

ActionLine

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

Community Land Trusts

Selecting a High Net Worth Investment Adviser

Closing Protection Letters

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Winter 2006

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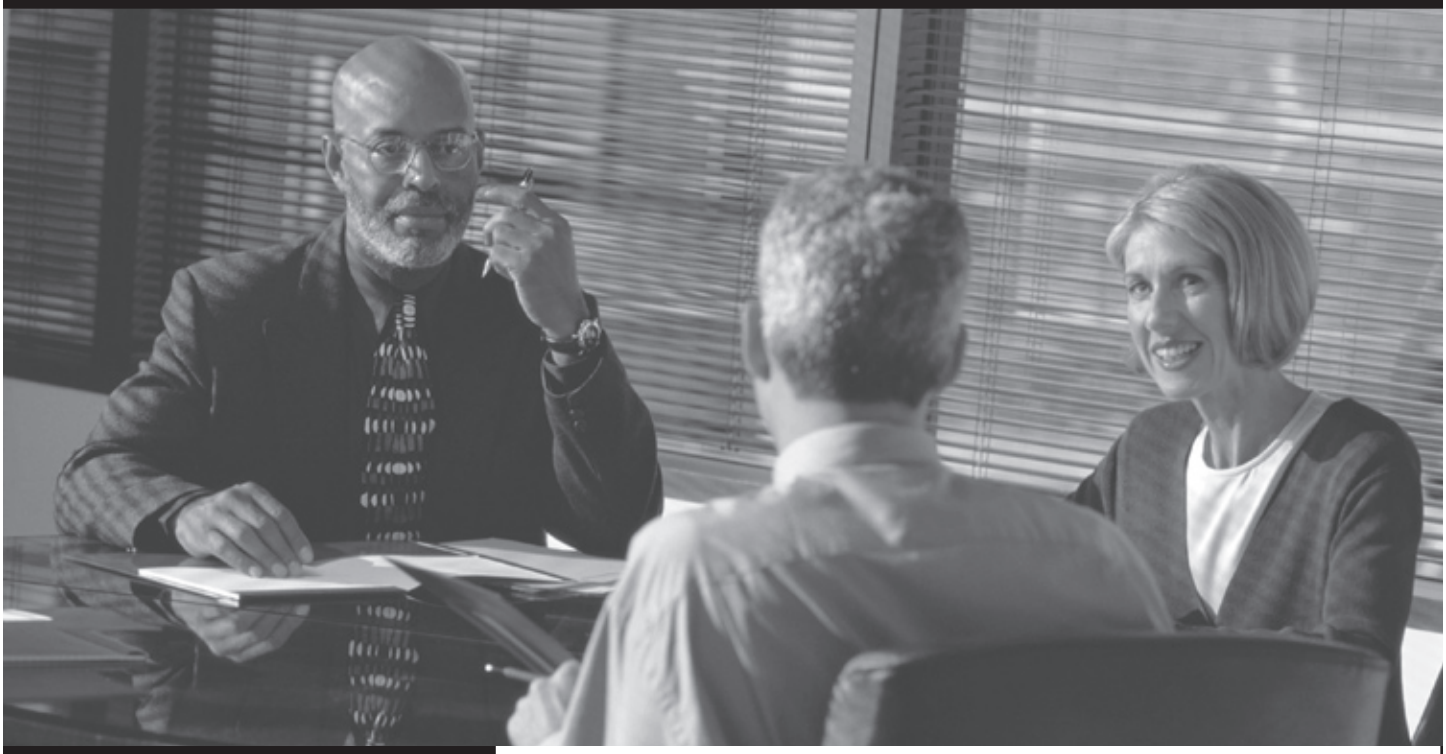

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Just "Good" Is Not Good Enough



By Rohan A. Kelley, Jr.
Section Chair
2006 - 2007

Chair's Column

It is always useful to do a self-examination and ask "What can I improve?" In the case of our Section, there may be many answers to that question.

One of those answers is found in the composition of our Section and its leadership, that is, "our diversity." I told you in my first Chair's Column that "doing it better is one of my goals for the Section during my year as Chair."

A quick primer on how our Section is organized is that our dues-paying membership approaches 10,000 members. Then, a small percentage of those members (we should have more) have volunteered to serve on Section committees which do much of the business of the Section such as generating proposed legislation, preparing and filing amicus briefs with the appellate courts and supreme court on cases of substantial interest to our members and the public, producing this ActionLine magazine and editing articles for our column in The Florida Bar Journal, considering ethical issues which are specific to our practice and recommending changes or clarifications to The Florida Bar's professionalism committee, and so on as I described in my previous Chair's Column. Above the committee structure is the Executive Council of the Section comprised of each chair and vice chair of a Section committee and Circuit Representatives to each judicial circuit who provide direct liaison with our local members and the voluntary bar associations. Membership on the Council is about 250 members. The Council is governed by its officers, and I am the chair. That background on the Section is relevant to what I wish to say below.

Even though our Section is "doing a pretty good job" in many areas of its performance, we are not doing a very good job with diversity. Diversity has been defined as the participation in a target population "of differences that include gender, race, ethnicity, sexual orientation, and physical and mental disabilities." (Diversity in the Legal Profession, Florida Bar Symposium 2004 Final Report and Recommendations). It is an accepted concept that understanding diverse views and cultures which are present within a constituency is beneficial, if not necessary, to the leadership role. That understanding comes as a result of representation and participation by persons with those different views and cultures.

The Section has its best diversity record in the gender category. For example, in the normal order of transition of chairpersons, the next two chairpersons of the Section will be female. My quick review of the Executive Council indicates about 25% of the Executive Council is female. This compares with about 31% of the total Florida Bar membership and about the same percentage of female Section members.

We have our worst diversity record in race, cultural origin and disabilities. Of our 250 member Executive Council, currently there is one black member and four of Hispanic origin. For many years and until several years ago, Professor J. J. Brown of Stetson College of Law, a disabled person, participated as an executive council member and made a noticeable contribution. I'm pleased to report that JJ has accepted

See "Good Enough," page 26

2006-2007
Executive Council Meeting Schedule

NOVEMBER 30 – DECEMBER 3, 2006
Gaylord Opryland, Nashville
Out-of-State Executive Council Meeting
Reservation Phone # 615-883-2211
Room Rate $145.00
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FEBRUARY 22 – FEBRUARY 25, 2007
Hutchinson Island Resort Marriott
Executive Council Meeting
Reservation Phone # 800-775-5936
Room Rate $189.00
Cut-off date: 01/22/2007

MAY 24 – MAY 27, 2007
Westin Diplomat Resort Fort Lauderdale
Section Convention & Exec Council Meeting
Reservation Phone # 888-627-9057
Room Rate $199.00
Cut-off date: 04/23/2007

AUGUST 2 – 5, 2007
The Breakers, Palm Beach
Legislative Update & Executive Council Meeting

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Statements or expressions of opinion or comments appearing herein are those of the editors or contributors and not The Florida Bar or the Section.

About the Cover: On this issue's cover is a photograph of reptiles sunning themselves at the location of the Section's Executive Council meeting in September. We thought it only fitting that the inaugural photo on the cover of the RPPTL magazine be reptiles. The young alligators in the photo live inside the atrium (confined, of course) of the Gaylord Palms Hotel in Kissimmee, Florida. The photo was taken by Section officer, John Neukamm.

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Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments. **We also accept paid advertising from outside vendors.**

Forward any proposed **ARTICLE OR NEWS OF NOT**E to Dresden Brunner at *Dresden@comcast.net*.

For information on ADVERTISING, please contact Diane Preston Moore at *DMoore@fowlerwhite.com*.

The deadlines for all submissions are as follows:

Issue	Deadline
Spring 2007	January 31, 2007
Summer 2007	April 30, 2007

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

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Closing Protection Letters in Florida:

A Title Underwriter's Liability to the Commercial Lender

By Solomon Genet, Esq., Associate General Counsel and Vice President of National Title Insurance Company, Miami, FL and Laurie Generalli, Esq., Bratter Krieger Law Group, LLP, Miami Beach, FL

A closing protection letter ("CPL"), also known as an "insured closing letter," is a letter executed by a title underwriter that expressly indemnifies a lender against damages arising out of the title underwriter's agent's "bad acts" committed in the performance of closing a real estate transaction. These "bad acts" may take two forms, either (a) fraud and/or dishonesty or (b) failure to comply with the lender's written closing instructions.[1] With minimal effort, a commercial lender can use the CPL as a powerful tool to limit its potential losses due to certain problems arising out of a Florida real property transaction.

The existence of CPLs originated with the development of the sale of title insurance, not directly from title underwriters, but through the underwriter's title agents.[2] Lenders had concerns about these unknown parties' control over their monies, and thus a procedure was developed for the title underwriter to maintain a level of accountability in case of the title agents' defalcation or other bad acts.[3] A CPL provides the lender with some comfort, as the deep-pocketed underwriter may be liable for the title agent's mis-performance.

In 1987, the American Land Title Association determined it would be appropriate for the CPL form to be standardized, to provide uniformity in its application.[4] While ALTA has since developed a number of variations of the form CPL, the State of Florida has only approved a single form.[5]

The purpose of this article is to offer an understanding of the CPL, specifically as to whether, and under what circumstances, a commercial lender may hold an underwriter liable for the "bad acts" of its title agent in conjunction with a real estate closing.[6] The first section will cover a title underwriter's liability to the lender in the absence of a CPL, the second section will cover the title underwriter's liability where a CPL has been issued, the third section contains three practice pointers, and the fourth a conclusion.

I. A Title Underwriter's Liability in the Absence of a CPL

The analysis as to the lender's advantages where a CPL has been issued becomes clearer with an understanding of the lack of protections in Florida in the CPL's absence.

A. An Underwriter's Statutory Liability

Section 627.792, Florida Statutes, states that a title underwriter, under certain circumstances, may be liable for its title agent's wrongful defalcation, misappropriation, or conversion of funds. This is true in the absence of the issuance of a CPL.

The Florida Supreme Court, in interpreting this statute, has ruled that it is limited in two very important ways: (a) it only covers funds held in trust under another specific statute, Section 627.8473; and (b) it only applies to title agents licensed by the State of Florida, and not attorneys serving as agents of the title underwriter, who are exempt from these licensing requirements.[7] As such, while Section 627.792 may provide a commercial lender with the ability to recover against the title underwriter under some circumstances, broad protection is not achieved. In addition, this statute is wholly inapplicable to a title agent's compliance with the lender's closing instructions, which is a key part of the protections provided by a CPL.

Interestingly, a title underwriter can be liable to the lender under Section 627.792 even if it did not issue a title commitment incident to the transaction. Simply, if a title agent regulated by this statute is holding funds as set forth by this statute and commits the enumerated bad acts causing losses, the underwriter may be liable for the lender's damages.[8] Moreover, if the title agent has two or more underwriters, neither of which issued a title commitment, the liability is split between them in accordance with the proportional business done between the title agent and each title underwriter in the previous one-year period.[9]

B. An Underwriter's Liability Through Apparent Agency

Under Florida law, to establish the existence of "apparent agency," the plaintiff must prove the following elements: (a) a representation by the principal; (b) a reliance on that representation by a third party; and (c) the third party's change in position in reliance on the representation.[10] Courts in jurisdictions other than Florida have utilized this theory, in the absence of the issuance of a CPL, to hold a title underwriter liable for the fraud or dishonesty of its title agent in connection with a real estate closing.[11] These courts have reasoned that since the wrongdoer was the underwriter's "approved" agent, there were sufficient ties between the two for the lender to rely on their agency relationship. To the contrary, Florida courts have generally rejected this approach and denied finding an agency relationship absent a CPL or other supporting evidence.

In *Security Union Title Insurance Co. v. Citibank*,[12] the Florida First District Court of Appeal reversed the trial court's decision, finding that a title underwriter could not be held liable for its agent's fraud simply by virtue of the underwriter's appointment of the agent as its policy-issuing title agent. The appellate court rejected the plaintiff's theory of apparent authority, reasoning that where the underwriter did not make any representations of the agent's capacity outside of the issuance of title insurance, i.e., the title agent's role in closing the transaction, and did not put the agent in a position that enabled it to commit

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High-Rise Retrofit With Alternative Energy System

Deadline: December 31, 2007

By Nicole C. Kibert, Esq., Carlton Fields, P.A., Tampa, FL
On behalf of the Section's Development & Governmental Regulation of Real Estate Committee

In June, Governor Bush signed into law House Bill 7121 "Disaster Preparedness Response and Recovery" codified as Chapter 2006-71, Laws of Florida, which was drafted in response to the busy hurricane seasons of 2004 and 2005. One of the provisions contained in this new law is of special concern to high-rise residential buildings that exceed 75 feet in height. By December 31, 2007, each such building must be retrofitted with an alternative energy system that would power at least one elevator accessible to all residents over a five-day period for a specified number of hours each day. The alternative energy system must also power an emergency lighting system and any fire alarm system in the building. Evidence of compliance of existing systems or plans and specifications for construction of a complying system must be provided to a local building official by December 31, 2006.

Although these requirements apply to all high-rise buildings, it is of particular concern for high-rise condominiums because of the short time frame for compliance – less than 18 months.

Although these requirements apply to all high-rise residential buildings, it is of particular concern for high-rise condominiums because of the short time frame for compliance – less than 18 months. Associations will need to act swiftly to determine how to meet the requirements. This type of retrofitting is most likely going to be costly and will require the boards of affected condominiums to levy special assessments to pay for the expense. As association practitioners know all too well, condominium owners often protest special assessments, and, as a result, it is important to start the planning process now.

Another provision requires multifamily buildings to include proof of a maintenance contract for the generator and associated fuel supply to be posted conspicuously for the elevator inspector and also evidence of quarterly inspections which have verified that the equipment is being maintained properly and is in good working condition. The generator key must also be kept in a lockbox posted at or near any installed generator unit. For applicable buildings that are in the process of construction, an alternative power source for the elevators, emergency lighting and fire alarm systems must be verified as operational or a certificate of occupancy may not be issued for the building. In addition, written records of the alternative power systems contract must be maintained by the owner of any residential multifamily dwelling on site for verification purposes.

In addition to the installation of an alternative energy system, each applicable building must also write an emergency operations plan that details procedures and timelines for emergency preparation, as well as pre- and post-emergency plans. This plan must at least cover a life safety plan for evacuation of residents, maintain emergency lighting and other required electrical systems and outline how the health, safety and welfare of the residents will be maintained. Such plans are not required to be filed with local officials at this time but must be open for inspection by local and state government agencies.

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Community Land Trusts as Affordable Housing

Florida Supplement to the ICE Legal Manual

By Jaimie Ross, Chair and Charles Elsesser, Vice Chair, Affordable Housing Committee, RPPTL Section

Perhaps no issue has so attracted the attention of local governments in Florida as the affordable housing crisis. The median resale price of existing homes in Florida has increased almost 80% over the last five years. In Florida's coastal areas, land and house prices have doubled and tripled. Yet over that same five year period, the average income in Florida has risen by less than 1.5%.



The soaring cost of existing housing, coupled with similar increases in the cost of land and construction, require increasing funds for each subsidized unit. Local governments, however, find their limited resources totally inadequate to meet the need. With limited public funds and an enormous and increasing gap between the income of Florida's workforce and the cost of housing, Florida's communities are looking to new tools to meet the housing needs of Florida's residents. A tool that an increasing number of Florida communities are looking to is the community land trust.

A community land trust ("CLT") refers to a process of separating land from improvements (i.e. house) for the purpose of transferring title to the house to a qualified buyer while leasing the land to the same buyer through a long term lease with significant resale price restrictions on the house and improvements The term is also used to describe the private non-profit corporation that holds title to the land for the benefit of the CLT community and manages the individual ground leases with the homeowners.

