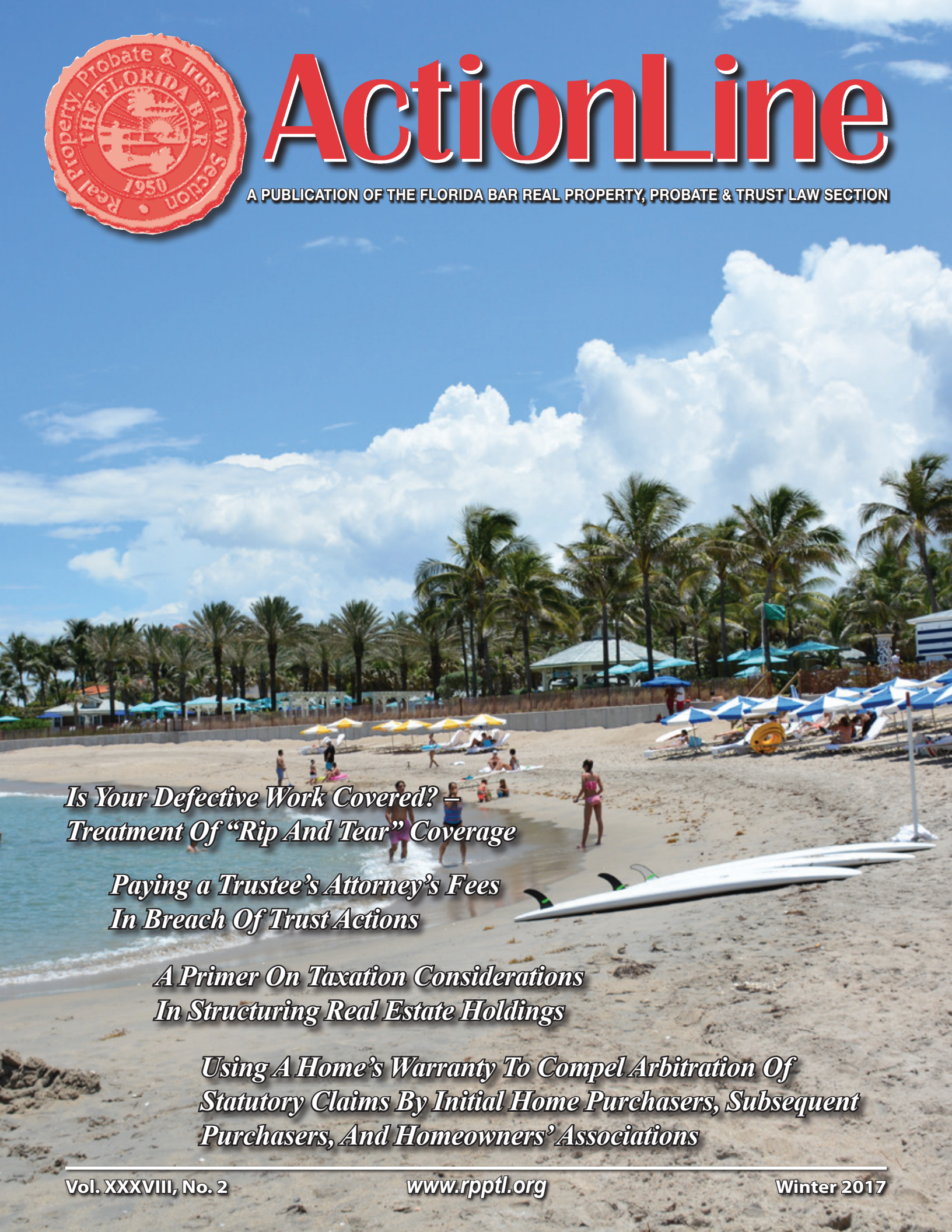
ActionLine

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



Is Your Defective Work Covered? – Treatment Of "Rip And Tear" Coverage

Paying a Trustee's Attorney's Fees In Breach Of Trust Actions

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Realistic Optimism: Prepare For The Worst And Hope For The Best



Chair's Column

By Deborah Goodall
Section Chair, 2016- 2017

I wrote my first chair's second column on gratitude. For my second, I had another theme in mind, but recent weather-related events caused me to change course – much like Hurricane Matthew did at the beginning of October. As you are all aware, that devastating storm caused death and destruction throughout the Caribbean and, as it neared Florida with our great state seemingly in its crosshairs, we were told to "prepare for the worst and hope for the best." As lawyers, we do that for our clients on a regular basis – whether writing or reviewing contracts, preparing and negotiating settlement agreements, advising on insurance needs, or drafting testamentary documents. For estate planners, it is usually fear of "the worst" that motivates our clients to finalize an estate plan that may have been lingering in a state of near completion for quite some time. But it seems to me that many of us do not take our own advice when it comes to our own planning.

As I watched the continuous coverage of the weather forecast, the endless radar loops and the ever-changing spaghetti models, I worried that this might be a major hurricane with a direct hit to our area. Just a few days before, I had been more concerned with the last-minute details of our upcoming RPPTL Committee and Executive Council meetings scheduled for the Disney Boardwalk Inn beginning Wednesday, October 5th and wrapping up on Sunday, October 9th. Now I found myself anxiously awaiting every updated track and scrambling to review the disaster planning procedures that we had been given by our landlord. Our office is in a Hurricane Evacuation Zone and, because we had experienced some serious flooding during a non-tropical rain event, early preparation seemed vital. We had planned to leave town for the RPPTL meetings in Orlando, so the evacuation part wasn't difficult. We already had the perfect inland hotel booked. But the packing of the office and leaving home not knowing in what shape either would be in when we returned put things into an entirely different perspective.

We prepared the office by taking down and wrapping art work and diplomas, securing all paper files and covering nearly everything in plastic tarps and bubble wrap. The computers were dismantled and placed in large plastic bins. While packing, stacking and taping, I couldn't help but flash back to 2004 and 2005 when the very active tropics caused us to complete a similar exercise several times. After Hurricane Wilma tore through South Florida, the volume of missing windows caused many high-rise towers in Miami and Fort Lauderdale to look more like buildings still under construction than fully occupied offices. In the aftermath of the storm, the streets were littered with more than glass, tree limbs and debris. There were papers everywhere. I couldn't help but wonder if some of those papers belonged to attorneys. Did they contain confidential client information? Is there another copy of the now-missing paperwork that the lawyer can use to complete the client's work? Would the attorney be able to access it given the closure of the building and the lack of electricity to power the computers and servers? And to add even more concern — would the lawyer need to inform the client that the papers were lost?

As I turned out the lights and took one last glance at the almost barren office, it occurred to me that planning for the worst takes on an entirely different dimension when we, as lawyers, are tasked to do so for ourselves. My mind was flooded with concerns. Once the server was taken down, how would we be able to communicate with our clients? What would happen to the phone lines if the electricity went out or if the cell phone towers were damaged? If there were no email access, what would happen to the client work and transactions that we are handling with deadlines impacted by the approaching storm?

Once the office was secured, it was time to change gears and worry about our home. I became weary looking through the long checklist of errands to run and things to buy: gas for the generator, cash in case the ATMs wouldn't work, extra tarps and shutters from the home improvement store, water and non-perishable foods from the grocery store, and food and treats for our beloved elderly black labrador from the pet store. My husband had already decided to stay behind with the dog and to be there in case the roof started leaking – or worse. Everything took longer than anticipated. Lines at the gas station snaked out onto the streets. Stores were running out of water and ice. Waiting in those lines gave plenty of time to ponder the many

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

other worries that were crowding my brain. Where would we store all the potted plants and the patio furniture that could easily become dangerous projectiles? What about the shutters for the doors and windows? Where did we stash that plastic emergency box - the one with the extra flashlights, batteries and the almost extinct corded telephone that proved invaluable when the phone lines worked even after the power went out back in 2005? Do I have the hard copies of the insurance policies ready to take with me? Is there anything in the house that is so irreplaceable that I want to lug it with me to Orlando for safe keeping? The wedding album? The baby photos? My mom's china? With each passing thought, I vowed to keep things better organized for "next time."

We scheduled calls with our Disney meeting planners to discuss the weather forecast and the likelihood that many attendees from South Florida may opt to stay home. We reviewed the contract and the numbers and we decided to proceed with the meeting as scheduled. The forecast for Orlando wasn't bad while the predictions for South Florida grew increasingly scary. I did worry about asking people from South Florida to travel when a storm was approaching but for many of us who had made the long drive to Orlando in the post-Wilma aftermath, this was a chance to leave town before the storm hit – something that I had vowed I would do after that dreadful trek north in October of 2005. As an added bonus, late on Tuesday, an announcement was made that many schools in South Florida would be closed for both Thursday and Friday, and Wednesday was deemed an optional day for those that needed time to help with preparation. The good news was that the children could now come to the meetings without missing school. The bad news is that this seemed like a very ominous prediction that we were in the inescapable path of a dangerous storm. We announced that attendance at the RPPTL meeting was 100% voluntary and that no one was expected to travel. After all, safety first.

"Man plans and God laughs"

My family arrived in Orlando just after midnight on Tuesday and, early Wednesday morning, we began our first meeting. Around the conference room table, lawyers from many firms around the state began receiving email messages announcing the closure of various offices in South Florida. Additional schools were closing. Quickly, however, the storm path shifted and it appeared that Orlando would also be included in the cone. We were now having multiple unscheduled meetings with the Disney staff to update us on our scheduled events. By early Thursday afternoon we received the news that for only the fourth time in history, Disney was closing all theme parks, water parks and Disney Springs and that certain hotels were being evacuated. Our hotel was one of the emergency shelters so, we felt a sense of security, all around us there was a sense that nothing was normal. Airports closed and the Governor declared a state of emergency and enacted a travel ban. Those of us that were there, we learned that we were officially there for the duration. We learned that our Friday meetings were going to have to be cancelled because the conference room space was needed for staging and feeding the other hotel guests, who like us, were not able to leave. The hotel was at more than 100% capacity because some guests that had planned to leave could not. Disney staff who are assigned to work around the clock in these types of emergencies are known as the "Ride Out Crew" and the work ethic and sense of spirit of these individuals is to be commended. They kept us and the other guests in the fully-booked resort comfortable, well fed, and entertained. We had a chance to witness the magic of Disney in an entirely unexpected way. The catering manager became a bartender. Our dedicated meeting planner became just about everything from server to entertainer to all around cheerleader. Mary Ann Obos, our talented Section Administrator, with help from my son, Steven Goodall, answered questions from attendees and hotel staff, updated the App with the ever-changing information, and kept calm, cool and collected even though there were times that I am sure that was difficult to do.

Those of us who were there had plenty of quality time to spend together. Our children played together. Parents bonded. By Saturday morning, the skies cleared and the roads reopened. Our Executive Council meeting was held as planned. Many folks that lived within driving distance came to join those of us that rode out the storm in the happiest place on earth. We were all safe. We reached out to those of our friends and colleagues from areas of Florida that were much harder hit – and fortunately they were also safe. We were blessed in so many ways and rather than focus on what went wrong or what we were not able to do, it is much more productive to concentrate on what went right and what we could accomplish. The committee meetings that were held were memorable. We had plenty of free time to spend with one another. We played cards and board games. We didn't have to eat canned food. There was electricity the entire time. I had the opportunity to sit and spend time with many of the spouses and children of our hard-working Section members – and to thank them in person for the sacrifices that they make by allowing their loved ones to volunteer for the Section. We had a riddle contest. We had a very productive and somewhat humorous Executive Council meeting. Our App provided a method of communication when emails failed. Our sponsors – whether

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Weaving Around The Thorny Branches Of Dual Community Association Membership

By D. Michael Arendall, Esq., Zinzow Law, LLC, Palm Harbor, Florida



M. ARENDALL

You are sitting at your desk, sipping your first cup of coffee, and checking emails, some of which you saw overnight – attorneys in modern practice hardly keep bankers' hours – and the receptionist buzzes your line. Your presence is requested at the front desk, and when you arrive there the process server delivers the sour news and a stack of pleadings. "You've been served." Your association client, its community association management firm, and your firm are all named as defendants, and you recognize the plaintiffs in the Federal court action as four recent thorns-in-your-side condominium owners in your client's association. After asking that another pot of coffee be put on to brew, and before telephoning your association client's president or your carrier, you sit down to try to unwind how you got here.

But more on that later; first, a refresher about the genesis of association-style living.

During the twentieth century an overwhelming number of Americans decided to settle in homesteads that fused the best features of old and new America. We sought out the convenience of urban city-dwelling paired with the frontier-like individualism of possessing our own dirt or our own four walls. By the mid-1940s, the concept was a reality. On the site of a potato field on Long Island, New York, the first modern planned development was born, marketed primarily to returning servicemen and purchased with low-interest loans guaranteed by the government that had just sent them to war.[1]

The concept of planned developments caught fire and spread across the nation, including Florida, where homeowners' and condominium associations now thrive. Most often, homeowners' and condominium associations exist independent of one another. They are governed by separate chapters of the *Florida Statutes* that contain differing provisions on a host of governance and other matters, and they receive starkly differing degrees of regulatory oversight by the state. Yet, creative developers have increasingly begun to craft mixed-format communities that mandate membership in coextensive condominium and homeowners' associations, a scheme neither directly sanctioned nor prohibited by Florida state law. Developers set out to create a system where condominium owners could govern their own affairs, but also enjoy broader recreational and other amenities managed by a different association for the benefit of a wider group of people, including single-family homeowners in separate segments of the development.

The amenities were, no doubt, attractive at first blush. But the fiscal consequence, nay burden, of such an arrangement is plain: condominium owners are bound to pay their condominium dues and then fork over more dues to a separate association to sustain the recreational amenities. On occasion, condominium owners in these dual association communities have cried foul or have attempted to secede altogether, believing the dual-mandated association setup to be fundamentally unfair, akin to double taxation, or claiming lack of use of the amenities. Naturally, the amenities associations fight back against an attempted exodus by a large chunk of their dues-paying members, necessitating court interpretation of the interplay between Florida's community association statutes and common law real estate doctrines.

In the mid-1980s, the First District Court of Appeal encountered such a dispute.[2] Eighty owners of a condominium resort in Walton County objected to the developer's mandate that they, along with other neighboring condominium and homeowners' associations, "enjoy" membership in an association responsible for the maintenance of roads, lakes, and canals, as well as landscaping, lighting, security, and a number of other community features.[3] The court described the recreational association as a "master" association comprised of constituent condominium and homeowners' associations.[4] At issue was language in the condominium declaration, as well as in the deed that originally conveyed the swath of land to the developer, that allowed condominium owners to utilize recreational and other amenities if they met the developer's conditions, namely the payment of dues.[5] The trial judge concluded that the developer's requirement of membership dues was a reasonable condition for use of the amenities.[6] On appeal, the judgment was affirmed, with the court declaring as fully enforceable contractual provisions that give developers absolute discretion to set terms and conditions for the use of amenities, as long as the terms and conditions are fair and reasonable.[7] Critically, the court found nothing unreasonable or improper in a developer's mandate that condominium owners be members of an amenities homeowners' association which, according to the court of appeal, "provide for necessary upkeep in the face of high absentee ownership."[8]

Under firmly rooted real estate legal doctrines, developers are permitted to bind property owners and their successors in title to ownership in associations that provide amenities to a planned community through real covenants written into deeds. Real covenants differ in form, duration, and enforceability from personal covenants that apply to particular

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owners. Unlike personal covenants that apply between specific parties, real covenants run with and bind the land itself, not individual owners. They are created when (i) the liabilities or rights under the covenant are intended to and do pass to subsequent owners, (ii) the covenant touches, relates to, or involves the land in a way that enhances the value of the property or renders the land more convenient or beneficial to the owner, and (iii) the party against whom the covenant is being enforced has notice of the covenant.[9]

For example, a real covenant embedded in a recorded deed for land upon which a condominium is built might contain the following language: "Each owner of each residential condominium unit built on the land conveyed by this deed shall be required to join and maintain memberships in the association known as…, providing recreational and support amenities to said land." Such a covenant meets the requirements established by Florida law for an enforceable, binding membership obligation upon the condominium owners.[10] The notice of such covenant, one of its legally essential features, is provided via the constructive notice[11] or implied actual notice[12] principles of the law, even where the covenant is contained in the original deed of the larger tract and not the individual deeds to the respective condominium owners.[13] Equally important to the long-term sustainability of amenities associations, courts are not permitted to modify real covenants to make them more or less fair or equitable to one party or another.[14] Owners who protest a properly constructed dual membership scheme by citing lack of notice, arguing lack of use of the amenities, or asserting lack of political influence in the amenities association will find little sympathy inside a courtroom because of the clear dictates of established real estate law.

Feeling confident in their firm legal footing, homeowners' associations may turn to the courts to enforce the covenants that bind condominium owners to dual membership and the accompanying dues. But this path is not without its thorns. Notwithstanding the association class action provisions of Florida's civil procedure rules that permit the condominium association to be named and served as the class representative of all similarly situated owners,[15] condominium owners may try to attack the personal jurisdictional of the court for lack of personal service upon them. They may also challenge the defending condominium association's authority to obtain discovery from the class member owners, whether for the same jurisdictional issues or practical ones created by the absence of any association power to compel discovery compliance by the individual condominium owners. Every litigator knows about the power of an untimely or unanswered Request for Admissions, but the warm glow of that discovery tactic is dulled significantly if the court begins to question who was responsible for answering the request: the owner or the class representative association. Realistically, the path can be long and arduous for a homeowners' association to endure on its way to a final judgment in its favor or other favorable resolution to a dual membership challenge.

Practitioners and stakeholders should be wary of the potential for an even more complex minefield as layers of the dual membership onion are peeled back. Condominium owners and their boards who, upon receiving the amenities association's monthly or annual dues notices and demands for nonpayment, are angry at their perceived double taxation (perhaps without meaningful representation) may seek out counsel to pursue Federal Fair Debt Collection Practices Act ("FDCPA") and Florida Consumer Collection Practices Act ("FCCPA") claims against the homeowners' association, its community association manager, and the association's general or collections counsel. These claims, some of which assert, for example, that the association, board, manager, or association attorney are seeking to collect sums that are not lawfully due or are taking action that the owners believe cannot legally be taken, can drag in liability insurers for the association, manager, or counsel, depending on the severity of the perceived threat, further adding complexity to the dispute and the threat of higher insurance premiums.

Even if the merits of FDCPA and FCCPA claims are tenuous at best, the reality is that the cost of defense of such claims through trial militates in favor of early settlement and dollars being paid to complaining condominium owners. Unlike state court litigation, where attorneys largely dictate the pace of the case, Federal court litigation is driven by strictly-enforced Federal court rules of procedure and by lifetime-appointed judges, driving up litigation costs and the pace of the attorneys' fee meter. Further, the boards of amenities homeowners' associations that are sued on FDCPA and FCCPA claims may be compelled by their fiduciary duties to explore unsavory avenues for relief, such as malpractice or other tort claims, against the community association manager or general counsel that triggered the collection letters, lien threats, or litigation.

There are practical business reasons for creating a single recreational amenities association that serves the many diverse constituent communities of a planned development. By spreading the expenses associated with operating recreational facilities and amenities amongst a larger membership body, the amenities association can help keep per-owner dues lower and can blunt the severity of future dues increases. Creative planned community developers can look outside of traditional association schemes in offering their properties for sale and, in so doing, may be able to cloak long-term financial obligations as attractive amenities. But the knowledge of an experienced real estate litigator can also be invaluable in dodging the many thorns that can snag the unwary traveler down the dual association membership path.

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Endnotes

1 James F. Peltz, *It Started With Levittown in 1947: Nation's 1st Planned Community Transformed Suburbia*, Los Angeles Times (June 21, 1988).

2 *Scott v. Sandestin Corporation*, 491 So. 2d 334 (Fla. 1st DCA 1986).

3 *Id*. at 334.

4 *Id*.

5 *Id*. at 334-35.

6 *Id*. at 335.

7 *Id*.

8 *Id*.

9 *See Maule Indus., Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798, 801 (Fla. 3d DCA 1958); *PGA North II of Fla., LLC v. Div. of Admin., State Dept. of Trans.*, 126 So. 3d 1150, 1153 (Fla. 4th DCA 2012).

10 *Bessemer v. Gersten*, 381 So. 2d 1344, 1347 (Fla. 1980) ("[a] developer, in carrying out a uniform plan of development for a residential subdivision, may arrange for the provision of services to the subdivision or for the maintenance of facilities devoted to common use, and may bind the purchasers of homes there to pay for them. In this case, all of the elements of an affirmative covenant running with the land have been established.").

11 *See, e.g., Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 311-12 (Fla. 2d DCA 1966) ("And the authorities are practically unanimous in holding that the recorded deed containing such restrictions is not necessarily the immediate deed by which the instant owner takes or has taken title; it may be in an antecedent deed, even the deed from the original common grantor.").

12 *Id*. at 313 (the law precludes an owner from remaining willfully ignorant of a thing readily ascertainable when the means of knowledge is at hand).

13 *Id*. at 311-12.

14 *AC Associates v. First Nat. Bank of Fla.*, 453 So. 2d 1121, 1129-30 (Fla. 2d DCA 1984).

