Conference Manual

Fund Assembly

Orlando | May 9-11, 2019

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Fund Assembly
Speaker Topics

Thursday, May 9

Welcoming Remarks 1

The Many Faces of the BFP – A Day in 'Claims Court' 3

The Continuing Evolution of Wire Fraud Schemes:
Prevention, Mitigation & Recovery 41

General Counsel's Perspective 51

Title Teasers 53

Friday, May 10

Breakouts

Bank Secrecy and Spotting Money Laundering 82

Agathokakological* Nature of Property Assessed Clean Energy (PACE) Loans 118

Insuring Leases: Valuation, Endorsements,
and Other Consideration 276

Marketing & Ethics Panel Discussion 332

Coulda, Shoulda, Woulda: Avoiding Claims of Legal
Malpractice in Real Estate Transactions 365

Caught in The Dark Web – A Real Estate Attorney's View 513

Easements & Access from Title Insurer's Perspective 538

General Session

To All The Economists I've Loved 562

Mastering Florida's Marketable Record Title Act 564

Legislative Update - 2019 617

Digital Closings and Remote Online Notarization:
The Latest and Greatest 619

Quiz on Recent Real Property Cases 673

Saturday, May 11

Residential Track

Homestead - Conveyances, Mortgages and Disposition
After the Death of the Titleholder 688

Representing Foreign Buyers – Choice of Entity and Compliance:
What You Don't Know May Hurt You 730

Attorneys Are From Mars & Realtors® Are From Venus:
Serving the Unique Legal Needs of Real Estate Agents 779

Commercial Track

Commercial Workflows, Tips & Efficiencies Panel Discussion 851

Negotiating Commercial Real Estate Loan Documentation:
Bridging the Gap Between Borrowers and Lenders 855

Title Insurance Aspects of Florida's Construction Lien Law 874

Accreditation ..... A

Back to Speaker Topics

Fund Assembly

Welcoming Remarks

Melissa Murphy, *Executive Vice President, Chief Legal Officer, General Counsel and Secretary, The Fund*

Back to Speaker Topics

Speaker Information

Welcoming Remarks

Melissa Murphy

Executive Vice President, Chief Legal Officer, General Counsel and Secretary, The Fund

I began working for The Fund in October of 2014. As General Counsel, I am using my 35 years of private practice experience to help The Fund continue to provide its lawyer members with everything they need to be successful in their real estate practices.

I really believe in the value an attorney brings to a real estate transaction. The Fund plays such a pivotal role in helping attorneys stay efficient in their practices and up-to-date on the laws and regulations; and the numbers at Assembly show we are doing it the right way. Watching the people here work so hard to support the membership is very energizing and motivating.

As The Fund looks to support attorneys in the future, I hope to help accomplish that goal in new and creative ways. I am excited about being part of this.

Back to Speaker Topics

Fund Assembly

The Many Faces of the BFP – A Day in 'Claims Court'

George Perez, *Claims Manager, The Fund*
Michael Rothman, *Legal Education Manager, The Fund*
Carlos Lerman, *Shareholder, Lerman & Whitebook, P.A.*

Back to Speaker Topics

Speaker Information

The Many Faces of the BFP – A Day in 'Claims Court'

George Perez

Claims Manager, The Fund

George Perez is The Fund's Claims Manager. He graduated from the University of Central Florida and Brooklyn Law School. Prior to joining The Fund, Mr. Perez was in private practice where he was involved in transactional real estate for both residential and commercial properties; as well as representing institutional lenders. He was also a real estate and title insurance litigator representing a number of title insurance underwriters. During his years of private practice, Mr. Perez was also involved in estate planning/probate and trust administration as well as business law. He has taught in Valencia College's ABA-accredited paralegal studies program in addition to being a regular speaker at The Fund's New Member Training program. He is a member of the Florida Bar.

Michael Rothman

Legal Education Manager, The Fund

Michael Rothman is The Fund's Legal Education Manager, having joined The Fund in 2017. As Legal Education Manager, Mr. Rothman oversees the production of The Fund's live webinars and other educational offerings, and supervises New Member Training. Prior to joining The Fund, Mr. Rothman was a partner in the Miami office of Rothman & Tobin, P.A., where he served as outside claims counsel for The Fund, assisting in the resolution of title claims for its insured owners and lenders. Mr. Rothman also was a long-time Fund Member and handled residential and commercial closings. He represented some of Florida's premier homebuilders in many south and central Florida communities, including Weston, Abacoa, Celebration, Baldwin Park, Lake Nona and Golden Oak.

Mr. Rothman has presented at The Fund Assembly on multiple occasions, and was a frequent lecturer for National Business Institute, speaking on topics ranging from claims avoidance to ethical considerations for the real estate practitioner.

Mr. Rothman is a graduate of SUNY-Albany and the University of Miami School of Law. He is a certified circuit court mediator, specializing in disputed real estate matters.

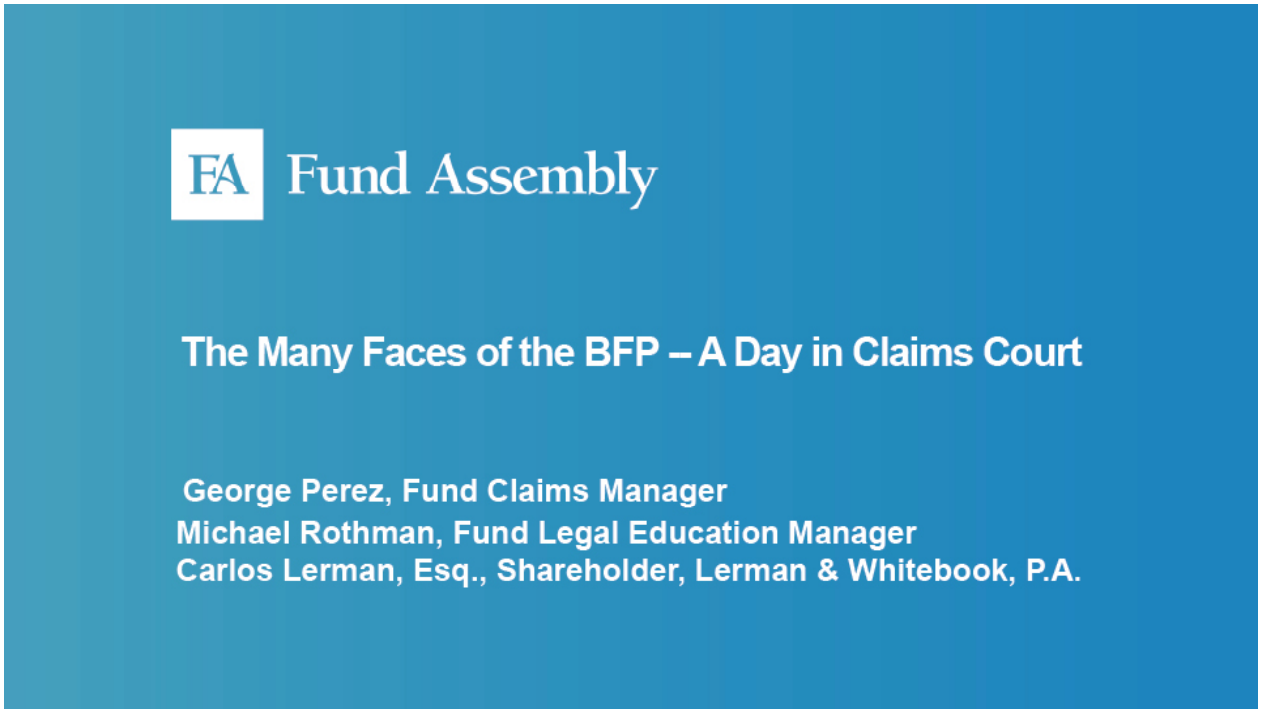
Back to Speaker Topics

Carlos Lerman

Shareholder, Lerman & Whitebook, P.A.

Carlos Lerman is a shareholder with Lerman & Whitebook, P.A. Mr. Lerman practices in Miami-Dade, Broward, Palm Beach and Monroe Counties. He concentrates his practice in the areas of title litigation (representing insureds and insurers), commercial and real estate litigation, mortgage and construction lien foreclosures, landlord-tenant disputes, and contract and business disputes. He also handles real estate transactions including commercial and residential closings and leasing.

Mr. Lerman received his B.B.A. degree, from Florida International University in 1985 and his J.D. degree from the University of Miami Law School in 1988. Mr. Lerman was a member of the University of Miami Law Review. He was admitted to the Florida Bar in 1988. In addition, Mr. Lerman is an active Florida licensed real estate sales person and is a member of both the state and local bar associations. Mr. Lerman is a frequent lecturer on various legal topics concerning title insurance claims and real property law.


FA Fund Assembly
The Many Faces of the BFP – A Day in Claims Court
George Perez, Fund Claims Manager
Michael Rothman, Fund Legal Education Manager
Carlos Lerman, Esq., Shareholder, Lerman & Whitebook, P.A.

Case No. 1- The Statutory BFP: *Tyson Enterprises, Inc. v. Douglas*

- Tyson Enterprises (creditor)
- Filed lawsuit against King for money damages only
- King transfers title to Arum
- Arum sells to Douglas
- FJ in favor of Tyson
- Tyson claims fraudulent transfer

- Douglas (current fee owner)
- Paid valuable consideration to Arum
- Does not know Tyson Enterprises or King
- No knowledge of lawsuit between Tyson and King

Case No. 1- The Statutory BFP: *Tyson Enterprises, Inc. v. Douglas*

- Ruling: In favor Douglas
- Florida Statutes 726.105 & 726.106 – the power to set aside a fraudulent transfer
- Florida Statute 726.109 - the statutory BFP
- No actual or constructive notice on the part of Douglas

Select Year: 2018 Go

The 2018 Florida Statutes

Title XLI
STATUTE OF FRAUDS, FRAUDULENT TRANSFERS, AND GENERAL ASSIGNMENTS

Chapter 726
FRAUDULENT TRANSFERS

View Entire Chapter

726.105 Transfers fraudulent as to present and future creditors.—

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

History.—s. 5, ch. 87-79; s. 937, ch. 97-102.

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The 2018 Florida Statutes

Title XLI
STATUTE OF FRAUDS, FRAUDULENT TRANSFERS, AND GENERAL ASSIGNMENTS

Chapter 726
FRAUDULENT TRANSFERS

View Entire Chapter

726.106 Transfers fraudulent as to present creditors.—

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

History.—s. 6, ch. 87-79.

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Title XLI
STATUTE OF FRAUDS, FRAUDULENT TRANSFERS, AND GENERAL ASSIGNMENTS

Chapter 726
FRAUDULENT TRANSFERS

View Entire Chapter

726.109 Defenses, liability, and protection of transferee.—

(1) A transfer or obligation is not voidable under s. 726.105(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under s. 726.108(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) The first transferee of the asset or the person for whose benefit the transfer was made; or

(b) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under subsection (2) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under ss. 726.101-726.112, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) A lien on or a right to retain any interest in the asset transferred;

(b) Enforcement of any obligation incurred; or

(c) A reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under s. 726.105(1)(b) or s. 726.106 if the transfer results from:

(a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) Enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

(6) A transfer is not voidable under s. 726.106(2):

(a) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(b) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) If made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

(7)(a) The transfer of a charitable contribution that is received in good faith by a qualified religious or charitable entity or organization is not a fraudulent transfer under s. 726.105(1)(b).

(b) However, a charitable contribution from a natural person is a fraudulent transfer if the transfer was received on, or within 2 years before, the earlier of the date of commencement of an action under this chapter, the filing of a petition under the federal Bankruptcy Code, or the commencement of insolvency proceedings by or against the debtor under any state or federal law, including the filing of an assignment for the benefit of creditors or the appointment of a receiver, unless:

1. The transfer was consistent with the practices of the debtor in making the charitable contribution; or

2. The transfer was received in good faith and the amount of the charitable contribution did not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the charitable contribution was made.

History.—s. 9, ch. 87-79; s. 2, ch. 2013-189.

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Case No. 2- BFP Based on Recording Act- *Borg v. Connors*

- Agassi sold house to Borg
- Borg closed on Monday, Jan. 3
- Borg recorded deed on Wed., Jan. 5
- Borg paid value
- Borg did not know about Connors

- Agassi sold house to Connors
- Connors closed on Tuesday, Jan. 4
- Connors recorded deed on Thur., Jan. 6
- Connors paid value
- Connors did not know about Borg

Case No. 2- BFP Based on Recording Act- *Borg v. Connors*

- Ruling in favor of Connors
- Florida is a "notice" state, see Sec. 695.01, F.S.
- Florida law protects the subsequent BFP
- Borg and Connors both victims of Agassi's fraud
  - But who could've better protected himself?
  - Borg could have and should have recorded on Monday
  - Connors would have then been on constructive notice
  - Demonstrates importance of prompt recording!

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The 2018 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 695
RECORD OF CONVEYANCES OF REAL ESTATE

View Entire Chapter

695.01 Conveyances and liens to be recorded.—

(1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

(2) Grantees by quitclaim, heretofore or hereafter made, shall be deemed and held to be bona fide purchasers without notice within the meaning of the recording acts.

(3) A lien by a governmental entity or quasi-governmental entity that attaches to real property for an improvement, service, fine, or penalty, other than a lien for taxes, non-ad valorem or special assessments, or utilities, is valid and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration only if the lien is recorded in the official records of the county in which the property is located. The recorded notice of lien must contain the name of the owner of record, a description or address of the property, and the tax or parcel identification number applicable to the property as of the date of recording.

History.—ss. 4, 9, Nov. 15, 1828; RS 1972; GS 2480; RGS 3822; CGL 5698; s. 10, ch. 20954, 1941; s. 8, ch. 85-63; s. 2, ch. 2013-241.

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Case No. 3 – BFP In The Face of Forgery- *Bartman v. Buckner*

- Bartman owns property free and clear
- Deed from Bartman to grantor
- Deed from grantor to Buckner
- Bartman discovers deeds
- Bartman sues to quiet title based on forgery

- Buckner paid valuable consideration
- Not familiar with Bartman
- No knowledge of alleged forgery

Case No. 3 – BFP In The Face of Forgery- *Bartman v. Buckner*

- Ruling: In favor of Buckner
- Void vs. Voidable
- General Rule- no BFP in face of a forgery
- Exception- Equitable Estoppel
- *Zustrassen v. Stonier*, 786 So.2d 65 (Fla. 4th DCA 2001)
- Knowledge by victim + delay + intervening interest = BFP
- No knowledge on the part of Buckner

Back to Speaker Topics

786 So.2d 65

Klaus ZURSTRASSEN, Appellant,
v.
David STONIER, Edward Wihlborg and Diane Wihlborg, Appellees.

No. 4D00-294.

District Court of Appeal of Florida, Fourth District.

May 16, 2001.

[786 So.2d 67]

Wayde P. Seidensticker, Jr. and Katy L. Koestner of Seidensticker & San Filippo, LLP, Naples, and Cohen, Conway, Copeland & Paiva, P.A., Stuart, for appellant.

Matthew G. Brenner of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, for appellees-Edward Wihlborg and Diane Wihlborg.

WARNER, C.J.

The trial court entered summary judgment in this suit to quiet title, finding that appellant waived the right and/or was estopped from asserting the forgery of his signature on a deed conveying the property to his brother. It further found that appellant ratified his brother's subsequent sale of the property. Because we conclude material issues of fact remain, we reverse.

Appellant, Klaus Zurstrassen, a citizen of Germany, and his brother, Rolf, a citizen of the United States, acquired title to two vacant lots in Indian River County in June 1997. The brothers intended to build on the lots and then sell them. On September 10, 1997, Klaus returned to Germany, leaving Rolf in charge of commencing construction. While construction commenced on one lot, a deed was recorded in the public records on September 25, 1997, purportedly conveying Klaus's ownership in the lots to his brother Rolf. Klaus claims that the deed was a forgery and that he had no knowledge of it.

Klaus returned from Germany in October, and construction on the one lot continued. Just before Klaus left again for Germany, the brothers agreed to sell the constructed home. Klaus met with a realtor to prepare a listing. The realtor researched the title and informed Klaus that his name did not appear on the last deed in the chain of title. He was not shown any deed and did not know that title was vested in his brother's name alone. Klaus asked Rolf about it, and Rolf told Klaus that he did not know why Klaus's name did not appear on the deed but that he should not be concerned with it. Because of the uncertainty created by the revelation of some title problems and the necessity of Klaus to return to Germany, the brothers signed a document between them recognizing Klaus's interest and the terms of the brothers' initial agreement regarding the properties.[1] The agreement stated that title to the properties was in Rolf's name alone and it outlined the process of selling the properties and distributing the proceeds. Klaus then returned to Germany.

In June of 1998, Rolf transferred both lots to David Stonier by quitclaim deed. Stonier was unaware that Klaus made any claim to the property. Then in August of 1998, Stonier executed a warranty deed on one lot to the Wihlborgs. The deed to the Wihlborgs was mistakenly recorded in Brevard County and was not recorded in Indian River County until November 23, 1998.

While in Germany, Klaus was notified that the lots had been sold. However, when he returned to the United States, he immediately began investigating the title to the property and uncovered the forged deed and the subsequent deeds. He instituted suit to quiet title to the property and for rescission on November 9, 1998, and filed a notice of lis

fastcase

Back to Speaker Topics

pendens on November 10, 1998, thirteen days before the Wihlborg deed was recorded in Indian River County. Both Stonier and the Wihlborgs

[786 So.2d 68]

answered the suit and claimed that Klaus was estopped from asserting any rights because he had acknowledged in the February 1998 agreement that title to the property was in his brother's name and he had delayed in objecting to any purported fraud. Stonier also alleged that he was a bona fide purchaser for value and filed a counterclaim for slander of title and damages.

Stonier and the Wihlborgs moved for summary judgment and conceded for purposes of the motion only that Klaus's deed to Rolf was a forgery. The trial court entered summary judgment in their favor on the quiet title and rescission claims, concluding that because Klaus was aware as of February 1998 that the property was titled solely in Rolf's name and failed to object, Klaus had waived or was estopped from asserting any right to object to any subsequent sale to Stonier. This appeal ensued.

Equitable Estoppel:

We think Klaus is correct in his assertion that the forged deed is void and thus creates no legal title nor affords protection to those claiming under it. *See McCoy v. Love*, 382 So.2d 647, 648 (Fla. 1979); *Lloyd v. Chicago Title Ins. Co.*, 576 So.2d 310, 311 (Fla. 3d DCA 1990). *See also Jammadas v. Singh*, 731 So.2d 69, 70 (Fla. 5th DCA 1999)(forged mortgage is void and a legal nullity); *Southeast Bank, N.A. v. Sapp*, 554 So.2d 1193, 1195 (Fla. 1st DCA 1989)(same). In *Wright v. Blocker*, 144 Fla. 428, 198 So. 88 (1940), relied on in *McCoy*, the court said of the effect of such deeds, "`[a] forged deed, in the sense defined above, is absolutely void and wholly ineffectual to pass title, even to a subsequent innocent purchaser from the grantee under such forged deed.'" *Id.* at 91 (quoting 16 Am Jur. 451-2).

Appellees rely on *Sunrise Savings and Loan Ass'n of Florida v. Giannetti*, 524 So.2d 697 (Fla. 4th DCA 1988). In *Giannetti*, a person forged Giannetti's signature on a satisfaction of mortgage which was relied upon to the detriment of Sunrise Savings and Loan which made a subsequent loan believing it to have priority. This court held that because Giannetti was negligent in not discovering the forged satisfaction of mortgage, as between two "innocent" parties, Giannetti was more blameworthy and therefore should suffer the loss. This court relied on two cases, *United Service Corp. v. Vi-An Construction Corp.*, 77 So.2d 800 (Fla.1955), and *Jones v. Lally*, 511 So.2d 1014 (Fla. 2d DCA 1987). However, neither *Vi-An* nor *Jones* involved a forgery. As *McCoy* pointed out, where fraud in the inducement is present, a deed may be voidable in equity, but it can still convey title. 382 So.2d at 649. *Giannetti* was criticized in *Sapp* which pointed out that the opinion gave no consideration to the law regarding forged instruments. *See Sapp*, 554 So.2d at 1196. *Giannetti*, however, relies on estoppel arguments to reach its result. As we hereinafter explain, equitable estoppel principles apply, even to void deeds. Thus, *Giannetti* is not inconsistent with *McCoy*, *Lloyd*, and *Jammadas*.

Because the deed conveying title from Klaus to Rolf is void, it had no legal effect to transfer Klaus's ownership of the property to Rolf. Nevertheless, appellees still argue that Klaus should be estopped from asserting his claim that the deed was a forgery because of his subsequent knowledge of the forgery. The elements of estoppel are: (1) representation of a material fact by the party estopped to the party claiming the estoppel that is contrary to the fact later asserted by the estopped party; (2) reliance on that representation by the party claiming the estoppel; and (3) the party

fastcase

Back to Speaker Topics

claiming the estoppel detrimentally changed their position due to such

[786 So.2d 69]

reliance. *See Jewett v. Leisinger*, 655 So.2d 1210, 1212 (Fla. 4th DCA 1995). In the context of title to disputed land, estoppel prevents a party who by acts, words, or silence allows another to purchase title to property "under an erroneous opinion of title, without making known his claim," from afterwards exercising his or her legal right against such person. *Coram v. Palmer*, 63 Fla. 116, 58 So. 721, 722 (1912).

Robertson v. Robertson, 61 So.2d 499 (Fla.1952), suggests that in certain circumstances a party may assert equitable estoppel against a claim that conveyances are void as a result of forgery. In *Robertson*, a sister forged her brother's name to a deed purporting to convey the property to her. She then executed several mortgages on the property to obtain funds. After the sister encountered other problems, one of the mortgagees disclosed the forged deed to the brother at the sister's request. The sister then executed a conveyance back to the brother. The deed recited that it was subject to the mortgages. Upon later foreclosure by one of the mortgagees, the brother filed an action for declaratory and other relief on the ground that the mortgage was based upon the forged deed. The mortgagee asserted that the brother was equitably estopped to assert the forgery. In ruling in favor of the brother, the court said:

> As stated in 19 Am.Jur., Estoppel, Sec. 34, page 634: "Equitable estoppel or estoppel in pais is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon, thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed." We do not think the circumstances here are such as to work an estoppel against the appellant, within the rule stated.
>
> *It is essential in proving an estoppel that the party asserting the same show that he relied upon the conduct of his adversary and changed his position in reliance thereon, and that he would consequently be injured by an assertion of the truth or that the other party has benefited by his former position. L.B. Price Mercantile Co. v. Gay*, Fla., 44 So.2d 87 [1950].
>
> Here, the forged deed had been executed and recorded, and the mortgages executed and recorded, *before* the appellant learned what had transpired. The damage had already been done, at the time he accepted a reconveyance of the property from his sister. The fact of the forgery was disclosed by the appellant to the Tinters' attorney immediately after he himself learned of it, and we have no doubt that this fact was communicated forthwith by such attorney to the Tinters.

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Back to Speaker Topics

> While the Tinters may have filed their foreclosure suit relying on the recital in the deed from Sarah to the appellant that the appellant assumed and agreed to pay the mortgages, and the appellant's subsequent attempts to obtain refinancing thereof, on the off-chance that the appellant would not plead the defense of forgery available to him, this is purely suppositional, as the record is devoid of any evidence to this effect. "When a party is to be deprived of his property or his right to maintain an action by an estoppel, the equity ought to be strong and proof clear ...."
>
> [786 So.2d 70]
>
> *Hooper v. Bail*, 133 Me. 412, 179 A. 404, 406.

Id. at 503-04 (underlined emphasis added). Further, only a party who relied on statements made to that party can claim that the speaker is estopped by those statements. *See Fotomat Corp. of Fla. v. R.B. Films, Inc.*, 366 So.2d 1213, 1217 (Fla. 1st DCA 1979).

In the instant case, there were no representations by Klaus to either purchaser of the lots. Indeed, it does not appear that either Stonier or the Wihlborgs had any knowledge of the paper signed by both brothers which explained that title was in Rolf's name but both brothers would share in the profits.[2] Moreover, there is no evidence of record that Klaus knew at the time he signed that paper that his signature had been forged onto a deed conveying his interest to his brother. *Cf. First S. Ins. Co. v. Ocean State Bank*, 562 So.2d 798, 800 (Fla. 1st DCA 1990) (if owner knowingly cloaks another with indicia of ownership or authority, doctrine of estoppel precludes owner from complaining when a third party relies on representation to his detriment; but estoppel does not apply where indicia of ownership is not knowingly given by true owner, such as in case of forgery). All he knew as he was leaving for Germany was that the realtor reported that his name was not on the title, but he did not know the reason or the legal ramifications. In sum, there were material issues of fact regarding the defenses of equitable estoppel raised by both Stonier and the Wihlborgs.

Waiver:

Likewise, there are issues of fact as to whether Klaus waived his right to contest the forged deed. "The elements of waiver are: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right." *Leonardo v. State Farm Fire & Cas. Co.*, 675 So.2d 176, 178 (Fla. 4th DCA 1996). A waiving party must possess all of the material facts in order to constitute waiver. *See Wilds v. Permenter*, 228 So.2d 408, 410 (Fla. 4th DCA 1969). Waiver of fraud can occur where a party should have discovered the fraud through ordinary diligence. *See Hurner v. Mut. Bankers Corp.*, 140 Fla. 435, 191 So. 831, 833 (1939).

Waiver may be implied by conduct, but that conduct must be clear. *See Am. Somax Ventures v. Touma*, 547 So.2d 1266, 1268 (Fla. 4th DCA 1989). Thus, while forbearance for a reasonable time alone cannot constitute waiver, *see id.* at 1268, conduct leading one to believe that a right has been waived may imply such a waiver. *See Arbogast v. Bryan*, 393 So.2d 606, 608 (Fla. 4th DCA 1981) (quoting 22 Fla. Jur.2d, *Estoppel & Waiver* § 89) (parties' failure to timely speak out and enforce a claim to commissions due from a transaction constituted waiver).

At the least, there is a question of fact as to whether Klaus acted diligently in discovering the forgery. Although he had been told the property was titled solely in Rolf's name, Rolf repeatedly assured him

fastcase

Back to Speaker Topics

[786 So.2d 71]

that he should not be concerned with title problems. Klaus had to leave for Germany immediately after learning that his name was not on the title. He began investigating the title immediately upon his return. Whether he should have started investigating earlier is a question of fact.

Ratification:

Because Klaus did not know of the forgery, we also conclude that the court erred in granting summary judgment on the issue of ratification of the fraud. Ratification occurs where a party with full knowledge of all the material facts makes an affirmative showing of his or her express or implied intention to adopt an act or contract entered into without authority. *See Deutsche Credit Corp. v. Peninger,* 603 So.2d 57, 58 (Fla. 5th DCA 1992). The issue is one of fact. *Id.* at 58-59. If a party knows of a fraud, does not reject it, and takes any material act inconsistent with an intent to avoid it or delays in asserting any remedial rights, then that party ratifies the fraud. *See Ball v. Ball,* 160 Fla. 601, 36 So.2d 172, 177 (1948). However, in the instant case, there is no evidence that Klaus knew of the forgery so as to reject it. Even though he signed the paper acknowledging that title was in Rolf's name and authorizing Rolf to sell the property, Rolf led him to believe that the title problems were a mix up and not the true state of ownership of the property. On this record, material issues of fact remain as to the issue of ratification.

For the foregoing reasons, we reverse and remand for further proceedings.

DELL and HAZOURI, JJ., concur.

Notes:

1. Klaus was required to leave the United States because of the expiration of his six month visa.

2. Stonier's claim that Rolf had good and valid title to the property is further belied to some extent by the fact that Rolf conveyed the property to Stonier by quitclaim deed. A quitclaim deed conveys whatever title the grantor has, if any. *See Blitch v. Sapp,* 142 Fla. 166, 194 So. 328, 330 (1940). A quitclaim deed provides no warranties of the validity of title. *See Goldtrap v. Bryan,* 77 So.2d 446, 448 (Fla.1954). Therefore it is hard to say as a matter of law that Stonier could have relied on the validity of title conveyed through a quitclaim deed.

Case No. 4- BFP in the Face of Fraud- *Winthorpe v. Valentine*

- Winthorpe falls into default on mortgage. Moves out of home. Is introduced to Beeks
- Beeks gets Winthorpe to sign a QCD
- Winthorpe thought he was signing loan modification application papers
- Beeks deeds to Duke. Duke deeds to Valentine
- Winthorpe sues Valentine to recover property on basis of fraud

- Valentine buys from Duke
- Claims not knowing anything about Duke and Beeks being bad guys
- Valentine never met or heard of Winthorpe
- Valentine claims he is a BFP

Case No. 4- BFP in the Face of Fraud- *Winthorpe v. Valentine*

- Ruling for Valentine
- Not a case of forgery
- Void v. Voidable
- House was vacant. Valentine not on notice of party in possession
- Valentine not part of the conspiracy
- Valentine is a BFP
- See *McCoy v. Love*, 382 So.2d 647 (Fla. 1979)

Back to Speaker Topics

Page 647

382 So.2d 647
Icie Lee Nowling McCOY, etc., Petitioner,
v.
Clyde E. LOVE et al., Respondents.
No. 52814.
Supreme Court of Florida.
Dec. 27, 1979.
Rehearing Denied May 14, 1980.

Stanley B. Levin and James R. Green, of Levin, Warfield, Middlebrooks, Mabie, Rosenbloum & Magie, Pensacola, and Allen W. Lindsay, Jr., of Beall, Lindsay & Lindsay, Milton, for petitioner.

John E. Venn, Jr., of Smith, Sauer & Venn, Pensacola, for respondents.

BOYD, Justice.

This cause is before the Court on petition for certiorari to review the decision of the court below, Love v. Elliott, 350 So.2d 93 (Fla.1st DCA 1977), on the ground that it is in conflict with a decision of another district court of appeal. We have jurisdiction. Art. V, § 3(b)(3), Fla.Const.

Page 648

Mary V. Nowling Elliott, now deceased, brought an action seeking the cancellation of a deed. The trial court found that Mrs. Elliott, a simple, elderly woman who could neither read nor write, owned an undivided one-fifth interest in the minerals underlying a seventy-five acre tract of land. In January 1972 B. G. Russell offered to buy her entire interest, but she refused. She orally agreed to sell Mr. Russell two of the thirteen to fifteen mineral acres she owned for $3300.00. The trial court found further:

Defendant Russell prepared the mineral deed, and instead of the two acres of minerals agreed upon, fraudulently substituted the clause: "one-fifth (1/5) interest in and to all the oil, gas, and other minerals" and then inserted the legal description of the 75 acres. Obviously, one-fifth of 75 acres is 15 acres a deal that the Plaintiff had consistently refused to make.

Mrs. Elliott lived with her daughter, who could read, write, and understand simple things. The daughter looked over the instrument Russell had prepared. Although she did not understand the deed, she advised Mrs. Elliott that she guessed it was all right.

Several days later, Russell contacted Mrs. Elliott and told her that he had made a mistake in drawing up the deed. He offered to pay her $15,000 for the interest that had been conveyed. She refused and insisted on a reconveyance of that portion of the interest which she had not intended to sell. "(O)n February 16, 1972, Russell and his wife purported to reconvey to Plaintiff the thirteen seventy-fifths (13/75ths) interest of which she had been defrauded." On February 11, 1972, however, Russell conveyed a substantial portion of the same mineral rights to C. P. McClelland, who later conveyed to respondents Messrs. Love, Harris, and Carpenter. Mrs. Elliott remained ignorant of the Russell-McClelland and subsequent transactions until October 1973 when she wanted to sell more of her mineral rights and a title search revealed them. She sued for cancellation of the deed. The trial court held in her favor, concluding:

By trick and fraud the Plaintiff was induced to sign a conveyance other than the one she intended to sign. Therefore, there was no lawful delivery of such instrument. The instrument is void. In light of her lack of education and attained age, the Court finds she was free of any negligence or inattention.

On appeal, the district court reversed. The court characterized the central question as being whether a deed procured by such fraud as was found in this case is void at law,

fastcase

Back to Speaker Topics

as the trial court held, or merely voidable in equity on petition of the defrauded grantor. If the deed was void, then no legal title passed to the grantee. If the deed was only voidable in equity, then the equitable defenses of laches and of a bona fide purchaser are available. See Holley v. May, 75 So.2d 696 (Fla.1954); Bryson v. Bridges, 51 Fla. 395, 41 So. 28 (1906).

A bona fide purchaser has the right to rely on the record title of his grantor, but this protection extends only to those purchasing a legal title. Myers v. Van Buskirk, 96 Fla. 704, 119 So. 123 (1928). The recording of a void or forged deed is legally insufficient to create a legal title, and affords no protection to those claiming under it. Reed v. Fain, 145 So.2d 858 (Fla.1962); Wright v. Blocker, 144 Fla. 428, 198 So. 88 (1940). (The question of whether a void or forged deed can constitute the root of title under the operation of the Marketable Record Titles law, chapter 712, Florida Statutes (1977), is not at issue in this case.)

The district court implicitly held that the deed in the instant case was voidable, as is indicated by the court's discussion of the applicability of the defenses of purchaser-without-notice and laches. In so doing it created conflict with Houston v. Mentelos, 318 So.2d 427 (Fla.3d DCA 1975).

