

ActionLine

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

Amendments To The Rules Of Civil Procedure: A Series

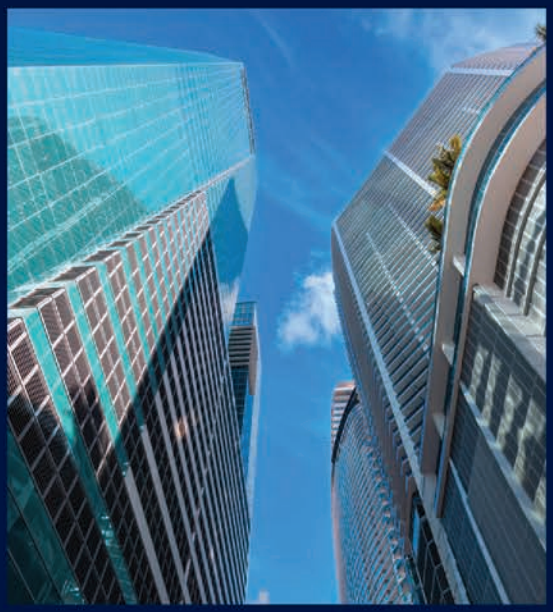
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Love And Wealth (Some Conditions May Apply)

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The Final Chapter:

STORIES THAT BIND US



By John C. Moran

As I write this final Chair's column, I find myself thinking not about endings, but about stories. Not the grand, sweeping kind that fill history books, but the small, everyday stories that quietly shape who we are, both as individuals and as a Section.

If you've seen any of my prior columns, you probably know I enjoy reading. One of my favorite books from the last few years is "Storyworthy" by Matthew Dicks. The book offers advice on how to find, craft, and tell stories. Dicks suggests that the best stories aren't reserved for the stage or the spotlight. Instead, they're the ones that make us laugh, pause, or see the world a little differently. He calls this the "dinner test." Dicks asks us to consider if our story for the boardroom is like the story you would tell a friend at dinner. According to Dicks, "this should be the goal."

Over the past year, I've tried to bring some of that spirit to these columns. I've written about the power of unreasonable hospitality, employing a magician's mindset to question perceptions and seek diverse perspectives, and trying to balance AI with the human side of our profession. Each column was, in its own way, a story: a snapshot of a lesson learned, a challenge faced, or a moment shared with all of you.

Those who've attended Executive Council meetings over the last couple of years know that members of our History Committee, including past chair David Brennan and Michael Stafford, have treated us to tales of the Section's early days: the legendary debates, the improbable victories, the personalities who shaped our path, and the antics of "Ed the Raccoon." These talks remind us that our history isn't just a list of accomplishments; it's a living, breathing collection of stories.

When I reflect on my years in the Section, it's not the formal moments or the official minutes that come to mind first. Instead, I recall stories that would pass the "dinner test" – the ones I would share with friends over a meal. I remember the respectful, spirited debate during an Executive Council meeting over a proposed comment to a rule change, where disagreement was met with genuine listening and mutual respect. I think of a night at Bern's Steak House, when dessert in the Harry Waugh Dessert Room led to a friendly wager about who could sneak the name "Harry Waugh" into a CLE presentation the next morning (for the record, I won). Lastly, who could forget the infamous holiday drone show at The Broadmoor hotel abruptly grounded by NORAD – I'll be telling this story for years to come!

As I turn the page on this chapter, I encourage each of you to think about your own story as a member of the Section. Maybe it's a hallway conversation after a tense committee meeting, laughter over late-night cocktails in the hospitality suite, or quiet encouragement offered to a new Section member. What moments have shaped you? What lessons have you learned? What stories are you still writing?

For me, the true value of this Section lies in the stories we've shared together. Thank you for being part of mine.

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

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Get Included In ***ActionLine!***

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 Erin Farrington Finlen at erin@estatelaw.com. and Michelle Hinden at Mhinden@nishadkhanlaw.com. Deadlines for all submissions are as follows:

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GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Jeremy Citron at The Florida Bar at 850-561-3155, or at jcitron@floridabar.org.

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

Letter From The Co-Editors-In-Chief



E. FINLEN



M. HINDEN

Greetings Fellow Section Members,

We have an excellent double issue for you all this time around!

These issues cover the conclusion of our esteemed, and now former Section Chair, John Moran's tenure. Thank you, John, for all of your work during the year and the excellent job that you've done in leading the Section.

In his outgoing letter, he touches on one of the great benefits of in-person Section involvement and the connections we develop with one another over the years – a sentiment this author heartily joins. We've included a ***Salute to John Moran*** on page 42 and on page 43 we feature another side of John Moran, the dapper man of style!

We also extend a warm welcome to Cary Wright as our incoming Section Chair and look forward to another successful year!

Our lineup for this issue covers a wide range of topics that we hope will be informative for everyone, including:

- ***Amendments to the Rules of Civil Procedure*** by J. Richard Caskey. This is a multi-part series that addresses changes to the new civil rules of procedure. We would like to commend the ad hoc Civil Rules Revisions Committee for all of their hard work and input over the past years.
- ***To Bulk or Not to Bulk? That is the Telecom Question*** by Derek Carrillo, which discusses bulk telecommunication agreements and multi-dwelling units.
- ***Allocation of Liability Claim Risk in Commercial Leases: Contractual Indemnity and Additional Insured Coverage*** by Robert H. Friedman, which offers valuable guidance on addressing insurance and indemnity provisions in commercial leases.
- ***Common Law Duties Owed by Financial Institutions*** by David A. Weintraub. This is an interesting topic for practitioners who regularly represent vulnerable clients.
- ***Love and Wealth (Some Conditions May Apply)*** by Robert H. Trudeau and Patrick J. Kilbane discussing tips for marital agreements when dealing with high-net worth families.
- ***What Makes You So Interested Anyway?*** by Dale Noll. This is a great foundational article about interested persons in trust and probate matters.

Lastly, dear readers, if you have certain topics that you want to see in *Actionline*, please let us know! With a Section approaching 13,0000 members we cross the gamut of death and dirt practices and are always open to topic suggestions. Additionally, we are always looking for Editors-At-Large, content contributions and sponsors so please contact us at erin@estatelaw.com or mhinden@nishadkhanlaw.com with questions.

Our next in-person meeting will be in Orlando, December 3-7 and if you are unable to join in person and want to attend the meetings, please register online and you may attend via zoom.

Sincerely,

Erin and Michelle.

Amendments To The Rules Of Civil Procedure:

A SERIES

By J. Richard Caskey, Co-Chair Ad Hoc Rules Revisions Committee,
J. Richard Caskey, P.A., Tampa, Florida

Through a series of opinions in 2024 and 2025, the Florida Supreme Court implemented (and continues to revise) a significant overhaul of the Florida Rules of Civil Procedure (the "Civil Rules"). The amendments to the Civil Rules, most of which became effective January 1, 2025, included broadly reworked case management procedures, new discovery and disclosure requirements, and ongoing adjustments to the summary judgment rule.

The Real Property, Probate and Trust Law Section has been active in the review and comment process since the inception of the Civil Rules revisions project. As part of this effort, the Section established an ad hoc Rules Revisions Committee to monitor the status of potential Rule changes and recommend comments as needed. Additionally, the Rules Revisions Committee ensures Section members have access to thorough and timely CLE programs and other informative materials regarding the changes.

This article is the first in a series exploring and summarizing the recent amendments to the Civil Rules, starting with the amended case management procedures in Rule 1.200 and the new initial discovery disclosure requirements in Rule 1.280(a). The second article in the series will address additional revisions relating to discovery, including a party's duty to supplement discovery, and the Florida Supreme Court's adoption of the federal proportionality standard. The third article will be somewhat of a "catch-all" to summarize other significant changes adopted as part of the 2024 and 2025 amendments (such as the Rules regarding meet-and-confer requirements, summary judgments, and continuances) and any subsequent amendments made before the time of publication. Last, the fourth article will analyze amendments to the Florida Rules of General Practice and Judicial Administration and their interaction with the Civil Rules.

This article addresses amended Rules 1.200 and 1.280(a), including the specific exemptions from those Rules for probate, guardianship, and trust-related cases.

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Rule 1.200 Codifies "Active Case Management"

The Florida Supreme Court explained the 2024 amendments to the Civil Rules "are intended to promote the fair and timely resolution of civil cases" and "codify active case management." [1] The overhaul of Rule 1.200 was driven in part by a desire to address perceived inefficiencies in civil litigation, such as prolonged discovery disputes and inconsistent case progression.

Amended Rule 1.200 was rewritten entirely and represents a shift in the direction toward structured judicial oversight. While the prior Civil Rules allowed judges to have discretion to issue management orders and they permitted parties to navigate discovery and pretrial motions without clear deadlines, amended Rule 1.200 mandates courts must issue case management orders and assign every civil case to one of three "tracks" based on the case's complexity, discovery needs, and other resource demands. This categorization is intended to enhance efficiency and enable consistent progression of each case.

The court commentary included in the 2024 amendment clarifies amended Rule 1.200 supersedes any contradictory local case management rules or administrative orders but does not preclude circuits from adopting local rules and administrative orders refining or supplementing it. Consequently, practitioners should review local rules and administrative orders for the circuits in which they practice to determine whether those jurisdictions adopted additional requirements after implementation of the amended Civil Rules.

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Each Case has a Track Assignment

Rule 1.200, as amended, establishes a specific framework for case management, including a requirement of assigning each case to one of three identified tracks: complex; streamlined; or general.[2] The court must make a track assignment within 120 days after an action commences and may do so either by initial case management order or by an administrative order from the chief judge of the circuit.[3] After assignment, a track may be changed on request if a party files a motion promptly after the appearance of good cause for reassignment,[4] or by the court on its own motion.[5]

The court assigns the initial track for a case based on the amount of judicial attention required (not on the monetary value of a case),[6] with the following guidelines:

Complex cases are designated as such by court order and must proceed under Rule 1.201.[7] Complex cases are anticipated to have complicated legal or case management issues[8] and likely to involve, for example, difficult or novel legal issues, many separately represented parties, large numbers of witnesses, experts, or exhibits, or a substantial amount of time needed for trial.[9] Typical examples of complex cases include class actions and multi-district litigation.

Streamlined cases reflect the parties' mutual understanding of the facts, have limited discovery needs, well-established legal issues, few expected dispositive motions, minimal documentary evidence, and require no more than three days for trial.[10] Uncontested cases and simple disputes fall into this track.

General cases are all other cases that are not streamlined or complex.[11]

Case Management Orders are Mandatory

In all cases to which the Rule applies, the court must issue a case management order establishing a projected trial period and differentiated deadlines based upon the track assignment.[12] In complex cases, Rule 1.201 (which was subjected to only minor amendments and retains substantially its prior form) continues to govern case management orders.

In streamlined and general cases, the order must specify (at a minimum) certain required deadlines listed in the Rule. Examples of required deadlines include completion of expert and fact discovery, resolution of pretrial motions, filing and service of motions for summary judgment, and completion of alternative dispute resolution.[13] Of course, courts have historically been free to issue case management orders, and nothing in the amended Civil Rules prohibits a court from setting other deadlines in addition to those required. Any deadlines set by case management order must be consistent with the time standards for the resolution of cases in Florida Rule of General Practice and Judicial Administration 2.250(a)(1)(B).[14]

Deadlines are Strictly Enforced

Deadlines in a case management order are required to be strictly enforced and may be altered only by court order.[15] Notices of unavailability expressly have no effect on such deadlines.[16] Parties are permitted to submit an agreed order to extend a deadline if the extension does not affect their abilities to comply with the other remaining deadlines in the case management order.[17] However, if extension of a particular deadline may affect a later deadline, parties must seek an amendment of the case management order (rather than move for extension of that particular deadline).[18] Motions to extend a deadline or amend a case management order must contain the specific allegations described in Rule 1.200(e)(3)(A) through (D). If a trial period stated in a case management order is still a projection, a motion to change the projected trial period may be made in accordance with Rule 1.200(e)(3).[19] However, after an actual trial period is set, parties seeking to change the trial period must file a motion for continuance of the trial compliant with Rule 1.460.[20]

Rule 1.280(a) Requires Parties to Automatically Disclose Information and Documents

Consistent with the expressed concept of actively advancing cases, new Rule 1.280(a) imposes certain automatic disclosure obligations upon all parties to a civil action at the onset of the case. Without awaiting a discovery request, each party must provide to all other parties initial disclosures with respect to four categories of information: (A) identification of and contact information for each individual likely to have discoverable information the disclosing party may use to support its case (including disclosure of the subjects of the information); (B) copies or descriptions of documents and things the disclosing party has and may use to support its case; (C) computations of damages claimed and copies of items on which the calculations are based; and (D) copies of insurance policies or agreements.[21] Unless otherwise ordered, a party must disclose the initial information required under Rule 1.280(a)(1) within 60 days after service of the complaint or joinder in the action.[22]

As stated above, initial disclosure obligations are automatic and applicable regardless of track assignment. Parties must comply with initial disclosure obligations without receipt of any discovery request or issuance of any order.

Rule 1.280(a)(1) closely tracks the similar Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure. Like the Federal Rule, Florida's version does not require initial disclosure with respect to information and items the party will not use. Notably, the individuals and documents subject to automatic disclosure are only those that may be used to support the *disclosing* party's case. The Rule does not expressly require a party to disclose individuals or documents that might support the *opposing* party's case. As a result, items a party will not use at all or

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items unfavorable to the disclosing party are not necessarily subject to the initial disclosure requirements (although as a practical matter, a party will likely have to disclose unfavorable information through further discovery, and many parties will choose to "over-disclose" information in an abundance of caution). Florida courts will likely look to federal case law interpreting Rule 26 for instruction in connection with disputes about initial disclosures.

Other Rule changes impacting initial disclosures (such as the duty to supplement and the potential for sanctions) will be addressed in Part 2 of this series of articles.

Exemptions for Probate, Guardianship, and Trust Cases

Amended Rule 1.200 applies to all civil actions, except identified actions enumerated in Rule 1.200(a)(1) through (18). The same enumerated actions are also exempt from the initial discovery disclosure requirements of Rule 1.280(a)(1). For many Section members, one of the most critical aspects of the amended Civil Rules is that among those exemptions are most cases in the context of probate, guardianship, and trust law.

It may be surprising to some practitioners, but many estate-related cases fall under the Civil Rules. While probate and guardianship cases are generally governed by the Florida Probate Rules, the Civil Rules apply to all probate and guardianship proceedings that are considered "adversary proceedings" under the Probate Rules.[23] Additionally, many of the discovery Rules, including Rule 1.280, apply in all probate and guardianship proceedings, regardless of whether they are adversarial.[24] Judicial proceedings concerning trusts are initiated by filing a complaint and are governed by the Civil Rules.[25] Likewise, cases involving exploitation of the elderly and other vulnerable adults encompass civil causes of action typically governed by the Civil Rules.

Initial drafts of Rule 1.200 included exceptions to its application, but probate, guardianship and trust-related matters were not among them. This was viewed as problematic for a number of reasons, and (in part due to comments from the Section and others) the final version of Rule 1.200 adopted by the Supreme Court included exceptions for probate, guardianship, and trust actions. The result is most probate, guardianship, and trust-related cases are exempt from the rigid case management tracks of Rule 1.200 and the initial disclosures required by Rule 1.280(a).

Specifically, Rule 1.200(a)(4) provides exemptions for "an action or proceeding initiated under chapters 731–736, 738, and 744, Florida Statutes." Those referenced exceptions include the Florida Probate Code (Chapters 731 through 735), the Florida Trust Code (Chapter 736), the Florida Uniform Principal and Income Act (Chapter 738), and the Florida Guardianship Law (Chapter 744).

Additionally, Rule 1.200(a)(17) provides exemptions for "all proceedings under chapter 415, Florida Statutes, and sections 393.12 and 825.1035, Florida Statutes." These statutory references encompass civil actions for abuse, neglect, or exploitation of a vulnerable adult (Section 415.1111), proceedings relating to appointment of a guardian advocate for a person with a developmental disability (Section 393.12), and actions for an injunction to protect against exploitation of a vulnerable adult (Section 825.1035).

A sampling of additional exceptions perhaps notable to members of the Section includes summary proceedings under Fla. Stat. § 51.011,[26] actions subject to the Florida Small Claims Rules,[27] eminent domain proceedings,[28] actions to enforce arbitration awards,[29] and actions to enforce foreign judgments[30] (among others).

Rule 1.280(a)(2) incorporates these same exceptions and expressly provides the actions listed in Rule 1.200(a) are exempt from initial disclosure requirements, unless otherwise ordered by the court.

Practitioners should note the listed actions are not exempt from application of *all* amended Civil Rules, but rather are exempted only from the requirements of Rules 1.200 and 1.280(a). As a result, cases that fit within one of the exceptions are not required to be given a "track" assignment, not subject to mandatory case management orders or deadlines, and are exempt from automatic application of the new initial discovery disclosure requirements. The practical result of the exemptions is while application of these specific Rules is not mandatory, judges might still issue orders imposing similar requirements. As a result, judges retain control and discretion to manage actions falling within the listed exceptions.

Cases will arise where a plaintiff files a complaint containing multiple causes of action, some of which are exempt and some of which do not fall into any of the enumerated exemptions. The Civil Rules do not address how such multi-count "hybrid" cases should be treated. However, this author's belief is even if only one cause of action in a complaint is exempt, the entire proceeding should be treated as exempt from mandatory application of Rules 1.200 and 1.280(a). Total exemption makes sense from a technical, legal perspective as well as a practical one.

Imposing otherwise inapplicable Rules to an exempt action would seemingly acknowledge a backdoor loophole and allow courts and parties to ignore the action's exempt status. This would thwart the intent of the Civil Rules. The Supreme Court chose to create specific exemptions for specific reasons, and those reasons do not cease to exist merely because a non-exempt action is alleged in conjunction with an exempt one. By treating the entire proceeding as exempt, the court may then evaluate management needs on a case-by-case basis

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and customize its orders accordingly. This leaves the ultimate discretion in the hands of judges to enter appropriate case management and discovery orders for lawsuits including exempt actions.

Stay Tuned for Part 2

The comprehensive amendments to the Civil Rules included many other revisions related to the discovery process. Other parts of Rule 1.280, as well as Rules 1.340 (relating to interrogatories), 1.350 (relating to production of documents and other materials), and 1.380 (relating to discovery violations and sanctions), were significantly amended. Part 2 of this series, which will appear in the next issue of ActionLine, will discuss those additional discovery-related amendments.


