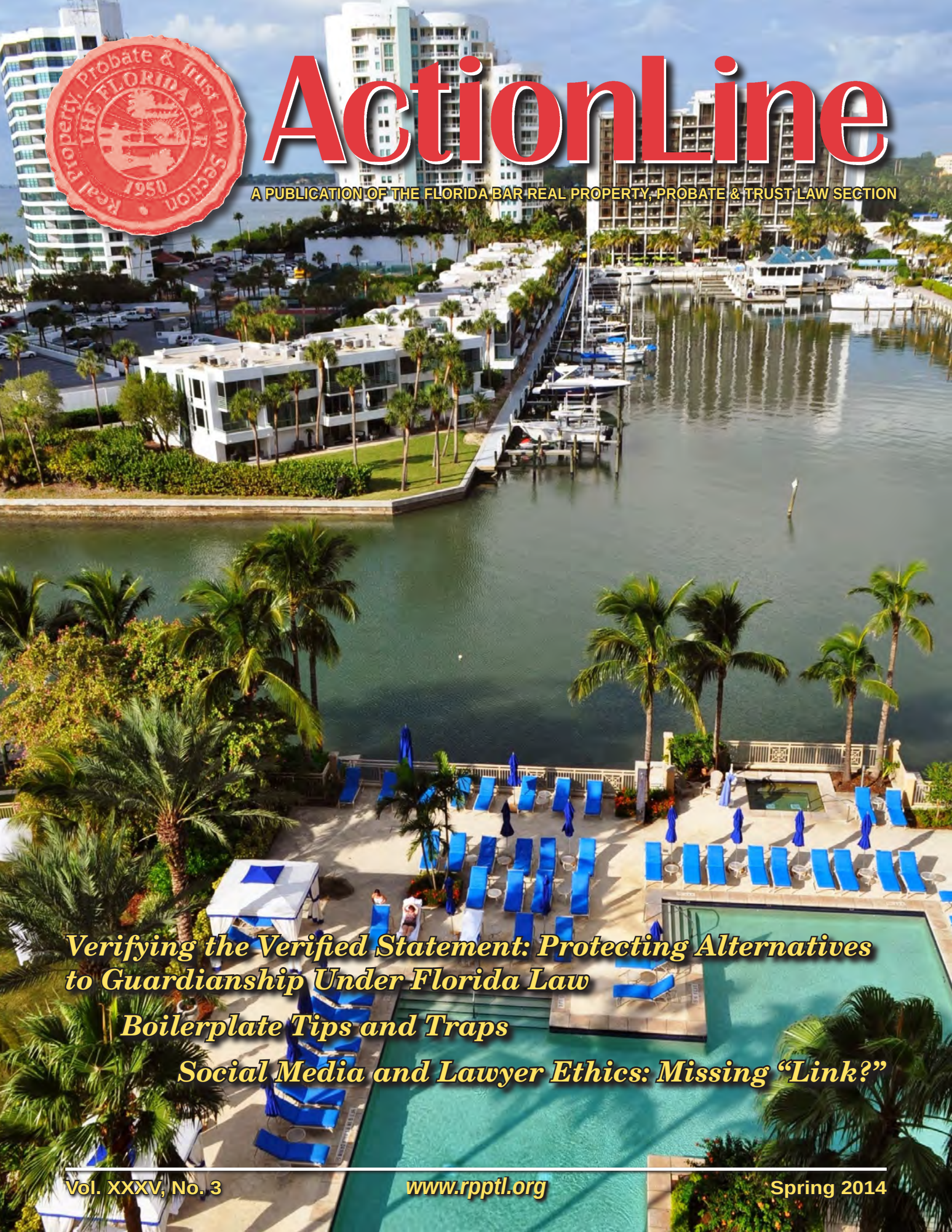


ActionLine

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

Verifying the Verified Statement: Protecting Alternatives to Guardianship Under Florida Law

Boilerplate Tips and Traps

Social Media and Lawyer Ethics: Missing "Link?"

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The Back Row – Once A Leader, Always A Leader and More

The 250 member RPPTL executive council meets 5 times per year in a hotel ballroom set up as a classroom. The last row of tables is reserved for the past chairs of the Section, who are affectionately referred to as the "Back Row." In many organizations, the leader has no formal or informal role after his or her term expires. That is not the case with the Section. Our former leaders have an established role in grooming, mentoring and selecting our future leaders.

At the end of their term, each Section chair automatically becomes a permanent member of the executive council and a member of the long range planning committee. This committee convenes annually in February to consider and nominate for election the chair-elect, director of the real property law division, director of the probate and trust law division, secretary, treasurer, director of the at-large members, the at-large members and the representatives for our out-of-state members. The committee is able to make informed recommendations for future leaders because most of the Section's former chairs remain active in the Section participating in its executive council meetings, its general and substantive committees, its educational programs and social activities. This allows our past chairs many opportunities to observe first hand and mentor those they are considering for leadership positions.



CHAIR'S COLUMN

By Margaret "Peggy" Rolando

Section Chair, 2013- 2014

The Back Row is respected for its institutional – and encyclopedic -- memory of RPPTL's legal positions, history and traditions, it is also known for its humor, strong opinions and continued contributions to the Section, local communities, The Florida Bar, ABA's Real Property, Probate and Trust Law Section and other highly selective legal organizations, such as American College of Real Estate Lawyers (ACREL), American College of Trust and Estate Counsel (ACTEC), and American College of Construction Lawyers.

Almost without exception, the Back Row members continue to be fully engaged in the Section's substantive and standing committees. Their expertise, judgment and work product inform the committees' deliberations, CLE programs, and legislative proposals.

John Arthur Jones *(Chair 1980-81)* set the gold standard with his contributions. Now in his 65th year as a lawyer, he continues to attend executive council meetings, most recently our meeting in November 2013 at the Sarasota Ritz Carlton. In addition to his significant contributions to banking, probate and trust laws, he is legendary for his history of mentoring probate and trust lawyers throughout the state and developing Section leaders. In his role as Chairman of the Florida Probate and Guardianship Forms Committee for 25 years, he assisted thousands of Florida practitioners who relied on these forms. In honor of his many years of service to the Section, the annual service award was named the John Arthur Jones Service Award in 2012.

Other Section chairs well known for recruiting and mentoring members of the executive council include **Ruth Barnes Kinsolving** *(1995-96),* **Julie Williamson** *(1997-98),* **G. Thomas Smith** *(1999-00),* **Steven L. Hearn** *(2002-03),* **Louis B. Guttmann** *(2003-04),* **Laird A. Lile** *(2004-05),* **Julius "Jay" Zschau** *(2005-06),* **George J. Meyer** *(2011-12)* and **William F. Belcher** *(2012-13).*

At times, a former chair returns to head a committee in his area of expertise. **Edward F. Koren** *(1988-89)* has led the Section's influential Principal & Income Committee for years. **Robert W. Goldman** *(1996-97)* has co-chaired the Section's highly regarded Amicus Committee for almost 15 years. Periodically, the Section is invited by state appellate courts to submit amicus briefs in the areas of real property, probate, trust, estate and construction law. On other occasions, we request permission to file an amicus. Our amicus briefs are admired for being concise and well written. They are narrowly focused and include an informed discussion of the law and recommend a position in light of best practices. The Section's amicus briefs are often favorably cited in the courts' opinions.

When **J. Michael Swaine** *(2001-02)* led the Section, he was especially attentive to our sponsors and exhibitors. Fittingly, he is now a vice chair of our Sponsors Coordination Committee. Former chair **Joan Bradbury Kayser** *(1986-87)* is director of trust & estate services with Harris Private Bank, sponsor of the Probate Roundtable at the Executive Council meetings.

The Section regularly relies on past chairs to address sensitive or high profile issues. Last year, Fletch Belcher created the Special Subcommittee on Integrity Awareness and Coordination to deal with potential conflicts of issue in the Section. This subcommittee is co-chaired by **Jerry E. Aron** *(1991-92)* and **Sandra F. Diamond** *(2008-09)*. Fletch is an active member of the committee. **Roland D. "Chip" Waller** *(1993-94)* is an outspoken and thoughtful advocate for the small firm practitioner and retail consumer of legal services. He led the Section's Ad Hoc Trust Account Issues Committee when it addressed whether non-lawyers should

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

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ABOUT THE COVER:

View from balcony at Ritz Carlton in Sarasota.

Photo by John Neukamm.

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Get Included in *ActionLine!*

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

ARTICLES: Forward any proposed article or news of note to Silvia Rojas at srojas@thefund.com . Deadlines for all submissions are as follows:

ISSUE	DEADLINE
Spring	January 31
Summer	April 30
Fall	July 31
Winter	October 31

ADVERTISING: For information on advertising, please contact Shari Ben Moussa at sbm@katzbarron.com

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Kelly Nicole Catoe at kcatoe@hnh-law.com

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

RPPTL Section members Honored as Recipients of The President's Pro Bono Service Award for 2014

Congratulations to the following Real Property, Probate and Trust Law Section members for having been recognized by the Supreme Court of Florida as recipients of The President's Pro Bono Service Award for 2014:

Timothy G. Hains (20th Judicial Circuit) has practiced as an attorney in Florida since 1974 and is currently a partner with Quarles & Brady, LLP, in Naples. He was managing partner at the firm from 2000 to 2011. He has been Board Certified in Real Estate by The Florida Bar since 1987. His practice focuses on real property law. Quarles & Brady has been a leading local firm in supporting and promoting legal aid and pro bono service. As Hains began to wind down his caseload after many years of service, he and his firm approached Legal Aid Service of Collier County in 2012, offering services as a pro bono attorney. From January through October of 2013, Hains handled 12 pro bono cases and provided more than 28 hours of pro bono service. He continues to handle ongoing cases.

Michael Harshman (12th Judicial Circuit) is currently a member of the Najmy-Thompson law firm in Lakewood Ranch. Harshman began his involvement with Legal Aid of Manasota, Inc., in 2011. Within three years, he has accomplished an extraordinary amount of pro bono work, devoting more than 1,100 service hours to clients in need. Through Legal Aid of Manasota, Harshman has seen more than 100 clients and has helped people facing foreclosure, divorce, custody matters, paternity and victims of domestic violence seeking orders of protection. He has also provided free mediation services to indigent families in both the areas of foreclosure and family law.

David Mangiero (11th Judicial Circuit) is a partner in the law firm of Palmer, Palmer & Mangiero in Miami. His principal areas of practice include wills and trusts, estate trust and guardianship administration, probate, trust and guardianship litigation, special needs trusts, Medicaid planning and real estate. Since 2006, Mangiero has provided well more than 1,000 hours in pro bono legal services to the Guardianship Program of Dade County, Dade Legal Aid/Put Something Back and to his clients. He has also contributed more than 1,140 hours of service to the legal community, religious organizations, civic organizations and other charities/schools.

Joseph M. Mason (5th Judicial Circuit) is in private practice in the firm McGee & Mason, P.A., practicing real estate development and litigation law. He provides pro bono services through Community Legal Services of Mid-Florida Inc. and the Legal Advocacy Center of Central Florida. Mason began volunteering with Community Legal Services more than 15 years ago. In 2000, he was appointed to the board of directors and served as board president from 2002 until 2004. When Withlacoochee Area Legal Services merged with Central Florida Legal Services and Greater Orlando Area Legal Services to form Community Legal Services in 2004, Mason continued to serve on the board of directors. He also serves on the board of directors of the Legal Advocacy Center, the sister organization to Community Legal Services. In 2003, he served on the Legal Services Corporation Region 3 Consolidation Task Force, which oversaw the merger of the three programs that became Community Legal Services.

Stephen B. Moss (17th Judicial Circuit) is a partner in the Fort Lauderdale office of Holland & Knight. He practices in the areas of development law, hotel development and operations, title insurance and business law. Two years ago, United Way of Broward County tapped Moss to help them create a comprehensive program to support the area's military service members, veterans and their families. More than 11,000 Operation Iraqi Freedom and Operation Enduring Freedom veterans live in Broward County. Launched on Jan. 30, 2013, MISSION UNITED is a partnership between United Way of Broward County and the American Red Cross. It is a unique, community-based program that supports veterans as they re-acclimate to civilian life. Moss worked more than 550 pro bono hours in 2013 getting the program off to a good start. He has galvanized community support and created a structured system of public and private services in the areas of employment, health care, housing, education and legal matters.

For additional information on each recipient, you can review the program at the following link if you are viewing this magazine online: 2014 Recipients of Pro Bono Service Awards - Program Guide or search "*2014 Pro Bono Service Award Program – The Florida Bar*" for the online pdf link. The above are excerpts from the program.

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be allowed to sign attorney trust account checks and under what circumstances.

Jerry Aron became chair of the Ad Hoc Trust Account Issues Committee in 2012 with the mission of persuading The Florida Bar's Professional Ethics Committee that audits of separate real estate trust accounts by title insurance underwriters should be permitted as being in the best interest of the client. The Section had reached this conclusion after careful consideration of the opposing view. Jerry led the committee's efforts with well-crafted letters to and repeated appearances before the PEC. **John B. Neukamm** *(2009-10)* joined Jerry in 2013 as co-chair of the committee and was able to convince the PEC to modify its Proposed Advisory Opinion 12-4 to add the following sentence: "In recognition of the value of title insurance underwriter audits in assuring the safety and proper disbursement of funds deposited into a special trust account, it may be reasonable for an attorney to conclude that such an audit would be reasonably necessary to serve the affected client's interests."

David C. Brennan *(1987-88)* has been a statewide leader in the guardianship law and practical challenges facing guardians. He currently chairs the Section's Ad Hoc Guardianship Law Revision Committee that has embarked on a comprehensive review, analysis and reconsideration of the guardianship laws in Florida.

When the Section was approached in 2011 by State Representatives Kathleen Passidomo and George Moraitis about participating in a working group they were assembling to formulate legislation on foreclosure reforms, the Section turned to Jerry Aron to participate in the working group and to lead our Ad Hoc Foreclosure Reform Committee. The committee advised the legislators on possible solutions to address the consequences of the foreclosure crisis and assisted with drafting the proposed legislation.

In 2008, the Section tapped **Melissa Murphy** *(2007-08)* to serve on the Title Insurance Study Advisory Council which examined the industry, its practices, agent licensing and premiums. She assisted in developing the Section's extensive recommendations to the Advisory Council. Melissa also chaired the Title Insurance Committee during a critical period when the title insurance industry was under scrutiny by the Legislature.

Sandy Diamond was an influential voice on the Florida Supreme Court's Taskforce on Residential Foreclosures (2008–2009) when it dealt with the foreclosure crisis that grew out of the economic downturn.

Some of our committees are formed as a result of a past chair's initiative to improve the Section's processes or deliberations. For example, John Neukamm started the Meeting Planning Committee and served as its first chair. The purpose of the committee is to assist the Chair and Chair Elect in planning the executive council meetings occurring during their term. The committee also reviews contracts with hotels and other event venues and learns from the past chairs' collective experience. John was instrumental in developing a calendar of events to avoid conflicts between RPPTL executive council meetings and meetings of ACREL, ACTEC, ABA, religious holidays – and his beloved Gator football games. George Meyer was the obvious choice to assume leadership of this committee in light of his skill in reviewing and negotiating contracts with hotels and other venues. George has also developed a protocol for evaluating meeting sites.

The Section's mission includes presenting top notch continuing legal education programs. All of the former chairs have extensive experience planning, producing, writing for and speaking at Section sponsored seminars. A few of our past chairs have gone beyond the customary topics and format. **Rohan Kelley** *(2006-07)* was an early proponent of e-filing and e-service and led the Section's efforts to encourage a uniform statewide electronic filing system. Rohan and Laird Lile co-chaired the Section's Florida Electronic Filing & Service Committee and worked to publicize the then novel e-service requirements. In 2012, they presented a free webinar entitled "*What RPPTL Lawyers Need To Know About E-Filing and E-Service.*" The webinar was an overwhelming success with over 1,300 attendees. The materials and a replay of the webinar were then posted on the Section website (www.rpptl.org). This was an outstanding example of former chairs providing a valuable service to Section members. The Section's coordination with the clerks of the circuit court was led by Laird in his role as our liaison with the clerks of the circuit court.

When the Section's executive council gathered in Lisbon, Portugal, for our out-of-state meeting in September 2013, Julie Williamson organized a fascinating seminar on *Lisbon: Real Law, Real Life – Exploring the Effects of the Economy on our Practice and our "Corporate Responsibility*." She moderated a panel of Portuguese business lawyers and real estate professionals to discuss the legal and business impediments to restructuring the economy and the ethical dilemmas posed by their country's severe recession.

In addition to their continued involvement in the Section committees, members of the Back Row are also leaders in state and national legal and bar organizations. The American Bar Association has benefitted from the leadership of our former chairs Edward F. Koren and Jay Zschau. Ed served as chair of the ABA's Real Property, Probate and Trust Law Section in 2004-2005. Jay has been chair of the ABA's Land Trust Committee and past group chair of the ABA Condominium and Planned Unit Development Committee Group. Ed and Jay also act as the Section's liaisons with the ABA. George Meyer chaired the ABA's Forum on the Construction Industry before he became the Section's chair. He is also a member of American College of Construction Lawyers.

Bruce Stone *(1998-99)* is the current President-Elect of ACTEC, and serves on its Executive Committee and Board of Regents. He is also a member of the Joint Editorial

continued, next page

Board for Uniform Trust and Estate Acts, which monitors and recommends updates to the Uniform Probate Code and the Uniform Trust Code. Laird Lile is also a member of ACTEC's Board of Regents.

Julie Williamson is starting a 3 year term on the Board of Governors of ACREL, and Tom Smith previously served on ACREL's Board.

Two of our past chairs, Sandra Diamond and Laird Lile, significantly raised the Section's profile in The Florida Bar when they were elected to the Board of Governors. They have been especially helpful in giving the Section more representation at the highest level of the Bar.

ACREL counts among its fellows the following former chairs: Jerry E. Aron, **Patrick T. Christiansen** *(1985-86)*, Ruth Barnes Kinsolving, George J. Meyer, Melissa J. Murphy, John B. Neukamm, G. Thomas Smith, J. Michael Swaine, Roland D. "Chip" Waller, Julie A. S. Williamson and Julius J. "Jay" Zschau.

Past chairs who are ACTEC fellows include **Louie N. Adcock, Jr.** *(1992-93)*, William F. Belcher, David C. Brennan, Sandra F. Diamond, **Brian J. Felcoski** *(2010-11)*, Robert W. Goldman, Steven L. Hearn, **Roger O. Isphording** *(1990-91)*, John Arthur Jones, Rohan Kelley, Edward F. Koren, Laird A. Lile, **Bruce Marger** *(1994-95)*, and Bruce Stone.

On the political front, the RPPTL PAC and the Real Property, Probate and Trust Law PAC have benefitted from the leadership and insights of Sandra Diamond, Laird Lile, Chip Waller and Bob Goldman.

Many of our past chairs play significant roles in their local communities. Julie Williamson's involvement in the University of Miami School of Music led to the creation 10 years ago of an annual series of music performances known as St. Martha-Yamaha Concert Series that presents artists from around the world. The series has featured Baroque, classical, jazz and contemporary music at affordable prices. The performances garner great reviews and enthusiastic audiences.

Pat Christiansen has an extensive history of contributing to his community in the areas of transportation and infrastructure. Pat has been a member of the Florida High Speed Rail Commission since 2010 and a long-time member of City of Orlando Transportation Advisory Committee.

Some of our former chairs have joined academia as adjunct professors, training undergraduates as well as law students. For example, Melissa Murphy is adjunct professor at both the Warrington College of Business and the Levin College of Law at the University of Florida. Bruce Stone is an adjunct professor at the University of Miami School of Law, where he teaches in the graduate masters program in estate planning.

With their long history of contributions, our past chairs continue to enhance the effectiveness of the Section. Through their activities in the Section, their communities, The Florida Bar Association, American Bar Association, ACTEC, ACREL and the Forum, the Back Row has burnished the prestige and influence of the Section and opened many doors for members of the Section.



John Neukamm, Steve Hearn and other past RPPTL Chairs enjoying the Back Row

Verifying the Verified Statement: Protecting Alternatives to Guardianship Under Florida Law

By Matthew Triggs, Esq. and Jessica D. Zietz, Esq.
Proskauer Rose LLP, Boca Raton, Florida

When a court has determined that a person is incapacitated, Florida's guardianship laws require the court to "consider and find whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person."[1] Although a revocable trust and durable power of attorney ("DPOA") can serve as alternatives to guardianship, suppose those documents were prepared under circumstances where the settlor/principal had already lost capacity (but was not yet adjudicated) or was the victim of undue influence. Florida's guardianship code contemplates just such a scenario, and it allows an interested person the possibility of precluding consideration of those customary alternatives to guardianship and proceed directly to the guardianship.

Specifically, Florida law provides that neither a trust nor a DPOA can be considered as an alternative to guardianship if an interested person files a verified statement stating: (1) that he has a good-faith belief that the alleged incapacitated person's revocable trust, trust amendment, or DPOA is invalid, and (2) a reasonable factual basis for that belief.[2] If a statement meeting these guidelines is filed with the applicable circuit court, "the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian."[3]

This seems simple enough, in theory. The statutory framework, however, does not set forth any criteria to guide the court with respect to the second element, meaning that there is no guidance in determining whether the interested person has stated "a reasonable factual basis" for his belief that the revocable trust or DPOA is invalid. Thus far, the courts have had little opportunity to provide guidance of their own; currently, just one Florida appellate court has addressed the issue: the Second District Court of Appeal (the "Court") in *Searle v. Bent*.[4]

In *Searle*, the petitioner, Anne, sought to determine the capacity of her elderly mother, Dain. During the guardianship proceedings, Anne filed a verified statement contending that her mother's DPOA and various estate planning documents were invalid as of the date of execution due to either Dain's lack of mental capacity or because the documents were a product of undue influence. Anne's verified statement "contained numerous facts regarding [Dain's] mental and physical condition, as well as findings made by medical experts regarding her mental capacity and need for a guardian."[5]

Following a hearing, the trial court issued an order determining that Dain was incapacitated and required a plenary guardianship. The trial court also concluded, based on "the totality of the evidence," that Anne's verified statement had "established a reasonable factual basis to believe that Ms. Searle's trust, trust amendments, and durable power of attorney were invalid and thus not an alternative to guardianship."[6]

On appeal, Dain argued that the trial court erred in relying on Anne's verified statement and in essentially invalidating her estate plan. The Court disagreed, noting that the trial court had complied with the clear, unambiguous language of the statute. The Court also explained that the trial court had not invalidated Dain's estate plan, but instead held only that the estate planning documents could not be used as an alternative to guardianship. As the trial court observed:

> The court is not required to determine the validity of the challenged documents at this time and renders no opinion on the truth or falsity, sufficiency or insufficiency of the allegations. In accordance with this finding of good faith and reasonable factual basis, the court may not deem the trust, the trust amendment or the durable power of attorney alternatives to the appointment of a guardian.[7]

Thus, the *Searle* opinion confirms that a comprehensive verified statement will preclude consideration of a revocable trust, trust amendment, or DPOA as an alternative to guardianship. What happens, however, when a statement offered by an interested person is either not so robust or does not offer concrete evidence of a current incapacity, but rests largely on supposition as to incapacity or undue influence when the revocable trust or DPOA was executed? In those circumstances, should the holder of the DPOA or the trustee be permitted to challenge whether a "reasonable factual basis" has been shown?

Searle offers some hints that, when evaluating a verified statement, courts can consider evidence beyond the statement itself. In the trial court's order, affirmed by the appellate court, the judge reasoned:

> The court does not believe that the naked act of filing the affidavit should automatically jettison valid documents and render meaningless an individual's existing estate plan. To do so, without notice and an opportunity to be heard at the time of the incapacity determination, strikes the court as a due process violation worthy of some constitutional concern. At the very least, this court believes that the affidavit should be subject to some scrutiny to establish to the court that the affiant did have a "good faith belief" and "a reasonable factual basis for that belief."[8]

If such an inquiry is undertaken, what type of evidence could be proffered to refute the supposed "reasonable

factual basis" for the allegations in the verified statement? Presumably the legislature did not intend for § 744.331(6)(f), Fla. Stat., to turn a guardianship proceeding into a mini-trial with respect to capacity and undue influence with respect to the execution of the revocable trust or DPOA. Thus, even assuming that the drafter testifies as to capacity at the time of the execution of those documents, that testimony would not necessarily refute the existence of a "reasonable factual basis" for the belief that the documents are invalid. After all, the test is not whether the documents in question are, in fact, invalid. Indeed, the legislature's requirement of a showing of a reasonable factual basis suggests that the drafter's testimony would be largely misplaced in such a proceeding. Weighing the competing concerns of protecting the incapacitated person from possible further exploitation versus avoiding the cost, expense, and loss of rights associated with a guardianship through the use of alternative measures, the legislature appears to have concluded that protection of the incapacitated person should be paramount.

