The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section

Advanced Real Property Certification Review Course

– Volume IV –

COURSE CLASSIFICATION: ADVANCED LEVEL

February 9 - 10, 2018

Live and Webcast Presentation
Loews Portofino Bay Resort at Universal Studios
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Course No. 2597R

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Common Questions About CLER

1. **What is CLER?**
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. **What is the requirement?**
   Over a 3 year period, each member must complete 33 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness, and 3 hours in technology.

3. **Where may I find information on CLER?**
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org/rules.

4. **Who administers the CLER program?**
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. **How often and by when do I need to report compliance?**
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date by logging in to your member portal at member.floridabar.org.

6. **Will I receive notice advising me that my reporting period is upcoming?**
   Four months prior to the end of your reporting cycle, you will receive a CLER Reporting Affidavit, if you still lack hours.

7. **What happens if I am late or do not complete the required hours?**
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

8. **Will I receive any other information about my reporting cycle?**
   Yes, you will receive reminders prior to the end of your reporting cycle, if you have not yet completed your hours.

9. **Are there any exemptions from CLER?**
   Rule 6-10.3(c) lists all valid exemptions. They are:
   1) Active military service
   2) Undue hardship (upon approval by the BLSE)
   3) Nonresident membership (see rule for details)
   4) Full-time federal judiciary
   5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
   6) Inactive members of The Florida Bar

10. Other than attending approved CLE courses, how may I earn credit hours?

Credit may be earned by:

1) Lecturing at an approved CLE program
2) Serving as a workshop leader or panel member
3) Writing and publishing in a professional publication or journal
4) Teaching (graduate law or law school courses)
5) University attendance (graduate law or law school courses)

11. How do I submit various activities for credit evaluation?

Applications for credit may be found on our website, www.floridabar.org.

12. How are attendance hours posted on my CLER record?

You must post your credits online by logging in to your member portal at member.floridabar.org.

13. How long does it take for hours to be posted to my CLER record?

When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

14. How may I find information on programs sponsored by The Florida Bar?

You may wish to visit our website, www.floridabar.org/cle, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

15. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?

Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):

... CLER credit may not be counted for more than one reporting period and may not be carried forward to subsequent reporting periods.

16. Will out-of-state CLE hours count toward CLER?

Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

17. If I have questions, whom do I call?

You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don't forget to check your Basic Skills Course Requirement status.

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT

(Maximum 16.5 hours)

General ..... 16.5 hours Ethics ..... 1.0 hour

CERTIFICATION CREDIT

(Maximum 16.5 hours)

Condominium & Planned Development ..... 16.5 hours
Real Estate ..... 16.5 hours
Business Litigation ..... 16.5 hours
Construction Law ..... 16.5 hours
Tax Law ..... 1.0 hour

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date you will be sent a Reporting Affidavit (must be returned by your CLER reporting date). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be ADVANCED.

REAL PROPERTY, PROBATE AND TRUST LAW SECTION

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Terry L. Hill — Director, Programs Division

For a complete list of Member Services visit our web site at www.floridabar.org.

LECTURE PROGRAM

Friday, February 9, 2018

7:30 a.m. - 8:00 a.m.	**Late Registration**
8:00 a.m. - 8:05 a.m.	**Introductions**
8:05 a.m. - 8:35 a.m.	**Marketable Record Title Act & Curative Statutes** *Melissa Scaletta, Orlando*
8:35 a.m. – 9:00 a.m.	**Title Insurance** *Karla J. Staker, Maitland*
9:00 a.m. – 9:50 a.m.	**Ethics** *Lynwood F. Arnold Jr., Tallahassee* *Frederick W. Jones, Winter Park*
9:50 a.m. – 10:05 a.m.	**Break**
10:05 a.m. – 10:45 a.m.	**Foreclosures** *Alfred A. Lasorte, West Palm Beach*
10:45 a.m. – 11:35 a.m.	**Real Estate Finance and Lending** *David R. Brittain, Tampa*
11:35 a.m. - 12:25 p.m.	**Recording Statute, Priorities and Judgment Liens** *Martin S. Awerbach, Clearwater*
12:25 p.m. – 1:30 p.m.	**Lunch (Included)** *Mary A. Robison, Jacksonville* *Christopher C. Cathcart, Altamonte Springs*
1:30 p.m. – 2:05 p.m.	**Condominiums and Condominium Associations** *William P. Sklar, West Palm Beach*
2:05 p.m. – 2:40 p.m.	**Construction Liens** *Lee A. Weintraub, Fort Lauderdale*
2:40 p.m. – 2:55 p.m.	**Break**
2:55 p.m. – 3:20 p.m.	**Tax Liens and Tax Titles** *Robert G. Stern, Tampa*
3:20 p.m. – 3:45 p.m.	**Surveys and Easements** *Richard W. Taylor, Deland*

3:45 p.m. – 4:30 p.m.	**Homeowner's Associations** *Michael G. Gelfand, West Palm Beach*
4:30 p.m. – 5:00 p.m.	**Environmental Issues** *Roger Schwenke, Tampa*
5:00 p.m. – 6:00 p.m.	**Reception**

Saturday, February 10, 2018

8:25 a.m. - 8:30 a.m.	**Opening Remarks**
8:30 a.m. - 9:10 a.m.	**Doc Stamp Taxes** *E. Burt Bruton, Miami*
9:10 a.m. – 10:00 a.m.	**Far/Bar: Closing Procedures** *Matthew Hoffman, Pensacola* *Brian W. Hoffman, Pensacola*
10:00a.m. – 10:30 a.m.	**Tenancies and Conveyances** *Robert M. Schwartz, Boca Raton*
10:30 a.m. – 10:45 a.m.	**Break**
10:45 a.m. – 11:30 a.m.	**Homestead** *Alan B. Fields, Irvine California*
11:30 a.m. – 12:00 p.m.	**Zoning and Permitting** *Richard Davis, Tampa*
12:00 p.m. – 12:45 p.m.	**Lunch (On your own)**
12:45 p.m. – 1:25 p.m.	**Land Trusts** *Andrew M. O'Malley, Tampa*
1:25 p.m. – 1:55 p.m.	**Bankruptcy** *Marsha G. Rydberg, Tampa*
1:55 p.m. – 2:10 p.m.	**Break**
2:10 p.m. – 2:50 p.m.	**Public Lands and Waterbodies** *Alan B. Fields, Irvine, CA*

2:50 p.m. – 3:20 p.m. **Landlord/Tenant and Mobile Homes**
Jennifer S. Tobin, Orlando

3:20 p.m. – 3:50 p.m. **Case Law and Statutory Update**
Manuel Farach, Fort Lauderdale

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TABLE OF CONTENTS

FORECLOSURES
Alfred A. Lasorte, West Palm Beach

REAL ESTATE FINANCE AND LENDING
David R. Brittain, Tampa

RECORDING STATUTE, PRIORITIES AND JUDGMENT LIENS
Martin S. Awerbach, Clearwater

LUNCH (INCLUDED)
Mary A. Robison, Jacksonville
Christopher C. Cathcart, Altamonte Springs

CONDOMINIUMS AND CONDOMINIUM ASSOCIATIONS
William P. Sklar, West Palm Beach

CONSTRUCTION LIENS

Lee A. Weintraub, Fort Lauderdale

TAX LIENS AND TAX TITLES
Robert G. Stern, Tampa

SURVEYS AND EASEMENTS
Richard W. Taylor, Deland

HOMEOWNER'S ASSOCIATIONS
Michael G. Gelfand, West Palm Beach

ENVIRONMENTAL ISSUES
Roger Schwenke, Tampa

DOC STAMP TAXES
E. Burt Bruton, Miami

FAR/BAR: CLOSING PROCEDURES
Brian W. Hoffman, Pensacola
Matthew Hoffman, Pensacola

Geographic Targeting Order

FR/BAR Contract

TENANCIES AND CONVEYANCES
Robert M. Schwartz, Boca Raton

HOMESTEAD
Alan B. Fields, Irvine California

ZONING AND PERMITTING
Richard Davis, Tampa

LAND TRUSTS
Andrew M. O'Malley, Tampa

BANKRUPTCY

Marsha G. Rydberg, Tampa

PUBLIC LANDS AND WATERBODIES

Alan B. Fields, Irvine, CA

LANDLORD/TENANT AND MOBILE HOMES
Jennifer S. Tobin, Orlando

CASE LAW AND STATUTORY UPDATE
Manuel Farach, Fort Lauderdale

AUTHORS/LECTURERS

LYNWOOD F. ARNOLD, JR. received his undergraduate degree from Stetson University and his law degree from Florida State University. He is a member of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar, currently serving as Co-Chair of the Membership and Inclusion Committee and as Lead At Large Member for the Second Judicial Circuit.Mr. Arnold is a past chair of the Real Property, Probate and Trust Law Section of the Hillsborough County Bar Association. He is a member and past president of the Bay Area Real Estate Council. He is a director of the Capital Region Real Estate Council and member of the Tallahassee Bar Association. Mr. Arnold serves on the Professional Ethics Committee of The Florida Bar and on the Board of Directors of the Legal Aid Foundation of the Tallahassee Bar Association. He is a Master in the William H. Stafford Chapter of the American Inns of Court.Mr. Arnold's practice areas include real estate transactions and litigation; estate and trust litigation; wills, trusts and estates; and the mediation of real estate and estate disputes. Mr. Arnold has been certified by the Florida Supreme Court as a Board Certified Real Estate Lawyer and a Circuit Court Mediator. He has an AV rating from Martindale-Hubbell.

MARTIN S. **AWERBACH** is Board Certified as a real estate lawyer by The Florida Bar. He has an extensive background in real property law and is particularly knowledgeable and experienced in real estate title and title insurance law. Unlike most Board Certified real estate lawyers, Mr. Awerbach primarily practices as a litigator in real property and commercial cases. He is often retained as a consultant, and has testified in both the state and federal courts as an expert witness on real estate, real property titles, and title insurance matters. Mr. Awerbach received his baccalaureate degree from Rutgers College and his Juris Doctor from The Rutgers University School of Law - Camden. Prior to entering private practice, Mr. Awerbach was Vice President and Associate Regional Counsel for Safeco Title Insurance Company's southeast region, consisting of Florida and five other southern states. Before that, he was a Florida State Counsel for USLIFE Title Insurance Company. In 1986, he entered private practice and started the firm that expanded to become Awerbach | Cohn. Mr. Awerbach is a Vice Chair of the Real Estate Certification Review Course Committee, of The Florida Bar Real Property, Probate and Trust Law Section, and a member of the Florida Land Title Association Claims Prevention, Avoidance and Education Committee. He is also on the RPPTL Section's Executive Council, and a member of the Real Property Litigation Committee, the Real Property Problem Study Committee, and the Title Insurance and Title Insurance Liaison Committee. He is a past chair of The Florida Bar Real Estate Law Certification Committee, the Real Property Litigation Committee, and the Real Property Law Committee of the Clearwater Bar Association. He is a lecturer at the annual RPPTL Section's Real Estate Certification Review Course, a frequently requested lecturer at continuing education seminars for attorneys and title insurance professionals, and is co-author of several seminar publications.

DAVID R. BRITTAIN is a shareholder in the Tampa office of the firm Trenam Law and the Co-Chair of its Real Estate and Lending Transactions Practice Group. Since 1990, he has been board certified in Real Estate Law by The Florida Bar Board of Legal Designation and Certification, and concentrates his practice in representation of private sector real estate developers, investors, lenders and managers. Mr. Brittain received his B.A. with high honors, from Furman University (1978) and his M.B.A. and J.D., with honors, from the University of Florida (1982), where he was an editorial member of the University of Florida Law Review. Mr. Brittain is a member of the Hillsborough County and Florida Bars and a Fellow of the American College of Real Estate Lawyers. He currently serves as Chair of the Real Property Finance and Lending Committee of the Real Property, Probate and Trust Law Section of The Florida Bar and is a past Chair of the Legal Opinions Committee of the Section.

BURT BRUTON is a shareholder in the real estate department of the law firm of Greenberg, Traurig, P.A. at its office in Miami, Florida. He is an active member of several committees of the Real Property, Probate and Trust Law Section of The Florida Bar, including the Legislative Review Committee, the Real Estate Structures & Taxation Committee, the Real Property Finance & Lending Committee, and the Title Insurance Committee. Mr. Bruton is a fellow of the American College of Real Estate Lawyers and is the author of a chapter on documentary stamp taxes in The Florida Bar Practice Manual on Florida Real Property Complex Transactions.

CHRISTOPHER C. CATHCART is a solo practitioner in Altamonte Springs, Florida. He received a BS degree in Finance from California State University Long Beach in 1981, and a JD, with honors, from the Florida State University College of Law in 1984. Since graduating and passing The Florida Bar Exam in 1984, he has been in private practice with an emphasis on small business and real estate law. His clients include developers, contractors, shopping center owners, office building owners, and homeowners. He handles real estate transactions and closings, lease preparation and evictions, contract preparation and litigation, probate and probate litigation, code enforcement matters, construction lien and construction defect litigation, and simple wills and trusts. He received his Board Certification in Real Estate Law in 2016.

RICHARD E. DAVIS is a senior counsel in Holland & Knight's Tampa office and a member of the Florida Land Use Team. Mr. Davis represents both public and private clients – before administrative bodies and in court – on a wide range of land use matters, including issues pertaining to zoning, developments of regional impact and comprehensive plan amendments. Mr. Davis has nearly 40 years of experience in land use law practice in Florida, having worked in Hillsborough, Pasco, Manatee, Sarasota, Hardee and Hernando counties and many other municipalities throughout the state. He is board certified in city, county and local government law and serves as a mediator in land use matters as well. Mr. Davis is a member of multiple private organizations relating to land development and is a frequent speaker at seminars concerning the regulation of land development and implementation of comprehensive plans and judicial review of local land use decisions. He has previously served on a select committee appointed by the Board of County Commissioners of Hillsborough County to review and recommend changes to the county's capital improvements budget process. Mr. Davis is Florida board certified in city, county and local government law.

MANUEL FARACH, with three decades of both transactional and litigation experience, including as outside general counsel for a savings and loan association, Manny approaches his clients' legal challenges with a perspective that combines legal knowledge with a practical understanding of the financial services industry. Manny focuses on transactional matters (with an

emphasis on real estate), business litigation, debtor-creditor law, creditor representation in bankruptcy, and appellate law. He is board certified by The Florida Bar in both Real Estate Law and Business Litigation. Throughout his career, Manny has counseled businesses in numerous industries and of varying sizes, including lenders and government agencies such as the Federal Deposit Insurance Corporation (FDIC), the Resolution Trust Corporation (RTC), and the Federal Savings and Loan Insurance Corporation (FSLIC), as well as numerous borrowers in complex transactions. Manny has also provided counsel in corporate mergers and acquisitions; financial and debtor-creditor matters to creditors and lenders (including bankruptcy and complex foreclosure litigation); landlord/tenant disputes; Internet law; and construction and real estate development matters. For more than 20 years, Manny has served as an arbitrator for the American Arbitration Association, has significant FINRA (Financial Industry Regulatory Authority, formerly NASDR) arbitration experience, and is certified as a Florida Supreme Court approved mediator. He also previously served as a Foreclosure Commissioner for the United States Department of Housing and Urban Development (HUD). Manny served as a law clerk for the Honorable C. McFerrin Smith of the Ninth Judicial Circuit Court of Florida while in law school and to Judges James T. Downey and Bobbi Gunther of the Florida Fourth District Court of Appeal following law school. Manny has authored numerous legal publications, including *Florida Real Estate Law* (Thomson-West), the real estate component of West's Florida Practice Series, and publishes the (Florida) Real Property and Business Litigation Report, a highly read weekly compilation of Florida real estate and business cases. The Florida Supreme Court appointed Manny the Chair of its committee on business jury instructions, and he is a regular speaker on topics as diverse as real estate law, business litigation, technology law, and professionalism.

ALAN FIELDS is Senior Vice President and Director of Underwriting Services for WFG National Title Insurance. He is a corporate and real estate attorney with experience in complex transactions and turn-arounds. Alan received his B.A. (Economics) in 1983 from Davidson College and his J.D. from Florida State University College of Law in 1986. He is a past Executive Director of the Florida Land Title Association; has been an active member of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar for over 20 years, and currently serves as its Title Insurance Committee. Alan is a Fellow of the American College of Real Estate Lawyers and has lectured and written extensively on Real Property and Title issues.

MICHAEL J. GELFAND, a Florida Bar Board Certified Real Estate Lawyer, Certified Circuit and County Civil Court Mediator, Homeowners' Association Mediator, Arbitrator, and Parliamentarian. Mr. Gelfand is the senior partner of Gelfand & Arpe, P.A. Located in West Palm Beach, his firm emphasizes a community association law practice, counseling associations and owners how to set legitimate goals and how to effectively achieve those goals. Mr. Gelfand is also a co-owner of ARC Mediation, Palm Beach County's largest mediation and arbitration firm. Michael Gelfand is a Past Chair of The Florida Bar's Real Property, Probate and Trust Law Section, the Bar's largest substantive law section with over 10,000 members. He has served as the Section's Real Property Division Director and chaired the Section's Legislative Review Committee and the Section's Condominium and Planned Development Committee. He also chaired the Palm Beach County Bar's Community Association Law Continuing Legal Education Committee. He served many terms as Special Master for the City of Boca Raton after chairing the City's Builders Board of Adjustment and Appeals. He received a gubernatorial appointment to the Fifteenth Circuit Judicial Nominating Commission. Michael Gelfand is a sought-after community association law commentator, including presentations for the American Bar Association, American Legal Institute, American College of Real Estate Lawyers, The Florida

Bar, the University of Miami and the Chautauqua Institute, among others. His writings have received acclaim, including AThe Plaza East Trilogy: Not a Nursery Rhyme, but Scary Warfare@, *The Florida Bar Journal*, a critical analysis of the collision between hurricanes and Florida's condominium property insurance legislation. The Florida Bar has published his works including "Alternate Dispute Resolution, Arbitration and Mediation" and "Condominium and Homeowner Association Liens" and many statutory updates. Mr. Gelfand has been recognized nationally, as a member of the College of Community Association Lawyers, and as a Fellow of the renowned American College of Real Estate Lawyers, including serving as Chair of ACREL's Common Interest Ownership Committee. Michael Gelfand believes in personal community involvement and encourages others to become involved in their communities. He is a recipient of the Palm Beach County *Pro Bono* Child Advocate of the Year Award. His public-school volunteer efforts include serving as the real estate/construction appointee on the Palm Beach County School District's Construction Oversight and Review Committee, and as a magistrate for the District's Law Magnet Program. He has also served as chair of the Youth Orchestra of Palm Beach County, Florida. For additional information, please visit: www.gelfandarpe.com and www.arcmediation.com

BRIAN W. HOFFMAN: Brian W. Hoffman is a partner with the law firm of Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC, and practices in the firm's Pensacola office. Mr. Hoffman is Board Certified by The Florida Bar in Real Estate. He received his Bachelor of Science degree in Business Administration majoring in Finance with high honors from the University of Florida in 2000 and received his Juris Doctor with honors from the University of Mississippi School of Law in 2002, where he was an associate editor of the Mississippi Law Journal. His practice focuses on commercial litigation, real estate litigation, real estate transactions, debt enforcement actions, and general business and corporate law. He was a Fellow with the Real Property, Probate and Trust Law Section of The Florida Bar for 2012-2014, and he currently serves as a member of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar. Mr. Hoffman serves as Co-Chair of the Title Insurance and Title Insurance Liaison Committee, Vice-Chair of the Real Estate Certification Review Course Committee, and Vice-Chair of the Title Issues and Standards Committee for the Real Property, Probate and Trust Law Section of The Florida Bar.
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MATTHEW C. HOFFMAN is a partner with the firm, of Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC, and practices in the firm's Pensacola office. He received his Bachelor of Science degree in Accounting with highest honors in 2000 from the University of Florida and received his Juris Doctor from the University of Florida College of Law in 2003. In 2013, he received an LL.M. in Taxation from the University of Alabama School of Law. He is admitted to the Florida and Alabama Bars, practices primarily in the areas of residential and commercial real estate transactions, and has significant experience representing lenders in commercial and consumer real estate transactions. Mr. Hoffman is an active member of the Escambia-Santa Rosa Bar Association, serving as President in 2016, and is also a member of the Estate Planning Council of Northwest Florida.

FREDERICK W. JONES is a Florida Bar Board Certified Real Estate lawyer. He has been a member of The Florida Bar for over 40 years, and his legal career includes serving as Staff Counsel for the Florida Real Estate Commission, private practice and Judicial Magistrate positions. In private practice for more than 35 years, most recently as Partner in the Winter Park law firm of Graham, Builder, Jones, Pratt & Marks, LLP, (now Burr & Forman LLP), he has specialized in residential and commercial real estate transactions, mortgage law, agency, title

insurance and lender and broker representation, as well as estate planning and probate. He served as a Special Magistrate for the Orange County ad valorem tax Value Adjust Board and most recently was General Magistrate in Orange County, 9th Judicial Circuit Courts handling residential mortgage foreclosure cases. Mr. Jones received his B.A. from the University of Florida and his J.D. from the University of Florida College of Law. He holds an "AV" rating by Martindale Hubbell and has been recognized as a Florida Super Lawyer from 2007 – 2012. He is a member of The Florida Bar and United States Supreme Court Bar and has been an active member of the American Bar Association and Orange County Bar Association. Mr. Jones is on the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar, has served as Chairman of the Section's Residential Real Estate & Industry Liaison Committee and currently is an At Large Member representing the 9th Judicial Circuit. Mr. Jones was appointed by The Florida Bar as an Attorney member on the Florida Realtor-Attorney Joint Committee and has continuously served on the Joint Committee since 1997, where he is on the FAR/BAR Contract Sub-Committee. He is founding member and past chair of the Central Florida Real Estate Attorneys Council and currently serves as President of the Attorneys' Real Estate Councils of Florida. He is past Chairman of the Real Property Committee of the Orange County Bar Association and was honored with the Attorney Appreciation Award by Orlando Regional Realtors Association in 1996. Mr. Jones is a member of Florida Blue Key, Rotary Club of Winter Park, Winter Park Chamber of Commerce and serves on the boards of various community and charitable organizations.

ALFRED A. LASORTE is a partner in the West Palm Beach office of Shutts & Bowen LLP, where he is a member of the Business Litigation Practice Group. Al is Florida Bar Board Certified in Civil Trial Law and Business Litigation. He has been listed in *Best Lawyers in America*®, *Florida Trend's Florida Legal Elite* and *Florida Super Lawyers*, and he is a Fellow in Litigation Counsel of America, an invitation-only trial lawyer honorary society, limited to less than one-half of 1% of American lawyers. He was also named "Lawyer of the Year" in 2016 by *Best Lawyers*®.With more than 30 years' experience in real estate and commercial litigation, Al's expertise ranges from broad commercial disputes to niche practices in title insurance litigation and foreclosure of large commercial loans. His experience as lead counsel in over 100 jury and non-jury trials and as a former prosecutor in the Fifteenth Judicial Circuit, combined with his knowledge of substantive real estate law, afford him a unique vantage point from which to counsel his clients, whether they are lending institutions, business or real property owners, or title insurers. Al counsels clients on commercial disputes, real estate litigation, foreclosure and title insurance matters. He represents clients concerning large, complex commercial foreclosure actions, title encumbrances and other legal disputes both in and out of court. He is one of a few Florida litigators with a focus on real estate title and encumbrance issues. Al has been retained as an expert witness in numerous commercial and real estate cases and has been court-appointed as special master and as receiver. He has also been called upon to sit as mediator in more than 150 business and real estate litigation matters. For the past twelve years, Al has been selected by The Florida Bar to present the mortgage foreclosure seminar at the annual Florida Bar Real Estate Certification Review Course in Orlando. He frequently speaks at seminars across the state on advanced topics concerning real estate litigation, including the Attorneys Title Fund Assembly in Orlando and the University of Miami's Annual Ralph E. Boyer Institute on Real Property Law. He's a member of the Palm Beach County Bar Association and the Florida Land Title Association and a former member and past chair of The Florida Bar Business Litigation Certification Committee and the 15th Judicial Circuit Professionalism Council. Al has held leadership positions with various community organizations for many years. He's a former member of the Board of Directors of the Friends of the West Palm Beach Public Library. An avid amateur astronomer, Al's library lectures on "Galileo" have been among the library's best

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ANDREW M. O'MALLEY is a partner with Carey, O'Malley, Whitaker, Mueller, Roberts & Smith, P.A. in Tampa, Florida. He graduated with high honors from the University of Kentucky and received his law degree from Duke University, where he was a member of the Editorial Board of the Duke Law Journal. He has lectured at ABA and Florida Bar seminars on such topics as land trusts, commercial leases, boundary law, foreign investment in U.S. real estate, basic real estate transactions, advanced real estate law and ethical considerations in real estate transactions. He is the past-President of The Florida Bar Foundation, a Fellow of the American Bar Foundation, the chair of The Florida Bar Real Property, Probate and Trust Law Section, recipient of the RPPTL Section's 2008 Lifetime Professionalism Award and 2009 Annual Service Award and has chaired the land trust committees of The Florida Bar and the American Bar Association. He is the co-author of AUsing Land Trusts to Prevent Small Farmer Land Loss,@ *ABA Real Property, Trust and Estate Law Journal*, Fall 2009 issue. He was elected to the American College of Real Estate Lawyers and has been selected for inclusion in both *Florida Super Lawyers* magazine and *Florida Trend* magazine's "Legal Elite."

MARY ROBINSON was born in St. Paul, Minnesota, and is a graduate of the University of Minnesota at Duluth (B.A., magna cum laude, 1980), and Duke University (J.D., 1983). Mary was admitted to The Florida Bar in 1983. Mary is Board Certified in Real Estate by The Florida Bar Board of Legal Specialization and Education and is currently serving as the Chairman of the Real Estate Certification Committee of The Florida Bar. Mary served as a member of The Florida Bar's steering committee for the fifth edition of *Florida Real Property Complex Transactions*. Mary's younger daughter, Clara, is a graduate student in coastal biology at The Virginia Institute of Marine Science. Her older daughter, Rachel, teaches Latin at Windermere Preparatory School in Windermere, Florida.

MARSHA RYDBERG concentrates her practice in real estate, commercial litigation, land use, and bankruptcy. She is a graduate of Emory University and Stetson College of Law, where she finished first in her class. Marsha is a past member of The Florida Bar Board of Governors, having served twice on its Executive Committee, as well as on numerous other Bar and Board Committees, including Legislation and Budget. She is a past chair of the Bar's Council of Sections and currently is a member of the Executive Councils of the Real Property, Probate and Trust Law and the Business Law Section. Marsha is a past President of the Hillsborough County Bar Association and in 2014 was named that Association's Outstanding Lawyer of the Year. In 2015, Marsha received the Hillsborough Association of Women Lawyers' "Trailblazer" Award and the Hillsborough County Trial Lawyers' Michael J. Fogarty "In the Trenches" Award. She has been a member and chair of the Stetson Law School Board of Overseers and has served as an adjunct professor, teaching Banking Law and Real Property Finance. In 2014, she was named to

the Stetson Hall of Fame. Marsha also has been active in numerous civic, religious and community organizations.

MELISSA SCALETTA, Vice President, Chief Underwriting Counsel. I began working at The Fund in a March of 1998. I wanted to work at a The Fund because I had a desire to increase my knowledge and experience with transactional real estate and title issue while working among the experts in the industry. I am driven to work for The Fund by its Members and the importance of the role Florida real estate lawyers play in real estate transactions. Some of my favorite Member experiences all involve digging into challenging real estate transactions and title problems. Fund Members sometimes encounter pressure to close transactions despite unique title issues. I enjoy working towards creative solutions to resolve these title concerns. Consumers are uniquely protected with involvement of attorney title agents in real estate transactions. The ongoing presence of attorneys in real estate transactions is the essence of The Fund's mission. Working among experienced and talented real estate lawyers, both Fund Members and Fund employees, to continue achieving industry expertise and consumer protection is inspirational and motivating

ROBERT M. SCHWARTZ, B.C.S. has been actively engaged in the practice of law in Florida for more than 45 years, has been certified by The Florida Bars Board of Legal Specialization & Education as a Florida Bar Board Certified Real Estate Lawyer since 1987 when the program began and is a widely recognized expert in the field of Real Property Law. A member of the Executive Council of the Real Property, Probate and Trust Law Section (www.RPPTL.org) of The Florida Bar (www.FlaBar.org) for more than 20 years, he is a past Chair (and current member) of the Condominium & Planned Development Committee of the Section and is currently the Lead At Large Member of the Council for the 15th Judicial Circuit. He also is a member of the Commercial Real Estate, Problem Study, and Landlord Tenant Committees of the Section. He has been a lecturer on real property subjects for more than 30 years and has been a faculty member and speaker for the annual Florida Bar Advanced Real Estate Law and Certification Review Course every year since 1993 and has presented the section of the Course concerning Tenancies and Conveyances every year since 1996. He has also been a speaker at The Florida Bar's annual Condominium Law Seminar, Attorneys Title Insurance Fund's Annual Assembly, and The Institute on Condominium Cluster Development sponsored by the University of Miami Law Center. He has served as an expert witness concerning Real Property matters in lawsuits throughout South Florida and has repeatedly qualified as an expert witness in trials conducted in several Florida counties. Mr. Schwartz's practice today primarily involves real estate transactions. His practice has included the representation of developers, real estate entrepreneurs, lenders, condominium associations, homeowner associations, title insurance companies, other lawyers, and individual buyers or sellers of residential and commercial properties. He has been involved in significant real estate projects such as the acquisition and development of residential communities, office complexes, and shopping centers, involving construction, sales, financing, property management, and leasing. He has also served as local counsel for out-of-state law firms, institutional lenders, and development companies. He has been a member of Attorneys Title Insurance Fund since 1973 and is currently an attorney agent for Old Republic National Title Insurance Company. He has been an approved closing agent for institutional lenders doing business throughout Florida. A past President of the South Palm Beach County Bar Association and a past member of the Board of Directors of the Palm Beach County Bar Association, he has also served as the chairman of the Palm Beach County Realtor/Attorney Joint Committee. He has been an approved instructor by the Florida Real Estate Commission. Mr. Schwartz received his Juris Doctor degree from the University Of Florida College Of Law in 1971. He holds the Martindale Hubbel Directory's highest possible rating AV.

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WILLIAM SKLAR, a member of the real estate and finance practice group, represents developers and lenders. He assists them with planning, drafting, and the development of residential, commercial, and complex mixed-use condominiums and planned developments. Mr. Sklar also serves as regulatory counsel in compliance matters under numerous federal, state, and local statutes; regulations; and ordinances, including the Interstate Land Sales Full Disclosure Act (ILSA), Fair Housing Act, and Florida Condominium and Homeowners Association Acts. Additionally, he represents clients in real estate transactions and financing. Mr. Sklar is an adjunct professor of law at the University of Miami School of Law and a member of the faculty of the LLM graduate law program in real property, teaching courses in condominium and planned development law and a related drafting and litigation workshop since 1980. He is Director of the University of Miami's Boyer Institute on Condominium and Cluster Developments. Mr. Sklar is board certified by The Florida Bar in Real Estate Law and by the Supreme Court of Florida as a Circuit and County Court Mediator.

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ROBERT STERN joined the firm in 1990 and is the co-leader of the Real Estate & Lending Transactions Group. Robert represents clients in all aspects of real estate, distressed property, and financing commercial work. His practice focuses on commercial real estate, with an emphasis on transactional and financing matters. His clients include developers, lenders, investors, and retailers. Robert has served as an expert witness, receiver, mediator and adjunct professor of law. He strives to add value to every deal as a trusted advisor for his clients, based on negotiation skills and practical experience honed over twenty years of buying, developing, financing, permitting, leasing and selling commercial real estate.

RICHARD W. TAYLOR is the senior member of the firm Taylor and Nordman, P.A. in DeLand, Florida. He received his BA degree from Florida State University in 1970 and his JD degree, with honors, from Florida State University in 1973. He has been in private practice in his hometown DeLand since 1977, practices primarily in the fields of real property, probate, and trusts. He regularly handles real property, probate and trust litigation and resolution of such

matters. He serves on the Real Property Problems Study Committee of the Real Property, Probate and Trust Law section and co-chairs the Uniform Law and Model Acts Committee. He has fern and citrus interests and is Chairman of the Board of Surety Bank in DeLand. He has been a Florida Board Certified Real Estate Lawyer since 1987.

LEE WEINTRAUB, at age 46, was the youngest recipient ever of the Lifetime Achievement Award from The Florida Bar's Construction Law Committee. Mr. Weintraub is also an adjunct professor of law at Nova Southeastern University Shepard Broad College of Law teaching construction law. In 2009 and 2013, Florida Trend magazine named him one of Florida's Legal Elite, an honor bestowed on only the top 2% of Florida lawyers. He was selected by Florida Super Lawyers every year from 2007 through 2017, which names Florida's top 5% of lawyers as chosen by their peers. Mr. Weintraub has been recognized by Chambers USA – America's Leading Business Lawyers every year since 2003. Chambers USA noted he focuses on licensing and construction defect litigation, but is particularly renowned for his expertise in the Construction Lien Law. He was also selected in the Best Lawyers in America© every year from 2006 through 2018. Mr. Weintraub is Board Certified in Construction Law by The Florida Bar and serves as Vice Chair of the Firm's Construction Law Practice Group. Since passing the construction law board certification exam, he has served as a board certification exam course instructor every year the course has been offered. He is a certified arbitrator for the American Arbitration Association and, as a lawyer, represents owners, developers, contractors, subcontractors, design professionals, bond sureties and other commercial entities in litigation, arbitration and transactions. He is a frequent lecturer statewide, nationally and internationally on construction related topics. The Firm's Public Private Partnership (P3) practice team is led by Mr. Weintraub along with Vice-Chair Jennifer Drake. This multi-disciplinary team of professionals is experienced in development, construction, government, real estate, corporate, finance, procurement, and land use. Mr. Weintraub helped draft, negotiate and advocate for the P3 legislation that became law in Florida in 2013 and all its subsequent amendments. He is a frequent lecturer and author on the nuances of how to structure P3 projects. He is also a founding member and former Chair of the Florida Council for Public/Private Partnerships, a non-profit consortium of public and private sector organizations working together to further P3 opportunities.

BANKRUPTCY

By

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Bankruptcy and Creditors' Rights

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I. INTRODUCTION

Bankruptcy is Code-based; most real property law is based on "common law."

a. Code Chapters 1, 3 and 5 apply to all bankruptcy cases.
b. The other Code Chapters relate to particular types of cases and relief.

The most common types of bankruptcy cases are:

a. Chapter 7- liquidation for individuals and (most corporations).
b. Chapter 13- debt adjustment for individuals with regular income, subject to and debt ceilings. [Chapter 12 is similar to Chapter 13, but it relates to family farmers.]
c. Chapter 11- reorganization for individuals, corporations and partnerships.

Bankruptcy Court jurisdiction is set forth at 28 USC §1334 and includes matters:

a. Arising under Title 11 (the Code);
b. Arising in Title 11; or
c. Related to cases under Title 11. ***In re TMT Procurement Corp.,*** 764 F.3d 512 (5thCir.2014).

The Anna Nicole Smith case for alleged tortuous interference with inheritance, ***Stern v. Marshall,*** 131 S.Ct.2594 (2011) originated in State Court. After she filed for Bankruptcy relief, it was removed to the Bankruptcy Court as a "related to" proceeding. The United States Supreme Court, in reversing the Bankruptcy Court, articulated the jurisdictional parameters for "related to" proceedings holding Bankruptcy Courts lack jurisdiction to render a final adjudication in such matters. Bankruptcy Courts only may prepare and submit findings of fact and conclusions of law for final determination by an Article III (District Court) judge. Although this decision led to substantial jurisdictional wrangling, in the final analysis, most cases either settle before trial or the District Court adopts the Bankruptcy Court's findings and conclusions.

II. WHAT DO THE NUMBERS 7, 13, AND 11 MEAN IN BANKRUPTCY COURT?

Chapter 7- Liquidation for Individuals and most Corporations and Partnerships.

In Chapter 7 Cases a Trustee (a Department of Justice employee) liquidates the Debtor's non-exempt assets. The Chapter 7 administers the Debtor's estate by collecting the Debtor's assets, paying the costs of administration, and equitably distributing any remaining assets to creditors in accordance the Bankruptcy Code priorities.

Bankruptcy follows an "entity theory" for corporations and partnerships. Since the partnership agreement may provide it will be dissolved on the bankruptcy filing of one of the partners, the partnership agreement should be considered before filing.

Since 2005, individuals whose debts are primarily consumer debts[a] have been required to satisfy the "means test" to be eligible to file Chapter 7. If the Debtor receives less than the State's median income, she qualifies automatically for Chapter 7. Otherwise, the "means test" must be applied to determine whether the Debtor is eligible for Chapter 7. The "means test" is a complex formula to determine whether the Debtor has the "means" to pay creditors some of their allowed claims; it is based on IRS guidelines. Code §707. A split exists regarding the applicability of the means test to involuntary and converted Chapter 7 Cases. ***In re Fox***, 370 B.R.639 (Bankr.D.N.J.2007). Code §707(b)(1). BUT SEE: Judge Glenn required such Debtors to meet the means test. ***In re Summerville,*** 515 B.R. 651 (Bankr.M.D.Fla.2014).

A party in interest may move to dismiss a Chapter 7 case for failure to satisfy the "means test." Instead of a presumption in favor of bankruptcy relief for a Chapter 7 Debtor, a presumption of abuse arises if the Debtor fails the means test. Code §707. Sanctions for "bad faith" Chapter 7 filing apply both to the Debtor and to counsel. To avoid sanctions, the Debtor and counsel must prove the Chapter 7 was filed after a good faith, duly diligent examination to assure the Debtor's eligibility for relief.

A Chapter 7 Case may be dismissed for "cause" based on the "totality of the circumstances;" the statutory grounds for dismissal are not exhaustive. ***In re Piazza,*** 719 F.3d 1253 (11thCir.2013).

[a] Developers, whose debts primarily are guarantees of business obligations, may be eligible for Chapter 7 because their debts generally are not primarily consumer debts. Thus, developers/ business guarantors may prefer Chapter 7 over an individual Chapter 11, which is more expensive and burdensome, and over Chapter 13 because the amount of their guarantees may disqualify them from relief.

Chapter 13- Debt Adjustment for Individuals with Regular Income.

Chapter 13 always is voluntary involuntary Chapter 13 Cases are not permitted. Only individuals with regular income, who owe less than $394,725 in non-continent, liquidated, unsecured debt and less than $1,184,200 in non-continent, liquidated, secured debt are eligible. Code §109(e). [These amounts vary periodically.] Wage earners use Chapter 13 to protect their home from foreclosure because a default on the Debtor's principal residence can be cured at any time until the home is foreclosed.

A Chapter 13 Estate includes all the Debtor's pre-petition property and all property acquired after commencement of the Case, but before the Case is closed, dismissed or converted, whichever first occurs. A Chapter 13 Trustee is appointed, but unlike Chapter 7, a Chapter 13 Debtor retains her assets.

Early in the Case, the Debtor proposes a Plan. The Debtor must agree either to pay all her debts in full or to pay all excess revenues over her living expenses (all "disposable income") to the Chapter 13 Trustee.[b] The Trustee distributes the money to creditors in accordance with the confirmed Plan. Code §1306. A Chapter 13 Case should result in a Plan, which is much like a Court-approved budget, lasting for 3-5 years.

Chapter 13 Cases generally move quickly, with little creditor involvement. Creditors do not vote on the Plan and no disclosure statement is filed, though they may file Objections to it. The Court then conducts a hearing on the Objections to determine whether to confirm the Plan.

Unsecured creditors must receive deferred payments equal to or better than they would receive under Chapter 7.

Secured creditors either must accept the Plan or retain a lien on the collateral and receive value, as of the "effective date," not less than the allowed amount of their secured claim. Payments should be received in sufficient equal monthly amounts at least to provide "adequate protection." Code §1322(c)(2). If the last mortgage payment on the Debtor's home is due before the last Plan payment, payments may be revised and extended over the length of the Plan.

[b]An above-median-income Debtor's Plan may provide for full payment of all unsecured claims within 5 years without devoting all disposable income to the Plan. ***In re Winn***, 469 B.R.628 (Bankr.W.D.N.C.2012); ***In re Richall***, 471 B.R.245 (Bankr.D.N.H.2012).

A mortgagee cannot be forced to accept less than the full amount of the debt to release its lien on the Debtor's home. ***Nobleman v. Am.Svgs.Bank,*** 508 U.S.324, 113 S.Ct.2106, 124 L.Ed.2d 228 (1993). Further, neither the Bankruptcy Code nor Florida law, permit a Chapter 13 Debtor's Plan to force a secured creditor, which has not asserted control over the property or initiated a foreclosure, to accept a quitclaim deed to the Debtors' residence. ***In re Rose,*** 512 B.R.790 (Bankr.W.D.N.C.2014).

The automatic stay continues until discharge, which follows final payment under the Plan; however, secured creditors retain their liens on collateral until they are paid in full. Code §1325. If the Chapter 13 Case is converted or dismissed before the Plan is completed, the lien remains on the collateral to the extent provided by non-bankruptcy law. Code §1328. Also, any lien "stripped" from property reattaches if the Plan is not paid in full. Because of this, title insurance underwriters have adopted special procedures for insuring properties under these circumstances.

The Chapter 13 confirmation hearing is to be held 20-45 days after the Meeting of Creditors. Code §1324. Before confirmation all required tax returns must have been filed; the Court must find the petition was filed in good faith; and all post-petition domestic support obligations must be current. Code §1307, 1308. "Best interests of creditors" as of the effective date of the Plan is the test for confirmation.

Chapter 11- Reorganization for Individuals, Corporations, and Partnerships.

When a Chapter 11 Case is filed, the Debtor automatically becomes new entity, a "Debtor-in-Possession" ("D-I-P"). Although the Debtor's management remains in control, the D-I-P is considered a separate entity from the Debtor. The D-I-P has all the rights, duties and powers of a Bankruptcy Trustee.

Unlike the Chapter 7 Estate, which includes only the Debtor's pre-petition, non-exempt assets, the Chapter 11 Bankruptcy Estate includes all the Debtor's pre- and post-petition non-exempt assets.

Chapter 11 is available for individual Debtors, as well as for corporations and other entities. Although individuals always have been able to file Chapter 11 petitions, special provisions were added in 2005 which make individual Chapter 11 cases resemble Chapter 13s in some ways. Attorneys make a mistake if they treat an individual Chapter 11 Case exactly like a Chapter 13. Chapter 11 is more complex and expensive than Chapter 13 and it imposes greater burdens on Debtors and their lawyers, but it allows the Debtor a breathing spell to restructure her debt.

As with Chapter 13, individual Chapter 11 Debtors cannot receive a discharge until the confirmed Plan is successfully completed. Post-petition earnings are included in the Plan, which must extend at least 5 years. Code §1115. If a creditor files an objection to the Plan, the Court will consider whether the Debtor is contributing her non-exempt pre-petition assets and all her disposable post-petition income to the Plan as a condition of confirmation. Code §1129(a)(15).

For 180 days after the bankruptcy filing (100 for small business Debtors), the Debtor has an "exclusivity period" during which only the Debtor may file a Plan. Code §1121. The "exclusivity period" may be extended (or reduced) by the Court "for cause;" however, the absolute deadline for exclusivity is 300 days. After the exclusivity period expires, or if a Trustee is appointed, any "party-in-interest" may file a Plan.

A Plan may call for reorganization or liquidation of the Debtor. "Claims" (of creditors) and "interests" (of equity security holders) must be separately classified, but each claimant/interest holder within a class must be treated the same. Each secured claim generally is classified separately; however, since claims are secured only to the extent of the "value" of the collateral, an under-secured claim may be divided into both secured and unsecured classes. Code §506(a).

Only "impaired" classes may vote on the Plan. A class is impaired unless the Debtor cures all defaults and leaves the claimant's rights unaltered or offers to pay cash equal to the allowed Claim amount.

Plan confirmation requires a favorable vote by 2/3 in amount and ½ in number of the creditors voting "allowed" Claims. Code§1126, 1129. Allowed Chapter 11 Claims include:

- Claims not scheduled as disputed, unliquidated, or contingent,
- Filed Claims to which no objection has been filed, and
- Claims which the Court has "allowed."

At least one impaired class of Claims, excluding insiders, must accept the Plan. In addition, the Plan must be "feasible," and it must comply with all the provisions of the Bankruptcy Code, including the "absolute priority rule." Code §1129.

The absolute priority rule precludes the Debtor from making any payment to a junior creditor or class (or to equity) unless all senior classes and creditors have been fully paid or have accepted the Plan. In other words, the Debtor's equity interest holders [or the individual Debtor] cannot retain any asset unless all creditors are fully paid or

have accepted the Plan.[c]

Most Courts hold an individual Debtor's post-petition earnings are excluded from the absolute priority rule, but the rule applies to all other property of the Debtor. Accordingly, an individual Debtor cannot retain any property (except exempt assets, e.g., homestead) unless all creditors agree or will be fully paid within the 5-year Plan period. ***In re Martin,*** 497 B.R. 349 (Bankr.M.D.Fla.2013); ***In re Maharaj***, 681 F.3d 558 (4thCir.2012); ***In re Lively,*** 717 B. R.406 (5thCir.2013)**; *Dill Oil Co., LLC v. Stephens,*** 704 F.3d 1279 (10thCir.2013); ***In re Gelin,*** 437 B.R.435 (Bankr.M.D.Fla.2010). BUT SEE: ***In re House American, LLC v. Cardin,*** 751 F.3d 734 (6thCir.2014).

The Plan may be confirmed even if not all Classes have accepted it; this is the famous/notorious "cramdown." Code §1129(b). As a condition of "cramdown," the Plan cannot discriminate unfairly and it must be "fair and equitable" to each impaired class that has not accepted the Plan. Holders of impaired secured Claims must receive the "indubitable equivalent" of their allowed Claims, to wit, they must retain their liens on the collateral and receive deferred cash payments totaling at least the value thereof. If collateral is to be sold, liens are transferred to the proceeds of the sale.