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A Primer On Taxation Considerations In Structuring Real Estate Holdings

By Debbie Faulkner, Esq., Burke Faulkner Law, P.A., Palm Harbor, Florida

In early 2014, the investment firm Morgan Stanley published the results from a survey of millionaire investors that revealed that 77% of them invested in real estate. In 2016, Florida dominated the list of the nation's top twenty most attractive housing markets for investment purposes, with seven cities on the list. This is great news for lawyers for two reasons: first, the real estate slowdown since the Great Recession of 2008 seems to be waning, and second, real estate investments have a unique set of complicated planning opportunities. When besieged with new real estate clients, all itching to close yesterday, it is easy to get lost in the mechanics of each deal and overlook the lasting implications of the entity selection and structure of each deal. The way that a real estate investment is structured often has a substantial impact in the manner in which the investment is taxed, and, ultimately, the amount of profit realized by the client/investor.

The first, and perhaps the most crucial, step in most real estate investment transactions is the entity selection. While many lawyers advise their clients to create a limited liability company ("LLC") in which to hold real estate, many lawyers lack an understanding of the underlying tax principles for such a recommendation. Due to the profound effect that taxation has on the profit realized in each real estate transaction, it is important for lawyers to understand the basic taxation considerations in the deal. This article is intended to provide a general overview of tax considerations in structuring real estate holdings, and tips for attaining maximum tax deferral for clients. An understanding of these principles is critical for the proper structuring of the transaction.

C Corporations

Prior to 1997 (in which began the advent of LLCs), corporations and general partnerships dominated the business landscape. While corporations provide limited liability to owners, the corporate form is rarely selected in the modern era as the entity of choice due to the double layer of taxation (at the corporate and owner levels) of the corporate structure.[3] Further, while the legal profession thrives on the lack of absolutes, there is little debate that C corporations should never be selected for real estate investments. The reason for this is straightforward - real property can be transferred into a corporation without triggering tax recognition, but can never be transferred out of the corporation without some form of tax recognition event.[4] Nevertheless, it is still important to understand the tax considerations involved with C corporations and real property.

If a C corporation desires to sell a parcel of real estate, the initial questions should be (a) what is the tax basis in the property, and (b) how was the property acquired. If the real property was contributed to the corporation under § 351 by one of the shareholders in exchange for stock, and the real property had a value in excess of the shareholder's basis at the time of the contribution, the corporation has a carryover basis in the property under § 362. In other words, the corporation has the same basis the shareholder had in the real property (and the shareholder takes basis in the C corporation stock equivalent to the basis it held in the property).[5] The corporation also takes a carryover basis in real property that is subject to a liability at the time of contribution, such as a mortgage. The shareholder's basis in the stock, however, is adjusted to account for the liability.[6] Upon sale, the corporation will recognize gain (i.e., the sales price less tax basis) which is taxed at a corporate rate up to 35%.

For example, assume that the C corporation, after the sale of the contributed real property, intends to liquidate and distribute cash proceeds to the shareholders. The transferee shareholder would recognize capital gains (or ordinary income if the property was contributed under one year prior to the sale), for the difference between the amount distributed and the shareholder's basis in stock upon this distribution. Therefore, in addition to the capital gain recognized by the C corporation on the sale, the transferee shareholder would recognize capital gains.[7]

Unfortunately, while there is no steadfast way to avoid this double layer of taxation when moving a property out of a C corporation, other strategies can be utilized to minimize the tax consequences. If the C corporation intends to hold the property as an investment, the most prudent course of action may be to elect to reclassify the corporation as an S corporation.[8]

S Corporations

If a C corporation intends to either (a) maintain real property recently purchased and/or (b) sell an existing asset and buy and hold a similar property, it is best to make an "S election" and

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qualify the corporation as an "S corporation." S corporations are "pass-through" taxation entities. The corporation does not pay a separate tax because all of its losses, deductions, and credits pass through to the shareholders.

Even though the S corporation is a pass-through entity, S corporations have their own set of particular tax rules. For example, if the corporation holds the real property for a minimum of 5 years after the S election is made (the "5 Year Window"), the corporate layer of tax is not levied on the corporation upon the sale of the real property.[9] Accordingly, the gains will pass through to the shareholders and be subject to only a single layer of tax. If the S corporation sells the property before the end of the 5 Year Window, the property's built-in gains will be subject to both levels of C corporation taxation despite having elected S corporation tax treatment.

If the S corporation must sell the property within the 5 Year Window, there is a way to defer tax recognition and avoid the application of double taxation - the "1031 Exchange" (also known as a "like-kind exchange"). Under § 1031, if the corporation intends to sell real property within the 5 Year Window, the tax consequences can be deferred by selling the property (the "original property"), and purchasing another, like-kind investment property (the "new property") within 180 days after the sale. With a 1031 Exchange, the "holding period" for ownership of the property is continued as if the original property were still owned by the S corporation. If the S corporation holds the new property beyond the end of the 5 Year Window, the S corporation will effectively avoid the application of double taxation, thereby improving the shareholders' profits - and making for very happy clients.

Limited Liability Companies

The S corporation, while certainly an improvement upon the C corporation in terms of owning real estate, is not without its drawbacks. Ideally, the goal would be to avoid double-taxation and only have a transaction taxed once. From a pure tax standpoint, partnerships are far superior to C and S corporations for real estate holdings because partnerships are pure pass-through entities and therefore, there is only one level of tax. However, from a partner liability and control perspective, a partnership as a legal entity may not be ideal. Beginning in 1997, the LLC was created to meld the ownership and management structure of a corporation while providing the limited liability protection of a limited partnership. The liability limitation and state law creditor protection advantages of an LLC are widely known and have contributed to the proliferation of the LLC over other partnership entities. Given the popularity and ubiquity of the LLC, however, it makes sense to discuss real estate held in a partnership through the prism of this entity.[10]

S corporation shareholders and LLC members alike obtain tax basis through capital contributions, contributions to purchase stock, loans to the entity, and through allocation of income or loss. S corporation shareholders, however, receive no basis adjustment for the S corporation's debt and liabilities (among other basis restrictions),[11] whereas debt incurred by an LLC is treated as contributions of funds by the members. The contribution treatment allows the members to increase the basis in their respective membership interests. Additionally, the S corporation has structural and operational limitations.

Perhaps most importantly, the generous partnership tax basis rules result in increased profits to the LLC members upon the sale of appreciated property. While the members of LLCs, like corporation shareholders, obtain basis for the amount invested in the company (through capital contributions, property used to purchase stock, loans to the entity, and allocation of income or loss), an LLC members' basis also include the liabilities of the entity as if the members themselves lent the LLC the money representing the debt.[12] For example, if Adam invests $50,000 in Dewey Cheatem and Howe, LLC for 50% ownership, and the LLC thereafter borrows $60,000 to buy property, Adam has a tax basis of $80,000 in his membership interest. [(100% x $50,000) + (50% x $60,000) =$80,000]. This ability allows LLC members to receive tax-free distributions, or to deduct losses in excess of the members' cash investment. Additionally, upon the death of an LLC member or sale of its membership interest, § 754 allows the successor member to elect a "step up" in basis in the member's percentage as to all inside property in the LLC if the property's fair market value exceeds the value of the owner's capital account at the time of transfer. This step-up is only applicable to the particular member, and allows for an equitable relationship between the member's "outside basis" (i.e., the basis in the membership interest) and the "inside basis" (the member's pro-rata allocation of the basis of assets owned by the LLC). Therefore, the successor member is able to reduce taxable gain in the event of a sale by the LLC of its underlying real estate assets.

Finally, upon liquidation, the LLC has favorable tax treatment because a liquidation of an LLC is a non-recognition event. The LLC can distribute its property tax free with the members receiving a carryover basis in the underlying assets, whereas, with C and S corporations, the liquidation of property is treated as a sale for fair market value which triggers tax recognition.

As a result of these favorable tax law distinctions, purchasing a real estate investment under an entity taxed as a partnership is the ideal structure for investors.

In the end, if no election is made, an entity with two or more members will be classified as a partnership by default.[13] If, however, the LLC has only one member, regardless of an election to be classified as an LLC (and thereby seeking partnership tax treatment), the entity will be disregarded as a separate entity from the owner.[14] An entity disregarded as a

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separate entity for tax purposes will be taxed on the personal income tax return of its owner, and therefore not subject to double taxation. However, in most states, a single member LLC is not presumptively provided charging order protection, and its owner also would be bereft of various liability protections afforded to multi-member LLCs.

Tricks of the Trade Can be Traps for the Unwary

1031 Exchanges

A way to defer tax recognition on the disposition of real property is for the entity to engage in a 1031 Exchange. The Internal Revenue Service (the "Service") gave tacit approval, through a non-binding private letter ruling, to the use of 1031 Exchanges for exchanging "underwater" property, when the lender is willing to accept the first property in full satisfaction of the outstanding nonrecourse liability.[15] Ordinarily, an investor would recognize gain upon returning the property to the lender in the amount of the liability less the investor's tax basis. By creatively using a like-kind exchange, however, the investor can free up capital to invest in new property, and hopefully ride out the market downturn.

The good news is that 1031 Exchanges, also known as like-kind exchanges, are available to individuals and business entities alike, provided that the properties involved are purchased for business or investment, and not personal purposes.[16] The bad news is that if an exchange is not executed properly, the exchange fails. For example, if the real estate investor takes control of the capital or proceeds between the sale of the first property and the purchase of second property, the 1031 Exchange will fail and the gain on the sale of the first property will be recognized.[17] For this reason, it is imperative that the rules are carefully followed and a reputable qualified intermediary ("QI") is used.

Except in limited circumstances, 1031 Exchange treatment is not available if the parties are "related parties."[18] Under § 1031(f), related party exchanges are permitted, despite the restriction, if the parties do not dispose of the property received in the exchange for a minimum of 2 years.[19] Sale of the property prior to two years voids the non-recognition enjoyed in 1031 Exchanges. By forcing related parties to hold the property, the Service has effectively removed the incentive familial investors had to offset their gains with a loss and cash out tax-free.

Documentary Stamp Taxes

In the past, it was commonplace for lawyers to assist investors in avoiding documentary stamp tax (deed tax) upon the transfer of real property by (a) transferring unencumbered property from an individual investor into a wholly-owned entity, and then (b) immediately selling the recipient entity to the buyer of the underlying real property. The transfer from the individual to his or her wholly-owned entity constituted "a mere change in form of the stockholder's equity," and thus documentary stamp taxes were not levied.[20] Upon the sale of the LLC, the new owner was able to dissolve the company and own the property outright, completely avoiding the documentary stamp tax. This loophole was functionally removed by the Florida Legislature when it amended Fla. Stat. § 201.02, to require a conduit entity[21] to pay documentary stamp tax if the property was transferred to the entity within 3 years of the sale of the entity.[22] By closing this loophole, the Florida Legislature removed the incentive to quickly place the property in a company before its sale.

It is still possible to avoid the documentary stamp tax if an investor transfers the real property into the recipient entity at least 3 years prior to the sale of the property. For liability protection and general taxation reasons, investors should transfer investment properties into an LLC, or other entity. If the recipient entity ends up holding the investment for the 3-year "hold-out" period, the investor receives an ancillary benefit of avoiding the documentary stamp tax, equivalent to seven tenths of a percent.[23] At first blush, the tax savings may seem minimal, but the savings is compounded by the institutional and professional investor.

Conclusion

Understanding the impact the structure of the holding company has on the tax deferral opportunities afforded to real estate investors is critical to providing proper advice. It is recommended that any attorney who represents real estate investors first carefully consider the long-term taxation implications, and know and understand any state or tax law changes that may impact the structuring decision.



D. FAULKNER

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Endnotes

1 *Millionaire Investors Name Real Estate as Most Popular Alternative Asset Class by Wide Margin*, Morgan Stanley, (Feb. 6, 2014) https://www.morganstanley.com/pub/content/msdotcom/en/press-releases/millionaire-investors-name-real-estate-as-most-popular-alternative-asset-class-by-wide-margin_404f321a-29ad-438c-afab-ff18ceb302ac.html.

2 Best Buy Cities: Where to Invest in Housing in 2016, Forbes, (Jan. 27, 2016) http://www.forbes.com/sites/erincarlyle/2016/01/27/best-buy-cities-where-to-invest-in-housing-in-2016/#682fb7512429.

3 Section 11. Unless specifically stated otherwise, all section references in this Article shall be to the Internal Revenue Code of 1986, as amended (the "Code").

4 *See* § 351 (providing for deferral of gain recognition upon the transfer of appreciated property provided the transferor retains a minimum of 80% control of the receiving corporation); *But see* § 1001 (requiring tax recognition upon the transfer of appreciated property); § 357(c) (providing for recognition of gain where the transferred property has liability in excess of tax basis).

5 *See* § 358.

6 If the property contributed was subject to liability not in excess of the shareholder's tax basis, tax deferral could still be achieved for the taxpayer under § 351 and § 357(a), but the basis calculation for the stock received is re-

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calculated under § 358, and is no longer equivalent to the basis the shareholder had in the transferred real estate. *But see* § 357. Transferring property subject to liabilities can trigger gain recognition based on a variety of factors, including whether the shareholder received boot at the time of the exchange in excess of tax basis, and whether the underlying liability was acquired for a bona fide business purpose. The calculation of basis on a contributed property subject to liability is complex and involves an in-depth discussion beyond the scope of this article.

7 IRC § 1001, 61(a)(3); § 1411.

8 Before making such a conversion, though, one should consider that the business will be valuated, and the fair market value of the stock recalculated. If the business owners' succession plans involve the gift or bequest of all or part of the stock in the corporation, a prudent practitioner will consider advising the shareholders to gift all or part of the stock prior to making the S corporation election to reduce the gift taxes owed.

9 Section 1374.

10 Under § 7701, an LLC can technically elect to be treated as a C or S corporation, or remain with the default classification of partnership taxation. Since legal publications and articles conventionally refer to "LLC" to denote an LLC taxed as a partnership, the author has done the same.

11 The Service permits LLC members to increase their basis in depreciable real property upon the sale of a membership interest, or a member's death, whereby S corporations enjoy no such opportunity.

12 *See PUBLICATION 541 PARTNERSHIPS, 2016 WL 155422, at *21* https://www.irs.gov/publications/p541/ar02.html#en_US_201601_publink1000104289

13 Treas. Reg. § 301.7701-3.

14 *Id.*

15 Private Letter Ruling 201302009 (Jan. 11, 2013).

16 Section 1031 is not limited in application to real estate. *See* Treas. Reg. § 1.1031(a)-2 (providing that general asset or product classes can be like kind). It can be used to exchange personal property such as automobile fleets, trucking equipment or trucks, livestock, paintings or artwork, aircraft, taxi medallions, licenses, copyrights, trademarks, franchise licenses – the possibilities are endless.

17 *Id.*

18 "Related parties" include any immediate family member (brother, sister, parent, or spouse) as well as any ancestor of person of lineal descent. Companies are related if both parties are under the same control group, and a corporation and a partnership are related if both have the same majority owner. For trusts, the parties are related if they include the grantor and fiduciary of the same trust; fiduciaries of two trusts by the same grantor; the fiduciary of a trust and a beneficiary of such trust; the fiduciary of a trust and a beneficiary of another trust by the same grantor; fiduciary of a trust and a corporation that is majority owned by the trust or its grantor; a person and an organization to which § 501 (charitable organizations exempt from tax) applies and which is controlled directly or indirectly by such person or by members of the family of such individual. Lastly, the Service has stated that an executor and beneficiary of an estate are related parties in all situations unless the exchange is in the satisfaction of a pecuniary bequest.

19 Section 1031(f)(1)(c).

20 *Crescent Miami Ctr., LLC v. Fla. Dep't of Revenue,* 903 So. 2d 913, 918 (Fla. 2005) (*quoting, Fla. Dep't of Revenue v. De Maria,* 338 So. 2d 838, 840 (Fla. 1976)).

21 A conduit entity is an entity to which real property is conveyed without full consideration. *See* Fla. Stat. § 201.02 (2016).

22 *Id.*

23 Document Stamp Tax in most areas is 70 cents for each $100 or fractional part thereof. Fla. Stat. § 201.02 (2016).

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present or absent – were recognized and appreciated. All three of our out-of-state members were present (now THAT is dedication – they flew into the storm!). All twelve officers were there and acting not only in their own roles, but often playing multiple parts as very capable understudies for committee chairs who understandably could not be present. One of my favorite expressions is "Man plans and God laughs." Fortunately, we were all able to stay in good humor and laugh right along with Him. The meeting was certainly not what we had planned, but it will not soon be forgotten.

Long before this happened, we had already begun the planning for a disaster preparedness CLE to be presented during the 2017 Convention that will be held at the Hyatt Regency Coconut Point Resort and Spa in Bonita Springs from May 31 – June 4th. Brian Sparks is an Executive Council member who is uniquely qualified to present on this topic and he had volunteered to spearhead this CLE years before I ever became the Chair. I hope you can plan to join us for the Annual Convention and the CLE next spring. I would like to think that Hurricane Matthew was just a reminder not to be complacent and I, for one, look forward to attending the seminar to learn more. And when another storm approaches (and I do mean when, not if), we will all be better prepared to plan for the worst and hope for the best.

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Governing Law For Dispositions Of Florida Real Property By Non-Resident Decedents

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P. MIZE

Does Florida law govern the disposition of Florida real property owned by a nonresident decedent? This was the issue before Florida's First District Court of Appeal in 2001 in the case of *Saunders v. Saunders*.[2] Colorado resident Robert S. Saunders, Jr. died testate and owning Florida real property. Mr. Saunders and his wife, Denise R. Saunders, were married at some point subsequent to the execution of Mr. Saunders' Last Will and Testament. After Mr. Saunders' death, Mrs. Saunders sought a pretermitted spousal share of the Florida real property, pursuant to Florida's pretermitted spouse statute.[3] On appeal, the First District Court of Appeal held that Florida's pretermitted spouse statute was inapplicable and that Colorado's pretermitted spouse statute governed the disposition of Mr. Saunders' Florida real property.[4]

At the center of the controversy in *Saunders* was Fla. Stat. § 731.106, which is entitled **Assets of nondomiciliaries** and provides, in part:

> **(2)** When a nonresident decedent . . . provides in her or his will that the testamentary disposition of her or his tangible or intangible personal property having a situs within this state, **or of her or his real property in this state**, shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law.[5] (emphasis added)

While Fla. Stat. § 731.106(2) explicitly provides that a nonresident decedent may provide by will for Florida law to govern the disposition of the decedent's real property located in Florida, it is silent as to whether Florida law governs when the decedent's will does not contain a provision directing that Florida law governs the disposition of the real property located in Florida. In construing Fla. Stat. § 731.106(2), the court in *Saunders* made its determination of legislative intent by applying the rule of statutory construction which provides that, if the language of a statute is clear and unambiguous, construction should stop at giving effect to the plain meaning of the statutory language.[6] The *Saunders* court applied that rule of statutory construction and concluded that, according to the plain meaning of Fla. Stat. § 731.106(2), "the legislature intended that Florida law apply only to distribute a nondomiciliary testator's property situated in Florida when such testator's last will and testament provides that Florida law shall apply to his or her Florida property."[7]

In November of 2013, the Probate Law and Procedure Committee (the "PLPC") of the Real Property, Probate and Trust Law Section of the Florida Bar (the "Section") formed a subcommittee (the "Saunders Subcommittee") to study *Saunders* and Fla. Stat. § 731.106(2). One of the initial determinations by the Saunders Subcommittee was that the holding by the *Saunders* court cannot be reached by looking to the plain meaning of the words in the statute. Rather, this holding can be reached only by reading into Fla. Stat. § 731.106(2) the negative implication that when the nonresident testator's will is silent, Florida law does not apply to dispositions of Florida real property. Therefore, the Saunders Subcommittee considered additional sources, including legislative history and statutes from other jurisdictions, to try to determine the legislature's intent in enacting Fla. Stat. § 731.106(2).

Fla. Stat. § 731.106(2) has been in the Florida Statutes since the passage of the 1974 Florida Probate Code.[8] Prior to the enactment of Fla. Stat. § 731.106(2), it was well settled that all dispositions of Florida real property were governed by the common law doctrine of *lex loci rei sitae*, which provides that the law of the state where real property is located governs its testamentary disposition.[9] Florida courts applied that common law doctrine prior to, and after, the enactment of Fla. Stat. § 731.106(2).[10]

The 1974 Florida Probate Code was modeled after the 1969 Uniform Probate Code ("1969 UPC").[11] There is no explanation of Fla. Stat. § 731.106 in the legislative history for the 1974 bill, nor for the 1975 bill which made some procedural revisions to the 1974 Florida Probate Code. Section 2-602 of the 1969 UPC titled **Choice of law as to Meaning and Effect of Wills** provides that the meaning and legal effect of testamentary dispositions shall be governed by the law of the state selected in the testator's will, so long as the application of the selected state law is not contrary to the public policy of the state of administration. The approach by the 1969 UPC is broader than Fla. Stat. § 731.106(2) because it allows a testator to select the state's law that will govern his or her property without regard to having property located in that state.