The trial court cited Houston v. Mentelos in support of its holding that the deed was void. In that case, the plaintiff had orally agreed to lease her land. She signed two documents prepared by the purported lessee. One was a contract for sale and the other a warranty deed. The trial court

Page 649

found "that plaintiffs signature on the 'Warranty Deed' was obtained through the fraud of the defendant Thomas E. Mentelos who misrepresented that the documents which plaintiff signed embodied the oral lease agreement." 318 So.2d at 430. Also, the contract for sale was altered subsequent to its execution "by the addition of language which made the document to read like a contract to convey the subject real property rather than a lease agreement." Id. at 428. Mentelos, the fraudulent grantee, then executed a mortgage in favor of a mortgagee for value who had no notice of the fraud. Based on the trial court's conclusions that there was fraud and that there was no negligence on the part of the grantor, the district court held that the deed was void. We disapprove the holding of Houston v. Mentelos, 318 So.2d 427 (Fla.3d DCA 1975), to the extent that it held that a deed, the execution of which is procured by fraud, is void ab initio.

In Houston v. Mentelos, the court relied on the cases of Houston v. Adams, 85 Fla. 291, 95 So. 859 (1923) and Houston v. Forman, 92 Fla. 1, 109 So. 297 (1926). The rule enunciated in those cases was that where a grantor executes a deed and then places it in escrow, subject to conditions agreed to in a contract for sale, and the grantee gets possession of the deed through fraud, the deed is void, there is no conveyance, and a bona fide purchaser from the grantee will not be protected.

Delivery is an essential requisite of the execution of a deed conveying valid legal title. Without delivery, nothing passes to the grantee. Bould v. Coe, 63 So.2d 273 (Fla.1953); Lance v. Smith, 123 Fla. 461, 167 So. 366 (1936); Parken v. Jafford, 48 Fla. 290, 37 So. 567 (1904); Ellis v. Clark, 39 Fla. 714, 23 So. 410 (1897). The rule of Houston v. Adams that a deed procured by fraud is void is limited to situations where the fraud in the execution is such that it can be said there was a complete failure of delivery.

In Houston v. Adams, the grantor had attempted to condition the delivery through an escrow agreement. The grantor thus had given up actual possession of the deed but attempted to place conditions on its delivery. The grantor did not participate in the events

fastcase

Back to Speaker Topics

leading to the grantee's obtaining possession of the deed. No act of his made the fraud possible. The court likened the grantor's passivity in this matter to the situation where a safe is broken into and an undelivered deed stolen. We hold that the rule applied there is not appropriate to this case. Here, the execution of the deed, including delivery, was complete in all its legal requisites. The trial court's findings of fact that the grantee committed fraud and that the grantor was not negligent do not compel the conclusion that there was such a substitution of documents as to constitute failure of delivery or such an alteration of documents as to be the equivalent of a forgery. The grantor knew that she was executing and delivering a deed of mineral rights. The law charged her with the responsibility of informing herself as to the legal effect of the document she was signing. See Lewison v. Frumkes, 64 So.2d 321 (Fla.1952); Ross v. Richter, 187 So.2d 653 (Fla.2d DCA 1966).

Where all the essential legal requisites of a deed are present, it conveys legal title. Fraud in the inducement renders such a legally effective deed voidable in equity. Anders v. Anders, 143 Fla. 721, 197 So. 451 (1940). We hold that the district court was correct in holding that the deed was merely voidable, and that it conveyed a legal title to the grantee.

Because of its holding that the deed was void, the trial court granted summary judgment in favor of the plaintiff. Therefore there were no findings of fact on the issue of the good faith of the purchasers from McClelland. While the district court was correct in holding the deed voidable rather than void, there was no basis for it to conclude from the record that the defendants were bona fide purchasers. The case should be remanded for trial of this factual issue.

The decision of the district court, insofar as it held the deed voidable, is approved. It

Page 650

decision holding for the respondents is quashed with directions that the cause be remanded to the trial court for further proceedings consistent with this opinion.

It is so ordered.

ENGLAND, C. J., SUNDBERG and ALDERMAN, JJ., concur.

OVERTON, J., dissents with an opinion, with which ADKINS, J., concurs.

OVERTON, Justice, dissenting.

I dissent. The decision of the trial court was correct. I would hold the deed void under the factual circumstances of this case, which I find consistent with our holding in Houston v. Adams, 85 Fla. 291, 95 So. 859 (1923).

ADKINS, J., concurs.

fastcase

Case No. 5 – BFP Based on Reliance- *1st Bank of Madoff v. Rothstein National Bank*

- 1st Bank of Madoff (original mortgagee)
- Rothstein National Bank (subsequent mortgagee)
- Erroneous satisfaction of mortgage by 1st Bank of Madoff
- Defaults on both mortgages
- Priority dispute

- Rothstein National Bank is unrelated to 1st Bank of Madoff
- Satisfaction of record at time of origination of mortgage
- No knowledge of erroneous satisfaction

Case No. 5 – BFP Based on Reliance- *1st Bank of Madoff v. Rothstein National Bank*

- Ruling- in favor of Rothstein National Bank
- *United Service Corp. v. Vi-An Const. Corp.*, 77 So.2d 800 (Fla. 1955)
- Satisfaction based on fraud or administrative error (i.e. innocent lender) + no intervening interest = set aside/preserve priority
- Intervening interest (without knowledge of fraud or administrative error)? Junior lienor prevails. Reliance on official record *negates* relief sought by claimed senior lender

Back to Speaker Topics

Page 800

77 So.2d 800
UNITED SERVICE CORPORATION, a Florida corporation, Appellant,
v.
VI-AN CONSTRUCTION CORP., a Florida corporation, Jesse A. Owens and Mae FincherOwens, his wife, Appellees.
Supreme Court of Florida, Special Division A.
Jan. 25, 1955.
Rehearing Denied Feb. 22, 1955.

Page 801

George J. Bays, Miami, for appellant.

Herbert Schwarz, Miami, for John Nicholas, as Trustee & Receiver in Bankruptcy of the Estate of Vi-An Construction Corp.

J. Tillman Pearson, Miami, for Jesse A. Owens and Mae Fincher Owens, appellees.

DREW, Justice.

Appellant, United Service Corporation, (hereafter called United) loaned money to Vi-An Construction Corp., one of the appellees, (hereafter called Vi-An) in connection with a real estate development in Dade County.

About the time that Vi-An had completed a residence on Lot 14, Block 1 of Biscayne Gardens, Section 8, Part 5, according to the plat thereof recorded in Plat Book 49, page 3 of the public records of Dade County, Florida, it found purchasers for the same in Jesse A. Owens and Mae Fincher Owens, his wife, who then resided in the City of Atlanta, Georgia. The purchase price was $13,500, of which sum the purchasers paid $1,000 and secured therefor a preliminary receipt or contract of sale which provided for the delivery of a good and sufficient title, free of encumbrances, and the payment of the balance of $12,500 in cash at the time of taking title. A little while after the contract was entered into the Owens employed an attorney who examined the title and furnished them with an opinion thereto setting forth, among other things, that the property was encumbered by two mortgages, one in favor of United in the sum of $8,250 and the other in favor of H-5 Corporation in the sum of $1,200. In this appeal we are not concerned with the smaller mortgage.

On the day the Owens received a copy of the title opinion, the president of Vi-An, Vincent Cravero, called an attorney named Hagearty to meet with the Owens and their daughter and son-in-law, and Mr. Cravero and his wife, as president and secretary of the Vi-An Construction Corp., for the purpose of closing the transaction. It appears that Hagearty was employed by Cravero

Page 802

solely for the purpose of drawing the deed. The parties met in Hagearty's office and there was a discussion concerning the mortgages and the details of closing. The deed was prepared and was executed than and there by Mr. and Mrs. Cravero, as president and secretary of the corporation. The question of the mortgages was discussed and it was agreed that inasmuch as Mr. Owens' check for $12,500, the balance of the purchase price, was drawn on an Atlanta bank, the mortgages could not be satisfied at that time but that it would be necessary to wait a few days until the check cleared. Apparently at the suggestion of Mr. Cravero, the check of the Owens was made payable to Vi-An and at that time delievered to the seller so that it could be deposited for clearance. There is some dispute as to whether the check was actually handed to Mr. Cravero by Mr. Owens or was handed to Hagearty and by him handed to Mr. Cravero. In any event, the substance of the testimony is that Mr. Hagearty was to keep the deed until the check cleared and Mr. Cravero delivered him the original mortgage, original note and satisfaction at which time

fastcase

Back to Speaker Topics

he, Hagearty, was to record the satisfaction and the deed.

Cravero deposited the check on November 5th to the account of Vi-An. On November 11th, Cravero called the offices of United, with whom he had had extensive dealings of a similar nature, over a long period of time, and told them he would like to pick up the satisfaction of the mortgage on Lot 14, of Block 1. Later during the same day, he called at the office of the United and received an envelope containing the original mortgage, original note and duly executed satisfaction. Cravero placed these in his brief case where he held them for several days and until they were delivered to Hagearty, who recorded both the satisfaction and the original deed on November 24th. In the meantime, and two days subsequent to the time that United delivered the original mortgage, original note and satisfaction to Cravero, Cravero delivered a check to them in payment of the principal and interest due. We get the definite impression from the extensive testimony that this was not an unusual manner of handling matters of this kind because of the close relations and extensive financial dealings of these parties. This check was received by United on November 13th and deposited by it on that date. On November 18th, the check was returned because of insufficient funds but was redeposited by United at the request of Cravero. On November 21st the check was again returned, was held by United for three days, or until the 24th of November, and was deposited the third time. The check again was returned for insufficient funds on the 28th of November.

Between the time of the return of the check on the first occasion and its return the third time on November 28th, negotiations had taken place between United and Cravero concerning the precarious financial condition of Vi-An. During this period, and even though United was familiar with such precarious financial condition of Vi-An, United made additional advances in connection with the development. Beginning about the first of December there were numerous meetings between the officials of United and the officials of Vi-An with reference to the financial condition of the latter concerning a refinancing of the entire project and particularly concerning a proposition whereby Vi-An would assign certain of its assets over to United in connection with other obligations and indebtednesses existing between the companies. It was not until the latter part of December or early in January that Mr. and Mrs. Owens were advised or had any knowledge of the fact that the funds which they had delivered to Mr. Cravero had not been used in paying off the $8,250 mortgage. The first actual knowledge that they had of any trouble in the matter was when they were advised in the latter part of December by United and its attorney that they had better consult an attorney with reference to the matter. It was not until January 12th when suit was instituted by United to foreclose the previously satisfied mortgage that they actually knew just what position was being taken by United with reference to the matter.

Page 803

The lower court heard extensive testimony on the issues and entered a decree refusing to re-establish or enforce the mortgage lien. It is from this decree that this appeal has been taken by United.

It is the contention, among other things, of United that the mortgage was satisfied as a result of fraud practiced upon the mortgagee or mistake or accident and that the same should be re-established and foreclosed. They insist that such satisfaction should not inure to the benefit of the Owens because they, the Owens, did not rely upon the satisfaction when they paid their money to Cravero. They insist that this case is governed by the general principle of law, well recognized in this and other jurisdictions, that where the release or

fastcase

Back to Speaker Topics

satisfaction of a mortgage is the result of fraud, accident or mistake, it will not inure to the benefit of a person acquiring an interest in the property who did not rely or advance anything on the faith of such discharge. They insist that if the satisfaction did not enter into or induce the transaction, the restoration of the mortgage or the re-establishment of it does not operate prejudicially against the Owens or place them in any worse position than they were before. See 59 C.J.S., Mortgages, § 282 c. (4), page 351; 36 Am.Jur. 940, sec. 511.

This Court has long since recognized that a satisfaction of a mortgage procured by fraud or made through mistake may be cancelled if other parties having no notice of the fraud have not in the meantime acquired an interest in the property. Lovell v. Wall, 31 Fla. 73, 82, 12 So. 659, 661. In the foregoing case we held that no rights of third parties had intervened. We further held, 'There was no payment or satisfaction of the mortgage debt, and no valid cancellation of the mortgage. Mistakes as to the condition of one's title, or the correctness or regularity of antecedent proceedings may be classed with mistakes of fact, and are properly relieved from where the equity is clear.' (Emphasis supplied.) In Chappell v. Nalle, 119 Fla. 711, 713, 160 So. 867, 868, we said, 'The generally approved rule in such situations is that if the rights of innocent third parties have not intervened equity will grant relief to those who have through mistake released a mortgage before the debt was fully paid.' The above principles are firmly established and supported by abundant authority. The record is convincingly clear that when the Owens delivered their check for $12,500 to Cravero they had knowledge of the outstanding mortgages. The subsequent execution of the satisfaction and the delivery of it and the original mortgages and notes in no way induced them to part with such sum of money. Moreover, the record is abundantly clear that at the time United delivered the satisfaction and the original note and mortgage to Cravero without being paid in advance, Cravero's bank account had dwindled to the point that he did not have enough of the funds which had been previously given him by Owens to pay off the principal and interest due on the mortgage and was in serious financial difficulties finally resulting in bankruptcy. The argument of United that its negligence in delivering the satisfaction of the mortgage and the original mortgage and note to Cravero did not result in any injury to the Owens is logical and well taken. We are firmly of the view that had United acted promptly and in good faith when it discovered that the check given it by Cravero was not honored because of insufficient funds, and had then and there placed the Owens on notice thereof, and had advised the Owens that the satisfaction and original mortgage and note had been procured by them through fraud or misrepresentation on the part of Cravero or by mistake or had been satisfied by accident, they would have brought themselves within the rule which we have heretofore discussed and would then have been in a favorable position, under the circumstances of this case, to have sought the re-establishment of their mortgage and its foreclosure in the Equity Court. The failure of United to take this affirmative action promptly invoked the well-established rule that 'if one remains silent when it is his duty to speak, he will not be permitted to speak when in

Page 804

justice he should remain silent.' Instead of promptly notifying the Owens that Cravero had misappropriated the funds which they had entrusted to him and had not paid the mortgage which he was under obligation to pay, (knowledge not possessed by the Owens) and placing the Owens in a position then and there to take appropriate legal action to recoup the monies which were entrusted to Cravero, United elected to deal with Cravero and to redeposit the bad check on three separate occasions. Moreover, United, having

fastcase

Back to Speaker Topics

knowledge of the precarious financial condition of Cravero and his company-a fact wholly unknown to the Owens-proceeded to advance Cravero and his company additional monies and to negotiate with Cravero with reference to obtaining security for other obligations which existed between them. It was not until late in December and probably not until January 12th that the Owens knew or even suspected that United intended to look to them instead of Cravero and his company for the payment of the mortgage. Under such circumstances, it would be inequitable and unjust to extend to United the aid of equity in re-establishing its mortgage and the lower court was eminently correct in so holding.

The principle which we discussed in the forepart of this opinion, allowing the re-establishment of a mortgage which has been paid or cancelled through mistake or fraud or accident, is primarily concerned with the effect of such satisfaction as between the mortgagor and the mortgagee. Woven throughout the decisions dealing with this question, as well as the discussion of it by the text writers, is the observation that such principle will be enforced only if the rights of innocent third parties have not intervened. In this case the conduct of United after it discovered the defalcation of Cravero operated to the disadvantage of the Owens and from that point on they fell into the same category as innocent third parties referred to in the foregoing authorities. The Owens would probably have been in an exceedingly strong position to have recouped at least a part of their loss had United notified them promptly. There was negligence on the part of both Owens and United. Owens was negligent in paying over his money to Cravero without first securing the satisfaction of the mortgages. United was negligent in its careless manner of delivering to Cravero the original note, mortgage and satisfaction without requiring payment therefor. The rule is firmly settled that where one of two innocent parties must suffer a loss, the loss must fall on the one whose negligence or conduct contribute the greater to the loss. Had United acted promptly, as we have heretofore suggested, we think the application of the principle announced would have warranted the re-establishment of the mortgage. But the conduct of United after the discovery of the desperate financial condition of Vi-An was sufficient to place the greater blame and the greater negligence on its shoulders. In passing on this question the lower court said 'On consideration of the evidence, including that bearing on the status and experience of the parties involved, the history of their dealings and opportunities to know or anticipate actions of the others and their dealings and conduct after discovery of the fraud or default, this Court finds that the evidence preponderates in favor of the defendant owners of the property. The negligence and actions of the plaintiff place a definite excess of blame on plaintiff for the result.' (Emphasis supplied.) The lower court further said 'Even if the negligence or neglect of the parties in this connection were equal, the court would still be required to leave the parties in their present positions and would not be justified in shifting the present status of loss from one party to the other as prayed for by the plaintiff.'

In Tampa & J. Ry. Co. v. Catts, 79 Fla. 235, 247, 85 So. 364, 367, we quoted from Pomeroy on equity jurisprudence as follows:

"He who comes into equity must come with clean hands.'

"It (the maxim) assumes that the suitor, asking the aid of a court of equity, has himself been guilty of conduct in violation of the fundamental

Page 805

conceptions of equity, and therefore refused him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party, who,

fastcase

Back to Speaker Topics

as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or award any remedy.' Vol. 1, Pomeroy, third edition, par. 397.'

It must be remembered that here we are talking about principles relating to remedies. The mortgage has been satisfied. The legal rights of the parties have become fixed. The question we are considering is whether equity will lend its aid to restore the mortgage to verity and enforce its payment. In our judgment the scales of justice are sharply inclined in favor of the appellees. Loss must be suffered by one or the other. We agree with the lower court that the greater fault lies with appellant.

Affirmed.

MATHEWS, C. J., SEBRING and ROBERTS, JJ., concur.

fastcase

Case No. 6 – BFP Matters Not Entitled To Recording- *Adverse Bank v. Hard Money Financial, LLC*

- Adverse Bank made $300k loan
- Insured in first lien position
- Loan goes into default and Adverse Bank sues to foreclose
- Adverse Bank names Hard Money Financial as junior lienor
- Parties stipulate that Adverse Bank's mortgage was recorded ahead of Hard Money Financial's mortgage

- Hard Money Financial made $300,000 hard money loan
- Title report issued by Second National Title & Auto Repairs failed to disclose Adverse Bank
- Hard Money Financial made its loan on basis of appraisal
- Admits its mortgage was recorded after Adverse Bank's mortgage but asserts priority based upon defective acknowledgement

Case No. 6 – BFP Matters Not Entitled To Recording- *Adverse Bank v. Hard Money Financial, LLC*

- Ruling for Hard Money Financial, LLC
- Sec. 689.02, F.S. requires that a mortgage must be acknowledged to be recorded
- Adverse Bank's mortgage bears a jurat, not an acknowledgement
- Instruments not entitled to recordation impart no constructive notice
- See *Summa Investing Corporation v. McClure*, 569 So.2d 500 (Fla 3d DCA 1990)

Select Year: 2018 Go

The 2018 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 689
CONVEYANCES OF LAND AND DECLARATIONS OF TRUST

View Entire Chapter

689.02 Form of warranty deed prescribed.—

(1) Warranty deeds of conveyance to land may be in the following form, viz.:

"This indenture, made this day of A.D. , between , of the County of in the State of , party of the first part, and , of the County of , in the State of , party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of dollars, to her or him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold to the said party of the second part, her or his heirs and assigns forever, the following described land, to wit:

And the said party of the first part does hereby fully warrant the title to said land, and will defend the same against the lawful claims of all persons whomsoever."

(2) The form for warranty deeds of conveyance to land shall include a blank space for the property appraiser's parcel identification number describing the property conveyed, which number, if available, shall be entered on the deed before it is presented for recording. The failure to include such blank space or the parcel identification number, or the inclusion of an incorrect parcel identification number, does not affect the validity of the conveyance or the recordability of the deed. Such parcel identification number is not a part of the legal description of the property otherwise set forth in the deed and may not be used as a substitute for the legal description of the property being conveyed.

History.—s. 1, ch. 4038, 1891; GS 2449; RGS 3788; CGL 5661; s. 1, ch. 87-66; s. 17, ch. 88-176; s. 60, ch. 89-356; s. 752, ch. 97-102; s. 1, ch. 2013-241.

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Back to Speaker Topics

Page 500

569 So.2d 500
15 Fla. L. Weekly D2573
SUMMA INVESTING CORPORATION, Appellant,
v.
Daniel P. McCLURE and Corrine A. McClure, Appellees.
No. 89-2037.
District Court of Appeal of Florida, Third District.
Oct. 16, 1990.
Rehearing Denied Dec. 3, 1990.

Page 501

Stanley J. Bartel, Miami, for appellant.

McGuire and Parry and Charles J. Pratt, Jr., Bradenton, Melvyn Trute, Surfside, for appellees.

Before HUBBART, BASKIN and GODERICH, JJ.

PER CURIAM.

Summa Investing Corporation [Summa] appeals the entry of the portion of a final judgment foreclosing a second mortgage and an order denying Summa's motion to correct the eighteen percent (18%) default rate of interest used to calculate the rate due under the second mortgage. We reverse.

In 1973, Herman W. Thompson and Mary Louise Thompson, then the owners of the property, executed a $28,000.00 first mortgage and note in favor of Financial Federal Savings and Loan Association of Dade County [Financial Federal]. In 1983, Raymond E. Bellamy, the subsequent owner, executed a $12,000.00 second mortgage and note in favor of Daniel P. McClure and Corrine A. McClure [collectively, the McClures]. Bellamy signed the second mortgage, but his signature was witnessed and notarized by Corrine A. McClure who was a co-mortgagee. Bellamy never made any payments on the second mortgage. However, the McClures never exercised their option to accelerate the debt.

In 1985, Bellamy borrowed money from Steven Schiff and gave him a third mortgage. Bellamy defaulted on the third mortgage and Schiff foreclosed on the property. Ronald Baron and Miguel Hernandez bought the property at a foreclosure sale and sold it to Summa. Summa took title to the property without examining the status of the title. On March 25, 1988, Summa, after it took title, requested that the trial court enter an order in the foreclosure of the third mortgage disbursing the excess funds from the foreclosure sale to the McClures.

Financial Federal instituted a foreclosure action on the first mortgage on January 5, 1988. The clerk recorded a lis pendens on March 14, 1988, listing the McClures as the cross-plaintiffs seeking to foreclose on the property. The notice of lis pendens was addressed to Bellamy and Summa. The McClures purchased the first mortgage from Financial Federal on March 31, 1988. The trial court entered an order on June 21, 1988, dismissing Financial Federal as a party and allowing the McClures to replace Financial Federal as a plaintiff in the foreclosure action. The McClures filed an amended complaint seeking to foreclose on the first and second mortgages. Summa and the McClures filed motions for summary judgment. The court denied both motions on May 31, 1989. On July 27, 1989, the trial court decided to enforce both mortgages and awarded eighteen percent (18%) prejudgment interest on the second

Page 502

mortgage from November 28, 1983, when the first interest payment fell into arrears. Summa appealed. This opinion deals with the second mortgage since Summa has

fastcase

Back to Speaker Topics

abandoned its defense to the foreclosure on the first mortgage.

Summa contends that since the mortgage between Bellamy and the McClures was defectively acknowledged it was not entitled to recordation and it was, therefore, not constructive notice to Summa, a subsequent purchaser. We agree.

Under Florida law, "[i]t is the generally accepted view that an officer or a person otherwise legally authorized to take acknowledgments is not qualified to act where he has a financial or beneficial interest in the proceedings or will acquire such interest under the instrument to be acknowledged." 1 Fla.Jur.2d Acknowledgments § 11 (1977). Accordingly, the acknowledgment of a deed cannot be taken by a grantee or an interested party. Florida Sav. Bank & Real Estate Exch. v. Rivers, 36 Fla. 575, 18 So. 850 (1896); Hogans v. Carruth, 18 Fla. 587 (1882). In the instant case, the evidence is unrefuted that Corrine McClure was both a witness and a notary on a mortgage in which she was financially interested. Therefore, the acknowledgment is void and should have prevented the mortgage deed from being recorded. See Montgomery v. Carlton, 99 Fla. 152, 126 So. 135 (1930).

If the instrument is recorded despite the fact that it is improperly acknowledged, as occurred in the instant case, the recording is a nullity. See 1A C.J.S. Acknowledgments § 14(b) (1977). In McEwen v. Schenck, 108 Fla. 119, 146 So. 839 (1933), the court stated that "to entitle a mortgage of real estate to be recorded so as to 'be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice' ..., the execution thereof must be duly acknowledged...." This case was an early statement of the general rule that a mortgage which is defective or not entitled to be recorded does not give constructive notice to anyone, see 59 C.J.S. Mortgages § 261 (1949); 1A C.J.S. Acknowledgments § 14(b) (1977); Attorney's Title Insurance Fund, Fund Title Notes § 1.05.01 (1989), and is invalid as against a subsequent purchaser for value or a subsequent creditor. See 1A C.J.S. Acknowledgments § 13(a) (1977). Finally, the Utah Supreme Court determined the same issue and stated:

The fact that plaintiff's mortgage was recorded is of no avail to him. As before indicated, the acknowledgment of the execution of the mortgage sued on was made before and certified by the plaintiff himself as a notary public. By reason of this defect in its execution, the plaintiff's mortgage was not entitled to be recorded, and the fact that it was actually recorded had no legal effect.

Norton v. Fuller, 68 Utah 524, 251 P. 29, 30-31 (1926) (citation omitted). Based on the foregoing authorities, we find that the second mortgage here at issue, while enforceable between the McClures and Bellamy, was not entitled to recordation, was not constructive notice to subsequent purchasers for value and, accordingly, should not have been foreclosed.

Since our decision as to the first issue is dispositive of this case, we do not need to address Summa's remaining contention.

Reversed.

fastcase

Court is Adjourned

Back to Speaker Topics

Fund Assembly

The Continuing Evolution of Wire Fraud Schemes: Prevention, Mitigation & Recovery

Douglas Pollock, *President and Founder, IDSnetwork, Inc.*

Back to Speaker Topics

Speaker Information

The Continuing Evolution of Wire Fraud Schemes: Prevention, Mitigation & Recovery

Douglas Pollock

President and Founder, IDSnetwork, Inc.

Douglas F. Pollock, President and founder of IDSnetwork, Inc., has more than 40 years' experience conducting investigations into white-collar crime such as employee embezzlement, title agent and attorney defalcations, and real estate and mortgage fraud. Mr. Pollock received a Bachelor of Science degree in Criminology from Florida State University in 1973 and has investigated white-collar crimes in Oregon, Washington, California, Utah, Texas and Florida. He was formerly employed as a Director of Security and Loss Prevention for two major national corporations where his primary focus was on the prevention and investigation of employee theft, insurance fraud and other related crimes.

Mr. Pollock received the designation of Certified Fraud Examiner from the Association of Certified Fraud Examiners in 1996. He has also been certified as an instructor of insurance education in the states of Florida, Virginia and Pennsylvania in the areas of Title Agent Closings; Searches; and Policies, Rules & Regulations.

Mr. Pollock was a contract instructor for the US Treasury Department, Federal Law Enforcement Training Center, Financial Fraud Institute for more than twelve years and has provided both professional consulting services and expert witness testimony on behalf of several state and federal agencies. He is currently a contract instructor with the Metropolitan Police Academy in Miami-Dade County where he has instructed two classes on the investigation of real estate and mortgage fraud on an annual basis.

Fund Assembly

The Continuing Evolution of Wire Fraud Schemes:
Prevention, Mitigation and Recovery

Douglas Pollock, CFE

Business Email Compromise Scheme

- This has been the crisis scheme for the title insurance agent since 2014.
- Millions upon millions of $ have been lost due to this fraud scheme.
- Many seminars given on the subject along with a bunch of written material.
- Signature blocks on all e-mails containing warnings about BEC Fraud.
- There is a lot of education given to agents and their employees about this type of fraud.

So, why does this fraud scheme continue to plague this industry?

Business Email Compromise Scheme

"What is it?"

- Sophisticated scam targeting business' that regularly perform wire transfer payments.
- Carried out by compromising legitimate business email accounts through social engineering or computer intrusion techniques to conduct unauthorized transfers.
- Everyone can be hacked.
- No one is safe from hackers and scam artists.

Business Email Compromise Scheme

"How it Works"

Scheme started in 2014. The buyer's funds to close were reported to have been diverted through a fraudulent wire instruction form purportedly sent by the settlement agent.

Afterwards, they began to find ways to divert seller's proceeds and in some cases, the pay-offs to mortgage lenders.

After compromising an email account, the scammers will monitor all traffic looking for the best deal to intercept.

Business Email Compromise Scheme

"How it Works"

They will create almost identical forms, logos, signature patterns to make their fraudulent communication look authentic.

The scammer will now use domestic bank accounts that are set up by unsuspecting compatriots ('mules"). Then the money is immediately sent to foreign accounts throughout the world.

The victims of the BEC scam range from small businesses to large corporations and financial institutions.

Business Email Compromise Scheme

"How it Works"

Once a target is selected, the scammers will monitor and study their intended victims using social engineering techniques prior to initiating the BEC scam.

Many victims report being subjected to various forms of scareware and ransomware intrusions immediately preceding a BEC attack. These intrusions can be accomplished by a "phishing scam" in which the victim receives an e-mail or attachment from a seemingly legitimate source that contains a malicious link or attachment.

Business Email Compromise Scheme

"How it Works"

The victim clicks on the link and it immediately downloads malware, allowing the scammers unrestricted access to the victims personal information, including passwords or financial account information.

The introduction of malware is extremely easy to accomplish and can be done simply by sending an infected attachment such as a PDF image or Word document of a Contract for Sale & Purchase to an unsuspecting title agent or attorney.

Business Email Compromise Scheme

"New Developments"

- Losses due to this fraud scheme have been greatly reduced.
- Much of the money has been recovered in new cases due to bank's freezing money, the kill chain and current law enforcement arrests of bad guys and mules.

Most effective way to recover $ is to locate and attack the mule that opened the account.

BUT, the bad guys have found another way to get your trust account money!!

Business Email Compromise Scheme

"New Developments"

- Losses due to this fraud scheme have been greatly reduced.
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Most effective way to recover $ is to locate and attack the mule that opened the account.

BUT, the bad guys have found another way to get your trust account money!!

Malware is introduced into system via email or website access page.

They insert themselves in between the title agent and the buyer in a cash purchase transaction.

We have found the title agent has been hacked before and the malware continues to exist on their computer.

Fake Bank Wire Advice & Buyers Funds to Close

The hacker takes over the e-mail conversation between the buyer and title agent. He clones the forms used by the title agent and the bank.

The hacker changes the signature block on the e-mails to indicate that wire instructions will be sent via e-mail.

The hacker sends bogus wire instruction change to the buyer just before closing. The buyer funds the bogus account.

Fake Bank Wire Advice & Buyers Funds to Close

At the same time, the hacker sends bogus wire advice notice to title agent informing them the wired proceeds from the buyer have been received.

The title agent does not verify this with the bank and disburse the seller's proceeds and closing costs without receiving any money.

This only comes to light when the agent reconciles the trust account and realizes he never received the buyers funds to close.

Fake Bank Wire Advice & Buyers Funds to Close

- Bank wire advice can be "spoofed" in less than five minutes by hacker.
- Never, Never, Never rely on e-mail from anyone for anything important!! Verify independently by a solid and reputable source, i.e. check your bank, your seller, your buyer, etc.
- Make sure in your e-mail settings that your e-mails are not being forwarded to a third party. This is one way the hackers monitor your activity.
- DO NOT use a SINGLE e-mail address for all employees.
- But, most importantly, verify good funds before you close!!

What we have learned about the cyberthieves

- Many of the perpetrators from Nigeria work out of Atlanta, GA. Once they get the proceeds of the cyber fraud they leave the country for Nigeria with the proceeds to escape arrest.
- They use VPN apps to conceal their IP address and location.
- They use upscale hotel rooms so they are not interrupted and they use the open source hotel internet to conceal their location and identity.
- They change location every several days.
- They are also finding their "mules" from victims of romance schemes.

How to Become a Harder Target

- Cyber Liability Insurance
- "Wire Fraud Alert" email signature:

WE DO NOT ACCEPT OR REQUEST CHANGES TO WIRING INSTRUCTIONS VIA EMAIL OR FAX
Always call to verify

- Strong passwords
- Password manager (SplashID, LastPass and Keepass)
- Two-factor-authentication https://twofactorauth.org/

How to Become a Harder Target

Computer Malware Attacks

- Social media
- Vendor patches
- Anti-virus software
- Data back-ups
- Uninstall un-needed software
- Keep OS up to date
- Beware of Downloads & Links
- Lock computer-Don't leave Unattended
- Beware of free Wi-Fi
- Avoid free charging stations

What To Do If An Incident Occurs

Business Email Compromise

- Immediately Disconnect From Internet & Network
- Notify Bank Immediately
- You Have 48 hours To Get Professionals Involved
- Kill Chain
- Mule Location/Arrest
- Scan Entire System For Undetected Malware Via BEC Connections Software
- Preserve Evidence, Don't Use Computer

Summary Statement- Outgoing Wires

There is no excuse for this to happen in our industry!!!

If you send a wire to the wrong place, it's all on you, nobody else.

This can put you out of business in a hurry and is self-assured destruction.

Summary Statement- Outgoing Wires

If you have concerns about sending a wire to a seller or another party, write a trust or escrow account check, then the bank takes a hit on fraudulent endorsement, not you.

Always update your operating software to protect yourself and update your programs and applications as they come out.

Continue to monitor your e-mail setting so the hackers do not forward all your e-mails and attachments.

