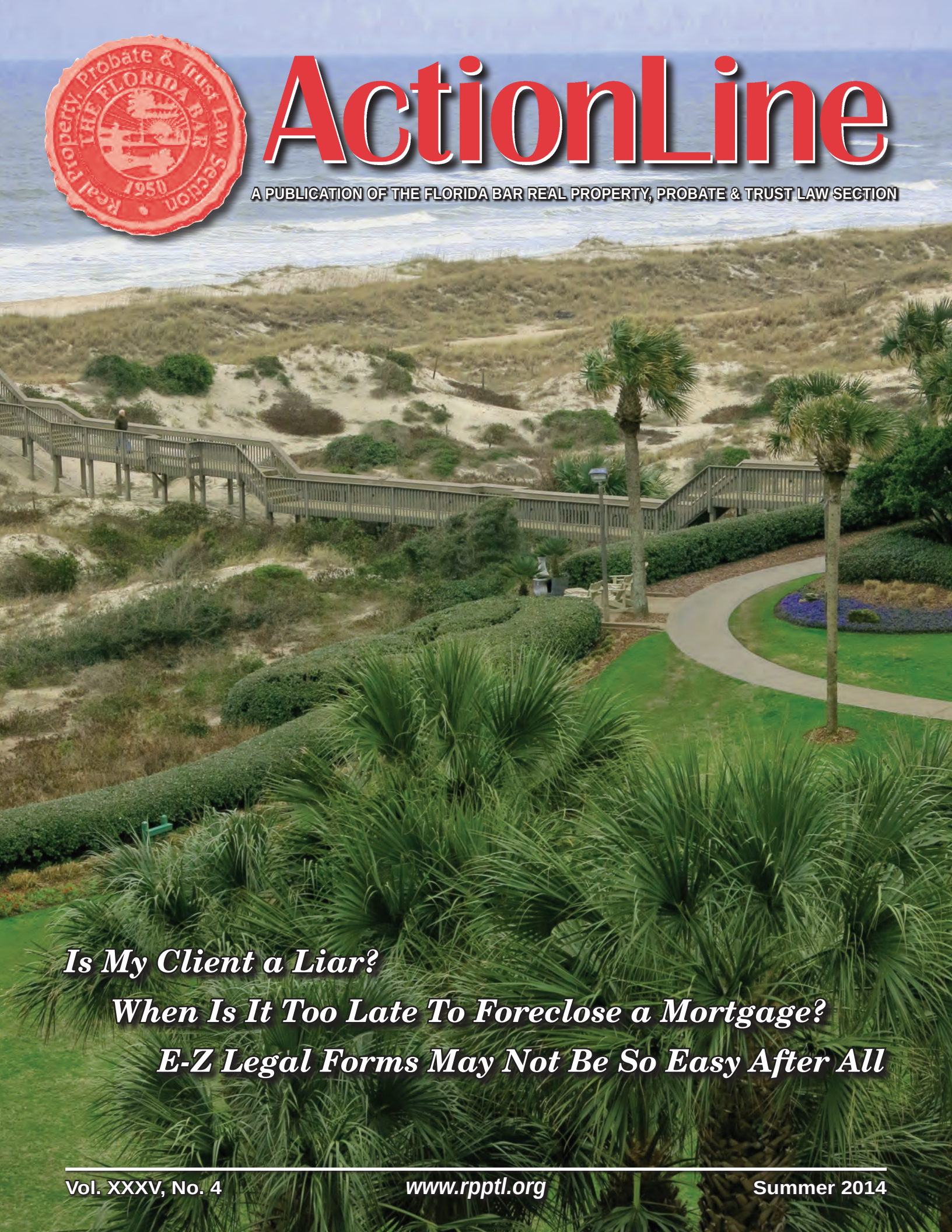

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The RPPTL Section As Amicus Curiae

Amicus curiae - Latin for "friend of the court."



CHAIR'S COLUMN

By Margaret "Peggy" Rolando

Section Chair, 2013- 2014

The Section's Amicus Coordination Committee knows how to say "no." The Committee is responsible for evaluating requests by litigants, trade groups, other sections of The Florida Bar and substantive committees of the Section for amicus briefs and recommending when the Section should consider serving as a friend of the court. While such solicitations are frequent, favorable responses are rare.

The Committee carefully reviews each case presented to assess and report to the Section whether the Committee believes it prudent for the Section to get involved in a case. Critical to the Committee's evaluation is why the Section's participation as an amicus is important and how its participation would assist the court in reaching a decision. Generally, the Section does not join in amicus briefs filed by other organizations. Nor does it file "me too" briefs that merely repeat the position of another amicus.

The Section's involvement as a friend of the court is governed by our bylaws and the rules of The Florida Bar. The Section can appear as an amicus only if the subject matter is within the purview of the Section, *i.e.* one of substantive areas of real property, construction, probate, trust, or related fields of law. The Section cannot participate as an amicus curiae without the consent of the board of governors of The Florida Bar.

It is the policy of the Section to file amicus briefs sparingly and only when the position asserted is: (a) consistent with a previously adopted Section position; or (b) a matter of compelling public interest that the Executive Council then adopts as a Section position; or (c) of special significance to lawyers in one of our practice areas.

Section's briefs do not typically discuss a party's legal position or the facts of the case. The Committee does not review or comment on the record; rather it focuses on policy driven legal issues. The Section will authorize an amicus brief only when the Section's expertise can offer a significant contribution to a court's consideration of the legal issues involved. The Section strives for impartiality and the correct, established rule of law. Its briefs are not argumentative; they use a neutral, respectful tone.

The Amicus Committee jealously protects the independence of the Section and its commitment to excellence in its amicus briefs. The Section has no interest in interceding in every appellate case within our substantive areas. Nor does it want to dilute its reputation for thoughtful, carefully researched, concise and even-handed briefs. The Section is careful to make judicious use of its limited resources. Our briefs are researched, prepared and reviewed by experienced volunteer attorneys. Consequently, over the past 25 years the Section has filed only 13 amicus briefs with the Florida Supreme Court, one with United States Eleventh Circuit Court of Appeals, one in a reported case of the Florida First District Court of Appeal, five in reported cases of the Third District Court of Appeal, and two in reported cases of the Fourth District Court of Appeal.

The Amicus Coordination Committee consists of four highly regarded appellate lawyers who are long standing members of the Executive Council. The longest serving member is **Robert W. Goldman**, a trust and estate litigator and former Chair of the Section (1996-97) from Naples, Florida. Bob took over as Chair of the Committee around 1994 from William Belcher, who had founded the Committee. **John W. Little, III**, of West Palm Beach, became co-Chair in 1998 and brought his expertise in real estate, eminent domain and inverse condemnation actions, and regulatory takings to the Committee's deliberations. The Committee leadership eventually expanded to include **Kenneth B. Bell** of Pensacola and **Gerald B. Cope, Jr.** of Miami, both former members of the judiciary. Ken served on the Florida Supreme Court from 2002 to 2008. Ken had previously been a circuit judge for 12 years in the First Judicial Circuit. Jerry was former Chief Judge of the Third District Court of Appeal and a member of the court for 21 years. Ken and Jerry brought to the Committee not only outstanding writing ability but keen insights into what a court may need from an amicus brief to assist it.

When will the Section file a friend of the court brief?

The Section generally does not participate in a case before it reaches the Supreme Court of Florida or the Eleventh Circuit Court of Appeals unless requested by a court. On occasion, it has been asked to do so by the Florida Supreme Court and the Third District Court of Appeal and the Fourth District Court of Appeal. Unless the Section is invited by the court to file an amicus brief, then either both

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ABOUT THE COVER:

View towards ocean at The Ritz-Carlton, Amelia Islanda.

Photo by Silvia Rojas.

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

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
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GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5625, or at mobos@flabar.org. Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

Summary of 2014 Florida Laws Impacting Condominiums, Cooperatives and Homeowners' Associations

By Steven H. Mezer, Bush Ross, P.A., Tampa, Florida, and Christopher N. Davies, Cohen & Grigsby, P.C., Naples, Florida on behalf of the Condominium & Planned Development Committee

The 2014 Florida legislative session approved two bills that have been signed into law impacting the development and operation of condominiums, cooperatives and homeowners' associations. The changes are in CS/CS/SB 440, now known as Chapter 2014-74, Laws of Florida and CS/CS/CS/HB 807, now known as Chapter 2014-133 Laws of Florida. The effective date is July 1, 2014.

The following is a summary of relevant changes. It is not intended to be either a comprehensive overview or to include every revision.

CS/CS/SB 440 amends several provisions in the Condominium Act to distinguish the provisions applicable to residential condominiums from those applicable to non-residential condominiums; amends provisions regarding retrofitting of fire sprinklers; amends provisions regarding hurricane shutters and other code compliant hurricane protection; extends the Distressed Condominium Relief Act; and amends requirements relating to phase condominiums. Some of the most notable revisions are as follows:

- **Written Inquiry**. The right of a unit owner to file a written inquiry by certified mail to the board of directors does not apply to owners of a non-residential condominium.
- **Proxy Voting**. Owners of non-residential condominiums may use general proxies and are not mandated to use limited proxies with the same restrictions as a residential condominium. Written ballots are not required in the election of directors at a non-residential condominium association.
- **Director Eligibility**. Limits on the length of a director's term do not apply to non-residential condominium associations.
- **Director Certification**. There is no requirement for director certification in a non-residential condominium.
- **Alternative Dispute Resolution**. The alternative dispute resolution provisions do not apply to non-residential condominiums unless specifically provided for in the declaration of condominium.
- **Fire Sprinklers and Retrofitting**. The obligation to initiate an application for a building permit for the installation of a sprinkler system before January 1, 2020, does not apply to non-residential condominiums. Voting to forego the retrofitting of such improvements is limited to residential condominiums only.
- **Code Compliant Hurricane Protection**. The installation or replacement of hurricane shutters, impact glass, code compliant windows or doors, or other types of code compliant hurricane protection by a unit owner conforming to the specifications adopted by the board applies to residential condominiums only.
- **Distressed Condominium Relief Act**. A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer, unless the condominium parcels were acquired on or after July 1, 2010, but before July 1, 2016.

  Note: This amendment was also included in CS/CS/CS/HB 807.
- **Phase Condominiums**. The plot plan may be modified by the developer as to unit or building types, but only to the extent that such changes are described in the declaration applicable to a residential condominium. A new provision limits the information that must be described in the original declaration of condominium or an approved amendment to residential condominiums.

CS/CS/CS/HB 807 addresses a variety of issues impacting operations of condominium, cooperative and homeowners' associations; creates rules for a condominium association to access an abandoned unit and for the appointment of a receiver; specifies that the statutory notice required of a homeowners' association to renew its covenants and restrictions for an additional thirty years is sufficient; broadens information that may be included in a member directory; requires board members to relinquish possession of records and association property to their successors; amends laws governing cooperative associations regarding financial oversight; provides for the prohibition on office-holding if delinquent or charged with theft; creates emergency powers for cooperatives and homeowners' associations; simplifies notice requirements regarding amendments to restrictive covenants; provides that a second attempt to terminate a condominium may not be made for 180 days; requires meetings in homeowners' association be held at a handicapped-accessible location, if so requested; and repeals the Community Association Living Study Council. The following further describes some of the revisions:

- **Right of Access to Abandoned Condominium Units**. An association may enter an abandoned unit to inspect

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parties must consent or the court must grant permission. The Section will consider filing an amicus brief under the following circumstances:

- when it appears a court may need assistance with respect to a confusing or specialized aspect of real property, probate, trust, construction or related fields of law, or
- when an appellate court is construing a statute that the Section played a significant role in drafting, or
- when a case involves fundamental property rights of the public or significant issues in the Section's substantive areas of law.

The Committee takes great pains to limit the Section's arguments to the law as we understand it and the policies the court may be considering, avoiding the specific facts of the case to the extent possible. The Section will not participate in the oral arguments when it has filed a brief because it does not want to be aligned with a particular litigant; however, a member of the Amicus Committee will attend the session in the event the court has any questions about the Section's brief.

The Section will not advocate for a position unless there is a broad consensus among the Executive Council members. Issues that have the potential for deep philosophical division within the Executive Council are unlikely to garner sufficient support to become a Section position or an appropriate subject matter for a friend of the court brief.

The Section must have a strong interest in the issue on appeal, and any advocacy by it must be based upon an established Section position. If the Section does not have a position, then the proposal must be duly noticed and approved by a 2/3 vote of the Executive Council members present at the meeting. Voting by proxy is not permitted. Whenever, because of time constraints, the Executive Council cannot meet to adopt a Section position prior to the time action is required, the Executive Committee may, by a 2/3 vote of its members, adopt a Section position. Any Section position approved by the Executive Committee must be reported at the next meeting of the Executive Council. A Section position often originates with and is proposed by a Section committee.

What is the vetting process?

Typically, one of the substantive committees or a member of the Section brings to the attention of the Amicus Committee a particular case that may warrant Section involvement or a court, by order, requests our involvement. The Committee identifies any conflicts its members may have. They also attempt to identify any conflicts members of the Executive Council may have and to exclude the conflicted persons from further involvement with the amicus process as it relates to the particular case. The Committee assists the Chair-Elect in identifying the particular Section committee(s) or individuals that have an expertise in the issue identified as possibly warranting Section involvement as a friend of the court.

Once it's determined that a matter appears to warrant Section involvement, the Amicus Committee works with the Chair-Elect and the chairs of substantive or special advisory committee(s) to develop the Section's position for consideration by the Executive Council and The Florida Bar and to research and draft the brief.

After Section approval or during the approval process, the Amicus Committee also coordinates with the general counsel of The Florida Bar, letting him or her know the issue, the case and potential conflicts with other sections, if any. Upon receiving the court's permission to appear in a case, the Section obtains Bar approval of our position and shares draft briefs and the Committee's final product with the Bar's general counsel. The Section is very grateful to Paul Hill for his insights and assistance in obtaining the requisite approvals of our briefs from the Bar within the compressed time frames typical in appeals.

A good illustration of the Section's vetting process oc-

continued, next page

ALERT: Inherited IRA's Not Protected under § 522 of the Federal Bankruptcy Code – Supreme Court Rules

In the case of *Clark v. Rameker,* 573 U.S. ____ (2014), the U.S. Supreme Court held that under the Federal bankruptcy code a debtor's inherited IRA is not exempt, thus, becoming subject to the claims of creditors. A summary of the case can be reviewed at www.rpptl.org.

curred in the case of *Ross G. Stone, Appellant v. Nancy Stone and Alma Stone, Appellees*, Fourth District Court of Appeal Case No. 4D11-4541. By an order dated June 14, 2013, the court asked the Section to file an amicus brief on the following question of first impression:

> Whether residential property owned by an irrevocable Qualified Personal Residence Trust Agreement (QPRT) at the time of death of the Grantor is subject to Florida Constitutional and statutory homestead devise restrictions where the QPRT provisions provide that the assets of the QPRT will revert back to the Grantor's estate to pass by devise under the Grantor's will if the Grantor dies before the expiration of the QPRT term.

On June 24, 2013, the Executive Committee met telephonically and approved filing an amicus brief as requested by the court. It also authorized Wm. Fletcher Belcher, who was the Section Chair then, to appoint an advisory committee to advise the Executive Committee as to the appropriate content of the amicus brief to be filed. The members of the advisory committee appointed were Charles Nash, Patricia Jones, Silvia Rojas, Jeffrey Goethe and Richard Gans. Tae Kelley Bronner was also appointed, but declined to participate due to a potential conflict of interest.

After receiving the recommendations of the advisory committee, the Executive Committee again met by telephone on July 9, 2013 and unanimously approved the following as positions of the Section with respect to the content of the Section's amicus brief to be filed in the *Stone* case:

(1) **In response to the question asked of the Section by the Fourth District Court of Appeal in its June 14, 2013 order**:

> If a Grantor and his or her spouse convey homestead property to a Qualified Personal Residence Trust ("QPRT"), and the QPRT provisions provide that the assets of the QPRT will revert back to the Grantor's estate, to pass by devise under the Grantor's will if the Grantor dies before the expiration of the QPRT term, and, if, as was the case in the *Stone* case, the Grantor dies before expiration of the QPRT term, then the disposition of the residence through the Grantor's estate is subject to the constitutional restrictions on devise of homestead. The rationale for this position is that the Grantor retained full control over the disposition of the QPRT assets until his death during the QPRT term.

(2) **In response to the second issue as to whether a spouse's joinder in the deed to the QPRT waives homestead rights when the deed contains no language expressly acknowledging the waiver of homestead rights**:

> The mere joinder by a spouse in an instrument wherein his or her spouse ("Grantor") conveys homestead property to a Qualified Personal Residence Trust ("QPRT") or similar arrangement, where the terms of the QPRT or similar arrangement provide that the homestead property which is the subject of the conveyance is to be distributed to the Grantor's estate upon the death of the Grantor, and, where the property is, in fact, distributed to the Grantor's estate upon the Grantor's death, does not in and of itself constitute a waiver of the spouse's homestead rights in that property under the Florida Constitution unless the instrument contains express language waiving those rights.

The Executive Committee then asked the Amicus Committee to prepare an amicus brief in the *Stone* case consistent with these positions and to obtain the approval of The Florida Bar. On August 12, 2013, Bob Goldman filed the Section's amicus brief. The *Stone* case is currently pending before the court.

The Section is justifiably proud of its reputation as a reliable friend of the court. We owe our position as a trusted amicus in large measure to the judgment, restraint and formidable appellate skills of our Amicus Coordination Committee. AL

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the unit and adjoining common elements; make repairs to the unit or to the common elements serving the unit, as needed; repair the unit if mold or deterioration is present; turn on the utilities for the unit; or otherwise maintain, preserve, or protect the unit and adjoining common elements. A unit is presumed to be abandoned if the unit is the subject of a foreclosure action and no tenant appears to have resided in the unit for at least four continuous weeks without prior notice to the association; or no tenant appears to have resided in the unit for two consecutive months without prior written notice to the association, and the association is unable to contact the owner or determine the whereabouts of the owner after reasonable inquiry.

Except in the case of an emergency, an association may not enter an abandoned unit until two days after notice of the association's intent to enter the unit has been mailed or hand delivered to the owner at the address of the owner as reflected in the records of the association. The notice may be given by electronic transmission to unit owners who have previously consented to receive notice by electronic transmission.

Any expense incurred by an association is chargeable to the unit owner and is enforceable as an assessment and the association may use its lien authority provided by Sec. 718.116, F.S., for collection of the expense.

The association may petition the court to appoint a receiver to lease an abandoned unit for the benefit of the association to offset, against the rental income, the association's costs and expenses of maintaining, preserving, and protecting the unit and the adjoining common elements, including the costs of the receivership and all unpaid assessments, interest, administrative late fees, costs, and reasonable attorneys' fees.

Note: The statute is unclear as to the disposition of any rent in excess of those expenses and assessments.

- **Insurance Repairs**. In the absence of an insurable event, the condominium association or the unit owners are responsible for the reconstruction, repair, or replacement, as determined by the declaration or bylaws.
- **Directory**. A cooperative or homeowners' association may print and distribute to parcel owners a directory containing the name, parcel address, and all telephone numbers of each parcel owner. However, an owner may exclude his or her telephone numbers from the directory by written request to the association. An owner may provide written consent to the disclosure of other contact information such as an e-mail address.
- **Relinquishment of Records**. An outgoing board, or committee member, must relinquish all official records and property of the condominium association in his or her possession or under his or her control to the incoming board within five days after the election. The Division of Florida Condominiums, Timeshares and Mobile Homes ("Division") has the authority to impose a civil penalty as set forth in Sec. 718.501(1)(d)6, F.S., against an outgoing board or committee member who willfully and knowingly fails to relinquish such records and property. This same change is applicable to cooperatives.

  Note: This statute does not address relinquishment of records by officers.
- **Communication Methods - Condominiums.** A board or committee member's participation in a meeting via telephone, real time video conferencing, or similar real time electronic or video communication counts towards a quorum and such member may vote as if physically present. A speaker must be used so that the conversation of such member may be heard by the board or committee members attending in person as well as by any unit owners present at a meeting. Members of the board may use e-mail as a means of communication but may not cast a vote via e-mail.
- **Notices of Board Meetings**. If twenty percent of the voting interests of a condominium or cooperative association petition the board to address an item of business, the board, within sixty days after receipt of the petition, must place the item on the agenda for its next regular or special board meeting.

  Note: The meeting does not need to occur within sixty days.
- **Termination**. If the plan of termination of a condominium fails to receive the required approval, the plan is not to be recorded and a new attempt to terminate the condominium may not be proposed at a meeting, or by solicitation for joinder and consent, for 180 days after the date that such failed plan of termination was first given to all unit owners.
- **Community Association Living Study Council**. The Community Association Living Study Council is eliminated. The Council was created in 2004 to receive public input on issues relating to condominium living (later expanded to include cooperatives and homeowner associations) and to recommend changes in the law and liase with the Division.
- **Audit Deadlines for Cooperatives**. Within ninety days following the end of the fiscal or calendar year or annually on such date as provided in the bylaws of the association, the board of administration shall prepare and complete, or contract with a third party to prepare and complete, a financial report covering the preceding fiscal or calendar year. Within twenty-one days after the financial report is completed by the association or received from the third party, but no later than 120 days

after the end of the fiscal year, calendar, or other date provided in the bylaws, the association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. The Division is to adopt rules setting forth uniform accounting principles, standards, and reporting requirements.

- **Financial Thresholds for Cooperatives**. An association with total annual revenues which meet certain criteria must prepare a complete set of financial statements according to generally accepted accounting principles.
- **Waiving Financial Reporting Requirements**. A cooperative association may waive the requirements to have the financial statement compiled, reviewed, or audited if a majority of the voting interests present at a duly called meeting of the association have voted to waive this requirement for the fiscal year. An association may not waive the financial reporting requirements of this section for more than three consecutive years.
- **Exception for Less Than Fifty Units**. A cooperative association in a community of fewer than fifty units, regardless of the association's annual revenues, must prepare a report of cash receipts and expenditures unless the recorded governing documents provide otherwise.
- **Disclosure of Receipts in Cooperatives**. A report of cash receipts and expenditures must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including the following, as applicable: cost for security, professional, and management fees and expenses; taxes; costs for recreation facilities; expenses for refuse collection and utility services; expenses for lawn care; cost for building maintenance and repair; insurance costs; administration and salary expenses; and reserves, if maintained by the association.
- **Change in Reporting for Cooperatives**. Upon petition by twenty percent of the unit owners, the board must hold a meeting within thirty days for a vote on raising the level of reporting for that fiscal year. Upon majority vote of voting interests, the association must prepare an amended budget or adopt a special assessment to pay for the financial report. Financial statements must be provided within ninety days after the end of the fiscal year.