The comment to Section 2-602 of the 1969 UPC provides clues to the origin of Fla. Stat. § 731.106(2). The comment notes that New York and Illinois have statutes that allow nonresident testators to provide that the law of those states will govern the dispositions of the testator's property located in those states.[12] The New York statute applies to both real property and tangible and intangible personal property, whereas the Illinois statute is limited to tangible and intangible personal property.[13] Fla. Stat. § 731.106(2) appears to have been modeled substantially on

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the Illinois statute. The primary difference between the two is the addition to Fla. Stat. § 731.106(2) that allows a nonresident testator to specify that Florida law will apply to the testator's Florida real property, in addition to the testator's tangible and intangible personal property located in Florida. Additionally, after the enactment of a non-resident choice-of-law statute, Illinois continued to follow the common law doctrine of *lex loci rei sitae* and New York continued to have a statutory enactment of the *lex loci rei sitae* doctrine.[14]

After learning of the Illinois statute, the members of the Saunders Subcommittee considered several additional rules of statutory construction. The Saunders Subcommittee was primarily influenced by two such rules. First was the "borrowed statute rule," which provides that "statutes . . . borrowed from other jurisdictions will normally be given the same construction in Florida courts as the prototype statute is given in other jurisdictions."[15] The second was the rule that a statute "designed to change [a] common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard."[16] In conjunction with that rule of statutory construction, Florida courts have recognized a specific presumption against statutory abrogation by implication of an existing common law rule.[17]

Moving beyond a plain meaning analysis of Fla. Stat. § 731.106(2) and applying additional rules of statutory construction, the Saunders Subcommittee concluded that the holding of the court in *Saunders* was too broad. Both Illinois and New York continued to follow the doctrine of *lex loci rei sitae* after the enactment of their nonresident choice-of-law statutes. Therefore, applying the borrowed statute rule, it should be assumed that the Florida legislature — absent some express statement to the contrary — intended for Fla. Stat. § 731.106(2) to be interpreted in the same manner New York and Illinois interpreted their statutes, neither of which overturned the application of *lex loci rei sitae*.

In its opinion, the *Saunders* court concluded that Fla. Stat. § 731.106(2) "clearly, unequivocally, and specifically prescribes a different rule of law from the common law rule."[18] However, Fla. Stat. § 731.106(2) does not explicitly state that Florida law will not apply to the disposition of a nonresident testator's Florida real property when the testator's will does not invoke Florida law. To reach the conclusion that Fla. Stat. § 731.106(2) changed the common law, you cannot look to explicit language of the statute. Instead, you have to read into the statute the negative implication that if a nonresident testator's will does provide for Florida law to govern the disposition of the testator's Florida real property, Florida law will not govern. The Saunders Subcommittee, following the presumption that a change in the common law is not intended when the statute is not explicit in that regard, and the presumption against statutory abrogation by implication of a common law rule, concluded that the legislature's intention was not to change the common law regarding the disposition of a nonresident testator's Florida real property, but to codify it.

Based on the conclusion that the legislature did not intend to change the common law doctrine of *lex loci rei sitae*, the Saunders Subcommittee recommended a revision to Fla. Stat. § 731.106(2) to the PLPC. The PLPC approved the proposed revision in July of 2014. In August 2015, the Section's Executive Council voted unanimously to approve a motion to adopt as a Section legislative position the support of the proposed amendment of Fla. Stat. § 731.106(2). Ultimately, the legislature approved the deletion of the phrase "or of real property in this state" from Fla. Stat. § 731.106(2) and also approved the enactment of new Fla. Stat. §731.1055, which provides that "[t]he validity and effect of a disposition, whether intestate or testate, of real property in this state shall be determined by Florida law."[19]

With those legislative changes, it is now clear that Florida law governs all dispositions of Florida real property.

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Endnotes

1 The Saunders Subcommittee and the author were greatly aided by the research of a member of the Saunders Subcommittee, S. Dresden Brunner, Esq. Much of this article is derived from the research memorandum she prepared for the Saunders Subcommittee. The author thanks S. Dresden Brunner, Esq. for allowing him to use portions of her work product for this article.

2 796 So. 2d 1253 (Fla. 1st DCA 2001).

3 Fla. Stat. § 732.301 (1999).

4 *Saunders*, 796 So. 2d at 1255.

5 Fla. Stat. § 731.106(2) (1999).

6 *Saunders* at 1254 (citing *Aetna Casualty & Surety Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

7 *Id.*

8 See Ch. 74-106, Laws of Fla.

9 *Trotter v. Van Pelt*, 198 So. 215, 217 (Fla. 1940) (holding that the doctrine of *lex loci rei sitae* was absolute).

10 *Kyle v. Kyle*, 128 So. 2d 427, 429 (Fla. 2d DCA 1961); *Beale v. Beale*, 807 So. 2d 797 (1st DCA 2002) (citing 10 Fla. Jur.2d Conflict of Laws § 27 (1997), "[i]t is a universal principle that real or immovable property is exclusively subject to the laws of the country or state within which it is situated, and no interference with it by any other sovereignty can be permitted.").

11 Synopsis of House Bill 997 (1974).

12 Unif. Probate Code § 2-602 cmt. (1969).

13 Illinois Probate Act Sec. 89 b (1957); New York Estates, Powers & Trust Law Sec. 3-5.1(h) (1967).

14 *Lake County Trust Co. v. Two Bar B, Inc.*, 606 N.E.2d 258, 262 (3d Division, Ill. App. Ct. 1992) (citing *Dibble v. Winter*, 93 N.E. 145 (Illinois 1910); New York Estates, Powers & Trust Law Sec. 3-5.1(b) (1967).

15 *Flammer v. Patton*, 245 So. 2d 854, 858 (Fla. 1971).

16 48A Fla. Jur. 2d § 188.

17 *Olmstead v. Federal Trade Comm'n*, 44 So. 3d 76, 82 (Fla. 2010) (citing *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990)).

18 *Saunders*, 796 So. 2d at 1254.

19 Ch. 2016-189, §§ 1 and 2, at 1-2, Laws of Fla.

Is Your Defective Work Covered? – Treatment Of "Rip And Tear" Coverage

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Introduction

Typically, coverage does not exist under standard form Commercial General Liability ("CGL") policies for costs to repair defective work or a defective product itself. However, the more complicated issue at the forefront of construction defect litigation is whether otherwise uncovered defective work or the damages caused by the need to remove or replace non-defective work to "get to" defective work is covered.

In 2007, the Florida Supreme Court joined what is now the clear majority of jurisdictions in holding that a CGL policy covers certain elements of defective construction claims. In *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*[1] and the companion case of *Auto-Owners Ins. Co. v. Pozzi Window Co.,*[2] the Florida Supreme Court held that the CGL policy pays damages for those portions of the work that resulted in physical damage to the property. Both the *J.S.U.B.* and the *Pozzi* decisions distinguished claims for mere defectively performed work, which the Court held was not covered, from physical damage which resulted from this defective work, which was potentially covered. Both decisions held that defective construction claims constituted an occurrence and property damage, further holding that such claims were restored to coverage by operation of the subcontractor exception to the "your work" exclusion. Subsequent cases have reinforced the idea that under *J.S.U.B.* and *Pozzi* defectively performed work, without accompanying physical damage to other property, does not constitute a covered loss under a CGL.[3] *Amerisure Mutual Insurance Co. v. Auchter Co.* took the holdings of *J.S.U.B.* and *Pozzi* one step further and essentially implied a third party element to the definition of property damage.[4]

None of these cases answered one of the most common problems in defective construction insurance claims: whether an insurer is responsible to pay for the costs of accessing the covered damage. A common example is helpful in evaluating this issue. Many, if not most, of the residential defective construction claims in Florida involve claims of improperly installed stucco leaking and causing damage to the interior of the structure.[5] In many of these cases, the stucco itself is undamaged, although arguably improperly installed or otherwise defective, meaning not in conformity with the building code. Assuming the stucco is undamaged, the cost of repairing or replacing the stucco itself would clearly be an uncovered loss under *J.S.U.B., Pozzi,* and *Auchter.* However, the resulting water leakage to the substrate beneath the stucco would clearly be a covered loss.[6] If the only way to access the loss is to go through the stucco, which is commonly true, the question then becomes whether or not the cost of accessing the covered loss is covered under the CGL policy. In insurance parlance, this element of damage is known by three separate terms, all of which functionally mean the same thing: "Rip and Tear Damages," "Access Costs," or "Get to Damages." In the last 18 months, this issue has been resolved resoundingly in favor of insureds in Florida.

Florida Courts' Treatment of "Rip and Tear"

Much of the confusion regarding coverage for "Rip and Tear Damages," "Access Costs," or "Get to Damages" stems from a failure to properly read and interpret the policy terms. A CGL policy per the Insuring Agreement pays "those sums the insured becomes legally obligated to pay as damages because of…property damage." Cases finding coverage for "rip and tear" simply make clear that there is coverage for consequential damages as a result of your liability for covered damages.

The first case in Florida to directly address the issue in this manner was the Eleventh Circuit's opinion in *Carithers v. Mid-Continent Cas. Co.*[7] The *Carithers* decision addressed a series of issues important to CGL coverage, including the trigger of coverage and the scope of the duty to defend. However, the biggest impact of the *Carithers* decision was in its holding relative to "rip and tear" damages. In *Carithers*, the claimant, the Honorable Hugh A. Carithers, Circuit Court Judge, obtained a judgment against a contractor insured by Mid-Continent Casualty Company. One of the elements of damages for which Judge Carithers obtained judgment was damage to the ceilings and walls of his garage caused by water seeping in from a defective overhead balcony. All of the parties agreed that the defective balcony was not covered under *J.S.U.B., Pozzi,* or *Auchter.* The parties also agreed, however, that the resulting water damage in the ceilings and walls of the garage were covered. The only manner to access the covered water damage was to rip and tear through the defective balcony. Judge Carithers sought coverage for the cost of accessing the damage to the garage by tearing through the balcony. In affirming the trial court's award of these damages, the court noted:

> Under Florida law, the Carithers had a right to "the costs of repairing damage caused by the defective work...." *J.S.U.B.,* 979 So. 2d at 889. Since the district court determined that repairing the balcony was part of the cost of repairing the garage, which was defective work, the Carithers were entitled to these damages. *Carithers.*[8]

The Eleventh Circuit made clear the cost of accessing such damages was covered under its interpretation of Florida law.

Following *Carithers*, the federal and state courts, in speaking to the issue of recovery of rip and tear costs, have uniformly held in favor of such damages being available under the CGL policy.[9]

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Shortly after the *Carithers* decision, Florida's Fifth District Court of Appeal addressed the identical issue in *Mid-Continent Cas. Co. v. Treace,*[10] wherein the claimants, the Treaces, successfully sued their contractor for water damage to their home. The Treaces' claim included cost to access and repair the water damage caused by faulty construction. In a very short treatment of the rip and tear issue, the court noted:

> Without further discussion, we affirm that portion of the trial court's judgment which found the damages awarded for the cost to access and repair the water damage were covered by MCC's policy. *Treace*.[11]

The decision of Judge King in *Pavarini Construction Co. v. Ace American Ins. Co.* further expanded coverage for rip and tear and related damages.[12] In *Pavarini,* coverage was sought under an excess CGL policy. The defective construction condition in question was the omission of significant amounts of reinforcing steel within critical concrete structural elements causing destabilization. The omitted steel compromised the building's structural support system resulting in excessive movement of the building components. This structural problem, in turn, caused stucco debonding, cracking on the walls of the building and worsening cracking of the concrete elements, all of which in turn led to water intrusion. While these conditions were common throughout the building, evidence of the defective construction conditions was not yet present in every location in the building. Importantly, it was undisputed that the undamaged areas would eventually suffer damage from these conditions. The excess CGL carrier disputed whether coverage was available for repair of the entire building or only those areas which had already sustained physical damage. In authorizing coverage for the entire loss, Judge King noted:

> In interpreting a substantively identical insurance policy, the United States Court of Appeals for the Eleventh Circuit held that the complete replacement of defective subcontractor work may be covered when necessary to effectively repair ongoing damage to otherwise non-defective work. *See Carithers v. Mid-Continent Casualty Company*, 782 F. 3d 1240 (11th Cir. 2015). There, a balcony that had been defectively installed by a subcontractor was causing runoff and resulting water damage to an adjacent garage. Although the balcony itself did not constitute independent "property damage" under the terms of the policy, its replacement was necessary in order to effectively repair the garage. 'In other words, to repair the garage, it was necessary to completely replace the defectively constructed balcony.' Memorandum and Order, *Carithers v. Mid–Continent Casualty Company*, No. 12–00890, 2014 WL 11332308 (M.D. Fla. Mar. 11, 2014), DE 126 at 8. Similarly here, in order to adequately repair the non-defective project components, the building had to be stabilized. Even if the predominant objective of the repair effort was to fix the instability caused by the defective subcontractor work, it is undisputed that the same effort was required to put an end to ongoing damage to otherwise non-defective property, e.g., damage to stucco, penthouse enclosure, and critical concrete structural elements. *See* DE 128 at 2–3; DE 131 at ¶¶ 52–63. Thus, the ACE policy provides for complete indemnification.[13]

The court noted the following in a footnote:

> Citing *J.S.U.B.,* Defendant argues somewhat incidentally that mitigation of damages is not covered. Nowhere in *J.S.U.B.* is mitigation of damages mentioned. On the contrary, *J.S.U.B.* stands for the proposition that claims for repairing structural damage caused by the defective work of subcontractors may be covered. **As a natural corollary, coverage may exist for costs to repair defective work in order to prevent further structural damage and covered loss.** *See, e.g., Carithers v. Mid-Continent Cas. Co.,* 782 F. 3d 1240, 1251 (11th Cir. 2015). [emphasis added].[14]

Pavarini is presently on appeal to the Eleventh Circuit. Based on the foregoing decisions, broad "rip and tear" coverage appears to be here to stay in Florida at least until this issue is addressed by either the Florida Supreme Court or another one of Florida's District Courts of Appeal.

Other Jurisdictions' Treatment of "Rip and Tear"

To satisfy the terms of the Insuring Agreement under a CGL policy, the insured must demonstrate that there is both an "occurrence" and "property damage." "Property damage" is defined in part as "physical injury to tangible property." Therein lies the heart of where the "rip and tear" analysis in other jurisdictions outside of Florida often goes sideways. Much of the case law across the country and particularly in the Southeast improperly interpret the definition of "property damage," leading to improper results.

There are jurisdictions that have denied coverage for "rip and tear." In *Builders Mut. Ins. Co. v. Lacey Constr. Co., Inc.,*[15] a South Carolina federal court denied coverage for repairing or replacing allegedly defectively constructed retaining walls. In *Builders*, the insured was alleged to have negligently constructed two retaining walls in the common area of a development.[16] The retaining walls failed to adequately retain the soil behind the walls allowing erosion and silting below the walls. In its analysis, the court assumed the erosion and silting were damage to something other than the walls themselves.[17] The insured sought coverage for the cost of correcting the defects, but its insurer denied coverage and initiated a declaratory judgment action.[18] In granting the insurer's motion for summary judgment, the court held that not only was the insurer not "obligated to indemnify [the insured] for the costs of repairing and replacing the walls," but was also not obligated to indemnify the insured for "any incidental demolition or reconstruction necessitated by the repair," as such incidental

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repairs did not qualify as "property damage."[19] The court further stated the insurer "has no obligation to indemnify the [insured] for damages measured by the cost to repair either the retaining wall or any incidental costs including for removal or replacement of soil, patios, fences or other property which must be moved in order to make the repairs. This ruling does not, however, reach the costs which might be incurred to replace or repack eroded soil above the [retaining wall]."[20]

However, there are numerous other jurisdictions which have reached the opposite result. Recently, the Texas Supreme Court in *U.S. Metals, Inc. v. Liberty Mutual Group, Inc.*[21] found coverage for non-defective work damaged while repairing defective work. In *U.S. Metals*, the insured under a standard-form CGL insurance policy supplied flanges for use in constructing refinery processing units.[22] The flanges leaked and had to be replaced to avoid the risk of fire or explosion.[23] The flanges were welded to the pipes they joined and therefore had to be cut out while the refineries were shut down.[24] The insured claimed that its liability for the refinery owner's replacement costs and downtime damages were covered by its CGL policy.[25] For each flange, this process involved stripping the temperature coating and insulation (which were destroyed in the process), cutting the flange out of the pipe, removing the gaskets (which were also destroyed in the process), grinding the pipe surfaces smooth for re-welding, replacing the flange and gaskets, welding the new flange to the pipes, and replacing the temperature coating and insulation.[26]

The court ultimately concluded that the diesel units were not physically injured merely by installation of the defective flanges since the leaks occurred during the testing process and were preemptively replaced before any physical injury to other property occurred.[27] However, the court went on to state:

> But the units ***were*** physically injured in the process of replacing the faulty flanges. Because the flanges were welded to pipes rather than being screwed on, the faulty flanges had to be cut out, pipe edges resurfaced, and new flanges welded in. The original welds, coating, insulation, and gaskets were destroyed in the process and had to be replaced. The fix necessitated injury to tangible property, and the injury was unquestionably physical…But the insulation and gaskets destroyed in the process were not restored to use; they were replaced. They were therefore not impaired property to which Exclusion M applied, and the cost of replacing them was therefore covered by the policy.[28] (emphasis added).

Thus, the court found that the non-defective work that was damaged during the process of ripping and tearing through the pipe to fix the faulty flange was covered.

Seemingly, "rip and tear" coverage will continue to be a heavily litigated issue throughout the country, but Florida, at least for the time being, appears to be in favor of coverage for "access" or "get to" costs.



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Endnotes

1 979 So. 2d 871 (Fla. 2007).
2 984 So. 2d 1241 (Fla. 2008).
3 *Amerisure Mutual Insurance Co. v. Auchter Co.*, 673 F. 3d 1294 (11th Cir. 2012).
4 *Id*.
5 *See Travelers Prop. Cas. Co. of America v. Amerisure Ins. Co.*, Case No. 5:14-cv-10, 2015 WL 5769247 (N.D. Fla. Sept. 30, 2015).
6 *See id.*
7 782 F. 3d 1240 (11th Cir. 2015).
8 782 F. 3d at 1251.
9 *Mid-Continent Cas. Co. v. Treace*, 186 So. 3d 11 (Fla. 5th DCA 2015); and *Pavarini Construction Co. v. Ace American Ins. Co.*, Case No. 14-cv-20524, 2015 WL 9686009 (S.D. Fla. Oct. 30, 2015).
10 186 So. 3d 11 (Fla. 5th DCA 2015).
11 186 So. 3d at 12.
12 Case No. 14-cv-20524, 2015 WL 9686009 (S.D. Fla. Oct. 30, 2015).
13 *Id.* at *4.
14 *Id.*
15 C.A. No. 3:11-cv- 400-CMC, 2012 WL 1032539 (D.S.C. March 27, 2012).
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
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21 490 S.W.3d 20 (Tex. 2016).
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.*

Using A Home's Warranty To Compel Arbitration Of Statutory Claims By Initial Home Purchasers, Subsequent Purchasers, And Homeowners' Associations

By Michael G. Rothfeldt, Esq., Carlton Fields, Tampa, Florida

When disputes regarding construction defects arise between a homebuilder and the initial home purchaser(s), subsequent purchaser(s), or homeowners' association, these plaintiffs may attempt to avoid the arbitration provisions contained in either the home's purchase and sale agreement or limited warranty. Plaintiffs sometimes attempt to accomplish this by foregoing claims under the home warranty and instead suing for building code violations pursuant to Fla. Stat. § 553.84, or for deceptive trade practices under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") contained in Chapter 501, Florida Statutes. A defendant homebuilder can thwart this strategy, provided the arbitration provision does not exclude statutory causes of action.

When determining whether a statutory cause of action can be arbitrated, courts examine the relevant statute and arbitration provision for an intent to preclude certain claims or relief from arbitration.[1] Subsequent purchasers are third-party beneficiaries of a home's limited warranty and can be bound by its arbitration provision.[2] Similarly, homeowners' associations who bring claims on behalf of their individual homeowners are bound to arbitration provisions contained in the homeowners' purchase contracts and limited warranty agreements.[3]

Initial Purchasers

Homeowners can be compelled to arbitrate statutory claims where the arbitration provision and the relevant statutory language do not expressly prohibit arbitration.[4] For example, the plaintiff in *Reeves v. Ace Cash Express, Inc.*,[5] was compelled to arbitrate her claims arising under the Florida Consumer Collection Practices Act ("FCCPA") because the parties' arbitration agreement did not conflict with the FCCPA, which provides for punitive damages, class actions, attorney's fees, and injunctive relief.[6] Nothing in the FCCPA evinced a legislative intent to preclude arbitration of FCCPA claims. The arbitration provision did not identify or limit the specific relief the arbitrator could grant, and precluded only class actions.[7] But the provision contained a severability clause allowing severance of any offending provisions (*i.e.*, the class action prohibition) if necessary. The plaintiff did not specifically demand punitive damages, injunctive relief, or a class action, but she did argue that the arbitration provision required each party to bear their own attorney's fees, which conflicted with the FCCPA's remedies. However, the agreement was actually silent on fees, and the court noted that even when the Federal Arbitration Act[8] governs an arbitration agreement, Florida law controls the award of attorney's fees. Thus, if plaintiff prevailed, she would still be able to seek attorney's fees under the FCCPA in circuit court.[9] Accordingly, the court affirmed the circuit court's order compelling arbitration.

