ActionLine

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



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Income Tax Issues for Estate Planners
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Riding Off Into the Sunset ... A Few Farewells and Many Thanks



By John B. Neukamm

Section Chair 2009 - 2010

Chair's Column

As I write this column on June 30th, my last official day as chair of the RPPTL Section, I am quite aware of the Latin phrase, *"tempus fugit"* – this past year has truly flown by. In my first column, I expressed excitement about the opportunity to serve as the chair of this remarkable Section, and, as my term concludes, I feel a deep debt of gratitude to the Section and its members for that opportunity.

While it might be appropriate at this time to review the Section's many accomplishments over the past year, I'll defer to the Section's annual report that was published in the June 2010 issue of *The Florida Bar Journal* (and which may be reviewed, along with reports of other Florida Bar Sections at *https://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/229503dc 8ed4e1e885257730005bfcfd!OpenDocument* for that purpose). Instead, I'd like to take this opportunity to recognize a number of Section members who are responsible for many of those successes.

First, and foremost, I have been blessed to serve with an amazing group of officers. **Brian Felcoski**, who has served as Chair-Elect this last year, has overseen all of the work of the Section's General Standing Committees, has chaired the Section's Strategic Planning Committee, which has been charged with implementing the comprehensive plan that was adopted by the Section last year, has chaired the Section's Long Range Planning Committee, which has assembled another dedicated group of officers and circuit representatives to serve the Section during the coming year, and has organized the Executive Council meetings to be held in Palm Beach, Orlando, Clearwater, Santa Barbara and Miami Beach over the coming year. Brian is extremely diligent and highly organized, which are traits that I greatly admire, and his law firm is very committed to our Section (Brian will be the third Section Chair to come from that firm). Our Real Property Division Director, **George Meyer**, and our Probate Division Director, **Fletcher Belcher**, have done remarkable jobs overseeing the Section's substantive law committees this year. Those committees have addressed legislative issues, assisted with amicus briefs, assisted task forces appointed by the courts and the legislature with respect to e-filing, title insurance and mortgage foreclosures, have worked with the Business Law Section of The Florida Bar to issue a comprehensive report on legal opinions that has received national recognition, have worked with other organizations, such as realtors, contractors and bankers, involved in our substantive areas of practice, and have produced a significant number of high-quality continuing legal education programs.

Our Treasurer, **Peggy Rolando**, has assured that our Section remains fiscally strong (and, despite the difficult economic climate, it appears that the Section will even operate "in the black" this year). **Mike Dribin**, our Secretary, has maintained excellent records of our Section's activities over the past year and has prepared several moving tributes honoring the service of deceased Section members. His many photographs memorializing Section activities are also appreciated. As Director of Circuit Representatives, **Drew O'Malley**, assured the continued geographic diversity of our Section. The circuit representatives spearheaded the Section's involvement with the "Florida Attorneys Saving Homes" project, and Drew's commitment to pro bono legal services made him the perfect champion for that project. In addition, he improved Section communications with members practicing in the various judicial circuits and afforded Section sponsors opportunities to interact with Section members at his meetings. **Debbie Goodall**, our CLE Coordinator, was responsible for the variety of high-quality CLE programs which have provided increasing revenues to our Section. At her committee's suggestion, the Convention seminar was offered at no charge to attendees, and, not surprisingly, attendance far exceeded prior years' participation. I'm convinced that our Legislative Chair, **Michael Gelfand**, never sleeps (at least during the legislative session). As a result of his efforts (as well as the efforts of our substantive committee members and phenomenal team of legislative consultants), most of our Section's initiatives were enacted, and nearly all of the proposed legislation opposed by the Section failed to pass (and, in one instance in which inappropriate legislation was adopted by the Florida Legislature, Michael helped orchestrate a veto by the Governor). You will have an opportunity to learn more about the Section's legislative successes overseen by Michael and his committee during this year's Legislative and Case Law Update Seminar at the Breakers in August.

We are also fortunate to have tremendous support from The Florida Bar. Our Program Administrator, **Liz Smith**, is simply amazing. Her diligence, calm demeanor and

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Reptiles are always a welcome sight for the cover of *ActionLine!*

This one was photographed by John Neukamm.

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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.

Amendment 4 – Chaos, Job Loss and the Opposite of Thoughtful Planning

By Anne Q. Pollack, Esq.,
Mechanik Nuccio Hearne & Wester, P.A., Tampa, FL

On behalf of the RPPTL Governmental Regulation Committee

Amendment 4 (also referred to by its proponents as Hometown Democracy) is a proposed constitutional amendment which will be voted on statewide in November 2010. It would require a vote by the general electorate every time a local government comprehensive land use plan is amended. Amendment 4 seems like an understandable approach to encouraging more public participation in community planning, but its effects will be so widespread that positive future growth will be eliminated and our communities, our businesses, our jobs, our local governments, and the best parts of Florida's growth management processes will be devastated.

Comprehensive Plan

The Florida Local Government Comprehensive Planning and Land Development Regulation Act (Section 163.3164, Florida Statutes) requires that each community have a comprehensive plan and make growth and preservation decisions consistent with that plan. The comprehensive plan is like a constitution for land use in a community, and local governments use it as their principal policy and planning document. Every property in a community has a comprehensive plan land use designation, and that designation provides limitations on what uses can be built on the property and at what density or intensity.

To change what you can do on a property, you must amend the comprehensive plan. No matter how large or small the proposed change, if the comprehensive plan designation for a property does not permit it, the plan must be amended. As the document guiding development and preservation of a community, amendments to a comprehensive plan should be relatively infrequent and taken only after critical analysis. But comprehensive planning is not static; the comprehensive plan is a living, working document which often requires amendments due to economic, environmental, demographic and other changes within the community.

Comprehensive plans generally are permitted to be amended only twice a year, but there are several exceptions to this rule, and as a result, comprehensive plans are amended relatively frequently. The frequency of amendments, combined with a perception that developers can amend comprehensive plans at will, is what is driving the frustration propelling Amendment 4 proponents to action.

But Amendment 4 proponents exaggerate the "so called problem" by saying that the governing bodies of our local governments are approving changes without consideration of the desires of citizens and thereby allowing uncontrolled growth. In actuality, changes to a comprehensive plan are reviewed and approved by the local government's professional planners, usually a local government planning board, the local government's governing body, and often, the Department of Community Affairs. In making their decisions, they listen to citizens' concerns, as well as development experts and local planning staff who know the local code and planning requirements. To make planning decisions solely based on the personal desires of neighbors, as Amendment 4 would have us do, is poor planning and is the antithesis of a successful and effective comprehensive plan.

Amendment 4 also overlooks the fact that not all comprehensive plan amendments are about growth. There are many other reasons a community might want to amend its comprehensive plan: to address public safety issues (e.g., traffic calming, smart growth); to allow community services (e.g., hospitals, affordable housing, schools); to comply with state mandates, including regular updates and ever-changing statutory requirements. These issues are important to the community as a whole, but instead of allowing elected officials, and the trained land-use professionals who are answerable to them, to institute thoughtful long-term planning and comply with state requirements, the winner of an election on these issues would be those who are the most election-savvy and have the most money.

A Halt to Growth and Job Creation in Florida

According to a recent study by the Washington Economics Group, Amendment 4 would "… force local and state governments to either raise taxes or cut services. Public schools, public safety and local health care services would suffer from both the direct impact of Amendment 4." Some frightening figures show that Amendment 4 would "…permanently impact the economic growth potential for Florida, causing a steady decline in the standard of living of all Florida residents."

- It would lead to a loss of $34.676 billion in Florida's economic output each year.
- It would result in Florida losing over 267,246 jobs!!
- It would cost Floridians over $11.8 billion in labor income each year.
- It would reduce fiscal revenues by over $4 billion per year.

Amendment 4 is a simplistic and misguided response

continued, next page

Amendment 4

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to growth and its approval would bring chaos to Florida at a time when we are already suffering from the recession and are likely to suffer further as a result of the oil spill. It will push developers to build projects outside Florida where there are fewer risks and cause delays for projects (both big and small) which do move forward here. It will also lead to increased taxes and governmental administrative costs as local governments attempt to abide by its requirements, unnecessary layers of bureaucracy, combative and expensive lobbying campaigns, and voter confusion.

The Experience of St. Pete Beach

The chaos that is expected if Amendment 4 passes isn't just fanciful. The experience of St. Pete Beach, where a similar amendment was approved in 2006, shows how overbroad and destructive Amendment 4 will be.

In the early 2000s, the City of St. Pete Beach made a significant effort to update and modernize its outdated comprehensive plan. It held over 20 public workshops to prepare a vision statement and complete a revised comprehensive plan. The revised plan was approved by the City in 2005. In 2006, disgruntled locals, unhappy with the newly approved plan, put a referendum on the ballot which would repeal the comprehensive plan and adopt a charter provision similar to Amendment 4. In November 2006, the ballot measures were approved. Over the next few years, numerous new state mandates were enacted, each of which required a change to the City's comprehensive plan. Voters were bombarded with literature, and every amendment was politicized. So many public votes were required that, according to former St. Pete Beach Mayor Ward Friszolowski, the voters, typically very active in their community, became overwhelmed and soon stopped caring about what they were voting on. Eventually, the City was issued a notice by the State that its comprehensive plan was out of compliance with State law. Business owners and banks/lenders were queasy about investing in the City, and many projects in the works to revitalize and redevelop the City came to a halt.

Soon developers, frustrated by the stagnation of the City, held public meetings and redrafted the comprehensive plan. They put the revised, more developer-friendly plan on the ballot in June 2008 and it passed with 60% approval. The proponents of the measure requiring a public vote soon sued, arguing among other things, that the ballot language (75 words or less) did not adequately describe the 175 page comprehensive plan which the voters were approving. In November 2009, voters amended the charter again to significantly limit the type of comprehensive plan changes requiring a referendum vote.

The City has spent over $650,000 in litigation costs on this one issue, which is more than it spends on its planning department in an entire year. It has had to increase its millage rate and reduce spending on other services. Former Mayor Friszolowski says that the litigious behavior by Amendment 4 proponents indicates that their true goal is not to give the people a greater voice in the process but rather to stop growth completely. With approval of Amendment 4, the proponents may succeed in this goal.

The Lawyer's "Retirement Plan"?

Amendment 4 is so broad and unclear, it leaves open many legal issues that are sure to keep lawyers busy for a long time to come. Many of these have already been litigated by St. Pete Beach, causing the budget to be sapped, taxes to be raised and other programs to be cut.

- What constitutes an amendment to a "comprehensive land use plan" requiring voter approval? "Comprehensive land use plan" is not a statutory term with legal meaning. If proponents wanted Amendment 4 to pertain solely to a comprehensive plan's "future land use element" or the "future land use map," terms which are used in the Florida growth management statute, why didn't they use recognized terms? As currently drafted, every change, whether technical, substantive or statutorily required, would necessitate a referendum.
- How and when will referendums



Corey Avenue in St. Pete Beach, the site of the City's historic "downtown"

take place? Will comprehensive plan amendments require special elections or only be voted on at regular elections? City elections in small cities such as St. Pete Beach cost upwards of $20,000 each. A County election costs between $500,000 and $1 million. Who will pay for this? The uncertainty, cost and extended time frames could kill development projects and cause significant fiscal problems for local governments.

- There could potentially be 200 to 300 intricate land use planning amendments each year. How will voters become adequately informed? Will they spend the time to thoroughly review each amendment, some of which could be hundreds of pages long, or just vote no?
- Amendments must be summarized into 75 words or less to comply with statutory requirements. With complex issues at stake with comprehensive plan amendments, is it even possible to summarize into so few words? Who is charged with writing the summary? With so little information available, will voters just look to the media and advertisements to educate them?
- Will each comprehensive plan amendment be voted on individually or will all comprehensive plan amendments be voted on as a group? If separate, there could be hundreds of decisions to be made by voters each year. If collectively, how would voters support some amendments and oppose others within the group?
- Who votes? Voters in cities would have to vote on any land use comprehensive plan amendment throughout the entire city. Changes proposed for unincorporated areas would require all voters in an entire county to consider the change. What will voters far from your neighborhood know or care about your neighborhood's needs?
- What happens if statutorily required changes to the comprehensive plan are not approved by the voters? What happens if voters approve an amendment found "not in compliance" by the Department of Community Affairs?

Conclusion

At a time when the economy is not strong enough to sustain such a blow, Amendment 4 will lead to huge job losses and devastating declines in economic output. Moreover, it will lead to unwise, uneducated and misguided planning, which is the opposite of what a comprehensive plan is supposed to do – promote thoughtful planning.

VISIT *www.florida2010.org* for more information and ideas for how you can help defeat Amendment 4.