R. CASKEY

J. Richard Caskey ("Rich") *practices at J. Richard Caskey, P.A., in Tampa, in the areas of estate and trust litigation. As a Florida Supreme Court Certified Circuit Mediator and Appellate Mediator, Rich also focuses upon mediation of guardianship, estate, and trust disputes. Rich is a fellow of the American College of Trust and Estate Counsel ("ACTEC") and is current Co-Chair of the Section's Rules Revisions Committee. He most recently served for five years as Chair of the Section's Probate and Trust Litigation Committee. Rich attended the University of Florida and is a "Triple Gator" having earned his B.S. in Accounting, M.B.A., and J.D. degrees from UF.*

Endnotes

1 In re *Amends. to Fla. Rules of Civ. Proc.*, 386 So. 3d 497, 499 (Fla. 2024).
2 Fla. R. Civ. P. 1.200(b)(2024).
3 *Id.*
4 Fla. R. Civ. P. 1.200(c)(1) (2024).
5 Fla. R. Civ. P. 1.200(c)(2)(2024).
6 Fla. R. Civ. P. 1.200(b)(2024).
7 Fla. R. Civ. P. 1.200(b)(1)(2024).
8 Fla. R. Civ. P. 1.201(a)(1)(2012).
9 Fla. R. Civ. P. 1.201(a)(2)(A) through (H)(2012).
10 Fla. R. Civ. P. 1.200(b)(2)(2024).
11 Fla. R. Civ. P. 1.200(b)(3)(2024).
12 Fla. R. Civ. P. 1.200(d)(1) and (2)(2024).
13 See Fla. R. Civ. P. 1.200(d)(2)(A) through (I)(2024).
14 Fla. R. Civ. P. 1.200(d)(2)(2024).
15 Fla. R. Civ. P. 1.200(e)(1)(2024).
16 Fla. R. Civ. P. 1.200(f)(2024).
17 *Id.*
18 *Id.*
19 Fla. R. Civ. P. 1.200(e)(2)(2024).
20 *Id.* The amendments to Rule 1.460 will be discussed in part 3 of this series of articles.
21 Fla. R. Civ. P. 1.280(a)(1)(A) through (D)(2024).
22 Fla. R. Civ. P. 1.280(a)(3)(2024).
23 Fla. Prob. R. 5.025(d)(2). Pursuant to Rule 5.025(a), certain specific proceedings are deemed automatically adversary unless otherwise ordered by the court. Additionally, the court or a party may declare any other proceedings as adversary, thereby invoking application of the Rules of Civil Procedure. See Fla. Prob. R. 5.025(b) and (c)(2024).
24 See Fla. Prob. R. 5.080(2016).
25 Fla. Stat. 736.0201(a)(2021).
26 Fla. R. Civ. P. 1.200(a)(1)(2024).
27 Fla. R. Civ. P. 1.200(a)(3)(2024).
28 Fla. R. Civ. P. 1.200(a)(6)(2024).
29 Fla. R. Civ. P. 1.200(a)(12)(2024).
30 Fla. R. Civ. P. 1.200(a)(14)(2024).

ActionLine Call for Articles

ActionLine is seeking articles that:

- *Address timely topics in real estate, probate, trust and guardianship law; or share Section member activities or news.*
- *Consist of 1,000-3,000 words (one to four printed pages).*
- *Contain endnote references with links as appropriate.*
- *Engage and inform readers.*

Forward any proposed article overview or news of note to Erin Farrington Finlen at erin@estatelaw.com and Michelle Hinden at mhinden@nishadkhanlaw.com.

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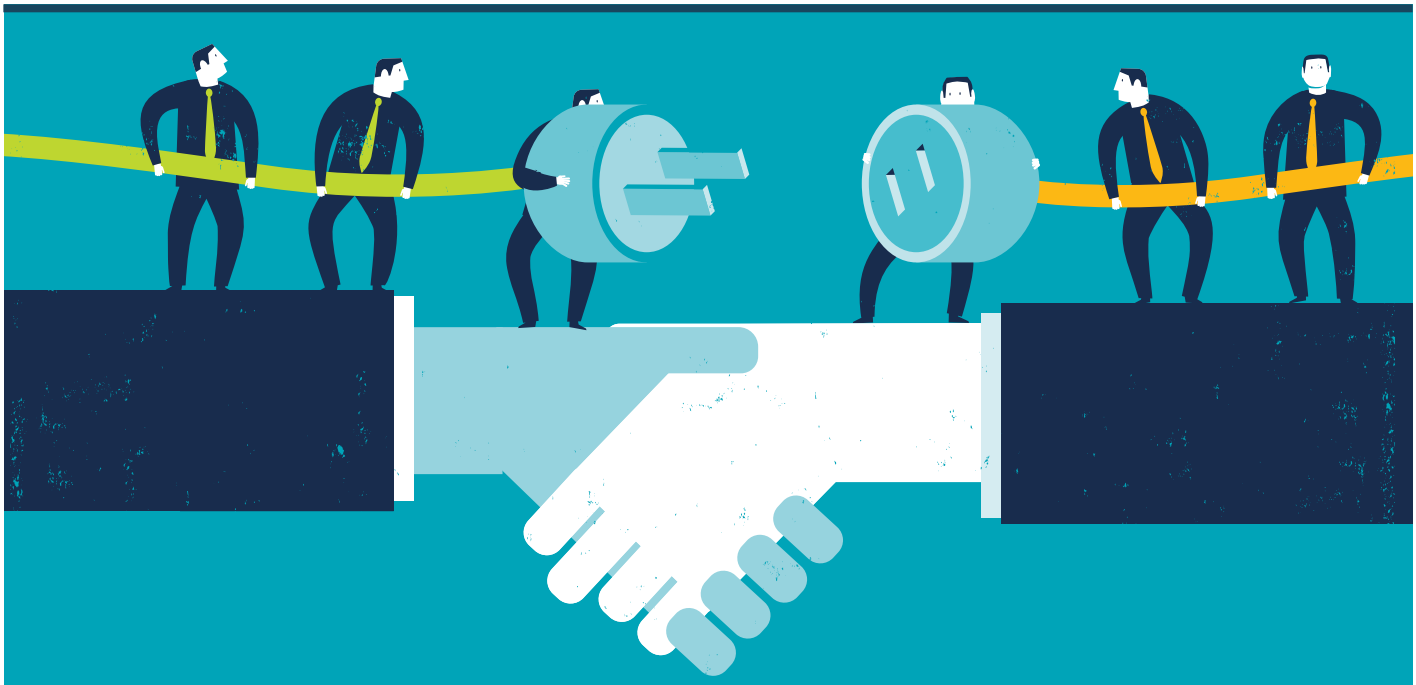
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To Bulk Or Not To Bulk?

THAT IS THE TELECOM QUESTION

By Derek A. Carrillo, Esq., Premier Law, Tampa, Florida

In the landscape of multi-dwelling units ("MDU" or "MDUs"), such as apartment complexes, condominium associations, student housing and planned communities, the provision of essential services like internet, television, and sometimes phone service is often handled differently in comparison to single-family homes. One prevalent model in use today is the bulk telecom agreement, which is a contract structure that has significant implications for property owners, management, and residents alike. These agreements, while offering potential benefits to its customers, like cost savings and simplified service delivery, are also frequently debated due to concerns about choice, transparency, and long-term value. Accordingly, understanding the nuances of bulk telecom agreements is crucial for any practitioner who represents a client in relation to a MDU property.

What is a Bulk Telecom Agreement?

At its core, a bulk telecom agreement is a contract between a telecommunications service provider (e.g., Comcast/Xfinity, Spectrum, AT&T, or Verizon) and the owner or the governing body of a MDU property (such as a landlord, a developer, a homeowners' association ("HOA"), or a condominium association). Under this type of agreement, the service provider agrees to provide specific telecom services (typically, internet or cable television, which is sometimes bundled with telephone service) to all or to a significant majority of the units within the MDU property at a negotiated, discounted "bulk" rate.

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Instead of each resident of the MDU property, individually, contracting with the service provider, the property owner or the governing association of the MDU, as applicable, essentially buys the service from the service provider in bulk. The cost of the service is then usually passed on to residents in the MDU, often as a mandatory line item in the residents' monthly rent, HOA dues, or condo fees. Residents, typically, cannot opt out of this fee, even if the resident does not wish to use the service or prefers to use a different service provider.

These bulk telecom agreements often involve granting the service provider with certain rights, which can range from the granting of non-exclusive access to install wiring throughout the MDU property to, more controversially, the granting of exclusive rights to market and to provide services within the MDU property for the duration of the bulk telecom agreement.

Florida law specifically authorizes condominium associations,[1] homeowners' associations[2] and cooperatives[3] to enter into bulk telecom agreements for the provision of communication services, such as video, internet, and telephone service to the residents. These bulk telecom agreements are categorized as operating expenses and must be outlined in the declaration or must be approved in accordance with the declaration.

Potential Benefits of Bulk Telecom Agreements

Bulk telecom agreements present a multitude of potential benefits for the property owners and the governing associations of the MDUs. One of the most significant advantages is the potential for substantial cost savings. By negotiating a bulk rate with a telecom service provider, property owners or the governing associations of the MDUs, as applicable, can secure discounted internet and/or television services for their residents. These savings can then be passed on to the residents, resulting in lower monthly bills and in increased disposable income. While less common, due to increased regulatory scrutiny, some bulk telecom agreements may include revenue-sharing or door fee arrangements, which obligate the service provider to pay the property owner or the governing association of the MDU, as applicable, either a portion of the revenue generated from resident subscriptions or a one-time fee for each unit connected. This type of agreement can create an additional income stream for the MDU property, which can be used to offset certain operating costs or fund community improvements.

High-quality internet and television services are highly sought-after amenities for MDU properties. By offering these services as part of a bulk telecom agreement, property owners and governing associations of MDUs, can enhance the appeal of their MDU properties and attract new residents or tenants, which can generate increased occupancy rates and higher property values. Dealing with a single provider for all telecom services can also significantly simplify property management, which eliminates the need to coordinate with multiple service providers, streamlines the billing processes, and simplifies troubleshooting and support. As part of a bulk telecom agreement, service providers usually agree to install or to upgrade the network infrastructure at each unit within the MDU property, saving the property owners or the governing associations, significant capital expense and ensuring that residents have access to the latest technology and high-speed connectivity.

Bulk telecom agreements often offer a high degree of convenience. In many cases, the service is active upon move-in, eliminating the need for residents to research service providers, schedule installation appointments, and set up separate billing accounts. Bulk rates are often fixed for a specific period, providing residents with predictable pricing and budget certainty. This can help residents manage their finances more effectively and avoid unexpected bill increases. Bulk telecom agreements ensure that at least one reliable service provider option is readily available throughout the MDU property, guaranteeing that residents have access to essential communication and entertainment services, regardless of their location within the MDU property.

Drawbacks and Controversies

Bulk telecom agreements, while offering potential cost savings and convenience, can present significant challenges for both property owners and governing association of MDUs and their residents. For property owners and governing associations of MDUs, the allure of a bulk telecom agreement often lies in the potential for cost savings and streamlined management. However, these agreements typically come with long contract terms that can lock the residents of MDU property into a single service provider and service package for an extended period. This lack of flexibility can be problematic as technology advances rapidly and resident needs evolve. Furthermore, these types of agreements often include mandatory fees and limited choices, which can lead to resident dissatisfaction and friction. If the service quality is poor, the burden of managing service provider performance and handling resident complaints falls on the property owner or the governing association of the MDU, as applicable, which can be quite frustrating.

Residents also experience significant drawbacks from bulk telecom agreements. The most prominent issue is the lack of choice. Residents are unable to select a service provider that best suits their individual needs and preferences and are locked into the property owner's or governing association's choice. Mandatory fees are another source of discontent, as a resident must pay for the bulk service even if the resident

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does not wish to use the service or prefers to use a different service provider. Further, the bundled packages often include unwanted services, leading to additional costs for residents. Service quality issues can be particularly frustrating, as residents have limited recourse, if the bulk service provider's network or customer service is subpar. The long contract terms associated with bulk telecom agreements can also lead to technological stagnation. Residents may be stuck with outdated technology while other areas enjoy faster and more advanced options. Finally, the initial cost savings advantage of bulk telecom agreements can be eroded over time due to price creep. Pre-negotiated escalation clauses can lead to increases in the bulk rate, diminishing the long-term financial benefits.

How Do Bulk Telecom Agreements Work in Practice?

Negotiation. The negotiation phase is a critical step in establishing a bulk telecom agreement. During this phase, the property owner or the governing association of the MDU, as applicable, engages in discussions with one or more service providers to reach a mutually beneficial agreement. Key points of negotiation typically include the services offered to the residents (internet speed tiers, television channel packages, etc.), the per-unit monthly rate, the contract duration (often 5, 7, or 10 or more years), the service level guarantees, the infrastructure installation or upgrades, and the exclusivity clauses.

Infrastructure. Once the negotiation phase is complete and an agreement is reached between the parties, the service provider will install and maintain the necessary network infrastructure throughout the MDU property. This infrastructure may include coaxial cable (commonly used for cable television and internet services), fiber optics (fiber optic cables offer faster speeds and greater bandwidth than coaxial cable), and network electronics (equipment like routers, switches, and modems that are necessary to manage and distribute the network traffic). The installation and maintenance of this infrastructure can require a significant initial investment by the service provider.

Service Delivery. After the infrastructure is in place, the service provider will activate the services for residents of the MDU property. This process typically involves minimal setup on the part of the residents, who may simply need to connect a modem or a cable box provided to the resident or specified by the service provider.

Billing. Under a bulk internet agreement, the service provider bills the property owner or the governing association of the MDU, directly for the total number of units covered by the agreement. This consolidated billing approach simplifies the process for both the service provider and the residents.

Cost Recovery. The property owner or the governing association of the MDU, as applicable, then recovers the cost of the services from the residents through mandatory fees that are integrated into their rent or association dues. This fee structure ensures that the cost of the services is shared, equally, among all residents, regardless of each resident's individual usage or preference. This is a key distinction between bulk telecom agreements and individual service contracts (*i.e.*, retail), where residents are billed directly by the service provider based on their usage.

Key Considerations When Negotiating or Evaluating Bulk Telecom Agreements

Property owners and association boards of MDUs must meticulously evaluate numerous factors when contemplating bulk internet, cable, and/or telephone agreements to ensure that the selected bulk telecom agreement aligns with the community's long-term technological needs and financial considerations.

Contract Term Length. The duration of the contract is a pivotal aspect that warrants careful consideration. Shorter terms, typically ranging from three to five years, offer the advantage of flexibility. As technology rapidly evolves and market dynamics shift, a shorter contract term allows the community to adapt and take advantage of new offerings and improved pricing structures without being locked into an outdated agreement. Conversely, longer terms might secure more favorable initial pricing due to the guaranteed revenue stream for the service provider; however, on the other hand, longer terms also carry the risk of technological obsolescence and resident dissatisfaction if the service provider fails to keep pace with advancements.

Exclusivity. The exclusivity of the agreement is another critical factor. Non-exclusive bulk telecom agreements are generally preferred as such agreements foster a competitive environment and provide residents with a wider range of choices. This can lead to better service quality, more innovative offerings, and potentially lower prices as service providers vie for the community's business. Exclusive marketing agreements, while potentially offering attractive initial terms, can limit resident choice and stifle market competition, potentially resulting in complacency from the service provider and a lack of responsiveness to resident needs.

Service Levels. The specific details of the services provided should be clearly defined and outlined in the bulk telecom agreement. Matters that should be addressed include internet speeds, television channel lineups, service reliability, and quality of customer support. The bulk telecom agreement should establish minimum performance standards, and should also include provisions for addressing service disruptions and

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resolving resident complaints in a timely and effective manner.

Pricing and Escalation. The pricing structure and any potential for future price increases must be transparent and must be clearly communicated to all of the residents of the MDU property. The bulk telecom agreement should specify any per-unit costs, annual price increases, and additional fees that may be applicable to the service being provided. This transparency helps to manage resident expectations and to avoid disputes or misunderstandings down the line.

Infrastructure Ownership and Upgrades. The ownership and maintenance of the community's infrastructure are also important considerations. The bulk telecom agreement should address who is responsible for maintaining and upgrading the infrastructure to ensure that it remains current and capable of supporting future technological advancements. This may include provisions for periodic upgrades or the replacement of outdated equipment to ensure that residents have access to the highest quality services available to the general public.

Termination Clauses. The agreement should include clear termination clauses that outline the conditions under which either party can terminate the bulk telecom agreement. This may include provisions for early termination due to poor provision of services, breach of contract, or other specified reasons. The agreement should also specify the remedies available to residents within the MDU property in the event of poor service or non-performance by the service provider.

Legal and Regulatory Compliance. The bulk telecom agreement must comply with all applicable laws and regulations. It is advisable to consult with an attorney who is experienced in telecom agreements to ensure that the bulk telecom agreement is legally sound and protects the interests of the residents of the MDU property.

Competitive Bidding and Ongoing Monitoring. Conducting competitive bidding processes, and ongoing monitoring of the service provider's performance are crucial components of a successful bulk service agreement process. By actively promoting competition among service providers and holding the selected service provider accountable for meeting minimum performance standards, the residents within the MDU property can ensure that they receive high-quality services at a fair price.

The Future of Bulk Telecom Agreements

Bulk telecom agreements are at a crossroads. While the allure of discounted rates and simplified amenities remains, several factors are shaping their future.

Increased Regulatory Scrutiny. The Federal Communications Commission ("FCC") has increasingly focused on promoting competition and consumer choice in MDU properties. Recognizing the potential for bulk telecom agreements, particularly exclusive ones, to stifle competition, the FCC has taken several actions over the years to deter the use of bulk telecom agreements.

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The FCC has long prohibited telecom service providers from entering into exclusive access agreements that grant such service providers with the sole right to provide service to a MDU property.[4] Residents must generally have the legal right to use an alternative service provider, if one is available and is willing to serve the MDU property (though practical access can still be a hurdle). Further, in 2022, the FCC adopted rules prohibiting exclusive revenue-sharing agreements between service providers and property owners or governing associations, and mandating that service providers disclose the existence of exclusive marketing arrangements in plain language to the residents receiving such services.[5] In its adoption of the 2022 rules, the FCC rationalized that exclusive revenue-sharing agreements can incentivize property owners to limit residents' access to competing service providers.

In early 2025, the FCC withdrew its proposal to ban bulk telecom agreements.[6] However, mandatory bulk billing arrangements continue to remain under scrutiny. The FCC is actively investigating the impact of these arrangements on competition and consumer choice, especially concerning broadband internet access, which is now considered an essential service. The regulatory goal is to find a balance between the potential efficiencies of bulk telecom arrangements and the necessity of fostering competition and maximizing consumer choice.

Evolving Consumer Preferences. The popularity of streaming services is rapidly changing how people consume television content. Consumers are increasingly "cutting the cord" and opting for streaming services due to their flexibility, lower costs, and vast content libraries. This shift is reducing the demand for traditional bulk cable television packages, especially among younger demographics. Additionally, high-speed, reliable internet access is now considered a necessity, and consumers are willing to pay a premium for it.

Technological Advancements. The deployment of fiber optic networks and the emergence of 5G fixed wireless technology are disrupting the telecommunications industry. These technologies offer faster speeds, lower latency, and greater reliability than traditional cable infrastructure. This increased competition is challenging the dominance of incumbent cable service providers in MDUs and giving residents more choices.

Greater Resident Awareness. Consumers are becoming more informed about their options and are less willing to accept mandatory fees for services that they do not want or that are of poor quality. This increased awareness is putting pressure on property owners and associations of MDUs to negotiate better deals with telecom service providers or to explore alternative options.

We have also seen a shift towards more flexible bulk models, focusing solely on high-speed internet rather than bundled television packages, or offering tiered options within a bulk framework. Non-exclusive agreements that allow competing service providers easier access to MDU properties are likely to become more common. Managed Wi-Fi solutions, where wireless access is offered to the residents within a MDU property as an amenity, are also starting to emerge as an alternative or a supplement to traditional bulk telecom agreements.

