Employee Benefits – L. Howard Payne and Kristen Lynch – Chairs: Linda Griffith reported on a recent Florida Supreme Court Case regarding stranger-owned life insurance.

Liaisons with Elder Law Section – Charlie Robinson and Marjorie Wolasky: It was reported that RPPTL is working on an amicus brief in the case *Smith v. Smith*, 199 So. 3d 911 (Fla. 4th DCA 2016), which is currently on appeal to the Florida Supreme Court. On appeal, the Fourth DCA affirmed the trial court's decision that a ward's marriage was void because he had not obtained court approval prior to marriage.

Liaisons with Tax Law Section – Lauren Detzel, Bill Lane, Brian Sparks and Don Tescher: Ms. Boje reported that the UVTA project, which is discussed above, is the only project that the Section is currently working on with the Tax Section.

Principal and Income Act – Ed Koren, Chair: Pam Price reported that the Committee is working on revising the Principal and Income Act, Chapter 738, Florida Statutes.

Probate and Trust Litigation – Jon Scuderi, Chair: No report.

Probate Law and Procedure – John Moran, Chair: Ms. Boje reported that the proposed Will Depository legislation will be an action item at the Executive Committee Meeting.

Trust Law – Angela Adams, Chair: Angela Adams reported that the benefit of the beneficiary legislation would be an action item at the Executive Council Meeting. The purpose of the legislation is to reaffirm that a trustee must administer the trust in accordance with the settlor's intent rather than for the benefit of the beneficiary.

Wills, Trusts and Estates Certification Review Course – Laura K. Sundberg, Chair: Ms. Boje reported that the Committee was considering possible modifications to the review course to focus on more sophisticated issues.

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Ad Hoc Committee Reports

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair: David Brennan reported that the Committee is drafting a brand new Chapter 744 with a target for a 2018 enactment date.

Ad Hoc Study Committee on Estate Planning Conflict of Interest – Bill Hennessey, Chair: Bill Hennessey reported that the proposed legislation regarding fiduciary fee disclosures is still on hold and that the change to the Florida Rules of Professional Conduct, which mirrors the proposed revisions to the statute, is still before the Florida Supreme Court.

Ad Hoc Study Committee on Jurisdiction and Service of Process – Barry Spivey, Chair. Barry Spivey reported that the Committee will present an information item at the Executive Council Meeting. The proposed legislation amends Fla. Stat. §736.08135 (2016) to clarify that Fla. Stat. § 736.08135(3) does not limit the beginning period for which a trustee of an irrevocable trust is required to render a trust accounting to beneficiaries and Fla. Stat. §736.1008 to clarify when any limitations or laches period begins to run for a beneficiary's claim or cause of action against a trustee for breach of trust based upon the trustee's failure to provide a trust accounting as required by law.

Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST) – Jeffrey A. Baskies and Thomas M. Karr, Co-Chairs: Tae Kelley Bronner reported that the Committee's proposal will be an action item at the Executive Council Meeting.

Ad Hoc Study Committee on Spendthrift Trust Issues – Lauren Detzel and Jon Scuderi, Co-Chairs: Ms. Boje reported that this Committee's legislation was temporarily tabled.

Adjournment. Ms. Boje concluded the Roundtable meeting at 4:30 p.m. The next Probate and Trust Law Division Roundtable meeting will be held on Saturday, December 10, 2016 at 9:00 a.m., Westin Key West, in Key West, Florida.

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IRS Issues Welcome Guidance On Portability Planning

By Rose Wilson, Esq., Buchanan Ingersoll & Rooney, P.C., Tampa, Florida

When portability was enacted in 2010, some estate planners believed that strategic use of a QTIP (Qualified Terminable Interest Property) election in combination with a portability election presented a new estate planning opportunity. This planning strategy utilized a wait-and-see approach to determine if appreciation or depreciation of assets following the death of the first spouse to die would make it more advantageous to apply the estate tax exemption at the death of the first spouse to die or to apply the DSUE (Deceased Spousal Unused Exclusion Amount) at the death of the surviving spouse. As explained below, it was believed that the selection between these two options could be delayed until the death of the surviving spouse using the provisions of an older Revenue Procedure, at which time it would be known which of the two options was preferable.

The ability to choose between application of the decedent's estate tax exemption or the DSUE at the death of the surviving spouse appeared to be available if the decedent's assets were placed in a QTIP-able trust and the executor made both a portability election and a QTIP election. If the assets in the QTIP trust appreciated following the death of the first spouse to die, then the surviving spouse or the surviving spouse's executor might choose to apply the estate tax exemption at the death of the first spouse to die by revoking the QTIP election, thus creating an appreciated bypass trust for the benefit of the surviving family members. If assets in the QTIP trust depreciated, then the QTIP election could be left alone, thus preserving the DSUE for use in the surviving spouse's estate without wasting the estate tax exemption on depreciating assets, and also allowing the opportunity for a second step-up in basis of the QTIP trust assets at the death of the surviving spouse.

Although estate planners have generally welcomed this new guidance for the additional clarity it provides, Rev. Proc. 2016-49 limits the potential tax planning opportunities available

For example, suppose portability had been available in 2002 for an individual who died in 2002 when the estate tax exemption amount was $1,000,000 and the full amount of the estate tax exemption was available to the individual's estate. The decedent's estate is valued at $1,000,000 and the decedent's estate planning documents transferred the entire estate to a trust that qualified for QTIP treatment. If the executor of the decedent's estate made a QTIP election and the value of the QTIP trust decreased to $800,000 by the time the surviving spouse died in 2004, it would be more beneficial for the surviving spouse's estate to keep the QTIP election in place and utilize the $1,000,000 DSUE. On the other hand, if the value of the QTIP trust had increased to $1,200,000 by the time the surviving spouse died in 2004, it would be more beneficial for the surviving spouse's executor to revoke the QTIP election so that none of the QTIP assets would be included in the surviving spouse's estate under Treas. Reg. § 20.2044.

The mechanism for revoking a QTIP election was provided by Rev. Proc. 2001-38. Although a QTIP election is irrevocable under Treas. Reg. §20.2056(b)(7)(B)(v), the IRS issued Rev. Proc. 2001-38 to provide relief in situations where a QTIP election was not needed in order to prevent potential transfer tax issues for the surviving spouse under §2044, §2519 or §2652. Under this Revenue Procedure, a surviving spouse could request revocation of a QTIP election either using a private letter ruling or on the estate tax return of the surviving spouse, if the QTIP election did not provide any benefit to the decedent's estate.

Rev. Proc. 2001-38 did not treat a QTIP election as void in all situations. For example, a QTIP election would not be ignored where a partial QTIP election was required to reduce the estate to zero and the executor mistakenly made a QTIP election for more than was needed, or for QTIP elections that were stated in terms of a formula designed to reduce the estate tax to zero. The procedure for requesting relief under Rev. Proc. 2001-38 was to submit proof that the QTIP election was not necessary to reduce the estate tax liability to zero, either with the Form 706 of the surviving spouse or with a private letter ruling request submitted any time prior to the filing of Form 706 for the surviving spouse.

Until recently, some estate planners feared that the IRS would not allow the intentional use of Rev. Proc. 2001-38 as an estate planning tool, or that the provisions of Rev. Proc. 2001-38 would automatically apply to treat an unnecessary QTIP as void. This fear arose from the language of the Revenue Procedure itself and the fact that the IRS issued Rev. Proc. 2001-38 prior to the enactment of the portability rules, and thus did not address the impact of portability. As a result of multiple requests for guidance on this issue from the American Bar Association, American Institute of CPAs and other professional organizations, the IRS and Treasury placed the issue on their priority list for future guidance, and recently addressed the issue in Rev. Proc. 2016-49.