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Farewells & Thanks

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organizational skills allowed your officers and me to focus on "the big picture" (and to occasionally assist our clients with their matters) while she handled the countless day-to-day issues. She and the Section received significant support from her supervisors, **Yvonne Sherron** and **Terry Hill** (both of whom have handled her job in the past), and the Bar's General Counsel, **Paul Hill**, who has always been readily available to assist our Section with respect to legislative, amicus and a myriad of other issues that arise (often without warning).

One of the best perquisites of serving as Section Chair is the opportunity to recognize Section members who have provided outstanding service to the Section with one of our four annual Section awards. Normally, the Section honors one recipient for each of those awards (although there have been occasions in the past in which more than one recipient received an award – usually when both recipients participated in a similar project). However, due to the significant number of Section members who have contributed mightily to our successes this year, I elected to recognize a recipient from each of our Section's Divisions for each of our awards during this year's Annual Convention.

The **Annual Service Award** is presented to a Section member who has rendered dedicated and significantly outstanding service to the Section throughout the current year. This year, **Lee Weintraub** and **Cary Wright**, who have been involved with the extremely successful Construction Law Institute since its inception, were jointly recognized as the Real Property Division's recipients of the Annual Service Award, and **Tae Kelley Bronner**, who has spearheaded the Section's diversity efforts and its popular and successful fellowship program (and who currently chairs the influential Probate Law & Procedure Committee), was recognized as the Probate Law Division's recipient of that award.

Our Section's most recent award, the **Rising Star Award,** recognizes Section members who demonstrate the potential for future Section leadership through their active participation in Section committees and projects. Our "Rising Star" from the Real Property Division this year was **Katherine Frazier**, who chaired the Section's Annual Convention, its Land Trusts Committee and its Model & Uniform Acts Committee. **Dresden Brunner**, who was responsible for many of the enhancements of our *ActionLine* publication, graciously agreed to coordinate the arrangements which led to the adoption of the Section's strategic plan and has served as a vice chair of our Member Communications & Technology Committee and as a vice chair of the Probate Law & Procedure Committee. Both Katherine and Dresden are highly motivated and competent individuals who "get the job done" (and done quite well).

As I noted in my last Chair's column, many former chairs of the Section remain passionately involved with the Section. Four of them were recognized at the Convention with the Section's most coveted awards, the Robert C. Scott Memorial Award and the William S. Belcher Lifetime Professionalism Award. Although Immediate Past-Chair **Sandy Diamond** (who also served as a Section officer this year) was recognized as a Probate Division recipient of the Belcher Award, one of the reasons she received the award was on account of her service as the Section's representative to the Task Force on Residential Mortgage Foreclosure Cases established by Chief Justice Peggy Quince. That task force issued its report to the Florida Supreme Court on August 15, 2009. In addition, Sandy consistently provided sage advice to the other officers and me throughout the year and, as a steering committee member, was one of the driving forces behind the adoption of the Section's strategic plan. Sandy has served the Section in nearly every capacity throughout the years, and, despite the fact that she claimed she does not to have enough "grey hairs" to merit such recognition, she is well deserving of that award.

The **William S. Belcher Lifetime Professionalism Award** was established in honor of Bill Belcher, a past chair of the Section who graciously and voluntarily shared his knowledge, expertise, ethics and professionalism with his fellow attorneys, in order to recognize Section members who best exemplify the qualities and virtues demonstrated by Bill during his lifetime of service to the profession. Thus, it was obvious that **Jerry Aron** was also deserving of such recognition. As chair of the Non-Judicial Foreclosure Task Force, Jerry has devoted hundreds of hours negotiating with bankers and representatives from the timeshare industry in crafting legislation to protect due process and property rights (and in articulating the Section's opposition to legislation which failed to protect such rights) over the years (and, in particular, during this year's legislative session). He has also kindly provided the benefit of his wisdom to other Section officers and me over the years. I am confident that Bill would be proud that his name has been associated with both Sandy and Jerry!

Finally, the **Robert C. Scott Memorial Award,** which was established to memorialize the memory and extraordinary accomplishments of Robert Claude Scott, was awarded to **Laird Lile** and **Melissa Murphy** in recognition of their devoted and continued service to the Section and its membership. Both Laird and Melissa graciously agreed to serve on the steering committee for the Section's strategic plan and actively participated in the project. As a former Legislative Committee Chair, Laird recognized the need to establish a PAC to facilitate communications with members of the Legislature, and he was instrumental in the formation of the RPPTL-PAC (which, incidentally, is not affiliated with the Section). He continues to remain actively involved with the Section, particularly with respect to probate and Section administrative issues, and, as a member of The Florida Bar's Board of Governors, he has provided immeasurable support to the Section. He willingly agreed to co-chair the

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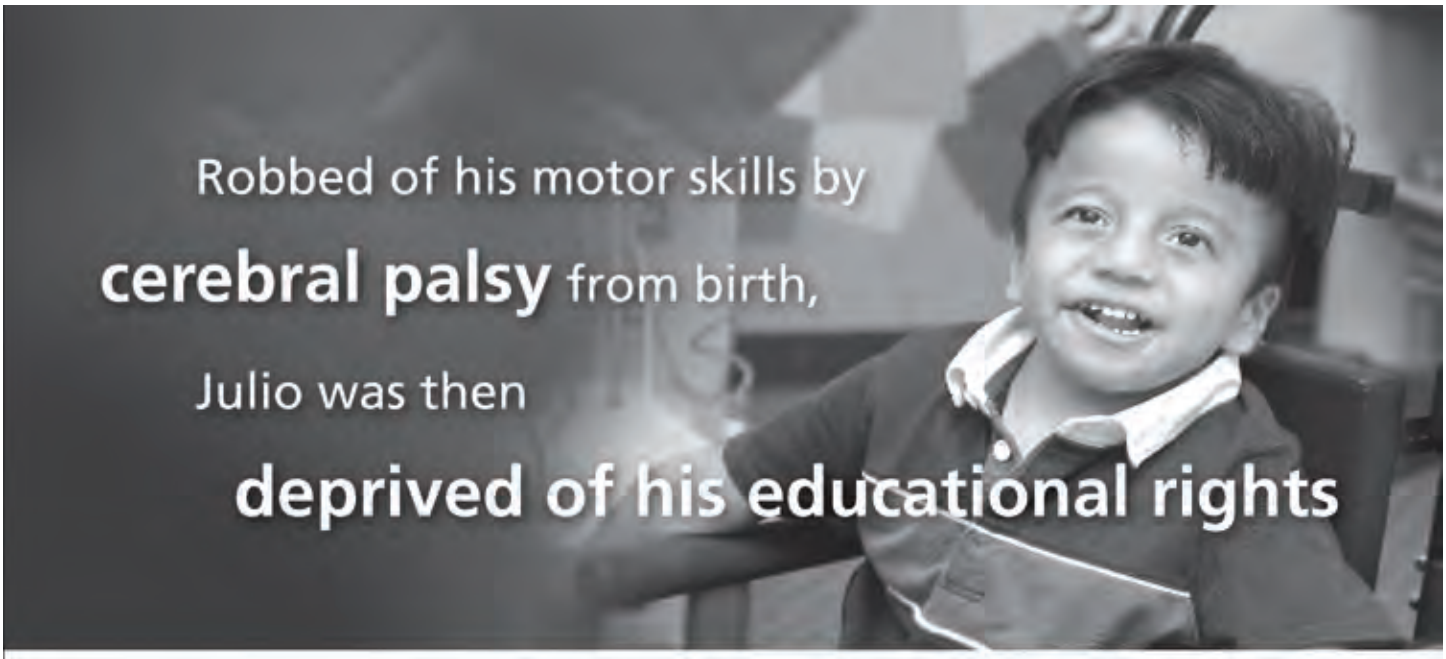

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Farewells & Thanks

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newly established Electronic Court Filing Committee and has worked closely with the courts this year with respect to the implementation of e-filing in probate cases. Melissa spent countless hours as one of the Section's designated representatives to the Title Insurance Study Advisory Council established by the Florida Legislature to review and report on title insurance related issues. She has also served on the Section's Legislative Committee and as an active member of various real property law committees and has even agreed to serve as chair of the Section's Title Insurance Committee next year.

It has been a joy to serve with the foregoing individuals, as well as countless other dedicated Section members, during the past year. With their assistance, I am sure that my successor, Brian Felcoski, will also enjoy his year as chair of this Section. Also, with Brian securely at the helm (based upon the extraordinary amount of email traffic that he's generated since the Section's Convention last month), an extremely talented and committed slate of officers serving on his Executive Committee, a dedicated and hard-working Executive Council, a large number of very active members serving on our Section's numerous committees and a vigilant cadre of former Section Chairs who, as I have noted in my last two columns, remain intimately involved in Section activities, I am quite confident that the Section will continue to thrive in the future.

I will always cherish my memories of this past year and have sincerely appreciated the opportunity to serve as chair of this fabulous Section. Thank you, and may God bless each of you and our beloved RPPTL Section!

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The RPPTL Section is grateful to all of its sponsors who faithfully support the good work of the Section. In addition to recognizing them in each issue of *ActionLine* as we do, we want to offer information to you in the event you wish to speak with a sponsor about the services it provides. Below is the name of the sponsor and contact information. Again, thank you sponsors for supporting RPPTL!

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A Tribute to John B. Neukamm

By Jane L. Cornett, Esq.,
Law Offices of Cornett, Googe & Associates, P.A., Stuart, FL



The 2009-2010 Chair of the Executive Council of the Florida Bar Real Property, Probate and Trust Law Section was John B. Neukamm of Tampa. John is a true Gator, having graduated from the University of Florida with an accounting degree in 1981 and a law degree in 1984.

John has been Board Certified in real estate ever since 1992. He first joined the Executive Council in 1993 and has been an active Section member since 1991. John started with the Legal Opinions Committee, so he was especially proud of that committee's role this year in co-authoring, along with the Business Law Section, the Report on Standards for Third-Party Legal Opinions of Florida Counsel.

John's long history of service to the Section is almost too extensive to detail. He has been the Section's real property division director, treasurer, secretary, *ActionLine* editor and annual convention chair in 2000 and 2001. Over the years, he has also served as a leader or active member of the Model and Uniform Acts, Professionalism, Membership, Real Property Forms, Strategic Planning, Long Range Planning, Meetings Planning, Budget, Mortgage Law, Landlord/Tenant Law, Title Insurance, Diversity, Fellowship, Bylaws and Legislative Committees, and he received the Section's Annual Service Award in 1998.

John has also been active in the Tampa Bay area, both through Bar involvement and community activities. In 1995 and 1996, John chaired the Hillsborough County Bar Association's Real Property, Probate and Trust Law Section. He has also served the Hillsborough County Bar Association as chair of its United Way Fundraising, Social and Membership Committees and was proud to receive the inaugural Outstanding Lawyer Award from that Association's RPPTL Section in 2009. His community involvement involves both church and civic activities. He's been a Big Brother and has been active at all levels of Scouting for many years. John's office is in Tampa, where he is a partner with the Mechanik Nuccio law firm.

As we probably suspected, John confirms that serving as Section Chair is an extremely time consuming activity, but John asserts that it is also extraordinarily rewarding. John said that he "loved being chair - it was truly a joy" and cited, as the biggest reward of that position, "the fabulous people" with whom he dealt.

During John's year as chair, the Section has achieved many accomplishments of which John can be justifiably proud. High on his list and very dear to John's heart, however, was the implementation of the Section's strategic plan. An important part of that implementation has been the redrafting of the Section's decades old Bylaws. The revised Bylaws will be reviewed and considered at the next Section meeting. In addition to the proposed restructuring of the Executive Council, the proposed Bylaws would be consistent with existing practices and recognize modern methods of communication which did not exist when the current Bylaws were adopted.

Another strategic plan objective that John expects will lead to more efficient and effective Section administration in future years was the assembly of an officer's notebook for each of the Section's Executive Committee positions. In the past, while new officers have had a reasonably good understanding of their roles, there has never been a written job description. Instead, information about their numerous responsibilities and critical deadlines were previously passed down by word-of-mouth. There now exists a written and detailed checklist for each and every position.

Membership in the Section has been another important focus for John. Even during these difficult economic times, our Section continues to have financial solvency, and John led the effort to seek new members and to make contact with those lapsed members who had failed to renew their valuable Section memberships.

John also expressed a great deal of pride in the success of our legislative and legal advocacy efforts. Almost all of the Section's initiatives were passed by the Legislature and, with rare exceptions, legislation opposed by the Section either failed to pass or was vetoed by the Governor. John is particularly proud that the Section's efforts to address estate planning issues arising due to uncertainties under federal estate tax law, to base documentary stamp taxes payable in "short sale" transactions upon the sales price (rather than the mortgage loan balance) and to oppose the bankers' non-judicial foreclosure legislation were successful. The Section also had three very successful amicus filings. All were DCA cases in which the Section's input was expressly sought by the courts, and, in each decision, the Section's contributions were acknowledged and the positions advocated by the Section were adopted.