Conclusion

Bulk telecom agreements represent a complex trade-off. They can offer genuine cost savings, and convenience, in exchange for opportunities for property-wide infrastructure upgrades. However, they inherently limit consumer choice and flexibility, potentially locking residents into long-term arrangements with services or service providers such residents would not normally choose themselves. For property owners and governing associations of MDUs, the allure of simplified management and potential cost benefits must be carefully weighed against the risks of long contract terms, evolving technology, and potential resident dissatisfaction. As regulators continue to emphasize competition and transparency, and as consumer demands shift towards high-speed internet and à la carte entertainment, the traditional bulk telecom model will undoubtedly need to adapt to remain relevant and equitable in the MDU landscape. Careful negotiation, transparency, and a resident-focused perspective are paramount when considering or managing these pervasive agreements.



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Endnotes

1 Fla. Stat. § 718.115(1)(d) (2024).

2 Fla. Stat. § 720.309(2) (2014).

3 Fla. Stat. § 719.107(1)(b) (2018).

4 47 C.F.R. § 76.2000 et seq. (2022).

5 47 C.F.R. § 64.2500 et seq. (2022).

6 David Shepardson, US FCC will drop Biden plan to ban bulk broadband billing for tenants, Reuters (Jan. 27, 2025), https://www.reuters.com/business/media-telecom/fcc-will-drop-biden-plan-ban-bulk-broadband-billing-tenants-2025-01-27/.

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Allocation Of Liability Claim Risk In Commercial Leases:

Contractual Indemnity And Additional Insured Coverage

By Robert H. Friedman, Esq., Friedman P.A., Palm Beach, Florida

Whether you represent landlords, tenants, or both, allocation of risk provisions in commercial leases are an important way to protect both parties in the event of a liability claim. The two key risk allocation provisions found in leases are contractual indemnification and additional insured coverage. Insurance is often seen as a way to backstop a contractual indemnity promise in a contract, which it is, but the downside is that all insurance policies have exclusions and limitations, and contractual indemnity has its own limitations. It is not always the case that insurance coverage will be available to pay for a contractual indemnity promise, and there will be situations where insurance coverage will apply, even in the absence of contractual indemnity obligations within a contract.

Contractual Indemnity in Commercial Leases

Most commercial leases contain indemnity provisions that divide the parties' responsibility in one of two ways: fault-based or location-based responsibility. Under a fault-based provision, the tenant agrees to defend and to indemnify the landlord for any claims resulting from the tenant's negligence, and the landlord mutually agrees to defend and to indemnify the tenant for any claims resulting from the landlord's negligence. The fault-based indemnity provision often contains language addressing joint negligence situations and allocates indemnity obligations for claims "to the extent caused by" the landlord or the tenant. Allocating indemnity based on relative fault may seem equitable, but in practice, this type of provision leaves many questions unanswered, which in turn invites disputes. Is a defense owed purely based on a claimant's allegations, or must the relative negligence of the parties be proven? What if only the tenant or the landlord is sued but either party may be at fault? What if the tenant is sued but the incident occurred in a common area that the landlord is responsible for maintaining? What if the landlord is sued as a deep pocket but was not involved with the operation of the premises? These are just some of the open questions that make fault-based indemnity obligations difficult to enforce in practice.

A Brighter Line: Indemnity Based on Location

A more efficient way to allocate contractual indemnity in commercial leases is to base contractual indemnity on the location of the incident, as this will draw a bright line between the parties' indemnity obligations in the lease. Most commercial leases will clearly set forth the responsibilities of the landlord and the tenant to maintain and keep safe certain areas. In a shopping center, for example, the lease will typically provide that the landlord is responsible for maintaining and providing security in the common areas, including the parking lot and the common walkways, and the tenant is responsible for maintaining the areas inside the leased premises, and directly in front of the leased premises. In this circumstance, in a location based contractual indemnity provision, if the landlord is responsible for maintaining the common areas, and the incident occurs in the common areas, then the landlord has an obligation to indemnify a tenant who is sued for any incidents arising from use of the common areas, even if the claimant alleges that the tenant was negligent. As you can see, a clear allocation of responsibility for maintenance and safety, and contractual indemnity provisions that dovetail those obligations, can go a long way towards avoiding contractual indemnity disputes.

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Negligence

Some leases require one party to indemnify the other party, even in instances where the other party is negligent. Although Florida courts view contracts that attempt to indemnify a party against its own negligence with disfavor, there is no prohibition under Florida law for such a provision.[2] However, Florida courts will give extra scrutiny to such provisions, and only enforce such provisions if they express an intent to indemnify against the indemnitee's own negligence in clear and unequivocal terms.[3] An enforceable provision must do more than just state, generally, that the indemnitor owes indemnity for "any and all claims," and instead, must explicitly state that indemnity applies, even if the indemnitee is negligent, so long as the indemnitee's negligence is less than 100%.[4] There are some exceptions to the foregoing rule, most notably for construction contracts that are subject to Florida's anti-indemnity statute, Fla. Stat. § 725.06, but this statute rarely applies in the context of leases.

The Obligation to Defend and the Vouching In Rule

A good indemnity clause will specify that a defense is owed for any claims that may potentially be indemnified, which is essentially the duty-to-defend standard in the insurance context. This can help avoid the wait-and-see approach that many indemnitors attempt to take when faced with an indemnity demand. Accordingly, in this circumstance, an indemnitor that ignores or rejects a tender of defense, when the obligation to defend is clear, can face severe consequences. For example, the "vouching in" rule, also referred to as "vouchment," holds that when an indemnitor rejects a contractual indemnity demand, and refuses to provide a defense, it cannot later collaterally attack a settlement or a judgment binding the indemnitee, except in limited situations where money was paid that was not owed to the plaintiff (i.e., due to a fraudulent or collusive settlement).[5]

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Additional Insured Coverage and Its Limitations

The parties' contractual indemnity obligations should be backed up by insurance requirements in the lease, which include additional insured coverage obligations. The goal of both the landlord and the tenant should be to ensure that any liability claim risk is shifted to insurance, and to also avoid coverage gaps that may leave a contractual indemnity promise uninsured. This requires that the promises made in the lease correspond with the coverage that will be purchased in connection with the lease. A typical general liability policy will provide insured contract coverage, which acts as an exception to the contractual liability exclusion, and which specifically promises to cover an indemnitor for the pre-loss indemnity promises it makes to the indemnitee. Without this insured contract coverage, the risk of the indemnity promise is, instead, shifted to the parties to the lease. Important to note, if the indemnity promise is intended to extend only to the extent of insurance, then this should be specified in the lease.

Some landlords or tenants may choose to self-insure, at least for smaller claims, using some combination of reserves, deductibles, self-insured retentions, fronted coverage, or captive insurance. If self-insurance mechanisms will be used to address any indemnity claims, this should be spelled out in the lease to make clear the lack of insurance backing up the indemnity promise in the lease. In leases with self-insurance mechanisms, the lease should also utilize "primary and non-contributory" language to ensure that any additional insured coverage is primary to not only the indemnitor's own insurance, but also to its self-insurance. Ensuring that the scope of insurance matches the scope of the indemnity promise in the lease is important to avoid failure-to-procure claims, which could require the indemnitor to step into the shoes of an insurer, if it fails to purchase the insurance specified in the lease.[6]

When reviewing insurance certificates to confirm coverage, parties need to ensure that the correct amount of additional insured coverage is listed. Some policies limit additional insured coverage, so it is no broader than, and its limits are no higher than that required by the indemnity agreement. Many leases require insurance of "at least" a certain amount, but do not address the question of whether additional insured coverage limits extend to the limit of the indemnitor's policy, even if the indemnity promise is for a lower amount. Many insurance policies will limit the additional insured coverage to the lesser amount unless clearly stated otherwise in the lease.

Forms of Additional Insured Coverage

Not all additional insured coverage provisions are the same, so simply requiring additional insured coverage in a lease, without specifying the scope of that coverage may lead to unpleasant surprises later on. Most insurance companies utilize standard forms from the organization called the Insurance Services Office, Inc. ("ISO").[7] There are several types of additional insured endorsements utilized by liability insurers, which are each designated by a form number and the date promulgated by ISO.[8] The additional insured endorsements most commonly utilized today are CG 20 10 07 04 and CG 20 37 07 04,[9] which provide coverage "only with respect to liability … caused in whole or in part by" the named insured. This language has been narrowly interpreted by Florida courts, so that it is limited to liability faced by the additional insured due to the negligence of the named insured.[10] Until 2019, the additional insured provision specific to landlords, "Additional Insured - Managers or Lessors of Premises (ISO Form CG 20 11)," contained the broader "arising out of" language,[11] but since 2019, the 2019 revision uses the narrowed "caused in whole or in part by" language.

What Type of Additional Insured Coverage Does Your Client Have?

After the lease is signed, it is important to follow up on an annual basis to ensure that the correct insurance has been purchased, so that insurance coverage complies with the lease. Most parties rely on a certificate of insurance that provides a summary of the coverages purchased. This can be problematic, as the standard certificate of insurance (typically written on an ACORD 25 form) has disclaimer language stating that it should not be relied upon, nor does it create coverage rights. Further, certificates of insurance are notoriously inaccurate, so it is essential to review the entire policy, or to, at least, review the additional insured provisions to the policy, to ensure compliance with the lease requirements. Most leases will give the parties the right to demand copies of insurance policies, and if your lease does not provide for this, it should be amended to provide for this going forward. Alternatively, Fla. Stat. § 627.4137 (2024) provides "claimants" with the right to demand to see a copy of an applicable liability policy, as well as a statement of coverage defenses raised by the insurer following a loss.

Broad-Form Endorsements v. Name-In-Lights Endorsements

The are two ways a party can be named as an additional insured on a liability policy: via a broad-form endorsement or a "name in lights" (NIL) endorsement. Most of the time, a broad-form endorsement is used. This endorsement names as "additional insureds" all parties that the named insured agreed to extend the policy's coverage to, without the need to specifically name each entity. This is the most common way to add additional insureds to policies because it is the simplest to administer. However, a party who wants to make sure it is provided with additional insured coverage can ask that a NIL endorsement be issued that expressly names the additional

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insured and that specifies the scope of the additional insured coverage provided for that entity.

What Happens If No Additional Insured Endorsement Is Issued?

There may be times when neither a broad-form nor a NIL additional insured endorsement is issued, or when a broad-form is issued but it is not the correct form. This can give rise to a failure-to-procure claim as addressed above.[12] However, it is important to note that, a missing additional insured endorsement on the policy does not necessarily mean that the indemnitee lacks insurance protections. If the landlord and tenant are both sued then this might trigger the indemnitee coverage, which applies when the insurer is defending the named insured in a case in which the indemnitee is also named as a defendant. The certificate of insurance standing alone can also create additional insured rights in certain circumstances, even when no additional insured endorsement is issued.[13] Florida courts have also held that the contractual indemnity agreement itself can create additional insured coverage, even in the absence of an issued endorsement.[14]

A party that believes it has contractual indemnity rights and additional insured rights should be clear that it is tendering a lawsuit filed against it under both protections. Prompt notice and demand for defense and indemnity can avoid the potential for waiver of indemnity or coverage rights. The contractual indemnity tender is targeted to the indemnitor, although it is expected that the indemnitor's insurer often will provide the response, as the insurer likely has insured contract or indemnitee coverage. In the contractual indemnity tender scenario, the insurer still remains a third party to the contractual arrangement, however, so the indemnitee cannot sue the insurer directly to enforce its contractual indemnity rights, and must, instead, sue the indemnitor as referenced in the contract.[15] However, if a party qualifies as an additional insured, then that party has direct coverage rights, which allows it to file a coverage action prior to the resolution of the underlying lawsuit.[16] An indemnitee's lawsuit against both the indemnitor and the indemnitor's insurer is often the best approach to sort out the obligations that are owed for defense and indemnity under the contractual indemnity provision as well as the additional insured coverage provisions in the lease.


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Endnotes

1 This article focuses on allocation of risk for liability claims. Risks of property damage and business interruption, from perils like fire and windstorm, raise other issues such as protection for loss payees and the impact of waiver of subrogation that are beyond the scope of this article.

2 *See, e.g., Charles Poe Masonry v. Spring Lock Scaffolding Rental Equip. Co., 374 So.2d 487, 489 (Fla. 1979).*

3 *See Id.; Cox Cable Corp. v. Gulf Power Co., 591 So.2d 627, 629 (Fla. 1992).*

4 *See, e.g., Camp, Dresser & McKee, Inc. v. Paul H. Howard Company, 853 So.2d 1072, 1077 (Fla. 5th DCA 2003), review denied, 884 So.2d 23 (Fla. 2004).*

5 *See Camp, Dresser & McKee, Inc., 853 So.2d at 1083; Heapy Eng'g, LLP v. Pure Lodging, Ltd., 849 So. 2d 424, 425 (Fla. 1st DCA 2003) ("Once a legal obligation has been established in the underlying action on the part of the indemnitee, the indemnitor will become bound by a settlement agreement in a suit against the indemnitee if the indemnitor was given notice of the claim and was afforded an opportunity to appear and defend the claim, as long as the settlement was not the result of fraud or collusion.")*

6 *See, e.g., Capitol Envtl. Servs., Inc. v. Earth Tech, Inc., 25 So.3d 593, 596 (Fla. 1st DCA 2009).*

7 If you are wondering how competing insurance companies can share policy language without violating antitrust law, the reason is the limited antitrust exemption Congress granted the insurance industry in the McCarran–Ferguson Act, 15 U.S.C. §§ 1011-1015.

8 For example, CG 20 10 11 85, the "gold standard" for additional insured coverage utilizing "arising out of" language (and increasingly difficult to obtain) is a commercial general (CG) liability form, number 20 10, promulgated by ISO in November 1985.

9 Prior to 1985, ISO provided additional insured coverage for both operations and completed operations claims on the CG 20 10 form. Post-1985 ISO policies require two endorsements to achieve the same result: CG 20 10 for operations coverage and CG 20 37 for completed operations coverage.

10 Some federal courts have held that additional insured coverage under this language is available only for the additional insured vicarious liability, although the latest decision from the 11th Circuit seems to contradict that conclusion. *See Cincinnati Specialty Underwriters Ins. Co. v. KNS Group, LLC, 561 F. Supp.3d 1298, 1313 (S.D. Fla. 2021), aff'd, 21-13628, 2022 WL 5238711 (11th Cir. Oct. 6, 2022).*

11 The "arising out of" language has been interpreted in Florida to mean "having a connection with," so it does not require proximate causation or that the named insured's negligence contribute to the additional insured's loss. *See Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913 So.2d 528, 539-40 (Fla. 2005).*

12 This oversight also may give rise to a broker malpractice claim.

13 *See, e.g., Liberty Mut. Fire Ins. Co. v. State Farm Fla. Ins. Co., No. 15-20941, 2019 WL 4739393 (S.D. Fla. July 19, 2019), aff'd, 2022 WL 1025164 (11th Cir. 2022). Part of the justification for this is that Fla. Stat. § 627.402(3) defines an insurance "policy" as "a written contract of insurance or written agreement for or effecting insurance, or the certificate thereof, by whatever name called, and includes all clauses, riders, endorsements, and papers that are a part thereof." It remains unclear under the case law what level of involvement the insurer must have with the issuance of the certificate of insurance for the certificate to bind the insurer.*

14 *See, e.g., Ring Power Corp. v. Amerisure Ins. Co., 326 F. Appx. 502 (11th Cir. 2009); Cont'l Cas. Co. v. City of South Daytona, 807 So.2d 91 (Fla. 5th DCA 2002).*

15 *Fla. Stat. § 627.4136*, Florida's "direct action" statute, prohibits a non-insured from suing the insurer until and unless it first obtains a judgment against the insured potentially covered by the policy.

16 The indemnitee is a necessary party to any coverage action between the indemnitor and its insurer, but having direct rights to sue on its own behalf gives the indemnitee the option to control the timing and forum for the coverage litigation.

Common Law Duties Owed by Financial Institutions

By David A. Weintraub, Esq., David A. Weintraub P.A., Plantation, Florida

According to a December 25, 2024, article in the *Wall Street Journal*,[1] there exists in the Philippines a town in which thousands of workers are employed for the purpose of fleecing elderly Americans, and others, of their life savings by convincing them to invest in bogus schemes or even engage in fictitious romantic relationships. The practice has become so prevalent in the United States that virtually all financial services firms have established entire departments designed to detect such fraud, and on occasion, stop it. Banks train tellers to spot fraud. Broker dealers train financial advisors, sales assistants, and operations personnel to spot fraud. However, what do these financial service firms do when they believe one of their clients, perhaps an elderly person suffering from dementia, is being victimized by a thief whom they have never met? When the exploited client wants to wire $100,000 to Hong Kong, should the financial institution follow the client's instructions? If not, what should they do? The answers to these questions vary significantly from bank to bank, and brokerage firm to brokerage firm.

In the securities industry, broker dealers may take comfort in contacting the "trusted contact," a person who may have been designated by the customer to be contacted if wrongdoing is suspected.[2] The "trusted contact" person may not even be the same person the customer has chosen as personal representative of his or her estate. However, what has the "trusted contact" agreed to do, in advance, in such a scenario? The answer is nothing. The phone call to the "trusted contact" serves merely as window dressing to address a problem that is deeper than a lay person can effectively address.

In the banking industry, there is no such common practice for customers to identify a "trusted contact" who can be contacted. Even if such a designee existed, the phone call to the "trusted contact" is more likely to punt the ball down the field than anything else. A lay person, other than an attorney or someone familiar with the court systems, would have little idea of their legal options, and may not be in a position to quickly hire a guardianship attorney or other appropriate professional.

Financial services firms, including banks and broker-dealers, have other options. They even have specific duties. Under Florida law, when anyone suspects exploitation of a vulnerable adult, they are required to contact the Exploitation Hotline, which is staffed by the Department of Children and Families ("DCF").[3] Whether DCF will do anything with the offered information is an entirely separate issue. Sometimes they do, sometimes they don't. Their criteria for getting involved is a mystery. Indeed, the same telephone number is used to report child abuse and elder abuse. According to DCF's website,

> A protective investigator from the department will make face-to-face contact with the alleged victim within 24 hours of receiving an abuse, neglect, exploitation or self-neglect report. If any person refuses to allow the protective investigator access to the victim, law enforcement may be called to assist. Once access to the victim is obtained, the protective investigator will interview all persons who may have knowledge of the victim's situation, evaluate the information obtained, and make a decision as to whether the reported allegations did or did not occur.[4]

For a financial institution reporting abuse, they have no idea when or if an investigator will be assigned to investigate, and when or if the investigator will make progress. For the financial institution, they are generally facing a scenario where a client wants money moved immediately. So, what should the financial institution do when red flags are present, or worst, they are 100% certain that a customer is being exploited?