Summary Statement- Incoming Wires

Regardless of who is hacked, you will likely be sued for failing to protect PII and for not doing enough to warn the customer about BEC Fraud.

There is a new plaintiff lawyer industry that is now taking on these cases nationwide and most of the cases are brought in US District Court. BIG $$$$$

To prevent the loss of the deal and being sued be sure to protect yourself on the front end of each transaction.

Make the buyer and seller sign a disclosure form and agreement that says the following:

Summary Statement- Incoming Wires

Get their wire instructions or payment instructions when they open a file. Tell them you will not change them without an Act of Congress and their closing will be delayed.

Your wire instructions DO NOT CHANGE!! Do not accept any wire instructions by e-mail after the initial disclosure is signed.

Assigned a Wire Control Person to handle any wire transfer instructions.

Any concerns arise, write a check!!

FA
Thank You!
for attending
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Back to Speaker Topics

Fund Assembly

General Counsel's Perspective

Melissa Murphy, *Executive Vice President, Chief Legal Officer, General Counsel and Secretary, The Fund*

Back to Speaker Topics

Speaker Information

General Counsel's Perspective

Melissa Murphy

Executive Vice President, Chief Legal Officer, General Counsel and Secretary, The Fund

I began working for The Fund in October of 2014. As General Counsel, I am using my 35 years of private practice experience to help The Fund continue to provide its lawyer members with everything they need to be successful in their real estate practices.

I really believe in the value an attorney brings to a real estate transaction. The Fund plays such a pivotal role in helping attorneys stay efficient in their practices and up-to-date on the laws and regulations; and the numbers at Assembly show we are doing it the right way. Watching the people here work so hard to support the membership is very energizing and motivating.

As The Fund looks to support attorneys in the future, I hope to help accomplish that goal in new and creative ways. I am excited about being part of this.

Back to Speaker Topics

Fund Assembly

Title Teasers

Moderator:
John Benson, *Associate Underwriting Manager and Senior Underwriting Counsel, The Fund*

Panelists:
Scott Jackson, *Underwriting Counsel, The Fund*
Jennifer Barrow, *Underwriting Counsel, The Fund*
Cynthia Raleigh, *Underwriting Counsel, Commercial Services, The Fund*

Back to Speaker Topics

Speaker Information

Title Teasers

John Benson

Associate Underwriting Manager and Senior Underwriting Counsel, The Fund

John D. Benson is an Associate Underwriting Manager and Senior Fund Underwriting Counsel located in the Palm Beach Branch. He received his B.S. degree in Business Administration and Economics from the University of Florida and his J.D. Degree from Nova Southeastern University. Prior to joining the Fund, Mr. Benson was in private practice, with a concentration in real estate transactions and closings. He has been a guest lecturer at Nova Southeastern Law School and is a member of the Florida Bar's Real Property, Probate & Trust Section; and the Broward County and American Bar Associations.

Scott Jackson

Underwriting Counsel, The Fund

Scott Jackson joined The Fund in 2004 as an Associate Underwriter after working for a year as an Underwriter/Claims Administrator for American Pioneer Title Insurance Company. Mr. Jackson later joined the Claims Department as a Claims Counsel in 2009, a position he would hold until he rejoined Underwriting in 2016. He still keeps his toe in the world of claims, teaching Claims Avoidance at New Member Training.

Mr. Jackson is an active member of the Real Property, Probate and Trust Law Section of the Florida Bar, and is lifelong Floridian. His home is maintained by 12 year old lab mix named Dixie who rules with a firm paw.

Back to Speaker Topics

Jennifer Barrow

Underwriting Counsel, The Fund

Jennifer Barrow is Underwriting Counsel in The Fund's Broward Branch. Ms. Barrow graduated with a Bachelor of Science degree in Political Science from Providence College. She then received her Juris Doctor degree from the University of Miami School of Law, where she was a member of the Center for Ethics and Public Service and won a grant for excellence.

Prior to employment with The Fund, Ms. Barrow was the managing attorney of a title company, a member of The Fund, and a partner at a firm focused on real estate litigation and transactions.

Ms. Barrow is admitted to practice in Florida and in the United States District Court for the Southern District of Florida.

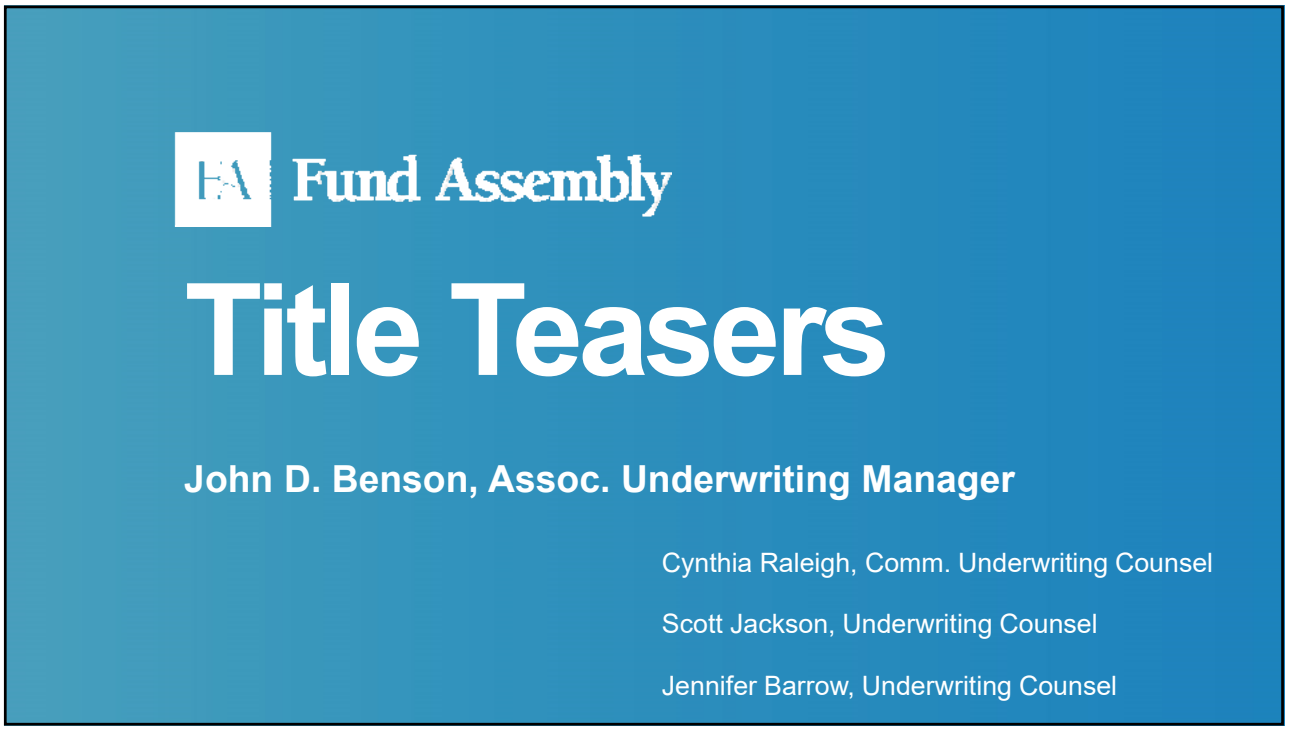
Cynthia Raleigh

Underwriting Counsel, Commercial Services, The Fund

Cynthia Raleigh is a Fund Underwriting Counsel, Commercial Services, based in Orlando. She earned her J.D. from the University of Miami School of Law and a B.S. from New York University in International Business and French.

Before joining The Fund, Ms. Raleigh gained commercial transactional and land use experience at both national and boutique law firms. She advised developers, homebuilders, and individuals nationwide in sales, purchases, leasing, and financing. Her experience includes retail, hotel, mixed use, condominiums, and large-scale residential development. She brings practical experience and problem-solving skills to every transaction.

Ms. Raleigh is licensed to practice law in Florida and is a member of the Florida Bar's Real Property, Probate & Trust Law section.


Fund Assembly
Title Teasers
John D. Benson, Assoc. Underwriting Manager
Cynthia Raleigh, Comm. Underwriting Counsel
Scott Jackson, Underwriting Counsel
Jennifer Barrow, Underwriting Counsel

Life Estates and Taxes

Bert, a single puppet, purchased his dream home on Sesame Street. In 2013, Bert conveyed title to the property to his longtime roommate Ernie, reserving a life estate for himself. The deed contained the appropriate language to create an enhanced life estate. Bert passed away in 2018. Ernie now seeks to sell the property to a bona fide purchaser (BFP) for $1.2 million.

For insuring purposes, may an owner's policy be issued without clearance of estate taxes for Bert?

Life Estates and Taxes

A. Bert's estate taxes did not attach to the property as title was vested in Ernie upon Bert's death, so no further clearance is required.

B. Bert's estate taxes would be divested by a sale to a bona fide purchaser for full and adequate consideration.

C. A release of the Bert's estate taxes from the IRS should be obtained and recorded.

Foreign Judgments

In January of 2012, Galen obtained a money judgment in Michigan (a galaxy far, far away) against his former boss, Orson, for tragic death of Galen's wife, Lyra. In 2013, Orson moved to Florida to forget about his failed inter-stellar construction project and purchased a commercial building in Empire Business Park. In January of 2019, Galen recorded the Michigan judgment in Florida under the Florida Enforcement of Foreign Judgments Act. Orson is now under contract to sell the Florida property. The Fund Member handling the closing provides Orson the commitment which requires the Michigan judgment to be satisfied. Orson objects to the requirement based on the Michigan statute of limitations for such judgments is only 6 years.

For purposes of issuing a policy without exception, does the judgment need to be released?

Foreign Judgments

A. The judgment needs to be released since the judgment was recorded in Florida which has a 20-year statute of limitations for foreign judgments.

B. The judgment does not need to be released because Michigan courts do not have any jurisdiction over lien rights against Florida property.

C. The judgment does not need to be released because the judgment expired under Michigan Law prior to being recorded in Florida.

Power Of (Thrones) Attorney

King Tommen is selling some excess castle space, Red Keep Place, to please his mother, Queen Cersei. Tommen appointed his religious and legal mentor, the High Sparrow, as his attorney-in-fact under a Durable Power of Attorney (DPOA) which contains the powers to sell and convey real property. Unfortunately, the High Sparrow cleaned out his dragon lair and cannot locate the original DPOA and can only produce a copy for closing. While the DPOA contains two witnesses, a jurat was used instead of an acknowledgment.

For insuring purposes, may you rely on the copy of the DPOA with a jurat to insure the sale of Red Keep Place?

Power Of (Thrones) Attorney

A. The copy of the DPOA with a jurat can be used provided a certificate attesting the DPOA to be a “true and certified copy” is attached at time of recording.

B. The copy of the DPOA with a jurat cannot be used as the DPOA is not acknowledged.

C. The copy of the DPOA with a jurat can be used with a subscribing witness affidavit and affidavit of lost original attached at the time of recording.

Authentication Under Foreign Seal

While traveling through the country of Liechtenstein, Daenerys Targaryen executes a warranty deed for the sale of Dragonstone Estate located along the Fire Coast of Florida. Upon review of the deed, you discover that the deed is not acknowledged, but instead is authenticated under the seal of the Princely Court of Liechtenstein.

For purposes of issuing an owner's policy, may the authentication be relied upon?

Authentication Under Foreign Seal

A. The authentication is under the seal of an authorized official in Liechtenstein, so the deed may be relied upon.

B. The deed must be acknowledged before a notary public of Liechtenstein or an officer of the US Embassy, so the deed may not be relied upon.

C. Any authentication under seal of a foreign country is acceptable, so the deed may be relied upon.

LLC Authority

Big Building, LLC, an Illinois limited liability company, is selling its commercial building. Fund Member Bill Brasskey obtained a certificate of good standing but cannot determine who any of the managers or members of the LLC are from records available online. In preparation for closing, Bill has been in contact with Jim McMahon, who purports to be the sole member and manager of Big Building but, when requested, cannot produce an LLC operating agreement for review because one was never created. Bill can see that McMahon has been the signatory on the annual reports filed and is acquainted with him through other business transactions.

For purposes of insuring a deed from Big Building, LLC, what evidence of McMahon's authority to convey the property can be accepted?

LLC Authority

A. Fund Member Bill Brasskey can accept the creation of an operating agreement and execution of an affidavit by McMahon, attesting he is the sole member and manager of the LLC.

B. Fund Member Bill Brasskey can accept the execution of an affidavit by McMahon, attesting he is the sole member and manager of the LLC.

C. No further written documentation is needed because of Bill Brasskey's knowledge of McMahon and his business.

Surveys and Form 9

Fund Member Larry Lawrence's client purchased some vacant land in 2015. A survey was obtained at the time, and both lender's and owner's policies were issued listing specific survey exceptions for minor fence encroachments. A Stop-N-Go Burgers was subsequently built on the property. Larry was provided a site plan and construction drawings showing the proposed improvements that were submitted and approved at the time construction was done. The property is now being refinanced with the same lender, who is requesting a Form 9-06 endorsement.

For purposes of issuing a Form 9-06 endorsement, may Larry rely on the existing survey?

Surveys and Form 9

A. The existing survey may be relied on provided an owner's affidavit that all improvements were constructed as shown on the plan and drawings is obtained.

B. The existing survey may be relied on provided a surveyor's affidavit that the improvements, if constructed as shown, will not encroach on adjacent property or easements is obtained.

C. A new or re-certified survey showing the completed improvements should be obtained.

JTWROS and Homestead

An unmarried couple, Harry and David, reside in a home they purchased as joint tenants with rights of survivorship (JTWROS). Harry has a toddler son from a previous relationship. While on a scenic hiking trip, Harry accidentally stepped off a cliff while taking a selfie and fell to his death. David is, understandably, devastated by the death of Harry and enters into a contract to sell their home for $750,000.

For insuring purposes, what should be done to clear the interest of Harry's son for closing?

JTWROS and Homestead

A. The mother of Harry's son will need to be appointed guardian of the child to execute a deed for his one-half interest in the homestead property.

B. No action is necessary to clear the interest of Harry's son because the homestead property was held as JTWROS.

C. No action is necessary to clear the interest because Harry's son was not living at the home, and therefore, the property was not son's homestead.

Mortgage Satisfaction

Edward Esquire is handling a transaction in which the existing mortgage from The First Bank of Orville will be satisfied. A review of title indicates that the mortgage was modified by the same lender several times. Upon receipt of a proposed satisfaction of mortgage executed by a proper officer of the Bank, Edward notices that the satisfaction does not reference the recording information of any of the previous modifications.

For insuring purposes, may Edward accept the proposed satisfaction of mortgage to mark off the requirement at closing?

Mortgage Satisfaction

A. Edward may accept the proposed satisfaction of mortgage because it properly referenced the original underlying mortgage.

B. Edward should request a revised satisfaction of mortgage which includes references to the subsequent modifications.

C. Edward may accept the proposed satisfaction of mortgage because it was executed by the proper mortgagee involved in the initial loan and the subsequent modifications.

Restrictions

Fund Member, James Bonde is representing Miss Honey-penny in the sale of her home and will be issuing the owner's and loan policies. Upon review of the commitment, the Buyer and Lender have demanded that the final policies affirmatively state that the restrictions listed as exceptions have not been violated and that any violation of the restrictions would not result in a forfeiture, otherwise, they will pull the deal. James has confirmed that the restrictions have not been violated and that any violation of the restrictions would not result in a forfeiture.

For insuring purposes can James provide the language requested in order to keep the deal?

Restrictions

A. The language requested may be provided because affirmative coverage not specifically prohibited in title insurance policies is permissible.

B. The language requested may be provided because the affirmative coverage is already included in the policy jacket.

C. The language requested is unnecessary because it is already contained in the ALTA Form 9-06 and 9.2-06 endorsements.

Survey and Appurtenant Easement

A Fund Member is handling a refinance of a commercial building together with an appurtenant easement interest that provides access through an adjacent parking lot behind the building. The easement interest was properly created by a deed in the chain of title and states that the easement will run with the land. The borrower provides a prior survey that describes only the building and an owner's policy that contains a specific survey exception. At closing, the borrower will execute an affidavit that states that there are no improvements other than as shown on the survey and that there are no improvements from adjoining lands that encroach onto the subject property.

May the Fund Member rely on the prior survey and affidavit to delete the standard survey exception in the loan policy insuring the building and the appurtenant easement interest?

Survey and Appurtenant Easement

A. The Member may rely on the prior survey and affidavit provided all specific survey exceptions on the prior policy are carried forward to the new loan policy.

B. The Member may rely on the prior survey and affidavit provided the loan policy retains the standard survey exception for the appurtenant easement interest.

C. The Member may not rely on the prior survey and affidavit because a prior survey and affidavit cannot be used for commercial property.

GSL

Milton Rhodes represents a purchaser of a $700,000 platted residential lot that is bounded on one side by a large lake in Clay County, Florida. The lake extends beyond the platted lands. Milton received a title commitment that includes the pre-printed general sovereignty lands exception (GSL) and exceptions for the beach, submerged lands and riparian and littoral rights, . Milton has requested that the GSL be deleted from the final owner's policy.

For insuring purposes, may the GSL be deleted from the final owner's policy?

GSL

A. The GSL should always be shown as an exception when insuring waterfront property.

B. The GSL can be deleted provided the original government survey indicates the land to not be submerged, tideland, swamp or overflow land.

C. The GSL along with the other water right exceptions can be deleted provided no portion of the land was ever submerged, tideland, swamp or overflow land.

Description in a Deed

Back in 1978, Lewis obtained title as the successful bidder at foreclosure sale to a parcel of land legally described as the east ½ of Lot 3, Block 15. His neighbor Clark, held title to the west ½ of Lot 3 and all of Lots 4 - 10. Lewis has been paying taxes and been in possession of his property since acquiring it in 1978.

Lewis is now selling his property and the review of title discovers that in 2002, Clark conveyed Lots 3 -10, Block 15 to his faithful friend, Sacajawea. All of the subsequent deeds in the chain correctly state the west ½ of Lot 3 and all of Lots 4 – 10, Block 15.

For purposes of issuing an owner's policy to Lewis's Buyer, what curative action needs to be taken regarding the 2002 deed from Clark to Sacajawea?

Description in a Deed

A. No curative action needs to be taken.

B. A deed from Clark for the East ½ of Lot 3 to Lewis's Buyer should be required.

C. A deed from the current owner for the East ½ of Lot 3 to Lewis's Buyer should be required.

Homestead Tax Exemption Lien

Iva Hostel's dad died in 2002 leaving her his longtime Florida homestead. In 2007, Iva obtained a loan on the property with Lands-down Mortgage. Needing to supplement her income, Iva rented out rooms whenever she could on Airbnb. In 2015, the County recorded a tax lien against the subject property for improper homestead exemption exclusion. In 2016, Lands-down filed a foreclosure action against Iva and joined the County as a party defendant. The County took no action and the sale went to successful completion. A certificate of title (CT) was issued to a 3rd party.

For insuring purposes, can a subsequent sale be insured without a release or clearance of the tax lien?

Homestead Tax Exemption Lien

A. A release or clearance of the tax lien is not required, because Lands-down's mortgage was recorded before the County tax lien and is superior in priority.

B. A release or clearance of the tax lien is required because the County's tax lien is superior to all other liens including Lands-down's mortgage lien.

C. A release or clearance of the tax lien is required because the 3rd party who acquired by certificate of title is a not a BFP.

Lost Trust

Jane Airs, a single woman, conveyed her homestead property by QCD dated May 20, 2002, to Jane Airs, as Trustee of the Maple Street Trust, u/a/d May 20, 2002. There are no trust powers in the deed. A year later she and her new husband, individually, executed a Warranty Deed to Ron Stewart and Sally Stewart, his wife. That 2003 deed contained only one witness.

Ron and Sally are now selling the property but cannot find the title policy they think they bought back in 2003, and the attorney that prepared the deed is deceased. Ron and Sally contact Jane regarding the trust. Jane is not sure if a trust was ever prepared back in 2002, and if she did, she cannot now locate the trust. Jane is willing to sign an affidavit that no trust was ever formed.

For insuring purposes, may an owners' policy be issued without any action regarding the 2002 trust?

Lost Trust

A. No action is required, because Jane and her husband gave a warranty deed to Ron and Sally which implies title never passed into the trust.

B. An action is required to re-establish the trust and thereafter obtain a new deed from the trustee; or alternatively, declare the deed to the trustee expunged from the record.

C. No action is required, because substantial time has passed.

LLC Management

A Florida LLC is selling a commercial building. The LLC filing on the State of Florida website indicates there are two managers. The seller's attorney has reviewed the LLC operating agreement and advises the Fund Member handling the transaction that the operating agreement does appoint and name two managers but is silent as to whether the consent of both managers is required to approve the sale. The seller's counsel proposes that only one of the managers is required to execute the deed on behalf of the LLC.

For insuring purposes, who should execute the deed from the LLC?

LLC Management

A. Both managers should execute the deed.

B. Only one of the two managers listed on the State of Florida website is required to execute the deed.

C. The recording of a resolution of all of the members is required.

Probate and Homestead

Patricia Lewis passed away survived by 6 adult children but no spouse or minor child. At the time of her death she owned several pieces of real property, including her homestead, identified in the petition for probate by address. Olive Lewis, one of Patricia's children, was appointed personal representative. Patricia's will contained specific distributive provisions, including one for her homestead to Olive. The will also contained a power of the PR to sell and convey and a general 'rest, residue and remainder' clause to all her children. No homestead determination has been made by the Court, and the administration has been progressing properly with no challenges filed in the probate file. The homestead property is now being sold.

In order to insure title to a BFP of the homestead property, what deeds should be obtained and recorded?

Probate and Homestead

A. A deed should be obtained from Olive, as PR of the estate.

B. Deeds should be obtained from Olive, individually and as PR of the estate and the other remaining five adult children.

C. A deeds should be obtained from Olive, individually and as PR of the estate.

POA for Trustee

Tilly Trustee holds title to rental property as trustee of a family revocable trust. After signing a contract to sell and shortly before the closing was to take place, Tilly suffered an unfortunate medical incident and is unable to execute any of the closing documents. The Fund Member proposes to have the deed and other closing documents signed by her son, Tommie, who holds a Durable Power of Attorney (DPOA) signed by Tilly several years before the Trust was created. The DPOA is properly executed and has the necessary powers for the Attorney-in-Fact to convey real property.

May the DPOA be used to execute the Seller's documents on behalf of Tilly as trustee for insuring purposes?

POA for Trustee

A. The execution of the deed and closing documents is considered a ministerial act, and the DPOA can be used.

B. The DPOA was executed by Tilly individually and not as trustee of the trust, so the DPOA cannot be used.

C. The DPOA cannot be used for property held in a trust.

The "Insured"

In 2015, Tom Smith and James Brown purchased vacant land for $500,000 under the name of T&B, LLC, a Florida limited liability company, and received an owner's policy. Two years later they conveyed the property by QCD to their newly formed Delaware LLC, SmiBro, LLC. The two LLC entities are wholly owned by the same principals Tom and James.

SmiBro, LLC is now obtaining a $450,000 construction loan, and Tom and James want to know if the owner's policy (OP) issued to T&B, LLC can be used to get a reissue rate on the construction loan?

The "Insured"

A. The OP insuring T&B, LLC can be used for purposes of charging reissue rates.

B. The OP insuring T&B, LLC cannot be used for purposes of charging reissue rates.

C. Reissue rates are not available, because the QCD is more than a year old.

COL and Bond

Hightower Construction contracted to a commercial high-rise on property owned by Golden Flower Development. As part of the construction process, Hightower furnishes a surety bond for the job to cover possible liens filed during construction and records a copy of the bond along with the Notice of Commencement. Clean Aire Products, who supplied the HVAC system under contract with Hightower, is not paid and files a claim of lien after giving notice to the contractor and owner. Golden Flower is now obtaining a construction mortgage to complete the project.

For insuring purposes, does the claim of lien by Clean Aire Products need to be released?

COL and Bond

A. The claim of lien does not need to be released as the lien is automatically transferred to the bond by operation of law.

B. The claim of lien does not need to be released, because the lienor gave the required notice to the contractor and the owner.

C. The claim of lien does not need to be released provided a notice of the bond is served on the lienor.

Enhanced Life Estate and Remainders

Kringle family matriarch Kris conveys her vacation condominium in South Beach to herself for life with a remainder to her favorite daughter, Kim. The deed contains powers reserved for Kris to sell, convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration, without any liability for waste, without joinder of the remainderman and with full power and authority to retain any and all proceeds generated by such action. Unfortunately, Kim passes away from a tragic cosmetic surgery mishap shortly after the recordation of the deed, survived by her husband, three minor children, her mother Kris and several siblings. Out of grief for Kim, Kris suffers a heart attack and passes away.

For insuring a sale of the vacation condominium, from whom will deeds be required?

Enhanced Life Estate and Remainders

A. Deeds are required from Kim's husband and an authorized guardian for Kim's children.

B. Deeds are required from all of Kris's heirs, Kim's husband and an authorized guardian for Kim's children.

C. Deeds are required from all of Kris's heirs including Kim's siblings.

Acknowledgment Abroad

Fund Member Lil DeVille is handling the sale of a beachfront home for longtime Florida Panhandle resident, Tommy Pickles. Tommy is on a business trip abroad and will not be present at closing. Lil provides the warranty deed and other closing documents to Tommy by email with instructions to sign the deed in the presence of two witnesses and a notary public, and to return the originals prior to the closing date. Tommy receives the email while at a conference in Davos, Switzerland. Fortunately, Tommy's business associate Chuckie Finster is also attending the conference and is a Florida notary. Tommy signs the deed in the presence of two subscribing witnesses and Chuckie, who then notarizes the deed.

For insuring purposes, is the acknowledgment of the deed acceptable?

Acknowledgment Abroad

A. The acknowledgment is acceptable because it was by a Florida notary public concerning Florida real property.

B. The acknowledgment is not acceptable, because the Florida notary public was not geographically located in Florida.

C. The acknowledgment is not acceptable, because the Florida notary failed to obtain authorization under Swiss jurisdiction.

LLC and Bankrupcty

Larry, Moe, and Curly are all the members of a manager-managed LLC. Larry's son, Joey Spendalot, is the manager. All the members execute a resolution approving the sale of real estate, authorizing Joey, as manager, to sign the documents. At closing, Joey advises the Fund Member handling the closing that two days before the closing, he had to file a Chapter 7 personal bankruptcy. The Fund Member checks PACER and confirms that Joey had filed a Chapter 7 personal bankruptcy.

For insuring purposes, may Joey still execute the deed on behalf of the LLC?

LLC and Bankruptcy

A. The bankruptcy filing does not affect Joey's ability to act as manager, so Joey may execute the deed on behalf of the LLC.

B. The bankruptcy filing terminates Joey's ability to act as manager until the bankruptcy case closes, so Joey may not execute the deed on behalf of the LLC.

C. The bankruptcy filing affects Joey's ability to act as manager, so an order from the bankruptcy court is required in order for Joey to execute the deed on behalf of the LLC.

Lien Stripping

Sam Seller filed a Chapter 13 Bankruptcy in 2012. The plan of reorganization was approved by the bankruptcy court with no objections by creditors. Sam's commercial property, which was scheduled in the bankruptcy, was encumbered by a second mortgage in favor of Big Bank. The court entered an order, with proper notice, stripping off Big Bank's second mortgage. That order was recorded. The order was not appealed, and Sam was discharged.

For purposes of insuring a sale of the commercial property, must the second mortgage be satisfied of record?

Lien Stripping

A. The second mortgage must be satisfied of record as lien-stripping orders are not recognized in Chapter 13 bankruptcies.

B. The second mortgage does not need to be satisfied of record provided a certified copy documenting there was no appeal is recorded.

C. The second mortgage does not need to be satisfied of record provided the Chapter 13 Plan has been fully performed.

Tax Lien Withdrawal

Rich Knomor, a high-flying condo developer fell on hard times and failed to pay his 941 payroll taxes. The IRS filed a Notice of Federal Tax Lien against Rich and his company, Knomor Development, Inc. Rich's accountant, a former IRS Commissioner, is able to obtain from the IRS a *Withdrawal of Filed Notice of Federal Tax Lien*, which relinquishes any lien priority obtained by the Internal Revenue Service when the notice was originally filed but does not affect the statutory lien rights. Rich and his wife, Joy, are now trying to sell their Star Island estate to a BFP.

For insuring purposes, may the Withdrawal be relied upon without obtaining a Release for the Star Island estate transaction?

Tax Lien Withdrawal

A. A withdrawal does not affect the statutory lien rights, so a release will still be required.

B. A withdrawal is sufficient where the property is being sold to a BFP, so no release is required.

C. A withdrawal granted by the IRS eliminates the tax liability, so no release is required.

FA
Thank You!
for attending
Special Thanks to Steven Presley,
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Back to Speaker Topics

Fund Assembly

Bank Secrecy and Spotting Money Laundering

Dennis Lormel, *Founder and President, DML Associates, LLC*

Back to Speaker Topics

Speaker Information

Bank Secrecy and Spotting Money Laundering

Dennis Lormel

Founder and President, DML Associates, LLC

Dennis M. Lormel retired from the Federal Bureau of Investigation (FBI) in December 2003, having served 28 years as a Special Agent. During his distinguished career, Mr. Lormel amassed extensive major case experience as a street agent, supervisor and senior executive, particularly in complex, document and labor intensive financial related investigative matters. In December 2000, Mr. Lormel was promoted to Chief of the FBI's Financial Crimes Program.

Immediately following the terrorist attacks of September 2001, Mr. Lormel formulated, established and directed the FBI's comprehensive terrorist financing initiative. He developed and implemented a variety of proactive and progressive investigative methodologies. These efforts evolved into the formation of a formal Section within the Counterterrorism Division of the FBI, known as The Terrorist Financing Operations Section. This multi-agency, multi-disciplined entity attained international recognition as one of the world's elite operations for tracking, investigating and disrupting terrorist-related financial activity. For his visionary contributions, Mr. Lormel received numerous commendations and awards, including the Award for Investigative Initiative, from the U.S. Department of Justice, and the George H. W. Bush Award for Excellence in Counterterrorism, from the Central Intelligence Agency.

Over the last 15 years, Mr. Lormel has provided risk advisory consulting services. He is the founder and President of DML Associates, LLC. Mr. Lormel provides consulting services and training related to terrorist financing, money laundering, fraud, financial crimes, suspicious activity and due diligence. He also offers financial intelligence services through case studies and trend analysis. Mr. Lormel has shared his insight on terrorist financing and money laundering, both domestically and internationally, through speaking engagements at hundreds of conferences, as well as through news media interviews. He served as an Advisor to the Congressional Anti-Terrorist Financing Task Force in 2005 and 2006. Mr. Lormel was presented with the 2010 Association of Certified Anti-Money Laundering Specialists (ACAMS) Volunteer of the Year Award and currently serves as a member of the ACAMS Advisory Board. Mr. Lormel is also a Board member for the West Coast AML Forum and an Adjunct Professor, in the Master of Arts Program, for Financial Integrity, at Case Western Reserve University.

Fund Assembly

Bank Secrecy and Spotting Money Laundering

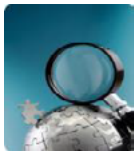
Dennis M. Lormel
President & CEO, DML Associates, LLC

Money Laundering Through Real Estate

- Money Laundering
- AML Legislation
- AML Program Requirements
- Geographic Targeting Orders
- Real Estate Crime Problems and Red Flags
- Takeaways

Why Should You Care?