As noted above, the statutory framework does not specify the criteria for a court to follow in making its determination. Neither the statute nor the Florida Probate Rules lay out the procedure to be followed when a challenge is made. For example, should a challenger be permitted discovery as to the allegations in the verified statement? Should an interested person be permitted to present evidence that he or she refutes the purported reasonable factual basis? Provided that the focus of the challenge centers on whether the filer had a reasonable factual basis, it does not seem to require a great leap to reach the conclusion that both might be permissible without running afoul of the purposes behind § 744.331(6)(b), Fla. Stat.

Perhaps the final unanswered question centers on the form in which a challenge is made. Certainly a motion to strike that challenges the strength of the verified statement would squarely present the issue. Given the seemingly self-executing nature of the verified statement, however, it would appear that the challenger must take some affirmative step to raise the issue.

These issues belie the seemingly short, straightforward language of § 744.331(6)(b), Fla. Stat. Without guidance from the legislature, courts considering these verified statements should strive for a fair approach that adheres to the statute while considering the rights of the incapacitated person.



M. TRIGGS



J. ZIETZ

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Jessica Zietz is an associate in the litigation department of Proskauer Rose LLP in Boca Raton. She concentrates her practice in probate and commercial litigation. Prior to joining Proskauer, Jessica served as a law clerk to the Honorable Robin S. Rosenbaum in the United States District Court for the Southern District of Florida.

Endnotes

1 See § 744.331(6)(b), Fla. Stat.
2 See § 744.331(6)(f), Fla. Stat.
3 *Id.*
4 *Searle v. Bent*, 2013 WL 5225218 (Fla. 2d DCA Sept. 18, 2013).
5 *Id.* at *1.
6 *Id.*
7 *Id.* at *2.
8 *In Re: The Matter of Searle*, Sixth Judicial Circuit Court in and for Pinellas County, Florida, Case No.: 10-394-IN-004, at 30.

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BOILERPLATE TIPS AND TRAPS

By Adele I. Stone, Esq., Fort Lauderdale, Florida
and Richard Eckhard, Esq., Tampa, Florida

IN THE BEGINNING

The term "Boilerplate" was used in the printing industry to refer to unalterable, steel-capped plates on which widely-used text was printed. Because the term migrated from the printing industry, it was adapted by lawyers to refer to those provisions which did not change from contract to contract. This article will explore certain boilerplate provisions and the cases which turned on the courts' interpretation of same.

SOME STANDARD BOILERPLATE PROVISIONS

A. TIME IS OF THE ESSENCE

Time is of the essence means that time is so material that timely compliance is essential to the right to require counter-performance.[1] It does not simply mean that delay will give rise to a right of action against that party, although the breach of any promise in a contract, including one dealing with the time of performance, has that result. Where time is of the essence, prompt performance is essential, and late performance gives rise in the innocent party to a right of rescission.[2] Where time is not of the essence, a reasonable delay does not constitute a breach of contract.[3] If time is not of the essence, then the obligor has a reasonable period in which to tender performance after the specified date.[4]

Time is of the essence can be expressed or implied. If a contract expressly states that time is of the essence, courts in Florida will enforce the intent of the parties.

In *Garcia v. Alfonso*, the seller of real estate appealed a judgment granting the buyer specific performance.[5] The contract gave the buyer 30 days from the effective date to obtain financing, and the seller canceled the contract when the buyer failed to timely satisfy that condition. The buyer did obtain financing within 47 days after the date of the contract, and the trial court found that performance to be timely.

In reversing the trial court, the 3rd DCA noted that the contract contained a time is of the essence provision, and that the seller's mortgagee was proceeding with a foreclosure action. In this situation, the appellate court concluded that the time is of the essence clause was not a "stock phrase" but was intended to permit the seller to immediately cancel the contract and obtain another purchaser if the buyer failed to timely perform.[6]

However, the presence of a time is of the essence provision does not mean that a court will apply that clause to all contract obligations. Instead, courts will recognize the express intent of the parties.[7]

In *Arvilla Motel v. Shriner*, the 2nd DCA explained a court's task in interpreting a time is of the essence provision:

> A "time is of the essence" clause is not necessarily a "stock phrase." *Rybovich Boat Works, Inc. v. Atkins*, 587 So. 2d 519, 521 (Fla. 4th DCA 1991). Where it clearly appears from the contract that time is essential, courts will recognize the parties' expressed intention. *Id*. However, this court warned against trying to 'achieve this result by merely putting into the contract the words "time is of the essence of this contract." ' *Jackson v. Holmes*, 307 So. 2d 470, 472 (Fla. 2d DCA 1975). '[T]o give effect to such a cryptic provision, [the court must know]: What performance at what time is a condition of which party's duty to do what?' *Id*. at 472 (quoting 3A Corbin, *Contracts* § 715).[8]

The *Arvilla Motel* court cautioned against applying a general time is of the essence provision "to all of the many promises for sundry performance, varying in amount and importance,"[9] because parties often insert the provision in the contract without any realization of its significance. "In short, a 'time is of the essence' provision will be given effect in an equitable proceeding [provided] it is shown to be clearly applicable to the contract requirement against which it is sought to be applied."[10]

If the presence of a time is of the essence clause does not mean that time is of the essence to all provisions in the contract, neither does the absence of a time is of the essence clause mean that time is not of the essence to any provision in the contract.

As the 4th DCA explained in *Sublime Inc. v. Boardman's Inc.*, in the absence of an express provision, a court will conclude that "time is considered to be of the essence … where [it] may be determined from the nature of the subject matter of the contract, or where treating time as non-essential would produce a hardship, or where notice has been given to the defaulting party requiring that the contract be performed within a stated time, which must be a reasonable time according to the circumstances."[11]

The appellate court extended its analysis to the conduct of the parties in *Kushnir Hotels v. Durso*.[12] The appellate court upheld the trial court's determination that, notwithstanding the absence of a time is of the essence provision in the contract, the parties' behavior during the negotiation of the contract and leading up to closing was sufficient to establish that time was of the essence to the parties' obligation to close the transaction on the stated closing date. In *Kushnir*, the purchaser failed to attend closing on the closing date specified in the contract despite seller's repeated warnings that it would not agree to an extension of that date.

Florida courts examine the materiality of contract dates. In *Command Security Corp. v. Moffa*,[13] the purchaser of certain assets had the right under the asset purchase agreement to seek adjustment of the purchase price if the assets "underperformed" (if actual revenues were less than target revenues). Specifically, the agreement provided that

continued, next page

the purchaser triggered the readjustment process by notifying the seller of asset revenues for a defined period within 45 days after the expiration of that period. The purchaser did not deliver that statement until 67 days after the expiration of that period (22 days late).

Quoting *Ballen v. Potter*, the 4th DCA stated that "[p]lacing in the contract the mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract."[14] The *Command Security* court found no evidence of hardship in the record as a result of the 22-day delay, and therefore, refused to imply that time was of the essence.

Although the absence of a time is of the essence provision does not necessarily mean that timely performance is irrelevant and inessential, the party seeking court determination that the parties intended that time be of the essence has a difficult task. As the 2nd DCA court in *National Exhibition Co. v. Ball* [15] said:

> The modern trend of decisions concerning brief delays by one party in performance of a contract or conditions thereunder, in the absence of an express stipulation in the contract that time is of the essence, is to not treat such delays as a failure of a constructive condition discharging the other party unless performance on time was clearly an essential and vital part of the bargain. Generally, as to land sale contracts, time is not of the essence for the reason that no substantial injury will normally result from the breach of a time term and it is therefore just to enforce the contract with due allowance for any damage rather than to discharge the party aggrieved by the failure to perform strictly on time.[16]

While no precise words are required to make time of the essence of the contract, a contract's intrinsic nature, the circumstances of its execution, the conduct of the parties, the fact of substantial partial performance, and the inequity of a refusal to grant specific performance when it results in forfeiture repugnant to equity, are all circumstances to consider in determining whether or not time is of the essence.[17] Of course, even an express time is of the essence provision can be waived by conduct of the parties.[18]

In lieu of including a time is of the essence clause in contract boilerplate language, consider identifying only those obligations that must be performed timely to provide the obligee the benefit of its bargain, include a specific due date for performance, clearly specify that time is of the essence as to those obligations, and identify the effect of untimely performance. But recognize that even the best drafted time is of the essence provision can be defeated by waiver and estoppel, excusable delay, and/or fraud.

B. BEST vs. REASONABLE EFFORTS

What is the difference between best efforts, reasonable efforts, diligent efforts, and good faith efforts? Many lawyers believe that a best efforts standard requires the obligor to consume all of its resources (possibly to the point of bankruptcy) and do everything in its power to perform the pertinent obligation. But if best efforts is something more or something different than reasonable efforts, what exists beyond reasonable efforts? Efforts beyond reasonable are by definition unreasonable; is that what best efforts means?

Case law does not generally distinguish between best efforts, reasonable efforts, diligent efforts, and good faith efforts.[19] *Ashokan Water Services, Inc. v. New Start, LLC* provides an excellent summary of case law on the issue, beginning with Judge Friendly's comment[20] that "New York law is far from clear" on the meaning of "best efforts." While acknowledging cases that vaguely describe best efforts as requiring greater than ordinary and diligent care, the *Ashokan* court concludes that those cases fail to articulate the difference among those standards. The court notes that, in applying the best efforts standards, courts typically measure adherence to that standard by requiring the use of "due diligence," "reasonable efforts," and "good faith."[21]

As a general matter, courts are more receptive to analyzing all of the facts and circumstances "including any hurdles that had to be overcome"[22] in determining a best efforts provision. As stated in a 10th Circuit case from 1976 and restated by the Court of Appeals in Utah,[23] "[a] 'best efforts' obligation does not require [defendant] to accomplish a given objective…. Rather, it requires [defendant] to make a diligent, reasonable[,] and good faith effort to accomplish that objective."[24]

Florida courts are no more instructive in defining "best efforts." The 4th DCA in *First Nat'l Bank of Lake Park v. Gay*[25] acknowledged that Florida law provides no clear definition of "best efforts." In that case, a commercial tenant sued its landlord for the landlord's failure to use best efforts to terminate the rights of the prior tenant in the premises as required under the lease. The trial court rejected the plaintiff's proposed jury instructions,[26] which defined best efforts as imposing a legal duty of performance more demanding than mere competence, due diligence, or good faith:

> It requires the party owing the duty to take all action and do all things necessary to consummate the transaction contemplated by the agreement. 'Best efforts' means maximizing the contractual benefits of the person to whom the duty is owed even if the benefits to the one owing the duty are reduced. If the duty of best efforts is owed, it must be performed even at a loss.[27]

The court noted that the definition of best efforts may vary depending on the circumstances of the transaction and the intent of the parties, and where that interpretation of that phrase is in dispute, it is a question for the jury.[28] Note, however, that in a concurring opinion, Judge Farmer concluded that best efforts must mean something more than mere good-faith duly diligent performance of the contract,

and, in his opinion, imposes upon the obligor a duty to use all of his or her skills, talents, and available resources to achieve the stated purpose.[29]

The United States District Court in South Florida recently wrestled with the term best efforts in *Chen v. Cayman Arts, Inc.*,[30] which involved a renewed motion for summary judgment whereby an artist plaintiff claimed his employer failed to use its best efforts to promote plaintiff's work, as required under their employment agreement. Citing the employer's failure to conclude a deal with a publisher seeking to engage the artist to illustrate a manuscript, the plaintiff claimed that the employer's unreasonable demands of the publisher caused the publisher to engage a different artist. The employer claimed that the term best efforts was mere boilerplate, and in any event, was intended to impose upon the employer no greater obligation than to use reasonable efforts. The court did not offer its interpretation of that term, instead noting that the disputed interpretation of a contract term is a question for the jury.

Based upon these cases, you should consider using reasonable efforts in lieu of best efforts, best reasonable efforts, commercially reasonable efforts, or any other permutation. Better still, provide objective, quantitative criteria as to what is required, and clarify that the stated standards are the minimum requirements and not intended to be exclusive. Consider reference to industry practices or past dealings between the parties, and include carve-outs, such as incurring increased costs, violating applicable laws, or filing a lawsuit.

The drafter of a contract should take advantage of the opportunity to craft language memorializing the parties' specific concerns and should not rely upon Florida case law.

C. FORCE MAJEURE

Most real estate contracts contain a provision relieving an obligor from its covenant to perform when a "superior force" or act of God interferes with that performance. However, few practitioners appreciate the important risk allocation effected by these provisions and accordingly fail to give these provisions the attention they warrant.

A simple statement in a contract relieving an obligor from its performance obligation in the event of an act of God or force majeure may not accomplish the intended result. In *Florida Power Corp. v. City of Tallahassee,*[31] the Florida Supreme Court described a high threshold for an obligor seeking to invoke force majeure to avoid an obligation:

> To excuse nonperformance of a contract on the ground of an act of God, there must, even in the absence of statutory provisions, be no admixture of negligence or want of diligence, judgment, or skill on the part of the promisor. An act of God, such as will excuse nonperformance of a legal contract, must be an act or occurrence so extraordinary and unprecedented that human foresight could not foresee or guard against it, and the effect of which could not be prevented or avoided by the exercise of reasonable prudence, diligence, and care or by the use of those means which the situation of the party renders it reasonable that he should employ. It must be the sole proximate cause of the nonperformance, without the participation of man, whether by active intervention or negligence or failure to act. When performance becomes impossible by reason of contingencies which should have been foreseen and provided against in the contract, the promisor is held answerable. Accordingly, a seasonable event, one which is likely to happen and which common prudence would provide for, is not such an extraordinary event as will constitute an act of God excusing nonperformance.[32]

Although the *Florida Power* court concluded that the hurricane which hit Tallahassee on October 7, 1941 and thereby prevented a delivery to the City of electric energy, was an act of God and a legal justification for the non-delivery of electricity as provided in the contract, the foreseeability portion of the standard cited by the Court would seem to have supported a contrary finding.

The Eleventh Circuit in *Stein v. Paradigm Mirasol, LLC,*[33] applying Florida law, noted that delays beyond the control of the obligor have been found to include excessive rain[34] and a heart attack suffered by the president of the obligor entity[35] but not to include delays caused by the obligor's contractor or mistaken assumptions about future pricing of materials.[36]

Clearly, the drafter of a contract should take advantage of the opportunity to craft language memorializing the parties' specific concerns and should not rely upon Florida case law. A well drafted force majeure provision identifies events for which relief will be granted; specifies that relief; and imposes notice requirements upon the party seeking relief.

a. Define the force majeure event.

Typically, a contract defines a force majeure event as a casualty, natural disaster, or other event beyond the control of the party. The drafter should go beyond that and name specific occurrences in the contemplation of the parties. For example, "a Force Majeure event means an event that is beyond the control of a party, including, without limitation, hurricanes, earthquakes, floods, wind storms, tornadoes, acts of terrorism, war, restrictive governmental laws or regulations, fire, strikes, lockouts, labor troubles, civil disorder or other events of a similar or different kind."

If the parties desire to be relieved of an obligation resulting from unusual market forces (e.g., a substantial decrease in availability or substantial increase in price of materials), the drafter should include in the force majeure clause objective criteria specifying what constitutes such an event (e.g., an

increase in the price of steel rebar to above $800 per ton). In the absence of such language, a change in economic conditions generally does not constitute a force majeure.[37]

Force majeure clauses frequently exclude foreseeable events and events the effect of which could have been avoided by taking reasonable measures. However, as almost all force majeure events are generally foreseeable (e.g., Florida hurricanes in late summer), that inclusion may be problematic. If the parties wish to exclude foreseeable events, they should carefully describe the types of required reasonable avoidance measures.

b. Specify the relief provided upon the occurrence of a force majeure event.

The parties should carefully consider the relief afforded an obligor invoking the force majeure clause. For example, the occurrence of a force majeure could permit either party to terminate the contract. Alternatively, a contract could provide that the party's obligation to perform is suspended during the period of force majeure but resumes after the force majeure event ends. Thus, for example, if a contract requires an obligor to perform 15 different obligations, one on each day from September 1st through September 15th, and a force majeure event occurs on September 1st and continues through September 14th, the obligor's performance of all 15 obligations would be due on September 15th. A better approach may be to excuse such performance for the period of force majeure delay and extend the period for performance for a period equivalent to the period of such delay. In that same example, the time for performance of each obligation would be extended for 14 days (for example, the obligation performance of which was due on September 1st would be due on September 15th).

c. Require the party invoking the force majeure clause to promptly notify the other party.

Finally, a force majeure clause should obligate the party invoking the clause to promptly notify the other party, detailing the event claimed to be a force majeure and its impact upon performance. Such notice permits the notified party to assess the impact of the claimed force majeure while it is ongoing (or at least a recent occurrence) and take steps, if possible, to ameliorate the effect of that occurrence. The failure to timely provide such notice could result in the invoking party waiving the right to assert a force majeure or it could preclude extension of time for performance for that portion of the force majeure occurring prior to the required notice.

D. ATTORNEYS' FEES

Florida follows the "American Rule" which dictates that attorneys' fees are only recoverable by the prevailing party in litigation when authorized by agreement of the parties or by statute.[38] Most often a real estate contract will include the customary "prevailing party" attorneys' fee provision wherein the party who prevails in the litigation or other action, is entitled to the recovery of its attorneys' fees from the non-prevailing party. However, before dotting that last "i" and crossing that last "t" on your document, give consideration to whether or not such a provision is appropriate in the context of your client's deal. For example, will such a provision likely empower your client to bring an action? Conversely, would such a provision embolden the other side to file such an action? After explaining the ramifications of such a provision to your client you may find that he or she directs you to exclude same from the contract.

If, however, it is decided to include an attorneys' fee provision, then consider whether or not the scope of the provision should apply to all causes of action whether arising from the four corners of the document or relating to a tangential claim. For the broadest application of an attorneys' fee provision, the phrase "and any action arising out of or relating to" should suffice but for a narrower application, limit the cause of action to which the provision applies. As an example, the provision could be limited to "any action to enforce this contract".

Does an attorneys' fee provision apply to fees incurred by the prevailing party in proving the amount of fees to be awarded in the underlying action? A recent case addressed exactly such issue.[39] In the *Waverly* case, a tenant sued a condominium association over a parking space dispute. The association filed a third-party complaint against the developer, and the court dismissed the complaints with prejudice. The court then awarded the developer fees incurred in the litigation, including fees relating to time spent proving the amount of the underlying fees.

The attorneys' fee provision in the *Waverly* case read as follows:

> *"16. Litigation. In the event of any litigation between the parties under this Agreement, the prevailing party shall be entitled to reasonable attorneys', paralegals' and paraprofessionals' fees and court costs at all trial and appellate levels."*

Based upon the foregoing provision, the developer argued that it was entitled to attorneys' fees incurred in proceedings to determine the amount of fees incurred by the developer in the litigation as a whole. The trial court agreed and awarded all fees incurred in the litigation by the developer including those fees attributable to the time spent in litigating the amount of fees.

The decision in the *Waverly* case is a striking departure from the Florida Supreme Court's decision in *State Farm v. Palma* which quashed the decision of the 4th DCA authorizing attorneys' fees for litigating the amount of fees. While the Court held that attorneys' fees could be awarded for litigating the issue of entitlement, it did not agree with the district court that the attorneys' fees could be awarded for litigating the amount of attorneys' fees under the statute which authorized same. However, in the *Waverly* decision, the court made it clear that the case was distinguishable

from the *State Farm v. Palma* case because the basis for attorneys' fees in the *Waverly* case was a contract provision, not a statute. Thus, *Waverly* reminds us that a carefully drafted attorneys' fee provision can serve to make your client whole if he or she prevails in the action, but one which is too narrowly drafted may leave your client with a deficit.

One might draw the conclusion that if an action to rescind a contract is successful, thus rendering that contract unenforceable, an attorneys' fee provision within that contract could not be enforced. However, Florida courts have recognized that the prevailing party in such a rescission action could recover its attorneys' fees even though the contract is, in fact, rescinded.[40]

In the *Tarr v. Honea* case,[41] the buyer exercised his right to terminate the contract, and a few days later, the buyer tried to rescind his termination, an attempt which the seller rejected. In the litigation filed by the buyer, the trial court found for the seller but denied the seller's motion for fees and costs, reasoning that the buyer's claim was founded on a contract that did not exist because the contract had terminated. The appellate court disagreed and reversed the trial court's decision and remanded the case to the trial court to award reasonable attorneys' fees and costs to the seller.

In a similar 1991 5th DCA case,[42] the trial court found that a real estate listing agreement had been cancelled and not replaced by a new agreement. In this particular case, the broker based his claim on the original listing agreement which did provide for an award of attorneys' fees to the prevailing party. The appellate court in *Gray v. Michael O'Shaughnessy* stated that a cancellation of a contract does not "erase the fact that valid enforceable obligations existed", including provisions relating to attorneys' fees.[43] The appellate court reversed the trial court's finding that the seller, who prevailed, was not entitled to an award of attorneys' fees.[44]

Compare the *Tarr* and the *Gray* cases with a 1999 2nd DCA opinion, *Leo v. MacLeod*,[45] in which the court refused to award attorneys' fees to the prevailing party seeking rescission of a contract based upon a mutual mistake and in a 1990 Florida Supreme Court decision, *David v. Richman,*[46] where the Court affirmed a trial court's denial of a motion for attorneys' fees based on a contract, which was held unenforceable because material elements of the contract were left blank. The Court reasoned that, because the contract was never in effect, an attorneys' fee provision found in such contract could not form the basis for an award of attorneys' fees.[47]

E. INCORPORATION BY REFERENCE

How often do you use the term "incorporated herein by reference" or "attached hereto and made a part hereof"? Be wary of the unintended consequences of such a phrase as is illustrated by the 1990 Florida Supreme Court decision, *OBS Company, Inc. v. Pace Construction Corporation*.[48] In the *OBS Company* case, the subcontractors' contract with the general contractor expressly incorporated the terms of the "Agreement between the Owner and Contractor and the conditions of the Contract between the Owner and Contractor (General Supplementary and other Conditions)". By incorporating the terms of the owner/contractor contract into the contractor/subcontractor contract, an ambiguity was created in that the payment conditions in the contractor/subcontractor contract differed from the payment conditions in the owner/contractor contract. The Court stated:

> *It is a generally accepted rule of contract law that, where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing*.

The Court resolved the ambiguity in favor of the subcontractor and held that, notwithstanding the specific provision in the contractor/subcontractor contract conditioning payment by the contractor on payment by the owner, the contractor was liable to pay the subcontractor, even though the owner had not paid the contractor. While the decision is in good part based on general law favoring payment to subcontractors and may have been decided differently if a subsequently enacted statute had retroactive effect, the case does illustrate the problem created when a contract incorporates the terms of another agreement.

Add to the *OBS Company* case another example of unintended consequences. In *Perdido Key Island Resort Dev., L.L.P. v. Regions Bank,*[49] the parties incorporated a promissory note's terms into the mortgage, the latter of which did not contain an arbitration agreement. However, the promissory note did provide for arbitration and because the promissory note was incorporated by reference into the mortgage, the court in *Perdido Key* held that the parties in fact agreed to arbitrate the mortgage foreclosure as well.[50]

NOT SO BOILERPLATE PROVISIONS

A. TITLE CURE PERIOD

While preprinted forms promulgated for use in residential, and some commercial, transactions have very similar title provisions, most of those can benefit from some tailoring. For example, if a standard title cure provision provides for a blank to be filled in for the number of days the seller is given to cure a title defect, most often the drafter adds "30 days". However 30 days is often not enough time to cure a title defect and in providing too short a period of time, the seller or the buyer may be given an opportunity to terminate the contract, a result which may not be desired by the other party. Therefore, consider the relative strength of the market and whether or not the strategy of limiting the time for the cure benefits your client as the buyer or the seller, and draft accordingly. For example, if the buyer has a strong motivation to purchase the property then the buyer would want to be able to enforce a longer time period for a cure

of title by the seller. Conversely, if the market is a strong "sellers' market" then the seller may not want to be held to a protracted cure period given the probable backup offers the seller will have which may offer a higher price.

