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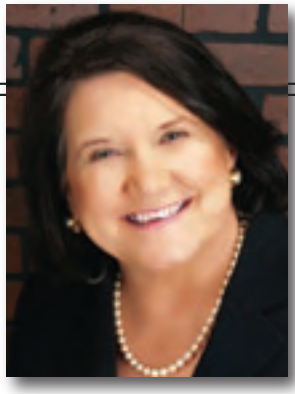

By Sandra F. Diamond

Section Chair 2008 - 2009

Chair's Column

Section members who attended the recent RPPTL Memorial Day weekend Convention seminar, *A Study in Fine Arts: Mixed Media of Real Estate, Probate, and Trusts* at the Vinoy Hotel in St. Petersburg, organized by Co-Chair **Dresden Brunner,** were fortunate to hear some of the best legal minds in the state discuss the difficult issues generated when real property enters the mix of estate planning and estate administration. (If you didn't come in person - get the CD now!) Those of you who were not at the seminar probably did not attend the Annual Convention Lunch which immediately followed. If so, you missed an extraordinary opportunity - one that, quite frankly, even those of us who planned the convention did not fully anticipate. Through the efforts of **Marilyn Polson** and her husband, **Herb Polson**, we heard from representatives of the **United States Central Command International Coalition Against Terrorism**. U.S. Central Command is headquartered at MacDill Air Force Base in Tampa. CentCom oversees U.S. military operations in the Middle East, including Iraq, Iran, Afghanistan, and Pakistan. Following 9/11, 60 nations assembled representatives in Tampa to fight global terrorism. Each table at the Annual Convention lunch hosted a military member of the International Coalition, with representatives from the United States, Norway, Romania, Netherlands, France, Italy, Poland, Finland, Sweden, Tajikistan, Australia, Japan, and Jordan. **Brigadier General Robert E. Livingston** of the United States and **Brigadier General Arne Skjaerpe** of Norway discussed the roles of the Coalition partners and the troops in the U.S. Central Command's region of responsibility. The discussion was candid and the assessment of the challenges sober. This behind the scenes look was a reminder that there are thousands of troops and a coalition of nations that are working militarily, diplomatically, economically, and financially to fight terrorism.

The RPPTL Convention is our annual opportunity to recognize those Section members who have made important contributions to the areas of real property, probate, and trust law. Some have been "out front" at seminars or served as Section officers, while others have worked diligently behind the scenes, quietly shaping legislation or volunteering for committee assignments. Each person chosen for one of the RPPTL Section awards is representative of many others that we were unable to recognize.

This year we designated a new award, "**The Rising Stars**" to honor the newer (sometimes younger) Section members who have stepped forward and undertaken significant Section or committee responsibilities. These are members who demonstrate potential for future Section leadership. This year's Rising Stars are **Tae Kelley Bronner**, from the Probate Division, and **Nicole Kibert**, from the Real Property Division. Tae has co-chaired the Section's Diversity initiative, organized the Fellowship Program, and is the incoming chair of the Probate Law Committee. Nicole has served as Vice Chair of the Development and Governmental Regulation of Real Estate Committee, is a member of the Executive Council of the Environmental and Land Use Section, and is playing an active role shaping our technology and website efforts. The Section's **Annual Service Award** was presented to the Coordinating Committee of the **Florida Attorney's Saving Homes Project. Drew O'Malley, Adele Stone**, and **Peggy Rolando** have contributed hundreds of hours structuring and steering the FASH program. The **Robert C. Scott Award** is presented to a Section member who exemplifies the devotion and continued service of former Section Chair Robert C. Scott to the Section and its membership. The award was presented to **Burt Bruton** in recognition of his contributions to the Section's legislative initiatives including serving as Legislation Chair for the past two years, coordinating scores of legislative white papers, and overseeing a myriad of real property, probate, trust, and guardianship law proposals. Several years ago the Section established the **William S. Belcher Lifetime Professionalism Award**. It is presented at the discretion of the Section in recognition of a member's lifetime contributions to the RPPTL Section, The Executive Council, Florida attorneys, and the public, in promoting the highest standards of ethics and professionalism. The Belcher Award was presented this year to former Section Chair **Laird A. Lile**. Laird has served as Chair of the RPPTL Legislation Committee, the Liaison with Corporate Fiduciaries Committee, the Strategic Planning Committee, and has co-chaired the Trust Code Revision Committee. He was instrumental in establishing the RPPTL PACs and now serves as a member of the Board of Governors of the Florida Bar, representing the Twentieth Judicial Circuit.

Perhaps the most significant recognition at our Annual RPPTL Convention was not a formal award at all but the standing ovation given to **John Arthur Jones** who is celebrating the 60th anniversary of his admission to The Florida Bar! John Arthur has served as Section Chair, previously received the Robert Scott Memorial Award, was honored as the first recipient of the William S. Belcher Lifetime Professionalism Award, and has served actively on the

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ABOUT THE COVER:

This issue's cover photo, "Gator in Pea Soup" by Dave Brennen, was the first place winner in the Section's inaugural Executive Council photography contest. To see other winners, see page 24.

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Get Included in *ActionLine!*

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

Forward any proposed **ARTICLE OR NEWS OF NOTE** to J. Richard Caskey at jrcactionline@gmail.com.

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The deadlines for all submissions are as follows:

Issue	Deadline
Spring	January 31
Summer	April 30
Fall	July 31
Winter	October 31

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

Tax Certificates – Buyer Beware!

By Hunter G. Norton, Esq., Abel Band, Chartered, Sarasota, FL

Although Florida Statute §197.102(3) and supporting case law proclaim that a tax certificate constitutes a first lien on real property, "superior to all other liens,"[1] the purchaser of a tax certificate should look before he leaps. While such authority may beguile even the prudent investor, lying silent in the public records are federal liens which will prime a tax certificate, despite the bold assurances of Florida law. Therefore, it is imperative that the purchaser of a tax certificate first determine whether a federal lien exists on the assessed real property, and second, whether the tax certificate was perfected prior to the federal lien.

The Tax Certificate

Florida county governments routinely sell tax certificates to alleviate their books, bolster their coffers and shift the burden onto John Q. Public, who may bid on and purchase the county's tax lien at a tax lien sale. Tax lien sales are creatures of statute and are set in motion by the assessment of taxes by the county tax collector. Real property taxes become due on November 1st of the year the taxes were assessed.[2] County governments are given tax liens, "superior to all other liens," on the taxed real property from January 1st of the year the taxes were levied via a "relation back concept."[3] If the taxes on the real property are not paid by the following April 1st, or within 60 days from the mailing of the original tax notice (whichever is later), the taxes are deemed delinquent.[4] Once delinquent, the tax collector is compelled to sell a tax certificate at a tax lien sale.[5]

The purchaser of a tax certificate, as well as the purchaser's attorney, should be well aware that this attractive investment may morph into an unattractive nuisance if a proper investigation is not undertaken.

The Tax Lien Sale

In contrast to a sale on the courthouse steps where the property goes to the highest bidder, potential buyers at a tax lien sale bid the interest rate down.[6] Typically the bidding starts at eighteen percent, the highest allowable interest rate, decreasing gradually as potential purchasers bid against one another.[7] The party who agrees to purchase the tax lien at the lowest accruing interest rate is issued a tax certificate evidencing a "superior lien" on the real property, which the property owner can redeem only by paying principal, costs and interest to the tax certificate holder within two years of issuance.[8] If the tax certificate is not redeemed within two years of April 1st of the year it was issued, the holder may file the certificate and apply for a tax deed from the tax collector of the county in which the real property is located.[9] From the perspective of the purchaser of the tax certificate, the prospect of guaranteed interest on the one hand and the issuance of a tax deed on the other make a tax certificate a very attractive investment. The allure of the tax certificate is buoyed by the assurance that it is a "first lien, superior to all other liens." However, the purchaser of a tax certificate, as well as the purchaser's attorney, should be well aware that this attractive investment may morph into an unattractive nuisance if a proper investigation is not undertaken.

A Federal Lien May Prime A Tax Certificate

Many a first year law student can recite the age old adage: federal law preempts state law when state and federal law conflict.[10] Federal law mandates that federal liens may prime any other lien existing on real property, including a state-issued tax certificate.[11] Federal liens include, but are certainly not limited to, FHA mortgage loans and federal judgment liens. For the purchaser of a tax certificate, the devil may lie in the details of the federal lien.

For example, 28 U.S.C. §3201 provides that a federal judgment lien is superior to any other lien which is perfected later in time.[12] Thus, if a federal judgment lien is recorded against real property prior to perfection of a state tax lien, the federal judgment lien will trump the state tax lien notwithstanding Florida's statutory guarantee that a tax lien is superior to all other liens.[13] Therefore, it is of paramount importance that the purchaser of a tax certificate determine whether a federal lien of any type[14] exists on the assessed real property.

Using a federal judgment lien as an example, assume Investor properly reviews the public records and discovers a federal judgment lien on real property for which a tax certificate is to be sold. At first blush, the existence of a federal judgment lien appears fatal to Investor's state tax lien position. However, all hope is not lost. If the state tax lien was perfected prior to the federal judgment lien, Investor can purchase the tax certificate and reign "superior" as proclaimed by Florida law. Though it sounds deceivingly simple, until recently there was no Florida case law expressly on point regarding perfection of state tax liens.

United States v. Falcone, et al.

While the Florida Statutes clearly provide that a tax lien is effective as of January 1st of the year the taxes were assessed, the issue of when a tax certificate is perfected has not been so apparent. Recently, the United States District Court for the Middle District of Florida clarified the issue in

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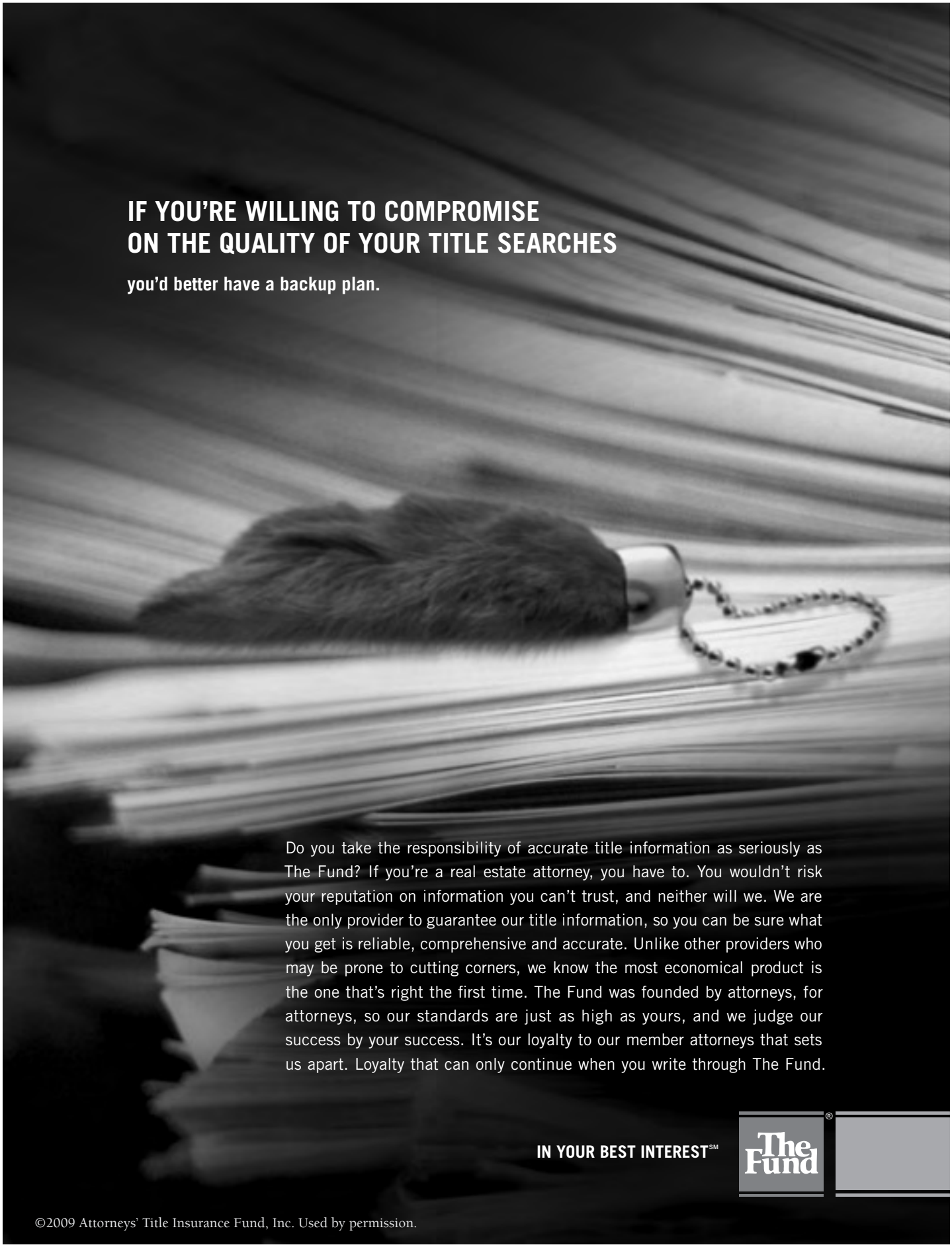
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Tax Certificates

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United States v. Falcone, et al.[15] The issue in *Falcone* was whether a federal judgment lien recorded *prior* to the issuance of a tax certificate, but *after* January 1st of the year the taxes were assessed, could prime the tax certificate. The Court expressly concluded, for the first time, that state tax certificates, like the tax liens they represent, take effect on January 1st of the year the taxes were assessed.[16]

The Middle District's ruling in *Falcone* is couched upon the notion that a tax certificate itself represents the assignment of a state tax lien rather than a separate, defeasible lien.[17] The *Falcone* Court determined that a tax certificate is indeed a perfected and choate lien on real property as of January 1st of the assessing year notwithstanding that a tax certificate cannot be issued until April 1st of the subsequent year.[18]In reaching its conclusion, the Middle District relied heavily on the Fifth Circuit Court of Appeal opinion in *U.S. v. Atlantic Mun. Corp.*, 212 F.2d 709, 711 (5th Cir. 1954), where the Eleventh Circuit's predecessor court held that a "lien based on a state tax certificate purchased in 1950 for delinquent 1949 taxes was a perfected and choate lien that pre-dated the United States' tax lien, which was perfected May 31, 1949."[19] On this rationale, the *Falcone* Court explicitly determined that a tax certificate is a perfected and choate lien on the subject real property effective January 1st of the year in which the taxes were levied.[20]

Conclusion

For the purchaser of a tax certificate who discovers a federal judgment lien on real property, the critical determination will be whether the federal judgment lien was perfected prior to January 1st of the assessing year. If it was, then the federal judgment lien primes the tax certificate notwithstanding Florida's statutory assurance that a tax certificate is a "first lien, superior to all other liens." Relative to a federal lien, the tax certificate may very well be a junior lien readily extinguished by the superior lienholder's interest. Therefore, it behooves the tax certificate purchaser (and most certainly his or her counsel) to tread cautiously, minding the Latin admonition, "Caveat Emptor!"