The first inquiry for any financial institution is determining whether they are acting in the capacity of a fiduciary. Broker-dealers owe a fiduciary duty to any client who maintains a fee based advisory account. That duty arises under the Investment Advisors Act of 1940.[5] The scope of that fiduciary duty is determined by both federal law and state law. A bank may owe a fiduciary duty if they are acting as Trustee. This duty arises under contractual and Florida statutory law.[6] A fiduciary duty may also be owed if the relationship between the client

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and the institution is one of "trust and confidence." This type of fiduciary duty arises under Florida common law.[7] Finally, some courts recognize that broker-dealers owe a fiduciary duty even in the case of commission-based accounts. Pursuant to *Gochnauer v. A.G. Edwards*, 810 F.2d 1042 (11th Cir. 1987). In that case the Court stated,

> The federal securities statutes were modeled after the common law actions of fraud and deceit. *Ernst and Ernst v. Hochfelder,* 425 U.S. 185, 193-215, 96 S.Ct. 1375, 1381-1391, 47 L.Ed.2d 668 (1976) (review of legislative history); *see also Securities Regulation,* 69 Am.Jur.2d § 1 *et seq*. The fiduciary concept derives from trust and agency principles. Actions contrary to the duties of loyalty and care are remedied by giving the beneficiary of the relationship the right to recover for the fiduciary's breach. *See* RESTATEMENT (2d) of Agency §§ 387-398 (1957); Weinrib, *The Fiduciary Obligation,* 25 U. Toronto L.J. 1 (1975); Langevoort, *Fraud and Deception by Securities Professionals,* 61 Tex.L.Rev. 2347, 2348 n. 9 (1983).
>
> Fraud is not the same as breach of fiduciary duty. Florida courts recognize two distinct causes of action for recovery. *See, e.g., Raymond, James Associates v. Zumstorchen Investment Ltd.,* 488 So.2d 843 (Fla. 2nd DCA 1986) (sufficient statement of facts to support common law claim of fraud; allegations of separate breach of fiduciary duty claim insufficient); *Zelman v. Cook,* 616 F. Supp. 1121 (D.C.Fla. 1985) (common law fraud claim distinct from breach of fiduciary duty claim in Florida). Florida courts recognize a breach of fiduciary duty claim at common law.

The law is clear that a broker owes a fiduciary duty of care and loyalty to a securities investor. *Thompson v. Smith Barney, Harris Upham Co., Inc.,* 709 F.2d 1413, 1418 (11th Cir. 1983);….[8]

Assuming an institution owes a fiduciary duty, it needs to know the scope, or meaning of that duty. Generally, it includes a duty to protect the client.[9] A duty to protect a client may be broad and may require the institution to aggressively act in order to protect the client.

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If an institution is acting in a non-fiduciary capacity, they gain great comfort from the fact that Florida's exploitation statute does not provide a private right of action for failing to contact the exploitation hotline. The institution, however, may be liable for common law negligence.[10] Regardless of whether the institution is acting in a fiduciary or a non-fiduciary role, several tools are available.

First, both Florida and federal law permit the filing of interpleader actions.[11] An interpleader action, which would serve to freeze the status quo, would protect the exploited client. In an interpleader action, the interpleader plaintiff, which in this scenario would be the financial institution, would be telling the court that there are potential competing claims to a pot of money, or to an account, and the institution prefers to deposit the funds into the court's registry so that a judge can determine what happens. In this situation, which this writer believes is ideal, a judge may also evaluate whether a client needs additional protection, such as the appointment of a guardian or a receiver, who can assume a more permanent role. One of the great advantages of the interpleader is that if the financial institution is considered "an innocent stakeholder," it's likely to recover its attorneys fees from its own customer.[12] Although this seems like a "win-win" for the institution, institutions rarely take this path, believing they have no obligation to do anything other than follow their client's instructions. Indeed, they may have greater fear of the legal consequences of not following their client's instructions. This leads to the question of whether there is a legal duty for a bank to do anything other than follow the client's instructions.

The caselaw in Florida is mixed on the question of whether a non-fiduciary bank has any duty other than complying withFla. Stat. § 415.1034(1)(a). In *Ginder v. Bank of America Corp*., 2015 U.S. Dist. LEXIS (M.D. Fla. 2015), the court addressed the duties that a Florida bank owed to its 81-year old customer.[13] While the court noted that generally there is no common law duty to prevent the misconduct of a third person, the *Ginder* court went on to find that, under Florida law,

> A duty may arise wherever an actor recognizes that his conduct involves a risk of harm to another. Restatement (Second) of Torts § 289 (1965). The ability of the actor to recognize that his conduct creates a risk of harm is judged according to a reasonableness standard or, if the actor exhibits "superior attention, perception, memory, knowledge, intelligence and judgment," then his ability is judged according to those superior abilities. *Id. § 289 (a) – (b).*

So how does one know when an actor recognizes "that his conduct creates a risk of harm…?" One indicator is the actor or institution's advertising. What are they representing to the public about their knowledge of the risk of harm?

Wells Fargo Bank, as one example, publishes an online brochure in which it states,[14]

> *Our commitment*
>
> Helping you and your loved ones avoid or recover from financial abuse is integral to helping you succeed financially.
>
> That's why we're committed to investing time, people and resources to help identify, intercept, and investigate incidents of suspected elder and vulnerable adult financial abuse.
>
> Our team members are trained to help discover and address risk factors that may expose this
>
> abuse and resolve problems in a professional and confidential manner. We are dedicated to putting safeguards in place to help protect the assets our customers have worked hard to accumulate.

One can reasonably argue that with this advertisement, available to anyone on the internet posted as recently as 2025, from a 2022 publication, Wells Fargo recognized that its conduct could create a risk of harm, and explicitly promised to train its team members to protect customer assets.

Wells Fargo is not alone. Truist Bank advertises,[15]

> *We're watching out for you.*
>
> We proactively fight fraud and other security threats with a multi-layered strategy of technology and dedicated teams

While Truist frames its security efforts as part of a team effort between the bank and its customers, there are numerous elderly citizens who refuse to go paperless, who refuse to use Zelle and Paze, who do not use online banking, who have no idea what "multifactor authentication" or "biometric identification" are. These are just some of the tools that Truist suggests customers use.[16]

Fidelity Investments is a broker dealer that identifies online the various types of scams to which its clients may be exposed. On its website, Fidelity represents,

> **Associate education:** Our holistic approach to security includes making sure our associates understand their role in protecting our company and customer accounts, and adhere to our security policies. We require regular training for all personnel

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on data protection, and specialized training for certain roles. ***Our associates who work directly with customers receive extra education on the latest methods used by criminals to commit identity theft and fraud.*** [emphasis supplied]

Legal and regulatory compliance: Fidelity has corporate-level policies and procedures designed to ensure awareness of and compliance with applicable technology, security, and privacy laws, regulations, and to align internal policies, controls, and actions to address those requirements.[17]

In one of its publications directed to its Financial Consultants, on page 5, Fidelity advised that its Financial Consultants should be cognizant of *"Out-of-the-ordinary withdrawals from investment accounts,"* *[18]

In the same publication, on page 6, Fidelity wrote,*[19]

Out-of-the-ordinary withdrawals from investment accounts

- *The client wants to use the funds at issue to support a grandchild or other relative in need, when in fact a suspicious person is claiming to be the relative.*
- *The client wants to invest in a new idea introduced by a friend or an unsolicited phone call or email.*
- *The client has unexpected bills that monies held in bank accounts not managed by the firm cannot cover.*
- *The client is unwilling to give a reason for the unusual withdrawal.*
- *The client has no concern for tax implications (e.g., excessive withdrawals from tax-deferred retirement accounts when required minimum distribution has been met).*

An increasing number of regulatory requirements for protecting the senior population

Protecting aging clients against risk is not only the right thing to do ethically; it is increasingly becoming your firm's legal duty, as regulatory agencies focus more and more on protecting the vulnerable adult population.

**Note that at the time of publication, this article has been removed from Fidelity's website.*

These institutions recognize that their conduct may enable the thief to achieve his or her goal. Release the money, and it is gone. The question arises, do financial institutions owe their customers a legal duty when they become aware of red flags indicating financial exploitation? First, they do not have a statutory duty. Whether they have a common law duty is uncertain, as suggested by the Middle District of Florida in *Ginder*.

In *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098 (Fla. 1998),[20] a case more well known for its recognition of the common law cause of action for defamation by implication, the Court stated with regard to establishing new common law causes of action,

> This Court can recognize new common law causes of action where that recognition is neither in conflict with contrary legislation nor outweighed by any competing interests. [citation omitted] We have explained that the common law "must keep pace with changes in our society" and "may be altered when the reason for the rule of law ceases to exist, or when the change is demanded by public necessity or required to vindicate fundamental rights." *Stone, 734 So. 2d at 1043* (quoting *United States v. Dempsey, 635 So. 2d 961, 964 (Fla. 1994)*). Indeed, this was the impetus for the Court's decision to recognize invasion of privacy as a common law cause of action in *Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (Fla. 1944)*.[21]

One can persuasively argue that all of the *Jews for Jesus* factors are present when a financial institution becomes aware of red flags indicating that its client is being exploited. In a more recent case from the Fourth District Court of Appeals, the court stated,

> The coexistence of common law negligence and a garden variety statutory violation is grounded in the common law's role as "an evolving body of law." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 533 n.28, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). The common law "'must keep pace with changes in our society' and 'may [even] be altered when the reason for the rule of law ceases to exist, or when the change is demanded by public necessity or required to vindicate fundamental rights.'" *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1104 (Fla. 2008) (quoting *Stone v. Wall*, 734 So. 2d 1038, 1043 (Fla. 1999)). As one court has explained:
>
> > One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier

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> rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Dean Pound posed the problem admirably in his Interpretations of Legal History (1922) when he stated, 'Law must be stable, and yet it cannot stand still.'
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> *Hack v. Hack*, 495 Pa. 300, 433 A.2d 859, 868-69 (Pa. 1981). One way that common law negligence evolves with changes in society is that it incorporates contemporary standards of conduct evidenced by legislative enactments.[22]

Whether *Jews for Jesus* would be recognized today as the standard for establishing new common law duties remains to be seen. The case was decided in 1998 by a Florida Supreme Court that is vastly different from today's Florida Supreme Court. Today's Court is considerably more conservative than the 1998's Court. Moreover, it is strongly guided by the late Justice Scalia's view that the judiciary should not legislate from the bench. Would creating a new common law cause of action by a state court be considered legislating from the bench? One should remember that Justic Scalia also wrote,

> My point in all of this is not that the common law should be scraped away as a barnacle on the hull of democracy. I am content to leave the common law, and the process of developing the common law, where it is. It has proven to be a good method of developing the law in many fields – and perhaps the very best method.[23]

From Justice Scalia's viewpoint, the common law may continue to develop, and the Florida Supreme Court in *Jews for Jesus* suggests reasonable standards for the development of that law.

More recently, in *Emerson v. Lambert*, 374 So. 3d 756 (Fla. 2023), in a footnote Justice Couriel cited a 1922 book review by Learned Hand, in which he stated of the common law, "it stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work."[24]

The evolution of the common law is delicate, as it should be. However, to suggest that banks owe a common law duty of care does not stretch the notion of decency, especially in the context of how the financial services industry portrays itself to the public in its advertising. If the industry was not willing to assume these duties, it would not make the extensive promises cited above.[25]

Banks will likely argue that no such common law duty may exist in light of "contrary legislation."[26] In *Kaufman v. Bank of America, N.A.*, 2020 U.S. Dist. LEXIS 101818 (S.D. Fla. 2020), the court granted plaintiffs leave to amend to plead common law negligence and to distinguish that claim from a claim for violation of Fla. Stat. § 415.1034. Chapter 415 is part of the Adult Protective Services Act. More recently, in *Arberman v. PNC Bank, N.A.*, 2022 U.S. Dist. LEXIS 227855 (S.D. Fla. 2022), the Plaintiff brought a negligence claim arising from PNC Bank's alleged failure to protect its customer from exploitation by a third party. The negligence claim was dismissed because the Plaintiff alleged that PNC owed a duty under Florida's Adult Protective Services Act, Fla. Stat. § 415.1034(1)(a)(8). Unfortunately for the Plaintiff, Fla. Stat. § 415.1034(1)(a)(8) does not provide a private cause of action. The Plaintiff should have alleged a claim for negligence arising under the common law, thereby forcing the court to engage in the analysis set forth in *Jews for Jesus*. Instead, the Plaintiff tried to "fit a square peg into a round hole." Nowhere in the opinion is there any indication of promises or advertising engaged in by PNC Bank that might have induced one into believing that PNC Bank had assumed a duty to protect its customers.

Indeed, according to PNC's own website, it employs an individual who at any one time "is working … on dozens of cases that involve elder financial abuse."[27] The PNC employee, Rob Stover, stated, "I see exploitation like this every day….Many elderly clients are extremely trusting and when they answer the phone, they are often too polite to hang up. I've seen more egregious situations where wrongdoers take advantage of a person's inability to make rational financial decision." PNC proceeds to describe a scenario where Mr. Stover managed to protect a PNC client from a lottery scam. He is not engaged in this work as a favor for PNC's customers. He is engaged in this work because it is his duty to uncover the red flags and protect PNC's customers whenever possible. If he is negligent, then PNC may be liable. If he does his job, everyone is satisfied.[28]

The *Jews for Jesus* "public necessity" element is certainly met here. According to the FBI, in 2023, there were over 101,000 complaints from Americans over 60 that crossed "the spectrum of cyber matters," including fraud, extortion, and identity theft, among other crimes. This was an 11% increase over 2022, and a sixfold increase from 2018. These complaints covered total losses of over 3.4 billion dollars. The average complainant lost approximately $33,000, and nearly 6,000 complainants lost over $100,000. Those over the age of 60 filed more complaints than any other age group, likely due to lack of technological sophistication.[29]

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Furthermore, only 56% of Americans over the age of 65 have access to the internet, and only 26% of them bank online. The other 74%, therefore, are either unbanked, bank over the phone, or, more likely, bank in person. Banks are in the best position to detect when something is wrong. When an 80-year-old customer enters a bank attempting to wire a large sum to someone and it is apparent that the customer has fallen for a scam, the bank should take appropriate steps to protect the customer. If annual losses of 3.4 billion dollars to such scams do not constitute a public necessity, then what does?

Conclusion

Lawyers representing victims of elder exploitation committed by third parties need to look for the deep pocket. Was there a financial institution that could have prevented the loss? Did they have a duty to prevent the loss? Were there red flags? The case law supports a strong argument that such a common law duty exists as the result of an evolution within society, and our expectations given how financial institutions represent themselves to their customers in both social media, and their own websites.



D. WEINTRAUB

David Weintraub *recently transitioned his securities litigation practice into a full-time mediation practice, focusing on claims involving the financial services industry, elder exploitation, and commercial disputes. David is the former Co-Chair of the Florida Bar Elder Law Section's Abuse, Neglect and Exploitation Committee. David is admitted to practice in Florida, New York and Nebraska. He can always be reached on his cell, (954) 816-8250.*

Endnotes

1 Feliz Solomon and Patricia Kowsmann, This 'Pig Butchering' Tale Stars a Mayor, WALL STREET JOURNAL, December 26, 2024 https://www.wsj.com/world/asia/how-a-young-mayor-turned-her-town-into-a-hub-for-pig-butchering-scammers-da89e2a5?st=DvyR8m&reflink=article_email_share (verified January 22, 2025).

2 FINRA Rule 4512.

3 §415.1034(1)(a)(8), Florida Statutes; a private right of action does not exist under this statute.

4 https://www.myflfamilies.com/services/abuse/adult-protective-services/how-report-adult-abuse/what-happens-after-i-make-report (verified 9/2/25).

5 *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); See also, Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. IA-5248 2, 6 n.15 (June 5, 2019).

6 Section 660.417 (2024), Florida Statutes.

7 *Board of Trustees of the City of Lake Worth Employees' Retirement System v. Merrill Lynch Pierce Fenner & Smith, Incorporated, 2011 U.S. Dist. LEXIS 58156 (M.D. Fla. 2011).*

8 *Gochnauer v. A.G. Edwards*, 810 F.2d 1042, 1049 (11th Cir. 1987).

9 *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

10 § 415.1034(1)(a)(8), Florida Statutes; a private right of action does not exist under this statute.

11 Fla. R. Civ. P. 1.240; Fed. R. Civ. P. 22.

12 *Zuckerman v. Alter*, 758 So. 2d 1172 (Fla. 4th DCA 2000).

13 See also *Regan v. Bank of Am., N.A.*, 2023 U.S. Dist. LEXIS 173505 (S.D. Fla. 2023) ("Although proof of a statutory violation will not overhaul the negligence cause of action by converting it into a case sounding in negligence per se, Florida courts do allow the showing of a statutory violation to establish the existence of a duty and a breach thereof." *Ginder v. Bank of Am. Corp., No. 14-CV-1271, 2015* U.S. Dist. LEXIS 25562, 2015 WL 898595, at *2 (M.D. Fla. Mar. 3, 2015) (quoting citation omitted).

14 https://www.wellsfargo.com/assets/pdf/personal/privacy-security/fraud/elder-financial-abuse.pdf (verified 9/2/25).

15 https://www.truist.com/fraud-and-security/protections (verified 9/2/25).

16 https://www.truist.com/content/dam/truist-bank/us/en/documents/info/cyber-security-checklist.pdf (verified 9/2/25).

17 https://www.fidelity.com/security/our-security-measures (verified 9/2/25).

18 Institutional Insights Managing the risks of working with senior investors, 2024. https://www.institutional.fidelity.com/app/literature/view?itemCode=9888405&renditionType=pdf (verified 12/27/24). Note this article has been removed from Fidelity's website as of the date of publication.

19 Institutional Insights Managing the risks of working with senior investors, 2024. https://www.institutional.fidelity.com/app/literature/view?itemCode=9888405&renditionType=pdf (verified 12/27/24). Note this article has been removed from Fidelity's website as of the date of publication.

20 *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098 (Fla 1998).

21 *Id* at 1104.

22 *Kohl v. Kohl*, 149 So. 3d 127, 134 (Fla. 4th DCA 2014).

23 A Matter of Interpretation, Antonin Scalia, New Edition 1997 Princeton University Press, p. 12.

24 Learned Hand, Book Review, 35 Harv. L. Rev. 479, 479 (1922) (reviewing Benjamin N. Cardozo, The Nature of the Judicial Process(1921).

25 There is no question that banks will argue that certain common law negligence claims are preempted by §670.202, Florida Statutes, particularly in the context of wire transactions. Notwithstanding these arguments, as we have noted, the common law evolves. The banks contribute to the evolution of the common law by the various promises they make through their extensive advertising efforts. Because this topic is well beyond the scope of this article, the author invites follow-up articles addressing these points.

26 *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1104 (Fla 1998).

27 https://www.pnc.com/insights/our-commitments/customers/fraud-fighter-rob-stover.html (verified 9/2/25).

28 In a recent arbitration administered by the Financial Industry Regulatory Authority ("FINRA"), a single arbitrator was asked to decide a dispute between Charles Schwab and its customer over whether Schwab should be liable for permitting funds to be wired from a California brokerage account to an out of state bank. There was only a single arbitrator because the case was small. While FINRA arbitration awards are of no precedential value, this arbitrator's thought process should be of value to any lawyer litigating these issues. The arbitrator stated, "During perpetration of this illegal wire transfer scam, Claimant resided in Claremont, California. The scammer's request to wire money, especially for such an odd amount, from Claimant's account, to a bank in Kansas should have set off alarms at Respondent. It did not. At a minimum, Claimant should have received a telephone call from a Schwab representative confirming his desire to make such a transfer. In circumstances like these, Respondent should consider implementing better protection for its clients." *Cortez v. Charles Schwab & Co., Inc., FINRA Case 23-02129* (December 20, 2024); https://www.finra.org/sites/default/files/aao_documents/23-02129.pdf (verified 12/30/24); *El Dorado Technical Services, Inc. v. Union General de Trabajadores de Puerto Rico*, 961 F.2d 317, 321 (1st Cir. 1992) ("It is black letter law that arbitration awards are not entitled to the precedential effect accorded to judicial decisions.").