John refers to the RPPTL Section as the "go-to Section." John bases this on the fact that our Section's expertise is frequently sought by the judicial and legislative branches. During this past year, Section representatives served on a working group established by the Florida Courts Technology Commission to address e-filing issues, on the Mortgage Foreclosure Study Commission and on the Title Insurance Study Advisory Council. Each of these groups have had, and will continue to have, major impacts on important

Florida laws, procedures and practices.

When asked about the most fun part of serving as Section Chair, John (like a true Gator) immediately thought of the Saturday night social events. He explained that, since the Executive Council members work diligently on Section business during numerous committee meetings on Thursday and Friday and during the Roundtable and Executive Council meetings on Saturday morning and afternoon, the Saturday night social events allow the members to "blow off some steam" and to truly enjoy one another's company. He also reminisced about the out-of-state meeting in Maui. While he noted that the group was smaller than prior years (undoubtedly due to the economic conditions), he reported that this afforded the attendees with a greater opportunity to bond with one another.

Other important Section accomplishments achieved under John's leadership included the first graduating class of RPPTL Fellows and the increased support of RPPTL programs at all ten Florida law schools.

In the interview with John, his pride in the Section and all of it's accomplishments really shines through. The Section also can be very proud of the public face that John has presented for us over the past year. The Section warmly welcomes John to his well-deserved spot in the "back row" (the traditional seating place reserved for our many former Section chairs who remain actively involved with the Section).

A hot and steamy photo contest

By Liz Smith, Section Administrator



John Neukamm's winning photo

The second annual RPPTL Photography Contest took place at the Section's Annual Convention this past May at the Tampa Marriott Waterside. The photographs were taken by RPPTL Section members or immediate family members and displayed during the weekend events.

John Moran, a very talented Florida Nature Photographer was our guest speaker at the annual luncheon and later judged our photos. Unfortunately, shortly before his presentation, the hotel lost power for many hours. The loss of power and heat setting in did not faze our renowned photographer; he gave a very descriptive presentation of his beautiful work, without slides. If you have seen his work, you can bet he has been in many uncomfortable conditions! We are very grateful he could withstand the heat and give such a memorable presentation.

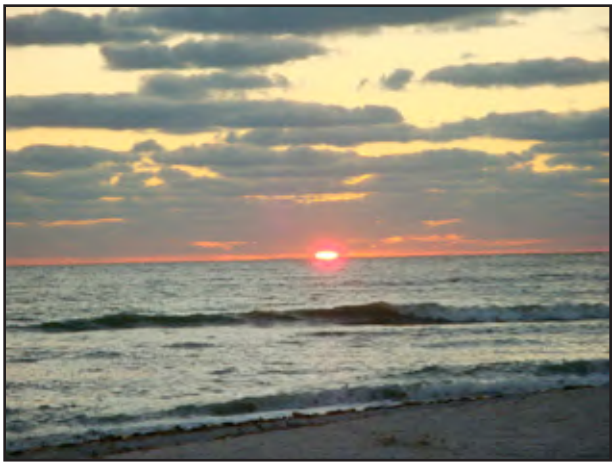
The first place prize was awarded to then Section Chair, **John Neukamm** (no this was not rigged). John's portrait of a three-horned lizard, in vibrant colors was taken during his out-of-state meeting in Hawaii. Second place was awarded to **John Paraday,** (the son of Section member Salome Zikakis)**,** and third place went to **Marilyn Polson.** Each of the photos appears in this issue of *ActionLine*, and, as part of his prize, John's first place photo will grace the cover of the next issue of *ActionLine.*

Once again, the section offered the photos for sale, with all of the proceeds going 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 or race.

All in all, the RPPTL Photography Contest was a hot and steamy success!



John Paraday's "Key West"



Marilyn Polson's sunset

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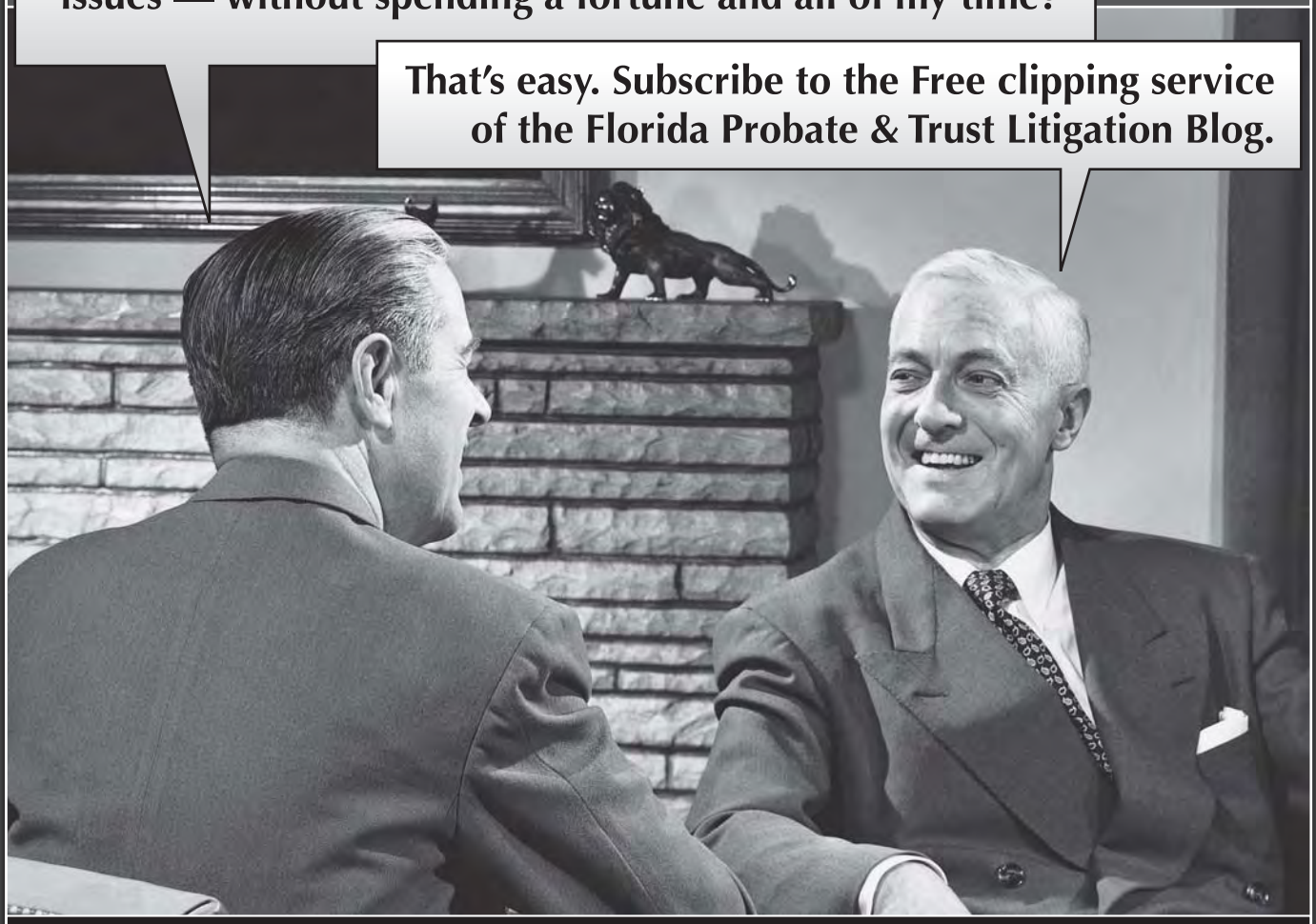

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New Focus: The "Other Taxes" Income Taxes Set to Soar by 2013

By Joan Crain, BNY Mellon Wealth Management, Fort Lauderdale, FL

Estate planners have traditionally concentrated on minimizing transfer taxes, with the implications of income taxes often playing a secondary role. However, the focus may need to shift or at least broaden in the next few years. After seventeen years of enjoying predominantly decreasing tax rates, our clients are about to face a sea change. Income tax rates are scheduled to start increasing in 2011. There has been talk of postponing some of these increases due to the poor economy. However, government budget deficits are also at record highs. Regardless of future Congressional actions, or which political party is in power at any given time, it will likely be many decades before upper income taxpayers see their income tax rates as low as those in 2010.

This article explores the growing labyrinth of scheduled income tax increases, and offers advisors some possible strategies to mitigate the coming damage.

Steep Tax Increases Starting Soon

High income taxpayers will see their after-tax income begin to shrink as early as January 1, 2011, when the lower tax rates enacted under President Bush's administration are scheduled to expire. Note that the current administration's definition of "high income taxpayers" is those with Modified Adjusted Gross Income (MAGI) over $200,000 (single) or $250,000 (married filing jointly).

For example, a top bracket taxpayer who receives $200,000 in qualified dividends in 2010 nets $170,000 after federal income tax. Under current law, as of January 1, 2011, that same $200,000 in qualified dividends will net only $120,800. This is because qualified dividends will no longer receive the preferential 15% tax treatment accorded them under the prior tax cuts. And unlike the capital gains tax rate, which is scheduled to increase to 20%, qualified dividends will revert to ordinary income status – at a top rate of 39.6%. President Obama's administration has expressed the desire to mitigate this. However, it seems likely that after this year the "wealthy" will pay more in taxes on dividends from their blue chip stocks.

By 2013 the situation will be even worse, as these same dividends are scheduled to become subject to a 3.8% Medicare surtax. Many professional advisors as well as their clients are shocked when told that by January 1, 2013, the highest marginal Federal tax rate on net investment income will be 43.4%. This represents a 39.6% ordinary income tax plus a 3.8% Medicare tax[1] on net investment income. Furthermore, many of these same investors, if they are also wage earners, will face an almost 1% increase in the Medicare payroll tax.[2] In 2013 this tax changes from a flat 1.45% to 2.35% for "high income taxpayers", making this a progressive tax for the first time. The following chart summarizes these federal income taxes and rates.

Highest Income Tax Rates 2010 through 2013

Planning is Critical

There is a small silver lining to this situation. This is one of the rare instances when taxpayers have a long lead time to prepare. With a cautionary eye to the possibility

continued, next page

Tax Law as of June 28, 2010

Federal Income Tax Rates *	2010	2011-2012	2013
Ordinary Income	35%	39.6%	39.6%
Long-term capital gain	15%	20%	20%
Qualified dividend	15%	39.6%	39.6%
Medicare tax on net investment income			3.8%
Medicare tax on wages – employee	1.45%	1.45%	1.45%
Additional Medicare tax on wages – employee above threshold	0%	0%	0.9%
Social Security tax wages – up to $106,800 in 2010	6.2%	6.2%	6.2%

Income Taxes Set to Soar

from preceding page

of intervening tax law changes which may require further adjustments, clients can position themselves for the future tax increases by taking a number of steps before January 1, 2011.

One of the most straightforward options is to accelerate income into 2010 and defer deductions until 2011. Along this line, corporate executives may want to exercise stock options this year, forgo the opportunity to defer their 2010 bonuses or other compensation, and consider electing to pay tax up front on grants of restricted stock. Converting traditional IRAs to Roth IRAs also becomes even more attractive before tax rates rise, and particularly before the 3.8% Medicare surtax starts in 2013.

This year may be an ideal time to diversify concentrated holdings with embedded gains. In 2010 taxpayers can take profits and net 85% of the proceeds under a 15% capital gain tax rate. Investors wanting to continue to hold securities which have appreciated significantly may choose to sell and repurchase these assets. Although this action will generate capital gains now, it will provide flexibility in the future. By increasing the cost basis of these assets, investors may mitigate the constraint of large capital gains taxes on later sales. Since the wash sale rule does not apply to gains, there is no need to wait to buy the same security back as we often have to do when realizing losses for year-end tax planning. A higher income tax rate environment will affect optimal investment and estate planning strategies in the future.

Strategies for Future Years

On the investment front, tax-exempt bonds will likely become more attractive for wealthy clients. When dividends and taxable interest are taxed at higher rates and included in the net investment income potentially subject to the Medicare surtax, investors will benefit from stocks paying little or no dividend, whose total return is more a function of capital appreciation. Certain types of investments such as REITs which may previously have been avoided due to their negative tax consequences, may now appear relatively more attractive, as they are no longer disadvantaged when compared with equities whose dividends were "qualified."

Asset location will also take on increased importance. Investors may benefit by placing assets that generate taxable interest and dividends in tax deferred vehicles such as IRAs, and holding assets whose return is primarily through capital appreciation in their taxable accounts. This strategy takes better advantage of the lower tax rates for long term capital gains, while mitigating the current and future hits to ordinary income.

