

ActionLine

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

Special Edition: COVID-19 and RPPTL Practice

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BDAL-1019

Letter From Your Chair And The Editors

Even before we started sheltering at home, working remotely, becoming safer-at-home and helping our school-aged kids ramp up for distance learning, we here at *ActionLine* started thinking about how to help our readers. We wanted to provide meaningful and practical information about legal issues arising from the COVID-19 pandemic and the impacts that the virus will have on your clients and practices. Within the first few days of the pandemic, we decided to publish this special issue of *ActionLine*, focused on issues in our practices related to the COVID-19 pandemic. The entire *ActionLine* staff was mobilized, new article and editing deadlines were set, and a shortened production process was adopted to provide this focused *ActionLine* issue to you as quickly as possible.


R. FREEDMAN


J. BASKIES


M. BEDKE

In providing this special issue to you, the editors of *ActionLine* joined closely with the leaders of the Section to share and develop content, coordinating the development of articles for this issue of *ActionLine* along with content for the Section's website editors as well. In this spirit of coordination and cooperation, the editors and Section Chair joined together to present this unusual joint Letter from your Chair and the Editors instead of submitting separate columns. We hope you enjoy this unique publication.

We started making a running list of questions:

- Will lenders exercise clauses deeming themselves insecure?
- What happens if you just received a bunch of "clean" tenant estoppels in your due diligence process but you now know (or suspect) the tenants will default on their rent payments?
- Will the COVID-19 situation trigger material adverse change ("MAC") clauses in legal documents?
- Is it time to refresh our understanding of the doctrines of frustration of purpose and impossibility?
- Do we need to revise and update our opinion templates to address issues arising from the pandemic?
- Will force majeure clauses be applicable in this instance (and going forward, should we draft those clauses to be applicable to similar events)?
- Will our rent loss or business interruption insurance provide relief?
- Is it time for real estate lawyers to give more thought to remote online notarization (RON)? (We know our friends on the probate and trust side of the Section have been thinking about RON.)
- What about the intersection of privacy and a duty to notify? Does a landlord have a duty to notify tenants if someone in the building tests positive for COVID-19?
- What will the impact be on legal aid providers? It seems that the need for legal services for our less-fortunate neighbors is likely to sky-rocket at the exact same time that IOLTA funding is dramatically decreased as a result of record low interest rates.
- Will this crisis be the catalyst for the establishment of an Infrastructure Bank and new public-private partnerships (P3s)?
- What happens when a tenant was planning to move out but finds itself in a holdover situation because movers are non-essential workers? Even if the tenant can't be evicted, due to various court orders, will they be liable for rent? For holdover rent?
- How will title insurance companies handle gap coverage when recording offices may be closed

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

ARTICLES: Forward any proposed article or news of note to Jeff Baskies at jeff.baskies@katzbaskies.com. Deadlines for all submissions are as follows:

VOLUME NO.	ISSUE	DEADLINE
1	Fall	July 15
2	Winter	October 15
3	Spring	January 15
4	Summer	April 15

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GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.

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

or operating with a skeleton crew?

- If a borrower/tenant gives notice to its landlord that it will not be paying rent for some period of time, will that trigger exposure under non-recourse carve-out guaranties?
- Can clients execute all of their estate planning documents at home?
- Can the witnesses to clients' wills and trusts be family members who are also beneficiaries?
- What issues are generated if the documents are not self-proved and what added future legal fees may be associated with them?
- How can clients execute Durable Powers of Attorney when the law requires DPOAs be executed with deed formalities, but yet there are restrictions on using RON?
- Will RON allow for self-proving wills under the current status of Florida law?
- Can any estate planning documents be executed via RON?
- What effect will court closures, stay at home orders and other measures have on court deadlines or other statutory time periods – like the time in which to challenge the validity of a document, to file a responsive pleading or to file a claim?

By the time that this magazine appears on your computer screen or is in your hands, you will undoubtedly have been addressing your own issues and likely added to the list above. The RPPTL Section created a special webpage (https://rpptl.org/DrawOnePage.aspx?PageID=124) to provide Section members with more immediate and informal communication to assist practitioners with some issues of immediate concern, but certainly there are too many issues and facets to address in such regard. Thus, as you read this Special Edition of *ActionLine*, you will find more in-depth articles and materials than we could place on the COVID-19 webpage, and we believe that you will find take-aways that will be helpful to you. Remember a few things:

- as a quarterly magazine, *ActionLine* is not a publication that provides "breaking news;"
- we realize we are presenting at least as many questions as we are answers to many of the issues raised (one commentator recently said, "This is developing law. Like the virus, it is new. We are currently in the Wild West stage!");
- worst case, the issues raised ought to lead to critical thinking and help develop creative solutions—what lawyers do best; and
- this too shall pass. As we did after 9/11, the Great Recession, and countless hurricanes, we will learn, we will adapt, and we will continue to serve our clients, communities and colleagues at the Bar.

As always, we hope you find this edition of *ActionLine* informative. Most importantly, we hope you and yours remain healthy and well.

Rob, Mike, and Jeff





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- Anne K., Beneficiary's Family

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Summary of Paycheck Protection Program

By Keith Durkin, Esq., Baker Hostetler, Orlando, Florida

Section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") creates the Paycheck Protection Program ("PPP"), which is designed to provide much needed economic relief to individuals and businesses devasted by COVID-19. The program went live for businesses with more than one owner on April 3, 2020. Independent contractors and sole proprietors could apply for the program on April 10, 2020. The program was appropriated $349 billion and was being administered on a first in/first out basis. Since then, a second round of funding has been secured. This article summarizes the PPP and key differences in guidance issued by the Treasury Department that deviates from the CARES Act.

Eligibility. The Paycheck Protection Program makes 100% federally guaranteed SBA loans available to businesses with 500 or fewer employees (the "500 employee test"), including corporations, partnerships, sole proprietorships, independent contractors, certain nonprofit organizations, veterans' organizations, and Tribal businesses. Restaurants and hotels are eligible to apply "the 500 employee test" on the basis of each physical location. Special rules apply to hotels and restaurants,[1] franchises, and entities receiving financial assistance from small business investment companies, and certain generally applicable affiliation rules are waived for the foregoing entities. The application process will end on June 30, 2020 (the "Covered Period").[2] The Payroll Protection Program simplifies the rigid SBA requirements for loans in favor of a 500-employee size limit, provided the borrower (a) was operating on Feb. 15, 2020; and (b) paid salaries and payroll taxes to and on behalf of employees or paid independent contractors through Forms 1099. The SBA has the authority to increase the 500-employee limitation on an industry-by-industry basis. Employers receiving the employee retention tax credit under the CARES Act are not eligible for these loans. Specific language in the Payroll Protection Program states that the SBA should issue guidance to lenders prioritizing loans to small businesses, rural markets, minority owned businesses, veteran owned businesses, and business in operation for less than 2 years.

Loan Terms and Amounts. The amount of each loan is limited to the sum of (a) the lesser of (1) $10 million; or (2) the borrower's average total monthly "payroll costs" for the 1-year period ending on the date the loan is made, multiplied by 2.5; and (b) any refinanced SBA economic injury disaster loan obtained after January 31, 2020. Treasury recently issued a Borrower's application form indicating that the payroll cost calculation period would be January 2019 – December 2019 rather than the trailing 12 months set forth in the CARES Act. To compound matters, Treasury also issued an Interim Final Rule that could be interpreted to utilize both payroll cost calculation periods. Finally, late on the night of April 6, 2020, Treasury finally issued Frequently Asked Questions ("FAQ") and answers stating that the calculation could be performed either way. Borrowers are encouraged to speak directly to their lenders to determine the proper payroll cost period. In many instances, the payroll cost calculation will make a significant difference in the amount received by borrowers. There is a special rule to compute the average monthly payroll costs for seasonal businesses and start-ups.

The CARES Act states that during the Covered Period, Borrowers are not required to provide collateral security for the loans or cause owners or affiliates to guarantee the loans. Treasury has issued guidance indicating that no collateral or personal guarantees will be required for loans during or after the Covered Period.

Payroll costs include the cumulative amount of salaries, wages, tips, retirement benefits, certain employer provided benefits, severance payments, state and local taxes paid on employee compensation, and other compensation paid to employees and independent contractors. Exclusions from payroll costs include any compensation paid to an employee or independent contractor in excess of an annualized amount of $100,000, and amounts paid to persons who reside outside the United States, certain taxes imposed or withheld during the Covered Period (specifically employee and employer FICA, a railroad excise tax, and employee withholding), and certain

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payroll costs for which tax credits were allowed pursuant to the Families First Act. There is confusion over whether the payroll cost calculation is for gross wages, i.e., without a reduction for FICA or employee withholding, or net wages. The specific language of the CARES Act states these amounts are not excluded from the payroll cost calculation until the Covered Period begins on February 15, 2020. The exclusion of these amounts makes a substantial difference in the net amount of the loan. It would make sense that these amounts would not be excluded in the payroll cost calculation if the loan proceeds were then used to pay payroll costs, the amounts would be excluded twice, i.e., once when the calculation is made and again when the amounts are utilized to pay employees. Confusion over the tax reduction is compounded by the payroll cost calculation period. If the payroll cost calculation period is calendar year 2019, there is no reduction for FICA or withholding because the CARES Act states that the FICA and withholding are not excluded from the calculation until the Covered Period, which begins on February 15, 2020. If, however, the payroll cost calculation is the trailing 12 months before the loan origination, then some portion of the payroll cost calculation will be affected by this reduction.

More confusion exists over whether a business's payments to independent contractors should be included in the payroll cost calculation. A plain reading of the CARES Act indicates that these payments should qualify so long as the payments rendered were a core part of an applicant's business, such as an attorney paying a paralegal as an independent contractor for periodic work. The CARES Act itself states that an applicant can obtain a loan if the applicant was operational on February 15, 2020 and "paid independent contractors on a Form 1099-MISC." Treasury issued an interim final rule stating that independent contractor payments would not be included in a borrower's payroll cost calculation. The interim final rule included the language in the CARES Act allowing an applicant to apply for a loan if the applicant paid independent contractors. Accordingly, the Treasury interim final rule seems to indicate that an applicant paying independent contractors could apply for a program loan, but the applicant's loan amount would be zero because all payments to independent contractors would be excluded from the payroll cost calculation.[3] To further complicate matters, the general consensus among practitioners was that the $100,000 was a firm cap for all possible inclusions in the payroll cost calculation, and, therefore, gross-ups for employer paid health insurance and retirement matches were subject to the $100,000 cap. This reasoning was consistent with Treasury's interim final rule. Treasury, however, stated in the FAQs that employer paid gross-ups for health care insurance and retirement contributions could be added on top of the $100,000 cap. Treasury's inconsistent guidance[4] caused many applicants to utilize a calculation methodology that may not have been the most favorable after the FAQ was issued. There is additional consternation that the FAQs do not have the same effect as Treasury's interim final rule. All of the above has caused substantial confusion in obtaining a program loan and borrowers are encouraged to work directly with their lenders on how the calculation should work. This author has recommended that clients prepare several different calculations, so all information will be available to be submitted when the lender determines the proper payroll cost calculation period and formula.

The Payroll Protection Program expands the permitted use of these SBA loan proceeds to include payroll costs, employee benefits, commissions, interest payments on mortgages, rent, utilities, and interest on debt obligations incurred before the Covered Period. Interest payments on mortgage obligations includes use of the funds for loan interest for real property and tangible personal property, such as financed equipment. Payments may only be for interest. No payments of principal may be made, and no prepayments of principal may occur. Also, please note that although the permitted uses include utilization of funds on debt obligations incurred before the Covered Period, this language does not appear in Section 1106 of the CARES Act governing forgiveness. Accordingly, using the funds for interest on debt obligations incurred before the Covered Period (excluding mortgage obligations explained above) would affect the forgivability of the loan.

Deferral. Lenders are required to provide "complete payment deferment relief" for a period from six months to one year on all principal and interest. The CARES Act provides that loans may have a maximum maturity date, which is 10 years after the borrower applies for the debt forgiveness described below. During the Covered Period, interest rates are capped at 4%. After expiration of the Covered Period, loans will bear interest at comparable SBA rates. Treasury's guidance however, substantially deviates from the CARES Act. According to Treasury guidance, including its interim final rule, loans that are not forgiven must be repaid in 2 years and will bear interest at 1%. While no interest payments are required during the deferment period, interest will accrue on the loan from the day the loan is made.

Lenders. Loans will be made by banks and other commercial lenders with existing authority to make SBA loans and other lenders that the SBA determines are qualified to originate and administer the loans. While repayment of the loans will be guaranteed by the federal government, potential borrowers will work directly with their originating lenders to close and administer the loans. The SBA will reimburse lenders the following processing fees: (a) 5% of the principal balance for loans $350,000 and below; (b) 3% of the principal balance for loans between $350,000 and $2,000,000; and (c) 1% of the principal balance for loans over $2,000,000.

Loan Forgiveness. A borrower may apply for forgiveness

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of a portion of the loan. The maximum eligible forgiven amount is equal to the cumulative amount of payroll costs, rent, utility payments, and interest paid on mortgages on real or personal property paid during the eight-week period following origination of the loan. The foregoing amounts include arrearages. The forgiven amount is not included in the borrower's federal taxable income. Amounts eligible for forgiveness may be less than the principal amount of the loans depending on the borrower's utilization of the proceeds. The SBA will reimburse the forgiven amount together with additional accrued interest to the lender within 90 days after the forgiven amount is finally determined. The forgiven amount is subject to several reductions and limitations. Payroll costs that were not taken into account to compute the maximum loan amount are not taken into account to compute the loan forgiveness amount. The amount forgiven cannot exceed the principal balance of the loan. If any portion of a borrower's loan is forgiven, then the borrower cannot defer its 2020 payroll tax obligations.

The forgiven amount is subject to two key reductions as follows:

A. Workforce Reduction:

The workforce reduction is a percentage reduction determined by multiplying the eligible forgiveness amount by a fraction, the numerator of which is the average number of full-time employees in the 8 week period following loan origination and the denominator is the average number of full time employees over two different testing periods unilaterally chosen by the borrower: (i) the average number of full-time employees between February 15, 2019, and June 30, 2019; or (ii) the average number of full-time employees between January 1, 2020, and February 29, 2020. If the numerator and denominator reduce to 1, the entire amount can be forgiven. If the numerator and denominator reduce to 4/5, then only 80% is forgiven. Some employers are concerned that layoffs, terminations and furloughs will prevent them from increasing the numerator. The CARES Act allows employers to rehire terminated employees and count them in the employers' numerators if the rehiring is accomplished by June 30, 2020 and the employees are reinstated at commensurate wage and benefits.

B. Salary Reduction:

The salary reduction portion is a dollar-for-dollar offset against the loan forgiveness amount equal to the excess of (i) the reduction in the salary of an employee earning less than $100,000 per year, over (ii) 25% of the employee's pre-reduction salary. This reduction doesn't apply to an employee earning over $100,000 per year, so an employee's salary could be reduced, (e.g., $250,000 to $100,000) with no consequences. If an employer reduces the salary of an employee whose annual salary is $100,000 or less by 25% or less, there is no penalty. If the reduction is more than 25%, then the statute provides that the excess is a dollar-for-dollar reduction of the loan forgiveness. The Treasury recently revised the borrower's PPP loan application to require a borrower to certify that the borrower will use 75% of the PPP loan on payroll costs. There is speculation that this certification was included to resolve confusion over whether a rehired employee is required to receive backpay. There was further speculation that employers could rehire terminated employees by the last pay period before June 30, 2020, and pay them one pay period commensurate with their former salary, without any reduction in the forgiveness amount. Treasury's new requirement that a borrower spend 75% on payroll would make it seem likely that the rehires would have to occur prior to the last pay period before June 30, 2020.

Lastly, if any portion of a borrower's loan is forgiven, the borrower cannot defer its 2020 payroll tax obligations.

Impact on Existing Loans. Prior to applying for a forgivable SBA loan, all prospective borrowers should review all existing loan agreements, notes, and bond or trust indentures to determine if incurring additional debt will cause a default or otherwise violate the terms of those agreements. Companies may also be guarantors of their parent entities' existing debt, and may, therefore, be subject to the same restrictions. Financial covenants, permitted debt definitions, permitted investments, and other terms of loan documents may need modifications to allow borrowers to access this government relief without technical defaults. Businesses with existing debt should consult with their legal counsel and lenders now about any necessary amendments or waivers to allow these loans. Existing lenders will likely support and encourage borrowers to obtain these loans.

Borrowers of SBA Economic Injury Disaster Loans. The SBA also separately provides emergency loans of up to $2 million to assist companies suffering from COVID-19 financial distress. The PPP allows these loans to be refinanced as federally guaranteed loans under the PPP. The refinanced loan proceeds become subject to all the conditions and limitations of the Payroll Protection Program explained above.

Documents. Borrowers should work directly with their lenders to provide the necessary supporting documentation. This author has been advising clients to provide their IRS Forms 941, 940, and W-3, and payroll processing records. The provision of Forms 940 is particularly important because these forms, unlike Forms 941, will set forth the employer paid health insurance premiums, retirement contributions, and other fringe benefits that will be included in the payroll cost calculation.

Affiliation Rules. The PPP is being grafted onto the existing SBA 7(a) program. The SBA 7(a) program has substantial regulations governing affiliation and control requirements that could combine separate businesses into one applicant.

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Borrowers with complex organization charts, 3504 pay agent arrangements, PEO arrangements, and common paymaster arrangements should review these detailed regulations and seek legal counsel on how to apply for PPP loans. This author has already advised many different applicants on the complexity of the SBA 7(a) affiliation rules and also how restaurants, hotels, and certain franchises can apply for program loans despite affiliation because of the specific waiver language set forth in the CARES Act for hotels, restaurants, and certain franchises. These regulations are set forth in 13 CFR 121.

The PPP is a powerful tool in the CARES Act stimulus package because it will provide much needed cash-flow to businesses struggling to fund operations. Applications should be prepared immediately because the estimated time intervals between application submission, approval, and funding are unknown.



K. DURKIN

***Keith Durkin** is an experienced tax attorney and trusted advisor to individuals, families and closely-held businesses in a broad range of matters, including sophisticated tax planning, intra-family wealth planning, business succession, business operations, asset protection, all probate matters, guardianship matters, and sophisticated estate and trust administrations. Keith routinely structures estate plans and business operations in the most tax efficient manner, with a particular emphasis on achieving intra-family goals, asset protection goals and streamlined tax reporting. Keith is also an experienced litigator, providing advice and representation in estate disputes, probate disputes, trust disputes, business disputes and tax audits. Keith is an ActionLine Editor-At-Large.*

Endnotes

1 The CARES Act specifically states that the special exclusion applies to any business with NAICS Code 72. NAICS Code 72 generally covers hotels and restaurants, but includes other businesses as well. Practitioners should review a client's tax return or other regulatory documents to determine what NAICS code the client utilizes.

2 The Covered Period is February 15, 2020, through June 30, 2020.

3 Treasury's interim final rule excluded independent contractor payments from the payroll cost calculation because those independent contractors could apply for program loans themselves. This rationale, however, would not apply to a business that makes substantial independent contractor payments as part of its business, such as a general contractor.

4 Although an analysis of the following is beyond the scope of this article, the original borrower application contained a requirement that a foreign 20% owner must be disclosed and that any applicant with a foreign 20% owner would be disqualified from receiving a loan. This requirement was quietly eliminated 24 hours after the first application was released, when Treasury issued a new borrower's application removing this requirement. Presumably, many foreign owned entities employing U.S. workers complained about this requirement, which did not appear in the CARES Act text.





Surviving The Storm: Business Continuity Planning For Law Firms

By Jordan DeLoach Hurlburt, Esq. & Carla A. DeLoach, Esq., DeLoach P.L., Orlando, Florida

A Daunting Reminder. As Florida practitioners, we are not strangers to natural disasters and related business disruption. The threat of the next hurricane looms each summer. But, unlike the hurricane, where radar identifies locale, scope, strength and timing, the COVID-19 pandemic has presented risks difficult to estimate. The COVID-19 pandemic is a daunting reminder of unpredictable externalities that create continuity risk for all businesses, including law firms. In a few short weeks, the COVID-19 pandemic has had a rapid and ravaging impact, fashioning a yet to be determined "new normal" for us all. Within this article, the authors:

1. identify the critical teams to ensure business continuity during crisis;
2. explain the roles those teams play during crisis; and
3. highlight lessons learned by the authors during the COVID-19 pandemic.

Law Firm Continuity Plan. A law firm continuity plan identifies the systems and procedures necessary to minimize loss, maintain productivity, and ensure sustainability of the law firm through the conclusion of the crisis. Broadly, the plan demands 2 divisions: **Crisis Operations Division (COD)** and **Command and Control Division (CCD)**.

The Crisis Operations Division. The COD is comprised of several teams which manage key areas of the firm and provide distilled and salient information to CCD. The following teams make up the Crisis Operations Division:

4. IT Team;
5. Accounting Team;
6. Legal Projects Team; and
7. Connection Team.

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The *IT Team* coordinates technology in the "cloud" with the boots on the ground. The COVID-19 pandemic has required most to transition to working remotely. Thus, to ensure productivity through the transition, the IT Team must be able to identify needs and provide swift resolution to any and all technical problems related to docking stations, hardware, scanners, laptops, security protocol resulting from increased e-document delivery, *etc.* With all this in mind, a cloud solution is a necessity for law firms. A cloud solution delivers a single provider who remotely stores all data, identifies all hardware, and manages all software through a user-friendly, 24/7, high touch platform. While the value of a cloud solution cannot be overstated, an effective continuity plan and IT Team must also include highly trained technical professionals *on* the law firm premises, whether employed by the law firm or hired as consultants. Those on-site professionals are critical to resolving issues quickly during a crisis and connecting the cloud with your legal team.

During any crisis, the *Accounting Team* must maintain a keen knowledge of critical numbers, while also optimizing its daily tasks of billing and collecting. Some of these critical numbers include the monthly break-even number (including required "WIP" to meet such break-even), the average and existing cash cycle, and the hierarchy of expenses (from crucial to dispensable). The accounting team must be able to communicate with the Command and Control Division on daily billing progress, cash cycle (receipts and disbursements), and prospective yet pending expenses. Further, it must optimize its daily tasks of billing and collecting during the crisis, when accounts receivable are likely to slow. Finally, utilizing off-site accounting support (that is also tech-savvy and emergency ready) provides margin for the Accounting Team, especially during crisis. Like the balance of the law firm, the accounting team may have to transition to working remotely during a crisis. Off-site accounting support can increase ease and provide payroll processing, accounts receivable processing, workers' compensation audit reconciliation, profit and loss statement preparation, *etc.*

The *Legal Projects Team* manages the legal team. This team is aware of the scope and nature of in-house legal projects. This awareness includes identifying those projects where retainers are held in the law firm's trust account or must still be obtained, as well as those clients who are "slow pay" versus those clients who are historically prompt payors. Further, this awareness includes identification of projects: *urgent and important, not urgent but important, not urgent and not important.* The Legal Projects Team must coach their legal staff to service paying clients, where retainers are already held in the law firm's trust account (if possible). Further, they must stress the importance of pursuing projects in a priority of urgency, as was previously mentioned. The Legal Projects Team must be aware of administrative projects that can be pursued were business to slow: file closings, file/data clean-up, protocol adjustments, template development, and continuing legal education. Lastly, and most importantly, the Legal Projects Team must manage the pipeline, regularly convening to identify project volume, project priority, and the status of rainy day projects.

In addition to awareness of the scope and nature of legal projects in house, the Legal Projects Team must also determine how to complete those legal projects in a crisis environment.

What existing protocol must be adjusted to ensure team communication and project flow?

How will project flow--which normally occurs with a walk down the hallway--adapt as the team goes remote?

The Legal Projects Team must be able to quickly adapt existing processes and protocol and communicate the same to the legal team to ensure billing continuity.

Lastly, the Legal Projects Team must ensure client care and communication is tailored. The legal team must be coached to employ a heightened level of sensitivity with clients, who are likely experiencing stress and uncertainty. Acknowledgement of the crisis environment is important, as is any and all accommodations that can be provided. Keep clients happy!

The *Connection Team*, though last in the COD team lineup, is certainly not least. The Connection Team understands that crisis creates anxiety and anxiety is often irrational. It is charged with keeping the law firm team members calm by facilitating daily team connection (telephone conference/video calls); communicating vital law firm updates; and making individual connections with the attorneys, legal assistants, case managers, *etc.* This team understands and internalizes the foremost human need for personal connection which may take the form of listening to a team member's personal challenges, injecting some humor or levity, or simply providing encouragement. In addition to connecting its team members, the Connection Team is charged with all vendor communication and updates. This would include special services (dry cleaning; shredding, food suppliers), cleaning service, and mail services.

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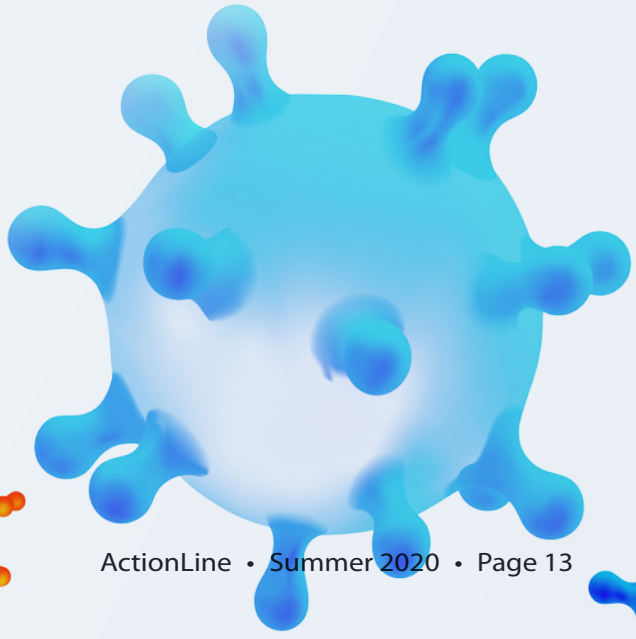

The **Command and Control Division** is mission control for law firm crisis and recovery management. This division ensures that the continuity plan is executed and that all resources are ready (and continue to be available throughout the crisis). The CCD's role is to:

1. have active communication with Crisis Operations Divisions obtaining information needed for strategic decisions: What resources are necessary to ensure transition to remote work? What costs can be cut and when? Are there layers of cost-saving measures and associated timing in deployment? Are marketing efforts required to solicit additional legal work? Is client satisfaction high? Is the brand protected through the crisis? Are there initiatives required to increase client connectivity and satisfaction during an otherwise stressful time?

2. stay informed on current government mandates and policies set forth due to the crisis; and

3. make difficult strategic decisions that will likely be unavoidable.

The CCD must be comprised of strategic thinkers with vested interests. They must have a sense of the current environment, while assessing the effect it may have on the short and long term growth of the law firm. As they captain the ship through the storm, the CCD must be willing to manage the mundane to the highly important--from taking over the mail "drop" to reviewing and curtailing benefits that affect your team's quality of life.

The COVID-19 pandemic has revealed that certain crises extend longer than others and that the duration can have an extreme effect on needed protocol adjustments. It is imperative the Command and Control Division meet regularly to assess the ongoing needs of its attorneys, support staff, clients, and law firm, so it can recognize the need for continued adjustments.

Our Deployment Amidst Covid-19 and the Aftermath. During the first week of March, the authors' firm began deploying its business continuity plan. Nearly four weeks later, values have been underscored and lessons continue to be learned. Principal of these lessons, we have been reminded of the need for existing systems. Without an existing IT Team, Accounting Team, Legal Projects Team, and Emotional Content Team, deployment would have been impossible. Without existing procedures, systems, information databases, and protocol, adaptation would be crippled. Business development during times of peace and order is critical, and we are thankful to be bearing the fruit of our previous labors during this time.

"By the time you hear the thunder, it's too late to build the Ark." — Unknown

Adaptation Anecdotes - Small adjustments can make a big difference in a crisis environment!