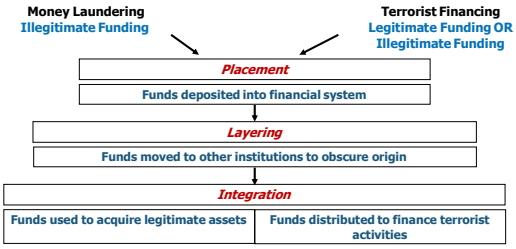
- What do these crime problems have in common?
  - Corruption
  - Drugs
  - Human trafficking
  - Flight capital
  - Other criminal activity
    - ***The offenders must launder the proceeds of their illicit activity***
- What does that mean to real estate professionals?
  - Real estate is a major facilitation tool
    - ***Real estate provides tremendous opportunity for exploitation***



Money Laundering Considerations

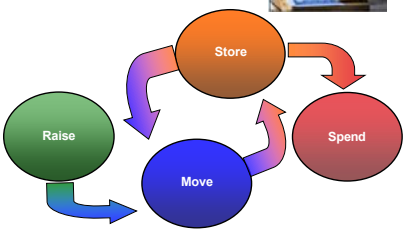
- Key words or drivers differentiating between who prevails (good guys or bad guys)
  - Transparency
  - Reasonableness
  - Perspective
  - Diligence (inherently reactive process)
  - Innovation
  - Exploitation
  - Reporting

Money Laundering: The Process

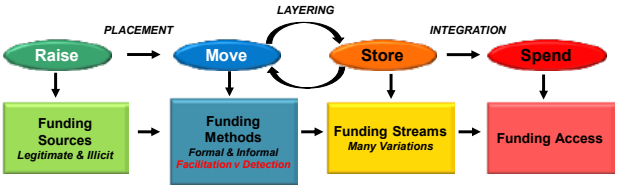


Understanding & Disrupting Funding Flows

- Must understand four dimensions
  - Organization
  - Funding capacity
    - Source of funds
    - Means to launder money
    - Availability of funds
  - Funding mechanism
    - Formal financial system
    - Informal system
  - Group members
- Funding cycle
  - Raise
  - Move
  - Store
  - Spend



Money Laundering Flow



Areas of Criminal Exploitation

- Fraudulent Activity
  - Major financial frauds
  - Common fraud
- Criminal predicate offenses
  - ***Invariably includes fraud and requires money laundering***
- Fraudsters and affiliations
  - Individuals
  - Groups of individuals
  - Organizations
    - Criminal and terrorist

Emerging Fraud Trends in 2019

- ***Cyber / internet fraud***
  - Business email compromise
  - Data breach
  - Denial of service
  - Email account compromise
  - Malware / scareware
  - Phishing / spoofing
  - Ransomware
- Virtual currency
  - Bitcoin
  - Initial coin offerings
- Opioids
  - Fentanyl
- Elder fraud
  - Market manipulation
  - Grandparent scams
  - Romance fraud
- Other significant crime problems with fraud components
  - Drug trafficking
  - Human trafficking.
  - Counterfeit goods
- Public corruption
- Trade based money laundering

Contrasts of Using Financial System

- In using the financial system, criminals and terrorists are confronted with distinct contrasts
  - ***Facilitation tool v. detection mechanism***
- Serves as facilitation tool by providing continuous access to funds
  - Financing the lifeblood of criminal and terrorist organizations
- Serves as detection mechanism because funds can be identified through monitoring and / or investigation
  - Financing a major vulnerability

U.S. AML Legislation

Evolution of BSA Legislation

- The key U.S. AML / CFT legislative framework is the Bank Secrecy Act (BSA)
  - Also known as the Financial Recordkeeping of Currency and Foreign Transactions Act of 1970
- The BSA was significantly amended buy the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (U.S. PATRIOT Act)
  - Title III of USA PATRIOT Act is the International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001
- Since 1970, other AML / CFT laws have been passed to enhance the BSA

13

Purpose of BSA

- Purpose of BSA to require U.S. financial institutions to ***maintain appropriate records and file certain reports*** involving currency transactions and a financial institution's customer relationships
- Currency transaction reports (CTRs) and suspicious activity reports (SARs) are the primary means used by banks to satisfy BSA requirements
- Recordkeeping regulations also include requirement that a financial institution's records be sufficient to enable transactions and activity in customer accounts to be reconstructed in necessary

Intent of BSA

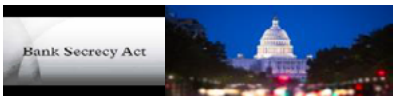
- The implementing regulations under the BSA were originally intended to aid investigations into an array of criminal activities, from income tax evasion to money laundering
- In recent years, the reports and records prescribed by the BSA have been utilized as tools for investigating individuals suspected of engaging in illegal drug and terrorist financing activities
  - ***Law enforcement agencies have found CTRs to be extremely valuable in tracking cash generated for illicit purposes***
  - ***SARs are likewise extremely valuable to law enforcement agencies***

BSA Reports

- Currency transaction reports (CTRs)
  - Reports filed by certain types of financial institution for cash currency transactions of more than $10,000 in one business day
    - Multiple transactions aggregated
- Form 8300 (cash over $10,000 received in trade or business)
  - Should be completed and submitted to IRS if a person engaged in trade or business receives more than $10,000 in a single or multiple related transactions in currency
- Suspicious activity report (SAR)
  - Report that documents suspicious or potentially suspicious activity attempted of conducted at or through a financial institution
- Report of Foreign Bank and Financial Accounts (FBAR)
  - Report that must be filed by U.S. person who has financial interest in or signature or other authority over any foreign financial account exceeding $10,000 alone or in aggregate at any time over a calendar year
- Report of International Transportation of Currency or Monetary Instrument (CMIR)
  - Each person who physically transports, mails, or ships currency or monetary instruments in excess of $10,000 at one time into or out of the U.S. must file a CMIR

Congressional Consensus Regarding BSA

- BSA legislation should or must be updated
- Concerns regarding the effectiveness & efficiency of BSA reporting
- Multiple Congressional committees assessing numerous issues and considering legislation
  - ***Bipartisan consensus***
- Congressional interest gaining momentum



Concerns, Prior Experience & Possibilities

- Concerns
  - Congressional will / motivation / understanding
  - Stakeholder engagement
  - Getting it right
- Prior experience dealing with the Hill
- Possibilities
  - Potential legislation in due course
  - Potential legislation driven by 9/11 like event
    - ***PATRIOT Act 2.0***

Key Issues & Testimony

- Key Issues
  - ***AML reporting requirements / thresholds***
  - Safe Harbor / information sharing
  - ***CDD / beneficial ownership***
  - Financial inclusion / de-risking
  - Terrorist financing
  - Human trafficking
  - Financial technology protection
  - ***Cash purchase of real estate***
  - Other matters
- Congressional testimony
  - Clearing House representatives (various hearings)
  - Lormel (Senate Banking Committee) (January 9, 2018)
  - Lormel (Senate Banking Sub-Committee) (June 20, 2018)
  - Lormel (House Financial Services Sub-Committee) (March 13, 2019)

U.S. AML Program Requirements

AML Program

- An AML program must be ***"reasonably designed"*** to prevent the system from being used to launder money or to finance terrorist activity
- Financial institutions are not expected to identify ***all*** illicit activity but to have a program ***"reasonable designed"*** to identify and report suspicious activity / transactions on a consistent and timely basis

Basic Elements and Pillars

- Policies and procedures
- Designated compliance officer
- Training
- Independent review
- ***(2018) CDD***

Consequences of Non-Compliance

- Consequences to a financial institution for not operating an AML program that is "reasonably designed" to identify suspicious activity in the U.S. includes:
  - Enforcement actions
  - Civil law suits
  - Deferred prosecution
  - Criminal prosecution

Nonbank Financial Institutions

- Nonbank financial institutions include all entities, excluding depository institutions, considered to be financial institutions under the Bank Secrecy Act
- Certain nonbank financial institutions are exempt from the requirement to maintain an AML program under Section 352 of the USA PATRIOT Act
  - ***Persons involved in real estate settlements and closings are exempt from requirements to maintain an AML program***
    - ***FinCEN encourages persons involved in real estate closings and settlements to voluntarily file SARs***
    - ***Safe harbor provisions apply***
    - ***SARs extremely beneficial to law enforcement***

Geographic Targeting Orders

Geographic Targeting Order (GTO)

- FinCEN can issue orders imposing additional recordkeeping and reporting requirements on domestic financial institutions or non-financial trades or businesses in a specific geographic area for transactions involving certain amounts of U.S. currency or monetary instruments
- Effective for up to 180 days
- Renewable for additional 180 days if circumstances justified
- Covered transactions must be reported within 30 days
- All records related to compliance with GTO must be retained for five years from last day GTO is effective

Real Estate GTOs

- Issued initially in March 2016, by FinCEN
- Consistently renewed and expanded
  - Initially in effect in Manhattan and Miami
  - Expanded to cover housing markets in New York, Florida, Texas, California and Hawaii
- Applies to real estate transactions involving luxury property purchased through shell companies
  - Particularly when conducted with cash and no financing
- Reporting thresholds went from millions to $300,000
- ***Real estate professionals encouraged to file voluntary SARs***
- Legislative considerations / proposals regarding real estate reporting requirements

Real Estate Crime Problems

Understand the Crime Problem

- To address the threat, you must understand the threat
  - Mortgage fraud and money laundering through mortgage fraud
  - Phishing and wire transfer fraud
  - Money laundering through real estate
- Warning signs (red flags)
  - Lack of transparency
  - Questionable source of funds
  - Reasonableness of parties involved in transaction
- Identify risk factors
  - Geographic risk / customer risk / transaction risk
- Situational awareness
  - Personal security / identifying money laundering in real estate

Situational Awareness from a Real Estate Perspective

- Situational awareness from a real estate perspective should focus on:
  - The money laundering threat
    - Lack of transparency
    - Current and emerging trends
  - Funding
    - Sources
    - All cash / cash and or other financing
  - Who you are dealing with (beneficial ownership)
    - Organizations
    - Individuals

Red Flags For Fraud and Money Laundering Involving Real Estate

- Many sources list red flags , to include:
  - FinCEN
  - FBI
  - The FFIEC Examination Manual (Appendix F)
  - Protiviti Guide to U.S. AML Requirements
  - National Association of Realtors
  - American Land Title Association
  - Google and other sources
- Red flags can be developed through media reports
- Red flags can be developed from case study typologies
- Red flags can be developed from legal filings to include a criminal information, indictments, search and arrest warrants

Mortgage Fraud Red Flags

- Two areas of mortgage fraud
  - Fraud for profit
  - Fraud for housing
- Common mortgage fraud schemes
  - Foreclosure rescue schemes
  - Loan modification schemes
  - Illegal property flipping
  - Builder bailout / condo conversion
  - Equity skimming
  - Silent second
  - Commercial real estate loans
  - Air loans

Phishing / Wire Fraud

- Use of altered email address
- Victims vulnerable through unsecured channels
- Use unwitting third parties to facilitate fraud
- Use of malware
- Perpetrators proactive
  - Maintain contact with multiple parties
  - Manipulate and compartmentalize victims and / or third parties
  - Frequently impersonate parties involved in transaction

Money Laundering Through Real Estate

- Geographic Targeting Order (real estate)
  - All cash purchases by shell companies
- Suspicious transactions include:
  - Lacks economic sense or has no apparent lawful business purpose
    - Suspicious real estate transactions may include purchases / sales that generate little to no revenue or are conducted with no regard to high fees or monetary penalties
  - Is used to purchase real estate with no regard for the property's condition, location, assessed value or sale price
  - Involves funding that far exceeds the purchaser's wealth, comes from an unknown origin, or is from or goes to unrelated individuals or companies
  - Is deliberately conducted in an irregular manner
    - Illicit actors may attempt to purchase property under an unrelated individual's or company's name or ask for records (e.g., assessed value) to be altered

Takeaways

Conclusion and Takeaways

- Understand the nexus between fraud and money laundering
  - Intertwined with most other predicate offenses
- As a nonbank financial institution, you can be a facilitation tool or detec mechanism

  - Consequences of facilitation v. detection
- Understand the crime problem
- Practice situational awareness and recognize warning signs that apply t

  - Lack of transparency
  - Questionable source of funds
  - Reasonableness of parties involved in transaction

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Getting to the root of the matter.
DML ASSOCIATES, LLC

Deconstructing a fraudster

What part of committing fraud is a good idea? For fraudsters, in the short term, the answer is everything. However, in the long run, the answer is nothing. The reason for this is that over time the weight of deception will cause a fraud to collapse. On the surface, a fraudster has the advantage of being proactive in building their spin and deception. Invariably, they succeed at exploiting the window of opportunity to sell their fraud scheme to their victims. Below the surface, as the threads of fraud are pulled and unraveled by either victims and/or investigators, the fraudster is at a disadvantage because the window of opportunity closes and the deception is exposed.

If fraud is ultimately destined to collapse and fail, why do people commit fraud? The answer is that, for whatever reason, they do not consider the consequences of their actions or they do not believe the consequences apply to them. If individuals inclined to commit fraud understood that inevitably they would actually deal with the consequences of their fraudulent actions, and that such consequences would be negative, they would more likely be deterred from committing fraud.

Deconstructing a fraudster to prevent and/or disrupt fraud requires understanding. You must understand the fraud risk, the mindset of a fraudster, the attributes of a fraudster, the fraud crime problem and the consequences of fraud. When you can place risk, mindset, attributes, the crime problem and consequences in context with each other, you can develop detective and preventive measures to deconstruct a fraudster.

Understanding fraud risk

In our personal and professional lives, we are all susceptible to falling victim to fraud for a variety of reasons. We tend to be gullible about “too good to be true” schemes and are prone to lack situational awareness for the warning signs of fraud. There are three basic risks that drive fraud:

- Trust
- Lack of control mechanisms that provide opportunity
- Lack of deterrence or understanding about consequences

Trust is the foundation for building personal and professional relationships. Trust is also a fraudster’s best friend. Trust facilitates opportunity because it enables a fraudster to circumvent control mechanisms. Misplaced trust buys time for a fraudster to keep the window of opportunity open and to perpetuate their deception. Differentiating between meaningful relationships and fraud requires understanding and situational awareness. Understanding the motivation and rationalization used by

fraudsters to justify their actions can be a critical component in recognizing the risk of fraudulent behavior.

Situational awareness is being aware of your physical surroundings. It requires being vigilant in identifying potential threats and dangerous situations. According to Stratfor, a leading geopolitical intelligence service, being situationally aware of your physical surroundings is more of a mindset than a skill. It is the recognition that threats exist and taking responsibility for your personal security. One of the key best practices is to trust your gut or intuition. If a person or activity is out of place or unusual, trust your instincts and be attentive for potential danger.

The same concept about situational awareness can be applied to fraud. It requires being vigilant in identifying and mitigating potential fraud risks and schemes. Being situationally aware of fraud is more of a mindset than a skill. It is the recognition that you are constantly vulnerable to fraud. You have to accept responsibility for your fraud vulnerability. The key best practice is to maintain your objectivity about trust, reasonableness and temptation. You must be objective about establishing trust relationships and not allowing such relationships to circumvent control mechanisms, such as separation of duties. You must consistently assess the reasonableness about situations and scenarios with which you are presented. You must remain objective about being lured into the temptation of financial enrichment or a false sense of security to scenarios that sound “too good to be true.”

Strong control mechanisms and monitoring limit the opportunity to commit fraud and lead to fraud deterrence. A perception of detection is more likely to cause a potential fraudster to consider the consequences of their actions. If an individual thinks that internal controls are in place that will detect fraud, they will be less inclined to “cross the line of integrity” and commit fraud.

Understanding the mindset of a fraudster

I have investigated fraud for 45 years and have been teaching fraud awareness since 1981. In my experience, a fraudster’s mindset is driven by five factors. Those factors or elements are as follows:

1. Integrity
2. Opportunity
3. Incentive or pressure
4. Rationalization or attitude
5. Capability

The five factors or elements build upon each other. An individual’s integrity is the starting point. If a person possesses a great deal of integrity and has limited opportunity, they will be less likely to cross what I refer to as “the line of integrity” and commit fraud. Conversely, if a person possesses limited integrity and is afforded a great deal of opportunity, they will more likely cross “the line of integrity” and commit fraud. In many instances, the integrity and opportunity continuum falls between the two extremes and will be driven by a combination of the other three factors: incentive, rationalization and capability.

Opportunity, incentive and rationalization are referred to as the fraud triangle. They were introduced in 1953 by criminologist Donald R. Cressey. The fraud triangle became widely recognized in the mid-1970s. The combination of the three factors was believed to be the drivers that led individuals to commit fraud. Opportunity represents the chance to commit fraud. Incentive or pressure represents the motivation and is usually caused by financial demands. Rationalization or attitude is the self-justification making the fraudulent act acceptable.

Subsequently, in 2004, David T. Wolfe, a certified public accountant and forensic accountant and Dr. Dana R. Hermanson, a college accounting professor, published a paper, which added capability to the fraud triangle, creating the fraud diamond. They believed that unless an individual possessed the right capabilities, they would not succeed in committing fraud. Capabilities are the personal traits and skillsets necessary to exploit opportunity, incentive and rationalization.

Opportunity is the most important factor because it influences integrity and capability. If there are strong control mechanisms and a perception of detection, there is limited opportunity. Limited opportunity would then be more likely to deter an individual from crossing "the line of integrity." Likewise, regardless of the proficiency of skillsets, the prospect of detection would likely serve as a deterrent.

When an individual succumbs to the temptation of committing fraud and crosses "the line of integrity," what do they think about? They think about executing their fraud scheme without being detected. They think about establishing and maintaining their illicit funding stream. They think about protecting their illicit funding stream and personally benefiting from it.

Fraudsters who think about the potential consequences of their illicit activity, particularly the ones who believe that consequences do not apply to them, will likely have an exit strategy. They recognize that their fraud scheme will have a useful life that will expire. These fraudsters tend to be more arrogant and lack empathy. For the most part, they are focused on identifying the warning signs that their fraud is about to collapse. If they are not overcome by greed, which happens in many cases and causes them to lose focus and get caught, they will attempt to execute their exit strategy, escape and protect their illicit proceeds.

Understanding the attributes of a fraudster

Looking back at the mindset of a fraudster, their attributes will be shaped, in part, by the combination of the fraud diamond and the specific fraud in which they engage. Once they exploit the opportunity, plan their illicit activity and cross "the line of integrity," their actions will be driven by the level of incentive required, in most instances, a financial incentive. As the opportunity and incentive come into focus, they will rationalize and justify their behavior. They will typically ensure they possess or acquire the necessary skillsets (capabilities) to achieve their illicit objective.

With the five fraud elements in place (integrity, opportunity, incentive, rationalization and capabilities) the attributes required to succeed manifest themselves. The fraudster must be motivated. They will be driven, manipulative and endeavor to develop and exploit trust relationships. They will need to be an

effective communicator and effective self-promoter. They will usually start out focused. However, their focus could become blurred by a sense of greed and arrogance. Greed and arrogance can be a fraudster's ally or biggest adversary by evolving into a critical vulnerability.

In many situations, fraudsters will lack empathy toward their victims. This lack of empathy is one reason why fraudsters may be inclined not to consider the consequences of their actions. Fraudsters will endeavor to avoid detection and maintain focus. Maintaining focus will enable them to execute their exit strategy. However, their greed and arrogance can also cause them to lose focus and not recognize the warning signs of their demise. The lack of empathy and focus caused by greed and arrogance will frequently be the lynchpins to a fraudster's undoing.

Understanding the fraud crime problem

Fraud is deception. Fraud knows no boundaries. Fraud schemes range from simple to complex. Fraudsters are adept at exploiting systemic vulnerabilities, such as the anonymity afforded by the internet. Troublingly, fraudsters understand how to use financial institutions to facilitate their illicit activity. There has been an upward trend in civil litigation cases where victims and/or groups of victims of fraud schemes have sued financial institutions for their role in facilitating the fraud. In almost all such situations, financial institutions have been unwitting facilitators. Nonetheless, they find themselves subject to lawsuits.

Since there is an expansive range of fraud schemes, fraud should be assessed, understood and addressed from two perspectives or levels: generic and specific. The ability to be deceptive and avoid detection is a fraudster's primary key to success. When potential victims and investigators understand how fraudsters take advantage of generic and specific fraud schemes, they position themselves to more favorably deal with the situation.

From a generic or simplistic perspective, fraud is deception. Over time, the weight of the deception will cause the fraud to collapse. How long does it take before a fraud collapses and is detected? It could be right at the start. It could be a matter of days, weeks, months or years. The useful life of a fraud is contingent on numerous considerations. The more situationally aware you are regarding the risk of fraud, the more likely that a fraud can be prevented or detected sooner rather than later.

There are a variety of specific fraud schemes that range from investment fraud to corporate fraud, embezzlement, check fraud, elder fraud and so many more sham activities. Regardless of the scenario, it should be viewed as deception and then from the type of specific fraud scheme it is. You need to consider which specific fraud schemes you are more susceptible to from both a personal and business perspective. Common themes to assess will originate with the potential abuse of trust and circumvention of control mechanisms. Regardless of whether it is an investment fraud, business fraud, embezzlement, elderly fraud or a check fraud, the abuse of trust and circumvention of controls will likely be a factor.

Disruptive and preventive measures leading to the deconstruction of a fraudster

Deconstructing a fraudster requires proactive and reactive measures. Preventive steps will be more proactive and detection mechanisms will be more reactive. Deconstructing a fraudster begins with fraud prevention. The best form of prevention is deterring a potential fraudster from crossing "the line of integrity." To do so, build a perception of detection by minimizing opportunity and reinforcing the fact that a fraudster will face serious consequences for their illicit activity.

Best practices to limit opportunity include having strong internal controls, consistent monitoring and a fraud risk assessment, assessing and testing the trust environment, and overall vigilance and situational awareness. In a business setting, promote a no tolerance for fraud policy. This begins with the tone at the top of the organization. Business leaders must endorse strong ethical standards and embrace a no nonsense, no tolerance policy.

If you are reacting to a fraud that has been detected, deconstructing the fraudster starts with planning. You must assess the situation and prepare a written plan to address the fraud. Depending on the circumstances, you should determine how to exploit the vulnerabilities of the fraudster and how to develop evidence regarding the fraud. This requires understanding. The greed and arrogance of a fraudster cannot only cause them to lose focus, but it could cause them to more openly talk about their scheme and add additional layers of spin and deceit. The added spin and deceit adds additional weight to the fraud leading to its ultimate collapse. In addition, many fraudsters want you to know they are the smartest guy or girl in the room and they will not shy from talking about it. Be a good listener and let them talk and implicate themselves.

Other steps you need to consider in furtherance of deconstructing a fraudster includes not allowing the fraudster to gain the upper hand. Planning and preparation can assure that you maintain the upper hand. You must gather your facts objectively, be persistent and be analytical in evaluating the information you gather and assess the reasonableness of the situation. Another element to consider when planning is to develop contingencies to deal with potential exit strategies the fraudster might contemplate. Depending on the circumstances and the specific mindset of the fraudster you are dealing with, you can be confronted with a variety of potential exit strategies. Understanding and planning are the keys to deconstructing a fraudster.

Understand the consequences of fraud

It is important to recognize and understand the multiple consequences of fraud. All actions or inactions regarding fraud have consequences for victims, financial institutions and other third parties, as well as to the fraudsters themselves. Victims of fraud face financial loss, potential devastation and emotional distress. Financial institutions and other third parties could find themselves in the contrasting situation of serving as a facilitation tool or being a detection mechanism. Regardless of whether they find themselves as a facilitation tool or detection mechanism, they could face the consequences of financial, reputational and/or litigation risk. Invariably a fraud will collapse. Fraudsters face the consequence of prosecution and incarceration, restitution, seizure and asset forfeiture. In addition, fraudsters face the loss of family and loved ones as a result of their fraudulent behavior. The more that can be done to

publicize and visualize the negative consequences fraudsters face, the greater the possibility of deterring potential fraudsters from crossing "the line of integrity."

Conclusion

What part of committing fraud is a good idea? If fraudsters were truly aware of the inevitable negative consequences of their illicit actions, they would more likely be deterred from fraudulent behavior.

Trust is the foundation for meaningful relationships. Trust is also a fraudster's best friend. Develop situational awareness for fraud with a focus on trust. Do not allow trust to negate control mechanisms. Limit the opportunity of fraud from occurring. Perception of detection is significant fraud deterrence. Strong internal controls will limit the opportunity for fraud. In promoting a perception of detection, reinforce the negative consequences of committing fraud. If a potential fraudster considered the inevitable negative consequences of fraud, they would likely be less inclined to cross "the line of integrity" and not commit fraud.

Once a fraud is occurring or has taken place, deconstructing a fraudster comes down to understanding and planning. You must understand the fraud risk, the mindset of a fraudster, the attributes of a fraudster, the fraud crime problem and the consequences of fraud. Understanding all of these should lead to better preparation and planning, which will subsequently lead to disruption and prevention.

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Getting to the root of the matter.
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Flash to bang: Left of boom, right of boom

Flash to bang

From a military perspective, the term “flash to bang” is from the time when light is first observed until the sound of the munition detonation. In this context, “bang” represents the moment an attack occurs. “Flash” is a warning or alert that the attack is imminent or underway. When the bang occurs, the military concern is how mission performance is impacted. Does it degrade operational capacity? Dealing with flash and bang requires planning and processes to mitigate any diminished capacity and areas of vulnerability. Learn the value of taking actions or mitigating steps “left of flash.” This means getting in front of the flash point, identifying the threat and preventing, disrupting or diminishing any adverse impact should the attack occur. If bang occurs, immediate steps must be taken to minimize the damage, rebuild capacity and mitigate additional risk. This is referred to as “right of bang.” The most important lesson is not to wait for flash or bang. The focus must be on the importance of developing left-of-flash strategies.

Why should the concept of flash to bang matter to anti-money laundering (AML) professionals? It should matter because of the threat of terrorism and terrorist financing.

Since 9/11, law enforcement, intelligence services and first responders have used the term “left of boom” as a point of reference to stay ahead of and avert terrorist attacks. In contrast to “left of boom,” “right of boom” is the time directly following a terrorist attack. Clearly, left of boom is where AML professionals want to be from a national security and economic standpoint. Establishing and maintaining a position left of boom is extremely challenging. From an AML compliance perspective, AML professionals are highly committed to address the challenges of identifying and reporting terrorist financing.

As an industry, numerous financial institutions have processes in place to either proactively or reactively attempt to identify terrorist financing. However, it is unlikely that many financial institutions have developed a visible left-and right-of-boom mindset. Nor is it likely that they have established specific left-of-boom and right-of-boom policies and procedures.

In 1996, and again in 1998, Osama bin Laden declared war against the U.S., their Western allies and virtually anyone who was a nonbeliever of his espoused form or interpretation of radical and extremist Islam. Despite the deaths of bin Laden and many, many more Islamist terrorists, the war declared by bin Laden lives on.

Unlike military professionals, AML professionals are not considered to be warriors. However, in the war against terrorism, finance is a major weapon. In that context, AML professionals are on the front line, serving in the back office of financial institutions. What makes this more compelling is that financial institutions are either facilitation tools or detection mechanisms for the illicit flow of funds.

The financial battlefield

Finance is one of the biggest vulnerabilities for terrorists. The 9/11 Commission Monograph on Terrorist Financing[1] aptly stated, "Following the money to identify terrorist operatives and sympathizers provides a particularly powerful tool in the fight against terrorist groups." Unfortunately, it is easier said than done. Identifying terrorist financing is extremely difficult. Complicating this challenge is the fact that AML compliance is inherently reactive. Developing left-of-boom strategies, staying left of boom and getting ahead of terrorist attacks requires proactive and innovative mechanisms. The unfortunate reality is successful terrorist attacks are inevitable. Therefore, as important as left-of-boom strategies are, right-of-boom policies and procedures must be developed to react, with a sense of urgency, to terrorist events.

In December 2018, the U.S. Treasury Department published the 2018 National Strategy for Combating Terrorist and Other Illicit Financing,[2] along with supporting risk assessments. The 2018 strategy stated, "U.S. banks face challenges in distinguishing terrorism-related financial transactions from licit activity." This is where it is incumbent to face and mitigate the challenge of terrorist financing. It is possible, but not likely or probable, to identify terrorist financing. To increase or improve the probability of identifying terrorist financing requires understanding the terrorist threat; understanding funding flows; and planning both proactive and reactive processes to meet the burgeoning challenges.

From a military perspective, the time between flash and bang is nearly instantaneous. The timing from the point that an explosion is imminent to underway to occurring is a matter of a few seconds or less. Taking the flash-to-bang concept and placing it in an AML context, the timing can be significantly different. A terrorist attack goes from imminent to deployment to attack. In this setting, imminent takes on a broader meaning and the timing can range from instantaneous or spontaneous to minutes, hours, weeks, months or years. Notwithstanding how remote the chances are, that presents a potential lengthy window of opportunity to detect suspicious activity.

Invariably, terrorist attacks—regardless of how simple or complex—follow the terrorist attack cycle.[3] The terrorist attack cycle is a six-step process including target selection, planning, deployment, attack, escape and exploitation. In the framework of the terrorist attack cycle, an

[1] "National Commission on Terrorist Attacks Upon the United States, Monograph on Terrorist Financing," August 21, 2004, https://govinfo.library.unit.edu/911/staff_statements/index.htm
[2] "National Strategy for Combating Terrorist and Other Illicit Financing 2018," U.S. Department of the Treasury, December 20, 2018, https://home.treasury.gov/system/files/136/nationalstrategyforcombatingterroristandotherillicitfinancing.pdf
[3] "Defining the Terrorist Attack Cycle," Stratfor, February 23, 2012, https://worldview.stratfor.com/article/defining-terrorist-attack-cycle

imminent attack would begin with target selection and planning. This is where the time frame ranges from spontaneous to years. Time of deployment to time of attack generally takes minutes to hours or days. The lengthier the time frame, the more vulnerable terrorists are to detection. This is why establishing left-of-boom strategies is critically important to AML compliance professionals.

In terms of improving the likelihood or probability of identifying terrorist financing, start with understanding the threat environment. Islamist terrorism is the biggest terrorist threat facing the U.S. and their allies. The Islamic State poses the greatest organizational threat, while homegrown violent extremists represent the most significant individual threat. From a terrorist financing perspective, the 2018 National Strategy for Combating Terrorist and Other Illicit Financing[4] states: "The most common method of terrorist financing (TF) in the United States involves individuals who knowingly provide funds to terrorists, terrorist groups, or their supporters abroad." Most Western countries share the same vulnerabilities.

The next step of improving the likelihood or probability of identifying terrorist financing requires understanding funding flows. There are three basic funding streams regarding terrorism: Funds that flow to an organization; funds that flow through the organization to support operations; and funds that flow to individuals. From a financial institution perspective, the focus should be on who is being dealt with—organizations, individuals or both? In accordance with the 2018 strategy, the most common method of terrorist financing involves individuals who knowingly provide funds to terrorists, terrorist groups or their supporters abroad.

A good example that illustrates understanding the terrorist financing threat environment and the funding flow is the case involving a young Alabama woman, Alaa Mohd Abusaad. Abusaad was indicted on October 31, 2018 by a federal grand jury in Birmingham, Alabama, for providing material support to al-Qaeda. Abusaad was a radicalized individual who raised and sent money to terrorist operatives who provided the funds to al-Qaeda. Abusaad instructed an FBI undercover employee (UCE) how to send money to her money facilitator contact overseas. The money was to be sent in small increments (under $400) through a money services business (MSB) using false identification. Abusaad told the UCE that sending money is the same as doing jihad. Abusaad also stated that money is always needed and that there could not be a war without weapons. In this case, the money was sent through an MSB. In other cases, money is sent through bank wire transfers and ATM transactions. One of the challenges posed by this type of case is a cheaper, faster and easier movement of money. The Abusaad case represents a fundraising network that was disrupted by the FBI through an undercover operation.

By combining knowledge of the terrorist and terrorist financing threats with understanding for the funding flows, financial institutions can develop proactive and reactive processes to respond to flash-to-bang terrorist activities in an effective and efficient manner.

[4] "National Strategy for Combating Terrorist and Other Illicit Financing 2018," U.S. Department of the Treasury, December 20, 2018, https://home.treasury.gov/system/files/136/nationalstrategyforcombatingterroristandotherillicitfinancing.pdf

Left-of-boom strategies

In regards to terrorism, left of boom means getting ahead of terrorist activities before attacks occur. It requires proactive and innovative strategies to include targeted transaction monitoring, vigilance and situational awareness. The most important element of any left-of-boom strategy is a meaningful and sustainable public and private sector partnership. The fundamental part of a successful public-private partnership is collaboration through information sharing. This would result in identifying more specific scenarios to develop rules for targeted monitoring. Leveraging public and private sector perspectives and capabilities would serve to enhance vigilance and situational awareness.

In the context of breaking down the terrorist attack cycle, there could be considerable pre-boom (attack) financial activity. Target selection and planning involve numerous steps that each require funding consideration. Target selection will probably require travel and surveillance. Planning will require equipment and/or weapons purchases and could include additional travel and/or surveillance. Deployment should require travel. Depending on the level of simplicity or sophistication, there will be funding requirements. The more effective the public and private collaboration, the more likely warning signs or alerts can be identified and mitigated.

Constant critiquing of processes; assessment and comparison of terrorist events; maturation and improvement of information sharing channels; and training, to include tabletop exercises, will enhance left-of-boom strategies.

Right-of-boom strategies

Unfortunately, regardless of how robust left-of-boom strategies are, society will continue to experience deadly terrorist attacks. Hence, AML professionals must be prepared to respond in an urgent reactive manner. Right of boom is the immediate response to the attack. Law enforcement, intelligence services and first responders will respond directly to a terrorist event at the crime scene and behind the scenes through other channels. Financial intelligence is one of those channels—a very important channel. Financial institutions should respond to terrorist events internally by monitoring negative news, as names and other evidence are revealed, and by conducting other monitoring techniques. This is where it is incumbent to develop and enhance timely right-of-boom policies and procedures.

In addition to the reactive strategies in keeping with the terrorist attack cycle, financial institutions should have a process for assessing the escape and exploitations elements of the cycle. Are there financial fingerprints that can be followed in reactive or more proactive processes in the post-attack environment? For example, in the event one or more terrorists escape the attack scene, it is possible they will use a credit card, debit card or access their bank account through other means. That type of financial intelligence is essential to law enforcement in completing a terrorist attack investigation.

Conclusion

This is a dangerous world that poses a constant threat to terrorism. Finance is one of the biggest vulnerabilities to terrorists. In that vein, AML compliance professionals play a pivotal role

in the war against terrorism. Since the terrorist attacks of 9/11, law enforcement, intelligence services and first responders have embraced the flash-to-bang concept and have striven to stay ahead of and avert terrorist attacks. This is referred to as left of boom. Proactive or left-of-boom terrorist financing strategies can be devastating to a terrorist by disrupting and denying them the access to money. Much the same, right-of-boom, or urgently reactive, strategies in the immediate aftermath of a terrorist event can be extremely beneficial to law enforcement.