Similarly, in *Orkin Exterminating Co. v. Petsch*,[10] the court held that a purchaser of pest control services was bound to arbitrate his FDUTPA claims pursuant to the service contract's arbitration agreement, which provided for arbitration of "any dispute arising out of or relating to the agreement." The plaintiff argued that the contract's "Limitation of Liability" language prohibited him from arbitrating his FDUTPA claims:

> Customer expressly waives any *claims* in any lawsuit, arbitration or legal proceeding against Orkin *for* breach of contract, negligence, other tort, or violation of any statute, rule or regulation, *for* loss of use, diminution of value, economic, compensatory, or incidental or consequential damages of any kind, or any exemplary, treble, liquidated, or any type of punitive damages.[11]

The court added emphasis to the terms it believed rendered the provision ambiguous, noting that it was unclear whether the waiver encompassed all claims based on the itemized *causes of action* or to the types of *damages* stemming from those claims. However, the court accepted Orkin's characterization of this provision as merely limiting the *remedies* but not the actual causes of action themselves. So construed, the limitations provision did not affect the remedies available under FDUTPA. Accordingly, the court reversed the trial court's conclusion that the plaintiff would be unable to pursue his FDUTPA rights in arbitration.

In the context of construction defect litigation, this analysis is particularly relevant to claims under Chapter 553, Florida Statutes, which provides a cause of action "in any court of competent jurisdiction" for "any person or party, in an individual capacity or on behalf of a class" damaged by a violation of the Florida Building Code.[12] It otherwise provides no specific remedies, unlike FDUTPA and FCCPA in *Reeves* and *Petsch*. Homeowner warranties less constricting than the *Petsch* warranty are unlikely to conflict with Fla. Stat. § 553.84. Many homeowner warranties contain language precluding class action claims "to the extent not prohibited by law." Such a provision should withstand a homeowner's argument that the provision conflicts with Fla. Stat. § 553.84's option for class action relief because, like the arbitration provision in *Reeves,* the preclusion of class actions can be disregarded where it conflicts with the law.

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One might argue that Fla. Stat. § 553.84's language granting the plaintiff a cause of action "in any court of competent jurisdiction" precludes such claims from arbitration. This argument will likely fail. In *Pulte Home Corp. v. Bay at Cypress Creek Homeowners' Ass'n, Inc.*,[13] the Second District held that Fla. Stat. § 553.84 claims can be arbitrated, though the homeowners' association in that case did not raise this particular argument. Furthermore, the legislative intent to preclude arbitration of a statutory cause of action must be unambiguously stated.[14] Because Fla. Stat. § 553.84 contains no express preclusion of arbitration, claims arising thereunder should be subject to arbitration.

FDUTPA claims also arise in construction defect litigation. Plaintiffs raising such claims often argue that the builder deceived the purchaser by promising—and then failing—to build a home that complies with applicable building codes and industry standards. FDUTPA claims can also be subject to arbitration. For example, in *Aztec Med. Servs., Inc. v. Burger*, the Fourth District held that the parties' arbitration provision coupled with the factual allegations of plaintiffs' complaint required the physician plaintiffs to arbitrate their breach of contract and FDUTPA claims against a medical management company.[15] The arbitration provision provided that the parties would work together to resolve "any dispute about their business relationship" and that if any party wished "to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association."[16] The trial court had denied Aztec's motion to dismiss and compel arbitration of the FDUTPA claim, holding that the arbitration provision's inclusion of "any dispute about [the parties'] business relationship" did not include a statutory cause of action for unfair trade practices."[17] The appellate court reversed for several reasons. First, nothing in FDUTPA expressly precluded arbitration. Second, the provision applied to "any dispute about [the parties'] business relationship" and was not limited to the rights and obligations of the parties under the terms of their agreement. Third, the plaintiffs' factual allegations supporting the FDUTPA claim were identical to those supporting the breach of contract claim, which was pending in arbitration. And lastly, reliance on the contract's terms would be necessary to determine whether "the claims submitted by the physicians[/plaintiffs] to Aztec were paid timely and whether Aztec improperly coded the claims submitted—the factual allegations at the core of the Unfair Trade Practices Act claim."[18] Accordingly, the court concluded that the plaintiffs should be required to arbitrate their FDUTPA claims.

Furthermore, homeowner claims not necessarily involving construction *defects* can also fall under an arbitration provision contained in the homeowner's purchase contract. For example, in *Beazer Homes Corp. v. Bailey*,[19] the court held purchasers were required to arbitrate their fraud in the inducement and FDUTPA claims against Beazer and its sales representatives, based on alleged representations that the lot would have a view of the golf course, where the purchase contract's arbitration provision stated that "should a controversy, claim or dispute arise out of this contract, Buyer(s) shall submit to binding arbitration."[20] Because the plaintiff's fraudulent inducement and FDUTPA claims required an interpretation of the sales contract, the court ruled that the claims were subject to the contract's arbitration clause given its broad inclusion of claims and disputes arising out of the contract.

However, claims and types of damage expressly excluded from a home warranty may not be subject to its arbitration provision. In *Grosseibl v. J. Chris Howard Builders, Inc.*,[21] the court held that a home warranty's arbitration provision encompassing "any dispute…arising out of or related to this warranty…" did not require arbitration of plaintiff's claims for breach of construction contract, rescission, and fraud. The plaintiff alleged that the house was not built to satisfactory building standards, that it was built on improper soil, that it suffered from numerous construction defects, and that, unbeknownst to the plaintiff, the builder had removed a pool originally contained on the property prior to construction.

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The warranty specifically stated it did not warrant that the home had been built in compliance with federal, state, or local building codes or standards. It also precluded coverage for defects in swimming pools, failure to construct the home in accordance with construction plans, and certain defects caused by soil problems. Moreover, the warranty stated it was independent from the contract for sale and purchase and that contract disputes were not covered under the warranty and therefore ineligible for dispute resolution thereunder.[22] The fraud claims were also not subject to arbitration because nothing in the warranty indicated that it applied to tortious conduct by the builder. The court rejected the contractor's reliance on cases involving arbitration provisions covering "all of the parties' disputes," noting that the warranty at issue was placed in a separate warranty and agreement and did not cover any of plaintiff's claims or disputes.[23] Accordingly, the court reversed the trial court's stay pending arbitration, holding that the claims were not subject to arbitration.[24]

Grosseibl emphasizes the importance of examining exactly what claims and types of damage are covered or excluded by a homeowner warranty, and the case can be distinguished by the constrictive language in its warranty and purchase contract. Some homebuilders may choose to exclude several types of damages from coverage under the warranty. *Grosseibl* suggests that the risk of this attempt to reduce covered warranty claims could result in an inability to control litigation costs through arbitration. A warranty with more expansive coverage may cost more to service, but the (arguably) lower costs of arbitration may result in a net positive to the homebuilder. This cost-benefit analysis is, of course, a decision to be made based on the needs and goals of the individual homebuilder.

The next question, then, is whether subsequent purchasers, who are not signatories to the limited warranty or original purchasing agreement, are subject to these arbitration provisions.

Subsequent Purchasers

Subsequent purchasers are third-party beneficiaries of a home's limited warranty and can be bound by its arbitration provision.[25] In *Bay at Cypress Creek*, a limited warranty's arbitration provision compelled a homeowners' association to arbitrate its claims against the homebuilder for building code violations under Fla. Stat. § 553.84 despite the association's tactical decision not to sue for breach of warranty.[26] The court held that arbitration agreement applied to statutory claims and breach of warranty claims, but the court cited no language from the provision itself. The court also concluded that subsequent purchasers were bound to the arbitration agreement, holding that "the subsequent purchasers are permitted to assume [the warranty] in favor of the initial purchasers" and are therefore third-party beneficiaries to the warranty who can be compelled to arbitrate.[27] Thus, the court reversed the trial court's denial of the builder's motion to compel arbitration.

A homebuilder could argue that its situation is identical to that of the defendant in *Bay at Cypress Creek*, and as a result, subsequent purchasers of its homes should also be bound to the home warranty's arbitration agreement. As assignees and/or third-party beneficiaries of that limited warranty, the subsequent purchasers can be held to its terms, including its arbitration provision. Some warranties will provide that the arbitration provision extends to any successor or assignee of the initial purchaser. Such language militates in favor of binding the subsequent purchaser to the arbitration provision. However, the lack of such language may not be problematic. Because the court in *Bay at Cypress Creek* made no reference to particular arbitration language, it is unclear whether the defendant's arbitration provision included a reference to assignees. Either way, the court does not appear to rely on assignment language in its holding and focuses instead on a third-party beneficiary analysis.[28] As a result, the lack of "assignee/successor" language in a warranty should not preclude a homebuilder from compelling subsequent purchasers to arbitrate.

Homeowners' Associations

The analysis is more nuanced when the homeowners' association is the plaintiff. In those circumstances, Florida law suggests that to the extent the homeowners' association brings claims on the *homeowners' behalf*, the HoA will be subject to the homeowners' warranties and the corresponding arbitration provision, if any. However, to the extent the claims involve the property owned solely by the homeowners' association, the warranty will not apply. For example, in *Pulte Home Corp. v. Vermillion Homeowners Ass'n, Inc.*,[29] the court held that any actions for damages to roofs and home exteriors that the plaintiff-homeowners' association brought on behalf individual homeowners were subject to the arbitration provision contained in the homebuilder's limited warranty even though the association did not itself sign a purchase agreement or limited warranty. Although no specific language was cited, the court stated that the limited warranty clearly provided that the homeowners would be required to arbitrate if they had brought these claims themselves.[30] The association, proceeding on behalf of those homeowners, should also be required to arbitrate its defect claims because the association's rights are not superior to those of the individual homeowners. However, the court held that the association could amend its complaint to allege claims involving property owned by the association itself. Those claims would not be subject to arbitration. Hence, the arbitrability of the claims will depend on who exercises control over the damaged portion of the home.

Conclusion

In sum, a homeowner can be compelled to arbitrate claims under Fla. Stat. § 553.84 and FDUTPA, assuming nothing in the home warranty excludes such claims. Because a subsequent

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purchaser is permitted to assume the warranty in favor of the initial purchasers, the subsequent purchaser is a third-party beneficiary of the home warranty and may be bound by the its arbitration provision. This logic also applies to homeowners' associations that bring claims on behalf of their individual homeowners. Homebuilders may employ the strategies discussed above to bring claims against them within the scope of their arbitration provisions.



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Endnotes

1 *See Reeves v. Ace Cash Express, Inc.*, 937 So. 2d 1136, 1137 (Fla. 2d DCA 2006).

2 *Pulte Home Corp. v. Bay at Cypress Creek Homeowners' Ass'n, Inc.*, 118 So. 3d 957 (Fla. 2d DCA 2013). (homeowners' association and subsequent purchasers required to arbitrate Section 553.84 claims).

3 *Pulte Home Corp. v. Vermillion Homeowners Ass'n, Inc.*, 109 So. 3d 233, 235 (Fla. 2d DCA 2013).

4 *See Aztec Med. Servs., Inc. v. Burger*, 792 So. 2d 617, 624 (Fla. 4th DCA 2001) (holding that the legislative intent to preclude arbitration as a way to resolve a statutory cause of action must be unambiguously stated); *see also Miller v. Roberts*, 682 So. 2d 691 (Fla. 5th DCA 1996) (arbitration is required for those disputes the parties have agreed to submit to arbitration).

5 937 So. 2d at 1137.

6 *Id.*

7 *Id.* at 1138 (noting that an arbitrator generally has power to fashion equitable remedies unless specifically prohibited).

8 9 U.S.C. § 1 (2016), *et seq.*

9 *Id.*

10 872 So. 2d 259, 262 (Fla. 2d DCA 2004).

11 *Id.* (emphasis in original).

12 Fla. Stat. § 553.84 (2016).

13 118 So. 3d at 958.

14 *Burger*, 792 So. 2d at 622; *see also Sharpe v. Lytal & Reiter, Clark, Sharpe, Roca, Fountain, Williams*, 702 So. 2d 622 (Fla. 4th DCA 1997) (holding that the phrase "the court shall adjudge a dissolution…" in § 620.715(1) of Florida Partnership Act was insufficient to grant exclusive jurisdiction to the courts and exclude arbitration).

15 *Burger*, 792 So. 2d at 624.

16 *Id.* at 619.

17 *Id.* at 620.

18 *Id.* at 624.

19 940 So. 2d 453 (Fla. 5th DCA 2006).

20 *Id.* at 456.

21 739 So. 2d 1255, 1256 (Fla. 5th DCA 1999).

22 *Id.* at 1257.

23 *Id.*

24 *Id.*

25 *Pulte Home Corp. v. Bay at Cypress Creek Homeowners' Ass'n, Inc.*, 118 So. 3d 957 (Fla. 2d DCA 2013).

26 *Id.*

27 *Id.*

28 *Id.*

29 109 So. 3d 233, 235 (Fla. 2d DCA 2013).

30 *Id.*

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Paying A Trustee's Attorney's Fees In Breach Of Trust Actions

A Practitioner's Roadmap Through Section 736.0802(10)

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With the passage of the most recent amendments to Fla. Stat. § 736.0802(10) ("subsection 10" or "the statute"), litigants now have a much clearer picture of their rights and duties when it comes to a trustee's use of trust assets to pay its attorney's fees and costs in defending against a breach of trust action.

As most practitioners know, this statute has been on the books, in one form or another, for many years.[1] Found in the section of the Trust Code describing a trustee's duty of loyalty, subsection 10 addresses the inherent conflict that a trustee faces when sued by a beneficiary for breach of trust. The provision deals with that conflict by imposing restrictions on a trustee's ability to use trust assets to defend itself in that situation. The prior version of the statute was comprehensive in scope; in practice, however, it left many open questions. In its latest version, which became effective on July 1, 2016, subsection 10 clarifies the rights and duties of trustees and beneficiaries alike, and attempts to set forth the procedural steps required of both when a trustee decides to use the assets of the trust, rather than its own assets, to defend against a breach of trust action.

What Fees Are Implicated?

Prior to its most recent amendment, subsection 10 did not consistently describe what categories of fees and costs were at issue. The amended statute makes clear that only those fees and costs incurred in connection with the breach of trust or breach of fiduciary duty allegations are at issue. Legal fees and costs incurred by the trustee in performing trust administration services, for example, are not implicated and nothing in subsection 10 would preclude a trustee from using trust funds to pay those attorney's fees or costs.

When Is The Statute Triggered?

Subsection 10 opens with an express reminder that the payment of attorney's fees or costs incurred in any proceeding may be made by a trustee from assets of the trust without court authorization unless the subsection is triggered.

It is now clear that subsection 10 is not triggered unless and until a beneficiary actually files a pleading in which a breach of trust claim is made against the trustee. A letter from the beneficiary's attorney claiming a breach does not trigger the statute. Nor does an unfiled draft complaint or an answer to an interrogatory. The statute draws a bright line for the trustee. If the beneficiary has not alleged *in a filed pleading* a claim or defense of breach of trust, the provision is not triggered and there is no procedural bar to the trustee using trust funds to pay its attorney's fees and costs.

The Trustee's Notice of Intent

Once the statute has been triggered, the trustee must decide if it intends to attempt to use trust funds to defend against the claim. If the trustee decides that it has no intention of using trust funds to pay for its attorney's fees and costs in that litigation, it need not follow the notice procedures spelled out in the statute and discussed below. The prior version of subsection 10, when read literally, seemed to impose a notice obligation on the trustee even if it did not intend to use trust assets.

But assuming the trustee decides that it cannot or will not pay the cost of defending the breach of trust claim, and that it instead intends to pay its attorney's fees and costs from trust assets, the trustee must first give notice to all qualified beneficiaries whose shares of the trust may be impacted by this use of trust assets.[2]

The notice must identify the judicial proceeding in which the allegations are pending, and it must inform the person served of his or her right to apply to the court for an order prohibiting the trustee from using trust assets to pay the trustee's attorney's fees or costs. Bear in mind that, once that notice is given, the trustee need not wait before paying legal fees from the trust. It need not wait to see how the litigation will play out or, for that matter, whether a beneficiary will attempt to preclude use of trust funds to pay legal fees and costs.

The issue of whether a waiting period should be imposed was the subject of much debate in the RPPTL Section's Probate and Trust Litigation Committee. Ultimately, the Committee concluded that no waiting period should be required. Thus, under the amended statute, as soon as a trustee provides notice, it can pay its legal fees and costs using trust assets. Nevertheless, a trustee's decision to pay at that point is not risk-free, as the court not only can preclude the use of further trust funds, but the court can also require a refund of fees and costs already paid, with interest at the statutory rate.

If a trustee does not give notice but nevertheless uses trust funds to pay its legal fees or costs, it is not going to like the consequences. Such conduct is in clear violation of the statute, and any qualified beneficiary can move to compel the return of such funds to the trust. By statute, those funds must be returned to the trust, along with interest at the statutory rate.

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To top it off, the beneficiary may receive an award of fees, under Fla. Stat. § 736.1004 for pursuing that relief.

The Beneficiary's Motion to Preclude Use of Trust Assets

Absent a motion by a beneficiary seeking to preclude the trustee's use of trust assets and a court order granting such a motion, a trustee who has provided the requisite notice of intent may pay its attorney's fees and costs from the trust.

The amended statute sets forth the procedure for a beneficiary to challenge the trustee's use of trust funds to pay its legal fees and costs if the beneficiary chooses to do so and is not otherwise barred under Fla. Stat. § 736.1008 ("Limitations on proceedings against trustees"). As noted above, if a trustee makes payment without notice, the statute provides that a beneficiary is entitled to an order compelling the return of those funds (with interest) on that basis alone.

Even where the trustee has provided notice, however, the beneficiary may move the court for an order (i) prohibiting the further payment of legal fees and costs from the trust and, (ii) if fees or costs have already been paid, requiring the return of funds already used. The statute clarifies the showing that such a beneficiary will have to make and the types of evidence available to both beneficiary and trustee at the hearing.

The statute provides that the court must deny the beneficiary's motion unless it finds that there is a reasonable basis to conclude that there has been a breach of trust. Even if the court does find that there is a reasonable basis, the court may still deny the beneficiary's motion for "good cause" (a term which the statute does not define).

Further, no longer will the parties to such a proceeding have to debate what evidence can be submitted in connection with such a hearing. The court may consider typical summary judgment evidence (affidavits, answers to interrogatories, admissions, and depositions), as well as actual live testimony or other evidence admissible under the Florida Evidence Code. These evidentiary submissions are not a one-way street; both the beneficiary and the trustee have the right to present evidence at the hearing.

If the court grants the beneficiary's motion, the court may preclude the use of further trust funds and, if the trustee had already paid attorney's fees or costs from the trust, the court may order the return of such funds along with interest at the statutory rate. What happens if, despite such an order, the funds are not returned? The short answer is very bad things for the trustee. The statute authorizes such remedies and sanctions as the court deems appropriate, including the striking of the trustee's defenses and pleadings.

Although the statute answers many questions that existed under the prior version of the statute, it does not answer all of them. In addition to not defining what constitutes "good cause" for the court to deny a beneficiary's motion, the statute remains noticeably silent on the topic of who must return funds to the trust if the court orders a refund. The court plainly has jurisdiction to require that the trustee return such funds. But the trustee's attorney can also potentially be ordered to return the funds, assuming it has been properly served with process as part of the proceedings.[3]

What Happens If The Claim Is Dismissed Or Resolved?

The statute provides that if a claim or defense of breach of trust is withdrawn, dismissed or judicially resolved (in the trial court, as the amended statute makes clear) without any determination that the trustee has committed a breach of trust, the procedures revert to the norm in which subsection10 does not apply. In other words, the trustee may use trust assets to pay attorney's fees and costs without court order and without service of a notice of intent. This includes payment of any fees or costs that were refunded to the trust pursuant to an order of the court.

As under the prior version, the statute continues to provide that it does not limit an interested person's right to challenge or object to a trustee's payment of fees or costs from the trust, as provided under other provisions of the Trust Code.



M. TRIGGS



J. GALLER

Matt Triggs *is a partner in the litigation department of Proskauer Rose LLP, and the head of the department in Boca Raton.* ***Jonathan A. Galler*** *is a senior counsel in the litigation department of Proskauer Rose LLP. Both concentrate their practice in probate and commercial litigation.* *The authors wish to thank Wm. Fletcher Belcher for co-chairing the subcommittee that worked on the statute.*

Endnotes

1 Initially Fla. Stat. § 737.403(2) (added to the Trust Code in 1974).

2 Fla. Stat. § 736.0802(10) (2016).

3 *See Simmons v. Estate of Baranowitz*, 189 So. 3d 819 (Fla. 4th DCA 2015); *Kozinski v. Stabenow*, 152 So. 3d 650 (Fla. 4th DCA 2014).

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Tenth Annual Construction Law Institute Set for March 16-18, 2017

On March 16-18, 2017, the **Tenth Annual Construction Law Institute** will be held at the **JW Marriott, Orlando, Florida**. In addition to advanced level seminars, the event will include a golf tournament on Thursday, March 15th, and evening receptions on March 16th and March 17th. Over 350 Construction Lawyers and Industry Professionals attended the 2016 Institute and we expect more in 2017. The Friday luncheon speaker will be Jerry Brodsky and Neal Sklar. Mr. Brodsky and Mr. Sklar are both partners with the Miami office of Peckar & Abramson, P.C. Mr. Brodsky and Mr. Sklar will give a presentation on the Panama Canal. This is sure to be an interesting presentation you will not want to miss!