Endnotes:

1 Fla. Stat. §197.102(3); *More v. U.S.*, 505 F.Supp. 612, 614 (N.D. Fla. 1980) (holding that the lien evidenced by a tax certificate is "a first lien, superior to all other liens, on any property against which the taxes have been assessed . . ."); *Sivort Co. v. State*, 186 So. 671, 672 (Fla. 1939) (". . . it is well settled that a valid tax sale certificate constitutes a lien of highest character." (internal citation omitted)).

2 Fla. Stat. §197.333.

3 *Id.* at §197.122(1); *See also In re Chief Charley's, Inc.*, 122 B.R. 785, 786 (M.D. Fla. 1990) (recognizing that the attachment of the state tax lien as of January 1st occurs via a "relation back concept.")

4 Fla. Stat. §197.122(1).

5 *Id.* at §197.432(1).

6 *Id.* at §197.432(5).

7 *Id.* at §197.172(2).

8 *Id.* at §§197.102(3), 197.432(5) and 197.472;

9 *Id.* at §197.502(1).

10 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

11 *See e.g.* 28 U.S.C. §3201(b); *More,* 505 F.Supp. at 614.

12 28 U.S.C. §3201(b).

13 *Id.*

14 Along with judgment liens, a government subsidized mortgage, as well as other liens authorized by federal law, may also constitute a superior lien. *See e.g. More,* 505 F.Supp. at 614.

15 *United States v. Falcone, et al.,* 2008 WL 5111236 (M.D. Fla. 2008).

16 *Id.* at 3-4.

17 *Id.*

18 *Id.*

19 *Id.* (*citing Atlantic Mun. Corp.*, 212 F.2d at 710-11).

20 *Id.*

Message From the Chair

from page 3

Probate Forms Committee. He has mentored scores of young associates and summer interns at Holland & Knight. John Arthur is a member of both the American College of Real Estate Attorneys and the American College of Trust and Estate Counsel. You may bump into John Arthur at Hillsborough County Bar Association Real Property, Probate and Trust Law Section meetings, the Attorney's Title Insurance Fund Assembly, the Ad Hoc Homestead Committee, or a Power of Attorney drafting meeting. While many attorneys considerably younger than he have retired, John Arthur still attends all Section Executive Council meetings and most RPPTL CLEs keeping up with cutting edge practice ideas and actively participating in Section activities.

The formal awards presented at the Annual Convention do not begin to recognize the effort and time spent by hundreds of members of the Section who contribute to the research, drafting, and shaping of our legislative proposals, preparing and presenting our CLEs, and writing and editing our publications. Thank you to the committee chairs, vice chairs, and members who work quietly behind the scenes!

RPPTL Member Adele Stone Is Florida Bar Board Certified Lawyer of the Year

Adele I. Stone of Atkinson, Diner, Stone, Mankuta & Ploucha, P.A. in Fort Lauderdale has received the 2009 Justice Harry Lee Anstead Award for The Florida Bar Board Certified Lawyer of the Year. She is the first woman to earn the award.

The Florida Bar Board of Legal Specialization and Education created the Anstead award in 2005 to recognize exemplary professionalism and excellence in the practice of law and character and commitment to The Florida Bar's certification program. The BLSE annually presents the award to a Florida board-certified lawyer or judge.

BLSE Chair Joni Armstrong Coffey of Miami presented this year's award June 29 at the BLSE's annual-convention reception sponsored by Florida Lawyers Mutual Insurance Company.



Section member, Adele Stone (right) was presented the 2009 Justice Harry Lee Anstead Award for The Florida Bar Board Certified Lawyer of the Year at the Bar's Annual Convention in Orlando in June. BLSE Chair, Joni Armstrong Coffey of Miami (left) presented the award June 29

Coffey applauded Stone's extensive involvement in ethics-related endeavors and organizations, and quoted her nominator as saying, "Adele exemplifies all that is good, decent and honorable in a lawyer."

Stone is board certified in real estate law and is managing shareholder at Atkinson, Diner, Stone, Mankuta and Ploucha, P.A. She currently chairs The Florida Bar Foundation. She is an executive council member of the Bar's Real Property Probate and Trust Law Section and co-chairs the section's professionalism and ethics committee. She is the 2009 recipient of the Russell E. Carlisle Advocacy Award, which recognizes an attorney whose career has exemplified a commitment to the poor and to public interest work. Stone frequently lectures at ethics seminars for a variety of organizations, and has served on The Florida Bar's Ethics Committee. She has served as Broward County recruiting chair for Florida Attorneys Saving Homes project and chair of Legal Aid of Broward County. She founded the Broward County Legal Aid Advisory Board.

Other board certified lawyers nominated for the Anstead award were Kristin Adamson-Landau, Tallahassee; Jeffrey Michael Cohen, Miami; Francine Marie Ffolkes, Tallahassee; Susan Whaley Fox, Tampa; Eric Aaron Jacobs, Hollywood; Sanford Arthur Minkoff, Tavares and L. Norman Vaughan-Birch, Sarasota.

The Florida Bar's board certification program is now in its 26th year and recently added specialties in adoption law and education law, bringing its total number of certification areas to 24, the greatest number of state-approved specialties of any program in the nation. For more information, please visit *FloridaBar.org/certification.*



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Title Insurance "Bridges the Gap" for Investors in Latin American and Caribbean Real Estate: *The Who, What, Where, How and Why*

By Jennifer Cruise and Ed Hamann, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company and Lawyers Title Insurance Corporation, and Stacy Kalmanson, Commonwealth Land Title Insurance Company and Lawyers Title Insurance Corporation

U.S. investment in Latin American real estate has significantly increased over the last decade and is expected to grow significantly into the foreseeable future.[1] In fact, Banco Central de Costa Rica reported an increasing trend of foreign real estate investment in Costa Rica from 2004 to 2007 that culminated in approximately $620 Million in 2007. The more compelling piece of this economic data is that approximately 55% of that investment in Costa Rica came from the U.S., as Americans sought vacation homes in the many coastal areas. This phenomenon is not isolated to Costa Rica. Interestingly, the American College of Real Estate Lawyers found in one of its surveys that approximately two-thirds of respondents indicated that either their firm or employer "had worked on at least one [foreign real estate transaction]".[2] Prior to the global economic crisis, investment in foreign real estate had not been lost on the securities market, as foreign mortgage backed securities were significantly increasing, most especially in Latin America.[3] Ultimately, this increase in investment in Latin American and also Caribbean real estate represents significant opportunities for U.S. attorneys and specifically, Florida attorneys, due to their proximity to these markets. How might an attorney best facilitate such transactions for clients, investors and the growing securities markets interested in participating in the mortgage backed securities market in Latin America[4] and the Caribbean?

Certain title insurance underwriters have been actively working to understand and compare the legal systems of other countries relative to the U.S. system, as they relate to real estate transactions and due diligence.

The purchase, sale and mortgaging of real estate is frequently a complex affair governed by increasing regulation and standardization. Closing checklists are commonplace and are used for transactions ranging from single family condominium units to multi-million dollar shopping plazas. As a result, little appears left to discover in the modern U.S. real estate transaction once the due diligence is accomplished via a relevant closing checklist. One constant in virtually any real estate transaction is title insurance to effectively certify a satisfactory due diligence and provide the insured an indemnity in the event that the insured matters turn out to be different than otherwise stated in the title insurance policy. As a result, much real estate due diligence expertise is found within title insurance companies. Attorneys and the securities market rely upon this expertise in assuring their clients and investors, respectively, that a satisfactory due diligence was completed. Yet, when the same investor, seller or lender enters into a real estate transaction "south of the border", a closing checklist often does not provide an interested party with the same depth and breadth of due diligence. These investors and their attorneys must navigate both large gaps in knowledge and the uncertainties of an unfamiliar system. However, certain title insurance underwriters have been actively working to understand and compare the legal systems of other countries relative to the U.S. system, as they relate to real estate transactions and due diligence. As these underwriters grow their due diligence and actively insure title in these various jurisdictions, investors, lenders, purchasers and their attorneys can draw on the underwriters' experience and know-how to bridge the gap between the specific transaction expertise of attorneys and the jurisdiction expertise of local counsel, allowing them to effectively ask better questions.

An attorney might assume an absence of standardization, sophistication and regulation of real estate transactions in Latin America and the Caribbean. However, although less standardization exists compared to typical U.S. transactions, additional and very different formalities are required. An accurate analogy is the difference in real property laws observed across states in the U.S., which are unified by the common-law legal tradition. A similar observation can be made across jurisdictions in Latin America and the Caribbean. For instance, in many Caribbean jurisdictions, which are based upon a long British legal tradition, real estate transactions resemble modern transactions in England that differ significantly from the common law practices inherited by the U.S. A few Caribbean jurisdictions were developed under a Dutch or French based system, depending on the colonial power historically or currently in control of the territory. Accordingly, in these jurisdictions, real estate transactions are handled in a fashion similar to the European colonizer. Finally, in Puerto Rico, the Dominican Republic and most

continued, next page

Title Insurancey

from preceding page

of Central and South America, the strong Spanish influence yields a separate set of real estate practices that will vary from country to country, but generally falls under the umbrella of European civil law principles, such as those found in the Napoleonic Code and Roman law.[5] In effect, attorneys taking part in this growing market for real estate related representations will often find themselves practicing Comparative Law as applied to real estate related matters on behalf of their clients. Some title insurance companies have already progressed significantly down this path.

This article does not attempt to address every possible complication potentially encountered within a Latin American or Caribbean real estate transaction, but instead seeks to address basic questions that the title insurance industry has encountered and should be asked prior to deciding whether or not to invest, develop, purchase or lend in Latin America and the Caribbean. Some of these basic questions about real property are:

- Who owns and can own land?
- What interest in land is owned or can be owned?
- Where is the land and can it be clearly defined?
- How are real estate transactions accomplished?
- Why are things done the way they are?



Who owns and can own land?

The first and usually most intuitive question is who owns the land? Attorneys will understand that many aspects of a real estate transaction are impacted by whether ownership is by a natural person, legal person, or in a representative capacity. However, the less intuitive question that many attorneys are not prepared to consider is who can own land in a particular country? For example, can foreigners own real property, and if so, how can foreigners acquire such ownership interest and are there limitations for disposing of the land at some future point in time? In some countries, foreign ownership is limited to certain types of land use, such as tourism or agriculture. Other jurisdictions prohibit foreigners from owning border lands or ocean front real estate.[6] In other instances, countries require a rather involved legal process of either registering or seeking permission to own land.[7] Finally, it is important to determine, for legal and tax purposes, if the land can or should be held individually or by an entity; and, if held by an entity, whether it can or should be domiciled in the U.S., in the local jurisdiction or in an unrelated jurisdiction. Although attorneys are accustomed to advising clients on these decisions, it is important to recognize the additional complexity involved when the land is located in Latin America and the Caribbean, and insist that local counsel be included in the decision-making process.

What interest in land is owned or can be owned?

Once the question of who owns or can own the land has been asked, the obvious next question becomes what property rights are included in the purchase of real property and what public or private third party interests may affect the land. Many jurisdictions outside of the U.S. have legal cultures that vest far more property rights in a government entity or State, under the legal fiction that they are held in trust for the public good. A very common example is ownership of natural resources such as oil, gas, and minerals that are found on the surface or subsurface.[8] It is fairly typical in the U.S. for a purchaser to acquire surface, subsurface and airspace rights for a parcel of real property. Generally, that is not the case in many Latin American jurisdictions, where the State via its constitution or other bodies of law lays claim to these interests and makes clear that they are not in the private domain until the State consents to such private ownership. This consent requirement is so fully ingrained in the legal culture of the region that a local counsel may not even think the issue need be pointed out, and such matters will not appear in real property public records. Similarly, waterfront property in many jurisdictions is owned by the State, which can in turn grant use rights to private parties under certain terms similar to a U.S. land lease.[9] Another less obvious interest that affects ownership or interest is government owned utility companies. In these instances, the government owned utility companies have the legal right to establish easements that are not required to be recorded. Hence, where the title evidence does not indicate the presence of utility easements on the land, the easements may exist, but are simply unrecorded and will

remain unrecorded, which creates a separate set of risks and concerns that are beyond the scope of this article.

Where is the land and can it be clearly defined?