Terrorist financing should be viewed as a battlefield in the war on terrorism. It is incumbent that financial institutions develop flash-to-bang mindsets to assist law enforcement in the fight against terrorist financing by establishing visible left- and right-of-boom policies and procedures. Financial institutions are the repositories for the financial intelligence required to disrupt terrorism both proactively and reactively. The more the flow of funds to terrorists are disrupted and denied and the faster those individuals who support terrorism by donating funds through financial institutions are identified, the more the threat of terrorism is diminished.

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Testimony of
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Before the
United States House of Representatives
Committee on Financial Services
Subcommittee on National Security, International Development, and Monetary Policy

At the Hearing "Promoting Corporate Transparency: Examining Legislative Proposals to Detect and Deter Financial Crimes"

March 13, 2019

Good afternoon Chairman Cleaver, Ranking Member Stivers and distinguished members of the Subcommittee. Thank you for holding this hearing and for giving me the opportunity to testify before you today. I applaud the Subcommittee for taking a leadership role in promoting and considering legislative enhancements to strengthen the Bank Secrecy Act (BSA). BSA reporting plays an integral role in safeguarding national security and furthering our economic wellbeing. Dating back to my days as a senior executive in law enforcement, and continuing as a private sector consultant, I have had the privilege to experience considerable interaction with Congressional members and staff regarding the effectiveness and efficiency of BSA reporting. This is one area in which I have continually witnessed bipartisan consensus regarding considerations to enhance BSA regulations.

You asked me to testify today and comment about three legislative proposals. The first is a discussion draft "to make reforms to the Federal Bank Secrecy Act and anti-money laundering laws, and for other purposes." The second, the Corporate Transparency Act of 2019, addresses the issue of beneficial ownership. The third, the Kleptocracy Asset Recovery Rewards Act, establishes a rewards program involving foreign corruption cases. You also asked me to provide comments regarding proposed legislative reform. I will do so in reverse order. I would like to start by focusing on the purpose and challenges of the Bank Secrecy Act (BSA) and anti-money laundering (AML) reporting, in order to build on them to enhance the BSA/AML regime.

I have been engaged in the fight against money laundering, fraud, corruption, terrorist financing and other predicate offenses or specified unlawful activity for 46 years. Between my law enforcement experience and my private sector consulting experience, as a subject matter expert, I have developed a unique perspective regarding the benefits, burdens and challenges of the BSA. Having served for 31 years in the government, 28 years as a Special Agent in the Federal Bureau of Investigation (FBI), I was the direct beneficiary of BSA reporting. Now, having been in the private sector for 15 years, working as a consultant and subject matter expert, primarily with the financial services industry, I have become sensitive to the burdens and challenges of BSA reporting encountered by financial institutions. Those

burdens and challenges are driven in part by regulatory requirements and expectations, as well as by the lack of consistent feedback mechanisms from law enforcement regarding the value of BSA reporting. Make no mistake, BSA reporting is essential to law enforcement's ability to defend our national security and the economy from the threats posed by bad actors.

My government investigative and private sector consulting experience has provided me a unique opportunity to understand and appreciate two very distinct perspectives regarding the BSA. Two of the principal stakeholders of the BSA are law enforcement and financial institutions. Putting this in the context of the flow and utilization of financial information, law enforcement is the backend user and beneficiary of BSA data. Financial institutions serve as the frontend repository and custodian of financial intelligence. Financial institutions also serve the critical function of being the monitor for identifying and reporting suspicious activity and other BSA data to law enforcement. Simply put, law enforcement uses BSA data to predicate or enhance investigations from a tactical standpoint. Law enforcement also uses BSA data for strategic purposes. From a simplistic standpoint, the flow of BSA data that is continuously filtered to law enforcement is invaluable. When you layer the complexities of regulatory compliance requirements and expectations over the monitoring and filtering process financial institutions must follow, the effectiveness and efficiency of BSA reporting from the frontend monitor to the backend beneficiary, becomes flawed.

The BSA/AML environment is fraught with much inefficiency, but the system works. Law enforcement consistently receives valuable intelligence from BSA data. The challenge is that the BSA system can and should be much more effective and efficient. In this regard, I commend the Subcommittee for dedicating the time to consider measures to strengthen BSA related regulations. An informed and thoughtful discussion about various mechanisms to strengthen the BSA/AML environment and to diminish the illicit flow of funds is in our best interests as a nation.

Law enforcement is the most important BSA stakeholder. The BSA was passed in 1970 with the legislative purpose of generating reports and records that would assist law enforcement in following the money and developing prosecutable criminal cases. Since passage of the BSA, additional legislation has periodically been enacted to enhance regulations. Most notably, passage of the USA PATRIOT Act established a host of new measures to prevent, detect, and prosecute those involved in money laundering and terrorist financing. Going forward, deliberations to enhance the BSA should focus on systemic vulnerabilities, evolving technology, emerging trends and opportunities to leverage public and private partnerships and information sharing with an eye on continuing to enhance law enforcement's investigative ability.

As noted in the introduction of the BSA, "the implementing regulations under the BSA were originally intended to aid investigations into an array of criminal activities, from income tax evasion to money laundering. In recent years, the reports and records prescribed by the BSA have also been utilized as tools for investigating individuals suspected of engaging in illegal drug and terrorist financing activities. Law enforcement agencies have found CTRs (currency transaction reports) to be extremely valuable in tracking the huge amounts of cash generated by individuals and entities for illicit purposes. SARs,

(suspicious activity reports) used by financial institutions to report identified or suspected illicit or unusual activities are likewise extremely valuable to law enforcement agencies". This statement is a true reflection of BSA reporting. However, there is a troubling backstory about perceived regulatory expectations that have resulted in systemic inefficiencies.

Regardless of the extent or effectiveness of BSA regulations, criminals and terrorists must use the financial system to raise, move, store and spend money in order to sustain their illicit operations and enterprises. The reality is that no matter how robust an anti-money laundering (AML) program is, it cannot detect all suspicious activity. The BSA standard is that financial institutions maintain AML programs that are reasonably designed to detect and report suspicious activity. One of the regulatory challenges confronting financial institutions today is the question: What constitutes a reasonably designed AML program? Regulatory expectations, either real or perceived, have caused financial institutions to lose sight of the purpose of BSA reporting and have consequently led to many of the systemic inefficiencies of BSA reporting.

In using the financial system, criminals and terrorists are confronted with distinct contrasts. On one hand, the financial system serves as a facilitation tool enabling bad actors to have continuous access to funding. On the other hand, the financial system serves as a detection mechanism. Illicit funds can be identified and interdicted through monitoring and investigation. Financing is the lifeblood of criminal and terrorist organizations. At the same time, financing is one of their major vulnerabilities. At the basic core level of the frontend and backend data process flow, BSA reporting works and is more apt to serve as the intended detection mechanism. The more convoluted and distracting the regulatory process becomes, the greater the likelihood that the financial system serves as a facilitation tool for criminals and terrorists.

In the aftermath of the terrorist attacks of September 11, 2001 (9/11), as a senior executive in the FBI, I testified before the House Financial Services Committee on October 3, 2001. One of the issues I was asked to address was what the FBI considered as vulnerably or high risk areas in the financial services sector. I testified that wire transfers, correspondent banking, fraud and money services businesses were the biggest areas of vulnerability to the financial services industry at that time. As a consultant, I testified at a hearing before the House Committee on Homeland Security, Subcommittee on Counterterrorism and Intelligence on May 18, 2012. During that testimony, I repeated and refined my October 3, 2001 testimony about the vulnerabilities of wire transfers, correspondent banking, fraud and money laundering. The refinement I made was that I placed the vulnerabilities into two categories: crime problems and facilitation tools. I stated that the most significant crime problems we then faced were fraud and money laundering. I identified the key facilitation tools used in furtherance of fraud and money laundering as: wire transfers, correspondent banking, illegal money remitters, shell companies and electronic mechanisms.

Today, March 13, 2019, I believe the most significant crime problems we face continue to be fraud and money laundering. Most, if not all, other predicate offenses or specified unlawful activities contain elements of fraud and require money laundering. The key facilitation tools used in furtherance of fraud

and money laundering continue to include: wire transfers, correspondent banking, illegal money remitters (informal value transfer systems), shell companies (beneficial ownership) and electronic mechanisms. I find it quite striking and troubling that the same vulnerabilities we face today regarding our financial services industry are the same vulnerabilities we faced in October 2001.

Regarding the BSA, it is important that all stakeholders be engaged in the discussion and deliberation to improve the effectiveness and efficiency of BSA reporting and enforcement. More importantly, all stakeholders should be involved in breaking down real or perceived regulatory impediments. In each of our areas of responsibility, all BSA stakeholders should strive to exploit the financial vulnerability of criminals and terrorists by ensuring the financial system serves as a detection mechanism disrupting illicit funding flows. Although the BSA system works, it is flawed and lacks the effectiveness and efficiency it was intended to achieve.

The starting point toward improving the effectiveness and efficiency of BSA reporting is to improve the current system through building meaningful and sustainable public and private sector partnerships beginning with BSA stakeholders, including the financial services industry, regulators, policy makers, sanctioning authorities, intelligence experts, law enforcement, legislatures and other stakeholders. We need to start by improving the efficiencies of our current system by breaking down impediments. We then need to determine what enhancements to regulations should be considered.

Building meaningful and sustainable partnerships begins with understanding perspectives. Each stakeholder partner possesses a perspective based on their professional responsibilities and experience. Each of our perspectives will be somewhat unique. Understanding and blending the perspectives of our partners will enable us to establish a middle ground to improve or build efficiencies upon. As this process evolves, we can leverage the capabilities and capacity of our partners. This type of evolution sets the stage for developing innovative ideas and proactive measures.

One of the inherent disadvantages we have in our financial system and AML environment is that we are reactive. Criminals and terrorists have the advantage of being proactive. Our ability to add innovative ideas and proactive measures to an otherwise reactive system can achieve impactful investigative results. In fact, there have been recurring innovative and proactive law enforcement investigations. I speak from firsthand experience when I talk about developing proactive techniques. I can point to specific proactive law enforcement initiatives following 9/11 that were the direct result of innovative public and private sector partnerships. My emphasis here is we can be innovative within the current framework. We can also improve the current landscape through enhancements to encourage and/or incentivize innovation. For example, financial institutions conduct baseline transaction monitoring to alert to anomalies that can lead to identification of suspicious activity. By developing rule sets and scenarios that are targeted to specific transactions or financial activity, we are more likely to identify specific or targeted suspicious activity regarding specific crime problems such as human trafficking. Financial institutions are reluctant to employ targeted monitoring initiatives because of concern for the potential regulatory expectations or other perceived impediments such innovative thinking could incur.

As an extension of public and private partnerships, we should consider how to improve information sharing. The PATRIOT Act provided us with information sharing vehicles such as Section 314(a) where financial institutions can share financial information with law enforcement and Section 314(b) where financial institutions can share information with each other. Efforts should be made to enhance Section 314 information sharing in the current environment. In addition, any proposed enhancements to the BSA should consider additional information sharing mechanisms. The more we can do to enhance information sharing, the more meaningful information will be for law enforcement and the more detrimental to criminals and terrorists. During their plenary session in June 2017, the Financial Action Task Force (FATF) stressed the importance of information sharing to effectively address terrorist financing. I have always been a huge proponent of information sharing to the extent legally allowable.

Throughout my career, I have worked closely with financial institution AML and fraud compliance professionals. I have the utmost respect for their dedication and commitment to protecting the integrity of their financial institutions and for identifying the misuse of the financial system by bad actors. Next to my former law enforcement colleagues, I hold my friends in AML and fraud compliance in the highest regard. It is important to note that the BSA shortcomings we face are systemic problems caused by multiple factors and not by groups of individuals.

The most important BSA report is a SAR. In most instances, the biggest regulatory compliance breakdown resulting in some sort of enforcement or regulatory action is the failure to file SARs or to adequately file SARs. I cannot underscore enough that law enforcement is the direct beneficiary of SARs. Regardless of systemic inefficiencies, law enforcement consistently benefits from SAR filings. SARs are used tactically to predicate and/or enhance criminal investigations. SARs are also used strategically for analytical purposes. When attempting to measure effectiveness and efficiency of SAR filing, we cannot solely rely on the percentage of SARs filed versus the number of SARs used to predicate or enhance an investigation. We must also factor in how SARs are used strategically for trend analysis and analytical purposes. Finding accurate metrics to determine the effectiveness and efficiency of SAR filing is extremely difficult.

When I was in law enforcement, I used SARs for both strategic and tactical purposes. When I was Chief of the Terrorist Financing Operations Section (TFOS) at the FBI, we established a financial intelligence unit. I wanted to know on a recurring basis what were the emerging threat trends, as well as emerging crime problems. SARs were one of the data sets we used for such trend analysis. We also used SARs for tactical purposes in furtherance of investigations. We used financial intelligence, some of which was derived from BSA data, to include SARs and CTRs, for tactical proactive investigations and for tactical reactive or more traditional “books and records” “follow the money” investigations. We used datamining technology for both strategic and tactical initiatives. I believe that the FBI continues to use BSA data for strategic and tactical investigative purposes.

Following my retirement from the FBI and as I have gained more of a financial institution perspective, based on my experience as a consultant, I have become more sensitive to the perceived lack of feedback to financial institutions from the Financial Crimes Enforcement Network (FinCEN) and law enforcement

regarding the value of SARs and how SARs should be written to get law enforcements attention. FinCEN has done a good job of discussing the value of SARs in their SAR Activity Review publications. In recent years, FinCEN has recognized financial institution personnel as the frontend provider and law enforcement agents as the backend consumer for outstanding investigations involving BSA data.

The law enforcement utilization of SARs, as I have described how I used SARs as an FBI executive, was more at a program level than at the grass roots investigations level. At the program level, there is a greater use of datamining and advanced analytics. At the grass roots field level, SARs are dealt with more in the form of individual manual reviews where each SAR is physically reviewed. For example, every U.S. Attorney's Office has a SAR review team. Even though the SAR review teams use excel spreadsheets and other analytics, they review SARs by hand. The reason this is important for the Committee is at the program level, I was more inclined to want to see more SARs filed. For our datamining purpose, more was better. At the grass roots level, SAR review teams would prefer to see less numbers of SARs filed. In this context, less is better. As a field agent and middle manager, I reviewed SARs manually, and I understand the grass roots perspective as well as the program perspective. Therefore, it is incumbent that as the Committee proceeds, you speak to a variety of law enforcement stakeholders to gain the best context available.

One of the most important issues where law enforcement should be the primary stakeholder to potential legislation is the issue of CTR and SAR reporting thresholds. Since SARs were first implemented, the reporting thresholds have been the same. Periodically, banking associations and financial institutions have recommended that reporting thresholds be adjusted to account for inflation. I strongly believe that CTR and SAR reporting thresholds should remain as they are. Law enforcement would lose valuable financial intelligence if thresholds are raised. This is especially true for terrorist financing, where our primary threat is from homegrown violent extremists involved in more minimal financial flows.

As I've stated, at the core level, the flow of BSA data from the frontend provider (financial institutions) to the backend consumer (law enforcement) is good. When financial institutions can be proactive and more targeted in their monitoring and reporting, the BSA data they provide is more effective and efficient. When the data flow becomes convoluted and more constrained, the system becomes more flawed and ineffective and inefficient.

When considering new legislation or enhancements to current legislation, we need to assess the theoretical and practical applications of the law. This is where understanding stakeholder perspective can be important. What needs to be remembered and consistently applied is that BSA reporting requirements are intended to provide law enforcement with information to support investigations. Either real or perceived, financial institutions are frequently frustrated by the difference between regulatory requirements and regulatory expectations. The difference between required and expected can impede the practical application of providing law enforcement with information in order to satisfy perceived regulatory expectations.

It is interesting that two of the Bills under consideration by the Subcommittee deal with Kleptocracy and beneficial ownership. Kleptocracy is a form of public corruption where political leaders embezzle or misappropriate State funds. Frequently, they do so through gatekeepers and shell companies by disguising there beneficial ownership of the ill-gotten gains.

Kleptocracy Recovery Reward Act

Kleptocracy is a serious problem that undermines the stability of victim countries. The FBI recently announced the formation of a fourth international corruption squad to address the national impact of foreign bribery , kleptocracy, and international anti-trust schemes. Squads are based in Los Angeles, Miami, New York and Washington, D.C. Frequently, Kleptocrats rely on gatekeepers and shell or front companies to move and hide their plunder.

According to the FBI, among the most challenging money laundering investigations are those targeting gatekeepers, which may include bankers, brokerage houses, trust companies, attorneys, accountants, money managers, notaries, or real estate agents. The FBI's International Corruption Squads investigates these international business people who provide professional services to illicit actors wishing to disguise the source or nature of the money. The Kleptocracy Asset Recovery Reward Act is a good bill. It would serve as a viable tool for law enforcement to develop evidence for prosecution, as well as identify, recover and repatriate stolen funds to victim countries.

Corporate Transparency Act of 2019

As a former law enforcement executive, I have been advocating beneficial ownership legislation since 2012. Beneficial ownership through shell companies has been a series vulnerability to our financial system and an impediment for law enforcement for much too long. I encountered my first case involving money laundering in 1975, as a Revenue Agent in the Internal Revenue Service working with the Organized Crime Strike Force in Newark, New Jersey.

One facilitation tool that consistently garners Congressional attention is the issue of beneficial ownership. Year after year, potential bills are introduced regarding beneficial ownership. I strongly encourage the Subcommittee to support this beneficial ownership legislation as an enhancement to the BSA. Throughout my law enforcement career, I dealt with the challenge of shell companies and identifying true beneficial owners.

I believe that the best case scenario would be to collect beneficial ownership at the point of incorporation by the Secretaries of State. Secretaries of State have consistently been resistant to this. A good case alternative is presented in this legislation. We need to have a central repository for beneficial ownership. FinCEN is the best alternative available for collection of beneficial ownership information. As with BSA data, FinCEN will be a viable conduit for law enforcement for obtaining beneficial ownership information. By collecting beneficial ownership information, and making it available to law enforcement, valuable investigative time will be saved.

On May 11, 2016, FinCEN issued Customer Due Diligence Requirements for Financial Institutions (the CDD Rule). The rule went into effect in May 2018. The rule strengthens existing customer due diligence (CDD) requirements and requires banks to identify and verify the beneficial owners of legal entity customers. From a practical perspective, with FinCEN collecting beneficial ownership information, the burden of the CDD requirements on financial institutions would be lessened, especially if FinCEN establishes an identification verification mechanism.

I firmly believe that beneficial ownership legislation is necessary and long overdue. My only concerns about this legislation are the potential differences or inconsistencies between information provided to Secretaries of State at point of incorporation and information provided to FinCEN at point of registration. In addition, from a practical perspective, I'm concerned about FinCEN's capacity to collect and disseminate beneficial ownership information in an effective and efficient manner.

Discussion Draft to Reform BSA/AML Laws

I believe the Discussion Draft sets the foundation for meaningful enhancements to BSA/AML legislation. Again, I'd like to commend the Subcommittee for your leadership role in considering legislative measures to enhance the BSA. Two important themes that resonate throughout the draft are information sharing and partnerships. Throughout my career I have been a strong advocate for sharing information and for establishing public-public and public-private partnerships. Meaningful partnerships lead to proactive and innovative initiatives. Without question, the more we can do to establish practical and sustainable information sharing mechanisms and viable partnerships, the more effective and efficient BSA reporting will become. Going back to considering financial institutions as being facilitation tools or detection mechanisms for fraud, money laundering and other predicate offenses, the end result of more effective and efficient BSA reporting is minimizing facilitation and maximizing detection.

I would like to offer some observations about select provisions in the Draft Discussion:

- Sections 103 and 104 regarding Civil Liberties

As an FBI Agent, I took an oath to uphold the Constitution and protect Civil Liberties. Any BSA/AML enhancements, particularly where law enforcement gains authority, must ensure we protect Civil Liberties.

- Section 109 FinCEN Exchange

In theory, the FinCEN Exchange is a good idea. Facilitating the public-private sharing of information between financial institutions and law enforcement is extremely important and valuable. From a practical perspective, FinCEN is not a law enforcement agency; and this type of public-private partnership may be better served directly between financial institutions and law enforcement. There

are examples of very productive law enforcement led working groups with financial institutions that facilitate productive information sharing.

- Section 111 De-Risking Report

There are adverse consequences for de-risking. De-risking is a concern and challenge for law enforcement. When individuals and/or entities are de-risked, the prospect of them going underground and losing transparency is problematic. It should be pointed out that a cause for de-risking is the result of regulatory expectations versus regulatory requirements. Real or perceived, financial institutions are influenced by how they believe the regulators view their risk management and determinations of what presents risk.

- Section 201 Sharing of Suspicious Activity Reports Within Financial Groups

Permitting financial institutions to share SAR information as articulated in the section would ultimately be beneficial to law enforcement.

- Section 202 Training for Examiners on AML/CFT

Training examiners for AML/CFT is a good idea. I believe this training should go beyond AML/CFT to include perspective training. What I mean by perspective training is that examiners may not know how financial institution employees think or operate. Bank operational training should be required in addition to AML/CFT training. Terrorist financing is extremely difficult to identify. From a practical perspective, it is extremely difficult for anyone to understand or identify terrorist financing.

- Section 203 Sharing of Compliance Resources

Sharing resources, especially by smaller financial institutions would have a tremendous cost benefit and could enhance the effectiveness and efficiency of BSA reporting.

- Section 206 Section 314(a) Improvements and Section 207 Sharing of Threat Pattern and Trend Information

Information sharing through Section 314 is extremely important. Any enhancements to improve information sharing would result in more effective, efficient and qualitative BSA reporting. In Section 206, from a practical perspective, it would be challenging to maintain current law enforcement points of contact. However, it would be a worthwhile effort. In Section 207 sharing typologies on emerging money laundering and counter terror financing threat patterns and trends would be extremely beneficial. One model for this type of information sharing exists on a small scale. The FBI's TFOS had an outstanding Bank Security Advisory Group where typologies were shared and acted upon. There are other examples of similar working groups, especially in the area of Human Trafficking.

- Section 214 Application of Bank Secrecy Act to Dealers in Arts and Antiquities

Arts and antiquities have for a long time, quietly been a mechanism for hiding ill-gotten gains and serving as a money laundering tool. This was never more evident than with the theft and black market sales of art and antiquities from Iraq and Syria by the Islamic State to help support their terrorist organization.

Beyond arts and antiquities, exemptions from BSA/AML requirements should be lifted from Non-Bank Financial Institutions to include persons involved in real estate closings and settlements and sellers of vehicles, including automobiles, airplanes and boats.

In addition to arts and antiquity dealers, consideration should be given to include gatekeepers, especially formation agents, who form corporations and trusts.

- Section 215 Revision to Geographic Targeting Order

Geographic Targeting Order referred to for real estate should be expanded. It should apply nationwide and consideration should be given to making it permanent.

- Section 301 Encouraging Innovation in BSA Compliance

Innovation is extremely important and should be broadly encouraged.

Once again, I thank the Subcommittee for the opportunity to testify. I look forward answering your questions or providing further clarification.

Back to Speaker Topics

Fund Assembly

Agathokakological* Nature of Property Assessed Clean Energy (PACE) Loans

***composed of both good and evil**

Linda Monaco, *Legal Education Attorney, The Fund*

Back to Speaker Topics

Speaker Information

Agathokakological* Nature of Property Assessed Clean Energy (PACE) Loans

*composed of both good and evil

Linda Monaco

Legal Education Attorney, The Fund

Linda Neale Monaco, B. C. S., is a Fund Legal Education Attorney. She received her B.S. in Industrial Distribution from Texas A&M University and J.D. with honors from Quinnipiac University. She is admitted to practice in Florida, Connecticut and in the United States District Court for Connecticut.

Ms. Monaco is a Florida Board Certified Real Estate Lawyer and a Florida licensed real estate instructor. Prior to joining The Fund, Ms. Monaco was a solo practitioner and taught classes to attorneys and paralegals alike. Since joining The Fund, Ms. Monaco has written and presented numerous seminars and webinars. She has presented several times at Fund Assembly and Fund Affiliate Assembly on topics such as Best Practices, FIRPTA, Ethics, Sovereignty Lands, Liens, Probate and Trust. She has served as master of ceremonies at the South Florida Fund Affiliate Assembly multiple times. Ms. Monaco also presented Basics of FIRPTA to the National Association of Realtors ® as well as a short program on Property Assessed Clean Energy Loans (PACE Loans) to FLTA.

Table of Contents		Page Number
1.	PowerPoint	2
2.	Sec. 163.08 F.S.	40
3.	Florida Resiliency and Broward County agreement	44
4.	Florida participating municipalities	56
5.	HUD letter December 7, 2017	72
6.	Green Corridor Payoff Quote	76
7.	Sample – Florida HERO Financing Program	77
8.	CFPB Notice for comments	121
9.	BCFP (CFPB) Advance Notice of Rulemaking	122
10.	Weston Commercial Properties Ltd Agreement	137
11.	Weston Commercial Properties Ltd Addendum	141
12.	Gorman Agreement	144
13.	Gorman Addendum	148
14.	Gorman tax bill 2017, 2018	151
15.	Termination of Agreement	153
16.	PACE Basics	156

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Fund Assembly

Agathokakological* Nature of Property Assessed Clean Energy (PACE) Loans

*composed of both good & evil

Linda Monaco, B.C.S.
Legal Education Attorney

Agathokakological

https://tvgeekingout.wordpress.com/2017/06/01/the-wayback-machine-%EF%BB%BFthe-incredible-hulk-tv-series-1978-1982/

- Adjective
  - Composed of both good & evil
  - First used in 1834

https://www.inverse.com/article/31620-the-mummy-mr-hyde-dr-jekyll-russell-crowe

https://aminutetomidnite.com/the-christian-life/a-wolf-in-sheeps-clothing/

2

Overview

- Good – background
  - Benefits of PACE financing
  - Details of PACE financing
- Evil – unseen hurdles
  - Issues associated with PACE financing
- Informing parties
  - Lack of knowledge across the board
- Examples

3

What is PACE?

- Long-term financing mechanism underwritten by government for
  - Energy efficiency
  - Renewable energy &
  - Water conservation projects
- Intended to be low-cost
- For properties
  - Commercial
  - Nonprofit
  - Residential

https://www.inverse.com/article/31620-the-mummy-mr-hyde-dr-jekyll-russell-crowe

4

What is PACE?

- National initiative
- State has to pass legislation authorizing municipalities to establish PACE programs
- Municipalities have to pass ordinances to participate
  - Not all municipalities in Florida participate
  - Programs are established locally
  - New areas are added frequently

5

https://www.animalsaustralia.org/issues/secret-lives-of-sheep.php

What is PACE?

- Improvements – generally
  - Heating & air conditioning
  - Solar
  - Cool roofing
  - Windows & doors

6

https://tvgeekingout.wordpress.com/2017/06/01/the-wayback-machine-%EF%BB%BFthe-incredible-hulk-tv-series-1978-1982/

Which States Have Approved C-PACE Financing?

7

C-PACE Programs

Commercial PACE

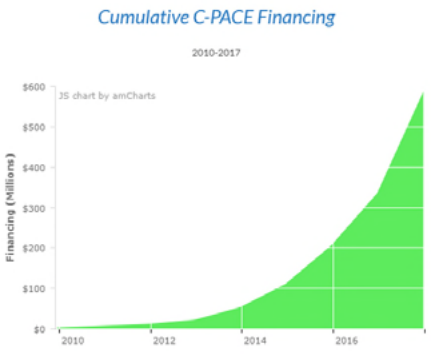
C-PACE OVERVIEW

$857	1827
Millions	*Commercial projects*

12,855

Jobs created

(Source: 15 jobs per million, EcoNorthwest)



8

C-PACE Programs

C-PACE improvement type breakdown

(By $ funded)

Energy Efficiency (49%)

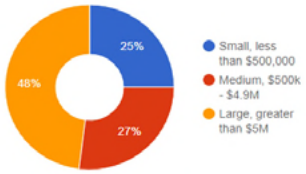
Renewable energy (27%)

Mixed (17%)

Resiliency (7%)

C-PACE projects by amount financed

(By $ funded)



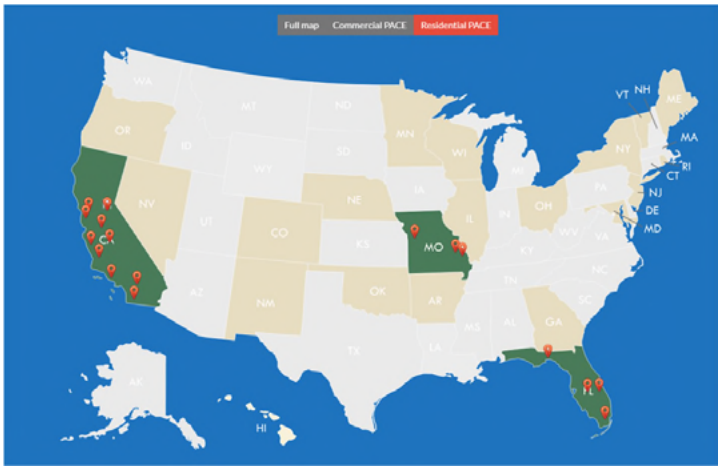
C-PACE dollars funded in each state (states > $10MM)

(By $ funded)

State	Total PACE amount ($, Millions)
CA	275
CT	130
MO	56
MN	54
OH	49
TX	36
DC	34
NE	28
CO	26
MI	25
WI	21
FL	16
MD	11

9

Which States Have Approved R-PACE Financing?



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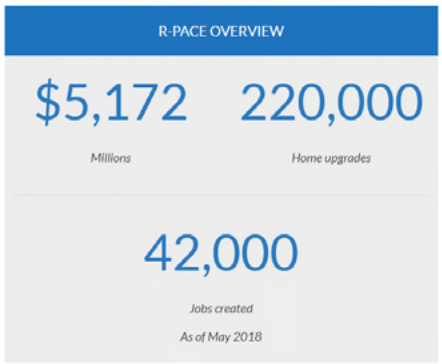
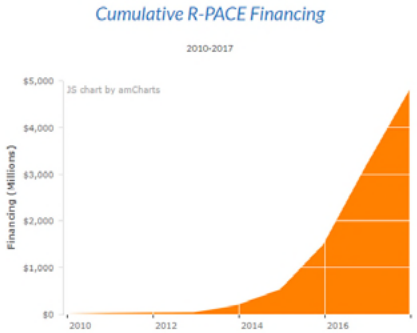
R-PACE Programs

Residential PACE





11

PACE details

- Generally up to 20 years financing
  - Paid in annual installments
  - Assessed as a non-ad valorem tax
  - May be administered by private entity
  - Assumable with no approval
  - Duration – pursuant to Agreement or Addendum
- May be combined with other incentive programs

12

PACE details

- Voluntary for all parties
- May cover 100% of project's hard & soft costs
- Residential or commercial applications do not take into account
  - Credit worthiness
  - Ability to repay

13

PACE details

- Finance up to 20% of just value
  - Exception to exceed if energy audit demonstrates annual energy savings equals or exceed annual assessment
  - All financing (mortgages & PACE financing) not to exceed FMV of real property
  - No adjustable rates
  - No negative amortization

14

PACE in Florida

15

PACE in Florida

40

- Commercial
- Residential
- Sec. 163.08 F.S.

163.08 Supplemental authority for improvements to real property.–

(1)(a) In chapter 2008-227, Laws of Florida, the Legislature amended the energy goal of the state comprehensive plan to provide, in part, that the state shall reduce its energy requirements through enhanced conservation and efficiency measures in all end-use sectors and reduce atmospheric carbon dioxide by promoting an increased use of renewable energy resources. That act also declared it the public policy of the state to play a leading role in developing and instituting energy management programs that promote energy conservation, energy security, and the reduction of greenhouse gases. In addition to establishing policies to promote the use of renewable energy, the Legislature provided for a schedule of increases in energy performance of buildings subject to the Florida Energy Efficiency Code for Building Construction. In chapter 2008-191, Laws of Florida, the Legislature adopted new energy conservation and greenhouse gas reduction comprehensive planning requirements for local governments. In the 2008 general election, the voters of this state approved a constitutional amendment authorizing the Legislature, by general law, to prohibit consideration of any change or improvement made for the purpose of improving a property's resistance to wind damage or the installation of a renewable energy source device in the determination of the assessed value of residential real property.

16

PACE in Florida – Qualifying Improvement

- Energy conservation & efficiency improvement
  - Insulation, energy-efficient heating/cooling, adding windows, electric vehicle charging equipment, etc.
- Renewable energy improvements using
  - Hydrogen, solar, geothermal, bioenergy & wind as an energy source
- Wind resistance
  - Roof, storm shutters, bracing, secondary water barrier, opening protections, etc.

17

PACE in Florida – Qualifying Improvement

- Local government
  - Pass ordinance or resolution
  - May levy non-ad valorem assessments
  - Collected pursuant to Sec. 197.3632 F.S.
- Not subject to discount for early payment
  - November vs. March
    - Sec. 163.08(4) F.S.
- May be administered by
  - For-profit entity or
  - Not-for-profit organization

44

18

Which Municipalities have Approved PACE Financing?