29 https://www.ic3.gov/AnnualReport/Reports/2023_IC3ElderFraudReport.pdf (verified 9/2/25).

LOVE AND WEALTH

(Some Conditions May Apply)

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Marital agreements are effective tools to provide clarity and security to couples in the event of divorce and death.[1] Absent a marital agreement, a couple will be subjected to "one size fits all" state laws in such circumstances. This may be fine for some couples, but it is often extremely undesirable for members of high-net-worth families. These families face unique considerations due to complex holdings, business interests, and generational wealth. Beyond the couple themselves, these default laws could also impact the business affairs and inheritance rights of other members of the family. There is also the real concern of potential spouses who may wish to marry into these families for the wrong reasons. To craft effective marital agreements, attorneys working with these families must understand these distinct circumstances. Below are ten tips for drafting and negotiating effective marital agreements for members of high-net worth families.

1 Tailor the Agreement to Reflect Family Priorities

There is no universal approach to marital agreements. There are instances in which a marital agreement that fully waives all spousal rights in the event of both divorce and death may be appropriate.[2] For example, an older couple, each financially secure and with children from prior relationships, might prefer to eliminate the economic implications of marriage entirely and the default marital rights granted by state law. However, such cases are exceptions rather than the norm.

For high-net worth families, a well-drafted agreement should reflect the family's unique priorities, such as safeguarding a business or preserving generational wealth. The desire to protect family wealth, especially from the risks of divorce, is an easily justified and reasonable point of negotiation. These assets often represent wealth generated by previous generations, making it desirable to exclude them from division upon marital dissolution. Conversely, the argument that a spouse marrying into the family should have legal claims to such wealth is difficult to rationalize and could raise concerns about the spouse's motivations.

Family wealth is frequently the most significant and valuable asset and therefore warrants primary focus. In fact, for high-net worth families, it may be desirable for the marital agreement to focus only on the protection of family wealth. This type of marital agreement not only accomplishes what is often the most significant objective (i.e., protecting the family business or generational wealth), but also tends to be more effective and easier to negotiate. By its nature, a marital agreement requiring the less wealthy spouse to waive all or nearly all rights will invite and justify requests for quid pro quo. This often turns the marital agreement into a monetary negotiation, which may create negative emotions for both spouses. In many circumstances, these monetary negotiations are unavoidable. However, by limiting the scope of the marital agreement to that which is most important, the scope of negotiations may also be limited, allowing the couple to reach an effective agreement more efficiently, while preserving interpersonal relationships.

2 Leverage Other Planning Tools First

Before turning to a marital agreement, consider whether other planning tools will accomplish the same goals more effectively and discreetly. For example, buy-sell agreements and trusts implemented by a senior generation should provide robust protection for assets and reduce the emotional and legal burden on the younger couple.

Buy-sell provisions can be included in a governing agreement for any business entity, including corporations, limited liability companies, and partnerships. These agreements can provide various rights and restrictions to ensure business interests remain in the family in the event of death or divorce. This goal will be achieved by including purchase rights, restricting ownership eligibility, etc. At a minimum, buy-sell agreements

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can also ensure control of a family business is not diluted or lost to a departing spouse.

Trusts may also provide significant protection for family wealth. By leaving assets in trust for future generations, a senior family member can specifically identify those people who will benefit from the trust assets (and, effectively, those who cannot). For example, when a trust beneficiary dies, the trust can specify beneficial ownership remains in the bloodline. Further, in the event of divorce, a trust created by a third party is generally not considered marital property that may otherwise be subject to division among divorcing spouses.

The protection these tools provide is by no means absolute (see below regarding the *Berlinger* case). However, these tools can provide tremendous protection and preemptively resolve many of the issues that would otherwise need to be negotiated in a marital agreement.

3 Engage Expert Advisors

Marital agreements often have implications that extend across many legal disciplines, especially for high-net worth families. Thus, it is important to seek the guidance of experienced matrimonial, estate planning, and perhaps business and tax counsel when drafting and negotiating such marital agreements.

Experienced matrimonial counsel will help anticipate issues that arise upon divorce and mitigate negative ramifications through the agreement. Also, relevant experience with negotiating divorce settlements helps establish benchmarks for reasonable positions when negotiating marital agreements.

In addition to divorce, most marital agreements address the impact of spousal rights in the event of death. To negotiate changes to these provisions, it is essential to have counsel who is experienced with complex estate planning and tax issues. Trusts are also common tools implemented by high-net worth families. It is imperative to understand where trust protections begin and end, in the event death (or divorce).

Finally, many high-net worth families have operating family businesses or family office structures. The rights of spouses in the event of death or divorce may impact ownership and potentially governance, so it is essential to understand these business structures and address issues that could arise.

4 Shift Responsibility to the Senior Generation

The most delicate aspect of a marital agreement is the interpersonal dynamic between the couple. Marital agreements are unique, as they are more than just economic contracts. Attorneys who represent current and prospective spouses with respect to marital agreements have an obligation to not only protect their client's economic interests, but to also avoid unnecessary stress on their client's relationships. Parents and other senior family members may also help mitigate the stress of a marital agreement. As noted above, buy-sell agreements and trusts implemented by a senior generation reduce the emotional and legal burden on the younger couple by providing essential protections outside the marital agreement. In addition, senior family members may further reduce the stress on junior family members by creating a legal requirement for marital agreements within the family.

Specifically, parents could include provisions in their estate plan to mandate marital agreements for future generations as a condition for broad access to inheritance. In the context of trusts, broad access and control over a trust may often give rise to greater spousal rights in the event of divorce. Conversely, a more restrictive trust could mitigate spousal rights in the event of divorce. Thus, parents may present this requirement to the couple as a choice between: (i) you, the couple, agreeing family wealth will be protected and not subject to claims in the event of divorce by signing a marital agreement; or (ii) we, the parents, will ensure the protection of family wealth by not permitting levels of access and control that can enhance your lifestyle, but give rise to greater spousal rights. The first option is usually the obvious choice.

This strategy is not without controversy, as many consider the requirement of marital agreements by parents to be "heavy handed." However, in the experience of the authors, so long as the required marital agreement is limited to protecting the family wealth and not one that overreaches, the agreement is usually easier to negotiate. This approach also positions the parents, not the child, as the "bad guys," helping to preserve the couple's relationship while still protecting the family's interests.

5 Start Negotiations with a Letter of Intent

Some attorneys begin the negotiation of marital agreements by circulating an agreement waiving all rights in the event of death and divorce. While this may be justified as a strategic move – anchoring the negotiation with the most protective terms for the client – it will likely set an adversarial tone from the outset. This approach can feel transactional and impersonal, particularly to the less wealthy spouse, and may undermine trust before meaningful dialogue has even begun.

Rather than beginning negotiations with a full draft of a waiver-heavy agreement, consider starting with a letter of intent. This document can outline the goals of the wealthier spouse or family and explain the rationale behind the proposed terms.

A letter of intent fosters a spirit of collaboration and communication, rather than confrontation. It allows the less wealthy spouse to understand the purpose of the agreement and to engage in meaningful dialogue before being presented with a formal legal document. This approach can lead to more thoughtful, respectful, and effective agreements.

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Further, the letter of intent might help the agreement survive a challenge to its validity. Sending the letter of intent shortly after the engagement and well before "Save the Date" notices are sent and deposits are paid to wedding vendors, will put the less wealthy spouse on notice that a marital agreement will be necessary before the couple proceeds any further with their wedding planning.

6 Address the Legal Risks in Berlinger

In *Berlinger v. Casselberry*,[3] the court held a discretionary trust could be garnished by a former spouse to enforce unpaid alimony and attorneys' fees. This decision highlights a significant exception to the protections typically afforded to discretionary trusts under Florida law. While the decision in *Berlinger* was not without controversy, the implications of the case must be considered when preparing marital agreements for high net worth families.

For families with multigenerational wealth in trust, *Berlinger* underscores the importance of not assuming trust assets are completely immune from marital claims. As noted above, attorneys who prepare and negotiate marital agreements must understand where the protections for traditional family structures begin and end. The implications of *Berlinger* should be addressed explicitly, particularly in the context of support obligations.

7 Handle Financial Disclosure with Care

Full and fair financial disclosure is a cornerstone of enforceable marital agreements. However, transparency must be balanced with the need for discretion. Attaching detailed financial statements, tax returns, or business valuations directly to the agreement will expose sensitive information if the agreement is ever filed with the court or becomes part of public proceedings.

To mitigate this risk, consider providing financial disclosure in a separate, document that is referenced, but not attached, to the agreement. This method preserves the integrity of the disclosure while minimizing the risk of public exposure. The agreement should clearly state both parties received and reviewed the disclosure document and had the opportunity to ask questions and seek independent advice and appraisals. Consider also including non-disclosure provisions in this document.

8 Plan for Tax Liabilities and Refunds

Tax matters may become a source of significant conflict during and after marriage, especially for couples with complex financial lives. A well-drafted marital agreement should address how tax filings, liabilities, and refunds will be handled to avoid ambiguity and future disputes.

As a default, a requirement that the couple file separate returns and pay taxes separately is often the simplest path. This avoids much of the complexity that arises from the filing of joint returns. That said, it is usually more tax efficient for couples to file joint returns. Also, many couples file joint returns because doing so reflects their shared life and mutual commitment; it reinforces the sense of marriage as a partnership. Therefore, it is also advisable to contemplate the possible filing of joint returns, and specifically who will be responsible for paying taxes and how any refunds or liabilities will be allocated. For example, if one spouse has significant income from a family business or trust, the agreement might allocate responsibility for estimated tax payments accordingly. Similarly, if a joint return results in a refund, the agreement should clarify whether the refund will be split equally, proportionally, or returned to the spouse who overpaid.

In addition, the agreement should address how tax preparation, tax audits, and interest and penalties will be handled, including who bears the cost and how cooperation will be ensured. These provisions are particularly important when one spouse has more complex or higher-risk tax exposure.

9 Preserve the Deceased Spouse's Unused Exemption

Currently, the federal gift and estate tax exemption for 2025 is $13.99 million.[4] This is the amount a person can gift during lifetime or transfer at death free of estate tax. Assets transferred at death that exceed the exemption are subject to federal estate tax at a 40% rate. "Portability" is a concept that became part of the federal tax laws in 2011, and permits a surviving spouse to effectively inherit a deceased spouse's unused exemption ("DSUE").[5] Given the significant amount of the exemption, the ability to preserve the DSUE with a portability election is a significant benefit.

A portability election is made by filing a federal estate tax return (IRS Form 706) for the estate of the deceased spouse. However, the personal representative for the estate of the deceased spouse may prefer to avoid the cost and complexity of an estate tax return if filing is not otherwise required. Such a decision would cause the loss of a significant tax benefit for the surviving spouse. Thus, a well-drafted marital agreement for a member of a high-net worth family should invariably grant the surviving spouse the right to compel the personal representative of the deceased spouse's estate to file the estate tax return to make a portability election. The agreement should further address responsibility for the cost for preparing and filing the return. In general, it will make sense to require the surviving spouse to pay such costs if the estate tax return is not otherwise required.

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10 Pay for Representation for the Less Wealthy Spouse

A well-drafted and tailored marital agreement could take many months to negotiate and finalize. The significant time, effort, and expense invested in protecting family wealth must result in an agreement that can withstand challenges to validity or enforceability. While there is no such thing as an ironclad contract, there are strategies to mitigate challenges.

One of the most effective ways to strengthen the validity and enforceability of a marital agreement is to ensure both parties have competent legal representation. Without independent legal guidance, the agreement is more susceptible to scrutiny based on lack of understanding, imbalanced negotiating power, or perceived unfairness. While not an obligation, the high-net worth family should consider covering the cost of counsel for the less wealthy spouse. The burden of attorneys' fees for the less wealthy spouse is often a significant hurdle to reaching a signed agreement. With access to substantial resources, high-net worth families are uniquely positioned to eliminate this impediment.

Even though counsel for the less wealthy spouse may be funded by the other spouse, it is of course essential that the attorney's duty of loyalty runs exclusively to the less wealthy spouse. Also, the ultimate decision regarding attorney selection must rest solely with the less wealthy spouse. However, it is fine (and, in fact, advisable) for the high-net worth family to offer a carefully considered shortlist of qualified attorneys to represent the less wealthy spouse. Attorney selection can have a profound impact on the efficiency and tenor of the negotiating process. Thoughtful recommendations can be especially beneficial, as experienced and collaborative counsel will often facilitate a smoother process and help foster a constructive and respectful outcome for all parties.

Ensuring both spouses are represented by counsel is one strategy to mitigate challenges to validity and enforceability. Other strategies include carefully drafted provisions and a thoughtful negotiation process. The available range of strategies and safeguards to strengthen marital agreements is extensive, though outside the scope of this article.


R. TRUDEAU

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Conclusion

Drafting a marital agreement for a member of a high-net worth family is a nuanced endeavor that demands more than legal proficiency. It requires a thoughtful blend of technical expertise, emotional intelligence, and strategic foresight. These agreements must not only protect wealth and anticipate legal complexities, but must also respect the personal dynamics of the couple and the long-term goals of the families involved.

By applying the ten tips outlined above, advisors can help clients navigate sensitive conversations, minimize conflict, and build agreements that are both equitable and enforceable. When done well, a marital agreement becomes more than a legal safeguard, it becomes a tool for fostering communication, preserving family harmony, and aligning expectations. In this way, love and legacy are not at odds but thoughtfully integrated into a shared future.


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Endnotes

1 This article refers to both prenuptial agreements entered into before marriage and postnuptial agreements entered into after the wedding as "marital agreements."

2 In Florida, the most significant spousal rights are: (i) in the event of divorce, equitable distribution and alimony; and (ii) in the event of death, rights to a spousal share of an estate, including the homestead. This list is certainly not exhaustive, and the rights of spouses vary from state to state.

3 133 So. 3d 961 (2d DCA 2013).

4 Under the One Big Beautiful Bill Act signed into law on July 4, 2025, the federal gift and estate tax exemption (also called the "applicable exclusion amount" or the "basic exclusion amount") is increased to $15 million per person beginning January 1, 2026, and adjusted for inflation annually thereafter. Unlike the previous exemption, there is no provision for the exemption to sunset or revert to a smaller amount.

5 An exemption is unused when the value of the deceased spouse's taxable estate is less than the amount of the exemption.



What Makes You So Interested, Anyway?

Who Is Really An Interested Person In A Matter?

By Dale Noll, Esq., Akerman LLP, Miami, Florida

The term "interested person" as it relates to probate and trust matters is a subject of much debate and litigation. It can vary by matter and even vary by a particular scenario in a proceeding where who is deemed an interested person will vary from one petition or motion to another. Understanding who is an interested person, and who is not, can assist lawyers in accomplishing their goals and ensuring that they do not create issues around notice and due process.

***Fla. Stat. § 731.201(23)*, defines "interested person" as**

> **any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent's estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.**[1]

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Chapters 736 and 744 of the Florida Statutes, do not define this term,[2] but refer to "interested persons" in various sections within these chapters and use the term to indicate who has standing to seek the defined judicial relief, or participate in a matter. Courts have also applied the *Fla. Stat. § 733.101(23)*, definition of "interested person" in trust disputes.[3] *Fla. Stat*. Chapter 736, does, however, define another key term related to standing – Qualified Beneficiary. Qualified beneficiaries have certain rights under Chapter 736, such as the rights to accountings and to demand information. This is defined under *Fla. Stat. § 736.0103(19)*:

> (19) "Qualified beneficiary" means a living beneficiary who, on the date the beneficiary's qualification is determined:
>
> (a) Is a distributee or permissible distributee of trust income or principal;
>
> (b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or
>
> (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.[4]

A seminal case regarding the definition of an interested person is *Hayes v. Guardianship of Thompson*[5], which is also applied in probate and trust matters.[6] In *Hayes*, it is noted that courts must "evaluate the nature of both the proceeding and the interest asserted" in determining whether the party seeking relief or seeking to participate is an interested person with standing to do so.[7] Further, because circumstances of a guardianship can change, the circumstances of who is an interested person can change within the same guardianship.[8] This is equally true in probate and trust matters. Beneficiaries or creditors whose interests are fully satisfied may well lose their status as interested persons.

Because judicial proceedings regarding trusts are governed by the Florida Rules of Civil Procedure, it is important to also understand the more general definition of standing. "To have standing, a would-be litigant must show '**a direct and articulable interest in the controversy, which will be affected by the outcome of the litigation.'**"[9]

Determining Who is an Interested Person

Notice and Waiver. Practitioners will want to start with the Florida Statutes and the Florida Probate Rules to determine who is entitled to notice. Generally, those individuals having a monetary interest in a matter are going to be interested people, hence the need for notice.

The rules may differ depending on the specific petition or action. For example, Rule 5.240, *Fla. Prob. R.*, requires service of a Notice of Administration upon the decedent's surviving spouse, all estate beneficiaries, trustees of any revocable trust, any beneficiaries of the revocable trust if the trustee and the personal representative are the same person, and persons who may be entitled to exempt property. Thus, if the decedent of an estate died without a surviving spouse, but with children, the children may be entitled to exempt property and are required to receive the Notice of Administration, even if they are not a beneficiary of the decedent's Will. However, Rule 5.201, *Fla. Prob. R.*, provides a petitioner the option to serve the Petition for Administration by formal notice, except that it is mandatory for a petitioner who is not entitled to preference of appointment to serve the Petition with the notice "on all known persons qualified to act as personal representative and entitled to preference equal to or greater than the applicant".[10]

The analysis should then consider who, outside of those specifically required to receive notice, can claim an interest sufficient to object to the relief being sought. In some instances, confidentiality might preclude service upon someone who is legitimately an interested person, so practitioners should be aware of confidentiality requirements.

What about practitioners who are concerned about a party whose status as an interested person is doubtful, or even those who the practitioner considers is absolutely not an interested person? Should the practitioner and their client worry about a litigious party not receiving notice of an action and later objecting? Service upon a party can be considered a waiver of an argument that someone is an interested person. One solution is to provide a "courtesy copy" of the motion, petition, hearing notice, or other filing. That can preserve the argument standing argument. As noted in *Hayes*: "The fact that they may have received a courtesy copy of some of the prior petitions does not in itself confer standing on them to participate in the subsequent proceeding."[11] Alternatively, serving even a courtesy notice can invite additional litigation, which may not be in anyone's interests.

Request for Notices and Copies of Pleadings. A party who asserts that they are an interested person is required to file a request for service in probate and guardianship matters.[12] If the party filing such a request is an interested person, they are entitled to notice of further proceedings and copies of subsequent pleadings and documents.

A party does not become an interested person by simply filing this notice. In *In re Guardianship of Martino*, the Second District Court of Appeal upheld the trial court's finding that the daughter of the Ward was not an interested person for the purposes of contesting guardian and the guardian's counsel's fees.[13] The trial court had determined that the daughter was

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not an interested person because she had frequently interfered with the administration of the guardianship.[14] Thus, parties can contest that a person seeking status as an interested person truly is interested.