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RPPTL Section Executive Council Meeting
The Breakers, Palm Beach
July 28 – July 30, 2016

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

Like many families with traditions, the RPPTL Section family is no different and this year returned to The Breakers in Palm Beach for the great summer reunion—better known as the July Executive Council Meeting and Legislative Update Seminar.

The RPPTL Runners/Walkers departed each morning down the palm tree-lined promenade to take in the summer humidity and beautiful neighborhood dotted with homes designed by Addison Mizner. The running/walking group continues to expand each meeting and we welcome you all to join the movement at the next one, rain or shine!

Meetings kicked off at 6:30 a.m. Thursday morning and over thirty committees convened to get their work accomplished in order to leave plenty of opportunity to attend the 36th Annual Legislative & Case Law Update Friday morning and afternoon. Following a busy day of meetings, we found ourselves once more overlooking the Atlantic Ocean through a wall of arched windows in the Venetian Ballroom. JP Morgan and Old Republic National Title Insurance sponsored the event and gave their time to discuss the many ways our members and their organizations work together to accomplish goals for our clients.

Lawyers from around the state were up bright and early Friday morning to attend the Annual Legislative & Case Law Update sponsored by Attorney's Title Fund Services, LLC. Seminar attendees enjoyed several topics including the Digital Assets Act, conservation easements, and medical marijuana, to name only a few. During breaks attendees had the opportunity to meet with exhibitors that support our practices and the RPPTL Section.

Friday evening's reception took place under the chandeliers of the Magnolia Room and was sponsored by Wells Fargo Private Bank before members continued to dinner sponsored by First American Title Insurance Company and Regions Private Wealth Management in the Venetian Ballroom. Both the reception and dinner highlighted the irresistible charm of The Breakers in ambiance and service. For those unable to attend the formal dinner, we heard rumors that Dave Matthews was spotted eating with the band in HMF, the north loggia restaurant named after resort founder Henry M. Flagler.

After a muggy run, members came together for the Probate Roundtable and Real Estate Roundtable held from 7:30 a.m. to 9:45 a.m., to prepare for the Executive Council Meeting. The Executive Council Meeting took place from 10:00 a.m. to 1:00 p.m. and was sponsored by The Florida Bar Foundation, reminding us that access to justice is something that should not be taken for granted and all individuals deserve the opportunity to that access.

While the RPPTL Section encourages you to build a "RPPTL family," we know your actual family is important to you! Saturday evening gave members and their families an opportunity to come together and practice their creative talents with paint lessons at Uptown Art.

There is a meeting of the Executive Council scheduled for June 1-3, 2017, at the Hyatt Regency Coconut Point Resort & Spa in Bonita Springs, Florida. Please encourage those in the area to join us. As always, the committee meetings schedule will be posted on the RPPTL website.



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RPPTL Section Executive Council Meeting
The Breakers, Palm Beach
July 28-30, 2016



John Moran and Shane Kelley



Tami F. Conetta with Section Sponsor, Northern Trust, speaking to a committee meeting.



Passing the torch - Debbie Goodall and Michael Gelfand



Section executives hard at work, Mary Ann and Willie Mae



Michael Meyer, John Redding and Shawn Brown



Section Fellow, Jennifer Grosso, with Debbie Goodall and Angela Adams

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



Darby Jones and Jerry Wells at the Executive Council Meeting (with Rohan Kelley and Chip Waller in the background)

View Photo Albums at www.rpptl.org



Wm. Cary Wright and friends at RPPTL Section dinner.



Jeffrey Baskies, Shane Kelley and David Carlisle at The Breakers



Drew O'Malley and Debra Boje



Award winners - Debra Boje, John Neukamm, Joe Tschida and Silvia Rojas (former Editor-in-Chief of *ActionLine*)



Beards!! Rich Caskey (former Editor-in-Chief of *ActionLine*) and Bill Hennessey



John Neukamm and friends on the way to dinner



Gadget Goodall and Cathy Hennessey at a Section reception.



Rob Lancaster and Theo Kypreos



Jim Russick and Team Old Republic

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Saturday, July 30, 2016
The Breakers Hotel, Palm Beach, Florida

Prepared by Anne Pollack, Esq., Tampa, Florida

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

Thank you to the Roundtable Sponsor, Fidelity National Title Group

Meeting opened at 8:02 a.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.

Orlando Meeting Summary. The Division Director pointed out that the summary is part of the meeting packet, and as it is not the minutes, it does not need approval.

Update on "No Place Like Home" Project – Larry Miller and Mike Bedke. Mike, on behalf of the Professionalism and Ethics Committee, updated on the No Place Like Home Project, an effort to assist vulnerable low income Florida residents with title issues generally arising after a disaster so that they can receive disaster-related relief, access to community development funds and available real property tax exemptions. The project is looking for sponsors. Legal aid organizations in Hillsborough County and Tallahassee are providing training and other assistance. Broward County legal aid would like to participate. When asked whether there would be a title insurance policy, it was responded that generally there will be a quiet title action and the ownership would be evidenced by a judgment. Work by title insurance companies have just generally been charged at cost.

Action Items On The Executive Council Agenda

"Uniform Assessment of Property in Land Trusts" Legislative Proposal. Burt Bruton, on behalf of the Real Estate Structures and Taxation Committee, reported on the status of the proposal to make land trusts exempt from a reset of the property assessment cap upon transfer from the beneficiary of the trust.

RPPTL Position Statement in Opposition to DFS Rule on Unlawful Inducements – Raul Ballaga and Cynthia Riddell. Raul reported on the status of the Section's position statement regarding the authority and action taken by DFS in this area. The Roundtable has already approved the position statement, but additional comments have been received, and the subcommittee would like to take it off the Executive Council's agenda and revise as appropriate. The Division Director advised that this would be withdrawn from the Executive Council meeting agenda.

Informational Items

Open Permits – Lee A. Weintraub and Michael S. Tobin, Co-Chairs. Lee reported on the Open Permit Task Force's efforts to deal with concerns related to closing open permits discovered at the sale of property. There are several options to close permits – have the original contractor to close the permit (but often the contractor is no longer around) or have a new contractor close the permit (but there are liability issues). The proposed bill will address these and other issues, including what code requirements must be met, what timeframes are applicable, who can certify that the project meets code requirements, whether bonafide purchasers can be exempt from liability, changes to the construction licensing code, and new efforts to reduce the problem in the first place. The building officials' association generally supports the bill, but because new substantive comments have been very recently received from them, the task force must take the bill off the agenda so as to address these concerns.

Potential RPPTL Amicus on *Save Calusa Trust v. St. Andrews* – Marketable Record Title Act Issues. The Division Director reported on the potential for the Section providing an amicus brief on the *Save Calusa Trust* case, related to Marketable Record Title Act issues. The Division Director advised that based upon the discussions that occurred at various committee meetings on Thursday, the Section is likely to proceed with filing an amicus, but that the final decision will rest with the Executive Committee (since there is not enough time to make a decision at these meetings). The Division

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Director referenced that a small committee of Real Property Division members will be chosen to assist with the brief if it proceeds, as two members of the Section's Amicus Committee are conflicted out, leaving only Bob Goldman (a probate and trust attorney) as the only remaining member.

Discussion Items

Unlawful Detainer – Mark Brown. Mark reported on behalf of the Problems Study Committee. The statute has generally been the same since the 1800's, so this is an effort to modernize and clarify it. The bill defines the three rights of action that are permitted under the statute (unlawful entry, forcible entry, and unlawful detainer) as well as where the statute does not apply (leases, right of ejectments, and mobile homes). The remedies have been simplified and tied to the three areas where the statute applies. The bill clarifies that no pre-suit notice is required, since the complaint will provide sufficient notice. The bill allows for bifurcation of the possession and damages claims. The bill clarifies that this is a possession action, and only incidentally tied to title. The bill does not address the transient occupant provision in order to avoid controversy and allow the bill to be approved by the legislature. Work will continue on the bill and it likely will be brought up for consideration at an upcoming meeting.

Ejectment – Mark Brown. Mark reported on behalf of the Problems Study Committee. This statute has been around for a long time without change. This bill will clarify that it is a right of action for possession, usually based on title, and clarifies where jurisdiction lies. The bill provides that no pre-suit notice is required, and further discussion was held on that issue. Work will continue on the bill and it likely will be brought up for consideration at an upcoming meeting.

Administrative Matters

Refresher on Process for Approval of Proposed Legislation – Steve Mezer. Steve (Co-Chair of the Legislation Review Committee) provided a review on the process of getting legislation approved through the Section and to the legislature, including persons to contact, committee review, Roundtable and Executive Committee review and approval, formatting, deadlines, position statements and forms. Information is available from the Legislation Review Committee and on the Section website. The Division Director explained how to move forward after a draft bill is finalized by a committee task force, and encouraged committees to have discussions amongst committees and in listservs to cut down the repetitiveness in committee and Roundtable meetings.

CLE for the 2016-17 Bar year – Bob Swaine. Bob (Co-Chair of the CLE Committee) first introduced Jim Robbins, who reported on the Commercial Real Estate Committee's effort to create a list of the initiatives and CLEs put on by the Section and various RPPTL committees, both in the past and planned for the future. Jim stated that he is working on a way to publish it to the Section going forward. Bob congratulated Jim Robbins on his efforts as chair of the Legislative and Case Law Update this year. Bob reported on the CLEs for the 2016-2017 year, and reminded committees that they are required to each produce at least one program. The Division Director encouraged committees to convert CLEs into articles for ActionLine and the Florida Bar Journal.

Newsletters. The Division Director reported that the Florida Bar has provided guidelines on creating committee newsletters (contained in the Roundtable agenda). Several committees

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already publish newsletters, which can be valuable for guidance to other committees considering the same.

RPPTL Quick Reference Guide – Lynwood Arnold and Jason Ellison. Jason (Co-Chair of the Membership & Inclusion Committee) reported on the Quick Reference Guide (contained in the Roundtable agenda), which was created to educate new members and new attendees on how the Section is structured and how RPPTL meetings work. Jason asked that members circulate it to their Circuits.

Registration. The Division Director asked that members register for the Real Property Roundtable if they plan to attend. There were nearly 100 people in attendance, exceeding registrations for breakfast by more than 30 people.

Websites. The Division Director asked committees to update websites to keep the information current and fresh.

Committee Reports

Condominium and Planned Development – William P. Sklar, Chair; Alexander B. Dobrev and Kenneth S. Direktor, Co-Vice Chairs. Bill updated on the current status of sprinkler retrofitting requirements. A task force has been created to advise the Bureau of Condominiums of the unanimous position of the Committee that the sprinkler requirement only applies to high rise condominiums (over 75 feet). A task force has also been created to work with the Bureau of Condominiums to look at alternatives and jurisdictional issues related to the statutorily-mandated arbitration.

Construction Law – Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs. Scott reported on the Committee's effort to establish a webinar subcommittee to have 3-4 webinars each year, including joint committee CLEs. They are planning to establish liaisons between this committee and other committees so as to get people to weigh in on construction issues earlier in the process.

Development & Land Use Planning – Vinette D.Godelia, Chair; Julia L. Jennison , Co-Vice Chair. Anne Pollack reported on the upcoming Sea Level Rise for Real Estate Transactional Attorneys webinar on September 14, 2016.

Insurance & Surety – Wm. Cary Wright and Scott P. Pence, Co-Chairs; Frederick R. Dudley and Michael G. Meyer, Co-Vice Chairs. Cary reminded the Division of its upcoming Risk Management seminars, which will be the third Monday of November and December, and the fourth Monday of January and February. These one-hour seminars will provide an overview of risk management, insurance products to cover business risks and risk-shifting provisions every lawyer should be familiar with when drafting and negotiating contracts.

Real Property Finance & Lending – David R. Brittain, Chair; E. Ashley McRae, Richard S. McIver and Robert G. Stern, Co-Vice Chairs. David reported on the presentation by Manny Fernandez on the CMBS market. He reminded the Division about a legal opinions webinar planned for August 31, 2016. Ashley McRae reported on the proposed Attorney Loan Officer Conference scheduled for July 26, 2017.

Real Property Litigation – Susan K. Spurgeon, Chair; Manuel Farach and Marty J. Solomon, Co-Vice Chairs. Susan reported on the webinar proposed for November 2, 2016 on real property litigation and professionalism.

Residential Real Estate and Industry Liaison – Salome J. Zikakas, Chair; Louis E. "Trey" Goldman, Nicole M. Villarreol and James Marx, Co-Vice Chairs. Salome reported that the committee had a presentation on flood risk projections. This is a helpful tool to developers as it projects 30 years out.

The Meeting was adjourned at 9:32 a.m.

Judicial performance feedback sought from Bar members



The Judicial Administration & Evaluation Committee is encouraging all Bar members to participate in the Confidential Judicial Feedback Program developed by the committee and approved by the Florida Bar Board of Governors.

The purpose of the Confidential Judicial Feedback Program is to promote judicial self-improvement and enhance the quality of our judiciary as a whole. Attorneys are asked to evaluate the judge's demeanor, knowledge, fairness, and other factors, but not to discuss issues of their specific cases. The commenting attorney's identity is kept confidential and the comments are provided only to the judge who is the subject of the review. All feedback is and remains confidential pursuant to Florida Rule of Judicial Administration 2.051(c)(4).

There are separate forms for trial court judges and appellate court judges. Feedback may be provided two ways: by competing the forms online at www.floridabar.org/JudicialFeedback or by downloading the forms at www.floridabar.org/JAEC and following the instructions.





































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Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, July 30, 2016

The Breakers Hotel, Palm Beach, Florida

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

The following briefly identifies for future reference some notable 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 7:52 a.m.

Sponsor Announcement. The Division Director acknowledged the sponsors of the Roundtable meeting, Stout Risius Ross ("SRR") and Guardian Trust. SRR is a premier global advisory firm that specializes in providing valuation & financial opinions. SRR currently employs approximately 400 appraisers working across 12 offices, with 50 appraisers in its Estates and Trusts Group. Guardian Trust, a professional trust company, has been working with families and professionals for almost 15 years. Guardian Trust's largest market is the administration of Special Needs Trusts.

Committee Reports

Guardianship, Powers of Attorney and Advance Directives – Hung Nguyen, Chair. Hung reported that the Committee will present the following action item to the Executive Council: a proposed amendment to Fla. Stat. § 744.3725 to remove the provision permitting a non-incapacitated spouse to bar a guardian's request to dissolve the marriage between the non-incapacitated spouse and the ward. Mr. Nguyen also reported on several other projects the Committee is working on, including, but not limited to, (i) a proposed legislative fix to *Rothman v. Rothman*, 93 So. 3d 1052 (Fla. 4th DCA 2012), which contradicts the holding in *Jasser v. Saadeh*, 97 So. 2d 241 (4th DCA 2012), (ii) a review of *Steiner v. Guardianship of Steiner*, 159 So. 3d 253 (Fla. 2d DCA 2015), and (iii) analyzing the legislation that allows for the use of medical marijuana in Florida.

Asset Protection – George D. Karibjanian, Chair. George reported that the Committee is continuing to review and discuss both the proposed Uniform Voidable Transactions Act and the proposed revisions to Fla. Stat. § 736.0504.

Attorney/Trust Officer Liaison Conference – Laura Sundberg, Chair. Stacey Cole reported that next year's ATO Conference may take place on August 24 through 26 rather than in late July. Ms. Cole stated that the Committee is aiming to finalize the list of speakers and sponsors for the 2017 ATO Conference by the end of 2016.

Digital Assets and Information Study Committee – Eric Virgil, Chair. Eric reported that the Florida Fiduciary Access to Digital Assets Act (Chapter 740) (the "Act") passed both houses of the Florida Legislature unanimously, and the Governor signed the bill into law. The Committee is in the process of putting together a CLE program to discuss the Act, which should take place this fall.

Elective Share Review Committee – Lauren Detzel and Charlie Nash, Co-Chairs. Lauren reported on the Committee's proposed amendments to Florida's elective share statutes. There are several proposed modifications to the statutes, including, but not limited to, changes to the attorneys' fees provisions and method of calculating the elective share amount. The Committee proposes calculating the elective share amount using a graduated percentage based upon the number of years the couple was married.

Estate & Trust Tax Planning – David Akins, Chair. David reported that several members of the Council have expressed concern with the final draft of the tenancy by the entireties ("TBE") legislation (likely to be codified in Fla. Stat. § 689.151), regarding removal of the unities of time and title for creating TBE property. Mr. Akins anticipates that the legislation will be redrafted and will be an action item at the next Executive Council meeting. In addition, the Committee is in the initial stages of determining whether Florida should pass legislation to permit the creation of statutory community property trusts.

IRA, Insurance and Employee Benefits – Howard Payne and Kristen Lynch, Co-Chairs. Howard reported that the Committee is researching various issues concerning the proper drafting of IRA beneficiary designation forms and division of

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said accounts upon an account holder's death. The issues being considered include tax implications that arise if a beneficiary resides in a community property state and the responsibility of beneficiaries' tax consequences when beneficiaries reside in different states.

Liaisons with ACTEC - Michael Simon, Bruce Stone, Elaine Bucher and Diana Zeydel. Elaine reported that the Florida Fellows of ACTEC launched the ACTEC Florida Fellows Institute, which was very successful. The inaugural class had about 30 participants and over 40 students were accepted into the upcoming class, which will begin this fall.

Principal and Income Act – Ed Koren, Chair. Linda Griffith reported the Committee is continuing to review and propose revisions to Florida's Principal and Income Act.

Probate & Trust Litigation - Jon Scuderi, Chair. Jon reported that the Committee is still discussing the expansion of standing to pursue a civil claim for the exploitation of a vulnerable adult. In addition, Mr. Scuderi reported that the Committee is working with the Trust Law Committee regarding the proposed legislation addressing assistive reproductive treatment and procedures.

Probate Law & Procedure - John Moran, Chair. John reported that the Committee approved draft legislation on the will depository and orphan will project, which will be an information item at the Executive Council meeting. Mr. Moran reported that the Committee is still working on the following projects: (i) updating the probate code to correspond with the changes made to the trust code concerning service of formal notice; and (ii) revising the statutes regarding summary administration. Finally, the Committee, after extensively considering whether to lessen the strict compliance standard in Fla. Stat. § 732.502 to a harmless error or substantial compliance standard, decided to keep the strict compliance standard.

Trust Law - Angela Adams, Chair. Angela reported that the Committee has two action items before the Executive Council: (i) the proposal regarding the required notifications for charitable trusts under Fla. Stat. § 736.0110(3); and (ii) proposed legislation on Florida's decanting statute, which provides a method for decanting a trust even where the trustee's discretion is limited to an ascertainable standard, and provides a process for decanting a trust for purposes of providing for a beneficiary's disabilities or special needs. In addition, Ms. Adams reported that the Committee is working on a project to modify some of the language in Fla. Stat. § 736.0103 as it relates to the benefit of the beneficiary rule.

Wills, Trusts and Estates Certification Review Course – Jeff Goethe, Chair. Jeff reported that Laura Sundberg is the chair of the Committee this upcoming year. The Certification CLE seminar will take place in April 2017.

Professionalism and Ethics – Larry Miller, Chair. Larry reported on the status of the Safe At Home project, which seeks attorney volunteers to assist clearing title to real property for vulnerable low income Florida residents, thereby allowing such residents to receive disaster-related relief, access to community development funds, an available real property tax exemptions. The Committee is working to roll-out the program statewide.

Ad Hoc Committee Reports

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair. David reported that the Guardianship Task Force completed the first draft of a brand new Chapter 744, which it is in the process of reviewing and revising. The Committee's goal is to have a proposal ready by this fall, so it is still on target for a 2018 enactment date.

Ad Hoc Study Committee on Estate Planning Conflicts of Interest - Bill Hennessey, Chair. Bill reported that even though the Committee's proposed legislation regarding fiduciary fee disclosures has been put on hold, the Committee is hopeful that the legislation will gain traction in the future. Meanwhile, the Florida Board of Governors approved a rule change to the Florida Rules of Professional Conduct, which mirrors the proposed legislation. In order to become effective, the proposed rule change must be approved by the Florida Supreme Court in the fall of 2016.

Ad Hoc Study Committee on Spendthrift Trust Issues – Lauren Detzel and Jon Scuderi, Co-Chairs. Jon reported that the Committee continues to work on a legislative proposal to address the holding in *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2013). Mr. Scuderi reported that the proposed statute will likely undergo further revisions as there was significant controversy over certain portions of the proposed legislation, most notably, the portion that would exclude a former spouse from being classified as an exception creditor of a discretionary trust.

Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST) – Jeff Baskies and Tom Karr, Co-Chairs. Tae Kelley Bronner reported that the proposed POLST legislation is undergoing some administrative changes as to how it relates to other statutes, and the Committee will have more of an update at the next Executive Council meeting.

Adjournment. As there was no further business to be discussed, the Division Director adjourned the Roundtable meeting at 9:18 a.m.



Settlements Involving Minors

By Elizabeth M. Hughes, Esq.,
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Under Florida law, certain scenarios require that the parent or guardian seek court approval to initiate or settle claims on behalf of a minor. The mandatory judicial procedures are intended to provide an additional layer of protection for the minor's benefit. Ultimately, judicial approval is granted only when the settlement is deemed to be "fair and enforceable."[1]

This article sets forth Florida's statutory requirements for settling claims of minors and when such settlement requires the establishment of a legal guardianship.