New CAM Statute Repeals Statutes and Modifies Release of Lien Requirements

Governor Scott did not accept the position of the RPPTL Section, which urged him to veto CS/CS/HB 7037, now 2014-146, Laws of Florida. The new law expands the duties of a licensed community association manager ("CAM"); creates statutory forms relating to unpaid assessments; creates professional practice standards for CAMs and provides conditions and limitations upon which a community association may indemnify a CAM or management firm.

The law inadvertently repeals two provisions of the Condominium Act necessary for collection of assessments and enforcement of lien rights: (i) Sec. 718.116(6)(c), F.S., which provided that if the unit owner remains in possession of the unit after a foreclosure judgment has been entered, the court, in its discretion, may require the unit owner to pay a reasonable rental for the unit. If the unit is rented or leased during the pendency of the foreclosure action, the association is entitled to the appointment of a receiver to collect the rent; and (ii) Sec. 718.116(6)(d), F.S., which provided that the association has the power to purchase the condominium parcel at the foreclosure sale and to hold, lease, mortgage, or convey it.

The statutory form for "releases of lien" in Chapters 718, 719, and 720 F.S adds a new requirement for two witnesses. A "release of lien" is not a title instrument; therefore, the RPPTL Section urged that pursuant to traditional real property principles, the "release of lien" form should not be held to the higher tests for validity, by requiring two witnesses. The RPPTL Section's veto letter to Governor Scott stated that the creation of a two witness standard creates significant title issues as to (i) "releases of liens" recorded prior to the effective date of the statute, which do not include two witnesses and (ii) the use of any "release of lien," whether it is for a community association or a mechanic's lien, which does not include two witnesses after the effective date of the statute. The RPPTL Section will be addressing these issues further.

Note that many issues that are part of the new law regarding what a CAM is permitted to do without such activity being the unlicensed practice of law are currently pending review by the Supreme Court of Florida in *The Florida Bar re: Advisory Opinion vs. Activities of Community Association Managers*, Case Number SC – 889, which is awaiting a final ruling.

By Steven H. Mezer, Esq., and Christopher N. Davies, Esq.

- **Type of Financial Statement in Cooperatives**. A majority of voting interests present at a properly called meeting may approve preparation of: (1) a report of cash receipts and expenditures in lieu of a compiled, reviewed or audited financial statement; (2) a report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or (3) a report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.
- **Director Ineligibility in Cooperatives**. A person who is either (1) delinquent in the payment of monies owed to the association or (2) charged by information or indictment with felony theft or embezzlement involving association funds is prohibited from holding office in the cooperative. These provisions mirror those set forth in Sec. 718.112(2)(o), F.S.

  Note: The validity of a board action taken is not affected if it is later determined that a director is ineligible for board membership due to having been convicted of a felony.
- **Association Emergency Powers**. Both cooperative and homeowners' associations now have the same emergency powers as a condominium association under Sec. 718.1265, F.S., in order for its board of directors to act to mitigate further damage and make emergency repairs.
- **Handicap Access to Board and Owners' Meetings**. Meetings of the board of directors and meetings of the membership of a homeowners' association must be held at a location that is accessible to a physically handicapped person, if requested.
- **Amendments**. If a copy of a proposed amendment to the governing documents of a homeowners' association is provided to the members before being voted on and the amendment is not changed before the vote, the association, in lieu of providing a copy of the amendment, may provide notice that the amendment was adopted, identifying the official book and page number or instrument number of the recorded amendment, and that a copy of the amendment is available at no charge to the member upon written request to the association.

  Note: The copies and notice described in this paragraph may be provided electronically to those owners who previously consented to receive notice electronically.
- **Marketable Record Title Act and Homeowners' Associations**. Notice and compliance with the statute preserves a claim of right, covenants or restrictions for up to 30 years after the filing of the notice unless the notice is filed again. A person's disability, or lack of knowledge of any kind, may not delay the commencement of or suspend the running of the 30 year period. Notice may be filed by a homeowners' association only if the preservation of such covenant or restriction or portion of such covenant or restriction is approved by at least two-thirds of the members of the board of directors at a meeting for which a notice, stating the meeting's time and place and containing the statement of marketable title action described in Sec. 712.06(1)(b), F.S., was mailed or hand delivered to members of the homeowners' association at least seven days before such meeting. The homeowners' association, or clerk of the circuit court, is not required to provide additional notice pursuant to Sec. 712.06(3), F.S. This amendment is intended to clarify existing law.

For a more comprehensive review of the statutory revisions, visit http://www.myfloridahouse.gov/Sections/Bills/bills.aspx.


S. MEZER

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New Legislation: HB 757

The Florida Legislature passed HB 757 effective July 1st, 2014. It is a significant piece of legislation that affects probate and trust practitioners. The following three articles highlight several of the important provisions contained in the new legislation:

- *Rest Easy – The "Morey Fix" Legislation is Here*; and
- *Burden of Proof in Will and Trust Contests*;
- *Lapsing: Who Needs it Anyway*

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Rest Easy – The "Morey Fix" Legislation Is Here

By J. Allison Archbold, Esq.,
Fergeson, Skipper, Shaw, Keyser, Baron & Tirabassi, P.A., Sarasota, Florida

Estate planning lawyers (and their malpractice carriers) can rest easier knowing that on July 1, 2014, the so-called "Morey fix" will become law.

Morey v. Everbank and Air Craun, Inc.[1] created quite a stir in the Florida estate planning community when the First District Court of Appeal released it on July 24, 2012, because the court held that an insured's life insurance proceeds payable to his revocable trust were not protected from creditors. Prior to the *Morey* decision, most estate planning lawyers, relying on Sections 222.13(1) and 733.808(4), F.S., believed that life insurance proceeds not payable to the insured or the insured's estate were always exempt from creditors.

In *Morey*, Paragraph A of Article V of the insured's revocable trust agreement provided as follows:

> The Trustee shall pay to the domiciliary Personal Representative of the Settlor's estate from time to time such sum or sums as such Personal Representative may certify to be required to pay the Settlor's "death obligations" and such other obligations required to be paid under Florida law, which includes without limitation, the following:
>
> The expenses of the Settlor's last illness and funeral … and the expenses of administering the Settlor's estate ….;
>
> All of the Settlor's enforceable debts, excluding, however, debts secured by life insurance or real or personal property ….[2]

After making such required payments to the personal representative and paying specific bequests, the revocable trust agreement required the trustee to hold the balance of the trust assets in a subtrust for the benefit of the insured's children.

After the insured's death, the trustee petitioned the court for a determination that the life insurance proceeds payable to the trust were exempt from all "death obligations" and, therefore, could not be used to pay the estate's creditors. In requesting this determination, the trustee relied on Sec. 222.13(1), F.S. (2008), which provides as follows:

> Whenever any person residing in the state shall die leaving insurance on his or her life, the said insurance shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy, and the proceeds thereof shall be exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment thereof provides otherwise.

Rather than rely on Sec. 222.13(1), F.S., the First District Court of Appeal focused on the language in Sec. 733.808(1), F.S., which provides that life insurance proceeds paid to a trustee "shall be held and disposed of by the trustee in accordance with the terms of the trust," and found that the insured had waived the statutory exemption "by naming as beneficiary a trust whose terms direct distribution of the trust assets to the personal representative."[3] In other words, the First District Court of Appeal held that a general waiver (as opposed to a specific waiver) of the creditor protection afforded by Sec. 222.13(1), F.S. was sufficient.