In addition to the title cure period, an often negotiated contract term is the seller's obligation, or lack thereof, to cure a title defect if litigation must be instituted to do so. Most sellers in commercial transactions will either refuse to commit to curing any title defect, or will specifically carve out the filing of a court action from an obligation to cure. If the buyer is willing to wait out a possible lengthy lawsuit, he should argue that the title defect is one which the seller should be motivated to cure in any event in order to render the title marketable for sale.

B. LIMITATION OF LIABILITY IN INDEMNIFICATION PROVISIONS

Courts will strictly construe indemnification contracts, and the contract which indemnifies a party against its own wrongful acts is not favored in Florida as illustrated by *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*[51] The decision in the *Poe* case turns on whether or not such provision clearly expressed an intent to indemnify the indemnitee for its own wrongful acts "in clear and unequivocal terms". The specific provision in the *Poe* case read as follows:

> *"The LESSEE assumes all responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, and agrees to hold the COMPANY harmless from all such claims."*

The *Poe* Court held that this language was too general to disclose an intention by the indemnitor to indemnify the indemnitee from the indemnitee's wrongful acts.

In the *Poe* case, the Court distinguished the language of the contract provision from the provision found in *Leonard L. Farber Co. v. Jaksch*,[52] which read as follows:

> "37. INDEMNITY: (a) Lessee shall indemnify LESSOR and save it harmless from suits, actions damages, liability and expense in connection with loss of life, bodily or personal injury or property damage arising from or out of any occurrence in, upon or at or from the Demised Premises or any part thereof, or occasioned wholly or in part by any act or omission of Lessee; its agents, contractors, employees, servants, invitees, licensees or concessionaries, including the sidewalks and common areas and facilities within the Shopping Center development;"
>
> "Addendum to Paragraph 37 – Anything contained in Paragraph 37 hereof to the contrary notwithstanding, Lessor shall not be relieved of any liability resulting solely from the negligence of Lessor or of its agents or employees."

The decision in the *Farber* case hinged on the words "in part" which the court concluded indicated the lessee's intent to indemnify the lessor where they were **jointly** at fault. The *Poe* and the *Farber* cases illustrate the intricacy with which indemnification provisions must be drafted.

FOR YOUR CONSIDERATION

The authors hope that this article will cause you to take a fresh look at your boilerplate language and model provisions. If any lesson at all is to be taken from our analysis, it is that one size does not fit all, and as with deal terms, boilerplate provisions must be tailored to the particular transaction at hand. We are not suggesting that we leave behind our favorite boilerplate provisions but rather, let us give them room to evolve into the twenty-first century and beyond!



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Endnotes

1 15 Williston on Contracts § 46:2 (4th ed.), at 395-97.

2 *Garcia v. Alfonso*, 490 So. 2d 130 (Fla. 3d DCA 1986).

3 *Blaustein v. Weiss*, 409 So. 2d 103 (Fla. 4th DCA 1982); *see also Jackson v. Holmes*, 307 So. 2d 470 (Fla. 2d DCA 1975).

4 *Sublime, Inc. v. Boardman's Inc.,* 849 So. 2d 470 (Fla. 4th DCA 2003).

5 *Garcia,* 490 So. 2d 130.

6 *Id.* at 131 (referencing *Restatement (Second) of Contracts* § 242, comment d (1981), which states that such stock phrases as time is of the essence do not necessarily have the effect of discharging the injured party's duties immediately, although they are to be considered along with other circumstances).

7 *Arvilla Motel, Inc. v. Shriver*, 889 So. 2d 887 (Fla. 2d DCA 2004).

8 *Id.* at 890.

9 *Id.* (quoting *Jackson v. Holmes*, 307 So. 2d 470, 472 (Fla. 2d DCA 1975)).

10 *Id.* at 890 (refusing to apply a time is of the essence clause contained within a paragraph concerning the ultimate closing to a provision concerning bank loan certification).

11 *Sublime, Inc. v. Boardman's Inc.*, 849 So. 2d 470, 471 (Fla. 4th DCA 1982); see also *Treasure Coast, Inc. v. Ludlum Construction Co.*, 760 So. 2d 232 (Fla. 4th DCA 2000) (concluding that time is of the essence to a payment obligation which provided for a due date and a penalty for late payment, notwithstanding the absence of a time is of the essence provision) and *Command Security Corp. v. Moffa*, 84 So. 3d 1097 (Fla. 4th DCA 2012) (holding that a deadline for seeking a post-closing purchase price adjustment was not material to the contract and thus time was not of the essence).

12 *Kushnir Hotels, Inc. v. Durso*, 912 So. 2d 633 (Fla. 4th DCA 2005).

13 *Command Security Corp.,* 84 So. 3d 1097.

14 *Id.*at 1100 (quoting *Ballen v. Potter*, 251 N.Y. 224, 225 (1929)).
15 *National Exhibition Co. v. Ball,* 139 So. 2d 489 (Fla. 2d DCA 1962).
16 *Id.* at 492-93 (*citing* Simpson, Contracts, § 125 pp. 449, 452).
17 See, e.g., *Hayes Mfg. Corp. v. McCauley*, 140 F.2d 187, 190 (6th Cir. 1944); see also *Blaustein v. Weiss*, 409 So. 2d 103 (Fla. 4th DCA 1982).
18 *Coppola Enterprises, Inc. v. Alfone*, 531 So. 2d 334 (Fla. 1988).
19 See, e.g., Corporate Counsel's Quarterly, April 2008, Vol. 24, No. 2, *Best Efforts Clauses*; *Ashokan Water Services, Inc. v. New Start, LLC*, 11 Misc.3d 686, 807 N.Y.S.2d 550 (N.Y. Civ. Ct. 2006) (holding that in the absence of any articulated objective criteria in the parties' agreement which performance could be measured, conclusory assertions were insufficient to demonstrate performance constituted a lack of best efforts).
20 *Id.* at 689 (quoting *Bloor v. Falstaff Brewing Company Corp*., 601 F.2d 609, 613 (2d Cir. 1979)).
21 *Id.* at 689-92.
22 *See, e.g.*, *Mark Technologies Corp. v. Utah Resources International, Inc.*, 147 P.3d 509 (Utah App. 2006).
23 *Id.* at 512 (quoting *United Telecommunications, Inc. v. American Television & Communications Corp*., 536 F.2d 1310, 1318 n. 7 (10th Cir. 1976) (rejecting a challenge to a jury instruction that combined the concepts of diligence and reasonableness in explaining the obligation to use best efforts).
24 *Id.*
25 *First National Bank of Lake Park v. Gay,* 694 So. 2d 784 (Fla. 4th DCA 1997).
26 *Id.* at 787 (quoting the trial court who commented that "the way that reads, you would almost think they have to take an Uzi submachine gun there and say 'end this lease'.").
27 *Id.*
28 *Id.* at 788-89.
29 *Id.* at 790 (Farmer, J., concurring).
30 *Chen v. Cayman Arts, Inc*., 2011 WL 3903158, at *10-11 (S.D.Fla. Sept. 6, 2011); see also *Marquardt Co. v. U.S*., 101 Fed.Cl. 265 (2011) (summarizing that many federal courts concur that where the parties dispute required actions under a best efforts clause, the issue cannot be resolved on summary judgment).
31 *Florida Power Corp. v. City of Tallahassee,* 154 Fla. 638 (Fla. 1944).
32 *Id.* at 646 (quoting 12 Am. Jur. 939); *see also Seaboard Air Line Ry. Co. v. Mullin,* 70 Fla. 450 (Fla. 1915) (providing that an act of God will relieve a common carrier from liability for damage to goods only where the act could not have been foreseen).
33 *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849 (11th Cir. 2009).
34 *Id.* at 857 (referencing *Devco Dev. Corp. v. Hooker Homes, Inc*., 518 So. 2d 922, 923 (Fla. 2d DCA 1987)).
35 *Id.* (referencing *Camacho Enters., Inc. v. Better Constr., Inc.,* 343 So. 2d 1296, 1297 (Fla. 3d DCA 1977)).
36 *Id.* at 858.
37 See *Home Design Center - Joint Venture v. County Appliances of Naples, Inc*., 563 So. 2d 767 (Fla. 2d DCA 1990).
38 *State Farm Casualty Co. v. Palma*, 629 So. 2d 830 (Fla. 1993).
39 *Waverly at Las Olas Condominium Association, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386 (Fla. 4th DCA 2012).
40 *Tarr v. Honea,* 959 So. 2d 780 (Fla. 4th DCA 2007).
41 *Id.*
42 *Gray v. Michael O'Shaughnessy,* 574 So. 2d 288 (Fla. 5th DCA 1991).
43 *Id.*
44 *Id.*
45 *Leo v. MacLeod*, 752 So. 2d 627 (Fla. 2d DCA 1999).
46 *David v. Richman,* 568 So. 2d 922 (Fla. 1990).
47 *Id.*
48 *OBS Company, Inc. v. Pace Construction Corp.*, 558 So. 2d 404 (Fla. 1990).
49 *Perdido Key Island Resort Dev., L.L.P. v. Regions Bank*, 102 So. 3d 1 (Fla. 1st DCA 2012).
50 *Id.*
51 *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.,* 374 So. 2d 487 (Fla. 1979).
52 *Leonard L. Farber Co. v. Jaksch*, 335 So. 2d 847 (Fla. 4th DCA 1976).

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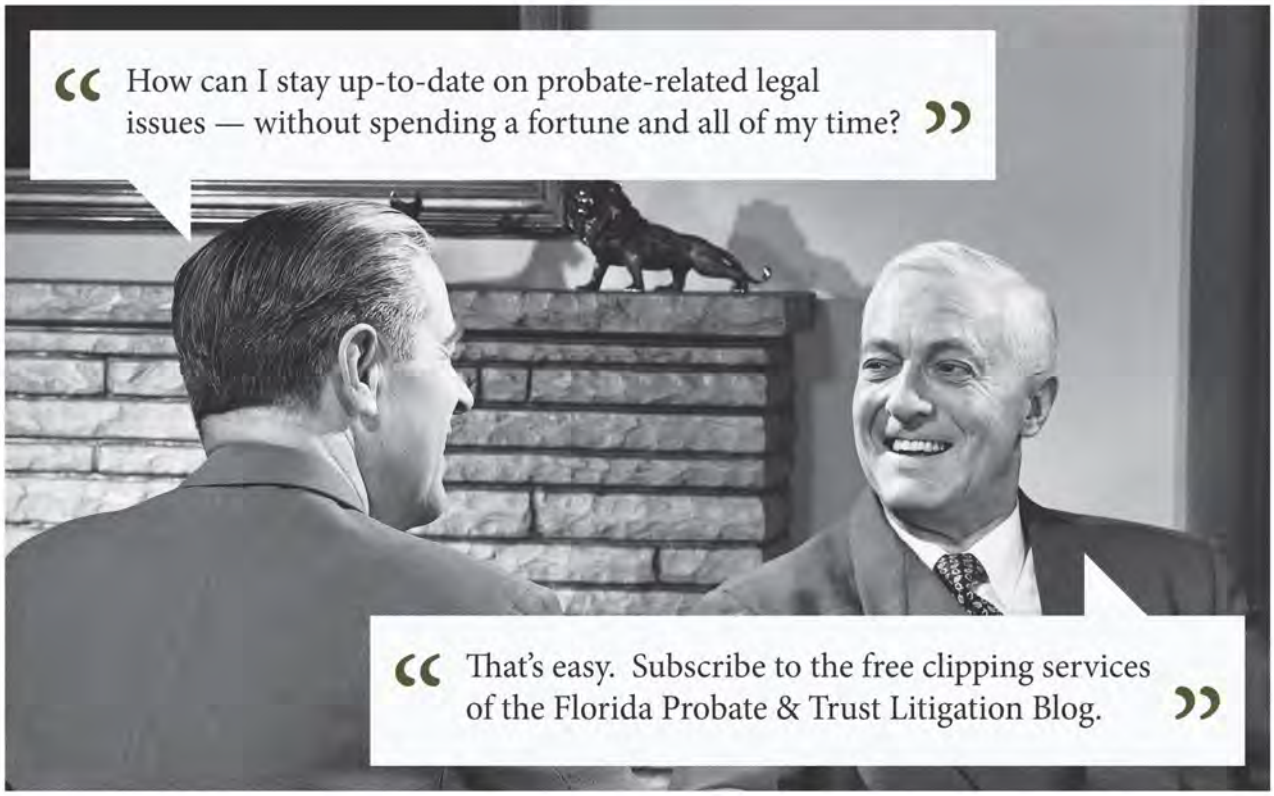
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By
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Linda Suzzanne Griffin Receives Certificate for Meritorious Public Service



During the February 8, 2014 Executive Council Meeting of the Real Property, Probate & Trust Law Section of The Florida Bar in Amelia Island, Linda Suzzanne Griffin received a Certificate for Meritorious Public Service from The Florida Bar as Chair of the Sixth Circuit Grievance Committee "A." The Certificate of Meritorious Public Service was presented during the meeting by Andrew Blaise Sasso, the member of the Board of Governors currently serving as liaison to the Section, in special recognition of Griffin's service on four grievance committees for a total of 12 years of service. The Certificate for Meritorious Public Service states: "[t]hrough selfless contributions of time and talent, the citizens of Florida may continue to be assured of a high degree of accountability, legal competence and ethical conduct in those who would serve them in the practice of law."

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Who Needs A Safe Harbor from the Economic Storm?

By Michael J. Gelfand, Gelfand & Arpe, P.A., West Palm Beach, Florida
On behalf of the Condominium & Planned Development Committee


M. GELFAND

All of a sudden, it is topsy-turvy in Florida condo-land, and just as much, if not more, in homeowners' association-land. What has everyone up in the air? As the reader may surmise, the subject of concern is money. When "speaking condo" the subject of money usually relates to assessments which are the lifeblood of these community associations.

Recent decisions of the various Florida District Courts of Appeal have upended long-accepted truths regarding assessment liability, and in particular, a first mortgage holder's so-called "Safe Harbor" for liability to pay delinquent Florida community association assessments when the lender forecloses.

Duty to Pay Assessments

Historically, covenants in a declaration of condominium required that the grantee of a condominium unit was jointly and severally liable for the grantor's delinquent association assessments.[1] Similarly, the covenants in many homeowners' association community declarations required the grantee of a homeowners' association parcel to have the same liability.

The reason for the assumption of liability by the grantee was seemingly obvious. The association had maintained the common elements, paid utilities for the common elements, and insured the common elements. Expenditures for each of these efforts benefited each unit. The grantee benefited from the association's expenditures; thus, the grantee should not benefit from this effort to the association's detriment. Because the grantee is usually in a good position to require a grantor to satisfy obligations before the transfer of property, or at least a better position than anyone else, the grantee was left proverbially holding the bag if the grantee did not confirm that the assessments were paid.[2]

Safe Harbor Creation

Paraphrasing Sir Isaac Newton, the establishment of an obligation frequently creates an equal and opposite reaction by the new obligator. Responding to mortgage lenders' desires to avoid assessment liability, in the early days of condominium and homeowners' associations, the developers of many communities provided special dispensations to lenders. Frequently, declarations of condominium and covenants provided a mortgage holder an exemption from grantee assessment liability. Those declarations provided that if the mortgage holder foreclosed the purchaser and obtained title at the resulting foreclosure sale, the mortgage holder received title free and clear of any obligation to pay delinquent association assessments.

In the background were Florida's notorious boom and bust cycles. In boom times, nearly all owners pay assessments. In the busts, some owners' did not pay assessments and were foreclosed.

In the busts, as a result of some owners not paying assessments, the owners who remained and fulfilled their duties found that to fund the shortfall created by foreclosed units, the remaining owners assessments had to be increased to pay for insurance, utilities, maintenance, amenities and services. Of course, the continuation of these services also benefited the properties that mortgage holders foreclosed. Thus, special dispensation not only provided an inequitable benefit to mortgage holders who were not paying assessments but exacted an inequitable burden on the remaining owners!

This situation increasingly appeared inequitable to many. This lead to a legislative response in 1992, approving amendments to the Condominium Act to add what has been colloquially, if not lovingly, now referred to as the "Safe Harbor."[3] Now ensconced in §718.116(1)(b)1, Fla. Stat., the current version of the Safe Harbor, summarized in a very short-hand version, significantly limits liability for delinquent assessments accruing before acquisition of title. The Safe Harbor by its terms only applies when the holder of a first mortgage acquires title as the result of the foreclosure of that mortgage.[4] The limitation, again simply summarizing, is the lesser of either: one percent of the original mortgage balance; or, twelve months of assessments. Since July 1, 2008, the homeowners' association laws have had a similar provision.[5]

The Great Recession/Upheaval

All was going well, or so it seemed, so long as the economy was in an upswing and assessment delinquencies were at a minimum. The arrival of the great financial upheaval of the late 2000s, revealed the changing nature of lender foreclosure actions. Before this recent "bust," diligently pursued mortgage foreclosures used to be completed in six to twelve months. This relatively short time period had justified the alternative Safe Harbor assessment liability limitation of twelve months of assessments.

In the new "bust", lender foreclosures of properties in community associations stretched out sixty months or more. While court backlogs may have added a month or two, here or there, or at the most a few months, as became obvious, the backlog was the result of lenders' foreclosure policies and strategies, and certainly not the result of community associations' conduct.

The impact on community associations, which had to absorb the unpaid assessments, was harsh. The impact

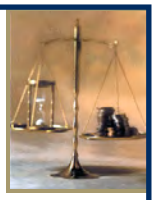
was brutal upon owners with fixed incomes who saw their assessments increase, sometimes doubling or more, so that associations could afford insurance and utilities. What made the situation unbearable for many was that mortgage holders who obtained mortgages as a business risk benefited from the delay, and innocent unit owners who did not seek any profits, suffered.

Nevertheless, during this period, lenders who took title paid their "Safe Harbor" amount. Under the enactments, third-party purchasers did not have the benefit of the Safe Harbor, so associations billed the third-party purchasers for all the delinquent assessments that accrued before the purchasers took title.

Homeowners' Associations

Then came *Coral Lakes v. Busey Bank.*[6] The *Coral Lakes* Court explained that in May 2006, the Haleys executed a note and mortgage in favor of Busey Bank. The Coral Lakes' Declaration of Covenants provided that the Association's lien for assessments was subordinate to a first mortgage.[7] In January 2008, Busey Bank filed an action to foreclose its 2006 mortgage.[8] The Association asserted that the Bank was liable for twelve months' assessments if the Bank purchased the property at the foreclosure sale. The trial court granted judgment for the Bank, finding no liability for pre-certificate of title assessments.[9]

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The District Court of Appeal affirmed. The "Declaration's plain and unambiguous language", which provided a strong presumption of validity, subordinated the claim for assessments to a first mortgagee's claim upon foreclosure or deed-in-lieu of foreclosure.[10] The Declaration did not contain relation back language or other potential protections for the Association. The provisions of later adopted §720.3085, Fla. Stat. (2007), would severely, permanently, and immediately change the parties' economic relationship; thus, the statute would constitute an unconstitutional retroactive impairment of contract.[11]

This was followed by the decision in *Ecoventure WGV, Ltd. v. Saint Johns Northwest Residential Ass'n, Inc.*[12] In 2001, Ecoventure sold property located within the Saint Johns community to a purchaser who later defaulted on a purchase money mortgage. Ecoventure foreclosed on the mortgage and took title to the property in 2008. The Association demanded payment for two years of assessments. The trial court entered judgment against Ecoventure.[13]

The District Court of Appeal reversed. Ecoventure's rights under the Declaration of Covenants vested in 2001, when it offered a mortgage. Applying §720.3085, Fla. Stat. (2007), which was enacted after the mortgage, would alter Ecoventure's vested rights. The enactment of a statute cannot disturb a prior contractual relationship.[14]

Condominium Associations

Notably, these decisions all concerned communities subject to the Homeowners' Association Act. There was a widely-held belief that these decisions would not apply to communities subject to the Condominium Act. The retroactive impairment of contract argument was thought not applicable to the Condominium Act Safe Harbor because the original Condominium Act Safe Harbor legislation expressly stated that the law applied only to mortgages enacted after the adoption of the Safe Harbor legislation on April, 1, 1992.[15] As a practical matter, foreclosing mortgage holders were paying the amounts due pursuant to the Safe Harbor legislation, and third-party purchasers paid the total amount that accrued.

This belief in the enforceability of the Safe Harbor has been shaken. First, *Aventura Management, LLC v. Spiaggia Ocean Condominium Association, Inc.*[16] held that a mortgage holder foreclosing on a condominium association which had foreclosed on an owner for non-payment of assessments, was not solely liable to the condominium association for assessments due prior to the mortgage holder taking title. The lender and the association were held to be jointly liable. This decision was recently clarified in *Park West Professional Center Cd'm., Ass'n., Inc. v. Londono*,[17] apparently holding that the mortgage holder is not liable for assessments accruing before acquisition of title when title is acquired from the condominium association which was liable for paying assessments.

continued, next page

Then came *U.S. v. Forest Hill Gardens East Cd'm. Ass'n., Inc.*[18] United States District Court Judge Hurley's decision laid out facts which are consistent with similar situations faced daily.[19] The decision arose from Forest Hill Gardens, a residential development located in suburban West Palm Beach. The Forest Hill Gardens development includes two condominiums, Forest Hill Gardens East and Forest Hill Gardens West, each having their own condominium association. There is a "master" property owners' association to which the condominium unit owners pay assessments.

The decision recites that mortgages on two condominium units were foreclosed by mortgagee banks. It appears that thereafter the Secretary of the Department of Housing and Urban Development obtained title. The Plaintiff's Motion for Summary Judgment alleges that post-foreclosure the banks deeded title to the units to HUD. HUD requested estoppel letters from the Defendant condominium association and property owners' association.

The Trial Court noting that the Safe Harbor is for "unpaid assessments" focused on what was actually due and thus unpaid. To determine what was due the condominium association, the Trial Court then reviewed the Declaration of Condominium. The Declaration included a special lender dispensation not unusual when the Declaration was recorded in 1980, that the acquirer of title after the foreclosure of a first mortgage is not liable for assessments due before the acquisition of title.

While addressing whether the Safe Harbor supersedes the Declaration's special dispensation for lenders, unfortunately, the Trial Court decision does not discuss the criteria for determining whether a statute may supersede or retroactively impair a contract such as a Declaration. It appears that the Trial Court utilized the constitutional retroactive impairment of contract test by asking whether the Legislature stated an intent to apply the Safe Harbor retroactively, albeit using a somewhat strained word "nullified." In this regard, the Trial Court found no "hint" of legislative intent to imply retroactive application.

In so holding, the Trial Court does not discuss, and may not have been aware of the original Safe Harbor statute which applied to mortgages recorded after April 1, 1992, to including the mortgage which was at issue, and did not apply to earlier mortgages. Contrary to the Trial Court's holding, the Legislature specifically provided a date when the statute would be effective, for a "first mortgage recorded after April 1, 1992."[20] Notably, the legislature did not restrict the Safe Harbor only to declarations of condominium recorded after that date, reinforcing the intent that the Safe Harbor would apply to declarations of condominium that had been recorded before that date.

The Trial Court decision also does not discuss the *Pomponio v. The Claridge of Pompano Cd'm.* criteria which includes justifying retroactive impairment of contract if a law is operating "in an area which was already subject to state regulation at the time the parties contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?"[21] Because of the increasing regulation by the Legislature of condominium associations for at least two decades before the Safe Harbor, well before the 1980 creation of the Forest Hill East Declaration of Condominium, there would appear to be an argument that one of the *Pomponio* criteria would apply to this matter.