Who can bring the action?

As most attorneys recall from their Contracts class from Law School, minors lack legal capacity to contract. Such incapacity includes the ability to pursue claims or enter into settlement agreements.[2] Because a minor may need to pursue claims or enter into such settlements, the Florida Legislature has created statutory avenues for parents or duly appointed representatives, such as legal guardians, to act in such areas on behalf of a minor.[3] Where a minor does not have a parent or legal representative, a "next friend,"[4] such as a guardian ad litem, may act on behalf of the minor.[5]

Minors are considered to be wards of the court and the courts are thus charged with responsibility for their welfare in many situations.[6] As a result, Florida has enacted specific rules and procedures for dealing with the property rights of minors.[7] For example, even though parents are jointly the natural guardians of their minor children, the status as natural guardian typically confers only custody of the person and not of the property.[8] As natural guardians, parents typically have all the rights, duties, and powers that a guardian of the *person* would have but without most of the rights, duties, and powers of a guardian of the *property*.[9] It follows that, while acting as the natural guardian, unless the property interest has a value of $15,000 or less, a parent does not have the power to contract away or waive her minor child's property rights.[10] Thus, this lack of authority over the minor's property rights means that parents, generally, do not have the legal authority to settle or compromise a child's claim or to waive substantive rights without court approval.[11] Florida law provides limited circumstances where parents may exercise the property rights of their minor children without judicial oversight.

General principles

Fla. Stats. §§ 744.301, 744.387, 744.3025, and Florida Probate Rule 5.636, govern the settlement of claims on behalf of minors. Different standards apply for the settlement of claims that exceed $15,000 from claims that fall under that monetary threshold. The Florida Statutes also have different requirements for the settlement of claims for minors depending on whether the minor has a natural guardian, if the settlement arose prior to an action being filed or if settlement is reached after litigation commenced.[12]

It is worth noting that Florida courts do not consider court approval a prerequisite to a valid settlement *offer* for a minor.[13] Stated differently, an offer to settle is not invalid simply because there is a requirement of subsequent court approval. Although Florida law requires a legal guardianship be established when the net settlement to the minor ward exceeds $15,000, a guardian to obtain court appointment and approval before *negotiating* the particular settlement.[14]

Claims on behalf of minors may be settled either before or after an action is filed.[15] However, once an action has commenced on behalf of a minor, no settlement shall be effective unless approved by the court having jurisdiction of the action.[16] When a civil action is pending, the petition for approval of settlement must be filed in such action. By contrast, if no civil action is pending, the petition for approval of settlement should be filed in the court where the action would be brought, and should be assigned to the judge who would preside over a petition for appointment of guardian of a minor. Most likely, this would be the Probate Division of the circuit court.[17]

Settlements of Less Than $15,000

If the *gross*[18] settlement amount does not exceed $15,000 and settlement is reached *before the filing of a lawsuit*, the claim can be settled by the minor's natural guardians without court approval.[19] If the natural guardian desires for court approval, Fla. Stat. § 744.387(2), allows the minor's natural guardian to petition the court for an order authorizing settlement of the claim.

Pursuant to Fla. Stat. § 744.387(3)(a), once an action on behalf of a minor has been commenced, no settlement – regardless of the amount at issue - is effective unless approved by the court having jurisdiction of the action.[20] The court must then determine if the settlement is in the best interest of the minor.[21] Further, it appears that when there is no natural guardian of the minor with the authority to settle a claim, a guardian of

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the property must be appointed and obtain court approval for both pre-suit settlements and those made after litigation has commenced.[22]

Settlements Exceeding $15,000

Where a proposed settlement exceeds $15,000 – regardless whether an action has been commenced – the natural guardian's authority to settle claims or to receive settlement proceeds ceases to exist. Court appointment of a guardian is required to settle such claims or effectively sign releases of those claims, which also means that the court must conclude that such proposed settlement is in the child's best interests.[23]

Although Florida courts agree that court approval is required when the minor receives a *pre-suit* settlement exceeding $15,000, they have not been consistent with the statutory authority for this conclusion.

For example, in *Sullivan v. Dept. of Transportation*,[24] the Second District Court of Appeal considered the pertinent provisions of Fla. Stat. § 744.387, in conjunction with the Florida Wrongful Death Act and found that, although the legislature omitted *pre-suit* procedures for the settlement for minors exceeding the statutory threshold, this did not exempt the minor's guardian from obtaining the court approval of the settlement. The court held that, based on its inherent jurisdiction to protect minors, when a minor child received a pre-lawsuit settlement in excess of the statutory amounts,[25] a court of competent jurisdiction must approve that settlement.[26]

…where minors' interests are involved, the failure to comply with Florida's statutory requirements will result in an invalid settlement not legally binding on the parties.

On the other hand, several other Florida and Federal courts have interpreted the language of Fla. Stat. § 744.387, to *explicitly* require that, if the settlement is in excess of $15,000, a guardian must be judicially appointed and the court must determine that the settlement is in the minor's best interests.[27] Either way, the practical implications are the same for Florida practitioners - seek court approval when settlements exceed $15,000 for minors.

Legal Guardianship Requirements

Parents may receive and manage their minor child's property "if the amounts received in the aggregate do not exceed $15,000."[28] If the *net* amount of the settlement exceeds $15,000, a legal guardianship is required[29] and the payment of the settlement proceeds should be made only to the minor's guardian of the property.[30] Inadvertently making payments directly to the parent as natural guardian does not discharge an obligation to the minor in excess of $15,000 and thus, the obligor could be in a position of having to pay the settlement amount twice.[31]

Appointment of a Guardian ad Litem

In certain scenarios, the court has discretion to appoint a guardian ad litem to review the settlement to determine whether it is in the best interests of the minor. The ad litem's duty of protection as to the minor's interests are set forth in Fla. Stat. § 744.3025, and Florida Probate Rule 5.636.[32]

When making a determination whether an ad litem *may* or *shall* be appointed by the court, the Committee Notes to Florida Probate Rule 5.636 make clear that the *gross* (total) settlement to be considered under this Rule is not limited to the amounts received only by the minor, but should include all settlement payments or proceeds received by all parties to the claim or action.[33]

If a minor's claim for personal injury, property damage, wrongful death, or any other cause of action in which the *gross* settlement of the claim exceeds $15,000, and if the court believes that an ad litem is necessary to protect the minor's interests, the court *may* appoint an ad litem before approving a settlement of the minor's portion of the claim.[34] By contrast, the court *shall* appoint an ad litem, without bond or notice, with respect to any proposed settlement that exceeds $50,000 if the minor, (a) does not have a court-appointed guardian of the property, (b) the court-appointed guardian has an interest adverse to the minor, or (c) the court determines that representation of the minor's interest is otherwise inadequate.[35] A proposed settlement is deemed to exceed $50,000 if the gross amount payable exceeds $50,000, without reduction to reflect present value or fees and costs.[36]

Recently, in *Allen v. Montalvan,* the Fourth District Court of Appeal reversed the trial court for failure to comply with Fla. Stat. § 744.3025(1), and held that where the insurance company *globally* tendered the $50,000 policy limit and the *pre-suit* settlement involved minors, the trial court was required to appoint an ad litem to represent the children's interest before approving a settlement that disposed of their claims.[37] This decision reiterates the principle that where minors' interests are involved, the failure to comply with Florida's statutory requirements will result in an invalid settlement not legally binding on the parties.

Conclusion

Florida practitioners should be aware that where a minor's interests are involved in any property settlement, significant additional legal work will likely be involved to protect the minor. Court approval of the settlement, and possibly the establishment of a legal guardianship, may be required to protect the best interests of the minor and to ensure that any

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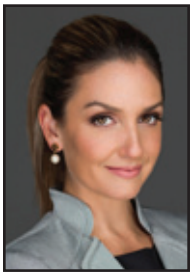
release given on behalf of the minor is legally effective. If settlement above the statutory threshold is entered into on behalf of a minor and there is no compliance with Florida law regarding guardianships, the settlement is unenforceable. Further, the purpose of obtaining an order from the court approving a minor's settlement is not to allow a party to control the settlement or the allocation of it, but instead, "is to protect the best interests of the minor and to ensure that any release given on behalf of the minor is legally sufficient."[38] Understanding the public policy behind the statutory requirements and following the proper procedures for settlements involving minors will guarantee that, (a) the parties are not exposed to additional liability, (b) the minor's interests are protected, and (c) their funds are secure and will be available for them for years to come.


E. HUGHES

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Endnotes

1 Fla. Stat. § 744.387; *See, e.g., Wisekal v. Laboratory Corporation of America Holdings,* No.12-80806-CIV-HURLEY, 2016 WL 1623418 (S.D. Fla. Apr. 22, 2016).

2 *Kingsley v. Kingsley,* 623 So. 2d 780 (1993) (citing to Fla.R.Civ.P. 1.210 Parties. "An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem.").

3 Fla.R.Civ.P. 1.210(b); *See, e.g., Dudley v. McCormick,* 799 So. 2d 436 (Fla. 1st DCA 2001); *see also* Fla. Stat. § 744.301.

4 "*Next friend,*" *Black's Law Dictionary* (10th ed. 2014). A person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but for who is not a party to the lawsuit and is not appointed as a guardian.

5 *Kingsley* at 781 ("unless minor has a guardian or other like fiduciary, minor must sue by his next friend.… When the action is brought by a next friend, the minor is the real party in interest, and the next friend is not a party to the suit.").

6 *See In re Brock*, 25 So. 2d 659, 660 (Fla. 1946); *See also Brown v. Ripley,* 119 So. 2d 712, 717 (1st DCA 1960).

7 *Id*.

8 *J.S.J. v. Pena*, 109 So.3d 1281 (5th DCA 2013); *See* Fla. Stat. §§ 744.301(2), 744.387(2), 744.397(3), and 744.444(8).

9 Fla. Stat. § 744.301(2) – the property threshold for a natural guardian is $15,000; *See also McKinnon v. First Nat. Bank,* 77 Fla. 777 (Fla. 1919).

10 *See* Kathleen A. Kadyszewski, *Florida Guardianship Practice,* § 22.7 (8th ed. 2014).

11 *Valentine v. Kelner,* 452 So. 2d 965, 966 (Fla. 3d DCA 1984).

12 *See* Kadyszewski at § 22.41 (8th ed. 2014).

13 *Berges v. Infinity Ins. Co.,* 896 So. 2d 665 (Fla. 2004).

14 *Id.* at 675.

15 Fla. Prob. R. 5.636(a).

16 Fla. Stat. § 744.387(3)(a).

17 Committee Notes to Fla. Prob. R. 5.636.

18 *Id.* ("The total settlement to be considered for valuation of the proposed settlement is not limited to the amounts received only by the minor, but includes all settlement payments or proceeds received by all parties to the claim or action…. Further, the "gross amount payable" under subdivision (e) is the total sum payable, without reducing the settlement amount by fees and costs that might be paid from the proceeds of the settlement. For example, if the proposed settlement is $60,000 but $20,000 of that sum will be paid to the attorneys representing the minor's interest in the action, the 'gross amount payable' still exceeds $50,000.").

19 Fla. Stat. § 744.301(1) and (4) and Fla. Stat. § 744.387(2).

20 Fla. Stat. §§ 744.387(3)(a) and 744.301; *see, e.g., Wilson v. Griffiths,* 811 So. 2d 709 (5th DCA 2002).

21 Fla. Stat. § 744.387(1); *See Hernandez v. United Contractors Corp.,* 766 So. 2d 1249 (3d DCA 2000).

22 *See Sullivan v. Dept. of Transportation,* 595 So. 2d 219 (2d DCA 1992). This occurs regardless of the amount of the claim, as the $15,000 threshold would only apply if there is a natural guardian, which, in this case, there is none.

23 Fla. Stat. § 744.38(3)(b); *see Wisekal,* No.12-80806-CIV-HURLEY, 2016 WL 1623418 (S.D. Fla. Apr. 22, 2016); *see also Wilson.*

24 *Sullivan v. Dept. of Transportation,* 595 So. 2d 219 (2d DCA 1992).

25 *Sullivan* at 220. (At the time the opinion was issued the statutory threshold was $5,000; the threshold amount has since been increased to $15,000. *See* Fla. Stat. § 744.387(3)(b)).

26 *See, e.g., Allen v. Montalvan,* No. 4D15-675, 2016 WL 3419303 (4th DCA 2016) (citing to *Sullivan* at 220, again recognizing that execution of a pre-suit settlement agreement by the natural guardian of a minor, without court approval, did not bar the bringing of a subsequent wrongful death claim – arising out of the exact same set of facts).

27 *See, e.g., Wisekal* (where the proposed settlement of the claims of the minor children exceeds $15,000 the natural guardian could not settle the claims of the children or effectively sign a release of those claims without court appointment as the legal guardian of the children *and* without court approval as to the determination that the proposed settlement was in the minors' best interest.); *See, e.g., Berges* at 667; *J.S.J.* at 1281; and *Meyers v. U.S.,* No. 6:13-CV-1555-Orl-41TBS, 2014 WL 5038585 (M.D. Fla. Sept. 29, 2014).

28 Fla. Stat. § 744.301(2).

29 Fla. Stat. § 744.387(2).

30 *See Ash v. Coconut Grove Bank,* 443 So. 2d 437 (Fla. 3d DCA 1984).

31 *Auerbach v. McKinney,* 549 So. 2d 1022 (Fla. 3d DCA 1989) (The acceptance of funds offered in settlement of a minor's claim using an arrangement that circumvents the proper legal procedures may result in personal liability of the plaintiff's counsel, restoration of funds improperly paid to the attorney, and legal malpractice liability. Attorneys had to return money meant for brain damaged minor client, where attorneys accepted payments from defendant's insurers made out to attorneys rather than to the minor client without seeking court approval.).

32 Fla. Stat. § 744.3025(d); Fla. Prob. R. 5.636.

33 *See* Committee Notes of Fla. Prob. R. 5.636.

34 Fla. Stat. § 744.3025(1)(a).

35 Fla. Prob. R. 5.636(d).

36 Fla. Prob. R. 5.636(e).

37 *See Allen* (where the monetary threshold amount is met in a global pre-suit settlement, the minor's guardian, natural or appointed, must obtain the circuit court's approval of the settlement.).

38 *Lincoln Nat'l. Life Ins. Co. v. Ragan,* No. 6:14-CV-1730-Or l041KRS, 2015 WM 4756747 (M.D. Fla. Aug. 11, 2015) (quoting from *McLaughlin v. Lara,* 133 So.3d 1004, 1006 (2d DCA 2013).

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The Florida Digital Assets Act – Ethical Issues In Representing Spouses In The Brave New Digital World

By J. Eric Virgil, Esq., The Virgil Law Firm, Coral Gables, Florida
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Digital Assets - What They Are and Why They Are Relevant to Planners

"Digital assets" are electronic records in which an individual has a right or interest. They are transmitted or stored on digital devices such as smartphones and computers. Digital assets can include items such as domain names; websites such as blogs, email accounts, documents, social media accounts, online financial and vendor accounts, business information, digital currency; and artistic content such as photographs. The most common and relevant digital assets to most people are their email communications with others.

Digital assets have both financial and sentimental value and that value can be lost. According to a 2013 survey from McAfee, Americans valued their digital assets, on average, between $35,000 and $55,000. This number is certainly much higher today in 2016.

Estate Planning for Digital Assets

While estate planners, fiduciaries, and fiduciary counsel have perfected techniques used to transfer long-established types of property, most attorneys and fiduciaries have not yet determined how to address the disposition of digital assets. In addition, few owners of digital assets consider the fate of their online accounts or information once they are no longer able to manage these assets.

During the estate planning process, clients can be advised to plan ahead. Such planning includes advice to clients to do the following: (1) make an estate plan that includes documents with digital asset provisions; (2) back up their electronic information and data; (3) take advantage of any so-called online tool provided by an internet service provider (such as Google's Inactive Account Manager) of the client; and (4) create a digital inventory for use by the client's future fiduciary.

The client's estate planning documents should be drafted to include language aimed at the administration of digital assets and information. Digital assets should be defined in the document and fiduciary powers over digital assets should be set forth in the documents.

Some typical language that might be included in a digital assets powers clause is: "Except as otherwise specifically provided herein, I authorize any person or entity that possesses, has custody of, or controls any digital assets of mine, including but not limited to online accounts or electronically stored information, to divulge to my Personal Representative any electronically stored information of mine; the contents of any electronic communications sent or received by me; and any records pertaining to me and maintained by that person or entity." The quoted language is very useful for fiduciaries in obtaining access to digital assets, but it may lead to some quandaries for estate planning attorneys.

Fiduciary Access to Email Accounts

The newly enacted Florida Fiduciary Access to Digital Assets Act (the "Act")[1] establishes a new chapter of the Florida Statutes - Chapter 740.

The problem the Act addresses is lack of a defined right of access for fiduciaries to digital assets. The Florida Probate Code and Trust Code do not mention digital assets, do not define these assets, and do not contain clearly applicable rules governing access to them by fiduciaries. These issues have now been addressed by the Act.

Prior to the passage of the Act, access to digital assets created a minefield where fiduciaries could unknowingly violate both federal and state criminal law regarding hacking and privacy. Fiduciaries also could run afoul of contract law by unwittingly violating terms-of-service provisions with individual account providers in attempting to access digital assets.

The Act generally takes a three-tiered approach to fiduciary access. The three-tiered approach is as follows:

1. A user's direction using an online tool prevails over an offline direction and over the terms-of-service, if the direction can be modified or deleted at all times by the user.

2. A user's direction in a will, trust, power of attorney, or other record prevails over the boilerplate terms-of-service.

3. If a user provides no direction, the terms-of-service control, or other law controls if the terms-of-service are silent on fiduciary access.[2]

The Act only governs access to digital assets. The underlying ownership and title of assets is not changed by the Act.

Perhaps the most important thing to remember about the Act is that it is "opt-in" with regard to the contents of email communications. What that means is that a client's estate planning documents must authorize the content of electronic communications to be turned over to a fiduciary in order for the fiduciary to have access to that information. Without express authorization to access content of communications, a fiduciary can only access what is known as "catalog" of the communications. A "catalog" for emails would be information

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regarding senders, receivers, dates, and subject lines. It would not include the underlying text of the emails themselves.

The opt-in nature of access to the content of email communications leads to at least two large planning issues. First, it creates the need for both estate planning documents with digital assets provisions and for specific language in the planning documents themselves referring to the content of electronic communications.[3] Second, a planner now needs to determine the client's goals and desires regarding whether their email communications should be accessible by a fiduciary.

While many, or even most, couples may think that having this power is convenient and would not think twice about granting such power to the other spouse, often, perhaps more often than most admit, this power presents considerable ethical dilemmas for the practitioner.

Representing married couples in an estate planning practice is already a challenge. In a time where pre-nuptial agreements are commonplace, failure to discuss the need for a pre-nuptial agreement or potential for a spouse to choose a pretermitted or elective share could certainly lead to the attorney being subject to a future malpractice claim. In addition to the common perils of representing both spouses, a seasoned practitioner can often sense when the joint representation of a husband and wife would be inappropriate because the attorney can foresee that the representation will ultimately result in the resignation or disqualification of the attorney.

Applicable Law Regarding Multiple Representation

Under the Rules Regulating the Florida Bar (the "RRFB") on conflicts of interest, a lawyer must not represent a client if the representation of one client will be directly adverse to the interests of another client, or if there is a substantial risk that the representation of a client will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.[4] Notwithstanding those conflicts, a lawyer may represent a client if: (a) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (b) the representation is not prohibited by law; (c) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and (d) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.[5]

The RRFB further provide that when representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.[6] The following excerpt is the only comment in the RRFB which provides advice specific to estate planning: "[c]onflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and depending upon the circumstances, a conflict of interest may arise."[7]

The rules merely provide a succinct statement that conflicts of interest may result when an attorney represents more than one member in a family. It does not provide specific advice as to how to correct the conflict.

With respect to Florida's rules on confidentiality, a lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary either to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another.[8] A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary to serve the client's interest unless disclosure is required by the RRFB or the client specifically instructs such information may not be disclosed.[9]

The RRFB are modeled from the Model Rules of Professional Conduct (the "MRPC"). The MRPC rule relating to confidentiality states that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary in seven different cases including to prevent substantial injury to the financial interests of another that is reasonably certain to result from the client's commission of a crime in furtherance of which the client has used the lawyer's services.[10]

The MRPC's rule relating to conflict of interest states that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is significant risk the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person, or by a personal interest of the lawyer. However, if there is a concurrent conflict of interest as listed above, the attorney may continue to represent a client if: (1) the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.[11]

The MRPC does not include any examples in its Comments specifically referencing estate planning conflicts. Further, unlike the RRFB, the rule relating to confidentiality in the MRPC leaves more to the discretion of the attorney. For instance, when following the Model Rules, the attorney may reveal information to prevent reasonably certain substantial bodily harm. Under the Florida rules, there is no discretion; the attorney must reveal that information.