Rev. Proc. 2016-49 modifies and supersedes Rev Proc. 2001-38. In this new Revenue Procedure, the IRS acknowledges the tax planning opportunities provided by intentional use of a QTIP election in conjunction with a portability election, and indicates that it will not treat a QTIP election as void if the executor also made a portability election. Thus, the surviving

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spouse will not be subject to potential transfer tax issues under Treas. Reg. §20.2044, §20.2519 or §20.2652. However, the Revenue Procedure limits the circumstances in which a QTIP election can be revoked. Under the new Revenue Procedure, a surviving spouse can request revocation of a QTIP election only if the decedent's estate tax liability would have been zero without the QTIP election, no portability election was made, and the procedural requirements of the Rev. Proc are satisfied. The Revenue Procedure will not treat a QTIP election as void: (i) where a partial QTIP was required to reduce the estate to zero and the executor mistakenly made a QTIP election for more than was needed; (ii) with respect to QTIP elections that were stated in terms of a formula designed to reduce the estate tax to zero, (iii) if the QTIP election was a protective election under Treas. Reg. §20.2056(b)-7(c); or (iv) if the decedent's executor made a portability election, even if the DSUE amount ended up being zero.

Although estate planners have generally welcomed this new guidance for the additional clarity it provides, Rev. Proc. 2016-49 limits the potential tax planning opportunities available to the surviving spouse and the surviving spouse's estate. Although Rev. Proc. 2016-49 seems to allow the surviving spouse to rely on a QTIP election to preserve the DSUE, the option of revoking the QTIP election to apply the estate tax exemption of the first spouse to die, which is preferable in the case of appreciating assets, is clearly not available to the surviving spouse. It remains to be seen whether combined QTIP and portability elections will be utilized with any frequency in the near future, as its use may be impacted by the fact that some tax planners still fear that the IRS might, on its own, treat a QTIP election as void even following the issuance of the new Revenue Procedure.

Aside from the above tax planning opportunities and concerns impacted by Rev. Proc. 2016-49, the ability to make a QTIP election on a return filed solely for portability purposes may eliminate the time and expense of having to obtain full appraisals for assets reported on the estate tax return, since the executor may make a good faith estimate of value for assets that are entitled to a marital deduction after the executor has exercised due diligence.[1] The option to use good faith estimates is not available in situations where a partial QTIP election is made.[2] It is also not available in situations where the amount of value transferred to the QTIP trust depends on the value of the asset, such as through a formula funding clause or otherwise.[3]


R. WILSON

Rose Wilson *is a shareholder at Buchanan Ingersoll & Rooney, P.C. Ms. Wilson is located in the firm's Tampa office. Ms. Wilson's practice focuses on tax planning, estate and business succession planning, and trust and estate administration matters.*

Endnotes

1 Treas. Reg. §20.2010-2(a)(7)(ii).
2 Treas. Reg. §20.2010-2(a)(7)(ii)(A).
3 *Id.*

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Two Ways to Improve Your Trust & Estate Practice

Out Of The Frying Pan Into The Fire: Sales Tax Consequences Of Related Party Rentals

By Jeanette Moffa, Esq., Moffa, Sutton, & Donnini P.A., Fort Lauderdale, Florida

As attorneys, we love to compartmentalize our lives. We have to. We trust no one. We set up trusts in our estates because we don't trust our children to be responsible. We draft and sign prenuptial agreements because we don't trust our spouses. And we set up separate companies to shield ourselves from our own liabilities because we simply can't trust ourselves.

So when clients come in who own the real property upon which they operate a business, we tell them not to trust themselves either. When we explain that creating separate entities can help avoid the operational liabilities they may inevitably bring upon themselves, our clients jump on board.

What some real property lawyers don't realize is that clients are opening themselves up to a huge tax liability by structuring businesses as separate entities to avoid other liabilities. In Florida, that tax liability is known colloquially as commercial rent tax, but in actuality it is a *sales* tax on commercial rent.

Section 212.031(1)(a), Florida Statutes, provides that:

> [i]t is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property.

Florida Administrative Code (F.A.C.) 12A-1.070(19) specifically addresses related party rent:

> (a) The lease or rental of real property or a license fee arrangement to use or occupy real property between related "persons," as defined in Section 212.02(12), F.S., in the capacity of lessor/lessee, is subject to tax.
>
> (b) The total consideration, whether direct or indirect, payments or credits, or other consideration in kind, furnished by the lessee to the lessor is subject to tax despite any relationship between the lessor and the lessee.
>
> (c) The total consideration furnished by the lessee to a related lessor for the occupation of real property or the use or entitlement to the use of real property owned by the related lessor is subject to tax, even though the amount of consideration is equal to the amount of the consideration legally necessary to amortize a debt owned by the related lessor and secured by the real property occupied, or used, and even though the consideration is ultimately used to pay that debt.

Never heard of this before? You aren't alone. Many CPAs and tax attorneys are not aware of this statute, let alone the rule and extent to which it applies. But who can blame them when the Department of Revenue itself has inconsistently interpreted both the statute and associated rule in such a way that is in direct conflict with the courts? The period of September 2004 to April 2006 is when the Department arbitrarily began to shift its stance on related party commercial rent, as evidenced in various Technical Assistance Advisements (TAAs) with an increasingly harsh treatment of taxpayers. The confusion for taxpayers is further exacerbated by two cases from 2004 and 2008, one from a Florida circuit court and one from an administrative court, which were both in favor of the taxpayer but also both in conflict with the Department's TAAs.

The Recommended Order on the first case, *Solano,* was entered on March 17, 2004.[1] The facts were, typical to a related party rent case, complicated. To avoid a lengthy discussion of them, the simplified and relevant facts are as follows: A sole proprietor owned the property on which he conducted business. The Petitioner later incorporated the business, however, they continued to own the real property individually. The Corporation paid the mortgage, ad valorem taxes, insurance, and related expenses for the property. In addition, the Corporation took all federal tax deductions for ownership of the building, including interest, real estate taxes and depreciation. Eventually, the property was formally deeded to the Corporation. The Department assessed sales tax for the property expenses while the property was owned individually.

The administrative judge referred to the rule above to determine that no tax was due. Under 12A-1.070(19), F.A.C., the court found that subsection (a) was not satisfied because no written or oral lease existed and the Petitioners and Corporation were not "in the capacity of lessor/lessee." For subsection (b), the court found the rule inapplicable because Petitioners did not receive any consideration from the Corporation for the use of the property. Finally, subsection (c) was the nail in the coffin for the Department as the court held that the debt was not "owned" by the Petitioners because the final mortgage was owned by the Corporation and only guaranteed by the Petitioners.

Needless to say, this was a very broad interpretation of the statute. While the facts obviously are outside of a lessor/lessee relationship, the court's determination of the relevancy of a written lease appears to be unsupported by the Rule.

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Furthermore, Petitioners, during the entirety of the period at issue, were liable in one form or another for the mortgage.

Solano was a case in which the operating company paid the real estate expenses directly. In most related party rent cases, the operating company will enter into either a direct or implied lease with the real estate company. Such a transaction is and always has been taxable. What many related parties have done to get around this is pay distributions from the operating company to its shareholder, who in turn makes contributions to their other company, the real estate company, to pay for the real estate expenses.

Such a scheme was originally successful. Six months after *Solano*, the Department issued TAA 04A-056 on such a distribution/contribution scheme. While these "advisements" do not carry the weight of law, they do reveal when and how the Department will fight a particular issue. In this TAA specifically, the Department used an invented three-prong test for determining rental consideration.

Specifically, the TAA stated that:

> [t]he Department would look to the membership agreement or other controlling documents to ascertain: (1) that distributions do not coincide with the time at which the property's expense obligations are due; (2) the amount of distributions does not coincide with the amount of the property's expense obligations; and (3) the distributions are based on a true reflection of income or profit and not on the amount of the property's expense obligations.

Violate these rules and the Department will find rental consideration. So where exactly is this three-prong test from? Absolutely nowhere. As stated above, the Department appears to have invented it. But no such problem existed yet. In this TAA and others, the Department still held in favor of the taxpayer despite its three-prong test.[2]

Then, abruptly on April 11, 2006, the Department made a drastic departure from its original stance. In response to a situation not unlike the prior TAAs, the Department extended the three-prong test to determine the following: (1) that a landlord/tenant relationship is present when one person is occupying the real property of another person; (2) that owners and operators are 'in the business' of renting as they have created the business arrangement for specific business benefits; (3) money flowing from the occupant to the owner have qualities of rental consideration because parts of the monies are ultimately used to satisfy the properties' expenses; and (4) the total amount of money flowing from the occupant to owner is taxable unless the owner can reasonably identify the amount of the properties' expense obligations, in which case sales tax is only due on the amount equal to such obligations.