In the U.S. legal tradition, the question of the land's location is addressed in the legal description for the land via a reference to metes and bounds or a recorded subdivision or condominium plat map. As a result, a surveyor is generally thought of as looking at the deed to re-trace the footsteps of the original surveyor to confirm that legal description.[10] Unfortunately, the method by which boundaries are given legal effect in most Latin American and Caribbean jurisdictions is quite different and needs to be understood before a surveyor is sent to find monumentation or other evidence of land boundaries. In most jurisdictions, separate and apart from the land registry, a cadastral office may be tasked with giving legal effect to boundaries for any given parcel of land. In addition, the requirement to legally establish such boundaries may not be mandatory; or the legally established boundaries may be extremely old and subject to inferior surveying technology. As a result, determining whether verifiable boundaries exist for land is of special concern to any buyer of foreign land. Consequently, an attorney must know what a surveyor is looking for and that the boundaries have been given some legal effect by either a formal approval or recording. In some instances, conflicts or discrepancies may exist between the information on file at the cadastral office and the information in the land registry, and any discrepancy will need to be carefully explored. As a result, it is highly advisable to have a new survey prepared for the land. Preferably, the survey should be completed before the acquisition, but no later than shortly after acquisition to ensure that any rights against sellers are not waived.

How are real estate transactions accomplished?

In the U.S. legal tradition, searching the public records is critical to any due diligence because the search verifies the correctness of a seller's or borrower's representations. This verification is necessary in a recording system partly because title documents are merely presented in the public records so as to provide constructive notice that someone has purported to affect title, meaning there is no guarantee that what has been accepted into the public records is in fact valid. By contrast, most Latin American and Caribbean jurisdictions generally employ a land registry system, which varies greatly from a recording system.

Unlike a recording system, a land registry system requires an examination, approval, and inscription of all documents presented, which establishes some validity to the title. Upon inscription, the registered title owner either obtains the benefit of legal presumption of validity or the State will guarantee that title is vested in the registered title owner. Yet, this validity is deceptive because maintaining and operating an efficient and effective land registry is quite expensive and labor intensive, and ultimately, an ever-increasing risk of human error, misfeasance, and/or malfeasance by land registry personnel exists.[11] In particu-

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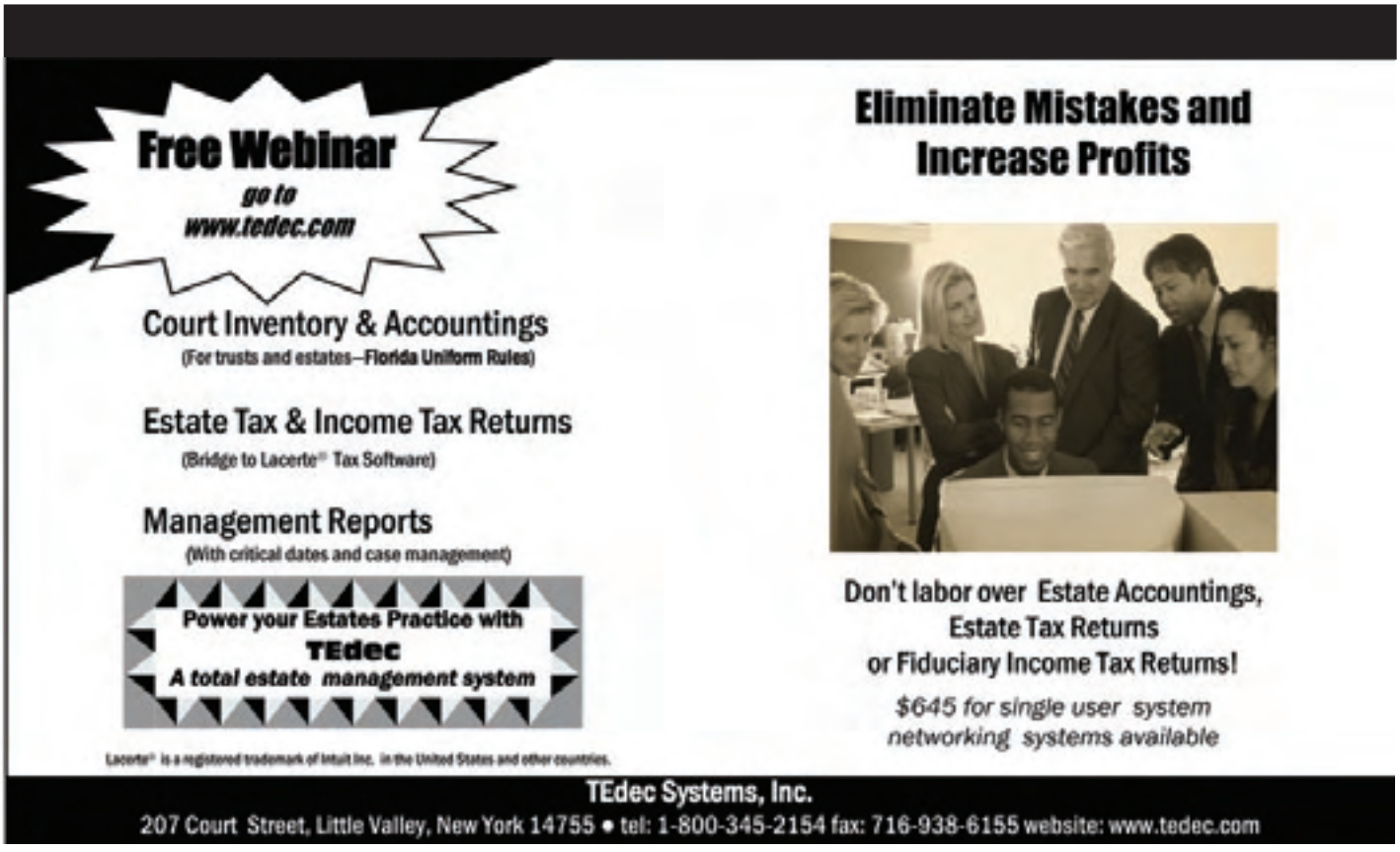

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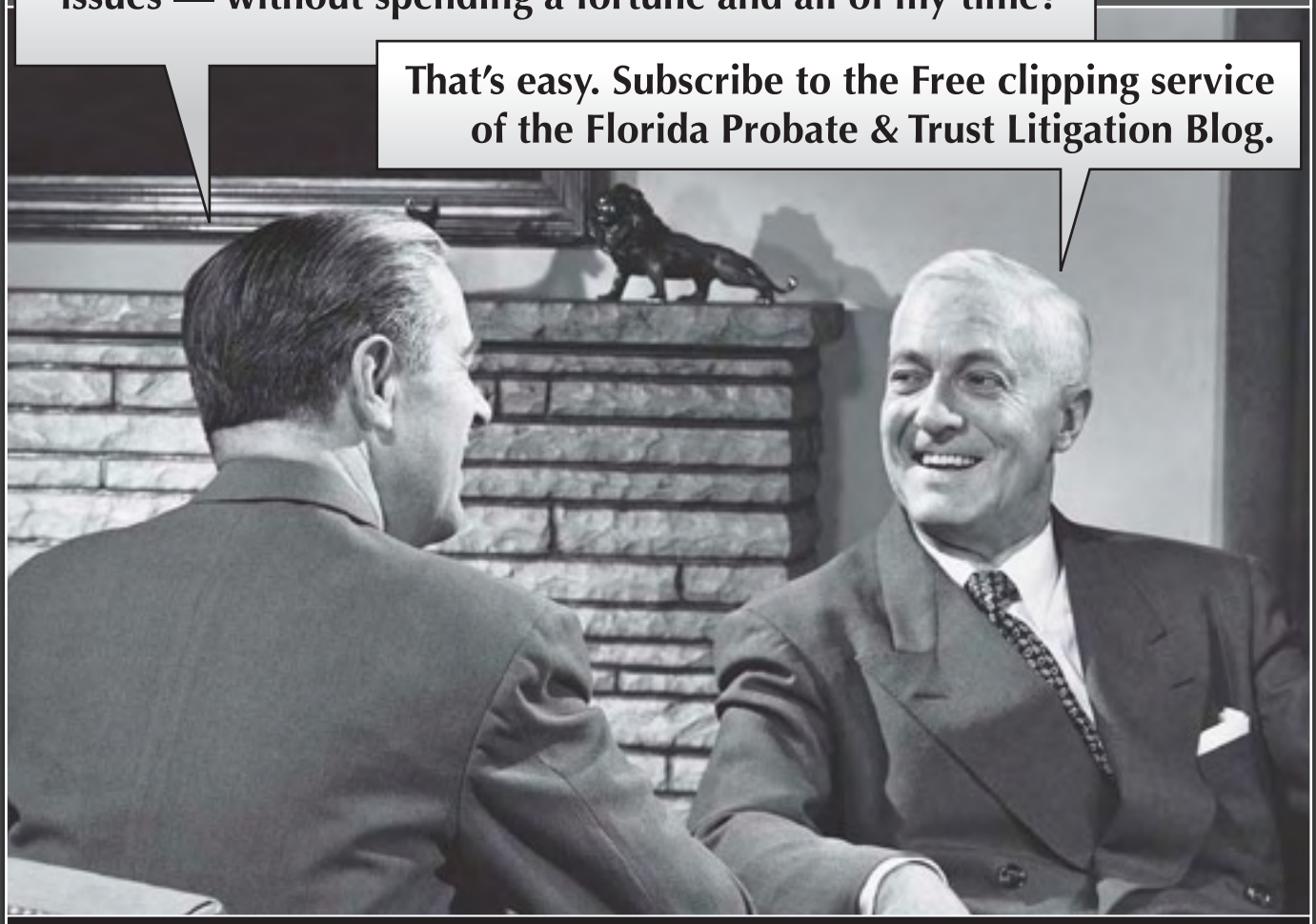

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lar, the success of any registry system depends on such matters as: (1) the registry system being either centralized or decentralized (i.e., the likelihood that registered title conforms with actual reality on the land); (2) the resources and expertise of the registry (i.e., quality and efficiency of the government officials); (3) the existence of government guarantee of the title; and (4) whether that guarantee, if available, is sufficient.[12] As a result, despite the allure of a land registry system, the traditional reasons for title insurance remain. Specifically, an owner may have to either establish or defend title in a foreign jurisdiction because of acts or omissions: (1) by parties to the transaction; (2) by registry personnel; or (3) due to matters arising from the chain of title. In the alternative, a registered title owner may find that a foreign attorney or professional responsible for a mistake that affects the title to land will not be sufficiently solvent to assume the financial risk of his or her mistakes.

Consequently, verifying the condition of title is quite different in a Latin American or Caribbean jurisdiction. Land registries are increasingly centralizing and making records accessible online. In those instances where the land registry system is not online and is decentralized, the question becomes where the search needs to be made. Regardless of where the registries are located and whether they are available online, there are two critical aspects of title due diligence to consider. First, whether the land registry issues certifications on the status of title, the contents of those certifications and their legal effect; and second, whether chain of title documents need to be reviewed and if so, for how long and how are those documents obtained, if at all? Many of these Latin American and Caribbean jurisdictions handle these matters very differently. In addition, most local counsel tend to be general practitioners, resulting in varying levels of competency in performing real estate due diligence. Few will have the kind of required experience in real estate transactions to perform due diligence that is expected in the U.S. Therefore, it is beneficial to work: (1) with title companies that have experience with multiple jurisdictions within Latin America and the Caribbean, and (2) with local counsel that has the ability to explain its best practices and the particularities of that jurisdiction to foreign attorneys.

One should also expect that local counsel will provide a complete explanation of the procedures required in order to properly present transaction documents to the land registry for registration. In many of these jurisdictions, there will be additional steps after the execution of documents that must be completed before documents can be submitted for registration. Any delay in presenting transaction documents to the land registry could create major concerns if the governing law dictates that title only transfers upon registration of transaction documents, rather than upon execution and delivery of transaction documents. As a result, besides pre-requisites to presentation, local counsel should also be prepared to advise as to the approximate length of time between presentation and actual registration in their jurisdiction, as well as many of the costs, which almost certainly will not be obvious to a U.S. based customer.

Why are things done the way they are?

As previously asserted, all Latin American jurisdictions and some Caribbean jurisdictions are based upon a civil law tradition, which is distinctly different than the common law. Civil law dates back to Roman law principles, which are the backbone of most continental European legal traditions and were heavily borrowed from by Latin American and Caribbean jurisdictions.[13] The differences are far too numerous to explore in this type of article and are the subject of various treatises on comparative law. However, this fact is mentioned as a reminder for practitioners regarding the significant differences in how civil law tradition treats land and land transactions. The differences between how real property and real property transactions are treated under the common law versus the civil law effects a rather large gap that needs to be bridged between local counsel, an attorney, and the ultimate client. In particular, attorneys may not be adequately prepared to supervise local counsel in a foreign jurisdiction. For instance, certain matters attorneys may inquire about are perhaps unimportant or inapplicable because of the legal tradition; yet, attorneys may simply not know to ask about other, critically important jurisdictional issues. These and other issues potentially vital in the particular jurisdiction might only be raised by an underwriter with sufficient experience to recognize the issue.