Cash value life insurance may also be purchased beyond the amount required for traditional insurance needs. Loans taken from such policies are not usually subject to income tax, so this may be a future source of funds. Note, however, that from a return on investment perspective this will make sense only if the projected after-tax returns exceed the cost of the insurance.

In summary, with tax rates increasing, tax-managed investing will become much more important, as clients focus more on what ends up in their pockets after April 15, rather

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Wealth Planning Strategies for Future Years

On a wealth planning front, advisors reviewing their clients' estate and financial plans can likely identify new ways to gain optimal benefits under the coming higher income tax structures.

Clients who are charitably inclined may want to increase their charitable gifts starting in 2011 since charitable deductions will become increasingly valuable as an offset to higher ordinary income taxes and even the Alternative Minimum Tax (AMT). Charitable Remainder Trusts (CRTs) will appeal to some clients as income smoothing vehicles and for the benefit of immediate charitable deductions. Charitable Lead Trusts (CLTs) may offer an answer to other wealthy taxpayers. The charitable deductions for the annual distributions to charitable beneficiaries of non-grantor CLTs may allow the trust to partially or entirely avoid the Medicare surtax. The choice of grantor vs. non-grantor CLTs will have further nuances in an era when trusts as well as trust beneficiaries face higher taxes. For some clients, contributions to grantor CLTs, as well as CRTs, will provide charitable deductions in the year of an income spike, such as when they make a Roth conversion. Non-grantor CLTs will be more advantageous to others, who want to avoid any excess income added to their MAGI.

During high income earning years, taxpayers may turn even more to retirement plans as a means of accumulating assets on a tax-deferred basis. However, while distributions from qualified retirement plans and IRAs will not be subject to the Medicare surtax on net investment income, they are taxed as ordinary income and will be included in the MAGI calculation for the Medicare surtax. In this respect, a Roth IRA (Roth) has a distinct advantage under current law. Since a Roth (other than an inherited Roth) has no Required Minimum Distributions, taxpayers with fluctuating income and/or sufficient outside sources of support, can avoid any withdrawals during years when these distributions may throw them into the upper income tier for the Medicare surtax.

The new tax landscape will also affect trust drafting and administration. Trusts currently reach the top income tax bracket with just over $12,000 of net income. Trusts must include undistributed capital gains in their MAGI as well as in net investment income for the purpose of the Medicare surtax. Consequently, income accumulation trusts, and even trusts which do not pay out capital gains, may not be the most tax efficient strategies for building long term wealth, especially if the trust beneficiaries may not be in the top income brackets. Trustees are usually mindful of not letting the tax tail wag the dog. However, given the increasingly large impact of income taxes, thoughtful trustees may weigh the relative marginal income tax brackets of current beneficiaries versus that of the trust when making some discretionary distribution decisions.

Transferring income producing assets to lower income family members may become more appealing than ever as a means of reducing the tax burden. Family Limited Partnerships and Limited Liability Companies could regain popularity more as a means of shifting income to others while retaining control, rather than to reduce transfer tax uses. Installment sales, as opposed to lump sum sales, will be useful to business owners and wealthier family members as they strive to smooth income streams and stay below the $250,000 MAGI threshold above which the Medicare surtax applies.

Conclusion

While estate tax reform continues to dominate the headlines, major changes on the income tax front will also soon affect high income taxpayers. Notwithstanding the uncertainty over the final details, and in spite of clients' reluctance to "pay any tax before its time," advisors should explain and explore these changes with their clients now. There are many strategies available to mitigate the damage, but clients must act soon, before this window of opportunity closes.

Endnotes:

1 Medicare surtax is a provision of the Patient Protection and Affordable Care Act of March 23, 2010 and Health Care and Education Reconciliation Act of March 30, 2010.

2 *Ibid.*

New Alternative Dispute Resolution Section Established

The Florida Bar Board of Governors has established the Alternative Dispute Resolution (ADR) Section as the twenty-third section of The Florida Bar. The new section will be a forum to share common interests, continuing legal education and advocacy for those interested in alternative dispute resolution. Florida Bar members in good standing are eligible to join the Section. For complete details on the new Section and to access the Section membership application, please visit The Florida Bar website at www.floridabar.org.

Are Millions at Risk to Win a Contract Worth Thousands? Florida Court Says Professionals May Not Limit Personal Liability

By Roger C. Brown, Esq. & Gregory S. Martin, Esq.,
Gregory S. Martin & Associates, P.A., Maitland, FL

In June of 2010, the Third District Court of Appeal in Miami, Florida reviewed and upheld the decision of a trial judge[1] who determined that Gerhardt M. Witt, a professional geologist licensed in Florida, was *personally* liable for damages in excess of four million dollars ($4,000,000). *See Witt v. La Gorce Country Club, Inc.,* 2010 WL 2292104 (Fla. 3rd DCA). The court reached this decision despite the fact that: (1) Witt provided his services through his corporate employer; and (2) the contract contained a limitation of liability provision. In sum, the court determined that professionals may not shield themselves from personal liability for malpractice by including limitation of liability provisions in their contracts. Consequently, this decision will likely have a tremendous impact on the construction industry in Florida, affecting owners, architects, engineers and contractors alike.

Overview of the Project and History of the Dispute

The lawsuit arose from the design and construction of an irrigation system for a golf course owned by the La Gorce Country Club, Inc (the "County Club"). The Country Club decided to implement a reverse osmosis water treatment system to irrigate its golf course as an alternative to the municipal water supply. To facilitate this, the Country Club entered into a design/build contract with ITT Industries, Inc. ("ITT") and contracted with Witt's company, Gerhardt M. Witt & Associates, Inc. ("Witt's Company"), to provide hydro-geologic consulting services.

Notably, the contract between the County Club and Witt's Company contained a limitation of liability provision for the Company's protection. In pertinent part, the provision stated that "[The Country Club] agrees, to the fullest extent permitted by law, to limit the liability of [Witt's Company] and its subconsultants to the total dollar amount of the approved portions of the scope for the project for any and all claims, losses, costs, damages of any nature whatsoever… [which] include, but are not limited to, negligence, professional errors or omissions, strict liability, breach of contract or warranty."

Throughout the design and construction of the project, many problems occurred related to the quality of the water and the operability of the water treatment system. During the first year of use, performance deteriorated considerably and, after just fourteen (14) months, the system failed completely. As a result, the Country Club filed a lawsuit against Witt (personally), Witt's Company and ITT.

The Trial Judge's Decision

While ITT was absolved of any wrongdoing, the trial judge determined that both Witt, individually, and Witt's Company were liable to the Country Club. Of utmost importance, the trial judge decided that the limitation of liability provision in the contract applied to Witt's Company, *but did not protect Witt from personal liability*. The trial judge based the decision on two grounds: (1) Witt, as an individual, was not a party to the contract between the County Club and Witt's Company, and therefore he could not receive the protection of the limitation of liability provision; and (2) a prior Florida Supreme Court decision questioned whether or not professionals could legally or ethically limit a client's remedies by contract. *See Moransais v. Heathman,* 744 So.2d 973 (Fla. 1999).

Review by the Third District Court of Appeal

The main issue before the Court of Appeal was whether a professional, such as a geologist, may protect himself/herself from liability by including a limitation of liability provision in a contract for services. The Court of Appeal decided this issue against the professional geologist and affirmed the decision of the trial judge. In other words, professionals in Florida may not protect themselves from personally liability by attempting to limit their liability through a contractual provision, such as the example cited above.

The Court of Appeal seems to have based its decision to hold Witt personally liable, despite the limitation of liability provision, on three factors: (1) Florida Statute § 492.111, which provides that "[t]he fact that a licensed professional geologist practices through a corporation or partnership shall not relieve the registrant from personal liability for negligence, misconduct, or wrongful acts committed by him or her"[2]; (2) reliance on the 1999 *Moransais* decision, which questioned whether professionals, such as engineers or lawyers, could limit their liability by contract in the same way that commercial manufacturers of products do; and (3) the contract between Witt's Company and the Country Club did not include Witt personally and therefore did not specifically protect him.

Commentary on the Court of Appeal's Opinion

The first part of the court's ruling, that professionals may not hide behind their companies in an effort to avoid liability for malpractice, is not a new concept and is supported by

the legislature's enactment of § 492.111, which specifically prohibits such. However, the second part of the ruling stating that professionals may not enter into contracts that seek to limit their liability for damages caused by malpractice, *e.g.*, to the amount of their compensation under the contract, is a case of first impression in Florida.

The court's rejection of limitations of liability for professionals raises questions. First, section 492.111 of the Florida Statutes only says that a professional cannot limit his or her liability by forming a company. The statute says absolutely nothing about whether a professional can or cannot limit exposure to malpractice lawsuits through a contract, which both parties are free to consider and negotiate prior to signing. It is unclear whether the legislature intended such a consequence. Second, while the earlier *Moransais* decision *questioned* whether it is legal or ethical for a professional to contractually limit liability, the *Moransais* court did not go so far as to say it is *prohibited.* An earlier United States Court of Appeals decision (applying Florida law) reached a conclusion that is directly contrary to the *Witt* rule. *See Florida Power & Light Co. v. Mid-Valley, Inc.* 763 F.2d 1316 (11th Cir. 1985) (holding that a limitation of liability clause exculpated an engineer, who was deemed to be a beneficiary of the limitation of liability clause contained in a contract entered into by his corporate employer). The *Witt* court attempted to differentiate that decision based on the fact that § 492.111 did not exist at the time. However, as stated above, the statute only addresses limitations of liability arising from *forming a corporation or partnership*; it does not prohibit *contracts* that limit liability.

Conclusion

Whether the decision will be accepted for consideration by the Florida Supreme Court, and if so whether it will stand, remains to be seen. Notwithstanding, what does this mean now for the construction industry? For design professionals and engineers, the impact appears to be obvious. Architects and engineers can no longer seek to protect themselves from liability by including limitation provisions in their contracts. If they do, the courts will probably render them unenforceable. Consequently, for even small dollar projects, the need for increased limits of professional malpractice insurance may be needed to avoid disproportionately large personal liability risk.

The *Witt* decision may threaten contractors as well. It would certainly appear to be applicable to any professional services provided. In those situations where contractors are required to "design and build" some elements of a project, increased costs for the malpractice insurance of design professionals will likely be passed on to the contractor. Alternatively, smaller specialized design professionals may be forced out of business because the cost of being adequately insured is too great or the risk of being uninsured is unacceptable. How the decision ultimately affects the industry as a whole remains to be seen, but it would seem to have a chilling effect on small business at an unwelcome time.

Endnotes:

1 In the Circuit Court for Miami-Dade County, the parties agreed to try the case before a trial resolution judge.

2 Florida Statute §§ 621.07 and 471.023(3) provide similar limitations on engineers who practice through corporations or partnerships.







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Section Executive Council Meeting

Tampa, May 27 – May 30th, 2010

By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, Florida

The annual convention of the Florida Bar Real Property, Probate and Trust Law Section met in Tampa, Florida from May 27th through May 30th at the Tampa Marriot Waterside. The hotel is in the historic downtown Tampa area within easy walking distance of lots of fun stuff and right along the trolley line. The theme for the annual convention was Time Out in Tampa - Cinema, Sangria and CLE.

The convention started out as is customary with lots of committee meetings on Thursday. The welcome reception on Thursday evening was held at the Tampa Theatre which is an incredible historic building. The theater was constructed in 1926 and the restoration of its interior is absolutely outstanding. It's considered a Grand Movie Palace and for a very good reason. Buses carried the participants on a short ride from the hotel from to the theater. The heavy appetizers were more than adequate for everyone's appetite and of course, the conversation among the guests was sparkling as usual. The highlight of the event was the performance of the "Mighty Wurlitzer," a restored pipe organ that arises underneath the floor area next to the stage. The movie shown was "Body Heat" which appropriately involves an attorney.

Friday from 8:30 until noon was a free seminar for all those in attendance at the convention, covering such issues as e-filing, ad valorum property taxes, creditor rights, foreclosures and a very interesting presentation by Brian Allbritton, US Attorney from the Middle District of Florida, on Florida's mortgage fraud epidemic. To make Mr. Allbritton's presentation even more challenging, the electricity decided to go out in all of the Tampa downtown area but the presenter was undeterred and the seminar reached its conclusion. While the attorneys were attending the seminar, the spouses and guests had a very special event offsite at a location called "Chef's on the Loose." My sister, who accompanied me to the meeting, said it was great fun and a really unique event (many thanks to Kathy Neukamm).