This drastic departure from earlier TAAs cannot be explained away with any change in legislation or by any cases in either circuit or administrative court. In short, the Department caught on to the distribution/contribution game and unilaterally determined to broaden its interpretation of taxable commercial rent.

So if you want to structure your rental agreement to eliminate sales tax on commercial rent, what can you do? Well, one option is to merge the businesses after the fact, or assessment, and argue *Solano*. Another, proactive option is to sign a formal lease agreement for a nominal rental amount (which will be subject to tax) and then make profit distributions and contributions as explained above. The Department has often argued against both of these options. However, there is no statutory support for its theory and it settles most of these cases.

The change in the government's stance back in 2006 is surely disappointing. But for an entire decade now, the Department has been regularly settling cases regarding this issue. In addition, the case law is on the taxpayer's side. In addition to *Solano*, the extremely taxpayer-friendly case of *US Cardiovascular* deconstructed the term "Base Rent" in a contract between related parties to exclude non real estate expenses from the taxable base.[3] So even when an explicit rental agreement exists, the courts are often taxpayer friendly. Today, the Department interprets *US Cardiovascular* to mean that mortgage, property tax, and insurance payments made directly by operating companies are subject to tax. Meanwhile, other items grouped into the base rent are nontaxable.

In many of these cases, lawyers have sat back, looked at the assessment that is the unanticipated consequence of their meticulous planning, and wondered why they ever formed a related party rental agreement in the first place. But careful planning now can avoid future assessments while still maintaining a liability shield.



J. MOFFA

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Endnotes

1 *Paul Solano and Diane Solano v. Florida Dep't of Revenue*, 2004 WL 542730, at *1.

2 TAA 04A-056, TAA 04A-057; TAA 05A-039.

3 *USCardio Vascular, Inc. v. Florida Dep't of Revenue*, 993 So. 2d 81 (Fla. Dist. Ct. App. 2008).

Sebo v. American Home Assurance Company: The Florida Supreme Court Confirms Application Of The Concurrent Cause Doctrine When A Loss Is Caused By Multiple Independent Perils

By Sean A. Mickley, Esq., Gould Cooksey Fennell, P.A., Vero Beach, Florida

In the world of insurance there are two kinds of policies for homeowners: named-peril and all-risk. A named-peril insurance policy only covers those perils listed specifically in the policy. A typical named-peril will cover fire, windstorm, explosions, smoke, hail, riot, aircraft, and vandalism. If a loss occurs under a named-peril policy, it is the obligation of the insured to prove that the loss was caused by a named-peril. For this reason, named-peril policies are generally cheaper than an all-risk policy. An all-risk policy covers any loss to an insured property except that which is specifically excluded. For this reason, the wording of the all-risk policy exclusions is extremely important. Because of the expansive coverage allowed under an all-risk policy, the acquisition cost is usually much higher than a named-peril policy, but the insurance company bears the burden of proving that a peril which caused damage is excluded.

Due to the broad coverage provided by an all-risk insurance policy, there are often disputes between insurers and policyholders as to whether there is coverage where multiple perils combine to cause a loss. In those scenarios, the overriding question was whether the multiple perils were independent or dependent in determining the proper theory of recovery. That is until the Second District Court of Appeal in *American Home Assurance Co. v. Sebo*[1] created a direct conflict with the Third District Court of Appeal in *Wallach v. Rosenberg*[2] in an opinion that essentially abrogated the concurrent cause doctrine in Florida.

On December 1, 2016, the Florida Supreme Court in *Sebo v. American Home Assurance Co.*[3] quashed the decision of the Second District Court of Appeal and clarified that: "when [multiple] **independent** perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurrent cause doctrine" in determining whether there is coverage under "all-risk" insurance policies.[4] Notwithstanding the clarification in *Sebo*, a close look at the opinion reveals that there could be a seismic shift in how insurance policy exclusions are drafted moving forward to avoid the impact when construction defects and natural weather perils converge.

Efficient Proximate Cause Doctrine versus Concurrent Cause Doctrine

The issue presented to the Florida Supreme Court in *Sebo* was as follows: "What is the appropriate theory of recovery to apply when two or more perils converge to cause a loss and at least one of the perils is excluded from an insurance policy?"[5] In deciding the issue, the *Sebo* court analyzed two distinct theories: the Efficient Proximate Cause Doctrine ("EPC") and the Concurrent Cause Doctrine ("CCD").

Efficient Proximate Cause Doctrine

"The EPC provides that where there is a concurrence of different perils, the efficient cause – the one that set the other in motion – is the cause to which the loss is attributable."[6] The EPC was first applied in Florida in *Fire Ass'n of Phila. v. Evansville Brewing Ass'n*.[7] In *Evansville Brewing*, the Florida Supreme Court considered whether damage caused by an explosion was a covered loss under an all-loss fire policy where the policy normally excludes explosion damage. In so considering, the Court explained, "while the insurer is not liable for a loss caused by an explosion which was not produced by a preceding fire, yet if the explosion is caused by fire during its progress in the building, the fire is the proximate cause of the loss, the explosion being a mere incident of the fire, and the insurer is liable."[8] Thus, the Court drew a line in the sand, so to speak – if a covered peril sets in motion damage from an uncovered peril, then the coverage exists; but, if an uncovered peril sets in motion damage from a covered peril, then no coverage exists. This analysis makes sense when perils are *dependent* upon one another and the cause of the ultimate loss or losses is distinguishable.[9]

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Concurrent Cause Doctrine

"The CCD provides that coverage may exist where an insured risk constitutes a concurrent cause of the loss even when it is not the prime or efficient cause."[10] As a practical matter, the CCD provides broader coverage than the EPC, as the CCD does not force a jury to decide whether one cause created the loss over another. The CCD was first applied in Florida in *Wallach v. Rosenberg*,[11] which grew from a California Supreme court case, *State Farm Mut. Auto Ins. Co. v. Partridge*.[12] In *Partridge,* the court reasoned that insurance coverage should be available to an insured where an insured risk combines independently with an excluded risk to produce the ultimate injury.[13] Essentially, the *Partridge* court found that if neither peril could have created the loss alone but instead combined to create the loss, the CCD should apply as opposed to the EPC.

In *Wallach*, Florida's Third District Court of Appeal applied the CCD and reasoning from *Partridge* to find coverage for an insured when a neighbor's seawall collapsed which led to a portion of the insured's seawall collapsing. Specifically, the *Wallach* court noted that the EPC is of little assistance where both causes of the harm are independent of each other.[14] In so finding, the *Wallach* court aptly illustrated, for purposes of applying the CCD, that an "independent" cause is "where weather perils combine with human negligence to cause a loss."[15]

The Second District Court of Appeal Case: *American Home Assurance Co. v. Sebo*

After *Wallach*, the Florida state and federal courts routinely applied the CCD, without criticism, where two independent causes combined to produce an ultimate injury.[16] That is until the Second District Court of Appeal in *American Home Assurance Co. v. Sebo* departed from approximately 25 years of case law in Florida, and applied the EPC where two independent perils converged to cause a loss. In so holding, the Second District Court of Appeal did so in a clear effort to, in its opinion, avoid rendering all exclusionary language in all-risk policies null and void.[17] Specifically, the court found that *Wallach* was flawed as "a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy."[18]

The Florida Supreme Court Case: *Sebo v. American Home Assurance Co.*

In *Sebo*, the Florida Supreme Court was faced with direct conflict between the Second District Court of Appeal's opinion in *American Home Assurance Co v. Sebo,* where the court applied the EPC Doctrine to the facts below, and the Third District Court of Appeal's opinion in *Wallach*, where the court applied the CCD to similar facts to those stated below.