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Advisory Opinion 95-4[12]

The sparse direction regarding joint representation under the RRFB and the lack of applicable case law resulted in confusion, and practitioners sought advice from the Probate and Trust Law ("RPPTL") Section of the Florida Bar. In response, a committee selected by the Section requested and received from the Professional Ethics Committee of The Florida Bar Advisory Opinion 95-4 (the "Opinion"), which contains a general fact pattern to elucidate the ethical issues. A summary of the fact pattern presented by RPPTL follows:

> A practitioner had been representing a husband and wife for some time in different areas. He had drafted numerous testamentary documents for each, both of which contained identical dispositive provisions. The practitioner, husband, and wife had always shared relevant information. After executing the most recent wills, the husband approaches the practitioner and tells him that he had gone to a different law firm and executed a codicil to his will making a large disposition to a woman with whom the husband had been having a secret affair. The husband asks the practitioner about the wife's elective share, should she be the survivor of the two. The practitioner tells the husband that he cannot provide guidance; that he will have to consider his ethical duties; that he may have to withdraw from representation of both husband and wife; and that the practitioner may disclose to the wife the substance of the conversation if the husband does not do so himself.

The Opinion discusses the two duties of attorneys which are at odds in this scenario: (i) the duty of confidentiality, that a lawyer is ethically obligated to maintain in confidence all information relating to the representation of the client[13] and (ii) the duty of communication, that the lawyer must communicate information that is relevant to the representation. Under the hypothetical facts, the attorney's duty of confidentiality to the husband directly conflicted with the attorney's duty to communicate to the wife. The Opinion's synopsis states:

> In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.

The Opinion addresses (and rejects) the view that the "usual rule of lawyer-client confidentiality does not apply in joint representation and the lawyer should have the discretion to determine whether the lawyer should disclose the separate confidence to the non-communicating client."[14] This view is favored by the Restatement Section 112, comment and the American College of Trust and Estates in its Commentaries on

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the Model Rules of Professional Conduct (2d ed. 1995) (the "ACTEC Commentaries"). While the Restatement notes that no case law supports the discretionary approach, the ACTEC Commentaries simply omit any mention of case law either for or against the discretionary approach.

Florida's rule seems to be unambiguous – a "[l]awyer owes duties of confidentiality both to [h]usband and [w]ife, regardless of whether they are being represented jointly."[15] Therefore, in the scenario discussed in the Opinion, an attorney is forbidden to disclose the husband's codicil to the wife.

The committee drafting the Opinion concludes that the lawyer must withdraw from the joint representation. The Opinion points out that while many conflicts can be cured by obtaining the informed consent of the clients, some are of a nature such that the lawyer cannot reasonably request consent to continue representation. The committee found the conflict in the Opinion's hypothetical was of a "personal and, quite likely, emotionally-charged nature. Lawyer's continued representation of both Husband and Wife in estate planning matters presumably would no longer be tenable." Therefore, the lawyer would have had to withdraw from representing the husband and the wife.[16]

As mentioned earlier, the ACTEC Commentaries on the MPRC leave more discretion to the attorney. In a situation where a spouse shares information with the attorney that is not shared with the other spouse, the ACTEC Commentaries to the Model Rule of MPRC 1.6 recommend three possible courses of action: (1) if the matter is trivial, to take no action; (2) encourage the spouse to tell the other spouse the confidential information;[17] and (3) to withdraw from representation.[18] If the situation involves "such adversity," ACTEC recommends withdrawal.

Another possible solution is representation of both the husband and wife as separate clients, with full consent of both.[19] This would guarantee ultimate confidentiality between the attorney and each spouse. While most practitioners have negative views of this possibility, ACTEC has recognized that "several sophisticated, experienced, and ethical practitioners follow this practice."[20]

The passage of the Act further complicates joint representation. Estate planning for a married couple generally requires that each spouse be honest with one another. Because the Act is an affirmative act, meaning that each of the powers set forth in the Act is granted to the fiduciary (whether it is under a Power of Attorney or as Personal Representative), the appointee (for purposes of our discussion we are assuming the appointee is the spouse) is automatically vested with all of the powers under the Act, meaning that if one spouse does not want their spouse to have the authority to access that spouse's digital assets, that spouse has to either affirmatively specify in his or her estate planning documents and durable power of attorney, that they do **not** want their spouse to have such authority. While numerous spouses have very clear desires that the other spouse not have access to their digital assets, the "conversation" to deliver that message is littered with landmines.

The following scenario is likely to occur more often than practitioners would like to admit:

> Walter and Heather Clanton arrive at the office of their estate planning attorney, Elgin Sneeden. Walter and Heather have been married for over 30 years. Sneeden explains the Act to them. Heather agrees to give Walter access. Walter gives Heather access but looks very uncomfortable. Jointly they tell Sneeden that the Durable Power of Attorney and estate planning documents should grant each other full access as contemplated by the Act. Two days later, Walter calls Sneeden and tells him that he does not want Heather to have access to his digital assets, specifically confiding that he has fathered at least one child out of wedlock and that the passcodes to the bank account that he has set up for that child, Bassand, are all on his computer. Walter asks Sneeden to advise him how to protect his digital assets specifically so Heather doesn't find out.

On one hand, the Opinion makes it fairly clear that Sneeden may not tell Heather anything. The duty of confidentiality outweighs the duty of loyalty and Sneeden must not share Walter's revelations. However, according to the Opinion, Sneeden needs to use his best effort to persuade Walter to tell Heather his secrets. If Sneeden cannot convince Walter, the Opinion suggests that Sneeden must then withdraw from representation. This could raise Heather's suspicions, especially when Sneeden informs Walter and Heather that they should obtain separate counsel. It is possible that the attorney's withdrawal from representation will cause damage to the marriage. In this case, continuing to represent both Walter and Heater would be directly adverse to Heather. Thus, according to the Opinion, Sneeden must withdraw. However, this result is deeply dissatisfying to Sneeden who believes that he could be an equal advocate for both spouses, and worse yet, worries if he will start having to regularly counsel couples to seek separate counsel.

With the increasing reliance on the Internet to conduct business and provide entertainment, it is safe to assume that many clients have digital assets stored which they do not want a spouse to discover through the use of a valid Florida Durable Power of Attorney or after their demise. What if Heather had suspicions of Walter's conduct and immediately took the Durable Power of Attorney which indicated in the "super powers" provisions that she was specifically granted unlimited access to all of Walter's digital assets and began accessing all of Walter's digital information? Does Walter have an action against Sneeden? If Sneeden hid the information from Heather who later suffered damages that she could

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have avoided "if she knew," does Heather now have an action against Sneeden? Is the only choice to withdraw as soon as every conversation gets uncomfortable? Exactly what can Sneeden say to Walter, and then to Heather? What duty does an attorney owe to each spouse if the attorney is informed of such in a joint representation setting?

Additionally, even if a spouse does not want the other spouse to access his or her digital assets, in some cases access to digital assets must occur. For instance, some digital accounts are programmed to autopay bills and more commonly are the only footprint of the decedent's investment accounts. The decedent's assets may be unnecessarily compromised if the spouse/Personal Representative is not able to access autopay and investment accounts. Even if access is "refused," provisions should be made for that information which must be accessed even for the client who does not want anyone to have access to his or her digital assets upon the client's incapacity or death.

What is the answer? Obviously, it is impractical to advise against spouses serving as agent under a Power of Attorney or as Personal Representative for the other's estate. Most couples likely do not care if the other spouse has unlimited access to his or her digital assets and information. A far too significant number of couples, however, who would answer, "No" to the question of unrestricted access (especially if asked in private) will walk through your doors.

The logical extension of this quandary begs the larger question which is "Should the joint representation of spouses be stopped altogether?" On its face, the query sounds absurd, but is it? ACTEC specifically mentions in its commentaries on the Model Rules that "[i]n some instances the clients may actually be better served by such a [joint] representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations."[21] The benefits of joint representation should not be taken away from the spouses who do not have any hidden skeletons. But how can an attorney tell when joint representation is the best solution and when it is not?

Most practitioners recommend a series of steps to minimize the possibility of conflicts and, candidly, to protect the attorney. First, the attorney should require the prospective clients to sign a "written waiver of confidentiality as to each other, so that any information provided to the lawyer by either spouse must be revealed to the other spouse."[22] Any reluctance by one of the parties will demonstrate the need at the beginning of representation for separate counsel. Second, the attorney should give the prospective clients a document which states that their interests may conflict in areas such as the plan for the disposition of the assets or the appointed fiduciaries.[23] The attorney should have the prospective clients sign this document allowing the attorney to use his best efforts to avoid any conflict. Next, the clients' fee agreement should allow the attorney to withdraw if he or she decides that there is a non-waivable conflict of interest. Finally, the attorney should mandate that both spouses be present whenever either spouse changes his or her estate planning documents.[24]

Once the attorney has "informed consent," or the approval of both spouses in writing to joint representation, the attorney should have protection from the beginning of the representation.[25] The clients will know at the start that the lawyer will share confidences between the spouses. Additionally, if one spouse individually calls the attorney, the attorney can begin the conversation with a brief statement summarizing the consequences of joint representation and reminding the client that the attorney will share confidences.

The steps suggested seem to protect the attorney in a very general manner. However, these steps do not address the bigger problem of fleshing out the issue to the clients. Perhaps the correct course of action is to have a general joint conversation with the clients about digital assets and tell them that they should discuss this issue before the documents are signed. The attorney can also clearly tell the clients, in each other's presence, that they can supersede their estate planning documents by making direct designations with their digitals providers, such as AOL, Facebook, etc., to disallow access to that specific account notwithstanding the designation in the Durable Power of Attorney or the Will (the designation with the provider appears to prevail under the Act). Further, if there is digital information that is extremely sensitive, perhaps they should give someone else (other than the attorney) the password or access with instructions of what to do with that information upon disability or death. Finally, the attorney can confidently also counsel the clients that if access causes them discomfort that they should not give anyone access, and that in such a case the information is likely to be lost forever (which, in some cases, would be the best result).

The Opinion, drafted in 1995 during the infancy of the Internet, may not be completely instructive for an attorney faced with the disposition of digital assets of one spouse in a multi-party representation. Florida follows an unambiguous rule – a lawyer owes a duty to both the husband and wife to withdraw in a conflict of "such adversity." Perhaps it is time to revisit the usual rule and allow the attorney to exercise discretion in such complex situations.

Indeed, the Opinion itself mentions the usual rule that client confidentiality does not apply in joint representation: the lawyer should have the ability to decide whether he or she may disclose the separate confidence to the non-communicating client. A rigid rule on confidentiality in multi-party representation in an era where people's lives and assets are increasingly linked to digital media and the Internet at least merits a closer look, if not thorough reconsideration.

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Endnotes

1 The Florida Fiduciary Access to Digital Assets Act was passed by the Florida Legislature and signed by the Governor in March 2016. The Act has an effective date of July 1, 2016.

2 An extensive discussion of the Digital Assets Act can be found in a recent article in the November 2016 edition of The Florida Bar Journal entitled "Access to Digital Assets – Florida's New Law For Fiduciaries: What are Digital Assets and Why are They Relevant?" By S. Dresden Brunner, p. 34 (Florida Bar Journal, November 2016).

3 For example, "to divulge to my Agent … the contents of any electronic communications sent or received by me…"

4 R. Regulating Fla. Bar 4-1.7(a).

5 R. Regulating Fla. Bar 4.1-7(b).

6 R. Regulating Fla. Bar 4.1-7(c).

7 R. Regulating Fla. Bar 4.1-7 cmt.

8 R. Regulating Fla. Bar 4.1-6(b).

9 R. Regulating Fla. Bar 4-1.6(c). For an interesting case on this issue highlighting the interaction of the rules of evidence and the rules of professional conduct, *see Vasallo v. Bean, et al.*, No. 3D16-1862, 2016 WL 6249157, at *1 (Fla. Dist. Ct. App. Oct. 26, 2016).

10 Model Rules of Prof'l Conduct R. 1.7(b) (2014).

11 Model Rules of Prof'l Conduct R. 2.7(b) (2014).

12 The final text of Advisory Opinion 95-4 is published in the Florida Bar News, July 1, 1997, at p. 6.

13 R. Regulating Fla. Bar 4-1.6

14 Opinion 95-4.

15 Opinion 95-4.

16 Opinion 95-4, citing R. Regulating Fla. Bar 4-1.16.

17 "The lawyer needs to communicate with the client who refuses to share the confidences, explaining the lawyer's obligation to the joint client as well as the possible legal consequences for the joint clients and the attorney in regards to a disciplinary or malpractice suit." Richardson, Catherine Houston, *A "Rest in Peace" Guide of Estate Planning Ethics*, 28 J. Legal Prof. 217, 224 (2003-04).

18 Commentaries on the Model Rules of Professional Conduct, at 76-77 (2d ed. March 1995, American College of Trusts and Estates Counsel) (the "ACTEC Commentaries").

19 ACTEC Commentaries, cmt on 1.6.

20 Ross, Bruce S., *Ethical Issues in Practice: Important Fiduciary Litigation,* ALI-ABA Estate Course Materials Journal 15.

21 ACTEC Commentaries, cmt on MRPC 1.7, 'General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients.'

22 Zaritsky, Howard M., 34 Est. Plan. 56 (2007).

23 Zaritsky, Howard M., 34 Est. Plan. 56 (2007). *See also* Kleinfeld, Denis A., AT FL-CLE 1-1, The Florida Bar, 8th ed. (2014).

24 Zaritsky, Howard M., 34 Est. Plan. 56 (2007).

25 Beasley, Teresa M., *Joint Representation of Spouses*, 19 No. 5 GPSolo 18, 20 (2002) ("One key to protecting yourself when representing married couples is ensuring that each client clearly consents to the joint representation after consultation ('informed consent'). Informed consent is imperative for joint representation in estate planning and always should be confirmed in writing. Using conflict waiver letters in the most practical way to guarantee consent from clients who will be represented jointly.").

Ethics Questions?

Call The Florida Bar's Ethics Hotline

1-800-235-8619

Achieving Code Compliance

By Amber Ashton, Esq., DeBeaubien Knight Simmons Mantzaris & Neal LLP, Orlando, Florida

Your client has received a Notice of Violation or has discovered a code enforcement lien on its property for failing to mow the lawn, having a fence in disrepair, or one of the multitude of other offenses that drive neighbors crazy and, in some instances, have real health and safety implications. How does code enforcement work and what options does your client have available to address the violation?

It is important to remember that the goal of code enforcement Notices of Violation and fines, and the liens imposed to secure the fines, is to compel compliance. Generally, municipalities and counties impose these fines to encourage property owners to address code violations as expeditiously as possible. Alternatively, in the case of a violation that may pose a threat to the health and safety of a community, like an unsecured pool that poses a drowning risk to neighborhood children or a junk pile that becomes home to rodents and vermin, code enforcement proceedings allow the local government to abate or correct the violation immediately to remove the health or safety hazard and impose fines and liens to provide a means for the local government to collect costs incurred to do so.

Upon receiving a Notice of Violation (or a notice of a fine), you should advise your client to immediately reach out to the code enforcement department that sent the Notice or imposed the fine to ascertain the exact nature of the violation and determine what steps are required to bring the property into compliance. Typically, if the violations are extensive your client will have the ability to appear at a hearing before a fine is imposed to request additional time to bring the property into compliance. Otherwise, your client should take whatever steps are necessary to bring the property into compliance as quickly as possible and should notify code enforcement as soon as compliance is achieved.

Of course, if your client has a real defense to the violation (e.g., failure to provide proper notice, the wrong property was cited, etc.), the hearing is also an opportunity to raise any defenses which may be available. Code enforcement hearings do not follow formal rules of evidence and are governed by principals of "fundamental fairness." As such, your client is welcome to bring any photographs, witnesses, or other evidence which may support either the fact that the property has been brought into compliance or was never in violation.

While some property owners prefer to have an attorney represent them in code enforcement proceedings, property owners are permitted to represent themselves. Where the code violations are numerous, the liens are extensive, or the property has been declared unsafe, it may be necessary for an attorney to facilitate an action plan with the local government that addresses the violations and seeks to mitigate any pending fines and release any liens.

If your client acquired title to a property through foreclosure or probate and later discovers substantial code enforcement liens against the property, all is not lost. Many, although not all, code enforcement liens may be eliminated through the foreclosure process. You should be aware, however, that many title companies will still require you to obtain a Release of Lien or other confirmation from the fining authority reflecting that the lien has been satisfied. If the liens are enforceable, many local governments have lien reduction or amnesty programs that allow for substantial reductions in the amount of the fine so long as the property is currently in compliance. Title companies may also require you to obtain an affidavit of compliance confirming that the property is now in compliance with the code or ordinance provision cited in the Notice of Violation.

Each municipality, county, and local government has its own set of ordinances and code enforcement procedures. It is important that you, as the practitioner, familiarize yourself with the applicable ordinances to properly advise your client. You may find that a simple phone call will result in a re-inspection determination confirming that compliance has been achieved or all that is required is the submission of an application for a lien reduction.AL

Pre-Immigration Income Tax Planning: Don't Leave Home Without It

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

Many non-US persons call Florida a part-time home. When a non-US client is contemplating permanent residence in the US, trust and estate planners often think of pre-immigration transfers of property to trusts or by gift to reduce the taxable estate for US estate tax purposes. Together with US transfer tax planning, keep these important income tax considerations in mind when evaluating pre-immigration planning for your client.

Income Tax

The goal of pre-immigration income tax planning is to minimize the non-US person's (non-USP) US income tax exposure. Generally, the non-USP will want to take steps to: (1) realize gains and obtain a step-up in tax basis; (2) accelerate income recognition to occur prior to immigration to the US; (3) defer loss and deduction recognition to occur after immigration to the US; and (4) avoid anti-deferral regimes.

Realize gains and step-up in tax basis.

By filing IRS Form 8832, commonly referred to as the "check-the-box" (CTB) election, a company electing to be treated as a partnership or disregarded entity will be deemed to have made a liquidating distribution of its underlying assets to its owners. Consequently, the tax basis of the assets is "stepped up" (or down) in the hands of the entity's owners to the value of the assets on the date of the election. Since gain realized on non-US assets is not subject to US income tax when realized by a non-USP, the step-up in tax basis of the company is tax neutral for US income tax purposes. Moreover, creating a step-up on the basis of the underlying assets effectively reduces future capital gain recognition after the non-USP becomes a US resident.

Publicly traded securities with unrealized gains should be sold so that the non-USP realizes the gains before immigrating to the US. The securities may later be repurchased in the public market after immigration. This also effectively achieves a tax-free step-up in tax basis.

Accelerate income recognition.

To the extent that a non-USP accelerates income recognition before immigrating to the US, such income will generally escape US taxation, assuming that it is not US-source income. Among other actions, a non-USP should consider the following measures before immigrating to the US: (a) exercise stock options, (b) accelerate deferred compensation, (c) accelerate royalties and licensing fees, and (d) accelerate rental payments and/or sell property that generates rental income.

Defer recognition of losses and deductions.

To the extent that a non-USP has assets with unrealized losses, realization of those losses should be deferred until after establishing US residency. A sale after residency that will generate a US capital loss may be used to offset future US capital gains.

To the extent that a non-USP has expenses or other payments that would be deductible for US income tax purposes, paying such items should be deferred until after establishing US residency.

Avoid anti-deferral regimes.

Practitioners must carefully examine any foreign corporations that the non-USP owns or controls which may trigger anti-avoidance rules governing controlled foreign corporations (CFCs) and passive foreign investment companies (PFICs) when the non-USP becomes a US resident. Some of these issues, including harsh tax penalties, can be resolved by making a CTB election with respect to the company, reorganizing the ownership structure to ensure that US ownership and control will be kept to a minimum, making a qualified electing fund (QEF) election, or restructuring the company's investments.

Advance pre-immigration planning can generate sizable tax savings for generations, particularly when combined with estate planning designed to achieve your client's other planning objectives.

Endnote

1 Home country tax ramifications should always be considered before taking any actions related to US pre-immigration tax planning.

Probate And Trust Case Summaries

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

The amendment to the statute governing intestate succession involving persons born out of wedlock eliminated the four-year statute of limitations for paternity determinations in probate proceedings in intestate succession and does not apply retroactively to untimely claims.

Rose v. Sonson, 2016 WL 4651350 (Fla. 3d DCA 2016).

Stephen Sonson died intestate on June 21, 2012 leaving two daughters and a son. The daughters filed a petition for administration as co-personal representatives. Claiming to be another son, Stephen C. Rose filed a counter-petition to determine beneficiaries of the decedent. Rose was born out of wedlock on December 25, 1964. Although Rose's mother told him from a young age that Sonson was his father, no paternity determination had been made before December 25, 1986 (four years after Rose reached the age of majority, as required under the law in effect on that date).

The decedent's daughters moved to dismiss Rose's counter-petition, claiming the four-year statute of limitations period for maintaining a paternity action had expired. The trial court agreed and dismissed Rose's petition based upon it's finding that the 2009 amendment to Fla. Stat. § 732.108(2)(b) (2009) (which eliminated the four-year statute of limitations) could not revive Roses' already extinguished claim. The amendment did not apply retroactively because the legislature did not express a clear intent it was to be so applied, and that retroactive application would constitute a violation of the due process rights of the decedent and the co-personal representatives, as the claim was already extinguished. Rose appealed the trial court's final order.