To reinforce its conclusion, the Trial Court cites to a Declaration of Condominium provision which did not have language incorporating changes in the law, but instead incorporated only the "present provisions" of the Condominium Act, and created a superiority provision. However, that provision does not address the legislature's authority to regulate condominiums which, as held by the Supreme Court of Florida:

> Condominiums and the forms of ownership interests therein are strictly creatures of statute. *See* § 718.101-718.622*, Fla. Stat.* (2000); *see also Winkelman v. Toll*, 661 So. 2d 102, 105 (Fla. 4th DCA 1995); *Suntide Condominium Ass'n v. Division of Florida Land Sales & Condominiums*, 463 So. 2d 314, 317 (Fla. 1st DCA 1984). In Florida, Chapter 718, Florida Statutes, known as Florida's "Condominium Act," gives statutory recognition to the condominium form of ownership of real property and establishes a detailed scheme for the creation, sale, and operation of condominiums.[22]

The decision without comment, apparently found no significance that HUD acquired title after the issuance of the Certificate of Title which would exclude application of the Safe Harbor, if otherwise enforceable in this situation.

In addition to assessment liability, the Trial Court decision also addressed whether collateral expenses such as attorney's fees and interest, are barred by the Condominium Act's "Safe Harbor" in §718.116(1), Fla. Stat.,[23] which is limited to unpaid common expenses and regular periodic expenses to which the so-called "twelve months/one percent" formula will apply. Citing *Elbadramany v. Oceans Seven Cd'm. Ass'n*, 461 So. 2d 1001 (Fla. 5th DCA 1984), the Court reinforces the conclusion that a charge to an individual owner is by definition not a common expense. Thus, the Trial Court concluded that interest, late charges, collection costs and attorney's fees sought by the Association "simply do not fit within the statutory or common sense understanding of regular periodic assessments."[24]

The Trial Court also commented upon a public policy rationale supporting the disallowance of collateral expenses: to allow prompt sales following a foreclosure, assessments are to be "readily verifiable figures." Collateral charges, as comment continued, are "open wide for disputes as to reasonableness and necessity" which would slow down

the resale process and further create additional problems for condominium communities.

Conclusion

So, where to now? First, the Safe Harbor should apply in communities with declarations recorded after the statutory enactments: April 1, 1992, for condominiums, and July 1, 2007, for homeowners' associations. Second, communities pre-dating the statutory enactments may have declarations that were drafted with language allowing claims, or may have been amended to allow the claims.

For other, older communities, there may be appellate review of the premise of Judge Hurley's decision, that the Legislature did not intend for the Safe Harbor to take priority over declarations for mortgages created after April 1, 1992. It would seem clear that the Legislature by including that date in the law knew what it was doing, and intended that priority, or retroactive effect, especially for condominiums which are a "creature of statute."

At press time, the Legislature is organizing for the 2014 session. The decisions cited in this article may increase pressure for legislative action, not only to clarify the retroactive priority of the law, but also perhaps to take the opportunity to redraft the Safe Harbor to increase the amounts to reimburse associations for expenditures inequitably benefitting mortgage holders, especially recognizing that the Safe Harbor's application is limited and any new legislation will likely be prospective.

MICHAEL GELFAND, a Florida Bar Board Certified Real Estate Lawyer, is the senior partner of Gelfand & Arpe, emphasizing community association law, counseling associations and owners how to set legitimate goals and to effectively achieve those goals. His Bar publications include: assessment collection, dispute resolution and insurance. Past-chair of the Condominium Committee, he is Real Property Division Director.
Dedicated to community involvement, he encourages others to lead by example. He is the recipient of the Palm Beach County Pro Bono Child Advocate of the Year Award, and serves on the School District's Construction Oversight Committee, and Law Magnet Program.

Endnotes

1 This is now a statutory obligation of the grantee. § 718.116(1)(a), F.S.

2 The issues of estoppel letters are intended to be addressed in a subsequent article.

3 1992 *Fla. Laws* Ch. 92-49.

4 The statutes also have provisions concerning a deed-in-lieu of foreclosure.

5 §720.3085 F.S.

6 30 So. 3d 579 (Fla. 2d DCA 2010).

7 *Id.* at 581.

8 *Id.*

9 *Id.* at 582-83.

10 *Id.* at 583-84.

11 *Id*. at 586.

12 56 So. 3d 126 (Fla. 5th DCA, 2011).

13 *Id*. at 127.

14 *Id*. at 128. This was followed by *Sienna Ridge H.O.A., Inc. v. Asia Pacific Sovereign Fund, LLC*, _____ So. 3d _____, 38 Fla. L. Weekly D1844 (Fla. 4th DCA, Aug. 28, 2013).

15 A note of caution was raised for mortgages which by happenstance were recorded on April 1, 1992. The law changing lien priority, Chapter 92-49, §10, *Laws of Florida*, was signed into law by the Governor on April 2, 1992; however, §41 stated that the law would have retroactive effect to April 1, 1992. Retroactive application would appear to violate the constitutional prohibition against the state's retroactively impairing contracts. Art. I, §10, *U.S. Const*.; Art. I, §10, *Fla. Const*.

16 105 So.3d 637 (Fla. 3rd DCA 2013). Issued after submission deadline was *Aventura Mgm't, LLC v. Spiaggia Ocean Cd'm. Ass'n, Inc.*, _____ So. 3d _____, Case No.: 3D13-1437 (Fla. 3d DCA March 5, 2014), on appeal after remand, clarifying that the purchaser at the bank's foreclosure sale "could only be held liable for the unpaid assessments of the immediate-prior owner."

17 _____ So. 3d _____, 38 Fla. L. Weekly D 2510 (Fla. 3d DCA, Nov. 27, 2013).

18 _____ F. Supp. 2d _____, Case No.: 13-80513-CV, 2014 WL 28723 (S.D. Fla., Jan. 3, 2014).

19 Normally trial court decisions are not the subject of articles because trial court decisions do not carry the force of law, frequently involve factual scenarios that are not fully explained, and are themselves subject to appellate review, but this decision justifies commentary as set forth in the text above.

20 1994 Fla. Laws Chp. 350 §10.

21 378 So. 2d 774, 779 (Fla.1979).

22 *Woodside Village Cd'm. Ass'n., Inc. v. Jahren*, 806 So. 2d 452, 455 (Fla. 2002).

23 The statute year is not stated in the opinion; however, the decision relates that at least some assessments were delinquent from 2010.

24 Footnote omitted; however, please read the footnote in the original decision.

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Social Media and the Judiciary: Friend or Faux

Lawrence J. Miller, Esq.,
Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A., Boca Raton, FL


L. MILLER

It is no surprise that the ethical concerns that arise from social media use in and by the legal community are not limited to the attorney side of the courtroom. In August 2011, during the ABA Annual Meeting session on social media, a speaker commented that "if Facebook were a country, it would be the world's third largest." At the same Annual Meeting, keynote speaker, Judge Herbert B. Dixon described one incident in which a disgruntled lawyer blogged that the judge in his case was an "evil, unfair witch." By March 2013, the University Of North Carolina School Of Government reported that 46.1 percent of judges they surveyed used a social media profile site.[1] Of course, electronically sharing information about oneself or posting information on others' social networking sites is now part of everyday culture. The need to have judges contribute and communicate as part of that culture is an important indicator of judicial involvement in that culture and has been said to show that our judiciary is not isolated or "out of touch."[2]

While issues arising from use of social media by judges is not the limit of "digital age" impact on the bench, this article will be limited to a narrow discussion of electronic social media ("ESM" as the American Bar Association has called it and as it will be referred to in this article) and ethical guidelines for judges who use ESM. In large part, the discussion here includes the observations of the ABA as to the application of its Model Code of Judicial Conduct in the ESM context, as well as the most current formal Florida ethics discussion of ESM use by the judiciary. By highlighting the present landscape of judicial ESM use, attorney conduct regarding ESM interaction with the judiciary can also be clarified.

Judicial Use of ESM: A "Friend" Indeed May be A Friend You Do Not Need.

A judge's use of ESM is generally treated as part of his or her overall social interaction and relationships. As such, a judge's ESM use is to first be measured on the same basis as other social interactions. But, as with "all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial conduct and avoid any undertaking that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety."[3] While not intended as burdensome intrusion into the everyday conduct of a judge, judges "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens."[4] The Model Code goes on to state that "all of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner that "promotes public confidence in the independence, integrity and impartiality of the judiciary. . ."[5]

As an example of judicial attempts to avoid running afoul of these rather general and somewhat aspirational boundaries, certain judges have pro-actively "defriended" attorneys who are appearing before them and who share Facebook or LinkedIn status with them.[6] Some in the legal community have commented that a judge's "defriending" during a trial implies an expanded and almost non-digital understanding of the word "friend." In essence, that word, in this context, should no longer be understood to describe the depth of an interpersonal relationship, but rather, used as a verb in the digital world, should be limited to a newly defined and much more distant relationship via Facebook or a similar ESM vehicle. More specifically, such an argument maintains that a judge's "friending" someone does not mean that some bias or favoritism publicly exists between a judge and his or her digital friend. In essence, "friended" folks are not really friends at all. This line of argument continues by maintaining that restricting a judge's use of ESM introduces distance between the judiciary and the society with which it is to be connected. Yet, this cultural involvement argument tends to ignore the danger posed by ESM's comparative potential to reach exponentially greater audiences than mere "social contract." Such impact is what catapults the concern level when judges are "ESM-ing" with others.

Also undermining some of the "cultural involvement" argument is the idea that ESM communications are frequently undertaken automatically and without consent of those who may be involved, touched or described in such communications. ESM data lives years and decades beyond the date of origin, and well beyond the "life" of simple social interaction or conversation in the courthouse lobby. As author and commentator Jeffrey Rosen also observes, management of digital communications is more difficult than everyday conversation, and without the visual or voice cues that are present in face to face conversation, digital communication may be more easily taken out of context, misinterpreted or relayed incorrectly.[7] So, while a "friend" in the digital sense may arguably be no friend at all, the meaning and reach of digital friending is far wider and lives longer than its human equivalent.

This tension, between the meaning of "friend" and the impact of "friending", is indicative of the greater ethical problems encountered when judges use all types of ESM. While the judge should be part of our greater social fabric, he or she must maintain the independence and integrity that supports the judicial system, including being held to and "judged" by a higher standard.[8] The reach, longevity and lack of complete contextual meaning in an ESM, can magnify and render negative the impact of seemingly innocuous digital colloquy and make what should be superficial appear far more problematic and ethically violative than if stated under different circumstances. This is especially

continued, next page

true when the persons engaging in ESM use are required to conform to more stringent rules of conduct.

Dealing with Digital Tension: ABA Formal Opinion 462

After considerable study of the ESM judicial challenge, The American Bar Association issued Formal Opinion 462 (entitled "Judge's Use of Electronic Social Networking Media") on February 21, 2013 ("ABA Opinion"). The ABA Opinion is based on the ABA Model Code of Judicial Conduct. The "friending" dichotomy described above sets out the tension between the judge as participant in modern culture and the judge striving to meet a higher standard of conduct. The ABA Opinion and its related commentary provide a real attempt to comprehensively define the dilemma and provide some guidance on how to properly chart an ethical course. The opinion itself is somewhat brief and aspirational, but the guidance provided by the accompanying commentary is real. Using concepts that are equally applicable in the "non-digital" world, the commentary suggests that each digital connection with an attorney or party be reviewed and considered on a qualitative basis. Depending on the real depth of the digital relationship, disclosure of digital contacts should be considered and made on the judge's first introduction into the matter. However, "designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person-vThe ABA Opinion goes on to clarify the ESM conundrum by stating that: "Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection."[10] It is not that the ABA Opinion is seminal or groundbreaking in its approach, but rather that it focuses the ethical analysis in the same way that other interpersonal relationships are analyzed in the judicial ethics context. The language of the ABA Opinion commentary is reminiscent of the language generally used to draw lines between proper and improper judicial contact with others. The commentary describes some of the factors and fact patterns that should be kept in mind when undertaking the judge's drawing of the ESM ethical line. In summary, though the methods of judicial (and other) digital contact and communication through ESM are part of a sometimes unsettling and changing landscape, the analysis suggested by the ABA Opinion is rooted in traditional and somewhat familiar measuring tools for judicial conduct.

Florida's First Response: Florida Supreme Court Ethics Advisory Committee Opinion 2009-20

In an effort to provide some path for judicial conduct in the ethical ESM jungle, the Florida Supreme Court, Ethics Advisory Committee published Advisory Opinion 2009-20 (November 17, 2009) ("Florida Opinion"). The Florida Opinion addressed questions regarding a judge's use of social networking vehicles. The questions included whether a judge 1) may post comments and other material on the judge's page on a social networking site if the publication of that information does not otherwise violate the Code of Judicial Conduct and 2) may add lawyers who may appear before the judge as "friends" on a social networking site. In the Florida Opinion the Ethics Advisory Committee answered "yes" to the first question, but as to question two, found that "listing lawyers who may appear before the judge as 'friends' on a judge's social networking page, reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge." In its answer to question 2 above, the Florida Opinion appears somewhat more restrictive than the ABA Opinion. A majority of the committee concluded that a judge's designation of someone as an ESM "friend" would suggest to an ESM reader the judge's bias or partiality in favor of the person so designated. A minority of the committee indicated that use of ESM is sufficiently ubiquitous as to have redefined digital use of the term "friend." The later ABA Opinion reflects a bit more of the "ubiquitous" analysis included in the "part of society and culture" argument described above.

Conclusion

Regardless of where one stands on the ESM philosophical discussion, the ethical landscape for both attorneys and judges continues to evolve. In the short four years between the Florida Opinion and the later ABA Opinion, the acceptance of just one aspect of ESM use, i.e., the judicial use of "friending," appears to have expanded, at least in theory. A measurement of state judicial guidelines shows that the matter continues to evolve in local jurisdictions. As with LinkedIn and other digital sites and technology, tweet carefully as the picture clarifies. Keep your "judicial friends" close, but your ethics search on judicial use of ESM closer.

Lawrence J. Miller is a shareholder in the Boca Raton firm of Gutter Chaves Josepher Rubin Forman Fleisher Miller, P.A. His practice focuses on estate, trust and guardianship litigation and administration, including multi-state and multi-jurisdictional disputes and contests. Mr. Miller received his B.A. with highest honors from Lehigh University (1974) and his J.D. from Emory University (1977). He is currently Chair of the Professionalism and Ethics Committee of the Real Property, Probate and Trust Law Section of The Florida Bar and remains active in its Probate and Trust Litigation, Probate Law and Procedure, Trust Law and Guardianship Committees.

Endnotes

1 See Judicial Ethics and Social Networking Sites, Michael Crowell, NC School of Government, March 2013.

2 See ABA Formal Op. 462.

3 See ABA Model Code of Judicial Conduct, Preamble 2 (2012).

4 See ABA Model Code of Judicial Conduct, Rule 1.2 (2012).

5 Id.

6 See Dahlia Lithwick and Graham Vyse, "Tweet Justice," available at http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html.

7 Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. Times Magazine (July 21, 2010).

8 See ABA Model Code of Judicial Conduct, Rule 1.2 (2012).

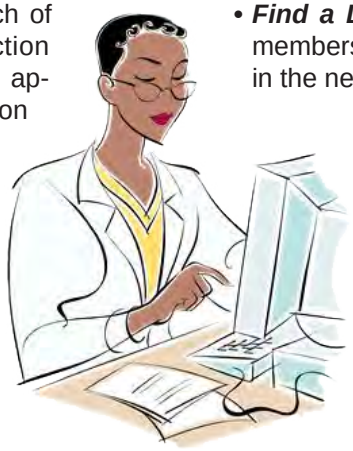
9 ABA Formal Opinion 462, n 13 (February 21, 2013).

10 ABA Opinion, p.3.

Explore the New RPPTL Section Website

By Silvia B. Rojas, Esq., Miami, FL

The RPPTL Section welcomes the launch of a new user friendly and dynamic Section website at http://www.rpptl.org. We greatly appreciate the work of the Member Information and Technology Committee through its Chair, Nicole Kibert and Co-Vice Chairs, Dresden Brunner, Travis Hayes and William Parady, and its sub-committees who have worked closely with the developer of the website and the webmaster to provide a new look with a blend of functionality and innovative design. The website is accessible through your PC, laptop, tablet or smartphone.



The website continues the previous division between a public side for non-Section members and a private side for Section members. The public area does not contain links to or information regarding the content of work in progress of the numerous committees. It does contain general information regarding the mission of the Section and of each committee as well as other information deemed for non-member use and to motivate non-members to join the Section. The private side is accessible by password so Section members can review the work of committees, interact with other Section members and be informed of Section and Executive Council activities in general.

A number of the webpages can be approached through different entry points. For example, on the private side, ActionLine can be approached from the left hand side button appearing on the private Home page or from the "About Us" drop down menu within the upper banner of the website. The links and buttons within that upper banner are fixed and easily accessible no matter where you travel within the website. Should you have any further questions, the new Section mascot, DDLex, located on a number of the website pages can be contacted for a response. There is also a general search engine provided on the upper banner of the Section website.

So let's get started exploring the Section website. The following provides some highlights of the contents and features accessible through both the public and the private side.

Links available to Non-Members on the Public Side

There are links located at the top of upper banner of the Section website similar to the links on the private side of the Section website. Click on the following websites links to view their content and/or function:

- ***About Us*** link provides readers with the Section's Mission Statement.
- ***Resources*** provides links to legal resources outside of the Section website
- ***Contact Us*** is the email link for comments to the Section Website Administrator
- ***Find a Lawyer*** contains a simple google search for members within the website but this will be upgraded in the near future.
- ***Florida Bar*** links you directly to the Florida Bar website.

Buttons available to Non-Members on the Public Side

The buttons are at the lower part of upper banner of the Section website. Click on the following website buttons to view their content and/or function:

- ***Home*** button takes you back to the public side Home page if you are in the public side of the website.
- ***About Us*** button contains a drop down menu with the following information:
  - ***About Us*** button connects you to the Mission statement of the Executive Council
  - ***ActionLine*** button connects you to general information regarding ActionLine but not to the actual magazines
  - ***Join RPPTL*** button connects you to information and an application form for attorneys and law students.
  - ***Fellows*** button connects you to information regarding our Fellowship Program and an application form.
  - ***Resources*** button connects you to the same page as the "Resources" link at the top of the page.
  - ***News*** button connects you to informational items considered newsworthy and current by the website administrator. Some news links may lead to the private side and request a log on.
  - ***Legislative Positions*** button connects you to a general review of our legislative program.
- ***Executive Council*** button contains a drop down menu with the following information:
  - ***Executive Committee*** button connects you to information on the makeup of the Executive Committee and lists the name and contact information for those holding office.
  - ***Executive Council Members*** button connects you to information on the makeup of the Executive Council members and lists the names and contact information for them. The main "Executive Council" button contains the same information.
  - ***Agendas*** button connects you to the agenda for the upcoming Executive Council meeting and all registration forms as the date of the meeting approaches. Also connects to previous agenda information for past meetings dating back several years.
  - ***Minutes*** button connects to a log on page.
  - ***By-Laws*** button connecting to the text of the Section

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By-Laws on the private side, links on the public side to a log on page.
  - ***Meeting Information*** button connects to a log on page.
  - ***Photos*** button connects to a log on page.
- **Sponsors** button contains a drop down menu with the following information:
  - ***Sponsors*** button connects to the names of the General Sponsors with their contact information, along with Friends of the Section and Committee Sponsors.
  - ***Become a Sponsor*** button connects to Information on becoming a sponsor and who to contact to become a sponsor.
- ***CLE*** button contains information regarding the CLE Seminar Coordination Committee and contact information for contacting the Vice Chairs of the committee and on its drop down menu contains:
  - ***Upcoming CLE*** button connects to information regarding the dates and topics for Section sponsored CLE programs.
  - ***CLE Archive*** button connects to information on past CLE programs.
- ***Committees*** button contains a drop down menu containing general information within the following buttons:
  - **General Standing** connects to an **o**verview of this group of committees as well as an overview or mission statement of each committee within the group. A few of the committees have content accessible from the public side.
  - ***Probate and Trust*** connects to an overview of this group of committees as well as an overview or mission statement of each committee within the group.
  - ***Real Property*** connects to an overview of this group of committees as well as an overview or mission statement of each committee within the group.
  - ***At Large Members*** content is accessible only after log on.
  - ***Search Committees and Members*** connects to a simple google search engine for Section members within the website but there are plans to upgrade this in the near future.
- **Calendar** content is not accessible from the public side.



Left Hand Side Buttons available to Non-Members on the Public Side

These buttons contain some of the same information as that available on the links included on the upper banner of the website with some design changes on the linked pages and one extra button. There are several videos available to the public regarding the benefits of joining the Section. If you know a Florida Bar member that is considering whether or not to join the Section, you may suggest viewing one or more of the videos to seal the decision.

Private Side Links and Buttons available to Section Members

After a Section member logs in to the private side, the public side information on the upper banner is accessible as well as additional links and content connected to the buttons that was hidden from view on the public side. There are also buttons on the left side of the website for quick access to the pages noted and in the middle of the Home page of the website there are columns containing current News, Links to Blogs, Next Meeting information and, of course, DDLex. A line appears to the right of the upper banner acknowledging that you have logged on. Here are some highlights:

- ***My Profile*** link appears on the right side of the upper banner of the Section website. This links to a web page that contains information regarding the Section member currently logged in and which can be edited only by that Section member. As the Section member currently logged in, the page holds information regarding your activity within the Section website, your contact information, as well as some additional information. The "Edit" button has a drop down menu for editing your profile and adding or deleting your image. Under "Updating your Profile," you can add further information about yourself and change your password. Your password has not been carried over from the previous website so **it is important that you create a new password after you have logged in** using your email address and "rpptl 2014" as an initial password. If you have a problem with the log in, please contact the webmaster using DDLex or the "Contact Us" link at the top of the page. Your Profile Page information (except the password) will be available to other Section members searching your name.
- ***Home*** button takes you back to the private side Home page if you are in the private side of the website.
- ***About Us*** button includes a drop down menu that now links you to more content. Using the drop down menu, the ActionLine button connects you to the magazine page containing issues dating back to February, 2001. Just click on the last line of the first page linked to that button to open up the page containing the magazines in PDF format.
- ***Executive Council*** button includes a drop down menu which now links you to minutes of past meetings dating back to 2005. The "ByLaws" of the Section are now visible. You can connect via "Photos" to view all the Executive Council meeting photos available through two photo

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RPPTL Section Executive Council Meeting
The Ritz-Carlton, Sarasota
November 21st through November 24th, 2013

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

The November meeting of the Real Property, Probate, and Trust Law Section of The Florida Bar was held at The Ritz-Carlton in Sarasota. The Ritz-Carlton on the waterfront bills itself as "a sophisticated blend of casual gulf-coast lifestyle and cosmopolitan excitement." The Ritz-Carlton is located dangerously close to some excellent shopping and lots of outstanding restaurants. The Ritz-Carlton is really two complex areas with one being located right on the Gulf.

Committee meetings kicked off at noon on Thursday, November 21st, 2013, and continued until 6:00 P.M. The Welcome Reception, from 6:30 – 8:00 P.M, was held outdoors on the lawn area very close to the water. There was an open bar serving all kinds of wonderful libations as well as an assortment of heavy appetizers. That evening, the hospitality suite, which also overlooked the water, was open and well-populated until 11:00 P.M.

Friday morning started with a continental breakfast at 7:30 A.M. and meetings promptly at 8:00 A.M. There were twenty different meetings that day so, for anyone in the Sarasota area, there were lots of opportunities to observe the committees hard at work. The reception and dinner that evening were held at the hotel and again the hospitality suite was open until 11:00 P.M.

Saturday morning started out bright and early at 8:00 A.M with the two Roundtable Division breakfasts. Both the Real Property Division Roundtable and the Probate and Trust Law Division Roundtable were extremely active meetings lasting right up to the start of the Executive Council Meeting at 10:00 A.M. The Executive Council Meeting was exceptionally lively with discussions and debates continuing well into the afternoon. The minutes from the Executive Council Meeting are available on the Section website at www.rpptl.org.

No committee meetings were held in the afternoon, however, there was a career coaching session from 2:00 P.M. – 4:00 P.M. for law school students who were in attendance.