As the Florida Supreme Court borrowed from the Second District Court of Appeal's opinion, the facts of the *Sebo* case are as follows:

> [John] Sebo purchased [a Naples, Florida] home in April 2005, when it was four years old. [American Home Assurance Company (AHAC)] provided homeowners insurance as of the date of the purchase. The policy, which insured against "all risks," was issued through a private client group and was referred to as a manuscript policy [-- stated differently, it was not a form policy].
>
> Shortly after Sebo bought the residence, water began to intrude during rainstorms. Major water leaks were reported to Sebo's property manager as early as May 31, 2005 [approximately one month after Sebo purchased the property]. . . . By June 22, 2005, the property manager advised Sebo of these leaks in writing. It became clear that the house suffered from major design and construction defects. After an August rain, paint along the windows just fell off the wall. In October 2005, Hurricane Wilma struck Naples and further damaged the Sebo residence.
>
> Sebo did not report the water intrusion and other damages to AHAC until December 30, 2005. AHAC investigated the claim, and in April 2006 it denied coverage for most of the claimed losses [with the exception of mold coverage in the amount of $50,000.00].
>
> The residence could not be repaired and was eventually demolished. In January 2007, Sebo filed suit against a number of defendants, including the sellers of the property, the architect who designed the residence, and the construction company that built it. He alleged that the home had been negligently designed and constructed and that the sellers had fraudulently failed to disclose the defects in the property. Sebo eventually amended his complaint in November 2009, adding AHAC as a defendant and seeking a declaration that the policy provided coverage for his damages.[19]

The basic tenets of contract interpretation were at issue in *Sebo*. Specifically, Sebo's insurance policy was an all-risk policy written by AHAC, which provided extremely broad coverage for property damage and personal injury unless it was specifically excluded. Thus, to the extent that AHAC argued that a peril was not a covered loss, the result was governed by the language of the exclusionary provisions with any ambiguity strictly construed against AHAC.

In *Sebo*, there was no dispute "that there was more than one cause of the loss, including defective construction, rain, and wind."[20] So, the Florida Supreme Court looked to the language of the Defective Work Exclusion in Sebo's all-risk policy, which provided:

> The following exclusions apply to the Part II – PROPERTY section of your policy
>
> 8. Faulty, Inadequate or Defective Planning

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> We do not cover any loss caused by faulty, inadequate or defective:
>
> a. Planning, zoning, development, surveying, siting;
> b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
> c. Materials used in repair, construction renovation or remodeling; or
> d. Maintenance;
>
> of part or all of any property whether on or off the residence.[21]

The Defective Work Exclusion above is almost universally added to all-risk insurance policies, such as homeowners insurance policies, for several reasons. The most prominent of these reasons is that if the homeowner hires a contractor or design professional to perform work on their home, the risk for covering damage caused by defective or faulty work should transfer to the contractor or design professional's insurance policy. As such, all-risk policy insurers generally prefer to make Defective Work Exclusions very broad in order to preclude any coverage for damage caused by defective or faulty work.

In *Sebo*, there is little doubt that if Sebo's home was damaged by defective or faulty work alone, then there would have been no coverage. However, because rainwater and hurricane winds combined with the defective construction to cause damage to the Sebo property, the Florida Supreme Court needed to decide whether (1) the EPC or CCD applied where multiple independent perils combine to cause a loss, and (2) whether the language of the Defective Work Exclusion precluded the use of either theory of recovery in determining coverage. As discussed below, although more nuanced in the opinion, the second issue will likely have a bigger impact moving forward.

In resolving the first issue, the Florida Supreme Court quashed the decision of the Second District Court of Appeal and found that where "there is no reasonable way to distinguish the proximate cause of Sebo's property loss," the EPC doctrine should not be applied because no efficient cause can be determined.[22] As such, "where weather perils combine with human negligence to cause a loss," it seemed logical and reasonable to the Florida Supreme Court that the loss should be covered even if one of the causes was excluded from coverage.[23] In the circumstances presented in *Sebo*, the Florida Supreme Court held that the CCD was the appropriate theory of recovery.

After finding in favor of applying the CCD, the Florida Supreme Court went on to address the second important point: whether the language of the AHAC's Defective Work Exclusion precluded the application of the CCD. By way of background, because the CCD had been applied in Florida for over 25 years after *Wallach*, insurance companies have added "anti-concurrent cause" language in certain exclusionary clauses to avoid the exact result in *Sebo*. In fact, a Florida federal court upheld the enforceability of "anti-concurrent cause" language, and explained that "when a peril is concurrently caused by a covered and excluded cause, coverage does not exist **if** the contract contains an anti-concurrent cause provision."[24] This is true because an insurer may draft the all-risk policy in any way it sees fit; the down side to that right is that any ambiguity in the policy is strictly construed against the insurer.

At the end of *Sebo* opinion, the Florida Supreme Court stated, "we disagree with the Second District's statement that the CCD nullifies all exclusionary language and note that AHAC explicitly wrote other sections of Sebo's policy to avoid applying the CCD."[25] At this point in the opinion, the Court clearly found that AHAC intentionally applied "anti-concurrent cause" language in other exclusions in Sebo's policy in an effort to avoid the application of the CCD to that specific exclusion. Accordingly, because AHAC did not explicitly avoid the CCD in the Defective Work Exclusion, the plain language of the policy did not preclude recovery.

The Impact of *Sebo*

Because the *Wallach* application of the CCD has been the prevailing theory of recovery when multiple independent perils combine to cause one loss, the *Sebo* opinion will likely not have a gigantic impact on the way cases are analyzed under similar facts. Instead, the big quarrel in multiple peril cases will come down to a battle of the experts, i.e., "whether the perils are dependent and the EPC doctrine applies, or whether the multiple causes of damage are independent and the CCD applies."

Nevertheless, the *Sebo* opinion will probably result in an enormous migration of all-risk policy insurers towards including "anti-concurrent cause" language into Defective Work Exclusions in order to avoid coverage. As such, individuals and companies should carefully analyze their all-risk policy exclusions henceforth for "anti-concurrent cause" language; this is particularly important when renewing policies annually. If the all-risk policy exclusions contain "anti-concurrent cause" language, the insured should attempt to "buy away" that portion of the exclusion in order to secure coverage where multiple independent perils combine to cause a loss. It will likely be costly to remove "anti-concurrent cause" language from the exclusions; however, given the impact of such language to coverage, the benefit may outweigh the cost of removal for policyholders.


S. MICKLEY

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Hubbell, and named as a Rising Star by Florida Super Lawyers. Mr. Mickley has substantial experience representing both public and private entities in complex construction and business matters throughout the state of Florida. He is currently the Chair of the Publications Subcommittee for the Construction Law Committee of the RPPTL.

Endnotes

1 *American Home Assurance Co. v. Sebo*, 141 So. 3d 195 (Fla. 2d DCA 2013). Hereinafter, the Second District Court of Appeal's *Sebo* decision shall be cited as "*American Home Assurance Co. v. Sebo*."

2 *Wallach v. Rosenberg,* 527 So. 2d 1386 (Fla. 3d DCA 1988).

3 *Sebo v. American Home Assurance Co.*, 2016 Fla. LEXIS 2596, 41 Fla. L. Weekly S 582 (Fla. Dec. 1, 2016). Hereinafter, the Florida Supreme Court's *Sebo* decision shall be cited as "*Sebo*."

4 *Sebo*, 2016 Fla. LEXIS 2596 at *6.

5 *Id.* at *5.

6 *Id.* at *7.

7 75 So. 196 (Fla. 1917).

8 *Evansville Brewing*, 75 So. at 198.

9 *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp 2d 1312, 1319 (M.D. Fla. 2002) (holding that the concurrent cause doctrine and efficient proximate cause doctrine are not mutually exclusive; rather, they apply to distinct factual situations).

10 *Sebo*, 2016 Fla. LEXIS 2596 at *8.

11 527 So. 2d 1386 (Fla. 3d DCA 1988).