The Third District Court of Appeal affirmed and analyzed the Florida Supreme Court decision of *In re Estate of Smith*, 685 So. 2d 1206 (Fla. 1996), in which the Court determined the four-year limitation period barred a sixty-year-old putative daughter from bringing a paternity action in probate court. The court in *Smith* reasoned that while Fla. Stat. § 742.10 recognized that paternity determinations could be made in probate proceedings, they are subject to limitations provided in Fla. Stat. § 95.11(3)(b). The present Court concluded that the same claim as in *Smith* was present in Roses' claim. It held the matter was time barred beyond the four years, the Florida legislature did not make the amendment to Fla. Stat. § 732.108(2)(b) retroactive and therefore it does not serve to revive claims that were expired by the time the amendment became law.

The total amount received by all parties in a settlement, and not just to minor victims, determines the monetary range for appointment of a guardian ad litem for minors.

Allen v. Montalvan, 2016 WL 4547993 (Fla. 4th DCA 2016).

Appellants were involved in an automobile accident where three of six passengers were children. Several individuals, including the driver, were killed and other passengers suffered varying degrees of injuries. Within two days of the accident, the mother of the minor victims obtained counsel to represent herself, her family members, and her minor children. Her counsel contacted the insurance company and received information on the appellees' coverage which had limits of $25,000 per person and $50,000 per incident.

The insurance company sent appellant's counsel a letter to memorialize the understanding which stated, in part, that they were globally tendering the insured's $50,000 bodily injury policy limits to settle the claims of all the parties involved, including the deceased victims, in exchange for a Full and Final Release of their insured. Two checks accompanied the letter in the amount of $25,000 each, payable to appellant counsel's trust account, as well as six releases, each naming one of the occupants of the automobile. The release form naming the deceased stated consideration in the amount of $25,000. The other five releases left the consideration amounts blank. The checks were deposited into the law firm's trust account and payments from those funds were made to the mother. The mother and father of the minor children later testified that these funds were used for household expenses, including furniture, clothes, and food for the children.

Two years later, appellant's counsel sent the completed releases, signed by the mother, with the blank consideration amounts filled in. The mother's claim stated it was released for $25,000, while the minors' claims showed consideration in the amount of $0. A few weeks later, the mother, now represented by new attorneys, filed a complaint for damages against the appellees arising from the automobile accident. Appellees answered and raised affirmative defenses, including that the claims were barred by settlement or accord and satisfaction arising from the prior release. The insurance company moved to enforce the purported settlement by dismissing the claims against the appellees, and to set a non-jury hearing to determine the validity and enforceability of the alleged settlement. The mother objected. The trial court conducted

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an evidentiary hearing without a jury found in favor of the appellees, granted the motion to enforce the settlement and concluded that Chapter 744, Florida Statutes did not require a different outcome.

In reversing the trial court's order, the Fourth District Court of Appeal examined Fla. Stat. § 744.3025(1)(b). Specifically, the Appellate Court found that because the case involved minors and totaled $50,000 or more, the court was required to appoint a Guardian ad Litem to represent the children's interests before approving a settlement agreement. The court found that the $25,000 distributed to the deceased driver should have been included in the computation of the gross settlement totaling $50,000 or more. Therefore, the minor children were involved in the settlement and within the monetary range of the statute. The court referred to Florida Probate Rule 5.636(d) which clarifies in a committee note that the total settlement "includes all settlement payments or proceeds received by all parties to the claim of action." The court therefore found the minor's settlement to be invalid.

Fees were awarded to attorney after successful defense of specific performance for sale of real property initiated prior to testator's passing, and resulting in a benefit to the estate.

Hampton v. Estate of Allen, 198 So. 3d 954 (Fla. 5th DCA 2016).

Mary Lou Jordan filed suit against the Estate of Clifford L. Allen, seeking specific performance of a real estate sales contract that was pending at the time of Allen's death. Wanda Hampton, the specific devisee of said real estate under Allen's will, filed a Motion for Authority to Defend Civil Action. The trial court granted the motion, reserving Hampton's right to petition the court for reimbursement of the attorney's fees and costs "based on providing a benefit to the estate." Hampton succeeded in the lawsuit and later filed a claim against the Estate, seeking reimbursement of attorney's fees and costs incurred in defending Jordan's action. The trial court denied the claim as the dismissal of the action did not enhance or increase the assets of the estate. Hampton appealed arguing that under Fla. Stat. § 733.106(3), her attorney's efforts effectuated Clifford L. Allen's intent as embodied in his will.

The Fifth District Court of Appeal reversed and applied the *de novo* standard of review as it depended on the interpretation of Fla. Stat. § 733.106(3), which provides that "[a]ny attorney who has rendered services to an estate may be awarded reasonable compensation from the estate." This has been interpreted to include attorneys' services which benefit the estate. The Appellate Court found that in successfully defending against the specific performance case, the real estate was transferred to the beneficiary of the estate, as stated in the will, and giving effect to the decedent's testamentary intent. Therefore, the request for attorney's fees should have been granted.

Sanctions based on frivolousness are not appropriate despite petitioner's lack of success in removal of guardian, when petitioner is a family member who stands to be reasonably affected by the guardian's actions.

St. Peter v. Osorio-Khor, 198 So. 3d 941 (Fla. 4th DCA 2016)

Niece was appointed plenary guardian of the person and property of her aunt and, following a transfer of all of the ward's liquid assets into the ward's living trust, as successor trustee. Five years later, Karlene Osorio-Khor ("Khor"), the guardian's sister, petitioned to remove the guardian alleging the guardian was the temporary guardian of Khor's father (the ward's brother), and sole trustee of the father's trust, as well as one of the beneficiaries, along with Khor. It was alleged that the father was the beneficiary of the ward's trust and, therefore, the contents of the ward's trust would eventually be merged into the father's trust, of which both sisters are beneficiaries.

Khor argued that Florida Statutes do not allow guardians to be beneficiaries and, as such, the guardian was breaching her fiduciary duty and had a conflict of interest. The Florida Probate Code provides that a petition to remove a guardian may be commenced by a court or interested person. Khor alleged to have standing as an "interested person" because she was one of the beneficiaries of the father's trust and a niece of the ward. The guardian moved to dismiss the removal petition stating, amongst other reasons, that Khor lacked standing as an "interested person" to challenge the guardian's role. The guardian also filed a motion to tax attorney's fees pursuant to Fla. Stat. § 57.105. The trial court granted the Motion to Dismiss. Khor defended the attorney's fees motion by asserting that the trial court provided some of the relief sought by appointing a monitor and a review of accountings. The trial court concluded that sanctions were inappropriate because Khor had a right to appear and bring the matter forth so that the court would consider whether or not the guardian should be removed. The court acknowledged deficiencies in the statute regarding the determination of an "interested person" and ultimately found the claim was not filed in bad faith.

The Fourth District Court of Appeal affirmed the trial court's decision citing *Wendy's of N.E. Florida, Inc. v. Vandergriff*, 865 So. 2d 520 (Fla. 1st DCA 2003). *Wendy's* cautions that Fla. Stat. § 57.105 must be applied carefully to serve the purpose of deterring frivolous pleadings and further defines "frivolous" to mean a case without merit in law and unsupported by reasonable argument, contradicted by overwhelming evidence, or undertaken to delay resolution or maliciously injure the other party. The Appellate Court held that pursuant to these standards, Khor's petition was not frivolous and she could be determined to have been an interested person, as she maintained a reasonable expectancy of being affected by the guardian's actions. The Appellate Court therefore affirmed the trial court's decision.

Real Property Case Summaries

Prepared by Scott M. Work, Esq.
– Clark, Partington, Hart, Larry, Bond & Stackhouse, P.A., Destin, Florida

Third party beneficiary doctrine allows a non-contracting party to enforce the contract terms against the contracting parties, not vice versa. It does not allow the contracting parties to enforce a contract against a non-contracting party without his or her consent merely by conferring a benefit on the non-contracting party.

Mendez v. Hampton Court Nursing Ctr., LLC, SC14-1349, 2016 WL 5239873 (Fla. 2016)

The Florida Supreme Court considered whether a nursing home resident is bound by an arbitration clause in a contract that the resident neither signed nor agreed to. The case was on appeal from the Third District Court of Appeal, which followed a prior First District decision, and found that the resident was an intended third party beneficiary of the contract and could be bound by the contract even though he never signed it. The Supreme Court accepted jurisdiction because the Third District's decision conflicted with decisions from other Districts.

Mendez admitted his father to the Hampton Court Nursing Center in 2009, and signed a nursing home contract with Hampton Court that contained an arbitration clause. In 2011, the father developed an eye infection that required his eye to be removed. Mendez filed suit against Hampton Court on his father's behalf, and Hampton Court moved to compel arbitration. The trial court granted Hampton Court's motion to compel arbitration, and Mendez appealed to the Third District.

In making its ruling, the Supreme Court agreed with the Second, Fourth and Fifth Districts, which previously reviewed similar facts under an agency law framework, and ruled that a resident was not bound by a contract that he or she did not sign. The Supreme Court cited *Found. Health v. Westside EKG Associates*, 944 So. 2d 188, 194 (Fla. 2006), stating that "[t]o establish an action for breach of a third party beneficiary contract, [the third-party beneficiary] must allege and prove the following four elements: '(1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach.'" The Supreme Court stated that the party enforcing the contract was critical to the analysis, holding the third party beneficiary doctrine enables a non-contracting party to enforce a contract against a contracting party - not the other way around. The court noted that the third-party beneficiary doctrine did not allow two contracting parties to bind a third party to the agreement without the third party's consent, as was the case with Mendez's father. In this case, Mendez's estate sued for negligence and statutory violations in the care of the father, and did not sue to enforce the contract between Mendez and Hampton Court.

In the case of the arbitration provision, the Supreme Court noted that if the father or his estate were suing to enforce the contract as a third-party beneficiary, then he may be bound by the terms of the contract, including the arbitration clause. Since the father's estate did not sue to enforce the contract, Hampton Court could not enforce the contract with the arbitration clause that Mendez's father did not sign. In support of its decision, the Supreme Court also cited *Corbin* and *Williston* for the proposition that third party beneficiary law grew from the need for "manifest justice" in contract law. The Supreme Court did not believe that the Third District or First District's decisions square with principles of justice and equity underlying the third party beneficiary doctrine because both decisions "permit contracting parties to bind the non-contracting party without the non-contracting party's consent."

Purchase agreement contained a provision that the purchasers were relying solely on the representations of sellers and third parties other than the real estate agents for verification of the home's condition, but the provision did not relieve agents of liability for breach of statutory obligations.

Kjellander v. Abbott, 1D15-5475, 2016 WL 4992415 (Fla. 1st DCA 2016)

The Appellant purchasers purchased a home and thereafter discovered numerous undisclosed material defects, including water damage, mold and HVAC issues. The purchasers sued the sellers, the sellers' agents, and their home inspector. Counts IV-VI against the sellers' agents included counts for fraudulent misrepresentation, fraudulent concealment, and breach of the duties of honesty, candor and fair dealing.

A provision in the purchase agreement stated that the purchasers were relying solely on the representations of sellers and third parties, other than the agents, for verification of

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the home's condition. The trial court dismissed Counts IV-VI because the provision in the purchase agreement "expressly contradicts" the claims brought against the agents.

The First District Court of Appeal noted that the applicable provision in the purchase agreement also stated that "[t] his Paragraph will not relieve [the agents] of statutory obligations." The court reasoned that claims based on violations of statutory obligations are not "contradicted" by the purchase agreement. The court stated that, under Fla. Stats. §§ 455.227(1)(a), 475.25(1)(b), 475.278(4)(a) and 475.42(1)(e), the agents' statutory obligations include "a duty of honesty and fair dealing, a duty to disclose all known facts that materially affect the value of the property and are not readily observable, and a duty not to make misleading, deceptive, or fraudulent representations in any transaction." The court further cited favorably from Fla. Att'y Gen. Op. 96-20 (1996) for the proposition that "Chapters 455 and 475, Florida Statutes, clearly make misrepresentation, concealment, and fraud by real estate brokers and salespersons contrary to the public policy of this state."

The First District reversed the dismissal, ruling that the purchasers' complaint effectively alleges violations of the agents' statutory obligations and was sufficient to withstand the agents' motion to dismiss.

A declaration of condominium and rules and regulations should be considered together. When one of the documents is silent on a matter, the courts should not impose contract rights or duties under the guise of construction. When the declaration states that it controls over the rules, and the rules are not in conflict with the declaration, the rules should be enforceable.

Le Scampi Condo. Ass'n, Inc. v. Hall, 41 Fla. L. Weekly D1582 (Fla. 2d DCA July 8, 2016)

Appellant, Le Scampi Condominium Association, Inc., appeals an adverse summary judgment entered in the trial court in favor of Appellees, Michael and Janet Hall. In the trial court, the Association filed for declaratory judgment and injunctive relief against the Halls because the Halls were leasing their unit for less than a month, and did not obtain approval of their tenants from the Association, both in violation of the Declaration of Condominium and Rules and Regulations.

Section 3 of the Declaration stated that the Rules are subject to the Declaration. Section 9.5 of the Declaration contained two provisions dealing with the sale, lease or transfer of units. 9.5A allowed for the "unrestricted" sale, lease or transfer to relatives, certain trusts and other unit owners with notice to the Association post-sale, lease or transfer. Section 9.5B required a 30 day prior written notice to the Association of a sale, lease or transfer to any other party, and certain disclosures regarding the identity and financial condition of the purchaser or tenant.

Section 9A of the Rules stated that units may not be rented without the approval of the Association. Section 9B of the Rules stated that units may not be rented for less than one month.

The Halls did not dispute that they leased their unit for less than a month and without obtaining Association approval. The Halls argued, and the trial court agreed, that Section 9.5B of the Declaration provided them with the unrestricted right to lease their unit, and that Section 9 of the Rules was in conflict with the Declaration. Therefore, Section 9 of the Rules was unenforceable.

The Second District Court of Appeal noted that the Declaration and Rules should be considered together to determine the parties' agreement. Further, since Section 3 of the Declaration stated that the Rules were subject to the Declaration, the Declaration should control in the event of conflict.

The Second District further noted that the trial court's ruling was decided on its interpretation of Section 9.5B of the Declaration as granting a right to lease a unit to persons other than the family members and trusts specified in Section 9.5A. The court further noted that, unlike Section 9.5A, Section 9.5B did not provide an unrestricted right to lease. Instead, 9.5B provided for prior notice, but did not otherwise address an owner's right to lease the owner's unit.

The court stated that, because Section 9.5B did not expressly grant an unrestricted right to lease, the trial court could not bestow such a right under the guise of contract construction. Since Section 9.5B of the Declaration did not grant an unrestricted right to lease, the appellate court ruled that Section 9.5B did not conflict with the Association's approval rights and lease period restriction in Section 9 of the Rules. The Second District reversed and remanded with instructions to grant summary judgment in favor of the Association.

Ch. 177, Fla. Stat., does not grant a local government unreviewable discretion to grant or deny a plat application. If an applicant meets the requirements of Ch. 177, Fla. Stat., the local governing board must show by competent substantial evidence that the applicant is not entitled to the requested action. The local governing board's discretion is limited and not unbounded. First-tier judicial review by the circuit court is a matter of right. A complete denial of first-tier judicial review is a miscarriage of justice permitting the District Court in second-tier review to intervene.

Blair Nurseries, Inc. v. Baker County, 1D16-0423, 2016 WL 4751757 (Fla. 1st DCA 2016)

Appellant, Blair Nurseries, Inc., appealed to the First District Court of Appeals for second-tier certiorari review of a denial of Blair Nurseries' application to vacate a plat by Baker County,

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Florida, which was upheld by the circuit court on first-tier certiorari review. Blair Nurseries owned acreage in Baker County that it subdivided in 2002 into a community for horse owners consisting of twenty-two, five-acre lots. Only one such lot was sold and, in 2014, Blair Nurseries filed an application with Baker County to vacate the 2002 plat, excepting the lot purchased by a third party.

The First District Court of Appeal noted that, to have the plat vacated, Fla. Stat. § 177.101(3) required Blair Nurseries to show: "(1) that it owned the property covered by the plat sought to be vacated; (2) that the vacation [of the plat] by the governing body of the county *will not affect the ownership* ... of other persons owning other parts of the subdivision, and (3) that vacation will not affect the ... right of convenient access of such persons." At the public hearing on the plat application before the Baker County Commissioners, the third party owner in the subdivision argued against the plat vacation stating that it would negatively affect her property value. The Baker County Commissioners unanimously denied the application because the diminution in value of the single lot sold would "affect the ownership" of the third party owner.

The circuit court, on first-tier certiorari review, determined that the word "may" in Fla. Stat. § 177.101(3), meant that the board's decision was discretionary and did not require the board to reach a particular decision if certain criteria were met. Thus, Blair Nurseries was not entitled to certiorari or mandamus relief.

The First District found that the circuit court's ruling precluded any judicial review of the Commissioners' decision and resulted in a miscarriage of justice and quashed the circuit court's decision. In so ruling, the First District stated that, "[f]ar from conferring unreviewable discretion, Fla. Stat. § 177.101(3) is a narrow grant of authority by which local governing bodies must govern their actions." Further, local governing bodies do not have unbridled discretion to do what they want or believe is justified; instead, upon a showing of the statutory requirements…, the Commission has a legal responsibility to grant the vacation request unless they prove non-compliance with applicable law." The court concluded that "the burden is upon the local governing body to demonstrate by competent, substantial evidence that an applicant is not entitled to the requested action; whatever discretion the local governing body has is limited and not unbounded." In deciding to quash the circuit court's decision, the First District further stated "[i]t is hard to imagine anything more manifestly unjust than a complete denial of judicial review when it should otherwise have been provided as a matter of right."

Association was not a successor-in-interest to the developer as to a release executed by a third party on behalf of the developer, where the association was not made a party in the underlying lawsuit or to the documents settling the lawsuit. Ambiguities in settlement agreements and releases can create a material issue of fact precluding summary judgment.

Ventana Condo. Ass'n, Inc. v. Chancey Design P'ship, Inc., 41 Fla. L. Weekly D1880 (Fla. 2d DCA Aug. 12, 2016)

The factual background and procedural history of this case are complex. The developer, Ventana Tampa, LLC, sued the general contractor, Hardin Construction, and one of the design professionals, Chancey Design, over construction delays and other issues. The Developer first settled with Hardin, and entered into a Mediated Settlement Agreement (MSA) that gave Hardin the right to pursue the Developer's claims against Chancey. The Developer did not assign its claims to Hardin, but only assigned the right for Hardin to pursue the Developer's claims on behalf of the Developer.

Hardin then sued Chancey in 2008. While that case was pending, the Developer's interest in the project was foreclosed by Mercantile Bank. The Developer and Mercantile Bank entered into a foreclosure settlement agreement wherein the Developer assigned its interests in the Hardin/Chancey litigation to Mercantile Bank. The ultimate foreclosure judgment entered in that case did not incorporate the settlement agreement or reference the assignment. Mercantile Bank subsequently assigned its interest in the foreclosure judgment to BMR Funding, LLC.

In 2010, Hardin settled the pending litigation with Chancey and entered into a settlement agreement in which Hardin signed a release for itself and on behalf of BMR which released Chancey from liability "arising out of the facts and circumstance raised in the [lawsuit]." The Hardin/Chancey lawsuit was then dismissed in 2010.

The Ventana Condominium Association was later turned over to the members, and in 2014, the Association brought suit against Hardin and Chancey over design defects in the condominium's "amenities deck." Chancey moved for summary judgment arguing that the Association is a successor-in-interest to BMR, which released Chancey in the 2010 release, and that the Association's claims involved the same claims brought earlier by the Developer and Hardin, which were released.

The trial court found that the Association was bound by the 2010 release because it was entered into on behalf of the Developer. The trial court also found that the Association was a successor-in-interest to BMR.

First, the Second District Court of Appeal examined the relationship between the Developer and the Association. In doing so, the court analyzed the applicable statutes in the Condominium Act, particularly noting Fla. Stat. § 718.11, The court determined that the Developer could have acted on behalf of the Association and made the Association a party

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to the lawsuit, but it did not. The court further noted that the record indicated that the Developer was only acting on its own behalf in the original lawsuit, and the claims and interests at issue in the original lawsuit were those of the Developer. The court also noted that the record did not support the trial court's finding that the Association was a successor-in-interest to the Developer. The court reasoned that the MSA between the Developer and Hardin only gave Hardin agency rights to pursue the Chancey litigation on behalf of the Developer; and that it did not assign the Developer's claims to Hardin.

Next, the court examined the relationship between BMR and the Association, and found that the trial court had no record evidence before it to find that BMR held the interests of the Developer at the time the 2010 release was signed by Hardin. Lastly, the court examined the language of the 2010 release itself. The court determined that the language of the release was ambiguous because it was unclear whether it released, among other things, latent defects and future litigation.

The Second District found that summary judgment was inappropriate because the release was not binding on the Association through Hardin or BMR, and because of the ambiguity in the terms of the release.

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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

2016 EXECUTIVE COUNCIL MEETINGS

FEBRUARY 22 – 25, 2017
Out of State Executive Council Meeting
Four Seasons Hotel • Austin, TX
Reservation Link: http://www.fourseasons.com/austin/
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MAY 31 – JUNE 4, 2017
Executive Council Meeting & Convention
Hyatt Regency Coconut Point Resort & Spa • Bonita Springs, FL
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JULY 27 – JULY 30,2017
Executive Council Meeting& Legislative Update
The Breakersl • Palm Beach, Florida
Room Block Link: https://resweb.passkey.com/go/FLABR17
Room Rate: $225

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

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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).

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