The reception and dinner that evening were held at The Ringling Circus Museum and really were, as Peggy Rolando predicted, a special treat. The folks who traveled to the museum by motor coach had free reign of the premises, walking throughout the museum, and were able to view beautifully carved parade wagons, performer wardrobes, and all sorts of circus props. There were also lots of circus posters, old photographs, and the personal railroad car of John & Mabel Ringling. A major attraction was a huge, detailed model of a traveling circus, showing all the components of the Big Top like the bank, the post office, the barber shop, kitchen, blacksmith shop, and stables. Docents were sprinkled throughout the museum for talks about the many exhibits. After touring the museum, the attendees were treated to an excellent dinner served by a very gracious and attentive staff. Once again, after returning to the hotel the hospitality suite was open for talk and a nightcap.

The final event was a Sunday morning continental breakfast. Afterwards, everyone headed home.

If you missed The Ritz-Carlton in Sarasota, you will have other opportunities to attend our Executive Council meetings in 2014. The list of upcoming meetings is posted on the Section website.



Versatile Peggy fitting into the teeny circus car at the Ringling Circus Museum



Enjoyable dinner at the Ringling Circus Museum

RPPTL Section Executive Council Meeting



Pamela Price holding her well deserved Robert C. Scott Award for 2012-13 with Immediate Past Chair, Fletch Belcher



Flood Insurance presentation at the RREIL Committee Meeting



Fred Dudley at the microphone ready to discuss the current proposal on the floor



Executive Council Meeting Saturday morning



Brenda Ezell and Katherine Frazier with one of our 2014 Fellows, Kymberlee Smith

Past RPPTL Chair, Robert Goldman, with Debbie Goodall and Hung Nguyen at the Thursday evening reception

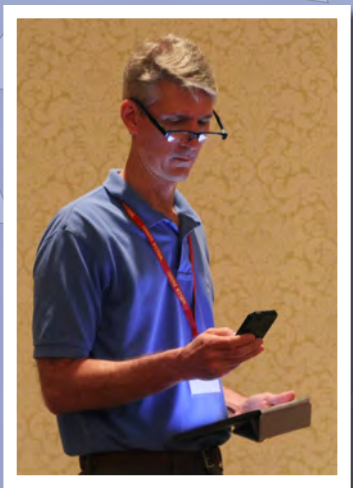




Past RPPTL Chair, Brian Felcoski, with Jussara Silva from JP Morgan Chase, Shannon Rountree and Cristina Papanikos

Photos by Michael Gelfand, John Neukmann and Silvia Rojas

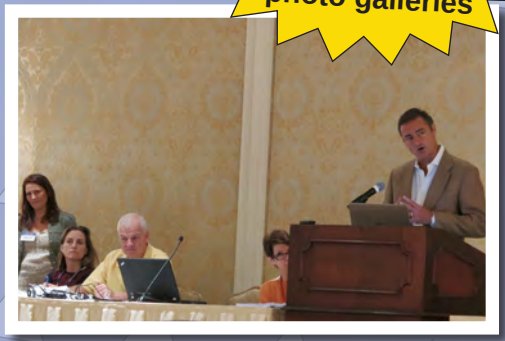
For more photos, log into www.rpptl.org and view the photo galleries



Trey Goldman making good use of all available equipment



Michael Bedke, recipient of the John Arthur Jones Annual Service Award for 2012-2013, with John Arthur Jones



Jeffrey Keiser from U.S. Trust presenting the benefits of wealth management specialists



Angela Adams leading the discussion for Section support of the non-probate creditors' bill proposal



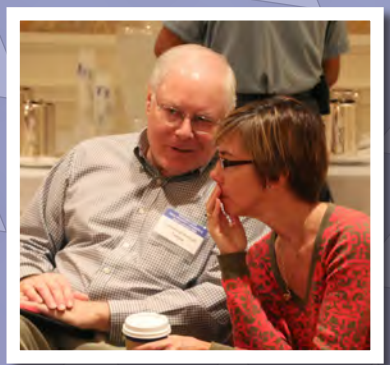
Members on both sides of the aisle discussed the non-probate creditors' bill



Mike Dribin presiding while Peggy Rolando shares a photo op with the new 2014 Fellows L-R: Peggy Rolando, Kymberlee Curry-Smith, Douglas Christy, Joshua Rosenberg, Sean Lebowitz



Condominium bill discussion at Real Property Roundtable



Lynwood Arnold and Alex Overhoff, Exec. Director of the FLTA sharing some comments during the EC meeting



Roundtables

Saturday, November 23, 2013
Ritz-Carlton
Sarasota, Florida

Prepared by Brian M. Malec, Esq., Orlando, Florida, and
Jane L. Cornett, Esq., Stuart, Florida

The following briefly identifies for future reference some notable presentations at the Division Roundtables.

Highlights from Minutes of the Meeting of the RPPTL Section
PROBATE AND TRUST DIVISION Roundtable

Thank you to the Roundtable Sponsors: Stout Risius Ross, Inc. and BMO Harris Bank

The Roundtable meeting was called to order by the Division Director, Debbie Goodall, on Saturday morning, November 23, 2013 at the Ritz-Carlton in Sarasota.

Announcements

Pam Price was recognized as the recipient of the Robert C. Scott Memorial Award. Josh Rosenberg and Sean Leibowitz were recognized as new Probate and Trust Division Fellows.

Action Items

Ad Hoc Study Committee on Estate Planning Conflict of Interest - Bill Hennessey, Chair: Bill Hennessey discussed a proposed fix to recently enacted F.S. § 732.806 (gifts to lawyers and other disqualified persons) to clarify that the statute applies only to instruments executed after October 1, 2013. Bill explained that the effective date was dropped from the original bill during the legislative process and some practitioners questioned whether the statute was effective retroactively. This proposal was approved at the Executive Council meeting.

Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets – Angela Adams, Chair: Angela Adams presented proposed legislation to create a process for the payment of enforceable creditor claims from a decedent's non-exempt, non-probate assets when the decedent's probate estate and revocable trust assets are insufficient to pay all enforceable claims. The proposed legislation did not receive the required 2/3 vote of the members present at the Executive Council meeting held immediately after the Roundtable. Ms. Adams also presented proposed legislation to clarify that a personal representative may bring a fraudulent transfer or fraudulent conversion action to recover assets transferred by the

See "Probate & Trust Division," next page

Highlights of the Minutes of the Meeting of the RPPTL Section
REAL PROPERTY DIVISION Roundtable

Thank you to the Roundtable Sponsor, Fidelity National Title Group

The Roundtable meeting for the Real Property Division of the RPPTL Section was called to order at 8:15 a.m. on Saturday, November 23, 2013 at The Ritz-Carlton in Sarasota. Michael J. Gelfand, Division Chair, started the meeting by introducing the new Section Administrator designated by Bar staff, Jamie Spradlin. Michael also introduced several students visiting from Stetson's Law School, as well as the new Real Property Division Fellows, Kim Smith and Doug Christy.

Action Items

Condominium & Planned Development Committee - Steve Mezer, Chair: An amendment to Florida Statutes § 712.06 of the Marketable Record Title Act was proposed. Steve explained the proposal would clarify intended publication requirements, and provide a benefit to clients. The Roundtable unanimously approved a recommendation for its adoption.

Real Property Litigation Committee – Martin S. Awerbach, Chair: Amendments to Florida Statutes § 49.021 concerning the appointment of attorney's ad litem were proposed. Marty explained the proposal would address problems raised by judges who declined to appoint an ad litem citing that there was no specific authority to do so. There are two goals of this legislation, the first being to confirm specific appointment authority and the second to confirm all prior appointments. With minor language changes, the Roundtable unanimously approved a recommendation for adoption.

Real Property Problems Study Committee - William Theodore Conner, Chair: An amendment to Florida Statutes § 709.2106, concerning powers of attorney, was proposed. Ted explained the proposal would clarify that

See "Real Property Division," next page

PROBATE & TRUST DIVISION

decedent prior to death when the estate otherwise has insufficient assets to pay all valid claims. This proposal was tabled at the Executive Council meeting for further committee review.

Publications. Chair-elect Mike Dribin encouraged Section members to write articles for ActionLine and the Florida Bar Journal.

Legislative Report. Bill Hennessey reported the Estates bill and Family Trust Company legislation will be included in the 2014 legislative session.

Committee Reports.

Ad Hoc Study Committee on Estate Planning Conflict of Interest - Bill Hennessey, Chair: The Committee continues to analyze the ethical and conflict of interest issues involved when an attorney is appointed as a client's fiduciary. The Committee is considering revisions to the personal representative fee statute that would require an attorney to make certain disclosures to the client when named as a fiduciary and to obtain a written acknowledgement from the client that such disclosures were made.

Ad Hoc Committee on Personal Representative Issues – Jack Falk, Jr., Chair: The Committee expects to have proposed revisions to F.S. § 733.212 ready for the Amelia Island meeting in February 2014.

Attorney/Trust Officer Liaison Conference – Jack Falk, Jr., Chair: This next conference will be held at the Ritz-Carlton Tiburon Resort in Naples on June 14-16, 2014.

Asset Protection – Brian Sparks, Chair: The Committee discussed a recent Missouri case addressing whether a trust protector could be held liable for not exercising the right to remove and replace the trustees of an irrevocable trust (Robert T. McLean Irrevocable Trust v. Ponder, Case No. SD 31767 (Mo. App. S.D. Oct. 24, 2013)) and a recent Florida bankruptcy case involving fraudulent transfer and conversion issues and the application of the attorney-client privilege (In re Cutuli, Case No. 11-35256-BKC-AJC (Bankr. S.D. Fla. September 16, 2013)). Keith Kromash reported the joint CLE program with the Estate and Trust Tax Planning Committee was a success and was well-attended. Bruce Stone stated that the Uniform Law Commission is considering drafting a uniform law regarding trust protectors.

Digital Assets and Information Study – Eric Virgil, Chair: The Committee completed review of the draft Uniform Fiduciary Access to Digital Assets Act, which includes provisions pertaining to the authority of personal repre-

continued, next page

REAL PROPERTY DIVISION

an otherwise valid power of attorney executed in compliance with the laws of the state of execution, including witness requirements, to convey or encumber Florida real property, applies to all Florida real property including homestead property. The Roundtable unanimously approved a recommendation for its adoption.

Condominium & Planned Development Committee – Steve Mezer, Chair: Amendments to the Condominium Act, to existing Part VII, the "Distressed Condominium Relief Act," and to add a Part VIII concerning bulk sales and assignees, were proposed. Steve Mezer and Bill Sklar provided some background stating that the amendments to Part VII had worked well providing stability in the important condominium market in 2010 but would sunset in 2015. While the State's real estate market appears to be in recovery, fluctuations in the market are expected and will happen again, so a sub-committee was tasked to draft a comprehensive new part to Florida Statutes Ch. 718 which led to extensive discussions of the proposal. To allow for further consideration, discussion and drafting, a substitute was proposed, recommending a one year extension of the sunset provision which was approved by a vote of 39 yes, 28 no. Steve remarked that the Committee will continue to work on the issue and anticipated presenting a revised motion at the next Roundtable in February.

Sponsor Announcements

Michael acknowledged several sponsor representatives attending the Roundtable, thanking them for their support and participation in division committees, and urging Section members to recognize them, especially during announcements at events. He thanked Fidelity National Title Group for their specific support of the Roundtable.

Upcoming Issues

Publications - Michael Allen Dribin, Section Chair Elect: Mike Dribin reported that both ActionLine and The Bar Journal are looking for more authors and substantive articles. Michael encouraged younger committee members to consider submitting an article as a way to be involved in the workings of the Section and an opportunity to "get their name out there and be recognized."

Information Items

Condominium & Planned Development Committee – Steve Mezer, Chair: There was a report on the briefing of proposed advisory opinion FOA #2012-2 involving Unlicensed Practice of Law activities by licensed community association managers. The Florida House Civil Justice Sub-Committee met on November 5th to propose legislation defining UPL.

continued, next page

PROBATE & TRUST DIVISION

sentatives, trustees, agents under powers of attorney, and guardians to access digital assets and information. The Committee will work on drafting proposed Florida legislation dealing with digital assets and information with the goal of including it in the 2015 legislative session.

Elective Share Review - Lauren Detzel, Chair: The Committee has identified ten issues with the current Elective Share statutes. These issues will be analyzed to determine whether any revisions to the Elective Share statutes should be made.

Estate and Trust Tax Planning – Elaine Bucher, Chair: The Uniform Transfers to Minors Act proposed legislation has been revised to include notice provisions for gift tax annual exclusion planning purposes. Pam Price, David Akins and Keith Braun presented a draft of proposed revisions to the estate tax apportionment statute.

Guardianship, Power of Attorney and Advance Directives – Sean Kelley, Chair: The Committee is making changes to the Health Care Advance Directives statutes (Chapter 765, F.S.). A representative from the Statewide Guardianship Ad Litem office discussed how to handle disabled children who attain the age of eighteen and are no longer covered by the Guardianship Ad Litem program and a subcommittee was appointed to look into this issue. The Committee voted to oppose the proposed Bock legislation that would require background checks and trust accountings for all guardianships. A subcommittee was appointed to draft the Section's opposition to the proposed legislation.

Liaisons with ACTEC – Michael Simon, Bruce Stone and Diana S.C. Zeydel: Sarah Butters, Jim George and Chuck Rubin were recently elected to ACTEC.

Liaisons with Elder Law Section – Charlie Robinson and Marjorie Wolasky. John Clardy, the current Chair of the Elder Law Section, was in attendance. The Elder Law Section is looking at Medicaid issues which have arisen as a result of new Florida laws.

Principal and Income – Ed Koren, Chair: The Committee is looking at a tweak to the Principal and Income Act to deal with new issues presented by the American Taxpayer Relief Act of 2012.

Probate and Trust Litigation – Tom Karr, Chair: The Committee approved proposed amendments to F.S. § 733.106(4) and F.S. § 736.1005(2), which articulate standards for assessing attorneys' fees and costs in will and trust contests. The Committee also discussed the probate of lost wills and issues raised in Smith v. DeParry, 86 So. 3d 1228 (Fla. 2d DCA 2012), including proposed

continued, next page

REAL PROPERTY DIVISION

Ad Hoc Foreclosure Reform Committee - Jeffrey Thomas Sauer, Chair: Michael Gelfand reported for the Committee on the status of the request by the Florida Legislature to the Supreme Court of Florida to adopt rules implementing the procedural provisions of the Foreclosure Reform Act. The Florida Bar Civil Procedure Rules Committee has been working on implementation including a new foreclosure complaint form.

Ad Hoc Trust Account Committee – John B. Neukamm & Jerry E. Aron, Co-Chairs: John Neukamm reported on the continuing efforts of the Section to secure the issuance of an ethics opinion from The Florida Bar's Professional Ethics Committee to confirm the Section's existing position that an attorney may continue to permit a title insurer to audit a special trust account used exclusively for transactions in which the attorney acts as a title or real estate settlement agent without being required to obtain client consent. After extensive discussions with the Bar's Professional Ethics Committee, an opinion is expected at or around the time of the next Executive Council Meeting in February.

Committee Administration

Michael reminded that the website is accessed by committee members seeking specific committee information, and by Bar members who seek general information preparing to join a committee. He encouraged each chair to keep their committee webpage up to date, including posting of minutes and agendas. As a bonus for chairs, posting of information on the website provides an inquirer a central source which should reduce inquiries, and thus time expended, especially for repetitive inquiries, by the committee chair. Michael also emphasized the need and responsibility for committee succession planning.

Communications – Nicole C. Kibert, Chair: Nicole reported on the new webpage which is still in the planning stages but is expected to be up and running in the near future.

Committee Reports

Commercial Real Estate – Art Menor, Chair: Art related that the Committee is in its second year and it is gaining members. A sub-committee has recently been created with the property appraiser in Miami-Dade County regarding vertical subdivisions and the Committee is planning a seminar for April 11th.

Condominium and Planned Development – Steven H. Mezer, Chair: The Committee has a CLE program on April 4th at the Tampa Airport. Jane Cornett is the Chair of the CLE subcommittee.

continued, next page

PROBATE & TRUST DIVISION

revisions to the definition of "disinterested witness" and "correct copy."

Probate Law and Procedure – John Moran, Chair: Three new subcommittees were formed during the meeting. Patrick Mize will chair the subcommittee reviewing issues raised in Saunders v. Saunders, 796 So. 2d 1253 (Fla 1st DCA 2001) dealing with the disposition of a nonresident's Florida real property. Jim George will chair the subcommittee examining whether revisions should be made to Florida law on holographic wills and harmless errors in wills. The third subcommittee will be looking at notice to creditor issues raised in Golden v. Jones, 126 So. 3d 390 (Fla. 4th DCA 2013), which is in conflict with Lubee v. Adams, 77 So. 3d 882 (Fla. 2d DCA 2012) and Morgenthau v. Estate of Andzel, 26 So. 3d 628 (Fla. 1st DCA 2009). John Moran reported that the Section will be filing an amicus brief if Golden is appealed to the Florida Supreme Court.

Trust Law – Shane Kelley, Chair: The Committee reviewed the Bock legislation affecting guardianship and trust administrations. The Committee is close to approving proposed revisions to F.S. § 736.0412 that are intended to prohibit nonjudicial modification during the first ninety years after a trust's creation, even if the trust has a 360-year rule against perpetuities period, unless the settlor expressly authorizes nonjudicial modification in the trust. The Committee also discussed whether to support the proposed Directed Trustee bill from the Florida Bankers Association, which would permit a settlor to exculpate an excluded trustee in the trust agreement. The Committee voted to recommend a revision to the bill which will be presented to the Florida Bankers Association.

Wills, Trusts and Estates Certification Review Course – Rick Gans, Chair: The Wills, Trusts and Estates Certification Review Course will be held on April 4 and 5, 2014 at the Orlando Airport Hyatt. The At-Large Members in Orlando will host a reception to recruit attendees to become active Section members. Course topics will be altered to expand on probate and trust litigation, reduce the focus on Federal tax, and add asset protection.

REAL PROPERTY DIVISION

Construction Law – Hardy Roberts, Chair: Hardy reports the Committee is looking to have more in-person meetings and perhaps a Roundtable to bring together multiple issues.

Construction Law Certification Review Course – Lee Weintraub, Chair: The review course and construction institute will be in March. The golf tournament is the 20th and the seminar is on the 21st and 22nd.

Insurance & Surety – W. Cary Wright, Chair: Cary reported a good meeting was held in conjunction with the Executive Council. The Committee has monthly call-in meetings on the third Monday of each month and produces a quarterly newsletter.

Legal Opinions – Kip Thornton, Chair: Kip reported the Committee is working with the Business Law Section on the new LLC statute and trust law issues.

Real Estate Structures and Taxation – Wilhelmina Kightlinger, Chair: Willie reported that the Committee held a successful land trust seminar in October and is looking at the problems of getting insurance for property held in land trusts. The Committee is hoping to present CLE at some of its upcoming meetings.

Real Property Finance & Lending – Jim Robbins, Chair: The Committee is looking at three different issues, including receivership model forms, how to deal with abandoned property, and stale mortgages that could be eliminated by an amended statute of repose or by other means.

Real Property Problems Study – W. Theodore "Ted" Conner, Chair: The Committee is working with the Construction Law Committee on issues pertaining to construction mortgages and is also looking at ways to correct errors in plats.

Residential Real Estate and Industry Liaison – Frederick W. Jones, Chair: Fred reported triumphantly that the FR/BAR contract is on the website for all members to access. The Committee is undertaking a project relative to trust account audits and a survey of practitioners for possibly drafting retainer form language for real estate transactions.

Title Insurance & Title Insurance Liaison – Kristopher Fernandez, Chair: Kris reported that the Committee is looking at the effects of the economic loss rule on title issues. Kris also reported that the ALTA Best Practices are posted to the website.

Title Issues and Standards – Christopher W. Smart, Chair: Bob Graham reported for the Chair that the searchable version of the Uniform Title Standards are now posted on the website.

The meeting was adjourned at 10:00 a.m. at which time everyone moved on to the Executive Council Meeting.

Fellowship Program Open to All Young RPPTL Attorneys!


JOSHUA ROSENBERG


DOUGLAS CHRISTY


KYMBERLEE CURRY-SMITH


SEAN LEIBOWITZ

At the Section's 2013 Executive Council Meeting, held at The Ritz-Carlton in Sarasota, Florida, the Section proudly announced the selection of four new attorneys to the Section's Fellowship Program. The Section's fourth class of Fellows will consist of **Joshua Rosenberg** of Miami, Florida, **Douglas Christy** of Tampa, Florida, **Kymberlee Curry-Smith** of Pembroke Pines, Florida and **Sean Leibowitz** of Boca Raton, Florida,. Mrs. Smith and Mr. Christy will serve as Real Property Fellows, while Mr. Rosenberg and Mr. Leibowitz will serve as Probate and Trust Law Fellows. The Section received over 60 applications from highly qualified attorneys throughout the state for the 4 positions.

The Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) is pleased to announce that we are currently accepting applications for our new 2014-2016 Fellowship class. The Fellowship Program is designed to attract and retain young lawyers to the RPPTL Section. The Fellowship program allows young lawyers to become substantially involved in the Section work, receive leadership training and work closely with leading attorneys in their field. The RPPTL Section program is designed to cultivate and develop future leaders to continue the strong presence of the Section as a leader in The Florida Bar.

The Fellowship Program is open to all lawyers who are members of the RPPTL Section and (a) have been admitted to the Florida Bar for fewer than 12 years or (b) are younger than 38 years of age who practice in the area of real property, estate or other area of law covered by the RPPTL Section.

Fellowships are provided for a two-year term and each Fellow will receive a subsidy of up to $2,500 annually (not to exceed actual out-of-pocket expenses) to help defray the expenses of attending RPPTL Section meetings. **The deadline to apply is April 1, 2014**. The application is available through the RPPTL section website at www.RPPTL.org or from Marsha Madorsky, mmadorsky@carltonfields.com.

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ADR Committee's Tips and Traps

By Deborah Bovarnick Mastin, Co-Chair, RPPTL ADR Committee
David R. Carlisle, Co-Chair, RPPTL ADR Committee

The RPPTL ADR Committee will be posting a practice tip or trap on a regular basis in Actionline. These practice tips or traps will address issues that should concern those whose practice includes drafting wills, trusts, estate plans, guardianship arrangements, those whose clients negotiate real estate development or sales agreements, construction or engineering contracts, and those who litigate disputes arising under these agreements.

Selecting an Arbitrator

One of the most valuable qualities of choosing arbitration as an alternate dispute resolution process is the ability for your client to have direct input into who the arbitrator or arbitrators will be.

The qualifications of a satisfactory arbitrator should be discussed with your client as part of your exploration of the client's expectations. For example, when drafting the arbitration provisions in your agreement, will or trust, consider whether the arbitrator should be a member of the Florida Bar. Perhaps your client would prefer that the arbitrators, or one of them, hold a Florida Bar Board Certification in Construction Law, Real Estate Law, or Wills, Trusts and Estates Law, or even whether the arbitrator, or one arbitrator on the panel, should not be an attorney. Perhaps a certified public accountant, a certified financial planner, or a Florida professional engineer, registered architect, or a forensic scheduler would be better suited to determining disputes that may arise under the plan or the contract. Perhaps your client would prefer a lawyer or other professional with years of experience in the particular transaction at hand. Engaging a knowledgeable and experienced arbitrator will expedite the arbitration proceeding and will provide your client with a more satisfactory outcome should a dispute arise.

Perhaps your client would like assurance that the arbitrator has extensive training and experience in arbitration. Although the Florida Supreme Court provides a process for the qualification of court-ordered arbitrators (Florida Rules for Court Appointed Arbitrators Rules 11.010 and 11.020), in circumstances that are not court-ordered, it is not required that the agreed upon arbitrator have the training necessary to meet the qualifications required for court-ordered arbitrations. Several ADR providers, including the American Arbitration Association (www.adr.org), JAMS (www.jamsadr.org), the International Institute of Conflict Prevention and Resolution (wwww.cpradr.org), and the Chartered Institute of Arbitrators (www.ciarb.org) screen and train members of their arbitration rosters.

If the arbitration agreement is silent as to the qualifications of the arbitrator, these questions and considerations can be raised with your client at the time a dispute arises.

The ADR Committee is currently compiling a directory of RPPTL members who are mediators and arbitrators with practice areas in real property, construction, probate, trust and guardianship law. This directory will be found on the ADR Committee webpage of the RPPTL website and will be available soon.