BUT SEE: Code §1141(c) provides that, unless the Plan or Confirmation Order preserves a lien, it is extinguished by confirmation. Several Courts have refused to extinguish a secured creditor's lien unless it participated in the bankruptcy (not merely received copies of notices and pleadings). ***City of Concord, N.H. v. N.New England Tel. Operations LLC,*** 795 F.3d 343 (2ndCir.2015); ***In re Ahern Enterprises, Inc.,*** 507 F.3d 817 (5thCir.2007); ***In re Be-Mac Trans.Co.,*** 83 F.3d 1020 (8th Cir.1996); ***JCB, Inc v. Union Planters Bank, NA,*** 539 F.3d 862 (8thCir.2008).

A 4-prong test for extinguishing a lien under Code §1141(c) has been established:

- The Plan must have been confirmed;
- The collateral must have been dealt with in the Plan;
- The lienor must have participated in the reorganization; and
- The lien must not have been preserved under the Plan.

[c] A senior creditor, like a bank, may agree to set aside or "gift" money to be distributed among "lower Classes"—e.g. unsecured claimants or administrative expenses, like attorney's fees, but this "gift" must be voluntary. ***In re ICL Holding Co., Inc.,*** 802 F.3d 547 (3rdCir.2015). Plan negotiations often center on establishment of such a set aside or "carve out," to induce other creditors to vote in favor of the Plan.

In ***Acceptance Loan Co., Inc. v. S. White Trans., Inc,*** 725 F.3d 494 (5thCir.2013), the Court held "participation" requires lienor activity, not mere nonfeasance (receipt of notices).

III. The Bankruptcy Discharge and Other Debtor Benefits. Code §524

Discharge is the primary goal of every Debtor. Discharge voids any *personal judgment* against the Debtor and operates as an injunction against any act to recover that personal debt. Code §524(a)(b). Discharge does **not** eliminate the debt; hence, discharge, per se, does not destroy any lien**.**

Corporations are not eligible for a Chapter 7 discharge.

Ordinarily, the bankruptcy discharge is available only to the Debtor, not to its shareholders/officers who are guarantors of corporate debt; however sometimes, especially if shareholders/officers contribute substantially to the reorganization, Bankruptcy Courts have permitted them to be discharged from their corporate guarantee obligations, even over the objection of secured creditors and the US Trustee. ***In re FFS Data, Inc.,*** 776 F.3d 1299 (11th Cir.Fla.2015).

The general period between discharges is 8 years. Code §727(a). Chapter 13 Debtors cannot receive a discharge if they received one under Chapter 7, 11 or 12 within 4 years before the new Chapter 13 or if they obtained a Chapter 13 discharge within the preceding 2 years. Code §1328(f).

Discharge cannot be granted until after any homestead challenge and any proceeding based on certain corporate improprieties has been finally resolved. Code §§522(q), 727(a), 1141(d), 1228(f), 1328(h).

Further, home membership association fees and assessments cannot be discharged while the Trustee/D-I-P has legal, equitable, or possessory title to the property. Code §523(a)(16).

"Domestic support obligations" are non-dischargeable. Code §101(14A), 523(a)(5) and (15).

Claims not scheduled by the Debtor will not be discharged if the creditor lacked actual knowledge of the Bankruptcy Case; however, such claims will be discharged if the creditor knew about the Case and failed to file a Proof of Claim, even if he received no formal notice from the Debtor or the Court.

Two types of proceedings are available to contest the Debtor's discharge:

- Code §727 provides grounds to bar a Debtor's discharge entirely. Examples include certain fraudulent activity and failure to maintain adequate books and records. ***In re Von Kiel,*** 486 B.R.327 (E.D.Pa. 2013); ***In re Boyajian,*** 486 B.R.306 (Bankr.D.N.J.2013).
- Code §523 lists exceptions to the discharge under certain circumstances. In Chapter 7 or 11, a creditor must timely file an adversary proceeding to avoid discharge if the debts were for:
  - Money, property, services or credit obtained by fraud;
  - Fraud or defalcation, while acting as a fiduciary, embezzlement, or larceny[d];
  - Willful or malicious injury to person or property.

The Chapter 13 "super-discharge" allows even these types of debts to be discharged.

Structured Dismissal.

Even without a confirmed Plan, Courts have approved a "structured dismissal" of a corporate Chapter 11 Case on agreement of all stakeholders. Even though discharge generally is not available in bankruptcy for corporations, the same result can be achieved through a Chapter 11 confirmed Plan or structured dismissal. Often these arise after a bankruptcy sale of all the Debtor's assets, which renders the Debtor administratively insolvent. To avoid incurring additional cost and time to convert the Case to Chapter 7, the Court may approve a "structured dismissal" if all US Trustee fees and administrative expenses have been paid and all excess funds are paid, pro rata, to unsecured creditors. ***In re Buffet Partners, LP,*** 2014 WL 3735804 (Bankr.N.D.Tex.2014).

Lien Stripping. Code §506

One of the Debtors bankruptcy benefits is "lien stripping." Code §506. Because a creditor is "secured" only to the extent of the value of its collateral, a creditor whose collateral is "underwater" (the value of the collateral is less than the amount of the debt) may have its lien stripped, leaving the creditor a partially secured claim for an amount equal to the value of its collateral and an unsecured claim for the balance. If the lien is junior to a prior lien, which equals or exceeds the full value of the collateral, the Debtor may "strip" away the entire lien and the creditor is left with only an unsecured claim against the Debtor.

[d] See: ***Bullock v. Bankchampaign,*** 133 S.Ct.1754 (2013).

Lien stripping cannot be applied to a Debtor's primary residence if the creditor's secured claim has been "allowed" under Code §502(a). For several years, the 11th Circuit (and other circuits) allowed Debtors to strip wholly unsecured junior liens off Debtor's primary residence. In ***Bank of America, N.A. v. Caulkett,*** **575 U.S.__, 135 S.Ct.1995 (2015)**, the US Supreme Court rejected that concept in Chapter 7 cases, reaffirming its decision in ***Dewsnup v. Timm***, 502 U.S. 410, 112 S.Ct.773 (1992) and declaring that a claim which has been "allowed" under Code §502 cannot be stripped off property by application of Code §506(d).

IV. <u>The Case Begins.</u>

The filing of a Voluntary Petition initiates a bankruptcy "Case." Code §101(42). Individual Debtors must take a pre-bankruptcy credit counseling course before filing. Within the "Case," adversary "proceedings" and "contested matters" may be filed or may be removed from State Court.

In a voluntary Case, the Petition constitutes an Order for Relief. The Bankruptcy Code and Rules go into effect immediately. Code §301. Similarly, in a joint Case (individual and spouse), the Petition constitutes and Order for Relief. Code §302.

Shortly after a Petition is filed, the Court sends a Notice to all creditors listed/ "scheduled" by the Debtor. The Notice includes the Case number and other important data, plus several critical deadlines, such as the "Claims Bar Date" and the deadline for filing Complaints Objecting to Discharge or to the "Dischargeability" of a specified debt. It also provides the date and place for the Meeting of Creditors.[e]

The Debtor should file a Suggestion of Bankruptcy in all pending litigation to provide notice of the bankruptcy to the State or Federal Court and to all parties. This does not always occur, but the stay is in effect even if no Suggestion is filed.

An Involuntary Chapter 7 or 11 Petition may be filed pursuant to Code §303.[f] Such a Petition must be filed by 3 or more creditors who have non-contingent claims that are not subject to dispute either as to liability or amount. Their aggregate claims must exceed any lien securing claims on the Debtor's property by $15,775 (adjusted

[e] One of the most "dangerous" aspects of bankruptcy is the strict enforcement of deadlines, often with drastic consequences for failure to comply. For example, if sufficient facts exist, all claims of the Debtor's creditors, except your client, can be discharged, but a timely adversary proceeding objecting to the dischargeability of the debt must be instituted under Code § 523(a)(2),(4) or (6).

[f] Involuntary Chapter 13 Cases are not permitted.

periodically.) [If there are less than 12 eligible creditors, the Petition may be filed by 1 creditor meeting those requirements.]

The Debtor may contest the Petition and argue the Case was improperly filed because its assets exceed its debts or because it is able to pay its debts as they become due. The Court then will conduct a hearing to determine whether the Debtor is insolvent. If the Court finds against the Debtor, the Court enters an "Order for Relief." Although the automatic stay goes into place immediately on filing the involuntary Petition, the Case commences on issuance of an Order for Relief; hence, most bankruptcy provisions, like the cash collateral restrictions, do not go into effect until an Order for Relief is entered.

If the Court finds the involuntary Case lacks merit and declines to issue an "Order for Relief," the involuntary Debtor may seek sanctions against the petitioning creditors. Code §303(i). ***In re Meltzer,*** 516 B.R.504 (Bankr.N.D.Ill.2014); ***Crest One SpA v. TPG Troy LLC,*** 793 F.3d 228 (2nd Cir.2015).

The Bankruptcy Estate. Code §541

The filing of a bankruptcy Petition creates an "Estate," which includes all legal and equitable interests of the Debtor in property. In Chapter 7 Cases (but not in Chapter 11, 12 or 13 Cases), "Property of the Estate" includes only pre-petition non-exempt assets, plus property acquired from inheritance/bequest, divorce/property settlement or life insurance policy within 180 days after filing. In ***Underhill v. Huntington Nat'l Bank, 579 Fed.Appx.480*** (6th Cir.2014), the Court had to determine whether the settlement proceeds from certain litigation were Property of the Estate, subject to the claims of creditors. Relying on ***Segal v. Rochelle,*** 382 U.S.375 (1966), the Court determined the claims were not "rooted" in a pre-petition violation or injury; therefore, they were not Property of the Estate.

The Estate does not include any power a Debtor may exercise solely for the benefit of another, e.g. property the Debtor holds as trustee or in an escrow account. ***In re Atlantic Gulf Communities Corp.***, 369 B.R.156 (Bankr.D.Del.2007).

By operation of law, all Property of the Estate is involuntarily transferred to the Trustee or D-I-P, without notice in the real estate records. Until or unless the Property has "re-vested" in the Debtor, any post-petition transfer of Property of the Estate, by sale or lien, must be in the name of and executed by the Trustee/D-I-P. Accordingly, if a Debtor purports to transfer title to or grant a lien on Property of the Estate, the act is a nullity, even if the Property was not scheduled in the bankruptcy.

All "Property of the Estate" must be administered in one of the following ways:

- The Trustee may abandon it. (Code §554).
- It may be declared exempt.[g]
- A secured creditor may obtain stay relief and execute on the collateral.
- It may be dealt with in a confirmed Plan, which may re-vest title in the Debtor, free and clear.

To abandon Property:

- The Trustee may file a Motion declaring the asset is burdensome to the Estate or of inconsequential value. If the Court agrees, the asset may be abandoned back to the Debtor, subject to all liens.
- Property also is deemed to have been abandoned to the Debtor if it is scheduled, but not administered, and the Case is closed. Code §554(c).

BUT SEE: Because it is property of the Debtor, abandoned property remains subject to the automatic stay under Code §362(a)(5) until discharge or closure of the Case; therefore, in an open Case, a secured creditor should obtain stay relief before enforcing its *in rem* rights even as to abandoned property. ***Gasprom, Inc. v. Fateh (In re Gasprom, Inc.),*** 500 B.R. 598 (BAP 9thCir.2013).

If Property is not scheduled and the Case is closed, the asset remains Property of the Estate. Code §554(d). The Estate must be reopened and the property must be scheduled and administered by the Trustee. See: ***In re Dunning Bros. Co.***, 40 B.R.877 (Bankr.E.D.Cal.2009). The Case was reopened after 70 years to administer and sell real estate with a clear title.

Schedules and Statement of Financial Affairs.

In addition to the Petition, a Debtor must file Schedules and a Statement of Financial Affairs ("SOFA"), which list all the Debtor's assets and liabilities and provide certain other information. They are signed under oath and penalty of perjury.

Schedule C lists the exemptions claimed by an individual Debtor. The Trustee and creditors have only 30 days after the Meeting of Creditors is concluded within which to object to an improperly claimed exemption. ***Taylor v. Freeland & Kronz,*** 508 U.S.638,

[g] Even if the Debtor is not entitled to the exemption, if the asset is listed on Schedule C and no one timely objects, it is exempt. ***Taylor v. Freeland & Kronz***, 508 U.S.638, 112 S.Ct.1644 (1992).

112 S.Ct.1644 (1992). After that deadline, even if the Debtor would not have been legally entitled to exempt the asset, it is exempt.

BUT: Where a Debtor properly claims an asset (like business equipment) as exempt and declares the asset value to be within the exemption limits, a creditor may challenge the Debtor's valuation even after the 30-day deadline. If the Court determines the property is worth more than the exemption limit, the Trustee may liquidate/sell the property and administer the excess value for the Estate. ***Schwab v. Reilly,*** 130 S. Ct.2650 (2010).

Meeting of Creditors. Code §341

A Meeting of Creditors is held in all Cases. The Meeting is conducted either by a member of the United States Trustee's staff (in Chapter 11 cases) or by the Chapter 7 or 13 Trustee assigned to the Case. No judge is present, but the Debtor is examined under oath. Although "341 Meeting" practice varies among Districts and Divisions, the Meeting generally is taped, but not transcribed, unless a creditor brings by a court reporter to the Meeting. The Debtor is examined based on the Schedules and "SOFA" (Statement of Financial Affairs). Creditors may have a limited opportunity to question the Debtor.

No later than 7 days before the 341 Meeting of Creditors, Chapter 7 or 13 Debtors must provide the Trustee their most recent tax returns. Failure to do so "shall" result in dismissal of the Case, unless the Debtor demonstrates failure to comply is due to circumstances beyond his control. Code §521(e).

Proof of Claim.

The Claims Bar Deadline on the initial Notice to Creditors should be calendared immediately. Failure to file a timely Proof of Claim generally prevents a creditor from recovering anything from the Debtor on an unsecured Claim.[h] Bankruptcy Rule 3001 governs Proofs of Claim. The Bankruptcy Rules contain a form, which the Court generally supplies with the Notice to Creditors. A creditor must attach sufficient backup materials to the Proof of Claim to document the basis for the Claim.

Technically, a fully secured lien should travel through bankruptcy intact, but counsel cannot always be certain a lien is fully secured. Since a creditor only is secured to the extent of the value of the collateral, if the debt is partially unsecured, the creditor must file a Proof of Claim to protect the unsecured portion of the debt from discharge. Accordingly, if in doubt as to the sufficiency of the collateral, a Claim should be filed

[h] The concept of an "informal proof of claim" has been used to avoid the Claims Bar Date and "save" a claim; however, the burden to establish an informal proof of claim is substantial.

both for the unsecured and secured portion of the debt. At a minimum, a notation should be placed on the secured Claim to reserve the right to file an unsecured Claim if the value of the collateral is deemed to be less than the amount of the debt. A creditor, who only files a secured Claim, without reserving the right to an unsecured Claim, may be precluded from asserting an unsecured Claim for the portion of the debt that later is determined to be "under water" and that part of the debt will be discharged.

Moreover, even if the collateral exceeds the value of the debt, the Debtor can be negatively affect the lien claimant's rights. Although a secured creditor's lien remains on the collateral notwithstanding the bankruptcy, the terms of that lien may be modified. Accordingly, a secured creditor should continue to monitor the Case even after it has obtained stay relief, to assure the confirmed Plan does not negatively affect the secured creditor's rights. Conventional wisdom has been that, in almost every situation, a creditor should file a Proof of Claim. Although the creditor submits to the jurisdiction of the Bankruptcy Court by filing a Proof of Claim, failure to file a Proof of Claim may result in total discharge of the creditor's unsecured Claim.

A creditor may file a time-barred Claim without violating the Fair Debt Collection Practices Act. ***Gatewood v. CP Medical, LLC,*** 533 B.R.905 (B.A.P.8thCir.2015). BUT SEE: A creditor who files a Proof of Claim in the Debtor's second bankruptcy for debts that were discharged in that Debtor's first Bankruptcy Case, may violate the discharge injunction and be subject to sanctions since filing a Proof of Claim is the first step in attempting to collect a discharged debt. ***Green Point Credit LLC v. McLean,*** 794 F.3d 1313 (11thCir.2015).

Counsel should consider whether to sign the Proof of Claim for the client. At least one Court has held that a counsel who signed a Claim on behalf of his client subjected himself to Rule 9011 and the duties of due diligence regarding the material contained in the Claim. ***In re Obasi,*** 2011 WL 6336153 (Bankr.S.D.N.Y.) In addition, at least one Bankruptcy Court has held that an attorney who signed his client's Proof of Claim was subject to deposition and waived the attorney/client privilege. ***Schmidt v. Rodriguez,*** 2013 WL 2450925 (Bankr.S.D.Tex.). [Neither of these is a reported decision.]

AND SEE: Bankruptcy Courts have authority, under Code §105 or state law, to recharacterize Claims and declare a secured or unsecured Claim to be equity. [A circuit split exists as to the applicable standard for recharacterization of Claims.) ***Law v. Siegel,*** 134 S.Ct.1188 (2014); ***In re Alternate Fuels, Inc.,*** 789 F.3d 1139 (10thCir.2015).

An unlisted (un-scheduled) unsecured creditor's Claim will be discharged if the creditor has actual knowledge of the Case and fails to file a timely Proof of Claim. Whether the creditor received notice of the claim from the Court is irrelevant.

Cash Collateral- Code §363(c)(2) & Rule 4001(b).

A Debtor may not use cash or cash equivalents, e.g. rents, accounts receivable, etc, which are collateral for a debt unless the secured creditor consents, or after notice and a hearing, the Court authorizes their use. Many Debtors continue to use cash collateral post-petition unless and until a creditor moves to stop that use.

Continuing to do business with a Debtor post-petition can be dangerous. Suppliers often wish to continue to do business with the Debtor during the Chapter 11. Relying on *Fla.Stat*. §679.332(2),[i] lawyers sometimes have advised their clients they may do so on a "COD" basis. In ***Marathon Petroleum Co. v. Cohen***, 599 F.3d 1255 (11thCir. 2010), the Court ruled, *Fla.Stat*. §679.332(2) does not govern a Debtor's unauthorized payment to a creditor using cash collateral. The creditor had to return the money/cash collateral the Debtor been used to pay the creditor and it was left with a dubious Administrative Expense Claim junior to secured creditor's lien on the cash collateral. BUT SEE: ***In re Wood Treaters, LLC***, 479 B.R. 122 (Bankr.M.D.Fla.2012)].

To obtain a Court Order authorizing the use of cash collateral, the Debtor must provide the creditor "adequate protection." The Code does not define adequate protection, but generally it consists of periodic payments sufficient to maintain the creditor's status quo during the Case. Near the beginning of a Case the Debtor and secured creditors often negotiate to establish the amount of "adequate protection payments" necessary so the Debtor may continue to use its cash collateral to do business and to maintain the automatic stay while a Plan is being prepared. A secured creditor cannot demand adequate protection payments to improve its position. On the other hand, some Courts have held cash collateral cannot be used to pay the Debtor's professional fees. ***Buttermilk Towne Center, LLC,*** 442 B.R.558 (6thCir.BAP 2010).

These early cash collateral negotiations between the secured creditor and the Debtor may shape the outcome of the Case. Accordingly, the creditor should be prepared to assert its rights to any cash collateral soon after the Case is filed.

[i] The Statute states the transferee of money from a deposit account takes free of the security interest in the account unless the transferee acts in collusion with the Debtor to violate the rights of the secured creditor.

V. What is the Automatic Stay? Code §362

As soon as a Bankruptcy Petition is filed, the "automatic stay" goes into effect. The purpose of the automatic stay is to preserve the status quo while allowing the Debtor an opportunity to reorganize and to obtain a "fresh start."

The automatic stay stops any foreclosure or other collection effort against the Debtor or Property of the Estate. Generally, it does not prevent actions against non-Debtors, such as the Debtor's spouse, principals and guarantors. The only co-Debtor stay is for Chapters 12 (family farmer) and 13 (wage earner), and that stay only applies to co-debtors on *consumer debts*.

Under Code §105, a Bankruptcy Court may exercise its inherent power to issue injunctions and thereby to stay actions that are not "automatically stayed." ***Commonwealth Oil Ref. Co. v. US-EPA***, 805 F.2d 1175 (5thCir.1986), *cert.denied*, 403 U.S.1005(1987); ***Venture Prop, Inc. v. Norwood Gr, Inc.,*** 37 B.R.175 (Bankr.D.N.H.1984); ***Costa & Head Land Co. v. National Bank of Commerce***, 68 B.R.296 (N.D.Ala.1986). Code §105, however, is applied in very limited circumstances for a co-debtor stay. ***In re Calpine Corp.,*** 365 B.R.401 (S.D.N.Y.2007). The standard elements for injunctive relief apply.[j]

Scope of the Stay- Code §362 (a)&(b)

The automatic stay includes both property of the Debtor and Property of the Estate. Accordingly, the stay prohibits proceedings even against the Debtor's exempt and abandoned property which are not "Property of the Estate." ***In re Gasprom, Inc.,*** 500 B.R.598 (BAP 9thCir.2013). For this reason, the best practice is to seek stay relief before proceeding against collateral, even if it is exempt or abandoned property, unless or until the Debtor has been discharged, the Case has been closed or dismissed, or the collateral has been sold pursuant to Bankruptcy Court Order.

An issue often arises as to whether a bank will violate the automatic stay if it freezes a Chapter 7 Debtor's accounts. In ***Citizens Bank of Md v. Strumpf***, 516 U.S.16 (1996), the Court held a creditor may impose an administrative freeze to preserve the status quo pending resolution of a Motion for Stay Relief. Reasoning a bank account is only a promise to pay the Debtor, not tangible property, the Court in ***In re Young,*** 439

[j] Code §105 has been used to obtain a Chapter 11 discharge for third party non-Debtors, who contribute to the Chapter 11 Plan, but third-party releases are not favored. Code §105, together with Bankruptcy Rule 9011, form the jurisdictional predicate for the Bankruptcy Court to impose sanctions. An injunction issued by the Bankruptcy Court cannot be collaterally attacked. See: ***Celotex Corp. v. Edwards***, 115 S.Ct.1493, 131 L.Ed.2d 403(1995).

B.R.541 (Bankr.M.D.Fla.2010), held the bank did not violate the stay by freezing the Debtor's accounts while awaiting instructions from the Chapter 7 Trustee.

The situation is different in Chapter 11. The D-I-P of a corporate Debtor is the equivalent of a Trustee and may assert an administrative freeze constitutes a stay violation. ***Tuscan Ranch, Inc. v. AEA Fed. Credit Union***, 2012 WL 603639 (9thCir.BAP) [not for publication]; ***Cook, supra*** (even after the Chapter 11 was converted to a Chapter 7, the Debtor had standing to challenge the freeze.)

Secured creditors often ask about the effectiveness of pre-petition stay relief waivers. Although Bankruptcy Court opinions vary, generally such waivers are not self-executing or per se enforceable. Some Courts have articulated factors to consider in determining the enforceability of such waivers:

- The sophistication of the party making the waiver;
- The consideration given for the waiver, including the length of time covered;
- Whether other parties, e.g. unsecured creditors or junior lienholders, were affected;
- The feasibility of the Debtor's Plan.

In re Desai, 282 B.R.527 (Bankr.M.D.Ga.2002); And See: ***In re DB Capital Holdings, LLC,*** 452 B.R. 804 (Bankr.D.Colo.2011); But See: ***LSREF2 Baron, LLC v. Alexander SRP Pats, LLC,*** 2012 Bankr.Lexis 2466 (Bankr.S.D.Ga.2012).

Not all actions related to a Debtor are stayed. Code §362(b) lists exceptions to the stay, such as government actions to create or perfect a lien for nonpayment of ad valorem taxes and other real estate assessments; IRS setoffs of an income tax refund as permitted by non-bankruptcy law and support enforcement proceedings.

A creditor may require the Debtor to appear as a witness for a deposition or at trial in a case involving a non-Debtor entity without violating the stay. ***In re Slabicki***, 466 B.R.572 (1stCir.BAP 2012).

The stay does not prevent a creditor from executing on corporate stock in the Debtor, because it is not Property of the Estate or of the Debtor; it belongs to the stockholder. ***In re Xtra Petroleum Transport,*** 473 B.R.430 (Bankr.D.N.M.2012).

The stay does not excuse a Debtor from complying with a pre-petition State Court Incarceration Order. ***In re Burgess,*** 503 B.R.154 (Bankr.M.D.Fla.2014).

Post-petition Claims are not automatically stayed. ***Turner Broadcasting Systems, Inc. v. Sanyo Elec.Co., Inc***., 33 B.R.996 (N.D.Ga.1983), *aff'd.*742 F.2d 1465 (11thCir.1984); ***Holland Am. Ins. Co. v. Succession of Roy*****,** 777 F.2d 992 (5thCir.1985).

Even after the bankruptcy filing, creditors have 30 days, not just 10, to perfect a lien without seeking stay relief, but the creditor must give the notice required under Code §546(b)(2). Code §547(e)(2). ***In re Worldcom, Inc***., 362 B.R.96 (Bankr.S.D.N.Y. 2007). A purchase money security holder may perfect its interest within 30 days after the Debtor takes possession of the property without violating the stay. Code §547(c)(3)(B). BUT NOTE: The UCC requires purchase money security interests to be perfected within 20 days.

Also, the automatic stay does not prevent eviction from residential real property if the landlord obtained a judgment for possession before the bankruptcy filing or if the lessor certifies the Debtor engaged in certain specified offenses. This latter provision is not self-executing; the landlord first must file a certificate with the Bankruptcy Court attesting to these facts. Even if the creditor is successful, the Debtor may bring a proceeding to re-impose the stay.

In addition, the stay is limited for repeat filings:

- If a Debtor files a Chapter 7, 11, or 13 within 1 year after an earlier Case is dismissed, the automatic stay in the second Case expires 30 days after the second filing, but a party in interest may obtain an Order continuing the stay based on evidence the second Case was filed in good faith as to the stayed creditor. Code §362(c)(3). ***In re Charles***, 332 B.R.538 (Bankr.S.D. Tex.2005).
- A Debtor who has had 2 or more Cases dismissed within the year preceding the filing of the current Case receives no stay. But at least one Court has held termination of the stay is only as to the Debtor and his exempt property, not as to Property of the Estate. ***In re Scott-Hood***, 473 B.R.133 (Bankr.W.D.Tex.2012).
- If an individual's Case was dismissed for failure to abide by Court Orders or if the Debtor voluntarily dismissed a prior Case after a stay relief motion was filed, she cannot re-file for 180 days. Code §109(g). Accordingly, when seeking dismissal of an individual's Case, ask the Court to include in the Dismissal Order an injunction against the Debtor refilling for 6 months.

As to **real property only**, a properly recorded (certified) stay relief Order in an earlier Case, which includes written findings that the Debtor's Petition was filed a part of a scheme to hinder, delay, **and** [usually "or"] defraud creditors, remains in effect for 2 years, even if the Debtor files another bankruptcy. The scheme to defraud, however, must involve either the transfer of all or part of the realty without approval of the creditor or the Court or multiple filings involving the same real estate. The Debtor may move to have the stay re-imposed for "cause" or on a showing of changed circumstances. Code §362(d)(4).

Relief from the Stay. Code §362(d)

For Cause.

Stay relief is available for "cause," including lack of adequate protection. "Cause" is not defined in the Bankruptcy Code; however, lack of "adequate protection" an express basis for "cause." "Adequate protection" is defined in Code §361. ***In re Delta Resources, Inc.***, 54 F.3d 722 (11thCir.1995). [Adequate protection for an over-secured creditor equals the decline in the value of the collateral, without considering the loan to value ratio].

"Bad faith" can constitute "cause" for stay relief or dismissal/conversion of a Case. The Eleventh Circuit has developed a substantial body of "bad faith" law. ***In re Phoenix Piccadilly, Ltd.***, 849 F.2d 1393(11thCir. 1988); ***In re Albany Partners, Ltd.,*** 749 F.2d 670 (11thCir.1984). Although "bad faith" is a fluid concept, the following non-exclusive criteria have been widely used (a creditor is not required to establish all these indices to obtain stay relief in a Case):

- The Debtor has one asset, especially real property and the secured lien encumbers the tract;
- The Debtor lacks employees, except perhaps the principals;
- Little or no cash flow or recognizable sources of income exist to sustain a Plan or to make adequate protection payments;
- Few if any, unsecured creditors, are named and their Claims are relatively small;
- Foreclosure had been commenced;
- The Debtor has been unsuccessful in defending against the foreclosure and bankruptcy offers the only possibility of forestalling foreclosure;
- Allegations of wrongdoing by the Debtor or its principals have been made.

SARE.

Debtors whose primary asset is real estate may be considered a "SARE" Debtor- a real estate-based, single purpose Debtor- a "Single Asset Real Estate" Debtor. Since 2005, SAREs have been subject to specific rules and limitations. SAREs include all

Debtors which own real estate constituting a single property or project, other than residential real estate with less than 4 units or a family farm. Code §101(51B). The real estate must generate substantially all the Debtor's gross income and the Debtor may not conduct any substantial business on the land, other than operating the real estate and incidental activities.

A SARE Debtor may own more than one parcel if all the property is to be developed as a single unit. In ***Meruelo Maddux Properties, Inc.***, 667 F.3d 1072 (9thCir. 2012), the Court held each of the 53 development companies, plus the parent, were separate SAREs, they were not substantively consolidated. In so doing, the Court rejected the Debtors' claim of a "whole business enterprise" exception to the SARE definition. Also, a Debtor was a SARE even though its principal also was the principal of the Debtor's tenants, who actively conducted business on the property. ***JJMM Int'l Corp.,*** 467 B.R.275 (Bankr.E.D.N.Y.2012).

SAREs do not include businesses whose income is derived from the operation of the property. Courts distinguish between owners of real property who conduct an "active" business on the land (not a SARE) and those with "passive" activities, like collecting rent (a SARE). ***In re Kara Homes, Inc.***, 363 B.R.399 (Bankr.D.N.J.2007) [Kara Homes and 32 affiliated debtors owning separate real estate for development as single-family residences and condominiums each filed Chapter 11. At first, they admitted they were SAREs; then, they claimed they were not. The Court held they were SAREs; the Debtors owned and developed real estate and generated income only from activities "incidental thereto."] And See: ***In re Penisgnoskay, Inc.***, 204 B.R.676 (Bankr.E.D.Pa. 1997) [A Debtor owning undeveloped raw land producing no income is a SARE.] ***In the Matter of Scotia Pacific Co., LLC,*** 508 F.3d 214 (5thCir.2007) [A Debtor with income derived from harvesting timber on land was not a SARE]; ***In re Club Golf Partners, LP,*** 47 B.C.D.229, 2007 WL 1176010(E.D.Tex.2007); ***In re Larry Goodwin Gold, Inc.,*** 219 B.R.392 (Bankr.M.D.N.C.1997); ***In re Prairie Hills Golf & Ski Club, Inc.***, 255 B.R.228 (Bankr.D.Neb. 2000) [Golf courses generally are not SAREs]. ***In re Whispering Pines Estates, Inc.,*** 341 B.R.134 (Bankr.D.N.H.2006). [Ordinarily, hotels are not SAREs.]

A secured creditor may obtain stay relief against a SARE Debtor that fails to file a "confirmable Plan" or to begin making monthly adequate protection payments to the secured creditor(s) within 90 days after filing the Bankruptcy Case or within 30 days after judicial determination the Debtor is a SARE. Code §§101 & 362(d)(3). Adequate protection payments must equal at least the non-default contract interest rate on the value of the creditor's interest in the real estate (which may be less than the debt

amount.)

Courts have construed the term, "confirmable Plan," broadly. In ***Wildwood Heights, Inc***., 385 B.R.832 (Bankr.N.D.W.Va.2008), the Court denied stay relief because, although the Debtor's Plan was unconfirmable, it felt the Debtor could file a confirmable Plan. Even a second amended Plan filed 5 months after the deadline was held to be sufficient to maintain the stay because it was an "extension and evolution" of the first Plan. ***In re 207 Redwood St., LLC***, 2011 Bankr.Lexis 3293.

Some Courts have granted less than "complete" stay relief against a SARE even though the Debtor failed to comply with the 90-day requirement. These Courts have identified 4 types of "stay relief:" terminating, annulling, modifying or conditioning continuation of the stay. ***In re Archway Apts., Ltd.,*** 206 B.R.463 (Bankr.M.D.Tenn.1997); ***In re LDN Corp.,*** 191 B.R.320 (Bankr.D.Va.1996). To extend the stay beyond 90 days, for "cause," Courts generally require evidence establishing a substantial likelihood that the Debtor will receive equivalent value from another source to compensate the lender for the delay. If the Debtor is under-capitalized, lacks cash flow or has substantial deferred maintenance, it may be unable to carry this burden. To establish "cause," the Debtor may provide a pending contract as evidence of the likelihood of an asset sale. ***In re Heather Apts., Ltd,*** 366 B.R.43 (Bankr.D.Minn.2007).

Lack of Equity/Unnecessary for Reorganization.

Stay relief also can be granted if the Debtor lacks equity in the collateral and the property is not necessary for an effective reorganization. With deflated real estate values, the first criterion is not difficult to establish; however, the second is tough to prove if the Debtor is a "bankruptcy remote" entity. Moreover, this basis for relief is not preferred because under-secured creditors cannot recoup "lost opportunity costs" resulting from continuation of the automatic stay. Hence, if the creditor proves the Debtor lacks equity in the collateral, it will not be entitled to attorneys' fees, post-petition interest, or costs because its "secured" interest is limited to the value of the collateral. ***United Svgs Assoc v. Timbers of Inwood Forest Assoc, Ltd***., 484 U.S.365, 108 S.Ct.626, 98 L.Ed.2d 740 (1988).

Procedural Issues- Code §362(e) & Bankruptcy. Rule 4001(a)(1)&(2)

A Motion for Stay Relief commences a "contested matter." The Motion must comply with the 7000 series of the Bankruptcy Rules and Rule 9014. Stay Relief Motions must be decided within 30 days; however, the Court may hold a preliminary hearing within the 30-day period and schedule the matter for final hearing within 30 days thereafter. To extend beyond 60 days, the parties must consent and the Court must

find "compelling circumstances." Code §362(e).

The effect of a Stay Relief Order is stayed for 14 days (the appeal time), unless the Court orders otherwise. If the proposed Appellant seeks additional time before the expiration for the 14-day period, it may receive a 21-day extension for a total potential appeal period of 35 days. Bankruptcy Rule 4001(a)(3). Title insurers often will not insure the foreclosed property during an appeal of a Stay Relief Order. ***Hope v. Gen'l.Fin. Corp.***, 807 F.2d 1540 (11th Cir.1987).

State Court Judges may want a "Comfort Order" confirming the stay is not in effect. Code §362(j) grants parties in interest the right to request a "Comfort Order" from the Bankruptcy Court; however, it does not provide the procedure.

Sanctions.

The Code requires an award of actual damages for *individuals* who have sustained a willful violation of the stay. Code §362(k). Bankruptcy Courts also have discretion to award punitive damages for "willful" stay violations. To be willful, the creditor must have known the stay was in place and must have intended to do the act that violated it. ***Durie v. Dueease***, 2008 WL 4936398 (Bankr.M.D.Fla.2008) [not reported in B.R.]. But if the creditor knew about the bankruptcy, the Debtor does not have to prove specific intent to violate the stay. ***Jove Eng, Inc. v. IRS***, 92 F.3d 1539 (11th Cir. 1996); ***In re Velichko***, 473 B.R.64 (Bankr.S.D.N.Y.2012). The issue is how to calculate actual damages. See: ***In re Samantha White,*** 410 B.R.322 (Bankr.M.D.Fla.2009); ***In re Hildreth,*** 357 B.R.650 (Bankr.M.D.Ala.2006).

In all Circuits, stay violations render the violative acts either void or voidable. In the 11th Circuit acts in violation of the automatic stay are void. ***Borg Warner Acceptance Corp. v. Hall***, 685 F.2d 1306 (11th Cir.1982). **And See:** ***In re Striblin,*** 349 B.R. 301 (Bankr.M.D.Fla.2006). Some Courts have equitably subordinated or disallowed claims where the creditor engaged in willful stay violations**.** ***In re Sayman's, Inc.***, 15 B.R.229 (Bankr.N.D.Ga.1981); ***In re Reed***, 11 B.R.258 (Bankr.D.Utah 1981). Other Courts have required the creditor to restore the pre-petition status quo. ***Dubbin v. Jakobowski***, 68 B.R.847 (Bankr.Pa.1987); ***In re Johnson***, 18 B.R.755 (Bankr.S.D.Ohio 1982).

Caveat:

Having received stay relief, the creditor must not "sleep on its rights." Code §108 provides the automatic stay does not suspend the statute of limitations. If the limitations period did not expire before the Bankruptcy Petition was filed, the time within which an action must be filed against the Debtor is extended until the later of:

- Expiration of the limitations period, or
- 30 days after termination of the stay as to that Claim.

See: ***Barraford v. T&N Ltd.,*** *17 F.Supp.3d 96* (D.C.Mass.2014).

VI. The Bankruptcy Food Chain. Code §507

The Bankruptcy Code contains classes and priorities for distribution.

- Secured Claims theoretically travel through bankruptcy without loss; however, a Claim is "secured" only to the extent of the value of the collateral, and the terms of a secured instrument can be modified or extended in a Plan.
- Domestic support obligations.
- Administrative expenses (Debtor's operating expenses), including professional fees, and in reorganization and debt adjustment Cases. Code §1108.
- Certain tax Claims and wage Claims not exceeding $10,000 and incurred within 180 days before the bankruptcy filing.
- Allowed, timely-filed unsecured Claims.
- Allowed, tardily-filed unsecured Claims.
- "Surplus" goes to the Debtor's equity security holders, who are characterized as having an "Interest," not a "Claim."

The amount of a "secured" Claim depends on the Court's valuation of the collateral as of the bankruptcy filing date; hence, an under-secured creditor may hold both a secured and unsecured Claim.

Moreover, the Court will strictly scrutinize a "secured" Claim to assure it has been properly perfected. Where a financing statement could not be found in a standard UCC search because it was recorded under the borrower's corporate name and a "d/b/a", the Court invalidated the lien and the creditor was held to be unsecured. ***In re Hastings State Bank v. Stalnaker***, 431 B. R.459 (8thCir.BAP 2010). AND SEE: ***In re Burns***, 435 B.R.503 (Bankr.S.D.Ohio 2010). A notary failed to write the mortgagor's name in the acknowledgment clause blank. The Court invalidated the mortgage even though the mortgagor's name and signature were on the same page above the acknowledgement.

VII. Exempt Assets.

The Bankruptcy Code lists exempt assets; however, many states, including Florida, have rejected all or some of the federal exemptions and rely in whole or in part on their own exemptions.

Homestead.

In 2005, Congress preempted certain State exemptions, including homestead. Under Code §522(b)(3), the state law of the place of the Debtor's domicile for the 730 days (2 years) immediately before the bankruptcy filing governs the applicable exemptions.[k] Accordingly, to take advantage of Florida's homestead exemption, the Debtor must have been domiciled in State for 730 days before the bankruptcy filing.

Even if the Debtor meets the domiciliary requirement, the homestead exemption has been substantially curtailed in bankruptcy. Code §522(p). A Debtor may not exempt any more than $146,450 [periodically adjusted] in home equity acquired during the 1215 days before the filing. Code §522(p)(1). Since the exemption is based on the Debtor's equity in the home, secured debt encumbering the home is deducted before the exemption is calculated. ***In re Kaplan***, 331 B.R.483 (Bankr.S.D.Fla.2005).

Substantial value added to the homestead during the 1215 days (about 3 1/3 years) before the filing is subject to the cap. For example, a Debtor who sells non-exempt property or incurs credit card debt to pay down a mortgage may find that additional home equity gained therby is not exempt. ***In re Maronde***, 332 B.R.93 (Bankr. D.Minn.2005). Code §522(o). Regular mortgage payments made during the 1215-day period may be exempt, even though those payments add to the Debtor's home equity by diminishing the outstanding principal balance. ***In re Blair,*** 334 B.R.374 (Bankr.N.D. Tex.2005).

A "safe harbor" allows the Debtor to "roll" up home equity from one home to another within the State, free from the cap, if the previous principal Florida residence was acquired more than 1215 days before bankruptcy. Code § 522(p)(2)(B). ***In re Wayrymen***, 332 B.R.479 (Bankr.S.D.Fla.2005). The Debtor claimed equity transferred from his two prior Florida homes should not be subject to the cap. He had owned his current home less than 1215 days, and the home he owned immediately before his current home was bought less than 1215 days before the filing. The Court allowed the Debtor to trace his home equity back to a prior Florida home, which had been bought about 5000 days before filing, and excluded all that equity from the homestead cap.

[k] If the Debtor did not maintain a domicile in the same state during those 2 years, the law governing exemptions is the place of the Debtor's domicile for the majority of the 180 days preceding the 2 years, to wit, 2½ years before filing. If nothing else works, the federal exemptions apply.

Personal Property. Chp.222, *Fla.Stat.*

If the Debtor does not claim or receive the benefit of the homestead exemption, *Fla. Stat.* §222.25(4) allows the Debtor to exempt $4000 of personal property. ***Osbourne v. Dumoulin,*** 55 F.3d 577 (Fla.2011).

Generally, an IRA is exempt and most Courts hold an inherited IRA can be exempt. ***In re Clark***, 466 B.R.135 (W.D.Wis.2012).

Insurance proceeds for damage to the homestead may be exempt—even if they were not used to repair the homestead. ***In re Carlew,*** 469 B.R.666 (Bankr.S.D.Tex.2012).

Tenancy by the Entireties.

Technically, T by E is not an "exemption;" it is an "immunity" from levy by creditors of only one spouse. An excellent overview is contained in the joint tax return context is contained at ***In re Uttermohlen,*** 506 B.R.142 (Bankr.M.D.Fla.2012). **AND SEE*: In re Newcomb,*** 483 B.R.554 (Bankr.M.D.Fla.2012).

About 25 states retain tenancy by the entireties ("T by E"). Treatment of T by E assets by Florida Bankruptcy Courts is not consistent. Because a creditor of both spouses can levy on T by E property, Courts generally hold a Trustee/D-I-P may "administer" T by E property if the Debtor has at least one joint creditor. The issue is who may receive the sale proceeds from the Debtor's interest in T by E Property?

- The most far reaching decision was one by Judge Cristol. ***In re Planas*****,** 199 B.R. 211(Bankr.S.D.Fla.1996). The Court held the existence of one joint debt, no matter how small, destroys the immunity for all T by E assets; hence, the Trustee may sell and distribute proceeds of T by E assets to all estate creditors, both joint and individual.
- Other judges hold T by E property is "exempt" only to the extent the Debtor's equity in the property exceeds her joint obligations. Since T by E property is conditionally subject to administration, the Trustee may sell the property, but the proceeds, equal to the amount of the joint debts, are distributed among all unsecured creditors, not just joint creditors, because the Code recognizes only one class of unsecured creditors. ***In re Geoghegan***, 101 B.R.329 (Bankr.M.D.Fla.1996); ***In re Boyd***, 121 B.R. 622 (Bankr.D.Fla.1989).
- Judge Killian held T by E property may be administered by the Trustee, in an amount equal to the joint unsecured debts as of the filing date, but such property or its proceeds may be distributed

only to joint creditors of both spouses, not to Debtor's individual creditors. ***In re McRae***, 308 B.R.572 (Bankr.N.D.Fla.2003).

VIII. Bankruptcy Trustee/D-I-P "Avoidance" Powers.

Trustee's General Powers.

The Code grants Trustees extensive avoidance powers, not available to ordinary creditors. [In Chapter 11 Cases, after the Petition is filed, the former Debtor automatically becomes a Debtor in Possession, "D-I-P," with the same rights and duties as a Bankruptcy Trustee.] For example, a Bankruptcy Trustee/D-I-P is considered a bona fide purchaser/lienor for value, who can challenge transactions, including liens, a Debtor otherwise would lack standing to contest outside bankruptcy. Code §544.

Under Code §545, the Trustee/D-I-P may avoid a statutory lien on the Debtor's property to the extent:

- It first becomes effective on filing bankruptcy or insolvency proceedings or on appointment of a receiver ("ipso facto" clause);
- It was not perfected or enforceable against a bona fide purchaser on the date the Case was filed; or
- It is not a statutory lien for rent or distress for rent.

Avoidance of Liens on Homestead or other Exempt Property. Code §522

The Trustee/D-I-P may avoid judicial liens impairing the Debtor's homestead by proving 3 elements:

- The existence of a judicial lien. [Courts have held some liens are not judicial liens. One Court held a divorce decree was an equitable, not a judicial, lien. ***In re Fischer***, 129 B.R.285 (Bankr.M.D.Fla.1991). Holders of vendors and mechanics liens have been held to have statutory, not judicial, liens. ***In re Piambino***, 45 B.R.243 (Bankr.S.D.Fla.1984); ***In re Davis,*** 96 B.R.1021 (Bankr.M.D.Fla.1989).]
- The homestead exemption to which the Debtor is entitled is impaired by the lien. In ***Owen v. Owen***, 500 U.S.305, 111 S.Ct.1833 (1991), the Supreme Court held preexisting judgment liens on homestead can be avoided even though they do not "impair" the exemption.
- The lien is on a property interest of the Debtor.

The Bankruptcy Court's Order avoiding the lien should clearly identify the lien; contain an express finding of impairment; and declare the lien is extinguished.

Fraudulent Transfers. Code §548

The Code recognizes 2 types of fraudulent transfers a Trustee/D-I-P may void:

- "Actual Fraud"-The Debtor made the transfer or incurred the obligation with the actual intent to hinder, delay, or defraud a creditor, or
- "Constructive fraud"- The Debtor received less than reasonably equivalent value in exchange for the transfer, **and** the Debtor was or became insolvent or was undercapitalized at the time of the transfer.

AND SEE: A pledge of assets by a subsidiary to secure the parent corporation's debt may be a fraudulent transfer. ***In re Tousa, Inc.***, 680 F.3d 1298 (11thCir.2012).

Where the Debtor makes a transfer to a self-settled trust or similar device, the "reach back" period for "actual fraud" (transfer with the intent to hinder, delay or defraud creditors) is 10 years. Code §548(e)(1).

The reach-back period for constructive fraud by insiders is 2 years; however, some states have longer fraudulent transfer limitations periods. Those State laws are incorporated into the Code; hence, in Florida, the 4-year statute of limitations can be used for fraudulent transfers.