12 514 P.2d 123, 133 (Cal. 1973).

13 *Id*. at 130.

14 527 So. 2d at 1388.

15 *Id.*

16 *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082 (Fla. 2005); *Transamerica Ins. Co. v. Snell*, 627 So. 2d 1275 (Fla. 1st DCA 1993); *Warfel v. Universal Ins. Co. of N. Am.*, 36 So. 3d 136, 137 (Fla. 2d DCA 2010), app'd 82 So. 3d 47 (Fla. 2012); *W. Best, Inc. v. Underwriters at Lloyds, London*, 655 So. 2d 1213 (Fla. 4th DCA 1995); *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317 (11th Cir. 2005).

17 *American Home Assurance Co. v. Sebo*, 141 So. 3d at 201.

18 *Id.*

19 *Sebo*, 2016 Fla. LEXIS 2596 at *2-4 (quoting *American Home Assurance Co. v. Sebo*, 141 So. 3d at 196-197) (first, second, and third alterations in original Florida Supreme Court opinion).

20 *Id.* at *13.

21 *Id.* at **13-14 (alteration in original).

22 *Id.* at *14.

23 *Id.* (citing *Wallach*, 527 So. 2d at 1388).

24 *Paulucci*, 190 F. Supp. 2d at 1318 (emphasis added).

25 *Sebo*, 2016 Fla. LEXIS 2596 at *15.

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Membership And Inclusion Committee Outreach And Events: May Through November 2016

By Douglas G. Christy, Esq., Becker & Poliakoff, P.A.

The Membership and Inclusion Committee of The Real Property, Probate and Trust Law Section continues to organize and participate in events with many Florida law schools and local organizations to build interest and membership in the Section with prospective or current law students and younger attorneys. In connection with that work, the Membership and Inclusion Committee successfully organized and participated in a number of events with law schools and local organizations during the months of May through November of 2016.

The 3rd Annual Miami-Dade County Public School Legal Initiative was held on May 19, 2016. It was organized by Kymberlee C. Smith, hosted by St. Thomas University Law School, and sponsored, in part, by the Section. The program provided a truly hands-on legal experience for over 100 middle and high school students from Carol City Senior High School, Law Enforcement Officer Memorial Senior High School, Madison Middle School, and Miami Arts Studio 6-12. Students participated in a meet and greet activity that allowed them to learn about various practice areas in the legal field, and also gave them the opportunity to explore careers in law enforcement. In addition, the Law Related Education Committee of The Florida Bar provided the U.S. Supreme Court 4th Amendment case study of *Florida vs. Jardines* for the students to dissect.

Law students from FAMU, Barry University, Stetson University, University of Florida, and Nova Southeastern University attended a student reception on June 3, 2016. The reception was held at Bar American in the Lowes Portofino Bay Hotel in connection with the Executive Council Meeting of the Section. In addition to drinks, hors d'oeuvres, and lots of laughs, students received advice from Executive Committee members of the Section about what it is like to practice, and interview tips for landing that first job.



The Section sponsored and organized an Eat-N-Educate event on August 30, 2016 at the Florida International University College of Law with over 40 students in attendance. Speakers included the Honorable Richard J. Suarez and Section members Manny Farach and Samah T. Abukhodeir. The speakers provided information to the student attendees regarding their involvement in the Section, the value of membership in the Section for law students, and about their respective practices.

The Section held an outstanding and productive Eat-N-Educate event on September 27, 2016 at the Florida State University College of Law. The students and Section members enjoyed beverages and hors d'oeuvres while discussing career paths, the joys and challenges of "Dirt" and "Death" law practices, and the benefits of Section membership.

Section members Marsha Madorsky, James Marx, and David Carlisle were among the diverse panel of speakers at the Section's Eat-N-Educate event at the University of Miami School of Law on September 28, 2016. Approximately 20

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students attended the event and heard from the speakers on a variety of topics, including the value and importance of Section membership, networking, small vs. large firm employment opportunities, mentoring, the impact of social media and technology in the legal profession, and, as coined by David Carlisle, the "uberization" of the law.

On October 25, 2016, the Section sponsored an Eat-N-Educate event at Saint Thomas University School of Law for a group of about 30 students. Section members Bill Parady and Salome Zikakis spoke and gave the students some great information regarding their participation in the Section and the value that their Section membership has provided to them, stressing the importance of attending Section events and seeking mentoring relationships. In addition, they also shared their personal experiences shifting their practices from big and medium sized firms to form their now partnership.

The Section was pleased to sponsor the Caribbean Bar Association's 20th Annual Scholarship Banquet on October 29, 2016 in Fort Lauderdale. The Banquet is the largest fundraiser for the Caribbean Bar Association's Scholarship Program, which funds paid internships for law students in Miami-Dade and Broward counties. This event highlights the Caribbean Bar Association's legal and community partnerships and initiatives throughout the past year, honors the scholarship recipients, and celebrates individuals and organizations that partner with

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and serve communities on local, national, and international levels to provide assistance to and support for Caribbean-Americans. The Section has been a sponsor of this event for five consecutive years.

On November 1, 2016, the Section sponsored an Eat-N-Educate event at Nova Southeastern University Shepard Broad College of Law. Speakers Sophia A. Lopez, Jesse H. Diner, and the Honorable Mark A. Speiser discussed the benefits of getting involved in the Section as a law student, provided essential tips and strategies for the effective practice of law, and promoted the value of Pro Bono service and professional courtesy to the profession to a group of approximately 20 students.

On November 15, 2016, the Barry College of Law Student Chapter held a dinner featuring Amber Jade F. Johnson, Jennifer Bloodworth, and Reed Bloodworth as speakers. Students hosted the dinner, which was followed by a panel session focusing on real property, probate and trust law, and the practice of law in general. After the panel, students participated in mock interviews and were given interviewing advice and tips.

The Membership and Inclusion Committee of the Section looks forward to continuing its outreach to Florida law schools and local organizations in furtherance of our efforts to build interest and membership in the Section with prospective or current law students and younger attorneys.





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Can You Imagine? Notarization By Skype?

By Patricia J. Hancock, Esq., Fidelity National Title Group, Maitland, Florida

Can you imagine a day when we give up our IBM Selectric typewriters, and deeds and contracts are prepared on a computer? Can you imagine talking to and seeing your clients from anywhere in the world using a little box you can carry in your pocket or wear on your wrist? Can you imagine being able to instantly send documents back and forth to clients and other lawyers—and not having to read them on fading thermal paper that keeps rolling up? Can you imagine being able to record a deed or file a pleading in a courthouse across the state, instantly, without leaving your office?

Just imagine all the ways that technology has and, in the future, will change the way we practice law and handle real estate transactions. The Real Property Probate and Trust Law Section and The Florida Bar have been involved in many of those change processes.

Can you imagine being able to notarize your client's signature over a TV screen without them leaving their home? That's probably coming, too. In 2012, Virginia adopted laws allowing its notaries to electronically notarize a document where the notary and the signer are not physically in the presence of the each other at any time during the notarization process. They also adopted stringent standards on how the notaries must identify the parties and document their identification (including a video recording) of the signing. Montana adopted some similar concepts into its notary law. Even Florida adopted a very restricted version of remote notarization – limited to law enforcement officers and court appearances.

Demand for that type of convenience is growing. The National Association of Secretaries of States (the regulators for the notaries across the country) has appointed a task force on remote notarizations. Fannie Mae, Freddie Mac, and a number of large lenders have endorsed the idea–driven by the added convenience and cost savings in real estate and mortgage transactions.

If remote notarization comes to pass, it too will require changes in our laws, changes in bar rules, coordination with our clerks and recorders, and changes in the way we practice law. The RPPTL section is again working to get ahead of the process.