56

FL municipalities

Municipality	County	State	Program Name	Lead Organization	Financing Type
Alachua	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Alachua	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Archer	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Archer	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Earleton	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Gainesville	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Gainesville	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Hawthorne	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Hawthorne	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
High Springs	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both

19

PACE Programs – https://pacenation.us

Florida Programs

State	Program name	Coverage	Residential / commercial	
FL	Counterpointe Energy Solutions	Many cities and counties	Residential, Commercial	
	HERO Program FL	Many cities and counties	Residential	
	Leon County PACE	Leon County	Commercial	
	RenewPACE	Any municipality in FL	Commercial	
	SELF	St. Lucie County	Commercial	
	Ygrene	Several cities and counties	Residential, Commercial	

Status
- [ ] *
- [x] Funded projects
- [x] Launched program

Cancel Apply

- Active program with funded projects
- Launched PACE programs

20

C-PACE Programs in Florida

- Innovative financing program
- Up to 100% financing
- Active commercial programs
  - Alliance NRG PACE
  - CounterpointeSRE – servicer
  - Leon County Commercial Pace Program
  - RenewPACE
  - Solar Energy Loan Fund (SELF)
  - Ygreen Works

21

R-PACE Programs in Florida

- Active residential PACE programs
  - Alliance NRG PACE
  - CounterpointeSRE – servicer
  - HERO Program FL
  - Ygreen Works

22

Requirements - Obligators

- All owners must agree to provisions
  - Think homestead
  - Sec. 163.08(13) F.S.

23

Requirements – Disclosure to Current Lenders

- Owner must send notice to current mortgage holder or servicer
  - 30 days prior to entering into agreement
  - Details of agreement
  - Verified copy or other proof of notice to be provided to local government
- Acceleration or unilateral modification of existing loan/mortgage can not be solely due to entering a PACE agreement
  - Sec. 163.08(13) F.S.

24

Requirements

- Requires owner to give written disclosure of assessment to prospective purchaser at or before execution of contract
  - Sec. 163.08(14) F.S.

25

http://freepik.adobe.vip/?free-photo/doctor-writing-a-prescription_977807.htm

Requirements – Disclosure to Buyer

QUALIFYING IMPROVEMENTS FOR ENERGY EFFICIENCY, RENEWABLE ENERGY, OR WIND RESISTANCE

The property being purchased is located within the jurisdiction of a local government that has placed an assessment on the property pursuant to s. 163.08, Florida Statutes. The assessment is for a qualifying improvement to the property relating to energy efficiency, renewable energy, or wind resistance, and is not based on the value of property. You are encouraged to contact the county property appraiser's office to learn more about this and other assessments that may be provided by law.

26

What is the Good?

- Easy 100 % financing for specific projects
- No credit check (other than if past taxes have been paid on time)
- No out-of-pocket costs
- Extended terms for financing
- Delayed first payment

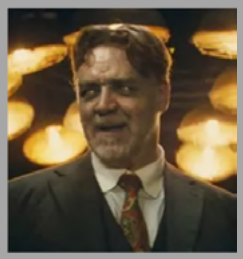
27

Begin Transformation

28

Critical Issues

- Will cause
  - Escrow shortage first year
  - Significant adjustment to escrow payments



29

https://www.inverse.com/article/31620-the-mummy-mr-hyde-dr-jekyll-russell-crowe

Critical Issues

- Annual assessment - $6,000.00
  - From recorded agreement
  - First year escrow will be $6,000.00 short
    - Required to pay shortage PLUS
  - Escrow for following year monthly increased of $500.00

30

https://animals.fandom.com/wiki/File:Gray_Wolf_Watching.jpg

Critical Issues

- Priority
  - Superior to all private liens including
    - Purchase money mortgages
    - Deeds of trust
    - Other security instruments

31

Critical Issues

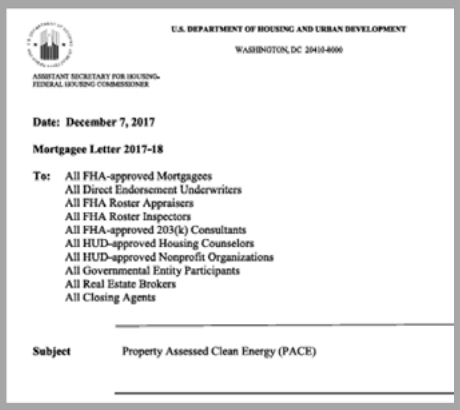
- Annual payment as non-ad valorem tax
  - No foreclosure for non-payment
  - Tax sale for non-payment
- Length of financing is not specified in statute
  - No extensions

32

Critical Information

72

- Properties encumbered with PACE obligation
  - Not eligible for FHA-insured mortgages
  - Refinance
    - Must payoff PACE obligation
  - Not eligible for FHA-insured HECM
    - Home Equity Credit Mortgage



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

Date: December 7, 2017

Mortgagee Letter 2017-18

To: All FHA-approved Mortgagees
All Direct Endorsement Underwriters
All FHA Roster Appraisers
All FHA Roster Inspectors
All FHA-approved 203(k) Consultants
All HUD-approved Housing Counselors
All HUD-approved Nonprofit Organizations
All Governmental Entity Participants
All Real Estate Brokers
All Closing Agents

Subject Property Assessed Clean Energy (PACE)

33

Critical Information

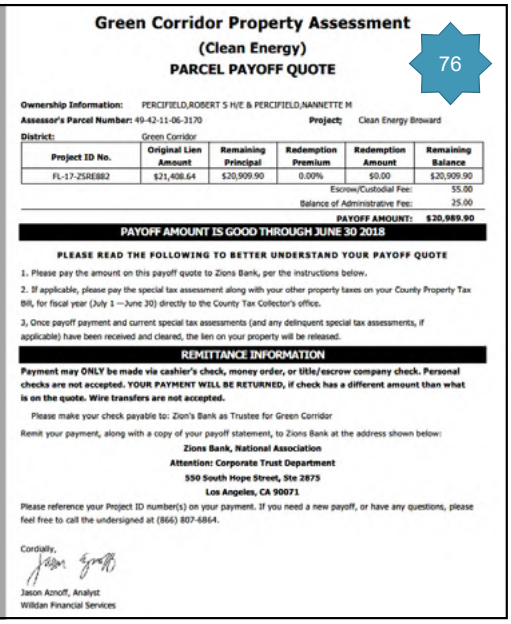
- If a mortgage cannot be FHA insured
  - Lender will not be able to sell loan on secondary market
- Recorded “Summary Memorandum of Agreement” may not contain accurate annual assessment
  - Signed & recorded prior to improvements
  - Owner may not use all available funds
- However, owner may request an “Addendum to Financing Agreement” to be calculated & recorded

34

Payoff Statement

- Does not indicate if current year assessment sent to tax collector
- 2. If, applicable, pay special tax assessment for fiscal year (July 1 – June 30) directly to County Tax Collector
- 3. Once payoff payment & current special tax assessments is received & cleared then lien will be released

35



Green Corridor Property Assessment
(Clean Energy)
PARCEL PAYOFF QUOTE

76

Ownership Information: PERCIFIELD,ROBERT S H/E & PERCIFIELD,NANNETTE M
Assessor's Parcel Number: 49-42-11-06-3170 **Project:** Clean Energy Broward
District: Green Corridor

Project ID No.	Original Lien Amount	Remaining Principal	Redemption Premium	Redemption Amount	Remaining Balance
FL-17-ZSRE882	$21,408.64	$20,909.90	0.00%	$0.00	$20,909.90

Escrow/Custodial Fee: 55.00
Balance of Administrative Fee: 25.00
PAYOFF AMOUNT: $20,989.90

PAYOFF AMOUNT IS GOOD THROUGH JUNE 30 2018

PLEASE READ THE FOLLOWING TO BETTER UNDERSTAND YOUR PAYOFF QUOTE

1. Please pay the amount on this payoff quote to Zions Bank, per the instructions below.
2. If applicable, please pay the special tax assessment along with your other property taxes on your County Property Tax Bill, for fiscal year (July 1 —June 30) directly to the County Tax Collector's office.
3. Once payoff payment and current special tax assessments (and any delinquent special tax assessments, if applicable) have been received and cleared, the lien on your property will be released.

REMITTANCE INFORMATION

Payment may ONLY be made via cashier's check, money order, or title/escrow company check. Personal checks are not accepted. YOUR PAYMENT WILL BE RETURNED, if check has a different amount than what is on the quote. Wire transfers are not accepted.

Please make your check payable to: Zion's Bank as Trustee for Green Corridor

Remit your payment, along with a copy of your payoff statement, to Zions Bank at the address shown below:

Zions Bank, National Association
Attention: Corporate Trust Department
550 South Hope Street, Ste 2875
Los Angeles, CA 90071

Please reference your Project ID number(s) on your payment. If you need a new payoff, or have any questions, please feel free to call the undersigned at (866) 807-6864.

Cordially,

Jason Aznoff, Analyst
Willdan Financial Services

Payoff Statement

- Does not indicate if current year assessment sent to tax collector
  - If sent then this payoff letter is short one year's payment
- 2. If, applicable, pay special tax assessment for fiscal year (July 1 – June 30) directly to County Tax Collector
  - Will not know if sent or not – tax collector cannot help
- 3. Once payoff payment & current special tax assessments is received & cleared then lien will be released
  - May not receive release until April the following year

36

What is the Evil?

- First year escrow shortage
- Increase monthly payment
- Super priority – no foreclosure – tax sale
- No extensions of financing
- Must payoff
  - If refinancing with FHA insured loan
  - If buyer is obtaining a new FHA insured loan
- Recorded Summary Memorandum of Agreement is not signed by owner
- Payoff statement may be inaccurate, impossible to verify

37

Transformation is Complete

38

Everyone is in the Dark

39

Sellers

77

- Owner/Seller did not
  - Read and/or
  - Understand PACE

b. **Tax Sale.** The Property Owner acknowledges that if any assessment installment is not paid when due, the enforcement and collection procedures set forth in the Uniform Assessment Collection Act (Section 197.3632, Florida Statutes) may be employed which could result in a sale of tax certificates for the Property and the ultimate sale of the Property for the payment of the delinquent assessment installments, associated penalties, interest and other costs.

c. **Interest Rate.** You will be charged a fixed interest rate on your total financed amount. Your interest rate will be provided in your financing documents and may be subject to change until you have signed financing documents.

d. **Program Administration Fee.** At the time of closing, the Program will charge a one-time program administration fee of 4.99% of the Project Cost to cover the cost of administering the Program. This fee will be included in the principal amount of the assessment.

40

Sellers

- Owners/Sellers are surprised by, (but should not be)
  - First year tax assessment
    - Lender required payment of shortage
  - Increase in escrow payment

NON - AD VALOREM TAXES

Levying Authority	Rate	Amount
14 LIGHTHOUSE POINT SOLID WASTE	@ 469.6800	469.68
14 LIGHTHOUSE PT FIRE PROTECTION		134.50
GRC PACE GREEN CORRIDOR		2,075.66
LP LIGHTHOUSE POINT STORMWATER	@ 60.0000	60.00

41

Sellers

- Owners/Sellers are surprised by, (but should not be)
  - Required to payoff
    - Refinance or
    - Selling

IN ADDITION, FANNIE MAE AND FREDDIE MAC, THE OWNERS OF A SIGNIFICANT PORTION OF ALL HOME MORTGAGES, STATED THAT THEY WOULD NOT PURCHASE HOME LOANS WHERE THE PROPERTY WAS ENCUMBERED BY A NON-AD VALOREM ASSESSMENT SUCH AS THE NON AD-VALOREM ASSESSMENTS THAT WILL BE IMPOSED AS A RESULT OF ENTERING INTO THIS FINANCING AGREEMENT. THIS MAY MEAN THAT PROPERTY OWNER(S) WHO SELL OR REFINANCE THEIR PROPERTY MAY BE REQUIRED TO PREPAY THE ENTIRE AMOUNT OF SUCH ASSESSMENT AT THE TIME THEY CLOSE THEIR SALE OR REFINANCING.

Sellers

- Seller may not
  - Inform real estate agent of PACE financing
  - Potential buyers of PACE financing, as required by statute
  - Understand that it will need to be paid at closing

43 https://www.freedomfoundation.com/labor/government-union-tells-members-not-to-talk-to-legislators-about-waste/

Real Estate Agents

- Are unaware of PACE financing altogether
- May price the property including the improvements & then expect buyer to assume PACE financing
  - Buyer pays twice
- May not know the meaning of GRC PACE Green Corridor as a tax
- May not be aware of statutory required disclosure

44

Real Estate Agents

- May believe that is “just an assessment”
  - Subject to Paragraph 9. Closing costs (f) Special Assessments

(f) **SPECIAL ASSESSMENTS:** At Closing, Seller shall pay: (i) the full amount of liens imposed by a public body ("public body" does not include a Condominium or Homeowner's Association) that are certified, confirmed and ratified before Closing; and (ii) the amount of the public body's most recent estimate or assessment for an improvement which is substantially complete as of Effective Date, but that has not resulted in a lien being imposed on the Property before Closing. Buyer shall pay all other assessments. If special assessments may be paid in installments **(CHECK ONE):**
☐ (a) Seller shall pay installments due prior to Closing and Buyer shall pay installments due after Closing. Installments prepaid or due for the year of Closing shall be prorated.
☐ (b) Seller shall pay the assessment(s) in full prior to or at the time of Closing.
IF NEITHER BOX IS CHECKED, THEN OPTION (a) SHALL BE DEEMED SELECTED.
This Paragraph 9(f) shall not apply to a special benefit tax lien imposed by a community development district (CDD) pursuant to Chapter 190, F.S., which lien shall be prorated pursuant to STANDARD K.

- Currently no provisions in FR/Bar contract or addendums

45

Buyer

- Proper disclosure by seller may not be understood
- May cause overvaluation
  - Assume PACE assessment
  - Pay full value for improved property

QUALIFYING IMPROVEMENTS FOR ENERGY EFFICIENCY, RENEWABLE ENERGY, OR WIND RESISTANCE.—The property being purchased is located within the jurisdiction of a local government that has placed an assessment on the property pursuant to s. 163.08, Florida Statutes. The assessment is for a qualifying improvement to the property relating to energy efficiency, renewable energy, or wind resistance, and is not based on the value of property. You are encouraged to contact the county property appraiser's office to learn more about this and other assessments that may be provided by law.

46

Buyer

- Recent improvements may not show on tax bill
  - Up to 18 month lag
- May agree to assume
- Assumption may cause debt to income issues with new loan
  - New lender will require payoff, if aware of priority of PACE financing

IN ADDITION, FANNIE MAE AND FREDDIE MAC, THE OWNERS OF A SIGNIFICANT PORTION OF ALL HOME MORTGAGES, STATED THAT THEY WOULD NOT PURCHASE HOME LOANS WHERE THE PROPERTY WAS ENCUMBERED BY A NON-AD VALOREM ASSESSMENT SUCH AS THE NON AD-VALOREM ASSESSMENTS THAT WILL BE IMPOSED AS A RESULT OF ENTERING INTO THIS FINANCING AGREEMENT. THIS MAY MEAN THAT PROPERTY OWNER(S) WHO SELL OR REFINANCE THEIR PROPERTY MAY BE REQUIRED TO PREPAY THE ENTIRE AMOUNT OF SUCH ASSESSMENT AT THE TIME THEY CLOSE THEIR SALE OR REFINANCING.

47

Other Closing Agents

- May not understand PACE assessment
- May just pro-rate PACE assessment
- May not pay off PACE financing
- May not hold escrow for final payment
- May show as a B-II exception
  - Object & make them pay it off
  - **Fund products always make PACE assessments a B-I requirement**

48

Lender

- Lenders are unaware
  - Only 3 states have PACE for residences
  - It is called a Summary Memorandum of Agreement
  - Will not recognize as a super priority financing
    - Unaware to call for payoff

49

Lender

- If not paid off
  - Will not be able to sell loan to Fannie Mae/ Freddie Mac
    - **Fund products always make PACE assessments a B-I requirement**
  - New loan will be in second place

7. Policy must insure that the security instrument constitutes a valid first mortgage lien on the borrower's fee simple (or acceptable leasehold) estate in the mortgaged premises, unless other lien position is specified in the Closing Instructions.

50

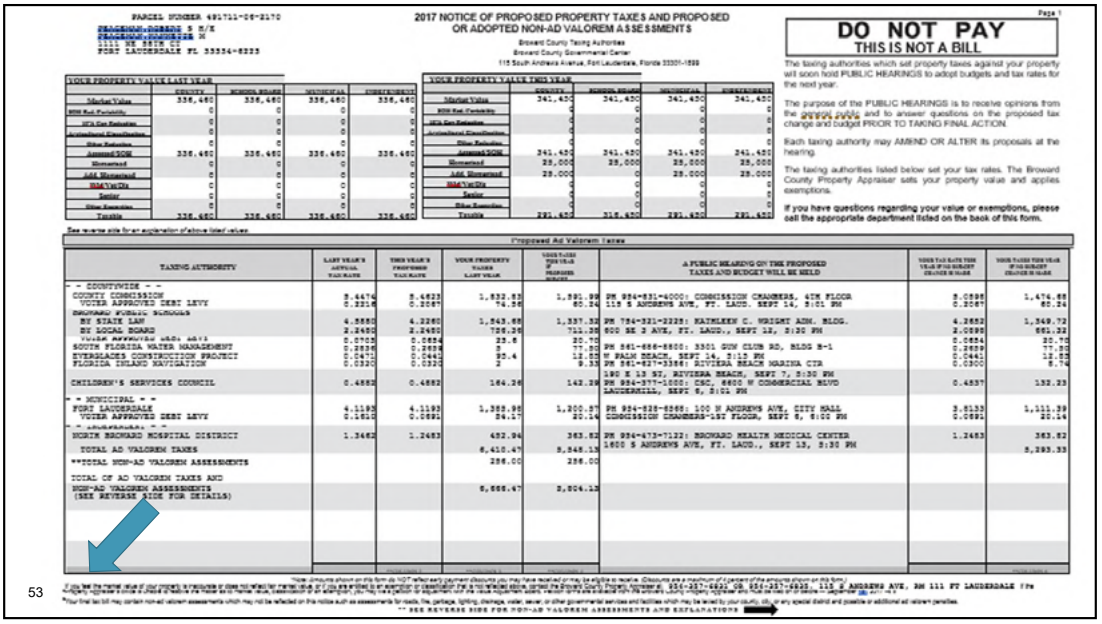
Additional Troubles

51

Current Assessment

- Work completed after July 1 will not appear on tax bill until November following year
  - Project completed August 4, 2017
  - First appearance on tax bill of November 2018
- TRIM notice will never show assessment

52



2017 NOTICE OF PROPOSED PROPERTY TAXES AND PROPOSED OR ADOPTED NON-AD VALOREM ASSESSMENTS

Broward County Taxing Authorities
Broward County Governmental Center
115 South Andrews Avenue, Fort Lauderdale, Florida 33301-1899

DO NOT PAY
THIS IS NOT A BILL

The taxing authorities which set property taxes against your property will soon hold PUBLIC HEARINGS to adopt budgets and tax rates for the next year.

The purpose of the PUBLIC HEARINGS is to receive opinions from the general public and to answer questions on the proposed tax change and budget PRIOR TO TAKING FINAL ACTION.

Each taxing authority may AMEND OR ALTER its proposals at the hearing.

The taxing authorities listed below set your tax rates. The Broward County Property Appraiser sets your property value and applies exemptions.

If you have questions regarding your value or exemptions, please call the appropriate department listed on the back of this form.

Proposed Ad Valorem Taxes

TAXING AUTHORITY	LAST YEAR'S ACTUAL TAX RATE	THIS YEAR'S PROPOSED TAX RATE	YOUR PROPERTY TAXES LAST YEAR	YOUR TAXES THIS YEAR IF PROPOSED BUDGET	A PUBLIC HEARING ON THE PROPOSED TAXES AND BUDGET WILL BE HELD	YOUR TAX RATE THIS YEAR IF NO BUDGET CHANGE IS MADE	YOUR TAXES THIS YEAR IF NO BUDGET CHANGE IS MADE
- - COUNTYWIDE - -							
COUNTY COMMISSION	5.4474	5.4623	1,832.83	1,891.99	PM 954-831-4000: COMMISSION CHAMBERS, 4TH FLOOR	5.0898	1,474.68
VOTER APPROVED DEBT LEVY	0.2218	0.2067	74.58	80.24	115 S ANDREWS AVE, FT. LAUD. SEPT 14, 5:01 PM	0.2067	60.24
BROWARD PUBLIC SCHOOLS							
BY STATE LAW	4.5680	4.2260	1,543.68	1,337.32	PM 754-321-2225: KATHLEEN C. WRIGHT ADM. BLDG.	4.2652	1,548.72
BY LOCAL BOARD	2.2450	2.2450	755.20	710.35	600 SE 3 AVE, FT. LAUD., SEPT 12, 5:30 PM	2.0595	691.32
VOTER APPROVED DEBT	0.0705	0.0654	23.6	20.70		0.0654	20.70
SOUTH FLORIDA WATER MANAGEMENT	0.2836	0.2636	9	77.7	PM 561-686-8800: 3301 GUN CLUB RD, BLDG H-1	0.2629	77.37
EVERGLADES CONSTRUCTION PROJECT	0.0472	0.0442	15.4	13.99	W PALM BEACH, SEPT 14, 5:15 PM	0.0441	12.99
FLORIDA INLAND NAVIGATION	0.0320	0.0320	2	9.33	PM 561-627-3386: RIVIERA BEACH MARINA CTR	0.0300	8.74
CHILDREN'S SERVICES COUNCIL	0.4882	0.4882	164.28	142.28	180 E 13 ST, RIVIERA BEACH, SEPT 7, 5:30 PM	0.4537	132.23
- - MUNICIPAL - -					PM 954-377-1000: CSC, 6600 W COMMERCIAL BLVD LAUDERHILL, SEPT 6, 5:01 PM		
FORT LAUDERDALE	4.1193	4.1193	1,386.95	1,200.57	PM 954-828-8565: 100 N ANDREWS AVE, CITY HALL	3.8133	1,111.39
VOTER APPROVED DEBT LEVY	0.1610	0.0691	54.17	20.14	COMMISSION CHAMBERS-1ST FLOOR, SEPT 5, 6:00 PM	0.0691	20.14
- - HOSPITAL - -							
NORTH BROWARD HOSPITAL DISTRICT	1.3482	1.2483	452.94	363.82	PM 954-473-7122: BROWARD HEALTH MEDICAL CENTER	1.2483	363.82
TOTAL AD VALOREM TAXES			6,410.47	5,845.13	1600 S ANDREWS AVE, FT. LAUD., SEPT 13, 5:30 PM		5,293.33
**TOTAL NON-AD VALOREM ASSESSMENTS			256.00	256.00			
TOTAL OF AD VALOREM TAXES AND NON-AD VALOREM ASSESSMENTS (SEE REVERSE SIDE FOR DETAILS)			6,666.47	6,004.13			

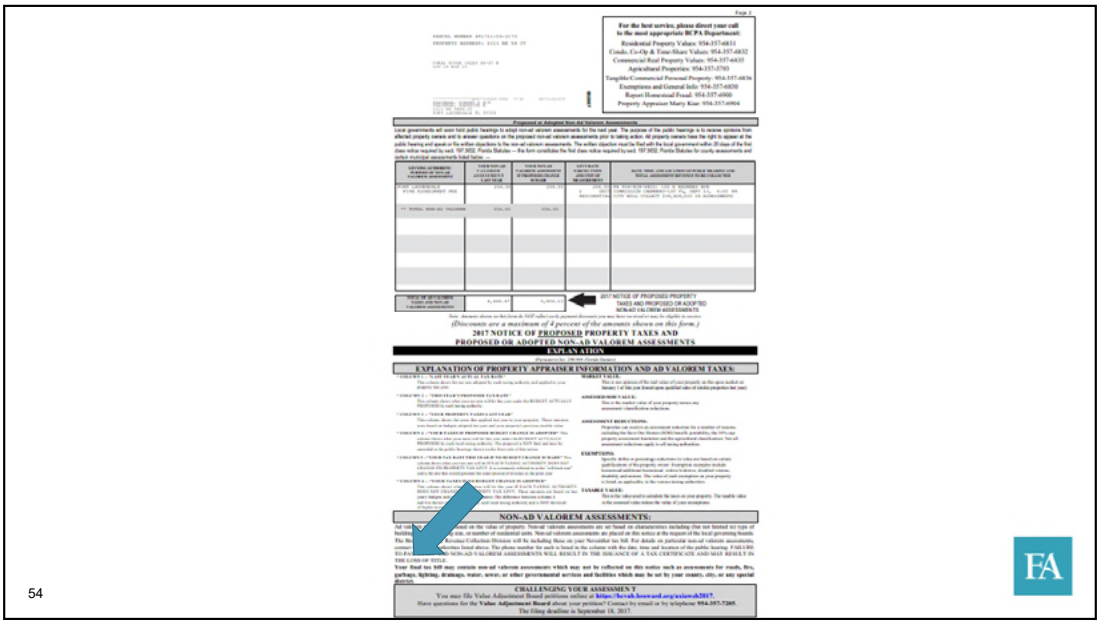
*Note: Amounts shown on this form do NOT reflect early payment discounts you may have received or may be eligible to receive. (Discounts are a maximum of 4 percent of the amounts shown on this form.)

*Property appraiser's office is unable to make the market value of your property available to you at this time. Value, classification or eligibility for exemption and/or portability may change at the time of final adoption of taxes.

*Your final tax bill may contain non-ad valorem assessments which may not be reflected on this notice such as assessments for roads, fire, garbage, lighting, drainage, water, sewer, or other governmental services and facilities which may be levied by your county, city, or any special district and possible or additional ad valorem penalties.

** SEE REVERSE SIDE FOR NON-AD VALOREM ASSESSMENTS AND EXPLANATIONS

53



For the best service, please direct your call to the most appropriate BCPA Department:

Residential Property Values: 954-357-6831
Condo, Co-Op & Time-Share Values: 954-357-6832
Commercial Real Property Values: 954-357-6835
Agricultural Properties: 954-357-5793
Tangible/Commercial Personal Property: 954-357-6836
Exemptions and General Info: 954-357-6830
Report Homestead Fraud: 954-357-6900
Property Appraiser Marty Kiar: 954-357-6904

2017 NOTICE OF PROPOSED PROPERTY TAXES AND PROPOSED OR ADOPTED NON-AD VALOREM ASSESSMENTS

(Discounts are a maximum of 4 percent of the amounts shown on this form.)

2017 NOTICE OF PROPOSED PROPERTY TAXES AND PROPOSED OR ADOPTED NON-AD VALOREM ASSESSMENTS

EXPLANATION

EXPLANATION OF PROPERTY APPRAISER INFORMATION AND AD VALOREM TAXES:

NON-AD VALOREM ASSESSMENTS:

CHALLENGING YOUR ASSESSMENT

54

TRIM Notice

- Page one
  - Your final tax bill may contain non-ad valorem assessments which may not be reflected on this notice
- Page two
  - **Your final tax bill may contain non-ad valorem assessments which may not be reflected on this notice**

55

Some Help

56

Summary Memorandum of Agreement are Recorded

- PACE financing is titled Summary Memorandum of Agreement
- Sec. 168.08 (8) F.S.
- Shall be recorded within 5 days after execution of the agreement

57

Summary Memorandum of Agreement are Recorded

- Sec. 168.08 (8) F.S.
- Recorded agreement shall provide constructive notice that assessment constitutes a lien of equal dignity to county taxes from the date recorded
- Does not require borrower's signature
- Will state approved maximum annual assessment

58

Addendum to Financing Agreement

- Borrower may request to have an addendum to financing agreement recorded
  - Section 6 of Florida Home Energy Renovation Opportunity (HERO) Program Financing Agreement
- Does not require borrower's signature
- Will update annual assessment
- Remember to include additional charges for payoff

59

121

cfpb Consumer Financial Protection Bureau

FOR IMMEDIATE RELEASE:
March 4, 2019

MEDIA CONTACT:
Office of Communications
Tel: (202) 435-7170

CONSUMER FINANCIAL PROTECTION BUREAU ISSUES ADVANCE NOTICE OF PROPOSED RULEMAKING ON PROPERTY ASSESSED CLEAN ENERGY FINANCING

WASHINGTON, D.C. – Today the Consumer Financial Protection Bureau (Bureau) issued an Advance Notice of Proposed Rulemaking (ANPR) on residential Property Assessed Clean Energy (PACE) financing.

"Today's action is the next step in the Bureau's efforts to implement the Economic Growth, Regulatory Relief and Consumer Protection Act as expeditiously as possible," said CFPB Director Kathleen L. Kraninger. "I look forward to reviewing the comments in response to the questions we are asking to facilitate the required rulemaking."

The Economic Growth, Regulatory Relief, and Consumer Protection Act, signed into law in May 2018, directed the Bureau to prescribe certain regulations for PACE financing.

The Bureau will consider the information it receives in response to today's ANPR to develop a Notice of Proposed Rulemaking. The information solicited will enable the Bureau to better understand the market and unique nature of PACE financing. This will help the Bureau formulate proposed regulations that not only would achieve statutory objectives but also would reflect a careful consideration of costs and benefits.

The public will have 60 days to comment after publication of the ANPR in the Federal Register.

The ANPR is available at:
https://files.consumerfinance.gov/f/documents/cfpb_anpr_residential-property-assessed-clean-energy-financing.pdf

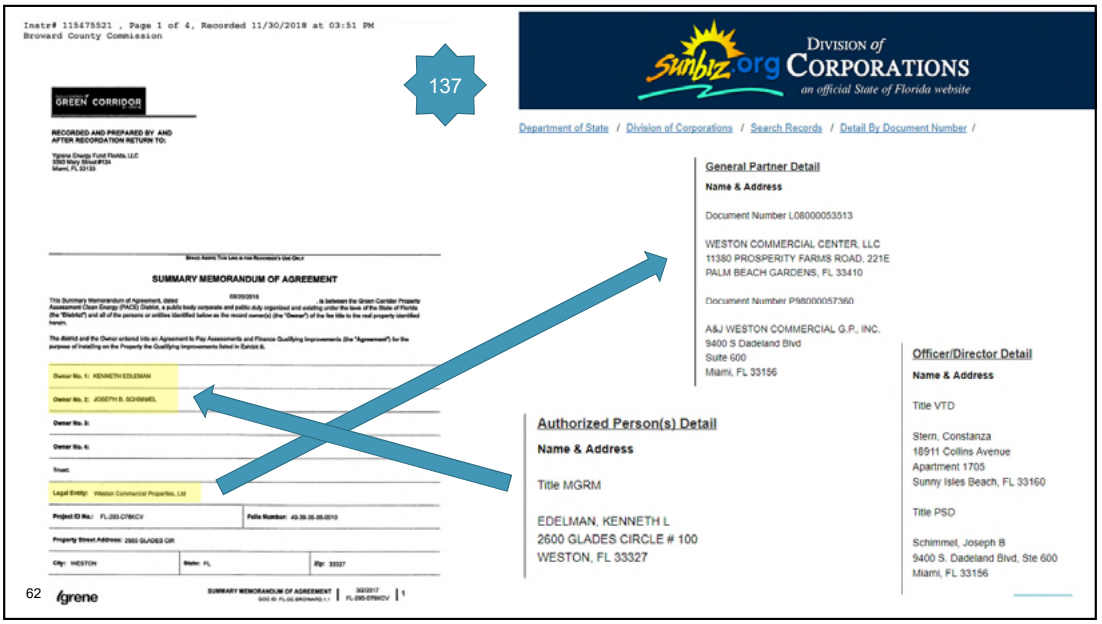
###

The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work by regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations, by making rules more effective, by consistently enforcing federal consumer financial law, and by empowering consumers to take more control over their economic lives. For more information, visit consumerfinance.gov.