Friday afternoon presented a little bit of a challenge to some of us since the electric still wasn't working and the hotel generators decided to quit. Since I was on the 26th floor at the time this occurred, I had the opportunity to walk down 25 floors (there's no 13th floor) in the dark. Who said that Executive Council meetings weren't exciting? Again, the attendees at the convention were undeterred and by 6:30 p.m. we all set off in the really cool trolley to the Florida Aquarium. Once again the food was great and the location was outstanding. The aquarium is a place where you can spend hours just wandering and looking at the multitude of displays. The reception started with drinks and hors d'oeuvres and ended up with dinner and the annual awards presentation.

Fortunately, by the time we got back to the hotel after dinner the elevators were working even if the air conditioner wasn't quite up to par.

Saturday started bright and early with the Probate and Real Property Roundtable breakfasts beginning at 7:30 a.m. (still no air conditioning). The Executive Council Meeting started shortly after 10 a.m. when out outgoing Chair, John Neukamm, was warmly welcomed to the back row. John also presented the traditional gift from the Chair to

See "Tampa Meeting," page 24

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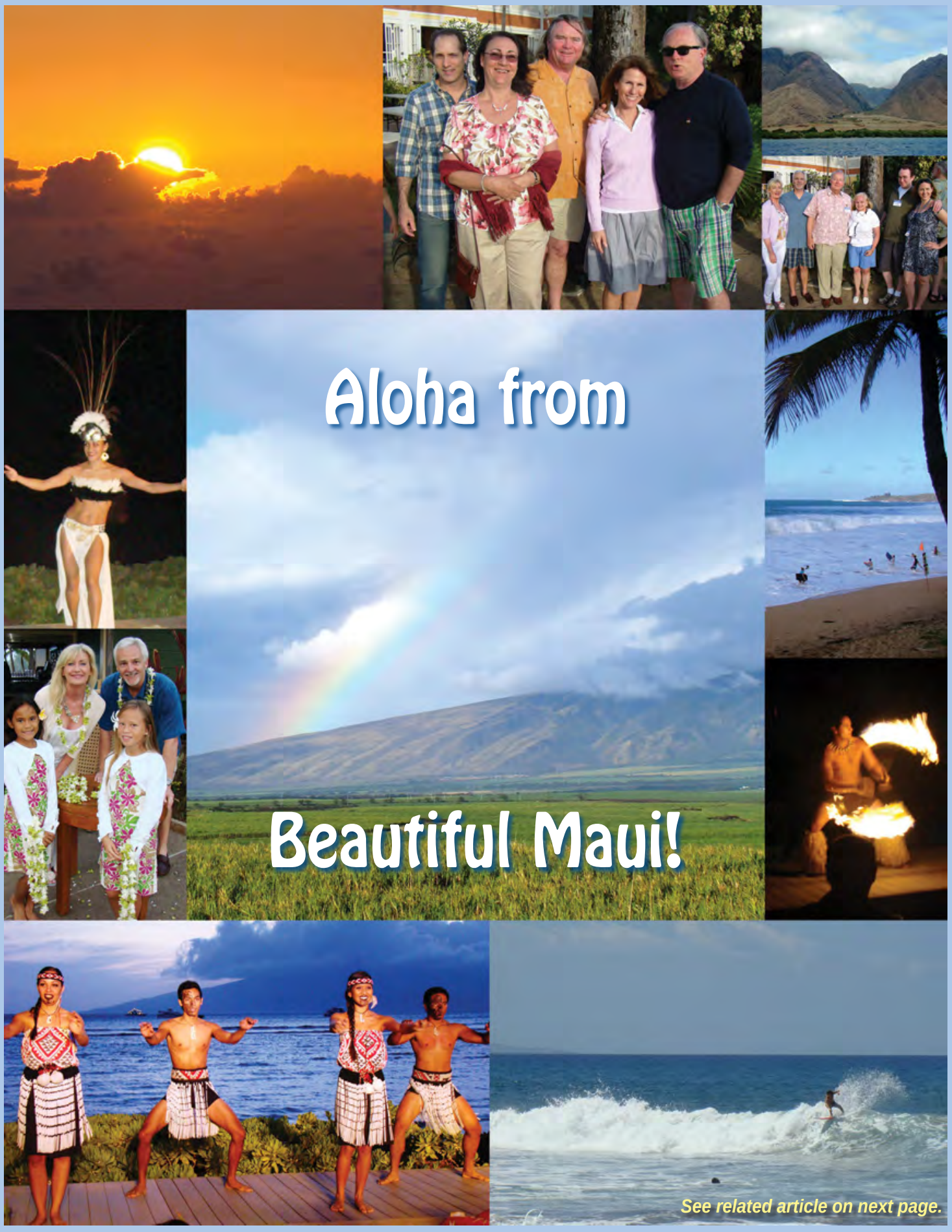

Photos by John Neukamm; arrangements by Kelly Catoe, Photo Editor.

Florida RPPTLs "Invade" Maui

By John B. Neukamm, Mechanik Nuccio Hearne & Wester, P.A., Tampa, FL

Approximately seventy-five RPPTL Section members and their guests spent a fabulous week on the exotic island of Maui during the Section's annual out-of-state Executive Council meeting on March 16th – 21st. We stayed at one of the premier Ritz properties in the world, the luxurious Ritz-Carlton Kapalau Resort. The resort is situated alongside word-famous DT Fleming Beach, which was voted "America's Best Beach" in 2006.



The festivities commenced with a preliminary reception overlooking the stunning resort and Kapalua Bay on Tuesday evening. After enjoying some traditional Hawaiian refreshments, some of the more adventurous attendees only had a few hours of rest before departing around 2:30 on Wednesday morning to experience a spectacular sunrise above the Haleakale volcano crater, followed by an exhilarating bike ride down the 10,000 foot tall volcano.

The welcome reception on Wednesday evening allowed the group to experience a beautiful sunset alongside the DT Fleming Beach. During that reception, the attendees enjoyed true Hawaiian hospitality, wonderful food, drinks and entertainment, as well as the company of their fellow RPPTL travelers.

Thursday morning, most of the group boarded a luxurious sailboat for a snorkeling trip during the peak of whale-watching season. Sea turtles, tropical fish and a number of whales joined us for a spectacular outing. That evening, we enjoyed an authentic luau feast at the Feast at Lele, featuring cuisine, dancing and music unique to various Pacific islands in an intimate setting alongside the Pacific Ocean highlighted by another magnificent sunset.

No trip to Maui would be complete without experiencing the famed "Road to Hana" drive, so most of the group explored the lush tropical beauty of Maui's Hana coast on Friday. The windows on our mini-coaches extended from our waists to the ceiling, so we didn't miss a single waterfall or any of the 600+ turns in the winding road. The tour officially began at the old sugar mill town of Paia and passed along a world famous windsurfing beach, several state parks and countless waterfalls. We took numerous photo and swimming breaks, and after a delicious lunch at a Hana resort, we continued the tour along the ruggedly scenic "back side" of the Haleakale volcano.

Since a number of attendees' travel arrangements required a departure on Saturday afternoon, the "farewell" reception and dinner, featuring live entertainment highlighting Hawaiian culture and history, took place on Friday evening. Our Executive Council meeting took place on Saturday morning, and featured, among other items, a lively discussion of various non-judicial foreclosure proposals pending before the Florida Legislature.

After the meeting concluded, the remaining attendees broke into three groups. The more daring members participated in a thrilling zipline and "high ropes" course adventure at a pineapple plantation overlooking the resort and Kapalua Bay. Others enjoyed world-class golfing, while the remaining members of the rest of the group elected to simply enjoy the peace and tranquility of the resort or nearby shopping. Our RPPTL Section friends regrouped for a final reception and dinner at nearby Merriman's Restaurant (and another breathtaking Maui sunset) on Saturday evening.

The meeting ended all too soon (particularly since a dreaded plane trip to Florida ensued), but those Section members who were fortunate enough to attend the meeting will always fondly remember the "aloha" spirit of the gorgeous island of Maui.

Tampa Meeting

from page 21

the attendees of orange and blue beach towels with an appropriate logo. The minutes for that meeting will be posted on the Section website and I encourage everyone to take a look.

Another special event was the second annual photo competition and exhibit. The entries were all great and available for purchase with 100% of the proceeds going to Creative Clay, a Tampa Bay charity with the mission of making the arts accessible to all.

Saturday afternoon from 2:30 p.m. until 3:30 p.m. included a boat tour of Tampa Bay. Dinner that evening was off site at the Tampa Bay History Center, in easy walking distance from the hotel along the beautiful riverwalk.

Since it was the long Memorial Day weekend, lots of folks stuck around on Sunday for a canoe trip on the Hillsborough River led by our intrepid Chair, John Neukamm.

It was a very interesting, very fun weekend. If you missed this convention, you missed a lot!

Community Association Legislative Update

By Robert S. Freedman, Nicole C. Kibert and Richard C. Linquanti, Carlton Fields, P.A., Tampa, FL

I. Introduction

The meltdown in the Florida economy has affected all segments of Florida condominium developments – developers, lenders, associations and owners – and the condominium market has stagnated. The Florida Legislature recognized these problems and took steps to help the Florida condominium industry to recover, and passed Senate Bill 1196. This bill was signed into law by Governor Crist on June 1, 2010 (as Chapter 2010-174, Laws of Florida) and is referred to as the "Legislation." The Legislation contains numerous changes to Chapters 718 (condominiums), 719 (cooperatives) and 720 (homeowners' associations). The Legislation became effective July 1, 2010. The Legislation created the Distressed Condominium Relief Act, as well as to provide associations with the ability to collect monies from tenants where the owner is not paying assessments. The Legislation also contains a variety of other changes which provide better protections and disclosures to owners. The following summarizes the Legislation's key provisions:

II. Distressed Condominium Relief Act

The Legislation, based upon the determination that successor purchasers of bulk units (including foreclosing mortgagees) should be granted relief from certain provisions of the Florida Condominium Act, creates the Distressed Condominium Relief Act for the purpose of creating economic opportunities for successor purchasers that would benefit existing unit owners and condominium associations. The Legislation creates two new classifications of bulk purchasers – a "bulk assignee" and a "bulk buyer," both of which are specifically excluded from being defined as "developer." A bulk assignee (a) acquires more than 7 condominium parcels, and (b) receives an assignment of some or all of the rights of the developer. A "bulk buyer" acquires more than 7 condominium parcels but does *not* receive an assignment of developer rights other than (i) the right to conduct sales, leasing, and marketing activities; (ii) the right to be exempt from the payment of working capital contributions to the condominium association; and (iii) the right to be exempt from any rights of first refusal that may be held by the condominium association.

Generally, liability following a bulk purchase will be as follows: the original developer's liability is essentially unchanged; a bulk assignee assumes all liability of an original developer, unless excluded by statute (exclusions pertain to warranties, the turnover audit, liability for developer actions while in control of the board, and requirements to fund deficits; note that a bulk assignee will have warranty liability if it undertakes design, construction, development or repair work, and there are other responsibilities for the period where the bulk assignee controls the condominium association) or otherwise specifically assumed; and, a bulk buyer has no liability unless expressly assumed or provided by statute.

The Legislation is scheduled to sunset on July 1, 2012, meaning that maintaining status as a bulk assignee or a bulk buyer requires acquisition of title prior to such date, unless the statute is extended.

As is evident by this brief overview, there are important differences between a bulk assignee and a bulk buyer and their respective implications, and applicability and suitability must be determined on a case-by-case basis, based upon the particular facts of the involved project.

III. Association Collection of Rent from Tenants

A process is now established by which the association (be it for a condominium, cooperative or homeowners association) may seek payment from the tenant of an owner in the event that the owner is delinquent in paying any monetary obligation to the association. If the association follows the required procedures, the tenant must begin paying rent to the association in the amount up to the monetary obligations due from the unit owner. A tenant's obligation to the association may not exceed the amount due from the tenant to the tenant's landlord. A tenant is not liable for any increase in monetary obligations of the property unless the tenant received written notice of the increase at least 10 days before the rent was due. A tenant will get credit for prepaid rent, and the landlord must give the tenant a credit for amounts paid to the association. The association does not become a landlord under Chapter 83 by collecting rent from the tenant, but the association may issue notices and take action to evict as though a landlord.

IV. Fire Safety for Condominium and Cooperative Elevators

There will now be a phase-in period for retrofitting of elevators in condominiums, cooperatives, or multifamily residential buildings issued a certificate of occupancy on or before July 1, 2008. The retrofitting requirements may not be enforced until the earliest of the following to occur: (a) July 1, 2015; (b) the elevator is replaced; or (c) the elevator requires major modification. These exceptions do not apply to residential buildings issued a certificate of occupancy after July 1, 2008.

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Community Association Update

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V. Alternative Power for Elevators in a Condominium or Cooperative

A majority of voting interests of a condominium or cooperative may vote to forgo the retrofitting of any improvements required by Section 553.509(2).