Language similar to that in the *Morey* trust agreement directing the trustee to distribute trust assets to the personal representative is boilerplate in many revocable trust agreements because under Florida law the trustee of such a trust is required to "pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of administration and obligations of the settlor's estate."[4] As a result of the *Morey* decision, many estate planning lawyers were faced with the decision whether
~~~~~~~~~~~~~~~~~

to amend their clients' revocable trust agreements to expressly prohibit the payment of life insurance proceeds to the personal representative or to prepare new life insurance beneficiary designations specifically designating a subtrust as the beneficiary, as opposed to the trust as a whole, to protect the life insurance proceeds payable to their clients' trusts from creditors.

As a result of the "Morey fix" legislation, no such changes to clients' estate plans are necessary. The "Morey fix" legislation requires the grantor to expressly state that Sec. 733.808(4), F.S., does not apply before language in a trust agreement will be construed to waive the exemption for life insurance proceeds. Now, in order to waive the creditor protection under Sec. 222.13(1), F.S., the waiver must be specific as opposed to general. Specifically, it amends Sec. 733.808(4), F.S., to read as follows:

> (4) Unless the trust agreement, declaration of trust, or will expressly refers to this subsection and directs that it does not apply, death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate and shall not be subject to any obligation to pay the expenses of administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.[5]

It also amends Sec. 736.05053(1), F.S., to reflect the changes made to Sec. 733.808(4), F.S.:

> A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor's estate. Payments made by a trustee, otherwise provided in the trust instrument, must be charged as expenses of the trust without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the provisions of this subsection; however, the payment must be made from assets, property, or the proceeds of the assets or property that are included in the settlor's gross estate for federal estate tax purposes and may not be made from assets proscribed in s. 733.707(3) or death benefits described in s. 733.808(4) unless the trust instrument expressly refers to s. 733.808(4) and directs that it does not apply.[6]

The changes "apply retroactively without regard to the insured's date of death."[7] The changes do not affect the amount of the creditor's claim or the creditor's rights, and instead go to the creditor's remedies.[8] Statutes relating to creditors' remedies are permitted to apply retroactively.[9]

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Endnotes:

1 93 So.3d 482 (Fla. 1st DCA 2012)
2 *Id*. at 484-485
3 *Id*. at 487
4 F.S. § 733.05053(1) (2014)
5 CS/CS/HB 757, Section 5, Reg. Session (Fla. 2014) (enrolled).
6 *Id*. at Section 9
7 *Id*. at Sections 6 and 10
8 *See* Scott v. Jenkins, 35 So. 101 (Fla. 1902)
9 16A C.J.S. Constitutional Law § 415

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Burden of Proof in Will and Trust Contests

By Jenna G. Rubin, Esq.,
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House Bill 757 made two changes to our current estate and trust law that RPPTL litigators need to review. These changes were meant to clarify who has the burden of proof in will and trust contests.

Both the Florida Probate Code (the "Probate Code") and the Florida Trust Code (the "Trust Code") are clear that all or part of a will, trust, revocation of a will, or revocation of a trust is void if it was procured by fraud, duress, mistake or undue influence. *See* Florida Statutes §§ 732.5165 and 736.0406. Yet until now, only the Probate Code specifically defined the party with the burden of proof in such an action. In will contests, Florida Statutes § 733.107(1) specifically provides that "the contestant [i.e., the plaintiff/petitioner] shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought." The Trust Code lacked such clarity. Because trusts are sometimes considered "will substitutes," and since revocable trusts frequently contain testamentary provisions, the Florida Legislature determined that the Trust Code relating to trust contests should mirror the Probate Code relating to will contests.

Thus, the Legislature amended Florida Statutes § 736.0207 to clarify that, specifically, the party challenging the validity of a trust or the revocation of all or part of a trust has the burden of establishing the grounds for invalidity. With the addition of the words shown in bold, Florida Statutes § 736.0207 now reads as follows:

736.0207. Trust contests–

(1) **In an action to contest the validity or revocation of all or part of a trust, the contestants shall have the burden of establishing the grounds for invalidity.**

(2) An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor's death. This section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Trust contests, however, are not completely identical to will contests. Unlike in a will contest, in a trust contest the burden is not on the proponent of the trust to establish prima facie its formal execution.

Florida Statutes § 733.107(2) was also amended to retroactively confirm the "shifting burden of proof" in cases of undue influence involving any testamentary dispositions regardless of whether the disposition is pursuant to a will. The broadening of the concept is intended to include trust contests. Rather than identify each specific circumstance in which the burden of proof shifts once the contestant establishes a presumption of undue influence, the Legislature changed Florida Statutes § 733.107(2) to clarify that the shift applies to *any* transaction or event to which the presumption of undue influence applies (regardless of whether the contest involves a will), and did so by including a more generalized statement intended to cover all such circumstances as indicated in bold below:

733.107 Burden of proof in contests; presumption of undue influence.–

(1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.

(2) **In any transaction or event to which the presumption of undue influence applies**, the presumption implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304.

The change clarifies that when the presumption of undue influences arises, in whatever context, it shifts the burden of proof.

Neither amendment changes the existing Florida law, but rather the amendments will clarify and codify the current state of Florida case law and should eliminate the confusion regarding who has the burden of proof in trust contests.

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Lapsing: Who Needs It Anyway?

By John L. Stansbury, Esq. and Patrick C. Emans, Esq.
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With respect to outright specific devises, the Florida Legislature recently amended the Florida Trust Code Antilapse Statute, Section 736.1106 of the Florida Statutes, to make it more consistent with the Florida Probate Code Antilapse Statute, Section 732.603 of the Florida Statutes. In general, the amendment provides that the antilapse provisions of the Florida Trust Code will only apply to an outright gift that is to occur upon the death of the creator of the gift if the intended but deceased recipient is an applicable family member of the creator. The amendment is effective for all trusts that become irrevocable after June 30, 2014.

Background

Antilapse statutes are default rules of construction that provide for a devise in a will or trust to pass to the recipient's descendants if the recipient predeceases the testator or settlor. The statutes prevent the devise from lapsing and passing as part of the residuary estate or passing by the laws of intestacy. The Uniform Probate Code has an antilapse statute and the majority of states have adopted some form of an antilapse statute. Frequently, estate planning attorneys prevent the application of the antilapse statute by conditioning the devise by requiring the recipient to survive the testator or settlor through words of survivorship in the instrument that creates the devise (e.g., "if he survives me" or "to my surviving children").

The antilapse statutes under both the Florida Trust Code and the Florida Probate Code specifically provide that the testator or settlor must express an intent contrary to the application of the respective statutes in order for the applicable statutory provisions not to apply (i.e., through use of words of survivorship). Prior to the 2014 amendment, the Trust Code Antilapse Statute (adopted in 2007 as part of the complete overhaul of the Florida Trust Code) and the Probate Code Antilapse Statute were inconsistent with respect to outright devises that were to occur upon the death of the creator of the gift (among other inconsistencies between the statutes). Specifically, the pre-2014 Trust Code Antilapse Statute provided, in relevant part, as follows:

> A future interest under the terms of a trust is contingent upon the beneficiary surviving the distribution date. Unless a contrary intent appears in the trust instrument, *if a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants* (emphasis added). They take per stirpes the property to which the beneficiary would have been entitled if the beneficiary had survived the distribution date.

Thus, the prior version of the Trust Code Antilapse Statute did not condition the substitute gift(s) on the relationship of the beneficiary to the settlor or testator. A gift to *any* beneficiary under the terms of a trust who failed to survive the distribution date would have been prevented from lapsing, and the gift would therefore have passed to the beneficiary's surviving descendants, per stirpes.

In contrast to the former Trust Code Antilapse Statute, the Probate Code Antilapse Statute provides, in relevant part, as follows:

> (1) Unless a contrary intent appears in the will, *if a devisee who is a grandparent, or a descendant of a grandparent, of the testator* (emphasis added):
>
> (a) Is dead at the time of the execution of the will;
>
> (b) Fails to survive the testator; or
>
> (c) Is required by the will or by operation of law to be treated as having predeceased the testator, a substitute gift is created in the devisee's surviving descendants who take per stirpes the property to which the devisee would have been entitled had the devisee survived the testator.

In the case of a deceased devisee, the Probate Code Antilapse Statute only prevents the devise from lapsing if the devisee was a grandparent of the testator or a descendant of a grandparent of the testator. Before the 2007 amendments, Section 737.6035 of the Florida Statutes (2007) not only saved a gift from lapsing if the deceased beneficiary was a grandparent or a lineal descendant of a grandparent of the settlor (like the Probate Code Antilapse Statute), but it also specifically provided that a gift to any other deceased beneficiary would lapse absent a contrary intention in the trust instrument (and therefore it would have passed as part of the residuary trust estate). When the Florida Trust Code was amended in 2007, however, it was thought to be economically and administratively more convenient to save all gifts from lapsing and not just gifts to applicable family members.

Recent Amendment to the Florida Trust Code Antilapse Statute

After the 2014 amendment by the Florida Legislature, the Florida Trust Code Antilapse Statute now mirrors the Probate Code Antilapse Statute in the case of an outright devise that is to be made to a deceased beneficiary upon the death of the settlor. Specifically, under the new antilapse statute, an outright devise that vests upon the death of the settlor (or the testator in the case of a testamentary trust) will now only pass to a deceased beneficiary's descendants if the beneficiary is a grandparent, or a lineal

descendant of a grandparent, of the settlor (or testator). On the other hand, if the deceased beneficiary of the outright gift does not have the requisite familial relationship with the settlor/testator, the gift would lapse, i.e., the gift would become part of the residuary trust estate. The new statute achieves the foregoing results by providing that the general antilapse rule found in Section 736.1106(2) of the Florida Statutes does not apply to an outright gift that vests upon the death of the settlor/testator unless the intended but deceased beneficiary is an applicable family member of the settlor/testator.

The new Trust Code Antilapse Statute maintains the same level of administrative convenience that existed under the prior statute for gifts that are not distributed outright upon the death of the settlor, i.e. gifts that could (but for the general antilapse rule in Section 736.1106(2) of the Florida Statutes) lapse many generations after the death of the settlor or testator when it might be troublesome or impossible to locate the residuary beneficiaries of the lapsed gifts. The new statute recognizes, however, that if an outright gift to a non-applicable family member lapses at the death of the settlor or testator, it is not overly burdensome to distribute the lapsed gift to the residuary beneficiaries. The result under the new statute is also more consistent with the presumed intent of the settlor/testator that he or she would only intend to save the outright gift from lapsing for certain family members, while preferring for it to lapse and pass to the residuary beneficiaries for any other beneficiary (rather than passing to the descendants of a non-family member).

Importantly, the new Trust Code Antilapse Statute, like the Probate Code Antilapse Statute, is only a default provision. The settlor of a revocable trust or the testator of a testamentary trust has the option of providing to the contrary if he or she desires.

Effective Date

The 2014 amendment to the Florida Trust Code Antilapse Statute applies to trusts that become irrevocable after June 30, 2014.

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E-Z Legal Forms May Not Be So Easy After All

The Four Corners Rule Applies in Will Construction Cases in Florida

By Sarah S. Butters, Esq., Holland & Knight, Tallahassee, Florida
and
Lee Philip "Lee" Teichner, Esq., Holland & Knight, Miami, Florida

In what should be a shot in the arm to attorneys who draft wills and other testamentary devices to be construed under Florida law, the Florida Supreme Court recently underscored some of the inherent pitfalls when a member of the public uses a preprinted legal form will to devise personal and real property. Of foremost concern is that preprinted form wills often do not capture the testator's true testamentary intent, particularly regarding property acquired after the execution of the will. In *Aldrich v. Basile*, 2014 WL 1240073 (Fla. 2014), decided March 27, 2014, Justice Parenti took the opportunity in her concurring opinion to highlight the cautionary tales and dangers of utilizing preprinted forms and drafting a will without the assistance of a lawyer and without a residuary clause or general devise.



In *Aldrich*, Ms. Aldrich, the testator, drafted her Last Will and Testament on an E-Z Legal form. After the form's preprinted language directing the payment of all of her just debts, Ms. Aldrich *hand wrote* that her property be bequeathed in a specific manner in the space provided in the form, as follows: (1) the house and its contents to her sister; (2) a Fidelity account to her sister; (3) a certain life insurance policy to her sister; (4) a certain automobile to her sister; and (5) all bank accounts at "Bank Certain" to her sister. Ms. Aldrich also hand wrote on the will form that if her sister died before Ms. Aldrich did, then Ms. Aldrich "leaves all of the listed assets to her [brother]." The will contained no other distributive provisions, such as a general bequeath or a residuary clause.

Three years later, Ms. Aldrich's sister died. At the time of the sister's death, Ms. Aldrich survived her, thus becoming her sister's beneficiary instead of her benefactor. Ms. Aldrich's sister left cash and land to Ms. Aldrich. Ms. Aldrich thereafter deposited the cash she inherited from her sister in an account with "Bank Different." Ms. Aldrich thereafter drafted another writing, likely intended to be a codicil to her original will (but that did not comply with the formal requirements of a will under Florida Statutes)[1], noting that her sister had passed away and reiterating that all of her worldly possessions should pass to her brother, Mr. Aldrich.

Upon Ms. Aldrich's death, Mr. Aldrich sought to have the probate court determine who should inherit the cash and real property that Ms. Aldrich inherited from her deceased sister's estate after the execution of her will. Ms. Aldrich left no spouse and no children, only her brother, Mr. Aldrich, and the offspring (nieces) of a predeceased brother. Ms. Aldrich's nieces from this predeceased brother asserted an interest in the probate action. Mr. Aldrich argued that the most reasonable and appropriate construction of Ms. Aldrich's will was that she intended for her entire estate, including what she acquired from her sister after the drafting of her will, to pass to him. The nieces argued that there was no residuary clause and therefore those assets passed by intestacy.

Mr. Aldrich argued that Sec. 732.6005(2), F.S., supported his position and that a will should be construed to pass *all* property that the testator owned at death, including property acquired after the will is executed. He also argued in favor of the legal presumption against construction of a will that results in partial intestacy and that, in making a will, a testator intends to dispose of his or her *entire* estate. In contrast, the nieces argued that without any general devise or residual clause in the will, Ms. Aldrich's will contained no mechanism to dispose of the after-acquired property or any other property not specifically mentioned in the will, so that Ms. Aldrich died intestate as to the later acquired property and the cash in Bank Different. The probate court entered summary judgment in favor of Mr. Aldrich on the purported authority of Sec. 732.6005(2), F.S.

The First District reversed the trial court's decision and concluded that Sec. 732.6005(2), F.S., does not control because the disputed property and cash were not addressed in the will and therefore it is irrelevant whether this property and cash was acquired before or after Ms. Aldrich's execution of her will. In other words, the general principle that a will must be construed to avoid intestacy only applied to disposition of assets in existence at the time the will is executed - not after acquired property. The First District determined that only subsection (1) (and not section 2) of Sec. 732.6005, F.S., applied. Sec. 732.6005(1) and (2), F.S., provide:

(1) **The intention of the testator *as expressed in***

***the will* controls the legal effect of the testator's dispositions**. The rules of construction expressed in this part shall apply unless a contrary intention is indicated by the will.

(2) **Subject to the foregoing**, a will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will. (Emphasis added.)

The Florida Supreme Court agreed with the First District's view and explained in its reasoning that Ms. Aldrich devised her property in the will with specificity and that her will evidences her intent to dispose of each *particular* item of property named in the will. The Court found it was equally, plainly obvious that Ms. Aldrich's will manifests no intent to dispose of the disputed, after-acquired property. The Court noted the legislative history of Florida law regarding wills and after-acquired property which supported the conclusion and the holding of the First District.

The legislative history shows that prior to June 13, 1892, a will was ineffective in Florida to devise real property in which the testator had no interest at the time the will was executed.[2] The Legislature used similar language when it enacted the Probate Act of 1933.[3] In *In re Vail's Estate*, the Florida Supreme Court explained the primary purpose of this section was to permit the transfer of after-acquired property by will rather by intestacy.[4] Additionally, the Legislature amended the 1974 Uniform Probate Code to clarify that a residuary clause in a will may pass property acquired by the testator's estate *after* the testator's death.[5] In 1975, the former Sec. 732.602, F.S., was repealed and Sec. 732.6005, F.S., was created. The original version of Sec. 732.6005, F.S., has never thereafter been amended and, as noted above, states in material part: (1) The intention of the testator *as expressed in the will* controls the legal effect of the testator's dispositions.

An evaluation by the Florida Supreme Court of Florida's legislative history concluded that the Legislature intended for after-acquired property to also be subject to the intestacy statute in the event it is "not effectively disposed of by will." The Court found that Florida law did not support Mr. Aldrich's argument that the after-acquired property not effectively disposed of by the will should nonetheless avoid the intestacy statute and be distributed under the will. The Court held that it is "well established" that, in construing a will, the intention of the testator is ***the controlling*** factor. The intention of the testator should be gleaned from within the **four corners** of the will unless the language employed by the testator is ambiguous, in which case the testimony of competent witnesses may be received and considered as an aid to the court in its quest for the testator's intent.[6]

Ultimately, the Florida Supreme Court held that it was clear from the language of Ms. Aldrich's will that she intended to leave only the enumerated property listed in her



will to her brother, Mr. Aldrich, in the event her sister predeceased her. Because Ms. Aldrich expressed no intent as to the disposition of any other property not specifically listed in the will, including any property she may have acquired after the execution of her will, the Court found that the language contained within the four corners of the will did not reveal an intent by the testator to devise the unmentioned, unaccounted for property to those specifically mentioned in the will (or the failed codicil).

Lessons Learned from Aldrich

Persons attempting to draft a will, be it do-it-yourself-ers and legal practitioners alike, should heed the upshot of the Aldrich *decision*. First, handwritten wills not executed in accordance with Sec. 732.502, F.S., will not be probated in Florida.[7] Florida has always strictly construed the requirements of Sec. 732.502, F.S., and also declined to adopt the Uniform Probate Code's "harmless error" test for mistakes in execution. Recently, the Second District declined to revisit the public policy and constitutionality of Florida's prohibition on holographic wills, even when the will was written intelligently by someone fully competent.[8] Thus, a do-it-yourself will to be probated in Florida must be executed in accordance with Florida law or it will be invalidated even before the court would begin to construe its intended meaning.

Second, in construing the intent of the testator's testamentary devises, a court will look within the four corners of the will to determine testamentary intent. This will be the regular course unless the face of the will contains ambiguous language, contradictory provisions or a mistake.[9]

Next, property not specifically devised in the will will be disposed under intestacy distribution laws absent a residuary or a general, catch-all devise clause. Therefore, unless the testator seeks to have a portion of his or her property be devised under the intestacy laws, the will drafter should regularly utilize a residuary or general devise clause.[10] Further, the will drafter should consider property not addressed in a specific devise and account for property that may be acquired after the drafting of the will, including its disposition via a residuary clause or general devise mechanism. The *Aldrich* decision removes from the probate court any discretion to attempt to figure out what the testator meant with regard to the distribution of unidentified property. This is particularly true given that after *Aldrich*, trial courts are implored, in accordance with Sec. 732.6005(1), F.S., to look within the four corners of the will to determine the intention of the testator regarding the disposition of property. *Aldrich* underscores the importance that the testator and will drafter say what he/she means and mean what he/she says.

Finally, *Aldrich* serves as a reminder to members of the public that in the end the E-Z way, even by handwriting a will or inserting a handwritten devise on a preprinted form, is often not the easy and right way, and can lead to a will not being considered by the court or a testamentary devise never intended by the testator.


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Endnotes:

1 There was only one signature of a witness on the face of this attempted codicil and therefore the document was an unenforceable testamentary instrument under the Florida Probate Code. See Sec. 732.502(1)(b), F.S. (requiring signature of the testator along with two attesting witnesses); and, Sec. 732.502(5), F.S., (codicil must be executed with the same formalities as a will).

2 *Frasier v. Boggs*, 20 So. 245, 248 (1896).

3 *See*, s. 5477(2)(b), Compiled General Laws of Fla. (Supp. 1933) (subsequently renumbered s. 731.05(2)).

4 *In re Vail's Estate*, 67 So. 2d 665, 670 (Fla. 1953).

5 *See* Sec. 732.602, F.S. (Supp. 1974).

6 *Adams v. Vidal*, 60 So. 2d 545, 547 (Fla. 1952).

7 Similarly, Florida courts will not probate a holographic (handwritten), foreign will unless it complies with the execution requirements of Sec. 732.502, F.S., notwithstanding whether the foreign will was executed in accordance with the law of the jurisdiction in which it was executed. *See*, Section 734.104(1)(a), F.S.

8 *See, Lee v. Estate of Payne*, — So.3d —-, 2013 WL 5225200 (Fla. 2d DCA September 18, 2013).

9 *Perkins v. O'Donnell*, 82 So. 401, 404 (Fla. 1919); *Adams,* 60. So.2d at 547 (testator's intention should be gleaned from four corners of will unless language employed is ambiguous in which case competent witnesses' testimony may be received and considered to aid the court in determining such intention); *see also*, Sec. 732.6005(1) F.S.

10 A testator wishing to distribute specific assets to specific individuals should still utilize a specific devise. This method of devise will necessarily not account for assets acquired after the will is drafted, which is the problem addressed in *Aldrich*.

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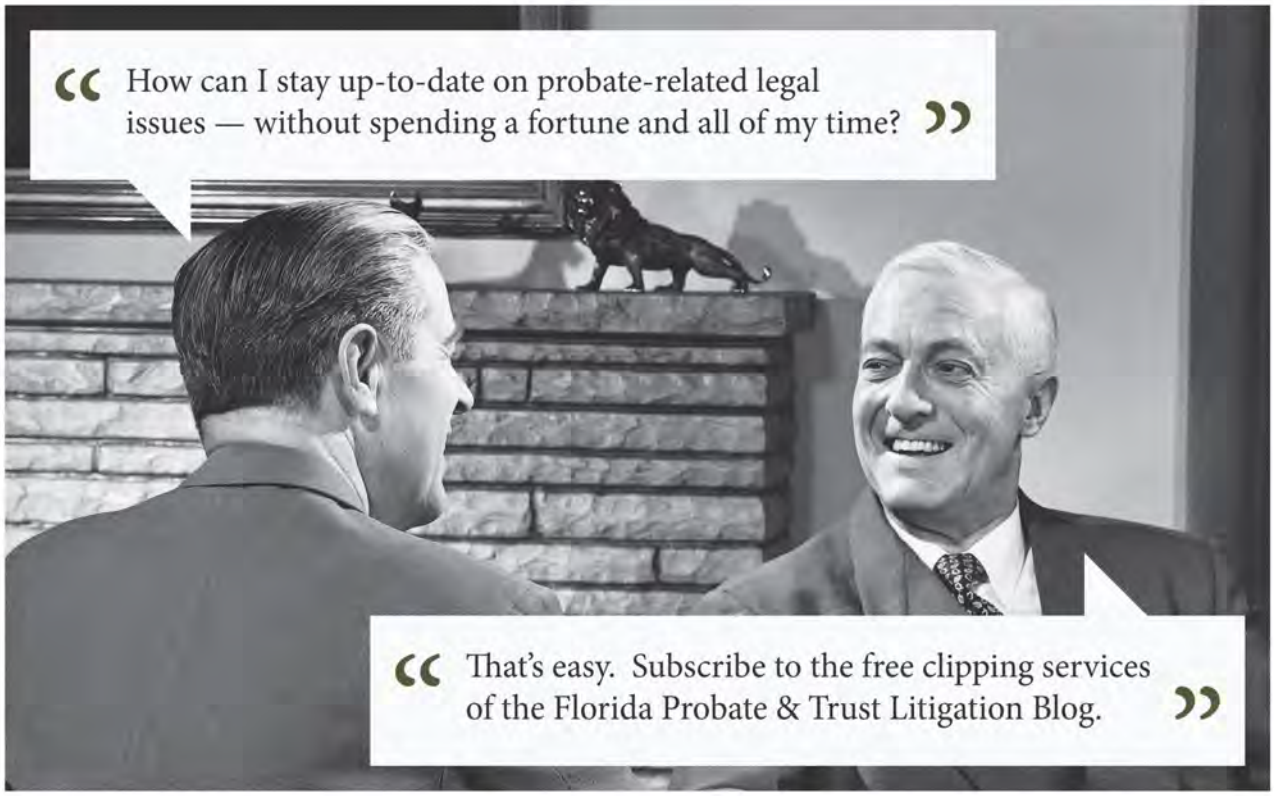

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Understanding the Requirements of a "Qualified Mortgage" Under Dodd Frank:

Closing the Barn Door After the Horses Have Left the Building

By Robert "Bob" S. Schumaker, Esq., Trenam, Kemker, Scharf, Barkin, Frye, O'Neil and Mullis, P.A.

Regulations designed to bring increased transparency to the lending process have had an unexpected negative impact on another important goal of the Obama Administration.


B. SCHUMAKER

Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203), known simply as the Dodd-Frank Act (the "Act"). The Act is a comprehensive attempt to correct many of the questionable practices followed by U.S. Banks and other financial institutions that caused or at least greatly contributed to the "Great Recession" experienced by this county in the prior decade. The stated purpose of the Act is to "Promote the financial stability of the United States by improving accountability and transparency of the financial system… and to protect consumers from abusive financial services…"[1]

The Act impacts the practices of virtually every federal agency involved in the United States financial markets including the Federal Deposit Insurance Corporation, ("FDIC"), the Federal Reserve, the Securities and Exchange Commission ("SEC"), and the Comptroller of the Currency. A full discussion of these changes, however, is well beyond scope of this article. This article will focus on the small but important implementation of the concept of the "Qualified Mortgage" to be applied by financial lending institutions making residential consumer loans.

The stated purpose of the Act is to "Promote the financial stability of the United States by improving accountability and transparency of the financial system… and to protect consumers from abusive financial services…"

Building Better Mortgages

An important provision of the Act is the creation of the Bureau of Consumer Financial Protection (the "Bureau") under the "Consumer Financial Protection Act of 2010."[2] The stated objective of the Bureau is the regulation of new and existing consumer finance products and services as well as enforcement of fair lending practices and the advancement of consumer education.

The Bureau is charged with overseeing and implementing Title XIV of the Dodd-Frank Act known as the "Mortgage Reform and Anti-Predatory Lending Act" (the "Reform Act")[3], which establishes rules designed to standardize and improve residential underwriting practices. One of the fundamental tenants of the new rule is to insure that financial institutions make loans to only those individuals who have the ability to repay such loans.