Support Delegation - Prior to the COVID-19 Pandemic, the attorneys at DeLoach, P.L. delegated tasks to their Support Team through slips, including filing and scanning, strikes, mailing, and scheduling. These slips were disseminated in hard copy to the Support Team. To adapt to working remote, the paper slips were consolidated into an email signature (used by all attorneys) (*see below),* isolating only those tasks which could be done remotely.

Project Flow - Prior to the COVID-19 Pandemic, the attorneys at DeLoach, P.L. prepared estate planning drafts, attached those documents to the client file, and placed the same in the reviewing attorney's "box" or office. To adapt to working remotely, the drafting attorney is now charged with ensuring all necessary client information is scanned. From there, once drafts are review ready, the reviewing attorney is alerted by email with salient document information and associated deadlines.

Telecommunications - Prior to COVID-19 Pandemic, DeLoach, P.L. moved to a unified communications platform. This platform allows all team members to work from anywhere, using any device, with an all-in-one phone and video conferencing solution, and does so with no disruption to client servicing. The platform also allows messaging on phone systems to be quickly updated to provide clients details regarding adjustment of office hours, etc.



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The Benefit Of A Force Majeure Clause During A Pandemic

By Wm. Cary Wright, Esq., Carlton Fields, Tampa, Florida[1]

COVID-19 has disrupted industries across the country with little to no exceptions. The effects of COVID-19 began through indirect disruptions, such as supply-chain delays, drop in consumer demand, and worker unavailability; but, as the virus progressed into a pandemic, local jurisdictions enacted orders requiring many industries to stop in their tracks, and the importance of "social distancing" and "self-isolation" became necessary precautions that prevented work from continuing. While COVID-19 is the textbook definition of *unforeseeable*, the contract still controls the fate of the parties. Understanding the meaning and application of a force majeure clause is more significant than ever.

What Is Force Majeure?

Force majeure is the concept of excusing contractual performance as a result of unforeseen circumstances. Although force majeure clauses have traditionally encompassed extraordinary events identified as "acts of God," the actual application of the term may have a much wider or narrower scope, depending upon the language of the contract clause.[2]

It is used "to excuse obligations under a contract where causes beyond a party's control create an inability for a party to perform."[3] No uniform set of events constitutes force majeure. Instead, force majeure provides "a flexible concept that permits the parties to formulate an agreement to address their unique course of dealings and industry idiosyncrasies."[4] It refers to certain circumstances that are "beyond the control of the party seeking to be excused from performance. . . . [and the] parties cannot take actions to protect themselves from risk."[5]

A common misconception is that force majeure applies when the total destruction of the subject of the contract occurs. While this is true, the scope of force majeure often extends much further. If a party wishes to invoke the force majeure clause, that invocation "must be accompanied by proof that the failure to perform was proximately caused by a contingency that, in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible or unreasonably expensive."[6]

To qualify as a force majeure event, four elements are required: (1) it must be external; (2) it must render the performance radically different than originally contemplated; (3) it must be unforeseeable (objective standard) or unforeseen (subjective standard); and (4) its occurrence must be beyond the control of the party concerned.[7]

Purpose Of Force Majeure

A force majeure clause serves two purposes: (1) it allocates risk and (2) it provides notice to the parties of events that may suspend or excuse performance. It can act as a safety net to the parties by modifying a contract, suspending a party's obligation or terminating the contract, but it normally does not permit a contractor to recover losses or damages resulting from the delay. Most importantly, force majeure clauses are construed by "the specific language of the contract."[8] Florida courts generally narrowly construe the clauses and only excuse a party's performance if the event is specifically identified in the clause.[9]

To successfully invoke a force majeure clause, a party must show the event was exclusively caused by an incident of such an extraordinary nature that it could not reasonably have been foreseen.[10] Further, the party relying on the force majeure event must not have possessed the ability to avoid the effects of the unforeseen event by taking some reasonable action.[11]

Foreseeability

In order to constitute force majeure and excuse performance or justify nonperformance, the event must have been unforeseeable at the time of contracting. The rationale is that the party's failure to contractually protect itself from a foreseeable contingency is, by definition, an assumption of that risk.[12]

The application of the foreseeability test is complicated by inevitable ambiguity that may become apparent when the parties seek to apply the clause to a particular event.[13] The ambiguity results from situations that may be foreseeable generally, but not specifically.[14]

The manner of a court's inquiry may affect whether the court finds an event to be foreseeable or unforeseeable. If the court tests foreseeability by asking specific questions, then it is more likely that the disruptive event will be considered unforeseeable.[15] However, if the court conducts a more general inquiry regarding the overall event, then it is more likely that the event will be deemed foreseeable.[16]

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Some courts hold that the foreseeability test should not be applied unless the force majeure clause specifies that the event must be unforeseeable.[17] Other courts treat foreseeability as a necessary additional element when seeking relief under a force majeure clause, even if not required by the contract.[18] Florida courts recognize that a force majeure clause can cover both foreseeable and unforeseeable events.[19] This ambiguity can be explained as such: "[e]ven though it is true that all catastrophic events, even wars or floods, can be foreseen by the parties at the time of contracting, what [courts] are really looking for . . . is the accompanying elements of abnormality, surprise and rarity of the event."[20]

An option available to drafters seeking to broaden the scope of force majeure via the foreseeability application is to focus the clause on the effects of a disruptive event, rather than specifically enumerating all potential events. For example, a force majeure clause could be drafted to focus on the unavailability of construction materials (as an effect of global pandemic) rather than attempting to draft a force majeure clause that specifically contemplates such an event (a global pandemic occurring). With a broader clause, courts are more likely to focus on the foreseeability of what results from the disruptive event, more likely leading to a conclusion of foreseeability, and therefore satisfying the force majeure component.[21]

Control

The notion of control is often set forth by the inclusion of language stating that the clause is not applicable when either party has any reasonable control over the event at issue. The principle of "control" subsumes the legal issues of contractual assumption of risk, foreseeability, legal control, actual physical control, fault and negligence, and avoidance and mitigation.[22]

The Fifth Circuit has held the phrase "reasonable control" involves two related concepts.[23] First, a party may not affirmatively cause a force majeure event.[24] Second, a party may not rely on an event excusing performance if they could have taken reasonable measures to prevent the event.[25]

Force Majeure Today

The traditional boilerplate language of force majeure is too vague for modern circumstances. It is no longer sufficient for parties to insert a force majeure clause in the miscellaneous section of a contract and hope that such an event will not happen. Instead, parties should use specific and detailed language in carefully defining the scope and effect of a force majeure clause.

Case Law

Force majeure is a common defense to breach of contract claims. Nevertheless, there have only been a handful of judicial opinions analyzing whether a pandemic qualifies as a force majeure event. Generally, courts agree that a pandemic will qualify as a force majeure event. However, the analysis does not end there. Courts use the specific contract language and requirements to decide if it applies to the particular force majeure event.

In *Fla. N. R. Co. v. S. Supply Co.*, the contract stated that "should . . . delays in performance and completion of the work to be done by the [contractor] . . . be occasioned by epidemics, strikes, or providential causes, a reasonable extension of time for the completion of [the] contract shall be made. Timely notice of all such delays shall be given."[26] Numerous delays occurred during the construction project, for all of which no notice was provided.[27] The lower court found one-half of the delay was caused by the contractor, one-fourth by the owner, and one-fourth by "unavoidable causes."[28] The lower court defined the "unavoidable causes" as "an epidemic of yellow fever, and . . . unusual rains and storms" and found those to be sufficient excuse for the delays.[29] It articulated that even without timely notice, "such notorious things as the epidemic, floods, and storms were necessarily known to the railroad company," and knowledge alone of those events was enough to constitute notice.[30]

The Supreme Court of Georgia disagreed.[31] It concurred that the events constituted force majeure events, but it came to a different conclusion regarding the notice requirement.[32] The court found the failure to provide notice waived the right to claim the defense of force majeure.[33] "[T]he contract plainly meant that in case of delays arising from such causes . . . the contractor [provide] notice . . . within a reasonable time after the delays occurred, and make demands for proper extensions of time, or that, failing so to do, the contractor would be chargeable with the consequences of such delays."[34] Because the contractor failed to provide owner with the requisite notice, it was held liable for one-fourth of the delay labeled by "unavoidable causes."[35]

Parties undergoing the same force majeure event can experience different outcomes in the context of contractual relief depending upon the extent of compliance with contract requirements. In response to COVID-19, it is crucial to read the contract and take the required actions in a timely manner so as to not waive the force majeure clause. In *SNB Farms, Inc. v. Swift and Co.*, the court analyzed whether an outbreak of Porcine Reproductive and Respiratory Syndrome (PRRS), which affected hog production, qualified as a force majeure event for purposes of summary judgment.[36] The relevant language in the hog purchase contract stated:

Where either party claims an excuse for nonperformance under this Section, it must give prompt telephonic notice, promptly confirmed by written notice, of the occurrence and estimated duration of the Force Majeure Event to the other party; and shall give prompt written notice when the Force Majeure Event has been remedied and performance can recommence hereunder.[37]

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The court found it to be "undisputed for the purposes of summary judgment that the outbreak of PRRS constituted a force majeure event."[38] However, the analysis did not end there. The court also had to determine whether sufficient notice was provided by the three affected entities to entitle them to the excuse of force majeure.[39] One entity provided notice of the PRRS in a letter and orally; hence, the court found the issue of notification was a question for a jury to decide.[40] The remaining two entities never mentioned the PRRS issue prior to litigation; thus, the court found they were precluded from asserting force majeure as a defense and found summary judgment against them appropriate.[41]

The outcomes of force majeure events can look similar to the outcomes of non-force majeure events, but that does not mean the events will be treated the same. In *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, the parties entered into an agreement for the sale and purchase of eggs.[42] After the first year, the buyer experienced an "unexpected fall in demand of [eggs] and [a] significant reduction in purchase orders" causing it to turn away deliveries and claim a defense of force majeure.[43] The court denied the drop in purchaser demand constituted a force majeure event.[44] In its dicta, the court posited: "[u]nlike the avian flu example, which may plausibly constitute an unforeseeable event precipitating a dramatic change in market conditions, a change in purchaser demand—even a substantial change—is a foreseeable part of doing business."[45]

Typically, courts find that, when a government order makes the performance of a contract impossible, it is excused. In *Harriscom Svenska, AB v. Harris Corp.*, a manufacturer stopped supplying its products to its distributor because of a new regulation from the government prohibiting the "sale of goods categorized as military equipment to Iran."[46] The distributor argued the manufacturer acted voluntarily in its decision to terminate the contract because the government regulation did not mandate the manufacturer stop shipping product.[47] The court disagreed, concluding the contract's force majeure clause excused the manufacturer's performance.[48] The court reasoned "for [the manufacturer] to have failed to comply would have been unusually foolhardy and recalcitrant, for the government had undoubted power to compel compliance."[49] Applying the court's rationale to today's pandemic, "[i]f the quarantine and travel restrictions put into place by governments [in response to COVID-19] render the contractor or subcontractor unable to perform, these actions may constitute a valid 'Government Entities' act excusing performance."[50]

In contrast, "fail[ing] to obtain [government] approvals or permits does not qualify as a *force majeure* event unless specifically included in the contractual provision at issue."[51] The court reasoned, "the Debtor's inability to obtain approvals and permits from [the city] was not wholly outside of the control of the Debtor nor was it unforeseeable."[52] Further, "the Eleventh Circuit Court of Appeals has specifically held that obtaining a building permit 'is not beyond [a party's] control or an unforeseeable obstacle that would prevent [a party] from' performing its contractual obligations."[53]

Industry Form Contract Documents

Several domestic organizations produce standardized industry form contracts for commercial and construction-related transactions. Among these standardized documents, the ones promulgated by The American Institute of Architects (AIA) and The ConsensusDocs endorsed by The Associated General Contractors of America (AGC) are the most common in the construction industry.

The AIA documents are probably the most widely used set of standardized construction documents in the United States.[54] The term "force majeure" is not used in the AIA A201 (2017) General Conditions, a voluminous set of contract terms incorporated by reference into most of the various AIA construction contract forms.[55] The AIA addresses this concept in Section 8.3 of the General Conditions, titled "Delays and Extensions of Time." Section 8.3.1 states:

If the Contractor is delayed at any time in the commencement or progress of the Work . . . by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, . . . then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.[56]

Case law interprets the phrase "other causes beyond the Contractor's control" more broadly than the traditional "acts of God" concept of force majeure. In one case, a company entered into a stipulation containing a clause similar to the AIA clause, providing for an extension of time to comply with a new regulation.[57] The company attempted to comply with the regulation, but an error caused equipment to fail and liquidated damages to be assessed by the department.[58] The paper company disputed the damages and raised a force majeure defense.[59] The court determined the force majeure clause was unambiguous, thus a force majeure event had occurred.[60] In contrast, another case illustrates circumstances that did not amount to "causes beyond the contractor's control," as contemplated by the AIA.[61] The contractor argued the poor weather justified damages for a delay, but did not produce evidence that the amount of days with bad weather was above average.[62] Thus, the court held the poor weather was not a "valid excuse" justifying any portion of the claimed delay in performance.[63] Although the delays were caused by "acts of God," they were contemplated "acts of God" and, thus, dealing with the consequences of the adverse weather was within the control of the contractor.[64]

The standard form ConsensusDocs documents also do not use the term "force majeure."[65] They contain a non-exclusive list of force majeure events, specifically including "epidemics."[66] Like the AIA, if a force majeure event occurs,

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the ConsensusDocs clause entitles contractors to an equitable adjustment to contract time, but not contract price.[67]

Drafting Force Majeure Provisions

There are many items to consider when drafting a force majeure clause. Force majeure clauses need to be drafted differently in today's world to adequately protect clients. It is critical to tailor the force majeure provision to the specific project, rather than relying on general terms.

In drafting the force majeure clause, it is important to determine what events should qualify as force majeure events for the specific project. Commonly included as specific triggering events are man-made disruptions, such as acts of terrorism, riots, strikes and wars, and natural disasters, such as floods, tornadoes, hurricanes, and earthquakes. Additional triggering events such as disease, epidemic, pandemic, and/or communicable disease can be included to protect the parties in a time such as this. Likewise, consider including "government interference" and/or "state of emergency" in the contract for protection from state actions. There is no one-size-fits-all list of triggering events, as each project is unique. Give careful consideration to what will work best for the particular project for which the contract is being drafted.

The force majeure clause must provide what actions are necessary to excuse performance and preserve remedies. The contract may provide the following requirements be implemented for it to constitute a force majeure event: (1) provide timely notice; (2) mitigate the damages; (3) resolve any disputes by engaging in mediation and/or arbitration; (4) ongoing reporting and due diligence; and (5) good faith negotiation of the contract. This list is non-exclusive and it is critical to draft the requirements in a way that makes sense for the project.

Moreover, think through how the risk will be allocated and what remedies can be applied. It is worth deliberating if the force majeure event should result in termination of the contract, excuse from payment, or an extended delay of the work. This can depend on the nature of the triggering event and the purpose of the project.

Below is an example force majeure clause that can be used as a starting point in construction project contracts:

No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, except for any obligations to make payments to the other party hereunder, when and to the extent such failure or delay is caused by or results from acts beyond the impacted party's ("**Impacted Party**") reasonable control, including, without limitation, the following force majeure events ("**Force Majeure Events**"): (a) acts of God; (b) flood, fire, hurricanes, or pandemics; (c) war, invasion, terrorist acts, or riot; (d) government order or law; (e) actions, embargoes, or blockades; (f) national or regional emergency; and (g) other events beyond the reasonable control of the Impacted Party.

The Impacted Party shall give notice within [NUMBER] days of the Force Majeure Event to the other party. The Impacted Party shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized. The Impacted Party shall resume the performance of its obligations as soon as reasonably practicable after the removal of the cause. In the event that the Impacted Party's failure or delay remains uncured for a period of [NUMBER] consecutive days following written notice given by it, the other party may thereafter terminate this Agreement upon [NUMBER] days' written notice.

Parties can use that example as the foundation for the force majeure clause, tailoring it to the specific circumstances of the

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project. While drafting, the parties should keep in mind that Florida courts tend to construe force majeure clauses narrowly and strictly adhere to the list of triggering events. Being diligent and meticulous in the drafting of the force majeure clause can ensure viability when the unforeseeable occurs.


W.C. WRIGHT

***Wm. Cary Wright**, is a shareholder and Co-Chair of Carlton Fields' Construction Practice Group. He has extensive experience representing clients in construction disputes, including construction claims, water intrusion and sick-building syndrome issues; construction liens; insurance coverage matters; risk management; and bond claims. Such engagements have involved bridges, convention centers, high-rise condominiums, highways, hospitals, stadiums and hotels. Mr. Wright also has substantial experience in contract drafting and contract review including the preparation of owner-contractor agreements and contractor-subcontractor agreements. Cary is an officer of the RPPTL Section and a former Editor-in-Chief of ActionLine.*

Endnotes

1 The author wants to thank and acknowledge the contributions of Monica L. Strady to this article. Monica is an associate at Carlton Fields and graduated from Stetson Law School in 2017, where she was Executive Editor of Law Review.

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14 *Id.*

15 2A Bruner & O'Connor Construction Law § 7:230.53

16 *Id.*

17 *See VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 288 (3d Cir. 2014).

18 *See id.* at 289 (discussing *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444 (3d Cir. 1983), where the court required the element of foreseeability even without the contract requiring it).

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38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 360 F. Supp. 3d 817 (S.D. Ind. 2018).

43 *Id.* at 831.

44 *Id.* at 841.

45 *Id.*

46 3 F.3d 576 (2d Cir. 1993).

47 *Id.* at 580.

48 *Id.*

49 *Id.*

50 Jonathan Huie, *Managing Project Risk Associated with the Coronavirus Outbreak Through Force Majeure Provisions* (March 4, 2020).

51 *In re Flying Cow Ranch HC, LLC*, 2018 WL 7500475, at *3. *See, e.g., Burns Concrete, Inc. v. Teton Cty.*, 161 Idaho 117, 120, 384 P.3d 364, 367 (2016), reh'g denied (Dec. 6, 2016) (holding that "the failure to obtain zoning approval for the permanent facility was foreseeable, and therefore that eventuality should have been included in the force majeure clause in order for the clause to apply to it"); *Fort Howard Senior Hous. Assocs., LLC v. U.S.*, 121 Fed. Cl. 636, 655 (2015) (holding that the "decision not to exempt FHSHA from local zoning requirements and any delay in making that decision is not a force majeure event that prevented construction").

52 *Id.*

53 *Id. Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1332 (11th Cir. 2010).

54 The American Institute of Architects, AIA Document A201 – 2017, General Conditions of the Contract for Construction § 8.3.1 (2017).

55 *Id.*

56 *Id.*

57 *St. Joe Paper Co. v. FL Dep't. Env'l. Regulation*, 371 So. 2d 178 (Fla. 1st DCA 1979).

58 *Id.*

59 *Id.* ("The [force majeure clause] provides for a reduced penalty . . . if a force majeure occurred.").

60 *Id.*

61 *S.J. Lemoine, Inc. v. St. Ladry Parish Sch. Bd.*, 527 So. 2d 1150 (La. Ct. App. 1988). *See* 8 No. 1 Journal of the American College of Construction Lawyers 2.

62 *Id.*

63 *Id.*

64 *Id.*

65 ConsensusDocs 200 – Standard Agreement and General Conditions Between the Owner and Constructor – 2011, Revised 2017.

66 *Id.*

67 *Id.*

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Understanding The COVID-19 Business Interruption Insurance Quandary

By Anita Setnor Byer, President, Setnor Byer Insurance & Risk, Plantation, Florida

The coronavirus disease's 2019 (COVID-19) pandemic appears to have softened the ground for a legal battle between commercial property insurance companies and the growing number of businesses seeking reimbursement for their lost revenues. Insurers are experiencing a surge in reporting of COVID-19 business interruption claims and anticipate a significant uptick in litigation pertaining to such claims.

It should come as no surprise that lines are already being drawn. Insurance companies are preemptively notifying agents and insureds that coverage for COVID-19 business interruption claims is unlikely under standard commercial property policies. This is generally true throughout the United States, but not for a subset of large, multi-national insureds who negotiate for protections for non-traditional risks through manuscript supply chain or dependent property coverage endorsements. Policyholders are not remaining idle either. Oceana Grill, a restaurant in the French Quarter of New Orleans, is reported to have filed the first COVID-19 business interruption lawsuit in Louisiana state court on March 16, 2020.

While the circumstances, policy forms and insurance companies involved in each case will vary, the essential question remains the same: does business interruption or civil authority insurance cover the income lost by businesses while closed because of COVID-19? If the answer is yes, insurance companies may end up paying billions of dollars to cover a risk that was not specifically underwritten or offset by premiums. If the answer is no, countless businesses may find that the doors they closed during the COVID-19 pandemic will never reopen.

Business interruption coverage, which is also known as business income coverage, is a type of commercial property insurance which covers the loss of income suffered by a business that is forced to slowdown or suspend its operations because the premises are damaged by a covered cause of loss. Business interruption policies often include a civil authority clause that covers the loss of income caused by action of civil authority that prohibits access to the insured premises because other property (i.e., not the insured premises) was damaged by a covered cause of loss.

The covered cause of loss requirement is critical because it serves as the trigger for business interruption and civil authority coverage. Notably, the word virus is not typically found in standard commercial property policies. This means that COVID-19 claims are not specifically covered or excluded. If the policy's conditions for business interruption or civil authority coverage are otherwise satisfied, claims cannot be denied merely because COVID-19 was the cause. On the other hand, if a policy does have a virus exclusion, then a COVID-19 claim would not be considered a covered loss and there can be no business interruption or civil authority coverage. Insurers are expected to start adding virus-specific exclusions to new policies and upon the renewal of existing policies, although some insurers will offer policies that specifically cover the risk of virus.

In the absence of an express virus exclusion,[1] the only way to know whether business interruption or civil authority coverage will apply to a COVID-19 claim is to examine the policy itself. The ISO Business Income (and Extra Expense) Coverage Form,[2] which is a standard form used by admitted insurance companies, provides that the insurer "will pay for the actual loss of Business Income you sustain due to the necessary 'suspension'[3] of your 'operations'[4] during the 'period of restoration.'"[5] This provision appears to support the contention that business closures caused by COVID-19 are indeed covered, but it cannot be interpreted in isolation.

The construction and interpretation of an insurance policy is a question of law for the court to decide.[6] Courts must analyze and interpret insurance policies as a whole, endeavoring to give every provision its full meaning and operative effect.[7] Courts may not rewrite policies, add meaning that is not present or interpret policies in a manner that is contrary to the intention of the parties.[8] Importantly, courts cannot focus on some provisions to the exclusion of the others.[9] This interpretational limitation is crucial because the very next sentence in the policy states that the suspension of operations "must be caused by

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direct physical loss of or damage to" the insured property. The standard civil authority clause similarly requires "direct physical loss of or damage to" property other than the insured property. In other words, there can be no business interruption or civil authority coverage without direct physical loss of or damage to the insured property or other property.

Ultimately, many, if not most of these lawsuits, will come down to a seemingly simple question. What does direct physical loss of or damage to property mean? The Broward County Administrator, through Emergency Orders, has concluded that COVID-19 "is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time."[10] Courts, on the other hand, must analyze and interpret the specific policies at issue according to their plain meaning.[11] Since "direct physical loss of or damage to" is not defined in the standard ISO policy form, reference to legal or non-legal dictionaries may be necessary.[12] Business interruption is not a new form of insurance coverage. Identical policy provisions have previously been interpreted by multiple courts, albeit under different circumstances, though outcomes have varied.[13] COVID-19 cases, however, will no doubt test the limits of existing case law.

There are other coverage requirements that may prove equally problematic for COVID-19 claimants. For example, coverage typically commences 72 hours after the time of direct physical loss or damage. It ends when the damage is repaired. This may disqualify many from coverage if it is determined that a thorough cleaning with basic disinfecting supplies is sufficient to remove COVID-19 from the premises. Policyholders may also find it difficult to prove that the suspension of business operations was necessary when other businesses facing similar circumstances remain open.

Finally, it is worth noting that legislative efforts may affect the trajectory of COVID-19 business interruption litigation. On March 16, 2020, a bill introduced in the New Jersey General Assembly seeks to add COVID-19 business interruption coverage to every commercial property policy issued to New Jersey businesses with fewer than 100 full-time employees.[14] Ohio introduced a similar bill March 24, 2020.[15] Two days later, California insurers were asked to provide comprehensive business interruption and related coverage information to aid the insurance commissioner in "weighing public policy options."[16] Whether these or similar bills ultimately become law remains to be seen, but the insurance industry will likely commit considerable resources to resist the enactment or enforcement of any such legislation.

These are unprecedented times. Insureds and insurers alike are facing existential threats through no fault of their own. Public policy concerns will no doubt influence the manner in which COVID-19 business interruption claims are resolved. Shutting down the economy was a drastic, yet necessary measure to stop the spread of COVID-19. But it comes with a cost. Courts will soon be called upon to decide who should pay, and consider the devastating impact on insurers if they are asked to respond to risks that have not been actuarially priced into their premiums. AL



A. BYER

Anita Byer *is President of Setnor Byer Insurance & Risk, an Independent Insurance Agency formed over 30 years ago to provide property, casualty and group benefit products and services to businesses and families.*

Endnotes

1 Exclusion of Loss Due to Virus or Bacteria, Insurance Services Office© Form CP 01 40 07 06. A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority. B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

2 Business Income (and Extra Expense) Coverage Form, Insurance Services Office© Form CP 00 30 04 02.

3 Suspension means, in relevant part, the slowdown or cessation of your business activities.

4 Operations means, in relevant part, business activities occurring at the described premises.

5 Period of Restoration means, in relevant part, the period of time that: a. Begins 72 hours after the time of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises. b. Ends on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location.

6 *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010)(noting that insurance policy interpretation is a question of law); *Citizens Prop. Ins. Corp. v. Mendoza*, 250 So. 3d 716, 719 (Fla. 4th DCA 2018).

7 *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 976 (Fla. 2017).

8 *Taurus Holdings, Inc. v. United States Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005).

9 *Allstate Ins. Co.*, 212 So. 3d at 976.

10 Broward County Administrator's Emergency Order 20-01 (March 22, 2020); Broward County Administrator's Emergency Order 20-03 (March 26, 2020).

11 *Altman Contrs., Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273, 276 (Fla. 2017).

12 *State Farm Fla. Ins. Co. v. Valenti*, 285 So. 3d 958, 960-61 (Fla. 4th DCA 2019) (noting that when a word in an insurance policy is not defined, Florida courts commonly adopt the plain meaning contained in legal and non-legal dictionaries).

13 *See Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362-KMM, 2018 U.S. Dist. Lexis 201852, at *23-25 (S.D. Fla. 2018)(noting that the direct physical loss requirement contemplates an actual change in the property that makes it unsatisfactory for future use or requires repairs and concluding that the need to clean dust and road debris found within the premises is not considered a direct physical loss); *see also Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW), 2014 U.S. Dist. Lexis 165232, at *13-19 (D.N.J. 2014)(summarizing various cases addressing the meaning of direct physical loss or damage and ruling that the accidental discharge of ammonia or heightened ammonia levels constitute direct physical loss or damage because it physically rendered the facility unusable).

14 Assembly, No. 3844, State of New Jersey (Introduced March 16, 2020).

15 General Assembly H. B. No. 589 (2019-2020) (Introduced March 24, 2020).

16 California Department of Insurance, Business Interruption Survey (BIS-2020) Request for Information: Business Interruption and Related Coverage in California (March 26, 2020).