The CLT approach results in permanent nonprofit ownership of the land, which is generally leased to lower-income households, who are assisted in buying homes developed on the CLT land. The CLT, which uses subsidies or similar resources to acquire the land, will transfer title of the house to an income qualified buyer but will retain title to the underlying land. By excluding the price of the land (which in some parts of Florida dwarfs the costs of the improvements) and arranging additional subsidies to assist the buyer purchasing the house, the overall purchase becomes extremely affordable. The CLT then leases the underlying land to the new homeowner at a greatly reduced rate (usually utilizing a 99-year ground lease).

In return for the significant subsidies required to develop this extraordinarily affordable homeownership opportunity, the CLT imposes resale restrictions on the improvements which insure that the property will remain affordable in perpetuity. The owner of a CLT home is required to sell to a similarly qualified buyer at a restricted price, determined by a resale formula found in the ground lease.

The restricted resale price mandated by the ground lease should provide a limited but reasonable return to the homeowner with respect to the original purchase price and any improvements. Typically, the sales price will include whatever monies the homeowner paid in equity at closing (down payment) as well as all principal payments made on the mortgage and some limited appreciation. The long term goal of the CLT is to remove this highly subsidized housing from the speculative market so that the homes remain permanently affordable.

With dramatically limited appreciation, the homes remain affordable to new homebuyers without significant additional subsidies. Under traditional homeownership subsidy programs, the subsidized home can be sold at the market appreciated sales price, with recapture of the original subsidy upon resale. Because of market appreciation, the recaptured subsidy is wholly inadequate for the local government to get another family into homeownership. The local government or other subsidy provider must then expend an even greater amount of subsidy to provide a homeownership opportunity to the next homebuyer. It is this massive drain on already depleted public resources which is driving local governments to increasingly explore the CLT option.

In addition to eliminating much of the cost of the land, the CLT can work closely with the local government and other subsidy provider in further assisting the home buyer with subsidies either in the construction of the homes or as monies directly provided to the homebuyer (i.e., down payment or closing cost assistance or both). The advantage of this close relationship with local government has also been a spur to local government involvement in these programs.

continued, next page

The CLT model of homeownership is clearly not for everyone. If a family can purchase a home without substantial subsidy they should certainly be encouraged to do so. The resale restrictions would prove extremely frustrating to a home owner who could have purchased a market priced home and realized full appreciation. However, for many working families homeownership is completely out of reach and will remain so for the foreseeable future. The CLT model provides all of the attributes of homeownership, including mortgage interest and property tax deductions and freedom from rent increases and evictions, coupled with long term affordability, and limits only the wealth building potential of a private market home.

The Institute for Community Economics (ICE), a national community development nonprofit located in Springfield, Massachusetts, is largely credited with designing the most widely utilized CLT model on a national level. The ICE CLT model envisions a democratically controlled membership organization charged with operation of the CLT. The ICE model further requires that residents living on CLT properties should constitute at least one-third of the board of directors of a CLT. While the ICE model is highly regarded and adapts well to Florida law, different communities can adjust the model to fit their needs and priorities.

Community Land Trusts are relatively new to Florida with very few in existence for longer than a year. As a result there is little familiarity with the legal structures underlying the model. In 2002, ICE produced Community Land Trust Legal Manual, a Handbook for Community Land Trusts and Their Attorneys, a national legal manual providing a broad overview of the law of Community Land Trusts. This publication is available directly from the Institute of Community Economics through its website, *www.iceclt.org.*



The CLT homebuyer is typically a low income, first-time homebuyer. To ensure the CLT homebuyer understands the limitations on this form of home ownership found in the terms of the 99-year ground lease, it is critically important for the homebuyer to have legal counsel. The RPPTL Pro Bono Committee has been assisting in this effort. Special recognition is owed to **Fred Jones** of Graham Builder Jones et al, Winter Park, Florida, for the pro bono representation he and his firm provided to the home buyers of ten homes recently sold by the Hannibal Square Community Land Trust in Winter Park.



Fred Jones

For the past year the members of the Affordable Housing Committee of the Real Property Probate & Trust Law Section of The Florida Bar have been working to produce a Florida Supplement to the ICE Legal Manual. This document is now available, at no cost, on the Real Property Probate &Trust Law Section Affordable Housing Committee website www.flabarrpptl.org . It is written as a supplement to the ICE Legal Manual and is not intended to be used as a stand-alone document. Each section of this Supplement is keyed to the ICE Legal Manual.

The Committee recommends that all Florida community land trusts and their counsel obtain a copy of the ICE manual to use in their practice. The Committee offers this Supplement to provide the Florida applications of the national principles described in the ICE Legal Manual. We hope that this document will be seen as a work in progress. As experience with the CLT model in Florida increases, we will continue to work diligently to provide updated information to the Section and other Florida lawyers.

Governmental Regulation of Real Property Committee Seeks New Members

The Section's Governmental Regulation of Real Property Committee (the "Committee") is looking for new members interested in the regulation of real property. The Committee is redefining its mission and purpose. Generally, the Committee gathers and disseminates information to Real Property Probate and Trust Law Section members relating to Federal, State and local legislation (when it is of statewide significance), administrative developments, and case decisions affecting the ownership and use of Florida real property. In addition, the Committee focuses on legal developments relating to environmental impacts on real property, land use and zoning regulations and promulgated rules of the regulatory agencies affecting the use and development of real property. The Committee coordinates with the Environmental and Land Use Law Section, Administrative Law Section and State and Local Government Law Section in complementary endeavors. If you wish to become involved in the Committee please contact Eleanor Taft at (239) 434-4022 or etaft@collierenterprises.com or Nicole Kibert at (813) 229-4205 or nkibert@carltonfiedls.com.

Law Students Become More Involved with RPPTL Section:

Florida Law Student RPPTL Committee Formation & Goals

By Stephanie A. Servoss, Secretary, Florida Student RPPTL Committee
Third Year Law Student, Florida A&M Univ. College of Law

The Florida Student RPPTL Committee ("SRC") conducted its second in-person meeting on September 29, 2006, at the Gaylord Palms in Kissimmee, Florida. The SRC is a statewide student organization that is seeking to include student members from all of the Florida law schools. The SRC adopted the following mission statement at the meeting:

> It is the mission of the SRC to facilitate one-of-a-kind collaboration amongst Florida law schools, students, and Florida Bar members with a focus on fostering and developing the future of the RPPTL Section, through involvement and support to the RPPTL Section to better equip and prepare young attorneys for practice in Real Property, Probate and Trust Law in the State of Florida.

The SRC will function as an umbrella organization for the individual law school RPPTL-related student organizations. Several law schools already have functioning groups, while others are just starting the formation process. The goal is to have active participation from all Florida law schools. In addition to the schools already involved (Barry, Florida A&M, FSU, Stetson and U. of Miami), students from Florida Coastal, FIU, Nova Southeastern, St. Thomas and UF have also shown an interest in the SRC.

Already, the SRC has assisted students from the various law schools by creating a forum to discuss school organizations, sharing information about activities that have been successful on campus and facilitating collaboration among law school groups. The FSU organization (FSU-R.E.A.L.S.) has provided an overview of their programs and presented ideas to encourage student participation. Stetson (Stetson-R.P.L.A.) has shared the tremendous successes of their recent meetings featuring Section members **Susan Spurgeon, Alan Fields, John Redding** and **Tae Bronner** as guest speakers.

Another benefit that SRC members have recognized is the opportunity to attend RPPTL Section meetings. The SRC attendees have shared their experiences and knowledge gained from Section meetings upon returning to their respective campuses.

The SRC members are available to conduct research for Section Committees, as projects and issues arise. The SRC is currently working to develop a system amongst all the Florida law school organizations so that the research can be promptly assigned. Currently, if a Section Committee has particular projects with which the SRC could assist, please contact the Liaison with Law Schools Committee members mentioned below, who will forward the request to the SRC.

We specifically thank the members of the Liaison with Law Schools Committee— including **Phil Baumann,** Chair, **Stacy Kalmanson,** Vice Chair, **Alan Fields** and **Sen. Fred Dudley**— for generously providing time to the formation and development of the SRC. Their availability and efforts are sincerely appreciated.

Keith Halpern, FSU, J.D. Candidate Dec. 2006, Chair of the SRC Founding Board, must be recognized as the individual who coordinated the inaugural meeting. His efforts led to a successful formation board meeting held in August 2006 at The Breakers in Palm Beach. Keith is continuing to further the SRC goals as Alumni Advisor.

The SRC extends appreciation to **Rohan Kelley,** Section Chair, for guiding our formation and suggesting projects that will support the Section. **Melissa Murphy,** Section Chair-Elect, has also advanced SRC development. The SRC will strive to continue expansion and further Section support under her forthcoming leadership, along with **Sandra Diamond, John Neukamm** and **Fletch Belcher.**

Attending the Section meetings and speaking with Section members enables SRC affiliates to recognize the value of Section participation. Thank you Section members for welcoming students to the Committee meetings and RPPTL Section events.

Clerk & Associate Database

Rohan Kelley, RPPTL Section Chair, has tasked the SRC with establishing an alternative means of identifying students for clerkships for Section members. The SRC would like to receive your input. For example, would it be more useful to have a standardized form? The SRC would like to ensure that both the information and format are structured for the optimum convenience of Section members. Please provide comments to: Jason Ellison, SRC Chair – JEllison@law.stetson.edu

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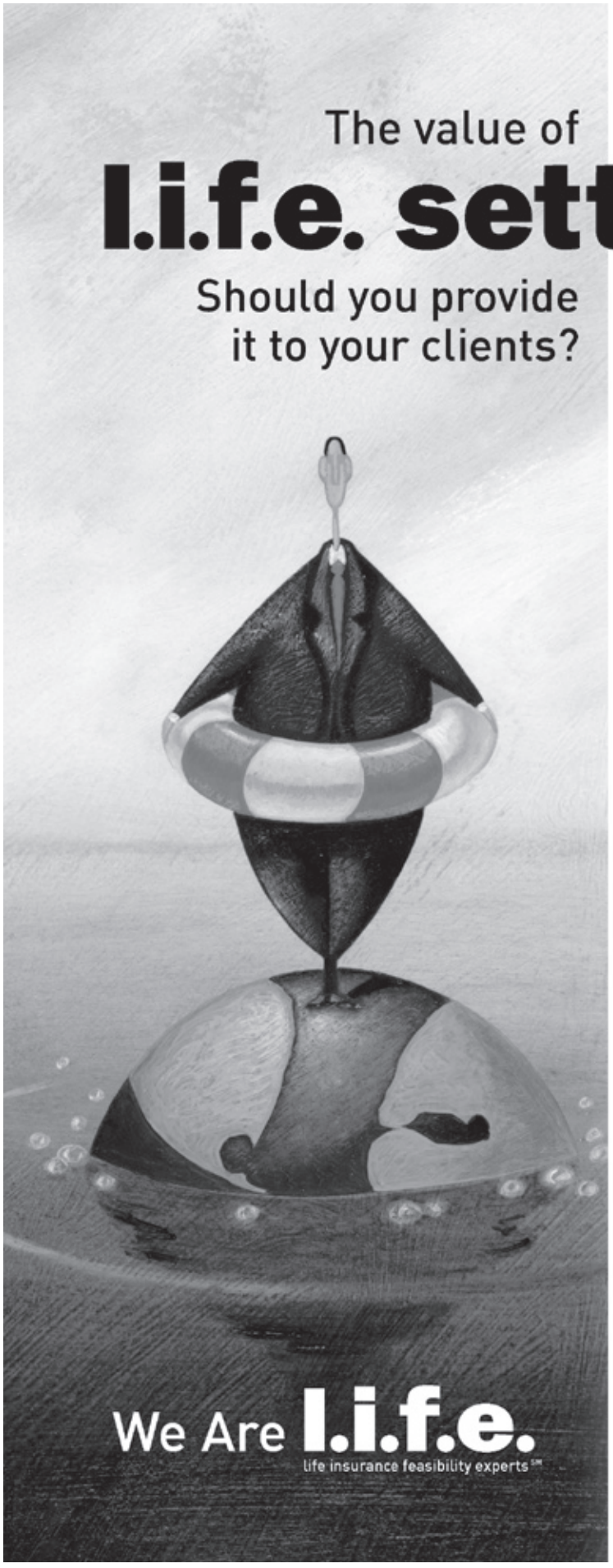

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While this definition may be simple, the realities encountered in the secondary market are a little more complex. Who is the right candidate for a Life Settlement? How can a policy owner be sure they are truly receiving a fair market valuation? What are the tax and regulatory implications of such a sale? This is where we provide value.

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Ashar Group LLC is an approved multi-year sponsor of both the Real Property Probate and Trust Law (RPPTL) and Tax sections of the Florida Bar. We look forward to serving as your resource within this market.

Please contact Jon Mendelsohn or Jason Mendelsohn for additional information.

Executive Council Meeting:

Legislative & Case Law Update

Palm Beach, August 10-13, 2006

By S. Dresden Brunner, Esq., Naples, FL

The Section's Annual Legislative & Recent Case Law Update returned this year to The Breakers in Palm Beach, Florida. This seminar is in its 26th year and, as always, was well attended. And, as always, the leadership put together a great program. Chaired by **Silvia Rojas,** with the capable assistance of Vice-Chairs, **Deborah Goodall** and **Sancha Whynot,** the program covered topics such as the new land trust statute, the new trust code, new rules of professional conduct, new eminent domain law, and, of course, recent case law updates for real estate and probate and trust law. The RPPTL-PAC worked with the Section in offering the seminar. Special thanks goes to the overall sponsor— Attorneys' Title Insurance Fund. Fourteen vendors had exhibits for attendees to visit and some had raffles.



Gathering for the Executive Council meeting on Saturday.

On the same day as the seminar, August 11, law students from around the state met for the day to organize a state-wide network of law student real estate, probate and trust law societies. The RPPTL Section provided support for the undertaking. The Executive Council approved the student RPPTL committee as a sub-committee of the Law School Liaison committee.

Scheduled on either side of the seminar day were meetings. On Thursday, August 10, the numerous and various committees of the Section met to address issues pertaining to the practices of dirt and death law in Florida. On Saturday, August 12, the members of the Executive Council met. During the roundtable breakfasts, the separate division committees presented reports to the Division Directors. At the Probate Roundtable, the FSU Real Estate Law Society presented an award to **Phil Baumann** for his efforts in supporting the Society.

The Executive Council held its meeting immediately thereafter. During the Executive Council meeting, **Rohan Kelley** and **Melissa Murphy** presented the Resolution previously passed in memory of **Dan Adams** to Dan's wife, Julie Adams. The Chair reported the creation of a new committee to review the Section's bylaws and the creation of a new mentoring program. The Construction Law Committee presented a glitch bill proposing various changes to the construction lien law statutes to clarify the statutes and conform them to existing law.



A committee meeting on Thursday.



Joan Bradbury Kayser, Rohan Kelley and Jay Zschau.



Brian Felcoski presenting on the new Florida Trust Code.



Barry Spivey, Debra Boje, and Angela Adams.



Suzanne Hearn welcomes one of the newest Section members to the weekend events.

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Palm Beach photos courtesy of John Neukamm.



Louise and Charlie Robinson enjoying the Friday night dinner.

2006 Pension Law Allows for Tax-free Charitable Transfers from IRAs

By Clay B. Tousey, Jr., Esq., Fisher, Tousey, Leas & Ball PA, Jacksonville, FL

Since 1974, millions of Americans have saved billions of pre-tax dollars in Individual Retirement Accounts (IRAs). Thanks to continued savings and investment returns, an estimated $3.6 trillion is currently invested in IRAs, and the total continues to grow. In early August 2006, a federal law was enacted allowing IRA owners to share the wealth of their retirement savings by giving directly to charity—without first counting it as income and paying income tax.