Not to editorialize, but think about that statement for a moment. It is difficult to believe that one of the touchstones of this massive piece of legislation is a proscription against federally-regulated lenders making residential loans only to consumers who reasonably demonstrate a good faith ability to pay. A novel concept.

Unfortunately, the title of the Reform Act explains why this legislation was necessary. Lenders, during the real estate boom that predated the so called Great Recession, were too often engaging in what Congress defined as "predatory lending practices." Such practices were characterized by poor underwriting and minimal due diligence by loan originators coupled with minimal equity requirements and a disregard of the borrower's overall financial condition.

A major contributor to the crash of the residential housing market was the ready availability of "subprime" mortgage loans. By definition, a subprime loan is a residential mortgage loan made to an individual whose credit score was low and who generally could not qualify for a more conventional loan. Subprime borrowers often had credit histories replete with frequent late payments and defaults of credit cards and other financing and sometimes prior bankruptcies. Because such loans were inherently more risky, lenders charged higher interest rates and fees. It was the nature of the subprime market that led to the criticism of predatory lending. Lenders were intentionally making high cost loans to borrowers who already struggled to pay their debts. Further compounding the problem was the fact that a great

majority of these subprime loans were adjustable rate loans that by their very terms became more expensive over time as designed increases in interest rates eventually kicked in. Borrowers who were already barely able to meet their monthly mortgage debt too often defaulted soon after the initial low interest rate began to rise.

Banks were not the only culprits. With the strong housing demand, the securities markets soon jumped into the game with a proliferation of mortgaged-backed funds created and traded as securities. These mortgage-backed funds, whose principal investments were subprime mortgages, quickly became an important outlet for banks to unload the risky mortgages that they had made. Because these funds were non-traditional securities, they were lightly regulated by the SEC. When the housing market collapsed, most of these funds were greatly devalued.

Finally, many felt that the federal government contributed to the "perfect storm" that led to the housing market collapse by the aggressive lending policies of federally- backed institutions such as Fannie Mae and Freddie Mac. Although the Financial Crises Inquiry Commission (the "Commission") appointed by President Obama in 2009 [4] concluded that these agencies were not the cause of the crisis, this finding was highly criticized and somewhat counterintuitive in that the primary role of both Fannie Mae and Freddie Mac was to promote affordable housing. Many attributed the Commission's exoneration of the two major federally-backed institutions as a politically engineered finding.

The debate over who is to blame for the housing crisis will no doubt continue for some time. Regardless of the cause of the crisis and with at least a tacit acceptance that nearly everyone, including the government, the banking and securities industries and consumers themselves, were partly responsible for the mess, the Bureau adopted the so called Ability-To-Repay/Qualified Mortgage Rule (the "Rule") which implemented the relevant portions of the Act to insure that regulated creditors act appropriately to protect consumers entering into new residential loan transactions.

The Rule

The Rule, which went into effect on January 10, 2013, seeks to further the Act's earlier amendments to the Truth-in-Lending Act (the "TILA")[5] that were implemented to generally: "prohibit a creditor from making a residential mortgage loan without a reasonable and good faith determination that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, along with taxes, insurance, and assessments." The Rule applies to residential mortgage transactions secured by a dwelling. The Rule does not apply to non-consumer transactions involving residential dwellings acquired for investment or business purposes.

Who does the Rule apply to? The Bureau defines a "creditor" as: "a person who both (1) regularly extends, whether in connection with loans, sales of property services, or otherwise, consumer credit which is payable by agreement in more than *four installments*; or for which the payment of a *finance charge* is or may be required; and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness; or, if there is no such evidence of indebtedness, by agreement." Those familiar with Regulation Z ("Reg. Z") of the TILA, will recognize this definition as applying to transactions historically covered by Reg. Z. Clearly, banks, saving institutions, and credit unions are covered by the Rule. Private enterprises that regularly extend credit for a fee are also covered.

Who is protected by the Rule? The Bureau defines a "consumer" as: "(with regard to a credit transaction) one in which the party to whom the credit is offered or extended is a natural person, and the money, property or services which are the subject of the transaction are primarily for personal, family, or household purposes." Again, the definition is very similar to the historic Reg. Z definition that has been the law for years. Unlike certain related consumer legislation designed to protect consumers' homes, however, the Rule is not limited to primary residences or first mortgage loans.

Essentially, the Rule requires creditors to make loans based upon a list of enumerated factors designed to help insure that the borrowers will be able to repay such loans. Again, with all due respect to Senators Dodd and Frank, it seems absurd that the federal government must essentially tell the banking industry not to make bad loans, but that is exactly what the Rule does. Presumably, this will preclude the possibly of a future housing market crisis.

How does the Rule work? Again, as a condition precedent to making a covered consumer loan, the lender must make a good faith determination that the borrower has a reasonable ability to repay the loan. To do this, the lender must consider and reasonably **verify** eight (8) underwriting factors to determine the borrower's ability-to-repay ("ATR"). These ATR factors are:

1. The borrower's current or reasonably expected income or assets that will be used to repay the loan;
2. The borrower's current employment status;
3. The expected monthly mortgage payment. Note, that in determining the monthly payment, the lender must assume the highest interest rate that may be payable at any time under the terms of the loan and full amortization of the loan;
4. The cumulative impact of payments on other loans to the borrower;
5. The borrower's monthly payments on real estate taxes and insurance required by the lender, together with other costs of ownership such as homeowner's association or condominium association dues;
6. The borrower's current monthly debt, including alimony and child support payments;

7. The borrower's monthly debt-to-income ratio (the borrower's "Debt Ratio"). The Debt Ratio is simply the borrower's total monthly obligations expressed in ratio to the borrower's gross income; and
8. The Borrower's credit rating.

If the list sounds like what good lenders already look at when underwriting a loan, you are correct. The list highlighted the underlying problem. Too often, lenders were employing shoddy underwriting practices and skipping important steps in the process. To borrow from the old adage relating to computer input: you put garbage in, you get garbage out. Many lenders were simply not properly underwriting loans and were routinely making loans destined to fail.

One of the common practices that the Rule now prohibits is the lender's reliance solely upon information contained in the prospective borrower's loan application. All important information must now be independently verified. For example, employment and current income must be verified directly by the borrower's employer. The key is that the lender must only rely upon reasonably reliable third party records or information obtained directly from such third parties.

The Rule does not dictate how each lender should establish a competent underwriting policy that incorporates the concept of ATR, but the Bureau has published general guidelines and suggestions for lenders to use. In whatever way these new underwriting guidelines are established, however, each lender is required to fully document its internal guidelines and follow those guidelines on a consistent basis. One important aspect of the Rule that should be implemented by lenders is a system of loan reviews designed to identify loans that appear to be in trouble. Examples of troubled loans are loans that consistently have late or missed payments or defaults in other loan covenants such as the failure to provide timely proof of insurance renewals. Lenders are required to reach out to the borrower as early as possible to help the borrower get back into compliance.

Qualified Mortgages: A Safe Harbor

Because, as described below, there is definitely a downside for lenders who do not adhere to the provisions of the Rule in the form of governmental sanctions and newly authorized private civil actions, there is ample incentive for lenders to comply with the Rule. To assist lenders in such compliance, the Bureau has created a "safe harbor" for lenders by recognizing the concept of a Qualified Mortgage ("QM").

A QM is a mortgage that is presumed to comply with the ATR requirements. There are two general types of QMs: (1) a loan that is deemed to meet all of the criteria of a QM, and (2) a "high-cost" loan that generally meets the criteria of a QM, except as to the interest rate or points charged. In the event of a consumer challenge, a court of law must find that a fully compliant QM has met the ATR standard. A high-cost QM is only presumed to have complied with the ATR standard, but such presumption is rebuttable in a court of law. Such presumption may be rebutted if the borrower can prove to the court that the borrower did in fact *not* have sufficient income to support the mortgage after paying the borrower's other obligations. Because an absolute safe harbor is always better than a qualified safe harbor, the Bureau, in enacting the two-tier QM concept, clearly hopes to encourage lenders to toe the line by remaining within the four corners of the QM definition.

A QM is a true Qualified Mortgage enjoying the above described safe harbor if it is a residential mortgage that meets the following requirements:

1. The total points and fees charged are less than three percent (3%) of the loan amount if the loan amount is $100,000 or more. If the loan amount is $60,000 or more but less than $100,000, the total points and fees must be no greater than $3,000. If the loan amount is $20,000 or more but less than $60,000, the total points and fees must be no greater than five percent (5%) of the loan amount. If the loan amount is $12,500 or more but less than $20,000, the total points and fees must be no greater than $1,000. Finally, if the loan amount is less than $12,500, the total points and fees must be no greater than eight percent (8%) of the loan amount;
2. The loan may not contain any "risky features" such as allowing negative amortization; be an interest only loan or a balloon loan not fully amortized;
3. The loan term must be thirty (30) years or less;
4. The borrower must have at the time the loan is made a debt to income ratio ("DTI Ratio") of forty-three percent (43%) or less, that is verified by the lender as described above.

Prepayment penalties are generally prohibited (but may be permitted on high-cost loans as described below).

Of course, this is the government so there are exceptions to the general rule. Loans made by Government Sponsored Entities (a "GSE") such as Fannie Mae and Freddie Mac, the Federal Housing Administration ("FHA") and the Veterans Administration ("VA"), must generally comply with the ATR requirement but do not have to comply with the DTI Ratio requirement. Further, small creditor loans made by lenders that have less than two billion dollars in assets and originate five hundred (500) or fewer loans per year are also exempt from the DTI Ratio requirement.

A QM is considered a high-cost mortgage if:

1. The mortgage is: (a) a first mortgage on the consumer's principal residence and the annual percentage rate ("APR") is six and a half percent (6.5%) greater

than the average prime rate (or eight and a half percent (8.5%) greater than the average prime rate if the home is personal property (i.e., a mobile home) and the loan is less than $50,000; *or* (b) a second mortgage of the consumers principal residence and the APR is eight and a half percent (8.5%) greater than the average prime rate; or

2. The total points and fees payable are more than five percent (5%) on loans of $20,000 or more or eight percent (8%) on loans greater than $20,000; or
3. The loan documents allow a prepayment fee of more than two percent (2%) or a prepayment fee for a payoff more than thirty-six (36) months after the loan is initially closed.

Again, making a high-cost loan does not mean that the loan does not constitute a QM. It simply changes the availability of the safe harbor afforded by a true QM.

Essentially, as might be evident to anyone that represents lenders making residential loans, it should not be difficult for most lenders to meet the fairly simple QM criteria. In fact, it is estimated by the Bureau that better than ninety percent (90%) of residential loans made in this country generally comply with the QM requirements.

The Stick

The Bureau is charged with regulating and enforcing the portions of the Act described in this article. How the Bureau will do this and what form these sanctions, which include administrative fines, civil suits and in some cases criminal actions, will take, is still largely unknown. The Act has extended the statute of limitations for violation of certain sections of the TILA to three (3) years (although the statute of limitations for violations of other sections remains one (1) year). Of significant note is the provision in the Act that aggrieved consumers may use a violation of the TILA as a defense to a foreclosure action without regard to whether such defense may otherwise have been barred by the relevant statute of limitation. The Bureau has been granted rulemaking authority to better define and clarify implementation of the ATR rule which will likely be an ongoing process over the next few years.

The Act itself has recently withstood one constitutional challenge by The Financial Stability Oversight Council and there may be others.[6]

Summary

Was the codification of the ATR rule much ado about nothing? Critics say the ATR rule has been an integral concept in banking since banks started making loans and that the ATR rule is simply an attempt to enforce common sense. Others point to the financial crisis of the past decade as proof that the system did not work and the need for fundamental change in the system. Both are pretty simplistic views and likely the root of the problem, and the solution will prove to be much more complex in the long run.

Clearly, the renewed emphasis on better underwriting procedures and better accountability should help to prevent defaults in a reasonably strong economy. Whether the Act will prevent future crises during the inevitable economic downturns remains to be seen.

One significant problem that has not been addressed is the impact that the Act has had on certain lenders. Regulations designed to bring increased transparency to the lending process have had an unexpected negative impact on another important goal of the Obama Administration. The President's objective to increase the availability of reasonably priced funding for consumer housing may have experienced a hiccup. Many of the local community banks, traditionally a significant source for prospective borrowers, have simply decided that the red tape involved in complying with the new residential mortgage requirements is too much. Many community banks have closed down their residential loan departments because the profit margin on such loans has been eliminated by the increase in compliance costs and the risk that the bank may be found to have violated the Act. If this trend continues, a major source of residential loans may disappear. Probably not what Senators Dodd and Frank intended.

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Endnotes:

1 Dodd-Frank Wall Street Reform and Consumer Protection Act, (Long Title), 12 U.S.C. 5301.

2 *Id.*, Title X (Consumer Financial Protection Act of 2010), Sec. 1011.

3 *Id.*, Title XIV (Mortgage Reform and Anti-Predatory Lending Act), Sec. 1400.

4 Fraud Enforcement and Recovery Act of 2009, 111 Pub.L. 21.

5 Truth-in-Lending Act, 15 U.S.C. 1601.

6 *State National Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127 (D.D.C. 2013).

Tips for Mediation – Be Prepared!

By David R. Carlisle, Esq., Duane Morris LLP, Miami, Florida


D. CARLISLE

Effective mediation requires that all of the participants, attorneys, clients and mediator be prepared for mediation. Although this seems intuitive, you would be surprised how many times lawyers come in unprepared to discuss the key strengths and weaknesses of their case. Another facet is when the attorney does not prepare his or her client for mediation. The following are just one mediator's tips for preparing for mediation.

Approach Mediation with a positive attitude.

If you believe your case won't settle – it won't.

If you believe that mediation is a "waste of a day," it will be because you won't be prepared, your client won't be prepared and you will not have prepared the mediator to help you settle the case.

1. Prepare the Mediator. Give the Mediator the Tools to Settle the Case

As the Attorney - Talk to me! No prohibition on ex parte communications with the mediator – it's part of the process and it's confidential.[1]

Tell me about the emotional triggers that may be driving the clients beyond the dollars and cents of the dispute. Usually, it boils down to the obvious:

- Mom always liked you best!
- Jealousy – one child/sibling is more successful than the other
- Sibling Rivalry / Bullying
- One child was favored over others – i.e. taken into the family business
- Cheating in life or business
- Unfair treatment of spouses, children or others
- One having control or manipulating a parent or parents
- Blocking access to information or to a parent

Inform the mediator if there are conflicts between you and your client. For example, have you discussed and does your client agree on the theory of the case? Are attorney's fees an issue or a driver of negotiations? Is there pressure to settle because of amount of fees or costs spent or to be spent or both?

Prepare your mediator by telling him or her of any special needs that might arise during the mediation. For example, tell the mediator if you expect volatile and possibly violent persons attending such that security is desirable. Are there other special concerns or accommodations needed? Are special accommodations needed because of handicaps or language barriers (e.g., do you need an interpreter)?

Tell the mediator if you anticipate the presence of non-parties. Nothing can skew the negotiation dynamic like the presence of others who may have their own agenda and views and the ability to sway the parties. These include:

- Husbands or wives
- Domestic partners or significant others
- Adult Children
- Parents
- "Trusted" Advisors

As attorneys, you may wish to counsel your client to leave such non-parties out of the mediation. If, however, the settlement may have tax impacts, then it is a good idea to have the accountant present or at least available by telephone so that the clients may be fully informed and the best tax strategy implemented in the settlement.

Prepare a Thorough Mediation Statement. Don't just send the mediator the pleadings. Tell the whole story.

- Where are you in the progress of the case?
- Are you only at the pleadings stage? Have you taken discovery? Do you have a trial date?
- Have you engaged experts? What are their opinions?
- Are there any interested persons who are not parties who may be impacted by any settlement?

Should the mediation summary be kept confidential or shared? Consider sharing it**-**

- If it is a matter of fact or law that sways the case in your favor, why not disclose it?
- Do you have a favorable expert opinion that has yet to be discovered? Why not share it?
- Be prepared with supporting documentation even if it has not been learned / exchanged in discovery (i.e. tax returns).
- WHY? Because if mediation impasses and discovery continues, your opponents will probably discover what you are withholding anyway.
- CAUTION: if you get too cute and withhold something in discovery believing that the mediation will protect you, it won't.[2]

2. Prepare Your Client for Mediation. The watchword here is -- **no surprises!**

- Discuss settlement parameters in advance. Compromise is about abandoning highest hopes and best possible scenarios in favor of what you can live with.
- Discuss risk factors and costs with your client. Prepare your client for the possibility he or she might lose!
- Don't sabotage the mediation by telling your client an

opinion or risk that he or she is hearing for the first time at mediation. Nothing is worse or more embarrassing than hearing the client in caucus say "you never told me that before! You always told me I had a great case and now you want me to settle." Before mediation, get your client to at least commit to considering a compromise.

- Discuss the mediation process with your client – no surprises.
- Prepare the client that they are likely to hear things that they are not going to like.

3. Are you, the Attorney, prepared?

What is the attorney's role? Advocate? Advisor? Gladiator? Conciliator? Effective Mediation requires the attorneys and clients to put down their swords and LISTEN**.**

The Preamble to Chapter 4, Rules of Professional Conduct is instructive:

> As a representative of clients, a lawyer performs various functions. As an **advisor**, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an **advocate**, a lawyer zealously asserts the clients position under the rules of the adversary system. As a **negotiator**, a lawyer seeks a result advantageous to the client but consistent with honest dealing with others. As an **evaluator,** a lawyer acts by examining a client's legal affairs and reporting about them to the client or others.

Come to mediation having thought your case through. If you are the Plaintiff, be prepared to explain your best case on liability. Even more importantly, be prepared to discuss your best case on damages.[3] Damages must be proven to a reasonable certainty and fuzzy math will not get you a settlement.

If you are the Defendant, be prepared to discuss your best factual and legal defenses. If part of your defense is lack of ability to pay or the prospect of bankruptcy, come prepared to prove it, because otherwise, no one will believe you.

All the attorneys should be mindful of and identify emotional and non-economic drivers to settlement or impediments to settlement**.**

Finally, come prepared with a template of a settlement agreement on your laptop or a flash drive. This will save a lot of time drafting if a settlement is reached.

In conclusion, if the attorney properly prepares the mediator, the client and himself or herself, the odds of achieving a good compromise and settlement are greatly increased. AL

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Endnotes:

1 See, Rule 1.720(i), Fla. R. Civ. P.

2 *See*, *Garvin v. Tidwell,* 126 So. 3d 1224 (Fla. 4th DCA 2012) (Settlement agreement could properly be rescinded based on unilateral mistake where the mistake did not result from excusable neglect but was a failure to disclose in discovery.)

3 *See*, *Saewitz v. Saewitz,* 79 So. 3d 831 (Fla. 3d DCA 2012).

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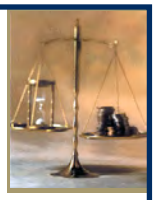

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Practice Preparedness: Are You Prepared to Practice In Any Florida Jurisdiction?

By Sancha Brennan Whynot
The Brennan Law Firm, Orlando, Florida


S. WHYNOT

You are licensed by The Florida Bar to practice law. ***Check***. You know the Florida statutes and the rules of procedure applicable to your practice areas. ***Check***. You monitor the Florida Law Weekly for new cases and stay up to date on your CLE credits. ***Check***, ***check***. With all of those tools, certainly you must be prepared to practice anywhere in the State of Florida, right? Unfortunately, without more, the answer is probably no. There are lesser known rules of procedure and practice, known as administrative orders and local rules, that directly affect the practice of law and vary widely across the state. It is important for every practitioner to identify and become familiar with the local rules and orders affecting their practice in every jurisdiction. If you are not familiar with them, it can be costly to you and to your client's case.

Local rules of court, administrative orders and required procedures are common in courts throughout the state. Most are for general court application and direct the administrative processes of the court. Some, but not all, are memorialized in writing, while others are simply locally 'understood' or uncodified rules, making the practice of your legal specialty a different experience depending upon the jurisdiction in which the case is filed. The practice of guardianship law provides a good example of these procedural and practical disparities among jurisdictions.

In 2011, the RPPTL Section became aware of an administrative order affecting the practice of guardianship law in the Ninth Judicial Circuit. As a service to its members, the Executive Council of the Section, through the efforts of its At Large Members statewide, gathered all published administrative orders and provided links to Section members to access these orders on the RPPTL Section website (www.rpptl.org). In addition, a special committee comprised of guardianship practitioners from different jurisdictions was organized to investigate and review the guardianship administrative order in the Ninth Circuit and to report its findings to the Executive Council of the Section. After reporting back to the Executive Council that it believed the administrative order to be more akin to a local rule than an administrative order, and therefore, subject to a process of vetting by the Florida Supreme Court Local Rules Advisory Committee prior to enactment, the Executive Council voted unanimously to initiate a judicial review of the administrative order.

What is an administrative order, a court rule and a local rule? Each is created pursuant to the Florida Rules of Judicial Administration.[1] An administrative order is defined as a "directive necessary to administer properly the court's affairs but not inconsistent with the constitution or with court rules and administrative orders entered by the supreme court."[2] A court rule is a rule of practice or procedure adopted by the court to assist with the broad administration of all litigation proceedings, parties and attorneys.[3] A local court rule is also a rule of practice or procedure, but is applicable to circuit or county court only and "because of local conditions, supplies an omission in or facilitates application of a rule of statewide application and does not conflict therewith."[4] A local court rule can also be created locally by incorporating an existing requirement of a Florida Supreme Court opinion, general law, rules of court or the Florida Constitution.

Although specifically defined by the Florida Rules of Judicial Administration, the manner in which administrative orders, local rules and court rules are created, amended or quashed varies and is more convoluted. There are several different ways that court rules can be proposed, amended or abolished; and Fla. R. Jud. Admin 2.140 specifically sets forth those methods. By comparison, while local rules and administrative orders are both included in the heading of Fla. R. Jud. Admin. 2.215(e), there is no specific direction as to how administrative orders are established.[5] Generally, administrative orders are enacted by the chief judge of a circuit. The rules require that all general administrative orders of a 'continuing nature' and those designated by the chief judge are to be recorded by the clerk of the circuit court and available for public inspection and duplication.[6] However the direction largely ends there.

Local court rules (as distinguished from rules of court) can be established by several different methods. Florida Rule of Judicial Administration 2.215(e)(1) provides that a local court rule can be proposed by a majority of the circuit and county judges in a particular circuit. After notification to the local bar and an opportunity for the bar to submit written or oral comments, the submission is then directed to the Florida Supreme Court for approval. The deadline for submitting proposals to the Florida Supreme Court is in January every year, although emergency proposals may be allowed for submission as well. Thereafter, the clerk of the Florida Supreme Court submits all local rule proposals to the Supreme Court Local Rules Advisory Committee and simultaneously provides copies of proposed rules to the "appropriate committees of The Florida Bar."[7]