Commercial Leases: Uncharted Implications of COVID-19

By Amy Reagan, Esq., DLA Piper, LLP, Miami, Florida and
Janelly Crespo, Esq., DLA Piper, LLP, Miami, Florida

The real estate leasing world has been dramatically impacted by the COVID-19 pandemic. Numerous shelter-in-place orders, declarations of public health emergencies, and sweeping government regulation aimed at mitigating the pandemic have all created significant hardships across the economy and novel legal questions for landlords and tenants regarding their rights and obligations. Parties to commercial leases are called upon to act reasonably in light of this public health and economic crisis, and in some ways they are required to temporarily ignore certain terms of their leases.

How Is COVID-19 Affecting Commercial Lease Agreements?

Rising Tide of Force Majeure and Impossibility Claims

Force majeure provisions are contractual clauses that offer relief from performing some, or all, of a party's contractual obligations and are triggered when events beyond a party's control prevent one or both of the parties from performing their contractual obligations.[1] Importantly, these clauses relieve a party's obligations under the contract due to circumstances that are beyond that party's control and were not reasonably expected.[2] Common examples of force majeure events are: "hurricanes, floods, extreme weather, earthquakes, fire, or other acts of God, unusual transportation delays, or wars, insurrections, or acts of terrorism."[3] Some leases may expressly include epidemics and pandemics within the definition of force majeure. It is important for parties to carefully review their lease language in order to determine which events are covered, as force majeure clauses are historically narrowly construed.[4] Even if the language does not list an epidemic or pandemic, the clause may still include the COVID-19 pandemic if it contains broad catchall language (e.g., "unforeseeable events," "conditions not within the parties' control").[5] Some older cases in the U.S. have held that the commercial impacts of contagious diseases, such as an epidemic, may excuse performance.[6] There is also an argument to be made that a pandemic, such as COVID-19, is an act of God.[7] In addition, force majeure clauses that include relief for disasters or government regulations may arguably excuse performance in light of the life-altering impacts of COVID-19. For example, every state in the country has received a federal disaster declaration, which is unprecedented, and most governors have issued stay-at-home orders and other regulations that impact business as usual in commercial real estate. While it is currently unclear to what extent the COVID-19 pandemic will be deemed a force majeure event in the absence of specifically enumerated language, this question will soon be evaluated by courts throughout the country.

It is important to note that even if an event is covered under the force majeure clause, not all contractual obligations may be excused under the lease. Commercial leases may contain carve-outs excluding certain lease obligations from the protections of the force majeure clause.[8] For example, leases may expressly provide that a party's monetary obligations will not be excused under the force majeure provision. Ultimately, the parties should act reasonably, and if a party seeks to rely on the force majeure provision to excuse performance, the terms should be reviewed to determine whether the party's issue falls within the force majeure clause or is otherwise protected by applicable law. The party should also consider whether there are alternate ways of performing the relevant contractual obligations.

In the absence of a force majeure clause, or as an alternative argument, the common law defenses of impossibility, impracticability, and frustration of purpose may provide relief for COVID-19 impacts.[9] Impracticability or impossibility exists where an unforeseen supervening event renders performance impractical or impossible, as long as the language of the contract, or the factual circumstance, does not indicate otherwise. Frustration of purpose exists where a supervening event frustrates the purpose of the contract and renders performance by one party worthless to the other party. Under Florida law, the defense of impossibility may be asserted "where purposes for which the contract was made, have, on one side become impossible to perform."[10]

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"'Acts of God' and governmental action are among several types of business risks which implicate the impossibility defense."[11] Government regulations that make performance of a contract illegal or situations where performance would subject a party to potential harm may render performance impossible, and therefore excused.[12] As a result of the COVID-19 pandemic, every governor in the country declared a state of emergency and most issued "shelter-at-home" orders, requiring individuals to remain at home unless they are engaging in essential activities. It is important to note that, depending on the circumstances, the defense of impossibility may not be available for claims of economic hardship or an inability to pay rent.[13]

Potential Health and Safety Concerns Over Tenants' Access

Another important issue is whether a landlord can prevent tenants from entering or accessing a commercial building due to public health and safety concerns. Under federal and state government regulations, certain tenants may be deemed essential businesses or providers of essential services. As such, these businesses have the right to conduct certain minimum business operations and building owners may be required to provide minimum services to these tenants. For example, under Florida Executive Order 20-89, "[n]o county or local authority may restrict or prohibit any 'essential' service from performing a function allowed under this order."[14] Moreover, none of the executive orders issued in Florida prevent a business' right to have certain employees occupy its premises in order to provide minimum business operations (such as ensuring that a business' network is operating properly so that other employees can continue to work remotely).

In the scenario where a landlord discovers or receives notice that a tenant, or the employee of a tenant, tested positive for the virus, it is important that the landlord implement safe distancing requirements in the building, as recommended by the Centers of Disease Control and Prevention[15] ("CDC"), the Occupational Safety and Health Administration[16] ("OSHA"), and state regulations. Further, many landlords are now considering the air patterns within their commercial buildings and whether changes to the air flow can minimize the spread of the virus. Landlords are also seeking to eliminate the spread by scaling back unnecessary or government-restricted services (e.g., closing on-site gyms and cafes) and maximizing appropriate services such as sanitization, security and engineering. Following the COVID-19 guidelines recommended by the CDC, OSHA, and state regulators will help to ensure that the landlord is taking reasonable steps in preventing the spread of the virus within its building. Importantly, the landlord is not required to provide all amenities to its tenants, such as gyms. Finally, while Florida's executive orders may not explicitly require that a landlord disclose to all tenants whether another tenant has tested positive for the disease, keeping tenants informed about the status of the building empowers tenants to take reasonable precautions to further avoid the virus.

Ultimately, if a landlord decides to shut down a commercial building due to safety concerns, the landlord should look to the terms of the commercial lease and applicable law to determine whether a tenant is entitled to delay rent, abate rent, or terminate the lease. Whether a tenant can exercise such a right depends on the applicable law and the language of the commercial lease, the majority of which contain language holding the landlord responsible for situations that are within the landlord's reasonable control. However, if a building is shut down because of a government order, it is possible that a court may consider it beyond the landlord's reasonable control.

Eviction Moratoriums In Florida

Another important consideration for landlords and tenants in Florida are eviction moratoriums. To date, Governor DeSantis has issued a state-wide eviction moratorium for *residential* leases.[17] As of the date this article was written, Governor DeSantis had not issued a similar state-wide eviction moratorium in the context of *commercial* leases. However, certain counties and judiciaries in the state have issued guidance and administrative orders restricting or modifying eviction proceedings, for example:

Supreme Court of Florida. The Florida Supreme Court issued Administrative Orders SC20-17 and SC20-23 suspending the requirement in Florida Rule of Civil Procedure 1.580(a) for the state's clerks of court to issue a writ of possession "forthwith" (i.e., immediately). Some courts within the state have interpreted this temporary modification as suspension of writs of possession entirely and not merely relaxing the timing requirement for issuing such writs.[18]

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Miami-Dade County. The chief judge of the Eleventh Judicial Circuit issued Administrative Order No. 20-08-A1, citing the Supreme Court's Order AOSC20-23 as a suspension of all writs of possession (which is a broader interpretation than the suspension of the "forthwith" requirement) and noting that foreclosures and eviction matters are also addressed by the Governor's Executive Order 20-94.[19]

Broward County. The chief judge of the Seventeen Judicial Circuit issued Administrative Order 20-23, which suspends the issuance of all writs of possession until normal operations of the court resume.[20]

Brevard and Seminole Counties. The chief judge of the Eighteenth Judicial Circuit issued Administrative Order No. 20-15, suspending all eviction, ejectment or writs of possession, or unlawful detainer proceedings until May 29, 2020.[21]

Hillsborough County. The chief judge of the Thirteenth Judicial Circuit issued Administrative Order No. 20-023, which temporarily permits the sheriff of Hillsborough County to stay the execution of five-day evictions, writs of possession and replevin until further order.[22]

Pinellas County. The Pinellas County clerk's office announced that in accordance with the Florida Supreme Court's orders and the Governor's Executive Order No. 20-94, the clerk's office "will not issue writs of possession for evictions and foreclosures through May 29, 2020; will not issue writs of possession for evictions related to non-payment of rent by residential tenants due to the COVID-19 emergency through May 17, 2020; and will cancel any mortgage foreclosure sales scheduled through May 17, 2020."[23]

Orange County. The sheriff's office announced that it is suspending all eviction activities; the announcement did not specifically reference commercial properties.[24]

Duval County. The Duval County clerk's office announced that per the Governor's Executive Order No. 20-94, "no new residential foreclosures or eviction cases may be filed through May 17, 2020." The clerk also announced: "All foreclosure sales scheduled through April 30, 2020 have been canceled. The enforcement of any writ of possession or writ of eviction that was previously issued in Duval County is stayed for the period between March 19, 2020 and April 30, 2020. No enforcement of issued eviction orders will take place during this period."[25]

Practical Considerations for Navigating Uncharted Hardships

The COVID-19 pandemic has created significant hardships within the global economy, especially within the commercial leasing sector. Irrespective of the contractual language within a commercial lease, current events encourage all parties to act reasonably. The numerous hardships and complications caused by the COVID-19 pandemic are forcing commercial landlords to consider their options on how best to help their tenants endure these difficult times. Prior to offering any relief package to tenants, there are several practical considerations and factors for landlords to keep in mind. As for tenants, negotiating rent relief should be closely tied to a tenant's current and expected business reality moving forward. The following considerations and factors are important for both landlords and tenants to consider:

Confidentiality. As part of any negotiation or relief package, a confidentiality clause within the agreement will likely be of utmost importance. Landlords want to avoid tenants disclosing to other tenants the terms of any relief agreement for fear that other tenants may seek similar relief or deals. Moreover, depending on each tenant's financial situation and lease terms, different deals may need to be reached with each. Meanwhile, tenants do not want their clients, employees, or competitors to know that they are in need of or are actively seeking rent relief. A confidentiality clause will likely be welcomed by all parties involved.

Rent Relief. Rent relief structures may be viable options. Rent deferral provides tenants with an immediate solution; however, this creates additional problems for a landlord's cash flow, ability to meet debt service, and other obligations. Landlords may consider extending lease terms or amortizing rent payments over the remaining lease term. Another option is applying funds from a security deposit to the next rent payment. In return, the tenant may be granted a period of time to replenish the security deposit.

Governmental Relief Packages. Rent relief can also be conditioned upon a tenant seeking available resources from both state and federal bailout programs, such as relief from the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") (e.g., the Paycheck Protection Program through Small Business Administration loans or Loan Payment Forbearance Program).

Conclusion

The current business reality of the COVID-19 pandemic has led to numerous tenants needing rent relief from landlords. Unfortunately, this trend will continue as state closures and "stay-at-home" directives will likely extend beyond April. Commercial landlords should evaluate their cash reserves and should find out whether their lenders will permit negotiations for short term rent relief for tenants. Ultimately, landlords and tenants will need to rise to the task together in order to develop creative solutions to survive the COVID-19 pandemic.

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Prior to joining DLA Piper, Janelly worked at a civil litigation firm in Miami where her practice focused on general liability, premises liability, wrongful death, and construction litigation. Additionally, Janelly clerked for the Honorable Vance E. Salter of the Third District Court of Appeal. While in law school, Janelly served as a judicial intern for the Honorable Edwin G. Torres of the United States District Court for the Southern District of Florida.

Endnotes

1 FORCE-MAJEURE CLAUSE, Black's Law Dictionary (11th ed. 2019); *Impact of COVID-19 on Supply Chain Contracts and Responding to Force Majeure Claims*, National Law Review (April 10, 2020). https://www.natlawreview.com/article/impact-covid-19-supply-chain-contracts-and-responding-to-force-majeure-claims (last visited April 15, 2020).

2 *Id*.

3 *Id*.

4 *Florida Power Corp. v. City of Tallahassee*, 18 So.2d 671 (Fla. 1944).

5 *See, e.g.*, *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 857 n.6 (11th Cir. 2009) (noting Florida courts apply catchall provisions); *Camacho Enters., Inc. v. Better Const. Co*., 343 So.2d 1296, 1297 (Fla. 3d DCA 1977) (heart attack was within catchall language to excuse delay); *Kel Kim Corp. v. Cent. Mkts., Inc*., 70 N.Y.2d 900, 902-903 (1987) (catchall language is narrowly construed and event must be similar to the force majeure events listed), *Free Range Content, Inc. v. Google Inc*., No. 14-cv-02329-BLF, 2016 WL 2902332, at *9-10 (N.D. Cal., May 13, 2016) (to fall within the catchall language the event must be similar to those enumerated and must be unforeseen).

6 *See, e.g.*, *Lakeman v. Pollard*, 43 Me. 463, 466 (1857) (held mill worker was justified in abandoning job due to concerns of cholera epidemic in the vicinity); *Coombs v. Nolan*, 6 F. Cas. 468 (S.D.N.Y. 1874) (excused performance delays due to epidemic impacting availability of horses).

7 1 Am. Jur. 2d Act of God § 6; ACT OF GOD, Black's Law Dictionary (11th ed. 2019).

8 In addition, at least some courts have refused to provide force majeure relief clauses for financial hardships. *Drummond Coal Sales, Inc. v. Kinder Morgan Operating "LP" C*, No.: 2:16-cv-00345-SGC, 2017 WL 3149442, at *9-10 (N.D. Al. July 25, 2017) (dismissing claim for relief under the force majeure clause in part because plaintiff sought to be excused from contractual obligations due to financial hardship caused by environmental regulations); *see also Macalloy Corp. v. Metallurg., Inc*., 728 N.Y.S.2d 14, 14-15 (1st Dep't 2001) (holding that financial hardship is not grounds for avoiding performance under a contract); *ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC*, NO: 18-80712-Middlebrooks/Brannon, 2019 WL 4694146, at *4 (S.D. Fla. Feb. 5, 2019) (noting that typically force majeure clauses are narrowly construed and generally only excuse a party's non-performance for events that are identified in the clause).

9 *Mailloux v. Briella Townhomes, LLC*, 3 So.3d 394 (Fla. 4th DCA 2009) ("In Florida, acts of God, impossibility of performance, and frustration of purpose are well-recognized defenses to nonperformance of a contract."); *Fla. Power Corp*., 18 So.2d at 675 (recognizing that an act of God which is extraordinary and unprecedented such that human foresight could not guard against it provides legal justification for nonperformance of a contract); *Am. Aviation, Inc. v. Aero–Flight Serv., Inc*., 712 So.2d 809, 810 (Fla. 4th DCA 1998) (explaining that impossibility of performance can provide a defense to nonperformance of a contract where facts making performance impossible were not available to promisor prior to execution of contract); *Equitrac Corp. v. Kenny, Nachwalter & Seymour, P.A*., 493 So.2d 548, 548 (Fla. 3d DCA 1986) (noting that doctrine of frustration of purpose can render a contract unenforceable).

10 *Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1367 (M.D. Fla. 2008).

11 *Id*.

12 Restatement (Second) of Contracts § 261, cmt. D.

13 *Drummond*, 2017 WL 3149442, at *6 (finding that financial hardship did not serve as a ground for excusing contractual obligations under a claim of impossibility).

14 Executive Order 20-89, *2020 Executive Orders*, Ron DeSantis 46th Governor of Florida (April 2, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-89.pdf (last visited April 15, 2020).

15 *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html (last visited April 15, 2020).

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18 AOSC20-23, Florida Supreme Court, (April 6, 2020) https://www.floridasupremecourt.org/content/download/633282/7195631/AOSC20-23.pdf (last visited April 15, 2020).

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An Employer's Business Continuity Guideline For Today

By Kelly Fleck, National Consumer Title Insurance Company, Tallahassee, Florida

By the time this article reaches the reader, I am not sure what "Today" will mean in the business world. Things are changing so incredibly fast these weeks. How much will the number of remote workers have increased? How much will the economy and real estate market have slowed down, if at all? Will the internet have collapsed from overuse? Many employers have business continuity plans. But are those plans prepared to deal with the kind of losses we face today? The purpose behind risk management and insurance is to mitigate loss. The amount of risk management, insurance, and other tools businesses (employers) use depends on risk tolerance. Have employers had a recent, honest discussion with themselves about their risk tolerance level? Even though a state like Florida is a veteran when dealing with certain natural disasters, many were wholly unprepared to deal with an immediate need to work remotely. The coronavirus is a loud wake-up call for all business continuity plans, of every business and employer, to be reviewed - now.

The purpose of this brief article is to point out areas for employers to review in their continuity plans, to overview the big picture and hopefully, put more risk management in place and keep it in the forefront of minds. Employers should endeavor to ensure they can function in a prolonged quarantine situation where people cannot get to a physical office. This requires remote employees to be equipped to function from home or another location. Logistically, this means laptops, printers and other equipment, as well as databases must be securely accessible, with IT help available to remote employees. Importantly, can the employer remotely integrate with its needed partners? In the real estate space, these partners include entities, such as banks, title agents, law firms, title insurance companies, notaries, and recording offices, among others.

As everything becomes more remote, the risk of cybercrime rises. Computer systems must be secure. Insurance coverage should also be reviewed. An employer should consider if it has enough cyber-insurance as well as business continuity insurance. A separate cyber-liability policy should be considered, after a review of the coverage of a general commercial policy, which can have cyber limits and exclusions. With numerous parties involved in a real estate transaction, each of the parties must maintain security controls; it takes one breach in the chain for hackers to break in. And there are plenty of people who are full-time, online criminals. They know many people are overwhelmed with information right now, using computers at a high volume, and are generally emotionally and psychologically vulnerable.

Various other insurance coverages should be reviewed for sufficiency. Workers' compensation coverage may need to be altered in light of an increase in remote employees. Empty office buildings due to a prolonged quarantine could be a target for vandalism or other crime. It is a good time to take a look at general commercial coverage as well as physical security systems. In addition to a cyber policy being prudent, due to increased remote work, there is a risk of more fraud due to an increase in remote online notarizations. It is important to review insurance policies including errors and omissions policies for remote notary coverage.

Risk management attempts to mitigate uncertainty. And today, we face an extremely high degree of uncertainty as Executive Orders change by the day, various offices close, people are unavailable, and internet bandwidth gets clogged and slowed down. For example, as of the writing of this article, remote online notarization service providers are backlogged by a week or two, due to the increase in remote services. As the frequency of remote work increases, the systems are likely to continue to slow or face interruption.

These are times that demand ingenuity and creativity. Already, we have seen these at work in the real estate industry with drive-through or curbside closings which integrate social distancing, offering gloves and hand sanitizer, only one person using a pen, among other measures to protect all parties. While business continuity plans must quickly adapt to being more remote, they should simultaneously adapt to being present in the event computer systems fail. This harkens to the days some of us can remember before cell phones, computers, and

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the internet. Will we need land telephone lines again? Should we be prepared to function with only hard copy paper, our vehicles, and the postal service or couriers? Do we need to train pigeons again and resurrect the Pony Express? (The latter may be going a bit far, but who expected the coronavirus pandemic?)

I do not remember who may have originally said the only constant is change, but we are all living this truth out in vivid clarity today. In many ways, it feels like the wild west or the days of the first colonies (not that I was there). We do not know what unknown forces we may face in this new environment. We know there are some dangerous forces (like increased cybercrime). But we also know nothing has changed insofar as the real estate industry simply needs to continue. It is important to note, as per the federal government and Executive Orders of the Governor of Florida, financial sector functions including settlement services and insurance are essential and critical infrastructure industries, at least as of the writing of this article.

I do hope and pray by the time this article reaches you, the coronavirus is a moot subject. But, an important lesson remains, even if we are so fortunate for that to be the case, business continuity plans must by their nature expect the unexpected. They ideally should prepare an employer for remote and non-remote functioning. As we watch some portions of the real estate industry, for example, those unprepared for the integration of immediate remote online notarization and functioning, we are reminded the real estate industry despite its various separate parts, is one major piece of the national economy which must maintain unity in operation. With the population and volume of closings in Florida being among the highest in the nation, it is ever more important for our state to show its leadership skills in business continuity today and every day.



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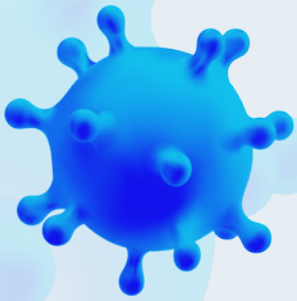



7 Strategic Estate Planning Techniques For Right Now

By Mark R. Parthemer, Esq., Senior Fiduciary Counsel at Bessemer Trust
and Sasha Klein, Esq., Ward, Damon, Posner, Pheterson & Bleau, PL, Palm Beach, Florida

Our thoughts are with all those impacted by COVID-19. We do not diminish the health and financial impact on anyone, but market disruptions trigger tax planning opportunities. Volatility in the markets and nearly historically low interest rates reflect the economic and other challenges presented to us right now. Further, sophisticated transfer tax planning often revolves around being able to convince the IRS to accept valuation discounts for lack of control or lack of marketability. The current market raises the opportunity to use "discounts" that cannot be questioned by the IRS.

Below are seven techniques applicable right now.

1. Alternate Valuation

If you are, or are advising, a Personal Representative or other fiduciary responsible for preparing a federal (or state) estate tax return, remember alternate valuation. Under Internal Revenue Code § 2032, an estate may elect to pay estate tax based not on the value of assets on the date of death, but on their value six months after death.[1] This is referred to as the Alternate Valuation Date ("AVD"). To qualify, a two-pronged test must be satisfied:

1. the value of the gross estate must decrease, and
2. the combined amount of federal estate tax (reduced by allowable credits) and generation skipping transfer tax must decrease.

With market volatility, it is possible that the value of a recent decedent's portfolio will drop dramatically on the AVD. This brings to mind another rule, and one that can be used strategically. If an asset is sold between date of death and the AVD, the sales price will be the measuring value.[2] So, if your estate has two assets, a home and shares of Exxon (XOM) stock, and you see that before the AVD the stock has dropped, but the financial advisor believes it may recover by the AVD, the PR could sell at the reduced market value to freeze that value for alternate valuation purposes. Although there is no express prohibition on the immediate repurchase of the stock, a more prudent approach might be to purchase a sector ETF, or a similar stock (such as Chevron), to maintain exposure to the industry.

And what about the home? The use of the AVD is an "in for a penny, in for a pound" proposition. If not disposed of before the AVD, the estate tax value of the home will be its fair market value on the AVD.

What if your estate has formula transfers such that no estate tax is triggered? Clearly, if no tax is due because of say an optimized credit shelter and marital trust arrangement, the second prong of the test cannot be met. In such case, there is another technique that could provide access to alternate valuation – the disclaimer. It may be possible to disclaim a small amount, or exercise a partial QTIP disclaimer, resulting in a modest estate tax liability; thereby potentially allowing the use of the AVD.

One of the authors was involved with an estate that highlights the importance of considering the AVD election. The decedent died March 12, 2001, owning over $600 million of real estate in New York City. The AVD for the estate was September 12, 2001, one day after the 9/11 attacks. The AVD value for New York City real estate the day after was starkly lower (less than $100 million), protecting almost half of a billion dollars from exposure to a 55% Federal estate tax rate.

Of course, your analysis of whether to use the AVD is not complete without thinking through the impact on basis from the point of view of the beneficiaries (and their intention regarding holding or selling the properties). The basis "step-up" rules provide that if alternate valuation is elected one uses the AVD value as the basis of each asset.[3]

2. GRATs

Grantor retained annuity trusts (GRATs) are an effective technique for wealthy families to transfer wealth free of estate, gift, and income taxes. They involve transferring wealth into a

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trust (usually short term, such as two years), while retaining an annuity repayment equal to most or all of the original principal plus an interest rate set by statute. Any growth in the assets beyond the interest rate "hurdle" will be transferred tax-free to the ultimate beneficiaries (often children or trusts for children).

Two components make GRATs potentially timely:

First, the interest-rate hurdle is a rate based on a provision in the tax code. It is known by the code section creating it, Section 7520. Established in 1989, and reset every month, the Section 7520 rate has averaged above 5%. In comparison, the April 2020 Section 7520 rate is a very low 1.2%.[4] GRATs funded in April will need only to outperform this very low hurdle in order to pass a tax-free gift to the remainder beneficiaries.

Second is market volatility. Imagine a stock that, based on fundamentals, should be trading at $100 per share. If market disruptions temporarily push down the value to $70 per share, one can transfer the stock at $70 into a GRAT, and if it were to revert to its $100 expected value once the market disruption has passed, this $30 increase (minus the Section 7520 rate interest cost) will avoid a potential future estate tax of 40% or more).

A further refinement to this technique is the timely use of a swap or substitution power.[5] Imagine your client has an existing GRAT originally funded with a concentrated position in an asset or asset class that has dramatically dropped in value. One cannot commute the term of a GRAT (do an actuarial division between the income and remainder beneficiaries). Can anything be done to "capture" the current depressed valuation?[6] Absolutely! Your client can swap into the trust a low-volatility asset, such as cash or fixed income, and use the retrieved stock to fund a new GRAT. Thus, like the above, reversion to the mean will serve as pure gain in the new GRAT. This technique allows you to achieve a successful GRAT for your clients off of the original asset.

3. Low interest rate loans

In most circumstances, the Internal Revenue Code requires that intra-family loans be made with a minimum amount of interest. The relevant minimum rates, known as the Applicable Federal Rates (AFR), are established each month. The rate floats monthly with demand loans, but can be fixed for term loans. If no (or a lesser) interest rate is charged, the Code imputes the difference and requires taxes to be paid by the lender on the actual and additional imputed interest.

There are three AFR rates used for term loans, depending on whether they are for less than three years (short), three to nine years (mid), or nine years or longer (long). They reflect, to a degree, relative term bond yields. Not surprisingly, April brings a very low set of rates.[7] Accordingly, clients (and their advisors) should consider strategies thereby advantaged. These include techniques from the simple to the complex, such as:

1) making a low rate loan to a child or grandchild;
2) refinancing an existing loan to reduce the rate;
3) lending to a family member or a grantor trust for the family member, who invests the proceeds in fixed income or other investments (the positive arbitrage is thereby outside your taxable estate and even could be in a GST-exempt trust);
4) selling assets to a trust in exchange for a promissory note; and
5) charitable lead trusts.

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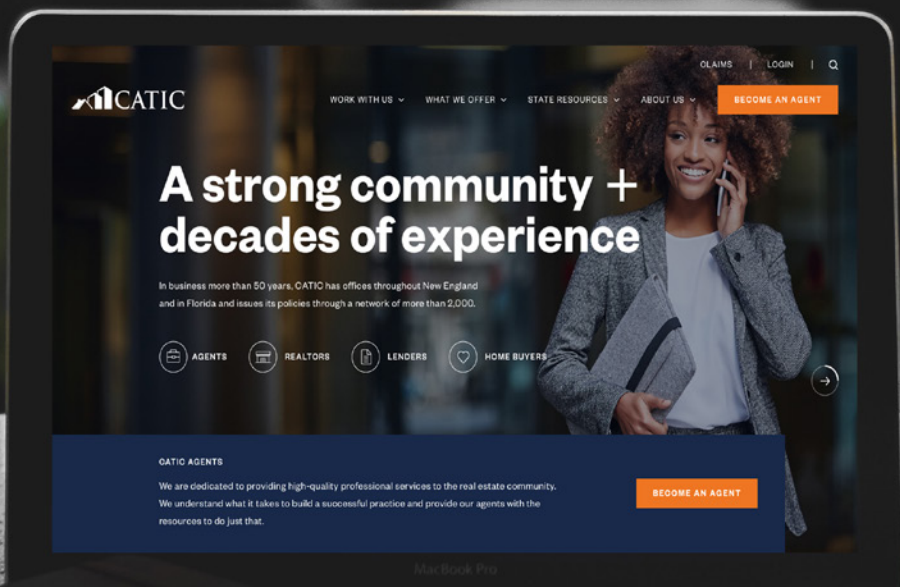

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4. Annual Exclusion Gifts

It is customary for advisors to guide clients on making annual exclusion gifts. These gifts of up to $15,000[8] (2020 amount) are per donor/per donee and do not require the use of gift/estate or GST exemptions.