Probably the biggest differences between how land is transacted in a civil law jurisdiction when compared to a common law jurisdiction is the importance of the role of the notary under a civil code (a “Civil Law Notary”). In civil law countries, a document can be either private or public. Public documents are those executed in the presence of and with the active participation of a Civil Law Notary. Only these public documents are permitted to affect land and be eligible for presentation in the corresponding land registry.[14] To better understand the significance of a Civil Law Notary, it is important to contrast who can be a notary in the U.S. as compared to a civil law jurisdiction. In Florida, as in most of the U.S., a notary is required to be 18 years of age, able to read and write English, and a resident of the State.[15] Once an applicant is appointed a notary, then the notary is authorized, among other functions, to administer oaths, and take acknowledgments.[16] In a real estate transaction, a notary acknowledges deeds by affixing his or her signature and seal, and ensuring that the person executing a deed has met minimum statutory requirements of identifying himself or herself as the proper person to execute such deed.[17] In contrast, a Civil Law Notary is a very specialized and specifically educated attorney, who has had a sovereign power delegated to him – the publica fides (public trust).[18] A Civil Law Notary acts in quasi-judicial role by ensuring that all parties are authorized and competent to act and understand the legal consequences of their actions and ultimately infusing transactions with

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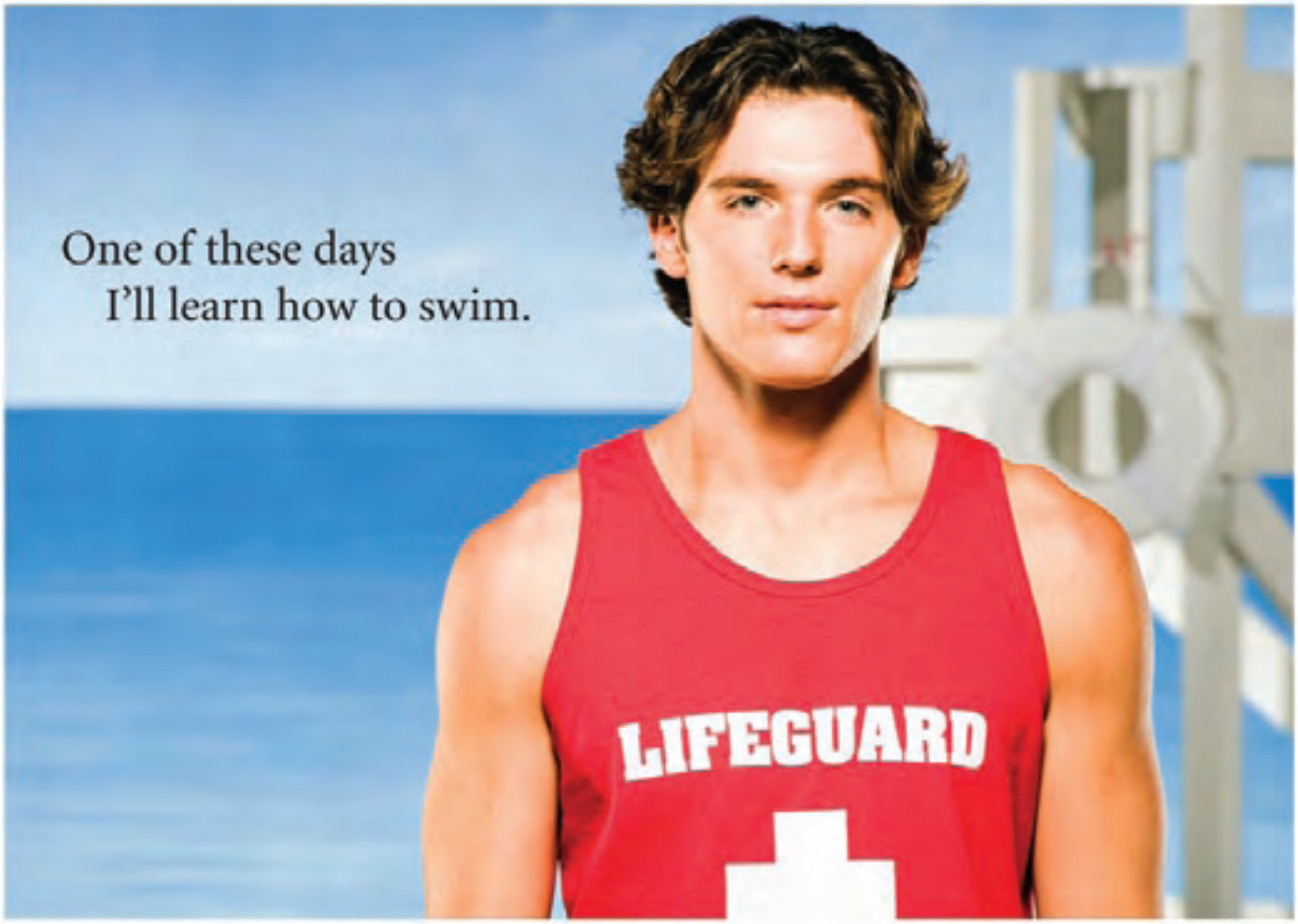

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impartiality.[19] Perhaps most significantly, the public trust vested in a Civil Law Notary results in public documents, such as deeds or mortgages, benefiting from a presumption of legality and truthfulness.[20] More than simply acknowledging the proper execution of an instrument, a Civil Law Notary authenticates the transaction and gives the instrument the required dignity to be enforceable amongst the parties, and further, suitable to be publicly enforceable (e.g., enforceable against third parties), and ultimately gives the contents of the instrument the highest probative effect in a court of law of competent jurisdiction.[21] In addition, a Civil Law Notary may be charged with ensuring that any and all taxes due and payable have been paid or are being paid during the transaction. This verification may take the form of a government certificate that tax obligations are current or that any exemptions to taxes are still binding. Furthermore, a Civil Law Notary may be responsible for determining and collecting any recording costs or stamp duty required to register transaction documents. An attorney should be prepared for the fact that a Civil Law Notary may either statutorily or customarily be entitled to a fee based on a percentage of the transaction amount. Since this fee is charged in addition to legal fees, local counsel should fully explain: (1) what is being paid for; (2) what recourses are available in the event of negligence or misconduct by a Civil Law Notary; and (3) what is a Civil Law Notary's ability to pay restitution in the event a customer experiences a loss due to a Civil Law Notary's negligence or misconduct.

Conclusion

Certainly, attorneys must consider many factors when assisting a client with any form of foreign real estate investment. The gap that exists between an attorney's breadth and depth of transaction expertise and local counsel's expertise of jurisdiction particularities can appear difficult to span, especially when compounded with language and cultural differences. Undoubtedly, an investor should be generally well served in most Latin American and Caribbean real estate transactions when provided the opportunity to utilize an attorney with significant experience in those regions, together with a local counsel experienced and comfortable with providing the educational client experience necessary for a foreign investor. However, one way to bridge the gap between the transactional expertise of an attorney and the jurisdictional expertise of local counsel is to rely upon the due diligence expertise of a title insurance underwriter familiar with both the specific jurisdiction and the risks of a foreign legal system. A number of title insurers have been actively pursuing title insurance in Latin America and the Caribbean over the last decade and, in doing so, have invested financial resources and manpower in developing both the individuals and the organizational structures necessary to competently insure these risks. These underwriters are rapidly becoming very sophisticated in establishing best practices across entire regions and in specific countries. These insurers offer in Latin American and Caribbean transactions what is expected domestically: (1) expertise that elevates the questions asked and allows for the effective evaluation of the answers provided during the due diligence process; and (2) assistance in assessing the potential curative work necessary on titles, that by definition, have never been previously examined by the critical eye of a title insurer. Finally, only title insurance can provide the indemnification that ultimately provides the client – an investor, purchaser or lender – with financial protection against the potential pitfalls of investment in a Latin American or Caribbean jurisdiction.

Endnotes:

1 Ann M. Burkhart, *Real Estate Practice in the Twenty-First Century*, 72 MO. L. REV. 1031, 1047-1056 (2007).

2 *Id.* at 1048.

3 Georgette Chapman Poindexter & Wendy Vargas-Cartaya, *En Ruta Hacia El Desarrollo: The Emerging Secondary Mortgage Market in Latin American*, 34 GEO. WASH. INT'L L. REV. 257, 257 (2002); Erica W. Stump, *Securitizations in Latin America*, 8 U. MIAMI BUS. L. REV. 195, 196 (2000).

4 In the late 1980's, Latin American securitization began to emerge and the trend has continued to develop. *See generally* Claire A. Hill, *Latin American Securitization: The Case of the Disappearing Political Risk*, VA. J. INT'L L., 293, 305 (1998).

5 *See generally* M. C. Mirow, *Borrowing Private Law in Latin America: Andres Bello's Use of the Code Napoleon in Drafting the Chilean Civil Code*, 61 LA. L. REV. 291 (2001).

6 Lei No. 6.634/79, de 2 de Maio de 1979, D.O.U. de 3.5.1979, as affected by Decreto No. 85.064/80, de 26 de Agosto de 1980, D.O.U. de 27.8.1980 (Brazil); *see also*, Ley No. 6043, 2 de Marzo de1977, Ley de la Zona Maritima [Ley Zona Maritima][Maritime Zone Law], art. 31 and 47 Alcance No. 36 de La Gaceta [L.G.] No. 52 de 16 de Marzo de 1977 (Costa Rica).

7 International Persons Landholding Act. 1993, Chapter 140, The Statute Law of The Bahamas.

8 Ley No. 6797 de 4 de Octubre de 1982, La Gaceta [L.G.] No. 230 de 3 de Diciembre de1984, as amended by Ley No. 8246 de 24 de Abril de 2002, La Gaceta [L.G.] No. 128 de 28 de Junio de 2002 (Costa Rica); Constitución Política de la Republica de Nicaragua [Cn.][Constitution] tit. VI, Ch. I, Art. 102, La Gaceta [L.G.] 05, 9 January 1987 (Nicaragua); Constitución Política de la República De Panamá de 1983 [Cn.][Constitution] tit. IX, ch. I, art. 254, La Gaceta [L.G.] 19815, 20 May 1983 (Panama).

9 *See generally, supra* note 6, Maritime Zone Law.

10 *See Tyson v. Edwards*, 433 So. 2d 549 (Fla. 5th DCA 1983) and *Akin v. Godwin*, 49 So. 2d 604 (Fla. 1951).

11 *See generally* John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61, 129 (1992).

12 Grenville Barnes, *Lessons learned: an evaluation of land administration initiatives in Latin America over the past two decades*, 20 LAND USE POLICY 367-374 (2003).

13 M. C. Mirow, *Borrowing Private Law in Latin America: Andres Bello's Use of the Code Napoleon in Drafting the Chilean Civil Code*, *supra* note 5 at 291.

14 John Henry Merryman And Rogelio Perez-Perdomo, The CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA, 106 – 108 (Stanford University Press 3d ed. 2007) (1969).

15 *See* FLA. STAT. §117.01.

16 *See generally* FLA. STAT. §117.03, FLA. STAT. §117.04, FLA. STAT. §117.045 and FLA. STAT. §117.05.

17 *See* FLA. STAT. §117.05.

18 Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945, 952 – 962 (1998).

19 *Id.* at 953 – 957.

20 *Id.* at 956.

21 *Id.*

Exploitation has many forms and many faces.



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Community Association Legislative Activity

by Michael Gelfand, Gelfand & Arpe, P.A., West Palm Beach

Community associations were bumped, but not slammed by this year's Legislative session. After years of substantial activity, commentators thought that 2009 would be a time of rest for community association related legislation, allowing lawmakers to concentrate on other matters. This belief was reinforced at the start of the legislative session by the resignation of the Speaker of the House and looming budget issues.

Rest was not the watchword, though. Nearly a dozen bills were introduced intending substantial changes to community associations. The driving force for many legislators was, perhaps not too surprisingly, insurance. Economic issues and constituent complaints generated many other proposals, including relief for bulk buyers of condominium units in distressed projects.

Bills addressed a seeming cacophony of issues were not adopted. Issues debated, but which died before reaching a final vote, included capping management company estoppel letter charges and restricting managers' drafting of documents to avoid unauthorized practice of law. Record keeping and related privacy issues, as well as the seemingly perennial flag proposals, were addressed, but not approved.

In perhaps the greatest upset, the one significant community association Bill to be adopted, Senate Bill 714, was vetoed by the Governor on June 1, 2009. The Bill addressed a broad range of issues from insurance, as discussed below, to election reform. The Governor's veto message stated that the Bill's delay until 2025, retrofitting fire sprinkler systems in older condominiums, created "an unacceptable safety risk, especially to Florida's elderly condominium residents" and that his position matched his predecessor's in a 2006 veto message.

This article briefly summarizes some of the more critical issues generating debate in Tallahassee and around the state directly affecting community association administration. When reading, please recall that there are substantial statutory and regulatory differences between the three major types of community associations and the Florida Statutes governing each: condominiums, governed by Chapter 718; cooperatives, governed by Chapter 719; and homeowners', governed by Chapter 720.

Condominium Insurance

Legislators adopted Senate Bill 714, responding to constituent complaints targeting last year's adoption of a small provision in a larger revision of condominium insurance provisions, §718.111(11)(g)(2). For years condominium unit owners were required to obtain insurance. Unit owner mandatory coverage was intended to address losses to owner's individual personal property, certain fixtures, and liability issues when losses were not caused by their condominium association's negligence.

The precipitating event for the constituents' complaints was an informal interpretation of that small provision by state regulators. The regulators stated that the 2008 legislative change mandated condominium associations to enforce a requirement that condominium unit owners have insurance coverage. Constituents feared that this would lead to condominium associations being required to obtain forced insurance coverage for units, or there would be a multitude of claims filed by condominium associations against owners to obtain proof of unit owner coverage. The anticipated expense and disruption to condominium communities was too much for owners and associations alike, becoming the basis for a hue and cry to repeal the new requirement.

The proposed change, if it is reintroduced and ever becomes law, may not be entirely good for all condominium communities. The Bill which would have repealed the enforcement language also repealed the mandatory unit owner insurance requirement. Even if a similar Bill does not become law, many condominium association communities will want to consider amending their declarations of condominium to ensure that unit owners obtain insurance, albeit mandated at the condominium level of governance, not statewide, to cover unit owner liability issues.

Bulk Condominium Unit Sales

Some may have found surprising the collaborative discussions addressing the bulk sale of units prompted by current economic conditions. Matters raised included removing statutory construction warranties, delaying turnover/transition of associations, and reducing a buyer's assessment and record keeping obligations. As one would surmise, these matters quickly drew the attention of many groups involved in community creation, sales, and governance.

Legislators requested the RPPTL Section to swiftly assist in evaluating proposed language and draft alternative solutions. The RPPTL Section facilitated discussions among the many interested groups. Groups participating included representatives of developers, builders, unit owners and associations.