New Section Website, from page 28

galleries on the website dating back over a decade.

- ***Committees*** button contains a drop down menu which now links you to all the Section Committees and all Section member accessible content, links and attachments. For those committees that have open membership, you can ask to join a committee easily with the "Join Committee" link within each committee Home page and the Chair of the committee or designee will respond online to your request.
  - Each Committee Chair or designee now has access to the back end of the website committee pages for posting content and attachments or can send attachments to the webmaster until they get more comfortable with direct posting.
  - Most committees allow for Section member access whether or not the Section member is a committee member so that all Section members can follow the activities of each committee, benefit from the information and attachments contained within the committee pages and interact with the committee members on areas of concern.
- ***Calendar*** button now allows access to the Section calendar for meeting information and CLE information so you can better manage your schedule.

Conclusion

This new website is more user-friendly with an engaging and entertaining modern design, unique database and management systems so that all Section members have access to vital information in their areas of practice and can interact within the website with other Section members. We welcome your questions and suggestions. Some functionality programming is currently being reviewed and upgraded to address all concerns so your comments are welcomed. If you have any general questions or concerns regarding the website that you would like to address through DDLex or "Contact Us" the response is just a click away.

Do Leasehold Cooperatives Qualify as Protected Homestead? It Depends….

By Jeffrey Scott Goethe, Esq., Bradenton, FL


J. GOETHE

When planning for the devise of a cooperative unit,[1] or dealing with the devise of a cooperative unit during a probate administration, Florida practitioners are frequently surprised to discover that what appears to be real estate, and is treated as real estate for almost every purpose under Florida law, is sometimes treated as personal property. This limited exception is based upon a 1978 Florida Supreme Court decision that denied the constitutional protection for a surviving spouse because her deceased husband's home was a cooperative apartment.[2] The Florida Supreme Court has now declined to hold that the 1978 decision applies to all cases involving Article X, Section 4, of the Florida Constitution on three separate occasions.

The Cooperative Act. The Cooperative Act, enacted in 1976, provides two key definitions:

> Sec. 719.103(12), F.S., "Cooperative" means that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.
>
> Sec. 719.103(14), F.S., "Cooperative parcel" means the shares or other evidence of ownership in a cooperative representing an undivided share in the assets of the association, together with the lease or other muniment of title or possession.

These definitions include key concepts for the application of homestead protections, including ownership, muniment of title, beneficial use, title, and possession. A residential cooperative is defined as one with units that are intended for use as a "private residence, domicile, or homestead…."[3]

The Wartels Decision.[4] Mr. Wartels died in 1974 (prior to the Cooperative Act), owning a cooperative apartment that he shared with his wife. The home was titled in his name alone. After his death, his widow sought constitutional protection as a surviving spouse under Article X, Section 4(c). The Florida Supreme Court, citing *Pasco v. Harley*[5]; *Hill v. First National Bank*[6]; and *Milton v. Milton*[7], held that "homestead property must consist of an interest in realty," and that a cooperative apartment may not be considered homestead property for the purpose of subjecting it to restrictions on the descent of homestead property. The *Pasco, Hill*, and *Milton* decisions, however, did not hold that a leasehold interest is not an "interest in realty." The *Hill* decision held that "[t]he exemptions 'from forced sale under process of any court,' of certain homestead property 'owned by the head of a family residing in this state,' have reference to the beneficial interests as owned by the head of a family in the specified classes of property."[8] The Court focused on the possessory rights required for the constitutional protections, rather than requiring legal title. Although *Hill* did not involve a leasehold cooperative, the Court seemed to be saying that a possessory right is an interest in real property.

The Southern Walls Decision. In 2002, the Fifth District held that an interest in a leasehold cooperative is protected from the claims of creditors during the owner's lifetime.[9] The Fifth DCA distinguished *Wartels* and held that *Wartels* applied to the constitutional restrictions on devise, but not the constitutional homestead protection from forced sale:

> In *In Re Estate of Wartels,* 357 So. 2d 708 (Fla. 1978), the court held that a co-op is not homestead for purposes of the laws relating to devise and descent. However, in *Ammerman v. Markham,* 222 So.2d 423 (Fla. 1969), the court held that a co-op may qualify as homestead for purposes of taxation. This dichotomy reveals that there is no definition of homestead that may be used with precision in all cases and that *Wartels* and *Ammerman* are not necessarily controlling regarding the issue of whether a co-op qualifies as homestead for purposes of the exemption from forced sale under Article X, Section 4(a)(1).[10]

The Florida Supreme Court declined to review *Southern Walls*.[11]

Phillips v. Hirshon. In *Phillips v. Hirshon*,[12] the Third District felt constrained to follow *Wartels* in a case involving constitutional restrictions on the devise of homestead in Article X, Section 4(c). The Third District certified a conflict between *Wartels* and *Southern Walls* because they both examined the application of the same section of the Florida Constitution, but reached different results. After initially accepting jurisdiction, reviewing briefs, and hearing oral argument, The Florida Supreme Court dismissed jurisdiction. In an unpublished order dated April 17, 2008, the Court stated:

> We originally accepted jurisdiction to review *Phillips v. Hirshon*, 958 So. 2d 425 (Fla. 3d DCA 2007), pursuant to article V, section 3(b)(4) of the Florida Constitution. See Phillips v. Hirshon, 963 So. 2d 227 (Fla. 2007) (granting review). However, upon further consideration, we have determined that we should exercise our discretion to discharge jurisdiction in this cause. Accordingly, jurisdiction is discharged and this review proceeding is hereby dismissed.[13]

Geraci v. Sunstar EMS. The *Geraci* decision marks the third opportunity for the Florida Supreme Court to review the conflict between *Southern Walls* and *Wartels*. At the

continued, next page

district court of appeals level, the Second District declined to apply the holding in *Wartels* and instead focused on the policy behind the constitutional exemption from forced sale:

> In considering the exemption from forced sale, a court must instead "focus on the debtor's intent to make the property his homestead and the debtor's actual use of the property as his principal and primary residence." *In re Dean,* 177 B.R. 727, 729 (Bankr.S.D.Fla.1995). When a lessee's interest in a leasehold estate includes the right to use and occupy the premises for a long term and the lessee has made the residence his principal and exclusive residence, such an interest is entitled to Florida's homestead exemption from forced sale. *Id.* at 729–30; *see also In re McAtee,* 154 B.R. 346, 348 (Bankr.N.D.Fla.1993) (finding a long-term lease to be subject to the exemption from forced sale because it constituted an interest in real property and was more than a "simple possessory interest"); *S. Walls,* 810 So.2d at 572 (finding a co-op to be subject to the exemption from forced sale because "a co-op owner owns the unit, pays valuable consideration for it, and has the right to the exclusive use and possession of it for the duration of the lease"). This construction of the homestead exemption from forced sale is consistent with "important public policy considerations such as promoting the stability and welfare of the state by encouraging property ownership and the independence of its citizens by preserving a home where a family may live beyond the reaches of economic misfortune." *In re McAtee,* 154 B.R. at 347–48.[14]

The Second District went on to distinguish *Wartels:*

> We recognize that at least two courts have refused to so distinguish *Wartels*. *See In re Lisowski,* 395 B.R. 771, 777 (Bankr.M.D.Fla.2008) (concluding that, under *Wartels,* the homestead exemption from forced sale applies only to improved land or real property that is owned by the debtor); *Phillips v. Hirshon,* 958 So.2d 425, 430 (Fla. 3d DCA 2007) (holding that a co-op did not qualify for homestead exemption for purposes of descent and devise because it was not an interest in realty under *Wartels*). However, we do not find the reasoning of these cases persuasive because they do not adequately reconcile the supreme court's decision in *Wartels* with the court's jurisprudence extending the exemption from forced sale to other beneficial interests in land and not limiting the exemption to a fee simple interest.

The Second District Court of Appeal, on August 20, 2012, denied a Motion for Certification to the Florida Supreme Court.

The Florida Supreme Court, however, initially accepted jurisdiction based upon a conflict between *Wartels* and *Southern Walls* and received initial briefs. In its initial brief, at page 26, the Agency for Health Care Administration argued that the decision in *Geraci* was in direct conflict with the decision in *Philips v. Hirshon.* After briefs were filed, the court dismissed jurisdiction on October 28, 2013, cancelling oral arguments scheduled for November 4, 2013. The order reads:

> We initially accepted review of the decision in *Geraci v. Sunstar EMS*, 93 So. 3d 384 (Fla. 2d DCA 2012), based on express and direct conflict. See art. V, § 3(b)(3), Fla. Const. Upon further consideration, we have determined that we should exercise our discretion and discharge jurisdiction. Accordingly, we hereby dismiss this review proceeding.[15]

The Florida Supreme Court has had three opportunities to overrule *Southern Walls* and hold that *Wartels* applies to cases involving the constitutional exemption from forced sale. The application of *Wartels* appears to be limited to cases under Article X, Section 4(c) involving restrictions on the devise of homestead, or perhaps to cases involving deaths prior to the enactment of the Cooperative Act. The Florida Supreme Court has not overruled, distinguished, or receded from *Wartels*. At the same time, however, the Court seems to accept the application of the protection from forced sale under paragraphs (a) and (b) of Article X, Section 4 to leasehold cooperative units. As the law currently stands, a leasehold cooperative unit is not subject to constitutional restrictions on devise, but still enjoys the constitutional protection from creditor claims, both during the owner's lifetime, and upon devise to persons who qualify as heirs.

Jeffrey S. Goethe is a partner with Barnes Walker, Goethe, & Hoonhout, Chartered in Bradenton. He is board certified by the Florida Bar in the area of wills, trusts and estates and has an AV® peer review rating from Martindale-Hubbell. Mr. Goethe earned his B.A. degree from Maryville College and his J.D. degree from the University of Tennessee. He is an active member of The Real Property, Probate and Trust Law Section; past chair of the Florida Probate Rules Committee; a member of the Manatee Estate Planning Council, and a Title Agent for the Attorneys' Title Fund Services, LLC.

Endnotes

1 The Cooperative Act was created by Ch. 76-222, Laws of Florida. Prior the enactment of the Act, provisions for the cooperative form of ownership were included within the Condominium Act.
2 *In re Wartel's Estate*, 357 So. 2d 708 (Fla. 1978).
3 § 719.103(22), Fla. Stat. (2013).
4 *In re Wartel's Estate*, 357 So. 2d 708 (Fla. 1978).
5 *Pasco v. Harley,* 75 So. 30 (Fla. 1917).
6 *Hill v. First National Bank,* 73 Fla. 1092, 75 So. 614 (1917).
7 *Milton v. Milton,* 63 Fla. 533, 58 So. 718 (1912).
8 *Hill v. First National Bank,* 75 So. at 616, citing *Pasco v. Harley,* 73 Fla. at 827-28.
9 *Southern Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566 (Fla. 5th DCA 2002).
10 *Southern Walls Inc. v. Stillwell Corp.,* 810 So. 2d at 569.
11 *Southern Walls, Inc. v. Stilwell Corp.*, 829 So.2d 919 (Fla. 2002).
12 *Phillips v. Hirshon,* 958 So.2d 425 (Fla. 3d DCA 2007).
13 *Levine v. Hirshon*, 980 So. 2d 1053 (Fla. 2008).
14 *Sunstar EMS v. Geraci*, 93 So. 3d 384 (Fla. 2d DCA 2013).
15 Florida Supreme Court Case SC12-2073.

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Title Insurers' Audits of Trust Accounts

By: John B. Neukamm, Tampa, Florida
on behalf of the RPPTL Section's Ad Hoc Committee
on Trust Account Issues


J. NEUKAMM

Since October 1, 1994, Florida attorneys maintaining special trust accounts used exclusively for transactions in which the attorney acts as the title or real estate settlement agent have been ethically permitted to allow a title insurer to audit such accounts without obtaining their clients' consent pursuant to *Advisory Opinion 93-5* issued by The Florida Bar. While the foregoing Advisory Opinion noted that *Rule 4-1.6* of the Florida Bar's *Rules of Professional Conduct* generally obligates an attorney to refrain from voluntarily revealing any "information relating to the representation of a client" unless the client has consented, The Florida Bar's Professional Ethics Committee (the "PEC") concluded that, with respect to special trust accounts, the exception set forth in Subsection (c)(1) of the confidentiality rule was applicable. That exception authorizes attorneys to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." In its Advisory Opinion, the PEC specifically recognized that "audits by title insurance underwriters are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account."

Until July 1, 2012, it was not mandatory for attorneys to maintain special trust accounts with respect to real estate transactions. However, since the adoption of § 826.8473(8), Fla. Stat., attorneys serving as title or real estate settlement agents have been required to maintain separate trust accounts for such transactions (to the extent permitted under applicable Florida Bar rules) and to permit title insurers to audit such accounts. That statute specifically provides as follows:

> (8) An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

In light of the adoption of the foregoing statute, a Florida Bar member sought guidance from the PEC with respect to the permissibility of allowing a title insurance company to audit special trust accounts used exclusively for real estate and title transactions without obtaining the informed consent of clients having no involvement with that particular title company. The PEC appointed a Subcommittee on Real Estate Trust Accounts & Proposed Advisory Opinion 12-4 (the "PEC Subcommittee") to review and address this issue. The PEC Subcommittee met multiple times over the last two years to consider this issue. After extensive discussions and much deliberation, the PEC Subcommittee recommended, over the strenuous objections of The Florida Bar's Real Property, Probate & Trust Law Section (the "RPPTL Section"), the Florida Land Title Association, Old Republic National Title Insurance Company ("ORT") and Attorneys' Title Fund Services, Inc. (the "Fund"), that the PEC adopt a proposed advisory opinion requiring an attorney to obtain their client's informed consent prior to permitting a particular title insurer to audit a special trust account which includes funds arising out of transactions in which both that insurer and other title insurers are involved.

Despite the PEC Subcommittee's recommendation, and in light of impassioned presentations made by representatives of the RPPTL Section, ORT and the Fund at the PEC's June 28, 2013, meeting held in conjunction with The Florida Bar's Annual Convention, the PEC directed the PEC Subcommittee to redraft the proposed advisory opinion to conclude that attorneys may not permit a title insurer to audit special trust accounts which include funds arising out of transactions in which both the insurer and other title insurers are involved without clients' consent unless an exception to the confidentiality rule applies. The PEC Subcommittee subsequently prepared such an advisory opinion, and that proposed advisory opinion was published as *Proposed Advisory Opinion 12-4* in the September 1, 2013, issue of *The Florida Bar News*.

The RPPTL Section's leadership and the members of the Section's Ad Hoc Committee on Trust Account Issues strongly believe that title insurers should continue to be permitted to audit special trust accounts maintained by an attorney solely with respect to transactions in which the attorney acts as the title or real estate settlement agent without the need to obtain consents from clients whose funds are held in such an account pursuant to the "client's interests" exception enunciated in Subsection (c)(1) of the confidentiality rule. The RPPTL Section's leaders did not believe the published proposed advisory opinion provided sufficient guidance or encouragement to attorneys confronted with such audit requests, so, on behalf of the RPPTL Section, RPPTL Section Chair Peggy Rolando submitted an objection to the proposed advisory opinion to the PEC on September 30, 2013. In her letter, Ms. Rolando noted that there are a number of very strong arguments that such audits will **always** will be in the client's best interest, as well as important policy reasons why the audits of special trust accounts maintained in connection with real estate transactions should be allowed (and, in fact, encouraged), including the following:

1. While the PEC determined that information regarding deposits into and disbursements from special trust accounts utilized solely in connection with real estate transactions is confidential, such information must, in fact, be routinely dis-

continued, next page

closed to the various parties involved with the transaction, as well as to third parties (including buyers, sellers, lenders, brokers, insurance agents, title insurers, appraisers, property owners' associations, etc.), in order to facilitate the closing of the transaction. Thus, it is not practical or in the clients' best interests to treat such information as confidential.

2. Assuring title insurers' ability to audit special trust accounts utilized solely in connection with real estate transactions is essential to preserving the public's access to legal counsel in real estate transactions. Title insurers are liable for the actions of their agents pursuant to closing protection letters and otherwise and will be unwilling to permit attorney-agents to issue title insurance commitments and policies if the insurers have no means to verify the proper disbursement of real estate settlement funds. The public is best served by access to the knowledge, skill and training of attorneys in connection with real estate transactions, but, if title insurers are only able to audit non-attorney agent escrow accounts, real estate transactions will undoubtedly shift from attorney-agents to non-attorney agents. Such a shift would not be in the best interests of clients who seek the assistance of competent legal counsel to handle their real estate transactions.
3. Permitting title insurers to audit special trust accounts utilized solely in connection with real estate transactions will increase the likelihood that real estate settlement funds will be properly disbursed. Audits of special trust accounts frequently disclose innocent errors that can be easily addressed by the attorney. For example, at closing, an attorney might collect funds to record a satisfaction of mortgage to be received post-closing. If the satisfaction is never received, the audit will disclose the presence of such funds in the trust account, and the title insurer can alert the attorney to the need to follow-up with the lender whose mortgage has been satisfied to obtain the satisfaction. It is certainly in the client's best interest to address such a situation within months after a closing rather than years later, when the client is attempting to sell or mortgage the property and finds that the property remains encumbered by a mortgage or other lien which was previously paid.
4. Permitting title insurers to audit special trust accounts utilized solely in connection with real estate transactions will reduce the likelihood that such funds will be misappropriated. This is, of course, in the best interests of all parties to real estate transactions, including the client. Unfortunately, audits have disclosed the misappropriation of real estate settlement funds by Florida attorneys. In the years 2008 and 2009 alone, a single title insurer suffered losses of $65 million when funds held for Florida real estate transactions were stolen from attorney controlled trust accounts, and three Florida domestic title insurers have been required to cease issuing policies in large part due to the misappropriation of funds from attorney trust accounts. In response to losses incurred by title insurers and members of the public and other issues, the Florida Legislature created the Title Insurance Study Advisory Council (the "Council") chaired by then Lt. Governor Jeff Kottkamp, which issued its final report and findings in 2009. Based upon testimony concerning *Advisory Opinion 93-5*, the Council recommended that attorneys engaged in title insurance transactions be required to maintain a separate trust account for such transactions. That recommendation was the impetus for § 826.8473(8), Fla. Stat., which includes language drawn directly from *Advisory Opinion 93-5*. Attorneys will be less likely to steal trust account funds if they know the trust account will be subjected to routine audits, and, if audits are permitted, the misappropriation of funds is likely to be discovered earlier than if audits are not permitted.
5. The PEC's suggestion that attorneys may simply obtain clients' consent through engagement letters or via a document executed by clients at closing is not feasible since deposits are often made prior to any formal engagement, many transactions, particularly with respect to residential real estate, are handled without formal engagement letters and, if the consent is to be provided at closing, it would not be effective with respect to audits to be conducted prior to closing. Furthermore, it is not appropriate to require attorneys to maintain separate trust accounts for each title insurance underwriter since attorneys often do not know which underwriter will be selected to issue a particular title insurance policy when the initial deposit is made, and it is not unusual for the anticipated underwriter to be changed during the course of a particular transaction due to differing underwriting guidelines, lender requirements or other issues that may arise as the transaction progresses towards closing. Finally, and most importantly, a lawyer who has stolen funds from their trust account would never seek client consent to an audit, so the PEC's suggestion that the attorney determine whether an audit would be in the client's best interests could result in the proposed advisory opinion being used as a shield by unethical attorneys to prevent the discovery of their illegal conduct. This could hardly be considered to be in the best interests of clients.
6. Presently, accountants routinely audit attorney-clients financial records, including records related to both their general and special trust accounts, without objection (with the apparent blessing of The Florida Bar). There is no specific exception to *Rule 4-1.6* permitting such audits, so, undoubtedly, the exception permitting attorneys to reveal such information to serve their clients' interests has provided the justification for such audits. In light of the existence of significant defalcations of real estate settlement funds by Florida attorneys, audits of special trust accounts maintained in connection with real estate transactions should, likewise, be permitted pursuant to that exception.

In addition, though not directly relevant to the inquiry, Ms. Rolando's letter noted that an unanticipated consequence of the PEC's suggested approach might be to shift substantial escrow and other real estate settlement funds from attorney

trust accounts that may be subject to the Florida Bar's IOTA program to non-attorney escrow accounts. Since real estate settlement funds presently comprise a significant component of trust funds subject to the IOTA program, the shifting of such funds from IOTA accounts to non-attorney escrow accounts would likely have a material and negative impact upon future IOTA program funding for indigent legal services.

The objection letter concluded by noting that real estate lawyer defalcations are a serious problem in Florida, and the RPPTL Section strongly believes that The Florida Bar should do everything possible to protect client's funds. The RPPTL Section then suggested that the inclusion of additional language in the proposed advisory opinion could continue to affirm the importance of such audits and provide a reasonable degree of certainty to attorneys that such audits continue to qualify for the "client's interests" exception enunciated in Subsection (c)(1) of *Rule 4-1.6* of the Florida Bar's *Rules of Professional Conduct.*

Ultimately, in light of the issues addressed in the RPPTL Section's objection letter and, after consideration of comments provided by representatives of the RPPTL Section, ORT and the Fund at the PEC's meeting held on January 24, 2014, in conjunction with The Florida Bar's Winter Meeting, the PEC, by a vote of 24 – 5, agreed to include the following additional language in the proposed advisory opinion:

> "In recognition of the value of title insurance underwriter audits in assuring the safety and proper disbursement of funds deposited into a special trust account, it may be reasonable for an attorney to conclude that such an audit would be reasonably necessary to serve the affected clients' interests."

The entire text of *Proposed Advisory Opinion 12-4* can be reviewed at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/4F8498828DAF0BFC85257BD700532AB2/$FILE/12-04%20PAO.pdf?OpenElement . That advisory opinion will become final unless a request for review is made on or before February 26, 2014. The RPPTL Section's leadership has concluded that the proposed advisory opinion, as revised, is sufficient to continue to permit title insurers to audit special trust accounts maintained exclusively with respect to real estate transactions and expects that such audits will continue to provide a practical and efficient means to assure the protection of such funds in the future.

John Neukamm is a shareholder with the Mechanik Nuccio law firm in Tampa, where he engages in a varied real estate and business law practice. John is a former Chair of The Florida Bar's Real Property, Probate & Trust Law Section, has been a Board Certified Real Estate Lawyer since 1992, is a member of the American College of Real Estate Lawyers, has an "AV" Martindale-Hubbell rating, is recognized by Florida Trend magazine as a Legal Elite Lawyer and as a Florida Super Lawyer by Law & Politics magazine and presently serves on the Florida Legal Education Association's Executive Board.

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Two Ways to Improve Your Trust & Estate Practice

Lougas v. Sophia Enterprises - Is There a New Way to Terminate A Lease?

By Kathrine Lupo, Esq., Gallagher & Associates Law Firm, P.A., St. Petersburg, Florida



K. LUPO

Courts use precedent to create predictability and in an effort to ensure that similarly situated individuals are treated alike. According to the Florida Supreme Court, "[t]he doctrine of precedent is basic to our system of justice;"[1] further, precedent provides the foundation for cases with similar underlying facts and policies to be decided consistently. Many cases are factually analogous, so legal precedent is readily applicable in those situations. However, when courts are faced with unusual fact patterns, the application of general legal theory does not always seamlessly direct an equitable result. With respect to a landlord's termination of a lease, the Florida Fourth District Court of Appeal's (the "Fourth DCA") decision *Lougas v. Sophia Enterprises, Inc.*[2] is an example of a case with atypical facts that were interpreted to fit the equities in that case, but which, if expanded beyond its very specific fact pattern, could potentially have inequitable results for other parties in similar, but not identical, circumstances.

The facts of *Lougas* are not complicated. A landlord and tenant executed a five-year commercial lease in 2007. The tenant was allowed to assign his rights under the lease, provided that he remained responsible for any unpaid rent by the assignee. The lease also provided that in the event of a sale of the leasehold property, the landlord could unilaterally terminate the lease. In April 2008, the tenant sold his business and, as allowable under the lease, assigned his lease interest. Then, at the end of August 2008, the landlord sent notice that it was exercising its rights to terminate the lease (the "Termination Notice"). The assignee was expected to return possession of the premises to the landlord by October 31, 2008.