Under Code §548(c), a transferee may have a whole or partial defense to the extent it took for value in good faith. In determining whether value was given, the Court considers what the Debtor gave up, not what the transferee received. ***Williams v. FDIC (In re Positive Health Management),*** 769 F.3d 899 (5thCir.2014).

Preferences. Code §547

The Trustee/D-I-P also has the right to set aside preferential payments on the theory that all creditors within a Class should be treated the same way.

A preference is a transfer of any interest of the Debtor in property:

- Made to or for the benefit of a creditor;
- Made for or on account of an antecedent debt owed by the Debtor before such transfer was made;
- Made while the Debtor was insolvent;
- Made on or within 90 days before the bankruptcy filing, or if the creditor at the time of such transfer was an insider, within one year

before the filing[l]; and

- The creditor received more than it would have under Chapter 7.

Creditors have statutory defenses to preference proceedings which must be proved by the preponderance of the evidence. ***Barrett Dodge Chrysler Plymouth, Inc. v. Cranshaw,*** 389 F.3d 1205 (11thCir.2004). Creditors may assert more than one defense, thereby eliminating payments various theories. The most frequent defenses include:

- **New Value:** The transfer involved a contemporaneous exchange for "new value" given to the Debtor. Code §547(c)(1). The "new value" defense requires a series of computations if more than one payment is challenged as preferential. The preference Complaint should list the date and amount of each alleged preferential transfer. The creditor must deduct from each alleged preferential payment, the value of any goods/services provided to the Debtor after the date of each alleged preferential payment. Separate calculations must be made for each allegedly preferential payment. It is not sufficient to deduct the total of all new value goods/services provided to the Debtor from the total amount of the alleged preferential payments made by the Debtor. Accordingly, the new value provided after the first alleged preferential payment must be deducted from the amount of that first alleged preferential payment. The creditor cannot carry over the negative "balance" to the next preferential payment. The same calculation must be made for alleged each preferential payment. ***See: In re Performance Transp. Services,*** 486 B.R.62 (Bankr.W.D.N.Y.2013); And See ***In re Proliance International, Inc.***., 514 B.R.426 (Bankr.D.Del.2014); Also See: ***Friedman's Inc.v.Roth Staffing Cos.,*** 738 F.3d 547 (3rdCir.2013); ***Pirinate Consulting Gr., LLC v. Styron, LLC,*** 2014 WL 4948421 (Bankr.D.Del.).
- **Ordinary course of business:** A preference defense exists for a payment made by the Debtor in the ordinary course of its business and of the transferee's business or it made according to ordinary business terms in the industry.[m] Code §547(c)(2); ***In re Globe***

[l] And Note: An "insider" may not be limited to the statutory definition in Code §101(31), an insider may include any person or entity whose relationship with the Debtor is not at arm's length. ***Schubert v. Lucent Tech, Inc. (In re Winstar Comm, Inc.),*** 554 F.3d 382 (3rdCir.2009).

[m] This involves a very fact-intensive analysis considering: 1) the time the parties were engaged in that business; 2) whether the amounts were typical of past payments; 3) whether the payment was tendered in the same manner as in the past; 4) whether the creditor was engaged

Manufacturing Corp., 567 F.3d 1291 (11thCir.2009). Expert evidence usually is required to establish ordinary business terms within an industry. On the other hand, ordinary business terms between the Debtor and creditor can be shown by the parties' historical data.

- Payments of a **non-consumer debt** under $6,425 per creditor/$600 for consumer debts (periodically adjusted) are not preferential.
- "**Domestic Support Obligation**" payments, by definition, are not preferences. 11 USC §547(c)(7).
  - **Purchase money security interests, statutory liens, and floating liens on accounts receivable and inventory** are not preferential. Code §547(c)(3), (5) and (6).

Equitable Subordination Code. §510(c)

Bankruptcy Courts may subordinate all or part of an allowed Claim for distribution and in so doing may eliminate or transfer the claimant's lien. This is not exclusively a Trustee avoiding power; it also can be a useful tool for creditors. The general test for equitable subordination involves 3 factors:

- The claimant was engaged in misconduct of some sort;
- The inequitable conduct resulted in injury to creditors or conferred an unfair advantage on the claimant;
- Subordination would be consistent with the intent of the Code.

If the claimant is an "insider," the threshold of proof of these elements is lower. Moreover, who is an "insider" is not determined by control over the Debtor; rather, the debtor/creditor relationship is examined to assure their conduct was at arms' length. ***US v. State Street Bank & Tr. Co.,*** 520 B.R.29 (Bankr.D.Del.2014).

IX. <u>Liens, Sales and Leases.</u>

Borrowing. Code §364

Because most Debtors are cash poor, they must find a source of funds almost immediately if they are going to stay in business. Accordingly, Debtors often seek to borrow money shortly after the Case is filed. Code §364 establishes tiers of borrowing that may be available to Debtors, and it articulates rules for each.

- Unless the Court orders otherwise, the D-I-P may obtain unsecured credit and incur unsecured debt, as an administrative expense, in the "ordinary course of its business."
- After notice and a hearing, the Court may allow a D-I-P unsecured credit

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in any unusual collection actions; and 5) whether the creditor did anything to gain an advantage over the Debtor.

outside the ordinary course of business, with administrative expense priority, but on conversion, Chapter 11 administrative expenses subordinate to Chapter 7 administrative expenses.

- If the D-I-P is unable to obtain unsecured credit, the Court, after notice and a hearing, may allow it to incur debt with priority over most administrative expenses, secured by a lien on otherwise unencumbered Property of the Estate or by a junior lien on encumbered Estate Property.

Since Debtors generally cannot obtain credit under any of these conditions, the Code also provides that, after notice and a hearing, the Court may authorize a **"priming lien,"** (debt secured by a lien senior or equal to any other lien on Property of the Estate) if the interest of the senior lienholder is "adequately protected." Since the D-I-P must provide "adequate protection" to the secured creditor being "primed," success generally depends on a valuation of the property to establish the existence of an "equity cushion." ***In re Strug-Division, LLC***, 380 B.R.505 (Bankr.N.D.Ill.2008). In ***Strug,*** the Court recognized that the existence of an "equity cushion" is the general test for adequate protection in the priming lien context, a "holistic" or flexible approach may be applied. The important question is whether the secured creditor's interest is being unjustifiably jeopardized. AND SEE: ***In re Stoney Creek Technologies, LLC.***, 364 B.R.882 (Bankr.E.D. Pa.2007). Although the priming lien was denied, the Court articulated an alternate analysis to the equity cushion.

The authority to incur debt is granted in a "Borrowing Order," specifying the amount and terms of the authorized loan. A post-petition lender must assure adequate notice to all creditors, especially to all secured creditors (hence, an independent title search is needed). The notice must specify the terms and conditions of the financing, like a loan commitment letter. A lender who advances more than the amount specified in the Borrowing Order will not have a priming lien for those funds. ***In re Flagstaff Foodservices Corp.***, 762 F.2d 10 (2nd Cir.1985).

Unless the Borrowing Order is stayed pending appeal, an entity extending credit in "good faith" will not lose its lien or have its priority affected, even if the Order is overturned on appeal, but the Borrowing Order must contain a judicial finding of "good faith." Code §364(e).

Sales- Code. §363

Chapter 11 Debtors/D-I-Ps may contemplate liquidation of some or all Property of the Estate. Sometimes liquidation occurs early in the Case because the Debtor cannot continue its business given its debt load, lack of liquidity, and the decrease in the value

of its assets. ***In re Chrysler LLC***, 576 F.3d 108 (2nd Cir.2009).

Secured creditors generally are entitled to credit bid their lien amount at the liquidation sale/auction. ***RadLAX Gateway Hotel, LLC v. Amalgamated Bank,*** 132 S.Ct. 2065 (2012). **BUT SEE:** ***In re Fisker Automotive Holdings, Inc.,*** 510 B.R.55 (Bankr.D.Del. 2014) where the Court declared the right to credit bid is not absolute if the Court "for cause orders otherwise." The Court may cap the credit bid to prevent the secured credit from chilling the bidding. In the opinion, however, the Court indicated it may not intend for the ruling to have precedential value. AND SEE: ***In re RML Development, Inc.,*** 528 B.R.150 (Bankr.W.D.Tenn.2014); ***In re The Free Lance-Star Publishing Co of Fredericksburg, VA,*** 512 B.R.798 (Bankr.Va.2014).

Ordinarily, a Trustee/D-I-P may sell assets in the ordinary course its business, *without prior Court approval*. "Reasonableness" determines "ordinary course of its business." For example, a subdivision developer may sell lots "in the ordinary course of business," but a textile company may not sell its factory without Court approval, because its ordinary course of business is textiles, not real estate. Any question as to whether a sale is in the ordinary course should be submitted to the Court.

Sales of Property of the Estate must be in the name of and signed by the Trustee/ D-I-P. This means a Chapter 11 grantor should specifically be called "D-I-P," even if the name of the Debtor and the D-I-P otherwise is identical.

Outside of the "ordinary course of business," the D-I-P/Trustee may use, sell or lease Property of the Estate only after notice and a hearing. The Court has substantial discretion to approve such sales if they are for business purposes.

Frequently, the D-I-P/Trustee wants to sell Estate assets "free and clear of liens, claims and encumbrances." Notice and a hearing are required. The D-I-P must establish at least 1 of 5 criteria:

- Applicable non-bankruptcy law permits the sale free and clear;
- The lienor consents;
- The property will be sold for more than the aggregate *value* of all liens. [Some Courts focus on the total face amount of all liens and require the sale to exceed that amount. ***Clear Channel Outdoor, Inc. v. Knupfler***, 391 B.R.25 (9th Cir.BAP 2008). Other Courts have approved sales for fair market value, even if the purchase price is less than the aggregate face amount of all liens on the theory that the lien cannot exceed the value of the collateral. ***In re Boston***

Generating, LLC, 440 B.R.302 (Bankr.S.D.N.Y.2010)]; ***In re Beker Indus. Corp.***, 633 B.R. 474 (Bankr.S.D.N.Y.1985)].

- The interest to be eliminated is in bona fide dispute. When real estate values are appreciating, Debtors often seek to sell assets to capitalize on the equity in the Property. Title disputes may provide grounds for the "free and clear" sale. See: ***In re Gulf States Steel, Inc.,*** 285 B.R.497 (Bankr.N.D.Ala.2002). A "bona fide dispute" exists when there is an objective basis for either a factual or legal dispute as to the validity of the interest.
- The lienor could be compelled, in a legal or equitable proceeding, to accept a money satisfaction. In ***Seidle v. Modular Paving, Inc.***, 14 B.R.862 (Bankr.S.D.Fla.1981), the Court permitted a sale even though less than the face amount of all liens would be paid.

Sales of Property of the Estate made as part of the Chapter 11 Plan are exempt from documentary stamp taxes. Code §1146(c). ***Fla. Dept. of Rev. v. Picadilly Cafeterias, Inc.***, 552 U.S.1074, 128 S.Ct.741, 169 L.Ed.2d 579 (2007). Outside a Plan, a D-I-P may sell substantially all the Debtor's assets; however, the Court, after notice and a hearing, must find the sale is made pursuant to an articulated business justification and good business reasons exist for the sale. The sale must be to a "good faith purchaser" and must meet the "entire fairness" standard, rather than the "business judgment" rule. Beyond that, the sale must not be done to circumvent the Plan process. ***Comm. of Equity Sec. Holders v. Lionel Corp.***, 722 F.2d 1063 (2nd Cir.1983); ***In re Boston Generating, LLC,*** 440 B.R.302 (Bankr.S.D.N.Y.2010). [Both cases list §363 sales criteria.]

The provisions of Code §365, regarding lease assumption/rejection, differ from those in Code §363(f) for sales free and clear of liens. An issue existed as to whether a Court may allow the sale of Property free and clear of lease interests. The conflict between the two provisions seems to have been resolved; the Courts now generally hold a Trustee/D-I-P may sell property free and clear of the lessee's possessory interest. ***In re Precision Ind., Inc. v. Qualitech Steel SBQ, LLC,*** 327 F.3d 537 (7th Cir.2003). Put another way, §363 trumps §365.

Debtors may not sell Property free and clear of easements and restrictive covenants; they are not liens. ***Gouveia v. Tazbir,*** 37 F.3d 295 (7th Cir.1994).

As with borrowing, proper notice and an opportunity for hearing are critical to the validity of any asset sale outside of the ordinary course of business. The notice should include at least the sale terms, the time for filing objections, and a legal

description of the property. Twenty (20) days' notice is required, unless the Court shortens the time. Proof of notice also should be filed. Similarly, unless a stay pending appeal is obtained, the sale cannot be overturned on appeal if the Bankruptcy Court's Sale Order contains an express judicial finding of "good faith." Code §363(m).

With post-confirmation sales, other considerations exist. If the Case was a Chapter 11, the Plan and Confirmation Order should be reviewed to determine whether the Plan authorizes such a transfer. If there are no restrictions on the Debtor's ability to transfer and the property has re-vested in the Debtor, the transfer probably is fine. If any deviation from the Plan exists, it is prudent to return to the Bankruptcy Court for an Order authorizing the sale. With Chapter 13, a Court Order authorizing the transfer should be obtained because of the Court's continued post-confirmation involvement with the Estate. A Chapter 7 Debtor can sell abandoned property, but remember the liens continue to encumber it.

X. Unexpired Leases and Executory Contracts. Code §365

The Debtor has an absolute right to assume, reject, or assume and assign its unexpired leases and executory contracts. Substantial litigation has occurred to determine whether the substance of a contract constitutes a "lease" or a secured transaction. Substantial rights depend on that determination. ***Sunshine Heifers LLC v. Citizens First Bank (in re Purdy),*** 763 F.3d 513 (6thCir.2014).

Executory Contracts.

Under the prevailing "Countryman definition" an "executory contract" is one in which obligations remain to be performed on both sides. Nonetheless, the determination of whether a contract is executory is not always easy.

Most Courts have held easements and restrictive covenants are not executory contracts; therefore, they cannot be assumed or rejected pursuant to Code §365. ***Gouveia v. Tazbir,*** 37 F.3d 295 (7thCir.1994).

If a contract is executory, the Debtor may assume or reject it; however, an unexercised option may not be an executory contract. ***In re Robert L. Helms Constr. & Dev. Co.,*** 139 F.3d 702 (9thCir.1998). But see: ***Lubrizol Enterprises, Inc. v. Richmond Metal Finishes, Inc.***, 756 F.2d 1043 (4thCir.1985) and ***In re Roomstore, Inc.***, 473 B.R. 107 (Bankr.E.D.VA 2012).

Assumption.

To assume/assign the Debtor or its assignee must provide for:

- "Adequate assurance" of future performance; and
- "Prompt cure" of all defaults (generally cure within one year).

In re Uniq Shoes Corp., 316 B.R.748 (Bankr.S.D.Fla.2004).

"Adequate assurance" may include a requirement for the Debtor's assignee/ tenant to post a deposit on similar terms as the Debtor.

The Debtor/assignee need not cure a "non-curable," non-monetary default, unless the default is for failure to operate. If the lessee fails to resume operations or to continue to operate, the lessor is entitled to damages for its actual pecuniary loss from non-operation.[n]

Breach of an "ipso facto" insolvency clause is not grounds to terminate an unexpired lease or executory contract in bankruptcy. Code §365(b)(2) and (e)(1). Similarly, a lease cannot be terminated due to assumption/assignment, even if the lease provides for termination on assignment. Code §365(f)(3).

Special provisions were added to the Code for shopping center leases. Adequate assurance of future performance in a shopping center lease, includes adequate assurance of the sources of rent and other consideration. In the case of assignment, the assurance also must relate to the assignee's financial condition and operating performance, e.g. the assignee must be similarly situated to the Debtor at the time it becomes a tenant. Code §365(b)(3)(A). Also, the Debtor must prove the percentage rent from the assignee will not diminish substantially. Code §365(b)(3)(B). Moreover, assumption/assignment is subject to all provisions regarding use, location, radius, exclusivity; the assignee cannot breach any other provision in any lease, financing agreement or master agreement in the center, i.e., assumption/assignment cannot disrupt the tenant mix or balance in the center. Code §365(b)(3)(C) and (D). Similarly, rejection does not change the enforceability of the lease terms as to radius, use, location, exclusivity, tenant mix or balance under non-bankruptcy law. Code §365(h)(1)(C).

Assumption and assignment releases the Debtor and the Estate from any liability for breach of the lease after the assignment. Code §365(k)

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[n] Such losses may be difficult to prove; therefore, lessors of non-residential property should include a liquidated damages provision quantifying the landlord's loss in the event the tenant ceases operation.

A Debtor cannot assume a lease of non-residential real estate terminated under state law before the bankruptcy Case was filed. Code §365(c)(3).

Assumption of the lease includes the right to exercise any renewal options, even though outside bankruptcy, renewal would have been prohibited because of the tenant's non-payment/breach of the lease. ***In re Fifth Taste Concepts Las Olas, LLC***, 325 B.R.42 (Bankr.S.D. Fla.2005). But: A split of authority exists on this issue.

Landlord's Duties Pre-Assumption/Rejection.

Post-petition, until the lease is assumed or rejected, the Debtor must perform under the lease, BUT for cause, the Court may permit the Debtor to remain in possession without performing its lease obligations for up to 60 days. Code §365(d)(3). A landlord may accept performance under the lease in bankruptcy without waiving its claims against the Debtor.

Time for Assumption/Rejection.

In a Chapter 7 Case, a residential real estate (or personal property) lease must be assumed within 60 days after the filing, or it is deemed rejected. That time frame can be extended for "cause;" however, the request for an extension of time must be made within the initial 60-day period. Code §365(d)(1).

In a Chapter 11, 12, or 13, a residential real estate (or personal property) lease, generally can be assumed any time before the Plan is confirmed. Code §365(d)(2).

If the Debtor is a tenant under a non-residential real estate lease, the lease is deemed rejected unless it is assumed within 120 days after the bankruptcy is filed or by the time the Plan is confirmed, whichever occurs first. Code §365(d)(4)(A). On the Debtor's Motion made within the first 120 days after filing the Case, the Court may extend the time up to 90 days for cause. Further extensions require the landlord's *written* consent.

Rejection.

Rejection constitutes a breach, not a termination, of the lease. Code §365(g).

- The breach is deemed to have occurred pre-petition; like a pre-petition claim under Code §502(g).
- If the lease is assumed and then rejected, the breach occurs as of the time of rejection.

- If the lease was assumed, and the Case was converted to a Chapter 7, and then the lease was rejected, the rejection is deemed to have occurred as of the day before conversion.
- If the assumption occurs after conversion and then the lease is rejected, the breach is effective as of the rejection date.

Even if the Tenant vacated the leased premises pre-petition, if the lease was not terminated according to state law pre-petition, the Debtor must pay rent for the first 60 days or until the lease is rejected, whichever is earlier; therefore, Debtors should reject the lease immediately on filing the bankruptcy Petition. ***In re Kirsch,*** 242 B.R.77 (Bankr. M.D.Fla.1999). In a Chapter 13, the Court granted the landlord an administrative expense Claim equal to 60 days' rent even though the tenant/Debtor had moved out, but had not rejected the lease. Recognized the result seemed "socially unjust," the Court followed the majority and granted the landlord "administrative rent" even though the tenant had vacated the premises. The Chapter 13 Debtor's only recourse would have been to have rejected the lease immediately on filing the bankruptcy petition. ***In re CHS Electronics, Inc***., 265 B.R.339 (Bankr.S.D.Fla.2001). The same result occurred with a Chapter 11 Debtor, which had vacated the premises, but had not rejected the lease. The Court recognized §365(d)(3) grants administrative expense priority to the landlord's rent claim for 60 days after the filing even though the Debtor received no post-petition benefit from the lease.

Rejection Damages.

When a lease is rejected, the landlord holds an administrative expense claim for post-petition unpaid rent and other post-petition charges under the lease; however, she must timely file an application to be paid that administrative expense. Code §503(b)(1).

A landlord also has an administrative expense claim for non-payment of rent on non-residential real estate if the lease was assumed and then rejected. The claim equals the amount due under the lease (except under a penalty term) for 2 years after the latter of the rejection date or the date of turnover of the property. §503(b)(7). The balance of the claim is unsecured under Code §502(b)(6).

The landlord has an unsecured claim for damages due to the tenant's rejection of the lease, but it is capped at the unpaid rent due as of the earlier of the bankruptcy Petition filing or surrender date, plus damages equal to 1 year's rent, or 15% of the remaining lease term, not to exceed 3 years, without acceleration. The 15% limitation is in terms of time, not rent; hence, if the remaining lease term is more than 20 years, damages are limited to 3 years. ***In re Ace Electrical Acquisition, LLC***, 342 B.R.831

(Bankr.M.D.Fla.2005). Code §502(b)(6). For a good analysis of the methodology to calculate these damages See: ***In re Clements***, 185 B.R.895 (Bankr.M.D.Fla.1995). Taxes, professional fees, maintenance and insurance costs, which were provided as addition rent under the lease were included in the calculation of the landlord's allowable claim.

In a guarantee situation, if the first Debtor/tenant rejects the lease and the second Debtor/guarantor later files bankruptcy, the damages cap runs from the date the first Debtor/tenant rejected, not from the date the second Debtor/guarantor filed. ***In re Henderson***, 305 B.R.581 (Bankr.M.D.Fla.2003).

Creditor is Tenant; Debtor is Landlord.

Where the creditor is the tenant and the Debtor is the landlord, Code §365(h)(1) applies. If the breach would entitle the tenant to treat the lease as having been terminated under non-bankruptcy law, rejection can be treated as termination. On the other hand, if the lease was commenced before bankruptcy, the tenant may retain its rights under the lease for the balance of the term, plus any renewals. If the tenant remains in possession, it may offset against its rent, the value of any damages caused by the landlord's non-performance after the rejection date; however, the tenant has no other rights against the Debtor or the estate for damages from non-performance.

PUBLIC LANDS AND WATERBODIES

By

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Riparian Rights and Waterfront Property

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I. Introduction. Why Do We Care?

Waterfront property is some of the most valuable in the state. And our clients, when they buy it, have a set of expectations as to the rights they have in those waters and the uses they can make of it. As their lawyers, we must explain to them exactly what those rights and permitted uses are. They are not often obvious.

The law about waterfront property raises some interesting and unique title issues that are not clearly resolved or resolvable by an examination of record title. As the result of a 1986 Supreme Court case, there is a fundamental uncertainty – and unknowability – about who owns a given parcel of what may have been sovereignty land beneath of navigable waterbody.

Beyond just who owns it, we must be familiar with the rights and uses that they can make of the waterfront property.

II. Key Points.

A. Not all Waterbodies are Public. We generally think in terms of all waterbodies being publicly owned. While that is generally the case, it is not always so. You get privately owned waterbodies in three ways:

1. Because the state has already sold them or somehow relinquished its interest.

2. Because the waterbody is too small to be "navigable" which unfortunately is a standard that changes depending on the political moods in Tallahassee, or

3. Because the waterbody was created after Statehood. These are generally artificial, but could also include waterbodies created by sinkholes.

If a waterbody is privately owned, we must be able to explain to our clients, what rights (if any) they may have to use that waterbody.

B. The Boundary is Legally Defined. The Boundary between public and private ownership on a waterbody is legally defined as either the Ordinary High Water Line (if non-tidal) or the Mean High Water Line (if Tidal). Those are defined as

1. The Ordinary High Water Line (OHWL) "as a line between a riparian owner and the public is to be determined by examining the bed and the banks and ascertaining where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as to the nature of the soil itself. High water mark means what its language imports, -- a water mark. It is coordinate with the limit of the bed of the water, and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation and to destroy its value for agricultural purposes." *Tilden v. Smith*, 94 Fla. 502, 113 So. 708, 712 (1927).

2. Mean High Water is generally the boundary between public and private ownership on tidally influenced waters. It is computed very differently as the average a height of the high waters over a 19 year period. Fla. Stat. §177.27 (14).

C. Waterfront Boundaries Move. The boundary along water frontage is ambulatory. It Moves from time to time and therefor can never be pinned down to a specific point in a survey. This becomes a key point later in our discussions because it affects the way in which a waterfront property must be described.

1. Accretion -- the gradual building up of the land;

2. Erosion -- the gradual washing away of the land;

3. Reliction – the gradual lowering of the water to expose the land and other gradual and imperceptible changes

Each move the boundary between public and private ownership.

4. Avulsive – sudden, perceptible changes or artificial changes -- do not change the boundary between public and private ownership. Examples of this would be a hurricane cutting a new pass, or changing the route of a river, or any change in the waterfront involving heavy equipment.

III. Waterfront Owner Has Certain Rights in the Waterbody. There are two types of rights to waterfront property, and although technically different, they are so similar that they are referred to almost interchangeably -- Riparian and Littoral Rights. They only apply when the state owns the waterbody, although similar rights have been found in shared private waterbodies.

A. Riparian vs. Littoral. Riparian rights attach to lands fronting on a river or stream; littoral rights are those appurtenant to lands fronting on an ocean, sea, or lake.

B. Vested Common Law Rights. Riparian and littoral rights are common law rights and, for constitutional purposes, they constitute "property." *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, 512 So.2d 934 (Fla. 1987); *State v.*

Florida National Properties, Inc., 338 So.2d 13 (Fla. 1976); *Brickell v. Trammell*, 77 Fla. 544, 82 So. 221 (1919).

C. Include Use Rights. Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property. *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, 512 So.2d 934, 936 (Fla. 1987), See also *Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967).

F.S. 253.141(1) defines riparian rights as follows:

> "Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary [exclusive] nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach."

D. Include Access and Contact Rights. Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property." Sand Key Assocs, 512 So.2d at 936. But see *Walton County v. Stop the Beach Renourishment,* 998 So.2d 1102, (Fla. 2008)

E. Can't be Statutorily Modified. Because riparian and littoral rights are common law creations that vested in the upland owner long before the adoption of the statutory definition in 1953, the statutory definition cannot constitutionally modify, limit, or restrict those rights granted at common law. *State v. Florida National Properties, Inc.*, 338 So.2d 13 (Fla. 1976). Nonetheless, the statutory definition is likely to be casually followed and is not a bad restatement of the common law.

More recently, the First District Court in *Save Our Beaches, Inc. v. Florida Dept. of Environmental Protection*, 27 So.3d 48 (Fla. 1st DCA, 2006), held that the establishment of an Erosion Control Line that had the effect of fixing the boundary in conjunction with beach restoration unconstitutionally deprived riparian owners of vested property rights. The First DCA certified it as a question of great public importance.

In a carefully nuanced 5-2 opinion with a strong dissent, the Florida Supreme Court rephrased the certified question as a challenge to facial constitutionality of the act and reversed. In doing so, they indicated that under Florida common law, there is no independent right of contact with the water. Instead, contact is ancillary to the littoral right of access to the water such that deprivation of the right is not a constitutional taking so long as the right of access is maintained.

The court also drew two other interesting distinctions. First they suggested that since the MHWL is the boundary between private and sovereignty ownership, the maintenance of their boundary with sovereignty lands is sufficient. The court also went into an analysis of the common law of avulsion. Beach restoration is clearly an avulsive change. Based on that analysis the court concluded the state, as the owner of the sovereign foreshore between high and low water marks had the same right to restore an avulsive loss as a private owner of riparian and littoral rights. *Walton County v. Stop the Beach Renourishment,* 998 So.2d 1102, (Fla. 2008).

This case was appealed to the U.S. Supreme Court as *Stop the Beach Renourishment, Inc., v. Florida Department of Environmental Protection, et al.* 560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184, (U.S. 2010)

In an 8-4-2-2 holding, the court concluded that the Florida Supreme Court had correctly interpreted the intersection of two core principals of Florida property law – Littoral rights and the Doctrine of Avulsion. Since in their view, this was not a change to a well established property right, or a recharacterization as public property that which previously was private, all 8 participating judges concurred that no taking had occurred in this case. Four of the judges would have used the case to articulate standards for evaluating a judicial taking, the other four would not articulate that standard – but for different reasons.

While not expressly overruling it, this case calls into question the notion that the right of an upland to receive accretions is not abrogated by a conveyance of the submerged sovereignty lands by the Trustees to the City of Pensacola. *See, City of Pensacola v. Capital Realty Holding Co., Inc.,* 417 So.2d 687, (Fla. 1st DCA, 1982).

A companion case to *Stop the Beach Renourishment* is moving forward on an inverse condemnation claim, challenging in part the location of the Erosion Control Line landward of the pre-hurricane Mean High Water Line. *Board of Trustees of Internal Imp. Trust Fund v. Walton County,* 121 So.3d 1166, (Fla. 1st DCA, 2013)

IV. Riparian Ownership Requires Proper Description. There must have been riparian ownership for title to filled lands to pass from the state. *See, Axline v. Shaw*, 35 Fla. 305, 17 So. 411.; *Brickell v. Trammell*, 77 Fla. 544, 82 So. 221. *Teat v. City of Apalachicola*, 738 So.2d 413 (Fla. 1st DCA 1999).

A. An example of a "correct" legal description will reference the OHWL/MHTL. For example

Commencing at the NE corner of Section X, Township Y, Range Z, run thence ..... to the POINT OF BEGINNING, continue thence N 89°59'57"E 150.00 feet to a point, thence S 0°00'03"E for 200 feet more or less to the Ordinary High Water Line of Lake FLEA (or Mean High Tide Line of the Gulf of Mexico), thence continue westerly following the Ordinary High Water Line of Lake FLEA to a point which lies S 0°00'03"E from the POINT OF BEGINNING, thence N 0°00'03"W 200 feet more or less to the POINT OF BEGINNING, lying and being in Reptile County, Florida.

B. If the property description of the upland parcel did not reach to the water's edge, you don't have riparian rights and among other problems, no title to the filled lands could arise under the Butler Act.

C. An area of S&O lands between the conveyed upland and the waterbody would obviously be fatal to riparian rights.

D. This is a common area of problems in plats as is shown on the examples in the appendix.

E. A legal description to a set point/distance, may or may not include riparian rights depending on where the OHWL falls with regard to that point. If the point is out in the water today (and not artificially or avulsively so), you have riparian rights, if short of the OHWL, you don't.

V. Canals and Retention Ponds Marketed As Lakes. In order to provide boat access and water frontage, many developers created a series of canals, and platted their roads and lots to maximize the canal frontage. These were generally (but not always) platted to a seawall along the back and a definite back line.

A. The first issue to be addressed is the title to the lot itself. If the lots were originally a tidal marsh (hence State owned sovereignty lands), you have a title issue which must be addressed in one of the manners outlined below in more detail.

1. Is there an express deed from the State conveying sovereignty or submerged lands?
2. Was the fill prior to the repeal of the Butler Act? Were there any Butler Act exceptions which would have prevented the property from being vested? Did they create an "island" in the marsh?
3. Was title cleared by the 1993 legislation? Were there any exceptions or limitations applicable to it?

B. The next issue is the rights in the canal.

1. If the entire area was originally a tidelands, the area which remained as a canal would not have been vested by Butler or the 1993 legislation and remains in state ownership. The normal rules of accretion, erosion, and reliction moving the

boundary would still apply – IF your landowner was the riparian owner. If not, perhaps future accretions in front of the seawall vested in the original developer or others. Look carefully at the plat dedication language as it pertains to the canal.

2. If the canals were cut into "uplands" they are privately owned, and the lot purchaser's rights in them (if any) will be determined by (a) the Plat dedication; (b) rules of prescriptive easement; (c) an implied right of access and use from the appearance on the plat (ie the designation of the canal or those little squiggly lines were intended to show that you had waterfront property, hence riparian rights) and/or (d) judicial determinations.

3. In evaluating canal front parcels, a survey and a site inspection are important. If the seawall is waterward of the measured distance, someone else may own your seawall and your riparian rights. If land has accreted in front of the seawall, it may be someone else's land. If part of what was designated as a canal was never dug out (and perhaps later sold by metes and bounds descriptions), you have potentially adverse claims – and must include appropriate exclusions in the title commitment.

C. **"Lakefront" is sometimes a Marketing Gimmick.** Subdivisions often call their retention ponds lakes, and even charge a premium for the lots fronting on them. If a retention point/lake is dug on uplands, the lake is still privately owned and the usual rules of conveyancing apply. The normal practice is to designate a rear lot line which does not reach to the planned high water level of the retention pond. The lot owner doesn't have riparian rights unless they have been expressly granted perhaps in the plat dedication, and the developer and others can access and use the land along the edge of the lake.

In the rare circumstance where the rear lot line actually reaches the water (or even into the retention pond), it is still a "hard boundary." The boundary line is not subject to change by erosion or accretion. Although not discussed in depth here, there may be private rights analogous to riparian or littoral rights in land-locked non-navigable lakes. See e.g. *Duval v. Thomas*, 114 So.2d 791 (Fla. 1959).

VI. History of Water-law and Sovereignty Land Titles. In order to understand the current problems and issues, a review of real property history is necessary: This history applies to both tidal and non-tidal waters.

A. Spain Cedes Florida to the United States: On February 22, 1819, the King of Spain, by treaty, ceded the territories of East and West Florida to the United States. Article II of Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, between United States and Spain.

B. State Acquired Title to Sovereignty Lands: The State of Florida, upon becoming a state, automatically acquired title to lands under navigable waters (so called "Sovereignty Lands") up to the Ordinary High Water Line (OHWL) through the common-law "equal footing" doctrine and through the express "equal footing" language of the admission statute. Act of March 3, 1845, ch. 48 §1. This was the first non-record conveyance.

In *Sexton v. Bd. of Trustees of the Internal Improvement Trust Fund*, 101 So.3d 946, (Fla. 1st DCA, 2012), the court explained that the Board is a statutory creature whose exercise of powers can be either regulatory or proprietary. Where the Board acts to manage or control state-owned sovereignty lands, in this case by granting an easement appurtenant, it acts as a fiduciary, holding the sovereignty lands as a public trust; its actions in doing so are deemed proprietary, rather than regulatory, in nature, and compliance with the Administrative Procedures Act (ch. 120, Fla. Stat.) is not required.

C. State Acquired Swamp and Overflowed Lands: In 1850, Congress passed the Federal Swamp and Overflowed Lands Act, Act of Sept. 28, 1850, ch. 84, 9 Stat. 519 (the "S&O Act"). Pursuant to the S&O Act, over 20 million acres, some 2/3 of the landmass of the state, was ultimately conveyed to the State of Florida.

D. State is Surveyed: During this same period, the United States commissioned a survey of the State of Florida, directing its surveyors to "accurately meander, by course and distance all navigable rivers ... all navigable bayous flowing from or into such rivers; [and] all lakes or deep ponds." These surveys were completed, submitted to the state and approved and used as a basis for conveying the S&O lands to the state. The patents from the U.S. used the descriptions from the official U.S. Government surveys, and made no mention of any unmeandered waterbodies shown on the plats.

E. The State Sells the Land: After the S&O lands were patented to the State, the State began actively selling off the S&O lands, again utilizing the descriptions contained in the U.S. Government surveys. The resulting deeds were absolute on their face and purported to convey all of the Trustees' interest in the land. They, like the Federal S&O Deeds, made no mention of unmeandered waterbodies, even when the waterbodies were clearly shown on the surveys. The landowners/purchasers paid a set price per acre, with the total based on the total acreage in the parcel, again without any adjustment for any waterbodies. The purchasers paid taxes on the land, farmed and built homes and other structures, all without any indication that the state might claim some interest in the property described in their deeds.

F. Conveyances Excepted Meandered Waters: Since the conveyances into private hands "excepted" only the meandered waterbodies, there were facially valid conveyances of lands under the non-meandered waterbodies into private ownership. Under Florida law, if the waterbodies were, in fact, non-navigable as of the date of statehood, those conveyances were wholly valid to convey the lands beneath those waters into private ownership. The relevant question then is whether the waterbody was "navigable" for purposes of the Federal Title Test, on the date of statehood. We, thus, have a situation where lands under what may or may not have been navigable waters were apparently conveyed into private ownership by the state, without any express reservation of rights in waters then known to be on the property.

G. MRTA is Passed: In 1963, the Legislature passed MRTA for the stated purpose of "simplifying and facilitating land title transactions by allowing persons to rely on a record title." Fla. Stat. §712.10 (2004). MRTA was, prior to the 1978 amendments, facially applicable to the state and to Sovereignty Lands.

H. Pre-*Coastal* Cases held MRTA Applicable: Prior to the ruling in *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986), Florida courts had repeatedly held that MRTA applied to land beneath waterbodies and could divest the state of ownership, where someone else had held record title to the parcel for the requisite 30 year period. See e.g., *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla. 1976); *Sawyer v. Modrall*, 286 So.2d 610 (Fla. 4th DCA 1973) (issue raised between private litigants); *State v. Contemporary Land Sales, Inc.*, 400 So.2d 488 (Fla. 5th DCA 1981) (MRTA perfects title in private owner to lands which would otherwise be owned by the state as sovereign); *City of Miami v. St. Joe Paper Co.*, 347 So.2d 622 (3d DCA 1977)(MRTA precludes city's claim to certain lands submerged under navigable waters), aff'd 364 So.2d 439 (Fla. 1978).

I. Attorneys' Relied: Attorneys called upon to examine title to waterfront property relied on these cases and routinely issued opinions that the individual owned lands down to the current waters edge. If pushed, they would reread this line of cases and conclude that MRTA perfected title in lands beneath the waters if the waterbody had not been meandered in the original U.S. Government Survey.

VII. Inland Waters & *Coastal* Technically, *Coastal* applies to both tidal and non-tidal waters, but as a practical matter owing to the influence of the Butler Act and the 1993 legislation, it has little practical effect on Tidal waters.

A. Background of Case: *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986) was one of a group of cases on the same basic facts. In the 1940s the state granted the predecessor of Coastal Petroleum Company a series of leases authorizing them to explore for oil, gas and other minerals off the coast of Florida, and on the sovereignty lands under certain enumerated lakes and rivers. Nothing was ever found in the way of oil and gas, but Coastal noted that phosphate had been dug from lands adjacent to (but not under) the Peace and Alafia rivers. Coastal filed suit against the phosphate companies claiming conversion of phosphate based on the theory that (1) the Peace and Alafia Rivers, North of Township 39 South, although not meandered, were navigable in 1845 and thus state property; (2) that because of avulsive lowering of the water, the area owned by the state extended hundreds of yards beyond the physical river, past a cypress swamp to the upland edge of an area of mixed hardwoods; and (3) that all phosphate dug from those lands belonged to the state, and they had a leasehold interest in that phosphate which entitled them to recover for its conversion. The state ultimately joined the litigation as a co-plaintiff and the case made headlines.

B. The Legal Issues: The landowners filed quiet title actions and moved for summary judgment on the following bases:

1. MRTA – They had record title for over thirty years.

2. Contemporaneous Determination -- The notion that the issue of navigability in 1845 had been decided at the time of the original U.S. survey, when the waterbodies in question were shown in the surveys, but not meandered, and when those surveys were expressly approved by the Governor and Cabinet.

3. Estoppel by Deed -- the common law rule that, if you deliver a deed conveying something you do not own and later acquire it, title passes automatically.

4. Equitable Estoppel -- The notion that, by purporting to sell the property and then for years treating the landowner as if they owned it, the state was estopped from challenging his ownership.

C. The Holding: *Coastal* held that MRTA, and the other summary bases of determination, could not be used to quiet title to Sovereignty Lands. (Equitable Estoppel was not addressed by the court.) They then held that the Trustees of the Internal Improvement Trust Fund, at the time of the S&O deeds, lacked the authority to convey sovereignty lands and that the lands were conveyed subject to an implicit notice of navigability (a non-record reservation). Ruling out the summary means of determining title effectively left it to lower courts to address the relevant legal doctrines:

VIII. Governing Legal Doctrines after *Coastal*: After *Coastal* there are basically five legal doctrines relevant to a Sovereignty Lands determination: They are:

A. If a given waterbody was navigable on March 3, 1845 (the date of statehood), the lands under that waterbody are Sovereignty Lands and ownership passed to the State by virtue of it becoming a state (the Equal Footing Doctrine). Note that the test is navigability when Florida became a state, not current navigability.

B. The dividing line between public and private ownership of lands adjacent to state-owned waterbodies is the OHWL. The main body of Florida case law addressing the issue, states "[t]he ordinary high water line (OHWL) is described as 'the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation.'" *Board of Trustees v. Walker Ranch*, 496 So.2d 153, 155 (Fla. 5th DCA 1986) quoting *Tilden v. Smith*, 94 Fla. 502, 113 So. 708, 712 (1927).

C. Changes in the OHWL resulting from slow, natural processes (accretion, reliction and erosion) change the dividing line between public and private ownership. Avulsive changes resulting from sudden or artificial changes affecting the OHWL do not affect the boundary between state and private ownership. Thus, as the natural movement of waters build up or erode lands along one side of a waterbody, the line of demarcation between public and private ownership adjusts to correspond to the then existing OHWL. On the

other hand, avulsive changes do not change this line of demarcation and, over time, a significant gap may develop between the water-line and the public-private boundary.

D. There is a rebuttable presumption that waterbodies which were meandered in the original U.S. government surveys were "navigable" and, conversely, that unmeandered waterbodies were not. This, however, is not an absolute rule, but may be challenged in court. The courts have not, to my knowledge, clearly established the strength of these presumptions.

E. The state does not lose title to any Sovereignty Lands through the application of the Marketable Record Title Act, the doctrine of contemporaneous determination or the doctrine of legal estoppel. This was the express holding of *Coastal.*

What is Navigable:

1. **Three Federal Definitions:** There are three definitions of navigability under the federal law. The first is used for the existence of federal admiralty jurisdiction, the second to determine the respective rights of the federal and state governments to regulate under the commerce clause and the third to determine land ownership. *See* MacGrady, *The Navigability Concept in Civil and Common Law: Historical Development, Current Importance, and some Doctrines that Don't Hold Water*, 3 FLA. ST. U.L. REV. 511, 587-605 (1975).

2. **Title Test:** The test for title purposes is whether, on March 3, 1845, a river was susceptible of use (actual use is unnecessary) in its natural and ordinary condition "for commerce" by a "customary mode of trade and travel." *See*, *The Daniel Ball*, 77 U.S. 557 (1870).

    a. **"Customary Mode" is Controversial:** Commercial log floatage and/or recreational boating have been suggested as extreme examples of "customary modes" of navigation. Both are problematic.

    b. The test of customary mode is at the date of statehood, so recreational boating is anachronistic.

    c. *Bucki v. Cone*, 25 Fla. 1, 6 So. 160 (1889), the one Florida case usually cited to support a log floating standard is unclear. While some portions of it seem to support a log floating standard for the title test, other sections suggest that the feasibility of log floating only establishes an easement. In fact, there is language expressly stating that the bed of the river in question was privately owned. The Moral: Don't rely on headnotes.

    d. The state position, as outlined in various draft regulations and cases suggests very broad standards for navigability, including log floatage and shallow draft vessels.

3. **From a title examination and insuring standpoint, Navigability is rarely the salient issue. If you have a waterbody, except in the most unusual circumstances, you will assume it is navigable and include the appropriate exceptions, while transferring the maximum possible -- without giving title warranties in your deed.**

IX. Problem is Indeterminacy. The initial problem is that we, as title examiners, cannot answer the key questions of (1) whether a given waterbody was navigable in 1845; and (2) where the OHWL *would be* had there been no avulsive changes in the intervening years. For purposes of thinking about it, our uncertainty comes about as a result of three things:

1. Avulsive changes.
2. Bowl theory – projection of OHWL to upland extent of any connected S&O lands.
3. Subtle redefinition and uncertainty about the definition of the OWHL.

A. Deliberate Changes. The S&O lands were conveyed to the state and then to individual landowners on the express condition that they be drained, reclaimed and made fit for agriculture. They were--with state permission! And some of the changes are now over 100 years old. Now it is contended that this type of artificial draining lowered the OHWL and artificially exposed state owned sovereignty land. Since drainage was so prevalent a practice, and occurred over so many years, it is all but impossible to retrospectively determine the magnitude of its impact.

B. Unlimited Scope of Changes which can be Cited: Even though "avulsive change" is a seemingly innocuous standard, its potential scope is broad and subject to no proximate cause type limitations. In *Coastal*, the Trustees alleged three separate categories of first-order artificial change: (1) pumping of ground water in surrounding areas; (2) elimination of some fifty square miles of tributary drainage area upriver through building and the like; and (3) installation of dams on a series of lakes which control flow into the upriver collection areas. One can plausibly allege that these factors impacted on almost every waterbody in Florida.

Moreover, there are no limits on the types of impact which can be argued. Potential arguments include: (1) that increased water pumping from the Green Swamp in northern Polk County lowered the Floridan aquifer, thus lowering the waterlevels in Lake Hancock and the Peace River; (2) the same argument could be made regarding pumping further north in Lake City and in the Okefenokee swamp; (3) likewise, one can allege an impact by the incomplete Cross Florida Barge Canal on the aquifer.

C. Subtle Redefinition of OHWL and S&O lands. Although the case law is clear in stating "[t]he ordinary high water line (OHWL) is described as 'the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation.'" *Board of Trustees v. Walker Ranch*, 496 So.2d 153, 155 (Fla. 5th DCA 1986) quoting *Tilden v. Smith*, 94 Fla. 502, 113 So.

708, 712 (1927), the arguments posited by the state in the *Coastal* cases and elsewhere have deliberately avoided this narrow standard and argued for a more expansive definition and resulted in a muddying of the issue.

The confusion is largely a product of the common law manner in which we decide and document cases. A judge can't simply say "the line is here" -- but must find a way to articulate that location in words which are consistent with the common law heritage. These issues, by their nature are fact specific to each waterbody, yet we try to generalize the imprecise words to other very different fact situations. Like all good lawyers, both sides of the issue argue selected bits of language which seem to support their position, all to often without comparing it with the underlying "facts" of the case in which the law was made.

The Second DCA expanded the scope of potential claims in *MacNamara v. Kissimmee River Valley Sportsmans' Assoc. & Board of Trustees of the Internal Improvement Trust Fund.* 648 So.2d 155 (Fla. 2d DCA 1994), *rev. den.* 651 So.2d 1195 to suggest that the boundary is the high water level rather than the high water line (a distinction which quickly runs into the traditional definition of Swamp and Overflowed Lands.

This opinion then goes on to suggest that the OHWL is some type of mathematical average of the annual high water levels and suggesting an analogy to the cycle of tides that established the Mean High Water Line boundary on tidal waters. The reasoning of this opinion is (in my opinion) seriously flawed. *MacNamara* substantially changes Florida water law (albeit in a more subtle fashion than *Coastal*) and will cause significant problems and a significant expansion of the State's land claims. Please keep in mind that the issue is not the ownership of areas currently under water, but of high, dry and Swamp and Overflowed lands which were originally conveyed as part of the 20 million acres of S&O lands and which today may have long been developed.