The RPPTL Section did not take a position on the proposal's policy, staying neutral in light of the divergent views of many. Instead, the RPPTL Section's Condominium and Planned Development Committee (Robert S. Freedman, Tampa, Chair; Steven Mezer, Tampa, Vice Chair) and the RPPTL Section's Legislative Review Committee (Burt Bruton, Miami, Chair), provided crucial drafting technical assistance. The RPPTL Section's technical assistance was reflected in Senate Bill 880. Though the Bill died on the last day of regular business on the calendar, it is likely that the concept will be heard in the Legislature in 2010.

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Legislative Activity

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Bills

Bills considered important to the community association law practitioner, and not vetoed as of the publication deadline, are briefly summarized. Other Bills that have impact, for which summary is beyond the scope of this short article including: **Growth Management, SB 360;** and, **Community Development Districts, HB 821.** Of course, each Bill must avoid the Governor's veto to become a Florida Law. The Florida Session Law number is stated if known at the time of press deadline. Access the "2009 Statutory Update" section at *www.gelfandarpe.com* for copies of each enrolled Bill, and if a Bill becomes law, the webpage will be updated with the Florida Session Law.

Impact Fees. Ch. 2009-49, Fla. Laws (HB 227), effective July 1, 2009.

§163.31801. Impact Fees. In a challenge, the burden of proof is shifted to the government by a preponderance of the evidence that the imposition of a fee is legal. Differential standards are prohibited.

Construction Defects. Ch. 2009-203, Fla. Laws (SB 2064), effective October 1, 2009.

§558.002. Definitions. The term "completion of a building or improvement" is defined, to include the issuance of a certificate of occupancy or equivalent, or if no certificate is available, substantial completion according to plans and specifications. Service is defined to be by certified mail, hand delivery or courier with evidence of delivery.

§558.003. Action. If the statutory notice is not provided, then the court shall stay instead of abating an action. The notice requirement shall not interfere with an owner's efforts to complete a project. Notice is not required for a project that has not been completed.

§558.004. Notice. Triggers for action are based on service rather than receipt of notice. No construction lien rights shall accrue for destructive testing pursuant to the chapter unless the owner contracts for the work. Required destructive testing is limited to that which is reasonable. Notices pursuant to subsection (3) are not admissions. The duty to exchange information if citing to the appropriate subsection, shall occur within a thirty day window and include items such as specifications as as-built plans, photographs and expert reports.

§558.005. Contract. Unless there is an express opt-out between a claimant and potential defendant, the chapter shall apply to all improvements contracted for after October 1, 2009. An educational notice is to be contained in agreements after October 1, 2009.

Not-for-Profit Corporations Act. Ch. 2009-205 Fla. Law (SB 2330), proposed to be effective October 1, 2009, except as otherwise provided.

The Not-for-Profit Corporations Act is extensively revised, including the following:

§617.01201. Filing. Electronic transmission formats are specified, allowing documents to be executed by a director.

§617.01401. Definitions. "Distribution" includes the payment of a dividend or any part of the income or profit of a corporation to its members, directors or officers. A "mutual benefit corporation" is a newly defined term but excludes associations organized under Chapter 718, 719, 720, 721 or any corporation where membership in the corporation is required pursuant to a document recorded in the county property records.

§617.0501. Registered Office and Registered Agent. The prohibition upon the Department of State charging for telephone requests is deleted.

§617.0505. Distributions. Not-for-profit corporations may not make distributions except as authorized in §617.1302. Corporations regulated by Chapter 718, 719, 720, 721 or 723 or a corporation where membership in such a corporation is required pursuant to a document recorded in the county property records may make refunds, give credits, disburse insurance proceeds, and pay settlements to its members without violating this section.

§617.0605. Members: Transfers. Procedures are stated for transferring memberships.

§617.0606. Members: Resignation. Procedures are stated for members' resignations.

§617.0607. Members: Termination. Procedures for punishment are provided.

§617.0608. Members: Purchase. Procedures for purchasing memberships are provided.

§617.0701. Members: Meetings. Subsections (1) and (3) of the members' meetings section do not apply to corporations regulated under Chapter 718, Chapter 719, Chapter 720, Chapter 721 or Chapter 723 or a corporation where membership in such a corporation is required pursuant to a document recorded in the county property records.

§617.0721. Members: Voting. Votes may be rejected by a secretary, officer or agent authorized to tabulate votes if acting in good faith and with a reasonable basis for doubting the validity of a signature on a vote, proxy, consent or waiver. Electronic attendance at meetings may be authorized by the board of directors.

§617.07401. Members: Derivative Actions. Derivative actions are provided.

§617.0802. Directors: Qualifications. A director may be fifteen years of age or older as permitted in the articles or by-laws or by resolution by the board of directors, except for corporations regulated by Chapter 718, Chapter 719, Chapter 720, Chapter 721 or Chapter 723.

§617.0808. Directors: Removal. Removal provisions are revised, including the potential of removal by directors vote.

§617.0809. Directors: Board. Filling of vacancies of a class elected director is restricted to that class or the directors elected by that class. A director appointed to fill a vacant term serves only until the next annual meeting, not until the end of the term.

§617.0824. Directors: Quorum. Directors younger than 18 years of age may not be counted towards a quorum.

§617.0832. Directors: Conflict. A conflict of interest transaction may be binding if authorized, approved or ratified by a vote of more than one director and the directors are not interested or do not have a relationship to the transaction, or by a majority of the members entitled to vote.

§617.1422. Dissolution: Reinstatement. Forms for reinstatement after administrative dissolution are specified. A dissolved corporation's name may be available after one year from the effective date of dissolution.

§617.1430. Dissolution: Judicial. Fifty members or ten percent of the voting interests, whichever is less, may petition for dissolution upon specified grounds.

§617.1703. Application. If there is a conflict with Chapter 718, Chapter 719, Chapter 720, Chapter 721 or Chapter 723, the particular chapters shall apply. Sections 617.0605 through 617.0608 do not apply to such corporations or other corporations where a membership in the corporation is required pursuant to a document recorded in the county property records.

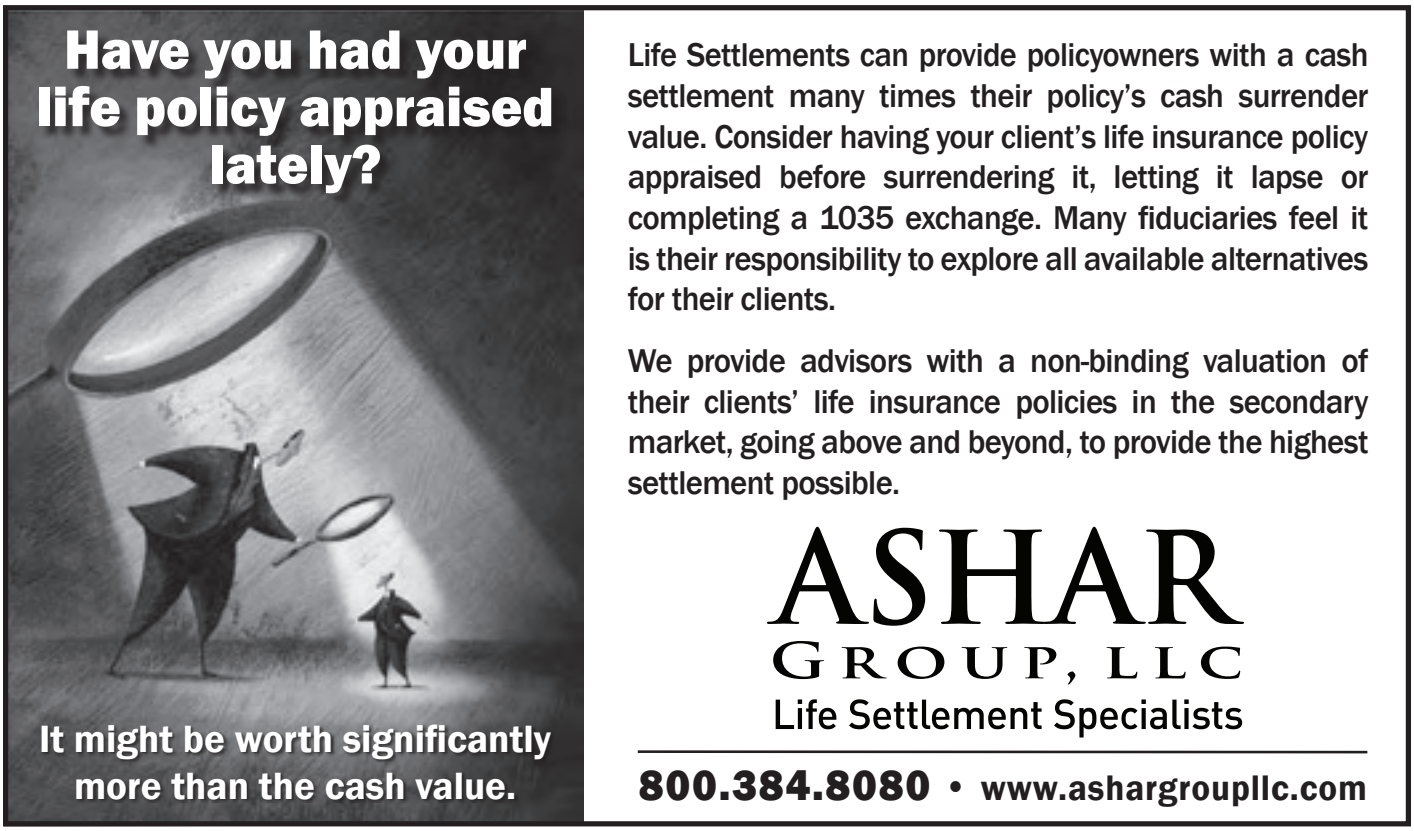
Water Conservation/Landscaping. Ch. 2009-199, Fla. Laws (SB 494), proposed to be effective July 1, 2009.

§373.62. Automatic Irrigation Systems. Licensed contractors working on an automatic landscape irrigation system must test inhibiting and interrupting devices and switches, including moisture detectors, and repair or install as necessary. Model ordinances are to be drafted to require reporting of non-compliance and providing for penalties. Because of water wastage, a uniform variance process based on soil moisture sensor control systems is adopted.

§403.9337. Model Ordinance for Florida-Friendly Fertilizer Use on Urban Landscapes. Counties and municipalities are required to adopt a proposed model ordinance addressing fertilizer use as a contributor to water quality degradation, exempting the farms located on land classified as agricultural lands.

§482.021. Definitions. The term "commercial fertilizer application" means the application of fertilizer for payment or other consideration to property not owned by the person or firm applying the fertilizer or the employer or the applicator. "Urban landscape" include pervious areas on residential, commercial, industrial, institutional, highway right-of-way, or other non agricultural lands that are planted with turf or horticultural plants.

§482.1562. Certification. A limited certification for urban landscape commercial fertilizer application shall begin January 1, 2014. Certification prerequisites include training and a fee. Certification does not authorize pest control use. Application to individual residential properties is exempted if the fertilizer and equipment is provided by the residential property owner or its residents.





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RPPTL Strategic Planning Committee Sets Goals for Section

By J. Richard Caskey, Hines Norman Hines, PL, Tampa, FL

On April 17, 2009, the RPPTL Section's Strategic Planning Committee gathered at the quaint Lakeside Inn in Mt. Dora, Florida for a weekend of meetings and careful planning for the future of the Section. The members of the Committee engaged in group analysis, and sometimes constructive debate, to compose a five-year Strategic Plan and recommendations for achieving the Section's goals.

In addition to meeting with the full Committee, members divided into six study teams: (1) Executive Council Governance; (2) Membership; (3) Legislation and Advocacy; (4) Communication; (5) Education; and (6) Financial. Each study team met separately and provided a report to the Committee regarding goals and concerns. The full membership of the Committee then worked together to address each of the study team areas and propose the Strategic Plan.

The Executive Council approved and adopted the Strategic Plan at its St. Petersburg, Florida meeting on May 23, 2009. The Strategic Plan is intended to provide guidance to the Executive Council in connection with strategic decisions from 2009 through 2014. It may be updated during that period following future meetings of the Strategic Planning Committee.

To view the full RPPTL 2009 – 2014 Strategic Plan, please visit the Section's website (you must be a member of the RPPTL Section to log in).

The Section thanks the Strategic Planning Committee

Steering Committee: John Neukamm, Chair; Sandy Diamond; Laird Lile; Melissa Murphy
Coordinator: Dresden Brunner

Study Teams
Executive Council Governance: Brian Felcoski, Chair; George Meyer; Chip Waller; Laird Lile; Melissa Murphy, Reporter
Membership: Phil Baumann, Chair; Mike Dribin; Drew O'Malley; Tae Bronner, Reporter
Legislation and Advocacy: Burt Bruton, Chair; Sandy Diamond; Alan Fields, Reporter
Communication: Nicole Kibert, Chair; Rich Caskey; Dresden Bruner; Keith Kromash, Reporter
Education: Debbie Goodall, Chair; Jack Falk; Dave Brennan; Cary Wright; Silvia Rojas, Reporter
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Strategic Planning
Committee Meeting
Mount Dora, FL, April 2009



Photo collage courtesy of John Neukamm.