Interest Without Right to Notice. To confuse matters even more, there are scenarios where individuals who have no right to notice or service of certain filings are nonetheless considered interested persons with a right to object or otherwise intercede.

For example, the Fourth DCA in *Rudolph v. Rosecan,* noted that Florida's guardianship statutes creates a conundrum.[15] *Fla. Stat. § 744.367*, states that no one other than the guardian, the guardian's attorney, the clerk of court, the Ward (unless a minor or totally incapacitated), and the Ward's attorney is entitled to copies of guardianship annual reports. However, *Fla. Stat. § 744.3701*, gives interested persons the right to object to the annual report. Therefore, someone who may truly be an interested person for purposes of objection to the annual accounting or plan for a Ward might not be entitled to service.[16]

A similar disparity was raised in *Carmel v. Fleischer.*[17] In *Carmel*, the Fourth DCA found that, because of a conflict of interest between the trustee of a trust and a trust beneficiary, the trust beneficiary was an interested person with standing to object to the final accounting and the petition for discharge by the personal representative (who was not the same person as the trustee). The Fourth DCA did not suggest that the personal representative had an obligation to have served the petition or the petition for discharge upon the trust beneficiary, but that did not mean that the trust beneficiary was not an interested person. However, since Rule 5.400, *Fla. Prob. R.*, requires that the final accounting and the petition for discharge be "filed and served on interested persons," was the personal representative in that case required to have determined that there was a conflict between the trustee and the beneficiary and that, therefore, the beneficiary of the trust needed to have been served?



Litigation Regarding Interested Person Status. As noted, an interested person who wants to receive notice in probate proceedings must file a request for notice under Rule 5.060, *Fla. Prob. R.* This does not excuse requirements to serve notice on certain individuals otherwise imposed by one of the rules.

The burden is upon a party seeking status as an interested person to establish that they are in fact an interested person.[18] In practice, when there is a question or there are efforts by an individual to seek relief that they lack standing to seek, someone would have to challenge whether the person is truly an interested person.

Interested persons in a matter might be able to argue that someone else should be considered "not" an interested person as the result of their conduct. For example, in the *Martino* and *Hayes* guardianship cases, the parties that sought to challenge guardian and attorney's' fees were found to not be interested persons due to their conduct, having interfered in the guardianship matters, and thus were partly responsible for the very expenses for which they complained. The *Hayes* opinion states, "Petitioners' concern about potentially excessive fees sounds a bit like the apocryphal story of the man who kills both his parents and begs the court for mercy because he is an orphan."[19]

Courts have applied concepts of considering a purported interested person's actions in determining if they are an interested person to probate matters. In *Boyles v. Jimenez*, the trial court reviewed whether fiduciaries named in a Will and a revocable trust executed in 2015 had standing to sue to challenge the validity of a 2017 Will and a revocable trust.[20] The Fourth upheld the trial court's removal of the appointed personal representative and trustee of the estate and trust under the 2015 documents and finding that the named personal representative and trustee of the 2015 documents (the drafting attorney, who had been disbarred) lacked the necessary qualities and characteristics to serve as personal representative.[21] The appellate court further upheld the trial court's determination that the appointment of the named successor under the 2015 documents (the drafting attorney's wife) to administer the estate and to pursue the challenge to the 2017 documents would result in "endless and unnecessary litigation" that would "impede the administration" of the Estate.[22]

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Accountings and Guardianship Reports. For irrevocable trusts, the qualified beneficiaries are entitled to annual accountings. For estates, only a final accounting is required and it must be served (unless waived) with a petition for discharge upon interested persons. Beneficiaries who have received their full distributions and creditors who have had their claims satisfied are not interested persons for a final accounting and thus not entitled to a copy.[23]

However, more remote interests may be found to confer interested person status. In *Richardson v. Richardson*[24], the appellate court found that a contingent trust beneficiary (decedent's son) was an interested person entitled to object to the personal representative's final accounting and petition for discharge, even though the personal representative was the beneficiary of the marital and the family trusts established by the Will and the personal representative (widow) testified that she would never exercise her absolute power of appointment to benefit the objecting contingent beneficiary. Due to the potential future failure by the widow to exercise her power of appointment, the contingent trust beneficiary had sufficient interest in the outcome of the proceedings to object.[25] More recently, the Fourth DCA found that a trust beneficiary was entitled to object to the accounting and the petition for discharge, even though his interests were represented by the trust beneficiary, due to a conflict of interest between the trustee and the trust beneficiary (discussed above).[26]

In guardianship matters, the right to inspection of accountings and guardianship reports is limited to "the guardian and the guardian's attorney, the guardian ad litem with regard to the settlement of the claim, the Ward if he or she is at least 14 years of age and has not been determined to be totally incapacitated, the Ward's attorney, the minor if he or she is at least 14 years of age, or the attorney representing the minor with regard to the minor's claim".[27] The court may

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"upon a showing of good cause" grant authority to others, which would suggest that a party seeking authority to receive copies of the report must show good cause and an Order of the court. However, as discussed, this limitation does not preclude an interested person party from asserting the right to object.

A recent guardianship case highlights that determination of interested person status is very specific to each scenario presented. In *In re Guardianship of McLain*, the appellate court distinguished from *Hayes* in finding that the personal representative of the Ward's estate had standing as an interested person to object to a guardian's final report and accounting, and to the guardian and attorney's fees included in the report.[28] Because Rule 5.680, *Fla. Prob R.*, requires service of the final report and accounting upon the personal representative, that personal representative, who was also the Ward's son, had standing to object to the final report, accounting, and the included fees. The court noted that under the specific circumstances of required service upon the personal representative, the son had standing regardless of whether he had been an interested person entitled to notice during the administration of the guardianship. The appellate court declined to determine whether the son was an interested person under Rule 5.060, *Fla. Prob. R.*, or whether the son/personal representative could object to previous fee awards not included in the final report.

Complete Gifts and Continued Administration. The term interested person "does not include a beneficiary who has received complete distribution."[29] Therefore, once a specific devisee receives their distribution, they are no longer an interested person. Satisfaction of specific devises early on can reduce the numbers of individuals with an ongoing interest in the administration of an estate.

Similarly, specific devisees may not have a reasonable interest in the outcome of administration of an estate to object, generally, to the administration of an estate (satisfaction of claims, payment of fees, compensation), unless there is a reasonable likelihood that the administration might diminish their interests. This requires a case-by-case analysis.

Dependent Relative Revocation

For those seeking to challenge a testamentary document, they have an additional burden in establishing their standing as an interested person. If the testator had prior testamentary documents and the testamentary provisions of the challenged and prior documents are sufficiently similar, the contesting party would have to prove that the prior documents were also invalid. The theory is based upon a presumption a testator would have preferred to revive a prior testamentary document over dying intestate. The leading case on this, the dependent relative revocation doctrine, is *Wehrheim v. Golden Pond Assisted Living Facility*.[30]

In *Wehrheim*, the decedent's children had been excluded in wills executed in 1998, 1999, and 2000, and were challenging a 2002 Will on the grounds of lack of capacity and undue influence (by the decedent's assisted living facility). To avoid the presumption that would revive documents that they were not beneficiaries (negating their interest in challenging the 2002 Will), the Wehrheim children argued that the revocation clause itself was not the product of undue influence and was not conditional on the validity of subsequent wills, but that the testamentary provisions of the 2002 Will were invalid due to undue influence. Under that theory, the appellate court determined that the Wehrheim children were interested persons with a sufficient interest to proceed with their will contest as intestate heirs. "While this may be a daunting task, the Wehrheims are nevertheless entitled to try to prove their case."[31]

To make it even more confusing, the Wehrheim children apparently only argued that the revocation clause was valid in context to their undue influence claim, and therefore, the appellate court found that they were not interested persons to challenge the 2002 Will based upon their claim of lack of capacity.[32]

One of the main takeaways from *Wehrheim* regarding standing as an interested person was the analysis of the similarities between the various wills and whether they were sufficiently similar that the doctrine applied. The Wehrheim children had argued that because the prior wills did not include the charity that was the main beneficiary of the 2002 Will, that the doctrine did not apply. However, the appellate court agreed with the trial court's determination that the similarity between all of the wills was that none of them named the Wehrheim children as beneficiaries (expressing an intention not to leave anything to her children) and so the presumption that the testator would have wanted to revive earlier bequests applied.[33]

Standing to Sue on Behalf of an Estate or Trust

Further, it is critical in discussions of standing to determine whether a claim is being "brought by or on behalf of one who is recognized in the law as a 'real party in interest,' that is, 'the person in whom rests, by substantive law, the claim sought to be enforced[.]'"[34] Generally, it is a trustee who is entitled to bring an action on behalf of a trust.[35] In *Roller v. Collins*, the appellate court held that the subject trust's contingent beneficiaries lacked standing to sue for statutory relief that may have been available to the trustee of the trust.[36]

Roller noted some common law exceptions to the general rule that "only 'a trustee may maintain a proceeding against a third party on behalf of the trust and its beneficiaries.'"[37] As an example, it notes that a conflict of interest between a trustee

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and a beneficiary may grant standing to the beneficiary to seek relief that would otherwise be left exclusively to the trustee to seek.[38] While that exception did not apply in *Roller*, the court in *Carmel*, discussed above, did find that the exception applied, giving the trust beneficiary standing to object to the personal representative's final accounting and petition for discharge. [39]

Similarly, it is generally the personal representative of an estate that has the standing (authority) to assert claims on behalf of an estate.[40] The proper party to litigation against or on behalf of an estate is the personal representative. If a party to ongoing litigation dies, the proper party for substitution is the personal representative (which requires appointment) and the matter must abate until their appointment.[41] That authority may be exclusive, but there are statutes that require the personal representative to bring claims that might otherwise be available directly to a decedent's surviving family members.[42]

There may also be instances, such as a conflict of interest, where an administrator ad litem is necessary to conduct litigation on behalf of an estate and to recover an estate's assets.[43]

Finally, where there are inter vivos transfers of assets, the personal representative does not enjoy exclusive authority to pursue claims to set aside those conveyances. A decedent's children or family members are entitled to bring the claims without joining the estate.[44]


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Endnotes

1 §732.201(23) (2024), Florida Statutes.

2 §736.0111 (2024), Florida Statutes, defines "interested persons" solely for that section, related to nonjudicial settlement agreements, indicating that the term "means persons whose interest would be affected by a settlement agreement." The term is used in other sections of Chapter 736 and not broadly defined.

3 *Cruz v. Cmty. Bank & Tr. of Fla.*, 277 So. 3d 1095, 1097 (Fla. 5th DCA 2019).

4 §736.0103(19) (2024), Florida Statutes.

5 952 So. 2d 498 (Fla. 2006).

6 See *Delbrouck v. Eberling*, 226 So. 3d 929, 932 (Fla. 4th DCA 2017); Cruz., 277 So. 3d at 1097.

7 *Hayes* at 498.

8 *Id.* at 507.

9 *Bivins v. Douglas*, 335 So. 3d 1214, 1218 (Fla. 3d DCA 2021) (emphasis in original) (internal citations and quotations omitted).

10 *Fla. Prob. R.* 5.201.

11 952 So. 2d at 509.

12 *Fla. Prob. R.* 5.060.

13 313 So. 3d 687, 691 (Fla. 2d DCA 2020).

14 *Id.*

15 154 So. 3d 381, 384 (Fla. 4th DCA 2014).

16 *Id.*

17 391 So. 3d 907, 911 (Fla. 4th DCA 2024). Westlaw appears to have misspelled the name of Mr. Fleisher.

18 *Christie v. Qualls*, 392 So. 3d 801, 802 (Fla. 2d DCA 2024).

19 952 So. 2d at 509.

20 330 So. 3d 953 (Fla. 4th DCA 2021).

21 *Id.*

22 *Id.*

23 §731.201(23) (2024), Fla. Stat.

24 524 So. 2d 1126 (Fla. 5th DCA 1988)

25 *Id.*

26 *Carmel*, 391 So. 3d at 911.

27 §744.3701(1) (2024), Fla. Stat.

28 406 So. 3d 1134, 1139 (Fla. 2d DCA 2025).

29 §731.201(23 (2024)), Fla. Stat.

30 905 So. 2d 1002, 1008 (Fla. 5th DCA 2005).

31 *Wehrheim*, 905 So. 2d at 1010.

32 *Id.*

33 *Id.* at 1008.

34 *Roller v. Collins*, 373 So. 3d 35, 40 (Fla. 5th DCA 2023) (internal citations omitted).

35 *Id.* citing, e.g., Cady Huss & Elizabeth Hughes, The Real Party in Interest: Trustees, Actionline Vol. 20, no. 2 (Winter 2018–2019).

36 *Id.*

37 Id.

38 Id.

39 391 So. 3d at 911.

40 *Bookman v. Davidson*, 136 So. 3d 1276, 1279–80 (Fla. 1st DCA 2014).

41 *De La Riva v. Chavez*, 303 So. 3d 955, 959 (Fla. 4th DCA 2020).

42 *Cont'l Nat. Bank v. Brill*, 636 So. 2d 782, 784 (Fla. 3d DCA 1994) ("Under the Wrongful Death Act, the personal representative is the party who seeks recovery of all damages caused by the injury resulting in death for the benefit of the decedent's survivors and for the estate.").

43 *Fla. Prob. R.* 5.120(a); Brill, 636 So. 2d at 783.

44 *Parker v. Parker*, 185 So. 3d 616, 619 (Fla. 4th DCA 2016).

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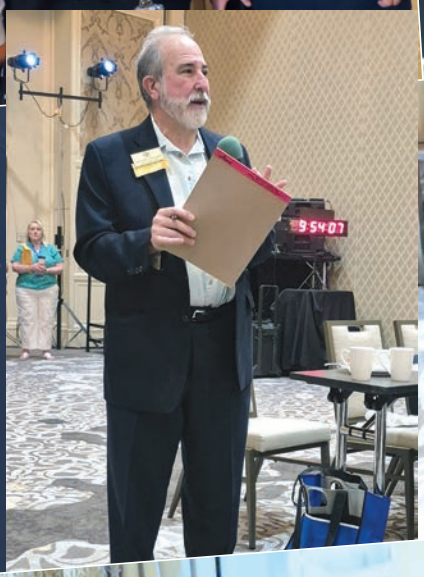



Executive Council Meeting & Legislative Update

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SALUTE TO JOHN MORAN



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

For the Real Property, Probate and Trust Law (RPPTL) Section of The Florida Bar year of 2024-25, the position of Chair was held by John Moran. John is an attorney with the Gunster Firm in West Palm Beach, where he has been since 2001 after graduation from the George Washington University School of Law. John's area of practice is probate, trust, guardianship and fiduciary litigation, including complex estate and trust administration.

John became involved with the Section early on in his professional career. Bill Hennessey and Mike Simon, who he still practices with at Gunster, introduced him to service with the Section. Mike connected John to Barry Spivey who was, at that time, Chair of the Trust Law Committee. John offered to take notes at the Trust Law Committee meetings, and the rest was history. John served as a Vice Chair of the Trust Law Committee, then moved over to the Probate Law and Procedure Committee, where he ultimately served as Chair for five years.

John reported that he has had a wonderful experience serving as Chair of the Section. John said that, unexpectedly, he very much enjoyed planning the Section meetings and finding ways to come up with unique events and surprises for Section members. John discovered in himself a talent for hosting and hospitality, which came as a surprise to him. John, fortunately, had very good mentoring from his spouse, Danielle.

Another facet of the Chair position that John enjoyed was writing the Chair's Column, published regularly in *ActionLine*. John's final column is in this current issue.

When asked if there were any surprises in his year as Chair, John said no, because he was very well trained and mentored by his predecessors, including Immediate Past Chair, Katherine Frazier. John is grateful to Katherine and many others in the "Back Row" who prepared John for what to expect and how to deal with the many demands on the Chair of the Section.

When asked if John had any advice for Section chairs that follow him, he said, "Don't be afraid to make it your own and to let the things you do reflect your interests and personality."

For new members of the Section, John's advice and recommendation is, don't try to do it all or know it all. It's better to dip your toes in committee meetings and volunteer, than to wait until you think you've got things figured out. But, after you volunteer, it's very important to follow through. The Section leadership is always looking for new members that can be relied on to advance into leadership positions. Also, for those new members with growing families, don't hesitate to bring your children along. John reports that one of his favorite takeaways from his many years of involvement in the Section is his own kids attending meetings and events and meeting our colleagues. He calls it the "RPPTL Effect." Growing up in the Section, John opines, is a wonderful way to raise your kids.

John stresses that he couldn't have done this year without the advice and support of his family: Danielle, Charlie, and Noelle. As for his wife, Danielle, John said, "It was awesome to work with her. We had a lot of fun collaborating on the meeting planning." He also expressed deep thanks and appreciation to the Section's administrators, Hilary Stephens and Jeremy Citron. He said, "Hilary and Jeremy work tirelessly to make sure everything runs smoothly. They do an incredible job."

The Real Property, Probate and Trust Law Section of The Florida Bar owes a huge debt to John Moran for the many, many hours and days that he invested in providing leadership as Chair of the Section for 2024/2025. If you see John, stop him, shake his hand, and tell him thank you for his wonderful and magical job this past year. Welcome to the Back Row, John, and your most deserved position there.

JOHN C. MORAN

MAN OF STYLE

















PRACTICE CORNER

Probate And Trust Division

Guardian or Guardian Advocate?

By Arienne C. Valencia, Esq. LL.M., Roetzel & Andress, LPA, Naples, Florida

This article explores the application and preference for guardian advocates as a less restricted alternative to guardianship. When dealing with "alleged" incapacitated persons who do not have any, or who have insufficient, less restricted alternatives, we must go through the arduous court process of guardianship: (1) finding the person incapacitated, (2) removing the person's rights and appointing a guardian, and (3) filing annual reports. Typically, the process to determine the incapacity of a person is the most difficult, costly, and time-consuming part.

Fortunately, the guardian advocate statute[1] exists to help persons with developmental disabilities circumvent that step by authorizing a circuit court to appoint a guardian advocate for persons with developmental disabilities, without an adjudication of incapacity. Developmental disability is defined as a

> "disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely."

Just like in the guardianship proceedings, all due process requirements are also applicable for guardian advocates. Then once a guardian advocate is appointed, the guardian advocate follows the same duties and has the same powers as guardians. However, guardian advocates are granted some additional "leeway" such as they are not required to have an attorney,[2] potentially not required to file annual accountings,[3] and have an easier process to restore capacity.[4]

Overall, a guardian advocate is the preferred choice as a less restrictive alternative to guardianship and should be used when applicable.