The new law could be a boon to philanthropy across the state.

This is a wonderful "win-win"— for people who would rather give to charity than pay taxes— and the nonprofit organizations they choose to support.

Thanks to decades of deliberate saving and favorable investment returns, a substantial share of today's retirees has more money in their IRAs than they'll ever need. Many have expressed an interest in giving the funds to charity, but income tax must be paid on all withdrawals, which sharply reduces the value of the gift. Others have asked about designating their children as beneficiaries, but that may draw additional tax consequences.

For larger estates, a good portion of IRA wealth goes to estate taxes and income taxes of beneficiaries. Experts estimate heirs will receive less than 25% of most IRA assets that pass through estates.

A provision in the new federal Pension Protection Act of 2006, signed by President Bush, creates a new option: transferring IRA assets directly to charity. By going directly to charity, the money is not included in the IRA owner's income and—most importantly— is not taxed, thereby preserving the full amount for charitable purposes. The law covers all gifts made this year and next.

In 2006 and 2007, holders of traditional and Roth IRAs who are at least 70 ½ years old can make direct charitable transfers up to $100,000 per year. While donor-advised funds and private foundations don't qualify for the transfers, Community Foundations of Florida offer a variety of types of funds that can accept a rollover gift and carry out the donor's charitable purpose. They include field-of-interest funds, scholarship funds, designated funds and unrestricted funds.

Designated funds at community foundations are the ideal way for donors to leave a lasting legacy for one or more of their favorite charities. One single gift is made to the foundation which then invests the funds for the perpetual benefit of the charities. I am advising my clients who plan to make estate gifts that will establish endowments at the community foundation to consider funding all or part of that gift now by taking advantage of this one-time opportunity.

This really is a limited-time offer: the window is open now, but it will close in 2007, unless Congress extends it. For anyone interested in establishing a permanent legacy in their community, this is the opportunity of a lifetime to make the gift of a lifetime.

Florida has 24 community foundations, serving citizens in all 67 counties. They are nonprofit community corporations created by and for the people of Florida to help donors make a positive impact on their community. Community foundations are experts regarding charitable giving and offer a variety of giving tools to help people achieve their charitable goals.

Learn more about how Florida's Community Foundations can help you assist your clients take advantage of the charitable IRA rollover provision at: *www.communityfoundationsfl.org.*

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RPPTLs Meet with REAL Reptiles

Executive Council Meeting in Kissimmee
September 28-October 1, 2006

By Jon Scuderi, Esq., Circuit Representative, Twentieth Judicial Circuit and S. Dresden Brunner, Esq., Naples, FL

The second Executive Council meeting during the 2006-2007 Section year was held in Kissimmee, Florida at the beautiful, something-for-everyone resort, Gaylord Palms Resort & Convention Center. The Gaylord Palms was amazing. It has a giant atrium in the center of the hotel that is filled with tropical vegetation, ponds, a small castle, a boardwalk, fish (including snook and red fish), and even a handful of small alligators, as well as a number of shops, restaurants and cafes. It was quite impressive. In fact, the cover photo of this issue is of the reptiles that live inside the atrium. Additionally, the hotel was not far from many of the attractions that the Orlando area has to offer.

Prior to the Executive Council meeting on Saturday, there were two full days of committee meetings. Conveniently scheduled the day before the Section meetings, a CLE seminar reviewing the new Florida Trust Code was held. The room was filled with attendees, and the presenters— **Sandra Diamond, Brian Felcoski, Laird Lile,** and **Professor David Powell**— gave an outstanding review of the current and the upcoming additions to the law. The seminar reviewed the provisions of Florida law that stayed the same and were implemented into the code and the new provisions as adopted or modified from the Uniform Trust Code. This was the last of four live presentations on the Florida Trust Code held throughout the state.

Two full days of committee meetings followed on Thursday and Friday, September 28 and 29. Our Section has many committees that represent many different areas and interests. The Section is always looking for new people to get involved.

Friday, the Asset Preservation Committee met and examined certain asset protection aspects of the new Florida Trust Code. Professor David Powell was available via teleconference to report on existing Florida law and aspects of the Florida Trust Code. On Friday, the Law Student RPPTL group held a meeting as did the RPPTL-PAC.

A reception and dinner were held on Friday night. For Section members who brought their young children along, the Gaylord Palms provided excellent (and fun) child care at the La Petite Academy in the hotel. The Section members' children were able to have their own "private playdate" and get to know each other better as their parents socialized

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Special Thanks to the Kissimmee Meeting...

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Meet With REAL Reptiles

from preceding page

upstairs. Also, the hotel was a family-friendly destination and included a marine activity pool with a giant octopus water slide. **Rohan Kelley** and **Tae Bronner** made an effort to plan this weekend to be family-friendly—and succeeded.

Saturday began with the Probate Roundtable and Real Property Roundtable meetings. In addition to hearing the Probate Division Committee reports, the members heard a presentation by sponsor Howard Frazier Barker Elliott, Inc. providing anecdotal information about valuation discounts seen in settlements with the IRS over FLP interests.

During the Executive Council meeting on Saturday, September 30, the topics of discussion included the costs of the Executive Council meetings. Discussion was had regarding the title insurance rate review and whether the RPPTL Section should lobby regarding the matter. The Executive Council approved legislation that would require that limited liability company names be distinguishable on the Florida Department of State's records from other LLC names filed.

In addition to the committee reports, the following items were addressed at the meeting:

Real Property Division

1. Ratification of Executive Committee's Action with respect to Proposed Amendment to Rule 1.221
2. Commercial Real Estate Lien Act Forms
3. Land Trust Act Amendments

Probate and Trust Division

1. Revisions to Fla. Stat. 731.401 to enforce arbitration provision in wills and trusts
2. Revisions to Fla. Stat. 733.620 to permit exculpation of the Personal Representative under a will
3. Revisions to Fla. Stat. 627.404 addressing the concept of an "insurable interest"
4. Revisions to Chapter 736 (Trust Code) to address glitches.
5. Revisions to Chapter 765 to integrate provisions of HIPAA

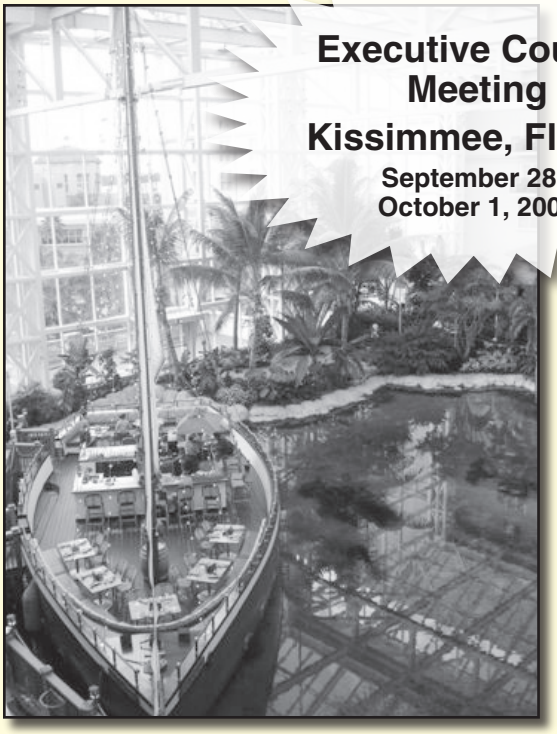
The significant planned activity for Saturday night was the Fantasy of Flight Museum, created and maintained by Kermit Weeks, former U.S. National Aerobatic champ. The group had a catered dinner and private museum tour. The motor coaches dropped us off at the red carpet, flanked by antique aircraft, and we could even go for a "dogfight" in the simulators.

It was a great— and certainly, busy— weekend. The next meeting is in Nashville, Tennessee (November 30 – December 3).



At the Saturday Executive Council Meeting

Executive Council Meeting
Kissimmee, Florida
September 28 - October 1, 2006



Inside the atrium at the Gaylord Palms hotel.



Enjoying the Friday evening reception inside the atrium of the hotel.



An officers meeting.



Section “Top Gun” Rohan Kelley in the cockpit at the Fantasy of Flight Museum.



Enjoying the reception at the Fantasy of Flight Museum.



Members of the Kelley Family enjoyed the museum on Saturday night.

Photos courtesy of George Meyer and John Neukamm.

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How To Select a High Net Worth Investment Adviser

By David Tuttle, JD, CFA, with assistance from Diane H. Timpany, AIF®, CFP, CEBS, Carol Cheswick Ross, MBA, and Susan Cheswick Brewer, MBA, Cheswick Wright Wealth Management, LLC.

Just like lawyers and law firms, investment advisers come in different shapes and sizes and the differences between a good one and a bad one can have a significant impact on achieving your goals. While referrals from friends can point you in the right direction, there is no substitute for being an informed consumer and conducting your own due diligence. We agree with the selection criteria set forth in Yale University's 2005 Endowment Update: "Yale selects only those managers who demonstrate considerable strength on several criteria: investment skills; organizational coherence; clarity of business strategy; appropriate fees and incentives; and, most importantly, personal and professional integrity." Our goal is to flesh out these criteria to provide you with a framework to help you select an investment adviser that is right for you and for your clients.

If you prefer to invest your money yourself and are looking for some help selecting an occasional investment, you may be satisfied with a Broker. If you just want someone to help you run the numbers on your financial future, a Financial Planner may meet your needs. If you are looking for comprehensive and ongoing advice from an adviser with a fiduciary obligation to act in your best interests, you should consider an Investment Adviser.

TYPES OF PROVIDERS

Providers of investment advice operate under many names but come in two legal varieties: Brokers and Investment Advisers. A Broker or Broker-Dealer (commonly know as a stockbroker) is someone in the business of buying and selling securities for clients. Brokers are required to know your financial situation and to recommend investments that are suitable to your situation. They are not considered to have a general fiduciary duty to their clients, although this higher standard may be applicable in certain circumstances. They are regulated by the SEC, state securities regulators and self-regulatory organizations such as the NASD and the NYSE. Historically, Brokers charged commissions on a transactional basis. However, many brokers are now compensated based on a percentage of assets under management.

An Investment Adviser (commonly referred to as an investment manager) is someone in the business of giving advice about securities. Investment advisers are subject to a fiduciary duty. This duty is more substantial than the "know your client" and "investment suitability" standards applicable to Brokers. This duty requires that Investment Advisers act in the best interests of their clients and make full and fair disclosure of any material facts, especially any possible conflicts of interest. Investment Advisers are regulated by the SEC if they manage $25 million or more in client assets or by state securities regulators if they do not meet that threshold. They manage investments on an ongoing basis based on a client's objectives.

A Financial Planner is someone in the business of developing, and often implementing, financial plans covering such areas as estate and tax planning, college and retirement savings, and other planning and investment topics. To the extent a Financial Planner engages in providing investment advice, the Financial Planner must register as a Broker or an Investment Adviser.

Which of these types of providers is right for you will depend in part on your personal preferences. If you prefer to invest your money yourself and are looking for some help selecting an occasional investment, you may be satisfied with a Broker. If you just want someone to help you run the numbers on your financial future, a Financial Planner may meet your needs. If you are looking for comprehensive and ongoing advice from an adviser with a fiduciary obligation to act in your best interests, you should consider an Investment Adviser.

PAYMENT ARRANGEMENTS

Financial Planners that are not also providing investment advice typically charge a fixed or variable fee for specific services. Some investment providers, including many Brokers, are paid commissions each time they engage in a transaction. Such commissions may or may not be disclosed to the client and may be in addition to management fees charged by the provider. This may be a cost effective payment arrangement for clients who do not expect to trade frequently and are looking for limited advice. However, this payment arrangement may create a conflict between the interests of the client and the interests of the investment provider by creating an incentive for the provider to recommend frequent trading or high commission products and services.

Some investment providers, including most Investment Advisers, charge a fee based on a percentage of assets under management. Although the fee level can vary materially among different providers and is often reduced for larger accounts, a typical fee is 1% per year. The Investment Company Institute (ICI) estimates that the asset-weighted average of annual expense ratios and annualized loads for US based stock funds is 1.13%. "[A]pproximately 80% of mutual fund investors seek professional advice when buying mutual fund shares outside of retirement

continued, next page

plans at work" and these advisers receive a share of the mutual fund fees. Given the benefits of separate account management in terms of customization and control of tax consequences—not to mention the ability to obtain comprehensive advice—a 1% fee appears to be a bargain.

Some providers, most notably hedge fund managers, charge a fee based on a percentage of assets and charge an additional fee based on a percentage of profits. Other providers offer a variety of services and charge a combination of these various types of fees. For example, some providers are registered as Investment Advisers and as Brokers and charge a fee based on assets under management and capture their clients' brokerage commissions. Some advisers add on charges for acting as custodian of client assets and share in the fees for the mutual funds or other products that they recommend. With the proliferation of discount brokers charging $10 or less per equity trade, brokerage, or pure trade execution, has to a large degree become a commodity (at least for smaller trades). It makes little sense for an investor to pay full service commissions unless that is the Broker's primary source of compensation. Some advisers are happy to pay full commissions to the brokers they use for their clients' accounts either because the broker is owned by the adviser or because some of the commission dollars are returned to the adviser in the form of "soft dollars", such as free research or other services that benefit the adviser but not necessarily the client.

We believe that the distinguishing factors among already highly qualified advisers are integrity, ethics and motivation. These factors will determine the extent to which an investment provider acts solely in your best interests.

The type of payment arrangement that makes sense for you will most likely flow directly from your decision regarding the type of adviser that best fits your needs. However, you should make sure that all fees are fully disclosed and reasonable in relation to the services to be provided, that any potential conflicts of interest are disclosed and that any fee sharing arrangements are equitable. All of this information should be in an Investment Adviser's Form ADV, a copy of which must be provided to prospective clients, updated regularly and filed in part with the SEC. You can find a copy of an SEC registered investment adviser's Form ADV (Part I only) on the SEC's Investment Adviser Public Disclosure (IAPD) website.

QUALITY OF PEOPLE

In our judgment, the most important consideration in selecting an investment provider is the quality of the people you will be working with. As Jack Welch said, "If you pick the right people and give them the opportunity to spread their wings and put compensation as a carrier behind it you almost don't have to manage them." When it comes to selecting an investment professional in these times of corporate malfeasance, executive greed, hedge fund blow ups and investment adviser defalcations, we would add a little bit of Ronald Reagan's wisdom: "Trust, but verify."

Integrity, ethics, training, experience, accessibility and longevity (low turnover) are a few of the most important characteristics to look for in an investment organization and its people. Investment Advisers are required to disclose in their Form ADV their qualifications, experience, compensation arrangements, services, investment strategies, possible conflicts of interest, record of any criminal or disciplinary actions, and ownership structure. Investment Advisers are also required to adopt and maintain a code of ethics and conduct that reflects an adviser's fiduciary duty and addresses such topics as the obligation to serve the best interests of clients, client privacy and confidentiality, and avoidance of conflicts of interest. This code of ethics must also be offered to clients.

Examining attributes relating to how "expert" a provider is or to the quality of service are pre-requisites to selecting a good investment provider. You should also ensure that senior professionals will be actively involved with your account. We believe that the distinguishing factors among already highly qualified advisers are integrity, ethics and motivation. These factors will determine the extent to which an investment provider acts solely in your best interests. A high quality Investment Adviser may not have all the answers, products or services, but should be willing to help you find and implement them, even if it means referring you to another professional or it results in the adviser receiving lower fees.

While we believe that most investment professionals are ethical, the scandals involving allegedly tainted Wall Street research, improper mutual fund practices (short term trading, after hours trading, kickbacks and similar practices at a large number of mutual fund groups) and executive compensation (option back dating and excessive compensation), to name a few, remind us that even star performers working at some of the most well recognized organizations in the world may not be ethical. In addition to conducting due diligence, another means of determining the likelihood that an investment professional will be looking out for your best interests is to examine structural elements of the organization. In particular, you should examine whether the business is operated by owners who have a substantial stake in the long term success of the business and whether compensation is structured to reward placing the interests of clients first.