VI. Fire Sprinkler Retrofitting in Condominiums and Cooperatives

The provision allowing unit owners to vote to forego retrofitting a condominium or cooperative with a fire sprinkler system is revised to include association property. The number of voting interests required to forgo such retrofitting is reduced from 2/3 to a majority, and unit owners in a "high-rise building" are no longer precluded from taking such a vote. If the unit owners have previously voted to forego retrofitting, a vote to *require* such retrofitting may take place at a special meeting of the unit owners called by a petition supported by at least 10% of the voting interests, but such a vote to require retrofitting may only take place every 3 years. Electronic transmission of notices is no longer allowed with regard to a meeting where a vote to forgo retrofitting or require retrofitting is to take place. Most importantly, the date before which a local government may not require fire sprinkler retrofitting is extended to the end of 2019. However, if the vote to waive retrofitting has not already occurred, by December 31, 2016, certain condominiums and cooperatives must initiate an application for a building permit for the required retrofitting, demonstrating that compliance will occur before the end of 2019.

RPPTL Legislative Archives Available

By Michael Gelfand, Gelfand & Arpe, West Palm Beach, FL

What did that law really mean? What was the legislative intent? How many times have you asked those questions?

Now, at your fingertips, is a powerful new tool to help you divine statutory intent, courtesy of past RPPTL Section "Fellow" Brenda Ezell. Ms. Ezell is coordinating the posting of our legislative archives on the Section's website at *www.RPPTL.org*.

The archived information, explaining the rationale of Section Legislative Positions, is presented through an easy and accessible chart. The chart is searchable by the factor you seek, whether it is the committee name, substantive topic, bill number, or if adopted, Florida Laws chapter number. If you are conversant with Excel©, then you will have an additional advantage of being able to sort columns.

The chart contains hyperlinks to the legislative documentation, usually containing three documents for each Section Legislative Position. First, the Section's intent for supporting a legislative position is usually found in a "white paper" authored by the chair of the substantive committee advocating the position. Second, a Legislative Position Request form identifies other Florida Bar Sections and standing committees which may have an interest in the position. Third, if a position supports a change in the law, then the proposed bill text, in legislative format accompanies the papers.

Archiving was possible only with the cooperation of prior Section and Legislative Review Committee chairs. Special recognition is deserved by Ms. Ezell, who is a real estate practitioner in Jacksonville. She contacted all of those who have been involved in the legislative process for the last five or so years. She then organized the materials, preparing the chart and hyperlinks.

As an inaugural Section Fellow, Brenda reported that the project "was a great way to learn what the Section has done from a legislative perspective, and an even better way to learn the substantive law. I found myself absorbed in the white paper discussions, even on the Probate side." While she has been a longtime member of the Section, Brenda stated that her "recent engagement as a Section Fellow and the legislative archive project demonstrated how working relationships have formed with Section leadership who succeeded in their goals of adopting and sometimes defeating legislation. It was very enlightening and I am grateful for the opportunity to be an active participant in RPPTL Section activities."

Learn what the Section has accomplished so you know where the Section is going. Access the Legislative Review Committee webpage by logging on to *www.RPPTL.org.* Click on the left hand menu marked "Committees" and move your cursor to click on "Legislative Review Committee." Once at the Committee page, you can access archives as well as current information regarding how legislative positions are created and current legislative positions.

VII. Termination of Condominium

The standard by which a condominium may be terminated for economic waste now includes the cost of construction necessary to construct intended improvements. This revision permits for the termination of condominium units that were planned for construction but no longer have any realistic chance of completion (as compared to the statutory language only formerly pertaining to reconstruction following an event of casualty). The provision regarding the creation of another condominium has been revised to allow the filing of either (a) a new declaration of condominium, or (b) an amended and restated declaration of condominium for any portion of the same property. In the event that a condominium is terminated to eliminate unconstructed units that are no longer economically feasible (as discussed immediately above), this revision allows the remainder of the condominium to continue under same terms, with the now-terminated portions removed from the declaration. These changes will create a potential means for resolving the "phantom unit" problem (where units legally exist because they were declared to condominium ownership but have never been constructed).

VIII. Other Condominium-Related Amendments of Interest.

A. Rental of Units. The prior limitation on amendments to the declaration of condominium that "restrict[] unit owners' rights relating to the rental of units" is narrowed to apply only to amendments that (i) prohibit the rental of units; (ii) alter the duration of a rental term; or (iii) specify or limit the number of times a unit may be rented during a specified period. The scope of the limitation is also expanded, however, to apply to bulk assignees and bulk buyers.

B. Limited Common Elements. A portion of the common elements serving only one unit or a group of units may be reclassified as a limited common element by an amendment to the declaration of condominium under specified circumstances. The Legislation specifically indicates that this represents a clarification of existing law.

C. Insurance. The term "hazard insurance" has been replaced with "property insurance." The requirement to reevaluate the adequacy of coverage every 36 months now applies to replacement cost, not full insurable value. The board meeting to establish the amount of insurance deductibles is no longer required to be open to unit owners. Property that must be excluded by an insurance policy is now limited to property "located within the boundaries of the unit and serv[ing] only such unit." The requirement for a unit owner to maintain insurance coverage has been deleted and replaced with a requirement that each condominium unit owner's policy must conform to the newly-stated requirements. A condominium unit owner's policy is no longer required to name the association as an additional named insured and loss payee.

D. Official Records. Unit owners are no longer permitted to inspect (i) personnel records of association employees, and (ii) personal identifying information such as e-mail addresses, telephone numbers, emergency contact information, any addresses of a unit owner (other than as provided to fulfill the association's notice requirements), but not the person's name, unit designation, mailing address, and property address, among other items of exclusion.

E. Financial Reporting. Condominiums with less than 75 units may now, regardless of annual revenue, prepare a financial report rather than a financial statement. The previous threshold was 50 units.

F. Directors and Officers. The general rule that co-owners of a single unit may not serve as members of the board of directors at the same time is now applicable to any condominium association that does not include timeshare units or timeshare interests, regardless of the number of units. However, two exceptions have also been added to the rule, allowing co-owners to serve simultaneously as directors when (i) they own more than one unit, or (ii) there are not enough eligible candidates to fill a vacancy on the board of directors. The list of conditions that will disqualify a person from election to the board is expanded to include delinquency in the payment of any fine, regular assessment or special assessment. The candidate certification form has been eliminated prior to an election, but a new director must certify within 90 days, in writing that he or she has read and understands certain documents and will fulfill the required duties. A certificate of satisfactory completion of a Division-approved condominium education program may be submitted instead.

A director is now deemed to have abandoned office by being more than 90 days delinquent in the payment of *any* monetary obligation to the association. Previously, this was limited to delinquency in the payment of regular assessments.

Mandatory removal of a director due to a charge of felony theft or embezzlement of the association's funds occurs after such a charge, whether it is by information or indictment. The vacancy created continues until the end of the director's suspension or the end of the director's term of office, whichever occurs first.

G. Assessments. The amount of liability for certain first mortgagees or their successors or assigns may be determined by the amount of unpaid assessments during a particular period. The length of that period has been extended from 6 months to 12 months. The period during which a claim of lien secures unpaid assessments now runs through the entry of a final judgment, rather than a certificate of title.

H. Deposits Prior to Completion of Construction. Earnest money deposits taken prior to completion of construction may be held in one or more escrow accounts. If a single escrow account is used, the escrow agent must

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use certain accounting procedures, but compliance with those procedures constitutes compliance with Section 718.202(11), even though only one escrow account is used. This intent of this change is to clarify existing law, effectively reversing the court's decision in *Double AA v. Swire*, 674 F. Supp. 2d 1344.

I. Transfer of Association Control. In the event a receiver for the developer is appointed by a circuit court and not discharged within 30 days, there is now the ability for a court to decide, within that 30 day period, that turnover would be detrimental to the association or its members, thereby not leading to a turnover event.

J. Sanctions Against Non-Paying Unit Owner. A unit owner that is more than 90 days delinquent in paying a monetary obligation to the condominium association may have his right to vote or to use certain non-essential common elements suspended until payment is made.

IX. Other Cooperative-Related Amendments of Interest.

A. Vacancy on Board of Directors. New provisions establish a default process to fill a vacancy on the board that occurs prior to the expiration of that director's term, unless the bylaws provide otherwise.

B. Lien Rights of Cooperative Association. The association's lien is expanded to include authorized administrative late fees and reasonable costs for collection services. New procedural requirements are added which prohibit an association from filing a lien until 30 days after notice of intent has been delivered to an owner.

X. Other Homeowners Association-Related Amendments of Interest.

A. **Certain Board Meetings Not Open to Public.** Board meetings may be closed to members other than directors where the meeting is with the association's attorney to discuss proposed and pending litigation.

B. Reserve Accounts. Limitations on funding reserve accounts contained in the governing documents now apply when reserve accounts are not established pursuant to Section 720.303(6)(d). Otherwise, if reserves are established pursuant to subsection (d), the provisions of Section 720.303(6) will apply. Neither provision precludes the termination of a reserve account pursuant to Section 720.303(6)(b). The existing conspicuous type disclosure in Section 720.303(6)(c), required for financial reports of the association, is revised. A new conspicuous type disclosure is required in the event reserve funding exists in the budget but reserve accounts are not established pursuant to Section 720.303(6)(d). The formula in Section 720.303(6)(g)(2) by which reserve funding must be calculated for pooled accounts is changed to incorporate doubtful accounts.

C. Compensation. Provisions have been created to prohibit compensation of a director, officer, or committee member of the association for performance of association duties. The Section also lists activities that are not prohibited under certain conditions.

D. Display of Flag. The provision granting a homeowner the right to erect a flagpole and display a flag if certain requirements are met is amended to provide that any such flagpole and display is still subject to (i) all building codes, zoning setbacks, and other governmental regulations, and (ii) all "locational criteria" in the governing documents.

E. Suspension of Rights for Failure to Pay. The association is authorized to impose fines or suspend the right to use common areas and facilities if a member is delinquent in paying any monetary obligation to the association for a period of more than 90 days. Such fines or suspension may continue until the monetary obligation is paid. The suspension of use rights may not apply to any portion of the common areas necessary for access to a parcel or the provision of utility services to the parcel.

F. Certain Fines Can Become Liens. Fines of $1,000 or more may now become a lien against a parcel. Previously, a fine of any amount could not become a lien against a parcel under this Section.

G. Community Association Elections. New procedural requirements have been created as to secret ballots, the ability of a homeowner to nominate himself or herself to serve on the board, and to fill vacancies on the board.

H. Recreational Leaseholds. Section 720.31(6) is created as a clarification of existing law, and (1) explicitly states the authority of an association to enter into agreements to acquire certain possessory or use interests in lands or facilities; (2) requires inclusion and description in the declaration, if in existence at the time the declaration is recorded; (3) specifies standards for approval, if entered into after the recording of the declaration; (4) authorizes funding for such possessory or use interests as a common expense; (5) authorizes the imposition of covenants and restrictions concerning the use of such possessory or use interests; (6) authorizes declaration provisions that are not inconsistent with the statute; and (7) allow an association to join with certain other associations in carrying out the intent of the statute.

I. Special Assessments Prior to Turnover. Prior to turnover, a developer-controlled board of directors may not levy a special assessment unless certain procedural requirements have been met.

Probate Case Summaries

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In construing terms of a trust, a court must look to the settlor's intent and must accord technical terms used in the trust their legal definition, unless obviously used by the settlor in a different sense.

Timmons v. Ingrahm, 36 so. 3d 861 (Fla. 5th DCA 2010)

At his death, the decedent was survived by his spouse and two children he had adopted from a previous marriage. The surviving spouse also had four children herself from a previous marriage, none of whom were adopted by the decedent.

In his will, the decedent created two trusts, the family trust and marital trust. The marital trust provided that upon the surviving spouse's death, the remaining principal would be "poured over" into the family trust and distributed in accordance with the family trust. The family trust provided that upon the surviving spouse's death, the trust assets were to be divided into as many equal shares as there are children of the decedent. The will expressly defined the decedent's children to include his two adopted children and the surviving spouse's four children.

The family trust also allowed the surviving spouse, who was also a co-trustee, a limited power of appointment concerning "all or any part of the principal of this trust, free and clear of any trust to and among my then living *lineal descendants* in such proportions and subject to such trust and conditions as she may direct. This limited power of apportionment may be exercised by said wife even to the point of completely exhausting the entire corpus trust of this trust estate." Based on this language the surviving spouse executed a limited power of appointment that attempted to grant all the principal and income of the family trust to her four children to the exclusion of the decedent's two adopted children.