A recently appointed subcommittee of RPPTL's Problem Studies Committee has embarked on a mission to study the remote notarization process and to evaluate its pros and cons. Among their challenges to tackle are:

- Ways of assuring the sanctity of the process, *e.g.*, that the party signing a document is really who he or she has represented himself or herself to be, and maintaining the ability to prove that after the fact. Top priority should be given in determining the quality and confidence in the proof of identity and capacity of the signer in the remote notarization. Will the identification measures be safer than today's notary identification? Safe as what we do today? Or less safe than what we do today?
- Striking the correct balance between mandating stringent Florida standards for remote notarization, while allowing the standards to be flexible to adjust and take advantage of future improvements in technology.
- How Florida law might interact with other states' remote notary laws. What are the jurisdictional parameters? Should a notary journal be required? If so, what documentation and information should be maintained in the journal? Protocols for valid remote notarizations will need to be created.
- How to address witness requirements on instruments. May a party have their signature witnessed by someone who isn't physically present, but "watches" them sign over a video link?
- Should remote notarization be limited to certain types of documents? For example, should wills and trusts require a traditional personal appearance, while deeds, mortgages and loan documents may be remotely notarized?

Working through all of these issues and drafting legislative and regulatory proposals to enable, limit, forbid or guide the evolution of remote notarization in Florida and across the nation is going to be a major and probably controversial task. Fortunately we have some very good lawyers donating their time to work on it.

In the meantime, does anyone have a spare Selectric ribbon I can borrow?



P. HANCOCK

Patricia J. Hancock *is a Senior Vice President and Senior State Counsel for Fidelity National Title Group, located in Maitland, Florida. She is Board Certified in Real Estate, a past President of the Florida Land Title Association and a Raymond O. Denham award recipient. Ms. Hancock obtained her undergraduate degree from Rollins College and her law degree from the University of Florida.*

Probate And Trust Case Summaries

Prepared by Prepared by Stephanie Villavicencio, Esq., Zamora, Hillman & Villavicencio, Miami, Florida

Neither a supplemental release agreement regarding trust account claims nor the statute of limitations apply to breach of trust claim in light of lack of full disclosure.

Turkish v. Brody, 2016 WL 6992203 (Fla. 3d DCA 2016).

In 1991, Carole (daughter of Mrs. Trask) and her husband executed two demand promissory notes in favor of Arthur (son of Mrs. Trask), individually. In 1997, Carole and her husband executed a third demand promissory note in favor of Arthur, individually. Mrs. Trask died on June 2, 2010 and her son, Arthur, was named Personal Representative of her estate. It was not until Mrs. Trasks's death that Carole learned the money loaned to her by Arthur was, in fact, obtained from Mrs. Trask. At issue are two trusts created by the decedent prior to her death, settlement of a gift tax liability, objection to the settlement and accountings related to the same. Both trusts named Arthur and his daughter, Shari, as co-trustees. Arthur and Carole were beneficiaries of Trust One during Trask's lifetime with the remaining principal to be divided between her two children. Trust One vests the Co-Trustees with "absolute discretion" to make distributions in equal or unequal amounts to either child to the exclusion of the other during Mrs. Trasks's lifetime. Trust One also permits Arthur, as trustee, to make distributions to himself without the consent of any Trustee, then serving.

Mrs. Trask was the only beneficiary during her lifetime of Trust Two. After her death, the remaining principal was to be divided equally among her two children. In 2006, Mrs. Trask voluntarily disclosed to the IRS that she owed over $3 million in gift taxes for the time frame commencing in 1991. She settled with the IRS, and requested that Arthur pay the settlement from Trust One via a loan to herself. The Co-Trustees approved the distribution without the approval of Carole, and Mrs. Trask executed an unsecured promissory note to Arthur, individually.

Carole received revised accountings for the time period covering 2005 through 2007 for Trusts One and Two, including a Receipt and Release Agreement ("RRA"). Carole then objected to the IRS settlement, and in response, the Co-Trustees and Carole executed a Supplemental Release Agreement ("SRA") to settle all claims arising out of the IRS transaction. Carole received additional accountings for both Trusts for the years 2008, 2009 and 2010. Carole initiated suit against the Co-Trustees contesting the distributions to Arthur from Trust One, including the IRS settlement. The Co-Trustees asserted that the claims were time-barred. Arthur later assigned the three promissory notes, executed by Carole and her husband, to himself as Personal Representative stating that money was never owed to him individually, but to his mother's estate. Arthur filed suit to demand enforcement of the notes.

The trial court found that (1) Arthur failed to disclose to Carol that Mrs. Trask had very little money and therefore the SRA was not valid to bar Carole's claims concerning the IRS settlement, (2) Carole owed the estate the three demand promissory notes to be offset from her distributions of both trusts and estate assets, (3) Arthur owed Carole a fiduciary duty when making distributions to himself from Trust One and, (4) Arthur needed to return funds to Trust One.

The Third District Court of Appeal affirmed the finding that the SRA was invalid and unenforceable for lack of disclosure, but reversed the determination that Arthur breached his fiduciary duty by making distributions to himself. The court found that the distributions that Arthur made to himself from Trust One were authorized by the express terms of the Trust, and that his extravagant lifestyle was financed by his mother through other substantial gifts, supporting her intent. The court further acknowledged that a release between adversaries constitutes a bar to an action; however, the SRA, in this instance was controlled by New York law, and the SRA failed to make a "full disclosure" when it did not include the fact that Mrs. Trask did not have the ability to repay the promissory note. The court held the six month statute of limitations was not applicable due to the failure to disclose the worthless note. The court remanded the issue of whether the Carole's repayments of the notes to the Estate were viable.

Without an express and distinct demand for performance, a writ of mandamus will not lie when it seeks to compel letters of guardianship following the entry of an Order Determining Partial Incapacity.

Cason v. Ross, 2017 So. 3d 1024 (Fla. 1st DCA 2017).

Cason, daughter of alleged incapacitated person, petitioned for writ of mandamus to compel the court to render a decision and issue letters of guardianship. Following hearings held from March through June of 2016, the trial court issued an Order Determining Partial Incapacity on August 29, 2016. Cason filed a motion for rehearing on September 8, 2016 alleging that the

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order removed certain rights from the alleged incapacitated person, but that no guardian was appointed to make decisions on her behalf. The writ asserts that the court had a ministerial duty to protect the alleged incapacitated person's rights and appoint a guardian.

The First District Court of Appeal reiterated the findings of *Huffman v. State,* 813 So. 3d 10, 11 (Fla. 2000) which held as follows: "In order to be entitled to a writ of mandamus the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." The appellate court held that Cason pointed to no authority for the proposition that the trial court had a deadline in appointing a guardian and that no express request was made to the trial court to enter a new order. The court concluded that mandamus will not lie if an express or distinct demand for performance has not been made.

An evidentiary hearing is required where the parties presented no evidence regarding the timing of a ward's gifts, or the conditions in making those gifts when the court's previously written order conflicts with an oral pronouncement.

Cajuste v. Herlitschek, 204 So. 3d 80 (Fla. 4th DCA 2016).

During the incapacity hearing, the parties had reached an agreement on limited incapacity and ward's counsel stated that all parties agreed to pay a $25,000.00 gift to the ward's aide upon the ward's death. The trial court stated to the parties that the order for limited incapacity would include the ward's retained right to make a gift to his aide in the amount of $25,000.00 and memorialized the same in the order determining incapacity, as well as the order appointing the ward's son as guardian. The ward died three months later and the court granted the guardian's petition to be discharged. The aide file a motion to unseal accountings, set aside the order discharging guardian and show cause as to why the guardian failed to pay the $25,000.00 to the aide. The trial court entered an order denying the aide's motion without an evidentiary hearing, finding that because the ward did not make the gift during his lifetime, the relief sought by the aide was not appropriate.

The Fourth District Court of Appeal emphasized the trial court's previously written orders (retaining the ward's right to make the $25,000.00 gift to the ward) and its later oral pronouncement that the gift would occur at the ward's death. The court found nothing in the record supporting the trial court's finding that simply because the ward did not make the gift during his lifetime, the relief sought by the aide was not appropriate. The appellate court held that the trial court erred in denying the aide's motion without an evidentiary hearing.

Even when there is no determination of incapacity and no appointment of guardian, counsel for emergency temporary guardian and for ward are entitled to fees under Fla. Stat. § 744.108(1).