Commissions and sales fees, such as mutual fund sales loads, encourage investment professionals to focus on products and sales and to engage in short term thinking rather than focusing on what is in the client's best interest over the long term. Advisers who are owner-operators and who hold strong conviction in their investment strategy will invest in the same portfolios, or portfolios that are very similar to those that they are constructing for their clients. Financial professionals who invest their own money alongside yours will have their interests aligned with yours and will treat your money like they are investing it for themselves.

Some advocate performance-based fees as a way to align the interests of investment providers and their clients. However, Section 205 of the Investment Advisers Act of 1940 (the Advisers Act) generally prohibits Investment

Advisers from charging performance-based fees except in certain limited circumstances. Additionally, performance-based fees may encourage investment professionals to take too much risk, which arguably has been one of the shortcomings of certain hedge funds that has led to blow ups like that experienced recently by one financial professional firm.

A group of NFL players recently sued the NFL Players Association (NFLPA) as a result of their being defrauded by an investment professional that was on the NFLPA's approved list of advisers. The adviser was apparently reporting good investment returns but was actually stealing clients' money and providing false account statements. Section 206(4)-2 of the Advisers Act requires that Investment Advisers who have custody of client assets either provide their clients with quarterly statements from a bank, broker or other qualified custodian or have an annual surprise audit of their books by an independent public accountant. Reviewing the required statements from an independent custodian, or asking for the results of an independent audit if required, can help you avoid being defrauded by an unscrupulous adviser.

It is important to use your intuition in selecting an adviser whom you believe is trustworthy and with whom you can work well. Compatibility and free and open communication with your adviser are critical. It is also important to conduct due diligence and ask probing questions about a prospective adviser's personnel, as well as the structure and culture of the organization, to determine if these elements support an ethical culture and align incentives with the best interests of clients.

PHILOSOPHY AND PROCESS

Investment Philosophy and Process. Investment professionals should have a clearly articulated and understandable investment philosophy and process that appeals to you and is compatible with your goals. There is no single right way to make money. Trading has proven to be a highly lucrative strategy for a select few investment professionals. This is epitomized by the success of Jim Simmons and his firm Renaissance Technologies. Mr. Simmons is famous for what the press reports as over 34% annual returns, net of substantial fees, since the inception of his Medallion hedge fund in 1988. His "high frequency", computer model driven trading style is purported to generate numerous trades each and every day in an array of commodities, stocks, bonds, currencies and derivatives around the world. The Renaissance model has worked but it is not suitable for everyone.

On the other extreme, for most "mortal" investors (and many immortal investors like Warren Buffett), a buy and hold strategy has been shown by various research to be more successful than trading and market timing strategies. Minimizing turnover, trading costs and taxes can add materially to investment results. Many advisers combine multiple strategies in their various offerings. Which strategy, or combination of strategies, you select is less important than selecting a strategy that fits your investment profile and personality and then engaging an investment manager that propounds the strategy and that will faithfully and consistently carry it out for you.

Asset Allocation/Diversification Philosophy and Process. Various studies have concluded that approximately 90% of the variability of returns across portfolios is derived from the asset allocation decision as opposed to the security selection and market timing skills of a manager. David Swensen, Yale University's Chief Investment Officer, is renowned for the success he has had managing the

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Topics addressed will be an overview of the Florida Trust Code, Affiliated Services and Beneficiaries/Trustees under the new FTC. We are applying for continuing legal education credits.

For more information, contact person Becky Wilson, Director of Membership,Florida Bankers Association via e-mail at bwilson@floridabankers.com or phone at 850/224-2265.

Yale endowment and for his cutting edge asset allocation strategies. For 2006, the asset allocation targets for Yale's endowment are Domestic Equity 14%, Fixed Income 5%, Absolute Return 25%, Foreign Equity 14%, Private Equity 17% and Real Assets 25%. However, a central thesis of Swensen's book, *Unconventional Success,* is that Yale's asset allocation approach is not suitable for individual investors. This is because individual investors do not have the perpetual investment horizon, the large size of assets under management, the access to the best performing products/investment managers, or the professional organization with expertise in evaluating such products and managers that Yale has.

Just as with investment strategy, advisers should have a clearly articulated asset allocation/diversification strategy. Many advisers use computer models to assist them in selecting the optimum portfolio to balance risk, return and the various factors comprising a client's investment profile. The most important thing to focus on is whether or not an adviser has a rigorous, institutional quality asset allocation process that is flexible enough to satisfy your specific needs.

Business Philosophy and Process. Some investment professionals focus on studying the markets and picking investments (product focus); others focus on financial planning and may even outsource the investment selection process to other investment managers (planning focus); and still others focus on offering a full array of investment products, planning services and related products and services such as banking and insurance (the Wall Street/bank and trust company full service sales model). An alternative model has developed which is known as the wealth management model. The focus in the wealth management model is not the products, the planning or the full service sale, but crafting integrated solutions to each client's needs.

The pinnacle of the wealth management approach is the Yale investment office or a private family office staffed with your very own investment, tax and legal advisers. For most investors, the wealth management approach can be viewed as a scaled down or "virtual" version of a private family office. The focus is on determining what is best for each client. The first step in the process is a comprehensive planning review with the whole family viewed as the financial planning unit. From this review, a deep understanding of a client's objectives, risk profile, time horizon, motivations, personal beliefs and other factors is developed. This allows the wealth manager to offer customized choices and solutions. The process is consultative, independent, objective and solutions driven. You should expect a differentiated level of service based on the amount of money you have to invest. The more you have to invest, the closer you can get to a true private family office approach. The less you have to invest, the closer you get to the mutual fund approach.

Your wealth manager does not need to be an expert in all areas of investment, financial, legal and tax advice and services. No one person can hope to achieve that status, so the wealth management model requires a team approach. Some organizations, such as the large Wall Street firms, banks and trust companies, establish the team in-house. Other organizations work with a network of outside experts, including a client's established advisers, to create a "virtual" private office. What is important to the wealth management model is that your financial adviser takes a comprehensive view of his or her role, works with you and your other advisers on a consultative basis, and develops integrated solutions to your needs.

Some investors may prefer to diversify their assets among multiple advisers. This may be a good option for those with substantial wealth, the skill to evaluate multiple advisers and the willingness to invest the time to manage them. For other investors, the need to coordinate the multiple advisers defeats the purpose of hiring an adviser. Without one financial quarterback, there is the risk of redundancies and conflicting approaches which can reduce the efficiency of your investment plan. In addition, some investors are looking to streamline their financial management by having a single point of contact and others take great comfort in having a single trusted adviser to do the worrying for them.

PRODUCT EVALUATION

The proliferation of investment products and styles by Wall Street for individual investors is astonishing. There are more investment companies (mutual funds, unit investment trusts and exchange traded funds) registered in the United States (15,308) than there are publicly traded companies on the NYSE (2,700 including closed-end funds and ETFs) and the NASDAQ (3,200). These various funds allow investors to obtain exposure to large swaths of the investment universe (e.g. S&P 500 Index Funds), to slice the investment universe into increasingly smaller and more "specialized" pieces (e.g. sector funds, leveraged bond funds, hedged funds, short funds, country specific funds), and to participate in asset classes that previously had high barriers to entry (e.g. the GLD which is an exchange traded fund that allows retail investors to cost-effectively and conveniently buy gold bullion with high liquidity). Then there are other asset classes, such as commodities, alternatives (hedge funds, private equity etc.) and real estate. Essentially, Wall Street has taken products and investment approaches historically reserved for institutional investors and the very wealthy and has made them available to retail investors. This proliferation of products has both complicated product selection and, to some degree, commoditized and de-personalized investment products.

Some advisers are product specialists who offer a limited array of investment products that they manage themselves. Other advisers are product generalists who offer a full array of both in-house and outsourced investment products, or what is known as "open architecture". Products and even open architecture are not solutions. A good adviser will be able to advise you about the various investment options, consult with you about what makes the most sense for your individual situation, and customize a solution that meets your needs. Products and open-architecture are merely tools that need to be rationalized by a good adviser.

PERFORMANCE MEASUREMENT

There are many ways to measure performance. One common approach is to compare returns to an appropriate benchmark. This is a relative return approach. Under this approach, risk is defined as the potential for the portfolio

to fail to track the index, or tracking error. Many individual investors are more concerned with risk in terms of standard deviation (a measure of how much returns vary from period to period) or downside risk (what is the likelihood of losing principal or not meeting an investment return goal). The difference between a relative return measure and an absolute return measure (for example performance above zero or some other fixed level) came into sharp focus in the 2000-2002 period. During this period, the S&P 500 fell by more than 40% from its high to its low and it has not yet returned to its high. If the market is off by 22%, as the S&P 500 was in 2002, being down only 20% is a victory on a relative return basis, but that kind of return may be devastating to an investor who is focused on preserving capital or obtaining stable returns.

Everyone knows that a good long term performance record is important in evaluating investment products. However, this analysis should not miss the potentially more important point that there are lots of ways to measure performance and risk. If you are a managing director at Goldman Sachs with 40% of your net worth tied up in Goldman stock, you probably should not be investing in a product that invests solely in the financial services sector, even if it is the best performing product in that sector. Your adviser should be focused on helping you determine the performance and risk measurement methods that are best suited to your individual situation and then constructing an investment plan designed to achieve your customized goals. Many advisers use computer models to assist them in selecting the optimum portfolio to balance risk and return. Whatever performance metrics are agreed to, performance should be evaluated on an after-fees/costs and after-tax total return basis. Managers with reasonable fees and turnover, and sensitivity to tax considerations, can increase the odds of investment success.

CONCLUSION

For high net worth investors looking for a full service adviser, we believe that a wealth management approach is uniquely able to (1) identify client needs, craft comprehensive solutions, and customize portfolios; (2) anticipate, recognize and react to clients' changing circumstances and changing opportunities in the financial markets; and (3) integrate changes in the legal and tax arena. We also believe that an adviser's compensation, regulatory and ownership structures should be examined to ensure that they are designed to eliminate conflicts of interest and promote the best interests of the client. Most importantly, an adviser should be selected based on integrity and compatibility.

Cheswick Wright Wealth Management, LLC, an affiliate of Wright Investors' Service, is focused on providing the highest quality investment and wealth management counseling, portfolio management and personal service to the fiduciary and high net worth market. David Tuttle, Carol Cheswick Ross and Susan Cheswick Brewer are Managing Directors and Portfolio Managers. Diane Timpany (dtimpany@cheswickwright.com) is Senior Vice President. *Copyright © by Cheswick Wright Wealth Management, LLC*

Guardianship and Guardianship Alternatives Workshop

By Knyvett Lee, R.G., CareSource, Inc., Fort Lauderdale, FL

An exciting and new workshop on Guardianship and Guardianship Alternatives for Persons with Developmental Disabilities is offered—titled "Wise Choices." This workshop is a collaboration between the University of Miami, Stetson University and CareSource, Inc. and is funded by the Florida Developmental Disabilities Council. The Florida Bar has approved it for 7.5 hours of General Credit, including **2 hours of Ethics Credit.** Seven hours of Continuing Education credit for Professional Guardians has been awarded by the Statewide Public Guardianship Office.

In addition to being valuable and timely information for our profession, it will also help any attorney serving as court-appointed counsel in a guardianship proceeding to meet the new educational requirements as set forth in F.S. §744.331(2) (d), which states "Effective January 1, 2007, an attorney seeking to be appointed by a court for incapacity and guardianship proceedings must have completed a minimum of 8 hours of education in guardianship."

The workshop will be offered on December 1, 2006 in Tampa and on January 19, 2007 in Tallahassee. Please visit our website, *www.WiseChoices.us* to learn more as well as register online. If you are interested in being a sponsor of one of the workshops, please contact the author directly at 954-720-2485 x 28.

CareSource (formerly The ElderCare Connection) is a not-for-profit social service agency offering direct client services, information and resources for the care and support of the frail, elderly, disabled or at-risk populations of South Florida.

Good Enough

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reappointment to the Executive Council, but he is the only current member of the council who functions under an apparent disability. A reason diversity is lacking at the Executive Council level is that it is also lacking at the Section committee level and the Section member level. If we wish to deal with this, we must start at the membership level and propagate diversity upward.

This imbalance in our membership, and in the higher levels of the Section, cannot be corrected overnight or even in the near term. It must be corrected over time through consistent, coordinated and continuing programs designed to accomplish that goal. However, even though results may be in the future, unless and until we begin, the goal will never draw any closer. Diversity must begin at the membership level, spread to the working committee level, and eventually reach into the Section Executive Council and Section officer levels.

I have appointed a membership diversity committee to address this issue. A method to encourage more diverse membership in the Section by attracting and retaining minority members is for the Section to develop programs which specifically encourage membership by minorities and to provide, enhance and publicize broad-based Section programs which are especially useful to its minority members.

This provides the segue into a discussion of several programs the Section is undertaking to address diversity problems, as well as providing benefits for non-minority members of the Section.

One difficulty that minority lawyers have in "breaking into" this area of the practice (it makes no sense to be a Section member if you don't or can't practice in this area) is that you can't learn how to do it until you do it, and you can't do it until you learn how. In order to address this issue, the Section is considering establishing practice enhancement fundamentals programs such as Fundamentals of titles and title insurance, Fundamentals of residential real estate closings, Fundamentals of guardianship practice, Fundamentals of probate administration, and Fundamentals of will and trust drafting. We are trying to determine whether we can obtain the necessary funding to provide these courses to our minority members without charge, and perhaps to all of our new members as a part of their membership dues.

Another task of the membership diversity committee is to establish a liaison with the minority voluntary bars throughout Florida to make them aware of the benefits that the RPPTL Section will offer to minority lawyers.

We hope that we can forge partnerships in these projects with the Equal Opportunities Law Section, the Young Lawyers Division and the Out-of-State Practitioner's Division.

This year the Section will install a mentor hotline. This hotline will allow members of our Section to have available at the other end of a phone line or an internet connection, experts with many years of practice experience who can respond to specific questions which are often difficult for newcomers to our practice area. This program is not intended to provide a detailed problem or case analysis but will provide an answer to a question directed to a specific matter or procedure.

The Section is also looking into establishing a Human Resources section on our website. Initially this part of the site would provide a listing of three separate categories of human resources that might be of interest to our members.

First, we would provide a list of our members who practice out of the state of Florida, together with information about that member. Many times when you represent a client, an issue may arise which relates to the law or procedure of another state. You may need to speak to a lawyer in that state with a specific question about that state's laws or you may want to refer a matter to a lawyer there. Assuming the matter relates to real estate, wills, trusts or estates, having access to a listing of our Section members who practice in the foreign jurisdiction will greatly help you make the needed contact.

Secondly, we have recently worked with law students in most of Florida's law schools to establish a student

Give It Back!

The Section's **PRO BONO COMMITTEE** is seeking Section members who wish to participate either as Committee members to organize and promote initiatives for the delivery of legal services or as volunteer panel members for the Committee's ongoing programs, which include:

1. **Attorneys for Affordable Housing Project –** Matching nonprofit low income housing providers needing transactional or organizational legal assistance with volunteer attorneys.
2. **Clear Title Project –** Providing guidance to legal services attorneys concerning real estate title issues, often in the context of obtaining clear title for subsidized rehabilitation loans.

The ongoing programs have been popular and the need for volunteers is great. The Committee is also interested in ideas for new projects. To join the Committee, or volunteer for the existing programs, please contact Andrew M. O'Malley, Committee Chair at 813/250-0577, email aomalley@cowmpa.com, or Adele Stone, Vice Chair at 954/925-5501, email astone@atkinson-diner.com.