The Supreme Court Local Rules Advisory Committee

is scheduled to meet on or before April 15th each year to consider applications, along with any other comments or responses submitted before March 15th of each year by local bar committees or any other interested persons. The Advisory Committee then submits its recommendations within 15 days after its meeting to the Florida Supreme Court. During its consideration of the Advisory Committee recommendations, the Florida Supreme Court may resubmit proposals with modifications to the committee for editorial comments, and may set hearings on any of the proposals. If hearings are scheduled, the Florida Supreme Court provides notice to the Chief Judge of the relevant circuit, the Executive Director of The Florida Bar, the Chair of the Rules of Judicial Administration Committee, any local bar association and any person who submitted comments.

How is an administrative order challenged? Historically, challenges to trial court administrative orders have been extremely rare. However, Fla. R. Jud. Admin. 2.215(e)(2) provides that, a judge or any member of the Florida Bar believing an administrative order to be a court rule or local court rule, rather than an administrative order, may apply to the Supreme Court Local Rules Advisory Committee for a determination. This was the action taken by the RPPTL Section on behalf of its members in the Ninth Circuit relative to Administrative Order No. 2011-02 of the Ninth Judicial Circuit Re: Court Appointed Professional Guardian Fees and Guardian's Attorneys' Fees for Involuntary Guardianships in the Orange County Division of the Ninth Judicial Circuit in January of 2012.[8] The Chief Judge in the Ninth Circuit filed a response in late February. The RPPTL Section filed its subsequent response on March 15th and a number of commentary letters and replies were filed by private attorneys, professional guardians, local bar association committees, the Elder Law Section of The Florida Bar, and the Florida State Guardianship Association, largely in support of the RPPTL Section's application.

In May 2012, the application and subsequent filings were directed to the Supreme Court Local Rules Advisory Committee for consideration and in July 2012, the Committee filed its majority recommendation that Administrative Order No. 2011-02 was more in the nature of a local court rule, rather than an administrative order.[9] On April 3, 2014, the Florida Supreme Court issued its order quashing Administrative Order 2011-02.

The practice of law is ever-evolving and it is essential for practitioners in all geographic and legal practice areas to be mindful of the methods by which laws and legal procedures are established, amended and challenged. While the Florida rules of court and local court rules are governed with more particularity in the Florida Rules of Judicial Administration, the requirements governing administrative orders remain unclear. Despite this ambiguity, the RPPTL Section has created a template for fellow affected parties to challenge debatable orders. Acknowledging that there may be administrative orders, local rules and rules of court, both written and unwritten, that affect the same practice area but widely vary from one circuit to the next, is a productive first step. Determining whether that should be the case, however, is a discussion for another time.

Sandra Brennan Whynot *is a partner in The Brennan Law Firm in Orlando. Mrs. Whynot's practice is concentrated in the areas of probate, guardianship and trust administration, as well as commercial and residential real property. She is a member of the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar and is currently serving on its Ad Hoc Guardianship Task Force Committee addressing changes to existing guardianship law.*

Endnotes:

1 See generally, Fla. R. Jud. Admin. 2.210.

2 Fla. R. Jud. Admin. 2.120(c).

3 Fla. R. Jud. Admin. 2.120(a).

4 Fla. R. Jud. Admin. 2.120(b)(1).

5 Fla. R. Jud. Admin. 2.215(e).

6 Fla. R. Jud. Admin. 2.215(e)(3).

7 Fla. R. Jud. Admin. 2.215(e)(B). There is no requirement that these proposals be submitted to the appropriate sections of The Florida Bar. However, the sections often have practitioners most knowledgeable about a particular area of the law and could offer constructive comments. This provision may be ripe for reconsideration.

8 Fla. Sup. Ct. Case No. SC12-76

9 Not long thereafter, the Chief Judge issued a request to the Florida Supreme Court Clerk to approve a proposed Local Rule No. 9. The RPPTL filed its response in opposition to Local Rule No. 9; and in March of 2014, the Supreme Court Local Rules Advisory Committee issued its comments.

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RPPTL Section Executive Council Meeting

Ritz-Carlton, Amelia Island
February 6th – February 9th, 2014

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

The Ritz-Carlton at Amelia Island is a gorgeous facility situated immediately adjacent to the Atlantic Ocean, on the southerly portion of the island. If you've never been to Amelia Island you are really missing something special and the Ritz-Carlton is an extra special portion of Amelia Island.

Meetings for the many committees of the Section started at 10:30 a.m. the morning of February 6th, and continued throughout the day with only a short break for lunch. The lunch provided was a called "grab and go" and it was very appropriately named as lots of Section members could be seen dashing from one committee meeting to another.

The first social event of the weekend was the welcome reception held from 7 – 9 p.m. onsite at the Ritz-Carlton. As would be expected, food and beverages were excellent. Unfortunately, the weather did not cooperate and it was a bit on the nippy side so the reception had to be held indoors but there was still a stunning view of the Atlantic Ocean right outside the reception area.

Friday started bright and early with meetings commencing at 8:00 a.m. At noon the Probate Roundtable and Real Property Roundtable both met as luncheon meetings. It was just as well that everyone was busy and indoors most of the day as the weather outside was quite disagreeable.

A special meeting on Friday afternoon was the Legislative Committee Policy rollout which was mandatory for all Committee Chairs and Vice-Chairs. This was a meeting that provided a great deal of guidance and insight into proper scheduling and presentation for legislative proposals from the various committees.

The festivities for the evening were an onsite reception with food, drink and music and then the hospitality room was open until 11:00 p.m.

The Executive Council meeting started at 8:30 a.m. and included a breakfast buffet for all the Executive Council members. Everybody had the afternoon free. Amelia Island is a lovely location for golf, biking and beach but unfortunately, the weather still did not cooperate. However, the local shops and restaurants offered some very unique items so it was a good day for shopping and lunching.

The social event for Saturday night was held offsite at a restaurant called PLAE. In addition to an excellent gourmet dinner there was a tasting of a variety of red and white wine. The wine offerings were both interesting and generous and everyone was happy to have a motor coach to return us all to the hotel. Again, the hospitality room was open until 11:00 p.m.

The last event of the weekend was a continental breakfast on Sunday morning and as the sun came out brightly, everyone returned to their normal lives after a weekend of food, frivolity and fellowship.

RPPTL General Sponsors

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

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Management Planning, Inc.	Joe Gitto / Roy Meyers	609-924-4200
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The Florida Bar Foundation	Jane Curran	800-541-2195
U.S. Trust	Stacey Cole	321-527-7815
Wells Fargo Private Bank	Mark Middlebrook / George Lange / Alex Hamrick	813-225-6544

RPPTL Section Executive Council Meeting

Ritz-Carlton, Amelia Island

February 6-9, 2014



John Adams from Chase Home Mortgage discussed the SAFE Act at the RREIL Committee meeting



Pete Dunbar at a lively PAC meeting



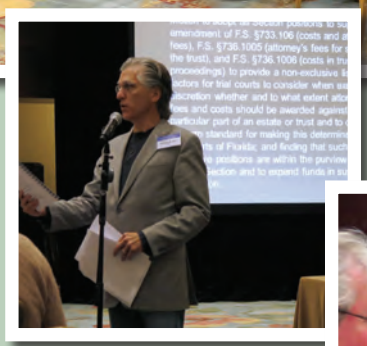
Kris Fernandez at work prior to the Title Insurance Committee meeting



Ashley DiNunzio-Gault giving report at the Real Property Litigation Committee meeting



Problems Study Committee at work



Thomas Karr at Executive Council meeting requesting support on a bill



Kathrine Lupo at the Real Property Roundtable



FLTA Exec. Director, Alexandra Overhoff, giving report at the Title Insurance Committee meeting

Photos by Michael Gelfand, John Neukmann and Silvia Rojas



A most happy Goodall family



Glen Mather and Ryan Moore from Nuview IRA, Inc. with Mike Dribin at Thursday night reception



Steve Goodall giving the Kids' Committee report at the Executive Council meeting



Robert Goldman in a most lively conversation with Brian Felcoski, Carlos Batlle, John Little and Tom Karr



For more photos, go to www.rpptl.org and view the photo galleries

Seth Marmor, Chris and Kymberlee Smith and Shannon Rountree



Spouses having fun designing some beautiful handbags



John Neukamm reporting on trust account issues at the Executive Council meeting



Sandy Diamond and grandson, Frankie, enjoying the outdoors at The Ritz-Carlton



Education with humor: ethics skit at Executive Council Meeting on embezzled trust account funds featuring Guy Emerich, Charles Nash and Paul Roman



Burt Bruton, Alan Fields and others enjoying the witty ethics skit

Roundtables

Friday, February 7, 2014
Ritz Carlton
Amelia Island, Florida

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

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

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 12:30 p.m. at the Ritz-Carlton in Amelia Island, Florida, at Salt Restaurant where a very generous luncheon buffet was being served. Michael Gelfand, Division Director, welcomed everyone and informed all attending of the location of the dessert table.

Michael next asked all visiting law school students to stand up and introduce themselves which they did. He also asked Section members who are not members of the Executive Council to introduce themselves. He thanked Peggy Rolando for scheduling the meeting in a beautiful oceanfront dining room.

Action Items

Commercial Real Estate Committee – Art Menor, Chair: The Committee proposed an amendment to Chapter 193, F.S., relative to a mandate for separate property tax bills for separately described portions of a multiparcel building with an allocation of underlying land values among the separate building parcels. The members recommended Executive Council approval unanimously.

Condominium & Planned Development Committee – Steve H. Mezer, Chair: The Committee proposed amendments to Chapter 718, F.S., the Condominium Act, to create a new part VIII and eliminate the application of part VII to transactions recorded after July 1, 2016. Steve explained that these amendments were worked on extensively by the subcommittee and supported by the Condominium & Planned Development Committee. The provisions relate to the rights and obligations of purchasers and lenders that acquire multiple units and are not considered developers

See "Real Property Division," next page

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 Director of the Probate and Trust Law Division, Debbie Goodall, called the meeting to order and thanked Travis Hayes for taking the minutes.

Action Items

Probate and Trust Litigation - **Tom Karr, Chair:** Tom Karr discussed proposed amendments to F.S. §§ 733.106, 736.1005, 736.1006 that would provide a non-exclusive list of factors for trial courts to use when exercising their discretion whether and to what extent attorneys' fees and costs should be assessed against a part of an estate or trust. *(Note: This proposal was passed at the Executive Council meeting on Saturday, February 8th)*. The impetus for the proposed changes was a series of 4th DCA cases (*Levin v. Levin*, 67 So. 3d 429 (Fla. 4th DCA 2011); *Geary v. Butzel Long, P.C.*, 13 So. 3d 149 (Fla. 4th DCA 2009); *In re Estate of Lane*, 562 So. 2d 352 (Fla. 4th DCA 1990)) which applied standards for awarding attorneys' fees that are not included in the statutes, such as requiring a finding of "wrongful conduct," "bad faith," "lawlessness" or "frivolousness."

Information Items

Ad Hoc Committee on Personal Representative Issues – Jack Falk, Chair: Jack Falk presented a proposal concerning: (1) the time period within which to file objections to probate after a notice of administration is served and the content of the notice of administration; and (2) the personal representative's and interested person's rights and duties when a personal representative is unqualified to act, or is no longer qualified to act as personal representative. It is anticipated that this proposal will be an Action Item at the Executive Council meeting in May. This proposal is

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

under the Condominium Act. Jerry E. Aron, Bill Sklar and Steve Mezer reminded everyone of the discussion that was held at the last Roundtable concerning part VII of Florida Statute 718. Bill Sklar, Chair of the subcommittee, thanked all the subcommittee members and Executive Council folks for their input. Jerry E. Aron explained that, due to concerns that were expressed at the last Executive Council, revisions have been made including procedural changes that had been requested by Bankers group. After limited discussion the members recommended Executive Council approval unanimously.

Construction Law Committee - Hardy Roberts, Chair: The Committee proposed that the Section take a position to oppose increases of recording expenses for construction claims of lien. This would include opposition of proposed amendments to Sec. 28.24 F.S. and Sec. 713.08 F.S. These are proposals that would selectively impact construction liens by calling for additional filing requirements. These proposals would also create a conclusion that a lien filed beyond the statutory 90 days is a fraudulent act. The position advanced was recommended for Executive Council approval.

Upcoming Issues

Michael encouraged all present to attend the PAC meeting at 5:00 pm that afternoon. Michael also recognized the Roundtable sponsor, Fidelity National Title Group.

Michael next commented on *ActionLine*, encouraging articles on substantive issues from any and all committees, noting that such articles advance committee goals of education of section members and of recruiting new blood, as well as rewarding initiative. Michael also reported on the upcoming meeting in Captiva and the Committee schedules for those meetings.

Michael asked all committee chairs to make a concerted effort to put information on the website such as agendas and minutes with the idea of being able to introduce the activities of committees to potential new members.

Information Items

Title Insurance & Title Insurance Liaison Committee – Kristopher Fernandez, Chair: Kris reported that the Title Insurance Committee reviewed seventeen (17) questions provided to it from the CFPB Mortgage Closings Questionnaire concerning the loan closing process. The Committee was able to respond to all. The Committee also had a lively discussion on several potential areas of legislation as well

continued, next page

PROBATE & TRUST DIVISION

in response to the Florida Supreme Court opinion in *Hill v. Davis*, 70 So. 3d 572 (Fla. 2011).

General Standing

Publications. Debbie Goodall solicited articles from Section members for the *Florida Bar Journal* and for *Actionline*.

Committee Reports

Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets – Angela Adams, Chair: Debbie Goodall reported that the Committee is no longer pursuing the legislative changes with respect to fraudulent conveyances.

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair: The Committee is working on various assignments relating to updating the Guardianship Code. There are many different constituencies which are interested in changes to guardianship law and the Committee has received many comments, therefore, it is anticipated that this will be a comprehensive project.

Ad Hoc Study Committee on Estate Planning Conflict of Interest - Bill Hennessey, Chair: The Committee continues to work on a proposal governing the appointment of an attorney as a fiduciary by a client. The proposal, which gives full discretion to clients to select fiduciaries, provides that a lawyer who does not make the required basic disclosures to a client will not be able to receive a fiduciary fee, but will be able to receive payment for attorneys' fees. The proposal is expected to be an Action Item within the next few meetings.

Attorney/Trust Officer Liaison Conference – Jack Falk, Jr., Chair: This year's conference will be held at the Ritz-Carlton Tiburon Resort in Naples on June 12-14. There will be numerous social events, respected speakers, and great topics.

Ad Hoc Committee on Treatment of Life Insurance Payable to Revocable Trust – Rick Gans, Chair: The Committee's proposal regarding the payment of life insurance proceeds to a revocable trust is part of the Section's 2014 legislative package. The bill is working its way through the legislature, but it looks like it should pass.

Asset Protection – Brian Sparks, Chair: The Committee will put together a joint CLE program in the fall with the Estate and Trust Tax Planning Committee. Keith Kromash and Rob Lancaster will be the co-chairs for the

continued, next page

REAL PROPERTY DIVISION

as a debate on possible economic loss rule legislation.

Ad Hoc Trust Account Committee – John B. Neukamm & Jerry E. Aron, Co-Chairs: John provided an extensive report about the issue of title insurers conducting audits of trust accounts and the statutory requirement of separate trust accounts for real estate funds. The Ad Hoc Committee attended the January 24th meeting of the Professional Ethics Committee and provided input and recommended language. John further reported that an advisory opinion is expected by the end of February confirming best practices. John also reported on a proposed amendment to Rule 5-1.1 on the handling of shortfalls in trust accounts. Michael thanked the Ad Hoc Committee for its fine work over several years.

Real Property Problems Study Committee – Jeffrey Thomas Sauer: Jeffrey reported on the issues concerning same gender marriages relating to real property ownership and transactions. The main question being asked and discussed is what do we tell a couple where the couple is legally married in another state? The Problem Studies Committee has formed a subcommittee to review how other states address this issue and the Committee welcomes comments.

CLE Seminar Coordination Committee – Robert Freedman, Chair: Rob reported that at the annual meeting at Captiva, The Committee will be offering a free program for two to three hours in an area of general interest. Rob also urged everyone to send out information through your listserv on all CLE programs and promised to try to get brochures out at an earlier date.

Commercial Real Estate Committee – Art Menor, Chair; Burt Bruton reporting: Burt reported on an upcoming seminar on May 15th which would be presented on the web only.

Condominium & Planned Development Committee – Steve H. Mezer, Chair: Steve talked about the issue of indexing on MRTA renewals and welcomed comments.

Construction Law Certification Review Course Committee – Lee Weintraub, Chair: Lee reported on the upcoming course to be held in Orlando in conjunction with the Construction Law Institute.

Landlord &Tenant Committee - Lloyd Granet, Chair: Lloyd reported that The Committee was looking for someone to speak on the issue of assignment of revenue.

continued, next page

PROBATE & TRUST DIVISION

CLE program. George Karibjanian and Rob Lancaster led an in-depth discussion of the *Berlinger v. Casselberry* decision and its importance to all practitioners, fiduciaries, judges and beneficiaries. Brian suggested that the Section consider the creation of an Ad Hoc Committee to study the issues raised in the *Berlinger* case because it affects numerous substantive committees.

Digital Assets and Information Study Committee – Eric Virgil, Chair: The Committee hopes to have its proposal finalized prior to the next meeting at Captiva in May. The Committee is also working on the White Paper and Legislative Position for the proposed Florida Act.

Elective Share Review Committee - Lauren Detzel and Charlie Nash, Co-Chairs: Charlie Nash reported that the review and revision of the elective share statutes are going to be a long-term project. There are currently nine subcommittees looking at various issues, such as how homestead should be handled and whether the amount of the elective share should be affected by the length of the marriage. If any members have input on any elective share issues, they should contact Charlie Nash, Lauren Detzel or Lee McElroy.

Estate and Trust Tax Planning – Elaine Bucher, Chair: It is expected that the UTMA proposal, which will allow UTMA accounts to be created for beneficiaries until they attain the age of twenty-five in certain circumstances, will be an Action Item at the Captiva Island RPPTL meeting. The Tenancy by the Entireties Subcommittee has been working with the Probate Law and Procedure Committee to finalize a proposal which will permit the creation of a joint tenancy with rights of survivorship or tenancy by the entireties with respect to personal property without the necessity of a transfer through a straw person. Justin Savioli is drafting proposed legislation that would allow drafters to intentionally trigger the Delaware tax trap. Russ Hale reported that the Tax Law Section has a proposal to eliminate all documentary stamp taxes for transfers between spouses. Jerry Wolf reported on his subcommittee's review of the Uniform Powers of Appointment Act passed by the Uniform Law Commission in July of 2013. No other state has adopted the act and the subcommittee recommended that Florida not enact at this time.

Guardianship, Powers of Attorney and Advance Directives – Sean Kelley, Chair: The Committee worked with the Clerks of Court on Palm Beach County Clerk Sharon Bock's proposed guardianship legislation, which clarifies the Clerks' duty to audit guardianships, conduct investigations, and request and receive pertinent

continued, next page

REAL PROPERTY DIVISION

Legal Opinions Committee – Kip Thornton, Chair: Kip informed everyone that his committee will be meeting at 2:30 that afternoon and looking at changes in the LLC statute.

Real Estate Certification Review Course Committee - Raul Ballaga, Chair: Raul commented that the course is a good general review on all matters real estate related and is not just for those people who are planning to take the test. The course will be presented February 21 and 22 in Orlando.

Real Estate Structures and Taxation Committee – Wilhelmina Kightlinger, Chair: Willie reported that the Committee intends to have an educational component in each of its meetings.

Real Property Finance & Lending Committee – Jim Robbins, Chair: The Committee is studying new mortgage rules and intends to present a CLE program to cover those and to consider the issue of stale mortgages as well as concerns about how to determine when the bank can actually step in to maintain an abandoned property, especially since different municipalities have different rules. The goal of the Committee is to bring some order to the existing chaos.

Real Property Problems Study Committee – W. Theodore "Ted" Conner, Chair: Ted reported the Committee is reviewing concerns about statutory notices for tax deeds, reestablishment and priority of mortgages and the unlawful detainer statute.

Residential Real Estate & Industry Liaison Committee – Frederick W. Jones, Chair: Fred reported his committee had a great meeting with a speaker on mortgage rules. Fred announced that five people had been appointed to the joint committee with the Florida Realtors Association. Fred also reported that the FR/BAR Contract is on the website in writable form.

Title Issues & Standards Committee – Christopher W. Smart, Chair: Chris reported that the Committee is working on new standards all the time and now looking at a proposal on easements and revisions on the standards concerning bankruptcy.

After lots of good food and lots of desserts the meeting was adjourned.

PROBATE & TRUST DIVISION

documents. The Committee also prepared a technical advice White Paper regarding the proposed legislation. Sean Kelley discussed Senate Bill 412, which the Section opposes. Finally, Sean reported that the Committee continues to work on a proposal relating to the admissibility of guardianship examining committee reports based on *Shen v. Parks*.

IRA, Insurance and Employee Benefits – Howard Payne and Lester Law, Co-Chairs: Carlos Rodriguez gave a case law update focusing on IRAs at the Committee meeting. Linda Griffin stated that she recently heard from reputable sources that a legislative proposal in Congress to limit the payout period for non-spousal inherited IRAs to five years likely will eventually be passed (with exceptions). Howard reported that NuView IRA in Fort Lauderdale is a new sponsor of the Committee, and a representative of that company gave a presentation about running self-directed IRAs at the Committee meeting.

Probate and Trust Litigation – Tom Karr, Chair: The Committee is making progress on proposed changes to F.S. § 736.0802(10) regarding the award of attorneys' fees in trust litigation cases. The Committee voted on policy issues pertaining to that proposal. The Committee also made progress on the "lost or destroyed wills" project. The Committee voted to remove the "disinterested witness" requirement, which the Committee felt was an antiquated requirement of who can testify. Mike Dribin stated that there is still a concern about the requirement to prove the contents of a will.

Probate Law and Procedure – John Moran, Chair: Al Stashis, chair of the Summary Administration Subcommittee, presented options for the range of issues that it is currently studying. The Subcommittee is attempting to balance the need for summary administration and a simplified proceeding with practitioners' concerns about the process, such as creditors not receiving notice. The Artificial Reproductive Technology (ART) Subcommittee is modeling its proposal after the Uniform Probate Code provisions and is considering whether ART children born after a decedent's death should be recognized for purposes of intestacy.

Trust Law – Shane Kelley, Chair: Shane Kelley reported that the Section is working on a compromise with the Florida Bankers Association to House Bill 405 which involves revisions to F.S. § 736.0703(9). The Committee continues to work on projects relating to non-judicial modification of trusts (which is almost complete), decanting, and the use of e-accountings. A subcommittee will be formed to report on the Florida Trust Code provisions pertaining to charitable trusts, including who should be served with notice on behalf of charitable trusts.

Wills, Trusts and Estates Certification Review Course – Rick Gans, Chair: The At-Large Members in the 9th Circuit have organized a Section recruitment event to coincide with the Wills, Trusts and Estates Certification Review Course being held on April 4 and 5, 2014 at the Orlando Airport Hyatt.

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RPPTL Reaching Out

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

The Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL) proudly sponsors networking events throughout Florida. It is actively working to increase its student affiliate membership and promote diversity within RPPTL.

The Hillsborough County Bar Association held its Diversity Networking Event at the Ferguson Center on February 22, 2014. Tara Rao coordinated RPPTL's booth, and with the assistance of Michael Bedke, Steven Reynolds, and Kathrine Lupo, informed student participants from across the state about the benefits of RPPTL student affiliate membership. Six new students joined as affiliate members, and a staff attorney from Bay Area Legal Services was recruited for full membership.



Hillsborough County Bar Association Diversity Event

In mid-February, Brenda Ezell represented RPPTL at the Southern Region, National Black Law Students Association in Jacksonville. The convention drew students from the Southeast region of the United States, and students interested in RPPTL took applications for affiliate membership in the Section.

The Stetson University College of Law's Real Property, Probate, and Trust Law Organization hosted its annual Meet and Greet Event on March 6, 2014, at the Tampa Bay Club. The event was promoted by Jason Ellison, the RPPTL Stetson Law Liaison. Students had an opportunity to network with local attorneys practicing in areas of law in which the student attendees were interested. Approximately 30 Tampa Bay area attorneys were in attendance, as well as students from both Stetson and Cooley law schools. Michael Bedke gave an inspirational speech urging students to become involved with RPPTL, followed by the Stetson Real Property, Probate, and Trust Law Organization's current president, Paige Baker. Paige emphasized a research opportunity she had with RPPTL, and shared the experience of presenting that research at a recent Executive Council Meeting. An additional six students signed up for affiliate membership at the event.