Many clients make these gifts every year at the beginning of the year, so that increases in value during the year are outside their estate. Others wait for the year-end holidays to make them. If that is your client, they should consider making them now with assets, such as publicly traded securities, suffering from a reduced value. Yes, basis for capital gains will carry-over (i.e., when sold, the recipient will use the donor's basis to compute capital gains or the value on the date of the gift, if lower), but the growth reflecting the return to normal value directly will benefit the donee at no tax cost to your client. More simply, clients can give cash and allow their child (or other donee) to invest and capture the hopeful swing back to normal valuations.

5. Full use of enhanced gift and GST exemptions

As we all are aware, the current tax law permits a very favorable $11,580,000 exemption for gift tax and generation skipping transfer tax (GST tax). The law that doubled the exemption to $10,000,000 in 2016 (with annual cost of living increases) is schedule to sunset and the exemptions will revert to $5,000,000, indexed, on January 1, 2026. Many predict that amount indexed will be between $6 million and $6.5 million.

Without a doubt, you have encouraged your clients to use the enhanced amount before it is lost. But it is time to revisit that advice, perhaps with some urgency. Now, given the recent market decline, this advice suddenly is even more timely because when values are depressed, the effect can be to give away even more in the long run when asset values increase.

6. Converting Traditional IRAs to Roth IRAs

Tax law permits conversion of traditional IRAs to Roth IRAs, thereby gaining more favorable tax treatment (for example, the same tax-free growth, but also tax-free withdrawals after age 59 ½ and no required minimum distributions). There have been two critical IRA tax law developments over the last few years, but conversion remains a viable technique; and especially now, given market volatility.

What has changed? First, the 2017 Tax Act ushered in the elimination of the ability for a taxpayer to recharacterize a converted IRA.[9] This means that prior to 2018, one could convert to a Roth, and later undo the conversion – recharacterize back to a traditional IRA – before the timely filing of the tax return for the year of the conversion. Conversion is still permitted, but this cancellation of the conversion is no longer an option.

Second, the SECURE Act, included in the December 20, 2019, budget bill, has all but eliminated stretch IRA planning for account owners who die on or after January 1, 2020 (ten-year stretch under most circumstances). This entails a detailed review of your client's IRA beneficiary designations but doesn't impact the conversion opportunity presently available.

So why is conversion timely? The account owner must include in taxable income the value of the traditional IRA assets on the date of conversion to a Roth IRA. When the market forces those values lower, less tax is triggered.

7. Tax-Free Substitution of Growth Assets into Grantor Trusts

Many clients have established irrevocable trusts that for income tax purposes, qualify for grantor trust treatment. This means that, even though the transfer is a completed gift, the client is deemed to be the taxpayer of the trust and reports its income on his or her tax return.

As noted earlier, assets can be exchanged with such trusts tax-free. Given the market changes, clients should review the assets they own directly as well as those in their grantor trusts to determine whether those with higher growth potential should be swapped into the trust (after considering basis and other factors).

Conclusion

Market volatility is unsettling. Staying true to an established, tailored investment policy can be particularly challenging; however, within this chaos, estate and income tax planning opportunities exist in what we may look back upon as a window of opportunity.



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Endnotes

1 The AVD for an asset disposed of within six months is the date of its disposition.

2 The actual sales price of a publicly traded security, not the median between the high and low on the date of sale is used. Rev. Rul. 70-512, 1970-2 C.B. 192.

3 IRC §1014(a)(2).

4 The Section 7520 rate is 120% of the mid-term AFT, rounded to the nearest 20/100ths.

5 As a grantor trust, substitutions can be made without triggering an income tax event. Rev. Rul. 85-13.

6 The term of a GRAT cannot be commuted. Treas. Reg. §25.2702-3(d)(4).

7 The rates are stated for term and compounding (annual, semi-annual, quarterly and monthly). The April AFR rates for annual compounding are: short term, 0.91%; mid-term, 0.99%; and long-term 1.44%.

8 The 2020 amount under IRC §2503(b).

9 Originally, recharacterization was permitted under IRC §408A(d)(6). *See* Notice 2000-30.

COVID-19 Responses

Statutory Emergency Powers Available To Florida Condominium & Homeowner Associations

By Barry Ansbacher, Esq. and Christene M. Ertl, Esq., Ansbacher Law, Jacksonville, Florida

Florida's Condominium Act, Ch. 718, Fla. Stat., and Homeowners' Association Act, Ch. 720, Fla. Stat. have long recognized the possibility of an emergency and the need for special provisions to accommodate such emergency conditions.

Even prior to the enactment of a statute specifically dedicated to emergencies, longstanding laws already provided for special accommodations, such as relief from the statutorily required 48-hour community wide notice of board meetings in the event of an emergency,[1] as well as relief from the generally applicable condominium requirement to solicit competitive bids for most services.[2] In an emergency, a condominium association may also enter an abandoned unit, without the otherwise required 2-day advance notice.[3] The preceding emergency powers were predicated on an "emergency" as determined by the board in the exercise of its business judgment, not on a publicly declared emergency.

In 2004, Florida was impacted by four major hurricanes -- Charley, Frances, Ivan, and Jeanne. The Florida Legislature recognized the need for condominium associations to be granted broader emergency powers in the event of a public emergency. In 2008, the Florida Legislature enacted Fla. Stat. § 718.1265 (2008) for Florida condominiums. In 2014, the Florida Legislature granted nearly identical emergency powers to homeowner associations by the enactment of Fla. Stat. § 720.316 (2014).

Although adopted nearly 6-years apart, the purpose of both statutory sections appears focused on dealing with the effects of tropical storms and hurricanes. The trigger for both statutes is not only the declaration of a state of emergency by the Governor, but also "damage caused by" the event for which the state of emergency was declared.[4]

Although "damage" is not defined in either statute, other sections illustrate the legislative focus on physical damage affecting the association property. The statutes authorize mitigation of damage, including removal of debris, preventing the spread of fungus, and disposing of wet drywall, insulation, carpet, cabinetry, and fixtures.[5]

Accordingly, when faced with the current pandemic, the question arises whether the statutory emergency powers are available.

On March 1, 2020, by Executive Order 20-21, Governor Ron Desantis directed "the State Health Officer and Surgeon General, Dr. Scott Rivkees, to declare a public health emergency in the State of Florida." On March 9, 2020, Governor DeSantis declared a State of Emergency by Executive Order 20-52 due to COVID-19, pursuant to his authority in Fla. Stat. § 252.36 (2019). Executive Order 20-52 fulfilled one of the two triggers necessary to enable the association emergency powers of Fla. Stat. §§ 718.1026 and 720.316 (2019). Whether the second trigger of "damage" has occurred requires more analysis.

As referenced above, the statutes provide little guidance for our damage analysis. Black's Law Dictionary likewise adds little clarity, as the definitions therein refer to the compensation that should be awarded a party in a dispute. Merriam-Webster Dictionary defines damage as "loss or harm from injury to person, property or reputation," and gives "flood damage" as the example.

Executive Order 20-52 identifies the confirmed presence of COVID-19 in eight counties in Florida and the risk posed to the entire state as justification for the declaration of emergency. The Order further refers to the Centers for Disease Control and Prevention ("CDC") recommended prevention measures including home isolation and community mitigation measures such as limiting face-to-face contact. Executive Order 20-52 seeks to mitigate and prevent future damage to public health anticipated from the spread of COVID-19. However, the emergency power statutes are limited to actions taken "*in response* to damage (emphasis added)."[6] In the context of a hurricane, this provision is understandable as associations need the resources to respond to the physical damage to improvements and infrastructure caused by the storm. When the emergency is a disease, the response contemplated by the CDC and Governor is also to prevent damage, in this instance widespread infection.

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Thus, a narrow construction of Executive Order 20-52 could preclude use of the emergency powers enumerated in Fla. Stat. §§ 718.1026 and 720.316.[7] However, if "damage" is construed consistent with the CDC pronouncements, the economic damage caused by a sustained economic shutdown due to "stay at home" orders necessitated by COVID-19, and the potential effect on property values that will ensue, then a board might act on the basis that such damage has already occurred, and the exercise of emergency powers would be required to respond appropriately.

Emergency Order 2020-04 issued on March 23, 2020 by the Secretary of the Florida Department of Business and Professional Regulation ("DBPR") attempts to address the concern regarding the damage element of the statutorily enumerated association powers in Fla. Stat. §§ 718.1026 and 720.316 and provide associations assurances that boards may properly exercise emergency powers.[8] In Emergency Order 2020-04, the DBPR Secretary asserts authority to "suspend the provision of any regulatory statute of that agency, if strict compliance with that statute would in any way prevent, hinder, or delay necessary action in coping with this emergency" based on Governor Desantis' Executive Order 20-52. Sections 1-3 of DBPR Emergency Order 2020-04 explicitly suspends the condition that the emergency powers be exercised in "response to damage caused by an event." Questions may be raised whether DBPR Emergency Order 2020-04 is within the authority of the DBPR Secretary, and more particularly whether jurisdiction extends beyond the regulation of residential condominiums, and elections. However, the below analysis assumes that the "damages" trigger has been met either through broad statutory interpretation, or by means of the DBPR Secretary's Emergency Order 2020-04.

There are no reported court cases or arbitration decisions interpreting Fla. Stat. §§ 718.1265 or 720.316.[9] There is, however, one arbitration decision analyzing the scope of emergency powers under Fla. Stat. § 718.1265(1), Fla. Stat. § 718.111(5)(b)(2), and Fla. Stat. § 718.3026(2)(b) (1998).[10] In that decision, the Division of Florida Condominiums, Timeshares and Mobile Homes was presented with a dispute between a condominium association and unit owners regarding damage that occurred in 1995 due to Hurricane Opal.[11]

The unit owners complained that a contractor hired by the association entered their home to remove storm damaged carpet, cabinets and appliances, ignoring the owners' demand that the association not enter their unit. The unit owners asserted that the emergency powers allowing entry, without permission or notice, existed only during the actual hurricane event. The association asserted that the emergency powers continued for as long as necessary to address the emergency conditions caused by the hurricane, and thus extended well after the event itself. The arbitrator ruled that based not only on emergency powers, but also on the broad provisions allowing entry by an association into a unit, the association acted properly, notwithstanding that the entry took place months after the hurricane had passed.

The unit owners also complained that the association failed to obtain repair estimates for the work, the cost of which exceeded 5% of the annual budget. However, the arbitrator rejected this complaint, ruling that the Fla. Stat. § 718.3026(2)(b) (1998) emergency powers contemplated the difficulty of procuring multiple bids following a hurricane. Such powers also continued after the event passed while the association addressed the resulting damage.[12]

Given the limited guidance available, associations must use their business judgment and rely upon advice of counsel in determining what actions they can take in light of the COVID-19 pandemic. Protection under the Business Judgment Rule means that any challenger would be forced to prove that the board breached its fiduciary duties in some way. Alleging and proving a breach of fiduciary duty by an association board can be difficult to prove, especially if the association board

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has sought legal or other expert advice during its decision making process.

The powers granted to both condominiums and homeowners associations during a state of emergency are "limited to a time reasonably necessary to protect the health, safety, and welfare of *the association* and [*parcel/unit*] *owners* and [*their/unit owners*] *family members*, *tenants*, *guests, agents, or invitees*."[13] They are further practically limited to acts necessary to mitigate further damage or make emergency repairs. Accordingly, the association should remember the overall goal is to protect and mitigate when exercising its business judgment to utilize the enumerated powers granted by Fla. Stat. §§ 718.1265 and 720.316 (2019).

The first few enumerated powers granted to the association relate to corporate matters such as meetings, authorized officers and official designation for a principal place of business. As to the current state of emergency, the relief from the strict noticing requirements for both board and membership meetings and the authority to cancel and reschedule association meetings are perhaps the most utilized. Notwithstanding, it is important to understand that the relief as to notice of meetings is not a complete waiver of the notice requirement(s), but rather a practical exception that allows for notice to be given "in any practicable manner."[14] In the current state of emergency, this usually means relief from physical posting of meetings. As an alternative, associations may post notice on their website, Facebook page, or by email to its members.

Fla. Stat. §§ 718.1265 and 720.316 also provide authority for the association to implement a disaster plan "before or immediately following the event for which a state of emergency is declared."[15] Both statutes list examples of items that may be included in the disaster plan such as the shutting down of systems on property that support the land or a building structure. In the current state of emergency, these powers may be necessary, but they are only examples and not the full list of authorized actions. As such, the disaster plan may also include the adoption of policies or procedures by the association board related to the emergency, including other emergency powers enumerated in the statute. Whether by a disaster plan or by association board adopted rules, policies, or procedures otherwise authorized by their governing documents, it is important for associations to provide a plan for their community as to how they intend to handle the state of emergency and exercise emergency powers.

The disaster plan or board policy regarding COVID-19, which should, at a minimum, include a preamble recitation that the Governor has declared a state of emergency, may include the suspension of all in-person board, committee or other meetings, provide that all board meetings will be held by telephone or video conference, provide that in-person inspections of association records are suspended, and restrictions related to access or use common areas and possibly even a unit. The disaster plan or board policy should be adopted at a properly noticed board meeting (relaxed notice) and published to owners by the most practicable means available. Further, with regard to policies that affect the ability to access places within the community or to travel within the community, both statutes require that such decisions be guided by or adopted based on the advice of emergency management officials or the advice of licensed professionals (such as medical professionals) retained by the board.[16]

Fla. Stat. §§ 718.1265 and 718.316 empower associations with the ability to "determine whether the [condominium/association] property can be safely inhabited or occupied" and "determine any portion of the [condominium/association] property unavailable for entry or occupancy by owners or their family members, tenants, guests, agents, or invitees to protect their health, safety or welfare."[17] The preamble to both subsections of Fla. Stat. §§ 718.1265 and 720.316 provide that such decisions can be made if "based upon the advice of emergency management officials or the advice of licensed professionals retained by the board."[18] As the exercise of such authority directly affects other historically legally protected rights of individuals, it is important that these decisions by an association be explicitly guided by, and documented to be guided by, the advice of emergency management officials or a licensed professional retained by the board.

Section Fla. Stat. § 718.1265 uses the phrase "condominium property," when describing the area over which the board has this extraordinary authority to determine accessibility or occupancy.[19] "Condominium Property" is defined in Fla. Stat. §718.103(13) (2019), and therefore, there is no uncertainty as to the scope of the association's authority. Fla. Stat. § 720.316 uses the phrase "association property" when describing the scope of this extraordinary authority, but "association property" is not defined in Chapter 720.[20] Fla. Stat. §720.301(9) (2019) does define "homeowners' association" *or "association."* When coupled with the standard dictionary definition of property, it seems a reasonable conclusion that the extraordinary authority of Fla. Stat. § 720.316(1)(g)&(1)(h) applies to all property owned or operated by the homeowners' association.[21]

Other provisions of Fla. Stat. §§ 718.1265 and 720.306 empower an association to "mitigate further damage," including the physical deconstruction of a building to remove

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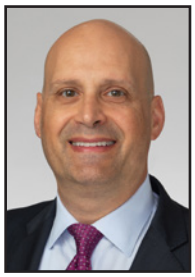
damaged portions, including mold and mildew, responses expected following a hurricane or tropical storm. However, these provisions may also be utilized to clean portions of the condominium or association property.[22]

With regard to condominiums, this power may be exercised by an association "even if the unit owner is obligated by the declaration or law to insure or replace those fixtures and to remove personal property from a unit."[23] In fact, Fla. Stat. § 718.1265 (1)(k), goes on to provide that a condominium association may also "contract, on behalf of any unit owner or owners, for items or services for which the owners are otherwise individually responsible, but which are necessary to prevent further damage to the condominium property."[24] In the current state of emergency, this power may be used to clean and sanitize an area or a unit that has been exposed to an individual with COVID-19.

Finally, there are also financial powers granted to associations under Fla. Stat. §§ 718.1265 and 720.316.[25] Associations may levy special assessments without a vote of owners, even if otherwise required by the governing documents. They may borrow money and pledge association assets as collateral without owner approval if such funding is necessary for emergency "repairs and/or to carry out the duties of the association when operating funds are insufficient."[26] When exercising these financial powers, an association should be sure that whatever actions they take relate to the current state of emergency and are necessary to protect the association or its members or are taken to mitigate further damage. Attorneys should review the arbitration decision discussed above[27] for guidance in evaluating whether its conduct is sufficiently related to the emergency.

The statutory emergency powers provide meaningful relief to associations dealing with COVID-19. However, with the benefit of hindsight, changes expanding these emergency powers to address situations beyond the contemplated storm damages are warranted. Further, relief as to the mandatory response times for inspection requests, estoppels, and other time-based mandates imposed by law or in the governing documents would extend the ability of associations to weather future events, whether storms or pandemics.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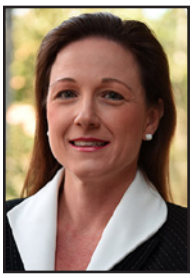
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Endnotes

1 Fla. Stat. §718.112(2)(c)1 (2019), Fla. Stat. §720.203(2)(c)1 (2019).
2 Fla. Stat. §718.3026(2)(b) (2019), Fla. Stat. §720.3055(2)(b) (2019).
3 Fla. Stat. §718.111(5)(b)2 (2019).
4 Fla. Stat. §§718.1265(1), Fla. Stat. §720.316(1) (2019).
5 Fla. Stat. §718.1265 (1)(j)(2019), Fla. Stat. §720.316 (1)(i)(2019).
6 Fla. Stat. §718.1265 (2019), Fla. Stat. §720.316 (2019).
7 Fla. Stat. §718.1026 (2019), Fla. Stat. §720.316 (2019).
8 Fla. Stat. §718.1026 (2019), Fla. Stat. §720.316 (2019).
9 *Id.*
10 In Re: Petition for Arbitration, *Horace H. Higdon and Frank B. Higdon, Petitioners, v. Seaspray Condominium Association, Inc., Respondent*, Case No. 96-0430 (March 24, 1998) (hereinafter, *Higdon*).
11 *Id.*
12 *Id.*
13 Fla. Stat. §718.1265(2), Fla. Stat. §720.316(2) (2019).
14 Fla. Stat. §718.1265(1)(a) (2019).
15 Fla. Stat. §718.1265(1)(f), Fla. Stat. §720.316(1)(f) (2019).
16 Fla. Stat. §718.1265(1)(g)&(1)(i) (2019), Fla. Stat. §720.316(1)(g)&(1)(h) (2019).
17 Fla. Stat. §718.1265(1)(g)&(1)(i) (2019), Fla. Stat. §720.316(1)(g)&(1)(h) (2019).
18 Fla. Stat. §718.1265(1)(g)&(1)(i) (2019), Fla. Stat. §720.316(1)(g)&(1)(h) (2019).
19 Fla. Stat. §718.1265(1)(g)&(1)(i) (2019).
20 Fla. Stat. §720.316 (2019), Fla. Stat. ch. 720.
21 Fla. Stat. §718.1265.
22 Fla. Stat. §718.1265(1)(j) (2019), Fla. Stat. §720.316(1)(i) (2019).
23 Fla. Stat. §718.1265(1)(j) (2019).
24 Fla. Stat. §718.1265 (1)(k) (2019).
25 Fla. Stat. §718.1265 (2019), Fla. Stat. §720.316 (2019).
26 *Id.*
27 *See, Higdon, supra.*

Using Grantor Retained Annuity Trusts In The Current Environment

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Introduction to GRATs

Grantor retained annuity trusts ("GRATs")[1], have been a popular planning tool. In the current planning environment, GRATs may be a powerful planning tool for three primary reasons:

Suppressed asset values (at the time of this writing the stock market has declined about 25% from its highs, and businesses are hemorrhaging during stay home orders). Funding a GRAT when asset values are low and hopefully likely to rise significantly in future years will shift all that appreciation above the applicable § 7520[2] rate outside the grantor's gross estate for federal estate tax purposes. For example, if a GRAT is funded with $1 million and the taxable remainder is only $1,000, any remainder passing to the successor beneficiaries in excess of $1,000 makes a gift tax free transfer.

Interest rates are at near historic lows (the § 7520 rate for April 2020 is 1.2%).[3] For comparison, in 1989, the Code § 7520 hurdle interest rate was at a high of nearly 12%. In March of 2009, it was almost 3%. GRATs are a technique that shine brightest when the lower interest rates are in effect. Simply put, the lower the interest rate, the lower the annuity payment that has to be made periodically back to the grantor to minimize the taxable gift made with funding a GRAT, and hence the greater value shifted outside the estate. Going back to the above example, if the § 7520 was 1.2%, any growth and income above that rate will pass gift tax free to the successor beneficiaries.

The massive federal bailout, and more that may be coming, will eventually require that taxes on the wealthy (and the not so wealthy) be raised. While no one can forecast what tax law changes may occur, it seems logical that estate taxes will increase, perhaps markedly so. Therefore, shifting assets out of an estate using current favorable laws, such as by using GRATs, may prove very advantageous.

However, while the current environment may be the so-called "perfect storm" for GRAT planning, practitioners need to be aware of a number of nuances to this planning. In many instances, it will not be GRAT planning as usual. This article will explore some of the differences in how practitioners may choose to plan for GRATs in the current environment.

Only Use GRATs for Appropriate Situations

While it is obvious to most practitioners, it is so important that it warrants stating it explicitly here. GRATs are not an ideal tool for most clients who have remaining gift exemption. The current exemption of $11.58 million is the highest in history and may be reduced, perhaps substantially, by future legislation and is slated under current law to be halved effective 2026. Thus, clients with remaining exemption should consider gifts to GST exempt trusts, and other planning techniques that use exemption, before focusing on GRATs.

Again, as practitioners are aware, GRATs are a not a technique that generally secure remaining GST exemption. Some suggest that after a GRAT is funded, an old and cold GST exempt trust may purchase the remainder from the GRAT to thereby shift future appreciation into a GST exemption solution. So, practitioners should consider the GST planning implications when determining whether to use a GRAT in the current environment in contrast other planning techniques. It seems appropriate to mention that the IRS has indicated it would not respect such a purchase of the remainder in a GRAT to provide GST exemption.[4]

Overview of the GRAT Technique

The common application of the GRAT technique has been to structure a short-term, typically two-year GRAT, designed to capture upside market volatility. The annuity paid to the grantor would be set high enough so that the GRAT would have a nominal value for gift tax purposes— a so-called "post-Walton zeroed out" GRAT.[5] There are different perspectives on whether or not to use a zeroed out GRAT. Some practitioners think that it is perfectly acceptable while others prefer to structure the GRAT so there's a very modest initial gift value that can appropriately be reported on a United States Gift Tax Return (Form 709). In any case, it may be possible to draft for minimum value.[6]

The result of this traditional GRAT approach is that a substantial portion of the assets of the GRAT (principal plus the § 7520 mandated return) would be paid back to the client as the grantor. Market returns, above the mandated federal interest rate, would inure to the benefit of the grantor's "heirs" (or a trust for their benefit either created under the GRAT instrument or otherwise). This could result in the client "re-GRATing" the large distribution received in each year of the GRAT to a new GRAT. In other words, if a million-dollar GRAT were created, the first one-year annuity payment (of, perhaps, $500,000+) would be paid back to the client as the grantor, who could then gift that payment into a new GRAT. This is why the technique of using repetitive short-term GRATs has been referred to as "rolling"

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or "cascading" GRATs. The concept of re-GRAT-ing each year's distribution to a new GRAT has been a common part of the GRAT technique. However, it has two important implications to GRAT planning in the existing environment.

The first application is to a GRAT that was created recently and now has suffered a dramatic decline in asset value because of the coronavirus economic decline. Instead of earning more than the mandated interest rate, as anticipated when the GRAT was created and funded, the GRAT may be worth 20% less than what was initially transferred to it. Thus, these GRATs will fail, resulting in no assets inuring to the intended trust for remainder beneficiaries. All the assets will be distributed back to the grantor to meet the periodic required annuity payment, with nothing left for heirs.

What should be done in such a case? As the GRAT assets are repaid to the grantor in the form of periodic required annuity payments, he or she might continue the plan by re-GRAT-ing the assets received as the annuity payment into new GRATs. The implications to how a practitioner might choose to structure these new GRATs are discussed below and this may be different than the traditional application of the GRAT technique.

Remember volatility was the rationale behind using the GRAT technique in the first instance, and that is exactly what the GRAT experienced (just not in the intended direction). Remind yourself that, just as with rebalancing portfolios during market upswings and declines, assets should be re-GRAT-ed to new GRATs. If, in fact, the markets are at a low enough point now, the new GRATs will remove the anticipated market recovery from the client's estate. So, for many facing GRATs that have busted, establishing a new GRAT and regifting the assets to that new GRAT as they are received from the old GRAT may be an appropriate strategy to consider.

Be mindful that Congressman Bernie Sanders' proposed tax act[7] would, perhaps, eliminate the viability of the GRAT technique in many cases by requiring a minimum ten-year term for any GRATs created after the enactment of the Act.[8] If the grantor does not outlive the term of the GRAT, some or all

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the assets would be included in the grantor's estate and that would dramatically decrease the risk of a GRAT succeeding. There is also a minimum required gift amount of at least 25% of the value of the assets contributed to the trust, effectively removing the ability to have a zeroed out GRAT and likely retarding the use of most GRATs being successful at all.[9] These two changes could potentially make GRATs impractical for taxpayers who have traditionally used GRATs when they no longer had gift tax exemption remaining. It would also seem to eliminate the commonly used technique of "rolling-GRATs."[10]

These proposals are not new. President Obama's Greenbooks included proposals to restrict GRATs by requiring a minimum ten-year term for GRATs that would have eliminated short term rolling GRATs. If the Democratic presidential candidate wins the 2020 election, tax proposals may include one that restricts GRATs in this way. However, even if the election retains Republican control in Washington, there may have to be similar restrictions put in place in order to raise revenues to fund the substantial bailout plans. Thus, when structuring new GRATs in the current environment, consideration should be given to how they may be changed since the elimination or severe restriction of the GRAT technique could prevent a rolling or cascading GRAT set up today when annuity payments are paid out in the future.

If the remainder beneficiaries of the GRAT plan are people whose relationship falls outside the scope of how the tax law defines "family" for these purposes (for example, a niece or nephew), then a property owner can use a grantor retained income trust, or a GRIT. The key benefit of a GRIT over a GRAT is that, instead of an annuity stream, the grantor receives back the income (in the trust accounting sense). The GRIT's success does not depend upon growth in the assets contributed to the trust (which is the case for a GRAT) but the value of the gift of the remainder will be quite high while the § 7520 rates are low.

Create a Paper Trail for Failed GRATs

A GRAT may pay back all of its assets to the grantor to meet the required annuity payment as a result of recent declines in asset values. Devoid of assets, the GRAT will fail. Consider having the trustees execute a short acknowledgement that the GRAT has been terminated with a final payment to the grantor, so that there is an obvious record in the files of what happened should a question arise in the future and to demonstrate there was no commutation of the grantor's interest in the GRATs, which the governing instrument must prohibit.

How to Handle an Existing GRAT That Will Likely Fail

Assume a GRAT has been funded, but asset values have plummeted. Say the client has gifted $2 million to the GRAT. First payment is about $1 million, but the asset value then is only $1.2 million. Do you have to leave all of the $200,000 in the GRAT? What can be done?

Can you buy that amount back from the GRAT for a note? Although commutation of the grantor's interest must be prohibited as required by the Regulations,[11] buying the assets back for a note is not prohibited in this context because it is the grantor writing a note to the GRAT not vice versa (which is prohibited). However, it likely would not be wise to distribute this note back to the grantor in satisfaction of the annuity to ensure that there is no violation of the Regulations.[12] Rather, some other asset should be substituted for the note so that asset and not the note is distributed to the grantor.

Consider having the grantor buy the remainder interest in a long-term GRAT after the three-year statute of limitations for the gift tax audit has run on the GRAT.

Alternatively, the grantor can substitute assets or purchase assets[13] if the GRAT is a grantor trust (as it almost certainly would be) and take assets out of the GRAT for cash and re-GRAT them.