D. The Bowl Theory. *MacNamara* and its use of a high water level sets provides support for the Bowl Theory. This notion has some intuitive appeal based on the physics 101 lesson that water seeks its own level, but would upset longstanding notions of what constitutes privately owned Swamp and Overflowed lands. In 1850, the Federal government transferred to the State all Swamp and Overflowed lands. The state then used the same definition to transfer those same lands into private hands. The definition used was very broad – far broader than would ever be adopted in today's more environmentally conscious times – and purported to privatize anything which was not covered by navigable waters and could be drained for agriculture.

In interpretations of the Swamp and Overflowed Lands Act, the categories of land were judicially defined. "Swamp lands," as distinguished from overflowed lands, are such as require drainage to dispose of needless water or moisture on or in the lands in order to make them fit for successful and useful cultivation. "Overflowed lands" are those that are covered by non-navigable waters or are subject such periodical or frequent overflows of water, salt or fresh, (not including lands between high and low water marks of navigable

streams or bodies of water, nor lands covered and uncovered by the ordinary daily ebb and flow of normal tides of navigable waters), as to require drainage or leaves or embankments to keep out the water, and thereby render the lands suitable for successful cultivation. *State ex rel. Ellis v. Gerbing*, 47 So. 353 (Fla. 1908).

Imagine the fairly common situation in 1850 Florida of a large flat non-navigable swampy area largely separated from an adjacent lake or river by a sandy ridge growing trees. If there was a gap in the ridge line such that water at high water levels could flow between the lake and the swamp, the bowl theory would hold that this swampy area was part of the waterbody and therefore state-owned sovereignty land. The "policy problem" is that many swamps of this type are no longer swamp and wetland, but have been drained, filled and turned into subdivisions and even whole cities.

The "legal problem" is that the "Bowl Theory" may constitute a taking by redefining privately owned S&O lands as state-owned sovereignty lands. It was well established that privately owned "overflowed" lands could be constantly covered by nonnavigable waters so long as they could be drained by levees, embankments and other methods to make them suitable for cultivation. *State ex rel. Ellis v. Gerbing*, 47 So. 353 (Fla. 1908). The "Bowl Theory" would eliminate the admittedly difficult to locate water-to-water boundary between sovereignty lands and S&O lands by characterizing all "attached" S&O lands (and former S&O lands) as state owned sovereignty lands.

Although it can be characterized as *dicta*, the court in *Lee v. Williams,* 711 So.2d 57 (Fla. 5th DCA 1998) *rev den.* 772 So.2d 193 (Fla. 1998), (a tidal case) cites references in the *Clement* briefs to a water-to-water boundary between the waters of various waterbodies, each marking the line of demarcation, with approval. The application of this tidal case to freshwaters, by implication, negates the application of the bowl theory. This is only fitting, as much of the impetus for the bowl theory came about as a result of *Phillips Petroleum*'s holding that all tidally influenced waters, whether or not navigable, passed to the state as sovereignty lands. Nonetheless, until clearly rejected, the state and various environmental groups can be expected to continue to press their "bowl theory."

X. Different Standard for Tidal Waters.

Unlike fresh waters where lands under non-navigable waters didn't pass to the state as sovereignty lands, all tidelands passed to the state. In the case of *Phillips Petroleum Company and Cinque Bambini Partnership v. Mississippi and Saga Petroleum U.S., Inc.,* 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), *reh. den.* 486 U.S. 1018 the U.S. Supreme Court held that non-navigable tidal waterbodies (NOT Fresh-water, Non-tidal Waterbodies) are state owned sovereignty land, regardless of (i) emergent vegetation, (ii) depth of water, (iii) periodically being exposed; or (iv) distance from the main waterbody. This case facially conflicts with some of the holdings of the Florida Supreme Court. As the U.S. Supreme Court expressly stated that individual states could and had deviated from these standards, the Florida cases supporting private ownership of lands under non-

navigable tidal waterbodies seemingly survive. See *Clement v. Watson*, 63 Fla. 109, 58 So. 25 (1912), and *South Venice Corp. v. Caspersen*, 229 So. 2d 652 (Fla. 2d DCA 1970).

More recently, *Lee v. Williams,* 711 So.2d 57 (Fla. 5th DCA 1998) *rev den.* 772 So.2d 193 (Fla. 1998), reconciled the seemingly disparate holdings of *Phillips Petroleum* and *Clement*. The reconciliation went something like this:

There were two key holdings in *Phillips Petroleum:*

1. **When it became a state, Florida acquired ALL lands under tidally influenced waters – whether or not navigable.** This has been a question on past certification exams. This is based on well established federal precedent since the early 19th century.

2 **Individual states have the authority to define the limits of the lands held under their individual public trust doctrines** and to recognize private rights as they see fit. States have reached different conclusions as to the scope of their respective public trust doctrines.

The *Lee v. Williams* court then took the next step and asked: "What are the limits of lands held in public trust and what private rights in tidelands has Florida seen fit to recognize?" They concluded that the public trust doctrine is a creature of common law and therefore – at least absent statutory or constitutional guidance – subject to judicial determination and modification and that *Clement* was consistent with other Florida precedents and still good law. The court also pointed out, almost as an afterthought, that sovereignty lands are defined in Art. X, § 11 of the Florida Constitution to mean "lands under navigable waters."

This is not without controversy. Some very capable lawyers, including Norwood Gay, in his article Tidelands, in Symposium on Sovereignty Lands, 20 Stetson L.Rev. 143 (1990) disagreed vehemently with Justice Whitfield's conclusions in *Clement* and pointed out the one irreducible flaw in its logic – and in the logic of *Lee v. Williams*. Title in both of these cases derives from federal land grants. Since the federal government had already parted with title to the non-navigable tidelands when Florida became a state in 1845, *Phillips Petroleum*, the federal government could not have subsequently transferred any title interest in these lands as part of its land grant. The issue is confused by the location of surveyors meander lines which were used as the basis of defining the lands conveyed. This issue, too, will be resurrected for further litigation.

The second trouble with the *Lee* analysis is that it didn't clearly take the second step. They dealt with the issue of public trust protection of nonnavigable tidelands (holding there is none), but did not directly deal with the issue of how title passed into the current owners. The court commented on and implicitly dismissed the state's argument that there was never a deed out of the state, but didn't take the next step and clarify how title passed. The only theoretical reconciliation I have seen for this conundrum is based on MRTA.

In *PPL Montana, LLC v. Montana,* 132 S.Ct. 1215, 182 L.Ed.2d 77, (U.S. 2012), a unanimous court provided an excellent review of the history of sovereignty lands, but maintained (and perhaps clarified) the *Phillips/Lee* dichotomy. The Court in *Montana* held that under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines what title passed to the state under the equal-footing doctrine.

Then, citing to *Brewer–Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88, 43 S.Ct. 60, 67 L.Ed. 140 (U.S. 1922), the *Montana* ruling quoted: "It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which. would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked."

XI. Filled Lands: Any discussion of filled lands must begin with an understanding of Sovereignty lands and the manner in which the state acquired title to the sovereignty lands. After that three acts which expressly permitted landowners to acquire title to sovereignty lands by filling simplify our discussion – the Riparian Act of 1856, The Butler Act and the 1993 Legislation.

A. The Riparian Act of 1856: The Riparian Act of 1856, ch. 791, Fla. Laws 1856 (the "1856 Act"), provided that a riparian owner of lands abutting a navigable stream, bay or harbor could bulkhead and fill out to the channel of the waterbody and thereby acquire title to the filled lands. This too is a non-record transaction, the conveyance occurred automatically upon filling. The 1856 Act, on its face, appeared to be an automatic conveyance of the fee ownership of lands under navigable waters out to the channel, regardless of whether the land was actually filled. Notwithstanding this language, the courts after some vacillation interpreted this conveyance to be effective only after the riparian landowner had actually filled the property.

B. The Butler Act: In 1921, the Legislature passed the Butler Act, ch. 8537 Fla. Laws 1921, retroactive to 1856, which was substantively similar to the 1856 Act, but:

a. clarified that it applied to lands filled after 1856;

b. clarified that it applied to landowners other than natural U.S. citizens and the U.S. government;

c. expressly provided that the lands were not granted until "actually filled in or permanently improved";

d. reiterated that the Butler Act did not convey S&O lands, or convey submerged lands to any persons other than a riparian owner; and

e. expressly provided that it does not apply to lakes, other than tide water lakes. See *Martin v. Busch*, 112 So. 274 (Fla. 1927) (Lake Okeechobee is not a tide-water lake).

The 1856 Act, like the later Butler Act, applied only to navigable streams, bays of the sea or harbor. It did not apply to lakes (except tide water lakes).

1. **Transfer of Title to Submerged Tidal Lands:** Effective May 29, 1951, the title to all submerged tidal lands (except those in Dade and Palm Beach Counties) was conveyed to the Trustees. ch. 26776 Fla. Laws 1951. This is generally, although not universally, viewed as terminating the ability of landowners to acquire title to tidal lands (except in Dade and Palm Beach Counties) under the Butler Act.

2. **Repeal:** The Butler Act was formally repealed by the Bulkhead Act, effective June 11, 1957. ch 57-362 Fla. Laws 1957.

3. **Butler Act Ineffective After 1951?** There is a distinct difference of opinion among practitioners as to the date the Butler Act ceased to be effective outside Dade and Palm Beach Counties. The 1957 repealer included a provision confirming title to all lands "heretofore filled or developed," which suggests that filling between 1951 and 1957 operated to convey title. The Fund, and other commentators, take the position that the Butler Act ceased to be effective as to lands outside Dade and Palm Beach Counties upon conveyance to the Trustees in 1951. They, thus, require a disclaimer for pre-1951 filling and a conveyance after 1951. See Title Notes 32.01.02 and MALONEY, PLAGER & BALDWIN, Florida Water Law & Administration --The Florida Experience, §125.3(b).

4. **Traps for the Unwary:** Even when one determines that filling was completed prior to May 29, 1951, there are potential problems:

   a. **Sovereignty Lands Leases:** DEP has been systematically requiring owners of docks, wharves and other improvements extending out over sovereignty lands to execute sovereignty lands leases with the state. They have also been seeking such leases on improvements which were clearly vested by the Butler Act, and the lease, executed with the formality of a deed, includes language which arguably "reconveys" the Butler Act improvements to the State.

      > "PROPERTY RIGHTS: The Lessee shall make no claim of or title or interest to said lands hereinbefore described by reason of the occupancy or use thereof, and all title and interest to said land hereinbefore described is vested in the Lessor."

   b. **Lakes Excluded:** The Butler Act does not grant rights in lakes other than tidal lakes. It is only effective as to filled lands in a navigable stream, bay of the sea or harbor.

   c. **Only Riparian Owner Could Fill:** The Butler Act, like the 1856 Act, only granted rights to riparian owners. If someone other than the riparian owner

filled the land, it is still state owned. The construction of the intracoastal waterway and various Corp of Engineers river straightening and drainage projects took place in the 1930s and 1940s. As the waterways were dredged, adjacent lands were filled. Since these lands were filled by the U.S. Government, Florida may one day contest the ownership of these filled lands because the upland owner did not do the filling. The court in *Stevens v. Trustees of Internal Improvement Trust Fund*, Case No. 85-529 (Hendry County, 1986) expressly upheld this analysis.

d. Riparian Ownership Required: There must have been riparian ownership for title to filled lands to pass from the state. *See, Axline v. Shaw*, 35 Fla. 305, 17 So. 411.; *Brickell v. Trammell*, 77 Fla. 544, 82 So. 221. *Teat v. City of Apalachicola*, 738 So.2d 413 (Fla. 1st DCA 1999).

e. Coastal Petroleum Leases: In 1944 the Trustees granted three leases to Coastal Petroleum Company, including the right to produce oil, gas and other minerals covering large tracts of sovereignty lands all along the west coast of Florida, from St. George Island south to Collier County and extending out roughly 7 miles. The leases also covered sovereignty lands under a long list of inland lakes and rivers.

The Coastal Leases were subsequently amended, pursuant to a settlement agreement, whereby Coastal Petroleum reduced its interest to a residual royalty on oil, gas, sulphur and other minerals that may be produced. These are easily overlooked exceptions since the leases are not broken down by section and township and will constitute a cloud as to all sovereignty lands under or adjacent to one of the listed bodies **and to filled lands** (whether legally or illegally filled). The application to illegally filled lands is obvious. Title to those remains in the State and the State could convey the lease interest. Lands which were legally filled (under the Butler Act or otherwise), after the leases were first recorded, also took subject to the leases. Specific exceptions are required as to these leases unless they have been released as to a parcel. See Title Notes 19.05.02.

f. Upland is Exposed Sovereignty Land: Assume a situation where the record owner of riparian property legally filled his land prior to 1951 (thus the Butler Act applied), and assume his land was later determined to be avulsively exposed sovereignty land. Under the *Coastal* decision, he never acquired title to the sovereignty lands. His filling created what could be characterized as an "island" in the exposed river bottom. The Butler Act would not act to grant title to such filled lands.

g. Is Dredging a "Permanent Improvement"? The Butler Act is still with us even though long repealed because it vested property rights. A recently litigated issue was whether the dredging around and within a marina constitute

the type of "permanent improvement" which (if done during the Butler period) would vest ownership of the dredged areas (where the boats sit). It was generally conceded that the actual area under the docks and piers was vested by the Butler Act. The Third Circuit, in *Trustees v. Key West Conch Harbor*, 683 So.2d 144 (Fla. 5th DCA 1996) *rev. den.* 695 So.2d. 698 (Fla. 1996) held that what constitutes an improvement was a case by case determination, and in that particular case, building piers and dredging around them was sufficient for the Butler Act to grant title.

This was later reversed in *City of West Palm Beach v. Board of Trustees of Internal Improvement Trust Fund*, 746 So.2d 1085 (Fla. 1999) which held that land under open water can never be subject to divestiture under the Butler Act even where it has been dredged incident to a permanent improvement. In *dicta* leading up to this ultimate question, the court indicated that "permanently improved" denoted "significant structures which are the functional equivalent of the 'wharves ... warehouses, dwellings or other buildings'" referred to in the Butler Act. *Id.* at * 17.

h. Logic of *Coastal*: One of the fundamental holdings of *Coastal* was that Article X, Section 11 of the Florida Constitution (restricting the conveyance of Sovereignty Lands unless determined to be in the Public Interest) was merely a codification of the existing Public Trust Doctrine. If such was the case, a determination of public interest would seemingly have been required for both the Butler Act and the 1856 Act in that both purported to divest the state of its sovereignty lands. The only findings were of the benefit of commerce from wharves and warehouses--both seemingly private benefits to the owners.

C. 1993 Legislation Provides Partial Solution To Sovereignty Lands Problems for Tidal Waters. The 1993 session of the legislature, CS/CS/HB 2315 (the "Act") added subsections (9) and (10) to Section 253.12 Fla. Stat. and provided a partial solution to the sovereignty lands problems in Florida, effective July 1, 1993.

1. Some Butler Act Shortcomings Solved. The Butler Act had a number of preconditions and shortcomings which after the passage of time are frequently difficult to prove. Although the new Act adds preconditions and limitations of its own, it eliminates some of the major stumbling blocks and preconditions to vesting under the Butler Act. The new Act should quiet certain parcels which, although filled during periods when the Butler Act was in force, failed to vest because of a failure of one or more preconditions.

2. Primary Operative Provisions.

a. Subsection (9) first provides a mechanism for automatic vesting of "[a]ll of the state's right, title and interest to all tidally influenced land or tidally influenced islands bordering or being on sovereignty land, which have been permanently

extended, filled, added to existing lands or created before July 1, 1975, by fill, and might be owned by the state, is hereby granted to the landowner having record or other title to all or a portion thereof or to the lands immediately uplands thereof and its successors in interest." This provision automatically transfers all lands falling into this category into private ownership -- which may be to the benefit of the State of Florida where it is the upland owner.

b. The second operative provision, which in no way affects or limits the automatic vesting of title as described above, requires the Trustees to provide recordable documentation of the boundary line as of July 1, 1975 upon request of the landowner and submission of a proposed legal description and supporting evidence. Although the boundary line of any waterfront parcel is ambulatory and will move as a result of non-avulsive changes, having a certain starting point was thought to be a definite improvement over the prior situation of having to look back at least to 1957 and frequently to Statehood.

c. Found Constitutional. The constitutionality of Subsection (9) under Article X, Section 11 of the Florida Constitution was expressly upheld in *River Place Condominium Association at Ellenton, Inc. v. Benzing*, 890 So.2d 386 (Fla. 2nd DCA 2004), also holding that section 253.12(9), gives priority to the landowner with record or other title, rather than the upland owner. *Id.* at 388 (stating that because that option is listed first in the statute, the record title holder has priority). See also *L.A.M.A. Land Management, L.C. v. Ferro*, 964 So.2d 699, (Fla. 3rd DCA, 2006)

3. Exceptions, Limitations, Shortcomings and Caveats of the Act.

a. Deliberately Limited to Tidal Waters. Although the sovereignty lands problem clouds inland titles, perhaps to an even greater extent than lands on tidal waters because of the ameliorative effect of the Butler Act, the Act only vests lands filled out into tidal waters. This was a deliberate political and policy decision and not to be faulted. The point to keep in mind is that the present solution is only partial.

b. Only Applies to Filled Lands. The inapplicability of the statute to lands exposed by "other avulsive means" leaves a small category of tidally influenced lands possibly unaddressed.

Imagine a variation on *Trustees of Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, 512 So.2d 934, 936 (Fla. 1987), where prior to 1975, there is gradual and imperceptible increase in exposed land in front of a property as a result of groins, jetties and other man-made structures located directly in front of the benefitted property. *Sand Key* characterized as non-avulsive the increases to lands resulting from man-made structures on the land of another. The court was careful to distinguish that situation from those in which the increase was the result of man-made structures placed by the benefitting landowner or on the benefitted property.

Arguably, the limited holding of *Sand Key* would not apply where the benefitted land held the triggering structure. Even though *Sand Key* might not characterize lands exposed or created through the interaction of natural forces on a groin or jetty as non-avulsive, they are not "filled" for purposes of the Act. Accordingly, the argument can be made that the resulting exposed lands would not be vested by the Act. Although the statute does not clearly address this situation, I would strongly argue that the term "fill" as used in this Act be construed to apply to lands exposed as a result of the interaction of natural forces on a groin or jetty.

c. "Filler" Does Not Benefit. Filled Lands are not vested in any person who filled or caused to be filled the lands in question and who, as of January 1, 1993, is the record owner of the filled lands or the adjacent upland. Although there is an intuitive appeal to the notion that illegal fillers should not benefit from their wrongful actions, this exception will be the source of significant title difficulties in future years for those waterfront lands which were owned in 1993 and 1975 by the same person. Strictly speaking, ownership by the filler at the time of filling is not required, although this element will be present in almost every case. The person who filled given lands does not show in the public record and in hindsight it is often difficult to determine when or by whom a given parcel was filled.

For clients with long term ownership positions, you should consider: (i) the recordation of an affidavit as to the facts surrounding the filling, if known, or at the very least an affidavit stating that the 1993 owner did not fill or cause to be filled the lands in question; and (ii) the application for a boundary line determination to bolster the argument for some type of estoppel as to subsequent owners.

d. Spoil Islands. The Act expressly does not apply to spoil islands. This exception was included out of concern over a handful of spoil islands occupied by squatters, some of whom are alleged to have filed "wild" quit claim deeds of record. This exception is a significant gap in the coverage of the statute and a potential trap for the title examiner. There are residentially occupied spoil islands in the state which are apparently a class of people intended to benefit from this Act.

e. Lands Previously Judicially Adjudicated or as to Which Litigation is Pending. Subsection (10) provides that the Act does not vest title to lands the title to which has been judicially adjudicated or as to which litigation was pending to determine title prior to January 1, 1993. This provision is a result of concerns raised by D.E.P. that the State might inadvertently lose its claim to lands on which it had already spent substantial funds asserting and prevailing on its claims.

The DEP has circulated a proposed rule which greatly expands the scope of this exception: It reads:

> "Litigation involving title" means any litigation in any forum in which the matter of title to the lands was raised or could have been raised. If, in any forum, the title of the state was admitted by the applicant or his predecessor in title, title to such lands shall be considered to have been "judicially adjudicated" under this rule.

Proposed FAC. 18-21.019(3)(c)2. 24 Fla. Admin. Weekly 1842 (Apr. 10, 1998).

f. Lands on State Acquisition Lists. Subsection (10) further provides that the automatic vesting does not apply to any lands which are included on "an official acquisition list, on the effective date of this act, of a state agency or water management district for conservation, preservation or recreation ...." The obvious intention of this provision is to avoid the ludicrous (and politically embarrassing) result of giving away state-owned, illegally filled lands and immediately paying to buy them back. This exception has several problems:

1. the official acquisition lists are NOT part of the public record and accordingly will not be readily available to a title examiner. I urge that one or more of the title companies undertake to solicit the official acquisition lists from all state agencies and water management districts under the Public Records Act and cause them to be recorded in the public records of the various counties.

2. The agencies are not required to act on the official acquisition lists within a set period of time or ever. This could result in holding certain filled lands in a perpetual state of limbo -- where they are neither vested in the upland owner, nor acquired by the State or one of its agencies.

3. The date by which lands need to be included on the official acquisition list is the effective date of the legislation, not some date in the past. This provides the various agencies and water management districts with an opportunity, should they be so /inclined, to prospectively block the application of the statute simply by including additional properties.

g. State or Local Recreation Areas. The automatic vesting provisions of subsection (9) do not apply to "lands maintained as state or local recreation areas." While superficially a logical exception, I believe this has two illogical consequences. First, it means that state or locally owned sovereignty lands which have been filled during the applicable periods continue to be impressed with the public trust obligations inherent in the sovereignty status. From a public policy standpoint, there is no reason why a state or local governmental owner should not receive the same title clearing benefit as private landowners. The failure to treat such lands in the same fashion can only limit the flexibility of the governmental entity if, at some point in the future, it determines the sale or change in use of former recreation areas to be in its best interest. Secondly, and quite ironically, it penalizes the "good guy" who leased or licensed his land to the state or a local government for recreational use and public enjoyment. The "bad guy" who exercised all of his private property rights and excluded the public receives the benefit of the automatic vesting.

Some have questioned whether this exception applying to lands "maintained as ... recreation areas" will be expanded to apply to any lands where "Soft Sand Public Rights" might have been exercised. See *City of Daytona Beach v. Tona-Rama, Inc.* 294 So.2d 73 at 78 (Fla. 1974). I do not believe such an expansive reading of the term "maintained" is appropriate.

h. Shore Protection Structures. The last exception of Subsection (10) is for "shore protection structures." This is a particularly troubling exception from a title standpoint in that:

1. The term "shore protection structure" is not defined, nor is it limited to cases where the "shore protection structure" is publicly placed or publicly owned. Does this mean that a landowner placing of private groins precludes him from the title clearing benefits of vesting? How about a seawall? If so, how much property is excluded from the vesting? Only the land immediately under the shore protection structure? Or some greater area as is impacted (protected?) by it?

2. The presence and absence of shore protection stations is impossible to determine from an examination of the public record, and the diligent title examiner will need to examine collateral materials and perhaps even physically inspect the property in order to determine whether there was an exception to the automatic vesting.

3. "Shore Protection Structures" deteriorate, can be removed, and the current absence of a structure does not necessarily indicate the absence of a structure on the effective date of the legislation (an uncertainty which will increase with the passage of time). Since this Act (quite rightly) provides for a one time vesting, the unvested nature of lands under an absent "shore protection structure" and the resulting sovereignty lands cloud will continue indefinitely -- and not be identifiable from an examination of the public record.

i. Assorted Provisions:

1. The Act includes an express finding of public interest in making these grants.

2. The Legislature expressly recognized and preserved the common law rule that the boundary between state-owned sovereignty lands and privately owned uplands is ambulatory and will continue to move as a result of non-avulsive changes.

3. Section 82 of the Act (which was not reproduced in Statute) expressly restricts the applicability of other sections of Florida Statutes which would otherwise limit, qualify or set preconditions on the transfer of state owned lands. The failure to "waive" these provisions would have resulted in an inherent statutory interpretation problem of how to reconcile §253.12(9) with the statutory provisions setting preconditions on the sale or transfer of state owned property and sovereignty lands, but not expressly made inapplicable by the Act.

XII. Public Trust in Filled & Privately owned Submerged Lands

Whether the Public Trust Doctrine continues to apply to to filled (previous sovereignty) lands and over sovereignty lands validly conveyed into private ownership has not been as clearly articulated as might be desired.

In *Hayes v. Bowman*, 91 So.2d 795 (Fla.1957), the Hayeses and the Abbotts (submerged landowners) acquired submerged land from the State, dredged and filled it, and built a peninsular subdivision with "fingers" or smaller peninsulas extending from the main peninsula. After selling the first group of lots,

they acquired additional submerged lands and proposed to dredge and fill that land. Three riparian lot owners (of the previously filled land) filed suit to enjoin the filling, claiming that filling would interfere with their common law riparian right to an unobstructed view of the bay and the right of ingress and egress to the channel. While the court ruled that the way the later fill related to the channel of the bay, it did not encroach on the lot owners right or view or to access the channel. The court continued with language suggesting that the submerged lands lawfully conveyed by the state into private ownership continued to be burdened by the public trust.

> "the State may dispose of submerged lands under tidal waters to the extent that such disposition will not interfere with the public's right of navigation, swimming and like uses. Moreover, any person acquiring any such lands from the State must so use the land as not to interfere with the recognized common law riparian rights of upland owners *Id.* at 799

In *5F, LLC v. Dresing*, 142 So.3d 936, (Fla. 2nd DCA 2014), after an extensive discussion of the public trust doctrine, the court concluded "there is a common law qualified riparian right or privilege to construct piers or wharves from the riparian owner's land onto submerged land to the point of navigability but not beyond the low water line, subject to the superior and concurrent rights of the public and to applicable regulations. This is true regardless of whether the submerged lands are held in trust by the State or privately held.

Contrast the view in *5F,* that traditional "waterfront rights" continue after the sale of Sovereignty submerged lands, with the conclusion in *Herbits v. Board of Trustees of the Internal Improvement Trust Fund*, 195 So. 3d 1195, (Fla. 1st DCA 2016) that land ceases to be "Sovereignty submerged lands" when it was conveyed or deeded (at least for administrative law purposes).

XIII. Insuring and Resolving Title for Waterfront Property. Each of the major title insurers have adopted clear standards for dealing with this class of lands.

A. **Policy Jacket** itself defines "'land': the land described or referred to in Schedule A,.... "The term 'Land' does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or *waterways* ...."

B. **Standard Exception.** Most underwriters have standard exceptions for Navigable waters, filled lands and potential sovereignty lands matters. These should only be removed after researching their inapplicability and consulting your underwriter.

1. **Filled Lands**. Analysis of filled lands for underwriting purposes is a whole different set of considerations which are discussed later.

2. **Freshwater.** Freshwater bodies are not affected by 253.12(9). Butler only applied to rivers, thus the tools for vesting filled or drained freshwater bodies are rather limited.

C. **Deleting the General Sovereignty Lands Exception.** Each of your underwriters will have specific requirements for removing or fine-tuning the general sovereignty lands exception.

D. **Handling Pre-1951 Filled Lands:** The handling of filled lands is much easier conceptually because there have been no cases casting broad based uncertainty over the area.

1. **Evidentiary Issues:** The major problems one faces in this area is in determining (I) whether one has filled lands at all (as opposed to avulsively exposed lands), and (ii) when those lands were filled. While these are both evidentiary issues, we are dealing with memorable events and live witnesses are available who can indicate whether a given parcel has been filled since 1951.

2. **Disclaimers Available:** Fla. Stat. §253.129 expressly directs the Trustees to issue disclaimers for lands filled or developed pursuant to the Butler Act. While the requesting party is required to show evidence of the date of filling and provide survey information, such disclaimers are available.

E. Handling Post-1951 Non-Tidal Filled Lands: For non-tidal lands filled after 1951 (or to which the provisions of §253.12(9) do not apply), a title examiner should confirm the following:

1. **Conveyance From Trustees:** The appropriate conveyances must have been issued by the Trustees, and the proceedings relating to the issuance of the deed have been in strict conformity with the applicable Florida Statutes (which have been amended over the years) and the required fill permits were obtained.

2. **Proper U.S. Permits Obtained:** All necessary U.S. Government permits must have been obtained and the filling conducted in accord with those permits. The Corp of Engineers' permit to fill, issued pursuant to the River and Harbor Act of 1899, 33 USCA §403, contains a notice that the permit may be revoked at any time it becomes necessary for navigation, and that the owner may be required to remove the fill at its own expense.

F. Handling Pre-1975 Tidal Fill. The provisions of §§253.12(9) and (10), Fla. Stat. provide a new and expedient method of handling filled lands on tidal waterbodies. The details of this new legislation are addressed above. Recall however that the automatic vesting of the State's ownership interest does not eliminate the need for U.S. Corps of Engineers permitting or the federal navigational servitude. Great care should be taken with regard to the many exceptions and limitations of this statutory provision.

F. Accretion in Front of Platted Lots. Some waterfront subdivisions (usually pre-1960) lay out fixed lot depths and what appear to be firm boundaries (a single line identical to those used for front and side boundaries) for lots fronting on the waterbody. Where there may have been additional lands waterward of the fixed boundary at the time of platting or later, this practice creates a potential ambiguity as to whether a conveyance of the lot solely by reference to the plat was intended to convey to the water's edge or riparian or littoral rights.

This situation was addressed in *Accardi v. Regions Bank*, 201 So.3d 743 (Fla. 4th DCA 2016). In A*ccardi,* the court held that a mortgage of the lot by reference to the plat also included accreted property formed waterward of the lot (at least absent an express statement of a contrary intent) citing *Haynes v. Carbonell*, 532 So.2d 746, 748 (Fla. 3d DCA 1988) and *Legendary, Inc. v. Destin Yacht Club Owners Ass'n,* 724 So.2d 623, 624 (Fla. 1st DCA 1998). It may or may not be significant that title to the accretions had been vested by a prior quiet title action. Regardless, this is a fact pattern to be pointed out to and discussed with your underwriter before agreeing to insure.

XIII.Other Water Related Matters:

A. Soft Sand Public Rights

In addition to recognizing sovereignty ownership of the foreshore, the courts have declared a separate class of privately owned beach properties imbued with public rights and privileges. In *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 78 (Fla. 1974), the court stated that

> [i]f the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.
>
> This right of customary use of the dry sand area of the beaches by the public *does not create any interest in the land itself*. Although this right of use cannot be revoked by the land owner, it is subject to appropriate governmental regulation and may be abandoned by the public. The rights of the owner of the dry sand area may be compared to rights of a part-owner of a land-locked nonnavigable lake, as described in *Duval v. Thomas*, 114 So.2d 791 (Fla. 1959). [Emphasis added]
>
> * * *
>
> The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.

The court's conclusion is not based on a prescriptive easement or specific findings of adverse possession (a position advocated by the dissent), but rather on a unique right established through custom — a concept not often seen in American jurisprudence.

The "soft sands" doctrine expressed in *Tona-Rama* gives upland owners an incentive to restrict access to the soft sand areas, if for no other reason than to prevent such rights from accruing.

The court in *Trepanier v. County of Volusia,* 965 So.2d 276, (Fla 5th DCA, 2007) gave a relatively narrow interpretation to the scope of *Tona-Rama* rights, stating that it was a case-by-case factual determination.

B. Riparian & Littoral Rights are not insured under the standard policy and any policy insuring waterfront property should include an exception.

> *Riparian & littoral rights are not insured under this policy.*

C. Navigational Servitude Exception. In all instances of artificially filled lands in what were formerly navigable waters, the United States has a continuing interests by reason of its control over navigable waters in the interest of navigation and commerce.

> *Those portions of the property herein described comprising artificially filled land in what was formerly navigable waters, are subject to any and all*

rights of the United States government arising by reason of the United States government's control over navigable waters in the interest of navigation and commerce.

This can be affirmatively insured with the Navigational Servitude Easement for an additional premium.

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LANDLORD/TENANT AND MOBILE HOMES

By

Jennifer S. Tobin, Orlando

LANDLORD-TENANT DISPUTES AND EVICTIONS

Jennifer Slone Tobin
Shutts & Bowen LLP
2018 Advanced Real Estate Law and Certification Review Course

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

LANDLORD — TENANT

Jennifer Slone Tobin
2018 Advanced Real Estate Law and
Certification Review Course[1]

I. GENERALLY

A. **Definition; Nature of Lease; Personal Property**. Although a lease affects real property, it is classified as personal property for purposes of probate and tax law.

1. Definition. A lease has been defined as "a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own" and 'it passes a present interest in the land for the period specified." *De Vore v. Lee,* 158 Fla. 608, 30 So.2d 924, 925 – 926 (1947). At common law, leases were considered personal property. *De Vore* at 926.

2. Probate. In Florida probate proceedings, a decedent tenant's interest in an out-of-state lease is subject to administration by the Florida probate court, whereas a decedent's interests in real property would be subject to an ancillary administration in the state where the land is located.

3. Sales Tax. Every person who engages in the business of renting or leasing real property in Florida is exercising a taxable privilege, unless such property is otherwise exempt from taxation. F.S. §212.031(1)(a). For the exercise of such a privilege, a 5.8 percent tax is assessed on the "total rent" charged by the person charging or collecting the rental fee. F.S. §212.031(1)(c). The "total rent" includes payments for the granting of the privilege to use or occupy the property and includes base rent, percentage rents, or similar charges. *Id*. Exemptions from the sales tax include: (a) property assessed as agricultural property; (b) property used exclusively as dwelling units; (c) property subject to tax on parking, docking or storage spaces under F.S. 212.03(6); (d) recreational property / condominium common elements subject to a lease for use rights as to the condominium owners; (e) certain public streets and port authority use charges; (f) certain charges related to motion pictures; (g) certain food, drink, internet and data concessions at convention halls or meeting spaces; and (h) certain space flight businesses. F.S. 212.031. However, one court has held that where there is no evidence that the parties to the leases intended for the costs of the leasehold improvements to be part of the total rent charged, no tax is due. *Department of Revenue v. Ruehl No. 925, LLC*, 76 So.3d 389 (Fla. 1st DCA 2011).

4. Documentary Stamp Tax. Under Florida law, a lease is not subject to documentary stamp taxes. Section 12B-4.014(7), F.A.C. The documentary stamp tax is due on "obligations to pay money", which is not applicable to leases since the statute contemplates an

[1]Kyle Stevens and Dulcy Reck with the firm of Shutts & Bowen LLP, provided assistance in the research and drafting of these materials.

outright obligation to pay money and a lease is contingent with undertaking to pay rent ripening into a debt only as the times for payment of rent arrive. *De Vore* at 925.

An assignment of a lease is subject to the documentary stamp tax. "All assignments of leases or other conveyances of leasehold interests in real property are taxable under Section 201.02, Florida Statutes, based upon the consideration paid, including leasehold mortgages encumbering the interest conveyed. However, mortgages encumbering the fee title are not consideration, except when assumed by the assignee." Section 12B-4.013(23), F.A.C.

5. Ad Valorem Tax. Property owned by a public body that is leased to a nongovernmental tenant shall be subject to ad valorem taxation unless the tenant is an organization which uses the property exclusively for literary, scientific, religious, or charitable purposes. F. S. §196.199(4). The public body is responsible for paying the ad valorem taxes on the property unless the lease contains an express pass-through provision requiring that the tenant reimburse the public body for or directly pay the ad valorem taxes. *Grove Key Marina, LLC v. Casamayor*, 166 So.3d 879 (Fla. 3d DCA 2015). Ad Valorem taxes may also be due on certain improvements to leaseholds for tenants holding long term leases where the useful life of the improvements do not extend beyond the term of the lease, regardless of whether the tenants have the right to renew such leases or to acquire the fee at the end of the lease term. *See Russell v. Southeast Housing, LLC*, 162 So. 3d 262 (Fla. 3d DCA 2015). Such taxes are due because the tenants hold equitable ownership, or "virtually all the benefits and burdens of ownership of the improvements at issue". *1108 Ariola, LLC v. Jones*, 139 So.3d 857 (Fla. 2014).

6. Criminal Responsibility of Landlord. As a general rule, a landlord is not criminally responsible for the illegal use of the premises by the tenant; however, there are several statutory exceptions, some of which are set forth below.

a. *Prostitution/Lewdness*. It is unlawful to let or rent any place, structure, or part thereof, trailer or other conveyance, with the knowledge that it will be used for the purpose of lewdness, assignation, or prostitution. F.S. §796.06. A violation of this section is a misdemeanor of the first degree for the first violation, and a felony of the third degree for any subsequent violations. *Id.*

b. *Gambling*. It is illegal, whether as owner or agent, to knowingly rent to another a house, room, booth, tent, shelter or place for the purpose of gaming. F.S. §849.03. A violation of this section is a third degree felony. F.S. §849.03; F.S. §849.01.

c. *Illegal Substances*. It is illegal to lease or rent any building or trailer with the knowledge that such place will be used for the purpose of trafficking in a controlled substance, as provided in F.S. §893.135; for the sale of a controlled substance, as provided in F.S. §893.13; or for the manufacture of a controlled substance intended for sale or distribution to another. F.S. §893.1351. A person who violates this subsection commits a felony of the third degree. *Id.* There are similar provisions in federal law. *See* 21 U.S.C.A. §856(a).

B. **General Drafting Issues**.

1. Statute of Frauds**.** No lease for a term of one year or longer shall be effective against creditors or subsequent purchasers for value and without notice, unless placed of record.

F.S §695.01(1). Leases for a term of more than one year must be in writing, signed in the presence of two subscribing witnesses. F.S. §689.01; F.S §725.01. These requirements also apply to assignments or surrender of leases with a term of more than one year. F.S. §689.01; F.S. §725.01. Note, however, that partial performance of an unwritten lease may remove it from the statute of frauds. *Swartz v. Russell,* 481 So.2d 64 (Fla. 3d DCA 1985); *Poinciana Properties, Ltd. v. Englander Triangle, Inc.*, 437 So.2d 214 (Fla. 4th DCA 1983).

2. Radon Disclosures. The following disclosure shall be provided on at least one document, form or application executed at the time of or prior to the execution of a rental agreement for any building:

> "RADON GAS: Radon is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county health department."
>
> F.S. §404.056(5).

3. Lead Paint Disclosures. If the leased premises were built before 1978, the landlord must provide a lead-based paint warning to the tenant and certain other disclosures as part of the lease agreement. The terms of the warning are below; however, a landlord should review the entire CFR section cited below to confirm compliance.

> "Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention." 40 C.F.R. §745.113(b)(1).

4. Residential Tenancies. The name and address of the landlord or another authorized person must be provided to the tenant prior to the commencement of the tenancy, and such person is authorized to receive notices and demands on the landlord's behalf until the tenant is notified otherwise. F.S. §83.50.

C. **Alterations**. Unless addressed by the terms of the lease agreement (in both residential and commercial tenancies), the tenant may make such alterations to the premises as are reasonably necessary to the enjoyment of the premises; however, the tenant must restore the premises to the condition existing at commencement of the term. *See Blow v. Colonial Oil Co.*, 225 So. 2d 167, 168 (Fla. 1st DCA 1969).

D. **Assignment and Subletting**. Unless addressed by the terms of the lease agreement (in both residential and commercial tenancies), the tenant may assign its interest in the lease or sublet the premises; the landlord may also assign its interest or convey the fee title. *Fernandez v. Vazquez*, 397 So.2d 1171 (Fla. 3d DCA 1981). If assignment/subletting is contingent on the landord's consent, the consent must be given or withheld in a commercially reasonable manner.

Id at 1173 –74. Caselaw does seem to imply, however, that a lease provision which, by its express terms, allows the landlord to withhold consent in its sole discretion, would be enforceable. *See dicta in Speedway Superamerica, LLC v. Tropic Enterprises, Inc.*, 966 So.2d 1 (Fla. 2d DCA 2007). A landlord may waive a nonassignment clause inadvertently by permitting an assignee to remain in possession and by accepting payment of rent. *Farmers' Bank & Trust Co. v. Palms Pub. Co.,* 86 Fla. 371, 98 So. 143 (1923). A prohibition on assignment without landlord approval is not violated by a collateral assignment as security for a loan – on foreclosure, the purchaser would succeed to the interest of the tenant without the need for landlord approval. *Gould, Inc. v. Hydro-Ski International Corp.,* 287 So.2d 115 (Fla. 4th DCA 1973); *City of Gainesville v. Charter Leasing Corporation*, 483 So.2d 465 (Fla. 1st DCA 1986).

E. **Mortgage of Leasehold**. An assignee of a mortgage on a leasehold of real property acquires only a lien and not an interest in the leasehold itself. *City of Gainesville* at 467. A mortgage is a species of intangible property, creating a lien on the land, but not an interest in the land. F.S. §697.02; *see also Waldock v. Iba*, 114 Fla. 786, 153 So. 915 (1934). Nor does a mortgage give the mortgagee the right of possession. F.S. §697.02.

F. **Casualty**.

1. Commercial Tenancy. Unless addressed by the terms of the lease agreement, the tenant bears the risk of loss in the event of a casualty (if not caused by the landlord). *Robinson v. L'Engle,* 13 Fla. 482 (1869); *City of St. Petersburg v. Competition Sails, Inc.*, 449 So.2d 852 (Fla. 2d DCA 1984).

2. Residential Tenancy. If the property is damaged or destroyed without the fault of the tenant, resulting in the substantial impairment of tenant's use of the dwelling unit, the tenant may terminate the lease and immediately vacate the premises. F.S. §83.63. If only a portion is rendered unusable, the rent is abated for the unusable portion. *Id*.

G. **Compliance with Law**.

1. Commercial Tenancy. Unless addressed by the terms of the lease agreement, the tenant has no obligation to prevent condemnation of the premises for failure to comply with minimum code and other regulations, including environmental issues and ADA compliance.

2. Residential Tenancy. The landlord and the tenant each have certain obligations with respect to applicable building, housing and health codes. F.S. §83.51 (as to landlord's obligations); F.S. §83.52 (as to tenant's obligations).

H. **Condition of Premises**.

1. Commercial Tenancy. Unless addressed by the terms of the lease agreement, there is no warranty of habitability or fitness for a particular purpose – in other words, the tenant has responsibility for making the premises usable. The landlord still owes a duty to protect tenants and others on the property from harm resulting from known or discoverable defects. And a landlord may be liable for negligently making agreed upon repairs. *Propper v. Kesner*, 104 So.2d 1 (Fla. 1958). Although no longer applicable in regard to residential dwelling units, the

common-law doctrine of caveat lessee still applies in the commercial lease context; thus, once landlord of commercial property surrenders possession and control, tenant assumes risk as to condition of premises, absent fraud or concealment. *Veterans Gas Co. v. Gibbs*, 538 So.2d 1325 (Fla. 1st DCA 1989). There are limits to this doctrine – the failure of a landlord to disclose a recorded restrictive covenant prohibiting tenant's proposed use of the leased premises may provide a basis for a claim of fraud in the inducement. *Camena Investments and Property Management Corp. v. Cross*, 791 So.2d 595 (Fla. 3d DCA 2001); s*ee also Victoriana Bldg., LLC v. Fort Lauderdale Surgical Ctr., LLC*, 166 So. 3d 861 (Fla. 4th DCA 2015) (determining the landlord breached the lease first by failing to provide code-compliant means of fire egress); *Russ v. Wollheim*, 915 So. 2d 1285 (Fla. 2d DCA 2005) (denying landlord's motion for summary judgment against personal injury plaintiff's negligence claim where landlord retained right to approve or deny lessee's alterations to premises). However, in the case where a change in law results in the sole permitted use of the premises to be illegal, the court found the lease to be void and illegal and unenforceable. *Lucas Games, Inc. v. Morris AR Associates, LLC*, 197 So. 3d 1183 (Fla. 4th DCA 2016) (2013 change to §849.16 outlawing slot machines outside of designated casinos rendered only permitted use under the lease illegal; lower court ruling for landlord overturned).

2. Residential Tenancy. The landlord has an implied warranty of habitability to the tenant and an obligation to maintain the premises. *Mansur v. Eubanks*, 401 So.2d 1328 (Fla. 1981). The landlord must comply with the requirements of applicable building, housing, and health codes or, where are no applicable building, housing, or health codes, maintain the roofs, windows, doors, floors, steps, porches, exterior walls, foundations, and all other structural components in good repair and capable of resisting normal forces and loads and the plumbing in reasonable working condition. F.S. §83.51. The landlord must, at commencement of the tenancy, ensure that screens are installed in a reasonable condition, and thereafter repair damages to the screens once annually when necessary. *Id.* Except for the limited exceptions in Section 83.51, Florida Statues, with respect to single family homes and duplexes, this obligation cannot be waived or modified. F.S. §83.51. The landlord does have a duty to reasonably inspect the premises prior to allowing a tenant to take possession and to make such repairs as are necessary to deliver a reasonably safe dwelling unit. *Mansur* at 1330. *But see Menendez v. Palms West Condominium Ass'n, Inc.* 736 So.2d 58 (Fla. 1st DCA 1999) (finding that the absence of a doorscope was not a dangerous condition that the landlord had duty to correct, and that there was no landlord liability resulting from tenant letting attackers into unit).

I. **Eminent Domain**. Unless addressed by the terms of the lease agreement, both the landlord and the tenant have a right to a condemnation award to the extent of their separate interests. *Trump Enterprises, Inc., v. Publix Supermarkets, Inc.*, 682 So.2d 168 (Fla. 4th DCA 1996) (holding "that a lessee of land under a written lease agreement for a term of years is an owner of property in the constitutional sense and is thereby entitled to full compensation for such a taking, notwithstanding the silence in such a lease.") The details, regulations and caselaw regarding takings are outside the scope of this outline, but the reader should be aware that there are significant nuances to this issue that should be addressed in drafting a lease.