Stetson University College of Law Meet and Greet

Miami University College of Law's Real Estate, Probate, and Trust Law Society held its first Student-Attorney Lunch Networking Event on March 20, 2014. Peggy Rolando, Michael Dribin, and David Carlisle explained the objectives of RPPTL and the benefits of membership to approximately 20 attorney and 40 student attendees. Marsha Madorsky and Toby Muir also represented RPPTL, as well as past and present RPPTL fellows Hung Nguyen, Joshua Rosenberg, and Kymberlee Smith. The experience piqued the interest of many students, and given UM's distinguished estate planning and tax program, it was a milestone event in building a mutually beneficial RPPTL-UM relationship.

Also on March 20, 2014, Ave Maria School of Law held its First Annual Bar Association and Alumni Networking Reception. RPPTL was represented at the event by ALMS (At-Large-Members) Jon Scuderi, Ellie Taft, and Steve Kotler. Interested students were given affiliate membership applications, and many expressed interest in attending the next Executive Council Meeting.

The Membership and Inclusion Committee would like to thank all of the attorneys who volunteered their time to attend these events and make them successful. Please contact Jason Ellison or Lynwood Arnold, Co-Chairs of the Membership and Inclusion Committee, for more information about RPPTL representation at your local networking event. If you are interested in attending upcoming events, details are posted under the new "Events" tab on the Membership and Inclusion Committee webpage.

Florida Legislature Reaffirms Economic Loss Rule for Title Insurance

By James C. Russick, V.P. Florida State & Gov't Affairs Counsel
Old Republic National Title Insurance Company
and
Alan B. Fields, V.P. National Agency Counsel
WFG National Title Insurance Company

As has been reported here and elsewhere,[1] in March, 2013, the Florida Supreme Court in *Tiara Condominium Assoc. Inc. v. Marsh & McClennan Companies, Inc*., limited the Economic Loss Rule ("Rule") so that it only applies in product liability cases.[2] The Rule is the long-standing legal principle that parties to a contract are limited to the remedies they agreed to in the contract. The Rule prevents a party to the contract from suing the other party in tort if the contract sets a different standard and allows the parties to agree to limit the extent of their liability.

Title insurance policies have historically been treated as a contract subject to the Rule. In a very thoughtful 2007 decision in *Chicago Title v. Commonwealth Forrest Investments*,[3] the United States District Court, Middle District of Florida, addressed the issue at some length. In that case, the insured brought a claim against Chicago Title and its agent for negligence in the performance of the search of the title and for negligent misrepresentation of the title to the subject property. Chicago Title filed for a declaratory judgment.

That court defined the issue as, "…whether in the context of a title commitment and title policy, an independent cause of action for breach of that duty (negligence) exists or whether the remedy for breach of that duty lies under the title policy" and found that it was fully addressed by the Rule, the relationship of the parties, and related statutory requirements placed on the insurer that helped define its duties and responsibilities.

Discussing the 2004 decision, *Indem. Ins. Co. of N. Am. v. Am. Aviation. Inc.,* the Florida Supreme Court in *Tiara* stated that the basic Rule bars tort actions "when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract."[4] However, the Court determined that *Am. Aviation* and other cases expanded the Rule beyond its origins in products liability cases and receded from that prior more expansive position.

The Florida Supreme Court did not review the *Chicago Title* case or the effect its *Tiara Condominium* decision could have on matters arising out of a title insurance contract. The court in *Chicago Title* had previously pointed out that:

> Florida Statutes require title insurers to search the official records prior to insuring title and prohibit the issuance of title policies without regard to the possible existence of adverse matters or defects of title. Fla. Stat. §§ 627.784 & 627.7845. The title search and list of encumbrances are integral parts of a title insurance policy because they shape the allocation of risk between the insurer and insured. The economic loss rule protects these contractual expectations including the important expectation that a title insurer's risk will be limited to the dollar amount shown on the face of the policy, *see* Fla. Stat. § 627.778(1)(a).[5]

The court in *Chicago Title* then concluded that the insured "must not be permitted to circumvent the policy's allocation of risk so as to expose Chicago Title to potential liability in excess of the policy limits by alleging a tort based on the negligent search and disclosure of encumbrances."[6]

The court in *Chicago Title* also compared title insurance to the abstractor/opinion of title model previously used in Florida.

> While some analogy to the abstractor liability cases may be appropriate, the **entire relationship** between [the insured], Chicago Title, and Florida Title Agency concerns the issuance of the Title Policy. [The Insured] determined that it would procure the Title Policy in lieu of an abstract of title and/or title opinion. **The very nature of the title insurance transaction was that [the Insured] obtained protection for title defects, but agreed to limit its recovery for any title defect to the limits of the policy.** Chicago Title, through its agent Florida Title Agency, agreed to issue the Title Policy and to pay up to the policy limits if any defect in the title was discovered. It is important to note that neither the Title Commitment nor the Title Policy purport to warrant that the title to the Property is free from title defects**. (emphasis added)**[7]
>
> * * * *
>
> Moreover, exposing title insurance companies to liability in excess of the policy limits is contrary to the legislature's goal in § 627.778(1)(a) of furthering the stability and viability of the title insurance industry by requiring title insurance policies to state the dollar amount of risk assumed and limiting such risk to one-half of the insurer's surplus.[8]

Separately, the court in *Chicago Title* was influenced by provisions in the policy that denied any liability in tort.

The elimination of the Rule in *Tiara Condominium* opened the door for duplicative contract and negligence claims against insurers, agents and abstractors for matters covered by (or even expressly excluded from coverage under) a title policy. Most title policy claims are the result of an error or omission somewhere in the search or examination process. That type of negligence is obvious, and under the title policy the liability would fall first to the title insurer. Less obvious is the idea that an agent's decision to take an exception for a known defect in a title policy (rather than taking steps to cure it) could become

the basis for a negligence suit. While the argument seems a bit nonsensical, since the commitment exception is your formal disclosure of the title issue to the insured client, it is a sufficient fact issue in a negligence claim to at least survive a motion for summary judgment. Tort claims have been articulated as a negligent misrepresentation of title, as a fraudulent misrepresentation of title, and as simple negligence in the search and examination required by statute. Additionally, insurers have had to defend claims of negligent appointment or retention of an agent. In fact, without the protection of the Rule, negligence and excess loss claims can be brought[9] against the searcher/abstractor and title agent and insurer every time a title claim suit is filed.

While the *Tiara Condominium* case did not involve the title insurance industry and the court was clearly not contemplating the negative impact of such a sweeping ruling on the title insurance industry, the end result is the same. Eliminating the Rule had potentially devastating impacts on title insurance pricing, solvency and the liabilities of title agents and abstractors with a correspondingly negative impact on Florida's real estate based economy.

To prevent this unintended result, Representative Kathleen Passidomo (R-Naples) and Senator Bill Galvano (R-Bradenton) introduced bills during the 2014 Session of the Florida Legislature. The House counterpart (HB 321) has been unanimously approved by both the Florida House and Senate, and signed by the Governor on June 13, 2014.

In addition to other changes, the bill restores the Rule as to title insurance policies by adding new § 627.778(3), F.S. That provision provides: "Only contractual remedies are available for a breach of a duty which arises solely from the terms of a contract of title insurance or an instrument issued pursuant to s. 627.786(3) [a Closing Protection Letter]."

During the legislative process, there was some concern expressed about the language of the originally filed bill.[10] Some argued that it could be read as inappropriately eliminating liability of title agents for closing functions not covered by title insurance or a closing protection letter, and even for an attorney's malpractice.[11] Such, of course, was not the intent, and through compromise and negotiation the affected parties agreed to the final language. It is important to emphasize that the legislative intent was clearly to re-apply Rule protections to ALL matters covered by or excluded from a title policy and closing protection letter. Title insurance professionals faced with tort claims after the effective date of this bill should take special note and comfort from the legislative intent expressed in the Staff Analysis for CS/CS/SB 570 citing *Chicago Title v. Commonwealth Forest Investments*, supra[12] and the court's characterization of the relationship between the parties in a transaction involving title insurance (the emphasized language within footnote 7) as it clearly gives meaning to the word "solely" within the new legislation.

The passage of this legislation returns the necessary contractual predictability required for an efficient and sustainable real property marketplace.

The changes under CS/CS/HB 321, now known as Ch. 2014-112, Laws of Florida, are effective July 1st, 2014.



A. FIELDS



J. RUSSICK

Alan Fields *is National Agency Counsel for WFG National Title Insurance Co., a fellow of the American College of Real Estate Lawyers and serves as Vice-Chair of the Legislation Committee and the Foreclosure Reform Committee and on the Executive Council of the Real Property, Probate and Trust Law Section.*

James C. Russick *is a Board Certified Real Property Lawyer and the Florida State Regulatory Counsel for Old Republic National Title Insurance Company. He is currently serving as President of the Florida Land Title Association (FLTA). He also serves on the Executive Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) and on the American Land Title Association (ALTA) Forms Committee and Governmental Affairs Committee.*

Endnotes:

1 Several articles and CLE resources have already been released addressing this change, including:

Judge Lisa T. Munyon, Judge Alice L. Blackwell, Paul Sarlo, *Tort and Contract Actions: Strange Bedfellows No More in the Wake of Tiara Condominium,* Fla Bar J, Volume 87, No. 10, December, 2013; Manuel Farach, Sanjay Kurian, *Tiara: A Sea of Change or Barely a Ripple?* Action Line, Vol. XXXV, No. 1, Fall 2013; and RPPTL Section CLE: The Economic Loss Rule in Florida: Is It Dead or On Life Support? – Homer Duvall, Manuel Farach and Sanjay Kurian, June 24, 2013

2 110 So.3d 399 (Fla. 2013). The case involved an action against an insurance broker.

3 494 F. Supp 2d 1332, (M.D. Fla. 2007)

4 891 So.2d 532, (Fla. 2004), at 536

5 *Id.* at 1336

6 *Id.* at 1336

7 *Id.* at 1335

8 *Id.* at 1337

9 Some would suggest it may be malpractice not to include a negligence count if there is any question about policy coverage.

10 As originally proposed, § 627.778 (3), F.S., would have read: "The terms of a contract of title insurance constitute an insured's sole remedy for any claim of loss against a title insurer, an agent issuing the title insurance contract, or an abstractor providing a title search for the contract, arising out of the status of title to the estate or interest covered by the contract." This language would have been added to § 627.786(3), F.S.: "[A Closing Protection Letter] is the insured's sole remedy for any liability assumed pursuant to this section."

11 Tort claims involving professional services have been an exception not barred by the Economic Loss Rule. See e.g. *Indemnity Insurance Co.* at 537.

12 http://www.flsenate.gov/Session/Bill/2014/0570/Analyses/2014s0570.cm.PDF

Can't We All Play by the Same Rules?

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D. LEITNER

It is clear that the Condominium Act and Homeowners' Association Statutes do not play by the same rules as there are many differences.

An attorney looking to practice community association law might initially think that both the Florida Condominium Act and the Florida Homeowners' Association Statutes are the same.[1] However, after spending some time reviewing and working in both, the practitioner will realize that there are in fact many differences between the two. Not only are there distinctions between the two, but also within the Condominium Act itself between residential and commercial condominiums. Therefore, the practitioner must become familiar with the similarities and differences and know how the law will be applied in certain situations. One such difference between the law governing condominiums and homeowners' associations is the applicability of an amendment to an association's governing documents regarding rental restrictions.

I am a real life example to rental restriction amendments and the difference between condominiums and homeowners' associations. Only two months after purchasing my first home, which is governed by a homeowners' association, I received notice that there was going to be an annual meeting and, at that meeting, the owners would be voting on some amendments to the declaration. All of the amendments were associated with various rental restrictions, such as only being able to rent your home one year after purchasing the home and only ten percent of the community could be rented at time. Due to the fact that these amendments were going to seriously affect me and my newly acquired property interests, I decided to not rely on my vague recollection of the law regarding this subject and instead further researched the issue.

Case Law

The seminal case governing rental restrictions is from the Florida Supreme Court in *Woodside Village Condo. Ass'n, Inc. v. Jahren*.[2] At issue was the validity of amendments to the declaration of condominium that restricted the leasing of units in the association.[3] The rental restrictions were comparable to the restrictions that my association wanted to adopt. In *Woodside* the amendments were adopted by a vote of at least two-thirds of the owners. Later that following year, the association attempted to have an owner come into compliance with the adopted rental restrictions and, when the owner failed, the association filed suit in circuit court. The main question that the Court had to wrestle with was whether or not the newly adopted rental restrictions were applicable to owners that had purchased their unit prior to the amendment being adopted.

The Court went on to say that a condominium's declaration is referred to as its constitution, and it strictly governs the relationships among the condominium unit owners and the condominium association.[4]

> A declaration of a condominium is more than a mere contract spelling out mutual rights and obligations of the parties thereto…it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property. Stated otherwise, it spells out the true extent of the purchased, and thus granted use interest therein.[5]

It was recognized that reasonable restrictions concerning use, occupancy and transfer of condominium units are necessary for the operation and protection of the owners in the condominium concept.[6] This is because condominium unit owners comprise a little democratic sub-society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.[7] Courts have also consistently recognized that restrictions contained within the declaration of condominium should be clothed with a very strong presumption of validity when challenged.[8] The logic behind this presumption was explained in *Hidden Harbour Estates, Inc. v. Basso* wherein the court found that there are essentially two categories of cases in which a condominium association attempts to enforce rules of restrictive uses.[9] The first, being restrictions in the declaration, and the second, being rules promulgated by the association's board of directors. Restrictions found in the declaration have such a strong presumption of validity because each owner that purchased a unit knew of and accepted the restrictions to be imposed.[10] Such restrictions will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.[11]

The basis of most amendments for rental restrictions is to promote owner occupancy and to limit transient tenants. The court in *Seagate Condominium Ass'n v. Duffy* stated that:

> Given the unique problems of condominium living in general and the special problems endemic to a tourist oriented community in South Florida in particular, appellant's avowed objective… to inhibit transiency and to impart a certain degree of continuity of residence and a residential character to their community… is, we believe, a reasonable one, achieved in a not unreasonable manner by means of the restrictive provision in question. The attainment of this community goal outweighs the social value of retaining for

> the individual unit owner the absolutely unqualified right to dispose of this property in any way and for such duration or purpose as he alone so desires.[12]

After reviewing case law, considering the statutory scheme as well as the condominium declaration, and other principals at the core of condominium ownership and lifestyle, the Court in *Woodside* held that the prior owners were on notice that the unique form of ownership they acquired when they purchased their units in the community was subject to change through the amendment process, and that they would be bound by properly adopted amendments.[13]

Condominium Act

Notwithstanding the decision in *Woodside*, the court did recognize the concerns that owners had who purchased their condominium units for investment purposes would be severely hampered, if not completely restricted, from renting their property because of the rental amendments.[14] The Court deferred to the Legislature. "The answer will usually be found in the legislative scheme creating and governing condominiums."[15] "[I]t is appropriate that such restraint (leasing restrictions) be set out in the legislative scheme that created and regulates condominiums and condominium living."[16]

Two years after the Court's decision in *Woodside*, the Legislature in 2004 revised the Condominium Act to include Sec. 718.110(13), Fla. Stat. The Legislature specifically crafted an exception to protect owners that acquired their property prior to amendments governing rental restrictions. The Legislature enacted this provision because of the public outcry of owners and investors in response to the applicability of the *Woodside* ruling. The current version of Sec. 718.110(13), Fla. Stat., states:

> An amendment prohibiting unit owners from renting their units or altering the duration of the rental term or specifying or limiting the number of times unit owners are entitled to rent their units during a specified period applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.[17]

Accordingly, for condominiums, if an individual buys a condominium unit and there were no rental restrictions already in existence at the time of purchase, the owner is not bound by the restrictions if they are adopted unless the owner votes in favor of the restrictions. However, if an individual buys a condominium unit that is already subject to rental restrictions then they are already on notice and take subject to said restrictions.

Homeowners' Association Statute

The underlying issues and concerns that caused the public outcry to create an exception to the Condominium Act regarding rental restrictions also exist with regards to properties covered by the Homeowners' Association Statutes. So it should follow that there should also be the same type of exception in the Homeowners' Association Statutes, right? Unfortunately, the answer is no, there is no exception in the Homeowners' Association Statutes regarding rental restriction amendments. In conducting my research in hopes of finding a comparable rental restriction amendment exception in the Homeowners' Association Statutes so the proposed amendments would not be applicable to me if I did not vote in their favor, I found that it did not exist.

Applicable Law

In my community the rental restriction amendments were duly adopted. Now the question is, if I did not vote for the rental restriction amendments, what law would apply should I refuse to comply with the amendments? Would I be subject to the rationale and holding in *Woodside* or should the exception in the Condominium Act be applicable?[18]

Some argue that because the Legislature has had the opportunity to create an exception and did for condominiums, but did not do so for homeowners' associations, that the Legislature has purposefully not felt the need to create an exception for homeowners' associations. A rule of statutory construction is "expression unius est exclusio alterius," meaning the mention of one thing generally implies the exclusion of another.[19] Sec. 720.306, Fla. Stat., provides broad authority for amending the governing documents to a homeowners' association.[20] Therefore, because (i) the Legislature allows the governing documents to be amended and (ii) no specific provisions similar to those in the Condominium Act have been enacted in the Homeowners' Association Statutes, the rationale and holding in *Woodside* is applicable. Meaning, I was on notice that the unique form of ownership I acquired when I purchased my home in the community was subject to change through the amendment process, and that I would be bound by properly adopted amendments.[21]

However, are there not the same concerns present in homeowners' associations as there are in condominium associations that caused the Legislature to create an exception for condominium associations? The Court in *Woodside* even said that "[t]he question is, of course, how far can two-thirds of the condominium owners go in restricting leasing rights in the condominium units."[22] This question is even more important in a homeowners' association context as owners do not live in such close proximity as condominiums, and homeowners' associations are not strictly creatures of statute as are condominiums.[23] Such restrictions severely infringe upon a homeowner's right to lease the owner's property whether it is for hardship or for investment purposes.

Conclusion

It is clear that the Condominium Act and Homeowners' Association Statutes do not play by the same rules as there

are many differences. One major difference is the applicability of an amendment to an association's governing documents regarding rental restrictions. The Condominium Act provides a specific exception concerning rental restriction amendments, but the Homeowners' Association Statutes have no comparable exception. Despite the fact that the *Woodside* case dealt with a condominium association and not a homeowners' association, the legal analysis and conclusion is likely the same. Unless the Legislature enacts an exception for rental restriction amendments for homeowners' associations, or new case law arises, the prospective purchasers and owners should be aware that they are on notice that the governing documents controlling their community are subject to change through the amendment process, and that they will be bound by properly adopted amendments, including rental restriction amendments.

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Endnotes:

1 Fla. Stat. §718.101 (2013); Fla. Stat. §720 *et. seq*. (2013).

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

3 *Id*. at 453.

4 *Id*. at 455.

5 *Id*. at 456 (citing *Pepe v. Whispering Sands Condominium Ass'n, Inc.*, 351 So. 2d 755 (Fla. 2d DCA 1977).

6 *Id*. at 456.

7 *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. 4th DCA 19175).

8 *Woodside Village Condo. Ass'n, Inc. v. Jahren*, 806 So. 2d 452, 457 (Fla. 2002).

9 *Id*. at 457 (Fla. 2002) (citing *Hidden Harbour Estates*, 309 So. 2d at 180.

10 *Id*. at 457-459.

11 *Id*. at 457 (referencing *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979).

12 *Woodside Village Condo. Ass'n, Inc. v. Jahren*, 806 So. 2d 452, 457 (Fla. 2002) (citing *Seagate Condominium Ass'n, Inc. Duffy*, 330 So. 2d 484, 486-87 (Fla. 4th DCA 1976).

13 *Id*. at 461.

14 *Id*. at 464.

15 *Id*.

16 *Id*.

17 Fla. Stat. §718.110(13) (2013).

18 *Woodside Village Condo. Ass'n, Inc. v. Jahren*, 806 So. 2d 452 (Fla. 2002); Fla. Stat. §718.110(13) (2013).

19 *Scope v Fannelli*, 639 So. 2d 141, 143 (Fla. 5th DCA 1994).

20 Fla. Stat. §720.306(1)(b) (2013) ("Unless otherwise provided in the governing documents or required by law, and other than those matters set forth in paragraph (c), any governing document of an association may be amended by the affirmative vote of two-thirds of the voting interests of the association. Within 30 days after recording an amendment to the governing documents, the association shall provide copies of the amendment to the members.").

21 *Woodside Village Condo. Ass'n*, 806 So. 2d at 464.

22 *Id*. at 464.

23 *Winkelman v. Toll*, 661 So. 2d 102, 105 (Fla. 4th DCA 1995).

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When Is It Too Late to Foreclose a Mortgage?

By David W. Rodstein, Padula Hodkin, PLLC, Boca Raton, FL


D. RODSTEIN

Since the mortgage crisis, mortgage holders have taken longer to initiate foreclosures following default. Foreclosure cases have taken longer than usual to reach judgment or dismissal. More cases than usual have been dismissed in foreclosure "rocket dockets."[1] As a result, foreclosure cases are being filed – and refiled – after the statute of limitations has arguably run. When it is too late to foreclose a mortgage has turned out to be a complex argument involving both the statute of limitations and the statute of repose.

Limitations vs. Repose – Procedure vs. Substance

Foreclosure actions are subject to the five year statute of limitations in Fla. Stat. § 95.11(2)(c). Five years after a foreclosure cause of action accrues that cause of action is time-barred. As discussed below, most cases involve successive causes of action with separate five-year limitation periods running against each cause of action. Because statutes of limitation are procedural, "their expiration does not affect the underlying substantive rights of the parties involved."[2] The statute of limitations "merely cuts off the right to file suit on that claim."[3]

By contrast, the statute of repose contained in Fla. Stat. § 95.281 is substantive. When the applicable time period under Fla. Stat. § 95.281 expires, the lien of the mortgage *terminates*. After that time, there is no cause of action for foreclosure because there is no longer a lien to be foreclosed.[4]

Some older appellate opinions conflate the two concepts, but practitioners and courts today should understand the difference. "[T]o the extent that it has caused confusion in the interpretation of the relation between sections 95.11(2)(c) and 95.281, the reference to section 95.281 as a 'statute of limitations' is unfortunate."[5]

Loan documents control key limitations issues

Accrual

All statutes of limitation begin to run "from the time the cause of action accrues. … A cause of action accrues when the last element constituting the cause of action occurs."[6] Because mortgages are contracts[7], the last element constituting a foreclosure cause of action is defined by the terms of the mortgage (and the note if incorporated).

Monetary covenants

The majority of foreclosure cases involve uniform residential loan documents, which contain nearly identical covenants and conditions regarding payment. Non-institutional residential mortgages and commercial mortgages vary widely in their monetary covenants. The contract terms affect when payments become due, grace periods for late payments, notice or demand requirements, acceleration clauses, maturity clauses, etc. None of these terms are required by law or implied by law in a mortgage. Therefore, the loan documents control when a cause of action accrues and the statute of limitations starts running.

Non-monetary covenants

Nearly all mortgages contain ongoing non-monetary covenants in addition to payment obligations. Such covenants typically require the mortgagor to keep the mortgaged property insured[8], to keep the property taxes paid,[9] and to pay the full balance upon a sale of the property.[10] Breaches of these non-monetary covenants give rise to a cause of action for foreclosure if they put the lender's security in jeopardy – even if all payments are current.[11]