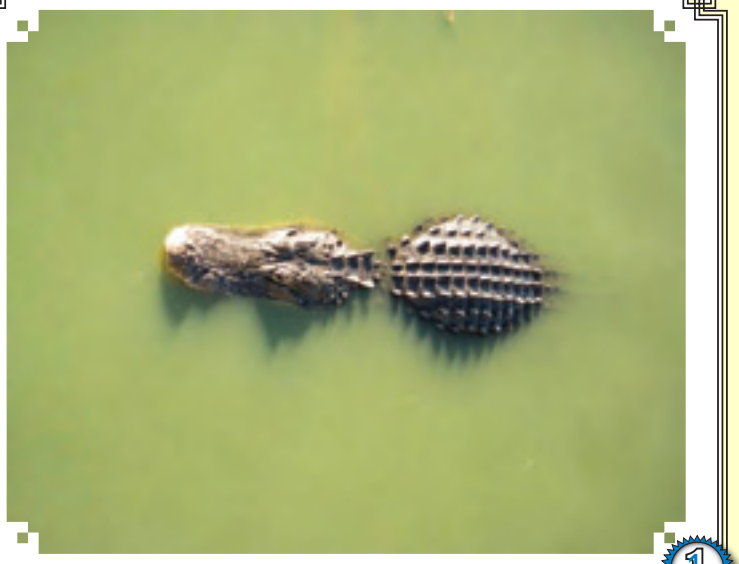
Inaugural Executive Council Photography Contest a Success!

By Liz Smith, Section Administrator

This year's RPPTL Annual Convention hosted its first Executive Council Photography Contest. The photographs were taken by RPPTL Section members or immediate family members. The subject matter ranged from landscapes to abstract and of course, many lizards.

Of the 45 entries, most pertained to subject matter derived from the fabulous locations of recent executive council meetings. The photos were displayed during the Convention and professionally judged by Chuck Vosburgh, Director of Photography and Digital Education for The Morean Arts Center. Mr. Vosburgh deemed first place to Dave Brennen for "Gator in Pea Soup," while second place went to Steve Hearn for "Galapagos Fly Catcher," and third place went to our newly appointed Chair, John Nuekamm, for his "Galapagos Sea Lion."

To wrap up the contest, the photos were sold by auction, in which all of the proceeds were donated to Creative Clay. Creative Clay, Inc. is a non-profit corporation with an expressed interest in providing the local community of Pinellas County, Florida with a place to experience all aspects of the arts. Creative Clay, Inc. is located at 1124 Central Avenue, in the heart of the St. Petersburg Arts District. Creative Clay's mission is to make the arts accessible for every interested member of the community regardless of age, gender, ability and/or race. All in all, the RPPTL Photography Contest was a smash hit and is probably a tradition in the making!



"Gator in Pea Soup" by Dave Brennen



"Galapagos Fly Catcher" by Steve Hearn



"Galapagos Sea Lion" by John Nuekamm

RPPTL's 2009 "Lunch Hour" Programs Are a Huge Success!

By Stacy Kalmanson, Commonwealth Land Title Insurance Company and Lawyers Title Insurance Corporation

This past February and March, hundreds of law students around Florida had the opportunity to attend the RPPTL "Lunch Hour" Programs at their campuses. The goal of the programs was to not only educate students about the Section and its various fields of practice, but also to encourage students to become active members with the Section after graduation.

We were fortunate to have wonderful attorney volunteer panelists with expertise in construction, elder law and guardianship, real estate and probate & trust. The volunteers were from large and small practices, private companies, government organizations and non-profit corporations. The Programs were also coordinated with the student RPPTL groups at the law school campuses. The Programs (and panelists) were extremely well-received and I can't thank the following panelists enough for their time and support:

Barry University Dwayne O. Andreas School of Law
Michael Gibbons (Lowndes, Drosdick, Doster, Kantor & Reed, P.A.)
Mark Grimes (Pohl & Short)
Mauri Hawkins (Attorneys' Title Insurance Fund, Inc.)
Brian Hess (Clayton McCulloh)
Joel Sharp (Baker & Hostetler)

Florida A & M University College of Law
Jacqueline Best (Broad & Cassel)
Keith Durkin (Broad & Cassel)
Ed Hamann (Commonwealth/Lawyers Title)
Stacy Prince (Broad & Cassel)
Randy Schwartz (Florida Association of Realtors)
Reinhard Stephan (Brokers Title)

Florida Coastal School of Law
Anne K. Buzby (Rogers Towers)
Lawsikia Hodges (City of Jacksonville)
Theresa Kenney (Ford, Bowlus, Duss, Kenney, Safer & Hampton, P.A.)
Ailish O'Connor (Law Offices of Ailish O'Connor)

Florida State University College of Law
Sarah Butters (Holland & Knight)
Fred Dudley (Holland & Knight)
David Eastman (Lutz, Bobo, Telfair, Eastman & Lee)
Jaimie Ross (1000 Friends of Florida)
Bruce Wiener (Gardner, Bist, Wiener, Wadsworth & Bowden, P.A.)

Stetson University College of Law
Colleen Carson (Baskin Fleece)
Fletch Belcher (Belcher Law Group)
Derek R. Houston (Trenam, Kempker, Scharf, Barkin, Frye, O'Neill & Mullis)



Some of the participants at the program at Florida A & M University College of Law are (from left to right): Randy Schwartz, Keith Durkin, Stacy Prince, Jacqueline Best, Reinhard Stephan, Ed Hamann, Clinton Cagle (FAMU's Student Bar Association President)

Mike LaRosa (First American Title Insurance Company)
Jason Quintero (Carlton Fields)

St. Thomas University College of Law
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John Roscow (Carpenter & Roscow, P.A.)
Gene Shuey (Eugene E. Shuey, P.A.)

University of Miami School of Law
Sol Genet (Meland Russin & Budwick, P.A.)
Al Gomez-Vidal (ChicagoTitle Insurance Company)
Aniella Gonzalez (Krinzman Huss & Lubetsky)
Daniel Vega (Vezina, Lawrence & Piscitelli, P.A.)
Marjorie Wolasky (Law Offices of Marjorie E. Wolasky)

Additionally, an extra thank you to Alan Fields (Committee Chair) for his great ideas, support and dedication to the Law School Liaison Committee and to Fred Dudley, Laura Sundberg, Jacqueline Best, John Roscow, Tae Kelley Bronner, Ed Hamann, Jennifer Cruise and Linda Martin for their time, input and assistance with soliciting volunteers. We hope to host Programs at Nova Southeastern University School of Law and Florida International University School of Law this Fall. If you would like to be involved with the Law School Liaison Committee or serve as a future panelist, please e-mail me at SKalmanson@cltlt.com or Alan Fields at abfields@firstam.com.

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To Notice or Not to Notice: *The Question for Evicting a Holdover Residential Tenant*

By Arthur J. Menor, Shutts & Bowen LLP, West Palm Beach, FL and Phyllis Harley, Harley Law Offices, P.A., Saint Cloud, FL

The Landlord/Tenant Committee of the RPPTL Section has concluded that under the current statutory scheme, no notice is required to be served on a residential tenant as a pre-condition to a landlord's eviction action when the tenant has held over after expiration of the lease term. Over the past year, the Committee has considered whether the applicable statutes should be revised to provide greater clarification that no such notice is required. As discussed below, the Committee does not recommend a statutory revision at this time, but does hope that this article will be used by practitioners and courts to better understand the issues involved.

This issue arises through practice and the fact that some Florida courts have at least implied that evidence of delivery of written notice to a tenant must be attached to *every* eviction complaint.[1] The majority of evictions are based on non-payment of rent, which, whether residential[2] or non-residential,[3] clearly require a three-day notice to the tenant to pay rent owed or surrender the premises before filing suit for eviction. In addition, residential evictions for material non-compliance with Section 83.52, Florida Statutes (dealing with the tenant's obligation to maintain the dwelling unit), or material provisions of the rental agreement, other than a failure to pay rent, or reasonable rules or regulations, require service of a seven-day notice on the tenant.[4] In review of paperwork for residential evictions, judicial staff are conditioned to look for either the three-day notice or the seven-day notice as an attachment to the complaint.

Under Section 83.20, Florida Statutes, it is clear that no notice is required to evict a non-residential holdover tenant.[5] The residential part of the statute is less certain.[6] However, Section 83.58, Florida Statutes, does provide in pertinent part: "If the tenant holds over and continues in possession of the dwelling unit or any part thereof after the expiration of the rental agreement without the permission of the landlord, the landlord may recover possession of the dwelling unit in the manner provided for in s. 83.59 [F.S. 1973]."

The view that notice is required before evicting a holdover residential tenant has some practical problems. If a court takes the view that a notice is required, what authority can it cite for the requirement? Chapter 83 does not expressly require delivery of any notice as a prerequisite to evict a holdover tenant and no cases exist to support the proposition that such a notice is required. There is no form of such a notice provided in the statute as is the case for the three-day notice for non-payment of rent[7] and the seven-day notice for material non-compliance with Section 83.52, Florida Statutes, or material provisions of the rental agreement, other than a failure to pay rent, or reasonable rules or regulations.[8] These statutory notices provide the tenant with a grace period in which to cure a default. If the default is cured within the grace period, the tenant may remain in possession. This concept simply does not apply to a holdover.

Chapter 83 does not expressly require delivery of any notice as a prerequisite to evict a holdover tenant and no cases exist to support the proposition that such a notice is required.

Initially, the Committee intended to propose a statutory amendment to clarify that no notice is required to evict a holdover residential tenant. The proposed amendment to Subsection 83.59(1) would have been as follows:

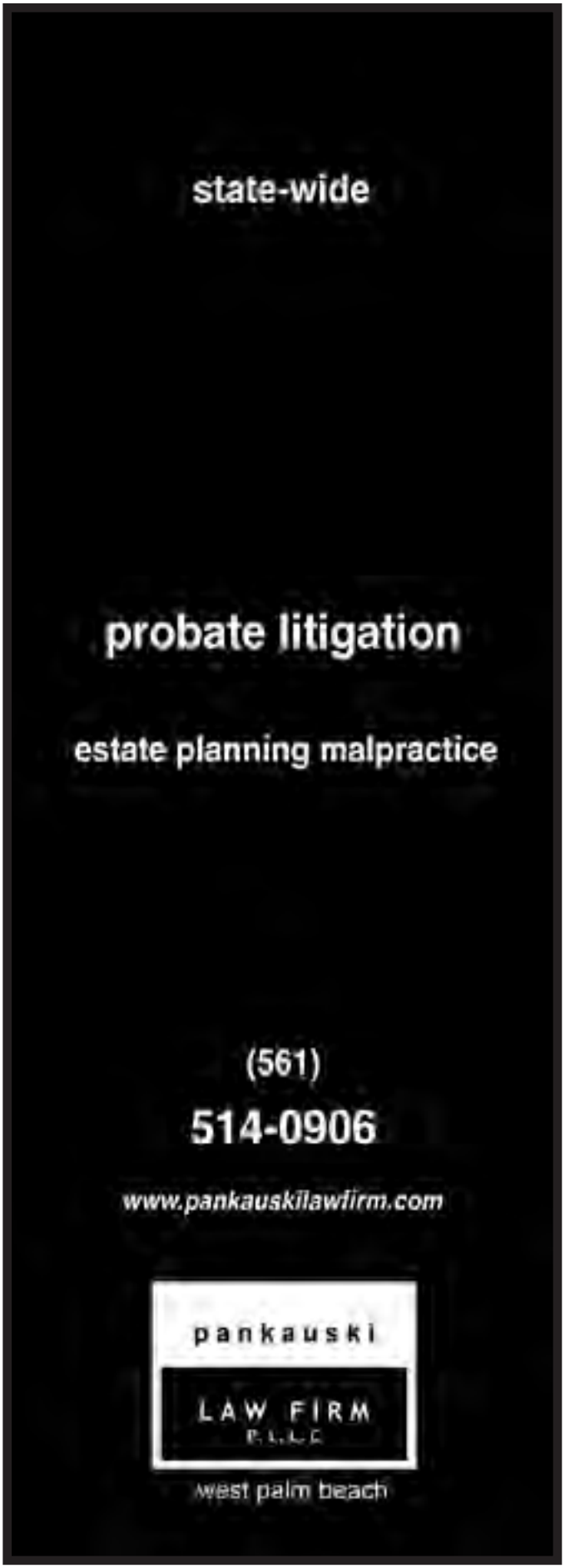
> (1) If the rental agreement or tenancy without a specific duration is terminated or if a rental agreement with a specific term expires and the tenant does not vacate the premises, the landlord may recover possession of the dwelling unit as provided in this section. If a rental agreement with a specific term expires, the landlord need not furnish the tenant with any notice prior to filing an action for possession under subsection (2).

After much consideration, however, the Committee concluded that a statutory amendment is not necessary at this time, since Section 83.59, when read in conjunction with Section 83.58 and the application of principles of common sense, does not demonstrate sufficient lack of clarity to merit the expenditure of resources necessary to enact a statutory amendment. Rather, the Committee felt that this article could be helpful in guiding practitioners and courts in evaluating this issue. Hopefully, all parties involved will reach the same conclusion as the Committee – that, under the current statutory scheme, no notice need be given to a holdover residential tenant prior to commencing an action for possession of the premises.

***

The Landlord/Tenant Committee of the RPPTL Section of the Florida Bar provides information about legislative and case law developments in the area of landlord and tenant law, provides expertise and input regarding proposed legislation affecting the landlord and tenant areas of

continued, next page



Evicting a Holdover Residential Tenant

from page 19

Florida law, acts as a resource to its members to discuss and share information about landlord/tenant practice matters, and cooperates with the Continuing Legal Education Committee of The Florida Bar to apprise members of new developments in the area of landlord and tenant law. Committee members' areas of practice and expertise include residential, commercial, retail, office, industrial and mobile home leasing with both transactional and litigation practices**. *If you would like to become a member of the Landlord/Tenant Committee, please contact Arthur J. Menor, Committee Chair (amenor@shutts.com).***

Endnotes:

1 *See* Administrative Order Number: C96-38 of the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Citrus County, which provides that all complaints in residential landlord/tenant eviction actions shall have attached to them: "The eviction notice as required in Chapter 83 Fla. Stat., (1995), with proof of service…"

2 §83.56(3), Fla. Stat. (2008). "If the tenant fails to pay rent when due and the default continues for 3 days, excluding Saturday, Sunday, and legal holidays, after delivery of written demand by the landlord for payment of the rent or possession of the premises, the landlord may terminate the rental agreement. Legal holidays for the purpose of this section shall be court-observed holidays only."