J. **Fixtures**. Unless addressed by the terms of the lease agreement, all fixtures become the property of the landlord. *Devlin v. The Phoenix, Inc.*, 471 So.2d 93 (Fla. 5th DCA 1985). The determination of whether a particular property annexed to realty is a fixture is a mixture of law and facts, to be determined by the particular circumstances of each case. *Community Bank of*

Homestead v. Barnett Bank of the Keys, 518 So.2d 928 (Fla. 3d DCA 1987). Trade fixtures are an exception to the general rule – a tenant is permitted to remove its trade fixtures (i.e. machinery and equipment) if not expressly prohibited by the lease *and* if the removal does not destroy the premises. *Sweeting v. Hammons,* 521 So.2d 226 (Fla. 3d DCA 1988). *But see H. Allen Holmes, Inc. v. Molter,* 127 So. 3d 695 (Fla. 4th DCA 2013) (holding the lease was ambiguous as to whether the tenant was entitled to retain fixtures; however, the landlord was entitled to retain that portion of the security deposit for damages to premises caused by removal).

K. **Construction Liens.** Unless the provisions of Section 713.10, Florida Statutes, are complied with by the landlord and the tenant, construction liens arising out of the tenant's improvements on the premises will extend to the interests of the landlord in the property. F.S. §713.10(1). There are two options for compliance: (1) record the lease or short form of the lease, wherein the lease (and/or the short form) recites the prohibition on such liability; or (2) record a notice advising that the leases for the property prohibit such liability, and insure that the leases actually contain such prohibition. F.S. §713.10(2)(b). A recorded notice under option (2) should contain language tracking the statute, which requires the following: (a) the name of the landlord; (b) the legal description of the parcel of land to which the notice applies; (c) the specific language contained in the various leases prohibiting such liability; and (d) a statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability. F.S. §713.10(2)(b)(2). The Florida legislature added (d) above to the statute (effective October 1, 2011) in response to *Everglades Electric Supply Inc. v. Paraiso Granite, LLC,* 28 So.3d 235 (Fla. 4th DCA 2010). The *Everglades* court found that a blanket notice recorded by a landlord under Section 713.10, Florida Statutes, was ineffective because the "no-lien" language in one of the leases in the shopping center was not identical to the language in the notice.

L. **Insurance**. Unless addressed by the terms of the lease agreement, neither party has the obligation to obtain insurance for the premises or to protect the other party.

M. **Maintenance**.

1. Commercial Tenancies. Unless addressed by the terms of the lease agreement, the landlord is not obligated to make repairs on the premises. *City of St. Petersburg* at 854. Prior repairs made by a landlord do not give rise to an assumption of the obligation to repair. *Id.* at 855. The tenant's obligation is only to return the premises at the end of the term in the same condition as the start of the term, reasonable wear and tear and natural casualty excluded. Section 83.201, Florida Statues, contains a procedure for a tenant to demand repair (if the lease agreement is silent as to the procedure to be followed) in the event that the lease agreement places repair obligations on the landlord. If the landlord fails to repair and such failure renders the premises wholly untenantable, the tenant may withhold rent after notice to the landlord that it will withhold rent for the next rental period and thereafter until the repair is complete. F.S. §83.201. The notice must give the landlord at least 20 days to complete the repair. *Id.* Upon completion of the repair, tenant must pay the withheld rent. *Id.* If landlord fails to complete the repairs within the specified time, the tenant may (i) agree to an extension; or (ii) abandon the premises, retain the withheld rent, terminate the lease, and avoid any future liability for rent. *Id.*

2. Residential Tenancies. The landlord has the obligation to maintain a residential dwelling unit in habitable condition. F.S. §83.51(1). This obligation includes the

obligation to comply with building, health and safety codes, and cannot be varied except with regard to single family homes and duplexes. *Id.* Unless varied by the terms of the lease, the owner of a dwelling unit other than a single family home or duplex, shall make reasonable provision for: (a) extermination; (b) locks and keys; (c) clean and safe conditions of common areas; (d) garbage removal and outside receptacles; and (e) functioning facilities for heat during winter, running water and hot water. F.S. §83.51(2)(a). The landlord must repair damage to screens once annually, when necessary. F.S. §83.51(1)(b). For single family homes and duplexes, unless varied by the terms of the lease, the landlord must install working smoke detection devices. F.S. §83.51(2)(b).

N. **Options to Purchase.** The following language entitles a tenant to exercise a purchase option at any time during the lease term that the tenant is not in default: "Lessor hereby grants to Lessee, during the term of this Lease, and provided that the Lessee is not in default of any part of this Lease Agreement, an option to purchase the property for the following prices . . ." *Welde v. Top Video & Productions USA, Inc*., 35 So.3d 119 (Fla. 3d DCA 2010). If a Lessee satisfies the requirements of a purchase option and exercises its right to purchase, then the Lessor cannot evict the Lessee. *Sena v. Pereira*, 179 So. 3d 433, 435 (Fla. 4th DCA 2015). If the Lessor brings an eviction action, the Lessee should raise a specific performance claim on the purchase option in the eviction proceeding; otherwise, the Lessee risks waiving its specific performance claim. *See id.* at 435 – 36. If a lease contains an option, the lease should specify whether rent continues to be due and payable after exercise of the option, as Florida courts have held that upon exercise of the option, the option becomes a contract, and the lease is terminated. *See Pensacola Wine and Spirits v. Gator Distributors,* 448 So. 2d 34 (Fla. 1st DCA 1984); and *Twelfth Avenue Investments, Inc. v. Smith,* 979 So. 2d 1216 (Fla 4th DCA 2008).

O. **Quiet Enjoyment**. Unless addressed by the terms of the lease agreement, the landlord grants the tenant an implied covenant of quiet enjoyment, which is limited to protecting the tenant from removal by the holder of an interest superior to landlord's interest. An express covenant of quiet enjoyment provides tenants with a greater protection than the implied covenant; and a breach of an express covenant can constitute constructive eviction. *Barton v. Mitchell Co.*, 507 So.2d 148 (Fla. 4th DCA 1987); *Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Brickell Building 1 Holding Co., Inc.*, 923 F.2d 810 (11th Cir. 1991). However, "a tenant may claim damages based on a breach of the implied covenant of quiet enjoyment even where the landlord's actions did not rise to the level of" constructive eviction. *Coral Wood Page, Inc. v. GRE Coral Wood, LP,* 71 So.3d 251 (Fla. 2d DCA 2011) (remanding for further factual findings wherein sports bar/restaurant tenant raised breach of quiet enjoyment affirmative defense and alleged that landlord's hiring of off duty police officers who harassed tenant's invitees was a breach).

P. **Recording**. No lease for a term of one year or more is effective against creditors or purchasers for value without notice unless the lease is recorded. F.S. §695.01(1). However, a tenant's possession of the premises usually creates actual or constructive notice. *Kroitzsch v. Steele*, 768 So.2d 514 (Fla. 2d DCA 2000); *Humble Oil & Refining Co. v. Laws*, 272 So.2d 841 (Fla. 1st DCA 1973). Recordation of a lease, or a memorandum thereof, is common practice in many larger, long term commercial leases.

Q. **Renewal and Extension**. Leases often provide for renewal / extension options under certain given circumstances. A renewal lease for a term of more than one year must comply with Section 689.01, Florida Statutes, and contain two subscribing witnesses or it is not

enforceable. *S&I Investments v. Payless Flea Market, Inc*., 36 So.3d 909 (Fla. 4th DCA 2010) (holding estoppel did not apply to render the lease enforceable because tenant had notice of the failure and tenant did not change its position in reliance on purported lease). If the lease provides for a renewal term but does not otherwise specify the terms of the renewal period, the terms will generally be the same as in the initial term. *Edgewater Enterprises, Inc. v. Holler*, 426 So.2d 980 (Fla. 5th DCA 1982). However, if the lease specifies that the terms of the renewal period will be as subsequently agreed to by the parties, the option can be unenforceable for failure to contain essential terms. *See Edgewater Enterprises*. *But see Ludal Development Co. v. Farm Stores, Inc.*, 458 So.2d 781 (Fla. 3d DCA 1984) (upholding extension option where lease set forth a method for determining rental payment); and *Bold MLP, LLC v. Smith,* 201 So. 3d 1261 (Fla. 1st DCA 2016) (renewal option upheld where court could imply a $75 per year increase in the rate based on the lease rates during the initial term). Timely exercise of an extension option is typically a condition precedent to the right to the option. A landlord's failure to provide information on estimated common area maintenance and real property taxes has been held to be a violation of the duty of good faith, such that tenant's failure to timely exercise its renewal option was excused. *PL Lake Worth Corp. v. 99Cent Stuff-Palm Sprints, LLC*, 949 So.2d 1199 (Fla. 4th DCA 2007). *But see Sunshine Gasoline Distributors, Inc. v. Biscayne Enterprises, Inc.*, 139 So. 3d 978 (Fla. 3rd DCA 2014) (finding that the landlord owed no duty of good faith and fair dealing when the lease contained a "binary choice", giving the landlord the right to approve a renewal in its sole discretion). Finally, Florida law does not favor perpetual extensions of leases as an unreasonable restraint on alienation; and unless the lease agreement is clear and unequivocal, it will be construed to not allow perpetual extensions. *Chessmasters, Inc. v. Chamoun*, 948 So.2d 985 (Fla. 4th DCA 2007).

R. **Right of Entry**.

1. Commercial Tenancies. Unless otherwise provided in the lease agreement, a landlord may enter onto the premises to determine whether waste has been committed. A landlord also has the right to enter if the lease agreement makes the landlord responsible for repairs.

2. Residential Tenancies. Landlord may enter the premises to inspect, repair and exhibit the premises at reasonable times. F.S. §83.53. A tenant shall not unreasonably withhold consent to the landlord to enter into the unit for such purposes. *Id.* The landlord must give reasonable notice for repairs at least 12 hours prior to the entry and the repairs shall be between 7:30 a.m. and 8:00 p.m. or as otherwise agreed to by the tenant or in an emergency. *Id*.

S. **Security**. The question of which party has the duty to provide security at the premises is one of fact – and for commercial leases silent on the issue the question generally turns on whether the landlord exercises control over the premises and public access to it. *Jones v. Basha, Inc.*, 96 So. 3d 915 (Fla. 2d DCA 2011) (citing *Brown v. Suncharm Ranch, Inc.,* 748 So.2d 1077 (Fla. 5th DCA 1999)). If the landlord surrenders possession and control over the leased premises to the tenant, the landlord is not liable for injury to a third party on the premises. *Jones* at 916 – 17. See Article III below for residential tenancies.

T. **Waiver**.

1. Commercial Tenancies. Unless otherwise provided in the lease agreement,

acceptance of rent by a landlord with knowledge of an existing tenant default acts as a waiver of the landlord's right to terminate the lease for such default. F.S. §83.202. An anti-waiver provision in the lease agreement may allow the landlord to later pursue its remedies for a default. *Raimondi v. I.T. 1, Inc.*, 480 So.2d 240 (Fla. 4th DCA 1985).

2. Residential Tenancies. Generally, acceptance of rent by a landlord with knowledge of an existing tenant default acts as a waiver of the landlord's right to terminate the lease for such default. F.S. §83.56(5). However, acceptance of partial rent by a landlord does not waive the landlord's right to terminate the lease or to bring a civil action for the default if the landlord either (1) provides the tenant with a receipt stating the date and amount received and the agreed upon date and balance of rent due before filing an action for possession; (2) places the amount of partial rent accepted from the tenant in the registry of the court upon filing the action for possession; or (3) posts a new 3-day notice reflecting the new amount due. F.S. §83.56(5)(a).

II. NON-RESIDENTIAL TENANCIES

A. **Written Provisions Control; Governed by Part I of Chapter 83, F.S.** The written provisions of commercial leases control. As *Rodeway Inns of America v. Alpaugh*, 390 So.2d 370, 372 (Fla. 2d DCA 1980) states:

> "If there is a lease, however, its provisions are conclusively controlling, and a court will not substitute its judgment for that of the parties by rewriting that lease. *S. H. Kress & Co. v. Desser & Garfield, Inc.*, 193 So.2d 192 (Fla. 3d DCA 1966). Although the Florida Residential Landlord & Tenant Act (§§ 83.40 et seq., Fla. Stat.) permits courts to override the terms and conditions of residential leases if they are deemed inequitable, there is no such control over business leases. As to those, the rule governing contracts in general is applicable – a party will not be relieved of obligations deliberately undertaken merely because they prove burdensome or otherwise improvident. *Nussey v. Caufield*, 146 So.2d 779 (Fla. 2d DCA 1962)."

The Florida Residential Landlord and Tenant Act, by its terms, specifically applies only to the rental of dwelling units, and not to nonresidential tenancies, which are governed by part I of Chapter 83. *Herrell v. Seyfarth, Shaw, Fairweather & Geraldson*, 491 So.2d 1173, 1175 (Fla. 1st DCA 1986). Florida follows the universal rule that parties *sui juris* may negotiate any contract not violative of law or public policy. *Chandler Leasing Division, Pepsico Service Industries Leasing Corp. v. Florida-Vanderbilt Development Corp.*, 464 F.2d 267 (5th Cir. 1972).

As an example of this, a recent case held that where the lease failed to specify dates for the completion of tenant improvements by a landlord, the court would not look to extrinsic evidence to determine a deadline for completion, and thus there were no grounds for the tenant to claim a breach of the lease by the landlord for failure to complete. *326-330 St. Armands Circle, LLC v. GEE22, LLC,* 139 So.3d 353 (Fla. 2nd DCA 2014).

B. **Tenancy at Will; Duration; Term**.

1. Oral Lease. Any lease of lands and/or tenements shall be deemed and held to be a tenancy at will unless it shall be in writing signed by the landlord. F.S. §83.01. Such tenancy shall be determined by the periods at which the rent is payable. *Id.* If the rent is payable

weekly, then the tenancy shall be from week to week; if payable monthly, then from month to month, if payable quarterly, then from quarter to quarter; and if payable yearly, then from year to year. *Id.* An oral agreement to occupy property and to pay rent in return qualifies as a "lease," and an oral lease has a specific expiration date, even though it might not be known at the time the tenancy is created. *Keeton Corrections, Inc. v. RJ & RK, Inc.*, 858 So.2d 349 (Fla. 1st DCA 2003). The expiration date of a tenancy at will is known with certainty as soon as the landlord gives proper notice of termination. *Id.* at 351.

2. Written Lease. A written lease with an unlimited term is a tenancy at will, and the term of such tenancy at will shall be determined by the periods at which the rent is payable. F.S. §83.02. If the rent is monthly, then the tenancy shall be from month to month; etc. *Id.*

3. Notice of Termination of Tenancy at Will. A tenancy at will may be terminated by either party giving notice as follows:

a. If the tenancy is year to year, by giving not less than 3 months' notice prior to the end of any annual period. F.S. §83.03(1).

b. If the tenancy is quarter to quarter, by giving not less than 45 days' notice prior to the end of any quarter. F.S. §83.03(2).

c. If the tenancy is month to month, by giving not less than 15 days' notice prior to the end of any monthly period. F.S. §83.03(3).

d. If the tenancy is week to week, by giving not less than 7 days' notice prior to the end of any weekly period. F.S. §83.03(4).

4. Holding Over After Term; Tenancy at Sufferance. When any tenancy created by an instrument in writing, the term of which is limited, has expired and the tenant holds over in the possession of said premises without renewing the lease by some further instrument in writing, then such holding over shall be construed to be a tenancy at sufferance. F.S. §83.04. Consent on the part of the landowner to the continued occupancy is not essential to the creation of a tenancy at sufferance, because if the occupancy is with the express or implied consent of the landowner, the tenancy will become a tenancy at will instead of a tenancy at sufferance. *Pillans & Smith Co. v. Lowe,* 117 Fla. 249, 157 So. 649 (1934). Tenancy at sufferance is not based on contract; a tenant at sufferance has no estate or title, but only naked possession without right. *Camp v. Ellis*, 71 Fla. 234, 70 So. 1006 (1916).

5. Acceptance of Rent. The mere payment or acceptance of rent shall not be construed to be a renewal of the term, but if the holding over be continued with the written consent of the landlord then the tenancy shall become a tenancy at will. F.S. §83.04.

6. Holdover.

a. *Double Rent*. The commercial tenant who holds over in possession after the expiration of the lease is subject to the statutory double-rent penalty imposed on the tenant at the landlord's option; double rent may be recovered at the end of every month. F.S. §83.06. The double rent provision of the statute does not apply if the lease is terminated before it expires.

Keeton Corrections at 352. A landlord who declares a breach of the lease might consider the lease to be terminated at that point, but the tenant is not liable for double rent merely by remaining in possession if the lease has not yet come to an end. *Id.*

b. *Remedies Following Holdover*. When a tenant holds over beyond the term of his tenancy, the landlord has among his possible remedies the options of: (1) demanding double rent; (2) demanding a specific amount of continuing rent; or (3) suing for the possession of the property plus damages, including special damages for loss of the property's use. *Lincoln Oldsmobile, Inc. v. Branch*, 574 So.2d 1111 (Fla. 2d DCA 1990). The foregoing remedies are mutually exclusive in that a claim for double rent or a specific amount of continuing rent implies that the landlord acquiesces to the continuing tenancy at a rental the landlord determines to be fair. *Id.* at 1113. A claim for special damages, on the other hand, implies the opposite, i.e., that the landlord objects to the continuing tenancy and suffers damage from loss of immediate possession of the property. *Id.* Thus, the landlord must decide whether to treat the holdover as a tenant or a trespasser. *Lincoln Oldsmobile* at 1113 (citing Annotation, Measure of Damages for Tenant's Failure to Surrender Possession of Rented Premises, 32 A.L.R.2d 582 at 585 (1953)).

C. **Right of Possession upon Default in Rent**.

1. Obtaining Possession. Pursuant to Section 83.05, Florida Statutes, if any person leasing or renting any land or premises other than a dwelling unit fails to pay the rent at the time it becomes due, the landlord has the right to obtain possession of the premises as provided by law. The landlord shall recover possession of rented premises only in any of the following situations:

a. In an action for possession under Section 83.20, Florida Statutes, or other civil action to determine the right of possession. F.S. §83.05(2)(a).

b. When the Tenant has surrendered possession to the Landlord. F.S. §83.05(2)(b).

c. When the Tenant has abandoned the rented premises. F.S. §83.05(2)(c).

2. Abandonment. Tenant's abandonment requires actual knowledge of abandonment; alternatively, abandonment shall be presumed if all of the following are true:

a. The Landlord reasonably believes that the Tenant has been absent from the premises for 30 consecutive days. F.S. §83.05(3)(a).

b. The rent is not current. F.S. §83.05(3)(b).

c. A notice pursuant to F.S. §83.20(2) has been served and 10 days have elapsed since service of such notice. F.S. §83.05(3)(c).

Note however, this presumption does not apply if the rent is current or the tenant has notified the landlord in writing of an intended absence. F.S. §83.05(3).

D. **Landlord's Lien For Rent; Priority; Enforcement**.

1. Statutory Lien. Landlords have a statutory lien for such rent upon the property found upon or off the premises leased or rented, and in the possession of any person, as follows:

a. Upon agricultural products raised on the premises for the current year; this lien shall be superior to all other liens, though of older date. F.S. §83.08(1).

b. Upon all other property of the tenant or sub-tenants usually kept on the leased premises; this lien is superior to any lien acquired subsequent to the bringing of the property on the premises. F.S. §83.08(2) (Non-Residential); F.S. §713.691 (Residential).

c. Upon all other property of the tenant; this lien shall date upon the levy of the distress warrant or writ. F.S. §83.08(3).

2. Time of Attachment. The lien attaches when the tenancy commences or when property is brought onto the premises, whichever is later. *Robie v. Port Douglas (Florida), Inc.*, 662 So. 2d 1389, 1391 (Fla. 4th DCA 1995); *see also Ruge v. Webb Press Co*., 71 Fla. 536, 71 So. 627 (1916). Further, unless the landlord agrees to subordinate its lien to a leasehold mortgagee, the landlord's lien has priority over the leasehold mortgagee.

3. Perfection of Lien. A landlord's lien is not required to be filed or recorded in order to be perfected. *Oaks Shopping Center Inc. v. Justice Marketing, Inc.*, 688 So.2d 456 (Fla. 5th DCA 1997).

4. Exemptions from Liens. No property of any tenant shall be exempt from distress and sale for rent, except beds, bedclothes and wearing apparel. F.S. §83.09. However, per F.S. §713.691, in a residential tenancy where the tenant is the head of a family, personal property owned by her or him in the value of $1,000 is exempt from the lien. There are also limited exemptions for property from distress and sale for rent. *See Flanigan's Enterprises, Inc. v. Barnett Bank of Naples*, 639 So.2d 617 (Fla. 1994) (holding that a liquor license is not "property" under statute granting landlord a lien for past due rent upon "property" of tenant usually kept on the premises).

5. Enforcement of Lien; Complaint; Distress Writ; Levy; Dissolution; Replevy. Any person to whom any rent or money for advances is due or the person's agent or attorney may file an action in the court in the county where the land lies having jurisdiction of the amount claimed, and the court shall have jurisdiction to order the relief provided in this part. F.S. §83.11. The complaint shall be verified and shall allege the name and relationship of the defendant to the plaintiff, how the obligation for rent arose, the amount or quality and value of the rent due for such land, or the advances, and whether payable in money, an agricultural product, or any other thing of value. *Id.*

a. *Distress Writ*. A distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed. F.S. §83.12. The writ shall enjoin the defendant from damaging, disposing of, secreting, or removing any property liable to distress from the rented

real property after the time of service of the writ until the sheriff levies on the property, the writ is vacated, or the court otherwise orders. *Id.*

b. *Bond Required*. Before a judge can issue a distress writ, the landlord must file a bond with surety to be approved by the court clerk, and payable to the tenant in at least double the amount demanded; or, if property, in double the value of the property sought to be levied. *Id.* The bond exists to pay all costs and damages which the tenant sustains if the landlord institutes an improper distress proceeding. *Id.*

c. *Dissolution of Writ*. The tenant may move for dissolution of a distress writ at any time prior to levy. F.S. §83.135. If the plaintiff proves a prima facie case, or if the defendant defaults, the court shall order the sheriff to proceed with the levy. *Id.*

d. *Tenant Bond*. The property distrained may be restored to the defendant at any time on the defendant's giving a bond with surety to the sheriff levying the writ. F.S. §83.14. The bond shall be approved by such sheriff; made payable to plaintiff in double the value of the property levied on, with the value to be fixed by the sheriff; and conditioned for the forthcoming of the property restored to abide the final order of the court. *Id.*

6. Non Statutory Liens. The landlord can also include a security agreement in the lease that would be enforceable under the Florida Uniform Commercial Code, wherein perfection of this type of lien requires filing a financing statement in the manner provided by law.

E. **Landlord Remedies Upon Breach by Tenant.**

1. General. Following default, and unless the lease agreement provides to the contrary, the landlord has the following options: (1) retake possession for the Landlord's account; (2) retake possession for the tenant's account, holding the tenant responsible for the difference between the remaining rent due and any amount landlord recovers in good faith from another tenant; or (3) take no action and sue the tenant as the installments of rents come due or for all the rents due when the lease expires. *Bucky's Barbeque of Fort Lauderdale, LLC v. Millennium Plaza Acquisition, LLC*, 67 So.3d 1207 (Fla. 4th DCA 2011). The landlord's use of the property after retaking possession is determinative of whether the landlord has exercised option (1) or (2) above. *Colonial Promenade v. Juhas*, 541 So.2d 1313 (Fla. 5th DCA 1989).

2. Causes for Removal of Tenants; Eviction. Pursuant to Section 83.20, Florida Statutes, any tenant may be removed from the premises in the manner hereinafter provided in the following cases (the below remedies may be altered by the terms of the lease agreement):

a. *Holdover Generally*. Where such person holds over and continues in the possession of the demised premises, or any part thereof, after the expiration of the person's time, without the permission of the person's landlord. F.S. §83.20(1).

b. *Three Day Notice*. Where such person holds over without permission, after any default in the payment of rent pursuant to the agreement under which the premises are held, and 3 days' notice in writing requiring the payment of the rent or the possession of the premises has been served by the person entitled to the rent on the person owing the same. F.S. §83.20(2). *E.g.*, *Edge Pilates Corp. v. Tribeca Aesthetic Med. Solutions, LLC*, 162 So.3d 246

(Fla. 4th DCA 2015) (finding a prima facie case for eviction under section 83.20(2) where tenant did not receive rent payment from subtenant at the end of the three-day period and subtenant remained in possession at the end of the three-day period). The service of the notice shall be by delivery of a true copy thereof, or if the tenant is absent from the rented premises, by leaving a copy thereof at such place. *Id.*

c. *Breach of Non-Rent Covenant*. Where such person holds over without permission after failing to cure a material breach of the lease or oral agreement, other than nonpayment of rent, and when 15 days' written notice requiring the cure of such breach or the possession of the premises has been served on the tenant. F.S. §83.20(3). This applies only when the lease is silent on the matter or when the tenancy is an oral one at will. *Id.* The notice may give a longer time period for cure of the breach or surrender of the premises. *Id.* In the absence of a lease provision prescribing the method for serving notices, service must be by mail, hand delivery, or, if the tenant is absent from the rental premises or the address designated by the lease, by posting. *Id.*

3. Hybrid Action for Eviction and Damages. If the issues are found for plaintiff, judgment shall be entered that plaintiff recover possession of the premises. F.S. §83.231. If the plaintiff expressly and specifically sought money damages in the complaint, in addition to awarding possession of the premises to the plaintiff, the court shall also direct, in an amount which is within its jurisdictional limitations, the entry of a money judgment in favor of the plaintiff and against the defendant for the amount of money found due, owing, and unpaid by the defendant, with costs. *Id.*

4. Rent Paid Into Registry of Court by Tenant.

a. *Procedure*. In an action by the landlord which includes a claim for possession of real property, the tenant shall pay into the court registry the amount alleged in the complaint as unpaid, or if such amount is contested, such amount as is determined by the court, and any rent accruing during the pendency of the action, when due, unless the tenant has interposed the defense of payment or satisfaction of the rent in the amount the complaint alleges as unpaid. F.S. §83.232(1). Section 83.232, Florida Statutes, delineates the procedures for tenant deposit, disputes, hearings and timing.

b. *Failure to Make Deposit*. Upon the tenant's failure to timely deposit a rental payment into the registry as required by court order under Section 83.232, Florida Statutes, the landlord is absolutely entitled to an ex parte, immediate default for a writ of possession of the premises. F.S. §83.232(5); see also *Kosoy Kendall Associates, LLC v. Los Latinos Restaurant*, Inc., 10 So.3d 1168 (Fla. 3d DCA 2009); *Key Largo Watersports, Inc. v. Whitehurst Family P'ship*, 954 So.2d 1278 (Fla. 3d DCA 2007); *214 Main St. Corp. v. Tanksley*, 947 So.2d 490 (Fla. 2d DCA 2006). *See Misha Enterprises v. GAR Enterprises, LLC*, 117 So. 3d 850 (Fla. 4th DCA 2013) (holding the trial court had authority to require tenant to pay rent into the registry even where landlord did not demand payment into the registry, and tenant's failure to comply with order entitled landlord to an immediate default and judgment for possession, but not to a striking of affirmative defenses on a damages claim). This harsh remedy can apply even for a late payment (by a day or two) – the statute's purpose is to keep the tenant from possessing the property rent-free during a dispute. *See Park Adult Residential Facility, Inc. v. Dan Designs, Inc.*, 36 So. 3d 811

(Fla. 3d DCA 2010) (tenant rent was two days' late where due date fell two days after tenant's law firm, Rothstein Rosenfeldt Adler, was seized by federal authorities; tenant issued cashier's checks that were sent to the law firm but not timely delivered to the court due to employees leaving the firm; writ of possession issued).

c. *Taxes*. Payment of ad valorem property taxes may constitute part of rent for commercial property, and tenant's failure to pay such taxes to court registry pursuant to court order in eviction action may render tenant vulnerable to eviction. *Cascella v. Canaveral Port Authority*, 827 So.2d 308 (Fla. 5th DCA 2002). A tenant's obligation to pay taxes may constitute consideration to use or occupy property, even though such obligation is contained in "Lease Covenants and Conditions" section of lease. *Id.*

d. *Amount in Dispute*. The amount of rent deposited with the court should only be the amount of rent in dispute. *First States Investors 3300, LLC v. Pheil*, 52 So.3d 845 (Fla. 2d DCA 2011). In *First States*, the tenant applied for and obtained an order to place all rent into the court; however, the tenant only disputed the calculation of the escalation of rents (and not the base rent). *Id.* The appellate court found that the trial court improperly permitted deposit of all rent sums and remanded the case for the trial court to determine the proper amount of rent in dispute to be deposited with the court. *Id. See also Double Park, LLC v. Kaine Parking 125, LLC*, 168 So. 3d 278 (Fla. 3d DCA 2015) (finding the lower court erred when it held a non-evidentiary hearing to determine the amount of rent in dispute).

F. **Measure of Damages**. If, upon a default by tenant, landlord elects to pursue the remedy of taking possession for the account of the tenant and suing for damages, then the leasehold estate remains in existence. *Hudson Pest Control, Inc. v. Westford Asset Management, Inc.*, 622 So.2d 546 (Fla. 5th DCA 1993). The landlord can hold the tenant for damages for the balance of the lease term following the landlord's recovery of possession. *Id.* However, the landlord then has a duty to mitigate the tenant's damages by making a good faith effort to release the property at a fair rental, and the landlord must credit the tenant for any rents obtained from another tenant during the lease term. *Id.*

1. Mitigation. A landlord's duty to exert a reasonable effort to mitigate damages does not arise until the landlord retakes the property. *Fairway Mortgage Solutions, Inc. v. Locust Gardens*, 988 So.2d 678 (Fla. 4th DCA 2008) (finding that landlord satisfied its duty to mitigate damages after tenant defaulted on a commercial lease where landlord sought and obtained a replacement tenant within three months of retaking property, although landlord allegedly rented other properties to prospective tenants before it rented tenant's property).

2. Conveyance of Property after Violation. Where, upon vacating, the tenant left the premises in a condition that violated the lease between the parties, the former landlord's cause of action accrued at that time, notwithstanding that the former landlord subsequently sold the leased premises to a third party. *Pomeranc v. Winn-Dixie Stores, Inc.*, 598 So.2d 103 (Fla. 5th DCA 1992) (citing *Cunningham Drug Stores, Inc. v. Pentland*, 243 So.2d 169 (Fla. 4th DCA 1970)). Neither the landlord's cause of action for breach of lease nor the amount of damages resulting from that alleged breach was lost, diminished, or destroyed by the conveyance of the leased premises by the landlord to a third party after the breach of the lease occurred. *Pomeranc* at 104-05 (citing *Gray v. Callahan*, 143 Fla. 673, 197 So. 396 (1940)).

3. Acceleration. As a general rule in Florida, rent will not be accelerated and future rent is demandable only in the amounts and at the time specified in the lease. *National Advertising Co. v. Main Street Shopping Center*, 539 So.2d 594 (Fla. 2d DCA 1989) (citing *Williams v. Aeroland Oil Co.*, 155 Fla. 114, 20 So.2d 346 (1944)) (finding that landlord of space for construction of highway billboard was not entitled to total rent due under multiyear lease as damages for tenant's breach of lease because lease did not provide for acceleration of rent in event of tenant's default).

G. **"Disposition of Personal Property Landlord and Tenant Act"**. Sections 715.10-715.111 of the Florida Statutes provide optional procedures when personal property remains on the premises after a tenancy has terminated or expired and the premises have been vacated by the tenant through eviction or otherwise. F.S. §715.101(2). Section 715.10-715.111 apply to all tenancies to which Part I or Part II of Chapter 83, Florida Statutes, are applicable, and to tenancies after a writ of possession has been issued pursuant to Section 723.062, Florida Statutes. F.S. §715.101(1). See the act for notice, storage, advertising, and sale requirements.

H. **Advance Payment of Rent**. Unless addressed by the terms of the lease agreement, rent is due and payable at the end of each installment period. *De Vore* provides:

> [T]he undertaking to pay rent periodically ripens into a debt only as the times for payments of rent arrive. *Calechman et al. v. Great Atlantic & Pacific Tea Co.*, 120 Conn. 265, 180 A. 450, 100 A.L.R. 302. In other words, the debt becomes fixed from time to time as the amount of rental is earned by the use of the property by the lessee. An obligation for the full amount that the lessor would eventually receive from the lessee for the occupancy of the property for the entire time mentioned in the lease would not be established merely upon the execution of the instrument, for 'rent does not accrue to the lessor as a debt or claim, unless payable in advance, until the lessee has enjoyed the use of the premises. It may never become due; for the lessee may be evicted, or the premises become untenable. It is not an existing demand, the cause of action on which depends on a contingency, but the very existence of the demand depends on a contingency. It is wholly uncertain whether the lease will ever give rise to an actual debt or liability.' *Wilder v. Estate of Bristol*, 37 Minn. 248, 33 N.W. 852.
>
> *De Vore*, 158 Fla at 611.

I. **Tenant's Action for Breach of Contract and Lost Profits**. Damages for lost profits are permitted for the breach of a lease agreement if they can be established with reasonable certainty. *4 Corners Ins., Inc. v. Sun Publications of Florida, Inc.*, 5 So.3d 780 (Fla. 2d DCA 2009); *U.S. Home Corp. v. Suncoast Utils., Inc.*, 454 So.2d 601 (Fla. 2d DCA 1984) ("Damages for lost profits must be reasonably certain and established by competent proof."); *see also Victoriana Bldg*, 166 So. 3d at 863 (holding that the tenant's proof of lost business value claim was speculative and therefore insufficient). However, a trial judge is not precluded from awarding damages due to an inability to provide an exact amount if the evidence establishes a reasonable basis for the damage award. *Clearwater Assocs. v. Hicks Laundry Equip. Corp.*, 433 So.2d 7 (Fla. 2d DCA 1983). However, the limitation of remedies in the event of a breach of a commercial lease agreement, such as a limitation on special and consequential damages, is enforceable. *Golden v. Mobil Oil Corp.*, 882 F.2d 490 (11th Cir. 1989).

J. **Guaranty of Lease/ Personal Liability of Tenant Officer**. At least one court has found that the plain language of a guaranty clause in a lease agreement created personal liability on the part of a corporate officer of the tenant and that an admonition clause or a joint and several liability statement in the lease agreement is not necessary in order to attach personal liability. *Coleman v. 688 Skate Park, Inc*. 40 So.3d 867 (Fla. 2d DCA 2010). In *Colemen*, the lease agreement contained a provision stating that where the tenant was a corporation or other entity, the individual executing the lease agreement on behalf of the tenant guaranteed the obligations of the tenant.

K. **Waste of Premises by Tenant.** The landlord's damages in tort, as opposed to contractual damages arising from the tenant's breach of the lease, are considered waste. Waste is the "destructive use of the property by one in rightful possession." *Stephenson v. National Bank of Winter Haven*, 92 Fla. 347, 109 So. 424 (1926). The tenant's duty not to commit waste arises by operation of law wholly apart from any covenant in the lease. *Stegeman v. Burger Chef Systems, Inc.*, 374 So.2d 1130 (Fla. 1st DCA 1979). In order to recover, the landlord must establish the rentable conditions of the leased premises at the time the tenant took possession and the resulting changes to the leased premises. *Id.* at 1131. The tenant can defend a waste claim by showing that the damages were caused by ordinary wear. *Cunningham Drug Stores* at 170 – 71. Ordinary wear means depreciation which occurs when the tenant does nothing inconsistent with the usual use and omits no acts which are usual for a tenant to perform. *Tirrell v. Osborn*, 55 A.2d 725 (D.C. App. 1947).

III. RESIDENTIAL TENANCIES

A. Florida Residential Landlord and Tenant Act

1. Generally. The Florida Residential Landlord and Tenant Act (the "Residential Act") is contained in Sections 83.40 – 83.682, Florida Statutes, and applies only to rentals of dwelling units. F.S. §83.40; F.S. §83.41. The Residential Act does not apply to: (a) residency or detention incidental to the provisions of medical, geriatric, educational, counseling or religious services; (b) occupancy under a contract of sale of a dwelling unit or the property of which it is a part in which the buyer has paid at least 12 months' rent or in which the buyer has paid at least 1 month's rent and a deposit of at least 5 percent of the purchase price of the property; (c) transient occupancy in a hotel, condominium or mobile home park; (d) occupancy by the holder of a proprietary lease in a cooperative; or (e) occupancy by an owner of a condominium unit. F.S. §83.42.

2. Variances from Provisions of the Act. The parties to a residential tenancy may not waive or prohibit any right, remedy or requirement under the Residential Act. F.S. §83.47(1)(a).

3. Good Faith. The Residential Act imposes an obligation of good faith in the performance or enforcement of every rental agreement subject to it. F.S. §83.44.

B. **Eviction Generally**. In order to properly complete a residential eviction action, a landlord must look not just to the written lease, but to the Florida Statutes and interpretative case law.

1. Three-Day Notice. A landlord is not entitled to relief in a residential eviction lawsuit based on nonpayment of rent unless the landlord has given the tenant a three-day notice (excluding Saturdays, Sundays and legal holidays) to pay the rent or quit the premises. F.S. §83.56(3); *Clark v. Hiett*, 495 So.2d 773 (Fla. 2d DCA 1986). The notice must substantially comply with the three-day notice form provided by statute, be in writing and demand the exact amount of overdue rent. F.S. §83.56(3); *See Kaplan v. McCabe*, 532 So.2d 1354 (Fla. 5th DCA 1988). The notice should not include late fees, attorneys' fees, interest, or any other charges unless expressly defined by the lease as "rent." These charges may be included in the eviction complaint. The notice must also contain a demand for payment of the rent past due or delivery of possession, and include the landlord's name, address and telephone number. The notice must calculate with absolute accuracy the three-day grace period for the tenant. If mailed to the Tenant, the Landlord must add five days to the deadline for payment. *Investment & Income Realty, Inc. v. Bentley*, 480 So.2d 219 (Fla. 5th DCA 1985). The notice requirement may not be waived in the lease. F.S. §83.56(4).

2. Landlord's Right of Reentry. The right of re-entry is provided by the Residential Act; however, there is no self-help right in Florida. *Ardell v. Milner*, 166 So.2d 714 (Fla. 3d DCA 1964). Thus, the right of re-entry is never more than the right to sue for eviction in court, unless the tenant has abandoned or surrendered the premises. F.S. §83.59(3).

3. Jurisdiction for Eviction Actions.

a. *Possession Only*. County court is the exclusive jurisdiction for landlord actions solely for possession of the premises, in all types of eviction actions (residential and non-residential). F.S. §34.011(2). If a landlord sues for simple eviction seeking only possession (and not past-due rent), the case must be filed in county court regardless of the past-due rent amount. *Id.* Therefore, when collection of damages is unlikely, a possession only case in county court may be the best approach.

b. *Possession and Damages*. A hybrid landlord action for eviction and collection of past-due rent must be filed in the court with the appropriate monetary jurisdictional limits (county or circuit). F.S. §34.011(1). Accordingly, the circuit court has concurrent jurisdiction over eviction cases in which the amount of past-due rent claimed is over $15,000. F.S. §34.01(1)(c); F.S. §26.012(2)(a).

c. *Counterclaims and Bifurcation*. If the landlord sues in county court and the tenant files a counterclaim for monetary damages in excess of the jurisdictional limit of the county court, the entire case must be transferred to the circuit court. Fla.R.Civ.P. 1.170(j); *see also CKN Airways, Inc. v. Flagler County*, 441 So.2d 1103 (Fla. 5th DCA 1983). If a tenant asserts a counterclaim without a sufficient basis, the tenant's motion to transfer the action may be denied. *City of Miami v. Jafra Steel Corp.,* 184 So.2d 178 (Fla. 1966); *see also* Fla. R. Civ. P. 1.150.

C. **Proceedings in Eviction Actions**.

1. Possession Only Actions. A landlord is entitled to the summary procedure under Section 51.011, Florida Statutes, for possession only actions. F.S. §83.59(2). In a summary procedure, the tenant has five business days after being served with the complaint to file a written

response with the court, which must include counterclaims. F.S. §51.011(1). No other pleadings are permitted. *Id.* The summary procedure statute provides for limited discovery and other matters designed to shorten the legal process. F.S. §51.011(2). The Florida Rules of Civil Procedure will apply to the action, subject to the shortened time frames of Section 51.011, Florida Statutes. F.S. §51.011; *See also Berry v. Clement*, 346 So.2d 105 (Fla. 2d DCA 1977).

2. Hybrid Eviction Actions. Actions for eviction and damages require bifurcated procedural treatment of the two claims. Summary procedures will apply to the eviction count. The full 20-day responsive pleading period and the other standard provisions of the Florida Rules of Civil Procedure will apply to the damages count(s). If the tenant fails to respond, the landlord's attorney should file for default in two stages: first, a default motion on the possessory count only, after the five-day period expires; second, a default motion on the damages count(s), after the 20-day period expires.

3. Pleadings.

a. *Eviction Only*. A complaint for eviction should allege:

(i) the existence of a landlord/tenant relationship;

(ii) nonpayment of rent (or other breach of the lease, if applicable); and

(iii) that the three-day notice (or seven-day notice, if applicable) was properly served upon the tenant.

The relief sought is possession of the subject premises.

b. *Eviction and Damages*. A hybrid eviction and damages action is authorized by Section 83.625, Florida Statutes. F.S. §83.625. However, for a landlord to obtain a money judgment for damages, personal service of process on the tenant is required. *Id.* In the absence of personal service, the lawsuit will be in rem and the landlord's remedy will be limited to possession of the premises.

c. *Posting of Summons at Premises*. In an action for possession only, or as to the eviction count in a hybrid action, process may be served by posting the summons and complaint at a conspicuous place on the premises. At least two attempts at personal service (upon any person 15 years of age or older residing at the tenant's usual place of abode), six hours apart, must be made prior to posting. F.S. §48.183(1). Section 48.183(2), Florida Statutes, with respect to the clerk's mailing of a copy of the summons and complaint to the tenant at the leased premises, must also be complied with to achieve service by posting. F.S. §48.183(2).

4. Attorneys' Fees. The prevailing party in an eviction action is entitled to attorneys' fees under the Residential Act, but this right is often also set forth in the lease. F.S. §83.48. The right exists regardless of whether there is a written lease agreement between the parties or whether the written lease agreement is silent on the matter of attorney's fees. *Gaccione v. Damiano*, 35 So.3d 1008 (Fla. 5th DCA 2010). The right to attorneys' fees may not be waived in the lease agreement. F.S. §83.48. Evidence, which may involve a hearing and testimony, must

be offered to establish the amount of the fee award. *Parker v. Dekle*, 46 Fla. 452, 35 So. 4 (1903); *Bowman v. Kingsland Development, Inc*., 432 So.2d 660 (Fla. 5th DCA 1983). When one party loses in a breach of contract action, the other party is the "prevailing party" in the litigation and a trial court has no discretion to deny an award of attorneys' fees if the contract contains a "prevailing party" attorneys' fees provision. *Point East Four Condominium Corp., Inc. v. Zevuloni & Associates, Inc*., 50 So.3d 687 (Fla. 4th DCA 2010). Attorneys' fees may not be awarded pursuant to Section 83.48, Florida Statutes, in a claim for personal injury damages based on a breach of the landlord's duty to maintain the leased premises under Section 83.51, Florida Statutes.

5. Defenses by Tenant.

a. *Rent Deposit Required*. If the tenant asserts any defense other than the payment of rent, including, but not limited to, the defense of a defective 3-day notice, the tenant must pay the delinquent rent alleged in the complaint, if any, into the court registry, or file a motion to determine the amount of rent to be paid into the court registry. F.S. §83.60(2). The tenant's failure to deposit the delinquent rent, or to file a motion to determine the amount of rent to be paid into the registry within five days, excluding Saturdays, Sundays and legal holidays, after the date of service of process constitutes waiver of all defenses other than payment of rent, and the landlord is entitled to a default judgment from the court. *Id.* The tenant must also pay into the court registry any rent that comes due during the pendency of the action. *Id.*

b. *Basis for Right of Occupancy in Dispute*. Where persons in possession claim a right of occupancy based upon something other than a lease agreement (such as under a purchase and sale contract), an evidentiary hearing is required to determine the basis for such persons' right of occupancy before the trial court can properly order eviction or rent deposit payments. *Grimm v. Huckabee*, 891 So.2d 608 (Fla. 1st DCA 2005).

c. *Landlord Failure to Maintain Premises*. Landlords are obligated to comply with local housing regulations. F.S. §83.51(1)(a). If no such regulations exist, the Residential Act sets certain minimum maintenance requirements. F.S. §83.51(1)(b). If the landlord has failed to maintain the leased premises as required, the tenant may be entitled to remain in possession, withhold rent, and obtain a court-ordered reduction of rent based on the reduced rental value of the premises. F.S. §83.60(1)(b). To properly assert this defense, the tenant must first serve the landlord with a written notice specifying the tenant's complaint and declaring an intention to withhold payment of rent unless the complaint is satisfied within seven days. F.S. §83.60(1). This notice is not timely if it is served on the landlord after the tenant receives the landlord's three day notice pursuant to Section 83.56(1), Florida Statutes. *Lakeway Management Co. of Florida, Inc. v. Stolowilsky*, 527 So.2d 950 (Fla. 3d DCA 1988). Alternatively, the tenant may serve written notice upon the landlord specifying the tenant's complaint and declaring the tenant's intent to terminate the lease unless the correction is made within seven days. F.S. §83.56(1). This strategy requires the tenant to be prepared to vacate the premises.

d. *Defective Three-Day Notice*. A three-day notice of nonpayment of rent (see III.B.1 above) is a statutory condition precedent to eviction. F.S. §83.56(3); *see also Clark,* 495 So.2d at 775. A material defect in the three-day notice will subject an eviction complaint to dismissal for failure to state a cause of action. *Investment & Income Realty* at 220.

However, the landlord must be given an opportunity to cure a deficiency in a notice or in the pleadings before dismissal of the action. F.S. §83.60(1)(a).

e. *Defective Service of Process*. If the notice is sufficient, the attorney should examine the return of service on the tenant. Frequently the process server fails to note on the return the time of day when service was effected. If the time is omitted, the service is invalid and the action will be barred on appropriate motion by the attorney until the return is amended. *See* F.S. §48.21.

f. *Waiver of Default*. Generally, acceptance of rent by a landlord with knowledge of an existing tenant default acts as a waiver of the landlord's right to terminate the lease for such default. F.S. §83.56(5). However, acceptance of partial rent by a landlord does not waive the landlord's right to terminate the lease or to bring a civil action for the default if the landlord either (1) provides the tenant with a receipt stating the date and amount received and the agreed upon date and balance of rent due before filing an action for possession; (2) places the amount of partial rent accepted from the tenant in the registry of the court upon filing the action for possession; or (3) posts a new three day notice reflecting the new amount due. F.S. §83.56(5)(a).