RPPTL auxiliary in those schools. Law students who have an interest in the substantive practice areas of the law in which our Section is involved have joined the school's RPPTL auxiliary. We will provide a listing, by school, of law students who have expressed in interest in these areas of the practice. Our members might wish to locate a 2nd or 3rd year student to do a research project or to hire as a summer clerk or as an associate. This listing will provide the necessary contact information. Oftentimes, one of the Section committees needs research done relating to a committee project. The committee chair will be able to locate a student who is willing to provide that assistance for the committee project.

Finally, a part of our Human Resources section will relate to the issue of diversity discussed above. The Section will provide a listing of its minority members who qualify and wish to be so listed, by geographical location and by minority group. If one of our Section members has been contacted by a prospective client and that Section member decides, for whatever reason, he or she cannot handle the offered matter, but wishes to support our minority Section members in their effort to "break into" or build their practice in this field, that member may wish to know of the Hispanic, or black, or disabled lawyers in the geographical area where the matter is situated. In fact, if the prospective client is a minority member and would be best served by minority representation, the referring lawyer can get the needed information from the Section's website Human Resources listings.

The theme for the RPPTL section this year is **"just good is not good enough."**

Please remember the topic of my first Chair's Column, that being that the Section is looking for more participation from its members in Section committees. You can check the Section website at *www.flabarrpptl.org* for specific information on how to join and participate as a member of a Section Committee.

Finally, please mark your calendars for this year's RPPTL Section convention at the Westin Diplomat in Hollywood. This will occur on May 24 – 27, 2007. On Thursday the 24th, we will have Section committee meetings. If you haven't attended a Section committee meeting, these are open to all Section members whether or not you are a member of the committee. This would be a great opportunity to see the committees of interest to you in action. Then on Friday the 25th, we will have two very popular seminars, one for the dirt lawyers and one for the death lawyers. On Saturday the 26th, the Executive Council will meet to do the Section's business and this meeting is open to all Section members. There will be exhibitors there to show you their newest wares and explain how your law office can benefit from their services.

If you haven't previously attended a RPPTL convention, please make plans to join us in Hollywood.



MARK WANICH



WILHELMINA KIGHTLINGER, ESQ.



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Closing Protection Letters

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the fraud, no such claim against the underwriter could be maintained.[13]

Similarly, in *Sommers v. Smith and Berman, P.A.,*[14] the issue before the court was whether a title insurance underwriter could be held vicariously liable where the lawyer/title agent's "bad acts" were limited to knowledge of seller's misrepresentations as to the size of the real property. The sole asserted basis for the underwriter's liability was the underwriter's relationship with the lawyer/title agent, which was based on the title agent's authority to issue title insurance.[15] The Florida appellate court, citing cases from other jurisdictions, found that since there were no allegations that the title underwriter/agent relationship extended farther than the scope of the issuance of title insurance, no basis for relief existed.[16]

While decided under Maryland law, worth mentioning for its analysis and reasoning is *National Mortgage Warehouse, LLC v. Bankers First Mortgage Co., Inc.*[17] There, the mortgage company and title agent conspired to defraud a lender of millions of dollars, and the defrauded lender sued the title agent's underwriter, arguing an actual/apparent agency between the title agent and title underwriter.[18] The court dismissed the agency claim, reasoning, among other things, that (a) pursuant to the actual agreement between the title underwriter and title agent, the title agent was solely the underwriter's agent for the issuance of title insurance; and (b) the lender had an obligation to utilize reasonable diligence in determining the extent of the agent's authority, and it failed to perform.[19]

II. Underwriter's Liability With a CPL

As stated above, a CPL provides that a commercial lender may look to the title underwriter for damages caused by its title agent incident to the closing of a real estate transaction, where the damages were caused by either the agent's (a) fraud and/or dishonesty or (b) failure to comply with the lender's closing instructions. A CPL supports two theories of liability of an underwriter to a lender; they are (a) a contract claim and (b) a tort claim based in agency. As there is a dearth of Florida case law on point, the analysis below is primarily based on decisional law from outside the jurisdiction.

A. Contractual Theory of Liability

For there to be a viable claim of breach of contract under Florida law, the plaintiff must demonstrate (a) the existence of a contract; (b) breach of that contract; and (c) damages resulting from the breach.[20] In *Primary Residential Mortgage Inc. v. Guarantee Title Insurance Co.,*[21] the United States District Court denied the defendant/title underwriter's motion to dismiss, finding that the plaintiff/lender alleged a breach of contract cause of action based on the CPL. The court reasoned that the CPL is a contract, and the alleged failure to reimburse plaintiff/lender for damages it suffered due to fraud is a breach thereof.[22]

Similarly, in *Federal Agricultural Mortgage Corp. v. It's a Jungle Out There, Inc.,*[23] the court dealt with assorted lawsuits arising out of an agricultural loan transaction; among them was a claim against the title underwriter for express indemnity due to the issuance of a CPL. The court analyzed the underwriter's liability from a strict contractual perspective, looking at the CPL's language for both the items covered and exclusions. Based on this analysis, the court granted summary judgment in favor of the title underwriter and against the lender.[24]

B. Liability Through an Agency Theory

Courts have found that the issuance of a CPL is evidence of the broader agency relationship between the title underwriter and the title agent, so that the title underwriter will be held liable for certain "bad acts" of the title agent.[25] In *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Co.,*[26] incident to the authorized closing of a real estate loan the lender delivered to the title agent closing instructions requiring that the closing go forward only if the underwriter can affirmatively insure that the lender's mortgage constitutes a first priority lien. Determined through a number of procedural steps unnecessary to review in detail, the deal was closed but the lender did not have a valid first priority lien.

Upon finding that the title underwriter would be liable to the lender, the court reasoned that the title underwriter's CPL provided the lender with the reasonable belief that the title agent closing the transaction had the apparent authority of the underwriter to do so. More specifically, the court stated that "[the underwriter] voluntarily assumed a duty independent of its obligations in the title policy to assure [the lender] that its mortgage was a first priority lien."[27]

In *Coldwell Banker Relocation Services v. TRW Title Insurance Co.,*[28] a title agent of the defendant/underwriter, serving as escrow agent on the deal, absconded with escrow funds rather than use them to pay off a mortgage. The lender[29] asserted a claim against the title underwriter, arguing that the underwriter was liable for the acts of its authorized agents. The court agreed with the lender, relying on the fact that (a) the underwriter had issued a CPL on this transaction; (b) the underwriter knew that the title agent performed escrow services at the closings of other transactions which it had underwritten; and (c) the agent used the underwriter's logo on certain marketing materials.[30]

Indeed, most telling is that in many of the decisions that have refused to impose liability upon the underwriter for the title agent's improper actions, the courts have explicitly stated that had a CPL been issued, it may have come to a different conclusion. For example, one court stated as follows:

> Review of the [title] policy language reveals that the policy did not insure against the improper disbursement of real estate closing funds, nor did it insure the honesty, fidelity, and competence of its agent.
>
> There is no evidence of any written guaranteed closing letters which would evidence a guarantee by [the title underwriter] for the proper disbursement of the real estate closing proceeds associated with the [loans], nor is there any other type of evidence that [the title underwriter] assumed any obligation to inform [the lender] of an improper disbursement.[31]

III. Practice Pointers

A. Lenders Should Require a New CPL Per Specific Transaction

While there is some authority to the contrary, there is decisional law and scholarly support for the proposition that

a CPL is valid per single transaction and is not applicable to more than the transaction upon which it is issued.[32] In other words, a CPL intended to cover multiple transactions may be insufficient to provide the expected protection. In *National Mortgage,* discussed in more detail *supra,* the lender attempted to argue— in support of its theory that the agent was an agent for the underwriter for more than just the issuance of title— that independently issued CPLs by the underwriter for the title agent help to prove its case. The court rejected this position, finding that a CPL issued by the title underwriter for the agent on transactions prior to the one at issue does not bear on the court's analysis.[33] Based on the above, a commercial lender should request and receive a CPL on a transaction specific basis.

B. Closing Instructions Are Key

Because in Florida there is a single acceptable form of CPL, a commercial lender cannot modify this document to provide itself with more protection. However, because the CPL protects the lender from non-compliance with its "written closing instructions," it is there that a lender should look to more broadly protect itself. While the form and manner of such modifications is outside the scope of this article, often the lender's closing instructions contain broad and ambiguous provisions, while transaction-based specificity would provide the lender with a pinch of prevention that is conceivably much cheaper than the pound of cure.

C. Whether an Assignee of a Mortgage Can Enforce a CPL

It is no surprise to a commercial lender that residential mortgages are regularly sold by the originating lender to third party entities. The issue on the instant topic is whether the third party purchaser stands in the shoes of the originating lender for purposes of the CPL's indemnification. Scholars and commentators have found that a third party purchaser of this loan does not gain these protections and thus does not have available to it the underwriter's deep pocket in case of the title agent's "bad acts."[34]

While not a Florida decision, there is case law that seems to support this position. In *GE Capital Mortgage Services, Inc. v. Privetera,*[35] the owner of real property filed a petition with the United States Bankruptcy Court, and during the course of the bankruptcy case received a standard order to sell the real property free and clear of all liens, with those liens to attach to the proceeds of the sale. Contemporaneously with closing, the purchaser received a CPL and a first mortgage loan. Thereafter, it was discovered that buyer's counsel absconded with the purchaser's payment for the property, and he was subsequently disbarred, prosecuted and imprisoned.[36]

The mortgagee on the debtor/seller's first mortgage (the "plaintiff") sued the title underwriter, alleging, among other things, that it is a third party beneficiary of the CPL and therefore the underwriter is obligated to make good on the plaintiff's first mortgage. The *Privetera* court rejected this argument, finding that the CPL protects the purchaser's first mortgage against buyer's counsel's conduct, not plaintiff's first mortgage. As the court succinctly stated, "[p]laintiff's 'benefit' is incidental to the transaction."[37]

IV. Conclusion

It is the authors' opinion that a commercial lender should

continued, next page

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request and receive a CPL from the title underwriter on a transaction-by-transaction basis. While the development of case law interpreting and applying CPLs remains relatively scarce, there is no doubt that a commercial lender is more protected with an underwriter-issued CPL than without one. Moreover, a commercial lender's close attention to the scope of the CPL's application, and the related information such as the lender's written closing instructions, could provide much needed protection from significant financial loss.

Solomon Genet *is Associate General Counsel and Vice President of National Title Insurance Company, a South Florida-based title underwriter. Mr. Genet graduated magna cum laude from the University of Miami School of Law, clerked for the Chief Judge of the United States Bankruptcy Court for the Southern District of Florida, taught both at the University of Miami School of Law and the St. Thomas University School of Law, and practiced corporate bankruptcy law and commercial litigation as a private attorney before joining National Title Insurance Company.*

Laurie Generalli *is an attorney with Bratter Krieger Law Group, LLP, a Miami Beach-based law firm, and focuses her practice on commercial real estate and corporate matters. Ms. Generalli has over ten years of experience in real estate related transactions and litigation, and writing title insurance. A major focus of her practice is the representation of institutional lenders in connection with secured financing for commercial and residential transactions.*

Endnotes:

1 Barlow Burke, "Law of Title Insurance," §13.10, 3d Ed. (2005).
2 James Bruce Davis, "The Law of Closing Protection Letters," 36 Tort & Ins. L.J. 845 (2001); 2 Title Ins. Law §20:11 (2005).
3 Davis, "The Law of Closing Protection Letters," 36 Tort & Ins. L.J. at 845-46; 2 Title Ins. Law §§20:11, 20:13(2005).
4 Davis, "The Law of Closing Protection Letters," 36 Tort & Ins. L.J. at 846; John C. Murray, "Closing Protection Letters: What is (and is not) Covered," 519 PLI/Real 45, 52-53 (2005).
5 §627.786 (3), Fl. Stat.; see also Murray, 519 PLI/Real at 66-67.
6 Note that there is an unresolved issue in Florida as to whether a CPL is considered an "insurance contract", which tangentially bears on the issues contained herein. This issue is expressly omitted from this article, but for well-reasoned analysis of this issue, see John C. Murray, "Insured Closings: Title Company Agents and Approved Attorneys," SL004 ALI-ABA 1289 (2005); Davis, "The Law of Closing Protection Letters," 36 Tort & Ins. L.J. 845; Shawn G. Rader, "Closing Protection Letters," 70-Dec. Fla. B..J. 38 (1996).
7 Hechtman v. Nations Title Insurance of New York, 840 So.2d 993 (Fla. 2003).
8 1 Fla. Jur. 2d Abstracts §19 (2006).
9 Id.
10 Fernandez v. Florida Nat'l College, Inc., 925 So.2d 1096 (Fla. 3d DCA 2006).
11 See e.g., Ford v. Guarantee Abstract & Title Co., Inc., 553 P.2d 254 (Kan. 1976); Sears Mortgage Corp v. Rose, 634 A.2d 74 (N.J. 1993).
12 715 So. 2d 973 (Fla. 1st DCA 1998).
13 Id. at 975-76; see also Sussman v. First Financial Title Co. of Florida, 793 So. 2d 1066, 1068 fn.4 (Fla. 4th DCA 2001); Glynn v. New Hampshire Insurance Co., 578 So.2d 36 (Fla. 4th DCA 1991) (an insurance agent may be the agent of an underwriter for one purpose and not another); see also National Mortgage Warehouse, LLC v. Bankers First Mortgage Co., Inc., 190 F. Supp. 2d 774 (D.Md. 2002) ("[A] title agent may wear two hats; he may issue title insurance, for which an underwriter … is wholly responsible, and, in the same transaction, act as closing or escrow agent, for which the underwriter may expressly disclaim liability."); Cameron County Sav. Assoc. v. Stewart Title Guaranty Co., 819 S.W. 2d 600 (Tex. App 1991).
14 637 So.2d 60 (Fla. 4th DCA 1994).
15 Id. at 61.
16 Id. at 62-63.
17 190 F.Supp.2d 774 (D.Md. 2002).
18 While a CPL was issued by the underwriter, it had expired as of the date of closing and was therefore of no force and effect. See id. at 782.
19 Id. at 781; see also Universal Bank v. Lawyers Title Insurance Corp., 62 Cal App. 4th 1062, 1066-67 (Cal. 2d Dist. 1997).
20 Rollins, Inc. v. Butland, 932 So.2d 1172 (Fla. 2d DCA 2006).
21 2005 WL 2874663 (E.D.Mo. Nov. 1, 2005).
22 Id. at *2-3.
23 2005 WL 3325051 (N.D.Cal. Dec. 7, 2005).
24 Id. at *31-32.
25 3 L. Distressed Real Estate §42:56 (2006); Coldwell Banker Relocation Services, Inc. v. TRW Title Insurance Co., 74 F.3d 1243 (8th Cir. 1996); RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Ins. Co., 58 F.Supp. 2d 503 (D.N.J. 1999); but see Guaranty Residential Lending, Inc. v. International Mortgage Center, Inc., 305 F.Supp.2d 846 (N.D.Ill. 2004) ("Agreeing to provide indemnification does not establish an agency relationship").
26 58 F.Supp.2d 503, 538-39 (D.N.J. 1999).
27 Id.
28 74 F.3d 1243, 1996 WL 5156 (8th Cir. 1996) (unpublished decision).
29 In actuality, the lender's mortgage was paid off and the plaintiff was the subrogee of the lender. See id.at *1.
30 Id. at *1-2.
31 Resolution Trust Corp. v. American Title Insurance Co., 901 F.Supp. 1122 (M.D.La. 1995) (emphasis added); see also Gerrold v. Penn Title Insurance Co., 271 N.J. Super 50 (1994).
32 National Mortgage, 190 F.Supp.2d at 781 ("[CPLs] are issued by title insurers in connection with specific transactions") citing John C. Murray, "Insured Closings: Title Company Agents and Approved Attorneys," 462 Prac. L. Inst. Real 457, 459 (Nov. 2000) ("The [CPL] applies only with respect to the particular transaction for which it is issued."); see also Burke, "Law of Title Insurance" at §13.10 ("Such [CPLs] are typically transaction specific …".).
33 Id.; see also Universal Bank, 62 Cal App. 4th at 1066 (where the lender did not request a CPL on the specific transaction, reliance on a form issued by the underwriter generally is of no force and effect).
34 Davis, "The Law of Closing Protection Letters," 36 Tort & Ins. L.J. 845 citing J. Bushnell Neilsen, Title & Escrow Claims Guide §14 at pg. 441; see also National Mortgage, 190 F.Supp.2d at 782, fn.2.
35 788 A.2d 324 (N.J. Super 2002).
36 Id. at 326.
37 Id. at 330; see also 1 Am. Jur. 2d Abstracts of Title § 16 ("A party who does not purchase title insurance may not rely on a title insurer to protect interests…; parties who desire protection…must obtain title insurance.")