The two adopted children sued for breach of fiduciary duty and accounting – challenging the attempt to disinherit them. They argued that the surviving spouse could only exercise her limited power of appointment in favor of the decedent's "lineal descendants" and that the surviving spouse's four children did not qualify as such.

After the parties filed cross motions for summary judgment, the trial court ruled in favor of the co-trustees and the decedent's two adopted children appealed.

In reversing, the appellate court held that the term "lineal descendants" did not apply to the surviving spouse's four children – who are stepchildren of the decedent. The appellate court also looked at the decedent's intent and did not find that he intended to give the surviving spouse the power to disinherit his two children in favor of her four children. Therefore, the appellate court ruled that the surviving spouse's purported exercise of the power of appointment was invalid.

Estate was not required to reimburse insurance company for 100% of funds insurance company provided to decedent for his medical expenses out of proceeds from a medical malpractice action because Florida Statutes Section 768.76 allows estate to reduce reimbursement amount on a pro rata basis for attorney's fees and costs incurred in bringing medical malpractice action.

Ingenix v. Ham, 35 So. 3d 949 (Fla. 2d DCA 2010)

The decedent's insurance company paid for medical expenses relating to a gastric bypass surgery the decedent had which ultimately resulted in his death. The decedent's estate filed suit against the medical providers which ultimately resulted in a settlement.

Thereafter, the estate filed a motion for equitable distribution seeking a determination from the trial court that under the formula set forth in Florida Statutes Section 768.76(4), the estate is entitled to reduce the amount of money it owes the insurance company due to costs and attorney's fees the estate incurred in litigating the lawsuit against the medical providers. Florida Statutes Section 768.76(4) provides that a collateral source provider that has a right of reimbursement shall have a right of reimbursement from a claimant to whom it has provided collateral sources if such claimant has recovered all or part of such collateral sources from a tortfeasor minus its pro rata share of the costs and attorney's fees incurred by the claimant in recovering such collateral sources from the tortfeasor. The insurance company argued that it is entitled to the full amount that it provided to the decedent for his medical expenses based on language in the insurance policy between it and the decedent.

The trial court applied Florida Statutes Section 768.76(4) and ruled that the estate was allowed to reduce the amount it owed the insurance company on a pro rata basis for costs and attorney's fees it incurred in litigating the lawsuit against the medical providers.

The appellate court affirmed and held that where Florida Statutes Section 768.76(4) applies (as in the instant case)

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probate litigation

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and conflicts with language in an insurance policy, Florida Statutes Section 768.76(4) controls to reduce the reimbursement amount by the pro rata share of attorney's fees and costs incurred in prosecuting the medical malpractice action.

Judgment creditor could not execute on assets in a spendthrift trust where trustee had legal interest in trust while beneficiary had equitable interest in trust, despite fact that trustee turned over management of trust to beneficiary where trustee had ultimate power regarding trust distributions.

Miller v. Kresser, 34 So. 3d 172 (Fla. 4th DCA 2010)

A judgment creditor who received a judgment against the beneficiary of a spendthrift trust brought proceedings supplementary against the beneficiary of the spendthrift trust, the trustee of the trust, and another judgment debtor. The judgment creditor argued that he should be able to execute against assets of the spendthrift trust because the beneficiary had dominion and control over all of the trust assets and over the trustee, who was the beneficiary's brother.

After a non-jury trial, the trial court, in its order, wrote a detailed account of the beneficiary's control over the trust and over his brother, the trustee. The trial court found that the trustee had almost completely turned over management of the trust's day to day operation to the beneficiary. The beneficiary controlled all important decisions concerning the trust assets, including investment decisions, and the trustee never independently investigated these decisions. The trial court concluded that the trustee rubber-stamped decisions of the beneficiary regarding trust assets.

The trial court concluded that the beneficiary's exclusive dominion and control over the trust served to terminate the trust's spendthrift provisions, allowing the judgment creditor to reach all of the trust's assets to satisfy his judgment. The court also found that the trustee effectively turned over all of the trust's assets to the beneficiary, and that there had been a merger of the trustee and the beneficiary by virtue of the beneficiary's control over the trust.

On appeal, the appellate court reviewed two issues, to wit: 1) whether a court can invalidate a spendthrift provision in a discretionary trust where the beneficiary has no express control over the trust and thereby allow the beneficiary's creditors to reach trust assets before they are distributed; and 2) whether a merger occurred such that the trust was terminated by law or through provisions of the trust.

The appellate court reversed the trial court's ruling based on both issues. While noting that these facts may be the most egregious example of a trustee abdicating his responsibilities to manage and distribute trust property, the appellate court, citing Florida Statutes Section 736.0504(2), held that creditors can only reach distributions which the trustee choose to make or when the beneficiary has the express right to receive distributions from the trust. In this case, the court noted that the trustee still had the power to deny any requests by the beneficiary pursuant to the terms of the trust and so creditors could not reach the trust assets before they are distributed to the beneficiary pursuant to the trust's spendthrift provision.

In addition, the appellate court held that there was no merger because merger only applies when the legal and equitable interests are held by one person and are coextensive and commensurate – *i.e*., the legal estate and the equitable estate are the same. Here, the appellate court concluded that the beneficiary had the equitable interest while the trustee had the legal interest, and thus there was no merger.

Testator's intent as evidenced by her will controlled so that language in will which provided that homestead be sold to fund specific cash bequests was valid.

Pajares v. Donahue, 33 So. 3d 700 (Fla. 4th DCA 2010)

The decedent died leaving a will stating that her husband had predeceased her and she had no children. The will had language which stated that proceeds from a house which was the decedent's primary residence would be devised to specific beneficiaries in certain dollar amounts. The will also contained another article entitled "Homestead or Primary Residence" which referenced the specific gifts to the cash beneficiaries but which also listed the names of the decedent's sister and niece and appeared to devise the primary residence to them.

The personal representative, who was the niece (and beneficiary), petitioned the trial court to construe the will and sought a declaration that the primary residence was homestead property not subject to administration so that it passed to the decedent's sister and herself – thereby nullifying the specific cash gifts to the other beneficiaries.

The trial court ruled that the will demonstrated that the decedent's intent was to sell the primary residence and to use the proceeds to pay the specific cash devises first, and that the remaining proceeds after payment of all estate taxes and debts go in equal amounts to the decedent's sister and niece.

The decedent's sister appealed arguing that the trial court erred because the will should have been strictly construed in favor of retaining the homestead exemption contained in the Florida Constitution. The appellate court rejected this argument and affirmed. In doing so, it noted that the intent of the testator controls and the language in the will which specified that the primary residence be sold and proceeds given to the cash beneficiaries showed an intent not to preserve the advantages of homestead status.

Judgment creditor was required to file claim against estate within 30 days after his attorney, while not a "probate attorney", was served with the notice to creditors.

Grainger v. Wald, 29 So. 3d 1155 (Fla. 1st DCA 2010)

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A judgment creditor's "personal injury" attorney was served with a notice to creditors by the personal representative as required by Fla. Prob. R. 5.041(b). After the 30 day period prescribed in Florida Statutes Section 733.702(1) expired (but before the three months time period), the judgment creditor filed a claim against the estate. The personal representative filed a petition to dismiss the claim arguing that the claim was untimely pursuant to Florida Statutes Section 733.702.

The probate court rejected the personal representative's argument and found that service of the notice to creditors was ineffective because it was served upon the judgment creditor's "personal injury" attorney rather than on his "probate" attorney. Accordingly, the probate court ruled the time period under 733.702(1) had not expired and denied the personal representative's petition to strike claim as untimely.

The appellate court reversed and rejected the probate court's distinction between service on a "personal injury" attorney versus service on a "probate" attorney. The appellate court noted that the Florida Probate Rules do not make any distinction based on the scope of an attorney's representation of a client. Rule 5.041(b) simply states that service shall be made on an attorney if an interested person is represented by an attorney.

The appellate court also noted that the record reflects that the judgment creditor had actual notice in time to file the claim because the claim shows that he executed it within the 30 day period. The claim was untimely because it was not filed within the 30 day period.

Court was not required to hold Baker Act hearing on involuntary inpatient placement within five calendar days.

D.M.H. v. Pietilla, 33 So. 3d 800 (Fla. 5th DCA 2010)

Appellant appealed the denial of her petition for writ of habeas corpus arguing that her confinement under the Baker Act was unlawful because the involuntary inpatient placement was not held within five calendar days, even though it appears to have been held within five business days.

Under the Baker Act, a petitioner may seek either involuntary outpatient or involuntary inpatient placement. Involuntary outpatient requires the trial court to hold a hearing "within 5 working days" while involuntary inpatient requires the trial court to hold a hearing "within 5 days."

Appellant seized on the different wording between involuntary inpatient and outpatient placement and argued that since her placement was an involuntary inpatient placement, the hearing should have been held within five calendar days – not five business or "working" days. The appellate court rejected this argument and ruled that the Florida Rules of Civil Procedure apply to Baker Act proceedings pursuant to Fla. R. Civ. P. 1.010. Since the Florida Rules of Civil Procedure apply, so do the time computation requirements of Fla. R. Civ. P. 1.090, which provides that weekends and holidays are excluded when the prescribed time period is seven days or less. Since Florida Statutes Section 394.467 does not specifically indicate how the five day time period is to be calculated, Rule 1.090 governs. Accordingly, the hearing was timely and Appellant's writ of habeas corpus was denied.

Where the factual basis for an objection to the qualifications of a personal representative was known to a party and could have been raised within the three month period as provided by Florida Statutes Section 733.212(3), failure to object to the personal representative's qualifications within that three month time period barred objection.

Hill v. Davis, 31 So. 3d 921 (Fla. 1st DCA 2010)

Following the decedent's death, appellee, a resident of New York, filed a petition for administration claiming he was entitled to serve as personal representative because he was the decedent's stepson and was nominated in the decedent's will. After appellee was appointed personal representative, he published a notice of administration and served a copy on appellant, who was the decedent's mother.

After the three month period expired as provided in Florida Statutes Section 733.212(3), appellant filed two motions to have appellee removed as personal representative on the ground that he was not qualified to serve pursuant to Florida Statutes Section 733.304 because appellee's father had predeceased the decedent and was not the decedent's spouse at the time of her death and therefore, appellee was not a lineal descendent of a spouse of the decedent. Appellee moved to strike appellant's motions as untimely because they were not filed within three months after service of the notice of administration. Appellee also asserted that he was qualified to serve as a nonresident personal representative.

The trial court denied appellant's motions to disqualify upon concluding that appellee was qualified to serve as a nonresident personal representative pursuant to Florida Statutes Section 733.304(3). The trial court also found that appellant's motions to disqualify were untimely but did not indicate whether this finding was a ground for its ruling.

The appellate court noted that the Third DCA addressed a similar issue in *Angelus v. Pass*, 868 So. 2d 571 (Fla. 3d DCA 2004), which held that the three month statute of limitations found in Florida Statutes Section 733.212(3) did not apply to bar a petition to remove the nonresident nephew-in-law of the decedent who misrepresented himself as the decedent's nephew and thus was never qualified to serve. However, the appellate court (the First DCA) disagreed with the sweeping holding in *Angelus* because it effectively renders part of Florida Statutes Section 733.212(3) meaningless. That statute states that interested persons must object to the qualifications of a personal representative within three months after being served with the notice of administration or the objection is

"forever barred." Accordingly, the First DCA held that the three month statute of limitation period in Florida Statutes Section 733.212(3) is applicable where the factual basis for the claim was known to a party and could have been raised within the three month period. The First DCA noted that the facts presented in this case did not create a situation where the factual basis for the disqualification was concealed from appellant or arose after the three month period.

Accordingly, the First DCA affirmed the trial court's decision based on the untimely motions to disqualify and it held that it was unnecessary to address whether appellee was qualified to serve as a nonresident personal representative pursuant to Florida Statutes Section 733.304(3).

The pendency of a class action against the decedent's personal representative does not obviate the need to file a statement of claim against the estate. Class claims are not allowed in estate administration.
Baillargeon v. Sewell, 33 So. 3d 130 (Fla. 2d DCA 2010)

Two creditors of a decedent filed a statement of claim in an estate on behalf of themselves and a class of similarly situated persons. The personal representative moved to strike the claim to the extent it attempted to assert a claim on behalf of persons other than the two named claimants, arguing that the statement of claim fails as to these unidentified claimants because it failed to state their names and addresses as required by Florida Statutes Section 733.703(1) and Fla. Prob. R. 5.490. The personal representative also argued the statement of claim was unverified by the unidentified claimants. The personal representative relied on *In re Estate of Gay*, 294 So. 2d 668 (Fla. 4th DCA 1974) (holding that filing of class claim was inconsistent with then Florida Statutes Section 733.16 and was in conflict with public policy of speedy administration of decedent's estate).