The assignee disputed that the standard which allowed for unilateral termination had been satisfied. Despite the assignee's requests, the landlord refused to rescind the Termination Notice. However, despite the Termination Notice, the assignee remained in possession of the premises and continued to pay rent beyond October 31, 2008. The landlord continued to accept the assignee's rent payments.. In December 2008, the assignee failed to timely pay rent, and the landlord brought suit against both the tenant and the assignee for breach of the lease.

The landlord's representative testified at trial that it intended to terminate the lease when it sent the notice, but realized later that it probably was not entitled to do so under the lease. The trial court held that the lease was not terminated due to the parties' continued performance after the termination notice. The tenant appealed, claiming that sending the notice terminated the lease, along with the tenant's obligations thereunder.

The Fourth DCA agreed with the tenant, holding that the lease was terminated because the landlord sent a termination notice which it did not later rescind despite the assignee's requests for it to do so. In the Fourth DCA's view, the assignee's disagreement with the basis for termination and the continued performance of the parties did not negate the termination or reinstate the lease. At the same time, the Fourth DCA concluded in a footnote that whether the landlord had the right to terminate and whether the assignee had a breach of contract claim against the landlord, was a "question for a different day." It noted that "[t]he fact that termination may have been improper does not negate the fact of termination."

It is commonly known in the legal community that a lease is a contract that is governed by general principles of contract law and construed to give effect to the intent of the parties.[3] Here, the Fourth DCA determined that, despite the landlord's later testimony that it probably did not have the right to do so, the intent of the landlord at the time it sent the notice was to terminate the lease. The Fourth DCA did not decide whether there was a contractual basis for the termination. Any such determination would have the following effects: if there were a contractual basis for termination, the landlord undoubtedly acted within its lease rights and effectively terminated the lease, presumably achieving whatever objective it had for doing so, and if there were no such contractual basis, then the landlord acted wrongfully by sending the notice and then failing to rescind it. As a matter of policy, the landlord should not later be permitted to benefit from a wrongful termination. When "…cooperation is unreasonably withheld, the recalcitrant party is estopped from availing [himself] of [his] own wrongdoing."[4]

In this narrow instance, a holding that the contract was terminated led to an equitable result because the landlord originally wanted the lease terminated, acted in accordance thereof, and presumably received the benefit of it. The Fourth DCA is not allowing the landlord to benefit from terminating the lease and then change its position to receive an additional benefit by arguing that the lease was not terminated. The Fourth DCA looked to the merits of this particular situation and required (1) the landlord to be bound by its own actions, (2) the tenant (the one party that did nothing wrong) to be released of the obligations of the terminated lease, and (3) the assignee to be responsible only for the period that it was in possession, but not for future rents under a contract that the landlord intended to terminate.

The difficulty with this case is that although it reaches an equitable result, it is based on such a unique fact pattern that, in practice, has a very narrow application. The

Fourth DCA reached its conclusion without having to determine whether the Termination Notice was proper. The more common circumstances will require the court to determine the issue of whether a party was entitled to terminate a contract and will be inseparable from whether it was, in fact, terminated. Since "…the rights of the lessor are the obligations of the lessee, and…the rights of the lessee are the obligations of the lessor,"[5] the right of the tenant to have a contract properly terminated would be an obligation of the landlord. Generally, whether this right was infringed upon would be a prerequisite because rarely would enforcing a wrongful termination by a landlord result in a benefit to a tenant.

Although in a footnote, holding that the termination was effective even though potentially improper, gives rise to the argument that one could intentionally terminate a contract without entitlement to do so, and the non-terminating party would be required to protect its rights by bringing a breach of contract lawsuit. Otherwise, as in *Lougas*, the wrongful termination notice could be enforceable in the future, even if both parties continue to perform pursuant to the contract. Thus, the hope is that the *Lougas* case will create precedent for a very narrow scope of cases whose facts dictate a comparable result. This case hopefully will not become global precedent for the idea that a wrongful termination may be enforceable, but rather will be applied only when the equities so require. The hope is that the general rule that a party is bound by his, her or its actions, and cannot later escape the consequences thereof by positing that those actions were not permitted by the contract, is still applicable.

Kathrine Lupo joined Gallagher & Associates Law Firm, P.A., in 2012. Her practice focuses on real estate law with an emphasis on foreclosure defense. She graduated cum laude from Stetson University College of Law in 2012 with a Juris Doctorate and a Masters in Business Administration. While at Stetson, she completed the Honors Program and was the president of the Real Property, Probate, and Trust Law organization. She is a member of the Real Property, Probate, and Trust Law Section of the Florida Bar, the St. Petersburg Bar Association, and the Pinellas County Chapter, Florida Association for Women Lawyers.

Endnotes

1 *U.S. Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So. 2d 871, 882 (Fla. 2007) (distinguished on other grounds).

2 *Lougas v. Sophia Enterprises, Inc.*, 117 So. 3d 839 (Fla. 4th DCA 2013).

3 *National Hotel, Inc. v. Koretzky*, 96 So. 2d 774, 776 (Fla. 1957).

4 *Ludal Development Co. v. Farm Stores, Inc.*, 458 So. 2d 781, 783 (Fla. 3d DCA 1984).

5 *Block v. Hirsh*, 256 U.S. 135, 164 (1921).

Guidelines for Service of Process on the Agency for Health Care Administration

Section 733.2121(3)(d), F.S., requires that the personal representative promptly "serve a copy of the notice to creditors and provide a copy of the death certificate on the Agency for Health Care Administration" if the decedent was 55 years or older. There seems to be continuing confusion where and how this service should be effected.

Language was recently added to the AHCA Medicaid Third Party Liability (TPL) web page that could be read to suggest the documents required to be served on AHCA can be served by e-mail in accordance with Florida Rule of Judicial Administration 2.516. Furthermore, an inquiry to a staff person with AHCA Medicaid recovery contractor, Xerox State Healthcare, LLC, suggested they would be glad to receive the documents by e-mail.

I had a recent conversation with the General Counsel for AHCA who set the record straight. Neither AHCA nor its Medicaid recovery contractee, Xerox State Healthcare, LLC, can properly accept service by e-mail of the documents required to be served by Sec. 733.2121(3)(d), F.S. No change in that status is contemplated. Only where Rule 2.516 has direct application, typically where AHCA is a party to ongoing litigation, can e-mail service be utilized pursuant to that rule. Rule 2.516 cannot be construed to authorize e-mail service by the personal representative of these documents.

The documents required to be served on AHCA by Sec. 733.2121(3)(d), F.S. must be served by the US postal service or an express carrier, in paper. Also, AHCA "will not object" to service on the Medicaid recovery contractee, Xerox State Healthcare, LLC; however, the proper way to serve these documents is to the following address:

Agency for Health Care Administration
Office of the General Counsel
2727 Mahan Drive, MS #3
Tallahassee, FL 32308

The reason for this is that the contractee has changed several times in the past several years, and once an address for service gets into the law office routine, it generally stays. If the contractee changes, that service will have gone to the wrong entity. The address above is the permanent address for AHCA and is unlikely to change.

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Spotlight on the Residential Real Estate & Industry Liaison (RREIL) Committee

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


F. JONES

If you have a residential real estate practice, this is the committee for you. If you are a real estate practitioner involved with a small firm or working as a sole practitioner, this is the committee for you. If you are looking for a committee with a dynamic and passionate chairperson, this is the committee for you.

For many years the Section had a committee that was dedicated to working on the FR/BAR contract and it served a very important function. But in recent years, the Section saw a need to offer more for the sole and small firm practitioner dealing in residential real estate whether it be in transactions, litigation, title insurance or representing folks like mortgage brokers, appraisers or surveyors. Under the leadership of Peggy Rolando, the need to provide more to these folks was discovered and this committee was formed. Peggy approached RPPTL Executive Council member Fred Jones, who is a long time Section member and a Florida Bar appointee on the Florida Realtor-Attorney Joint Committee, to assist in determining the focus and getting this committee up and running. Fred has chaired this committee from its inception.

The mission of the Residential Real Estate & Industry Liaison (RREIL) Committee is set out on the Committee webpage. Briefly stated, the purpose of the RREIL Committee is to provide a forum for Florida real estate attorneys who engage in residential real estate transactions to network, mentor and dialogue with each other and with other real estate and related industry professionals on various matters, issues and legislation impacting all of us; to identify, discuss and evaluate issues problems, challenges and concerns encountered in our profession; to liaise with and engage other real estate professionals and professional associations as well as other sections of The Florida Bar; to facilitate meaningful dialogue, exchange industry information and foster congenial and supportive relationships; to provide continuing educational opportunities for real estate lawyers in the State of Florida; to support the accord between Florida Realtors and The Florida Bar through the efforts of the Florida Realtor-Attorney Joint Committee and the FR/BAR contract; and to promote the benefits of and provide support the RPPTL Section of The Florida Bar.

The Committee works to find ways to network, mentor and communicate with its members, other sections of the Bar, other professionals and deal with pertinent legislation. The Committee has grown to over seventy (70) members. There are four (4) meetings per year which coincide with the RPPTL Executive Council meetings and most have a CLE component with CLE credit for one or two hours. Call-in capability is always available to make sure that the solo or small law firm practitioner can attend. The programs have included a CPA speaking on how to deal with Foreign Investment in Real Property Tax Act (FIRPTA), a presentation by Florida Representative Passidomo on the new foreclosure statute, and practical tips on how to deal with foreign clients. Fred emphasized that the Committee tries to focus on problems that the practitioner must deal with every day. The Committee also liaisons with other committees such as the Insurance and Surety Committee, Title Insurance & Title Insurance Liaison Committee and Real Property Finance & Lending Committee as well as with outside groups like the Florida Realtors, the Realtor-Attorney Joint Committee of the Florida Bar and Florida Land Title Association.

When you talk to Fred, you quickly catch his enthusiasm about the importance of supporting the smaller firms and providing value to those members. Fred also emphasized that the more value the Committee can provide, the more likely that other Section members will get involved with the Committee and sub-committees on a state-wide basis.

In the last few years, the Committee has also provided a seminar on contesting ad valorem taxes, entitled “TRIM Those Taxes”, to educate and inform attorneys that they do not have to be “big time” litigators to represent individual clients before the value adjustment board. The seminar had a huge turnout and shows another way where the Section and the Committee provide value back to its members.

Fred advised that the Committee’s focus this year is to get more sub-committees set up and running to reach attorneys throughout the state and involve more and more Section members. So if you are involved in a practice in any way related to residential real estate transaction, you should look into this committee. The next meeting will be held in conjunction with the Executive Council Meeting in Captiva. Even if you are not ready to join the Committee, you should attend a Committee meeting whenever you find them in your neighborhood.

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Real Estate Case Summaries

Prepared by Douglas Christy, Esq., Tampa, Florida

Reversal of a declaratory judgment which interpreted a 2012 amendment to § 163.3167(8), Fla. Stat., as requiring a municipality to submit a development order to public referenda was granted. Instead, the court held that a 2012 amendment to § 163.3167(8), Fla. Stat., reaffirmed the longstanding prohibition on referenda for development orders while grandfathering in specific charter provisions permitting referenda that were in place as of June 1, 2011.

Archstone Palmetto Park, LLC v. Kennedy, 39 Fla. L. Weekly D230a (Fla. 4th DCA 2014)

In February of 2012, the City of Boca Raton adopted an ordinance that amended a previously appointed development order imposing additional development approval requirements for a 4-acre parcel of land. Shortly thereafter, a group of residents filed a petition seeking to have a citywide referendum on whether the February 2012 ordinance should be repealed. The residents' petition was based on an existing ordinance providing broad authority for residents to have "the power by petition to require reconsideration by the council of any adopted ordinance or resolution" and to have the ordinance or resolution approved or rejected at a city election if the council does not repeal the ordinance or resolution. Following receipt of the residents' petition, the City filed suit in circuit court seeking declaratory relief that development orders, such as the development order at issue in the residents' petition, were not subject to referendum and the owner of the parcel at issue in the residents' petition intervened as a co-plaintiff. The trail court granted a declaratory judgment on cross-motions for summary judgment in favor of the residents, finding that "the Legislature intended for the referendum process to be permitted for Development Orders, where . . . the City Charter provided for this prior to June, 2011." In this case, where the municipality's charter contained a general provision permitting for the referendum process on any ordinances impliedly included development orders, the trial court reasoned that a 2012 Amendment to § 163.3167(8), Fla. Stat., supported the referendum process being available to the residents in the case.

The City and the property owner subsequently challenged the trial court's interpretation of § 163.3167(8), Fla. Stat., as being contrary to the Legislature's intent. Tracing the legislative intent of the specific statute and recognizing that the use of the referendum process is constrained to those situations where "the people through their legislative bodies decide it should be used," the Fourth District Court of Appeal concluded that the statute clearly expresses the Legislature's intent to bar the referendum process for development orders unless exempted by specific authorization that existed before June 1, 2011. Further, the Court recognized that the 2012 amendment to § 163.3167(8), Fla. Stat., was done to avoid invalidating existing charter provisions promulgated by several Florida municipalities that were impacted by a 2011 amendment to § 163.3167(8), Fla. Stat., providing a blanket prohibition on the referendum process for any development orders, comprehensive amendments and map amendments. Drawing from the statute's history, the Legislature intended to enforce the 2011 Amendment's impediment on the referendum process while also exempting specific charter provisions that were in place as of June 2011 that permitted the referendum process for development orders, comprehensive amendments and map amendments. Finding that there was no express wording to the contrary, the Court declined to infer that the Legislature intended to radically expand the referendum process through general charter provisions.

Appeal seeking certiorari review from a circuit court order discharging a claim of lien and a lis pendens on the basis of a name discrepancy in the claim of lien versus the underlying contract for improvements to real property was granted to prevent the discharge of a claim of lien and lis pendens founded upon the claim of lien.

Premier Finishes, Inc. v. Maggirias, 38 Fla. L. Weekly D2388a (Fla. 2d DCA 2013)

In the underlying dispute, the contractor, using a fictitious name, entered into a contract to build a house. In the ensuing litigation brought by the contractor, the owner challenged the claim of lien and the lis pendens through a motion to dismiss because the contract used the fictitious name whereas the claim of lien and the party identified in the litigation used the corporate name of the contractor rather than its fictitious name. The trial court granted the owner's motion to dismiss regarding the count seeking foreclosure of the claim of lien, without prejudice and with leave to amend, reasoning that there was no contract or allegation as to a contract to which the contractor was a party because of the difference between the fictitious name for the contractor used in the contract and the name of the contractor used in connection with the claim of lien and the litigation. The owner further requested that the lien and lis pendens be discharged and the Court acquiesced. However, the trial court did not dismiss a second count of the complaint founded on a breach of contract claim. After filing an amended complaint that addressed the relationship between the contractor identified on the claim of lien and the fictitious name used on the contract and reasserted the lien foreclose

claim with an additional count seeking to impose an equitable lien, the owner again moved to dismiss the lien foreclosure claim and the equitable lien count of the complaint based on the claim of lien having been discharged. The contractor in turn moved for a writ of certiorari on the discharge of the lis pendens and claim of lien resulting from the owner's first motion to dismiss.

As a result of the dismissal of the lien foreclosure count after the expiration of the time period to file an amended claim of lien, the Second District Court of Appeal turned to § 713.08(4)(a), Fla. Stat., which provides that "[t]he omission of any of select details or errors in such claim of lien shall not, within the discretion of the trial court, prevent the enforcement of such lien as against one who has not been adversely affected by such omission or error." Because there was no specific finding by the trial court as to there being any adverse effect on the owner as required by Florida law, and further because there were no missing elements in the claim of lien or the contract that would render the owner unable to deduce the relationship between the contractor and its fictitious name, the Court concluded that the trial court had deprived the contractor of its statutory basis for the claim of lien and did so contrary to existing law. The contractor's writ of certiorari was granted and the trial court's order was quashed to the extent that it discharged the claim of lien and the lis pendens founded upon said claim of lien.

Nonfinal order requiring owner's tenant to pay rent directly to foreclosing mortgagee in mortgage foreclosure litigation was reversed due to mortgagee's failure to offer competent substantial evidence establishing its entitlement to rent and distinction between statutory requirements relating to sequestration of rents into the court registry versus statutory requirements relating to assignment of rents directly to the lender in a pending foreclosure.

Wane v. U.S. Bank, National Association, 128 So.3d 932 (Fla. 2d DCA 2013)

After filing foreclosure proceedings, the mortgagee moved for an assignment of rents from the owner's tenant to the mortgagee on the basis of a rider attached to the mortgage. In response to the motion, the owner argued that the mortgagee had not complied with the requirement set out in the rider by providing notice of default to the owner. Relying on the copy of the notice of default attached to its motion, the mortgagee argued that the notice of default was sufficient to prove its compliance with the rider's requirement but the owner argued that the copy of the notice of default attached to the mortgagee's motion was unauthenticated and, therefore, legally insufficient. The trail court subsequently entered an order on the mortgagee's motion, which the owner sought review of as a nonfinal order.

The Second District Court of Appeal agreed with the owner's argument that the copy of the notice of default attached to the mortgagee's motion was insufficient because such letters were not self-authenticating and could not be considered without some form of authentication. Relying on earlier cases decided by the Court challenging notice of default offered up in connection with motions for summary final judgment in foreclosure proceedings, the Court recognized that notices of default that are unauthenticated do not constitute competent substantial evidence in foreclosure proceedings. Further, the Court concluded that the mortgagee had also failed to comply with the provisions of § 697.07, Fla. Stat., and was required to comply with both the requirements sent out in the rider and the applicable provisions of § 697.07, Fla. Stat. The Court focused on the distinction between seeking sequestration of rents into the court registry, which only requires a bare showing of a pending foreclosure action and an assignment of rents provision in the mortgage documents under § 697.07(4), Fla. Stat., versus seeking an assignment of rents to the mortgagee, which requires proof of a default and proof of a written demand for the rents pursuant to § 697.07(3), Fla. Stat. Based on the failure of the mortgagee to offer the level of proof required under § 697.07(3), Fla. Stat., and the unauthenticated notice of default offered with mortgagee's motion that did not comply with the rider, the case was remanded to enter an order sequestering the rents into the registry of the court or to hold further proceedings to allow the mortgagee to prove its entitlement to an assignment of rents on the basis of its compliance with both § 697.07(3), Fla. Stat., and the rider.

In a landlord-tenant dispute, after finding that the lease was ambiguous as to which party was entitled to trade fixtures for the leasehold property, the tenant will be entitled to remove structures or articles the tenant has placed on the leasehold property for its own purpose on the basis of an implied contract permitting such removal.

H. Allen Holmes, Inc. v. Jim Molter, Inc., 127 So. 3d 695 (Fla. 4th DCA 2013)

Following the expiration of a lease, the tenant removed its trade fixtures from the leasehold property, prompting the landlord to retain the tenant's security deposit. The tenant then filed suit on a breach of contract claim on the basis of an improper retention of the security deposit, and the landlord made claims against the tenant for breach of contract on the basis of the removal of the trade fixtures, conversion and civil theft. At the non-jury trial, the trial court found that the tenant was entitled to retain its trade fixtures and a partial return of its security deposit while also finding that the landlord was entitled to the remainder of the security deposit to repair the damages which the tenant caused to the leased premises by removing the trade fixtures. The trial court also found that the landlord was not entitled to judgment on its conversion and civil theft claims against the tenant and the tenant's president and that neither party was the "prevailing party" for purposes of recovering attorney's fees and costs. Both parties appealed the final judgment.

continued, next page

Finding that the matter was subject to de novo review because the matter depends on an interpretation of the parties' controlling lease contract, the Fourth District Court of Appeal concluded that the lease contract was ambiguous on the issue of which party was entitled to retain the trade fixtures. Based on this finding, the Court recognized that there is a presumption in favor of "the right of a tenant to remove structures or articles [the tenant] has placed on the leased property for [its] own purpose, even in the absence of an express stipulation" and that there is an implied contract permitting such removal, as held in *Sweeting v. Hammons*, 521 So.2d 226 (Fla. 3d DCA 1988). Having found that the tenant had prevailed on its entitlement to the trade fixtures and concluding that this issue, in relation to the security deposit, was the most significant issue in the litigation, the tenant was held to be the prevailing party in the litigation. Further and on the basis of the prevailing party reasonable attorney's fees and costs provision in the lease contract, the Court concluded that the tenant was entitled to its reasonable attorney's fees and costs in prosecuting its breach of contract claim and in defending the landlord's breach of contract claim. The tenant and the tenant's president were also found to be entitled to a recovery of prevailing party reasonable attorney's fees and costs but were not entitled to a recovery of attorney's fees and costs on the civil theft claim under § 772.11(1), Fla. Stat., without any finding that the claimant raised a claim that was without substantial fact or legal support.

Court's inherent, equitable authority to appoint a receiver in cases involving a non-profit condominium association is not restricted by §§ 617.1432, 718.117, and 718.1124, Fla. Stat.

Granada Lakes Villas Condominium Ass'n, Inc. vs. Metro-Dade Investments Co., 125 So. 3d 756 (Fla. 2013)

The plaintiff in the underlying action was the developer of the condominium operated by the defendant condominium association and continued to own an unspecified number of condominium units in the condominium. The defendant initially agreed to collect all fees and assessments associated with the plaintiff's condominium units and pay them to the developer/owner and a master association for the condominium units. The developer/owner and the master association subsequently brought an action against the condominium association, claiming damages on the basis of the condominium association's failure to pay the amounts to developer/owner and a master association resulted in the developer/owner and master association being unable to pay for expenses such as utilities and maintenance expenses for the common areas. The developer/owner subsequently filed an emergency motion for appointment of a receiver over the condominium association to facilitate the collection of assessments and to perform an accounting. The trial court ultimately concluded that it lacked the statutory authority to appoint a receiver after initially finding that it could appoint a receiver based upon the condominium association's argu-

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ment on a motion for rehearing that the trial court had no basis for appointing a receiver under §§ 617.1432, 718.117, and 718.1124, Fla. Stat. Upon appeal to the Second District Court of Appeal, the trial court's decision was reversed and remanded for the trial court to exercise its discretion on whether to appoint a receiver because "the trial court erred as a matter of law because its right to appoint a receiver in this instance is inherent in a court of equity" and further that §§ 617.1432, 718.117, and 718.1124, Fla. Stat., do not restrict a trial court's "broad, equitable authority to appoint a receiver." The decision of the Court, in conflict with the decision of the Third District Court of Appeal in *All Seasons Condominium Ass'n, Inc. v. Busca*, 8 So. 3d 434 (Fla. 3d DCA 2009), was certified as a direct conflict and was reviewed by the Florida Supreme Court.

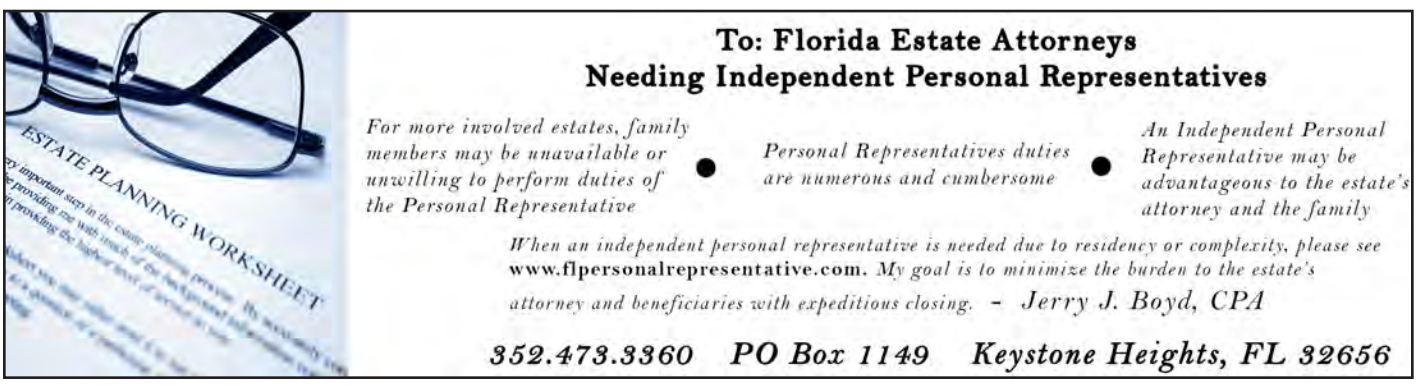
The Florida Supreme Court, recognizing that equitable receiverships are a creation of common law and that receiverships based on statutory provisions may serve a different, specific purpose, did not find any conflict between the basis for a receivership as enumerated in the statutes and the basis for a receivership under the common law. Reviewing the statutes identified by the condominium association as limiting the ability of the trial court to appoint a receiver, the Florida Supreme Court found that nothing in the statutes limited, expressly prohibited, or implied that the statutorily-enumerated circumstances are the only instances in which a court may appoint a receiver in cases involving a condominium association. Further, the Florida Supreme Court noted a number of instances where receivers were appointed for condominium associations in circumstances not involving those circumstances outlined in §§ 617.1432, 718.117, and 718.1124, Fla. Stat. For these reasons, the Florida Supreme Court held that the trial court's inherent equitable power to appoint a receiver over a condominium association was not limited by the enumerated categories set forth in §§ 617.1432, 718.117, 718.1124, Fla. Stat., and disapproved of the decision in *All Seasons* to the extent of any inconsistency with the opinion of the Florida Supreme Court.