Another option is to re-GRAT entire annuity interest. It seems likely that the grantor's annuity interest would be valued in the same manner as it was when the GRAT was created as § 7520 mandates how non-commercial annuities are to be valued for gift and estate tax purposes.

Some Thoughts on Rolling/Cascading GRATs

As mentioned above, a common GRAT technique has been the use of short-term rolling or cascading GRATs which are intended to capture upside market volatility. The mathematical superiority of short-term rolling GRATs over a single long-term GRAT has been documented.[14] There are a few points to consider:

What is the likelihood of the next administration making the estate tax rules tougher? Might GRATs be eliminated? Or might a required minimum ten-year term and a specified 25% minimum gift value on GRAT funding be enacted? Either of these restrictions would have a chilling effect on post-enactment GRAT plans and effectively undermine the assumptions of rolling GRATs for currently funded GRATs, if the successor GRATs are so fundamentally altered. If the next administration wants to raise revenues on the wealthy, or if there really is no choice in order to fund the very large bailouts during the coronavirus crisis, GRATs may disappear. Note also that restrictions on GRATs could be coupled with the elimination of discounts on related party transactions, elimination or restriction on so-called Crummey powers[15] (which are used to allow gift tax annual exclusions for transfers to trust), etc. The result may be a substantial enhancement of estate tax revenues.

If a rolling GRAT plan is being funded with discounted interests in a family or other closely held business, what impact will a legislative repeal or restriction on such discounts have on the plan? Short-term GRATs require high payouts to minimize or eliminate gift tax. That may mean that a significant portion of

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the equity in the family business may be repaid to the grantor in the form of GRAT annuity payments. If so, when the grantor wishes to re-GRAT, the assets may not, at that future date, qualify for discounts. Therefore, it may be advisable to lock in the discounts by using a longer term GRAT now (i.e., not the traditional two-year GRAT term). Question: if discounts are eliminated by future legislation, may that permit the payment of annuity amounts in kind (e.g. stock in a closely held business held in the GRAT), valued without discounts, even though discounts applied to the valuation of the interests when gifted to the GRAT?

What about creating a long-term GRAT instead of a series of short-term GRATs on the possibility that Congress may restrict GRATs? Although many have demonstrated the superiority of short-term GRATs compared to longer-term GRATs, the assumption is that a short-term GRAT is one in a series and may not be allowed in the future.

The more granular you make the GRAT, the more likely to capture upward market swings. Creating several GRATs each funded with one sector of the market is more likely to succeed than one GRAT funded with all of a market. The reason is that, with one GRAT, good performance in one sector will be offset by negative performance in another. But each GRAT funded with its own sector of the market can stand alone without erosion of other sectors.

GRAT Immunization

GRAT immunization refers to the process of substituting a nonvolatile asset such as cash for the assets inside the GRAT. So, if the GRAT holds Zoom stock, which has appreciated dramatically, the grantor could swap in cash and swap out equivalent value of Zoom stock. The rationale for this is that if the GRAT, whatever the term, realizes a significant uptick in value, the client will want to lock in that uptick by substituting less volatile assets. The application of this technique is discussed in the section that follows.

GRAT Immunization Will Have to Change

Considering the preceding factors does not change the fact that short-term rolling GRATs is a better strategy, but that strategy may not be given sufficient duration to succeed if the GRAT rules are changed by new legislation. Perhaps a safer long-term strategy may be to create a series of longer-term GRATs. If the GRAT technique is repealed, GRATs that have been executed and funded may be grandfathered in from these adverse changes. However, with longer-term GRATs, the traditional approach of immunization using cash or Treasury bills won't make economic sense. The reason is that swapping cash or treasuries into a two-year GRAT, and typically after some time is already run on that GRAT term, does not leave significant wealth unproductive for a long period of time. However, by opting into, for example, a ladder of six, eight and ten-year GRATs, the GRAT arrangements will be locked in for a longer time. In case future legislation restricts or eliminates short term GRATs, immunization has to be looked at differently. If in the second year of a ten-year GRAT there is a spike in the stock market, immunization may make sense but, in contrast to a two-year GRAT that may have mere months to run, this six, eight or ten year GRAT may have five or more years left to run. Holding assets idle in cash or treasuries for that long a period of time is not likely to be desirable. Thus, a more sophisticated investment technique will have to be implemented in order to immunize new longer-term GRATs.

Example: A client establishes a series of ten $1 million ten-year GRATs, each for a different asset class. One of the ten-year GRATs experienced a substantial gain in year one, doubling in value. Under the rolling GRAT paradigm, this would have been a two-year GRAT, not a ten-year GRAT. The client likely would have been advised to substitute Treasury bills for the $2 million in the GRAT, thus locking in the large gain. This strategy would not be acceptable in a ten-year GRAT unless the client retained Treasury bills for the nine remaining years. However, a two-year GRAT will not work either if GRATs are restricted next year by new legislation, or if it takes three or more years for that asset class to recover from the current coronavirus recession. Instead, while clearly less advantageous, the ten-year (or some other term longer than the traditional two-year) GRAT might prove the only practicable, effective technique. There are several approaches to consider. One might be to substitute a diversified portfolio with a nine-year time horizon for the $2 million appreciated GRAT property. Although clearly not as secure as locking in the gain with Treasury bills on a two-year GRAT with one year remaining, it will be more secure for purposes of retaining that gain than, perhaps, the ten year-long term overall asset allocation. Assume that the client generally has a 20+ year investment horizon and an overall asset allocation consisting of 60% equities, 25% bonds, and 15% alternatives. Perhaps the nine-year remaining GRAT may be given as substitute property, a more conservative allocation designed to minimize downside risk of giving up the $1 million initial gain, but still consider the long nine-year time horizon and the need for growth inside the GRAT. The client's wealth manager might recommend a 40% equity, 45% bond, and 15% alternative strategy. Perhaps option techniques can be used to hedge the downside risk in the highly successful GRAT while leaving some upside potential for growth in light of the nine years remaining. Although that strategy will come at a cost since it will reduce the upside, it can, perhaps, be viewed as insurance on preserving the large gain in the early years of a long term GRAT.

Long-term GRATs are not as efficient as a series of short-term GRATs. However, the budget deficit that the next administration will have to address, the uncertainty whether GRATs will survive, and the unknown timing of market improvements make it worth reconsidering them.

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GRATs As an ILIT Funding Tool

Irrevocable life insurance trusts (ILITs) are a ubiquitous planning tool. Many ILITs are funded using annual exclusion gifts.[16] This technique is also on the chopping block under proposed legislation. The Sanders tax proposal, for example, includes a cap on annual exclusion gifts of $20,000 per donor (not per donee).[17] That could undermine the funding in many traditional life insurance trusts. Practitioners may want to consider, in the current environment given what some view as an increased risk of harsher tax legislation to pay for the current bailouts, using GRATs to "pre-fund" future life insurance premiums in ILITs. If the insurance trust is not GST exempt, a GRAT could be structured to pour into the insurance trust as its remainder beneficiary and thereby infuse capital now before restrictions are created on ILIT Crummey Trust funding. If the ILIT is GST exempt, it could borrow at the low applicable Federal rate (AFT) from the successful GRAT and without income tax effect if each is a grantor trust as to the same grantor.

The Very Long Term GRAT

A concept that has been discussed for a number of years is often called a ninety-nine year GRAT. This technique is really an interest arbitrage and it is a technique whose time may be optimal right now. Many practitioners are under the misconception that if you died during the term of a GRAT, the entire GRAT principle is included in your taxable estate. That is not correct. Rather, to determine what portion of a GRATs assets are included in this settlor's estate, you take the required annuity payment and divide it by the § 7520 rate at the date of the grantor's death.[18] If interest rates are higher at the date of death, the full value of the GRAT will not be included in the grantor's estate if he or she dies during the GRAT term. With interest rates at historic lows, it may be a reasonable bet to assume that interest rates will be higher, perhaps substantially higher as of the date of death. So for clients that have used all of their current high temporary exemption, a bet now that asset values will grow substantially and interest rates will be much higher by death may make a ninety-nine year GRAT a valuable planning tool. If the § 7520 rate rises before the grantor dies, he or she could sell the remaining annuity payment before then and exclude a significant part of the trust from his or her estate.

Conclusion

Existing GRATs should be reviewed to determine whether or not they will remain viable and, if likely not, whether remedial action should be taken now. For new planning in the current environment, the GRAT, while subject to shortcomings of not being an efficient tool for using remaining exemption or GST planning, can provide a valuable planning tool for many clients.



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Endnotes

1 Described in Internal Revenue Code ("Code") § 2702 and Treas. Reg. 25.2702-3(b).

2 26 U.S. Code § 7520.

3 Rev. Rul. 2020-09.

4 *See* PLR 200107015 (not precedent).

5 *See Walton v. Comm'r*, 115 T.C. 589 (2000), acq. IRS 2003-44 I.R.B. 964, Notice 2003-72.

6 *See Blattmachr & Zeydel*, "Comparing GRATs and Installment Sales," 41 Philip E. Heckerling Institute on Estate Planning, Ch 2.

7 "For the 99.8 Percent Act," S. 309 116th Cong. (2019).

8 *Id.* at S. 309 §7(a) and (b).

9 *Id.* at S. 309 §7(a)(4).

10 *See*, e.g., https://www.wealthmanagement.com/estate-planning/treasury-releases-2017-greenbook.

11 Treas. Reg. 25.2702-3(d)(5).

12 Treas. Reg. 25.2702-3(d)(6).

13 There would be not taxable income even under Rev. Rul. 85-13, 1985-1 CB 184.

14 *See* Bernstein Journal, vol. VI, no. 1, Summer 2008, p. 9.

15 *See, generally*, "Building an Effective Life Insurance Trust," 129 Trusts & Estates 29 (May 1990).

16 26 U.S. Code § 2503(b).

17 S. 309 §10(a).

18 See Treas. Reg. 20.2036-1(c), especially Example 2.

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* *This benefit is available for General Sponsors of the Thursday night reception; Friday night reception; Friday night dinner; Roundtable meetings; and Saturday night function. General Sponsors of breakfasts, luncheons and the Executive Council meeting sponsors will be introduced and thanked at the Executive Council meeting. RPPTL reserves the right to not hold one or more designated events at one or more meetings during the Term. If an event is not held at a meeting, the RPPTL will provide substitute recognition and an opportunity to address the Executive Council.*

For more information contact the Chair of the Sponsorship Committee
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Remote Online Notarization In The Time Of COVID-19

By Laura M. Licastro, Esq., Westcor Land Title Insurance Company, Maitland, Florida

On April 1, 2020, Florida Governor Ron DeSantis issued Executive Order 20-91, which included implementation of the Safer at Home order requiring everyone in Florida to stay home unless they are providing or obtaining "essential services." Even though legal services related to real estate and settlement services are considered essential services, which would allow you to remain open, let us assume that in the interest of keeping you, your family, your employees, and their families as safe as possible, you have decided to temporarily close your office and have everyone work from home.

You have on your desk a checklist for moving your law practice to a completely remote operation. Most of the items are taken care of, but you need to be ready to handle the real estate closings that are in your pipeline. This is the time to seriously consider implementing remote online notarization ("RON") for your clients' real estate transactions, but you wonder what your options are and what concerns you should have before making the switch.

A multitude of sources are disseminating information about how the real estate industry can harness the power of technology to continue the flow of real estate transactions in the face of shelter-in-place orders due to the spread of the novel coronavirus ("COVID-19"). For example, at the end of March 2020, the National Association of Realtors® issued guidance to its members regarding open houses and strongly encouraged a switch to virtual open houses.[3] In addition, Fannie Mae has authorized the use of "desktop appraisals," which utilize information from the multiple listing service, public records, and other available data sources to determine a property's features.[4] This article will briefly review the status of RON in Florida, highlight some important considerations for the real estate practitioner who wants to employ RON, and point out some pitfalls to avoid to ensure a positive experience for all parties involved.

Status of RON in Florida

A detailed review of Florida's comprehensive RON law,[5] which went into effect on January 1, 2020, is beyond the scope of this article, but a brief summary is helpful. One major result of this legislation was to create Part II of Chapter 177 in the Florida Statutes.[6] This part details the qualifications to become a remote online notary, the procedure for appointment, the technology requirements, fees, and requirements for the notary's journal and storage of the remote online notarial session. Other Florida statutes have been updated to include references to remote online notarization. One particularly important change for real estate practitioners to note is that acknowledgments must now state whether the signatory appeared in the actual presence of the notary public or RON was employed.[7]

The Florida Department of State ("FLDOS") has a webpage devoted entirely to information on RON.[8] One of the requirements for becoming a remote online notary is successful completion of a two-hour course approved by

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the Florida Department of State.[9] The list of approved course providers is available on FLDOS's RON webpage.[10] As of the date of submission of this article, five approved providers were listed.[11] The site also includes names of licensed online notaries, a link to the registration form, and links to the RON statutes and regulations. When submitting an application, in addition to providing a $25,000 bond and $25,000 in errors and omissions coverage, the applicant must also name one or more RON platform providers with which it will contract in order to comply with the technology requirements of the RON law.[12] FLDOS does not list or endorse any providers on its website, simply reminding the prospective registrant of the need to choose a provider who can meet the technology requirements in the statute.[13]

Issues and Concerns for Practitioners Considering RON for Closings

Real estate practitioners considering using RON for their closings first must decide whether one or more people in their own offices will become online notaries, or they will simply use a RON provider that supplies its own notaries. There are pros and cons to each choice, and the two options have different costs associated with them. There is no one-size-fits-all choice.

Technology Concerns

One of the purposes of Fla. Stat. § 117.295 (2019) is to authorize the Department of State to promulgate rules which set the standards for, among other things, the methods for confirming the identity of the participants to a RON session, the security of the electronic record generated during the course of the session, the audio-video technology to be used, and the manner of storing the electronic record.[14] If the Department of State does not enact any specific regulations related to these matters, which it has not done as of the date of the writing of this article, then the minimum acceptable standards set forth in Fla. Stat. § 117.295 (2019) will apply.[15]

Complying with these technology requirements can be a cost concern for a small practice, especially if more than one person in the office is going to be a remote online notary. There may be a need to upgrade existing computer hardware and/or software in order to have the computing power and technology devices necessary to perform the identity proofing, electronic notarization, and storage mandated by state law. The practitioner who decides to use the RON provider's own notaries does not have to worry about this cost.

International Clients

If your client base includes non-US persons and businesses whose physical appearances are known to you, you may want to consider becoming an online notary yourself rather than relying on someone in your office or on a RON provider's notaries because there are stringent requirements for proving the identity of the principal to the online notary. If the notary does not personally know the principal, Florida's RON law requires that the principal's identity be proven using both credential analysis of a government issued ID and knowledge-based authentication by having the principal successfully answer four out of five questions, the answers to which only the principal would know.[16] The information used for these questions and answers comes from US and state public databases, such as DMV records and land records. Since most foreigners do not have a government-issued ID that is capable of being analyzed by US RON providers and also do not have sufficient US public records from which to prepare the knowledge-based authentication questions, the only way for them to use RON for a Florida real estate transaction would be if the notary can personally identify them.

Lender/Attorney Acceptance

Another consideration in the use of RON is lender and/or attorney acceptance. There are a few aspects of this issue. The first is whether the originating lender will accept a mortgage that has been acknowledged using RON, and the second is whether that mortgage can be sold on the secondary market. It should not be automatically assumed that, just because Florida, or any other state, has a RON law in effect, all mortgage lenders will accept documents notarized via RON. The prudent practitioner will inquire of the lender early in the process if traditional in-person notarization may not be possible.

Dealing with the sale of loans on the secondary market should be a bit easier if the loan is likely to be sold to Fannie Mae or Freddie Mac. Fannie and Freddie recently updated their single-family seller guides to add short-term requirements for RON in light of COVID-19.[17] Freddie Mac's requirements are somewhat more restrictive than Fannie Mae's in that the online notary public must be licensed and domiciled in the state where the property is located and that state must have a RON law in effect.[18] In both cases, the title insurance policy cannot take exception to the fact that the mortgage was notarized using RON. [19]

In addition to considering whether a lender will accept a mortgage notarized using RON, it is also important to consider whether the attorney representing a buyer will accept a deed notarized using RON. While a title insurer may be willing to accept a deed notarized using RON, buyer's counsel may not.

Choosing a Provider

Regardless of whether you (or one or more of your office staff) will act as the remote online notary, you will need to select a provider. The Florida Department of State does not recommend, endorse, or list any RON providers on its website. It is up to the notary to choose one and determine that the provider meets the statutory technology requirements.

There are a couple of considerations when selecting a provider. If you want a provider that has its own notaries, make sure to determine this up front. Some providers require you to bring your own.

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If you need a provider that has its own notaries, the next question to ask is where the provider's notaries are licensed. Many RON providers have been in business since before Florida's RON statute went into effect and employ notaries from various other states, such as Virginia or Texas. It is important to know where the notaries are licensed for a couple of reasons. First, a title insurer that is issuing one or more policies in connection with the transaction may have underwriting guidelines that limit the use of remote online notaries to only those licensed in Florida or in a small number of other states. It is important to check with the title insurer that will be underwriting the policy to learn whether there are any such restrictions.

Another important reason to know where a notary is licensed is to satisfy the requirements of any lender that your client may be using. A lender may insist that the notary be located in a specific state. If you happen to represent one or more lenders, it would be prudent to ask if they have any restrictions regarding the location of a remote online notary so you can choose a provider that can accommodate as many of your closings as possible with as short a wait time as possible. Also, as mentioned above, Freddie Mac will only purchase loans with mortgages that are notarized using RON if the notary is licensed and domiciled in the state where the property is located and that state has a RON statute.

When choosing a provider, a third consideration is cost. Whether you or a staff member is acting as the notary or you are using the service provider's notaries, understanding the costs involved is important so you can explain them to your client or anyone else in a closing you are conducting who may be using the remote online notary's services. If you or someone in your office is acting as the notary for a closing, you can charge up to $25 per notarial act.[20] Naturally, there are the hardware/software and provider subscription costs to consider as well.

Finally, as with all third-party vendors, you want to choose a provider with which you are comfortable. The provider will not only be supplying you with either technology or notarial services, or both, but it may also be responsible for storing the required video back-up and electronic journal of each notarial session. You can check out a vendor's website to see if they have any videos of sample RON sessions available for you to review at your leisure. Chances are you may also request a free sample RON video demonstration if one is not already available on the website. Keep in mind that obtaining one may involve signing up for a webinar or a call with a salesperson from the company.

RON Outside of Florida

Although Florida's RON law is currently available to serve most of your needs, several other states and even the Federal government have been busy rushing to get some kind of RON laws enacted to keep real estate sales and refinances closing during the COVID-19 pandemic. Some of these efforts are potentially better than others.

SECURE Notarization Act

On March 18, 2020, Senator Kevin Cramer (R-ND) introduced S. 3533, known as the "Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2020." According to the bill, one of its goals is to "require any Federal court located in a State to recognize [electronic and remote] notarizations performed by a notary public commissioned by any other State when the notarization occurs in or affects interstate commerce."[21]

The SECURE Notarization Act dispenses with the need for special training or licensing for notaries in order to conduct remote online notarizations as long as certain minimum standards are met.[22] The person signing and the notary have to be able to hear and see each other at the same time.[23] If the notary does not personally know the signer, then the notary must identify him or her using at least two separate methods of third-party authentication or by oath or affirmation of a credible witness who is either in the presence of the signer or can also see and hear the notary and signer at the same time.[24] This legislation also allows for RON of persons outside the jurisdiction of a US state or territory if the document being notarized involves property located within the United States as long as the notary has no knowledge that the signing of the document is a violation of the laws of the jurisdiction where the person is located. As of the submission of this article, S. 3533 was still in the Senate Judiciary Committee, its first committee.[25]

Executive Orders

In an effort to keep their respective real estate markets and other business moving during the COVID-19 pandemic, several states have issued executive orders permitting licensed notaries to perform RON without any additional licensing requirements and sometimes without specialized technology requirements. One state that made a lot of news doing this is New York.[26] The American Land Title Association ("ALTA") has published a list of states that have issued executive orders related to RON.[27]

If one or more people involved in your closing are going to execute documents while in a state that does not have a RON law and is subject to an executive order, a prudent practitioner will determine in advance whether anyone is planning to sign any documents requiring notarization and whether they plan to use RON. The practitioner should also contact any lender whose mortgage may be remotely notarized and any title insurer or title agent that will be involved in issuing a policy in connection with the transaction to determine whether the use of RON in an executive order state is acceptable.

Conclusion

RON can be an important addition to your real estate practice, not just during the COVID-19 pandemic, but well into the future. As with any technology tool, it is important to understand how it works and what the possible pitfalls are.

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Fortunately, a lot of good information is available. A lot of false information is circulating as well, so be sure to stick to trusted sources and keep the lines of communication open between all parties involved.

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Endnotes

1 Fla. Exec. Order No. 20-91 (Apr. 1, 2019).

2 https://floridadisaster.org/globalassets/governor-essential-services.pdf (last visited April 4, 2020).

3 https://www.nar.realtor/open-house-guidance-during-covid-19 (last visited March 30, 2020).

4 Fannie Mae Lender Letter LL-2020-04, issued Mar. 23, 2020, and updated Mar. 31, 2020, *see* https://singlefamily.fanniemae.com/media/22321/display (last visited Apr. 4, 2020).

5 Ch. 2019-71, Laws of Fla. (2019).

6 Fla. Stat. §§ 117.201 – 117.305 (2019).

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16 Fla. Stat. § 117.265(4) (2019).

17 *Fannie Mae Selling Guide*, 88-89 (Apr. 1, 2020); Freddie Mace Single-Family Seller/Servicer Guide, https://guide.freddiemac.com/app/guide/section/1401.16 (last visited Apr. 5, 2020).

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20 Fla. Stat. § 117.275 (2019).

21 S. 3533, 116th Cong. (2nd Sess. 2020).

22 Sec. 4, S. 3533, 116th Cong. (2nd Sess. 2020).

23 *Id.*

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25 https://www.congress.gov/bill/116th-congress/senate-bill/3533/all-actions?q={%22search%22:[%22S.+3533+Notarization%22]}&r=1&overview=-closed&s=1&KWICView=false (last visited Apr. 6, 2020).

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How Best to Handle Client Meetings, Document Signings, Hearings, Depositions, and Mediations in the Outbreak Environment

By Daniel L. McDermott, Esq., Adrian Philip Thomas, P.A., Fort Lauderdale, Florida, and Alexander P. Gil, Esq., J.D., L.L.M of Alexander Gil, PLLC

The start of 2020 has brought much change to all of our lives as the COVID-19 pandemic has grown and spread exponentially. In many communities around the state of Florida, the concept of attorneys working remotely from their homes became an unexpected reality, and did so nearly overnight, as leaders at all levels of our state government began requiring the closure of non-essential businesses in an effort to "flatten the curve" of the COVID-19 pandemic. Consequently, many Section members are struggling, both from the perspective of knowing what exactly is permitted and allowed in this dynamic environment that seems to bring new rules and regulations with each passing day, as well as from the perspective of knowing what their law firms need in order to quickly get up and running so that the attorneys and their support staff can work remotely from home while continuing to provide their clients with critically important legal services.

On April 1, 2020, Governor Ron DeSantis issued the statewide Safer at Home Executive Order 20-91 (the "Safer at Home Order"), which allows only "essential activities and services" and (as amended) supersedes any conflicting official action or order issued by local officials in response to COVID-19. Examples of essential activities listed in the Safer at Home Order include attending religious services, taking care of pets and caring for a loved one or friend. Before the issuance of the Safer at Home Order, the Executive Committee of The Florida Bar Board of Governors took the position that law firms are essential businesses, either entirely or in limited circumstances, and requested that that any state, city and county protective pandemic protocols include a statement that law firms are essential businesses. While Governor Ron DeSantis's statewide Safer at Home Executive Order 20-91 refers to essential services and activities, specifics were not provided regarding whether the provision of legal services would be considered one of those essential services or activities.

After signing his Safer at Home Order, Governor DeSantis said he had received questions about the meaning of essential activities under same. In response, the Governor has indicated that it is "less important what you do, than how you do it," before going on to say that the goal is to avoid close contact with people outside your home to reduce the transmission rate. Consequently, and notwithstanding any of the best practices or other tips that are discussed herein, practitioners and other readers of this article are cautioned to carefully and frequently review relevant orders and other legal authority in order to determine whether their respective practices and work meet the mandates of the Safer at Home Order and any other rules, regulations, or orders impacting their respective communities.

This article is in no way intended to address whether and/or to what extent the provision of legal services constitute "essential activities and services" or whether attorneys and their support staff should work remotely.[1] Rather, the purpose of this

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article is to explore potential[2] best practices for members on the "death side" of the RPPTL Section, who focus on probate, trust, guardianship, estate planning, and/or advanced directives, whether for estate planning and/or transactional clients (i.e., the "Planners") or probate/guardianship/trust administration and/or litigation matters (the "Litigators").

Due to the widely varying concerns, implications, and considerations faced by Planners and Litigators as a result of the Coronavirus/COVID-19 pandemic, this article is broken down into three sections. The first and second sections examine potential best practices for the Planners and the Litigators, respectively. The third section is intended to be more generally applicable and contains links to government information and other official sources of information, articles, helpful videos, and other resources that Section members may find useful during this challenging period.

The Planners: Estate Planning Perspective

This section focuses on how to conduct estate planning document signings, meeting all of the statutory formalities, and staying safe in the process during the COVID-19 Pandemic. This process is particularly difficult in Florida, where no emergency order or statute waives the requirement of *physical presence*. Given the state of affairs with coronavirus, attorneys throughout our state face the difficult question of how to conduct execution ceremonies of estate planning documents and advanced directives while simultaneously meeting the state required formalities, complying with the Safer at Home Order and other orders impacting their practices, and keeping themselves, their clients, and their support staff safe by maintaining proper social distancing. Many people are now worried about their safety and the safety of their loved ones and are looking to have their estate plan put together in the event something were to happen to them during this pandemic. As attorneys, we want to help, but we also want to ensure we do it as safely as possible, without exposing ourselves, our support staff, or our clients to too much risk.

In the state of Florida, *physical presence* "means being in the same physical location as another person and close enough to see, hear, communicate with, and exchange credentials with that person."[3] Although the state of Florida passed House Bill 409 to allow remote online notarization, (1) the ability to utilize remote online notarization for testamentary and other estate planning documents does not commence until July 1, 2020, and (2) nothing has been passed to allow individuals to witness a document execution without being physically present. Furthermore, as of the date of drafting this article, no emergency order has been issued relaxing these formalities. This means that in order to execute testamentary documents individuals are required to be in the vicinity of the signor and the two witnesses (and the notary for Durable Power of Attorney).[4]

Administrative Order No. AOSC20-16 allows for witnessing and notarizing without being *physically present*; however, this only applies to administering oaths for depositions and legal testimony, not for wills and trusts.

Whereas in other jurisdictions you may be able to get away with video/Skype/Zoom/etc. signings, the state of Florida requires *physical presence* which includes being in the "same physical location as another person and close enough to see, hear, communicate with, and exchange credentials with that person." So, where does that leave us? Below are two different options that are being tossed around.

Drive Up Signings

One way of getting documents executed and meeting all required formalities would be by essentially conducting a Drive

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Herb Given and Yoshi Smith

Up Signing. The idea behind the "Drive Up Signing" would be for the individual executing the documents to be very familiar with the contents of the documents. Therefore, the client should have reviewed the documents thoroughly and asked any questions (telephonically or through email) prior to driving to execute them.