In response, the claimants argued that they did not need to file the statement of claim as there was a pending action against the decedent and that the personal representative was properly substituted upon the decedent's death. The claimants also attempted to distinguish *Gay* and argued that they should be allowed leave to amend the statement of claim as soon as they were able to determine the names and addresses of the other members of the class because it was a defect as to form, which can be amended pursuant to Fla. Prob. R. 5.490(e) and Florida Statutes Section 733.704.

After a hearing, the trial court held that the filing of the claim was unnecessary because there was a pending federal action asserting the class claim against the decedent at the time of his death and because the personal representative had been properly substituted as a party defendant in that action. The trial court also ruled that class claims can be filed in an estate administration proceeding. As a result, the trial court denied the personal representative's motion to strike the claim and allowed the claimants six months to amend their statement of claim to identify the other members of the class by name and address. The personal representative appealed.

The appellate court reversed and held that claims must be filed by class members against an estate despite the pendency of a class action against the estate. The appellate court also rejected the claimants' argument that amending the claim to add addition claimants was a matter of form, and concluded that adding claimants was a matter of substance which is impermissible (if done untimely outside of the claims period). In addition, the appellate court held that class claims are not allowed in an estate administration because the legislature never overruled *Gay*, which it is presumed to have known about.

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Rev. 07/10

Real Estate Case Summaries

Prepared by Meredith Freeman, Bush Ross, Tampa, FL

Under the applicable statute of frauds, a lease for a term in excess of one year must have two subscribing witnesses regardless of whether the lease is a new lease or a renewal of an existing lease.
S & I Investments v. Payless Flea Market, Inc., 40 So. 3d 48 (Fla. 4th DCA 2010)

S & I Investments ("S & I") appealed the trial court's ruling that a lease was binding even though only one subscribing witness signed it. Under the applicable statute of frauds (§ 689.01 Florida Statutes), a lease for a term in excess of one year is not valid unless it is signed in the presence of two subscribing witnesses. The appellate court held that because the statute does not make a distinction between an original lease and a renewal of an existing lease, subscribing witnesses are necessary for both an original lease and for a renewal of an existing lease. The appellate court, therefore, reversed the trial court's ruling that the lease was valid. In addition to arguing that the lease was valid notwithstanding the statute of frauds, Payless Flea Market, Inc. ("Payless") also argued that S & I was estopped from defeating the lease because S & I operated under the previous lease, which also lacked the proper witnesses. The appellate court rejected Payless' argument because S & I challenged the validity of the renewal lease before its effective date.

The trial court erred in allowing parol evidence because the contract term "appraising for no less than $620,000.00" was not ambiguous.
Gibney v. Pillifant, 32 So. 3d 784 (Fla. 2d DCA 2010)

The purchasers signed a contract to buy a house that had not yet been constructed. The purchasers required contingent language in the contract which provided that the property must appraise "for no less than $620,000.00." The purchasers obtained an appraisal in the amount of $560,000.00 and attempted to terminate the contract. The sellers obtained a second appraisal for $635,000.00. The sellers argued that the terms of the contract were ambiguous. The trial court allowed parol evidence as to the parties' intent and conduct and found that any appraisal above $620,000.00 satisfied the contingency. The trial court ruled that the purchasers breached the contract by not moving forward with the purchase. The Second District Court of Appeals reversed, reasoning that the terms of the contract were not ambiguous and the trial court erred in allowing parol evidence. The appellate court ruled that the terms unambiguously provided that any appraisal below $620,000.00 excused the purchasers from performing the contract.

Specific performance of an option contract to buy real property is available when the buyer establishes — by clear and convincing evidence — that the buyer is ready, willing, and able to purchase the property.
Invego Auto Parts, Inc. v. Rodriguez, 34 So. 3d 103 (Fla. 3d DCA 2010)

The Third District Court of Appeals reversed the trial court's order denying specific performance when the buyer presented — by clear and convincing evidence — that the buyer was ready willing and able to purchase the property pursuant to an option contract. Invego Auto Parts, Inc. ("Invego") exercised its option to purchase under the terms of the parties' contract. Felix Rodriguez refused to sell the property and Invego brought an action for specific performance. The trial court found that Invego was not ready, willing and able to purchase the property at the time it exercised the option. The appellate court disagreed. Specific performance can be granted in the discretion of the trial court when (1) the purchaser is clearly entitled to it; (2) there is no adequate remedy at law; and (3) the judge believes that justice requires it. The purchaser must also show as a condition precedent to specific performance that it either paid the contract sum, was ready, willing and able to do so or that it was excused from doing so. Here, Invego provided evidence that it obtained a loan sufficient to purchase the property and the loan was available for ten years. The appellate court reversed because there was clear and convincing evidence that Invego was ready, willing and able to close.

When a debtor refinances a mortgage in first position, the holder of the new mortgage is only entitled to equitable subrogation to the extent a junior lienholder is in no worse position than it was before the original first mortgage was discharged.
Aurora Loan Services, LLC. v. Senchuk, 36 So. 3d 716 (Fla. 1st DCA 2010)

The debtor executed a first mortgage in favor of Wells Fargo Bank. The debtor then executed a second mortgage in favor of John and Carmen Barry ("Barrys"). Later, the debtor refinanced the property which resulted in a mortgage in favor of Aurora Loan Services ("Aurora"). The debtor did not pay off the Barrys' loan even though the debtor

continued, page 37

received sufficient cash from the refinance to do so. The debtor defaulted on both Aurora's loan and the Barrys' loan. Aurora initiated foreclosure proceedings and the Barrys sought summary judgment finding that the Barrys' loan was first in priority based on Florida's recording statutes. Aurora argued that it was in first position based on equitable subrogation. The trial court granted summary judgment in favor of the Barrys, finding that the Barrys' loan was in first position.

Equitable subrogation has been employed to allow creditors refinancing a first mortgage to retain first position provided that the refinance does not place the holder of a junior lien in a worse position than if the prior first mortgage had not been discharged. Aurora argued that it was only entitled to equitable subrogation for the amount due and owning on the first mortgage. In other words, Aurora conceded that it was not entitled to equitable subrogation for the portion of the loan that was above the amount of the original mortgage which the debtor received as a result of the refinance. The appellate court agreed and reversed the trial court's final judgment of foreclosure, finding that Aurora's loan (limited to the amount of the original first mortgage) was in first position.

The mortgagee's failure to conclusively establish that it is the lawful owner and holder of the note precludes summary judgment.

Riggs v. Aurora Loan Services, LLC, 36 So. 3d 932 (Fla. 4th DCA 2010)

Aurora Loan Services, LLC ("Aurora") filed a foreclosure action against Jerry Riggs ("Riggs"). The promissory note reflected that Mangus Financial Corporation was the holder of the note. On the promissory note there was a blank line where the name of the assignee should have been. The trial court granted summary judgment over Riggs' objection that Aurora's status as the "lawful owner and holder" of the note was not conclusively established. The appellate court agreed with Riggs and reversed, finding that the blank, unsigned and unauthorized endorsement created a genuine issue of fact as to whether Aurora was the lawful owner and holder of the promissory note.

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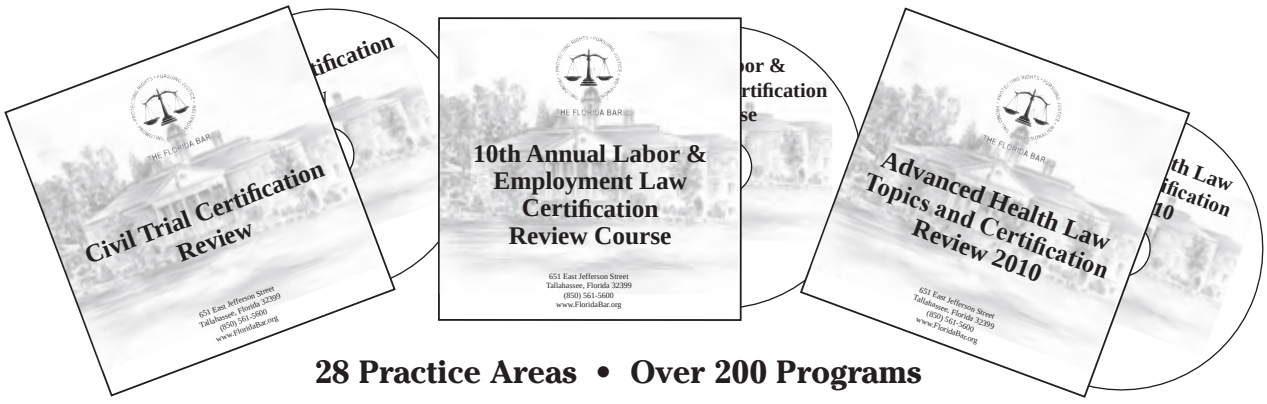

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Opening Remarks
Lester B. Law, Naples – Program Co-Chair
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8:55 a.m. – 9:40 a.m.
Charging Order Status and Planning After Olmstead
Alan Gassman, Clearwater
Tom Wells, Miami

9:40 a.m. – 10:10 a.m.
Asset Protection Trusts: Here, There, If not, Where?
Jerome L. Wolf, Boca Raton

10:10 a.m. – 10:40 a.m.
The Difference Between Modification and Reformation Can be Unexpected Taxes
Deborah L. Russell, Naples

10:40 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 11:30 a.m.
The Law Changes, Whom Do You Tell
Charles I. Nash, Melbourne

11:30 a.m. – 12:00 p.m.
Planning Considerations for Out-of-State Property
Patrick J. Lannon, Miami

12:00 p.m. – 1:15 p.m.
Lunch (on your own)

1:15 p.m. – 1:45 p.m.
Roth IRAs – Deciding Whether to Roth Your Traditional IRA or Give it to Charity?
Lester B. Law, Naples

1:45 p.m. – 2:15 p.m.
Using Trusts in Roth IRA Planning
Kristin M. Lynch, Ft. Lauderdale
Linda S. Griffin, Clearwater

2:15 p.m. – 2:45 p.m.
Proliferation of a Potpourri of Post-Petter-Planning Techniques
Richard Franklin, Washington, DC

2:45 p.m. – 3:05 p.m. **Break**

3:05 p.m. – 3:35 p.m.
Recent Developments in Charitable Planning
Ramsay Slugg, Dallas-Ft. Worth, TX

3:35 p.m. – 5:00 p.m.
Hot Topics – The Future of the Estate Tax and Planning for the Balance of 2010 and Beyond
Richard Franklin, Washington, DC
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Carolyn Bell, West Palm Beach; Susan J. Tarbe, Miami; Franklin Zemel, Ft. Lauderdale
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Ethics of Practice in a Global Economy
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Working With Ethically Challenged Attorneys
Deborah A'Hearn, Largo; Joseph Corsmeier, Clearwater, Franklin Zemel, Ft. Lauderdale
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What's Happening Within the Section...

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

THE PROBATE TEAM 2010
October 22 - 23, 2010
Caribe Royale All-Suite Hotel – Orlando, Florida
Reservation Phone: (800) 823-8300
Room Rate: $129.00 (Queen-Double Suite)
$149.00 (King Deluxe Suite)
Cut-off Date: September 17, 2010
Course Registration: (850) 561-5619

EXECUTIVE COUNCIL MEETING

November 3 - 7, 2010
Sandpearl Resort
Clearwater Beach, FL
Reservation Phone # (877) 726-3111
Room Rate: $199.00
Cut-off Date: October 1, 2010

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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REPORT ON STANDARDS FOR THIRD-PARTY LEGAL OPINIONS OF FLORIDA COUNSEL PUBLISHED

On January 21, 2010, the Legal Opinion Standards Committee of the Business Law Section of The Florida Bar and the Legal Opinions Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (the "Committees") published the exposure draft of their "Report on Standards for Third-Party Legal Opinions of Florida Counsel (the "Report"). The Report is intended to provide guidance as to the nature and meaning of the content of legal opinions and to articulate the diligence required to render such opinions. A copy of the Report can be found on the website of The Florida Bar Business Law Section and on the website of the Real Property, Probate and Trust Law Section.

FLOOD INSURANCE PROGRAM EXTENDED TO SEPT. 30

The President signed into law the extension of the National Flood Insurance Program through September 30, 2010. The extension temporarily cures the existing situation relating to the ability by the Program, which previously lapsed, to issue new flood insurance policies. This extension permits existing real estate closings on hold for lack of flood insurance coverage to now close, as well as new policies to be issued through September 30, 2010. For further information please visit *http://www.fema.gov/business/nfip/* or *www.floodsmart.gov*.

ARTICLES

... for the next issue of ActionLine are being accepted.

Contact:

jrcactionline@gmail.com

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.)

This issue of ActionLine has been printed on RECYCLED PAPER with soy-based ink!