Guardianship of Beck, 204 So. 3d 143 (Fla. 2d DCA 2016).

Petitioner filed petition for appointment of emergency temporary guardian for Mr. Beck, and Ms. Yates was appointed his emergency temporary guardian of person and property. Mr. Berschback, trustee of Mr. Beck's living trust and health care surrogate, was denied appointment and later sought to remove Ms. Yates and terminate the guardianship. The trial court denied Mr. Berschback's motion, and Mr. Beck passed away a month later prior to the final determination of incapacity or whether a plenary guardian should be appointed. Three petitions were filed seeking attorney's fees and costs by attorney for petitioner, attorney for emergency temporary guardian and the attorney for the ward under section Fla. Stat. § 744.108(1). Berschback, who was alleged to have neglected Mr. Beck and to have not delivered accountings to him during his lifetime, filed objections to the petitions asserting that no statute authorized the trial court to award fees and costs incurred prior to determination of incapacity and the appointment of a plenary or limited guardian.

The trial court entered a final order denying the fee petitions, stating that the statute was limited to situations where a judicial determination of incapacity is found by the court and appointment of guardian is ordered. The Second District Court of Appeal reviewed the statutory construction of Fla. Stat. § 744.108(1) *de novo,* and analyzed whether the petitioners in this case fell into any of the three categories entitled to fees and costs mentioned in the statute: a guardian, an attorney who has rendered services to the ward, or an attorney who has rendered services to the guardian on the ward's behalf. The appellate court held that regardless of whether Ms. Yates was appointed upon determination of incapacity, she is a "guardian" for purposes of Fla. Stat. § 744.108(1) if she is appointed by the court to act on behalf of the person or property of the ward. The appellate court further ruled that the legislature included the person subject to an emergency temporary guardianship within the definition of ward.

Despite Mr. Berschback's correct statement that a person subject to an emergency temporary guardianship is still an "alleged incapacitated person," and not a ward, the court held that for purposes of Fla. Stat. § 744.108(1), the emergency temporary guardian is a "guardian" and the subject of the guardianship is a "ward." Therefore, the appellate court remanded to the trial court whether counsel to the petitioner and counsel to the ward benefited the ward in order to determine entitlement to fees.

Real Property Case Summaries

Prepared by Amber Ashton, Esq., DSK Law, Tampa, Florida

Foreclosing lenders must join association at the inception of a foreclosure action in order to avail themselves of the limitation of liability provided by Fla. Stat. § 720.3085.

Federal National Mortgage Ass'n. v. Mirabella at Mirasol Homeowners' Ass'n., Inc., 204 So. 3d 164 (Fla. 4th DCA 2016).

At the time the appellant, Federal National Mortgage Association ("FNMA") filed its action to foreclosure its first mortgage on property located in Palm Beach, Florida, it did not join appellee homeowners association, Mirabella at Mirasol Homeowners' Association, Inc. ("HOA"), as a party to the foreclosure. Four (4) years after filing the initial complaint, FNMA amended its complaint and joined the HOA.

The Fourth District Court of Appeal noted that the Mirabella Declaration of Covenants ("Declaration") provided for a continuing lien on the property and was recorded before FNMA's mortgage. Under common law, a junior lienholder cannot eliminate the interest of a senior lienholder through foreclosure. However, the Florida legislature modified the common law when it adopted Fla. Stat. § 720.3085, which limited the liability of a foreclosing first mortgagee for assessments and other amounts due to a homeowners' association to the lesser of (1) unpaid "'periodic or special assessments that accrued or came due during the 12 months'" prior to acquisition of title, or (2) 1% of the original mortgage debt. Importantly, Fla. Stat. § 720.3085, only allows a foreclosing first mortgagee to avail itself of the limitation of liability "'if the first mortgagee filed suit against the parcel owner and *initially joined* the association as a defendant in the mortgage foreclosure action.'" (emphasis added by court).

The HOA did not dispute FNMA's status as a first mortgagee and confined its argument to FNMA's failure to "initially join" the HOA in the foreclosure action. FNMA argued that the word "initially," as used in Fla. Stat. § 720.3085, relates to "the entire first action for foreclosure," such that the limitation of liability would not apply in a re-foreclosure effort filed to eliminate additional junior liens. FNMA argued that since the HOA was eventually added to the original foreclosure action, the limitation of liability should apply.

The Fourth District Court of Appeal agreed with the interpretation of the HOA and referenced Michael J. Gelfand, *Condominium and Homeowners' Association Liens*, in FLORIDA CONDOMINIUM AND COMMUNITY ASSOCIATION LAW § 16.92 (The Fla. Bar ed., 2d ed. 2011), in finding that the legislature wanted homeowners' associations to have the ability to participate in foreclosure actions from their inception so that they can take steps "to move the case to a quick resolution."

As a result of FNMA's failure to initially name the HOA in its foreclosure action, the HOA was entitled to seek all unpaid assessments from FNMA.

When a judicial sale occurs after a final judgment of foreclosure is entered, the property is discharged from all liens which were recorded after the recording of the lis pendens through the date of the issuance of the Certificate of Title, as well as all unrecorded liens which were recorded prior to the lis pendens, unless the lienholder intervenes in the foreclosure action within thirty (30) days of the recording of the lis pendens.

Ober v. Town of Lauderdale-By-The Sea, 42 Fla. L. Weekly D245a (Fla. 4th DCA, January 25, 2017).

A lender filed suit to foreclose its mortgage on certain property in the Town of Lauderdale-by-the-Sea (the "Town"), and recorded a lis pendens in the public records in November 2007. Final Judgment was entered in the lender's foreclosure action in September 2008. Between July 2009 and October 2011, the Town recorded seven (7) code enforcement liens on the property all of which purportedly related to violation which arose after entry of the Final Judgment. The Appellant purchased the property at the foreclosure sale in September 2012, and the Certificate of Title to the property was issued in Appellant's name. Thereafter, three (3) additional code enforcement liens were recorded against the property by the Town.

Appellant filed suit to quiet title in order to eliminate the Town's code enforcement liens from the property. The Town responded by filing a counterclaim to foreclose its liens. The trial court entered judgment in favor of the Town to foreclose all ten (10) liens on the property. Appellant appealed the final judgment in favor of the Town.

Appellant relied upon Fla. Stat. § 48.23, which states in pertinent part, "the recording of . . . lis pendens . . . constitutes a bar to enforcement against the property . . . of all interests and liens . . . unrecorded at the time of the recording of the notice . . . ," to argue that the Town's code enforcement liens were barred from enforcement pursuant to the notice of lis

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pendens recorded by the lender in the underlying foreclosure action. The Town argued the lis pendens expired upon entry of the final judgment of foreclosure.

On rehearing, the court looked to Fla. Stat. § 48.23(1), and found that the language of the statute is broad and encompasses "all interests and liens," and contemplates that all liens would be barred through a "judicial sale," which the court found to be consistent with how a foreclosure operates in the real world since the final judgment is not, in effect, the end of a foreclosure lawsuit. The court held, consistent with Form 1.996(a) of the Florida Rules of Civil Procedure, that all liens recorded after the recording of the lis pendens, regardless of whether they are recorded prior to or after the final judgment is issued, are discharged from the property unless the lienholder intervenes in the action within thirty (30) days of the recording of the lis pendens.

The court reversed the final judgment in favor of the Town and remanded the case to the trial court for further proceedings.

Buyer that prevails in action for specific performance is entitled to fair rental value of the property during the period execution of final judgment is stayed pending appeal and Seller is not entitled to interest at the statutory rate on the sale price post-final judgment during the stay of execution.

Futernick v. Trushina, 41 Fla. L. Weekly D2642a (Fla. 3d DCA November 23, 2016).