Additional preparation is required. You will not have the luxury of taking your client(s) through the documents page by page and directing them where to sign. Instead you should have a detailed instructional breakdown laying out on which pages each person (testator, witnesses, notary[5]) needs to sign for each document. In addition, have each signature page and line clearly marked for signature. If you have the ability, mark them with colored sticky strips to indicate who signs where. The instructional breakdown should include a key designating a color to each particular signor. For example:

Testator = Blue Tab

Trustee = Yellow Tab

Witness 1 = Green Tab

Witness 2 = Red Tab

Notary = Purple Tab

Bring enough pens for each individual to have his or her own pen. I recently purchased a bulk pack of blue Bic pens for this purpose. The point is to reduce exposure to items touched by others. The client(s) (along with their witnesses) can then drive to your office parking lot. If the witnesses and client(s) are not already quarantining together, they should have the witnesses bring their own separate car(s) to the Drive Up Signing. Ideally all parties are wearing masks[6] and gloves. Have everyone roll down the windows so they are within earshot and can see each other signing, yet maintain a safe distance. Have each party sign the documents and then notarize each document as well. This Drive Up Signing concept only works if you yourself are a notary, have a staff member that is a notary, or the client brings a notary. Wait to notarize the documents after witnessing each party sign where he or she needs to sign. Then, after notarizing take pictures with your cellphone of each executed page for the client's file. After all the documents are signed, they should be placed in a sleeve for the client(s) to take home for safekeeping. After the pandemic clears up, you should have your client make copies of all of the executed documents and either bring them to the office or mail them in so they can be kept in the firm records. As provided in fn 2, the only document required to be notarized is the durable power of attorney; however, if a notary is already present, the notary should continue to notarize the remaining documents.

This concept could work for home-bound clients as well. Assuming they can have witnesses meet at the house, you could drive to their house in order to have the documents signed. This would be the same concept as above; however, it would be done in the client's parking lot or driveway. Avoid going into the home if at all possible. If the individual is bedridden (and has capacity), contemplate doing the signing outside of the client's bedroom window with the window open.

This concept could also work if your client is at a health care facility that is not completely closed off to visitors. It may take more planning and precautions, but if that is the case, perhaps a window signing, courtyard signing, or open-door signing may be conducted.

The benefit of this concept is that you can rest assured that the formalities are met and can still take enough precautions to avoid further spreading of the virus.

Mailing Documents

As an alternative to drive-up execution ceremonies, you can mail the documents to the client with explicit instructions on how to conduct the signing ceremony. The onus is then on the client to follow the instructions explicitly to follow the formalities required under Florida law. This only works if the client(s) know a notary or feel comfortable driving to an open UPS store or bank. It is my understanding, as of the time of drafting this article, that some banks have remained open or at least allow members to make an appointment to come in.

In a perfect world (during this pandemic), Florida would issue an emergency order allowing signing ceremonies to occur over Zoom meetings. However, that has not happened, and people, particularly now, would like to get their estate plans put together.

The Litigators: A Whole New Normal

The rapid spread of coronavirus throughout Florida communities and the ensuing COVID-19 pandemic has crippled courts across the state as judges, attorneys, and litigants try to achieve and administer justice under the laws of our state, while also balancing public safety concerns amid a pandemic, the likes of which this generation has simply never faced. In fact, as of April 3, 2020, four states have mandated the use of virtual hearings and nineteen states, including Florida, have issued orders to use them whenever possible and suspended administrative rules that might have prohibited their use. Consequently, and regardless of whether the provision of legal services constitutes one of the essential services or activities authorized by the Safer At Home Order, it is clear that the Litigators reading this article have been or will be impacted by the closure of courthouses, as well as facilities used for depositions, mediations, and other legal proceedings.

This section focuses on the new normal faced by attorneys who handle uncontested probate and guardianship administrations and probate, trust, and/or guardianship litigation and includes potential best practices, tips, and other practical tools for the Litigators to use while unable to physically attend the hearings, mediations, and depositions that are the lifeblood of many of our practices.

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In-Person Hearings, Depositions, and Mediations

On March 24, 2020, the Supreme Court of Florida issued an Administrative Order Regarding Covid-19 Emergency Measures in the Florida State Courts (Order AOSC20-17), which addresses the closures of courthouses and suspensions of dockets and calendars. This Order combined and extended temporary measures previously implemented in prior administrative orders, and also implemented "additional temporary measures essential to the administration of justice in Florida during the COVID-19 pandemic."[7] More specifically, and as pertinent to RPPTL Litigators, the Supreme Court ordered as follows:

(1) Extended the order suspending all jury proceedings, jury selection proceedings, and civil and criminal jury trials;[8]

(2) Extended the order that all circuit and county courts shall continue to perform essential court proceedings, which includes, as pertinent hereto, hearings on petitions for temporary injunctions related to safety of an individual, hearings on petitions for the appointment of an emergency temporary guardian, and hearings to determine whether an individual should be involuntarily committed Baker Act or the Marchman Act;[9]

(3) Extended the mandate that "no proceedings or other court events other than essential proceedings and proceedings critical to the state of emergency or the public health emergency shall be conducted through in-person hearings;"[10] and

(4) Directed the chief judge of each judicial circuit to cancel or postpone court proceedings other than essential and critical proceedings unless the chief judge determines that other proceedings and events can be effectively conducted remotely without the necessity of in-person court appearances.[11]

The foregoing were extended from previous administrative orders through April 17, 2020, or as provided by subsequent order. On April 6, 2020, the Supreme Court issued Administrative Order AOSC20-23, which "extends, refines, and strengthens previously enacted temporary remedial measures," and shall remain in effect until the close of business on May 29, 2020.[12]

Despite the foregoing general restrictions and prohibitions, the foregoing Order AOSC20-17 also expressly stated that it was not intended to limit the chief judge's authority to conduct business or approve additional court proceedings or events that are required in the interest of justice, so long as risks to the health of the individuals and the public health are minimized, and concluded, "the constitutional right of access to the courts by the public must be considered by the presiding judge in all cases." In other words, while proceedings other than the limited category proscribed by the Florida Supreme Court may not be conducted through in-person hearings, and the chief judges of each judicial circuit were directed to cancel or postpone court proceedings other than essential and critical proceedings, the Court left a carve-out for local courts to conduct hearings if "the chief judge determines that other proceedings and events can be effectively conducted remotely without the necessity of in-person court appearances."

In addition to extending the previously implemented social-distancing measures through May, Administrative Order AOSC20-23 also includes what are referred to as Guiding Principles. These Guiding Principles strengthen the dictates of the prior administrative orders and, again, makes clear, that the order is not intended to limit the "chief judge's authority to conduct business or to approve additional court proceedings or events…that are required in the interest of justice, if doing so is consistent with protecting the health of the participants and the public health." These Guiding Principles appear to strike a balance between the need to "maintain judicial workflow to the maximum extent feasible," while also "protecting the health of the participants and the public health."[13] The first principle states, "[t]he presiding judge in all cases must consider… the public's constitutional right of access to the courts," and the second directs chief judges in each circuit "to take all necessary steps to facilitate conducting proceedings with the use of technology" in order to maintain judicial workflow to the maximum extent feasible. However, the fourth principle goes on to make it abundantly clear that "Judges and court personnel who can effectively conduct court and judicial branch business from a remote location shall do so."

In furtherance of the foregoing discretion for chief judges to allow proceedings without the necessity of in-person court hearings, the Supreme Court of Florida also issued Administrative Order AOSC20-16 (March 18, 2020), which (1) permits Court Reporters to remotely swear in a witness via audio video communication equipment, and (2) suspends all "rules of procedure, court orders, and opinions applicable to remote testimony, depositions, and other legal testimony. . . that can be read to limit or prohibit the use of audio-video communications equipment to administer oaths remotely."[14] In light of the foregoing, the Litigators in the Section and their clients, subject to the discretion of the chief judge of their circuit, may be able to remotely conduct proceedings that are neither essential nor critical, albeit remotely and without the necessity of in-person court appearances.

Technology to Enable Remote Hearings, Depositions, and Mediations

Even before the Coronavirus and COVID-19 pandemic, remote conferencing systems, such as LifeSize, and video-conferencing technology providers such as GoToMeeting, Zoom, Skype, and FaceTime were already being utilized with increasing frequency for virtual meetings and to conduct depositions and mediations. Now, with attorneys and law firms being forced to shift to remote operations, coupled

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with the foregoing relaxed rules regulating the use of audio-video communications equipment for court proceedings, virtual meeting technologies like those identified above can be valued tools for the Litigators who are trying to continue representing their clients and operating their law firms during these challenging times.

In addition to providing the ability to communicate through the use of audio and/or audio-visual equipment, many of these companies also offer features that are specifically designed for use by attorneys. For example, Zoom allows restricted access to a meeting by making use of the Waiting Room feature. When the Waiting Room feature is used, the individual "participants" who are seeking to join the meeting will be "parked" in a Waiting Room until the meeting "host" admits them. This feature allows judges, arbitrators, mediators, or any other designated "host" to decide who can enter the meeting and when. Similarly, Zoom meetings can also be set up to make use of virtual breakout rooms, a feature particularly useful for conducting mediations. When this feature is used, participants can be assigned to breakout rooms for caucuses, either in advance or as needed, by the mediator or other host after opening remarks and statements are made.

As an example of a Florida circuit that has allowed the use of audio-video conferencing technology to conduct proceedings without the necessity of in-person court hearings, the Seventeenth Judicial Circuit has provided its judges the ability to stream and host court proceedings via Zoom in order to facilitate court activities. In doing so, the Seventeenth Judicial Circuit's Office of Court Administration also advises users new to Zoom to watch a number of instructional videos before getting started with Zoom, which are set forth in the section below. Similarly, the Seventeenth Judicial Circuit's Office of Court Administration has also provided the following list of "Tips for Successful Hearings":

- Dress in a soft solid color (like a black robe for judges). If a tie is worn, use a solid tie rather than one with a pattern.
- When speaking, remember to look directly at the webcam, not at the screen.
- Position the camera at your eye level or slightly above eye level.
- Be mindful of what is behind you, choose a solid neutral wall if possible.
- Check the lighting. Light from a window behind you might blind the camera, making you look dark. Light above you in the center of a room might also cast shadows. Ideally, position a lamp, or sit facing a window, where light is directly on your face. Also be aware that your monitor casts light that can make you look blue.

Moreover, the following are some practical tips from practitioners and various service providers of video-conferencing technology that can be used when conducting depositions, mediations, and/or remote hearings:

Don't use a speaker phone! Using speaker will make it hard for the court and other participants to hear you due to background noise, problems with rustling, and white noise.

To ensure clarity, participants should use microphones and headphones, if possible, and, try to conduct proceedings in a room with good acoustics.

If the acoustics are less than desirable and no other locations are available, try using fabric (such as rugs, drapes or pillows) to absorb the sound.

Check your lighting and background of your makeshift home teleconference facility. Have a good light source in front of you to light your face; avoid light behind you, which will darken your face.

Do everything possible to prepare beforehand and try to make sure the participants are properly set up with hardware, software and internet. If possible, make sure to have IT support on hand during the proceeding to handle any technical issues that may arise.

Make sure participants are fully and appropriately prepared, just as if he or she were to appear in court. This includes preparing participants insofar as listening to the court, maintaining professionalism and courtesy, being mindful of their appearance on camera, and being mindful about appropriate attire for witnesses/parties, as well as their body language, grooming, facial expressions, eye contact, and not speaking over anyone else!

Be patient with witnesses, patient with court staff, and patient with the bench. Remember, we are all in this together, and all of the actors in a judicial proceeding are dealing with their own concerns, whether child-care related, health related, finance related, or perhaps just dealing with the "new normal" that we all find ourselves navigating.

Close any non-essential applications during the proceeding as webcams generally use a great deal of your CPU.

Have your materials ready and know the rules! While you should try to have a copy of your hearing file, legal authority, and other documents, you also should be mindful of the requirements for making use of these at your remote proceedings. You need not only to have usable official documents and legal authority, many courts have implemented requirements for how to present, exchange, and make use of exhibits, demonstratives, and/or legal authority. Make sure that the way you plan to present is one that is approved for use in your particular proceeding and locality— in this new normal long gone are the days were you can prepare the night before and show up with just anything and hope to make use of it in court.

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Test your settings before your proceeding to ensure that your proceeding goes off without interruption caused by otherwise avoidable technical issues.

Have a reliable phone with a full battery and a good signal and, when possible, try to use a landline to avoid the risk of having your call dropped mid-hearing.

In the section below are links to several other helpful pieces of information on the use of audio or audio-visual technology to conduct your legal proceedings. Moreover, the service provider of audio, audio-visual, and/or video-conferencing technology that you ultimately use may have additional resources available online or through your representative that you may find helpful to review before using the technology for the first time. Finally, some providers even have special pricing or waived fees in light of the COVID-19 pandemic,[15] so do your research and ask questions when deciding what solution is best for your practice and your clients.

Where to Find the Answers: Helpful Links

President Franklin D. Roosevelt famously opined that "there are as many opinions as there are experts." While the COVID-19 pandemic may be different in many ways from the difficult times that FDR guided our country through during World War II, this maxim is perhaps even more true today than it was nearly three-quarters of a century ago.

Reliable information is critical when dealing with a public health emergency. It is vitally important to get your information from verifiable, reliable official sources, such as the Centers for Disease Control, the Florida Department of Health, the Florida Bar, and the Supreme Court of Florida.

This article and what follows is not intended to provide a comprehensive overview of all available resources or court-specific information; rather, the authors have endeavored to provide a non-exclusive list of potential best practices, tips, and other resources to help practitioners navigate these challenging times and locate the ever-changing rules, regulations, administrative orders, and/or executive orders that have been implemented in response to the COVID-19 pandemic. The following link will re-direct you to a COVID-19 landing page that the authors have set up with a custom-curated collection of links to official information and other resources that these authors found helpful:

https://www.florida-probate-lawyer.com/probate/covid-19-legal-resources/

It goes without saying that this Coronavirus/COVID-19 pandemic is having an enormous impact on everyone globally. Everyone is adapting and attempting to situate themselves to continue operating their respective businesses in this new normal. That being said, as things change, the above procedures and information may become obsolete, so please be sure to check official sources for the most up-to-date information possible. This virus will come to an end, but your legal practice doesn't have to while we all navigate these challenges. It is the hope of this article's authors that this article becomes irrelevant and unnecessary as soon as possible. In the meantime, stay safe, and we hope these resources help!



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Endnotes

1 The Florida Bar website provides the following caution: "We stress that the absolute best course to take at this time is to work remotely using electronic communications and to avoid in-person contact as directed. When that isn't possible, you should follow the health and safety guidelines issued by national state and local health officials (posted on our COVID-19 webpage) concerning proper hygiene, social distancing, and other recommended protocols."

2 The authors use the word "potential" as this crisis is novel to everyone involved and quite dynamic. The best practices may evolve and/or change altogether, depending on future legislative changes or emergency orders.

3 Fla. Stat. § 117.201(11).

4 *See* Fla Stat. §736.0403(2)(b); *see also* Fla. Stat. §732.502.

5 If you would like to limit exposure of the notary, do not notarize any documents that do not strictly require it. The only document that requires it is a durable power of attorney. Fla. Stat. §709.2015(2).

6 Although earlier articles and news from the CDC indicated that healthy individuals should not wear masks, there seems to be a change in guidelines, wherein everyone should be wearing a mask outside whether showing symptoms or not. However, given the shortage of medical masks such as the N95 masks, nonmedical masks are recommended. Mr. Gil ordered a set of cloth, reusable (machine washable) masks from Amazon.

7 *See* Administrative Order AOSC20-17 (March 24, 2020), at pages 1-2.

8 *Id.*, at page 2; *see also* AOSC20-13 (March 13, 2020), at page 2.

9 *Id.*, at page 2.; *see also* AOSC20-15 (March 17, 2020), at page 3.

10 *Id.*, at page 2.; *see also* AOSC20-15 (March 17, 2020), at pages 3-4.

11 *Id.*, at page 2.

12 This date will remain in effect "unless a different end date is indicated herein or as provided by subsequent order."

13 *See* Administrative Order AOSC20-23 (April 6, 2020), at pages 2-3, s. I.

14 *See* Administrative Order AOSC20-16 (March 18, 2020), at paragraphs 1-3.

15 For example, Empire Legal Reporting will be waiving our Video Conference fees until June 1, 2020 when you order a court reporter for a deposition or other legal proceeding.

Retirement Account Relief Under The CARES Act

By Alfred J. Stashis, Jr. and Denise B. Cazobon,
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Signed into law on March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") provides much needed relief for individuals and businesses impacted by the COVID-19 pandemic. This article addresses the IRA and retirement plan related provisions of the act.

Waiver of Required Minimum Distributions for 2020. The CARES Act waives retirement plan required minimum distributions (RMDs) for 2020. This is true both for clients over age 72 who are withdrawing from their own accounts and for clients who benefit from inherited IRAs.[2]

The act also waives the 2020 RMD for account owners who reached age 70-1/2 in 2019. But for the act, those individuals would have needed to take their first RMD on or before their required beginning date of April 1, 2020. Those individuals who did not take that first RMD in 2019 will have their procrastination rewarded, in that both their first RMD (for 2019) and their second RMD (for 2020) are now waived.[3, 4]

Clients benefitting from inherited IRAs which are subject to the 5-year rule, because, for example, the IRA was left to the decedent's estate, can disregard calendar year 2020 for purposes of determining the 5-year period. Essentially this turns the 5-year withdrawal period into a 6-year withdrawal period.[5]

Certain taxpayers may have already taken their 2020 RMDs and may now wish to undo those withdrawals. Further guidance will be required from the IRS, but for original account owners, it may be possible to recontribute the withdrawn funds as an eligible rollover distribution within 60 days of withdrawal. Such individuals must not have made a rollover within 12 months prior to receiving the withdrawn funds. The IRS may further relax or extend the 60-day and 12-month rules, including potentially to allow beneficiaries of inherited IRAs (who would not otherwise qualify to recontribute) an opportunity to unwind their 2020 inherited IRA withdrawals.

Relaxation of Penalties for Coronavirus-related Distributions. Generally, account owners under age 59-1/2 are subject to a 10% penalty for taking early distributions from their IRAs or retirement plans. This is in addition to any individual income tax which applies. The CARES Act relaxes that rule and allows individuals to withdraw up to $100,000 from their IRAs or retirement plans without penalty for "coronavirus-related distributions" (CRDs).[6]

A CRD is a distribution made during 2020 to an individual who is diagnosed with COVID-19 or to someone whose spouse or dependent is diagnosed with COVID-19. A CRD can also be made to someone who experiences adverse financial consequences in 2020 as a result of: being quarantined; being furloughed or laid off, having work hours reduced by an employer; being unable to work due to lack of child care; closing or reducing hours of a business owned or operated by the account owner; or other factors determined by the Secretary of the Treasury.[7]

The income resulting from a CRD can be recognized all in 2020 or ratably over three years, at the taxpayer's option.[8] The taxpayer also has the ability to recontribute the amount withdrawn over a three-year period (rather than the typical 60-day period) beginning in 2020 in order to avoid payment of the required income tax.[9]

Each taxpayer will self-certify that he or she qualifies to receive a CRD. There is no responsibility for the plan administrator to independently verify that a plan participant qualifies to receive a CRD.

Expansion of Ability to Borrow against Retirement Plans. The CARES Act also permits greater borrowing from retirement plans (other than from IRAs, which do not permit loans).[10] For loans made within 180 days of March 27, 2020 (the CARES Act enactment date), account owners may now borrow up to 100% of the account, but not more than $100,000. Previously the limit on borrowing was up to 50% of the account, but not more than $50,000.[11]

In addition, outstanding retirement plan loan payments due between March 27, 2020 and December 31, 2020 can now be delayed for one year.[12]

IRA Contribution Deadline Extended. Beyond the relief provided under the CARES Act, IRS Notice 2020-18 postpones the due date for filing 2019 federal income tax returns until

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July 15, 2020. The result is that the deadline for making 2019 IRA contributions is likewise extended.

Planning Opportunities for High Net Worth Clients. While the focus of the CARES Act is to provide broad-based relief to those individuals most hurt by COVID-19 and the resulting economic impact, the recent stock market declines present potential planning opportunities for our high net worth clients.

Individuals with sizable retirement accounts may wish to take their 2020 RMD anyway (and maybe even more than what would have been their 2020 RMD) and to pay the resulting income tax at currently low prevailing tax rates, particularly if 2020 is otherwise expected to be a lower-than-normal income year. The benefit of this approach is that the taxpayer is withdrawing those assets from the taxable account at lower asset values, which triggers less income tax. Thereafter the client has the chance to re-deploy the withdrawn assets into more tax-favorable investments outside of the IRA. Note that while this strategy may be optimal from a tax-planning perspective, it is less so for asset protection purposes.

A perhaps more favorable planning option for many high net worth clients will be the Roth IRA conversion. Here, the strategy is to convert all or part of the traditional IRA account to a Roth IRA while the account values are depressed. So doing will likewise trigger less income tax. Note that Roth conversions may be of particular benefit to those clients who will likely have taxable estates, because the tax base subject to federal estate tax will be eroded somewhat due to payment of the income tax upon the conversion to Roth. Clients with sizable retirement accounts which will be subject to the new SECURE Act 10-year distribution rule at death may also find the Roth conversion advantageous, especially those for whom accumulation trust planning plays an important role.



The government's response to the COVID-19 pandemic changes day-by-day. Further clarifying rulings and changes can be expected from the IRS and Treasury. In the meantime, we, as advisors, would do well to keep abreast of these developments to best assist our clients.



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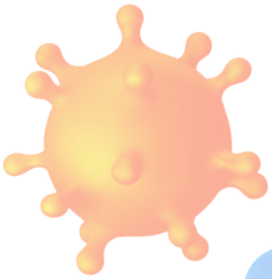

Endnotes

1 The provisions enacted under the CARES Act apply to defined contribution plans under IRC §§ 401(a), 403(a) or 403(b), some deferred compensation plans under § 457, and individual retirement plans.

2 IRC § 401(a)(9)(I)(i).

3 IRC § 401(a)(9)(I)(ii).

4 For all other purposes, such as determining whether the account owner died before or after his or her required beginning date, April 1, 2020 remains their required beginning date. IRC § 401(a)(9)(I)(iii)(I).

5 IRC § 401(a)(9)(I)(iii)(II).

6 P.L. 116-136, § 2202(a)(1) and (2).

7 P.L. 116-136, § 2202(a)(4)(A).

8 P.L. 116-136, § 2202(a)(5).

9 P.L. 116-136, § 2202(a)(3).

10 P.L. 116-136, § 2202(b). For the definition of a "qualified individual," see P.L. 116-136, § 2202(a)(4)(A)(ii).

11 P.L. 116-136, § 2202(b)(1).

12 P.L. 116-136, § 2202(b)(2).

Learning From The Pandemic For Disaster Preparation

(Such As For The 2020 Hurricane Season)

By Brian C. Sparks, Esq., Gunster, Tampa, Florida

We already have been through a lot with the COVID-19 pandemic and more unknown challenges are certain to come. Some people have had it worse than others and have suffered greatly in terms of health, economics, and otherwise. They deserve our compassion and help, and it is heartening to see the many efforts underway on their behalf.

After major incidents, first responder agencies (*e.g.*, law enforcement, fire/rescue, and emergency medical services) typically debrief their personnel involved to

1. help the first responders deal with the trauma they may have suffered,

2. assess what went right and wrong during the incident, and

3. learn lessons to be applied during the next incident.

Our own COVID-19 pandemic experience to date presents us with the same important opportunity for us to do the same at this interim point because the effects of the pandemic are ongoing and will continue for years to come. It also is not the last disaster we will face. Recent predictions for the Atlantic hurricane season that starts on June 1st are that hurricane activity will be 140% of the average season.[1] To help readers facilitate their own pandemic briefing, this article presents selected observations about the pandemic and responses to it to date, and factors for individuals to consider for themselves in their own preparedness activities.

I have prepared this article based on my primary community service activity experiences over the last fifteen years, which have been as a volunteer wilderness emergency medical technician and disaster preparedness and response worker during hurricanes, floods, tornadoes, motor vehicle and boating accidents, and other large and small disasters. For a more detailed discussion of personal preparedness and references to comprehensive preparedness resources, please see my prior article on this topic.[2]

In a recent video, an actor portrayed herself as of now, talking to herself back in January 2020. The January 2020 version celebrated her good job, her social relationships, upcoming international vacation travel plans, booming economy, and so on, while predicting that the then-raging Australian wildfires would be the biggest news story of 2020. The present version of the actor chuckled at the earlier version's recitation of life as it was not so long ago. As to the prediction that the Australian wildfires would be 2020's biggest news story, the present version said "not even close." The January 2020 version understandably was befuddled at what possibly could happen in a few short months to change so many things. Now we know: a highly contagious disease that spread quickly worldwide with a still mounting death toll.[3]

That fictional time-travel video can serve as a useful model for our own self-assessment debriefing of our preparedness and response to the pandemic.

On the professional front, consider the state of various legal practice areas back in January 2020: real estate and corporate deals flourished in the strong economy; government, labor, employee benefits, and health care law practices were active, but generally not overwhelmed; litigation practices generally were strong and active; and estate planners were helping their clients plan with their generally increasing wealth, while warning them that the fall election results might accelerate tax law changes otherwise built into the law not to become effective until 2025. Since then, many real estate and corporate deals have collapsed; government, labor, employee benefits, and health care law practices have experienced huge demands; litigation in many cases has stalled as courts have closed but for emergency matters; and estate planners have been addressing the pandemic's effect on clients' health and estate planning circumstances, while also wrestling with Florida's "in the presence" document execution requirements in a highly contagious environment.

A few of the many other things that have changed in our practice lives are that back in January 2020 we generally commuted to and from work each day at offices in commercial buildings rather than working remotely at home. We had face-to-face meetings at our offices while now we generally communicate through online videos or teleconferences. In my estate planning practice, I have conducted document signings with clients who have pandemic risk comorbidities "in the presence of" witnesses and notaries by observing each other separated by glass patio doors while wearing personal protective equipment ("PPE") and then quarantining the documents for the recommended fourteen day period.

On the personal front, back in January 2020 we regularly had face-to-face social interactions with our families, coworkers, and friends in our homes, in our offices, at restaurants, and at other places. We went to retail stores without any special planning. We walked both ways down the aisles in grocery stores. We exercised at fitness centers. We had medical procedures some pandemic restrictions have prohibited as nonessential. Our children went to their schools and had

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their own face-to-face social and athletic interactions with their families and friends. We traveled freely domestically and internationally through a variety of transportation means without curtailment or prohibition by government imposed pandemic restrictions.

Predictably, as the pandemic unfolded, many people engaged in what behavioral economists and psychologists rightly label "panic buying," whether rushing to buy those items made sense or not. The list of panic bought goods includes N95 respiratory masks (the category of which many of us were unaware of beforehand); hand sanitizer; toilet paper (even though the disease generally has not been gastrointestinal in nature requiring more than normal usage); bleach; disinfecting wipes; paper towels; milk; eggs; bread; fresh and processed meat, poultry, and fish; canned soup; pasta; frozen pizza; flour; and yeast (overnight we became a nation of bakers). Nonetheless, fresh produce generally remained abundantly available. Home delivery supplier Amazon suddenly became overwhelmed with orders and stopped (or at least delayed) delivery of items it characterized as nonessential and restricted sale of certain medical supplies to healthcare facilities.

As we Floridians have come to expect with hurricanes, unscrupulous people attempted to buy up inventories of high demand items and resell them at highly inflated prices, notwithstanding anti-gouging law prohibitions. We also were reminded that high demand items have to be secured, lest thieves steal them.

Thankfully, unlike with a hurricane, so far during this pandemic, public utilities still have functioned; gas stations still have gas; banks still have cash (despite heavy ATM withdrawals); bottled water, plywood, batteries, ice, peanut butter, and snack foods are still readily available; and the Internet has continued to work, albeit at times slowly.

We also know from our Florida hurricane experiences, and now from the pandemic, that people will flee disaster areas to less or unaffected areas and those refugees will not always be welcomed in their relocations. With massive outbreaks of infection, many Louisianians, New Yorkers, and other northeasterners understandably fled to Florida, leading our governor to impose fourteen day self-isolation requirements on them.