6. Post-Possessory Remedies.

a. *In General*. Pursuant to Section 83.595, Florida Statutes, when the landlord regains possession of the premises following a writ of possession, surrender by the tenant, or abandonment by the tenant, the landlord has a choice of at least the following remedies:

(i) The landlord may treat the lease as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant. F.S. §83.595(1).

(ii) The landlord may retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between rental stipulated to be paid under the lease agreement and what, in good faith, the landlord is able to recover from a reletting. F.S. §83.595(2). Where the landlord posts a notice of termination and does not otherwise advise the tenant that it is taking possession for the benefit of the tenant (and holding the tenant responsible for future obligations under the lease), the landlord has elected option (i) above and not this option (ii). *Atlantis Estate Acquisitions, Inc. v. Depierro*, 125 So. 3d 889 (Fla. 4th DCA 2013).

(iii) The landlord may do nothing, holding the tenant liable for the rent as it comes due. F.S. §83.595(3).

(iv) The landlord may charge liquidated damages, as provided in the lease agreement, or an early termination fee to the tenant if the landlord and tenant have agreed to liquidated damages or an early termination fee, if the amount does not exceed two months' rent, and if, in the case of an early termination fee, the tenant is required to give no more than 60 days' notice, as provided in the lease agreement, prior to the proposed date of early termination. This remedy is available only if the tenant and the landlord, at the time the lease agreement was made, indicated acceptance of liquidated damages or an early termination fee. The tenant must indicate

acceptance of liquidated damages or an early termination fee by signing a separate addendum to the lease agreement containing a provision in substantially the form provided in F.S. §83.595(4). F.S. §83.595(4); *see Wilson v. Terwillinger,* 140 So.3d 1122 (Fla. 5th DCA 2014) (holding a liquidated damages provision enforceable although it was referenced only in the lease addendum, *which was signed simultaneously with the lease*, as language is not required to be in both the lease and the addendum).

b. *Acceptance of Surrender*. The landlord's acceptance of a tenant's surrender of possession absolves the tenant from further liability to the landlord; and the landlord must return the security deposit to the tenant and may not seek damages for breach of the lease. Whether or not a landlord has accepted surrender or merely taken back the premises with the intent of releasing the premises is a question of fact. *Kanter v. Safran*, 68 So.2d 553 (Fla. 1953). If the landlord has the intent to release and pursue the tenant for damages, the landlord should indicate its intent in writing to avoid any claim of acceptance of surrender.

c. *Re-letting for Account of Tenant*. If the landlord elects to terminate the lease and retake possession for the account of the tenant, the tenant remains liable for past-due rent and the landlord may recover as damages the difference between the rent agreed to under the lease and the amount of rent recovered by the landlord by re-renting the premises for the remainder of the original lease term. F.S. §83.595(2). The landlord must promptly notify the tenant that the lease is terminated and the landlord will attempt to re-let the premises. The landlord must exercise good faith and make a diligent effort to re-let the premises on commercially reasonable terms. *Id.* If the tenant offers a commercially reasonable substitute tenant, the landlord may not arbitrarily reject the offer. *Fernandez*, 397 So.2d at 1174.

d. *Enforcement of Lease*. The "do nothing and collect rent" remedy requires either a substantial waiting period for the rent payments to accrue or multiple collection actions. To avoid these undesirable alternatives, the lease should contain a rent acceleration clause to afford the landlord the option, upon default, to declare the entire balance of rent payments immediately due and payable. *See National Advertising* at 595.

e. *Security Deposits and Advance Rent*. The landlord customarily collects a security deposit and advance rent from the tenant before the tenant takes possession of the premises. Advance rent is money paid to the landlord to be applied to future rent payment periods, but does not include rent paid in advance for a current rent payment period. F.S. §83.43(9). F.S. § 83.49(1) requires that the landlord hold advance rent in segregated accounts "whenever money is deposited or advanced by a tenant on a rental agreement…as advance rent for other than the next immediate rental period …" A security deposit offers some protection to the landlord from the tenant's breach of the lease. F.S. §83.43(12). *See Atlantis Estate Acquisitions, Inc. v. Depierro,* 125 SO. 3d 889 (Fla. 4th DCA 2013) (holding that where lease term was for one year and the entire rent paid up front, the upfront payment was not advance rent, and therefore landlord did not have to hold in a segregated account and was entitled to retain it after terminating several months in due to tenant's damage to the premises). The landlord may claim the security deposit to compensate the landlord for unpaid rent or damages to the premises caused by the tenant. F.S. §83.49(3). A security deposit belongs to the tenant until an unpaid obligation to the landlord arises. Advance rent belongs to the landlord absent the landlord's failure to perform. *Zaconick v. McKee*, 310 F.2d 12 (5th Cir. 1962).

f. *Landlord's Duty Regarding Deposits*. Pursuant to Section 83.49, Florida Statutes, the landlord or its agent must:

(i) Elect one of the following:

(a) Hold the deposit in a separate non-interest-bearing account in a Florida banking institution for the benefit of the tenant or tenants. F.S. §83.49(1)(a). The landlord must not commingle the deposits with any other landlord funds. *Id.* Further, the landlord must not use or pledge the deposits until the deposit is actually due the landlord. *Id.*

(b) Hold the deposit in a separate interest-bearing account in a Florida banking institution for the benefit of the tenant or tenants. F.S. §83.49(1)(b). The tenant shall receive and collect interest in an amount of at least 75 percent of the annualized average interest rate payable on the account or interest at the rate of five percent per year, simple interest, whichever the landlord elects. *Id.* The landlord must not commingle the deposits with any other funds of the landlord. *Id.* Further, the landlord must not use or pledge the deposits until the deposit is actually due the landlord. *Id.*

(c) Post a surety bond, with the clerk of the circuit court in the county in which the dwelling unit is located in the total amount of the security deposits and advance rent the landlord holds on behalf of the tenants or $50,000, whichever is less. F.S. §83.49(1)(c). A landlord, or agent, engaged in the renting of dwelling units in five or more counties, may elect to post a surety bond with the office of the Secretary of State; such bond shall be in the total amount of the security deposit or advance rent held on behalf of tenants, or in the amount of $250,000, whichever is less. *Id.* In addition, the landlord must pay to the tenant five percent per year, simple interest. *Id.*

(ii) The landlord must, in the lease agreement or within 30 days of receipt of the advance rent or security deposit, give written notice to the tenant disclosing the amount of the advance rent or security deposit. F.S. §83.49(2). The notice must be given in person or by mail to the tenant, state the name and address of the depository where the advance rent or security deposit is being held or state that the landlord has posted a surety bond as provided by law, state whether the tenant is entitled to interest on the deposit, and contain the disclosure language contained in Section 83.49(2)(d), Florida Statutes, regarding the landlord's and the tenant's rights if the landlord imposes a claim on the deposit. The landlord must also notify the tenant within 30 days after a change in location or manner of holding the security deposit, however, notice is not required on a financial institution merger or name change. *Id.* The required disclosure language in 83.49(2)(d) is:

> YOUR LEASE REQUIRES PAYMENT OF CERTAIN DEPOSITS. THE LANDLORD MAY TRANSFER ADVANCE RENTS TO THE LANDLORD'S ACCOUNT AS THEY ARE DUE AND WITHOUT NOTICE. WHEN YOU MOVE OUT, YOU MUST GIVE THE LANDLORD YOUR NEW ADDRESS SO THAT THE LANDLORD CAN SEND YOU NOTICES REGARDING YOUR DEPOSIT. THE LANDLORD MUST MAIL YOU NOTICE, WITHIN 30 DAYS AFTER YOU MOVE OUT, OF THE LANDLORD'S INTENT TO IMPOSE A CLAIM AGAINST THE DEPOSIT. IF YOU DO NOT REPLY TO THE LANDLORD STATING YOUR

OBJECTION TO THE CLAIM WITHIN 15 DAYS AFTER RECEIPT OF THE LANDLORD'S NOTICE, THE LANDLORD WILL COLLECT THE CLAIM AND MUST MAIL YOU THE REMAINING DEPOSIT, IF ANY.

IF THE LANDLORD FAILS TO TIMELY MAIL YOU NOTICE, THE LANDLORD MUST RETURN THE DEPOSIT BUT MAY LATER FILE A LAWSUIT AGAINST YOU FOR DAMAGES. IF YOU FAIL TO TIMELY OBJECT TO A CLAIM, THE LANDLORD MAY COLLECT FROM THE DEPOSIT, BUT YOU MAY LATER FILE A LAWSUIT CLAIMING A REFUND.

YOU SHOULD ATTEMPT TO INFORMALLY RESOLVE ANY DISPUTE BEFORE FILING A LAWSUIT. GENERALLY, THE PARTY IN WHOSE FAVOR A JUDGMENT IS RENDERED WILL BE AWARDED COSTS AND ATTORNEY FEES PAYABLE BY THE LOSING PARTY.

THIS DISCLOSURE IS BASIC. PLEASE REFER TO PART II OF CHAPTER 83, FLORIDA STATUTES, TO DETERMINE YOUR LEGAL RIGHTS AND OBLIGATIONS.

Section 83.49(2), Florida Statutes, requiring the foregoing disclosures and notices, does not apply to any landlord who rents fewer than five individual dwelling units.

(iii) Upon vacating the premises for termination of the lease, if the landlord does not intend to impose a claim on a security deposit, the landlord has 15 days to return the security deposit, together with interest if required, or the landlord shall have 30 days to give the tenant written notice by certified mail of the landlord's claim on the deposit and the reason for imposing the claim. F.S. §83.49(3)(a). The tenant must be advised of the right to contest the claim. Section 83.49(3)(a), Florida Statutes, sets forth required language for notice to the tenant:

> "This is a notice of my intention to impose a claim for damages in the amount of ____ upon your security deposit, due to _____. It is sent to you as required by s. 83.49(3), Florida Statutes. You are hereby notified that you must object in writing to this deduction from your security deposit within 15 days from the time you receive this notice or I will be authorized to deduct my claim from your security deposit. Your objection must be sent to (landlord's address) ."

The landlord forfeits the right to impose a claim upon the deposit if the required notice is not timely provided and may not seek a setoff against the deposit but may file an action for damages after return of the deposit. *Id.* Unless the tenant objects to the imposition of the landlord's claim or the amount thereof within 15 days after receipt of the landlord's notice of intention to impose a claim, the landlord may then deduct the amount of its claim and remit the balance of the deposit to the tenant within 30 days after the date of the notice of intention to impose a claim for damages. F.S. §83.49(3)(b). The failure of the tenant to make a timely objection does not waive any rights of the tenant to seek damages in a separate action. *Id.* The prevailing party is entitled to court costs plus

a reasonable attorneys' fee for litigating entitlement to a security deposit. F.S. §83.49(3)(c). The court is also required to advance the cause on the calendar. *Id.*

(iv) When interest is due to the tenant, the landlord may pay directly to the tenant, or credit against the current month's rent, at least once annually. F.S. §83.49(9). No interest is due to a tenant who wrongfully terminates the lease prior to the end of the rental term. *Id.*

g. *Waste of Premises by Tenant*. The common law concept of waste has been supplanted for residential tenancies by the Residential Act, and the tenant's duties are as outlined in Section I above. F.S. §83.52.

h. *Writs of Possession; Lien*. Pursuant to Section 713.691, Florida Statutes, a landlord in a residential tenancy has a lien on all personal property located on the premises as secured for accrued rent. F.S. §713.691(1). This lien is in addition to any other lien the landlord may acquire, and may be modified by the rental agreement. *Id.* The lien attaches to the tenant's personal property when the sheriff gives the landlord possession of the premises. *Id.* Note, if the tenant is the head of the family, there is a $1,000 exemption from this lien. F.S. §713.691(2). There is no distress writ for residential tenancies. F.S. §713.691(3). Following the entry of judgment in favor of the landlord, the clerk issues a writ to the sheriff, describing the premises, and commanding the sheriff to put the landlord in possession after 24 hours' notice conspicuously posted on the premises. Saturdays, Sundays, and legal holidays do not stay the 24-hour notice period. F.S. §83.62(1). At the time the sheriff executes the writ of possession or at any time thereafter, the landlord or the landlord's agent may remove any personal property found on the premises to or near the property line, and the landlord may request that the sheriff keep the peace (at a fee) during the changing of the locks and the removal of the property to the property line. F.S. §83.62(2).

7. Miscellaneous Remedies.

a. *Eviction for Cause Other Than Nonpayment; Seven-Day Notice*. As in non-residential tenancies, the residential landlord has a right of reentry for the tenant's breach of non-monetary lease covenants or the statutory obligations in the Residential Act. F.S. §83.56(2). The landlord must serve the tenant with a seven-day notice of the default before an eviction action may be filed. *Id.* The notice requirement may not be waived in the lease. F.S. §83.56(4). There are two types of seven-day notice:

(i) If the noncompliance is of a nature that the tenant should not be given an opportunity to cure it or if the noncompliance constitutes a subsequent or continuing noncompliance within 12 months of a written warning by the landlord of a similar violation, the landlord may deliver a written notice to the tenant specifying the noncompliance and terminate the rental agreement, and the tenant shall have seven days from the date that the notice is delivered to vacate the premises. F.S. §83.56(2)(a). Examples of noncompliance which are of a nature that the tenant should not be given an opportunity to cure include, but are not limited to, destruction, damage, or misuse of the landlord's or other tenants' property by intentional act or a subsequent or continued unreasonable disturbance. Id.

(ii) If such noncompliance is of a nature that the tenant should be given an opportunity to cure it, the landlord shall deliver a written notice to the tenant specifying the noncompliance, and stating that if the noncompliance is not corrected within seven days from the date the written notice is delivered, the landlord shall terminate the rental agreement by reason thereof. F.S. §83.56(2)(b).

b. *Tenant's Intentional Destruction*. The landlord may also obtain injunctive relief for intentional destruction of the landlord's property. F.S. §83.681(1). Damage to the premises in excess of twice the amount of the security deposit, or $300.00, whichever is greater, constitutes irreparable harm to the landlord for the purpose of determining whether the landlord is entitled to injunctive relief. F.S. §83.681(3).

c. *Termination of Periodic Tenancy*. As in non-residential tenancies, periodic residential tenancies are classified by the frequency of rent payments. F.S. §83.46(2). For example, if the rent is payable once monthly, it is a month-to-month tenancy. *Id.* A month-to-month tenancy is continuous until terminated. *Drum v. Pure Oil Co*., 184 So.2d 196 (Fla. 4th DCA 1966). If the dwelling unit is furnished without rent as an incident of employment, and there is no specific agreement as to the duration of the tenancy, the duration is determined by the periods for which wages are payable; if no wages are payable, the frequency is month to month. F.S. §83.46(3). Section 83.57, Florida Statutes, sets forth the number of days required for notice of termination of residential tenancies without specific duration (60 days for a yearly tenancy; 30 days for a quarterly tenancy; 15 days for a monthly tenancy; and 7 days for a weekly tenancy). F.S. §83.57.

d. *Actions against Holdover Tenants*. As in non-residential tenancies, the Landlord may recover double the amount of rent due from a holdover tenant who refuses to surrender possession at the end of the term. F.S. §83.58. Where the tenant holds over after expiration of the lease with the consent of the landlord, the tenancy thus arising is generally presumed to be upon the same covenants and terms as the original lease so far as they are applicable to the new tenancy. *Wingert v. Prince*, 123 So.2d 277 (Fla. 2d DCA 1960). However, the statutory penalty may not be due from a tenant holding over under a bona fide claim of right based on reasonable grounds. *Painter v. Town of Groveland*, 79 So.2d 765 (Fla. 1955).

e. *Unconscionable Rental Agreement or Provision*. If a court as a matter of law finds a rental agreement or any provision thereof to have been unconscionable at the time it was made, the court may refuse to enforce the rental agreement, enforce the remainder of the rental agreement without the unconscionable provision, or so limit the application of any unconscionable provision as to avoid any unconscionable result. F.S. §83.45(1). When it is claimed or appears to the court that the rental agreement or any provision thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to meaning, relationship of the parties, purpose, and effect to aid the court in making the determination. F.S. §83.45(2).

f. *Enforcement of Rights and Duties; Civil Action*. Any right or duty declared in the Florida Residential Landlord and Tenant Act is enforceable by civil action. F.S. §83.54. A right or duty enforced by civil action under Section 83.54, Florida Statutes, does not preclude prosecution for a criminal offense related to the lease or leased property. *Id.* If either the

landlord or the tenant fails to comply with the requirements of the rental agreement or the Florida Residential Landlord and Tenant Act, the aggrieved party may recover the damages caused by the noncompliance. F.S. §83.55.

D. **Prohibited Activities.** The Residential Act prohibits a landlord from taking any of the following actions:

1. Interruption of Utilities. A landlord is not permitted to cause, directly or indirectly, termination or interruption of any utility service, regardless of whether the service is under the control of, or payment for the utility service is made by, the landlord. F.S. §83.67(1).

2. Access. A landlord shall not prevent the tenant from gaining reasonable access to the dwelling unit, including but not limited to, by changing locks. F.S. §83.67(2).

3. Servicemembers. A landlord shall not discriminate against a servicemember in offering a dwelling unit for rent or in any terms of the agreement. F.S. §83.67(3).

4. Flag. A landlord shall not prohibit a tenant from displaying one portable, removable, cloth or plastic United States flag, not larger than 4 ½ feet by 6 feet, in a respectful manner on or in the dwelling unit. F.S. §83.67(4).

5. Limitations. A landlord may not remove outside doors, locks, roof, walls or windows except for purposes of maintenance or repair. F.S. §83.67(5). Landlord may also not remove the tenant's personal property unless such action is taken after surrender, abandonment, recovery of possession under Section 83.59(3)(d), Florida Statutes, or lawful eviction. *Id.* If provided in the rental agreement (or separate agreement), the landlord is not responsible to comply with Section 715.104, Florida Statutes, requiring a landlord notify the prior tenant that personal property remains on the premises, if the following disclaimer is provided:

> BY SIGNING THIS RENTAL AGREEMENT, THE TENANT AGREES THAT UPON SURRENDER, ABANDONMENT, OR RECOVERY OF POSSESSION OF THE DWELLING UNIT DUE TO THE DEATH OF THE LAST REMAINING TENANT, AS PROVIDED BY CHAPTER 83, FLORIDA STATUTES, THE LANDLORD SHALL NOT BE LIABLE OR RESPONSIBLE FOR STORAGE OR DISPOSITION OF THE TENANT'S PERSONAL PROPERTY. *Id.*

6. Penalties. A landlord who violates Section 83.67, Florida Statutes, shall be liable to the tenant for actual and consequential damages or three months' rent, whichever is greater, and costs, including attorney's fees. F.S. §83.67(6). Subsequent or repeated violations are subject to separate awards of damages. *Id.* Further, a violation of this section constitutes irreparable harm for the purposes of injunctive relief. F.S. §83.67(7).

7. Floatation Bedding. No landlord may prohibit a tenant from using a flotation bedding system in a dwelling unit, provided that the system does not violate applicable

building codes. F.S. §83.535. The tenant shall be required to carry in the tenant's name flotation insurance. *Id.*

8. Retaliatory Conduct. It is unlawful for a landlord to discriminatorily increase a tenant's rent or decrease services to a tenant, or to bring or threaten to bring an action for possession or other civil action, primarily because the landlord is retaliating against the tenant. F.S. §83.64(1). In order for the tenant to raise the defense of retaliatory conduct, the tenant must have acted in good faith. *Id.* Section 83.64(1)(a)-(f), Florida Statutes, contains examples of conduct by the tenant for which the landlord may not retaliate. Evidence of retaliatory conduct may be raised by the tenant as a defense in any action brought against him or her for possession. F.S. §83.64(2). However, Section 83.64(3) does not apply if the landlord proves that the eviction is for good cause. F.S. §83.64(3). "Discrimination", for purposes of F.S. §83.64, means "that a tenant is being treated differently as to the rent charged, the services rendered, or the action being taken by the landlord" and is a prerequisite to a finding of retaliatory conduct. F.S. §83.64(4).

E. **Termination of Lease by a Servicemember**. Any servicemember may terminate a rental agreement by providing written notice to the landlord specifying the termination date, which must be at least 30 days after the landlord's receipt of the notice, if any of the following criteria are met: (1) the servicemember is required, pursuant to a permanent change of station orders, to move more than 35 miles from the premises; (2) the servicemember is prematurely or involuntarily discharged or released from active duty; (3) the service member is released from active duty after having leased the premises while on active duty and the rental premises are 35 miles or more from the servicemember's home of record prior to entering active duty; (4) after entering into a rental agreement, the servicemember receives military orders requiring a move to government quarters or the servicemember becomes eligible to do so and opts to move; (5) the servicemember receives temporary duty orders, temporary change of station orders or state active duty orders to an area 35 miles or more from the location of the premises, provided that the orders are for a period of more than 60 days; or (6) the servicemember has leased the property, but prior to taking possession of the rental premises, receives a change of orders to an area that is 35 miles or more from the location of the rental premises. F.S. §83.682(1). The provisions of this Section 83.682, Florida Statutes, may not be waived or modified. F.S. §83.682(5). Section 83.682, Florida Statutes, also provides guidelines for the information to accompany the notice, for process when a servicemember dies, and for rent amounts due upon termination.

F. **Foreclosure Proceedings**. Where a tenant is occupying residential premises that are the subject of a foreclosure sale, upon issuance of a certificate of title, the purchaser named in the certificate of title takes title to the premises subject to the rights of the tenant under Section 83.561, Florida Statutes (added in 2015). The purchaser does not assume the obligations of a landlord (except as to the protections in F.S. §83.67 – see Prohibited Practices, above), unless or until the purchaser assumes an existing rental agreement or enters into a new rental agreement. F.S. §83.561(4).

1. Notice of Termination. The tenant may remain in possession for 30 days following delivery by the purchaser of a written 30 day notice of termination. The 30 day notice must be in substantially the following form:

NOTICE TO TENANT OF TERMINATION

You are hereby notified that your rental agreement is terminated on the date of delivery of this notice, that your occupancy is terminated 30 days following the date of the delivery of this notice, and that I demand possession of the premises on (date) . If you do not vacate the premises by that date, I will ask the court for an order allowing me to remove you and your belongings from the premises. You are obligated to pay rent during the 30-day period for any amount that might accrue during that period. Your rent must be delivered to (landlord's name and address) . F.S. §83.561(1)(c).

The foregoing 30 day notice must be made in accordance with Florida Statutes Section 83.56(4) – by mailing, or if the tenant is absent from the premises, by leaving a copy at the premises.

2. Writ of Possession. The purchaser at the foreclosure sale may apply for a writ of possession based on a sworn affidavit that the 30 day notice was delivered and that the tenant failed to vacate at the end of the 30 day period. If the writ is issued, it must be served on the tenant, and will be governed by Florida Statutes Section 83.62 (sheriff to execute the writ of possession – See III(C)(6)(h) above). F.S. §83.561(2).

3. Applicability. The provisions of Florida Statutes Section 83.561 do not apply if: (a) the tenant is the mortgagor in the foreclosure or is the child, spouse or parent of the mortgagor in the foreclosure; (b) the tenant's lease is not the subject of an arm's length transaction; or (c) the tenant's lease allows the tenant to pay rent that is substantially less than fair market rent for the premises, unless the rent is reduced or subsidized due to a federal, state or local subsidy. F.S. §83.561(3).

IV. SELF- STORAGE FACILITY ACT

Contrary to the other provisions of Chapter 83, Florida Statutes, the Self-Storage Facility Act, set forth in Sections 83.801–83.809, Florida Statutes, does not govern the possession of any interest in land; instead, the relationship between the owner and tenant is a license to use a particular storage space.

A. **Application**. A "self-storage facility" is any real property designed and used for the purpose of renting or leasing individual storage space to tenants who are to have access to such space for the purpose of storing and removing personal property." F.S. §83.803(1). A "self-contained storage unit" means any unit not less than 200 cubic feet in size, including, but not limited to, a trailer, box, or other shipping container, which is leased by a tenant primarily for use as storage space whether the unit is located at a facility owned or operated by the owner or at another location designated by the tenant. F.S. §83.803(2). The Self-Storage Facility Act does not apply to a "warehouse" as defined in Chapter 677, Florida Statutes, nor to self-contained storage units of less than 200 cubic feet in size. F.S. §83.803(1)-(2). Moreover, the Self-Storage Facility Act does not permit a private cause of action in favor of a tenant claiming an owner's improper sale of personal property in a self-storage unit under the Self-Storage Facility Act. *Shurgard Income Properties Fund 16 – Ltd. Partnership v. Muns*, 761 So.2d 340 (Fla. 4th DCA 1999).

B. **Owner's Lien on Personal Property**. The owner of a self-service storage facility or self-contained storage unit has a lien upon all personal property, whether or not owned by the tenant, located at a self-service storage facility or in a self-contained storage unit for rent, labor charges, or other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to the Self-Storage Facility Act. F.S. §83.805. The lien attaches as of the date that the personal property is brought to the self-service storage facility or as of the date the Tenant takes possession of the self-contained storage unit. *Id.* The priority of the lien shall be the same as provided in Section 83.08, Florida Statutes, for a landlord's lien for rent in commercial tenancies. *Id*.

C. **Owner Authorized to Withhold Access Upon Nonpayment**. Unlike the non-residential and residential tenancy provisions of Chapter 83, Florida Statutes, upon the failure of a tenant to pay the rent when it becomes due, the owner may, without notice, after 5 days from the date the rent is due, deny the tenant access to the personal property located in the self-service storage facility or self-contained storage unit. F.S. §83.8055. In denying the tenant access to personal property contained in the self-contained storage unit, the owner may proceed without judicial process, if this can be done without breach of the peace, or may proceed by action. *Id*.

D. **Notice to Tenant**. Prior to the enforcement of the owner's lien, the tenant shall be notified by written notice delivered in person, by e-mail, or by first-class mail with a certificate of mailing to the tenant's last known address and conspicuously posted at the self-service storage facility or on the self-contained storage unit. F.S. §83.806(1). The written notice must include: (i) an itemized statement of the owner's claim, showing the sum due at the time of the notice and the date when the sum became due; (ii) the same description, or a reasonably similar description, of the personal property provided in the rental agreement; (iii) a demand for payment within a specified time not less than 14 days after delivery of the notice; (iv) a conspicuous statement that, unless the claim is paid within the time stated in the notice, the personal property will be advertised for sale or other disposition and will be sold or otherwise disposed of at a specified time and place; and (v) the name, street address, and telephone number of the owner whom the tenant may contact to respond to the notice. F.S. §83.806(2). Mailed notice is presumed delivered when it is deposited with the United States Postal Service and properly addressed with postage prepaid; however, special requirements apply to service by email. F.S. §83.806(3); F.S. §83.806(1). The owner must also give notice to persons who hold perfected security interests under the Uniform Commercial Code in which the Tenant is named as the debtor. F.S. §83.805.

E. **Notice of Sale**. Prior to the enforcement of the owner's lien, but after expiration of the time provided to the tenant in the notice required by Section 83.806(1), Florida Statutes, an advertisement of the sale or other disposition must be published once a week for two consecutive weeks in a newspaper of general circulation in the area where the self-storage facility or self-contained storage unit is located. F.S. §83.806(4). The advertisement must include: (i) a brief description of what is believed to constitute the personal property contained in the storage unit; (ii) the address of the self-service storage facility or the address where the self-contained storage unit is located; (iii) the name of the tenant; and (iv) the time, place, and manner of the sale or other disposition. F.S. §83.806(4)(b). A lien sale may be conducted on a public website that customarily conducts personal property auctions. The facility or unit owner is not required to hold a license to post property for online sale. F.S. §83.806(4)(a).

F. **Tenant's Right to Redeem**. At any time prior to the sale or other disposition of personal property, the tenant may pay the amount necessary to satisfy the owner's lien and the reasonable expenses incurred by the owner under the Self-Storage Facility Act and redeem the personal property. Upon receipt of such payment, the owner shall return the personal property to the tenant and thereafter shall have no liability to any person with respect to such personal property. F.S. §83.806(6).

G. **Sale of Personal Property**. The sale or other disposition cannot take place sooner than 15 days after the first publication. F.S. §83.806(4)(b)(3). Any sale or other disposition of the personal property shall conform to the terms of the notice of sale and shall be conducted in a commercially reasonable manner. F.S. §83.806(5). A purchaser in good faith of personal property sold to satisfy a lien pursuant to the Self-Storage Facility Act, despite noncompliance by the owner with the requirements of the Self-Storage Facility Act, takes the property free of any claims, except for those interests provided for in Section 83.808, Florida Statutes. F.S. §83.806(7). Statutory provisions concerning the disposition of the proceeds of the sale of the personal property are set forth in Section 83.806(8), Florida Statutes; whether or not the owner of the self-service storage facility or self-contained storage unit will be able to satisfy its lien in whole or in part from such sale proceeds will depend on the priority of the owner's lien relative to other lienholders. F.S. §83.806(8). If the rental agreement contains a limit on the value of property stored in the tenant's storage space, the limit is deemed to be the maximum value of the property stored in such space. F.S. §83.806(9). If a lien is claimed on property that is a motor vehicle or watercraft and rent and other charges related to the property remain unpaid or unsatisfied for 60 days after the maturity of the obligation to pay the rent and other charges, the facility or unit owner may sell the property pursuant to F.S. §83.806 or have the property towed. If a motor vehicle or watercraft is towed, the facility or unit owner is not liable for the motor vehicle or watercraft or any damages to the motor vehicle or watercraft once a wrecker takes possession of the property. The wrecker taking possession of the property must comply with all notification and sale requirements provided in F.S. §713.78. F.S. §83.806(10).

H. **Servicemembers**. A rental agreement or an application for a rental agreement must contain a provision disclosing whether the applicant is a member of the uniformed services as that term is defined in 10 U.S.C. § 101(a)(5). F.S. §83.808(2).

V. FORCIBLE ENTRY AND UNLAWFUL DETAINER

Chapter 82, Florida Statutes, is often overlooked by landlords and their legal counsel. This chapter essentially codifies the common law rule that prohibits self-help repossessions of real property.

A. **Unlawful Entry and Forcible Entry**. Section 82.01, Florida Statutes, provides: "no person shall enter into any lands or tenements except when entry is given by law, nor shall any person, when entry is given by law, enter with strong hand or with multitude of people, but only in a peaceable, easy and open manner." F.S. §82.01. The forcible entry and detainer action is designed to compel the party seeking possession (whether or not the real owner and as such entitled to ultimate right of possession) to respect the actual present possession of another even if wrongful by requiring the party seeking possession to resort to legal channels in order to obtain possession. *Floro v. Parker*, 205 So.2d 363 (Fla. 2d DCA 1967). By requiring the use of legal process, this

principle prevents criminal disorder and breaches of the peace, which would likely ensue if no such remedy existed and parties resorted to private common-law means for enforcing their rights. *Florida Athletic & Health Club v. Royce*, 160 Fla. 27, 33 So.2d 222 (1948).

B. **Unlawful Entry and Unlawful Detention**. Section 82.02, Florida Statutes, provides: "no person who enters without consent in a peaceable, easy and open manner into any lands or tenements shall hold them afterwards against the consent of the party entitled to possession." F.S. §82.02. The statute does not deprive the owner of the right of entry or right of one to enter who does so under bona fide claim of title, but in both cases it must be done in peaceable, easy, and open manner. *Goffin v. McCall,* 91 Fla. 514, 108 So. 556 (1926). The unlawful entry and unlawful detention provisions of Chapter 82, Florida Statutes, do not, however, apply to residential tenancies. F.S. §82.02(2); F.S. §82.04(2); F.S. §82.081(2).

C. **Action for Possession**. In the case of either an unlawful entry and forcible entry or an unlawful entry and unlawful detention, an action for possession under Chapter 82 may be brought within three years after the person entitled to possession has been turned out or deprived of possession. F.S. §82.03; F.S. §82.04(1). Further, the plaintiff in such an action is entitled to the summary procedures of Chapter 51, Florida Statutes. *Id.* The action is merely to determine the present right of possession, not legal title to the subject real property. F.S. §82.05. Unlawful detainer is intended to be an expeditious remedy in which the main issue is right to immediate possession. *Tollius v. Dutch Inns of America, Inc*., 218 So.2d 504 (Fla. 3rd DCA 1969). If the verdict is in favor of plaintiff, the court shall enter judgment that plaintiff recover possession of the property together with its damages, and shall award a writ of possession. F.S. §82.091.

D. **Damages**. The plaintiff is entitled to recover double the monthly rental value of the premises from the time of the unlawful or wrongful holding, with the monthly rental value of the premises being an issue of fact to be established at trial by evidence. F.S. §82.071. In an action based on unlawful entry and unlawful detention, however, the plaintiff may not recover more than the monthly rental value of the premises unless it is established that the unlawful detention was willful and knowingly wrongful. *Id.* The prevailing party is entitled to an award of its costs in an action brought under Chapter 82, Florida Statutes. F.S. §82.091.

LANDLORD TENANT

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General Considerations

PART I
GENERAL
CONSIDERATIONS

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General Lease Matters

- Personal Property
- Sales Tax Due on Certain Leases
  - Leasehold improvements
- Ad Valorem Taxes
  - Two 2015 Cases
  - Government owned property / pass throughs
  - Leasehold Improvements on long term leases

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Criminal Responsibility of Landlord

- General Rule
- Exceptions
  1. Prostitution / lewdness.
  2. Gaming purposes.
  3. Trafficking in controlled substance.

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4

Drafting / Generally

- Statute of Frauds (F.S. 689.01)
- Effect of Recording (F.S. 695.01)
- Disclosures
  a. Radon
  b. Lead Paint
  c. Residential (name and address of landlord)
  d. Security Deposit Disclosure (Residential)

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5

Drafting Considerations

Unless specified below or in the materials, the following apply if the issue isn't addressed in the lease itself:

- Alterations
- Assignment and Subletting
- Casualty
- Condition of Premises
  1. Commercial:
  2. Residential:
     Victoriana Bldg., LLC v. Fort Lauderdale Surgical Ctr (2015)
- Eminent Domain

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6

Drafting Considerations, Continued

Unless specified below or in the materials, the following apply if the issue isn't addressed in the lease itself:

- Fixtures
  - *H. Allen Holmes, Inc. v. Molter (2013)*
- Construction Liens
- Maintenance
  1. Commercial: Landlord no duty to repair
  2. Residential (statutory): compliance with building, health, safety codes
- Quiet Enjoyment

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7

Drafting Considerations, Continued

Unless specified below or in the materials, the following apply if the issue isn't addressed in the lease itself:

- Renewal (*F.S. 689.01 and 725.01)*
- Options
  Sunshine Gasoline Distributors, Inc. v. Biscayne Enterprises, Inc., 139 So.3d 978 (Fla. 3d DCA 2014)
- Landlord Right of Entry
  Commercial v. Residential
- Waiver (Acceptance of Rent)
  Commercial v. Residential
  2013 Changes to 83.56 – Acceptance of Partial Rent Does Not Waive; see provisions for receipt after 3 day notice issued

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8

Non-Residential Tenancies

PART II
NON RESIDENTIAL
TENANCIES
RIGHTS AND REMEDIES

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9

Non-Residential: Tenancies at Will

Unless specified below or in the materials, the written provisions of a non-residential tenancy control.

326-330 St. Armands Circle, LLC v. GEE22, LLC, 139 So.3d 353 (Fla. 2nd DCA 2014)

- Tenancies at Will
- Term of Tenancy at Will
- Termination of Tenancy at Will (F.S. 83.03)

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10

Non-Residential: Holdover

- Holding Over
- Remedies of Landlord
  a. Statutory Double Rent Penalty (F.S. 83.06) on expiration (not termination)
  b. Demanding a specific amount of continuing rent
  c. Suing for Possession Plus Damages
- Remedies Exclusive

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11

Non-Residential: Rent Default

- Right to Obtain Possession

  Landlord may recover possession in following ways:
  1. Surrender
  2. Action under 83.05
  3. Abandonment
- Abandonment

  Actual Knowledge or Presumption:
  1. Landlord believes Tenant absent for 30 consecutive days
  2. Rent is not current; AND
  3. A notice under F.S. 83.20(2) has been served and 10 days elapsed

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12

Non-Residential: Rent Default (cont.)

- Statutory Lien for Rent (F.S. 83.08)
  1. Agricultural products
  2. Tenant's Property on Premises
  3. All Tenant Property.
- Drafting Note: Priority over Leasehold Mortgage
  Unless landlord subordinates, its lien has priority over leasehold mortgagee
- No Requirement to Record/File to Perfect
- Exemptions (beds, clothing; liquor license)

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13

Non-Residential: Rent Default (cont.)

Statutory Lien for Rent, cont.

- Enforcement – F.S. 83.10-14
  Verified Complaint

Non Statutory Liens

- Security Agreement

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14

Non-Residential: Other Remedies

Other Remedies of Landlord:

1. Retake Possession for benefit of Landlord
2. Retake Possession for benefit of Tenant
3. Take No Action and Sue When Rent Due
   Consider adding right to accelerate rent

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15

Non-Residential: Eviction § 83.20

F.S. 83.20 creates process for eviction; may be altered by lease terms:

- 3 day notice (Failure to Pay Rent)
  Edge Pilates Corp. v. Tribeca Aesthetic Med. Solutions (2015)
- 15 day notice (Non-monetary defaults)
  For material defaults only.

Hybrid Action Possible
For eviction and damages

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16

Non-Residential: Rent into Registry

Tenant to Pay Rent into Court Registry (F.S. 83.232)

- Payment required unless Tenant alleges defense of payment or satisfaction
- Failure by Tenant to pay
- Ad Valorem Taxes
- Only amount in Dispute to be Deposited

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17

Non-Residential: Damages

Measure of Damages:

- Duty to Mitigate (Good Faith)
- Restoration of Premises
- Acceleration of Rent
  Only if permitted by terms of lease.
- Lost Profits
  Reasonable certainty
  Limitation on special / consequential damages is enforceable
  Victoriana – 2015 – proof of lost business value speculative.

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18

Non-Residential: Other Matters

- Disposition of Personal Property Act
  F.S. 715.10, et seq. Applies to Residential and Commercial.
- Waste (Tort)
  Damages remedy available

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19

Residential Tenancies

PART IIII
Residential Tenancies
Rights and Remedies

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20

Residential Tenancies: F.S. 83.40 – 83.682

- No Variances from requirements of the Act permitted
- Applicability
- Good Faith

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21

Residential: Eviction

Eviction for Non-Payment of Rent

- Three-Day Notice:
  1. Three day notice to pay rent or quit the premises
  2. Saturdays, Sundays and legal holidays excluded
  3. Substantial compliance with the statutory form
  4. In writing
  5. Demand exact amount of overdue rent
  6. Must not include late fees, attorneys' fees, interest or other charges unless defined as rent
  7. 3 day period calculation must be exact
  8. If mailed, add five days to deadline for payment
  9. *2013 Addition to 83.56 – Notice Cannot be waived in the lease*

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22

Residential: Foreclosure Notices

- 83.561 – Termination of Rental Agreement on Foreclosure - 2015
- 30 Day Notice:
- Not Applicable To:
  1. If tenant is the child, spouse or parent of mortgagor
  2. A non-arms length lease
  3. Tenant's rental agreement is substantially less than market (unless a subsidy applies)

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23

Residential Only: Eviction, cont.

- Summary Procedure (F.S. 51.011)
  1. Possession Only Actions
  2. Limited process / pleadings.
- Hybrid Actions
  1. Personal service required for damages claim
- Attorney's Fees
  1. The prevailing party is entitled to recover attorneys fees
  2. Hearing required to establish fees due
  3. *2013 Addition to 83.48 – cannot waive right in lease*
  4. *2013 Addition to 83.48 – Codification of Gilbert v. Jabour, 527 So. 2d 951 (Fla. 3d DCA 1988) – no attorney's fees awarded in a personal injury claim based on a landlord's duty to maintain*

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24

Residential: Tenant Defenses

- Rent Deposit Required
  1. If tenant must pay delinquent rent into the court registry or file a motion to determine amount. *2013 addition to 83.60 adds confirmation that this can include defense of defective 3 day notice.*
  2. Failure constitutes a waiver of all defenses other than payment.
- Landlord Failure to Maintain
  1. Notice of repair is not timely if it is served after landlord's 3 day notice.
  2. Tenant may also give a 7 day notice of intent to terminate if repair not made.
- Defective Three Day Notice

  3 day notice of non-payment is a statutory condition precedent. Material defect will subject the complaint to dismissal for failure to state a cause of action. *2013 Addition to 83.60 – Landlord must be given an opportunity to cure deficiency prior to dismissal*
- Defective Service of Process

  Any failure to comply with F.S. 48 can form the basis of a valid tenant defense.
- Waiver

  2013 Addition to 83.56 – Acceptance of Rent not waiver if process followed

Shutts

25

Residential: Post Possessory Remedies

- Abandonment of Premises
  1. Terminate lease, retake possession and terminate further tenant liability
  2. Retake possession
  3. Do nothing
  4. Pursue liquidated damages

  Wilson v. Terwillinger, 140 So.3d 1122 (Fla. 5th DCA 2014).
- Acceptance of Surrender
  1. Releases tenant from further liability to landlord
  2. Landlord must return security deposit
- Writs of Possession; Lien on Personal Property
  1. Attaches when sheriff gives LL possession (24 hrs after notice posted)

     - 2013 Addition to 83.62 – Saturdays, Sundays and legal holidays do not stay 24 hour period

Shutts

26

Residential: Security Deposits

- Security Deposit v. Advance Rent

  Atlantis Case 2013
- Landlord Duties Regarding Deposits
  1. Post Bond / Segregate
  2. Landlord may not commingle funds.
  3. Notify tenant - can be in lease *with 83.49(2) notice*
  4. Return in 15 days after termination (30 days if a claim)
  5. No right to claim if notice not timely serviced, *and deposit must be returned, however, Landlord can pursue damages*
  6. *2013 Addition to 83.49 - Landlord may disburse advance rent to the applicable advance rent period without notice to tenant.*

Shutts

27

Residential: Security Deposits Con't

- *Failure of Tenant to object within 15 days after landlord claim does not waive right to seek damages .*
- *New Owner – Transfer of Deposit, presumed (as to one month)*
- *New Disclosure required starting 1/1/2014 (prior leases can use either form)*

YOUR LEASE REQUIRES PAYMENT OF CERTAIN DEPOSITS. THE LANDLORD MAY TRANSFER ADVANCE RENTS TO THE LANDLORD'S ACCOUNT AS THEY ARE DUE AND WITHOUT NOTICE. WHEN YOU MOVE OUT, YOU MUST GIVE THE LANDLORD YOUR NEW ADDRESS SO THAT THE LANDLORD CAN SEND YOU NOTICES REGARDING YOUR DEPOSIT. THE LANDLORD MUST MAIL YOU NOTICE, WITHIN 30 DAYS AFTER YOU MOVE OUT, OF THE LANDLORD'S INTENT TO IMPOSE A CLAIM AGAINST THE DEPOSIT. IF YOU DO NOT REPLY TO THE LANDLORD STATING YOUR OBJECTION TO THE CLAIM WITHIN 15 DAYS AFTER RECEIPT OF THE LANDLORD'S NOTICE, THE LANDLORD WILL COLLECT THE CLAIM AND MUST MAIL YOU THE REMAINING DEPOSIT, IF ANY.

IF THE LANDLORD FAILS TO TIMELY MAIL YOU NOTICE, THE LANDLORD MUST RETURN THE DEPOSIT BUT MAY LATER FILE A LAWSUIT AGAINST YOU FOR DAMAGES. IF YOU FAIL TO TIMELY OBJECT TO A CLAIM, THE LANDLORD MAY COLLECT FROM THE DEPOSIT, BUT YOU MAY LATER FILE A LAWSUIT CLAIMING A REFUND.

YOU SHOULD ATTEMPT TO INFORMALLY RESOLVE ANY DISPUTE BEFORE FILING A LAWSUIT. GENERALLY, THE PARTY IN WHOSE FAVOR A JUDGMENT IS RENDERED WILL BE AWARDED COSTS AND ATTORNEY FEES PAYABLE BY THE LOSING PARTY.

THIS DISCLOSURE IS BASIC. PLEASE REFER TO PART II OF CHAPTER 83, FLORIDA STATUTES, TO DETERMINE YOUR LEGAL RIGHTS AND OBLIGATIONS.

Shutts

28

Residential: Miscellaneous Remedies

- Eviction for Other Than Non-Payment
  1. 7 Day Notice without grace period for items not curable or continuing non-compliance w/in 12 months. 7 days to vacate
- Intentional Destruction
  1. Injunctive relief available
  2. Damages
- Termination of Periodic Tenancies
  1. Frequency of rent payments

Shutts

29

Residential: Prohibited Activities

Residential Act (F.S. 83.64 & .67) prohibits:

- Interruption of Utilities
- Prohibiting Access (i.e. changing locks)
- Discriminating against servicemembers
- Prohibiting display of 1 flag (<= 4½'x6') in a respectful manner
- Removing outside doors, locks, roof, walls or window
- Removing personal property unless after surrendor, abandonment, F.S. 715.104 or lawful eviction
- Penalties to landlord for violation: greater of actual and consequential damages or 3 months rent
- Prohibiting floatation bedding (flotation insurance may be required).
- Servicemember Protections 83.682
- *Retaliatory Conduct (increase rent, decrease service or threaten action).* *Includes: complaint to public agency, organization of tenants, payment of association fees and/or raised rights under fair housing laws.*

Shutts

30

Other Issues

Part IV
OTHER ISSUES

Shutts

31

Self Service Storage Space

- F.S. 83.803(1).
- License; not an interest in land
- Owner lien
- Attaches as of date on premises
- Can withhold access for nonpayment
- May sell property after advertisement of sale

Shutts

32

Forcible Entry and Unlawful Detainer

- Ch. 82, Florida Statutes
- Requires legal process to remove someone possessing without right
- An action for possession may be brought within 3 years of the alleged unlawful entry
- Determines present right of possession, not legal title
- Summary procedure under Chapter 51 available
- Damages - monthly rental value of the premises

Shutts

33

CASE LAW AND STATUTORY UPDATE

By

Manuel Farach, Fort Lauderdale

2017 Real Property Case and Statutory Law Update

Manuel Farach, McGlinchey Stafford

Real Property Certification Review Course
February 10, 2018

Manuel Farach

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Banking Counsel
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Creditors' Rights, Financial Restructuring, and Bankruptcy
Intellectual Property
Labor and Employment
Real Estate

Manny focuses on real estate matters (both transactional and litigation matters), complex business litigation, debtor-creditor law, creditor representation in bankruptcy, and appellate law. He is board certified by The Florida Bar in both Real Estate Law and Business Litigation. Manny is a Fellow of the American College of Real Estate Lawyers, and serves as Vice-Chair of the College's Bankruptcy and Creditors' Rights Committee, and also serves as the Chair of the ABA's Real Property Litigation Committee. Manny is a member of the Executive Committees of the Real Property, Business Law and A.D.R. Sections of The Florida Bar and servers as Chair of various committees within the sections.