Check out YOUR RPPTL Section website:

flabarrpptl.org

Probate Case Summaries

By Leslie A. Peterson, Second Year Law Student, University of Miami, Coral Gables, FL

Relief granted to plaintiffs who were deprived of normal incidents of property ownership, including the right to sell or dispose of the property during their entire lifetimes by a clause in Decedent's will prohibiting partition of the property. Since the prohibition against partition cannot stand because it is inconsistent with the devise made in the will, the intent of the Decedent cannot be carried out. *Vinson v. Johnson*, 931 So. 2d 245 (Fla. 1st DCA 2006).

Decedent executed a will leaving his 34-acre farm and home to his nine living children, as tenants in common. The will specifically stated that Decedent's Estate "shall not be subject to partition or forced sale by any heir, but shall only be sold upon agreement of all heirs." Furthermore, the will required that the children share all taxes and ownership expenses and that "any heir that pays more than his or her share shall be entitled to contribution from the nonpaying heirs upon sale of the property." After decedent's death, the five children who sought partition brought suit against the remaining four children for forced sale of the real property.

The trial court agreed with the plaintiffs' analysis of "heirs," holding that the term refers to all of the testator's lineal descendants, so that the clause at issue could interfere with the right to sell or dispose of an individual interest in the property indefinitely, so long as any living descendant withheld his or her consent. The defendants timely appealed the trial court's judgment directing that the property be partitioned and sought review of the judgment.

The First DCA reviewed the judgment *de novo* pursuant to *State v. Glatzmayer*, 789 So. 2d 297, 302 n. 7 (Fla. 2001). Rather than determining its decision on the analysis of the term "heirs," the First DCA held that the prohibition against partition and sale is an unlawful restraint on alienation even if it applies only to the nine children who were living at the time of the testator's death. The reasoning behind this decision finds its basis in the undivided fee simple interest in real property and how prohibition deprives the interest of the normal incidents of property ownership, including the right to sell or dispose of the property during their entire lifetimes.

Although the Decedent's will should be construed to carry out the intent of the testator, the First DCA held that to apply this principle, the testator's intent must be lawful. *See Adams v. Vidal*, 60 So. 2d 545 (Fla. 1952); *In re Lesher's Estate*, 365 So. 2d 815 (Fla. 1st DCA 1979). A testator's right to sell or dispose of his property as he wished cannot restrict the right of alienation as it is "inherent and inseparable quality of the estate." *See Adams v. Vidal*, 60 So. 2d 545 (Fla. 1952); *In re Lesher's Estate*, 365 So. 2d 815 (Fla. 1st DCA 1979). The First DCA stated that Decedent's prohibition against partition and sale is an unlawful restraint on alienation even if it applies only to the nine children who were living at the time of the testator's death because it is inconsistent with the right of ownership and is therefore invalid. *See generally Iglehart v. Phillips*, 383 So. 2d 610 (Fla. 1980)

Since there was no precedent in Florida regarding prohibitions against partition or forced sale of property devised in a will as being unlawful restraints on alienation, the First DCA examined the precedents of other jurisdictions. *See, e.g.*, *Pavlikowski v. Ehrhardt*, 161 A.2d 652 (Pa. 1960); *Mills v. Blakelin*, 30 N.E.2d 873 (Mass. 1941). The rationale of *Ehrhardt* and *Mills* is directly supported in Florida cases arising in other contexts. The First DCA also looked to *Davis v. Geyer*, 9 So. 2d 727 (Fla. 1942) which explained how the prohibition against a restraint on alienation would be applied in a variety of circumstances. Specifically, the court in *Geyer* stated that a condition in a will that "land devised to a number of persons shall not be divided or sold during the lifetime of the grantee[s]" is void. *Geyer*, 9 So. 2d at 730.

Although the First DCA recognized that a restriction on the right to partition property might be valid if it were effective only for a limited time, it held that a restraint on alienation is unreasonable if it exists for the lifetime of the grantee or devisee. *See* 61 Am.Jur. 2d *Perpetuities, Etc.* §102 (2002). Since the restraint applied to Decedent's children for their entire lives, the First DCA held that the restriction of property ownership without receiving any of the benefits throughout the entire life of any one of Decedent's children would be inconsistent with the fee simple estate devise to that child by the terms of Decedent's will. Therefore, the First DCA affirmed the trial court's grant of relief to plaintiffs.

In an action against Decedent's second wife for breach of trust and breach of fiduciary duties, Decedent's sons properly filed a complaint in the county which was the situs of the trust and its assets, in which the trust was administered before it was purportedly revoked, and in which distributions would have been made by trustee upon Decedent's death. *Weinberg v. Weinberg*, 936 So. 2d 707 (Fla. 4th DCA 2006).

Decedent and his second wife executed a revocable trust agreement in Palm Beach County, Florida which held title to their condominium in Palm Beach County and certain personal property. Under the terms of the trust, upon Decedent's death, Decedent's second wife would receive a fee simple interest in the couple's condominium and fifty percent of the remaining trust assets. Additionally, Decedent's sons from a prior marriage who resided in Tennessee were to receive monetary distributions from the trust at that time.

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Probate Case Summaries

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Six days after Decedent's death, Decedent's second wife executed a document in which she purported to revoke the trust and take title to all property previously held in the trust and recorded such document in Palm Beach County. A few days after Decedent's second wife moved to Miami-Dade County, Decedent's sons, claiming that their trust distributions were irrevocable upon Decedent's death, filed suit against her in Palm Beach County seeking declaratory relief and damages for both breach of trust and breach of fiduciary duty. Decedent's second wife, claiming to be a resident of Miami-Dade County, moved to dismiss for improper venue and appealed the trial court's denial. Since there are no disputed facts and venue turns on a question of law, the Fourth DCA reviewed the matter *de novo* rather than as abuse of discretion. *See Carr v. Stetson,* 741 So. 2d 567, 568 (Fla. 4th DCA 1999); *Dive Bimini, Inc. v. Roberts,* 745 So. 2d 482, 483-84 (Fla. 1st DCA 1999).

The Fourth DCA referred to Section 47.011, Florida Statutes, the general venue statute, which states that actions must only be brought in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located. The Fourth DCA held that the Decedent's sons rightfully chose venue in Palm Beach County as plaintiffs may select a venue of their choice as long as it is one of the three statutory alternatives, it will be honored. *See A & M Eng'g Plastics, Inc. v. Energy Saving Tech. Co.,* 455 So. 2d 1124 (Fla. 4th DCA 1984). Under tort law, venue is established where the plaintiff first suffers injury. *Wincor v. Cedars HealthCare Group, Ltd.*, 695 So. 2d 924, 925 (Fla. 4th DCA 1997); *see also Harb v. Commerce Realty Group, Inc.,* 881 So. 2d 35, 36 (Fla. 4th DCA 2004) ("For purposes of venue, a tort accrues in the county where the plaintiff first suffers injury."). Since the location, administration, and would-be distributions of the trust was Palm Beach County before Decedent's second wife purported to revoke it, Palm Beach County is where the injury to the sons first took place. Therefore, the Fourth DCA affirmed Decedent's sons' choice of venue.

The guardianship estate should only be compensated for services the guardian performed in the course of pursuing claimant's claims for workers' compensation benefits. *Florida Cypress Gardens v. Lavoy*, 932 So. 2d 542 (Fla. 1st DCA 2006).

Claimant became totally incapacitated by an injury she sustained 26 years prior in the course of her employment with her Employer. A guardian was appointed to serve Claimant and handle her workers' compensation claims. Eventually Guardian received a court order granting guardianship fees to be paid from the guardianship estate which Claimant later petitioned to be paid by her former Employer. Claimant asserted that the all guardian fees should be assessed against the employer and carrier, who only agreed to pay for the services Guardian rendered in connection the claim for workers' compensation benefits.

Concluding that Employer and Carrier had failed to present any evidence that would justify a reduction in the guardian's bill, the Judge of Compensation Claims agreed with Claimant and, with one minor exception, approved of all the fees and costs relating to all of the guardian's services, including those that were unrelated to the pursuit of workers' compensation benefits. The question on appeal is an issue of law that concerns whether some or all of these services qualify for reimbursement in a claim against Employer and Carrier.

The First DCA held that it was bound by *Southeastern Concrete Floor v. Charlton*, 584 So. 2d 574, 576 (Fla. 1st

The Insurance Committee Seeks Members

A new committee has been formed on the Probate side of the Real Property, Probate and Trust Law Section. At the moment, it is entitled simply "The Insurance Committee". Its primary purposes are:

1. To improve the general understanding of lawyers regarding the use of insurance products.
2. To improve the capability of lawyers in understanding insurance proposals.
3. To improve the relationship between lawyers and life insurance underwriters.

While the ultimate plan would be to bring the knowledge gained through participation in this committee's work to The Florida Bar through CLE programs or participation in other CLE programs promoted by other committees, its initial function will be that of promoting the knowledge and interest of people who wish to attend committee meetings.

We have already had one meeting wherein Randy Ellington, a Florida Bar member who sells life insurance, presented a power point presentation on how to understand insurance proposals. While enlightening, this entire area is complex enough where we will probably have several more presentations of this variety. At the August committee meeting in Palm Beach, a presentation by the Ashar Group on life settlement was held. It is anticipated that in the future we will have discussions regarding the various attributes of universal life insurance, what guarantees really mean, and advising irrevocable life insurance trustees on the evaluation of existing life insurance policies.

We are a small committee but hope to have all those who are interested in this whole area, and who have a desire to improve their knowledge, to attend. To join the committee, please contact L. Howard Payne, Committee Chair, at 941/487-2800 or HPayne@lawnav.com.

DCA 1991), which stated that an employer is obligated to pay for the services of a guardian only to the extent that those services were "incurred in and about the handling of the claimant['s] rights, duties, and responsibilities under Chapter 440."

The Fourth District Court of Appeal reversed the trial court's orders which entered final judgment of dissolution of marriage after death of one of the spouses. Interlocutory orders in divorce proceeding generally do not survive the dismissal of a lawsuit when a spouse dies before entry of final judgment. *Marlowe v. Brown*, 31 Fla. L. Weekly D2038 (Fla. 4th DCA August 2, 2006)

After a 25-year marriage, the Wife filed for divorce upon which the parties came to a "mediation agreement for temporary relief." At the request of the parties, the trial court approved the mediation agreement. Among the provisions of the agreement was a provision that addressed equitable distribution and called for a 50/50 division of the assets and liabilities, with the one liability of the parties being the mortgage on the ranch property. The mediation agreement did not specify what would happen if one of the parties died during the pending divorce action.

The Wife perceived the Husband's counter petition for dissolution as an attempt to disavow the terms of their agreement and to seek unequal distribution of the parties' assets and partition of the ranch property. The trial court denied the Husband's motion to set aside the mediation agreement and held an evidentiary hearing to determine the marital and non-marital assets of the parties. Later, the trial court issued an order that specifically identified the non-marital assets of both the Husband and Wife, rejecting the Husband's claim that the real estate was his non-marital property.

Before final judgment of the dissolution, valuation of the properties, and equitable distribution, the Husband died. The Husband's brother and tentative personal representative of his estate filed an emergency motion in the divorce proceeding seeking to restrain the Wife from disposing of marital property. The tentative personal representative argued that the divorce had been acrimonious and that he desired to make a proper inventory of the property of deceased Husband's estate. The trial court restrained the Wife from removing anything from the ranch property and ordered the release of the Husband's address book to the personal representative. The Wife appealed this order and moved that the probate court declare certain assets to be hers.

The trial court found the Husband and Wife owned the ranch property as tenants by the entirety. The Wife argued that these lots passed to her by operation of law when her husband died. The probate court, however, denied the Wife's motions and held, *inter alia*, that the mediation agreement (1) was binding to the "Widow and the Deceased (or his estate and trust)," (2) survived the Husband's death, and (3) ensured that all assets of the parties, whether held "individually . . . or jointly" were "all marital assets to be divided fifty-fifty." After the Wife died in April 2005, her personal representative continued the appeal of this order against the Husband's brother in his capacity as trustee of the Husband's Revocable Living Trust dated July 25, 2001. The Bank which served as curator of the Husband's estate opposed the wife's motions in probate.

The Fourth DCA held that the dissolution of marriage action terminated with the Husband's death and the dissolution judge should have dismissed the case upon the Wife's motion. *See Sahler v. Sahler*, 17 So. 2d 105, 106-07 (Fla. 1944); *MacLeod v. Huff*, 654 So. 2d 1250, 1251 (Fla. 2d DCA 1995). The Fourth DCA found that the trial court did not reserve jurisdiction in the final judgment to determine property rights after the Husband's death. *See Fernandez v. Fernandez*, 648 So. 2d 712 (Fla. 1995); *Becker v. King*, 307 So. 2d 855, 858-59 (Fla. 4th DCA 1975). The Husband's death left the Wife in the legal position of one whose marriage was terminated by death and not by a final judgment. Interlocutory orders in a divorce proceeding generally do not survive the dismissal of a lawsuit when a spouse dies before the entry of a final judgment. *See Jaris v. Tucker*, 414 So. 2d 1164, 1166 (Fla. 3d DCA 1982); *see also Price v. Price*, 153 So. 904, 905 (Fla. 1934) (holding that when one spouse dies after the issuance of the decree, but while the appeal is pending, the surviving spouse procuring the

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reversal "will be entitled to all rights of succession or the like, in the estate of the other, the same as if no divorce has ever been had.").

The Fourth DCA refused to agree with the contention of the Husband's estate that the mediation agreement survives the death of the Husband. The Fourth DCA distinguished the Husband's estate's argument from *Snow v. Mathews*, 190 So. 2d 50 (Fla. 4th DCA 1966), which involved a more definite and complete agreement than the one at issue. Since the Husband opposed the Wife's interpretation of the divorce proceeding, the Fourth DCA found that the mediation agreement was too tentative and preliminary to control the disposition of property after the death of the husband. At most, the parties agreed via the mediation agreement that distribution of marital assets and liabilities would be equal, the beginning premise of all equitable distribution. *See* §61.075(1), Fla. Stat. (2004). Paragraph 11 of the settlement agreement neither identifies the assets nor what happens to assets which the parties do not agree are marital. Furthermore, the January 21, 2003 order did not value the assets or determine entitlement to them; it contemplates further discovery regarding certain assets and the ultimate entry of an order of equitable distribution. Both documents were only interlocutory in nature, serving as a step in the direction of a final solution, the final judgment that was never entered. *See Greenwald v. Blume*, 312 So. 2d 783 (Fla. 3d DCA 1975). For these reasons, neither the settlement agreement nor the January 21, 2003 order survives the death of the husband to control the disposition of property. Therefore, the Fourth DCA reversed orders in both the dissolution and probate actions.