Most foreclosure cases involve successive limitation periods

Successive failures to make payments constitute separate causes of action.[12] When there are multiple causes of action due to multiple payment defaults, each cause of action carries its very own five year limitation period. Therefore, "the statute of limitations runs against each installment from the time it becomes due,"[13] and "the statute of limitations may run on some and not others."[14]

Installment payments do not become time-barred

To the extent the preceding language suggests that the statute of limitations runs against "installments", it is imprecise and misleading. Statutes of limitation are procedural and do not affect the underlying substantive rights and obligations of the parties.[2] Therefore, the statute of limitations runs against *causes of action* which arise from a failure to make installment payments. It does not run against the installments themselves, which are substantive obligations of the borrower. The borrower is still legally obligated by the note and mortgage to pay a six year-old installment even though the lender is prevented by the statute of limitations from suing over nonpayment of that installment.

In uniform residential mortgage documents, the borrower also makes a separate promise to repay the entire debt, independent of the promise to make monthly payments.[15] The failure to make a payment more than five years ago may prevent foreclosure based on that payment default, but it does not cancel the borrower's separate contractual obligation to repay the entire debt – an obligation that continues through the date of maturity. A court that reduces the amount owed because there are time-barred causes of action for payment defaults more than five years old would incorrectly diminish the substantive contractual rights of the

lender (a) to repayment of the full debt and (b) to liquidation of the mortgaged property to satisfy that debt.

The significance of the contractual provisions in this analysis is seen in *Isaacs v. Deutsch*.[16] The defendant in *Isaacs* promised to make a series of child support payments *without* separately promising to pay a specified sum.[12] Therefore, when the cause of action for the first failure to pay became time-barred, there was no other provision of the contract requiring that money to be paid. As a result, only the installments due within five years preceding the lawsuit were collectible.

By contrast, in a foreclosure suit based on a breach of the uniform residential loan documents, the borrower's separate promise to pay the full debt requires that the full debt be reflected in the final judgment of foreclosure even if installments older than five years remain unpaid. The distinction between the case of an *Isaacs* installment contract and the uniform residential loan documents should be clarified in future judicial opinions.

Acceleration

Loan documents control again

An acceleration clause is: "A provision or clause in a mortgage, note, bond, deed of trust, or other credit agreement, that requires the maker, drawer or other obligor to pay part or all of the balance sooner than the date or dates specified for payment upon the occurrence of some event or circumstance described in the contract. Such clause [sic] operates when there has been a default such as nonpayment of principal, interest, or failure to pay insurance premiums."[17]

In the absence of an acceleration clause, the full debt cannot be demanded until the time stated in the contract.[18] "A provision for the acceleration of the maturity of a debt secured by a mortgage is to be construed in accordance with the intention of the parties as disclosed by the ordinary meaning of the words used and the circumstances of the parties."[19]

Self-executing versus optional

Acceleration clauses fall into two categories: self-executing and optional. A self-executing acceleration clause is triggered by the happening of the contingency stated in it, whether or not the holder of the instrument wants the acceleration to occur.[20] An optional acceleration clause is one that expressly makes acceleration an option of the lender and is the type included in uniform residential loan documents. To exercise this option "the holder or payee of the note must take some clear and equivocal [sic] action indicating its intent to accelerate all payments under the note, and such action should apprise the maker of the fact that the option to accelerate has been exercised."[21] This may be achieved by sending written notice to the debtor, making an oral demand, alleging acceleration in a court pleading, and the like.

The BIG question: Does acceleration preclude future causes of action from accruing?

Many foreclosure cases are repeat filings, meaning that a previous foreclosure case was filed due to breach of the same mortgage and was then dismissed before the filing of the current case. When the previous case was filed more than five years prior to the new case, foreclosure defendants have argued that the second case is barred by the statute of limitations. Since the previous case accelerated the full balance, they argue that the statute of limitations began to run against all future payments on the date of acceleration. Therefore, five years after the first case was filed any newly filed case is time-barred.

This argument has been raised both as an affirmative defense to subsequent foreclosure filings and as a quiet title claim to remove the mortgage lien from the subject property. The courts in multiple quiet title cases have rejected the argument, following the reasoning of *Singleton v. Greymar Associates*, where the Florida Supreme Court stated: "While it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue."[22] Following dismissal of the first case, "the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action."[23] *Singleton* is arguably not controlling authority on the statute of limitations because the only defense raised in *Singleton* was *res judicata*.

However, in *U.S. Bank v. Bartram*, the 5th DCA held that *Singleton* also controls statute of limitations defenses. "Based on *Singleton,* a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on its merits."[24] The 5th DCA certified the issue to the Florida Supreme Court as a question of great public importance, and the borrowers have moved the 5th DCA for rehearing. As of the date of submitting this article, the 5th DCA had not ruled on the motion for rehearing.

Tolling

Statutory Tolling

Tolling has been consistently interpreted as a temporary suspension of the running of the statute of limitations time clock which extends the period for filing a claim.[25] Fla. Stat. § 95.051 provides an exhaustive list of those conditions which toll statutes of limitation. That section abrogated the common law of tolling and "delineates an exclusive list of conditions that can 'toll' the running of the statute of limitations."[26]

While multiple subsections of Fla. State § 95.051(1) could have application in a mortgage foreclosure, subsection (f) has the most pronounced impact. It provides for tolling

based on "[t]he payment of any part of the principal or interest of any obligation or liability founded on a written instrument."

Contrary to the standard concept that tolling temporarily suspends the time clock, courts have consistently construed Fla. Stat. § 95.051(1)(f) as *restarting* the clock from zero. The rationale for this is that: "[b]y making partial payments on the debt, the debtor recognizes and signifies the intent to honor the obligation. It is not until the payee [sic] stops making payment that the creditor is placed on notice that the debtor is no longer willing or able to honor the underlying obligation."[27]

Equitable Tolling

Equitable tolling "has been applied when the plaintiff has been misled or lulled into inaction, [etc.]"[28] It can apply even where there has been "no misconduct on the part of the defendant."[29]

Equitable Estoppel

Equitable estoppel is similar to equitable tolling but arises out of more directly culpable conduct of the defendant. It is said to apply where "the wrongdoer prevails upon the other to forego enforcing his right until the statutory period has lapsed."[30]

Any of these conditions – statutory tolling, equitable tolling, or equitable estoppel – can extend the five year statute of limitations period. The statute of repose, however, cannot be tolled.

Counterclaim in Recoupment

"A civil defendant may assert a counterclaim in recoupment to recover an affirmative judgment even though the claim would be barred as an independent cause of action under the statute of limitation."[31] This rule applies to the collection of a time-barred debt, but it is unclear whether it extends to the equitable relief of foreclosure based upon that debt.

Effect of a mortgage after foreclosure is time-barred

A foreclosure action can become completely time-barred by the statute of limitations even before the mortgage lien has been extinguished by the statute of repose.[32] In such cases, a future breach of the non-monetary covenants can give rise to new foreclosure causes of action with new five year limitation periods and enable the mortgagee to foreclose.[33]

Conclusion

Analysis of limitation and repose issues begins with the loan documents. That contractual language controls when a cause of action accrues. The five year period of Fla. Stat. § 95.11(2)(c) then limits when a cause of action may be brought, subject to tolling which may extend that time. The statute of limitations limits the time for bringing the foreclosure action but does not extinguish the debt or the mortgage. The statute of repose terminates the lien of the mortgage so that no foreclosure cause of action exists. When a foreclosure case is dismissed, the acceleration in that first case does not prevent a subsequent foreclosure based on a different default and does not provide a basis for removal of the mortgage lien in a quiet title action, under current law. That issue and clarification of the amount due on "time-barred installments" are current battleground issues and are expected to be the subject of forthcoming appellate opinions.

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Endnotes:

1 Foreclosure "rocket dockets" have helped Florida courts dispose of over 20,000 mortgage foreclosure cases per month between January 2013 and March 2014. *Source*: www.flcourts.org.

2 *Allie v. Ionata*, 503 So. 2d 1237, 1241-42 (Fla. 1987).

3 *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 603 (Fla. 2d DCA 2005).

4 *Id.; Am. Bankers Life Assur. Co. of Florida v. 2275 W. Corp.*, 905 So. 2d 189, 192 (Fla. 3d DCA 2005); *City of Riviera Beach v. Reed*, 987 So. 2d 168, 170 (Fla. 4th DCA 2008).

5 *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 605 (Fla. 2d DCA 2005).

6 Fla. Stat. § 95.031(1).

7 37 Fla. Jur 2d Mortgages, Etc. § 1 (2014).

8 *Delgado v. Strong*, 360 So. 2d 73 (Fla. 1978); *Pezzimenti v. Cirou*, 466 So. 2d 274, 277 (Fla. 2d DCA 1985).

9 *Lunn Woods v. Lowery*, 577 So. 2d 705, 707 (Fla. 2d DCA 1991); *accord Heimer v. Albion Realty & Mortg. Inc.*, 300 So. 2d 31, 32 (Fla. 3d DCA 1974); *Siahpoosh v. Nor Properties, Inc.*, 666 So. 2d 988 (Fla. 4th DCA 1996).

10 *Kaan v. Wells Fargo Bank, N.A.*, 13-80828-CIV, 2013 WL 5944074, p.3 (S.D. Fla. 2013).

11 *Delgado v. Strong, supra*; *Pezzimenti v. Cirou*, *supra* (fact that mortgagee purchased forced place insurance with retro-active date so that "property was never uninsured" did not cure mortgagor's breach which put the security in jeopardy).

12 *Isaacs v. Deutsch*, 80 So.2d 657, 660 (Fla. 1955) (installment contract).

13 *Id. But see Monte v. Tipton*, 612 So.2d 714 (Fla. 2d DCA 1993); *Pitts v. Pastore*, 561 So.2d 297, 299 (Fla. 2d DCA 1990); and *Smith v. Branch*, 391 So.2d 797, 798 (Fla. 2d DCA 1980), all holding that cause of action for foreclosure based on breach of demand notes more than five years prior to complaint did not accrue until filing of complaint because cause of action only arose upon demand by lender.

14 *Cent. Home Trust. Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933

(Fla. 5th DCA 1980) (promissory note).

15 For example, the Adjustable Rate Note in *U.S. Bank Nat. Ass'n v. Bartram*, 39 Fla. L. Weekly D871 (Fla. 5th DCA 2014) contains the following monetary covenants and conditions. Paragraph 1: "… I promise to pay $650,000.00 … , plus interest…." Paragraph 2: "Interest will be charged on the unpaid principal until the full amount of Principal has been paid. … The interest rate is the rate I will pay both before and after any default…." Paragraph 3: "If on March 01, 2035, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the 'Maturity Date.'" The mortgage in that case incorporates these provisions in paragraph 1 under Uniform Covenants: "Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note…."

16 *Isaacs v. Deutsch,* 80 So. 2d 657, 660 (Fla. 1955).

17 *Reed v. Lincoln*, 731 So. 2d 104, 105 (Fla. 5th DCA 1999) (quoting Random House Dictionary of the English Language 10 (2d ed.1987)).

18 *Nat'l Educ. Centers, Inc. v. Kirkland*, 635 So. 2d 33, 34 (Fla. 4th DCA 1993). However, in case of an unequivocal repudiation of the contract, the non-breaching party can recover the value of future performance including payments to become due in the future. *Id.*

19 Baader v. Walker, 153 So. 2d 51, 54-55 (Fla. 2d DCA 1963) (quoting 59 C.J.S. Mortgages § 495(3)a, at page 784).

20 *Id.*

21 *Cent. Home Trust. Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th DCA 1980)(quoting 11 Am.Jur.2d Bills and Notes s 296 (1963)).

22 *Singleton v. Greymar Associates,* 882 So. 2d 1004, 1008 (Fla. 2004), *U.S. Bank Nat. Ass'n v. Bartram*, 39 Fla. L. Weekly D871 (Fla. 5th DCA 2014); *Romero v. SunTrust Mortg., Inc.*, 1:13-CV-24491-UU, 2014 WL 1623703 (S.D. Fla. 2014); *Dorta v. Wilmington Trust Nat. Ass'n*, 5:13-CV-185-OC-10PRL, 2014 WL 1152917 (M.D. Fla. 2014); *Kaan v. Wells Fargo Bank, N.A.*, 13-80828-CIV, 2013 WL 5944074 (S.D. Fla. 2013).

23 *Singleton v. Greymar Associates*, 882 So. 2d 1004, 1008 (Fla. 2004)*; accord Star Funding Solutions, LLC v. Krondes*, 101 So. 3d 403 (Fla. 4th DCA 2012); *c.f. Olympia Mortgage Corp. v. Pugh*, 774 So. 2d 863, 866 (Fla. 4th DCA 2000).

24 *U.S. Bank Nat. Ass'n v. Bartram*, 39 Fla. L. Weekly D871 (Fla. 5th DCA 2014).

25 *Hankey v. Yarian*, 755 So. 2d 93, 96 (Fla. 2000).

26 *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001); *accord Larson & Larson, P.A. v. TSE Indus., Inc.*, 22 So. 3d 36 (Fla. 2009).

27 *Cadle Co. v. McCartha*, 920 So. 2d 144, 146 (Fla. 5th DCA 2006); *accord Chaplin v. Estate of Cooke*, 432 So. 2d 778, 779 (Fla. 1st DCA 1983); *Hosp. Constructors Ltd. ex rel. Lifemark Hospitals of Florida, Inc. v. Lefor*, 749 So. 2d 546 (Fla. 2d DCA 2000); *see also Cuillo v. McCoy*, 810 So.2d 1061 (Fla. 4th DCA 2002).

28 *Machules v. Department of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988).

29 *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 n. 11 (Fla. 2001) (citing *Machules*).

30 *Black Diamond Properties, Inc. v. Haines*, 69 So. 3d 1090, 1093 (Fla. 5th DCA 2011).

31 *Regions Bank v. Cuny*, 118 So. 3d 329, 330 (Fla. 1st DCA 2013); s*ee also Maynard v. Household Fin. Corp. III*, 861 So.2d 1204, 1207 (Fla. 2d DCA 2003) (citing *Allie v. Ionata*, 503 So.2d 1237, 1238–39 (Fla.1987)).

32 *Houck, supra,* at 605.

33 *Id.; Broward County v. 8705 Hampshire Drive Condo., Inc.,* 127 So. 3d 853 (Fla. 4th DCA 2013); *Kaan, supra*.



Is My Client A Liar?

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N. FLEISHER

Once upon a time I was a young lawyer who believed everyone shared my reverence for the legal system. This naive belief has been worn down over the years. One of the most important skills that attorneys develop from years of practice is the ability to sense when a client is lying. We have all met with clients who seem sincere and convincing, and it takes years of hearing similar stories over and over again to learn that many of these clients are either stretching the truth or not telling the truth. As a litigator, one of the greatest dilemmas I face is how to deal with such clients in court proceedings. When a lawyer knows that the client is lying, the duties of the lawyer are fairly clear. The duties of the lawyer, however, are more nuanced when the lawyer merely ***suspects*** that the client is lying.



Rule 4-3.3 of the Rules of Professional Conduct found in the Rules regulating the Florida Bar addresses these two issues:

> Rule 4-3.3. Candor Toward the Tribunal
>
> **(a) False Evidence; Duty to Disclose**.
>
> A lawyer shall not **knowingly**:
>
> .....
>
> (4) offer evidence that the lawyer ***knows*** to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer ***may*** refuse to offer evidence that the lawyer reasonably ***believes*** is false." (emphasis added)

As the above quoted language indicates, a lawyer may not offer testimony that the lawyer knows to be false. This rule requires the lawyer to simply refuse to offer such false evidence regardless of the client's wishes. All lawyers are officers of the court, and it is the duty of a lawyer to prevent the Judge from being misled by false evidence. When a lawyer is in the unfortunate situation of learning that a client intends to testify falsely before the court, or if the client is insistent that the lawyer knowingly introduce false evidence, the lawyer simply cannot allow this to occur. The comments following Rule 4-3.3 suggest that the lawyer first try to persuade the client that the false evidence should not be offered to the court. It seems self-evident, but many clients need to be reminded that testifying falsely before a court is perjury, and thus, a criminal offense. Moreover, a client might think that he or she is willing to risk perjuring himself or herself, yet the client may not realize that, although the lawyer is not falsely testifying under oath, the lawyer, nonetheless, owes a duty to the court not to allow false evidence to be presented when the lawyer is aware that the evidence is false. In other words, a client who might be willing to risk a sanction by providing false testimony to the court has to realize that it is not the client alone who is personally at risk. The lawyer is also at risk and might lose his or her license and otherwise be sanctioned for knowingly allowing a client to falsely testify.

If the lawyer is unable to persuade his or her client to refrain from falsely testifying before the court, the lawyer must refuse to offer the false evidence. If, during the course of the court proceeding, the client, despite the remonstrations of the lawyer against making false testimony, nevertheless provides perjured testimony or false evidence to the court, the lawyer must alert the court that false evidence has been presented. While this will almost certainly result in the lawyer withdrawing from representing the client, as an officer of the court, the lawyer has no choice.

If everything were simply black and white, the job of a lawyer would be easy. However, the legal profession is, more often than not, about shades of grey. This is particularly true when dealing with the honesty of clients. When a lawyer meets with a client for the first time, the client often seems reasonable and honest. However, over the course of a representation, the lawyer learns more details of the case and may question the veracity of the client. With experience, a lawyer is able to more quickly determine whether

a client is being truthful. However, when it comes to the lawyer's duty to the tribunal, there is a difference between ***knowing*** that a client is lying and ***believing*** that a client may be lying. There is no prohibition to a lawyer offering testimony of a client when the lawyer merely "believes" that the client is not being truthful. The comments following Rule 4-3.3 make this distinction:

> The prohibition against offering false evidence only applies if the lawyer ***knows*** that the evidence if false. A lawyer's reasonable ***belief*** that evidence is false does not preclude its presentation to the trier of fact. (emphasis added)

A lawyer who reasonably believes that his or her client is lying does not risk sanction from the Florida Bar for allowing the client to testify. Ultimately, it is up to the trier of fact to determine the veracity of such testimony. However, if the lawyer reasonably believes that the client is testifying in an untruthful manner, the Florida Bar rules allow the lawyer to refuse to offer this testimony.

In a situation where a lawyer believes, but does not know, that the client is lying, why wouldn't the lawyer simply let the client give the testimony and allow the court to decide whether the testimony is believable? This goes back to the beginning of this article where I mentioned reverence for the legal system. Years of practice as a probate litigator has not changed my view that the system requires respect and honesty. This is especially true in the probate arena, where a finite number of lawyers specialize in the practice, and these lawyers typically practice before a limited number of judges. A lawyer's reputation for honesty and integrity is particularly important in trust and estate matters before the probate division because he or she see the same opposing counsel and same judges on a regular basis.

While the Florida Bar rules may allow a lawyer to offer evidence the lawyer believes is untruthful, Section 57.105 of the Florida Statutes puts the lawyer at a potential financial risk. If the lawyer knows that a claim or defense made before the court in a civil proceeding is not supported by the material facts necessary to make the claim or defense, the court has the ability to award attorney's fees against the client and the lawyer. Thus, even if a lawyer is not necessarily at risk of losing his or her license by allowing a client to present evidence which seems dubious, the court has the ability to make the lawyer pay out of his or her own pocket for allowing frivolous positions to be taken in court.

Probate and trust litigation involves emotionally fraught situations where clients are working out deep seated family grievances. In this context, clients can often internalize false stories or false memories to such a degree that they lose sight of reality. Even when the lawyer presents the clients with proof which undermines their story, clients often cling to emotional delusions even in the face of contrary evidence. I often find myself telling clients that I might believe them, but unfortunately, the judge will never believe them. If this does not succeed in bringing the client to a more reality based view of the case, I am sometimes able to get the client's attention with a reminder that it's crazy to invest enormous amounts of money in attorney's fees in support of a position that is unlikely to be favored by the court.

While the lawyer owes a duty to his or her client, it is also the obligation of the lawyer to make sure that legal proceedings are conducted in a manner that leads to the truth. This may seem naive, but it is the obligation which lawyers are sworn to uphold.

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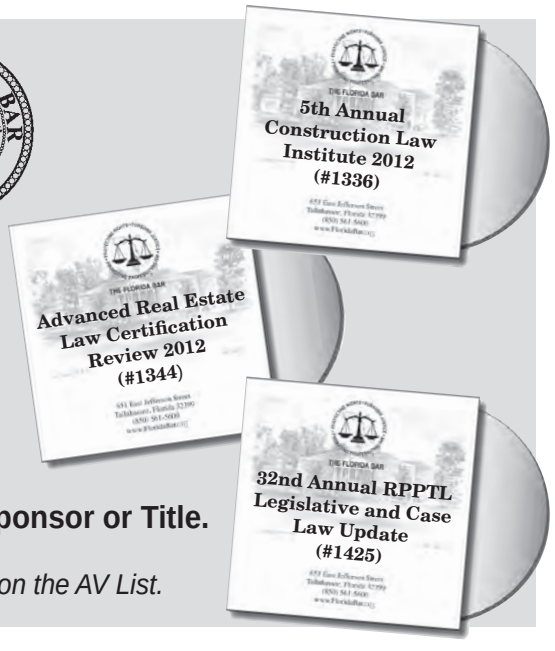

Probate Case Summaries

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A guardian can access assets held by a ward and the ward's spouse as joint tenants with rights of survivorship during and after a ward's life to pay authorized expenses.

Romano v. Olshen, 29 Fla. L. Weekly D515 (Fla. 4th DCA 2014)

Husband and wife, Jack Olshen and Irene Olshen, were married in 2004. Husband filed a divorce proceeding in 2010, and the wife responded with a petition to determine incapacity. The probate court found the husband to be incapacitated and appointed a professional guardian. Due to the husband's incapacity, the trial court ordered the dissolution proceeding abated for a period of three years pursuant to § 61.052, Fla. Stat. The husband died within the three year period.

During their marriage, the husband sold his business, and deposited the proceeds of $1,300,000 into a brokerage account titled as joint tenants with rights of survivorship with his wife. In the guardianship proceeding, counsel for the professional guardian accumulated expenses which exceeded the amount of the husband's sole assets. The trial court approved the guardian's expenses, but reserved ruling on the source of payment.

After the husband's death, the professional guardian filed a petition seeking access to the joint account to pay guardianship administrative expenses. After an evidentiary hearing, the trial court held that the joint account immediately became the wife's asset upon the husband's demise and was therefore not available to pay guardianship expenses. In support of this conclusion, the trial court determined that the joint account was held as tenants by the entireties, as opposed to joint tenants with rights of survivorship, and, therefore, the withdrawals required the consent of the wife. The trial court relied on the Florida Supreme Court case of *Beal Bank, SSB v. Almand & Associates,* 780 So. 2d 45 (Fla. 2001), which applied a presumption that a joint account titled in the name of a husband and wife is held as tenants by the entirety.

The trial court did express concern with the ruling because the court viewed it as inequitable. Subsequent to the ruling, the trial court entertained the professional guardian's counsel's petition for authorization to utilize the joint account for the payment of the attorney's fees awarded during the husband's lifetime. The trial court granted the petition, and permitted the professional guardian's counsel's fees to be paid from the joint account because the order of entitlement occurred during the husband's lifetime. Further, the trial court granted other lifetime expenses of the husband to be paid from the joint account.

On appeal, relying in part on the equitable and protective nature of a guardianship, the Fourth District Court of Appeal affirmed the fee and expense awards, but reversed the trial court decision and determined that the account is properly viewed as in a joint tenancy with rights of survivorship as opposed to an account held as tenants by the entirety. The court specifically stated that the presumption described in *Beal Bank, SSB, i.e.* that a joint account held by a husband and wife is held as tenants by the entirety is applicable between a debtor and third-party creditor. There is no such presumption in a guardianship proceeding. Due to the court's delineation that the account was owned as joint tenants with rights of survivorship, the court affirmed the trial court's rulings that a guardian is permitted to withdraw from the joint account for the ward's necessities. Further, the court held that the professional guardian could utilize the joint account to pay post-death expenses because Chapter 744, and specifically § 744.527, Fla. Stat., contemplates a guardian performing post-death tasks.

Finally, consistent with the equitable and public policy reasons of protecting a ward, the court implored the legislature to consider amending § 744.457(1), Fla. Stat., to permit access to a tenancy by the entireties account for the necessary expenses of a ward without approval by the spouse.

Where a ward's right to determine residence is removed, only the guardian, and not an interested person, has standing to petition the court for a change of residence.

Bivins v. Rogers, 39 Fla. L. Weekly D519 (Fla. 4th DCA 2014)

The Fourth District Court of Appeal affirmed the trial court's determination that only the ward's guardian, and not the ward's son as an interested person, has standing to petition the court to change the ward's residence. In *Bivins,* the ward's son sought to move his father to Texas where the ward's family resides. The ward's son filed a petition to change residence and in response, the guardian filed a motion to dismiss.

The guardian's motion to dismiss contended that based upon § 744.2025, Fla. Stat., only a guardian has standing to petition a court to change a ward's residence. In response, the ward's son alleged that he had standing as an interested party since he is the ward's next of kin and heir to the ward's estate. The trial court granted the guardian's motion to dismiss, concluding that the ward's son

would have standing as an interested person to contest the guardian's petition to change residence, but does not have standing to initiate his own petition to change residence.

On appeal, the Fourth District Court of Appeal affirmed the trial court. The court approved the trial court's legal reasoning that only the guardian has standing to petition for a change in the ward's residence based upon the language of the statute and that no Florida authority supported the ward's son's position that he had standing to initiate such a petition. The court further stated that the son is not without legal rights afforded under the Florida Guardianship Code. For instance, the court stated that, as an interested person, the ward's son has the right to petition the court for interim judicial review pursuant to § 744.3715, Fla. Stat., or can seek removal of the guardian pursuant to § 744.477, Fla. Stat.

Award's preneed guardian is entitled to a statutory presumption in favor of appointment assuming the court finds the preneed designation was executed during a period of mental competency.

Koshenina v. Buvens, 130 So. 3d 276 (Fla. 1st DCA 2014)