Through media, a prominent educational institution (Johns Hopkins University), and government agencies, the pandemic also led to the unprecedented, but peculiar spectacle of data of infection spread, hospitalizations, and deaths being displayed, seemingly in real time, for public consumption like a box score in a macabre sporting event. These real-time lagging yet regularly updated displays of questionable accuracy heightened public anxieties.[4] [5]

Some disasters come on slowly, such as rising global waters from temperature increases. Slowly evolving disasters present humans with opportunities to prepare over long periods of time to ameliorate the disasters' effects, whether people marshal the societal and political will to do so or not. More commonly though, disasters, like this pandemic, come on relatively quickly and overwhelm our ability to deal with them in real-time.

Professional emergency managers also broadly characterize disasters as either low impact, high frequency events or as high impact, low frequency events. Examples of the foregoing are a gas leak at a single residence, a two vehicle accident, and a single victim drowning. Examples of the latter are of course this pandemic, hurricanes, major terrorist attacks like on 9/11, and the 2018 California wildfires.

This pandemic at first appeared to develop slowly around the world. In near term hindsight, epidemiological officials' alarms were not heeded as they should have been and then, seemingly suddenly, our lives changed forever over the April 4th – 5th weekend. Many law firms and other businesses that had not already required personnel to work remotely, suddenly did so. Many elected government officials who had downplayed the risks up until then and had encouraged citizens to go about their normal lives, -interacting with others, attending sporting

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events, weddings, and continuing public transportation use, suddenly rang alarm bells. Many ordered shutdowns of schools, newly labelled nonessential businesses, and other activities involving personal contact. Healthcare facilities lamented their lack of readiness to handle anticipated dramatic increases in patients with a serious and highly-contagious disease and feared being overwhelmed. Many were seriously frightened.

As we have seen repeatedly, governments generally cannot be relied upon to provide adequate assistance to the populace immediately after the onset of a crisis that affects a large number of people over a large area. Governments oftentimes simply do not have the resources available to provide that critically needed immediate assistance. As with the pandemic, government and private resources quickly can be overwhelmed in an emergent disaster. That notoriously happened in the wake of Hurricane Katrina's strike on the upper Gulf coast. Nonetheless, good governments with sufficient financial resources available eventually catch up and make headway in disasters toward containment and recovery.

Additionally, when governments act in a disaster, at least initially, the tools they often employ are heavy-handed measures designed to control the populace through fear of arrest, fines, and public humiliation.[6789]

Can blame for this pandemic's inadequate preparedness be put solely on government, thereby exculpating ourselves? Could anyone have anticipated all of the extreme changes we have experienced? Many governments indeed have developed pandemic response strategies and protocols. For example, the United States government's pandemic influence response strategy initially was developed over a decade ago and most recently was revised in 2017. It is a document publicly available online. [10] Of course, most of us thought we had no specific need to contemplate a pandemic, any more than the myriad other disasters that could befall us, like an major earthquake, a world impacting volcanic eruption, an electromagnetic pulse ("EMP," whether naturally caused or manmade), a nuclear incident (whether accidental or purposeful), etc. The details and scopes of the various disasters that could befall us are well beyond normal citizenry interests, abilities to comprehend, and, for the most part, specific usefulness in preparedness.

Still, governments appropriately have been criticized for inadequacies in their anticipation of and preparation for the pandemic's devastating consequences and their responses. At least in Western democracies, fear of the ballot box ultimately compels (or at least should compel) governments to follow the demands of their citizens. In that light, before the pandemic, how many of us demanded better government preparations for pandemics and other disasters? How many of us hereafter will do so?

Whatever part of inadequate pandemic preparedness responsibility rests with governments, we are reminded that governments alone cannot be relied upon to solve all of the problems a disaster creates. Individual preparedness is also critical.

At this writing, the recently popularized objective to "flatten the curve" (a term previously only used regularly by epidemiologists) of the pandemic's demands on our healthcare system seem to have been successful to a greater or lesser degree throughout the country. While hospital systems in some areas of massive infection were overwhelmed for a while, even in some of those areas, officials are releasing ventilators and other essential equipment and supplies to other areas whose curve peaks are projected to be later. Whether flattening the curve, coupled with measured reopening of society, in the future will be judged to have been successful, remains to be seen.

Despite all of the negative consequences and implications of this pandemic, we as the American people can be very proud of how we have handled the overwhelming circumstances involuntarily thrust upon us. We have adhered to the U.S. Marine Corps' slogan to "improvise, adapt, and overcome" likely in many cases without even realizing it. Many of us have *improvised* to maintain our legal practices to continue to serve our clients while working remotely with perhaps minimal or even no visits to our offices for in-person staff assistance, files, copying, scanning, mailing, and other office resources we previously considered to be essential. Faced with continuing shortages of N95 masks, in a timeless American "do it ourselves" fashion, countless people have *improvised* by home manufacturing cloth masks for donation to persons who need them. We have learned that "just in time" grocery and other store inventory practices have resulted in inadequate availability of essential goods so we have *adapted* by maintaining more extensive inventories in our homes. Through those and many other activities, we have *overcome* many of the short-term effects of the pandemic on our lives, but more challenges remain in helping our society to recover.

The foregoing indicate that it is short-sighted and inadequate to prepare just for the ongoing pandemic, or even the next one. Instead, we need to prepare broadly and comprehensively for a range of potential disasters, whether a respiratory pandemic like COVID-19 currently thought to spread by person-to-person contact, a hurricane, or something else. For example, consider clean water, which is essential to human existence. What will we do if it is determined, as there have been some limited and, as of this writing, unproven allegations, that COVID-19 spreads through municipal sanitary water service? Since clean, sanitary water is fundamental to human existence, if we fear that it is compromised, we likely will scramble (and rightly so) to buy up supplies of bottled water, water filters, and disinfectants such as iodine and bleach. Certainly it would be better to maintain some of these items as part of our preparedness. It could come in helpful for a hurricane too.

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With modern meteorology, hurricane strikes in Florida usually are predicted days and even weeks out from landfall. Nonetheless, even with that much advance notice, many people do not adequately prepare (or their even good preparations can be destroyed or become inaccessible by the storm). Why is it that so many people do not prepare adequately for hurricanes? The information about what to do and how to prepare is readily available from credible sources. So, why do people routinely overwhelm stores for bottled water, nonperishable foods, and plywood as a hurricane approaches? It is not just new Florida residents who are occupying the long lines at those times.

What motivates or fails to motivate individual preparedness is beyond the scope of this article, but two professors at The Wharton School of the University of Pennsylvania who are codirectors of the Wharton Risk Management and Decision Processes Center have published an excellent, nontechnical, and surprisingly short book that helps us answer that question. It is highly recommended reading in connection with personal preparedness planning.[11]

Should we prepare for the next potential pandemic like we have prepared for the present one? General preparation seems prudent, but overly narrowly preparation may be ineffective if the next pandemic has markedly different features. For example, while COVID-19 generally manifests as a respiratory illness leading to breathing problems like pneumonia, the next pandemic could be gastrointestinal leading to abdominal cramps and diarrhea with a rapid loss of life-sustaining bodily fluids and electrolytes. Broad comprehensive preparation is the best course of action.

Reliance on the Internet is riskier than many people appreciate. During the pandemic, the Internet rapidly disseminated information about the virus and government, business, educational, societal and other reactions. Not all of that information has been valid, and yet people's understandable fears have driven readership (*see e.g.*, fake virus assessment methods, treatments, and cures commonly circulated by well-meaning people).

Many workers have been able to successfully transition to working remotely from home because of Internet access. What if the next disaster broadly disables the Internet with no near term prospect for a restart? What will people do then? Will it be enough then to say "I can't work?" Even with a functioning Internet, will it continue to have the capacity to handle the increased traffic resulting from so many working remotely and others accessing online entertainment from home during the daytime?[12]

At the onset of the pandemic, many Americans were outside the United States in foreign countries or on cruise ships when international travel was substantially curtailed, international borders were closed, and the pandemic hit their locations. Many were left stranded. Some of them



B. SPARKS

even were required to be isolated or even quarantined by government order, whether infected or not. Weeks into the pandemic thousands of Americans anxious to return home were unable to do so. What if they only took enough life-maintaining prescription medicines, money, and other essential items with them for the planned duration of their trip, suddenly lengthened indefinitely?

The lessons to be learned from the COVID-19 pandemic will take years to identify, analyze, critique, and implement. What is clear is the fundamental truth about personal preparedness: it is a personal responsibility of all of us to engage in it to the best of our abilities and resources and to do it well. No less than our lives, the lives of those we care most about, and the lives of everyone else are at stake.

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Endnotes

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2 https://www.floridabar.org/the-florida-bar-journal/what-would-you-do-today-if-you-knew-a-hurricane-was-going-to-hit-your-home-or-practice-tomorrow/.

3 I relate to this pandemic from a peculiar family perspective. I never met my paternal grandmother, because she died in 1920 of the 1918 Spanish Flu pandemic in the then-remote Alaska fishing town of Ketchikan (now a major stop on Alaskan Inside Passage cruises - - until recently). She was otherwise healthy and in her early twenties, two of the prime attributes of fatal victims of that disease. Back then, diseases took a while to circle the globe, unlike with today's constant and rapid international travel (at least until recently). The 1918 Spanish Flu is estimated to have killed upwards of 675,000 Americans and killed 50 to 100 million people worldwide. As tragic as the COVID-19 pandemic has been to date, so far, thankfully, and hopefully as it continues to unfold, its mortality has not come close to those numbers even in a world that has close to four times the 1918 population.

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POLITICAL ROUNDUP

Outlining Changes From The 2020 Regular Legislative Session and Predicting How COVID-19 Will Likely Result In An Upcoming Special Session

By H. French Brown, IV, Esq., Dean Mead, Tallahassee, Florida

The 2020 Regular Session

On March 19th, the Legislature completed its work during the 2020 Regular Session by approving a $93.2B budget for the upcoming state fiscal year beginning July 1st. Ultimately, lawmakers had to extend the sixty-day Regular Session by an additional six days in order to wait the constitutionally mandated 72-hour cooling off period to vote on the budget.

Every Session is unique. This year was no different. As the final weeks of the legislative session were winding down, the severity of the COVID-19 crisis was becoming clear. Just two days before the legislators came back to Tallahassee to approve the budget, Governor Ron DeSantis was closing bars and nightclubs and limiting access to restaurants and beaches. Since March 19th, much more has changed.

At the conclusion of the 2020 Regular Session, only 201 bills were approved by the Legislature out of the 3,518 bills initially filed for consideration. Similar to the 2019 Regular Session, this was a near-record low number of bills approved. Even before COVID-19, this was no surprise as Legislative sessions during election years are traditionally more tranquil as lawmakers usually want to get back to campaigning in their respective districts. However, COVID-19 could require the Legislature to return to Tallahassee before, or after, the November elections.

Most of the Legislature's $93.2B upcoming spending plan was written before COVID-19, but due to the anticipated crisis, some spending provisions were dialed back in the final days. Highlights in the budget include: $500 million in new spending to boost the minimum pay for new teachers and merit-based bonuses for veteran educators; 3% pay raises for all state workers; $100 million to preserve Florida Forever, the state's land conservation program; and fully funding the affordable housing programs at $370 million, which was the first time the programs were fully funded since 2006. Ultimately, Lawmakers put an additional $300 million into reserves in the new budget to brace for the effects of COVID-19, and they initially appropriated $25 million as requested by the Governor in the current state fiscal year to combat the crisis.

Additionally, the annual legislative tax cut package, House Bill 7097, was significantly reduced in the final hours of the session, stripping any recurring revenue reductions, in order to responsibly account for impacts associated with the ongoing public health emergency caused by COVID-19. The tax cut package did include the annual back-to-school and hurricane preparedness sales tax holidays in August and June, respectively. The bill also contains many tax administration changes that would not impact state revenues.

The Legislature also passed a number of policy bills related to water, hemp, employee eligibility, and healthcare that will have significant impacts on the State. Senate Bill 712 contains comprehensive water policy changes relating to water quality improvements, septic systems, basin management action plans, stormwater management, sanitary sewer overflows, and wastewater project grants. The bill transfers regulation of the septic tank program from the Department of Health to the Department of Environmental Protection ("DEP") and directs DEP to develop rules to address water quality issues associated with septic tanks. It directs DEP and the water management districts to update stormwater rules to increase nutrient removal. The bill significantly expands planning and reporting requirements for Basin Management Action Plans and requires the development of wastewater plans and septic tank remediation plans by local governments under specified circumstances. It establishes a wastewater grant and directs DEP to adopt rules for the land application of biosolids. The bill increases the amount of administrative penalties that may be imposed by DEP for permit violations and requires DEP to conduct a study on the bottled water industry in Florida.

At the beginning of the Session, Governor DeSantis requested a bill to require businesses to use the federal E-Verify program to check the immigrations status of workers in the state. The Legislature obliged by approving Senate Bill 664, which requires private businesses to use either the E-Verify system or keep a three-year record of documents used by applicants when filling out federal I-9 forms. The bill requires a

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party to a public contract to terminate the contract if it believes in good faith that another party is employing an unauthorized alien or is not registered with and using E-Verify. To enforce the eligibility-verification requirements for private employers, the bill requires an employer to provide an employee's eligibility-verification documents to any of several government agencies upon request. These agencies, in turn, must request the federal government to check the employee's work-eligibility status. Employers and contractors have until January 1, 2021 to begin verifying employment eligibility as required in the bill.

Following the passage of the 2018 federal farm bill, states were authorized to create industrial hemp programs. In 2019, the Florida Legislature passed a broader law that allowed the Department of Agriculture and Consumer Services to create such a hemp program. However, a number of issues quickly came to light during the implementation of the program. In 2020, the Legislature clarified a number of the sticking points for producers and retailers by modifying the definition of hemp extracts, clarifying the labeling and packaging of hemp products, and prohibiting the sale of products to persons under 21 years of age. These necessary refinements to the state hemp program were designed to allow these new businesses to grow and flourish in Florida.

Multiple bills related to the scope of medical practice, which were a priority of House Speaker Jose R. Oliva, passed. House Bill 607 allows qualified nurse practitioners to independently operate primary care practices without an attending doctor's supervision. Advanced nurse practitioners with at least 3,000 hours of experience under the supervision of a physician could qualify to provide services including family medicine, general pediatrics and general internal medicine under the new law. House Bill 389 would allow qualified pharmacists who enter into agreements with doctors to treat chronic conditions like asthma, arthritis and obesity, as well as test for and treat ailments like the flu, strep throat, lice and skin conditions like ringworm and athlete's foot. Both of these bills were quickly sent to Governor DeSantis after passage. Both bills were immediately signed into law. These were just a couple of the handful of bills sent to the Governor before the COVID-19 crisis exploded.

As provided above, 201 general bills were approved during the 2020 Regular Session. However, at the time of writing this article, only nine of those bills had been sent to the Governor for review. Of those nine bills, four bills were annual administrative bills related to the adoption of and providing minor revisions to the Florida Statutes. This shows the Legislature is intentionally holding bills and recognizing the importance of allowing the Governor to fully focus on the COVID-19 emergency response at this time. Legally, there are no time restrictions on when the Legislature can send approved legislation to the Governor. Practically, the Legislature is only required to send the Governor a budget for approval before July 1.

If / When Would a COVID-19 Special Session Occur

Frankly, at the time this article was written, the breadth and depth of the COVID-19 impacts on the state's budget are uncertain. Florida's general revenue fund is the main source of discretionary funding for the state. This January, the state's economists estimated that the State would receive $36.2B in general revenue during the state's current fiscal year, which ends June 30, 2020. Of that amount, approximately $12.5B (34.5%) was expected to be received in March through June 2020.

The state's sales and use tax generates approximately eighty-five percent of general revenues. Unfortunately, the sales and use tax is also a significantly time-delayed revenue source. March sales tax data will not be reported to and audited by the Department of Revenue and then analyzed by state economists until mid-to-late May. April sales tax data will not be analyzed until mid-to-late June. This timing delay makes any budget Special Session before July 1st unlikely. If such Special Session were to occur, it would be based on speculative or partial information specific to the actual COVID-19 associated revenue impacts to this state.

What appears more likely at this time would be for the state rely on its substantial reserve funds built over the prior number of years and federal stimulus funds to weather this pandemic. The state's current reserve cash balance is anticipated to be in excess of $2B. The state has other available reserves funds that could be accessed during this emergency, if necessary. Additionally, the federal CARES Act includes approximately $8.3B in funds available for state and local budget stabilization. The projected reserves and the influx of federal funding under the CARES Act should help alleviate concerns regarding significant budget cuts to the next state budget. This makes it seem most likely that a Special Session, if necessary, would occur after July 1st.

A Special Session in the late summer, fall, or just after the election would allow the economists and Legislature to more fully understand the COVID-19 impacts to state revenues and resources. It would also allow time to better understand the mechanics of and potentially start seeing the effects associated with the considerable federal recovery funds that will arrive in this state.

A Special Session occurring after July 1st would oblige Governor DeSantis to approve the Legislature's March 19th budget. However, any line-item appropriations the Governor decides to veto from the $93.2B spending plan will further buffer the state's healthy reserves.


F. BROWN

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Lawyer's Practical Guide To Available Resources For Small Businesses In Response To The Covid-19 Pandemic

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As you already know, the COVID-19 pandemic has resulted in a sharp economic downturn. The stay-at-home order has severely affected businesses that are unable to operate while the order is in effect. Businesses have lost revenue, causing businesses to make cuts or completely shut down. If approached with this dilemma by a struggling small business owner, a representing attorney may want to consider encouraging the business owner to assess all economic aid offered by the Coronavirus Aid, Relief and Economic Security Act ("CARES Act") to help the business owner retain its employees and remain in business. While many businesses and professionals appear to be focusing on the Payroll Protection Program ("PPP"), it is important to note that there are a plethora of other benefits offered by the CARES Act, which may be utilized to help your business owner clients get through this economic downturn. This edition of Practice Corner will offer general information to assist attorneys when advising small business owners of certain benefits available to them under the CARES Act during this COVID-19 economic downturn.

Some of the economic benefits offered by the CARES Act, which attorneys should explore when advising business owners are:

1. the Economic Injury Disaster Loan ("EIDL");
2. the Economic Injury Disaster Advance Loan Program;
3. the SBA Small Business Debt Relief Program; and
4. various available tax credits.

When exploring the EIDL program, it is important to note that it takes effect retroactively from January 31, 2020 and remains in effect until December 31, 2020.[1] Who is eligible? A business must have 500 or fewer employees (based on SBA size standards) and must have been in existence as of January 31, 2020.[2] Businesses that are able to participate are sole proprietorships (with or without employees), independent contractors and, in most circumstances, private nonprofits.[3] Another item to note is that a small business owner who applies for an EIDL is not automatically disqualified from a PPP loan.[4] If an EIDL is applied for, the business owner is not permitted to use any loan proceeds for the same purpose as the funds obtained from the PPP loan.[5] In other words, no double dipping. The loan program is serviced by the U.S. Small Business Administration ("SBA") and offers small businesses a working capital loan up to $2,000,000.[6] Loan proceeds may be utilized to pay expenses, including payroll and other operating expenses, that could have been paid by the business owner, under normal circumstances, if COVID-19 had never taken place.[7] A big advantage is that the loan interest rate is set at 3.75% for small businesses and 2.75% for non-profits and the SBA is offering 30-year terms to repay the loan.[8]

As an additional incentive, the EIDL program offers business owners an advance through the Economic Injury Disaster Advance Loan Program. Under this program, a business owner may be eligible to receive a $10,000 emergency advance within 3 days of applying for an EIDL.[9] The program is designed to provide economic relief to businesses currently experiencing a temporary loss of revenue due to COVID-19.[10] There are a couple of caveats that your business owner clients should be aware of: (1) if your client is also applying for the PPP program, any amounts advanced under this emergency advance would be deducted from the amount forgiven in the PPP loan;[11] and (2) duplication in the use of funds is prohibited.[12]

If your business owner client currently has an SBA loan, it should consider the Small Business Debt Relief Program. This program commenced on April 1, 2020 and is available through September 27, 2020.[13] A small business owner who currently has either an SBA 7(a) loan (not made under PPP), a 504 loan or a microloan is eligible for this debt relief program.[14] The program is further extended to small business owners who take out an SBA 7(a) loan, 504 loan or microloan before September 27, 2020.[15] The downside is that disaster SBA loans are ineligible for this program.[16] The program provides that the SBA will automatically make all of the small business owner's loan payments, including principal, interest and fees, for a period of 6 consecutive months.[17] It is important to note that a business owner is not precluded from participating in this

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program and applying for either a PPP loan, an EIDL, or any other available SBA financial assistance.[18]

Other benefits offered by the CARES Act are the various tax incentives available to business owners. A few worth noting are:

1. The Employee Retention Tax Credit;

2. the Payroll Tax and Self-Employment Tax Deferral; and

3. the Families First Corona Virus Response Act (FFCRA) Tax Credits for Emergency Sick Leave and Expanded Family Medical Leave.

The Employee Retention Tax Credit is available to private employers and nonprofits carrying on a trade or business in 2020 that either: (1) partially or fully suspended operations as a result of a governmental order limiting commerce, travel or group meetings due to COVID-19; or (2) experienced a decline in gross receipts by more than 50% in a quarter, in comparison to the same quarter in 2019.[19] It is important to note that business owners who receive a PPP loan are ineligible for this tax credit.[20] The benefit of this tax credit is that the business owner may claim a refundable payroll tax credit equal to 50% of any qualified wages, paid in a calendar quarter, to its employees.[21] The maximum overall limit of qualified wages applicable to each employee is $10,000, which means that the maximum credit available to a business owner for an employee would be $5,000.[22]

The Payroll Tax and Self-Employment Tax Deferral is generally available to all business owners; however, those who receive a PPP loan are ineligible for this deferral.[23] During the applicable wage period, a small business owner may be able to defer the payment of its required deposit for the employer portion of the FICA tax, Railroad Retirement tax, if applicable, and half of any SECA tax liability, through the end of the year.[24] The deferred tax payment would be due in 2 equal installments: the first half due by the end of 2021 and the remaining half due by the end of 2022.[25]



The FFCRA Tax Credit is available to private employers with fewer than 500 employees.[26] The benefit of this tax credit is that the business owner may claim refundable tax credits, under sections 7001 and 7003 of the FFCRA, respectively, to cover qualified leave wages paid to qualified employees for reasons related to COVID-19.[27]

In conclusion, to help your business owner clients avoid frustration during these trying times, it is important to have a general understanding of the various economic relief programs offered by the CARES Act during the COVID-19 crisis and to consider all economic aid available when working with your business owner clients to develop and implement a plan.

Endnotes

1 Cares Act, H.R. 748, 116th Cong. § 1110 (2020).

2 U.S. Small Bus. Admin., https://www.sba.gov/disaster-assistance/coronavirus-covid-19 (last visited Apr. 6, 2020).

3 U.S. Senate Comm. on Small Bus. & Entrepreneurship, The Small Bus. Owner's Guide to the CARES Act, at p. 8 (2020) (hereinafter, "CARES Act Guide"), available at: https://www.sbc.senate.gov/public/_cache/files/2/9/29fc1ae7-879a-4de0-97d5-ab0a0cb558c8/1BC9E5AB74965E686FC6EBC019EC358F.the-small-business-owner-s-guide-to-the-cares-act-final-.pdf

4 *Id*.

5 CARES Act, H.R. 748, 116th Cong. § 1102 (2020).

6 U.S. Small Bus. Admin., https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loan-emergency-advance (last visited Apr. 6, 2020).

7 CARES Act Guide, supra note 3, at p. 7.

8 U.S. Small Bus. Admin., supra note 6.

9 Cares Act, H.R. 748, 116th Cong. § 1110 (2020).

10 U.S. Small Bus. Admin., supra note 6.

11 CARES Act Guide, supra note 3, at p. 8.

12 CARES Act, H.R. 748, 116th Cong. § 1102 (2020).

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15 CARES Act Guide, supra note 3, at p. 6.

16 *Id*.

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22 Internal Revenue Service, supra note 19.

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24 *Id*.

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26 Wage and Hour Div.: U.S. Dep't of Labor, Emp. Rights, Paid Sick Leave and expanded Family and Medical Leave Under the Families First Coronavirus Response Act, at p. 1 (Mar. 2020), available at: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf .

27 Internal Revenue Service, https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs (last visited Apr. 6, 2020).

Trust Drafting Consideration: Fla. Stat. § 736.0412 Nonjudicial Modification

By Joseph M. Percopo, Esq., LL.M., Mateer Harbert, Orlando, Florida

When reviewing an existing trust or drafting a new trust, one of many important considerations is whether the trust can be modified in the future. Methods for trust modification exist at common law and in Florida statutes. At common law, an irrevocable trust generally may be terminated or modified with the consent of the settlor and all beneficiaries.[1] The Florida Statutes offer a variety of different options[2] pertaining to trust modification, reformation, and termination and such provisions "are in addition to, and not in degradation of, rights under the common law to modify, amend, terminate, or revoke trusts."[3] The primary statute for nonjudicial reformation is Fla. Stat. § 736.0412 (2019).[4]

Fla. Stat. § 736.0412 (2019) applies to irrevocable trusts and revocable trusts after the settlor's death. Such modification, which includes amending or changing the trust terms, terminating the trust in whole or in part, and directing or prohibiting trustee action,[5] is permitted only upon the unanimous agreement of all "qualified beneficiaries"[6] and the trustees.[7] However, any "beneficiary"[8] may initiate a judicial proceeding in an attempt to block a proposed modification or termination.[9]

There are two requirements to applying Fla. Stat. § 736.0412 (2019):

(1) The trust must have been created after December 31, 2000,[10] and either:

(2)(a) The trust terms expressly authorize nonjudicial modification AND it vests within the common law rule against perpetuities;[11] or

(2)(b) The trust provides that the 360 year perpetuities period is applicable.[12]

A trust opting for the 360 year perpetuities period may not prohibit this particular form of trust modification.[13]

For purposes of Fla. Stat. § 736.0412 (2019), the trust drafter must consider the applicable perpetuities period and whether this form of nonjudicial modification is desired. To permit this form of nonjudicial modification, the drafter must incorporate (1) the 360 years perpetuities period or (2) specific language expressly permitting nonjudicial modification. However, the drafter may preclude this particular form of nonjudicial modification by incorporating the common law rule against perpetuities period (as opposed to the 360 year period) and avoiding inclusion of any language which expressly permits nonjudicial modification.

One final thought - while nonjudicial modification under Fla. Stat. § 736.0412 (2019) may be prohibited by proper trust drafting, such prohibition does not universally preclude potential application of other forms of nonjudicial reformation, such as trust decanting[14] and nonjudicial settlement agreements.[15] It can, however, be evidence of intent that the Settlor did not wish for the terms of the trust to be changed. AL

Endnotes

1 A detailed analysis of common law trust reformations is beyond the scope of this article. See *Peck v. Peck*, 133 So.3d 587 (Fla. 2d DCA 2014)(citing to *Preston v. City National Bank of Miami*, 294 So.2d 11 (Fla. 3d DCA 1974)("Florida common law requires the trial court to allow modification or termination of a trust if the settlor and all beneficiaries consent, even if the trust is irrevocable and even if the trust's purposes have not been accomplished").

2 Options include forms of nonjudicial settlement agreements, judicial modification, nonjudicial modification, and trustee decanting. See Fla. Stat. §§ 736.0111 and 736.04113 - 736.0417 (2019).

3 Fla. Stat. §736.0412(6) (2019); See also Fla. Stat. §§ 736.04113(4), 736.04114(6), and 736.04115(5) (2019).

4 The predecessor to Fla. Stat. § 736.0412 (2019) is Fla. Stat. § 737.4032 (2005).

5 Fla. Stat. §§ 736.0412(2) and 736.04113(2) (2019).

6 See Fla. Stat. § 736.0103(16) (2019) (qualified beneficiary includes (1) permissible distributees of trust income or principal, (2) someone who would be a distributee or permissible distribute of trust income or principal if the interests of the distributees described in (1) above terminated without causing the trust to terminate, and (3) someone who would be a distributee or permissible distributee if the trust terminated in accordance with its terms on that date).