Throughout his career, Manny has counseled businesses in numerous industries and of varying sizes, including lenders and government agencies such as the Federal Deposit Insurance Corporation (FDIC), the Resolution Trust Corporation (RTC), and the Federal Savings and Loan Insurance Corporation (FSLIC), in addition to numerous borrowers in complex transactions. Manny has also provided counsel in corporate mergers and acquisitions; financial and debtor-creditor matters to creditors and lenders (including bankruptcy and complex foreclosure litigation); landlord/tenant disputes; Internet law; and construction and real estate development matters.

For more than 20 years, Manny has served as an arbitrator for the American Arbitration Association, has significant FINRA (Financial Industry Regulatory Authority, formerly NASDR) arbitration experience, and is certified as a Florida Supreme Court approved mediator. He also previously served as a Foreclosure Commissioner for the United States Department of Housing and Urban Development (HUD). Manny served as a law clerk for the Honorable C. McFerrin Smith of the Ninth Judicial Circuit Court of Florida while in law school and to Judges James T. Downey and Bobbi Gunther of the Florida Fourth District Court of Appeal following law school.

Manny has authored numerous legal publications, including *Florida Real Estate Law* (Thomson-West), the real estate component of West's Florida Practice Series, and publishes the (Florida) Real Property and Business Litigation Report, a highly read weekly compilation of Florida real estate and business cases. The Florida Supreme Court appointed Manny the Chair of its committee on business jury instructions, and he is a regular speaker on topics as diverse as real estate law, business litigation, technology law, and professionalism.

TITLE

AHF-Bay Fund, LLC v. City of Largo, Florida, 227 So. 3d 740 (Fla. 2d DCA 2017).

A subsequent purchaser is on constructive notice of and bound by a non-recorded agreement when there is a recorded memorandum of agreement in the title record and the recorded memorandum refers to a non-recorded agreement which states that the non-recorded agreement runs with the land.

Pettis v. Chrisentery, --- So. 3d ----, 2017 WL 4781169 (Fla. 1st DCA 2017).

Florida Statute section 95.231(2) bars defenses or claims against the claimant to real property, i.e., it does not operate to bar the claimant in its claims to real property.

Bayview Loan Servicing, LLC v. Newell, --- So. 3d ----, 2017 WL 6028499 (Fla. 1st DCA 2017).

A metes and bounds legal description that has correct angles but is missing degree symbols is a property description that can be located by a surveyor and is thus a sufficient legal description, including for purposes of foreclosure.

MRTA

Sand Lake Hills Homeowners Association, Inc. v. Busch, 210 So. 3d 706 (Fla. 5th DCA 2017).

The "false or fictitious filing" provision of the Marketable Record Title Act, Florida Statute section 712.08, merely requires that a filing be false or fictitious (intent is irrelevant) before awarding attorney's fees for the false filing.

LEGAL DESCRIPTIONS

Heartwood 2, LLC v. Dori, 208 So. 3d 817 (Fla. 3d DCA 2016).

Reformation of a corresponding deed is not required when the applicable mortgage contains the correct legal description.

LIS PENDENS

Jallali V. Knightsbridge Village Homeowners Association, Inc., 211 So. 3d 216 (Fla. 4th DCA 2017).

A lis pendens filed by a first mortgagee does not bar the foreclosure of an association's subsequent lien for unpaid assessments against the owner where the association's subsequent lien was imposed under the association's declaration of covenants recorded before the first mortgagee recorded its notice of lis pendens.

Ober v. Town Of Lauderdale-By-The-Sea, 218 So. 3d 952 (Fla. 4th DCA 2017).

A lis pendens does not terminate at final judgment in a foreclosure case, and liens or claims filed after final judgment of foreclosure are extinguished by the foreclosure sale.

Federal National Mortgage v. Gallant, 211 So. 3d 1055 (Fla. 4th DCA 2017).

A party is generally not permitted to intervene in a pending foreclosure action where a lis pendens has been filed, even if the party seeking intervention purchased the property. Furthermore, intervention after final judgment is generally disfavored.

Symcon Development Group Corporation v. Passero, 219 So. 3d 879 (Fla. 4th DCA 2017).

The anticipated purchaser of real property which is the subject of litigation between the seller of the real property and a third party has a sufficient interest in the pending litigation to deviate from the normal rule so as to allow the non-party purchaser to intervene in the litigation.

Carlisle v. U.S. Bank, 225 So. 3d 893 (Fla. 3d DCA 2017).

A non-party may use the Pearlman (v. Pearlman, 405 So. 2d 764 (Fla. 3d DCA 1981)), Exception to raise a Florida Rule of Civil Procedure 1.540 (b) claim only if their interests predated the litigation. Accordingly, a purchaser pendent lite who takes after a lis pendens is filed cannot use the Pearlman Exception to raise a 1.540 (b) claim.

Ortiz v. Weiss, 227 So. 3d 689 (Fla. 3d DCA 2017).

A trial court has discretion to require the posting of a bond when a lis pendens is not founded on a duly recorded instrument, and has further discretion to discharge the lis pendens if the bond is not posted by the due date.

3709 N. Flagler Drive Prodigy Land Trust, Mango Homes LLC v. Bank Of America, N.A., 226 So. 3d 1040 (Fla. 4th DCA 2017).

A purchaser subsequent to a mortgage may not challenge the validity of the mortgage but may challenge the standing of the mortgagee to foreclose.

HOMESTEAD

Flinn v. Doty, 214 So. 3d 683 (Fla. 4th DCA 2017).

Unjust enrichment is all that is necessary to impose an equitable lien on a homestead; fraud and egregious conduct are not requirements to imposition of the equitable lien.

Spector v. Spector, 226 So. 3d 256 (Fla. 4th DCA 2017).

Alimony creditors, in addition to taxes, consensual liens and construction liens, are a fourth exception to the protection against forced levy of homestead under the Florida Constitution.

Miami-Dade County v. Lansdowne Mortgage, LLC, --- So. 3d ----, 2017 WL 4655060 (Fla. 3d DCA 2017).

Tax liens for improperly claiming homestead tax exemptions are retroactive and will take priority over previously recorded liens notwithstanding Florida Statute section 196.161(3)'s statement that "any purchaser for value of the subject property shall take free and clear of such lien [for improperly claiming homestead]."

LITTORAL AND RIPARIAN RIGHTS

HagertySmith, LLC v. Gerlander, Case No. 5D16-3655 (Fla. 5th DCA 2017).

Upon rehearing, the Fifth District reaffirms that the littoral rights of owners of lakefront property include the right to an unobstructed view of the lake.

EASEMENTS

Kovach v. Holiday Springs RV, LLC, 223 So. 3d 1069 (Fla. 5th DCA 2017).

A recorded easement "to the said grantee, and grantee's heirs and assigns forever the following described land, situate, lying and being in Hernando County, Florida, to-wit: An ingress/egress, utility, and drainage easement over the following described property . . ." runs with the land and may be used by others than the named grantee.

RESTRICTIVE COVENANTS

Tarantola v. Henghold, M.D., P.A., 214 So. 3d 726 (Fla. 1st DCA 2017).

When used in a restrictive covenant, the phrase "including [a specific restriction]" following a general restriction illustrates the restricted conduct and are not words that limit the restriction.

Santa Monica Beach Property Owners Association, Incorporated v. Acord, 219 So. 3d 111 (Fla. 1st DCA 2017).

It is the manner in which property is used, i.e., used for residential or business purposes, that determines whether a "no businesses" restriction is violated. Accordingly, short-term home rentals do not violate a "no businesses" association restriction because the use of the property is residential.

Clark v. Bluewater Key RV Ownership Park Property Owners Association, Inc., 226 So. 3d 276 (Fla. 3rd DCA 2017).

Even though residential in use, the renting of residential r.v. spaces to "work campers" violates a "no businesses restriction" in restrictive covenants.

Victorville West Limited Partnership v. The Inverrary Association, Inc., 226 So. 3d 888 (Fla. 4th DCA 2017).

A restrictive covenant will be enforced despite changed conditions if the restriction was for the benefit of and continues to benefit the dominant estate.

White v. Mederi Caretenders Visiting Services of Southeast Florida, LLC, 226 So. 3d 774 (Fla. 2017).

Home health service referral sources can be a protected legitimate business interest under Florida's Non-Compete Statute, Florida Statute section 542.335.

DEDICATIONS

Mathers v. Wakulla County, 219 So. 3d 140 (Fla. 1st DCA 2017).

Maintenance of a roadway under the requirements of Florida Statute section 95.361, not acceptance by a county, satisfies the requirements for statutory dedication of a roadway to a county. Additionally, private parties may invoke this statute section to argue that maintenance by a county has resulted in the dedication as a public roadway.

Provitola v. Comer, 225 So. 3d 347 (Fla. 5th DCA 2017).

The obstruction of a public street is a public nuisance and individuals cannot maintain an action for the obstruction unless they have suffered a special injury.

TAXES

City of Largo, Florida v. AHF-Bay Fund, LLC, 215 So. 3d 10 (Fla. 2017).

PILOT (Payment in Lieu of Taxes agreements that pay government in lieu of ad valorem taxes) contracts do not violate either Florida Statute section 196.1978 or Florida Constitution Article VII, § 9(a).

Treasure Coast Marina, LC v. The City of Fort Pierce, Florida, 219 So. 3d 793 (Fla. 2017).

A municipally owned and operated marina qualifies as an exempt "municipal or public purpose" under Article VII, Section 3(a) of the Florida Constitution, and is therefore exempt from ad valorem taxation.

McLendon v. Nikolits, 211 So. 3d 92 (Fla. 4th DCA 2017).

The list of agricultural activities found in Florida Statute section 193.461(5) is not exhaustive, and agricultural tax exemptions may be granted for agricultural uses not listed in the statute.

Villages of Avignon Community Development District v. Burton, 215 So. 3d 127 (Fla. 2d DCA 2017).

Ad valorem tax liens are subject to the same priority as CDD liens, and the Second District certifies the following as a question of great public importance:

> WHEN A COUNTY HOLDS AN AD VALOREM TAX LIEN AGAINST PROPERTY AND A COMMUNITY DEVELOPMENT DISTRICT (CDD) FORECLOSES ON A COEQUAL ASSESSMENT LIEN ON THE SAME PROPERTY WITHOUT JOINING THE COUNTY IN THE FORECLOSURE ACTION, MAY THE COUNTY ISSUE A TAX CERTIFICATE ON THE PROPERTY SUBJECT TO THE CDD ASSESSMENT LIEN OR IS THE COUNTY'S TAX LIEN HELD IN SUSPENSION UNTIL THE CDD SELLS THE PROPERTY TO A THIRD PARTY PURSUANT TO KOSTECOS V. JOHNSON, 85 SO. 2D 594 (FLA. 1956)?

Nikolits v. Haney, 221 So. 3d 725 (Fla. 4th DCA 2017).

The property appraiser for a county may issue a Certificate of Correction under Florida Administrative Code Rule 12D-8.021(2)(a)(6), but an affected property owner may challenge the corrected value as being beyond market value.

STATUTE OF FRAUDS

Wells Fargo Bank, N.A. v. Richards, 226 So. 3d 920 (Fla. 4th DCA 2017).

An unsigned mediation agreement is an attempt to modify a credit agreement in violation of both the Statute of Frauds, Florida Statute section 725.01, and the Banker's Statute of Frauds, Florida Statute section 687.0304, and is not enforceable.

CONVERSION

Spradley v. Spradley, 213 So. 3d 1042 (Fla. 2d DCA 2017).

A cause of action for conversion can be brought for wrongful detention of items which have no intrinsic value, including papers and documents.

COMMUNITY ASSOCIATIONS

Beacon Hill Homeowners Association, Inc. v. Colfin Ah-Florida 7, LLC, 221 So. 3d 710 (Fla. 3rd DCA 2017).

The Third District continues to follow Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Association, Inc., 169 So. 3d 145 (Fla. 4th DCA 2015), rejects a Kaufman argument and holds that homeowner association declarations are not automatically revised to follow changes in the association statute.

Dwork v. Executive Estates of Boynton Beach Homeowners Association, Inc., 219 So. 3d 858 (Fla. 4th DCA 2017).

Strict compliance with the 14-day notice requirement of Florida Statute section 720.305(2)(b) is required before an association can impose fines.

Beach Club Towers Homeowners Association, Inc. v. Jones, --- So. 3d ----, 2017 WL 4526773 (Fla. 1st DCA 2017).

Condominium owners whose condominium is based on lease that is not automatically renewable are not equitable owners of the land underlying the condominium, and thus are not subject to ad valorem taxation on the land underlying the lease.

Villas of Windmill Point II Property Owners' Association, Inc. v. Nationstar Mortgage, LLC, --- So. 3d ----, 2017 WL 4810770 (Fla. 4th DCA 2017).

An assignee lender who is jointly and severally liable for association assessments with the foreclosing lender under Florida Statute section 720.3085(2)(b) is entitled to the benefits of the "safe harbor" provisions of Florida Statute section Florida Statute section 720.3085(2)(c).

The Waterview Towers Condominium Association, Inc. v. City of West Palm Beach, --- So. 3d ---- 2017, WL 4990569 (Fla. 4th DCA 2017).

A party, including a lessee, who joins in or consents to a declaration of condominium subjects their property to the declaration and all of its provisions. Additionally, restrictive covenants may be enforced by grantees among or between themselves where the grantees obtained their property from a common grantor and the restrictive covenants were part of "a general plan of development or improvement" or a "general building scheme."

Arlington Pebble Creek, LLC v. Campus Edge Condominium Association, Inc., --- So. 3d ----, 2017 WL 5076915 (Fla. 1st DCA 2017).

An association seeking fraudulent inducement and negligent misrepresentation claims against a developer resulting from a condominium turnover must still prove intent, reliance, and damages to prevail on its claims.

Waverly 1 and 2, LLC v. Waverly At Las Olas Condominium Association, Inc., 88 So. 3d 386 (Fla. 4th DCA 2017).

Language in a condominium declaration that "[a]nything to the contrary notwithstanding, the foregoing restrictions of this section 9 shall not apply to Developer owned Units or Commercial Units" means that the landscaping requirements of section 9.1 of the condominium declaration does not apply to commercial unit owners.

Ice v. The Cosmopolitan Residences on South Beach, A Condominium Association, Inc., --- So. 3d ----, 2017 WL 6347071 (Fla. 3d DCA 2017).

A claimant states a cause of action for conversion if he alleges that a condominium association wrongfully detained and exercised dominion and control over his personalty removed from a condominium unit after service of a writ of possession by the sheriff.

UNLAWFUL DETAINER

Wincor v. Potash, 227 So. 3d 650 (Fla. 4th DCA 2017).

By statute, a defendant may be served in unlawful detainer actions by posting service of process.

TRESPASS

Gunning v. Equestleader.Com, Inc., --- So. 3d ----, 2017 WL 4557837 (Fla. 2d DCA 2017).

A contract vendor has no claim for civil trespass to real property as the contract vendee becomes the equitable owner of the real property upon execution of the contract.

LANDLORD TENANT

Flournoy v. CML-GA WB, LLC, 851 F.3d 1335 (11th Cir. 2017).

A landlord rebutting circumstantial claims of racial discrimination in violation of 42 U.S.C. § 1981 must only produce legitimate, non-discriminatory reasons for the treatment.

Garcia v. Dadeland Station Associates, Ltd., 218 So. 3d 474 (Fla. 3rd DCA 2017).

A long-term lease that is not perpetually renewable does not have the attributes of Accardo v. Brown, 139 So. 3d 848 (Fla. 2014), and is not deemed fee simple ownership of the real estate in the lessee.

The City of Pensacola v. Seville Harbour, Inc., 219 So. 3d 984 (Fla. 1st DCA 2017).

Pro tanto assignments of leases are recognized in Florida, and the retention of an easement when assigning a lease renders the lease transfer a pro tanto assignment and not a sublease since the assignor has retained an interest, i.e., the easement.

JPAY, Inc. v. 10800 Biscayne Holdings, LLC, 225 So. 3d 876 (Fla. 3d DCA 2017).

Retaking leased premises and attempting to re-let, even if for benefit of tenant, may indicate an intent to accelerate all remaining payments due on the lease.

Sears, Roebuck & Co. v. Forbes/Cohen Florida Properties, L.P., 223 So. 3d 292 (Fla. 4th DCA 2017).

A local government ordinance which by its effect restricts subleasing may impair existing contractual rights and may be a violation of the tenant's constitutional rights.

City of Pompano Beach, Florida v. Beatty, 222 So. 3d 598 (Fla. 4th DCA 2017).

A land-lease which provides for re-appraisal of rental payments at specific times limits re-appraisal rights to only those specific dates.

Borjas v. Vergara, --- So. 3d ----, 2017 WL 4655209 (Fla. 3d DCA 2017).

When a party is in possession of rental premises without a rental agreement and furthermore claims an equitable interest, then ejectment and not eviction is the proper remedy to dispossess the defendant.

MUNICIPAL GOVERNMENT

Bank of America Corp. v. City of Miami, 137 S.Ct. 1296 (2017).

A municipality has standing as "aggrieved person" under the Fair Housing Act, 42 U. S. C. §§3604(b), 3605(a), and may state a cause of action against a lender for discriminatory lending practices under the statute.

City of Cooper City v. Joliff, 227 So. 3d 633 (Fla. 4th DCA 2017).

A municipal special assessment that is improperly apportioned is voidable, not void, and as a result must be challenged within the specified time frame.

Indian Creek Country Club, Inc. v. Indian Creek Village, 211 So. 3d 230 (Fla. 3d DCA 2017).

A municipal special assessment can only be imposed if the property assessed derives a special benefit from the service provided and when the assessment is fairly and reasonably apportioned according to the benefits received. Whether to impose a special assessment is a legislative function which can be overturned only if there is no substantial, competent evidence to support the decision.

LAND USE AND ZONING

Nipper v. Walton County, 208 So. 3d 331 (Fla. 1st DCA 2017).

Government seeking to enjoin violations of its zoning code must demonstrate (1) a clear legal right to the relief, (2) inadequacy of a legal remedy, and (3) irreparable injury if the relief is not granted. Moreover, alternative remedies are ignored and irreparable harm is presumed when government seeks an injunction to enforce its police power.

City of Sunny Isles Beach v. Cavalry Corp., 208 So. 3d 1247 (Fla. 3d DCA 2017).

The "development approach" (also described as the "discounted cash flow" method) is appropriate for determining the value of governmental takings, and is calculated by (1) valuing the property as of the date of the taking (2) valuation is determined by what a willing buyer would pay for the property in its then-existing condition on that date, for development into its highest and best use; and (3) the highest and best use may be a prospective use.

Village of Palmetto Bay, Florida v. Alexander School, Inc., 223 So. 3d 1037 (Fla. 3d DCA 2017).

Zoning ordinances which require approval of voters before a municipality will act on a requested zoning change are not unconstitutional deprivations of due process. Moreover, such ordinances are legislative enactments for which movant must prove the ordinance is "unreasonable and bears no substantial relation to public health, safety, morals or general welfare."

City of Riviera Beach v. J & B Motel Corp., Wells Fargo Bank, N.A., 213 So. 3d 1102 (Fla. 4th DCA 2017).

Municipalities have twenty years to foreclose Chapter 162 code enforcement liens.

Corrections Corporation of America v. City of Pembroke Pines, --- So. 3d ----, 2017 WL 4990557 (Fla. 4th DCA 2017).

On rehearing, the Fourth District re-affirms that a municipality has no obligation to provide utility services outside its boundaries unless it has contracted to do so or has otherwise assumed the duty to so by holding itself out as the public utility for the affected area.

Highlands-In-The-Woods, L.L.C. v. Polk County, 217 So. 3d 1175 (Fla. 2nd DCA 2017).

Requiring a developer to connect to a reclaimed water system is a permissible development exaction that satisfies the Nollan/Dolan test as using reclaimed water is a legitimate state interest.

City of Satellite Beach v. Goersch, 217 So. 3d 1143 (Fla. 5th DCA 2017).

A petitioner bears the initial burden of establishing it has met the requirements for a variance, and the burden does not shift to the government until this burden is met.

City of Key West v. Key West Golf Club Homeowners', 228 So. 3d 1150 (Fla. 3rd DCA 2017).

A municipality may, as part of its legislative functions, require those who benefit from a storm water management system to participate in and pay for the system.

FF Cosmetics FL, Inc. v. City of Miami Beach, 866 F.3d 1290 (11th Cir. 2017).

The commercial First Amendment rights of retailers to distribute handbills and solicit business on public sidewalks outweighs the interests of municipality in aesthetics and order.

Ricketts v. Village of Miami Shores, --- So. 3d ----, 2017 WL 4943772 (Fla. 3d DCA 2017).

An "as-applied" constitutional challenge to a zoning ordinance must demonstrate that there are no set of circumstances under which the ordinance would be constitutional.

Surf Works, L.L.C. v. City of Jacksonville Beach, --- So. 3d ----, 2017 WL 5162015 (Fla. 1st DCA 2017).

A miscarriage of justice authorizing reversal on second-tier certiorari occurs when a party complies with the zoning law seeking the highest and best use of their property, and the governing authority refuses to apply the correct law.

Pinellas County v. The Richman Group of Florida, Inc., --- So. 3d ---- 2017 WL 5759040 (Fla. 2d DCA 2017).

Citizen input may be a sufficient ground to support a governmental land use decision under the rational basis test, and it is not arbitrary and capricious for government to decide without a more formal investigation that citizen concerns are valid and that the proposed development should not be permitted as a result.

EMINENT DOMAIN AND INVERSE CONDEMNATION

Hill v. Suwannee River Water Management District, 217 So. 3d 1100 (Fla. 1st DCA 2017).

The actions of a governmental entity in draining a pond and flooding fields are not quasi-judicial in nature, and therefore, the governmental entity is not entitled to quasi-judicial immunity for its actions.

Hardee County v. FINR II, Inc., 221 So. 3d 1162 (Fla. 2017).

The Bert Harris Act, Florida Statute section 70.001, does not apply to property affected by government action on adjoining property.

Golfrock, LLC v. Lee County, Florida, --- So. 3d ----, 2017 WL 2882716 (Fla. 2d DCA 2017).

A suit for regulatory taking cannot request a declaratory judgment that any further attempts to obtain a permit are futile.

CONTRACTS

Buck-Leiter Palm Avenue Development, LLC v. City of Sarasota, 212 So. 3d 1078 (Fla. 2d DCA 2017).

A contract for redevelopment of real property that is twenty-three pages long, outlines numerous obligations of the parties regarding the development and contains default and attorney's fees provisions is not an agreement to agree in the future.

Piero Salussolia, P.A. v. Nunnari, 215 So. 3d 156 (Fla. 3d DCA 2017).

The following "success fee" provision in an attorney engagement agreement is an unenforceable agreement to agree in the future:

> 2. Success Fee. A success fee of a percentage, to be agreed upon amongst the parties hereto, based on the amount by which Client's Judgment amount is reduced will be charged as a success fee NOT TO EXCEED 1 MILLION. For example, if Client owes $10,000.00 on the Judgment and through the Appeal and/or the Settlement, that amount is reduced to $6,000.00 saving Client $4,000.00, then the Firm success fee shall be a percentage of $4,000.00. Success fee shall be payable to the Firm immediately upon termination of the Appeal and/or the full execution of the Settlement Agreement.

Armao v. McKenney, 218 So. 3d 481 (Fla. 4th DCA 2017).

Oral cohabitation agreements that affect real property are enforceable in Florida and are not required to comply with the Statute of Frauds to be enforceable.

Peebles v. Puig, 223 So. 3d 1065 (Fla. 3rd DCA 2017).

Matters already covered in a contract are not actionable in fraud. Moreover, fraud damages must be separate and distinct from breach of contract damages.

Deauville Hotel Management, LLC d/b/a Deauville Beach Resort v. Ward, 219 So. 3d 949 (Fla. 3rd DCA 2017).

Intentional infliction of emotional distress may arise out of breach of contract, but the conduct must be outrageous and well beyond a mere breach of contract.

Transcapital Bank v. Shadowbrook at Vero, LLC, 226 So. 3d 856 (Fla. 4th DCA 2017).

The Caveat Emptor Doctrine remains in commercial transactions, subject only to exceptions for an artifice or trick has been employed, where the other party does not have an equal opportunity to learn facts, or where a party undertakes to disclose facts but fails to disclose all facts.

Spa Creek Services, LLC v. S.W. Cole, Inc., --- So. 3d ----, 2017 WL 4845085 (Fla. 5th DCA 2017).

Contractual language requiring consent for the assignment of contracts, contractual interests, rights, and obligations has no effect on the assignment of a chose in action for breach of the contract. Additionally, a Delaware LLC may continue litigation to wind up its affairs after dissolution.

BUSINESS ENTITIES

Fonseca v. Taverna Imports, Inc., 212 So. 3d 431 (Fla. 3d DCA 2017).

A corporate "event or transaction [such as a recapitalization or the levying on a judgment] should not be permitted where its objective or result is the seizing of corporate control for an improper purpose."

McKane Family Limited Partnership v. Sacajawea Family Limited Partnership, 211 So. 3d 117 (Fla. 4th DCA 2017).

Failure to comply with the pre-suit demands of Florida Statute section 608.601 (since repealed) requires dismissal without prejudice.

Super Products, LLC v. Intracoastal Environmental, LLC, 210 So. 3d 240 (Fla. 2d DCA 2017).

A court may dismiss a lawsuit under Florida Statute section 605.0904(1) for a LLC's failure to hold a certificate of authority from the State of Florida to conduct business, but the better practice is to stay the lawsuit pending compliance.

Landmark Funding, Inc. v. Chaluts, 213 So. 3d 1078 (Fla. 2d DCA 2017).

Florida's Revised Limited Liability Company Act, Florida Statute § 605.0803, gives standing to derivative plaintiffs only to members of the LLC at time of suit or to those who were members at the time of the conduct giving rise (including those who obtained their membership interest from someone who was a member at that time), and such is determined solely from the pleadings at the motion to dismiss stage; the Second District rejects that records from other proceedings can be "impliedly incorporated" into the pending complaint.

Purchasing Power, LLC v. Bluestem Brands, Inc., 851 F.3d 1218 (11th Cir. 2017).

The state of citizenship of a LLC, for diversity purposes, is the state of citizenship of its members traced back to an individual.

Phelan v. Lawhon, --- So. 3d ----, 2017 WL 1177595 (Fla. 3d DCA 2017).

The Corporate Shield Doctrine does not stop a Florida court from acquiring long-arm jurisdiction over out of state defendants.

Mancinelli v. Davis, 217 So. 3d 1034 (Fla. 4th DCA 2017).

The Intra-Corporate Conspiracy Doctrine applies in Florida as an agent cannot conspire with its principal (the corporation).

Fritz v. Fritz, 219 So. 3d 234 (Fla. 3rd DCA 2017).

The Third District adopts the Fourth District's Karten v. Woltin, 23 So. 3d 839 (Fla. 4th DCA 2009), decision and holds that excessive payments, mismanagement and waste do not constitute the type of individualized harm necessary to allow the filing of a direct (as opposed to a derivative) action under Florida Statute section 607.07401 notwithstanding that the mismanagement and waste affect the value of shares owned by all the shareholders.

McClandon v. Dakem & Associates, LLC, 219 So. 3d 269 (Fla. 5th DCA 2017).

A trial court may appoint a receiver to carry out the provisions of a charging order on an LLC, but may not give the receiver managerial control over the LLC.

Building B1, LLC v. Component Repair Services, Inc., 224 So. 3d 785 (Fla. 3d DCA 2017).

A challenge to a party's inactive corporate status must be raised prior to final judgment otherwise it is waived.

Omes v. Ultra Enterprises, Inc., 116 So. 3d 633 (Fla. 3d DCA 2017).

A shareholder loses all rights as a shareholder pursuant to Florida Statute section 607.1323(1) and is only entitled to the value of their shares once the shareholder deposits their certificates, or in the case of uncertificated shares, returns the executed forms.

MVW Management, LLC v. Regalia Beach Developers LLC, --- So. 3d ---- 2017, WL 3879979 (Fla. 3d DCA 2017).

"Advancement" and "indemnity" of attorneys' fees under management or operating agreements are different concepts and Florida law typically offers indemnification for third party (and not first party) claims.

Green Emerald Homes LLC v. Green Tree Servicing LLC, 210 So. 3d 263 (Fla. 4th DCA 2017).

A party seeking to effect substitute service on a limited liability company must comply with Florida Statute section 48.062(3) if the party has already exerted diligent but unsuccessful efforts to serve under subsections (1) and (2), and must also comply with section 48.161(1) by sending notice to the defendant, via certified or registered mail, that substitute service has been effected through the Secretary of State, (ii) filing the return receipt from the defendant, and (iii) filing an affidavit of compliance.

Capstone Bank v. Perry-Clifton Enterprises, LLC, --- So. 3d ---- 2017, WL 5894915 (Fla. 1st DCA 2017).

A charging order is the exclusive remedy by which a judgment creditor of a Florida limited liability company may execute upon a member's interest in the limited liability company or rights to distributions from the limited liability company.

ARBITRATION

Kindred Nursing Centers Limited Partnership v. Clark, 137 S.Ct. 1421 (2017).

State laws which treat arbitration provisions differently than other contractual provisions violate of the Federal Arbitration Act, 9 U. S. C. §2.

Kroma Makeup Eu, LLC v. Boldface Licensing + Branding, Inc., --- F.Supp.3d ---- 2017 WL 3822106 (11th Cir. 2017).

Applying Koechli v. BIP International, Inc., 870 So. 2d 940 (Fla. 1st DCA 2004), the Eleventh Circuit rules that equitable estoppel may be used to compel non-signatories to engage in arbitration only when the dispute with the signatory falls within the scope of the arbitration clause in the main dispute.

Kendall Imports, LLC v. Diaz, 215 So. 3d 95 (Fla. 3d DCA 2017).

The inability to read a contract in English, including contracts containing an arbitration provision, is not — without more — a basis for finding the arbitration provisions unenforceable.

Vitacost.Com, Inc. v. McCants, 210 So. 3d 761 (Fla. 4th DCA 2017).

A "browsewrap agreement" on an Internet website, including an agreement to arbitrate, is not binding unless the party browsing is made aware that browsing and purchasing on the website is subject to the additionally incorporated terms and conditions.

Sawgrass Ford, Inc. v. Vargas, 214 So. 3d 691 (Fla. 4th DCA 2017).

A trial court may compel arbitration on the basis of fairness, including equitable estoppel.

Fouche v. Pilot Catastrophe Services, Inc., 217 So. 3d 225 (Fla. 5th DCA 2017).

A trial court granting a motion to compel arbitration should, pursuant to Florida Statute section 682.03(7) stay and not dismiss the trial court proceedings pending the decision of the arbitral panel.

Kaplan v. Epstein, 219 So. 3d 932 (Fla. 4th DCA 2017).

Review of voluntary binding arbitration beyond the circuit court is barred by Florida Statutes section 44.104 unless a constitutional issue is raised.

Anderson v. Taylor Morrison of Florida, Inc., 223 So. 3d 1088 (Fla. 2nd DCA 2017).

An arbitration provision which limits statutory claims is void as against public policy.

DDRA, LLC v. JARM, LLC, 223 So. 3d 1109 (Fla. 3d DCA 2017).

The question of arbitrability of a contract is for a court to determine unless the parties have agreed otherwise.

Newman for Founding Partners Stable Value Fund, LP v. Ernst & Young, LLP, Case --- So. 3d ---- 2017 WL 4535044 (Fla. 4th DCA 2017).

An arbitrator has jurisdiction to determine the issue of arbitrability when the arbitration agreement contains a delegation provision as the entire matter has been delegated to the arbitrator and the court retains jurisdiction only to review a challenge to the delegation provision.

Reunion West Development Partners, LLLP v. Guimaraes, 221 So. 3d 1278 (Fla. 5th DCA 2017).

"While arbitrability is generally an issue for trial courts to decide, courts must delegate the authority to the arbitrator if the parties' contract so provides."

Mukamal v. Marcum LLP, 223 So. 3d 422 (Fla. 3d DCA 2017).

An earlier agreement to arbitrate is abandoned only if there is a clear manifestation to do so; standard merger and integration clauses are not sufficient to do so.

Saunders v. St. Cloud 192 Pet Doc Hospital, LLC, 224 So. 3d 336 (Fla. 5th DCA 2017).

An agreement to arbitrate all claims "arising out of or related to" a contractual agreement is limited to issues arising out of the contract itself, and does not encompass claims arising out of performance of the contract itself.

Larsen v. Citibank FSB, 871 F.3d 1295 (11th Cir. 2017).

An arbitration provision included into a depositor agreement as the result of a unilateral change by the bank is enforceable.

Managed Care Insurance Consultants, Inc. v. United Healthcare Insurance Company, 228 So. 3d 588 (Fla. 4th DCA 2017).

The Federal Arbitration Act allows vacatur of an arbitration award only when there is "evident partiality or corruption in the arbitrators[,]" 9 U.S.C. § 10(a)(2) (2015), and "'evident partiality' [means when] a (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." Gianelli Money Purchase Plan & Trust v. ADM Investor Services, Inc., 146 F.3d 1309, 1312 (11th Cir. 1998).

Chaikin v. Parker Waichman LLP, --- So. 3d ----, 2017 WL 4518527 (Fla. 2d DCA 2017).

The filing of a lawsuit is inconsistent with an arbitration provision and waives a party's ability to enforce the arbitration provision against an unwilling party.

Boardwalk Properties Management, Inc. v. Emerald Clinton, LLC, --- So. 3d ----, 2017 WL 4679604 (Fla. 4th DCA 2017).

An arbitrator exceeds their authority by deciding issues not submitted to arbitration.

Lucky Star Horses, Inc. v. Diamond State Insurance Company, --- So. 3d ----, 2017 WL 4950025 (Fla. 3d DCA 2017).

Arbitration is not waived, despite the passage of time and the filing of numerous pleadings, until the party to the arbitration clause is brought into the case.

CONSTRUCTION AND CONSTRUCTION LIENS

Johnson v. State of Florida, Department Of Business and Professional Regulation, Construction Industry Licensing Board, 212 So. 3d 382 (Fla. 4th DCA 2017).

Employees of municipalities need not apply for registration as a qualifying agent for their employer municipality under Florida Statute section 489.103(3).

Trump Endeavor 12 LLC, v. Fernich, Inc., 216 So. 3d 704 (Fla. 3d DCA 2017).

"Substantial compliance" with the delivery requirements of the Notice to Owner provisions of the Florida Construction Lien Law, Florida Statutes section 713.06, is sufficient to enforce a construction lien, especially when the contractor is aware of the existence of the Notice to Owner and is not prejudiced by the error in the Notice.

Criswell v. JM Custom Woodworking, Inc., 216 So. 3d 717 (Fla. 4th DCA 2017).

A general contractor may not file a claim of lien for an item that is not in the direct contract between the contractor and the owner is not lienable under the Florida Construction Lien Law.

Busch v. Lennar Homes, LLC, 219 So. 3d 93 (Fla. 5th DCA 2017).

A "punch list" clause such as the one below may extend "completion" of the sales contract beyond the closing date, and accordingly, may extend the running of the statute of limitations and the statute of repose:

> 10.1 Purchaser shall be given an opportunity to examine the Home with Seller's representative prior to closing of title on a date and time scheduled by Seller. At that time, if any items are noted, Purchaser shall present to Seller an inspection statement signed by Purchaser, if any items noted are actually defective in workmanship or materials in Seller's opinion in accordance with construction standards prevalent for a similar home in the county where the community is located, Seller will be obligated to correct those items at Seller's cost. A second inspection of the home will be conducted prior to closing at which time the Purchaser will be given an opportunity to examine the home with Seller's representative to acknowledge that items listed on the inspection statement prepared after the first inspection have been corrected. Any remaining items that Seller has agreed to correct will be corrected by Seller at Seller's sole cost and expense prior to closing or at Seller's option within a reasonable time after closing.

Bauer v. Ready Windows Sales & Service Corporation, 221 So. 3d 761 (Fla. 3d DCA 2017).

There may be no prevailing party in a construction/contract case.

Don Facciobene, Inc. v. Hough Roofing, Inc., 2017 WL 3091578 (Fla. 5th DCA 2017).

A written construction contract containing a merger and integration clause replaces an existing oral agreement, even if the construction is substantially completed.

Rabil v. Seaside Builders, LLC, 226 So. 3d 935 (Fla. 4th DCA 2017).

The failure of Florida's Contest of Lien statute, Florida Statute section 713.22(2), to require giving notice to a contractor's counsel or notification that a separate suit is required does not violate due process concerns.

BK Marine Construction, Inc. v. Skyline Steel, LLC, And Great American Insurance Company, --- So. 3d -----, 2017 WL 4990566 (Fla. 4th DCA 2017).

A party seeking judgment for invoiced construction materials delivered to and incorporated into a job site must correspond the invoices to the allegations of the complaint, and if there are multiple portions of a job site, must demonstrate as to which portion of the job site the materials were incorporated into.

Lexon Insurance Company v. City of Cape Coral, --- So. 3d ----, 2017 WL 5759059 (Fla. 2d DCA 2017).

The statute of limitations for breach of a construction surety contract begins to run upon breach of the underlying construction contract, not upon demand upon the surety.

REAL ESTATE SALES AGENTS

Schumacher v. Reback Realty, Inc. 211 So. 3d 71 (Fla. 4th DCA 2017).

For purposes of determining a real estate sales commission, whether or not more than one sales agent "participates" in a transaction is a question of fact precluding summary judgment.

Trevarthen v. Wilson, 219 So. 3d 69 (Fla. 4th DCA 2017).

A real estate broker may be responsible for wrongful acts of its agents if the broker accepts commissions generated by the agents.

Plaza Tower Realty Group, LLC v. 300 South Duval Associates, LLC, 223 So. 3d 1079 (Fla. 3rd DCA 2017).

Real estate brokers have an ownership interest in deposits arising from defaulted real estate contracts when the broker's listing agreement with the owner specifies a fund upon which the brokers can claim.

MISREPRESENTATION

Global Quest, LLC v. Horizon Yachts, Inc., Case No. 15-10713 (11th Cir. 2017).

The Eleventh Circuit adopts Oceanic Villas, Inc. v. Godson, 4 So. 2d 689 (Fla. 1941), and holds that an "as is" clause does not bar a plaintiff from bringing a fraud claim.

Philip Morris USA, Inc. v. Duignan, —— So. 3d ——, 2017 WL 5471866 (Fla. 2d DCA 2017).

A jury instruction requiring "detrimental reliance on a statement" may not be proper in a fraudulent concealment or fraudulent omission case.

GUARANTYS

Element Financial Corp. v. Marcinkoski Gradall, Inc., 215 So. 3d 1252 (Fla. 4th DCA 2017).

A guarantor is not a "debtor" within the meaning of the Uniform Commercial Code, Florida Statute section 679.3161(1)(b), and therefore a creditor is not required to file notice of its lien in order to perfect its security interest within four months of a guarantor moving to Florida.

EVIDENCE

In re Amendments To The Florida Evidence Code, 210 So. 3d 1231 (Fla. 2017).

The Florida Supreme Court declines to adopt the "Daubert Amendment" to the Florida Evidence Code to the extent the changes are procedural.

ICMFG & Associates, Inc. v. The Bare Board Group, Inc., --- So. 3d ---- 2017, WL 1040742 (Fla. 2d DCA 2017).

A plaintiff is required to prove a connection between the tortious conduct of the defendant and its lost profits, even when defendant's pleadings have been struck as a sanction for misconduct.

Edmonds v. U.S. Bank National Association, 215 So. 3d 628 (Fla. 2d DCA 2017).

A witness must have personal knowledge of a company's regular practice of mailing letters for a court to adopt the rebuttable presumption of mailing as a routine business practice.

DiGiovanni v. Deutsche Bank National Trust Company, 226 So. 3d 984 (Fla. 2d DCA 2017).

A judge may not investigate facts on his own, even under the guise of taking judicial notice.

JPMorgan Chase Bank National Association v. Pierre, 215 So. 3d 633 (Fla. 4th DCA 2017).

A witness need not have personal knowledge of a breach letter being sent so long as the witness testifies from the business records and the business records demonstrate the breach letter was sent.

Cagwin v. Thrifty Rents, Inc., 219 So. 3d 1003 (Fla. 2d DCA 2017).

An instrument may be treated as an affidavit even if it is acknowledged and not sworn to.

Nationstar Mortgage Company v. Levine, 216 So. 3d 711 (Fla. 4th DCA 2017).

Parol evidence is generally not admissible to explain a patent ambiguity, but may employed to explain a latent ambiguity or to explain a patent ambiguity when the identity, capacity or the parties' relationship with one another is at issue.

E-Commerce Coffee Club v. Miga Holdings, Inc., 222 So. 3d 9 (Fla. 4th DCA 2017).

A contractual provision that states a report is binding on the parties but is contradicted by a later provision stating either party may contest the report is patently ambiguous and subject to parol testimony.

The Warwick Corporation v. Turetsky, 227 So. 3d 621 (Fla. 4th DCA 2017).

A court may refer to an instrument incorporated by reference into a contract to determine whether the contract is ambiguous.

Wells Fargo Bank, N.A. v. Eisenberg, 220 So. 3d 517 (Fla. 4th DCA 2017).

A party need not have participated in the boarding process of a loan to permit a prior servicer's records to be admissible; a prior servicer's records are admissible where the current note holder presents testimony that it "had procedures in place to check the accuracy of the information it received from the previous note holder."

Deutsche Bank National Trust Company v. de Brito, --- So. 3d ---- 2017, WL 5163048 (Fla. 3d DCA 2017).

A witness need only be generally familiar with another company's records or the boarding process by which the records were incorporated into a party's records to satisfy the Business Records Exception to the Hearsay Rule.

Friedle v. The Bank Of New York Mellon, 226 So. 3d 976 (Fla. 4th DCA 2017).

An authenticated document is not automatically admissible if another section of the Evidence Code (such as hearsay) makes the document non-admissible. Additionally, the Tipsy Coachman Rule does not apply if the trial court record is not sufficiently developed.

MORTGAGES

San Matera The Gardens Condominium Association, Inc. v. Federal Home Loan Mortgage Corporation, 207 So. 3d 1017 (Fla. 4th DCA 2017).

The Fourth District joins the Fifth District and the Second District in holding that a servicer (a company authorized to collect payments under a loan) is entitled to the benefit of the safe harbor provision of Florida Statute section 718.116(1)(b).

NEGOTIABLE INSTRUMENTS

Wells Fargo Bank, N.A. v. Sheikha, 221 So. 3d 657 (Fla. 4th DCA 2017).

A party may enforce a promissory note that has the words "canceled."

U.S. Bank National Association for Home Equity Asset Trust 2004-6 Home Equity Pass-Through Certificates, Series 2004-6 v. Kachik, 222 So. 3d 592 (Fla. 4th DCA 2017).

An allonge is part of a negotiable instrument, and as a result, the Best Evidence Rule requires the original allonge be introduced into evidence to enforce the note.

Partridge v. Nationstar Mortgage, LLC, 224 So. 3d 839 (Fla. 2d DCA 2017).

A plaintiff may not use the Clerk of the Court as a bailee for a negotiable instrument instead of properly assigning the note to the new plaintiff.

Nationstar Mortgage, LLC v. Martins, --- So. 3d ----, 2017 WL 5474450 (Fla. 4th DCA 2017).

A lender's unilateral decision to leave a note and mortgage with the Clerk of the Court in the file of a previously filed foreclosure does not establish standing.

GMAC Mortgage, LLC v. Pisano, 227 So. 3d 1279 (Fla. 4th DCA 2017).

A blank indorsement on a note merely indicates the note can be transferred, and does not indicate as a matter of law that it has been transferred.

FORECLOSURE

Romagnoli v. SR Acquisitions – Homestead, LLC, 218 So. 3d 955 (Fla. 3d DCA 2017).

Guarantors not joined in the foreclosure action are not estopped from raising defenses in a law action on their guaranties, including equitable actions that could have been raised in the foreclosure action.

Glen Garron, LLC v. Buchwald, 210 So. 3d 229 (Fla. 5th DCA 2017).

When seeking only foreclosure, Florida Rule of Civil Procedure 1.130 (a) does not require a copy of the promissory note upon which the foreclosure action is based to be attached to the complaint so long as the relevant portions of the note are set forth. Moreover, Rule 1.130(a) is not jurisdictional and failure to comply may be corrected by amendment.

Houk v. Pennymac Corp., 210 So. 3d 726 (Fla. 2nd DCA 2017).

An order of substitution does not relieve a substituted plaintiff in a mortgage foreclosure action from the requirement to prove ownership or entitlement to enforce the note.

Beltway Capital, LLC v. Lucombe, 211 So. 3d 328 (Fla. 2d DCA 2017).

Verification of a complaint pursuant to Florida Rule of Civil Procedure 1.110(b) and Florida Statute section 702.015 is not an element of the cause of action of mortgage foreclosure. Moreover, failure to verify is subject to a motion to dismiss pursuant to rule 1.420(b), but notice of hearing needs to be given and a party may not use Rule 1.140(h) to ambush a party a trial by calling up the motion without notice.

Bank of New York Mellon Trust Company, National Association v. Ginsberg, 221 So. 3d 1196 (Fla. 4th DCA 2017).

"[T]he fact that the trust identified in the complaint is somewhat different from the trust identified in the special endorsement [attached to the foreclosure complaint] does not create a defect in standing."