Under doctrine of separation of powers, city's discretion to file, prosecute, abate, settle, or voluntarily dismiss a building and zoning enforcement action is a purely executive function that cannot be supervised by the courts, absent the violation of a specific constitutional provision or law, and property owners have no right to compel a city to pursue violations of its building and zoning code.

Detournay v. City of Coral Gables, 127 So. 3d 869 (Fla. 3d DCA 2013)

The City of Coral Gables began enforcement actions against the owner of a commercial property used as a private yacht basin that rented slips and moorings in a manner that allegedly violated various provisions of the City's building and zoning code. After obtaining three administrative citations in relation to the code violations, the citations were held in abeyance by the City for a period of time while it attempted to settle them as part of a potential re-development of the commercial property. Dissatisfied with the City's efforts and actions regarding the code violations, a small group of neighboring property owners filed suit against the City seeking declaratory relief and an injunction regarding the City's failure to pursue further action against the commercial property owner for the code violations. After the commercial property owner intervened in the litigation as a defendant, a two-day trial resulted in the entry of an order dismissing the declaratory relief count for lack of standing and ruling in favor of the City on the injunctive relief count.

The Third District Court of Appeal agreed with the dismissal of the declaratory relief count but on the grounds that the action would violate the separation of powers rather than on the lack of standing argument. The Court, recognizing several cases where a governmental authority was held immune from suits founded in negligence, mandamus and criminal law for its failure to enforce its ordinances, underscored the rationale that allowing such actions would violate the separation of powers by requiring the judicial branch to interfere with discretionary functions of other branches of government. The Court concluded that the injunctive relief count should be dismissed for the same reason. The Court confirmed the trial court's decision to dismiss the declaratory relief count for the reasons outlined in its decision but reversed the judgment on the merits as to the injunctive relief count, which should have been dismissed similarly without the court reaching the merits of the dispute.



Probate Case Summaries

Prepared by Joshua H. Rosenberg, Esq.
Markowitz, Ringel, Trusty, + Hartog, P.A., Miami, Florida

A mother threatened to disinherit her children. Before the mother's death, the two children came to an oral agreement that they would split their inheritance equally no matter their mother's wishes. The mother executed a will disinheriting one child and leaving all her assets to the other. When the mother died, the disinherited child sought to enforce the oral agreement to share the estate assets equally. An oral contract to circumvent the decedent's wish to disinherit a child, by agreeing to share in the estate equally, is valid and has sufficient consideration.

Ferguson v. Carnes, 125 So. 3d 841 (Fla. 4th DCA 2013)

The Fourth District Court of Appeal reversed the trial court and found sufficient consideration to validate an oral agreement to inherit equally, despite one child being disinherited by the decedent's last will and testament.

Ferguson and Carnes were brother and sister. During their life, Ferguson and Carnes' wealthy mother made many threats to disinherit both of them. Realizing that they both faced the threat of losing their inheritance, the siblings agreed to split their inheritance equally no matter what their mother's will said. When their mother died, the will left all of her assets to Carnes and disinherited Ferguson. When Ferguson sought equal distribution of assets, Carnes refused to do so.

To obtain the inheritance that he believed was due to him, Ferguson sued for breach of the oral contract. The primary issue pertained to the enforceability of the oral agreement that each would not allow the other to be disinherited. Carnes filed a Motion for Summary Judgment arguing there was lack of consideration for the oral agreement and the trial court granted his request.

On appeal, after the Fourth DCA found that there was offer, acceptance, and sufficiently specific terms, the court focused on the issue of whether there was adequate consideration. Citing *Diaz v. Rood,* 851 So. 2d 843, 846 (Fla. 2d DCA 2003), the Fourth DCA noted that promises have long been recognized as valid consideration in forming contracts. In reviewing the facts, the Fourth DCA stated that "the consideration lies in the fact that each gave up the possibility of inheriting more than the other in return for insuring that neither would be disinherited in whole or in part." Accordingly, the trial court was reversed and the case was remanded.

A woman drafted a durable power of attorney ("DPA"), naming her son as her attorney-in-fact. Upon her incapacitation, the son began to act as her agent. The DPA was provided to an insurance company who refused to honor it and demanded that a guardian be appointed to make decisions for the incapacitated person. Because there were no arguments by the insurance company that the DPA was invalid on the basis of lack of capacity at execution or improper execution, the request to appoint a guardian for the incapacitated litigant was found to be frivolous and sanctionable.

Albelo v. Southern Oak Insurance Company, 2013 WL 440199 (Fla. 3d DCA 2013)

Because a valid durable power of attorney ("DPA") was presented and no objections were made, the Third District Court of Appeal reversed the trial court, found that the appointment of a guardian was unnecessary, and sanctioned the Defendant for making frivolous requests for the appointment of a guardian.

Albelo was an elderly woman who suffered damages as a result of a burglary that occurred at her home. One month prior to the burglary, Albelo executed a DPA in favor of her son. After executing the DPA, issues pertaining to her capacity were raised and her son began acting as her agent under the DPA. Acting in his capacity as agent, the son filed a premises liability suit against Southern Oak Insurance Company.

Although Southern Oak did not receive notice of Abelo's claim until more than a year after the burglary, the company paid $1,690.00 on the claim. A few months after the burglary occurred, Albelo filed a sworn proof of loss, supported by a public adjuster's estimate, for the amount of $57,760.66. Southern Oak refused to pay the additional amounts claimed. It appears that the only reason that Southern Oak denied Albelo's request for additional funds was because they believed that the sworn claim was fraudulent as being instigated only by Albelo's son.

The burglary and the existence of a loss were conceded at the trial by Southern Oak. Southern Oak argued that Albelo's son, acting as her agent under the DPA, could not maintain the claim on her behalf. Ignoring the existence of a valid advanced directive, Southern Oak took the position that Albelo's son could only remedy the standing issue by having a guardian appointed for his mother. Albelo did not dispute that she suffered from age-related cognitive disabilities when the suit was filed and that her son was acting as her agent. Albelo's son refused to open a guardianship for his mother, citing the fact that Southern Oak did not refute the validity of the DPA. The trial court disregarded this argument and held that Abelo's son should have opened guardianship proceedings. As a result, the suit was dismissed with prejudice.

In his appeal, not only did Albelo assert that the trial court was in error for requiring the opening of incapacity proceedings, but also that Southern Oak's failure to respect the DPA violated Section 709.2119, Fla. Stat. (2012) and required the assessment of sanctions in accordance with Section 57.105, Fla. Stat. (2011). The Third DCA agreed with Albelo, reversed the trial court, and remanded on the issue of the amount of fees and costs to be assessed against Southern Oak.

continued, next page

Stemming from the incapacity of one person, family members engaged in protracted and multifaceted litigation. A settlement agreement was reached by the parties, but a clause regarding releases was omitted. One of the parties sought to enforce the agreement as it stood, absent the omitted clause. All parties and their counsel, except the appellant, agreed that the omission was due to a scrivener's error and/or mutual mistake. Because evidence showing the parties' true intent and inadvertence of error was undisputed, there was sufficient basis to permit judicial reformation of the settlement agreement.

Sugar v. Guardianship of Stern, 109 So. 3d 809 (Fla. 3rd DCA 2013)

The Third District Court of Appeal affirmed the trial court's order authorizing the reformation of a settlement agreement where the only evidence presented showed that errors in the settlement agreement were due to a scrivener's error.

Idelle Stern had four children who engaged in protracted guardianship and trust litigation. Idelle was adjudicated incapacitated, found to be totally incapacitated, and had a professional guardian appointed. Successful mediation occurred in an effort to settle all of the related litigation. A written settlement agreement was signed by all four of her daughters and approved by the probate court. It was subsequently discovered that the settlement agreement, which contained a provision that the one daughter agreed to be released from any responsibility and to receive no benefit from any suit filed against the trust attorneys for malpractice, inadvertently omitted a similar provision as to any litigation against the trustee.

Three of Idelle's daughters and the professional guardian agreed that the missing clause should have been included in the original agreement and that the omitted portion was only omitted from the agreement as a result of a mistake. The three daughters and the professional guardian moved for reformation of the settlement agreement. Idelle's fourth daughter objected, but offered no evidence to refute the assertion that the clause in question had been omitted by mistake. The only evidence presented was in the form of six sworn affidavits by the three daughters and the professional guardian, along with sworn testimony of three of the attorneys who attended the settlement conference. All evidence confirmed that the omitted provision was a scrivener's error and a mutual mistake. The trial court granted the request to reform the settlement agreement and an appeal was filed.

Noting that the evidence of mistake was unrefuted, the Third DCA affirmed, citing *Tobin v. Michigan Mut. Ins. Co.,* 948 So.2d 692, 696 (Fla.2006) for the proposition that reformation is an equitable remedy employed when a written instrument, due to mutual mistake, does not accurately express the intent or agreement of the parties.

A trust was executed which had language providing for a specific bequest to the settlor's wife of $5,000,000, payable only if the wife agreed to waive her right to the elective share. Because a trust gives a financial incentive to decline the elective share and thereby only provides an alternative to the statutory minimum, it is an exception to the statutory prohibition against no contest clauses found in Section 736.1108(1), Fla. Stat. (2010).

Dinkins v. Dinkins, 120 So.3d 601 (Fla. 1st DCA 2013)

The First District Court of Appeal affirmed the finding that a trust clause providing an alternative to the elective share was valid and differentiated such language from "no contest" clauses which are invalid under Section 736.1108(1), Fla. Stat. (2010).

The decedent sought to discourage his wife from taking the elective share. Therefore, the decedent's trust included the language:

> **Conditional Specific Bequest of Cash** If my spouse, JEANETTE M. DINKINS, survives me, and if she or her legal representative makes a valid disclaimer of all of her interest in the QTIP Trust created under Article VII of this Trust Agreement, and also makes a valid waiver of her right ... to elect the elective share in my estate, then the Trustee shall distribute five million dollars ($5,000,000.00) to JEANETTE M. DINKINS, outright and free of trust.... My objective is to provide five million dollars ($5,000,000.00) of assets to JEANETTE M. DINKINS, in addition to ... any ... property to which JEANETTE M. DINKINS is entitled as a result of my death, except for the Elective Share.

The estate was estimated to be worth between $24,000,000 and $55,000,000. The clause did not prevent the wife from taking the elective share, but rewarded her in the event that she (or her assigns) declined it.

The widow argued that the trust provision was unlawful because it would penalize her for taking the elective share and cause her to forfeit the $5,000,000 million bequest. In her view this was improper because, like all "no contest" clauses, the trust language threatened her with forfeiture of a devise if she pursued legal action. The trial court rejected this position, concluding that the provision did not penalize the widow, upon which she appealed to the First DCA.

Section 736.1108(1), Fla. Stat. (2010) invalidates clauses in trusts which purport to penalize any interested person for contesting the instrument or instituting other proceedings relating to a trust estate or trust assets. However, the First DCA differentiated this case from others concerning no contest clauses. In cases where such clauses were invalidated, the beneficiary forfeited the right to receive benefits under the governing instrument if the beneficiary contested the instrument. Here, the widow did not forfeit all benefits, but was provided with an alternative to the statutory minimum benefit found in the elective share. In affirming the trial court's decision, the First DCA determined that the trust language was valid since it was more akin to an alternative to a statutory minimum rather than forfeiture of rights.

One child was the primary care-taker for her mother during the end of her life. The mother executed a durable power of attorney ("DPA") in favor of that child and a will naming all her children as equal co-beneficiaries.

Allegedly, with use of the DPA, the testamentary designations of a particular account were changed and provided a disproportionate share of the estate to pass to the caretaker. The First District Court of Appeal held that there was insufficient evidence to show undue influence because many of the heirs, including the care-taker, had a close relationships with the mother; the care-taker was not present when the change in testamentary designations was made; and there was no evidence that the caretaker had given direction to the Decedent to make the changes.

Estate of Kester v. Rocco, 117 So.3d 1196 (Fla. 1st DCA 2013)

The First District Court of Appeal reversed the trial court and held that there was insufficient evidence to establish that an individual's caretaker, who was her child, had exercised undue influence with respect to testamentary designations placed on certain accounts despite such designations providing the care-taker with a disproportionately large proportion of the individual's estate.

Kester died testate in 2011. Her will was executed in 2004, but there were two codicils executed in December 2010. The codicils specifically named her children, Glenna, Pamela, Cynthia, Monte, and David, as equal beneficiaries of the estate and designated Glenna and David as her co-personal representatives. Shortly after Kester's death, Glenna took possession of two accounts outside of probate as a result of testamentary designations made with the institutions holding the funds. Glenna also took possession of a third account where Kester listed Glenna, Monte and David as beneficiaries. All testamentary designations were made by Kester outside the presence of Glenna.

Because the accounts had testamentary designations, Glenna did not list them as estate assets in the probate inventory. Furthermore, these designations left Pamela and Cynthia completely disinherited. Pamela and Cynthia challenged the inventory of estate assets and petitioned the court to compel Glenna to return the value of the three accounts to the estate. The primary basis for Pamela and Cynthia's claim was undue influence exerted by Glenna in misuse of the DPA and breach of her fiduciary duty to the estate and beneficiaries.

The trial court agreed with Pamela and Cynthia by finding that Glenna had obtained her beneficial interest in the three accounts through undue influence. The court held that Glenna had breached her fiduciary duty, created by both the DPA and appointment as personal representative, to carry out her mother's wishes. The trial court ordered Glenna, without penalizing her other siblings, to return the proceeds to the estate and pay damages to Pamela and Cynthia. The penalties assessed against Glenna were to be charged solely against her share of the estate. Finally, the court revoked the letters of administration appointing Glenna and David the co-personal representatives and substituted Pamela as the interim personal representative.

The First District Court of Appeal overturned the trial court by finding that evidence that a parent and an adult child had a close relationship is insufficient to prove undue influence, especially when other children also had a strong relationship with the decedent. It further held that where communications and assistance are consistent with what is expected of a caretaker child, there is no presumption of undue influence.

The creation of a revocable trust was authorized by the trial court during an emergency temporary guardianship even though no notice was provided to interested parties. The trust named one child as the trustee and provided her with sole discretion for making distributions to her siblings. The Third District Court of Appeal overturned the trial court and held that a successor judge has jurisdiction to review the orders of its predecessor where there was fraud upon the court.

Mack v. Polsby, 129 So. 3d 1169 (Fla. 3d DCA 2014)

The Third District Court of Appeal reversed the probate court and found that a successor judge can review the orders of its predecessor where a fraud on the court had been perpetuated by failing to provide notice to interested parties.

Charles Mack never expressed a desire to create a trust before he suffered a massive stroke. He had four children, two sons and two daughters. One of his daughters filed a Petition for Appointment of Emergency Temporary Guardian ("ETG") and was appointed without objection. As ETG, she made a request to create a revocable trust on her father's behalf under which she named herself as trustee and she was given the sole right to determine the amount/manner of all distribution from the trust. The ETG failed to provide notice to her three siblings of her request to create the revocable trust. The text of the trust named all four children as equal beneficiaries, named the ETG as the sole trustee, and provided the trustee with sole authority to make decisions about distribution of trust assets. The ETG's request was granted and the trust was created.

Soon after the creation of the trust, Mack died and the other three children filed a trust action to revoke the trust. The judge who granted the ETG's request to create the trust retired before the trust action or appeal was filed. A successor judge heard the request to overturn the trust and dismissed the request after agreeing with the daughter's assertion that the court lacked jurisdiction to review a predecessor judge's orders.

Case law in Florida generally supports the conclusion that successor judges have no authority to review the decisions of their predecessors even when the predecessor entered an order due to an error at law. See *Groover v. Walker,* 88 So. 2d 312 (Fla. 1956). However, Fla. R. Civ. P. 1.540(b) allows relief from a judgment procured by the opposing party's fraud or if the judgment itself is void.

The Third DCA reversed and remanded the matter back to the trial court after finding that the trial court had jurisdiction to determine whether the trust should be revoked. Jurisdiction was retained by the trial court because the particular daughter, as the ETG, committed a fraud upon the court when she petitioned the probate court to create and fund the revocable trust without notice to interested parties.

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9:50 a.m. – 10:40 a.m.
Revocation of Wills, Trusts & Devises by the Testator/Settlor
W. Fletcher Belcher, St. Petersburg

10:40 a.m. – 10:50 a.m.
Break

10:50 a.m. – 11:40 a.m.
Trust Protectors: Now That the Trust is Protected, Who Protects the Trust Protector?
Elaine Bucher, Esq.

11:40 a.m. – 12:50 p.m.
Lunch (On Your Own**)**

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Do It Yourself Estate Planning or Inter-Vivos Undue Influence? Factors to Consider
Patrick J. Lannon, Esq., Miami

1:20 p.m. – 1:50 p.m.
Attorney/Fiduciary Privilege – The Rule Change That Didn't Work
Rohan Kelley, Fort Lauderdale

1:50 p.m. – 2:40 p.m.
Don't Repeat What I Say Unless ... (Hearsay in Probate and Trust Litigation)
Thomas Karr, Esq., Miami
Jack Falk, Esq., Miami
Mary Karr, Esq., Miami

2:40 p.m. – 2:50 p.m.
Break

2:50 p.m. – 3:40 p.m.
The Reliance Defense for Fiduciaries
John Moran, Esq., Palm Beach

3:40 p.m. – 4:30 p.m.
Panel Discussion – Professionalism in Trust and Estate Proceedings
Judge Lauren Laughlin, St. Petersburg
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FR/BAR CONTRACTS & RIDERS

FOR THE SALE AND PURCHASE OF RESIDENTIAL PROPERTY

Approved by The Florida Bar, Real Property, Probate & Trust Law Section and The Florida Realtors

_____ **Set(s) of 10 FR/BAR CONTRACTS (Revised August 2013)** **$50.00 per set**

_____ **Set(s) of 10 FR/BAR "AS IS" CONTRACTS (Revised August 2013)** **$50.00 per set**

_____ **Package(s) of FR/BAR COMPREHENSIVE RIDERS (Revised August 2013)** **$50.00 per package**
(*a package is ten copies of each rider listed below***)**

Condominium Rider
Homeowners' Association/Community Disclosure
Seller Financing (Purchase Money Mortgage; Security Agreement to Seller)
Assumption of Existing Mortgage(s)
Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA)
Appraisal Contingency
Short Sale Approval Contingency
Homeowner's/Flood Insurance
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
Defective Drywall
Coastal Construction Control Line
Insulation Disclosure for New Residence
Lead-Based Paint Disclosure (Pre-1978 Housing)
Housing for Older Persons
Rezoning Contingency
Lease Purchas/Lease Option
Pre-Closing Occupancy by Buyer
Post-Closing Occupancy by Seller
Sale Of Buyer's Property
Back-Up Contract
Kick Out Clause
Sellers's Attorney Approval
Buyer's Attorney Approval
Licensee Disclosure of Personal Interest in Property
Binding Arbitration

Order Sub-Total	**$_____**
Sales Tax 6.5%	**$_____**
Shipping & Handling	**$ 9.00**
TOTAL	**$_____**

Firm:_____

Attn:_____ **Attorney Bar #:** _____

Street Address:_____ **(WILL NOT DELIVER TO P.O. BOX)**

City/State/Zip:_____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

Phone: (_____)_____ **Fax: (_____)**_____

E-mail address:_____

METHOD OF PAYMENT

I have enclosed check #_____, in the amount of $_____

OR

Please Circle One: VISA or MASTER CARD Amount to be charged $_____

_____ _____/_____ _____
Card Number **Exp. Date** **Signature of Cardholder (REQUIRED)**

Billing Address:_____ _____
Print Name

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PROBATE & GUARDIANSHIP FORMS

The FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2014 FLSSI forms.**

Firm: _____

Attorney Name: _____ **Attorney Bar #:**_____

Physical Address: _____

City/State/Zip: _____

Phone: (_____)_____ E-mail Address: _____

2014 PROBATE FORMS

OPTION #1 **2014 FORMS AND INDEX - .PDF ON DISK $379.10**
OPTION #2 **2014 NEW & REVISED FORMS ONLY - .PDF ON DISK $138.20**
OPTION #3 **2014 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $399.30**

2014 GUARDIANSHIP FORMS

OPTION #1 **2014 FORMS AND INDEX - .PDF ON DISK $339.10**
OPTION #2 **2014 NEW & REVISED FORMS ONLY - .PDF ON DISK $192.20**
OPTION #3 **2014 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $359.30**

If you would like to order individual forms, please visit www.flssi.org to download our "long" order form which lists each form for separate purchase.

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METHOD OF PAYMENT

Either mail this form with check to the address listed above or include credit card information and fax to 407.515.1504. Prices include shipping, handling and sales tax. **VISA or MasterCard Only.**

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Charge **Card Number** **Exp. Date** **Signature of Cardholder**

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Credit card billing address (If different from shipping address above) **Printed Name of Cardholder**

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SHIP DATE _____/_____/2014 LB_____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___

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 resource pages where searches can be done for out-of-state licensed Section members, law students available for clerkships or special project assistance, and other classifications. Further, each Section committee has list serves that discuss issues and current hot topics available to committee members.

SCHEDULE

2014 EXECUTIVE COUNCIL MEETINGS

May 29 – June 1, 2014
Executive Council Meeting / RPPTL Convention
South Seas Island Resort, Captiva, Florida
http://www.southseas.com
Reservations: 877-597-9696
Room Rate: $165.00
Cut-off Date: May 7, 2014

July 30 – August 2, 2014
Executive Council Meeting & Legislative Update
The Breakers, Palm Beach, Florida
Reservations: 561-655-6611
www.thebreakers.com
Room Rate: $206.00
Cut-off Date: June 30, 2014

September 17 – 21, 2014
Executive Council Meeting/Out of State
Sofitel Chicago Water Tower, Chicago, IL
Reservations:1-312-324-4000
www.sofitel.com/gb/hotel-2993-sofitel-chicago-water-tower/index.shtml
Room Rate: $255.00
Cut-off Date: September 3, 2014

November 13 – 15, 2014
Executive Council Meeting
Waldorf Astoria, Naples, Florida
Reservations: 1-239-597-3232
www.waldorfastoria3.hilton.com/en/hotels/florida/waldorf-astoria-naples-APPNGWA/index.html?WT.srch=1
Room Rate: $179.00
Cut-off Date: October 23, 2014

2014 CLE SCHEDULE:

Check the RPPTL Section's website www.rpptl.org under the "CLE" tab's drop down menu for topics, dates and locations of upcoming CLE seminars. Check the Florida Bar website www.floridabar.org/CLE for detailed information as it becomes available.

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

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Scan here for instant access to the Section website.



ACTIONLINE BULLETIN BOARD

Sign up for theAttorney/ Trust Officer Liaison Conference June 12-14 at the Ritz-Carlton, Naples

Seller Financers Beware Are you a Loan Originator under the SAFE Act? See RREIL Committee website under "Handouts and Links" for more information

FR/BAR Residential Contract in writeable format. See RREIL Committee website

Uniform Title Standards online. See Title Issues & Standards Committee website

Get Published!

Articles for the next issue are being accepted – Contact Silvia Rojas at srojas@thefund.com

Young Lawyers! Applications for the **RPPTL Fellowship Program** are due April 1st - See page 36

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