The following chart summarizes the difference between the guardian and guardian advocate process:

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	GUARDIAN	GUARDIAN ADVOCATE
Determine Incapacity	• Petition to Determine Incapacity • Notice • Appoint Attorney for Alleged Incapacitated Person (AIP) • Examining Committee • Adjudicatory Hearing • Order Determining Incapacity	• Adjudication of incapacity is not required for a person with developmental disability
Appointment	• Petition to Appoint Guardian[5] • Notice • Hearing • Order Appointing Guardian/Letters of Guardianship	• Petition to Appoint Guardian Advocate • Notice • Appoint Attorney for person with developmental disability • Hearing • Order Appointing Guardian Advocate/Letters of Guardian Advocate
Reports	• Initial Plan required • Initial Inventory required • Annual Plan required • Annual Accounting required • Simplified accounting may be used if the property is in a designated depository with limited transactions	• Initial Plan required • Initial Inventory required • Annual Plan required • Annual Accounting may be waived if the person with a developmental disability receives income only from social security benefits and the guardian advocate is also the representative payee
Restoration of Capacity	• Suggestion of Capacity – Statement and physician must examine ward and file report within 20 days • Notice/Objection Period • Hearing • Order of Restoration – needs preponderance of evidence	• Suggestion of Capacity-Statement and "evidentiary support" or good faith basis • Appoint Attorney for person with developmental disability • Notice/Objection Period • Hearing • Order of Restoration – the standard is not explicit, granted only "if court is satisfied with the evidentiary support"
Other	• Guardian must be represented by attorney	• Guardian advocate does not have to be represented by an attorney

Generally, the Petition to Appoint Guardian is filed at the same time as the Petition to Determine Incapacity. As a result, the Notice of both petitions, the hearing, and the Order Determining Incapacity/Order Appointing Guardian are also completed at the same time.



A. VALENCIA

Arienne C. Valencia *is an attorney with Roetzel & Andress, LPA in Naples, Florida, and her practice focuses on estate planning, probate and trust administration, and elder law. She earned her B.S. from the University of Florida, and her J.D. and LL.M. in Elder Law from Stetson University College of Law.*

Endnotes

1 Fla. Stat. § 393.12; Fla. Prob. R. 5.649.

2 Fla. Prob. R. 5.030.

3 Fla. Stat. § 393.12(10).

4 Fla. Stat § 393.12(12); Fla. Stat. § 744.464.

5 Generally, the Petition to Appoint Guardian is filed at the same time as the Petition to Determine Incapacity. As a result, the Notice of both petitions, hearing, and Order Determining Incapacity/Order Appointing Guardian are also completed at the same time.

PRACTICE CORNER

Real Property Division

Who Pays What Now?
The NAR Settlement's Impact on Florida Real Estate Practices

By Lisa M. Super, Esq., Zimmerman Kiser & Sutcliffe, P.A., Orlando, Florida

In March 2024, the National Association of Realtors ("NAR") agreed to a $418 million settlement agreement[1] ("Settlement Agreement") in connection with certain antitrust lawsuits[2] against NAR and certain individual brokerage firms[3]. The Settlement Agreement contemplated several policy changes, most notably in connection with broker compensation. The policy changes contained in the Settlement Agreement went into effect on August 17, 2024.

Background

Prior to the settlement, NAR implemented the cooperative compensation rule, which required that listing agents specify the amount of compensation being offered to potential buyers' agents on the multiple listing service ("MLS"). To comply with this rule, a Seller would have to agree to setting a real estate commission, typically between 5%-6%, prior to the agent listing the home on the MLS. Typically, the MLS is provided to real estate agents by local real estate boards or associations of realtors who are all members of NAR. In response to this, several home sellers filed lawsuits against NAR, alleging that the rules imposed by NAR requiring brokers to communicate an offer of compensation on the MLS may have violated antitrust laws. In or about March 2024, NAR agreed to the Settlement Agreement, which proffered new rules known as Practice Changes.[4] While not all real estate agents or brokers are members of NAR, many have chosen to join due to two lucrative membership benefits: the ability to utilize NAR's trademarked term of "REALTOR®", and the ability to access the MLS. For purposes of this article, the "buyers' agent", "buyers' broker", "listing agent" or "listing broker" shall be deemed NAR members.



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Key Changes

The most notable change is that listing agents are no longer permitted to advertise offers of compensation on the MLS. It is important to distinguish that this prohibition does not forbid listing brokers or sellers from offering compensation for buyer broker compensation, rather, such arrangements are no longer permitted to be included on the MLS listing. The Settlement Agreement additionally removes the prerequisite that a buyers' broker have a subscription to the MLS to accept an offer of compensation. This prohibition of disclosure on the MLS does not prohibit a listing agent from disclosing whether the seller is offering buyer broker compensation outside of the MLS.

The Settlement Agreement further establishes a rule requiring written agreements between potential buyers and their agents, known as buyer broker agreements. Prior to showing any properties listed on the MLS, a buyer broker agreement must be negotiated and signed by the potential buyer and their agent. Said buyer broker agreement must specify the amount or the rate of compensation the buyers' agent will receive and provide the basis for how said amount will be determined.[5] The buyer broker agreement should also clearly establish what services the buyer will be receiving and what the specific costs will be. Real estate agents may only represent to potential buyers or sellers that their services are "free" or "available at no cost" where said agent will receive no financial compensation from any source for said services. Additionally, buyers' agents are prohibited from "filter[ing] out or restrict[ing]" [6]listings for their customers based on the amount of compensation, or lack thereof, being offered to the buyer's broker.

The final notable change is regarding disclosures. Now, both buyers' agents and listing agents are required to provide disclosures containing language stating that real estate commissions are not set by law and are fully negotiable. While this has always been the case, it must now be conspicuously provided in a disclosure form. Additionally, listing agents must

> conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that the listing broker or seller will make to another broker, agent, or other representative (e.g., a real estate attorney) acting for buyers; and such disclosure must be in writing, provided in advance of any payment or agreement to pay to another broker acting for buyers, and specify the amount or rate of any such payment.[7]

Practice Considerations.

While the intention seems to be providing an environment where a buyer or a seller can negotiate compensation directly with their respective brokers, there are a few key issues to keep in mind. For example, when reviewing buyer broker agreements it is important to determine whether the language of the agreement obligates the buyer to pay compensation in the event the transaction does not close. An additional consideration is to determine whether the buyer will need to bring any additional funds to closing in order to compensate the buyer's agent. Since the Settlement Agreement requires that a buyer's agent disclose compensation from any source in a manner that is "objectively ascertainable and may not be open ended"[8] in the buyer broker agreement, the amount of additional cash that a potential buyer may need to bring to the table to compensate their broker should be reasonably ascertainable at the time the buyer intends to put in an offer. Note that the Settlement Agreement prohibits the buyers' agent from receiving compensation in excess of the amount or rate provided in the buyer broker agreement. It's also important to make sure when reviewing listing agreements or preparing contracts that you are utilizing the most recently updated form documents. The Florida Association of Realtors form documents and the FR/Bar form documents have been updated to contain language consistent with the disclosure requirements of the Settlement Agreement.



L. SUPER

Lisa M. Super *practices with the law firm of Zimmerman, Kiser & Sutcliffe, P.A. in Orlando, Florida, and focuses primarily on residential and commercial real estate transactions, and lender representation. Ms. Super completed her undergraduate studies at Eastern Michigan University and earned her juris doctor from Ave Maria School of Law. She is currently serving as the President of the Central Florida Real Estate Attorney's Council.*

Endnotes

1 Corrected Settlement Agreement at Page 1, *Burnett v. Nat'l Ass'n of Realtors*, No. 4:19-cv-00332-SRB (W.D. Mo. filed April 19, 2024)

2 *Burnett et al. v. National Association of Realtors, et al.*, No. 19-CV-00332-SRB (W.D. Mo.), *Moehrl et al. v. National Association of Realtors et al.*, Case No. 1:19-cv-01610-ARW (N.D. Ill.); *Daniel Umpa v. The National Association of Realtors, et al.*, No. 23-cv-945 (W.D. Mo.), and *Don Gibson v. The National Association of Realtors, et al.*, No. 23-cv-00788 (W.D. Mo.)

3 NAR maintains that it did not engage in any wrongdoing in regard to the Multiple Listing Service (MLS) cooperative compensation model rule.

4 Corrected Settlement Agreement at Page 28-30, *Burnett v. Nat'l Ass'n of Realtors*, No. 4:19-cv-00332-SRB (W.D. Mo. filed April 19, 2024)

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

Probate Case Summaries

By Lyudmyla Kolyesnik – Greene|Kolyesnik BridgeTrust, PLLC, Jacksonville, Florida

Estate may be reopened based on allegations of fraud in distribution of wrongful death settlement proceeds, despite prior settlement agreement with trust, where the personal representative entered into a private agreement with a beneficiary without fully disclosing the beneficiary's rights as surviving spouse.

Udell v. Udell, 397 So. 3d 1050 (Fla. 4th DCA 2024)

The surviving spouse of Evelyn Udell sought to reopen her estate after a wrongful death settlement was distributed to a non-marital trust, rather than directly to him. The decedent's son, who served as personal representative and co-trustee of the trust, argued that a prior settlement agreement between the trust beneficiaries (the "Private Agreement") barred the surviving spouse from seeking any further distributions. The trial court granted summary judgment in favor of the personal representative. The surviving spouse appealed.

The Fourth District Court of Appeal (the "4th DCA") reversed and remanded. Following the decedent's tragic death, the personal representative brought a wrongful death claim pursuant to Fla. Stat. § 768.20 (2019). The claim was based on the surviving spouse's loss of consortium. The parties presented no other claims for survivors' damages or lost earnings. Despite this, the personal representative distributed the entirety of the settlement proceeds into the decedent's non-marital trust, from which the surviving spouse received limited monthly distributions. At no time during the estate or the wrongful death proceedings did the surviving spouse have independent legal counsel.

After a dispute arose between the surviving spouse and the decedent's sons regarding a proposed donation in the decedent's memory, the parties entered into the Private Agreement. Under its terms, the surviving spouse began receiving an increased monthly amount from the trust and agreed not to seek any further trust distributions.

Eight months later, the surviving spouse petitioned to reopen the estate, alleging that the personal representative, acting individually and in his fiduciary capacity, failed to disclose that the surviving spouse had a personal right to the wrongful death proceeds. The petition alleged that the decedent's sons used their positions as fiduciaries to divert those funds into the non-marital trust, thereby benefitting themselves and their children as remainder beneficiaries. The surviving spouse argued that he relied on his sons to act in his best interest and would not have entered into the Private Agreement had he known that he was legally entitled to the full proceeds from the settlement.

In response, the personal representative argued that the surviving spouse had waived any such claims through prior waivers and the Private Agreement. The trial court granted summary judgment on those grounds. The 4th DCA reversed the trial court's order, holding that the petition sought to challenge the distribution of the wrongful death settlement itself, not to obtain additional trust distributions. The court explained that claims involving fraud or bad faith allow for reopening of an estate, even after the personal representative has been discharged.

The court emphasized that the wrongful death settlement, which arose solely from the surviving spouse's loss of consortium, was not an estate asset and should not have been placed in the decedent's trust. The Private Agreement related to the trust only and did not govern matters involving the estate. Moreover, the court found no language in the agreement or in the earlier waivers that expressly released claims based on fraud.

Importantly, the court reiterated that "[i]n any transaction with a beneficiary, a fiduciary has an obligation to make full disclosure to the beneficiary of all material facts." Because the personal representative's failure to disclose to the surviving spouse, his right to receive the wrongful death settlement directly, the allegations supported a claim for fraud sufficient to justify reopening the estate.

The court further held that under Florida law, a waiver of legal rights must be knowing and intentional. A general waiver or release is not effective to bar a fraud claim, unless it explicitly states that fraud is being waived. In this case, the Private Agreement did not contain such language, and thus, could not preclude the surviving spouse's request for relief.

Because the surviving spouse acted promptly upon discovering the relevant facts and was previously denied the opportunity to conduct discovery into the personal representative's conduct, the 4th DCA found that summary judgment was improper. The case was remanded for further proceedings on the fraud-based claims.

Children contesting the validity of a trust in which they were not beneficiaries had standing to sue the trustee for mismanagement and accounting issues, as their potential inheritance depended on the outcome of the trust challenge.

Cates v. Community Bank and Trust of Florida, 277 So. 3d 1095 (Fla. 5th DCA 2019)

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The children of Mr. Gregory Cates, appealed the dismissal of their breach of trust action against Community Bank and Trust of Florida ("Bank"), the trustee of their late father's trust for alleged mismanagement of trust assets as revealed in the trust accounting. The trial court concluded that the children lacked standing because they were not named beneficiaries of the trust. The Fifth District Court of Appeal reversed, holding that they qualified as "interested persons" under the Florida Trust Code and had standing to bring the claim, because they would be affected by the trustee's actions, in the event that they succeeded in contesting the validity of the decedent's will and trust, in a separate action.

The matter arose after the decedent executed a pour-over will in 2016, shortly before his death. The will directed that the majority of his assets be transferred into a revocable trust, which named the Bank as trustee. The trust directed the majority of its assets to two charitable organizations and granted one of the children a life estate in the decedent's homestead property. The other child received no distribution under the trust.

After their father's death, the children filed an action to invalidate the 2016 will and trust, alleging that the decedent lacked testamentary capacity at the time of execution. In response, the Bank delivered trust accountings and investment statements to the children, each containing a statutory limitations notice pursuant to Fla. Stat. § 736.1008.

Shortly thereafter, Ms. Cates and Mr. Cruz filed a separate action against the Bank, alleging breach of trust and mismanagement of the trust assets. The Bank moved to dismiss the complaint, arguing that since the children were not beneficiaries of the trust, their interest in the estate was hypothetical and contingent upon their success in the pending invalidation action. The trial court agreed and dismissed the breach of trust case for lack of standing.

Under Fla. Stat. § 736.0201(2), an "interested person" may invoke the court's jurisdiction in proceedings related to the validity, administration, or distribution of a trust. Fla. Stat. § 731.201(23), defines "interested person" as any person who may reasonably be expected to be affected by the outcome of the proceeding. The Fifth District Court of Appeals found that, although the children were not named in the trust as beneficiaries (apart from the life estate), they had a concrete interest in the trust assets because of their pending invalidation action. If successful, they would inherit under a prior will or through intestacy. That interest was sufficient to bring a claim against the trustee regarding the administration of the trust.

Fourth District Court reversed probate court order directing the transfer of the estate from Florida to New York where although the decedent was not domiciled in Florida, the decedent owned real property in Broward County.

Markes v. Markes, 50 Fla. L. Weekly D975a (4th DCA 2025)

The Fourth District Court of Appeal reversed a probate court's order transferring a Florida estate proceeding to New York after the probate court found that the decedent's last domicile was in New York, not Florida. Although the appellate court agreed with the trial court's determination that Florida was not the decedent's domicile at the time of death, it held that venue was proper in Broward County due to the decedent's ownership of real property in the state.. The court also clarified that Florida courts have no authority to transfer probate matters to other states.

Decedent, originally from Jamaica, spent many years living in New York but frequently vacationed in Florida and accumulated multiple properties in the State. In 2017, he suffered medical issues and lived in an assisted living facility in New York until 2020. He then relocated to Jamaica, where he lived until his death in 2023.

In August 2023, two of the decedent's children filed a probate petition in Broward County, claiming he was domiciled there and owned ten Florida properties. The 2017 will they submitted disinherited another child, the appellee. After learning of the case, the appellee intervened, arguing the decedent was domiciled in New York and asking that the probate be moved there. The Broward court held a hearing, found the decedent was not domiciled in Florida, and ordered the case transferred to New York.

On appeal, the Fourth DCA agreed Florida was not the decedent's domicile. While he had shown interest in retiring there, he never moved permanently and spent his final years in Jamaica. The court emphasized that domicile depends on a person's intent to make a place their permanent home, and here, the record supported Jamaica as that place. However, the appellate court reversed the transfer order, holding that Florida retained jurisdiction and venue was proper in Broward County. Fla. Stat. § 733.101(1)(b) provides that if a decedent is not domiciled in Florida, venue lies in any county where the decedent owns property. Venue was propere because the decedent owned substantial real property in Broward County, venue was proper.

The court also found no statutory or legal authority permitting a Florida court to "transfer" a probate proceeding to another state. The court noted that even if another state might have concurrent jurisdiction over a decedent's estate, Florida courts cannot unilaterally move proceedings out of State. Furthermore, Florida law permits courts to administer the estates of nonresidents who own property within the State, even if the decedent died domiciled abroad. The court pointed to Fla. Stat. §§ 731.106(2) and 732.502(2)(2023), which grant Florida courts authority to determine the validity and distribution of property under a will executed by a nonresident, and to apply Florida law where appropriate.

Accordingly, the appellate court affirmed the trial court's

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Real Property Case Summaries

By Lisa M. Super, Esq., Zimmerman Kiser & Sutcliffe, P.A., Orlando, Florida

The doctrine of equitable estoppel cannot be applied to toll the statute of repose under Fla. Stat. § 95.281 based on the mortgagor's post-maturity payments. The plain language of Fla. Stat. § 95.281(4) prohibits extending the time to pursue a foreclosure action by any method, other than a recorded extension agreement executed by the mortgagee and mortgagor.

Quintana v. Rodriguez Fam. Inv. P'ship, LLLP, 402 So. 3d 398 (Fla. 3d DCA 2024)

Quintana and her husband ("Quintana") entered into a mortgage contract with Rodriguez Family Investment Partnership, LLLP ("RFIP") to secure payment of a promissory note in the amount of $300,000 on April 10, 2009. The mortgage specified a maturity date of April 10, 2012 and was recorded. The parties entered into a mortgage modification to secure the payment of an additional $100,000, identified in a second promissory note on September 3, 2009. In the mortgage modification, both parties agreed that the amounts in first promissory note and the second promissory note were consolidated into a total of $400,000. The mortgage modification was recorded without a maturity date on its face, was not deemed a novation of the mortgage, and provided a provision stating that the second promissory note was secured as a future advance under the mortgage, notating that the second promissory note was of an "equal dignity with note I as though it had been executed at the same time as note I." In 2011, a satisfaction was erroneously recorded. Despite this erroneous recordation of satisfaction, Quintana continued making payments to RFIP on the mortgage until August 24, 2016. In September 2016, Quintana contacted RFIP to modify the terms of the loan documents. The following month, RFIP counter-offered but Quintana never replied. In 2017, an affidavit of scrivener's error was recorded in Miami-Dade County, acknowledging that the subject property's mortgage was not satisfied.

RFIP filed suit against Quintana to establish and foreclose an equitable lien or, in the alternative, to impose an equitable vendor's lien on the subject property, and later amended its complaint to add a claim for mortgage foreclosure. Quintana moved for summary judgment arguing, in relevant part, that Quintana's post-maturity payments did not extend or toll the statute of limitations or statue of repose. RFIP cross-moved for summary judgment, arguing that under Fla. Stat. § 95.281(1)(a), Quintana's post-maturity payments tolled the statute of limitations and RFIP was entitled to an equitable lien under the theory of unjust enrichment because a judgment in favor of Quintana would result in a windfall. The trial court granted RFIP's cross-motion for summary judgment and held that pursuant to the doctrine of equitable estoppel, Quintana's post-maturity payments tolled the limitation period of Fla. Stat. § 95.281(1).

Quintana argued on appeal that the trial court's finding that the doctrine of equitable estoppel cannot apply under the factual circumstances here to toll Fla. Stat. § 95.281(1) (2018). The appellate court agreed with Quintana and reversed the trial court's ruling, holding that the doctrine of equitable estoppel cannot be applied to toll the statute of repose under Fla. Stat. § 95.281 based on the mortgagor's post-maturity payments.