60

Examples

61



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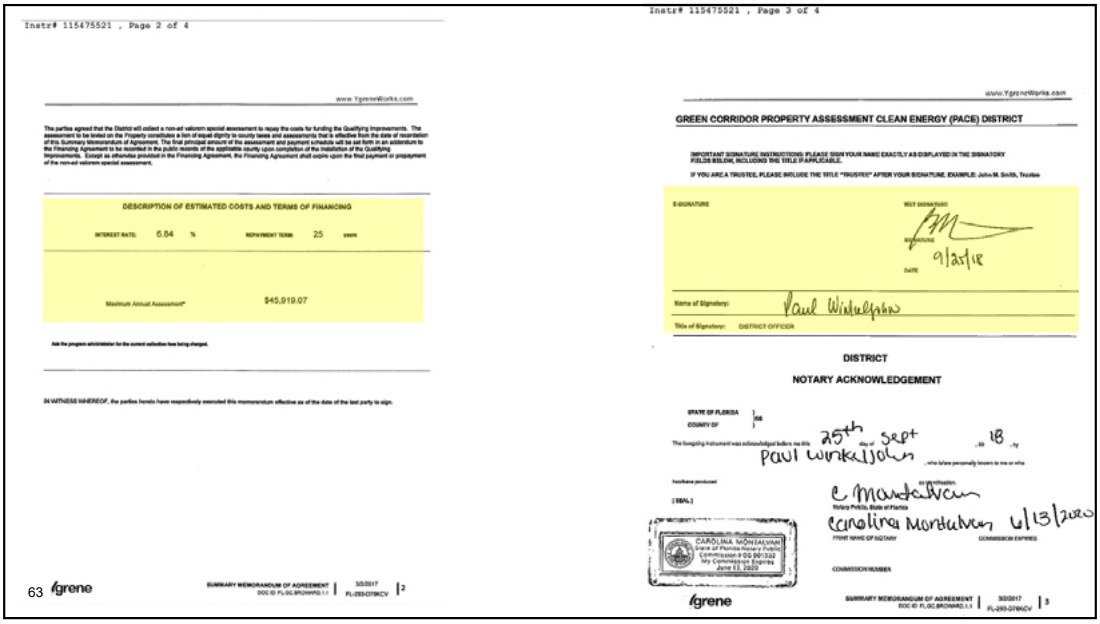


Instr# 115475521 , Page 2 of 4

DESCRIPTION OF ESTIMATED COSTS AND TERMS OF FINANCING

INTEREST RATE: 6.84 % REPAYMENT TERM: 25 years

Maximum Annual Assessment* $45,919.07

63 grene

Instr# 115475521 , Page 3 of 4

GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT

E-SIGNATURE WET SIGNATURE

SIGNATURE 9/25/18

DATE

Name of Signatory: Paul Winkelman

Title of Signatory: DISTRICT OFFICER

DISTRICT

NOTARY ACKNOWLEDGEMENT

STATE OF FLORIDA)
COUNTY OF)

The foregoing instrument was acknowledged before me this 25th day of Sept, 18, by Paul Winkelman, who is/are personally known to me or who has/have produced

[SEAL]

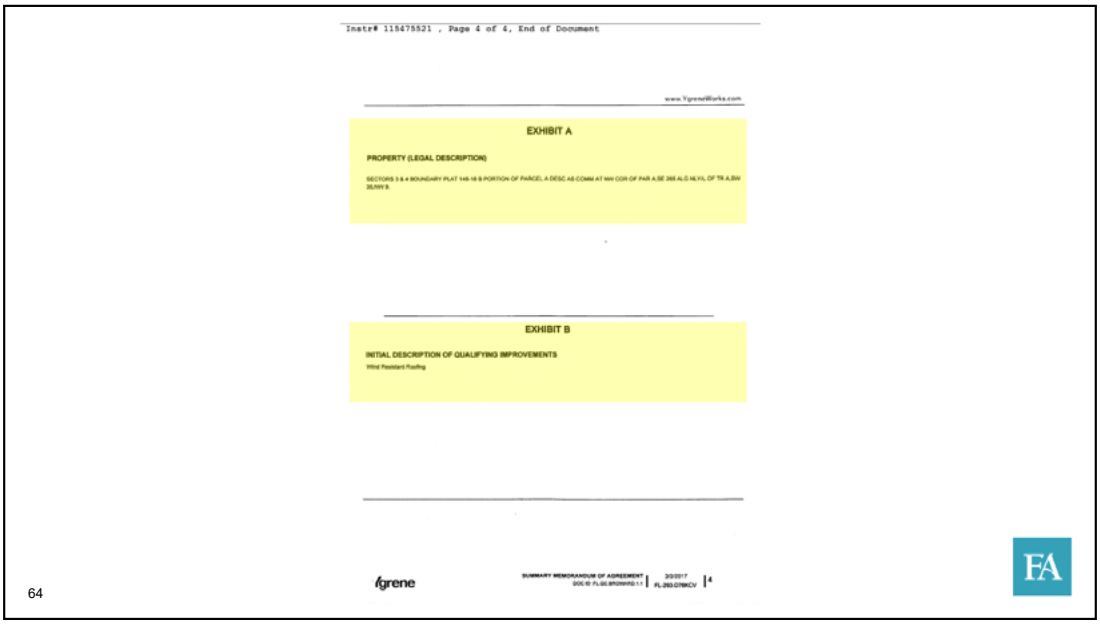
Notary Public, State of Florida

Carolina Montalvan 6/13/2020
PRINT NAME OF NOTARY COMMISSION EXPIRES

COMMISSION NUMBER

CAROLINA MONTALVAN
State of Florida-Notary Public
Commission # GG 062332
My Commission Expires
June 13, 2020

grene



Instr# 115475521 , Page 4 of 4, End of Document

EXHIBIT A

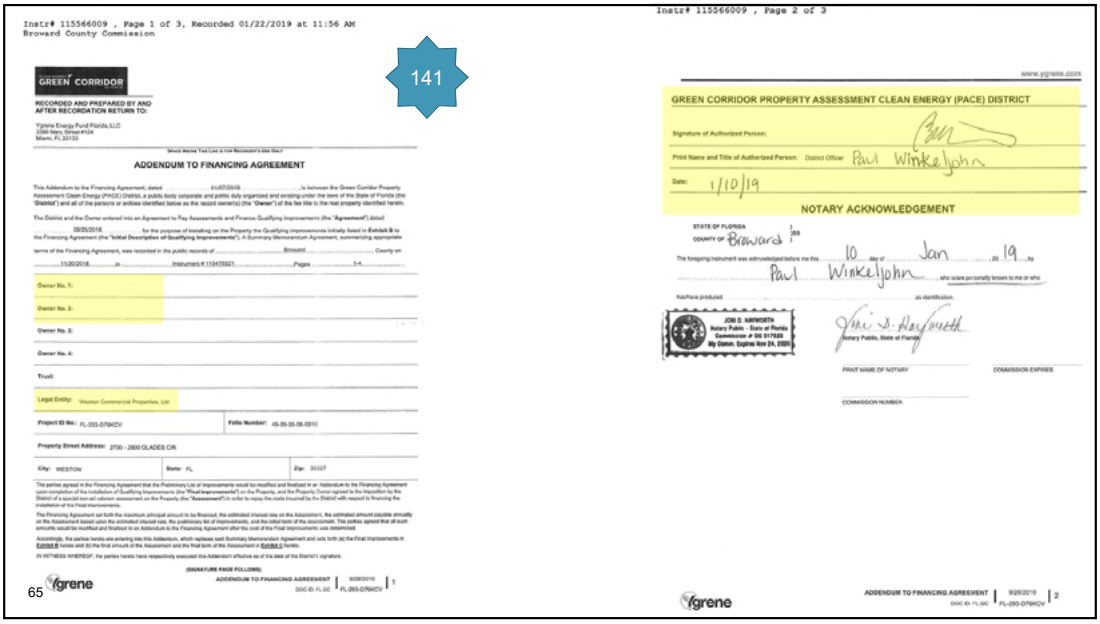
PROPERTY (LEGAL DESCRIPTION)

EXHIBIT B

INITIAL DESCRIPTION OF QUALIFYING IMPROVEMENTS

Wind Resistant Roofing

64 grene



Instr# 115566009 , Page 1 of 3, Recorded 01/22/2019 at 11:56 AM
Broward County Commission

141

GREEN CORRIDOR

RECORDED AND PREPARED BY AND
AFTER RECORDATION RETURN TO:

Ygrene Energy Fund Florida, LLC
3390 Mary Street #124
Miami, FL 33133

ADDENDUM TO FINANCING AGREEMENT

Owner No. 1:
Owner No. 2:
Owner No. 3:
Owner No. 4:
Trust:
Legal Entity: Weston Commercial Properties, Ltd

Project ID No.: FL-393-07BKDV
Folio Number: 49-39-35-06-0910

Property Street Address: 2700 - 2800 GLADES CIR
City: WESTON State: FL Zip: 33327

ygrene
65
ADDENDUM TO FINANCING AGREEMENT | 8/28/2018 | DOC ID: FL-GC | FL-393-07BKDV | 1

Instr# 115566009 , Page 2 of 3

www.ygrene.com

GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT

Signature of Authorized Person:
Print Name and Title of Authorized Person: District Officer Paul Winkeljohn
Date: 1/10/19

NOTARY ACKNOWLEDGEMENT

STATE OF FLORIDA
COUNTY OF Brevard ss

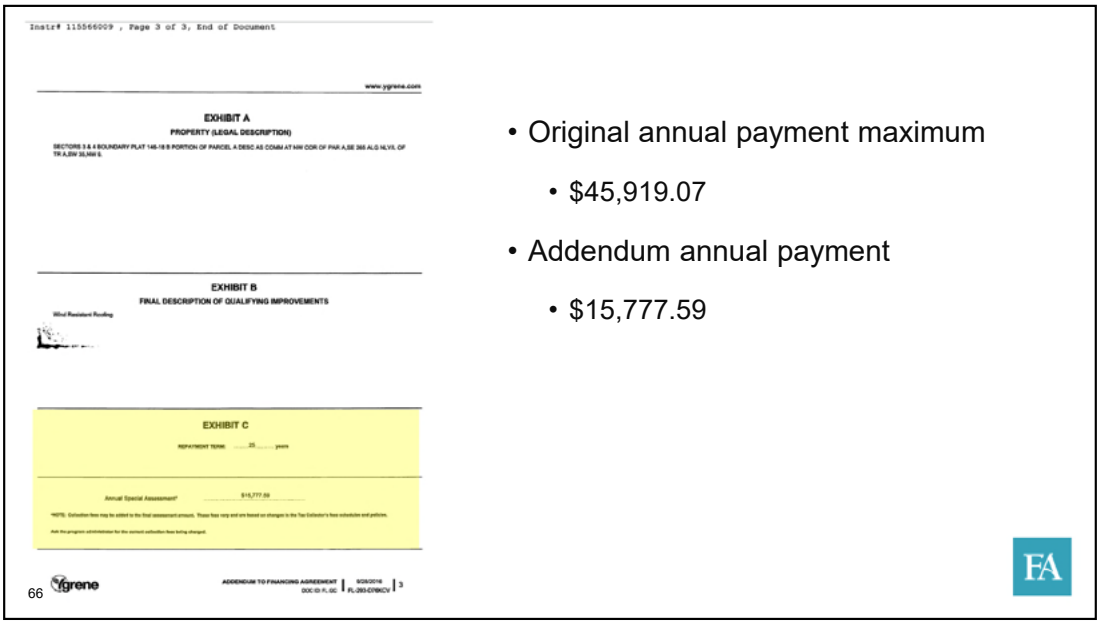
The foregoing instrument was acknowledged before me this 10 day of Jan 20 19 by Paul Winkeljohn who is/are personally known to me or who has/have produced as identification.

JOSH D. HAYWORTH
Notary Public - State of Florida
Commission # GG 017533
My Comm. Expires Nov 24, 2020

Notary Public, State of Florida

PRINT NAME OF NOTARY COMMISSION EXPIRES
COMMISSION NUMBER

ygrene
ADDENDUM TO FINANCING AGREEMENT | 9/28/2018 | DOC ID: FL-GC | FL-393-07BKDV | 2



Instr# 115566009 , Page 3 of 3, End of Document

www.ygrene.com

EXHIBIT A
PROPERTY (LEGAL DESCRIPTION)

EXHIBIT B
FINAL DESCRIPTION OF QUALIFYING IMPROVEMENTS

Wind Resistant Roofing

EXHIBIT C

REPAYMENT TERM: 25 years

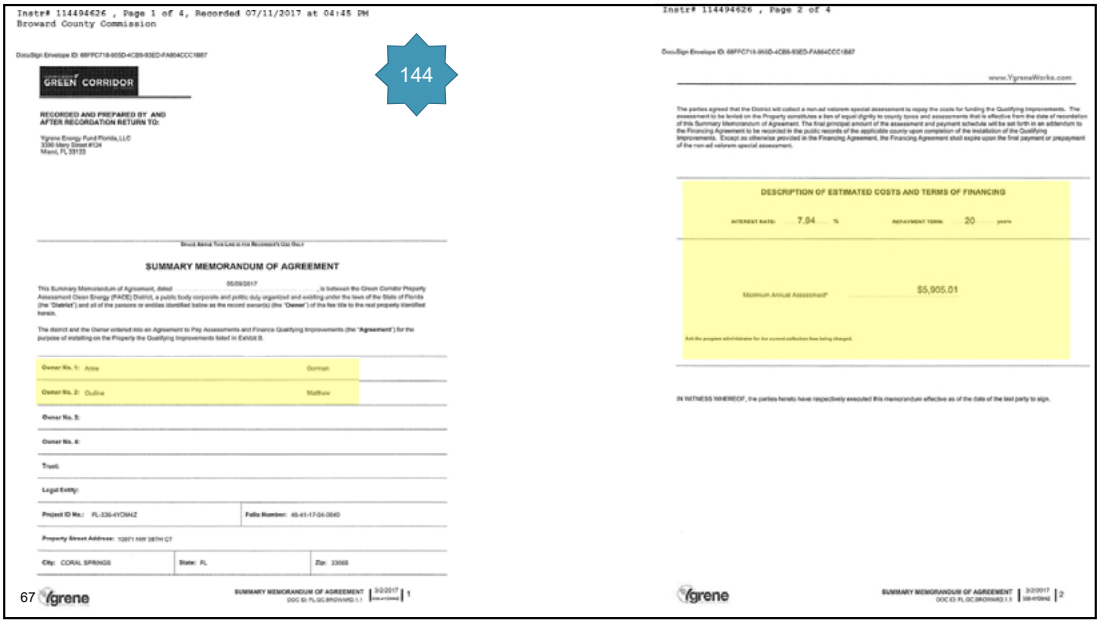
Annual Special Assessment* $15,777.59

*NOTE: Collection fees may be added to the final assessment amount. These fees vary and are based on changes in the Tax Collector's fees schedules and policies.

Ask the program administrator for the current collection fees being charged.

ygrene
66
ADDENDUM TO FINANCING AGREEMENT | 9/28/2018 | DOC ID: FL-GC | FL-393-07BKDV | 3

- Original annual payment maximum
  - $45,919.07
- Addendum annual payment
  - $15,777.59



Instr# 114494626 , Page 1 of 4, Recorded 07/11/2017 at 04:45 PM
Broward County Commission

144

GREEN CORRIDOR

RECORDED AND PREPARED BY AND AFTER RECORDATION RETURN TO:

SUMMARY MEMORANDUM OF AGREEMENT

Owner No. 1: Anne Gorman
Owner No. 2: Outina Mathew
Owner No. 3:
Owner No. 4:
Trust:
Legal Entity:
Project ID No.: FL-336-4YONHZ
Folio Number:
Property Street Address:
City: CORAL SPRINGS State: FL Zip:

67 ygrene SUMMARY MEMORANDUM OF AGREEMENT 3/2/2017 | 1

Instr# 114494626 , Page 2 of 4

www.YgreneWorks.com

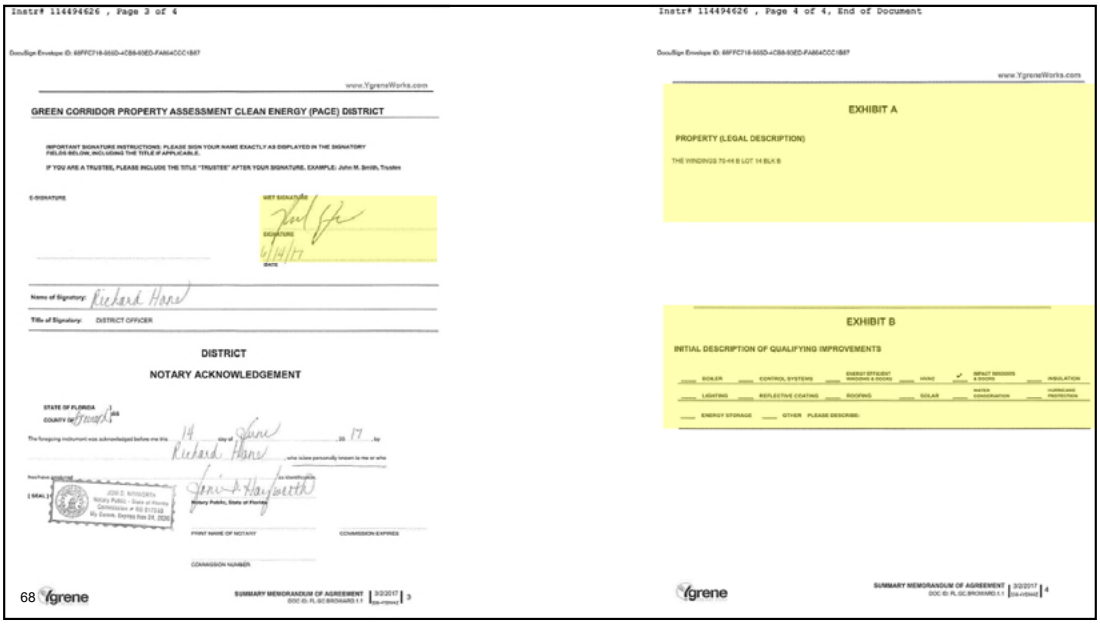
DESCRIPTION OF ESTIMATED COSTS AND TERMS OF FINANCING

INTEREST RATE: 7.94 % REPAYMENT TERM: 20 years

Maximum Annual Assessment* $5,905.01

IN WITNESS WHEREOF, the parties hereto have respectively executed this memorandum effective as of the date of the last party to sign.

ygrene SUMMARY MEMORANDUM OF AGREEMENT 3/2/2017 | 2



Instr# 114494626 , Page 3 of 4

www.YgreneWorks.com

GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT

IMPORTANT SIGNATURE INSTRUCTIONS: PLEASE SIGN YOUR NAME EXACTLY AS DISPLAYED IN THE SIGNATORY FIELDS BELOW, INCLUDING THE TITLE IF APPLICABLE.

IF YOU ARE A TRUSTEE, PLEASE INCLUDE THE TITLE "TRUSTEE" AFTER YOUR SIGNATURE. EXAMPLE: John M. Smith, Trustee

E-SIGNATURE

WET SIGNATURE

SIGNATURE

DATE 6/14/17

Name of Signatory: Richard Hans

Title of Signatory: DISTRICT OFFICER

DISTRICT

NOTARY ACKNOWLEDGEMENT

STATE OF FLORIDA
COUNTY OF Broward

The foregoing instrument was acknowledged before me this 14 day of June, 17 by Richard Hans who is/are personally known to me or who has/have produced as identification.

Notary Public, State of Florida

PRINT NAME OF NOTARY COMMISSION EXPIRES

COMMISSION NUMBER

68 ygrene SUMMARY MEMORANDUM OF AGREEMENT 3/2/2017 | 3

Instr# 114494626 , Page 4 of 4, End of Document

www.YgreneWorks.com

EXHIBIT A

PROPERTY (LEGAL DESCRIPTION)

THE WINDINGS 70-44 B LOT 14 BLK B

EXHIBIT B

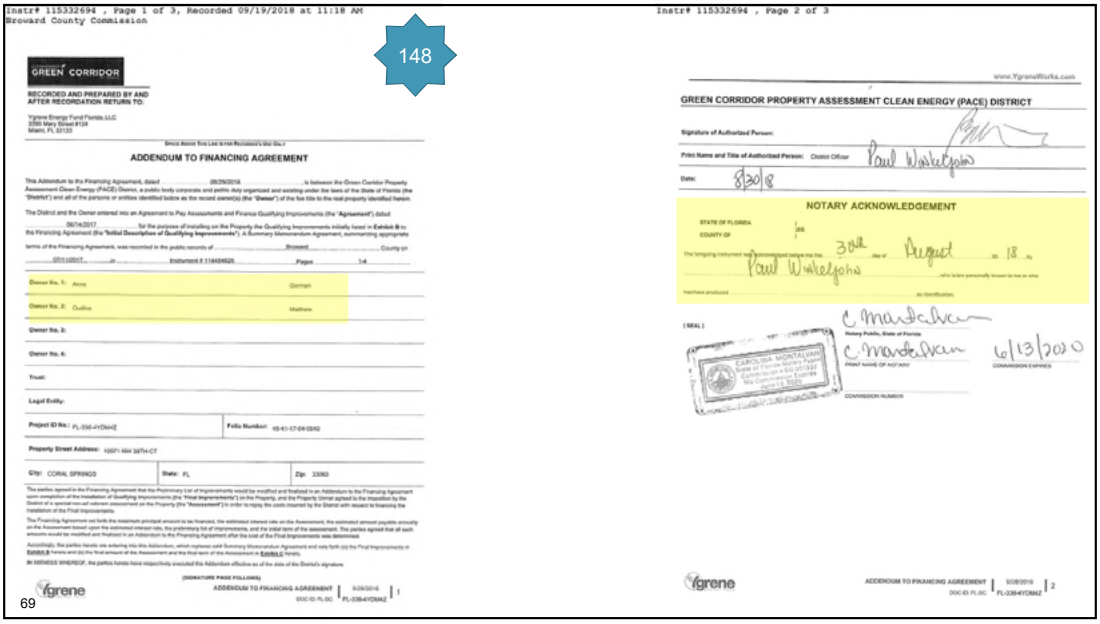
INITIAL DESCRIPTION OF QUALIFYING IMPROVEMENTS

___ BOILER ___ CONTROL SYSTEMS ___ ENERGY EFFICIENT WINDOWS & DOORS ___ HVAC ✓ IMPACT WINDOWS & DOORS ___ INSULATION

___ LIGHTING ___ REFLECTIVE COATING ___ ROOFING ___ SOLAR ___ WATER CONSERVATION ___ HURRICANE PROTECTION

___ ENERGY STORAGE ___ OTHER PLEASE DESCRIBE:

ygrene SUMMARY MEMORANDUM OF AGREEMENT 3/2/2017 | 4



Instr# 115332694 , Page 1 of 3, Recorded 09/19/2018 at 11:18 AM
Broward County Commission

148

GREEN CORRIDOR

RECORDED AND PREPARED BY AND AFTER RECORDATION RETURN TO:

Ygrene Energy Fund Florida,LLC
3390 Mary Street #124
Miami, FL 33133

ADDENDUM TO FINANCING AGREEMENT

Owner No. 1: Anne Gorman
Owner No. 2: Outline Matthew
Owner No. 3:
Owner No. 4:
Trust:
Legal Entity:
Project ID No.: FL-336-4YDM4Z
Folio Number: 48-41-17-09-0042
Property Street Address: 10071 NW 36TH CT
City: CORAL SPRINGS State: FL Zip: 33065

ADDENDUM TO FINANCING AGREEMENT | 9/20/2018 | 1
DOC ID: FL-DC | FL-336-4YDM4Z

69

Instr# 115332694 , Page 2 of 3

www.YgreneWorks.com

GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT

Signature of Authorized Person:
Print Name and Title of Authorized Person: District Officer Paul Wiltrejohn
Date: 8/30/18

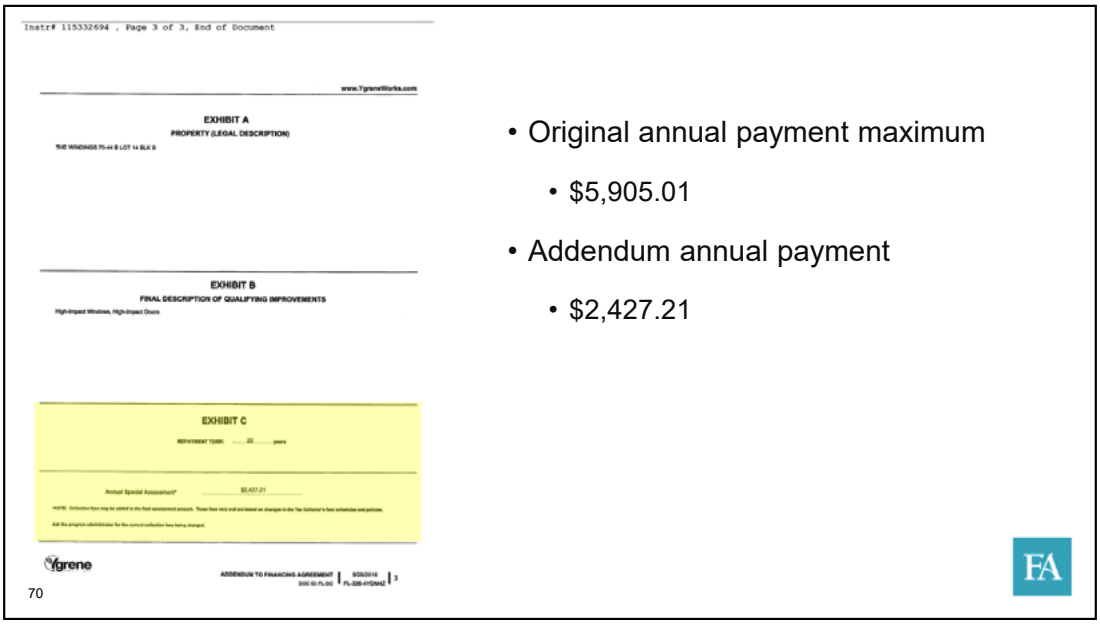
NOTARY ACKNOWLEDGEMENT

STATE OF FLORIDA
COUNTY OF

The foregoing instrument was acknowledged before me this 30th day of August, 20 18, by Paul Wiltrejohn who is/are personally known to me or who has/have produced as identification.

[SEAL]
Notary Public, State of Florida
PRINT NAME OF NOTARY
COMMISSION NUMBER
6/13/2020
COMMISSION EXPIRES

ADDENDUM TO FINANCING AGREEMENT | 9/20/2018 | 2
DOC ID: FL-DC | FL-336-4YDM4Z



Instr# 115332694 , Page 3 of 3, End of Document

www.YgreneWorks.com

EXHIBIT A
PROPERTY (LEGAL DESCRIPTION)

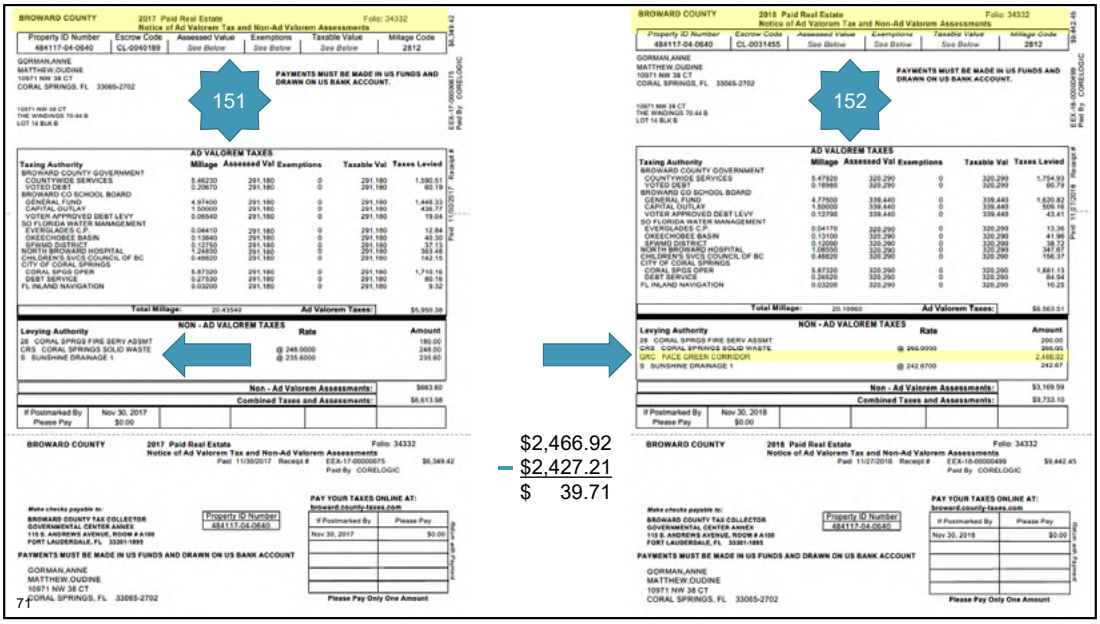
EXHIBIT B
FINAL DESCRIPTION OF QUALIFYING IMPROVEMENTS
High-Impact Windows, High-Impact Doors

EXHIBIT C
REPAYMENT TERM: 20 years
Annual Special Assessment* $2,427.21

ADDENDUM TO FINANCING AGREEMENT | 9/20/2018 | 3
DOC ID: FL-DC | FL-336-4YDM4Z

70

- Original annual payment maximum
  - $5,905.01
- Addendum annual payment
  - $2,427.21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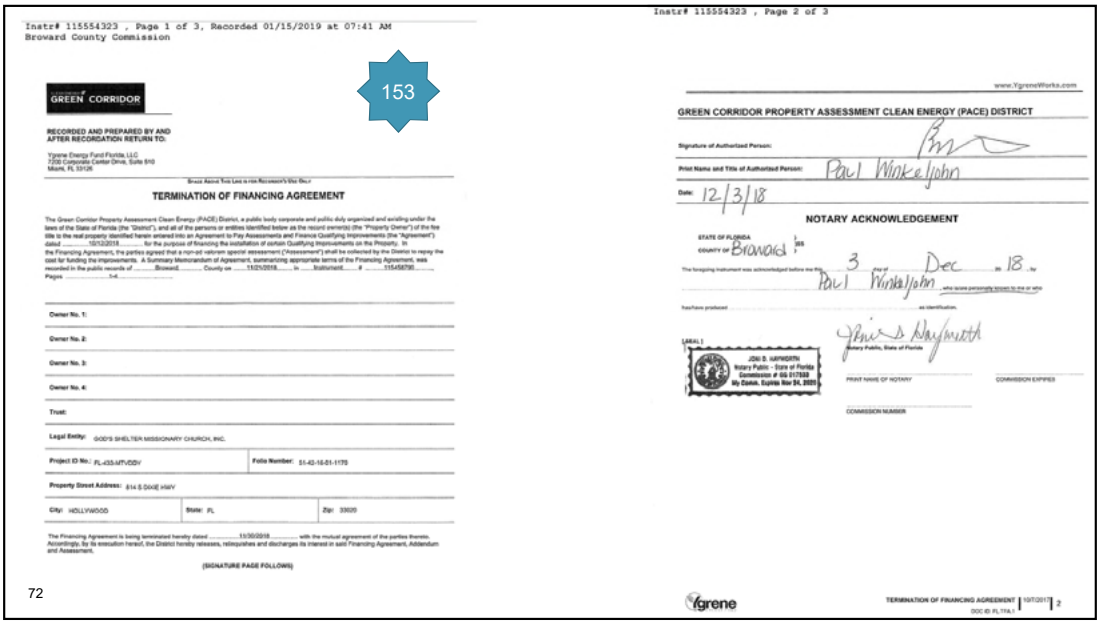
$ 39.71
71


153
TERMINATION OF FINANCING AGREEMENT
GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT
NOTARY ACKNOWLEDGEMENT
72

What to do?

- PACE financing is different
- Do not discount
- Try to verify if current assessment has been sent to tax collector
- Require parties to execute a re-proration/post-closing adjustment agreement for
  - Ad valorem &
  - Non-ad valorem taxes

74

What to do?

- Escrow funds until
  - Next tax bill to ensure payment in full or
  - Receive a Termination of Agreement
- Call underwriting for further instructions

75

The 2018 Florida Statutes

163.08 Supplemental authority for improvements to real property.—

(1)(a) In chapter 2008-227, Laws of Florida, the Legislature amended the energy goal of the state comprehensive plan to provide, in part, that the state shall reduce its energy requirements through enhanced conservation and efficiency measures in all end-use sectors and reduce atmospheric carbon dioxide by promoting an increased use of renewable energy resources. That act also declared it the public policy of the state to play a leading role in developing and instituting energy management programs that promote energy conservation, energy security, and the reduction of greenhouse gases. In addition to establishing policies to promote the use of renewable energy, the Legislature provided for a schedule of increases in energy performance of buildings subject to the Florida Energy Efficiency Code for Building Construction. In chapter 2008-191, Laws of Florida, the Legislature adopted new energy conservation and greenhouse gas reduction comprehensive planning requirements for local governments. In the 2008 general election, the voters of this state approved a constitutional amendment authorizing the Legislature, by general law, to prohibit consideration of any change or improvement made for the purpose of improving a property's resistance to wind damage or the installation of a renewable energy source device in the determination of the assessed value of residential real property.

(b) The Legislature finds that all energy-consuming-improved properties that are not using energy conservation strategies contribute to the burden affecting all improved property resulting from fossil fuel energy production. Improved property that has been retrofitted with energy-related qualifying improvements receives the special benefit of alleviating the property's burden from energy consumption. All improved properties not protected from wind damage by wind resistance qualifying improvements contribute to the burden affecting all improved property resulting from potential wind damage. Improved property that has been retrofitted with wind resistance qualifying improvements receives the special benefit of reducing the property's burden from potential wind damage. Further, the installation and operation of qualifying improvements not only benefit the affected properties for which the improvements are made, but also assist in fulfilling the goals of the state's energy and hurricane mitigation policies. In order to make qualifying improvements more affordable and assist property owners who wish to undertake such improvements, the Legislature finds that there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance.

(c) The Legislature determines that the actions authorized under this section, including, but not limited to, the financing of qualifying improvements through the execution of financing agreements and the related imposition of voluntary assessments are reasonable and necessary to serve and

achieve a compelling state interest and are necessary for the prosperity and welfare of the state and its property owners and inhabitants.

(2) As used in this section, the term:

(a) "Local government" means a county, a municipality, a dependent special district as defined in s. 189.012, or a separate legal entity created pursuant to s. 163.01(7).

(b) "Qualifying improvement" includes any:

1. Energy conservation and efficiency improvement, which is a measure to reduce consumption through conservation or a more efficient use of electricity, natural gas, propane, or other forms of energy on the property, including, but not limited to, air sealing; installation of insulation; installation of energy-efficient heating, cooling, or ventilation systems; building modifications to increase the use of daylight; replacement of windows; installation of energy controls or energy recovery systems; installation of electric vehicle charging equipment; and installation of efficient lighting equipment.