7 Note that consideration of the Settlor's intent is not required for purposes of this type of modification/termination.

8 This differs from a "qualified beneficiary" and provides for larger class of individuals to potential object. The term beneficiary is defined in Fla. Stat. § 736.0103(4) (2019) and includes any "person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee."

9 Fla. Stat. § 736.0410 (2019).

10 For revocable trusts, the date the trust is considered created is the date the right of revocation terminates (usually at the death of a Settlor). See Fla. Stat. § 736.0412(5) (2019).

11 Fla. Stat. § 689.225(2) (2019) (interest must vest or terminate (a) no later than 21 years after the death of an individual then alive or (b) within 90 years after its creation).

12 Fla. Stat. § 689.225(2)(f) (2019).

13 Fla. Stat. § 736.0105(2)(k) (2019).

14 Fla. Stat. § 736.07117 (2019).

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State And Local Tax Case Summaries

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

City lost its opportunity to contest a property tax assessment by attempting to intervene in a separate case rather than follow the procedures of Fla. Stat. § 194.171 (2019).

Merrick Park, LLC v. Garcia, Nos. 3D18-2090 & 3D18-1393 (Fla. 3d DCA 2019)

Tenant owned a commercial property improvement on the City's land. Both parties challenged the property appraiser's assessments, and VAB reduced both assessments. The property appraiser filed a complaint to contest the VAB reductions of the property improvements, but not the underlying land. The Tenant filed a counterclaim seeking additional reduction of the assessment on the property improvements. The City also filed a counterclaim for an additional reduction of the underlying land. However, the City had not been named a party-defendant in the property appraiser's lawsuit against the Tenant and also had not initially filed a motion to join or intervene.

The intervention of the City in the case was challenged by the property appraiser, which prevailed in the lower court. The Third District Court of Appeal addressed the trial court's denial of the City's motion to intervene in the case. During the appeal, the City raised three arguments in support of its position: (1) its motion to intervene was timely; (2) the City was not a stranger to the property appraiser or to the Tenant; and (3) if intervention was not granted, the City would not be able to pursue its land action which would cost the City hundreds of thousands of dollars in property tax.

Acknowledging that an affirmation of the trial court's orders on appeal would result in neither party being able to assert an additional challenge to the tax assessment, the Third District Court of Appeal found the law to be clear. Specifically, Fla. Stat. § 194.171 (2019), provides:

> No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the value adjustment board if a petition contesting the assessment had not received final action by the value adjustment board prior to extension of the roll under s. 197.323.

The City filing a counterclaim in a case in which it was not a party did not satisfy the statutory requirements. Therefore, the Third District Court of Appeal affirmed the trial court's orders denying the City's intervention in the case.

Statute improperly limited class of persons eligible for veteran spouse's exemption.

Dep't of Rev. v. Bell, Case No. 2D18-3134 (Fla 2d DCA 2020)

Taxpayer, a widow of a member of the United States Army who was killed in action in Iraq in March 2007, applied for a property tax exemption under article VII, section 6(f)(1), of the Florida Constitution. Her application for the tax exemption was denied by the Hillsborough Country Property Appraiser because the Taxpayer's husband was not a Florida resident as of January 1, 2007, the year he was killed in action. The January 1requirement is imposed by Fla. Stat. § 196.081(4) (2020).

The Third District Court of Appeal evaluated whether the statutory language requiring permanent residency by the deceased spouse on January 1 of the year of the veteran's death was consistent with the constitution. Article VII, section 6(f)(1), of the Florida Constitution provides that, to receive the benefit, the following must be established: (1) the applicant is a surviving spouse; (2) the applicant's deceased spouse was a member of the United States Armed Forces; and (3) the decedent spouse died from service-connected causes while on active duty as a member of the United States Armed Forces.

The Third District Court of Appeal held that the constitutional provision did not limit the property tax benefit to a surviving spouse whose veteran spouse was a Florida resident on January 1 of the year of the veteran's death. Therefore, Fla. Stat. § 196.081(4) (2020) was an invalid and unenforceable limitation on the class of persons eligible for the benefit provided by the constitution.

Airbnb and similar transient rental platforms are not liable for tourist development tax.

Gannon v. Airbnb, Inc., Case No. 4D19-541 (Fla. 4th DCA 2020).

The Fourth District Court of Appeal addressed whether Airbnb, Inc., Airbnb Payments, Inc., Homeaway.com, HomeAway, Inc., and TripAdvisor, LLC, were required to collect and remit the tourist development tax to the county tax collector as dealers. Summary judgment was issued in favor of the companies, which was affirmed by the Fourth District Court of Appeal.

The companies entered into agreements under which

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they collected and remitted funds from customers to owners of transient rentals. The Tax Collector filed a complaint for declaratory relief, seeking a declaratory judgment that the companies were required to register as dealers, collect, and remit tourist development tax. Posed with the question of whether the owners of the transient rentals or the companies were required to collect and remit tourist development tax, the trial court found that "dealers are limited to those engaged in the business of renting, not the business of servicing those in the business of renting." As a result, summary judgment was entered in favor of the companies.

Comparing the companies to the online travel companies in the *Alachua*[1] case, the Fourth District Court of Appeal found that the companies did not own, possess, or have a leasehold interest to convey in any of the properties listed on their online platforms. Furthermore, the court rejected the Tax Collector's argument that the companies were dealers because they received consideration on the owners' behalf. Consequently, the court affirmed the summary judgment from the trial court, holding in favor of the companies.

Landowner did not qualify for a reduction in a property's appraised market value because the property was not a qualifying residence.

Broward Cnty. v. Font, Case No. 4D19-150 (Fla. 4th DCA 2020)

Landowner brought an action against Broward County alleging a breach of a settlement agreement between the county and city over an airport expansion, which included a program allowing certain homeowners to obtain a reduction in certain properties' appraised market values. In addition, the Landowner sought a declaration that it was entitled to participate in the program.

The program is limited to owners of single-family homes, condominium units, townhomes, and 2-unit residences located within the applicable area who purchased their residences before the effective date of the agreement. Broward County rejected the Landowner's request for inclusion because it was not the owner of a qualifying residence. Specifically, the Landowner had purchased property in 2013 from a seller who was in the process of rebuilding. After purchasing the property, the Landowner continued rebuilding the home. According to the property appraiser, thirteen days after the effective date of the program, only the "beginnings of a foundation and construction" were on the site.

The trial court denied the Landowner's claim of breach of the settlement agreement but granted summary judgment in favor of the Landowner on the declaratory judgment claim. However, the Fourth District Court of Appeal reversed the summary judgment ruling in favor of the Landowner, finding that the agreement specifically required the purchase of a "residence" prior to its signing. The court found that the Landowner did not qualify for the reduction in market value and reversed and remanded the case for entry of summary judgment in favor of the County.

Endnotes

1 *Alachua Cty. v. Expedia, Inc.*, 175 So. 3d 730 (Fla. 2015).



Probate And Trust Case Summaries

Prepared by Antonio P. Romano, Esq.,
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A guardian who is also a child of a Ward is not entitled to compensation for merely doing what any child does; however, a guardian is entitled to compensation for services that would reasonably have been performed by a professional or other non-family member guardian necessary to discharge a guardian's duty to the Ward, to the extent those services were actually performed and properly documented.

Jones v. Guardianship of Jones, 45 Fla. L. Weekly D360 (Fla. 5th DCA Feb. 14, 2020)

Penelope Jones, as guardian for her father, sought compensation from the Court. The Court denied her Petition, the sole basis being that the guardian had "an obligation to provide such services for the ward without compensation due to the father/daughter familial relationship between the Ward and the guardian."

The guardian appealed. The Fifth District Court of Appeal (the "Fifth DCA") reversed and remanded to the trial court. The Fifth DCA reasoned that where, as in the instant case, there is a close familial relationship between the guardian and the Ward, the guardian is not entitled to compensation for "merely doing what any family member would do for their relative under the circumstances."[1] However, a guardian in a close familial relationship with the Ward is entitled to compensation for reasonable and necessary services performed "within the scope of his or her duties as a guardian."[2]

The Fifth DCA indicated that, on remand, the trial court should determine services performed by the guardian that would reasonably be performed by a professional or other non-family member guardian necessary to discharge a guardian's duty to the Ward, and that the guardian would be entitled to compensation for to the extent those services were actually performed and properly documented.[3] However, the Fifth DCA also reiterated that the guardian would not be entitled to compensation for services "that would not generally be undertaken by a professional or other non-family member guardian, i.e., 'for merely doing what any daughter does.'"[4]

Mother, as next of kin, had due process right to meaningfully participate in evidentiary hearing on the petition to appoint a successor guardian, as the plain language of the statutes defining "next of kin" and entitling the next of kin to notice of the hearing on the appointment of a guardian does not exclude the next of kin's right to meaningful participation at the hearing, even if they cannot be appointed to act as the guardian.

Carter v. Bromberg, 5D19-401, 2020 WL 1073187 (Fla. 5th DCA Mar. 6, 2020)

In November 2016, the court appointed Bonnie Carter ("Carter") to be the plenary guardian of her incapacitated son following the resignation of her ex-husband as their son's guardian. Approximately one year later, the Department of Children and Families ("DCF") filed a separate petition under Fla. Stat. Ch. 415 (2017), for the entry of an order authorizing protective services to protect the Ward from "abuse, neglect, or exploitation," as defined in Fla. Stat. §415.102, while under Carter's care. Following an evidentiary hearing, the trial court entered an order authorizing DCF to provide the protective services, including changing the residence of the Ward. The court entered an order that "suspended" any guardianship orders, and in a separate order in the guardianship case, "suspended" the Letters of Guardianship issued to Carter for a period of "sixty (60) days or until further order of the court."

Several months later, DCF and the Ward's court-appointed counsel filed a "joint motion to intervene" in the guardianship proceedings, seeking the issuance of an order disqualifying Carter from serving as the Ward's guardian under Fla. Stat. §744.309(3). This subsection lists, in pertinent part, certain persons who are disqualified from being appointed to act as guardian, including any person who has been judicially determined to have committed abuse, abandonment, or neglect against a child as defined in Fla. Stat. §39.01 or Fla. Stat. §984.03(1), (2), and (37).

In December 2018, a professional guardian petitioned to be appointed successor plenary guardian of the Ward. Carter also moved to reinstate her Letters of Guardianship. The trial court held an evidentiary hearing on the professional guardian's petition to be the Ward's successor plenary guardian. Carter was present, but the trial court did not permit her to participate. There was no order entered at that point on the joint motion to disqualify Carter from acting as guardian or otherwise removing her as plenary guardian.

The trial court granted the petition and entered an order appointing the professional guardian to be the Ward's successor plenary guardian of the person and property. Shortly thereafter, the court, without a hearing, entered a separate order denying Carter's motion for reinstatement of her Letters of Guardianship. The court found in this order

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that (1) Carter was not an "interested person," (2) she had failed to demonstrate a change in circumstances from the time her Letters of Guardianship were suspended to justify reinstatement, and (3) a professional guardian had just been appointed.

Carter appealed. The Fifth District Court of Appeal (the "Fifth DCA") reversed and remanded to the trial court. The Fifth DCA reasoned, in pertinent part, that pursuant to Fla. Stat. §744.3371(1) (2018), reasonable notice of the hearing must be served on next of kin. The term "next of kin" is defined as "those persons who would be heirs at law of the ward or alleged incapacitated person if the person were deceased and includes the lineal descendants of the ward or the alleged incapacitated person,"[5] which Carter is considered. Reasonable notice in this circumstance included the right to participate at the hearing.[6] "[W]here a person has both standing and notice, a right to due process is triggered to insure that participation is meaningful."[7] Accordingly, Carter was entitled to meaningfully participate at the hearing to appoint her son's successor guardian, which would have included not only her right to testify, but also to call witnesses, cross-examine witnesses, and make argument to the court, and the denial of this right constituted fundamental error.[8]

The Fifth DCA also indicated that DCF's argument that Carter was disqualified, and thus the trial court committed no error was misplaced, as (1) no court order was entered disqualifying Carter, and (2) assuming that Carter is, in fact, statutorily disqualified to act as guardian, the plain language of the statutes defining "next of kin" and entitling the next of kin to notice of the hearing on the appointment of a guardian does not exclude the next of kin's right to meaningful participation at the hearing if they do not seek to be appointed as the plenary guardian or, as alleged in this case, cannot be appointed to act as the guardian.

While Fla. Stat. §733.106(4) (2018) allows probate courts to direct the payment of attorney's fees out of a beneficiary's portion of an estate, it does not permit probate courts to impose personal liability for the estate's attorney's fees and costs. Additionally, the personal representative was not entitled to a charging lien under these circumstances, as he merely administered the estate and produced no tangible return for the estate or the personal representative.

Lopez v. Hernandez, 45 Fla. L. Weekly D471 (Fla. 5th DCA Feb. 28, 2020)

Angel Ruben Lopez Hernandez ("Ruben") and Angel Raul Lopez Hernandez ("Raul") both challenged a probate court order addressing attorney's fees and costs sought by Julius Williams ("Williams"). Williams served as Ruben's attorney when Ruben was the estate's personal representative. The order awarded Williams fees and costs, and it imposed a charging lien on Ruben's portion of the estate. It divided responsibility for the attorney's fees between the estate and Ruben, personally, concluding that Ruben directed Williams to engage in frivolous litigation on the estate's behalf.

The Fifth District Court of Appeal (the "Fifth DCA") reversed in pertinent part, however, because the probate code does not allow for the personal imposition of attorney's fees and Williams is not entitled to a charging lien. The Fifth DCA reasoned that while Fla. Stat. §733.106(4) (2018) allows probate courts to direct the payment of attorney's fees out of a beneficiary's portion of an estate, it does not permit probate courts to impose personal liability for the estate's attorney's fees and costs. Accordingly, the probate court could not direct Ruben to pay the estate's attorney's fees himself.

As to Williams's contention that he was entitled to a charging lien, the Fifth DCA indicated that Williams was not entitled to a charging lien because "[t]he personal representative ... received no fund or positive judgment or settlement out of [his] efforts." He merely administered the estate and produced no tangible return for the estate or the personal representative.

Strict compliance with statutory requirements is a prerequisite for the valid creation or revocation of a will, and Florida courts refuse to recognize holographic wills that are not executed in strict compliance with Florida's testamentary statutes, even if the will is valid under the laws of the state or country of execution.

Sacha Zaidman & Patricia Zaidman v. Natchaya Zaidman, 3D19-0966, 2020 WL 1696316 (Fla. 3d DCA Apr. 8, 2020)

The wife, Natchaya Zaidman ("Wife"), and the children, son Sacha Zaidman and daughter Patricia Zaidman (collectively, the "Children"), of the decedent, respectively, filed competing wills of the decedent, René J.A. Zaidman.

The first will, filed by Wife, was executed in Miami-Dade County on March 28, 2012, with the requisite formalities for self-authentication under the Florida Probate Code, as well as under Fla. Stat. §732.502(1) (2019) (the "Florida Will").

The second will, filed by Children, was handwritten, dated May 17, 2015, and deposited with a Rabbi in Antwerp, Belgium (the "Belgium Will"). The Belgium Will purported to revoke all previous wills, stated that it was only to be revealed to Children after the decedent's death, and provided that any dispute regarding it was to be resolved in the Orthodox Rabbinical Tribunal in Antwerp rather than in a secular court.

The petition for administration filed by Wife in Miami alleged under oath that the decedent and Wife were residents of a single-family home in Aventura, Florida, and that the decedent was domiciled in Miami-Dade County. Children, themselves residents of Belgium and Israel, filed a counter-petition (and, later, an amended counter-petition) contending that the

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Belgium Will controlled and accordingly revoked the Florida Will. Following an adversary hearing, the trial court granted the Wife's motion to strike the Children's amended counter-petition with prejudice. The court concluded that, as a matter of law, the earlier Florida Will controlled and had not been revoked by the later Belgium Will.

Children appealed. The Third District Court of Appeal ("Third DCA") affirmed. The Third DCA reasoned that in Florida, a will must be signed at the end by the testator and in the presence of two witnesses who witness the execution (or an acknowledgement by the testator) in the presence of each other.[9] These statutory formalities apply to foreign wills, as section 732.502(2) provides:

> Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where the will was executed. A will in the testator's handwriting that has been executed in accordance with subsection (1) shall not be considered a holographic will.

Thus, under Fla. Stat. §732.502(2), a holographic will is a "will in the testator's handwriting" and it must comply with subsection (1) to be a valid will in this state. Florida courts refuse to recognize holographic wills that are not executed in strict compliance with Florida's testamentary statutes, even if the will is valid under the laws of the state or country of execution. Similarly, for a valid revocation of a will by writing, Fla. Stat. §732.505 (2015), provides a will (or codicil or any part of either) is revoked by writing:

> (1) By a subsequent inconsistent will or codicil, or any part of either, even though the subsequent inconsistent will or codicil does not expressly revoke all previous wills or codicils, but the revocation extends only so far as the inconsistency.
>
> (2) By a subsequent will, codicil, or other writing.

Here, the Belgium Will was handwritten by the testator in the presence of (at best) one witness. This alone makes the will invalid as a matter of law.[10] Thus, even assuming that the 2015 Belgium Will is valid in Belgium, it is still invalid in Florida for failing to comply with the statutory formalities provided in Fla. Stat §732.502(1), and accordingly could not properly revoke the Florida Will.

Endnotes

1 *In re Guardianship of Sapp*, 868 So. 2d 687, 694 (Fla. 2d DCA 2004).
2 *Id.*
3 *Id.* at 698.
4 *Id.*
5 *See* § 744.102(14), Fla. Stat. (2018).
6 *See Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 506 (Fla. 2006).
7 *Zelman v. Zelman*, 175 So. 3d 871, 878 (Fla. 4th DCA 2015).
8 *See id.; see also Pettry v. Pettry*, 706 So. 2d 107, 108 (Fla. 5th DCA 1998) ("Due process requires that a party be given the opportunity to be heard and to testify and call witnesses on his behalf, and the denial of this right is fundamental error." (citation omitted)).
9 Fla. Stat. §732.502(1)(a)-(c) (2015).
10 *See* Fla. Stat. §732.502(1) (2015).

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Real Property Case Summaries

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It was within the District Court's discretion to authorize a landowner to provide non-expert opinion testimony as to the value of land subject to condemnation because such testimony was grounded on the landowner's personal experience selling similar tracts of land.

Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County, Florida, Sunderman Groves, Inc., and Unknown Owners (if any), Case No. 18-11836 (947 F.3d 1362) (11th Cir. Jan. 22, 2020)

This case is an appeal by Sabal Trail Transmission, LLC ("Sabal") from the United States District Court for the Middle District of Florida's (the "District Court") decision: i) to allow Jan Sunderman, an owner of Sunderman Groves, to provide non-expert opinion testimony as to the value of land subject to condemnation by Sabal[1] and ii) to award attorney's fees and costs to Sunderman Groves.[2]

The condemnation action arose from Sabal's construction of an underground natural gas line to stretch from Alabama to Florida. Sabal sought to lay 1,335 feet of pipe across a 40-acre plot of land owned by Sunderman Groves, resulting in the permanent condemnation of 1.535 acres of land and a temporary easement impacting 2.386 acres of land during the construction of the pipeline.[3] Such easement would extend diagonally across a 40-acre tract.[4] While the parties agreed Sabal was entitled to condemnation under the federal Natural Gas Act,[5] the amount of compensation due to Sunderman Groves was determined by a jury trial before the District Court.[6]

Sabal and Sunderman Groves each introduced expert testimony at trial as to the value of the land taken by condemnation. Jan Sunderman also testified as to her opinion of the value of the land. Jan's testimony drew from her past experience selling other tracts of land owned by Sunderman Groves for residential development, concluding that Sabal's easement would "be 'definitely undesirable' for rural residential development…."[7] Jan Sunderman also described Sunderman Groves' plans for the specific tract of land impacted by Sabal's gas line.[8]

Jan Sunderman's testimony included both her opinion as to the value of the property and the reduced value of the property after the installation of Sabal's gas line. Sabal challenged the District Court's admission of Jan Sunderman's testimony as to the reduced value of the property after the installation of the gas line, arguing such testimony constituted speculation versus opinion which was derived from Jan Sunderman's personal knowledge.[9] The Court explained that an owner of property may generally testify as to a property's value but distinguished under what circumstances a property owner can offer an opinion as to the diminution of value. Specifically, the Court stated that where the testimony is grounded on personal knowledge, as opposed to speculation, the property owner's testimony may encompass both the property owner's opinion as to the value of the property and the potential diminution of value to the property.[10] Since Jan Sunderman's testimony was grounded on her personal knowledge from selling 25 other lots owned by Sunderman Groves to prospective residential buyers, the Court ruled the testimony was not speculative and, therefore, was admissible by the District Court.[11]

Fla. Stat. § 45.032 (2018) governs the distribution of surplus funds in a foreclosure sale, and the plain meaning of such statute requires the surplus funds to be awarded to a note holder under an agreement for deed, as the record owners of the property.

Corey v. Unknown Heirs of Neuffer, Case No. 2D19-1083 (Fla. 2d DCA March 20, 2020)

In this case, the Second District Court of Appeals (the "Court") reviewed an appeal filed by Robert and Audrey Corey ("Coreys") as the note holders under an agreement for deed between the Coreys and Mr. Neuffer (now deceased), who defaulted on his payments towards the property. The trial court granted to the heirs of Neuffer surplus funds available after the foreclosure sale, "reasoning that they held equitable title upon their father's death and, consequently, possessed the right of redemption to the property and to any surplus funds from the sale."[12] The Coreys appealed.

On appeal, the Court reviewed the application of Fla. Stat. § 45.032 (2018) to the distribution of surplus funds when an agreement for deed is used instead of a mortgage. Under Fla. Stat. § 45.032(1)(a)(2018): "The 'owner of record' is 'the person or persons who appear to be owners of the property that is the subject of the foreclosure proceeding on the date of the filing of the lis pendens[,]'"[13] and the owner of record receives the surplus in a foreclosure action.[14] The Court explained that while an agreement for deed is subject to foreclosure rules

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(including a right of redemption),[15] under an agreement for deed, title is not conveyed to the purchaser until all payments are made.[16] Fla. Stat. § 45.032 (2018) governs the distribution of surplus funds from a foreclosure sale, and the plain meaning of such language would require the owner of record, in this case the note holder under an agreement for deed, to receive the surplus regardless of the rights afforded Neuffer's heirs under Fla. Stat. § 697.01(1) (2018).[17]

The Court reversed and remanded the case with orders to disburse the surplus funds to the Coreys.[18]

A hold harmless agreement is a form of indemnification (as opposed to a prevailing party attorney's fees provision) that can be independently enforced against the indemnitor regardless of whether the party to be indemnified was a prevailing party in the action subject to indemnification.

Law v. Law, Case No. 3D18-1177 (Fla. 3d DCA March 4, 2020)

In *Law v. Law,* the Third District Court of Appeals (the "Court") reviewed the trials court's interpretation of an indemnification clause as a prevailing party attorney's fees provision contained in a mediated settlement agreement ("MSA") that became part of the final judgment of dissolution of the marriage of Ruth P. Law and Benjamin F. Law ("Final Judgment").[19] The clause at issue was:

E. Debts and Obligations: Except as set forth herein, the parties shall be solely liable for any debts and obligations in his or her sole name, *holding the other harmless*.[20]

("Paragraph E"). After entry of the Final Judgment, David and Rosemary Candler ("Candlers") sought to recover on a note held by the Candlers against Benjamin Law. Such efforts to recover on the note resulted in Ruth Law being the recipient of demand notices and a named defendant in a foreclosure action brought by the Candlers. After Ruth Law successfully obtained summary judgment in her favor in the foreclosure action, she sought indemnification from Benjamin Law under Paragraph E in the separate dissolution proceeding.[21] The motion was denied, "… the family court ruled that Paragraph '1.E.' of the MSA 'does not support an award of fees and costs to [Ruth] as the prevailing party in the [Candler litigation].'" Ruth Laws appealed arguing the trial court misidentified Paragraph E as a prevailing party attorney's fees provision.[22]

The Court reversed the trial court's decision, finding that a hold harmless agreement (*see* language emphasized in Paragraph E) is a form of indemnification, and as such, does not require a party to be a prevailing party in order to recover attorney's fees and costs. "A contract of indemnity differs from a prevailing party attorney's fees provision in one important way: the duty to indemnify is enforceable regardless of whether the indemnitee prevails."[23] After ruling that Ruth Law properly sought indemnification under the MSA from Benjamin Law in the dissolution proceeding, the Court reversed the trial court's decision and remanded the case for further proceedings. 4L

Endnotes

1 947 F.3d 1362 at 3.

2 The U.S. Court of Appeals for the 11th Circuit (the "Court") did not rule over the issue of attorney's fees and costs on appeal due to the Court's lack of jurisdiction on the matter. The Court declined to rule on such issue because a final award of attorney's fees and costs had not yet been entered by the District Court and the Court could not exercise pendant appellate jurisdiction over the attorney's fees and costs issue. *Id.* at 16-22.

3 *Id.* at 4.

4 *Id.*

5 15 U.S.C. §§ 717-717z.

6 *Id.* at 5.

7 *Id.* at 10.

8 *Id.* at 9.

9 *d.* at 14.

10 *Id.* at 14-6.

11 *Id.* at 16. ("Because Sunderman's opinion was based on her personal experience and knowledge, we conclude that the district court did not abuse its discretion in allowing her to testify.").

12 Case No. 2D19-1083 (Fla. 2d DCA March 20, 2020) at 3.

13 *Id.* at 4.

14 *Id.* at 5.

15 *Id.* at 5 ("See Kubany v. Woods, 622 So. 2d 22, 24 (Fla. 2d DCA 1993); accord Luneke, 621 So. 2d at 746 ('An agreement for deed is deemed to be a mortgage and subject to the same rules of foreclosure as a mortgage.')").

16 *Id.* at 6.

17 *Id.* at 8.

18 *Id.* at 9.

19 Law v. Law, Case No. 3D18-1177 (Fla. 3d DCA March 4, 2020) at 2.

20 *Id* at 4 (emphasis added).

21 *Id* at 7.

22 *Id.* at 8.

23 *Id.* at 9.

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What's Happening Within The Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys who practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website, including up-to-date news and articles regarding case law and legislative changes, publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses (see page 55), 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.

EXECUTIVE COUNCIL MEETING & LEGISLATIVE UPDATE

~~*JULY 23 – JULY 26, 2020*~~

NOW SCHEDULED FOR AUGUST 20-23, 2020

The Breakers • Palm Beach, Florida
Room Rate (Deluxe Room – King): $239
Premium Room Rate: $290

OUT OF STATE EXECUTIVE COUNCIL MEETING

SEPTEMBER 30 – OCTOBER 4, 2020
Four Seasons Resort • Jackson Hole, Wyoming
Standard Guest Room Rate: $395 (single/double)

EXECUTIVE COUNCIL & COMMITTEE MEETINGS

DECEMBER 3 – DECEMBER 6, 2020
Disney's Yacht Club • Orlando, Florida
Standard Guest Room Rate: $289 ($25 pp for each person over 18 years old)

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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Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

Fellows Applications

Extended until June 30th

WANT TO BE AN ACTIONLINE AUTHOR?
See RPPTL website for guidelines and deadlines on submitting articles.

Need CLE?

Check our website at RPPTL.org for a list of OnDemand products available at a discount to Section members.

COVID-19

Check out the RPPTL.org COVID-19 information page on useful practice tools during the pandemic.

REMINDER

Time to renew your Section membership. Memberships expire on 06/30/20 — check your Florida Bar Portal for the most up to date information.

JUNE 17

Audio Webcast: More Homestead Essentials

Like our **Facebook** page **@FLRPPTL** to get the most up to date Section information

Follow us on **Twitter** **@RPPTL_FL**

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