Wilmington Savings Fund Society v. Louissaint, 212 So. 3d 473 (Fla. 5th DCA 2017).

A copy of a note with a blank indorsement attached to the complaint, with the original filed at trial, is enough to establish standing for the party that filed the complaint, even if the note is lost after the complaint but later found by time of trial.

Desylvester v. Bank of New York Mellon on behalf of Holders of Alternative Loan Trust 2005-62 , Mortgage Pass-Through Certificates Series 2005-62, 219 So. 3d 1016 (Fla. 2d DCA 2017).

Upon rehearing, the Second District re-affirms that a foreclosure complaint that alleges that "all subsequent payments" have not been made within five years is sufficient to withstand a statute of limitations attack notwithstanding the original date of default was not within five years; Collazo v. HSBC Bank USA, N.A., 41 Fla. L. Weekly D2315 (Fla. 3d DCA Oct. 13, 2016), is distinguished.

Klebanoff v. Bank of New York Mellon, 228 So. 3d 167 (Fla. 5th DCA 2017).

The Fifth District distinguishes Hicks v. Wells Fargo Bank, N.A., 178 So. 3d 957 (Fla. 5th DCA 2015), and Collazo v. HSBC Bank USA, N.A., 213 So. 3d 1012 (Fla. 3d DCA 2016), based on their facts, and holds that a complaint alleging a default on a date "and all subsequent payments thereafter" is not barred by the statute of limitations.

Kebreau v. Bayview Loan Servicing, LLC, 225 So. 3d 255 (Fla. 4th DCA 2017).

The Fourth District joins the First, Second, and Third Districts in holding that "all subsequent defaults" cures possible statute of limitations issues if any subsequent defaults occurred within the statute of limitations.

The Bank of New York Mellon Trust Company, N.A. v. Fitzgerald, 215 So. 3d 116 (Fla. 3d DCA 2017).

A party who successfully defends a mortgage foreclosure suit on the basis of lack of standing is not entitled to an award of attorney's fees because there is no privity between plaintiff and defendant sufficient to implicate Florida Statute section 57.105 (7).

Nationstar Mortgage LLC v. Glass, 219 So. 3d 896 (Fla. 4th DCA 2017).

The Fourth District follows Bank of New York Mellon Trust Company, N.A. v. Fitzgerald, 42 Fla. L. Weekly D519 (Fla. 3dDCA Mar. 1, 2017), and holds that a party that successfully defends on the basis of the plaintiff's lack of standing is not, since there is no contract between the parties, entitled to an award of contractual prevailing party attorney's fees.

The Bank of New York Mellon Trust Company, N.A. v. Fitzgerald, 215 So. 3d 116 (Fla. 3d DCA 2017).

A party who successfully defends a mortgage foreclosure suit on the basis of lack of standing is not entitled to an award of attorney's fees because there is no privity between plaintiff and defendant sufficient to implicate Florida Statute section 57.105 (7).

U.S. Bank National Association for BAFC 2007-4 v. Roseman, 214 So. 3d 728 (Fla. 4th DCA 2017).

A promissory note sought to be introduced at trial that varies from the one attached to the complaint is reviewed for violation of Florida Statute § 673.4071 as to whether such alteration modifies the obligation of any party or whether the alteration was fraudulently placed on the instrument.

Khleif v. Bankers Trust Company of California, N.A. on behalf of Certificateholders Vendee Mortgage Trust 2001-1, 215 So. 3d 619 (Fla 2d DCA 2017).

A plaintiff proves a prima facie case by attaching to its complaint and introducing into evidence a short form mortgage that refers to the full, recorded long form mortgage.

Ventures Trust 2013-I-NH by MCM Capital Partners, LLC v. Johnson, --- So. 3d ----, 2017 WL 2821933 (Fla. 5th DCA 2017).

A cause of action for mortgage foreclosure accrues the day after a mortgage payment is missed, not upon acceleration of the amounts due under the mortgage.

Powell v. Wells Fargo Bank, N.A. for Structured Asset Mortgage Investments II Inc., 219 So. 3d 828 (Fla. 4th DCA 2017).

The Fourth District re-affirms that a non-holder in possession may enforce a promissory note by showing "(1) evidence of an effective transfer; (2) proof of purchase of the debt; or (3) evidence of a valid assignment, " but must show the "chain of possession" of the note starting with the first holder of the note.

Fogarty v. Nationstar Mortgage, LLC, 224 So. 3d 313 (Fla. 5th DCA 2017).

A trial court can on its own calculate interest and escrow amounts in a foreclosure judgment when substantial, competent evidence is admitted that proves the principal and escrow amounts due.

Nationstar Mortgage, LLC v. Bo Chan, 226 So. 3d 330 (Fla. 5th DCA 2017).

The Fifth District joins the Second and Fourth Districts in holding that a party substituting for a plaintiff that had standing at inception gains the same standing.

Garcia v. Christiana Trust, --- So. 3d ----, 2017 WL 3611667 (Fla. 3d DCA 2017).

A general reservation of jurisdiction in a final judgment typically reserves jurisdiction for deficiency judgments only; retention of jurisdiction for other reasons must be specifically reserved.

Nationstar Mortgage, LLC v. Diaz, 227 So. 3d 726 (Fla. 3d DCA 2017).

A final judgment, including a foreclosure final judgment, is typically void only if "(1) the trial court lacks subject matter jurisdiction; (2) the trial court lacks personal jurisdiction over the party; or (3) if, in the proceedings leading up to the judgment, there is a violation of the due process guarantee of notice and an opportunity to be heard." Additionally, a party is only entitled to damages and is not entitled to vacate a foreclosure judgment when the requirements of Florida Statute section 702.036 have been met.

Mid-Continent Casualty Company v. R.W. Jones Construction, Inc., 227 So. 3d 785 (Fla. 5th DCA 2017).

Agreeing to not contest another creditor's right to claim attorneys' fees is not an agreement to the reasonableness of those fees.

Buckingham v. Bank of America, N.A., --- So. 3d ---- 2017 WL 4798594 (Fla. 2d DCA 2017).

A Power of Attorney must specifically reference the loan in question in order to create standing for a lender to prosecute a foreclosure.

Werb v. Green Tree Servicing LLC, --- So. 3d ----, 2017 WL 6368609 (Fla. 4th DCA 2017).

Possession of a note is the primary criteria to determine standing, even when servicing rights of the note have been transferred prior to the filing of the complaint. Moreover, introduction of an incomplete payment history merits remand to the trial court, not dismissal with prejudice, for further taking of evidence.

FORECLOSURE SALES

The Bank Of New York Mellon v. Glenville, 215 So. 3d 1284 (Fla. 2nd DCA 2017).

A claimant to surplus funds under Florida Statute section 45.031(7)(b) must file their claim within sixty (60) days of the foreclosure sale and not within sixty days of the issuance of the certificate of title; conflict certified with Straub v. Wells Fargo Bank, N.A., 182 So. 3d 878, 881 (Fla. 4th DCA 2016).

Karapetyan v. Deutsche Bank National Trust Company, 220 So. 3d 542 (Fla. 3d DCA 2017).

Florida Statute section 45.031(2) does not require the second publication of a foreclosure sale to be on the final day of the two-week period for advertising sales.

Rodriguez v. Federal National Mortgage Association, 220 So. 3d 577 (Fla. 5th DCA 2017).

A third-party purchaser at foreclosure sale cannot claim surplus foreclosure sale proceeds as a third-party purchaser is not listed in Florida Statute section 45.032 as a party entitled to claim.

Wells Fargo Bank, N.A. v. Rutledge, 148 So. 3d 533 (Fla. 2d DCA 2017).

A purchaser at a foreclosure sale may not intervene in the case and may not raise defenses that belong to the foreclosed borrower.

Echeverry v. Deutsche Bank National Trust Company, --- So. 3d ----, 2017 WL 5474448 (Fla. 4th DCA 2017).

A certificate of sale issued under Florida Statute sec. 45.0315 divests a borrower of her equity of redemption, and thus a bankruptcy filed after this certificate of sale does not bar the issuance of a certificate of title.

SUMMARY JUDGMENT

Genuinely Loving Childcare, LLC, v. Bre Mariner Conway Crossings, LLC, 209 So. 3d 622 (Fla. 5th DCA 2016).

Foreseeability for the purposes of contractual defenses (including impossibility, impracticality, frustration of purpose, and commercial frustration of purpose) constitutes an issue of fact precluding summary judgment even though the law infers that risk was either allocated by the contract or was assumed by the party if it was foreseeable at lease inception.

Lucey v. 1010 Logic, Inc., Lucey v. 1010 Logic, Inc., Case No. 2D15-5325 (Fla. 2nd DCA 2017) (Fla. 2nd DCA 2017).

The burden of proving an affirmative defense in the face of a summary judgment does not shift to the non-moving party until the moving party establishes prima facie entitlement to summary judgment.

Capotosto v. Fifth Third Bank, --- So. 3d ---- 2017 WL 5634885 (Fla. 4th DCA 2017).

A party moving for summary judgment has the burden to conclusively show the complete absence of any genuine issue of material fact, however and once movant has done so, the burden shifts to the non-movant to raise an issue of genuine fact and a non-movant cannot avoid summary judgment merely by asserting a fact without any evidence to support it.

CONDITIONS PRECEDENT

Dixon v. Wells Fargo Bank, N.A., 207 So. 3d 899 (Fla. 4th DCA 2017).

A default letter stating that acceleration has already occurred, sent only six days before the lawsuit was filed, and that fails to provide sufficient notice of default and a thirty-day opportunity to cure, does not "substantially comply" with the standard paragraph 22 condition precedent requirements.

Harris v. U.S. Bank National Association, 223 So. 3d 1030 (Fla. 1st DCA 2017).

The "face to face" counseling requirements of H.U.D. regulation 24 C.F.R. § 203.604 are a condition precedent when the lender has a branch within 200 miles of the borrower, but the condition precedent can be waived.

ARC HUD I, LLC v. Ebbert, 212 So. 3d 513 (Fla. 2d DCA 2017).

The time to determine whether a lender has a branch within 200 miles of borrower so as to bring into play the "face to face" counseling requirements of H.U.D. regulation 24 C.F.R. § 203.604 is when the borrower defaults.

U.S. Bank, N.A. for RFMSI 2006-S10 v. Adams, 219 So. 3d 211 (Fla. 2nd DCA 2017).

A "paragraph 22" notice need not use the word "foreclosure sale"; the following is sufficient to give borrowers notice of the consequences of failure to cure a default:

Once acceleration has occurred, we may take steps to terminate your ownership in the property by a foreclosure proceeding, which could result in Lender or another person acquiring ownership of the property.

National Collegiate Student Loan Trust 2007-1 v. Lipari, 224 So. 3d 309 (Fla. 5th DCA 2017).

The giving of notice of assignment under Florida Statute section 559.715 is not a condition precedent to filing suit for collection of a student loan.

McIntosh v. Wells Fargo Bank, N.A., Case No. 5D16-2189 (Fla. 5th DCA 2017).

A foreclosing plaintiff must, as conditions precedent, comply with HUD regulations that limit acceleration and foreclosure when the mortgage incorporates the regulations.

BANKRUPTCY

In re Lunsford, 848 F.3d 963 (11th Cir. 2017).

A bankruptcy court's adoption of an arbitrator's factual finding of violation of securities law is sufficient to preclude a debtor's discharge under 11 U.S.C. § 523(a)(19)(A), and a separate factual finding by the trial court is not required.

In re Appling, 848 F.3d 953 (11th Cir. 2017).

The bankruptcy code section of a "statement respecting the debtor's . . . financial condition" has to be given its ordinary meaning and a debt respecting that statement is not dischargeable unless, under 11 U.S.C. § 523(a)(2)(B), that statement is in writing.

Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973 (2017).

"Structured dismissal" plans under 11 U.S.C. 1112(b) must pay creditors in accordance with the bankruptcy priority rules.

Herendeen v. Mandelbaum, --- So. 3d ----, 2017 WL 4798155 (Fla. 2d DCA 2017).

A discharge in bankruptcy does not extinguish a debt, and bankruptcy trustee may continue to prosecute a state law claim even after discharge of the bankrupt debtor.

Title Max v. Northington, --- F.3d ----, 2017 WL 6276001 (11th Cir. 2017).

Applying Georgia law regarding pawnshops, the Eleventh Circuit holds that state law controls property rights and that the Bankruptcy Code does not trump state law unless the clear text of the bankruptcy code so states.

DEFICIENCY PROCEEDINGS

Bonita Real Estate Partners, LLC v. SLF IV Lending, L.P., 222 So. 3d 647 (Fla. 2d DCA 2017).

A deficiency decree arising out of foreclosure of a Florida property is controlled by Florida law notwithstanding loan documents choosing the law of another state.

Dyck O'Neal, Inc. v. Ward, 216 So. 3d 664 (Fla. 2d DCA 2016).

A deficiency proceeding is not an action on a consumer debt but is instead an action to enforce a foreclosure judgment. Accordingly, Florida Statute section 559.715 of the Florida Consumer Collection Practices Act does not apply to deficiency proceedings.

Friedman v. Mercantil Commercebank, N.A., 211 So. 3d 310 (Fla. 3d DCA 2017).

In deficiency proceedings, the date of transfer of the property is the "valuation date" if there is no foreclosure sale.

Dyck-O'Neal, Inc. v. Meikle, 215 So. 3d 604 (Fla. 4th DCA 2017).

A court may later acquire jurisdiction over an individual for deficiency suit purposes even if the foreclosure was first conducted by publication, i.e., non-personal service.

Bush v. Whitney Bank, 219 So. 3d 257 (Fla. 5th DCA 2017).

Florida Statute section 95.11(5)(h)'s one year statute of limitations to bring deficiency actions does not apply to deficiency actions arising out of short sales because by its own terms the statute only applies to situations where a certificate of title has been issued or the lender has accepted a deed in lieu of foreclosure.

Whitney Bank v. Grant, 223 So. 3d 476 (Fla. 1st DCA 2017).

The five-year statute of limitations period in Florida Statute section 95.11(2)(b), and not the one-year statute of limitations of Florida Statute section 95.11(5)(h), applies in actions for deficiency proceedings arising out a short sale (as opposed to deficiency actions arising out of a foreclosure sale).

CONSUMER PROTECTION

Midland Funding, LLC v. Johnson, 137 S.Ct. 1407 (2017).

The filing in bankruptcy court of a proof of claim that is time barred under state law is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act.

Henson v. Santander Consumer USA Inc., 137 S.Ct. 1718 (2017).

Parties that purchase and collect debts for their own account are not "debt collectors" within the meaning of the Fair Debt Collection Practices Act, 15 U. S. C. §1692a(6).

Bivens v. Bank of America, N.A., 868 F.3d 915 (11th Cir. 2017).

Failing to timely respond to a borrower's Qualified Written Request ("QWR") under 12 U.S.C. § 2605(e) is not a violation of the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 et seq., if the borrower sends his QWR to an address other than the one the servicer designates to receive QWRs.

Pedro v. Equifax, Inc., 868 F.3d 1275 (11th Cir. 2017).

It is not objectively unreasonable for a credit reporting agency to interpret section 1681e(b) of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., to permit reporting an account for which a consumer is an authorized user.

Bennett v. Mortgage Electronic Registration Systems, Inc., --- So. 3d ---- 2017 WL 3879973 (Fla. 3d DCA 2017).

The Truth in Lending Act permits correction of errors within 60 days under 15 U.S.C. § 1640(b).

Hart v. Credit Control, LLC, 871 F.3d 1255 (11th Cir. 2017).

A debt collector's voicemail is a "communication" under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and initial communications that do not contain a "mini-Miranda" warning violates the Act. However, a voicemail that identifies the caller and the purpose of the call is a "meaningful disclosure" under the Act; identification of the person making the call is not required.

CIVIL PROCEDURE

Kopel v. Kopel, --- So. 3d ----, 2017 WL 372074 (Fla. 2017).

Florida Rule of Civil Procedure 1.190(c) permits amended complaint to relate back to the filing of the original, timely filed complaint so long as the new claims arise out of the same conduct, transaction, or occurrence as in the original filing.

Rivas v. The Bank of New York Mellon, 211 So. 3d 124 (Fla. 4thDCA 2017).

The Fourth District adopts the Third District's interpretation of Florida Rule of Civil Procedure 1.540(b)(4) in De La Osa v. Wells Fargo Bank, N.A.(De La Osa II), No. 3D14-1455 (Fla. 3d DCA Dec. 14, 2016) (en banc).

Solar Dynamics, Inc. v. Buchanan Ingersoll & Rooney, P.C., 211 So. 3d 294 (Fla. 2nd DCA 2017).

A claim involving a patent's scope, validity, or infringement must first be brought in federal court; state courts are without jurisdiction to make those determinations even if the overall claim is a legal malpractice claim alleging negligence arising out of the patent's prosecution.

SRMOF II 2012-1 Trust v. Garcia, 209 So. 3d 681 (Fla. 2nd DCA 2017).

A dismissal without prejudice does not require the listing of the Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993), factors. The Fifth District aligns itself with the First and Third District Courts of Appeal.

Cleveland v. Crown Financial, LLC, 183 So. 3d 1206 (Fla. 1st DCA 2017).

A claim of newly discovered evidence may be the basis for relief pursuant to Florida Rule of Civil Procedure 1.530, but a rehearing or new trial based on newly discovered evidence is warranted only where the evidence was discovered after the trial and could not have been discovered before trial by the exercise of due diligence; the rule is not an automatic opportunity for the losing party to try its case twice.

Sybac Solar, GmbH v. 6th Street Solar Energy Park of Gainesville, LLC, 217 So. 3d 1068 (Fla. 2d DCA 2017).

A corporation is entitled to designate its own representative for deposition under Florida Rule of Civil Procedure 1.310(b)(6), but the opposing party may take additional depositions. The person designated need not have the most knowledge (or any knowledge) on the matter, but may be prepared by the corporation in order to state the corporation's position.

Dabas v. Boston Investors Group, Inc., --- So. 3d -----, 2017 WL 3271833 (Fla. 3d DCA 2017).

The difference between void and voidable is important for purposes of Florida Rule of Civil Procedure 1.540(b)(4); a judgment is void only if the trial court lacked subject matter jurisdiction, the trial court lacked personal jurisdiction over the person, or the trial court permitted a violation of the due process guarantee of notice and opportunity to be heard.

The Bank of New York Mellon v. Simpson, 227 So. 3d 669 (Fla. 3d DCA 2017).

Generalized allegations of fraud in an industry without specific allegations of fraud in the case at bar are not sufficient to support a Florida Rule of Civil Procedure 1.540 motion for relief based on fraud of a party.

Pace v. Bank of New York Mellon Trust Company National Association, 224 So. 3d 342 (Fla. 5th DCA 2017).

Allegations in a complaint, including claims of interference with a contractual relationship, are covered by the absolute judicial immunity rule; alleged statements made by a process server when serving the complaint may be covered by qualified immunity if the statements are pertinent to the judicial proceedings.

Garcia v. Navy Federal Credit Union, Case Nos. 5D16-1350 & 5D16-3055 (Fla 5th DCA 2017).

The Fifth District agrees with the Third District that Florida Rule of Civil Procedure 1.540 only applies to final, not interlocutory orders, and may not be used to collaterally attack non-final orders such as post-judgment writs of possession.

LITIGATION PRIVILEGE

Debrincat v. Fischer, 217 So. 3d 68 (Fla. 2017).

The litigation privilege does not bar an action for malicious prosecution; Wolfe v. Foreman, 128 So. 3d 67 (Fla. 3d DCA 2013), is overruled.

AGM Investors, LLC v. Business Law Group, P.A., 219 So. 3d 920 (Fla. 2d DCA 2017).

The Litigation Privilege extends to actions that are necessarily preliminary to the institution of legal action, but does not extend to actions not necessary to litigation.

Ira Scot Silverstein, LLC v. Kube, 225 So. 3d 955 (Fla. 3d DCA 2017).

A law firm's retention information (fee agreements, checks, affidavits, etc.) in lawsuits unrelated to the present lawsuit are protected by the Litigation Privilege and need not be produced.

Arko Plumbing Corp. v. Rudd, --- So. 3d ---- 2017 WL 4654904 (Fla. 3d DCA 2017).

Florida's Litigation Privilege does not extend so far as to protect defendants from accessing, without consent, plaintiff's password-protected vehicle tracking system.

VENUE

Quick Cash, LLC v. Tradenet Enterprise Inc., 211 So. 3d 1113 (Fla. 3d DCA 2017).

The following paragraph in a contract constitutes an exclusive and mandatory jurisdiction and venue clause:

> This purchase order shall be deemed entered into and performed in the State of California and Buyer consents to the jurisdiction of the State of California for purposes of enforcement of the terms hereof. Buyer agrees to the above General Terms including but not limited to terms relating to interest on late payments, conditional terms, attorneys (sic) fees and jurisdiction for enforcement.

H. Gregory 1, Inc. v. Cook, 222 So. 3d 610 (Fla. 4th DCA 2017).

The words "shall" and "exclusive" make a venue selection clause mandatory.

Travelers Casualty and Insurance Company of America v. Community Asphalt Corporation, 221 So. 3d 742 (Fla. 3d DCA 2017).

A contract cannot override the venue provisions of the surety bond statute (Florida Statute section 255.05(1)(e)) and force venue in contravention of the statute.

Inspired Capital, LLC v. Condé Nast, 225 So. 3d 980 (Fla. 3d DCA 2017).

The "arising out of or related to" analysis of Jackson v. Shakespeare Foundation, Inc., 108 So. 3d 587 (Fla. 2013) ("arising out of or related to" is broader than "arising out of" an encompasses more claims) applies to venue provisions as well as arbitration provisions.

LONG-ARM JURISDICTION AND CHOICE OF LAWS

Nationstar Mortgage LLC v. Glass, 219 So. 3d 896 (Fla. 4th DCA 2017).

On Motion for Rehearing En Banc the Fourth District follows Bank of New York Mellon Trust Company, N.A. v. Fitzgerald, 215 So. 3d 116 (Fla. 3d DCA 2017), and holds that a party that successfully defends on lack of standing is not entitled to an award of contractual prevailing party attorney's fees since there is no contract between the parties.

Corporate Creations Enterprises LLC v. Brian R. Fons Attorney at Law P.C., 225 So. 3d 296 (Fla. 4th DCA 2017).

Florida Statute sections 685.101 and 685.102 allow parties to confer long-arm jurisdiction on the courts of Florida by contract if the contract:

1. Includes a choice of law provision designating Florida law as the governing law, in whole or in part;
2. Includes a provision whereby the non-resident agrees to submit to the jurisdiction of the courts of Florida;
3. Involves consideration of not less than $250,000 or relate to an obligation arising out of a transaction involving in the aggregate not less than $250,000;
4. Does not violate the United States Constitution; and
5. Either bears a substantial or reasonable relation to Florida or has at least one of the parties be a resident of Florida or incorporated under the laws of Florida.

Wells Fargo Equipment Finance, Inc. v. Bacjet, LLC, 221 So. 3d 671 (Fla. 4th DCA 2017).

An out-of-state loan secured by Florida real estate is sufficient for specific jurisdiction under Florida Statute section 48.193(1)(a).

INJUNCTIONS

Vital Pharmaceuticals, Inc. v. Professional Supplements, LLC, 210 So. 3d 766 (Fla. 4th DCA 2017).

Damages for a wrongfully issued injunction are limited to the bond posted, and a party is not entitled to damages for the wrongful injunction if no bond is posted.

Planned Parenthood of Greater Orlando, Inc. v. MMB Properties, Case No. SC15-1655 211 So. 3d 918 (Fla. 2017).

A trial court must apply "equity principles underlying injunctive relief" and abuses its discretion in requiring changed circumstances to modify or dissolve a temporary injunction, even when the injunction is based on violations of recorded real estate covenants and declarations.

Abundant Living Citi Church, Inc. v. Abundant Living Ministries, Inc., 213 So. 3d 1055 (Fla. 3d DCA 2017).

An order of ejectment arising from a hearing on a "motion for ejectment" (without trial) is tantamount to a motion for summary judgment and must comply with Florida Rule of Civil Procedure 1.510.

Investor Trustee Services, LLC v. DLJ Mortgage Capital, Inc., 225 So. 3d 833 (Table) (Fla. 5th DCA 2017).

A person who purchases property after the filing of a lis pendens is a purchaser pendent lite and is not entitled to intervene or participate in the pending litigation.

UV Cite III, LLC, v. Deutsche Bank National Trust Co., 215 So. 3d 1280 (Fla. 3d DCA 2017).

A court may not sequester rents absent an assignment of rents agreement rents, some form of injunctive relief or the rents being the subject of the litigation.

ADT, LLC v. Northstar Alarm Services, LLC, 853 F.3d 1348 (11th Cir. 2017).

A non-party not in privity with a party restrained by an injunction may not be bound by that injunction as a successor in interest under the theory of de facto merger.

Villasol Community Development District v. TC 12, LLC, 226 So. 3d 854 (Table) (Fla. 5th DCA 2017).

A governmental unit waives sovereign immunity for the wrongful effects of an injunction when it takes affirmative steps to obtain the injunction.

Miranda v. Pacheco Entertainment Production Enterprises, Inc., 220 So. 3d 523 (Fla. 3rd DCA 2017).

While a court is required to dissolve a temporary injunction where there is clear legal error, Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 925-26 (Fla. 2017), it has no such requirement in regard to permanent injunctions.

Bautista REO U.S., LLC v. ARR Investments, Inc., --- So. 3d ----, 2017 WL 3085349 (Fla. 4th DCA 2017).

Even if failure to do so results in loss of real property, a trial court may not issue an injunction to require a lender to deliver an estoppel letter in a certain amount as borrower has an adequate remedy at law and there is no irreparable harm for any breach.

ENFORCEMENT OF FOREIGN JUDGMENTS

Patrick v. Hess, 212 So. 3d 1039 (Fla. 2017).

A foreign judgment recorded under the Uniform Enforcement of Foreign Judgments Act becomes an enforceable Florida judgment even if the original judgment is no longer enforceable, and the twenty-year statute of limitations of Florida Statute section 95.11(1) applies to the Florida recorded judgment.

PROPOSALS FOR SETTLEMENT

Wheaton v. Wheaton, 217 So. 3d 125 (Fla. 3d DCA 2017).

A proposal for settlement, even though it is not filed, must be served by email under Florida Rule of Judicial Administration 2.516.

Boatright v. Philip Morris USA Inc., 218 So. 3d 962 (Fla. 2d DCA 2017).

A proposal for settlement need not follow Rule of Judicial Administration 2.516.

McCoy v. R.J. Reynolds Tobacco Company, --- So. 3d ---- 2017 WL 4812662 (Fla. 4th DCA 2017).

A Proposal for Settlement need not be emailed when the offeree was aware of the proposal; Wheaton v. Wheaton, 217 So. 3d 125, 126 (Fla. 3d DCA 2017), not followed

Oldcastle Southern Group, Inc. v. Railworks Track Systems, Inc., Case No. 1D17-48 (Fla. 1st DCA 2017).

The First District holds a Proposal for Settlement need not be e-served in accordance with Florida Rule of Judicial Administration 2.516, following McCoy v. R.J. Reynolds Tobacco Co., 2017 WL 4812662 (Fla. 4th DCA 2017), and Boatright v. Philip Morris USA, Inc., 218 So. 3d 962 (Fla. 2d DCA 2017), and certifying conflict with Wheaton v. Wheaton, 217 So. 3d 125 (Fla. 3d DCA 2017), rev. granted, 2017 WL 4785810 (Fla. 2017).

Costco Wholesale Corporation v. Llanio-Gonzalez, 213 So. 3d 944 (Fla. 4th DCA 2016).

Attaching a general release to a Proposal for Settlement does not make the proposal ambiguous and unenforceable.

Polk County v. Highlands-In-The-Woods, L.L.C., 227 So. 3d 161 (Fla. 2nd DCA 2017).

A proposal for settlement applies in a suit seeking inverse condemnation, including declaratory relief, where the main component of the suit is a claim for damages.

Taylor Engineering, Inc. v. Dickerson Florida, Inc., 221 So. 3d 719 (Fla. 1st DCA 2017).

The First District adopts the "nominal exposure standard" for determining whether a proposal for settlement is made in good faith, i.e., a proposal is made in good faith when the "offeror had a reasonable basis to conclude that his/her exposure was nominal or minimal."

Department of Transportation v. Butler Carpet Company, --- So. 3d ---- 2017 WL 2364645 (Fla. 2d DCA 2017).

A property owner is not entitled to severance damages for loss of access if the claimed loss of access is not caused by the use to which the property taken has been applied, but is entitled to severance damages if there is a direct connection between the activity on the taken property and the claimed loss of access.

Golisting.com, Inc. v. Papera, --- So. 3d ---- 2017 WL 4535042 (Fla. 4th DCA 2017).

A settlement proposal to each of two joint defendants is enforceable and not ambiguous even if the proposal states that it will refund a proportionate amount if both parties accept the proposal.

COLLATERAL ESTOPPEL AND RES JUDICATA

CSX Transportation, Inc. v. General Mills, Inc., 214 So. 3d 1232 (11th Cir. 2017).

The Eleventh Circuit holds that "federal common law adopts the state rule of collateral estoppel to determine the preclusive effect of a judgment of a federal court that exercised diversity jurisdiction."

Slater v. United States Steel Corporation, 871 F.3d 1174 (11th Cir. 2017) (en banc).

A court must examine all circumstances – not just failure to disclose assets on bankruptcy schedules – when determining whether to apply judicial estoppel in civil proceedings subsequent to a debtor's bankruptcy proceedings.

Anfriany v. Deutsche Bank National Trust Company for Registered Holders of Argent Securities, Inc. , Asset-Backed Pass-Through Certificates, Series 2005-W4, --- So. 3d ---, 2017 WL 6032578 (Fla. 4th DCA 2017).

Judicial estoppel under Florida law requires, in addition to other requirements, that one party be in possession of information not available to another party and that the party seeking judicial estoppel not "derive an unfair advantage or impose an unfair detriment" on the opposing party.

Forero v. Green Tree Servicing, LLC, 223 So. 3d 440 (Fla. 1st DCA 2017).

The two-dismissal rule does not bar subsequent suits, it merely makes the prior suit res judicata as to subsequent suits. Additionally, "all subsequent defaults" defeats a statute of limitations argument if any subsequent defaults occurred within the statute of limitations.

DAMAGES

Bayview Loan Servicing, LLC v. Del Lupo, 208 So. 3d 97 (Fla. 4th DCA 2017).

The introduction of documents into evidence which prove damages requires the denial of a motion to dismiss for failure to prove damages, even if the documents do not clearly state the damages.

Paeth v. U.S. Bank National Association, 220 So. 3d 1273 (Fla. 2d DCA 2017).

Remand for further proceedings to prove damages is proper when plaintiff has offered some proof, albeit incomplete, of damages.

Jane E. Bistline, M.D., P.A. v. Anthony Rogers, M.D., 215 So. 3d 607 (Fla. 4th DCA 2017).

Intentional interference with a business relationship may rise to the level of supporting punitive damages, but the conduct must be "egregious and sufficiently reprehensible to rise to the level of truly culpable behavior deserving of punishment."

Willson v. Big Lake Partners, LLC, 211 So. 3d 360 (Fla. 4th DCA 2017).

On rehearing, the Fourth District rules the proper remedy when a court reverses itself on the exclusion of slander of title damages evidence at trial (and allows previously excluded items into evidence) is to permit a new trial on damages because the party whose objection was previously sustained will have no opportunity to present counter-evidence on damages merely upon the motion for rehearing being granted.

Tubby's Customs, Inc. v. Euler, 225 So. 3d 405 2017 WL 3721812 (Fla. 2d DCA 2017).

A party who has been aggrieved by a total breach of contract may elect benefit of the bargain damages where "the proper measure of damages [is] either the reasonable cost of completion, or the difference between the value the [repair] would have had if completed and the value of the [repair] that has been thus far performed."

Asset Management Holdings, LLC v. Assets Recovery Center Consolidated Investments, LLC, --- So. 3d ----, 2017 WL 4654353 (Fla. 2d DCA 2017).

A breach of contract claim typically requires proof of lost profits, i.e., damages minus the costs of performing the contract, and a party cannot escape the requirement to prove costs by claiming a "set off."

The Allegro at Boynton Beach, L.L.C. v. Pearson, 227 So. 3d 1288 (Fla. 4th DCA 2017).

The decision by a plaintiff to pursue both a specific performance claim and a damages claim based on the same facts does not operate as an election of remedies because the two remedies are consistent with each other. Additionally, an owner that enters into a contract converts a pre-existing right of first refusal into an irrevocable option to purchase that is not affected by the termination of the underlying contract.

Williams v. Skylink Jets, Inc., --- So. 3d ----, 2017 WL 5474485 (Fla. 4th DCA 2017).

"Technical admissions" to Requests for Admissions will turn unliquidated sums into liquated sums for purposes of a final judgment.

Agritrade, LP v. Quercia, --- So. 3d ----, 2017 WL 5760269 (Fla. 3d DCA 2017).

The principle that a plaintiff cannot claim unjust enrichment when an express contract exists does not apply when there are multiple defendants facing the same damages and the there is no express contract against the party against whom unjust enrichment is sought.

PROCEEDINGS SUPPLEMENTARY

Paul v. Avrahami, Case No. 216 So. 3d 647 (Fla. 4th DCA 2017).

The Supplementary Proceedings statute, Florida Statute section 56.29, provides only for an award of fees or costs to the judgment debtor and does not provide for an award against the implied defendant.

Destination Boat Clubs, Inc. v. Island Breeze Boat Club & Rental Inc., 226 So. 3d 301 (Fla. 2d DCA 2017).

Attorney's fees cannot be awarded against an impleaded defendant, but can be awarded against the judgment debtor and the amount of awarded fees can be added to the judgment the impleaded defendant is required to pay.

Kennedy v. RES-GA Lake Shadow, LLC, 224 So. 3d 931 (Fla. 1st DCA 2017).

A party who has an interest in an asset must be joined in the proceedings supplementary used to execute upon the asset.

APPELLATE

Silver Beach Towers Property Owners Association, Inc. v. Silver Beach Investments of Destin, LC, --- So. 3d ----, 2017 WL 672138 (Fla. 1st DCA 2017).

The First District aligns itself with the Second District and in opposition to the Third District and holds that Florida Rule of Appellate Procedure 9.310(b)(1) (posting of a bond in the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount) is not the only way to receive a stay of execution on a money judgment.

Gomez v. S & I Properties, LLC, 220 So. 3d 539 (Fla. 3d DCA 2017).

An order denying a motion to dismiss based on an arbitration clause is not the same for appellate jurisdiction purposes as an order determining entitlement to arbitration; a party seeking arbitration must file a motion to compel arbitration.

Wardlow v. State of Florida, 212 So. 3d 1091 (Fla. 2d DCA 2017).

An appellate court has the power to change its ruling in a previously concluded appeal when failure to do so constitutes fundamental error.

Archer v. U.S. Bank National Association, 220 So. 3d 477 (Fla. 5th DCA 2017).

An order denying a motion to quash constructive service in an in rem case is not an appealable final order because there is no determination of the jurisdiction of a person.

Christakis v. Tivoli Terrace, LLC, 219 So. 3d 85 (Fla. 4th DCA 2017).

An appeal filed before the January 1, 2015 amendment to Florida Rule of Appellate Procedure 9.020(i)(3) has the effect of abandoning post-trial motions; the amendment to the rule does not have retroactive effect.

Landmark at Crescent Ridge LP v. Everest Financial, Inc., 219 So. 3d 218 (Fla. 1st DCA 2017).

A writ of certiorari cannot be taken from an order denying a motion to dissolve a lis pendens as any potential harm can be remedied on direct appeal. Specifically, financial harm, including that "the property cannot be sold while encumbered by the lis pendens, that Petitioner is in danger of defaulting on mortgages connected with the property if it cannot sell, and that the lawsuit might persist for a substantial time period" is not sufficient financial harm to justify certiorari relief.

Bankers Lending Services, Inc. v. Regents Park Investments, LLC, 225 So. 3d 884 (Fla. 3d DCA 2017).

Certiorari, not Florida Rule of Appellate Procedure 9.130(a)(3)(B), is the proper method to review orders granting or discharging lis pendens and bonds associated therewith.

Winchel v. PennyMac Corp., 222 So. 3d 639 (Fla. 2d DCA 2017).

Standing is an affirmative defense which must be proven by plaintiff at trial, and Rule 1.530 provides that a defendant may raise the issue of standing on appeal even if not raised at trial.

Wadley v. Nazelli, 223 So. 3d 1118 (Fla. 3d DCA 2017).

Failure to request the trial court grant leave to file an amended complaint after dismissal results in waiver of the request on appeal.

Yellow Cab Company v. Ewing, 225 So. 3d 302 (Fla. 3d DCA 2017).

Rendition for appellate purposes runs from time of entry of a final judgment and not from a later amended final judgment which merely corrects a clerical error.

The Leila Corporation of St. Pete v. Ossi, --- So. 3d ----, 2017 WL 3089659 (Fla. 2d DCA 2017).

An appeal must be filed from the date of the original (not the amended) final judgment if the amended final judgment does not substantively change the final judgment; attorney's fees and costs added into an amended final judgment are collateral to and do not substantively change the final judgment.

Kolawole v. Sellers, Kolawole v. Sellers, Case Nos. 15-13720 & 15-15801 (11th Cir. 2017) (11th Cir. 2017).

Typically in federal court, the period to file an appeal of a final judgment begins on the later of either two events: (1) when he district court enters the order constituting the final judgment, or (2) when the court disposes of the last motion seeking relief from the final judgment. However, a district court may still certify a non-final judgment (one that fails to adjudicate all of the parties' claims) as final if "there is no just reason for delay." Fed. R. Civ. P. 54(b). Cases that are consolidated, either by order or as a practical matter, will be considered one case for appellate purposes.

American Federated Title Corporation v. Gross, 224 So. 3d 301 (Fla. 3d DCA 2017).

An appellate court mandate may be recalled under Florida Statute section 43.44 and Florida Rule of Appellate Procedure 9.340(a) if the motion to do so is made within 120 days of the issuance of a mandate.

Camargo v. Prime West, Inc., 225 So. 3d 912 (Fla. 3d DCA 2017).

An administrative stamp as follows does not convert a non-final order into an appealable, final order:

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC, 227 So. 3d 752 (Fla. 1st DCA 2017).

Upon rehearing, the First District reaffirms there is no "excusable neglect" to permit the filing of a belated appeal when the claimed excusable neglect was error to timely see the final judgment email due to the law firm's computer system not being configured to correctly receive and store emails.

New Day Miami, LLC v. Beach Developers, LLC, 225 So. 3d 372 (Fla. 3d DCA 2017).

An order on a Florida Rule of Civil Procedure 1.540 motion may be an appealable final order, but a motion for rehearing directed to the order does not toll appellate time periods due to Florida Rule of Appellate Procedure 9.130(a)(5) which holds that "[m]otions for rehearing directed to these orders will not toll the time for filing a notice of appeal."

DNJS Holdings v. Pet Doctors Operating, LLC, 224 So. 3d 888 (Fla. 1st DCA 2017).

Certiorari may be granted to compel discovery when not giving discovery would eviscerate the petitioning party's trial court case.

In Re: Amendments to The Florida Rules of Appellate Procedure, 225 So. 3d 223 (Fla. 2017).

The Florida Supreme Court amended the Rules of Appellate Procedure to create new Rule 9.020 a new subdivision (l) defining the term "E-filing System Docket," the manner in which the PDF files are transmitted to the Clerk, amendments to Rule 9.200 (The Record), and amendments to Rule 9.220 (Appendix) to parallel the amendments to Rule 9.200 adopted in In re Amendments to Rule of Appellate Procedure 9.200, 177 So. 3d 1254.

ATTORNEY'S FEES

Trial Practices, Inc. v. Hahn Loeser & Parks, LLP, 228 So. 3d 1184 (Fla. 2d DCA 2017).

The Second District adopts the reasoning of Waverly Las Olas Condominium Ass'n v. Waverly Las Olas, LLC, 88 So. 3d 386 (Fla. 4th DCA 2012), and holds the following provision permits an award of attorney's fees for litigating the amount of attorney's fees:

> prevailing party in any action arising from or relating to this agreement will be entitled to recover all expenses of any nature incurred in any way in connection with the matter, whether incurred before litigation, during litigation, in an appeal, . . . or in connection with enforcement of a judgment, including, but not limited to, attorneys' and experts' fees.

Newman v. Guerra, Case Nos. 208 So. 3d 314 (Fla. 4th DCA 2017).

The "significant issues" test of Moritz v. Hoyt Enters., Inc., 604 So. 2d 807 (Fla. 1992), applies to claims for attorneys' fees under Florida Statute section 713.29.

Yellow Pages Photos, Inc. v. Ziplocal, LP, 795 F.3d 1255 (11th Cir. 2017).

Reducing a prevailing party's request for attorney's fees and costs in strict, mathematical proportion to the results obtained at trial is an abuse of discretion.

Henderson v. Onewest Bank, FSB, 217 So. 3d 209 (Fla. 1st DCA 2017).

"Absent a stipulation or waiver, the party seeking fees should present testimony from the lawyer who performed the services or an authorized representative of the law firm, and an expert as to reasonableness of the rates and fees. . . If the record reflects some evidence supporting the fee award, but not testimony from the lawyer or law firm or an expert, the proper remedy is to remand for further proceedings."

Isla Blue Development, LLC v. Moore, 223 So. 3d 1097 (Fla. 2d DCA 2017).

A "safe harbor notice" under Florida Statute section 57.105 need not comply with Florida Rule of Judicial Administration 2.516, i.e., need not be served via email and otherwise, in order to be effective. Conflict certified with Matte v. Caplan, 140 So. 3d 686 (Fla. 4th DCA 2014).

Estimable v. Prophete, 219 So. 3d 1001 (Fla. 4th DCA 2017).

A "safe harbor letter" under Florida Statute section 57.105 must strictly comply with Florida Rule of Judicial Administration 2.516(b)(1)(E), and requires"(i) the attachment of a copy of the document in PDF format, and a link to the document on a website maintained by a clerk; (ii) the subject line begin with the words 'SERVICE OF COURT DOCUMENT' in all capital letters, followed by the case number; and (iii) the body of the email identify the court in which the case is pending, the case number, the name of the initial party on each side, the title of each document served with that email, and the name and telephone number of the person required to serve the document.'"

Nationstar Mortgage LLC v. Glass, 219 So. 3d 896 (Fla. 4th DCA 2017).

On Motion for Rehearing En Banc the Fourth District follows Bank of New York Mellon Trust Company, N.A. v. Fitzgerald, 215 So. 3d 116 (Fla. 3d DCA 2017), and holds that a party that successfully defends on lack of standing is not entitled to an award of contractual prevailing party attorney's fees since there is no contract between the parties.

Florida Farm Bureau Casualty Insurance Company v. Gray, --- So. 3d ---- 2017, WL 4318904 (Fla. 1st DCA 2017).

The failure of a client to pay his attorney the contracted-for hourly rate does not transform the representation into a contingency fee representation, and as a result, a multiplier is not proper under this form of representation.

Joyce v. Federated National Insurance Company, 228 So. 3d 1122 (Fla. 2017).

Contingency multipliers are not just for "rare" and "exceptional" cases.

In re Estate of Assimakopoulos, 228 So. 3d 709 (Fla. 2d DCA 2017).

An award under Florida Statute section 57.105(1) may only include fees and may not include costs, including expert witness fees.

Tower Hill Signature Insurance Company v. Javellana, --- So. 3d ---- 2017, WL 6347070 (Fla. 3d DCA 2017).

A court must look at the "true relief" sought, not just the pleaded causes of action, in determining whether a party seeks both legal and equitable relief and is thus precluded from claiming attorney's fees under Florida Statute section 768.79.

RECEIVERS

Asset Recovery Group, LLC v. Cabrera, --- So. 3d ---- 2017 WL 5616883 (Fla. 3d DCA 2017).

A party, in both state and federal courts, must seek leave of the court that appointed a receiver before it can sue the receiver. The "carrying on business" exception of 28 U.S.C. § 959(a) does not apply against receivers appointed by state courts.

MUNICIPAL GOVERNMENT

Bank of America Corp. v. City of Miami, 137 S.Ct. 1296 (2017).

A municipality has standing as "aggrieved person" under the Fair Housing Act, 42 U. S. C. §§3604(b), 3605(a), and may state a cause of action against a lender for discriminatory lending practices under the statute.

City of Cooper City v. Joliff, 227 So. 3d 633 (Fla. 4th DCA 2017).

A municipal special assessment that is improperly apportioned is voidable, not void, and as a result must be challenged within the specified time frame.

Indian Creek Country Club, Inc. v. Indian Creek Village, 211 So. 3d 230 (Fla. 3d DCA 2017).

A municipal special assessment can only be imposed if the property assessed derives a special benefit from the service provided and when the assessment is fairly and reasonably apportioned according to the benefits received. Whether to impose a special assessment is a legislative function which can be overturned only if there is no substantial, competent evidence to support the decision.

SOCIAL MEDIA

Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association, --- So. 3d ---- 2017 WL 3611661 (Fla. 3d DCA 2017).

A "Facebook friendship" between a judge and a lawyer does not signify a true friendship, and is not, without more, sufficient to disqualify the judge from pending case where the Facebook friend is one of the lawyers.

STATUTORY UPDATE

REAL PROPERTY IMPROVEMENTS: F.S. 95.11(3)(C)

Completion of a contract relating to design, planning, construction or improvements to real property shall be the latter of completion of all work or when final payment is due.

ESTOPPEL CERTIFICATES: F.S. 718.116, 719.108, AND 720.30851

Statutory changes requires specifies delivery requirements for an estoppel certificate; requires that an estoppel certificate contain certain information; providing an effective period for an estoppel certificate based upon the date of issuance and form of delivery; prohibiting an association from charging a preparation and delivery fee or making certain claims if it fails to deliver an estoppel certificate within certain timeframes; revising fee requirements for preparing and delivering an estoppel certificate under various circumstances; authorizing the statement of moneys due to be delivered in one or more estoppel certificates under certain circumstances; providing limits on a total fee charged for the preparation and delivery of estoppel certificates.

CONDOMINIUM TERMINATIONS: F.S. 718.117

- Division of condominium must approve plan.
- Changes from at least 80% of the total voting interests of the condominium for approval of the plan of termination and now only requires 5% or more of the total voting interests of the condominium to reject the termination.