Funeral expenses may not be paid after an untimely filing. The trial court cannot order a personal representative to pay decedent's funeral expenses where funeral expense claim was filed more than two years after decedent's death. *Bush v. Webb*, 31 Fla. L. Weekly D2529a (Fla. 1st DCA October 11, 2006).

Decedent's will bequeathed all her property to her sister, who served as personal representative, and specifically stated that the "just debts, funeral and administration expenses be paid as soon after [her] death as may be practical . . . ." More than two years after Decedent's death, Decedent's children filed claims against the estate for the payment of her funeral expenses. The personal representative appealed the trial court's order directing her to pay the decedent's funeral expenses arguing that the funeral expense claims were untimely filed pursuant to Section 733.710(1), Florida Statutes.

In a per curiam opinion the First DCA agreed with the personal representative and reversed the trial court's order. Section 733.710 Florida Statutes (2001), entitled "Limitations on claims against estates," provides in pertinent part:

> (1) *Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section*.

Moreover, a "claim" is defined in part as a "liability of the decedent, whether arising in contract, tort, or otherwise, and *funeral expense*." §731.201(4), Fla. Stat. (2001) (emphasis added). Since the parties did not dispute the fact that the claims were filed more than two years after Decedent's death, the claimants were barred because they filed their claims against the decedent's estate more than two years after her death. *See May v. Ill. Nat'l Ins. Co.*, 771 So. 2d 1143, 1157 (Fla. 2000) (holding that Section 733.710 "obviously represents a decision by the legislature that 2 years from the date of death is the outside time limit to which a decedent's estate in Florida should be exposed by claims on the decedent's assets."); *see also Marshall Lodge No. 39, A.F. & A.M. v. Woodson*, 190 So. 749, 751 (Fla. 1939).



Real Estate Case Summaries

By Stephen E. Silkowski, Esq., Jacksonville, FL

"Demayo III": Florida homeowner cannot contractually waive homestead right. Question certified to Supreme Court.
Demayo v. Chames, 31 Fla. L. Weekly D 1628 (Fla. 3rd DCA June 14, 2006)

In this third time on appeal, the court withdrew its opinion issued on March 15, 2006, and substituted the following opinion in its place. The question presented was whether a party to a contract could contractually effectively waive his constitutional right to a homestead exemption under Article X. The court held here that he could not.

The exemption accorded has been part of the Florida Constitution for over a hundred years. In 1884, the Florida Supreme Court set forth the policy considerations underlying this provision:

> "*The object of exemption laws is to protect people of limited means and their families in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want, and against the consequence of ill advised promises which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasions of others. In this country especially where there happen to be many illiterate and unsophisticated people it would be mischievous to encourage such agreement in which by the mere scratch of a pen the whole policy of the exemption laws would become nugatory. Such people, without reference to 'race, color or previous condition,' are and ought everywhere to be the wards of the State and to be protected accordingly*".

The court thereupon certified the question to the Supreme Court.

For purpose of triggering obligation to close, issuance of residence occupancy certificate, not builder's completion of all project extras, is critical.
Fernandez v. Homestar at Miller Cove, Inc., 31 Fla. L. Weekly D 1756 (Fla. 3rd DCA June 28, 2006.).

The Purchasers and Seller entered into a purchase and sale agreement, whereby the Purchasers agreed to buy from the Seller a specific lot and the single family dwelling erected on the lot or that would be erected on the lot by the Seller. The transaction was an all cash sale that was not contingent upon the Purchasers obtaining permanent financing.

Although this was a cash sale, the Purchasers signed a mortgage loan application just six days prior to the scheduled closing. The Purchasers' lender faxed a loan approval letter, which was subject to the completion of the swimming pool. Despite that this transaction was a cash sale, the Purchasers did not attend the scheduled closing, because they were unable to obtain financing from their chosen lender because the swimming pool was not completed. When the Purchasers failed to appear at the scheduled closing, the Seller terminated the Agreement.

The Agreement was clear and unambiguous. As such, the court was required to construe the document as written, since it was the best evidence of the parties' intent. A construction of Paragraph 3 of the Agreement indicates that the Purchasers' "unconditional obligation to close" is triggered by the "completion of the Residence," which is evidenced by the "issuance of a Certificate of Occupancy for the Residence or such other similar certification by the appropriate governmental authority." The court concluded that the term "Residence," as used in Paragraph 3, included only the actual dwelling, not the swimming pool. Therefore, once the Purchasers received the seven-day notice required by Paragraph 8(a) and the certificate of occupancy was issued, the Purchasers were obligated to close on the scheduled date.

In support of this conclusion, the court noted that the swimming pool was one of the options listed in Addendum # 3. When entering into the Agreement, the Purchasers acknowledged that the "Seller may not be able to obtain all or part of the extras prior to or at the time of closing," but that under "no event shall Purchaser . . . object to final closing with full disbursement to Seller." As such, the parties are bound by the clear and unambiguous language contained in the Agreement and Addendum # 3 that obligates the Purchasers to close the transaction once the certificate of occupancy is issued for the residence, even if the options are incomplete.

Although the court acknowledged that it would have been more reasonable for the closing to take place after the completion of both the dwelling and swimming pool. As the Agreement was clear and unambiguous, the contracting parties were bound by those terms, and a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties. Unfortunately, as the Purchasers agreed that this real estate transaction was a cash sale, which was not contingent upon the Purchasers obtaining permanent financing, the Purchasers' lender's refusal to provide permanent financing because the swimming pool was not completed is irrelevant.

Lien of proper re-recording of certified judgment and affidavit relates back only to time of re-recording.
Clinton v. Doehla, 31 Fla. L. Weekly D 1814 (Fla. 3rd DCA July 5, 2006)

Doehla had obtained a money judgment against Clinton in Dade County. He sought to record the judgment in Mon-

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roe County and obtain a lien on Clinton's real property. In addition, Doehla obtained a writ of execution for the judgment from the Dade County Circuit Court.

Doehla thereafter made two unsuccessful attempts to perfect a lien on Clinton's real property in Monroe County. The first attempt was when Doehla recorded a certified copy of the judgment that did not contain Doehla's home address, as required by Section 55.10, Florida Statutes. The second unsuccessful attempt occurred when Doehla recorded a copy of the judgment that contained Doehla's address, but was not certified, as required by Section 55.10.

The trial judge granted Clinton a temporary stay of execution on the property, pending a hearing on the matter, and subject to a bond to be posted by Clinton. Clinton did not post the bond. The Sheriff's sale proceeded, and the property was sold.

Clinton then filed an "Amended Motion for Partial Summary Judgment" in which he sought the same relief sought in the initial Emergency Petition, claiming that the sale was invalid. The trial court eventually issued orders holding that the first two recordings did not comply with Section 55.10. Nonetheless, the trial court entered an order that under the circumstances presented, the Sheriff's sale should not be set aside.

The trial court erred when it found that the defects in the recording could have been, and were, corrected prior to the sale of the property. A judgment lien must be perfected prior to invoking the right to levy upon and sell real property, pursuant to Section 55.10.

Section 55.10(1) outlines the procedure for creating judgment liens on real property. A judgment creditor must first perfect a lien against the lands of a judgment debtor before proceeding with the final process under Section 56.061. When a judgment creditor fails to meet these requirements, nothing prevents the holder of a recorded judgment which does not properly contain the address of the creditor from curing the defect by re-recording the judgment and simultaneously filing an affidavit with the address as provided for in Section 55.10. Such re-recording, however, would not relate back to the original recording of the judgment, but would create a lien on property from the date of the re-recording forward.

When Doehla recorded a certified copy of the corrected judgment and corrected holder's affidavit that complied with Section 55.10 on November 5, 2002, the re-recording created a lien on Clinton's property from November 5, 2002 onward and did not relate back to July 2002.

Consequently, the notice of the Sheriff's Levy published on October 2, 2002 could not stand, because a lien had not been perfected on Clinton's real property in Monroe County at that time. Accordingly, the district court reversed the trial court's order and remanded with instructions that the Sheriff's sale be vacated.

A restrictive covenant in a commercial lease may be grounds for injunctive relief without a showing of irreparable harm.

Autozone Stores, Inc. v. Northeast Plaza Venture, LLC., 934 So.2d 670 (Fla. 2nd DCA 2006).

The court considered whether a tenant under a commercial lease must make a showing of irreparable harm to obtain injunctive relief for the violation of a lease provision restricting the use of the landlord's property adjacent to the leasehold property. Autozone, the tenant, appealed a final declaratory judgment entered in an action filed by Northeast, the landlord, against Autozone. The declaratory judgment had determined that, if the landlord's development of land adjacent to the leasehold constituted a breach of the lease, injunctive relief would be unavailable, because the tenant had an adequate remedy at law in the form of monetary damages. Because the appellate court concluded that Autozone would not be required to show irreparable harm to obtain injunctive relief for a violation by the landlord of a restrictive covenant affecting the use of real property, it reversed.

On appeal, Autozone argued that, because the lease provision at issue was a covenant affecting real property, it was not necessary to prove irreparable harm to obtain injunctive relief for a violation of the lease provision. Northeast responded that the case law governing the enforcement of restrictive covenants regarding residential communities was not applicable to the enforcement of a restriction in a commercial lease, such as the restriction at issue here.

Injunctive relief is normally available to redress violations of restrictive covenants affecting real property without proof of irreparable injury or a showing that a judgment for damages would be inadequate. The value of a restrictive covenant is often difficult to quantify and may be impossible to replace. Restrictive covenants have traditionally enjoyed the strong protection afforded property interests by specific remedies designed to secure enjoyment of the intended benefit rather than compensation designed to substitute for its loss. Because restrictive covenants usually are intended to create rights to use or protect specific property, to provide shared amenities, or to maintain the character of a neighborhood, their value is often difficult to monetize and impossible to replace without a change of location.

Florida law has long recognized that injunctive relief is available to remedy the violation of a restrictive covenant without a showing that the violation has caused an irreparable injury--that is, an injury for which there is no adequate remedy at law. A right exists to equitable relief in such cases because every piece of land in the world has a peculiar value, infringement of which is not readily remediable by assessment of damages of law. The rationale for that rule applies with equal force in the context of a restriction affecting the use of real property in a commercial lease. A tenant seeking to enforce a restrictive covenant under a commercial lease is no less entitled to the strong protection afforded property interests by specific remedies designed to secure enjoyment of the intended benefit than is the owner of a residential property seeking to enforce a setback requirement or other restrictive covenant. When the covenant at the core of the controversy is more in the nature of a no-competition-clause, and did not implicate real property, or easement rights, the court's reasoning here would not apply. The court further recognized that the rights of innocent third parties may have a bearing on the availability of injunctive relief. In the instant case, however, such third-party rights were not implicated. The

rule stated herein cannot be circumvented by the introduction of expert testimony. There exists the view that any harm--including the harm caused by the violation of a restrictive covenant relating to the use of real property--can be assigned a monetary value, but the law of Florida has not embraced that view.

Party listed as borrower on mortgage, but not liable on note, is indispensable party to foreclosure proceedings.

Sudhoff v. Federal National Mortgage Association, No. 5D05-3137 (Fla. 5th DCA October 20, 2006)

The court granted rehearing and withdrew its earlier opinion.

Sudhoff appealed from the trial court's order denying her motions to intervene and set aside the judicial sale of her marital home. She argued that the judgment of foreclosure was void because she had not been made a party to the suit and received no notice of the proceedings. Fannie Mae responded on appeal that her motions were untimely and that she was not a necessary party to the suit, because she did not sign the note and did not live in the home when Fannie Mae filed its complaint.

Sudhoff's husband owned a parcel of property individually and wished to mortgage it. Apparently, because of its homestead status, Fannie Mae required Mrs. Sudhoff to join in the mortgage, although not the note. The mortgage defined the term "Borrower" as "John J. Sudhoff, a married man, joined by his wife, Eva Marie Sudhoff." The mortgage made clear that because Mrs. Sudhoff did not sign the note, she was not liable for the debt, but was pledging her interest in the subject property to secure the debt. The note and mortgage provided that the "Borrower" (presumably including Mrs. Sudhoff given her designation as such in the mortgage) could reinstate the mortgage in the event of a default, under certain circumstances. The agreement also prohibited either party from pursuing judicial action against the other, unless the complaining party provided notice and a reasonable period to take corrective action.

Several years later, Fannie Mae filed a complaint to foreclose the mortgage. Mrs. Sudhoff was not named a party. Rather, Fannie Mae named Mr. Sudhoff "and all unknown parties . . . whether said unknown parties may claim an interest as spouses, heirs, devisees, grantees, or other claimants." The complaint acknowledged that both Mr. and Mrs. Sudhoff had executed the mortgage.

Fannie Mae submitted an affidavit of diligent search, stating that it could not find Mr. Sudhoff. It alleged "a diligent search . . . was made to discover the residence and whereabouts of the Defendant(s) . . . and of the Defendant(s) spouse, if any," but the record reflected no attempt to locate or serve Mrs. Sudhoff. Later, on Fannie Mae's motion, the court granted summary judgment and ordered a sale of the property. After the sale was conducted, a certificate of sale and a certificate of title were filed.

Two weeks later, Mrs. Sudhoff filed a notice of lis pendens, moved to intervene, moved to vacate judgment of foreclosure, and moved to set aside the foreclosure sale. She alleged that she should have been a party because the litigation sought to sell her marital home. Mrs. Sudhoff claimed that although she and Mr. Sudhoff were estranged, she had left her forwarding address with the postal service. Fannie Mae opposed her motions, arguing that her objections were untimely. Fannie Mae also claimed that Mrs. Sudhoff did not have standing to object because she was not a party. After the trial court denied Mrs. Sudhoff's motions and dissolved the lis pendens, this appeal followed. The appellate court concluded that the court abused its discretion when it denied Mrs. Sudhoff's motion to intervene, and reversed.

On appeal, Sudhoff contended that her interest in her marital property had been extinguished without due process. Indispensable parties are necessary parties essential to a suit, such that no final decision can be rendered without their joinder. This is in contrast to other necessary parties, who have an interest in a suit and ought to be made parties, but who do not have to be joined before a final decision may be rendered. A final decision will bind those parties joined in the suit, but will have no effect on the rights of necessary but unjoined parties. Measured thereby, the appellate court concluded that Sudhoff was, at the least, a necessary party who had a sufficient stake in the outcome to permit her to intervene and seek whatever relief might be available to her.

Fannie Mae's failure to join Sudhoff deprived her of her equity of redemption. The right of redemption is the mortgagor's valued and protected equitable right to reclaim her estate in foreclosed property. This equity of redemption is an estate in land. The right of redemption is an incident of all mortgages and cannot be extinguished except by due process of law.

Consequently, the appellate court concluded that Sudhoff was a necessary party. Because she was a necessary party to the foreclosure, and her equity of redemption was extinguished without due process, the court abused its discretion by denying her motion to intervene and to be heard on her motion to set aside the sale and vacate the judgment of foreclosure.

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The appellate court did not, however, conclude that the foreclosure proceedings were void as against Mr. Sudhoff and the junior lien holder. Florida has numerous decisions holding that a foreclosure suit may be maintained even though the holder of the legal title to the property is not a party to the foreclosure, but that the decree only establishes the rights of persons who are parties.

Titleholder who informs tax collector of new address, but whose new address is mistakenly left off of the tax roll, has right to challenge tax sale.
Vosilla v. Rosado, No. SC05-1778 (Fla. November 9, 2006)

The Supreme Court had for review a certified conflict over whether notice to a property owner that the property is scheduled for a tax deed sale, sent in compliance with section 197.522(1), Florida Statutes (2000), nonetheless violated due process of law when the taxing authority has received a change of address from the property owner, but sends the tax sale notice to the owner's former address. The property owners in this case asserted that the notice sent to their former address was constitutionally inadequate to give them the opportunity to take action that could have prevented the sale. The court agreed that the notice had not been reasonably calculated to apprise the owners of the tax deed sale that is the applicable due process test.