The First District Court of Appeal reversed and remanded the trial court's decision to disregard the ward's preneed guardian designation and to appoint the ward's siblings as plenary co-guardians. In 2010, Linda Koshenina executed a preneed guardian designation, nominating her husband James as her guardian. Although 57 years old at the time, Linda was showing signs of mental deterioration and was subsequently diagnosed with Pick's disease, a rapidly progressive and terminal form of dementia.

In 2012, Linda's siblings successfully petitioned for appointment of themselves as emergency temporary guardians of Linda. In response, Linda's husband James filed a Notice of Designation of Preneed Guardian, which named him as Linda's preneed guardian. During an evidentiary hearing, Linda's siblings maintained that the Designation of Preneed Guardian was executed at a time when Linda was mentally incompetent and that it was the product of James' undue influence.

The trial court heard evidence from the drafting attorney of the Designation of Preneed Guardian, who testified that prior to the execution of the document, he administered a routine competency test and that Linda successfully passed. Linda's neurologist, however, testified that while Linda could have experienced a lucid interval, just one month before the document execution, she was "extremely impaired."

The evidence further established that James was contentious and sometimes failed to appropriately care for his wife. Nonetheless, it was agreed that James loved his wife and the evidence also provided that Linda's siblings made infrequent contact with her.

The trial court ruled that Linda's Designation of Preneed Guardian naming James was executed only "after the dementia process had seriously compromised her ability to understand what she was doing" and the court "seriously questioned" whether Linda was competent during the execution of the document. However, the trial court did not find Linda incompetent. In addition, the trial court determined it was not in Linda's "best interest" to follow her Preneed Designation "because of the court's findings regarding events subsequent to the execution of this document."

On appeal, the court held that the trial court failed to rule on the core question of whether Linda was competent at the time she executed her Designation of Preneed Guardian. The appellate court stated that the trial court must rule on whether or not Linda was able to generally understand the nature of the decision and the implications of the Designation of Preneed Guardian when it was executed. The appellate court therefore remanded the issue to the trial court for it to weigh the competing testimony and arrive at a definitive ruling on capacity.

The appellate court further determined that the trial court applied an incorrect legal standard when it determined that the Designation of Preneed Guardian was not in Linda's best interests. Citing to §§ 744.3045(4) and 744.312(4), Fla. Stat., the appellate court ruled that a preneed guardian declaration creates a rebuttable presumption as to appointment and further that a preneed guardian shall be appointed "unless the court determines that appointing such person is contrary to the best interests of the ward."

Inconsistent with the above-referenced statutes, the trial court applied a simple "best interest" analysis. The appellate court reversed the trial court's decision, and on remand, ordered the trial court to give deference to Linda's Designation of Preneed Guardian, and to not follow the Designation of Preneed Guardian only if the trial court finds James's appointment to be contrary to her best interests.

Appellate court reversed trial court's reduction of the ward's attorney's compensation and charging him with costs because the trial court's finding that attorney's services did not benefit the ward was not supported by competent, substantial evidence.

In re Guardianship of Rawl, 133, So. 3d 1179 (Fla. 2d DCA 2014)

A petition for incapacity and the appointment of a guardian was filed against Carol Rawl. The trial court appointed attorney McGarry to represent Rawl, the Alleged Incapacitated Person ("AIP"), and attorney McKinney filed a notice of appearance as co-counsel for the AIP.

The three-person examining committee submitted their examining reports of the AIP to the trial court. One of the reports contained both "yes" and "no" boxes circled within the assessment form. In support of circling both boxes, the doctor noted that the AIP's capacity varied depending upon the time of day. Days before the incapacity hearing,

the medical doctor filed a new report. In the new report, her recommendation changed from a plenary guardianship to a limited guardianship. The reassessment was conducted because the AIP's counsel's office contacted the medical doctor requesting a reassessment.

During the incapacity hearing, the trial court concluded that it was inappropriate for the AIP's counsel to contact an examining member to request a reassessment. The trial court similarly deemed it inappropriate that the reassessment report was filed just days before the incapacity hearing. Because of what the trial court deemed as inappropriate, it ordered a second examining committee to evaluate the AIP.

The second examining committee found the AIP to be totally incapacitated, and it unanimously recommended a plenary guardianship. Counsel for the AIP, who was now the ward, thereafter petitioned the court for their attorney's fees and costs. Opposing counsel maintained that fees attributable to the second examining committee should not be awarded because it was appointed due to counsel's inappropriate tampering with the guardianship process.

During an evidentiary hearing, an expert retained by the ward's counsel opined that apart from a minor billing error, the fees were reasonable in both rate and hours spent. Further, the expert testified that the appointment of the second examining committee benefited the ward and the ward's counsel's conduct was not inappropriate. The trial court agreed with the expert witness that the hourly rate and number of hours were reasonable. However, the trial court, without explanation, reduced the counsel's attorney's fees by $3,766.25 and further imposed the $900 cost of the appointment of the second examining committee on the ward's counsel. The trial court noted that the disallowed attorney's fee was not of benefit to the ward and that the imposition of the $900 cost against counsel was due to his effort to obtain the impermissible re-examination.

On appeal, the Second District Court of Appeal reversed the trial court's decision. The appellate court concluded that the trial court's finding that $3,766.25 of the ward's counsel's fees were not for the ward's benefit was not supported by competent, substantial evidence. In fact, the Second District Court of Appeal noted that the trial court made its ruling even though the ward's counsel provided unrebutted testimony that he obtained the reassessment at the ward's request because he believed the first assessment to be inaccurate.

The appellate court did not condone or approve the ward's counsel's approach in contacting the committee member. However, the appellate court held that even if counsel brought the ward's concern to the trial court's attention, the ward likely would have incurred similar fees. Additionally, in reversing the $900 cost assessment against the ward's counsel, the appellate court concluded that there was no finding that counsel acted in bad faith and his actions were not prohibited by statute. The appellate court therefore reversed the reduction of fees to the ward's counsel as well as the assessment of costs. It ordered the trial court to reconsider the ward's counsel's fee petition, and should there be a reduction in fees, stated that there must be a finding as to the time entries or costs being disallowed as well as the basis for the reduction.

A child born before the execution of a will but legitimized thereafter is not a pretermitted child.

Estate of Maher v. Iglikova, 39 Fla. L. Weekly D746 (Fla. 3d DCA 2014)

The Decedent disappeared in the year 2004. Consistent with §§ 733.209 and 733.103, Fla. Stat., five years after the Decedent's disappearance, the trial court entered an order on a petition for order declaring death of a missing person. Thereafter, the Decedent's will dated July 2001 was admitted into probate.

The Decedent had two children during his lifetime including A.M.I., a minor who was born in December 2000. However, the Decedent first became aware of A.M.I.'s existence during the summer of 2002, and a paternity test confirmed that A.M.I. was the daughter of the Decedent.

After the admission of the Decedent's will into probate, the guardian for A.M.I. filed a petition to determine status as a pretermitted child. The petition was opposed by the guardian for the Decedent's second child, Lyudmila Taran. Taran filed a motion for summary judgment alleging that A.M.I. was not a pretermitted child under § 732.302, Fla. Stat. She maintained that the pretermitted children statute was inapplicable because, 1) A.M.I. was not omitted from the will as she was included in a class gift for all children who survive the Decedent, and 2) A.M.I. was not born or adopted after the Decedent executed his will. The trial court denied Taran's motion for summary judgment and instead found A.M.I. to be a pretermitted child under the statute.

The Third District Court of Appeal reversed the trial court's decision and determined that A.M.I. was not a pretermitted child because she benefited from the Decedent's will and she was born before the execution of the will. The pretermitted children statute, § 732.302, Fla. Stat., provides several requirements, including the child's omission from the will and the child's birth or adoption subsequent to the execution of the will. Examining the plain and obvious meaning of § 732.302, Fla. Stat., the appellate court found that A.M.I. was not omitted from the will because she was a beneficiary by a class gift provided to the Decedent's children in the will. In addition, the appellate court noted that the pretermitted children statute is only applicable if the child is born subsequent to the execution of a will. A.M.I. was born before the execution of the Decedent's will, and as a result the appellate court determined that she was not a pretermitted child..

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Real Estate Case Summaries

By Kymberlee Curry Smith, Esq., Pembroke Pines, Florida

Municipal government is preempted by the Florida Department of Environmental Protection's ("FDEP") Mangrove Act and lacks jurisdiction to regulate the unauthorized trimming or removal of mangrove trees unless the local government receives appropriate delegation from the FDEP. Circuit Court did not depart from requirements of law by reversing in part, special magistrate's order imposing fines for unauthorized removal of 109 mangrove trees.

Town of Jupiter v. Byrd Family Trust, 39 Fla. L. Weekly D237 (Fla. 4th DCA 2014)

On December 16, 2010, the Town of Jupiter (the "Town") received a complaint that the Byrd Family Trust (the "Trust") had removed 109 state-protected mangrove trees from its property without a permit and filled the vacant area with sand. On December 20, 2010, the Town issued a stop work order to the Trust to prevent any further tree removal. On February 16, 2011, alleging violations of the Town of Jupiter, Florida, Municipal Code § 26-99 and § 24-83, the Town issued a Notice of Violation ("NOV") for the tree removal and sand placement. In response, the Trust filed a Motion to Dismiss challenging the special magistrate's jurisdiction to regulate mangrove trees. On October 7, 2011, in granting in part and denying in part the Motion to Dismiss, the special magistrate determined that the Town did in fact have jurisdiction to enforce a Florida state law concerning mangrove trees. On January 23, 2012, the special magistrate issued a violation order with findings that the Trust did not comply with the Municipal Code § 26-99 and by doing so violated Florida statutes regulating the alteration of mangrove trees. Municipal Code § 24-83 was also violated because no permit was obtained for the sand placement on the property. Accordingly, the special magistrate fined the Trust $15,000.00 for each mangrove tree removed from the property, for a total fine of $1,635,000.00, and a fine of $15,000.00 for the sand placed without a permit. In addition, the Town's attorney was awarded attorney's fees and costs against the Trust.

The Trust appealed the ruling to the circuit court arguing again that the Town lacked jurisdiction to regulate the mangrove trees under Municipal Code § 26-99. The circuit court determined that the Town was not delegated appropriate authority from the State of Florida to regulate mangrove trees pursuant to the Mangrove Trimming and Preservation Act, §§ 403.9321-403.9333, Fla. Stat. (2011) (the "Mangrove Act").

In pertinent part, the Mangrove Act provides:

> *(1)* § *403.9321-403.9333* and any lawful regulations adopted by a local government that receives a delegation of the department's authority to administer and enforce the regulation of mangroves as provided by this section shall be the sole regulations in this state for the trimming and alteration of mangroves on privately or publicly owned lands. All other state and local regulation of mangrove is as provided in subsection (3).
>
> (3) A local government that wants to establish a program for the regulation of mangroves may request delegation from the department at any time. However, all local government regulation of mangroves, except pursuant to a delegation as provided by this section, is abolished 180 days after this section takes effect.

Thus, absent a delegation of authority, regulation of mangroves by a local government is preempted. In response, the Town acknowledged the lack of delegated authority to administer and enforce the Mangrove Act pursuant to § 403.9234, Fla. Stat., however, the Town maintained that the imposition of the fines did not violate the Mangrove Act's preemption of local government regulation because the code section only supports the state's regulation and does not contradict it.

The Town of Jupiter, Florida, Municipal Code § 26-99 provides:

> Mangrove Protection: All trimming or removal of mangroves shall conform to the procedures and regulations established by the Florida Department of Environmental Protection (the "FDEP") or the appropriate jurisdictional agency. Town staff shall have the authority to issue a stop work order if it appears that the FDEP's regulations are being violated.

However, the circuit court decided that while Municipal Code § 26-99 does not establish regulations relating to the mangroves, the imposition of the fines by the special magistrate was a regulation and a form of enforcement, which was prohibited and preempted by the Mangrove Act. Therefore, the special magistrate lacked jurisdiction to do so. A similar position was also held in *Sun Harbor Homeowner's Ass'n, Inc. v. Broward County Dept. of Natural Res. Prot.*, 700 So. 2d 178 (Fla. 4th DCA 1997), where Broward County attempted to regulate trimming of mangroves by assessing a fine.

The court also opined on the proceedings at the city level where the Town and special magistrate relied on *J11*

Investments, Inc. v. Leon County, 908 So. 2d 1140 (Fla. 1st DCA 2005). The court determined such reliance was misplaced as the subject case pertained to preemption under the Florida Agricultural Lands and Practices Act. The Florida Agricultural Lands and Practices Act prohibited a county from, "adopt[ing] any ordinance, resolution, regulation, rule or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land." *Id.* at 1141. The First DCA ruled, "that a prohibition on adopting new ordinances did not prevent the county from enforcing an existing ordinance." The Mangrove Act as applied in Jupiter, is distinguished because it not only prohibits adoption of local regulations involving mangroves, it abolishes all regulations absent the state's authority, rendering the violation order by the special magistrate reversed.

For the first time on rehearing, after having the $1,635,000.00 fine reversed by the circuit court, the Town now asked the court to recognize the Trust's violation as a single violation to Municipal Code § 26-99 with a new fine amount of $15,000.00. The court determined that any fine imposed without the FDEP's authority, reduced or otherwise, is improper. The petition for cert. was denied.

Mortgage foreclosure summary judgment reversed because court finds there remained a genuine issue of material fact as to whether lender provided defendant with adequate notice of default and opportunity to cure and lender submits no answer to homeowner's affirmative defense to lack of notice or proof of notice, only a statement that a notice was served.

Patel v. Aurora Loan Services, LLC, 39 Fla. L. Weekly D840 (Fla. 4th DCA 2014)

The Patels appeal a final summary judgment of foreclosure entered in favor of Aurora Loan Services, LLC ("Aurora"). The court reversed the final judgment, finding a genuine issue of material fact as to whether Aurora provided the Patels with adequate notice of default and an opportunity to cure.

The court utilized *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009), to provide insight on summary judgment standards. "Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (citing Fla. R. Civ. P. 1.510(c)). "[T]he burden is upon the party moving for summary judgment to show conclusively the complete absence of any genuine issue of material fact." *Id.*

In addition to *Frost,* the Patels relied on *Kurian v. Wells Fargo Bank, National Association,* 114 So. 3d 1052 (Fla. 4th DCA 2013), where the same court reversed a final summary judgment for similar reasons as in *Frost*. In *Frost,* the 4th DCA reversed a final summary judgment of foreclosure where a bank failed to counter an affirmative defense of lack of notice and opportunity to cure. The *Frost* opinion cited *Bryson v. Branch Banking and Trust Co.*, 75 So. 3d 783, 785-86 (Fla. 2d DCA 2011) ("In numerous foreclosure cases summary judgment has been reversed because the defendant has pleaded lack of notice and opportunity to cure as an affirmative defense and nothing in the bank's complaint, motion for summary judgment, or affidavits established that the bank gave the homeowners the notice and opportunity to cure required by the mortgage.").

Aurora, in this case, alleged the affirmative defense raised by the Patels was refuted by Aurora sending the Patels a default letter, however, the letter was not made part of the record in the case. Citing *Frost*, *Kurian* and *Bryson,* the court found that Aurora failed to meet its burden for summary judgment concerning the lack of notice and opportunity to cure. Accordingly, the court reversed the final summary judgment of foreclosure and remanded the case for further proceedings.

Protecting Tenants at Foreclosure Act of 2009 requires bona fide tenants in possession of foreclosed property under a valid lease must be given a 90 day notice to vacate, which becomes effective on date of sale of property to new purchaser/landlord who intends to live on property as primary residence

Citimortgage, Inc. v. Glenn E. Lutz, et. al, FLW SUPP 2105CITI (Fla. 7th Cir. 2014)

On October 15, 2013, a final judgment of foreclosure was entered and property was subsequently sold to Ryan Henson #10 Land Trust ("Purchaser") via Certificate of Title on December 17, 2013. At the time of purchase, the newly owned property was in possession of a mother and son as tenants. On January 2, 2014, a Writ of Possession was served on the tenants, who then filed an Emergency Motion to Quash the Writ, citing the Protecting Tenants at Foreclosure Act of 2009 (the "Act"). The Act provides that any new purchaser or successor in interest of residential property subject to foreclosure of a federally related mortgage shall assume interest and must provide notice to vacate to any *bona fide* tenant at least 90 days before the effective date of such notice."

A bona fide lease or tenancy is defined by the Act as one in which: (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state or local subsidy. The Act was amended by Congress in 2010 to clarify the date of a Notice of Foreclosure as "the date on which complete title to a property is transferred to a successor entity or person." Under the Act, a *bona fide* tenant under a valid lease, dated before the Notice of Foreclosure,

may be given a 90 day notice to vacate, which becomes effective on the date of sale to a purchaser intending to occupy the property as a primary residence. If not, the tenant may complete the lease term if there is no sale date. A *bona fide* tenant without a lease or with an at-will tenancy may have their tenancy terminated any time after a 90 day notice to vacate is provided to tenant.

The subject tenants entered into a written lease for the property on January 1, 2013, for an initial 6 month term. After the initial term, the lease was extended for an additional year. The lease was in effect during the time of this action, which meant the tenants were defined as *bona fide* tenants in possession and were required to receive a 90 day notice to vacate the property, which would become effective on the sale date to the new purchaser, provided the new purchaser intended to occupy the property as a primary residence. In this regard, the tenants' Motion to Quash Writ of Possession was granted.

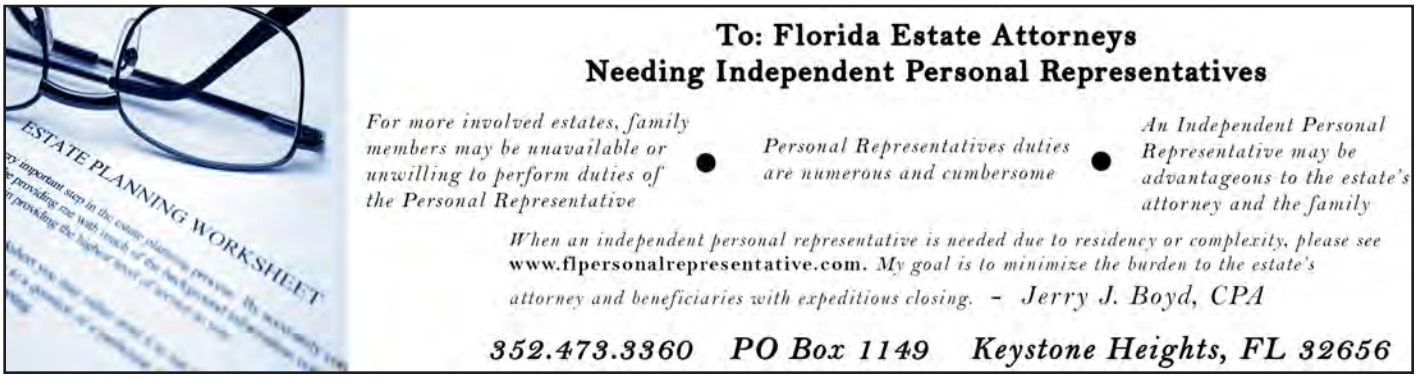
Writ of Certiorari, which raised the issue of whether the county court exceeded its jurisdiction in granting respondent's motion to authorize a levy sale, was denied. Respondent filed an emergency motion to allow pending levy sale to proceed which related to a judgment lien which was recorded on petitioner's property prior to petitioner's claim of homestead for the property. Court also found that authorization to carry out a ministerial act does not equate to a writ of mandamus.

Daniel A. Sepulveda v. Westport Recovery Corporation, FLWSUPP 2105SEPU (Fla. 11th Cir. 2013)

On October 8, 1997, a default judgment in the amount of $8,312.77 was entered on behalf of First Union National Bank of Florida ("First Union") and against Wilda Arana ("Arana"), however, the default judgment was not properly recorded. In October, 2005, Sepulveda deeded certain property in Polk County (the "Property") to Arana, who was his sister. Shortly thereafter, First Union's successor, Westport Recovery Corporation ("Westport"), recorded a judgment lien on the Property with the Polk County clerk. In March 2006, Arana deeded the Property back to Sepulveda. On November 28, 2012, Westport sought to levy against the Property and the Sheriff scheduled a sale of the Property for March 14, 2013. However, on March 1, 2013, Sepulveda filed notice with Polk County to claim his homestead exemption.

Sepulveda petitioned for Writ of Certiorari, arguing that the county court: 1) exceeded its jurisdiction by not deeming the Property as his homestead and 2) equated its ruling to a writ of mandamus by authorizing the Sheriff to proceed with the sale. Sepulveda argued that the circuit court had the sole jurisdiction to decide whether property is deemed homestead and whether exemptions apply. This court disagreed and relied on *Alexdex Corp. v. Nahcon Enterprise, Inc.*, 641 So. 2d 868 (Fla. 1994), in which it was decided that, "foreclosure actions are to be filed in the county court if the amount involved does not exceed the county court's jurisdictional monetary limit." In addition, Westport does not dispute Sepulveda's homestead claim to the Property and concedes that it was his homestead since the 2006 transfer to him, however, they argue that the recorded judgment lien pre-existed Sepulveda's homestead filing. Therefore, the motion to authorize the sale was proper. *Porter-Mallard Co. v. Dugger*, 157 So. 429 (Fla. 1934), a case with similar facts, and *Pasco v. Harley*, 75 So. 30, 33 (Fl. 1917), were cited and relied upon. *Pasco* held that, ("Homestead exemptions do not exist as against a judgment obtained or a conveyance made before the exemption was provided for by law").

Sepulveda further argued that the county court lacked jurisdiction to issue the sale order because it was tantamount to a writ of mandamus. The court recognizes that while correct on the law because circuit courts can only issue writs of mandamus, citing Fla. Const. art. V, § 5, ("The circuit courts…shall have the power to issue writs of mandamus…."), the facts relied upon by Sepulveda are incorrect. The court disagreed with Sepulveda's position that the court's order was a mandate to continue the sale. The court clarified the difference and stated that the order on present review declares that the Sheriff ultimately has the right to exercise its plain authority to proceed with the levy sale. It did not, however, compel it to do so, citing *State*



v. ex rel. Allen v. Rose, 167 So. 21, 22-21 (Fla. 1936), ("[M]andamus only lies to enforce a ministerial act or duty….[W]hile mandamus may be invoked to compel the exercise of discretion, it cannot compel such discretion to be exercised in a particular way….A writ of mandamus is issued only to require the performance of a plain official duty on the part of respondents." Having found that the order was not a writ of mandamus and the county court's jurisdiction was not exceeded, Sepulveda's petition for Writ of Certiorari was denied.

Homeowner that acquired property via tax deed was not liable for preexisting unpaid homeowners' association assessments. The issuance of the tax deed extinguishes both the outstanding debt of the preexisting assessments and liens.

Lunohah Investments, LLC. v. Harlene Gaskell, et al., 39 Fla. L. Weekly D41a (Fla. 5th DCA 2013)

Lunohah Investments, LLC, acquired certain property by tax deed. The Appellant initiated a quiet title action against the previous property owner and the two homeowners' associations that held liens for unpaid assessments. The Appellees claimed the liens survived, relying on § 720.3085(2)(b), Fla. Stat. (2011), which imposes joint and several liability on a property owner for unpaid assessments that "came due up to the time of transfer of title." Appellants argued that the outstanding liens were wiped out after the issuance of the tax deed under §§ 197.552 and 197.573(2), Fla. Stat. (2011), which together provide that "covenants creating any debt or lien . . . upon . . . property . . . or requiring the grantee to expend money for any purpose" do not "survive the issuance of a tax deed." While the trial court recognized that pursuant to §§ 197.552 and 197.573(2), Fla. Stat., the unpaid liens were extinguished upon the issuance of the tax deed, it decided to apply § 720.3085(2)(b), Fla. Stat.. to the facts of the case and ruled that the Appellants remained personally liable, no matter the method of acquisition. Summary judgment was granted to the Appellees.

The foundation of statutory construction provides that when two statutes result in conflict over the same subject matter, the more specific statute is given deference and the more general statute is considered, only if it does not contradict the more specific statute. *Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959).* In this appeal, § 720.3085(2)(b), Fla. Stat., was considered the more general statute, which did not address the specific method of acquisition of property with preexisting liens, but only whether liability was maintained upon transfer. It contradicted §§ 197.552 and 197.573(2), Fla. Stat., which specifically addressed the viability of unpaid assessments on property purchased by a tax deed. In that regard, §§ 197.552 and 197.573(2), Fla. Stat., prevailed and the liability for the surviving liens and the liens themselves were extinguished, via purchase by tax deed. The appellate court reversed and remanded the case to the trial court.

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What's Happening Within the Section...

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

Additionally, the Section is working on human 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 listservs that discuss issues and current hot topics available to committee members.

SCHEDULE

2014 EXECUTIVE COUNCIL MEETINGS

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

March 18 – 22, 2015

Executive Council Meeting

Ritz Carlton Grande Lakes
Orlando, Florida
Reservations: 1-407-206-2400
http://www.grandelakes.com/About-Grande-Lakes-50.html
Rate: $269.00
Cut-off Date: February 27, 2015

2014 CLE SCHEDULE:

Check the RPPTL Section website www.rpptl.org under the CLE tab's dropdown menu for topics, dates and locations for 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).

The Florida Bar
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Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

Beware: New Lien Forms for Condominiums, Cooperatives and HOAs - See HB 7037, effective July 1st, 2014

Florida Probate Rules Amended to minimize the amount of personal information in court documents.

See SC 13-188, May 22, 2014.

ETHICS QUESTIONS? Check out the Database in the Section's Professionalism and Ethics Committee webpage

New FL Bar Rule 5-1.2(c) requires written plans for most trust accounts. See http://tinyurl.com/le87fo9

Subsurface rights disclosure required under new Sec. 689.29, F.S., effective Oct. 1, 2014.

Get Published!

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

Did you know? The deadline for applying for **BOARD CERTIFICATION** in Real Estate and Wills, Trusts & Estates is October 31, 2014

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.)