Appellant ("Buyer") entered into contract to purchase marital home of appellees ("Sellers"), and ultimately pursued litigation against Sellers for specific performance after Sellers refused to convey property. Trial court entered final judgment in favor of Buyer requiring the Sellers to convey the property to Buyer. A trial was conducted as to the fair rental value of the property, but the court found that the rental value was completely set off by the Seller's payments for "property taxes, insurance, and statutory interest in the sales proceeds." Sellers appealed the final judgment, and contemporaneously sought and obtained a stay of execution of the final judgment after posting a bond. The appellate court ultimately affirmed the trial court's final judgment. *See*, *Futernick v. Trushina*, 146 So. 3d 63 (Fla. 3d DCA 2014).

The cause was remanded to the trial court for a determination of the additional delay in performance damages incurred by the Buyer as a result of the stay of execution. The trial court determined that the rental value of the property increased during the stay period from $12,000.00, the fair rental value of the property determined at the original trial which the Seller did not contest in the original appeal, to $14,000.00, and awarded Buyer $224,000.00, in delay of performance damages which occurred post-judgment. The trial court also determined that the Sellers were not entitled post-judgment interest at the statutory rate on the sale price. Sellers appealed seeking a determination that the fair rental value was not supported by substantial competent evidence and that they were entitled post-judgment interest at the statutory rate.

The Third District Court of appeal affirmed the determinations of the trial court based primarily on the Seller's failure to contest the fair rental value determination in their original appeal. The court also determined that the Seller was not entitled to post-judgment interest on the sale price at the statutory rate and adopted the reasoning of the Second District Court of Appeal in *Richardson v. Turner*, 810 So. 2d 1039 (Fla. 2d DCA 2002). In a footnote, the court acknowledge that under the *Richardson* analysis, the Sellers may not have been entitled to any post-judgment interest at all, but under the facts of this case the Buyer agreed to post-judgment interest at a rate of 1.49%, and could not, on appeal, seek appellate review of that portion of the final judgment.

Where bylaws set the date of the annual meeting and elections, board of directors of condominium association, by majority vote of the board of directors alone, cannot postpone annual meeting and election date.

M&M Property Management, LLC v. Palm-Aire Country Club Condominium Ass'n No. 2, Inc., 41 Fla. L. Weekly D2758b (Fla. 4th DCA December 14, 2016).

Three days prior to the date set forth in the bylaws of Appellee, Palm-Aire Country Club Condominium Ass'n No. 2, Inc. ("COA"), for the annual election of its board of directors, the then-empowered board of directors ("Original Board") voted to postpone the election. The records reflect no corresponding vote of all of the voting members of the COA occurred. As such, on the date set forth in the bylaws, a new board of directors was duly elected ("New Board").

After the election of the New Board, Appellant, the property management company for the COA, began taking direction from the New Board and generally turned over access and control of the COA's operations and bank accounts to the New Board. The Original Board sought and obtained a preliminary injunction against the Appellant requiring that access and control over the COA be returned to the Original Board.

The Fourth District Court of Appeal, cited *Concerned Citizens for Judicial Fairness, Inc. v. Yacucci*, 162 So. 3d 68, 72 (Fla. 4th DCA 2014), and found that in order to be entitled to a temporary injunction, a party must prove: "(1) it will suffer irreparable harm unless the injunction is entered, (2) there is no adequate remedy at law, (3) *there is a substantial likelihood that the party will succeed on the merits*, and (4) that considerations of the public interests support the entry of the injunction." (emphasis added by the court)

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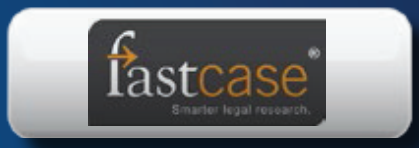




















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In determining that the COA did not meet the required threshold of "a substantial likelihood of success on the merits," as required, the court relied on Fla. Admin. Code R. 61B-23.0021(1)(c), which requires in pertinent part: "[i]n order to adopt different voting and election procedures in its bylaws . . . an association must obtain the affirmative vote of a majority of the *total voting interest* . . ." (emphasis supplied by the court). Since all of the voting members of the COA did not vote to change the voting procedures set forth in the bylaws, the Original Board had no authority to postpone the election and failed to demonstrate a "substantial likelihood of success on the merits." As a result, the court reversed the trial court's imposition of the temporary injunction.

Dismissal of case is an appropriate sanction for failure to attend a court ordered mediation and providing false testimony to the court regarding the failure to attend mediation.

Gozzo Development, Inc. v. Professional Roofing Contractors, Inc., 42 Fla. L. Weekly D344a (Fla. 4th DCA February 8, 2017).

The trial court ordered the parties to attend mediation, but the Appellant failed to attend. Thereafter, the Appellant filed a false certificate with the court regarding the mediation and made false statements during an evidentiary hearing regarding the Appellant's failure to attend mediation. The trial court determined that the Appellant both willfully failed to attend mediation and made the false statements regarding its failure to attend, and dismissed the case as a sanction.

The Appellant failed to request that the trial court make findings pursuant to *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993), and the trial court made no such findings in its order of dismissal. The Fourth District Court of Appeal found that dismissal was within the trial court's discretion in determining an appropriate sanction, and held that the Appellant could not raise the failure to make *Kozel* findings, when it failed to request them from the trial court.

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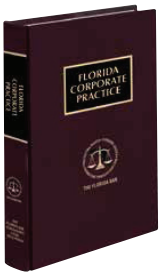
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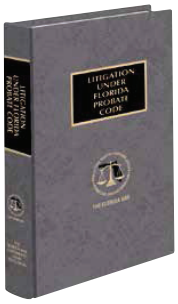
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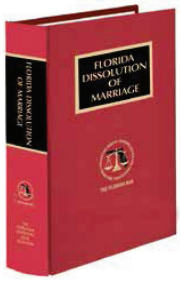
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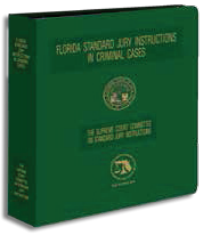
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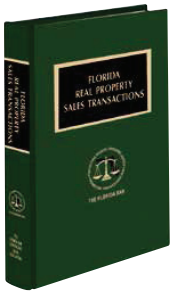
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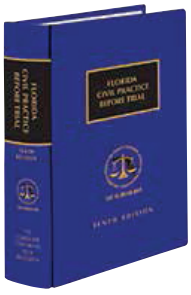
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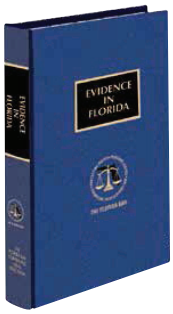
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What's Happening Within The Section...

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

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

SCHEDULE

2017 EXECUTIVE COUNCIL MEETINGS

MAY 31 – JUNE 4, 2017
Executive Council Meeting & Convention
Hyatt Regency Coconut Point Resort & Spa • Bonita Springs, FL
Reservation Link:https://resweb.passkey.com/go/flbar2017
Room Rate: $209 (single/double occupancy)

JULY 27 – JULY 30, 2017
Executive Council Meeting& Legislative Update
The Breakers • Palm Beach, Florida
Room Block Link: https://resweb.passkey.com/go/FLABR17
Room Rate: $225

OCTOBER 11 – 15, 2017
Out of State Meeting/ Executive Council/ Boston, MA
Fairmont Copley Plaza • Boston, MA
Room Block Link: https://resweb.passkey.com/go/floridabarrrptl
Room Rate: $375-$775

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

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

2017 CLE SCHEDULE:

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

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

The Florida Bar
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Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

PRACTICE CORNER:

Don't miss these short tips to assist in your practice.
See page 28-29.

2017 Wills, Trusts and Estates Certification Course and Advanced Practice Update

Live and Webcast Presentation:
Friday, April 7-8, 2017
Hyatt Regency Orlando Airport

SAVE the DATE!

The 1st Annual Attorney/ Loan Officer Conference will be held July 26th, 2017 at the Kravis Center in West Palm Beach.
More to follow!

BE AWARE

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

FinCEN

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

RPPTL Guardianship Seminar 2017:

"GUARDIAN'S ISLAND"
Live and Webcast Presentation: ***Friday, April 28, 2017***
St. Thomas University, Miami Gardens

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