Chapter 197, Florida Statutes (2000), requires the clerk of court to mail notice of the application for the tax deed to the address of the legal titleholder as listed on the latest tax assessment roll. Pursuant to these statutory provisions, the clerk of court mailed notice via certified mail to the Rosados at the address listed on the latest tax assessment roll. Because the Rosados' address had not been updated on the tax assessment roll, notification was mailed to their former residence, and the return receipt was signed by a relative who could not speak English.

The conflict issue was whether notice that complies with chapter 197 violates the requirements of due process where the taxing authority receives actual notice from the titleholder of a change of address but sends the notice of the tax deed sale to the former address. This issue did not require the court to determine whether the relevant statutory section was facially constitutional. Rather, the court was presented with an as-applied challenge to the constitutionality of the statute; that is, whether the section was unconstitutional as applied to the facts of this case.

The Due Process Clause of the Fourteenth Amendment requires that deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for a hearing appropriate to the nature of the case. The fundamental right to have a meaningful opportunity to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. A landowner whose property is to be sold for delinquent taxes undoubtedly has a vested ownership interest in the subject property, and is therefore entitled to notice of a pending tax deed sale.

The United States Supreme Court has explained that to satisfy due process, any notice given must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Determining whether a particular method of notice is reasonably calculated to provide adequate notice requires due regard for the practicalities and peculiarities of the case. Subject to this limitation, the legislature has the authority to determine the extent and character of the notice that shall be given by the state before property is sold for nonpayment of taxes. Although the tax collector may have made a reasonable calculation of how to reach the property owners, he had good reason to suspect when the notice was returned that they were no better off than if the notice had never been sent. The steps undertaken by the state when notifying a titleholder of an impending tax deed sale of the titleholder's property must be reasonably calculated to reach the titleholder under the totality of the circumstances. Such circumstances include unique information about an intended recipient that might require the taxing authority to make efforts beyond those required by the statutory scheme under ordinary circumstances.

Litigation between buyer and seller concerning real property does not render the subject property unmarketable. Also, communication by a party that he is ready to close waives his enforcement rights of certain breaches of the sale agreement.
Muñiz v. Crystal Lake Project, LLC, No. 3D05-1997 (Fla. 3rd DCA October 25, 2006)

The Purchasers appealed a final judgment denying their claim for specific performance of a contract to convey land

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entered into with the Seller, who cross-appealed the denial of its counterclaim against the Purchasers for breach of contract.

The Purchasers visited the Seller's sales office and were attended by one of the Seller's sales representatives, Cimino, who gave the Purchasers brochures depicting various model homes for sale by the Seller. The Purchasers decided to purchase one of the models in the brochures, the "Vizcaya" model, and entered into negotiations with Cimino regarding the items to be included in the structure to be built by the Seller. Cimino prepared a purchase and sale agreement for the Vizcaya model with a total purchase price of $269,990.00. Cimino made two copies of the unexecuted Agreement, added to each of the copies hand-written notations indicating additional options to be included in the structure, and gave both copies to the Purchasers for their respective signatures.

The Purchasers executed both copies of the Agreement and simultaneously made a separate list of additional items they believed were to be included on the subject property. The Purchasers gave this additional option list to Cimino. This list, however, was never added to nor incorporated by reference into either copy of the Agreement. After executing both copies of the Agreement, the Purchasers retained one copy and Cimino retained the other copy for transmittal to the Seller for signature by the Seller's authorized officer. The Seller's authorized officer ultimately executed the second copy. Although the Purchasers on numerous occasions requested a fully executed copy of the Agreement, it was not provided to them.

The copy of the Agreement retained by the Purchasers and not signed by the Seller's authorized officer, included hand-written notations to include the following options in the structure: crown molding; washer and dryer; tub enclosure on the second bathroom upper level; and ceramic tile in all areas except the bedroom. The copy of the Agreement executed by the Seller's authorized officer contained all of the hand-written notations except for the notation "ceramic tile all area but bedroom."

Construction of the structure on the property commenced soon thereafter. The Purchasers noticed that the structure was not being built according to their expectations and pursuant to the hand-written notations on the Agreement or the additional option list. The Purchasers consequently went to the County to review the plans that had been approved for the subject property. Realizing that the construction of the structure was not in accordance with the building plans nor with their expectations under the Agreement, the Purchasers reported the Seller to the County. A code compliance officer for the County visited the construction site and ordered corrections to be made to the plans. The Seller thereby made corrections to the building plans.

More than a year after execution of the Agreement and after commencement of construction on the subject structure, the Seller's attorney, Contreras, wrote the Purchasers a letter stating that they were in default of the Agreement due to the Purchasers' improper and unauthorized entry onto the construction premises. Along with the termination letter, Mr. Contreras sent the Purchasers a check in the amount of their deposit money. The Purchasers never cashed this check.

The Purchasers then filed a complaint for specific performance demanding that the Seller convey the property to them as per the terms of the Agreement. During the pendency of the litigation, the Seller received a certificate of occupancy for the subject property. Although the Seller had informed the Purchasers of its intent to terminate the Agreement, the Seller nonetheless sent notice to the Purchasers that a certificate of occupancy had been issued on the subject property, and offered a walk-through inspection with closing to follow. The Purchasers attended the walk-through inspection, prepared extensive notes on the items they felt were missing from the structure, and proceeded to the scheduled closing. The Purchasers attended the closing with cash in hand, the required financing in place, and indicated their willingness to close on the subject property despite the notations on the walk-through punch list. The Seller, however, notified the Purchasers for the first time, that a necessary condition to proceeding with the closing was that the Purchasers dismiss the pending lawsuit with prejudice and dissolve the lis pendens. Although the Purchasers agreed to dismiss the lawsuit without prejudice and dissolve the lis pendens, the Seller refused to close pursuant to its alleged inability to convey marketable title unless the lawsuit was dismissed with prejudice. The Purchasers refused to dismiss the lawsuit with prejudice and consequently the sale transaction was not consummated.

On appeal, the court agreed with the Purchasers that the trial court had abused its discretion in denying their claim for specific performance.

The decision whether to grant or withhold a judgment for specific performance is a matter within the sound discretion of the trial court that will not be disturbed on appeal unless clearly erroneous. The exercise of this discretion by the trial court, however, must be legally sound and not arbitrary. Thus, if it appears on appeal that the principles of equity justify specific performance, and no provision of law would be violated by enforcing specific performance, a decree refusing such relief may be reversed. The maxim is that equity will do what ought to be done. In order for a court to grant specific performance, the parties must have entered into an agreement that is definite, certain, and complete in all of its essential terms. The trial court itself granted the Purchasers' motion to adopt the fully executed copy of the Agreement as the actual purchase and sale agreement between the parties. Thus, there were no conflicting versions of the parties' agreement. A review of the fully executed Agreement reflects that it was definite, certain, and complete as to the parties, the description of the property, the contract price, and the financing terms thereof.

As to the conflicting versions of the Purchasers' additional option list, the Agreement specifically stated that for purposes of the options and upgrades, the parties would execute an Option and Upgrade Agreement establishing the terms and conditions of the Purchasers' selections, and that the Option and Upgrade Agreement would be incorporated into the Agreement. As the "Option and Upgrade Agreement" was not fully executed by both parties as per the terms of the Agreement, nor was it incorporated by reference thereto, it did not form part of the Agreement and consequently, no discrepancies existed relating to the Purchasers' additional option list. As the essential terms of the Agreement were clear and definite, the court concluded that the Purchasers were entitled to a decree of specific performance.

continued, next page

from preceding page

The Seller argued by way of its counterclaim, that the Purchasers were not entitled to specific performance of the Agreement, as the Purchasers had breached the Agreement (1) by repeatedly trespassing onto the property without written permission from the Seller and (2) by refusing to dismiss their complaint with prejudice, that the Seller claimed precluded closing.

A party who fails to comply with his contractual commitments is generally not entitled to require the other party to specifically perform the contract, unless noncompliance was excused or waived. Regarding the first claim of noncompliance, that the Purchasers trespassed on the property, the court concluded that the Seller had waived any noncompliance or breach by the Purchasers by obtaining a certificate of occupancy on the subject property, notifying the Purchasers of the receipt thereof, and scheduling a walk-through inspection to be followed by the closing.

The court was equally unpersuaded by the Seller's second contention, that the Purchasers had breached the Agreement by failing to dismiss their complaint with prejudice, as the Agreement did not impose such a requirement. The Seller had unilaterally inserted this additional condition into the Agreement at the eleventh hour, giving the Purchasers no opportunity to receive their benefit of the bargain as contemplated at the time the Agreement was executed. Consequently, the court concluded that the Purchasers had not breached the Agreement by refusing to dismiss the lawsuit with prejudice. The Purchasers' mortgagee bank was aware of the pending lawsuit between the Purchasers and the Seller, and it nonetheless provided the required financing to the Purchasers. Thus, any alleged concern the Seller may have had as to protecting the Purchasers' mortgagee bank was refuted by the fact that the Purchasers received the required financing and showed up to the closing ready, willing, and able to close on the property.

According to the agreement, regardless of whether the Purchasers' mortgagee bank provided the required financing or not, the Purchasers had an obligation to close on the subject property or be considered in default. Clearly, at the time the Seller drafted the Agreement and at the time the parties entered into the Agreement, the Seller had no concern for the mortgagee bank or the Purchasers' interest in the title as the closing was not contingent, in any way, upon the Purchasers obtaining mortgage financing. If the Seller really had been so concerned about protecting the mortgagee bank and the Purchasers' interest in the title, then the Seller should have contacted the Purchasers prior to scheduling the closing, in order to allow the Purchasers to seek legal advice on whether or not the pending lawsuit created a problem for the required financing and the title policy. The Seller, however, did not do so and only at the eleventh hour unreasonably refused to close on the property, even though the Purchasers arrived at the scheduled closing with cash in hand and the required financing in place.

The Seller failed to provide any law that a mortgagee bank does not have priority to the property over the purchaser when it provides financing to the purchaser who is involved in a lawsuit with the seller, nor did the Seller provide any case law establishing that a pending lawsuit between a purchaser and a seller creates a problem in the title passing between those particular parties. A review of the case law, however, indicated the contrary result as any "lien" the purchaser may have on the property because of his lawsuit with the seller is automatically resolved when the title passes. As to the pending lawsuit between the Purchasers and the Seller, the court concluded that it did not render the title to the subject property unmarketable. The court held that a dispute between the seller and the purchaser, as well as the threat of litigation relating to the seller and purchaser's transactions, does not affect the marketability of title between those particular parties. Consequently, in this case, as the instant litigation did not involve a third party, the court concluded that the current dispute or any potential litigation between the Purchasers and the Seller did not affect the marketability of title to the specific property at issue.

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Environmental & Land Use Considerations for Real Estate Transactions

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: January 26, 2007 • Tampa
Doubletree Hotel Tampa Westshore • 4500 West Cypress Street 33607

Video Replays (10 locations): February 16 - March 30, 2007

Course No. 0403R

8:00 a.m. – 8:30 a.m.
Late Registration

MORNING SESSION:

Case Study Introduction and Land Use Issues

8:30 a.m. – 9:00 a.m.
Case Study Introduction
Benjamin A. Wilson, Odessa

9:00 a.m. – 9:30 a.m.
Present the Contract
Barry B. Ansbacher, Jacksonville

9:30 a.m. – 10:15 a.m.
Comprehensive Plan
David L. Jordan, Tallahassee

10:15 a.m. – 10:30 a.m.
Break

10:30 a.m. – 11:15 a.m.
Zoning and Development Permits
H. Raymond Allen, II, Tampa

11:15 a.m. – 12:00 noon
Concurrency: Roads, Schools and Water, Oh My!!
Charles Gauthier, Tallahassee

12:00 noon – 12:30 p.m.
Coastal Issues: Coastal Construction Control Line and Coastal Permits
Thomas G. Tomasello, Tallahassee

12:30 p.m. – 1:45 p.m.
(Lunch provided in Tampa location only)
What Is a Wetland . . . and Why Should I Care
W. Michael Dennis, Winter Park

AFTERNOON SESSION:

Environmental Issues and Drafting Considerations

1:45 p.m. – 2:30 p.m.
Water Permitting
Irene M. Kennedy Quincey, West Palm Beach

2:30 p.m. – 3:15 p.m.
Cute and Costly Animals: ESA and Your Permits
Martha M. Collins, Tampa

3:15 p.m. – 3:30 p.m.
Break

3:30 p.m. – 4:15 p.m.
Contamination of the Site
Ralph A. DeMeo, Tallahassee

4:15 p.m. – 5:00 p.m.
Docks: DEP Permitting and Trustee Leases
Richard S. Brightman, Tallahassee

5:00 p.m. – 5:15 p.m.
Questions & Answers

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Charitable Giving as Part of the Family Income and Transfer Tax Plan

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: February 2, 2007 • Tampa
Tampa Airport Marriott • 813-879-5151

Video Replays (9 locations): February 16 - March 15, 2007

Course No. 0417R

9:15 a.m. – 9:45 a.m. **Late Registration**

9:45 a.m. – 9:50 a.m.
Introduction and Program Goals
Michael W. Fisher, Jacksonville, Program Chair

9:50 a.m. – 10:00 a.m.
Purposes of The Florida Bar Foundation
Donald J. Hale, Orlando

10:00 a.m. – 10:50 a.m.
The Crossroads of Ethics and Federal Legislation
Andrew C. Schulz, Washington DC

10:50 a.m. – 11:35 a.m.
A Foundation on Charitable Foundations: Private, Community, and Supporting Foundations and the New Florida Trust Code – Which, Why and How
Louis Nostro, Jr., Miami

11:35 a.m. – 11:50 a.m. **Break**

11:50 a.m. – 12:35 p.m.
What's New to Know: Pension Protection Act of 2006
Jeffrey Baskies, Fort Lauderdale
Kristen M. Lynch, Boca Raton

12:35 p.m. – 1:45 p.m. (Lunch included for Tampa location only)
Tallahassee's Role in the Future of Charitable Giving
Sherry Magill, Jacksonville

1:45 p.m. – 2:35 p.m.
Ethical Considerations for Lawyers and Other Professionals Dealing with Not-For-Profit Organizations and Donors
Michael P. Stafford, Uniondale, New York

Self-Dealing and Insider Transactions: Private Foundation Operations
Jerome L. Wolf, Boca Raton

2:35 p.m. – 3:05 p.m.
Charitable Giving and the Do-Gooder Client's Estate Plan: Psychological Approaches
Bruce M. Stone, Coral Gables

3:05 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:00 p.m.
Charitable Giving as Part of the Estate Plan: Marketing Means with Ends
Richard R. Gans, Sarasota

4:00 p.m. – 4:30 p.m.
The View from the Other Side of the Fence: Representing the Charity in Planned Giving Matters
Brian C. Sparks, Tampa

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If you have any information about this, please contact: Mara Der Hovanesian, Banking and Finance Editor, *BusinessWeek* (212) 512-4035), *mara_derhovanesian@businessweek.com*

– Greg Deal, Lakeland, FL

Save the Date!

What: The Charitable Organizations and Philanthropic Planning Committee of RPPTL Seminar

When and Where: Friday, February 2, 2007 -- Tampa Airport Marriott Hotel

Who Should Attend: Estate planners, those interested in philanthropy, advisors of charitable organizations, and advisors of clients who are considering forming foundations

Discussions will include: 1) when and how to recommend gift annuities, charitable remainder trusts, and charitable lead trusts; 2) what client situations can be facilitated by charitable planning, such as the sale of a business; 3) ethics of being a donor advisor and a board member of a charity; and, 4) community foundations and their use to donors and estate planners.

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