3 §83.20(2), Fla. Stat. (2008). "Where such person holds over without permission as aforesaid, after any default in the payment of rent pursuant to the agreement under which the premises are held, and 3 days' notice in writing requiring the payment of the rent or the possession of the premises has been served by the person entitled to the rent on the person owing the same."

4 §83.56(2), Fla. Stat. (2008).

5 This section provides in pertinent part: "Any tenant or lessee at will or sufferance, or for part of the year, or for one or more years, of any houses, lands or tenements, and the assigns, under tenants or legal representatives of such tenant or lessee, may be removed from the premises in the manner hereinafter provided in the following cases:

(1) Where such person holds over and continues in the possession of the demised premises, or any part thereof, after the expiration of the person's time, without the permission of the person's landlord."

6 *See* §83.59, Fla. Stat. (2008).

7 *See* §83.56(3), Fla. Stat. (2008).

8 *See* §83.56(2), Fla. Stat. (2008).

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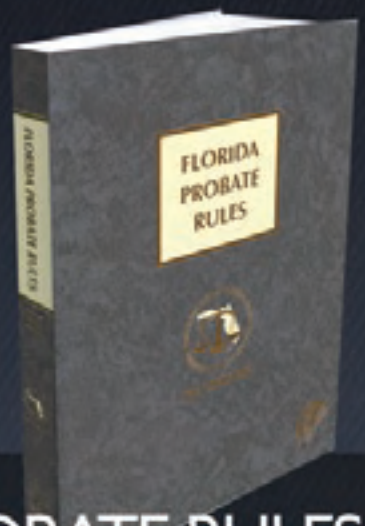



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How Far Does *Crescent* Go?

By James A. Schmidt, Esq. of James A. Schmidt, P.A., Tampa, FL

Department of Revenue v. Pinellas VP, LLC provides valuable examples of *Crescent*-like transfers that do not avoid the documentary stamp tax

The decision in *Crescent Miami Center v. Florida Department of Revenue*[1] required the Department of Revenue (the "Department") to refund $1.2 million of documentary stamp tax imposed on a single transaction. Like so many transactions these days, the transfer effectuated in *Crescent* was not from a typical seller to a buyer but done to accomplish a tax, lending or regulatory purpose. The precedent was expected to have far reaching consequences and left some legal observers wondering whether the documentary stamp tax had been effectively repealed.[2] Since that 2005 decision, only a handful of taxpayers have brought cases attempting to avoid the tax by applying *Crescent*. One recent case, *Department of Revenue v. Pinellas VP, LLC,*[3] which was decided in January of this year, tests the applicability of the principle blessed in *Crescent* in two transactions.

In *Crescent,* the grantor-owner of a downtown office building transferred its membership interests to a grantee through a multiple step process involving an intermediary entity. The purpose of the transaction was to segregate the property in order to facilitate future financing.[4] At the end of the series of transfers, the grantor had effectively transferred its sole asset to the grantee.[5] The Florida Supreme Court held that, "the transfer of property between a grantor and its wholly owned grantee, absent an exchange of value, is without consideration or purchaser and thus not subject to documentary stamp tax."[6]

In *Pinellas VP,* the Department appealed two final summary judgments that the trial court granted in favor of the taxpayer. The trial court applied the *Crescent* principle and ordered the Department to refund the total of $180,796 in documentary stamp tax, which the taxpayer had paid on two transactions. Both transactions involved entities wholly owned (albeit indirectly) and controlled by the same individual, Mr. Pridgen.[7] Although there are already significant legislative efforts underway to curtail the application of *Crescent,*[8] this case provides valuable examples of *Crescent*-like transfers that do not avoid the documentary stamp tax. There are two transactions to consider.

In the first transaction, Mr. Pridgen was the managing and sole member of Pinellas VP, LLC ("Pinellas VP") and the sole shareholder and director of Tarpon Ridge, Inc. ("Tarpon Ridge"). Tarpon Ridge owned twenty acres of land encumbered by a mortgage that secured a note guaranteed by Mr. Pridgen. Tarpon Ridge conveyed title to the land to Pinellas VP, but Pinellas VP did not pay Tarpon Ridge for the land. Both before and after the transfer, the land was subject to the mortgage, and Mr. Pridgen guaranteed the note.[9]

In the second transaction, Mr. Pridgen wholly owned and controlled (albeit indirectly) TPA Investments, LLC ("TPA"). TPA owned half of Imperial, LLC ("Imperial") with an unrelated party. When a buyer emerged to buy Imperial's sole asset, real property, Mr. Pridgen and the unrelated party wanted to sell but one wanted to defer the gain with a Sec. 1031 exchange while the other wanted to pay capital gains tax. Thus, Imperial transferred the land to TPA and the unrelated party as tenants in common so they could each sell their one half interest to the buyer on their own terms. On the transfer from Imperial to TPA, no money was paid for the land and both before and after the transfer, the real property was encumbered by a mortgage that secured a note one half guaranteed by Mr. Pridgen.[10]

Mr. Pridgen argued that both transactions were mere transfers of ownership that involved no exchange of value and were without consideration or purchaser. Therefore, according to the precedent established in *Crescent,* no documentary stamp tax should be due. The second transaction in particular was effectuated solely for federal income tax purposes and no economic benefit or detriment accrued as a result of the transfer. The Second District Court of Appeal saw it differently and distinguished both transactions from *Crescent* in two ways. First, it said *Crescent* did not involve a mortgage and second, *Crescent* involved a transfer from a parent corporation to a wholly owned subsidiary.[11]

The Court was clear that the presence of the mortgages in Pinellas VP created taxable transactions, regardless of the fact that Mr. Pridgen's obligations were identical before and after the transaction.[12] This is due to the clear statutory language in Florida Statute §201.02(1) which provides, in relevant part, "For purposes of this section, consideration includes, but is not limited to… the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not the underlying indebtedness is assumed."

The court also distinguished the case from *Crescent* because *Crescent* involved a transfer from a parent entity to a subsidiary entity. In the instant case, the transfers were between sibling entities with a common owner and between parent and child entities where only a partial interest was transferred.[13] The court did not elaborate on why it distinguished this factual difference in the second transaction. Applying its conclusion, the court seems to find that even without a mortgage, for a transfer to avoid documentary stamp tax, the transfer from a parent entity to a subsidiary entity cannot be of a fractional interest but must be for the entire property.

Endnotes:

1 *Crescent Miami Center v. Florida Department of Revenue,* 903 So. 2d 913 (Fla. 2005).

2 Stephen G. Vogelsang and Adi Rappoport, Crescent – Did the Florida Supreme Court Effectively Repeal the Documentary Stamp Tax on Transfers of Real Estate?, 79 FLA. B.J 44 (Oct. 2005).

3 *Department of Revenue v. Pinellas VP, LLC,* 3 So. 3d 361 (Fla. 2d DCA 2009).

4 Stephen G. Vogelsang and Adi Rappoport, Crescent – Did the Florida Supreme Court Effectively Repeal the Documentary Stamp Tax on Transfers of Real Estate?, 79 FLA. B.J 44 (Oct. 2005).

5 *Crescent Miami Center v. Florida Department of Revenue,* 903 So. 2d 913 (Fla. 2005).

6 *Crescent Miami Center v. Florida Department of Revenue,* 903 So. 2d 913 (Fla. 2005).

7 *Department of Revenue v. Pinellas VP, LLC,* 3 So. 3d 361 (Fla. 2d DCA 2009).

8 Senate Bill 2430 passed the House of Representatives and Senate during the 2009 legislative session and was signed by Governor Crist on June 10, 2009. The bill amends section 201.02, Florida Statutes, and will be the subject of another article in the next issue of ActionLine.

9 *Department of Revenue v. Pinellas VP, LLC,* 3 So. 3d 361 (Fla. 2d DCA 2009).

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

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Real Estate Case Summaries

Prepared by Meredith Freeman, Bush Ross, Tampa, FL

A mortgage that is duly recorded and subsequently assigned can be enforced against a subsequent purchaser by the assignee even if the assignment is not duly recorded, provided that the original mortgage was duly recorded and there is no satisfaction of record.

JP Morgan Chase v. New Millennial, 6 So. 3d 681 (Fla. 2d DCA 2009)

JP Morgan Chase ("JP Morgan") filed an action to foreclose two mortgages against New Millennial, LC ("New Millennial"). The mortgages that were the subject of the foreclosure action were assigned to JP Morgan by AmSouth Bank ("AmSouth"). The mortgages were recorded; however, the assignment of the mortgages to JP Morgan was not recorded. New Millennial purchased the property that secured the mortgages. New Millennial obtained a printout from AmSouth that showed that the loans had a balance of zero, but there was no satisfaction of record. The trial court granted summary judgment in favor of New Millennial, finding New Millennial was a bona fide purchaser for valuable consideration without notice of the assignment to JP Morgan. The Second District Court of Appeal reversed, holding that while failing to record the assignment would prevent JP Morgan from claiming priority over a subsequent assignee of the same mortgage who duly recorded the assignment, New Millennial was not a bona fide purchaser without notice. The appeals court reasoned that because New Millennial had actual knowledge of the mortgages recorded in the public records and had actual knowledge that the mortgages were not satisfied, it should have assumed the mortgages were in full force and effect until it received satisfactions of record.

The addition of nine cabanas to the common area pool of a condominium was a material and adverse change entitling a purchaser the right to cancel the purchase agreement under § 718.503, *Florida Statutes.*

Mastaler v. Hollywood Ocean Group, L.L.C. 34 Fla. L. Weekly D770 (Fla. 4th DCA 2009)

Richard M. Mastaler ("Mastaler") entered into a purchase contract with Hollywood Ocean Group, LLC ("Developer") for the construction and sale of a condominium unit. After the parties signed the purchase agreement and before the project was complete, Developer notified Mastaler that nine cabanas would be added to the pool area. Those who purchased the cabanas for $225,000 had exclusive use of the cabanas. Mastaler attempted to cancel the purchase agreement pursuant to § 718.503, *Florida Statutes* (2008). Developer refused to cancel the purchase agreement. Section 718.503 provides a purchaser with the right to cancel the purchase agreement within fifteen days of receiving an amendment from the developer that materially changes the offering in a manner that is adverse to the purchaser. The Appellate Court found that the addition of nine cabanas by the pool was material and adverse to Mastaler. The Appellate Court reasoned that the addition of the cabanas hindered the use of the common area around the pool and that a reasonable buyer would find the change significant to his or her decision to purchase the condominium unit, as the addition of the cabanas changed the aesthetic nature of the condominium complex.

A genuine issue of material fact was created, as to the issue of damages, when Plaintiff presented evidence that its revenues did not grow as much as they should have due to Defendant's wrongful eviction of Plaintiff.

4 Corners Insurance, Inc. v. Sun Publications of Florida, Inc. 5 So. 3d 780 (Fla. 2d DCA 2009)

4 Corners Insurance, Inc. ("4 Corners") filed an action against Sun Publications of Florida, Inc. ("Sun") for breach of contract and wrongful eviction. Sun changed the locks without notice even though 4 Corners timely attempted to renew the commercial lease. 4 Corners was eventually able to collect its possessions from the leased premises, but was forced to relocate. The trial court granted summary judgment in favor of Sun, finding that 4 Corners had not alleged a reasonable basis for its damages. The Second District Court of Appeal held that the trial court erred because there was a genuine issue of material fact as to whether 4 Corners was entitled to relocation expenses. Additionally, the trial court erred because there was a genuine issue of material fact as to whether 4 Corners suffered lost profits under the "yardstick test." Although 4 Corners had an increase in revenues after the alleged wrongful eviction, there was affidavit evidence presented that 4 Corners' revenue should not have merely grown. The affidavit evidence showed that its revenue should have doubled in the first three to five years in operation. The "yardstick test" is generally used to measure lost profits when a business has not been established long enough to compile an earning record that would demonstrate lost profits. In reversing the decision of the trial court, the appellate court held that the evidence presented with regard to damages was sufficient to establish a genuine issue of material fact in dispute.

Real Property Cases

from preceding page

Purchaser's possession after default of a contract for deed cannot constitute adverse possession because adverse possession cannot exist when the term of the possession is pursuant to a written contract. Rather, purchaser who defaulted reverted to her status as a tenant and made monthly payments to the owner.

Klein v. Meza, 4 So. 3d 51 (Fla. 3d DCA 2009)

Melania Flores Meza ("Meza") signed a contract for deed for the purchase of a condominium unit from Isobel Isserlis ("Isserlis"). The condominium association brought an action against Isserlis for failure to pay fees allegedly due in connection with the condominium. Isserlis died before resolution of the action and her heir, Linda Klein ("Klein"), was substituted in the action for Isserlis. The trial court began to question whether Klein was the owner of the unit and Meza executed a quitclaim deed for the unit to Klein. A balloon payment of almost $45,000 became due under the written contract. Meza did not make the balloon payment and claimed that she trusted Klein to secure the financing necessary to make the payment. Neither Meza nor Klein secured financing; however, Meza continued to occupy the unit.

Meza then brought claims against Klein which included adverse possession and illegal termination of the contract for deed. The appellate court held that adverse possession could not exist because Meza enjoyed possession pursuant to a written contract for deed. The court reasoned that Meza's continued occupancy after she failed to make a balloon payment that came due under the contract did not constitute adverse possession. The court concluded that after defaulting on the terms of the written contract for deed, Meza reverted to her status as a tenant and was not entitled to fee simple ownership of the unit without paying the balance of the agreed purchase price under the written contract for deed.

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Probate Case Summaries

Prepared by Hung V. Nguyen

Welbaum Guernsey, Coral Gables, Florida

A corporation qualifies as a "person" permitted to be a lawful beneficiary of a pay-on-death account.