The appellate court noted that the parties did not execute an extension agreement, and further noted that the statute clearly states that the time to file a claim "shall not be extended by any other agreement, nonresidence, disability, part payment, operation of law, or any other method." Fla. Stat. § 95.281(4). The appellate court further found that RFIP's reliance on *Irwin v. Grogan-Cole*, 590 So. 2d 1102, 1104 (Fla. 5th DCA 1991) to support its position that a mortgagor's payments beyond the maturity date serves to toll Fla. Stat. § 95.281(1) was misplaced. In Irwin, a purchaser took ownership of real property "subject to the mortgage more than five years after its original due date." Id. at 1104. The court determined that the purchaser was therefore barred from claiming a defense based on the limitation period of Fla. Stat. § 95.281(1) because it acknowledged the existence of the mortgage "even after the [limitation period of Fla. Stat. § 95.281(1)] had facially run." Id. at 1104.

Unlike in Irwin, the appellate court noted there was no such recognition of the validity of the mortgage past the five-year limitation period in the instant case, and notes that Quintana was the original obligor under the mortgage. Despite the original maturity date being April 10, 2012, Quintana continued to make payments until August 2016, however, no action to acknowledge the validity of the mortgage at any time after the five-year limitation contained in Fla. Stat. § 95.281(1) had run. The court further notes that RFIP had nearly a year between Quintana's final payment and the expiration of the fie-year time limit provided in Fla. Stat. § 95.281(1) to file it's claim, citing *Am. Bankers*, 905 So. 2d at 193 (finding that correspondence between parties discussing extending maturity date could not extend life of mortgage lien because it did not comply with recordation requirements mandated by Fla. Stat. § 95.281(2)). As a result, the court found that the the doctrine of equitable estoppel did not apply to toll the five-year time period RFIP had to file its claim. Accordingly, the appellate court reversed and remanded the trial court's decision.

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The contractual duty to maintain the property "in good working order, ordinary wear and tear excepted," does not include an obligation to replace assets that have aged beyond their useful life and can no longer be repaired.

Golf v. Grand Harbor Golf Club, LLC, 401 So. 3d 337 (Fla. 4th DCA 2024)

The Appellee, Grand Harbor Gulf Club, LLC (the "LLC"), is successor in interest to the developer of a country club located in Indian River County. The LLC's predecessor entered into an Agreement to Sell ("Agreement") with the Appellant, Grand Harbor Golf & Beach Club, Inc. (the "Club"), whereby the developer agreed to convey and transfer club facilities to the Club at a future turnover date. The Agreement placed pre-turnover duties on the developer, which include the obligation to maintain the Club facilities "in good working order, ordinary wear and tear excepted." The Agreement included a provision requiring expert inspection to occur within three months of the Agreement's execution, "to confirm that the existing Club Facilities are in good working order, taking into account the age and use of the facilities." The Agreement required the developer, at "its sole cost and expense," to "make the necessary repairs indicated in the inspection reports." On the turnover date, the Club agreed to accept the club facilities in its "where is, as is" condition, without warranties, subject only to the initial inspections and repairs. In 2004, the LLC became the successor in interest to the original developer and assumed all the developer's obligations under the Agreement and operated the Club until 2020, when a dispute arose as to whether the LLC was required to pay for all of the Club's desired repairs and renovations. The LLC proposed an early turnover as an alternative to bankruptcy, and the parties entered into a Second Omnibus Agreement (the "Omnibus Agreement") whereby the LLC transferred to the Club all of its unsold equity memberships. In addition, the Omnibus Agreement provided that the Agreement to Sell's "where is, as is" provision survived the turnover. Following turnover, the Club brought suit against the LLC asserting multiple counts for breach of contract and breach of fiduciary duty. This analysis focuses on Count I (claim for breach of the Agreement, alleging that the LLC and affiliated entities breached their obligations by failing to maintain the Club facilities in "good working order, ordinary wear and tear excepted," and failing to "operate the Club Facilities…in a manner comparable to other similar country club facilities in the State of Florida.")

Both parties filed competing Motions for Summary Judgment, with the Club arguing that the LLC's duty to maintain included an obligation to perform capital replacement of any asset that was beyond its useful life, and the LLC arguing that the duty to maintain provided in the Agreement did not encompass a duty to pay for capital replacements. The trial court agreed with the LLC, finding that the governing documents (including the Agreement) did not create a duty for the LLC to pay for capital expenses or to replace assets that could no longer be repaired, noting that "there is no provision anywhere in the Governing Documents that imposes a requirement on [the LLC] to pay for capital repairs/replacements." The trial court further found that the reservation of rights in the Omnibus Agreement "did not create new claims related to the condition of the club facilities; it only reserved claims if they already existed."

The appellate court found that the ordinary meaning of "maintain" does not encompass replacement or reconstruction of physical assets. In coming to this conclusion, the court found that a maintenance obligation similar to the one in this case did not include the duty to replace assets beyond their useful life. See *Polo/W. Hartford, LLC v. Loring Realty Advisors, VII, LLC*, No. CVH-7662, 2009 Conn. Super. LEXIS 1113, 2009 WL 1299099, at *9 (Conn. Super. Ct. May 4, 2009) (holding that a tenant's obligation to share the cost of "maintenance" of a parking area did not include the "cost of replacing or reconstructing it"); *Twp. of Lower Yoder v. Borough of Westmont*, No. 932 C.D. 2016, 167 A.3d 310, 2017 WL 2350448, at *1, *4 (Pa. Commw. Ct. May 31, 2017) (holding that a maintenance obligation for sewer lines did not require "wholesale replacement of the existing system").

The appellate court affirmed the trial court's Final Judgment and interpretation of the Agreement's terms finding that the trial court interpreted the agreement correctly and properly rejected the argument that the Agreement included the duty to replace assets beyond their useful life, but noted that issues of fact remain as to whether certain conditions of property fell under the LLC's obligation to maintain the property. As a result, the appellate court affirmed the trial court's ruling in part, reversed in part, and remanded for further proceedings consistent with the court's opinion.

A party seeking to reestablish a lost promissory note under Fla. Stat. § 673.3091(1) does not need to prove "how the note was lost, nor the circumstances surrounding its loss," rather, it need only establish the three factors provided under the statute.

U.S. Bank Tr., N.A. v. Rodriguez, 397 So. 3d 1141 (Fla. 2d DCA 2024)

U.S. Bank Trust, N.A. ("U.S. Bank"), as trustee for the LSF9 Master Participation Trust, was the plaintiff in a foreclosure proceeding. In connection with said proceeding, the trial court's found that U.S. Bank had failed to reestablish a note that was lost during the pendency of the suit because the representative of the servicer did not explain "how the note was lost, nor the circumstances surrounding its loss." U.S. Bank filed an appeal, arguing that U.S. Bank satisfied the three statutory requirements for reestablishing a lost note under Fla. Stat. § 673.3091(1).

The appellate court found that the trial court erred when

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ruling in connection with U.S. Bank's standing at the time of trial. In order to prove its standing at trial, U.S. Bank had to restablish the lost note. This is accomplished under section 673.3091(1), Florida Statutes (2017), by proving that

> (a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred; (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

The appellate court found that U.S. Bank's proof satisfied all three elements. First, the court noted that the servicer's litigation representative walked the court through the documents reflecting all transfers of the note, showing that the note was twice specially indorsed to U.S. Bank with no other indorsements and that U.S. Bank had been the owner of the note for several years before filing the foreclosure complaint. See Fla. Stat. § 673.2051(1) ("When specially indorsed, an instrument becomes payable to the identified person . . . ."); *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308, 310 (Fla. 2d DCA 2013) ("A plaintiff who is not the original lender may establish standing to foreclose a mortgage loan by submitting a note with a blank or special endorsement, an assignment of the note, or an affidavit otherwise proving the plaintiff's status as the holder of the note."); *Dixon v. Express Equity Lending Grp.*, 125 So. 3d 965, 967-68 (Fla. 4th DCA 2013) (holding that a note that is specially indorsed to a named entity establishes that entity's standing to bring a foreclosure action). The court further noted that the homeowner failed to question the indorsements, and presented no evidence to contradict U.S. Bank's ownership.

The court noted that the second and third elements were proven from the testimony from the servicer, which provided an account of the servicer's diligent 45-day, 400-point boarding process which included verification of the documents and the history of the loan at issue. Due to the foregoing, the servicer discovered the original note had been lost but had also determined the not had never been transferred or seized from U.S. Bank's control. Finally, the servicer's representative testified that a portion of the search for the lost note included contacting prior bailees of the note and which established that the note's whereabouts could not be determined. This was consistent to satisfy the third element of Fla. Stat. § 673.3091(1).

The appellate court found that U.S. Bank had successfully reestablished the note and that the trial court had placed a loftier burden on U.S. Bank than the statute requires. Further, the court noted that it has been expressly held that "[i]t is not necessary . . . that the affidavit or testimony establish 'exactly when, how, and by whom the note was lost.'" *Charm-B*, 363 So. 3d at 1121 (quoting Boumarate v. HSBC Bank USA, N.A., 172 So. 3d 535, 537 (Fla. 5th DCA 2015)).

As such, The appellate court held that the trial court erred by requiring additional proof of exactly how and when the note was lost, which is not mandated by the statute. As a result, the court reversed the judgment on appeal and remand for further proceedings.

Lisa M. Super *practices with the law firm of Zimmerman, Kiser & Sutcliffe, P.A. in Orlando, Florida, and focuses primarily on residential and commercial real estate transactions, and lender representation. Ms. Super completed her undergraduate studies at Eastern Michigan University and earned her juris doctor from Ave Maria School of Law. She is currently serving as the President of the Central Florida Real Estate Attorney's Council.*

Probate Case Summaries, from pg 49

ruling that the decedent was not domiciled in Florida but reversed the transfer order. The case was remanded for further proceedings in Broward County.

Probate court erred in holding personal representative personally liable for the full creditor claim, which exceeded the value of estate assets; liability for breach of fiduciary duty must be limited to actual damage or loss, and cannot exceed what would have been recovered from the estate, but for personal representative's breach.

Brush v. Coppelli, 50 Fla. L. Weekly D410b (5th DCA 2025)

The Fourth DCA reversed a probate court's damages award that held the personal representative, Brush, personally liable for the full amount of a creditor's $34,834.75 claim. While the court agreed Brush breached her fiduciary duty by making an improper distribution, it found she could only be held liable for the actual harm caused, $12,644.79 in improper distributions, not the total unpaid claim.

The estate lacked sufficient assets to fully pay Coppelli's judgment, and Florida law limits fiduciary liability to the damage resulting from the breach, not the entire amount the estate could not pay. By awarding Coppelli the full claim amount, the probate court placed her in a better position than she would have been in had no breach occurred, which was error.

On remand, the court must reduce the judgment to reflect only the loss caused by the breach.

Lyudmyla Kolyesnik *is a distinguished attorney and the founder of BridgeTRUST, PLLC, specializing in trust and estate administration, litigation, and fiduciary services. With a profound dedication to helping families safeguard their legacies, Lyudmyla combines meticulous legal advocacy with a deep commitment to her clients.*

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Roundtable

Highlights of the Meeting of the Section

REAL PROPERTY DIVISION and PROBATE AND TRUST DIVISION JOINT ROUNDTABLE

SATURDAY, FEBRUARY 8, 2025

The Ritz-Carlton • Amelia Island, Florida

Prepared by Lyudmyla Kolyesnik, Esq., Jacksonville, Florida and John C. W. Cherneski, Esq., Jacksonville, Florida

Thank you to the Probate Roundtable Sponsors: Stout Risius Ross, Inc. and Guardian Trust Foundation, Inc.

Thank you for the Real Property Roundtable Sponsor: FNF Family of Companies

The Chair of the Executive Committee, John Moran, called the meeting to order at 8:20 a.m.

Revised Rules of Civil Procedure Presentation. Chris Smart and Mike Hargett presented an overview of recent amendments to the Florida Rules of Civil Procedure. The amendments further align the Florida Rules of Civil Procedure with the Federal Rules of Civil Procedure.

Mike reminded Roundtable attendees that a free one-hour CLE about the rule changes is available on the Section's YouTube Channel @RPPTLCLE, clicking this link https://youtu.be/t6rZm7uiaHw, or by scanning the QR Code included at the end of this summary. Mike also encouraged section members to review the five Florida Supreme Court opinions issued between March 2024 – December 2024 concerning the rule changes.

Action Items. No action items were presented at this Joint Roundtable.

Information Items. No information items were presented at this Joint Roundtable.

Committee Reports

Professionalism and Ethics Committee – Andrew Sasso, Chair. Michael Gelfand gave a presentation on HB 173 regarding proposed Interest on Trust Accounts ("IOTA") legislation and the current requirements for IOTA accounts in Rule 5-1.1 of the Rules Regulating Trust Accounts. Interest that accrues on IOTA accounts is used to fund legal aid organizations throughout the state of Florida. In 2023, the Florida Supreme Court amended Rule 5-1.1 to require that IOTA accounts use a formula based on the Wall Street Journal Prime rate to calculate the minimum interest rate for IOTA accounts. As a result of the rule change, funding for Funding Florida Legal Aid (formerly The Florida Bar Foundation) rose from $9.5 million in fiscal year 2022-2023 to $45.5 million in fiscal year 2023 – 2024. Pursuant to the rule, The Florida Bar will notify lawyers directly if the financial institution where the lawyer's trust account is maintained is not in compliance with IOTA requirements. HB 173 would create section 655.97, Florida Statutes. The proposed legislation would create two alternative rates for banks to use in setting IOTA interest rates. Each bank would choose its alternative rate to pay. The first alternative is the highest equivalent rate the bank offers for comparable non-IOTA business or consumer accounts. The second alternative rate is 25 percent of the Federal Funds Target Rate or .25 percent, whichever is higher. It is anticipated that the proposed legislation would result in lower interest rates for IOTA accounts. The Florida Bar and the RPPTL Section are not taking a formal position on the proposed legislation at this time.

Trust Law Committee – David Akins, Chair. David reported that a legislative proposal to revise Fla. Stat. §§ 732.302 and 736.0201 to address rights and protections for pretermitted children in revocable trusts has been approved by the Trust Law Committee. The committee anticipates that the proposed legislation will be an information item at the next meeting. At the Amelia Island meeting, the Trust Law Committee also received reports from its Lost Trust Subcommittee and Consumer Protection Pamphlet Subcommittee.

Probate and Trust Litigation Committee – R. Lee McElroy, IV, Chair. Lee reported that at the Amelia Island meeting, the Probate and Trust Litigation Committee received reports from its Interested Person Subcommittee, Probate/Trust Procedures Subcommittee, and discussed a recent case addressing testamentary capacity and the new summary judgment standard, Reeves v. Gross, 403 So. 3d 362 (Fla. 3d DCA 2025). Lee also reminded attendees about the upcoming Probate & Trust Litigation Symposium.

Charitable Planning and Exempt Organizations Committee – Denise Cazobon, Chair. Denise reported that the Charitable Planning and Exempt Organizations Committee is working on a Charitable Organization Privacy Protection Act with the IRA, Insurance & Employee Benefits Committee. The goal of the act is to make it easier to name a charitable organization as a beneficiary of assets such as IRA accounts by protecting personal information of board members and other individuals associated with the charity.

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Probate Law and Procedure Committee – Theo S. Kypreos, Chair. Theo reported that the Probate Law and Procedure Committee is working with the Probate Rules Committee to investigate rule amendments regarding service of notice to creditors. The Probate Law and Procedure Committee is also forming a joint subcommittee with the Probate Rules Committee to review and recommend potential rule and statutory changes to summary administration procedures.

Membership Committee – Larry Miller, Chair. Larry reported that the committee is interested in expanding its presence and sponsorships within voluntary bar associations and estate planning councils. Larry asked any section members that are involved in their local bar associations and planning councils to contact him or any Membership Committee member about the sponsorship opportunities.

CLE Coordination Committee – Nick Curley, Co-Chair. Nick reminded attendees to view the free one-hour CLE on the Florida Rules of Civil Procedure. Nick also reported that the Membership Committee is planning a CLE webinar program on solo and small firm issues. Nick encouraged section members to contact Larry Miller or any of the Membership Committee vice chairs if they want to be involved.

Probate & Trust Law Division Report – Jon Scuderi, Director. Jon reported that the Probate & Trust Law Division will be presenting an information item at the Executive Council meeting concerning statutory discharge of a trustee.

Sponsor Announcements. Jon Scuderi recognized the Probate Roundtable sponsors, Stout Risius Ross, LLC ("Stout") and Guardian Trust Foundation, Inc. ("Guardian Trust"). Garry Marshall was present on behalf of Stout. Travis D. Finchum, Esq., was present on behalf of Guardian Trust.

Real Property Division Report – Steve Mezer, Director. Steve advised that the Real Property Division would present its report at the Executive Council meeting.

Adjournment. The meeting was adjourned at 9:13 a.m.

Free one-hour CLE on amendments to the Florida Rules of Civil Procedure

SATURDAY, MAY 31, 2025

Four Seasons • Orlando, Florida

Prepared by Lyudmyla Kolyesnik, Esq., Jacksonville, Florida

Thank you to the Probate Roundtable Sponsors:
Stout Risius Ross, Inc. and Guardian Trust Foundation, Inc.

Thank you to the Real Property Roundtable Sponsor:
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The Chair of the Executive Committee, John Moran, called the meeting to order at 8:10 a.m.

Presentation on the Benefits and Perils of Artificial Intelligence: Hardy L. Roberts, III, presented an overview of the potential efficiencies and risks associated with artificial intelligence tools in legal practice. He cautioned attendees about AI's known limitations, including its tendency to hallucinate legal authorities. For example, Hardy shared that while ChatGPT performed accurately in one test, it produced fabricated citations when asked to draft a motion to dismiss based on a sample complaint. He reminded attendees that AI tools are ultimately chatbots, not truth-seeking engines.

The presentation also referenced Florida Bar Ethics Opinion 24-1, issued January 19, 2024, which addresses confidentiality, misbilling risks, AI licensing agreements, and advertising rules, particularly concerning website chat boxes, allowing bots to speak on a firm's website. Attendees were encouraged to consult The Florida Bar Guide to Getting Started with AI for additional guidance. The presentation closed with notes on emerging legal AI tools, including Lexis AI and Westlaw AI services, which practitioners are starting to utilize and find helpful.

Action Items. No action items were presented at this Joint Roundtable.

Information Items. No information items were presented at this Joint Roundtable.

Division Reports. No division reports were presented at this Joint Roundtable.

Committee Reports:

Title Issues & Standards Committee – Liron ("Lee") Offir, Co-Vice Chair. Lee reported that the committee is actively working on updates to the title standards and will begin work on bankruptcy related standards next.

Historian Committee Presentation – David C. Brennan, Chair. David, marking his 50th year on the Executive Council, invited members to contribute scrapbooks for a humorous look back at the Section's history, including vintage announcements, budget reflections, and a "cold case" involving the late Ed the Raccoon. The presentation featured a 1983 RPPTL event flyer touting whiskey and football for $35 per couple, a photo of a man building a fence, a review of the 1987-88 budget drop from $117,000 to $93,000, a light-hearted poem, and concluded with a gift of amaretto to John Moran.

Sponsor Announcements. Jon Scuderi recognized the Probate Roundtable sponsors, Stout Risius Ross, LLC ("Stout") and Guardian Trust Foundation, Inc. ("Guardian Trust"). Garry Marshall was present on behalf of Stout. Travis D. Finchum, Esq., was present on behalf of Guardian Trust.

Adjournment. Meeting was adjourned at 9:05 a.m.

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