Belanger v. The Salvation Army, 556 F. 3d 1153 (11th Cir. 2009)

A personal representative of his father's intestate estate filed a diversity action against the Salvation Army to recover funds the Salvation Army withdrew from a pay-on-death account which was titled in the name of the decedent, in trust for the Salvation Army. The personal representative alleged unjust enrichment and conversion and argued that only a natural person can be the beneficiary of a pay-on-death account under Section 655.82, Florida Statutes.

The trial court dismissed the personal representative's complaint and he appealed.

In affirming the trial court's dismissal, the appellate court used the definition of "person" in Section 1.01(3), Florida Statutes which includes corporations because Section 655.82, Florida Statutes regarding pay-on-death does not define "person."

Proceeds from sale of testator's home were entitled to homestead protection and thus could not be used to pay creditors claims or administrative expenses of testator's estate where testator bequeathed home to son and directed him to share proceeds among his siblings only if he decided to sell the home.

Personal representative's actions in defending against a will challenge based on the Slayer Statute, which was voluntarily dismissed, entitled personal representatives to attorney's fees and costs pursuant to Section 733.106(3).

Estate of Shefner v. Shefner-Holden, 2 So. 3d 1076 (Fla. 3d DCA 2009)

Testator died survived by four adult children. Two of the children were named co-personal representatives pursuant to testator's will. The will devised the testator's home to the testator's son and directed that he not be forced to sell the home. The other two children challenged the will's validity based upon undue influence and the Slayer Statute (Section 732.802, Florida Statutes).

Before trial, the will challengers voluntarily dismissed the Slayer Statute claim. After trial, the court found that there was no undue influence.

As a result, the personal representatives sought attorney's fees and costs for defending the Slayer Statute claim and the trial court denied this claim. In addition, the will challengers filed a petition to determine that the proceeds from the sale of the home were protected as proceeds from homestead property. The trial court granted this petition. The personal representatives appealed the trial court's decision denying attorney's fees and costs as well as the determination that the proceeds from the home were protected from creditors and administrative expenses.

The appellate court affirmed the trial court's holding that the proceeds were protected from creditors and administrative expenses but reversed as to the claim for attorney's fees and costs. The appellate court reasoned that because the house was homestead property and it was devised to a qualified heir, it passed directly to the designated heir upon testator's death outside of the probate estate. As such, it was exempt from creditors of the decedent's estate and administrative expenses, and the fact that testator's son sold the house after the testator's death does not change the legal consequences of the bequest. The appellate court reasoned that the personal representatives were entitled to attorney's fees and costs pursuant to Section 733.106, Florida Statutes for defending against the Slayer Statute claim because their actions benefitted the estate by effectuating the testator's intent. The appellate court further held that upon remand, the trial court may determine which estate assets, after exclusion of the homestead property, should be used to pay the attorney's fees and costs.

Fla. R. Civ. P. 1.525 requiring that a motion for attorney's fees and costs be served within 30 days after the filing of a judgment applies to probate adversary proceedings.

Hays v. Lawrence, 1 So. 3d 1176 (Fla. 5th DCA 2009)

A petition for administration was filed seeking to admit a handwritten document as the last will of the decedent. On the same day that the petition for administration was filed, petitioners also filed a declaration that the proceeding was adversarial.

After a trial, the court denied the petition for administration. Petitioners appealed this decision and the appeal was dismissed on March 1, 2007.

On March 29, 2007, petitioners' attorney filed a petition for order authorizing the payment of attorney's fees and expenses pursuant to Section 733.106(2), Florida Statutes. The trial court granted a motion to strike the petition because it was not filed within 30 days after the final order was entered as required by Fla. R. Civ. P. 1.525. The pe-

continued, next page

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titioners appealed, arguing that the Florida Rules of Civil Procedure did not apply, because the underlying dispute in the probate court was not an adversary proceeding.

In affirming the trial court, the appellate court focused on the fact that the petitioners declared the dispute to be adversarial. Therefore, the Florida Rules of Civil Procedure applied to this case based on Fla. Prob. R. 5.025(d)(2). The appellate court distinguished *In re Estate of Beeman*, 391 So. 2d 276 (Fla. 4th DCA 1980), in which the proceeding had not been designated as adversarial.

A petitioner in an incapacity proceeding pursuant to Chapter 744, Florida Statutes has no right to an evidentiary hearing to challenge the examining committee's opinions. Once a majority of the examining committee concludes that the alleged incapacitated person has full capacity, the trial court was required to dismiss the petition to determine incapacity pursuant to Section 744.331(4), Florida Statutes.

Levine v. Levine, 4 So. 3d 730 (Fla. 5th DCA 2009)

Petitioner filed a petition to determine the incapacity of his father. The trial court appointed a three member examining committee to evaluate the father. The examining committee concluded that the father was not incapacitated. As a result, the trial court dismissed the petition and ordered the petitioner to pay the examining committee members' fees without ruling that the petitioner filed the petition in bad-faith.



The petitioner appealed arguing that he should have had the right to an evidentiary hearing to challenge the opinions of the examining committee. Petitioner also challenged the order directing him to pay the examining committee members' fees.

The appellate court affirmed the trial court's order dismissing the petition but reversed on the order granting fees against the petitioner. The appellate court relied upon Section 744.331(4) in holding that once the examining committee concludes that there is no incapacity, the trial court was required to dismiss the petition to determine incapacity. There is no right to an evidentiary hearing to challenge the examining committee's opinion under Section 744.331(4). The appellate court reversed the trial court's order that the petitioner pay the examining committee members' fees as there was no finding that the petition was filed in bad-faith as was required by Section 744.331(7)(c).

A will is not executed with the formalities required by Section 732.502(1)(b) where a witness did not see the actual signing.

Price v. Abate, 2009 WL 559908 (Fla. 5th DCA 2009)

A petition for administration was filed and petitioner alleged that she was the designated personal representative of the decedent's "undiscovered will". As a result, the trial court appointed the petitioner as the personal representative. Eight intestate heirs of the decedent filed a petition to determine beneficiaries of the decedent's estate and the petitioner responded by filing a petition to establish a lost will.

The intestate heirs sought summary judgment asserting that the petitioner could not sustain her burden of proving that the lost will had been properly attested to, and cited to the deposition testimony of the witnesses of the purported lost will. The first witness, a bank employee, testified that the decedent asked her to notarize a hand written piece of paper leaving everything to the petitioner, and that she did not remember seeing the decedent sign the will. The first witness notarized the will and called over the second witness, another bank employee, to also sign the will. Both witnesses testified that the second witness was not present and did not see anybody sign the will.

Based on this testimony, the trial court granted summary judgment in favor of the eight intestate heirs and ruled that the decedent died intestate, because the witnesses did not sign the purported lost will in the presence of each other and thus the lost document was not executed in accordance with the statutory formalities governing the execution of wills. The petitioner appealed, arguing that the physical proximity of the witnesses should satisfy the definition of the terms "in the presence of each other."

In affirming the trial court's decision, the appellate court held that the burden was on the proponent of a lost will to establish *prima facie* its formal execution and attestation, and that petitioner did not meet this burden based upon the testimony of the witnesses. The appellate court rejected petitioner's argument that the fact that the witnesses were in the vicinity of one another would be sufficient to meet the burden under the statute that the witnesses were in each others presence.

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Course No.	COURSE TITLE FORMAT AVAILABLE CD = AUDIO CD V = VIDEOTAPE (VHS) DVD = VIDEO ON DVD	CREDITS HOURS General	E = Ethics P = Professionalism S = Substance Abuse MIA = Mental Illness Awareness	Certification	Approval Period	COSTS S = Section Member N = Non-Section Member CD	Video or DVD
0715	Real Estate: Ethical Fraud & Other Fairy Tales **CD & DVD**	**6.5**	**5.0 E**	BL = 5.0 CR = 1.0 RE = 6.5	10/16/2008- 04/16/2010	**S = $225.00** **N = $250.00**	**S = $250.00** **N = $275.00**
0762	What Every Estate Planner Needs to Know About the Generation-Skipping Transfer Tax **CD & DVD**	**5.0**	**0**	ED = 4.0 EP = 4.0 TX = 4.0	10/24/2008- 04/24/2010	**S = $160.00** **N = $185.00**	**S = $250.00** **N = $275.00**
0714	Asset Protection in Florida **CD & DVD**	**6.0**	**0.5 E**	ED = 4.5 EP = 4.5 RE = 1.0 TX = 4.5	11/12/2008- 05/12/2010	**S = $225.00** **N = $250.00**	**S = $250.00** **N = $275.00**
0716	ABC's and XYZ's of Guardianship **CD & DVD**	**6.5**	**1.0 E**	ED = 5.0 EP = 5.0 FL = 5.0	11/06/2008- 05/06/2010	**S = $195.00** **N = $220.00**	**S = $250.00** **N = $275.00**
0799	Advising the Trustee **CD & DVD**	**3.5**	**0**	EP = 2.5	12/05/2008- 06/05/2010	**S = $115.00** **N = $140.00**	**S = $250.00** **N = $275.00**
0717	Hard Times: Foreclosures, Bankruptcy Offers of Judgment, MERS & Such **CD & DVD**	**5.0**	**1.0 E**	RE = 5.0	01/23/2009- 07/23/2010	**S = $145.00** **N = $170.00**	**S = $250.00** **N = $275.00**
0718	Trust & Estate Symposium 2009: The Best Laid Plans... A Showdown Between the Drafters and the Litigators **CD & DVD**	**7.0**	**0**	EP = 5.5	02/12/2009- 08/12/2010	**S = $255.00** **N = $280.00**	**S = $275.00** **N = $300.00**
0691	Advanced Construction Law & Certification Review Course 2009 **CD Only**	**19.0**	**1.0 E**	BL = 19.0 CC = 19.0 CL = 19.0 RE = 19.0	03/06/2009- 09/06/2010	**S = $350.00** **N = $375.00**	Not Available
0721	So You Think You Can Dance... But Can You Do the Probate Shuffle? **CD & DVD**	**8.0**	**1.0 E**	ED = 6.0 EP = 6.0 RE = 8.0 TX = 6.0	03/19/2009- 09/19/2010	**S = $270.00** **N = $295.00**	**S = $350.00** **N = $375.00**
0696	Wills, Trusts and Estates Certification Review & Advance Practice Update **CD Only**	**17.5**	**2.0 E**	ED = 17.5 EP = 17.5 TX = 17.5	04/03/2009- 10/03/2010	**S = $310.00** **N = $335.00**	Not Available
0697	Advanced Real Estate Law and Certification Review Course **CD Only**	**16.5**	**1.0 E**	CC = 16.5 CL = 16.5 RE = 16.5 TX = 12.5	04/03/2009- 10/03/2010	**S = $405.00** **N = $430.00**	Not Available
0724	Ins and Outs of Community Association Law **CD & DVD**	**7.5**	**0**	RE = 7.5	04/23/2009- 10/23/2010	**S = $215.00** **N = $240.00**	**S = $295.00** **N = $320.00**
0725	Issues Facing Today's Community Association Practitioner **CD & DVD**	**7.0**	**2.5 E**	RE = 7.0	04/24/2009- 10/24/2010	**S = $230.00** **N = $255.00**	**S = $310.00** **N = $335.00**

The maximum amount of credit hours for each course is indicated under the Credits/General column. To be in compliance, you must have completed the Total Minimum Requirement of **thirty (30) General hours**, including **five (5) hours of Ethics, Professionalism, Substance Abuse or Mental Illness Awareness (any combination) during each CLER cycle.**

Hours can be reported/viewed on The Florida Bar web site: www.floridabar.org

Every member's Florida Bar News label reflects a CLER reporting date. To avoid suspension, return your completed CLER affidavit prior to that date (Rules Regulating The Florida Bar 6-10.5).

What's Happening Within the Section...

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

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

SCHEDULE

EXECUTIVE COUNCIL MEETING AND LEGISLATIVE UPDATE SEMINAR

July 30, 2009 – August 2, 2009
The Breakers, Palm Beach
Reservations: (561) 655-6611
Room Rate: $176.00 (Superior King)
$189.00 (Deluxe Double)
Cut-off Date: June 29, 2009

EXECUTIVE COUNCIL MEETING

September 24-27, 2009
Ritz-Carlton, Naples
Reservations: (800) 241-3333
Room Rate: $199.00
Cut-off Date: August 10, 2009

THE PROBATE TEAM 2009

Friday & Saturday October 2-3, 2009
Marriott Waterside Hotel & Marina
Tampa, Florida
Reservations: (888) 268-1616
Room Rate: $135.00.
Cut-off Date: September 1, 2009
Seminar registration information and schedule:

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

The Florida Bar
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ACTIONLINE GOES GREEN!

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DEADLINE

for submissions for the next issue of ActionLine is

JULY 31, 2009.

FROM THE GREEN BUILDING SUBCOMMITTEE OF THE CONSTRUCTION LAW COMMITTEE OF THE RPPTL SECTION OF THE FLORIDA BAR:

The **Green Building Subcommittee** is pleased to announce the **June 1, 2009** launch of its blog: **FLORIDA GREEN BUILDING LAW** (**floridagreenbuildinglaw.com**).

The blog will be a medium to address recent developments in green building law as well as a forum where Florida Bar members and green building practitioners can sound off on issues affecting green building projects and law. The Subcommittee envisions that these discussions will assist in developing sound green building legal practices and may lead to the creation and/or modification of green building legislation. The blog will also feature green building projects in Florida and house green building legal resources such as incentives, legislation and articles. All are welcome to contribute with stories, comments, pictures and other green building-related information.

For more information, please contact the blog editor, Desiree Noisette, at dnoisette@hwhlaw.com, or the Subcommittee chair, Peyton White Lumpkin, at peytonwhitelumpkin@bellsouth.net.

If you are working on an interesting case or memo of law that you'd be willing to turn into an article for ActionLine, we would love to publish it for you! No article is too small or too large. (Submission information inside.)