2. Renewable energy improvement, which is the installation of any system in which the electrical, mechanical, or thermal energy is produced from a method that uses one or more of the following fuels or energy sources: hydrogen, solar energy, geothermal energy, bioenergy, and wind energy.

3. Wind resistance improvement, which includes, but is not limited to:

a. Improving the strength of the roof deck attachment;

b. Creating a secondary water barrier to prevent water intrusion;

c. Installing wind-resistant shingles;

d. Installing gable-end bracing;

e. Reinforcing roof-to-wall connections;

f. Installing storm shutters; or

g. Installing opening protections.

(3) A local government may levy non-ad valorem assessments to fund qualifying improvements.

(4) Subject to local government ordinance or resolution, a property owner may apply to the local government for funding to finance a qualifying improvement and enter into a financing agreement with the local government. Costs incurred by the local government for such purpose may be collected as a non-ad valorem assessment. A non-ad valorem assessment shall be collected pursuant to s. 197.3632 and, notwithstanding s. 197.3632(8)(a), shall not be subject to discount for early payment. However, the notice and adoption requirements of s. 197.3632(4) do not apply if this section is used and complied with, and the intent resolution, publication of notice, and mailed notices to the property appraiser, tax collector, and Department of Revenue required by s.197.3632(3)(a) may be provided on or before August 15 in conjunction with any non-ad valorem

assessment authorized by this section, if the property appraiser, tax collector, and local government agree.

(5) Pursuant to this section or as otherwise provided by law or pursuant to a local government's home rule power, a local government may enter into a partnership with one or more local governments for the purpose of providing and financing qualifying improvements.

(6) A qualifying improvement program may be administered by a for-profit entity or a not-for-profit organization on behalf of and at the discretion of the local government.

(7) A local government may incur debt for the purpose of providing such improvements, payable from revenues received from the improved property, or any other available revenue source authorized by law.

(8) A local government may enter into a financing agreement only with the record owner of the affected property. Any financing agreement entered into pursuant to this section or a summary memorandum of such agreement shall be recorded in the public records of the county within which the property is located by the sponsoring unit of local government within 5 days after execution of the agreement. The recorded agreement shall provide constructive notice that the assessment to be levied on the property constitutes a lien of equal dignity to county taxes and assessments from the date of recordation.

(9) Before entering into a financing agreement, the local government shall reasonably determine that all property taxes and any other assessments levied on the same bill as property taxes are paid and have not been delinquent for the preceding 3 years or the property owner's period of ownership, whichever is less; that there are no involuntary liens, including, but not limited to, construction liens on the property; that no notices of default or other evidence of property-based debt delinquency have been recorded during the preceding 3 years or the property owner's period of ownership, whichever is less; and that the property owner is current on all mortgage debt on the property.

(10) A qualifying improvement shall be affixed to a building or facility that is part of the property and shall constitute an improvement to the building or facility or a fixture attached to the building or facility. An agreement between a local government and a qualifying property owner may not cover wind-resistance improvements in buildings or facilities under new construction or construction for which a certificate of occupancy or similar evidence of substantial completion of new construction or improvement has not been issued.

(11) Any work requiring a license under any applicable law to make a qualifying improvement shall be performed by a contractor properly certified or registered pursuant to part I or part II of chapter 489.

(12)(a) Without the consent of the holders or loan servicers of any mortgage encumbering or otherwise secured by the property, the total amount of any non-ad valorem assessment for a

property under this section may not exceed 20 percent of the just value of the property as determined by the county property appraiser.

(b) Notwithstanding paragraph (a), a non-ad valorem assessment for a qualifying improvement defined in subparagraph (2)(b)1. or subparagraph (2)(b)2. that is supported by an energy audit is not subject to the limits in this subsection if the audit demonstrates that the annual energy savings from the qualified improvement equals or exceeds the annual repayment amount of the non-ad valorem assessment.

(13) At least 30 days before entering into a financing agreement, the property owner shall provide to the holders or loan servicers of any existing mortgages encumbering or otherwise secured by the property a notice of the owner's intent to enter into a financing agreement together with the maximum principal amount to be financed and the maximum annual assessment necessary to repay that amount. A verified copy or other proof of such notice shall be provided to the local government. A provision in any agreement between a mortgagee or other lienholder and a property owner, or otherwise now or hereafter binding upon a property owner, which allows for acceleration of payment of the mortgage, note, or lien or other unilateral modification solely as a result of entering into a financing agreement as provided for in this section is not enforceable. This subsection does not limit the authority of the holder or loan servicer to increase the required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment.

(14) At or before the time a purchaser executes a contract for the sale and purchase of any property for which a non-ad valorem assessment has been levied under this section and has an unpaid balance due, the seller shall give the prospective purchaser a written disclosure statement in the following form, which shall be set forth in the contract or in a separate writing:

QUALIFYING IMPROVEMENTS FOR ENERGY EFFICIENCY, RENEWABLE ENERGY, OR WIND RESISTANCE.—The property being purchased is located within the jurisdiction of a local government that has placed an assessment on the property pursuant to s. 163.08, Florida Statutes. The assessment is for a qualifying improvement to the property relating to energy efficiency, renewable energy, or wind resistance, and is not based on the value of property. You are encouraged to contact the county property appraiser's office to learn more about this and other assessments that may be provided by law.

(15) A provision in any agreement between a local government and a public or private power or energy provider or other utility provider is not enforceable to limit or prohibit any local government from exercising its authority under this section.

(16) This section is additional and supplemental to county and municipal home rule authority and not in derogation of such authority or a limitation upon such authority.

History.—s. 1, ch. 2010-139; s. 1, ch. 2012-117; s. 64, ch. 2014-22.

Instr# 114381798, Page 1 of 12, Recorded 05/12/2017 at 03:29 PM
Broward County Commission

This instrument was prepared by or under the supervision of (and after recording should be returned to):	
Joseph P. Stanton Broad & Cassel Bank of America Center 390 North Orange Avenue Suite 1400 Orlando, FL 32801-4961	(SPACE reserved for Clerk of Court)

LIMITED PURPOSE PARTY MEMBERSHIP AGREEMENT BETWEEN THE FLORIDA RESILIENCY AND ENERGY DISTRICT AND BROWARD COUNTY

This Limited Purpose Party Membership Agreement (the "Agreement") is entered into this 2nd day of May, 2017 by and between the **FLORIDA RESILIENCY AND ENERGY DISTRICT ("FRED")**, a public body corporate and politic created as a separate legal entity pursuant to Section 163.01(7), Florida Statutes, and BROWARD COUNTY, a political subdivision of the State of Florida (the "County") (collectively, the "Parties") for the purpose of providing a Property Assessed Clean Energy ("PACE") program within the jurisdictional boundaries of the County.

W I T N E S S E T H

WHEREAS, pursuant to Section 163.08(1), Florida Statutes ("F.S."), the Florida legislature determined that certain renewable energy, energy conservation and efficiency, and wind resistance improvements ("Qualifying Improvements") provide a special benefit to real property by alleviating the property's burden from energy consumption and/or reducing the property's burden from potential wind damage; and

WHEREAS, in order to make such Qualifying Improvements more affordable and assist property owners who wish to undertake such improvements, the Florida legislature also determined that there is a compelling state interest in enabling property owners to voluntarily finance such Qualifying Improvements with the assistance of local governments, through the execution of financing agreements and the related imposition of voluntary, non-ad valorem special assessments; and

WHEREAS, an Interlocal Agreement, dated September 6, 2016, as amended and supplemented from time to time, most recently on January 10, 2107, (the "Interlocal Agreement") was entered into between the Town of Lake Clarke Shores, the City of Fernandina Beach, any subsequent parties thereto (the "FRED Public Agencies"), and, in the limited capacity described therein, the Florida Development Finance Corporation ("FDFC" and, together with the Public Agencies, the "FRED Parties"), for the purpose of facilitating the financing of Qualifying Improvements for properties located within FRED's aggregate jurisdictional boundaries via the levy and collection of voluntary non-ad valorem special assessments on improved property; and

WHEREAS, pursuant to Sections 7(B) and 12(B), (I) and (J) of the Interlocal Agreement, FRED covenants and represents that it is relying solely on the powers granted to FRED under Sections 163.08(2) -(5), Florida Statutes; specifically, exercising the power of a local government under Section 163.08(3), Florida Statutes, to levy non-ad valorem assessments for the financing of Qualifying Improvements in the County; and

WHEREAS, as a Limited Member of the Interlocal Agreement, the County is not providing for the exercise of its own power of special assessment but merely providing its consent for FRED to levy special assessments within the jurisdictional boundaries of the County; and

WHEREAS, the Parties to this Agreement desire to supplement the Interlocal Agreement to include the County as a Limited Member, as such term is defined in the Interlocal Agreement, on the date last signed below and filing in accordance with Section 27 of this Agreement.

NOW, THEREFORE, in consideration of the above recitals, terms and conditions, promises and covenants hereinafter set forth, the Parties agree as follows:

SECTION 1. DEFINITIONS. Any capitalized or initially capitalized terms used in this Agreement, but not otherwise defined herein, shall have the meaning specified for such term in the Interlocal Agreement.

SECTION 2. PURPOSE. The purpose of this Agreement is to facilitate the financing of Qualifying Improvements through a PACE program, in accordance with Section 163.08, Florida Statutes, and provide an efficient process for real property owners within the jurisdictional boundaries of the County to access the PACE program and permit FRED to administer the PACE program within such jurisdictional boundaries.

SECTION 3. RIGHTS OF PARTIES. FRED, together with its member Parties, and the County, with the intent to be bound thereto, hereby agree that the County shall become a Limited Member of the Interlocal Agreement together with only those rights and obligations of Limited Members as are necessary to fulfill the purposes described in this Agreement, including access to financing and processing of voluntary non-ad valorem special assessments by FRED, within the jurisdictional boundaries of the County, as more specifically described below, and FRED agrees to operate the PACE Program within those jurisdictional boundaries in accordance with federal, state, and local laws, rules, regulations, ordinances, and all operational program standards of the County.

SECTION 4. LEVY OF SPECIAL ASSESSMENTS. The Parties hereby acknowledge and agree that the non-ad valorem special assessments arising from a property owner's voluntary participation in the PACE program shall be levied by FRED on properties within the jurisdictional boundaries the County, and any act by the County

in the collection and distribution of any non-ad valorem special assessments imposed by FRED are purely ministerial acts.

SECTION 5. QUALIFYING IMPROVEMENTS. FRED may provide access to financing for Qualifying Improvements to real property within the jurisdictional boundaries of the County, in accordance with Section 163.08, Florida Statutes, and subject to the terms of this Agreement, as well as applicable federal, state, and local laws, rules, regulations, ordinances, and all operational program standards of the County.

SECTION 6. FINANCING AGREEMENT. Before extending any financing or subjecting any participating real property within the jurisdictional boundaries of the County to the non-ad valorem special assessment authorized therein, FRED and FDFC, through their designees, shall, on a non-exclusive basis pursuant to the Section 163.08, Florida Statutes and this Agreement, enter into a financing agreement (the "Financing Agreement") with property owner(s) within the jurisdictional boundaries of the County who qualify for financing through FRED. The Financing Agreement shall include a thorough explanation of the PACE financing process and specify at what point in the process the special assessment will be added to the real property's owner's property tax bills (after completion of the project(s), permit approval, and approval by the property owner).

SECTION 7. BOUNDARIES OF THE PACE PROGRAM. For the limited purposes of administering the PACE program and imposing non-ad valorem special assessments as described in this Agreement, the jurisdictional boundaries of FRED shall include the jurisdictional boundaries of the County, which jurisdictional boundaries may be limited, expanded to reflect annexation, or more specifically designated from time to time by the County by providing written notice to FRED. Upon execution of this Agreement and written request thereafter, the County agrees to provide FRED the current jurisdictional description of the jurisdictional boundaries of the County.

FRED shall allow the County sixty (60) days from the date the County formally joins FRED to identify the municipalities within the County that elect to opt out of FRED ("Initial Opt-Out Period"). Prior to the expiration of the Initial Opt-Out Period, the County shall deliver to the FRED a list of municipalities that have elected to opt out of FRED and its FDFC PACE Program. FRED may not process or approve applications from Broward County residents for participation in the Broward County PACE Program until an incorporated area has: 1) signed a Limited Member Interlocal Agreement directly with FRED authorizing its own PACE Program, 2) provided written notification to the County of its intent to participate in the Broward County PACE Program, or 3) after the Initial Opt Out Period, whichever comes first.

SECTION 8. ELIGIBLE PROPERTIES. Within the jurisdictional boundaries of the County, improved real property, including any residential, commercial,

agricultural and industrial use may be eligible for participation in the PACE program within the limits otherwise prescribed in Section 163.08, Florida Statutes, and County's PACE ordinance and resolutions.

SECTION 9. SURVIVAL OF SPECIAL ASSESSMENTS. During the term of this Agreement, FRED may levy voluntary non-ad valorem special assessments on participating properties within the jurisdictional boundaries of the County to help secure the financing of costs of Qualifying Improvements constructed or acquired on such properties based on the finding of special benefit by the Florida legislature. Those properties receiving financing for Qualifying Improvements shall be assessed by FRED until such time as the financing for such Qualified Improvement is repaid in full, in accordance with Section 163.08, Florida Statutes, and other applicable law. Notwithstanding termination of this Agreement or notice of a change in the jurisdictional boundaries of the County as provided for herein, those properties that have received financing for Qualifying Improvements shall continue to be a part of FRED, until such time that all outstanding debt has been satisfied.

SECTION 10. TERM. This Agreement shall remain in full force and effect from the date of its execution by both Parties. Any Party may terminate this Agreement for convenience upon ninety (90) days' prior written notice ("Termination Notice") in accordance with the terms of the Interlocal Agreement. The County may also terminate the inclusion of any municipality that elects to opt out of the Program ("Municipal Termination Notice") after the Initial Opt Out Period. Beginning on the date FRED receives a Termination Notice from the County or a Municipal Termination Notice ("Termination Date"), FRED shall not approve any new applications affecting property within the jurisdictional boundaries of the County or municipality referenced in the Termination Notice or Municipal Termination Notice. Notwithstanding termination of this Agreement, however, property owners whose applications were approved prior to the Termination Date, and who received funding through the PACE program, shall continue to be a part of FRED, for the sole purpose of FRED imposing assessments for the repayment of such property's outstanding debt, until such time that all outstanding debt has been satisfied.

In the event County terminates the Agreement or a municipality terminates their participation in the Agreement, FRED shall provide for on-going management of assessments related to any projects completed under FRED's auspices, continue to provide all of its services in a professional manner in accordance with the Agreement, and continue to work in good faith with the County regarding collection and distribution of remaining assessments. Notwithstanding the above, if the County terminates the Agreement it shall not affect any separate Limited member Interlocal Agreement between a municipality and FRED.

SECTION 11. CONSENT. This Agreement, together with the resolution by the governing board of the County approving this Agreement, shall be considered the

Parties' consent to authorize FRED to administer the PACE program within the jurisdictional boundaries of the County, as required by Section 163.08, Florida Statutes.

SECTION 12. COUNTY COORDINATOR. The Director of the Environmental Planning and Community Resilience Division within the County shall serve as the County's primary point of contact and coordinator. The County will advise FRED of any changes to the County's primary contact and coordinator within 30 days of such changes.

SECTION 13. CARBON OR SIMILAR CREDITS. To the extent permitted by law, in the event that the Financing Agreement or any other PACE agreement with the property owner provides for the transfer of any carbon or similar mitigation credits derived from Qualifying Improvements to FRED, any such carbon or similar mitigation credits derived from properties within the jurisdictional boundaries of the County, shall be shared in equal parts between FRED and the County.

SECTION 14. LIMITED OBLIGATIONS. Neither FRED nor FDFC is authorized to issue bonds, or any other form of debt, on behalf of the County pursuant to this Agreement or the Interlocal Agreement. To the extent that FRED or FDFC issues PACE-related bonds under its own authority in connection with this Agreement or the Interlocal Agreement, the security for such bonds may be secured by the voluntary non-ad valorem special assessments imposed by FRED on participating properties within the jurisdictional boundaries of the County. The issuance of such bonds shall not directly, indirectly, or contingently obligate the County to levy or to pledge any form of assessment or taxation whatsoever, or to levy ad valorem taxes on any property to pay the bonds, and the bonds and any bond obligations shall not constitute a lien upon any property owned by the County. For any such bonds, the bond disclosure document, if any, shall include references to the fact that the County is not an obligated party, and also adequately disclose material attendant risks with PACE programs.

SECTION 15. LIABILITY, INDEMNIFICATION AND SOVEREIGN IMMUNITY.

(A) To the extent applicable County and FRED shall be subject to Sections 768.28 and 163.01(9)(c), Florida Statutes, and any other provisions of Florida law governing sovereign immunity. Pursuant to Section 163.01(5)(o), Florida Statutes, and this covenant of the parties hereto, the local governments who are either or both the founders or members of FRED shall not be held jointly liable for the torts of the officers or employees of the FRED, or any other tort attributable to FRED, and that FRED alone shall be liable for any torts attributable to it or for torts of its officers, employees or agents, and then only to the extent of the waiver of sovereign immunity or limitation of liability as specified in Section 768.28, Florida Statutes. County and FRED acknowledge and agree that FRED shall have all of the applicable privileges and immunities from liability and exemptions from laws, ordinances, rules and common law which apply to

the municipalities and counties of the State. County is completely independent of FRED. To the extent provided by law, FRED, FDFC, and its approved PACE administrators shall indemnify, defend and hold harmless County and any of its municipalities (including current and former officers, agents, and employees), which have participated in and been subject to this Agreement, from any and all damages, claims, losses, expenditures and liability arising from the negligence, reckless, or intentional misconduct of FRED relating to operation of the PACE program or arising from or in connection to this Agreement. Nothing in this Agreement is intended to inure to the benefit of any third-party for the purpose of allowing any claim, which would otherwise be barred under the doctrine of sovereign immunity or by operation of law.

(B) Neither County, nor the local governments who are either or both the founders or members of the Agency, nor any subsequently joining or participating local government as members of FRED shall in any manner be obligated to pay any debts, obligations or liabilities arising as a result of any actions of FRED, the governing board of FRED or any other agents, employees, officers or officials, FDFC or its approved PACE administrators of FRED, except to the extent otherwise mutually and expressly agreed upon, and neither FRED, the governing board of FRED or any other agents, employees, officers or officials of FRED, FDFC or its approved PACE administrators have any authority or power to otherwise obligate either County, the local governments who are either or both the founders or members of FRED, nor any subsequently subscribing or participating local government in the business of FRED in any manner.

(C) All of the privileges and immunities from liability and exemptions from laws, ordinances and rules which apply to the activity of officials, officers, agents or employees of the parties shall apply to the officials, officers, agents or employees thereof when performing their respective functions and duties under the provisions of this Agreement.

(D) The obligations of this section shall survive the expiration or earlier termination of this Agreement.

SECTION 16. AGREEMENTS WITH TAX COLLECTOR AND PROPERTY APPRAISER. This Agreement shall be subject to the express condition precedent that FRED enter into separate agreement(s) with the tax collector and the property appraiser within the jurisdictional boundaries of the County, which shall provide for the collection and distribution of any of the voluntary non-ad valorem special assessments imposed by FRED within the jurisdictional boundaries of the County. If required by the tax collector and property appraiser, the County agrees to enter into those agreements as a third-party to facilitate the collection and distribution of the voluntary non-ad valorem special assessments imposed by FRED.

SECTION 17. OPINION OF BOND COUNSEL. FRED warrants, based on counsel's review of the bond validation judgment and the underlying bond documents that the FDFC PACE program's structure complies with the bond validation judgment and the underlying bond documents.

SECTION 18. AGENTS OF FRED. FRED shall ensure that its agents, administrators, subcontractors, successors and assigns are, at all times, in compliance with the terms of this Agreement and applicable County, state and federal laws.

SECTION 19. NONDISCRIMINATION. During the term of this Agreement, FRED, FDFC, and its Program Administrators shall not discriminate against any of its employees or applicants for employment, if any, and shall abide by all applicable federal, state, and County ordinances and resolutions regarding nondiscrimination protections for all the protected statuses enumerated therein.

SECTION 20. NOTICES. Any notices to be given hereunder shall be in writing and shall be deemed to have been given if sent by hand delivery, recognized overnight courier (such as Federal Express), by certified U.S. mail with return receipt requested, or by electronic mail, if provided, addressed to the Party for whom it is intended, at the place specified. For the present, the Parties designate the following as the respective places for notice purposes:

If to FRED:

The Florida Resiliency and Energy District
c/o Florida Development Finance Corporation
William "Bill" F. Spivey, Jr.
Executive Director
800 N. Magnolia Avenue, Suite 1100
Orlando, Florida 32803
407.956.5695 (t)
bspivey@fdfcbonds.com

AND

Joseph Stanton, Esq.
Bank of America Center
390 North Orange Avenue
Suite 1400
Orlando, FL 32801-4961
407.839.4200 (t)
jstanton@broadandcassel.com

If to County:
Dr. Jennifer Jurado, Director
Environmental Planning and Community Resilience Division
115 S. Andrews Avenue, Room 329H
Fort Lauderdale, FL 33301
jjurado@broward.org

AND

County Attorney
Broward County Office of the County Attorney
115 S. Andrews Avenue, Room 423
Fort Lauderdale, FL 33301

SECTION 21. AMENDMENTS. No modification, amendment or alteration in the terms or conditions contained herein shall be effective unless contained in a written document prepared with the same or similar formality as this agreement and executed by the County and FRED or other delegated authority authorized to execute same on their behalf.

SECTION 22. JOINT EFFORT. The preparation of this Agreement has been a joint effort of the Parties hereto and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one of the Parties than the other.

SECTION 23. MERGER. This Agreement represents the final and complete understanding of the Parties regarding the subject matter hereof and supersedes all prior and contemporaneous negotiations, correspondence, agreements, or understandings applicable to the matters contained herein; and the Parties agree that there are no commitments, agreements, or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly, the Parties agree that no deviation from the terms hereof shall be predicated upon any prior representations or agreements, whether oral or written.

SECTION 24. ASSIGNMENT. The respective obligations of the Parties set forth in this Agreement shall not be assigned, in whole or in part, without the written consent of the other Party hereto.

SECTION 25. THIRD PARTY BENEFICIARIES. None of the Parties intend to directly or substantially benefit a third party by this Agreement. Therefore, the Parties acknowledge that there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a right or claim against either of them based upon this Agreement; provided, however, that counsel to the Parties may rely on this

Agreement for purposes of providing any legal opinions required by the issuance of debt to finance the Qualifying Improvements.

SECTION 26. RECORDS. The Parties shall each maintain their own respective records and documents associated with this Agreement in accordance with the requirements for records retention set forth in Chapter 119, Florida Statutes.

SECTION 27. RECORDING. This Limited Purpose Party Membership Agreement shall be filed by FRED with the Finance and Administrative Services Department's Records, Taxes, and Treasury Division of the County and recorded in the public records of the County as an amendment to the Interlocal Agreement, in accordance with Section 163.01(11), Florida Statutes.

SECTION 28. SEVERABILITY. In the event a portion of this Agreement is found to be unenforceable by a court of competent jurisdiction, that part shall be deemed severed from this Agreement and the remaining provisions of this Agreement shall remain in full force and effect.

SECTION 29. EFFECTIVE DATE. This Agreement shall become effective upon the execution by both Parties hereto and filing pursuant to Section 163.01(11), F.S.

SECTION 30. NOTICE. FRED GOVERNING BOARD MEETINGS. FRED shall provide the County thirty (30) day prior notice of FRED Governing Board meetings at which changes would be considered regarding fees charged and notices given to property owners, the approved Administrator agreements, or that could affect the County as a Limited Party.

SECTION 31. LAW, JURISDICTION, AND VENUE. This Agreement shall be interpreted and construed in accordance with and governed by the laws of the state of Florida. FRED, FDFC, their approved Administrators, and the County agree that the exclusive venue for any lawsuit arising from, related to, or in connection with this Agreement shall be in the state courts of the Seventeenth Judicial Circuit in and for Broward County, Florida. If any claim arising from, related to, or in connection with this Agreement must be litigated in federal court, FRED, FDFC, their approved Administrators, and the County agree that the exclusive venue for any such lawsuit shall be in the United States District Court or United States Bankruptcy Court for the Southern District of Florida. BY ENTERING INTO THIS AGREEMENT, FRED, FDFC, THEIR APPROVED ADMINISTRATORS, AND THE COUNTY HEREBY EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO THIS AGREEMENT. IF A PARTY FAILS TO WITHDRAW A REQUEST FOR A JURY TRIAL IN A LAWSUIT ARISING OUT OF THIS AGREEMENT AFTER WRITTEN NOTICE BY THE OTHER PARTY OF

VIOLATION OF THIS SECTION, THE PARTY MAKING THE REQUEST FOR JURY TRIAL SHALL BE LIABLE FOR THE REASONABLE ATTORNEYS' FEES AND COSTS OF THE OTHER PARTY IN CONTESTING THE REQUEST FOR JURY TRIAL, AND SUCH AMOUNTS SHALL BE AWARDED BY THE COURT IN ADJUDICATING THE MOTION.

SECTION 32. BREACH. A breach of this Agreement shall mean a material failure to comply with any of the provisions of this Agreement. If any party breaches any obligation herein, then, upon receipt of written notice by the non-breaching party, the breaching party shall, within 30 days after receiving written notice of such breach, proceed diligently and in good faith to take all commercially reasonable actions to cure such breach and shall continue to take all such actions until such breach is cured. Unless otherwise provided herein, the Parties to this Agreement may proceed at law or in equity to enforce their rights under this Agreement.

[SIGNATURE PAGES FOLLOW]

[SIGNATURE PAGE TO LIMITED PURPOSE PARTY MEMBERSHIP AGREEMENT]

IN WITNESS WHEREOF, Broward County, signing by and through its County Administrator authorized to execute same by the Broward County Board of County Commissioners' action on the 16th day of August, 2016, has executed this Limited Purpose Party Membership Agreement.

WITNESSES:

Print Name: Christina Daly

Print Name: JODI GARDNER

BROWARD COUNTY, through its COUNTY ADMINISTRATOR

By _____
BERTHA HENRY

2nd day of May, 2017

Approved as to form by
Joni Armstrong Coffey
Broward County Attorney
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (954) 357-7600
Telecopier: (954) 357-7641

By _____ 5/1/17
Michael C. Owens (Date)
Senior Assistant County Attorney

STATE OF FLORIDA
COUNTY OF BROWARD

The foregoing instrument was acknowledged before me this 2nd day of May, 2017, by Bertha Henry, County Administrator of Broward County, Florida, who is personally known to me/has produced N/A as identification.

_____
Printed/Typed Name: _____
Notary Public-State of Florida
Commission Number:

(SEAL)

Notary Public State of Florida
Susan E Seferian
My Commission FF 030088
Expires 06/20/2017

[SIGNATURE PAGE TO LIMITED PURPOSE PARTY MEMBERSHIP AGREEMENT]

WITNESS:

Jennifer Jenkins

WITNESS:

FLORIDA DEVELOPMENT FINANCE CORPORATION on behalf of FLORIDA RESILIENCY AND ENERGY DISTRICT

By: _____
William "Bill" F. Spivey, Jr.
Executive Director

STATE OF FLORIDA
COUNTY OF Orange

The foregoing instrument was acknowledged before me this 12 day of April, 2017, by William "Bill" F. Spivey, Jr., Executive Director of the Florida Development Finance Corporation, who is personally known to me/has produced _____ as identification.

(SEAL)

RYAN GREENE
NOTARY PUBLIC
STATE OF FLORIDA
Comm# FF086544
Expires 1/26/2018

Printed/Typed Name: Ryan Greene
Notary Public-State of Florida
Commission Number: FF086544

FL municipalities

Municipality	County	State	Program Name	Lead Organization	Financing Type
Alachua	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Alachua	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Archer	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Archer	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Earleton	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Gainesville	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Gainesville	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Hawthorne	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Hawthorne	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
High Springs	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
High Springs	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
La Crosse	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
La Crosse	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Micanopy	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Micanopy	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
New Berry	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Newberry	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Unincorporated area	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated areas	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Waldo	Alachua	FL	Alliance NRG PACE	Alliance NRG	Both
Waldo	Alachua	FL	Ygrene	Ygrene Energy Fund	Both
Cape Canaveral	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Cocoa	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Cocoa Beach	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Grank-Valkaria	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Indialantic	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Indian Harbor Beach	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Malabar	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Melbourne	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Melbourne Beach	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
Melbourne Village	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Palm Bay	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Palm Shores	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Rockledge	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Satellite Beach	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Titusville	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
West Melbourne	Brevard	FL	Alliance NRG PACE	Alliance NRG	Both
Coconut Creek	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Cooper City	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Coral Springs	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Dania Beach	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Dania Beach	Broward	FL	Ygrene	Ygrene Energy Fund	Both
Davie	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Deerfield Beach	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Fort Lauderdale	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Fort Lauderdale	Broward	FL	Ygrene	Ygrene Energy Fund	Both
Hallandale	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Hallandale Beach	Broward	FL	Ygrene	Ygrene Energy Fund	Both
Hillsboro Beach	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Hollywood	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Hollywood	Broward	FL	Ygrene	Ygrene Energy Fund	Both
Lauderdale Lakes	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Lauderdale Lakes	Broward	FL	Ygrene	Ygrene Energy Fund	Both
Lauderdale-by-the-Sea	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Lauderhill	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Lazy Lake	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Lighthouse Point	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Margate	Broward	FL	Alliance NRG	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
			PACE		
Margate	Broward	FL	Ygrene	Ygrene Energy Fund	Both
Miramar	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Miramar	Broward	FL	Ygrene	Ygrene Energy Fund	Both
North Lauderdale	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Oakland Park	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Parkland	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Pembroke Park	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Pembroke Pines	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Pembroke Pines	Broward	FL	Ygrene	Ygrene Energy Fund	Both
Plantation	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Pompano Beach	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Pompano Beach	Broward	FL	Ygrene	Ygrene Energy Fund	Both
Sea Ranch Lakes	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Southwest Ranches	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Sunrise	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Tamarac	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
West Park	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Weston	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Wilton Manors	Broward	FL	Alliance NRG PACE	Alliance NRG	Both
Adrian Town	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Babcock Ranch	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Boca Grande	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Cape Haze	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Charlotte Harbor	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Charlotte Park	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Cleveland	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Deep Creek	Charlotte	FL	Alliance NRG	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
			PACE		
Englewood	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Grove City	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Harbour Heights	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Manasota Key	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Murdock	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
North Port Charlotte	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Placida	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Port Charlotte	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Punta Gorda	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Rotunda	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Solana	Charlotte	FL	Alliance NRG PACE	Alliance NRG	Both
Crystal River	Citrus	FL	Alliance NRG PACE	Alliance NRG	Both
Inverness	Citrus	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Citrus	FL	Alliance NRG PACE	Alliance NRG	Both
Bellair-Meadowbrook Terrace	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Belmore	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Clay Hill	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Doctors Hill	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Doctors Inlet	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Fleming Island	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Green Cove Springs	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Hibernie	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Keystone Heights	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Lake Asbury	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Lake Geneva	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Lakeside	Clay	FL	Alliance NRG PACE	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
McRae	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Middleburg	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Oakleaf	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Orange Park	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Penney Farms	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Virginia Village	Clay	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Collier	FL	Alliance NRG PACE	Alliance NRG	Both
Century	Escambia	FL	Alliance NRG PACE	Alliance NRG	Commercial
Pensacola	Escambia	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Escambia	FL	Alliance NRG PACE	Alliance NRG	Commercial
Beverly Beach	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Bimini	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Bunnell	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Cody's Corner	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Daytona North	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Dupont	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Espanola	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Favoretta	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Flagler Beach	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Flagler Estates	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Hammock	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Korona	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Marineland	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Painters Hill	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Palm Coast	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
Relay	Flagler	FL	Alliance NRG PACE	Alliance NRG	Both
St. Johns Park	Flagler	FL	Alliance NRG	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
			PACE		
Chattahoochee	Gadsden*	FL	Alliance NRG PACE	Alliance NRG	Commercial
Greensboro	Gadsden*	FL	Alliance NRG PACE	Alliance NRG	Commercial
Gretna	Gadsden*	FL	Alliance NRG PACE	Alliance NRG	Commercial
Havana	Gadsden*	FL	Alliance NRG PACE	Alliance NRG	Commercial
Midway	Gadsden*	FL	Alliance NRG PACE	Alliance NRG	Commercial
Quincy	Gadsden*	FL	Alliance NRG PACE	Alliance NRG	Commercial
Cape San Blas	Gulf	FL	Alliance NRG PACE	Alliance NRG	Both
Dalkeith	Gulf	FL	Alliance NRG PACE	Alliance NRG	Both
Highland View	Gulf	FL	Alliance NRG PACE	Alliance NRG	Both
Honeyville	Gulf	FL	Alliance NRG PACE	Alliance NRG	Both
Indian Pass	Gulf	FL	Alliance NRG PACE	Alliance NRG	Both
Overstreet	Gulf	FL	Alliance NRG PACE	Alliance NRG	Both
Port St. Joe	Gulf	FL	Alliance NRG PACE	Alliance NRG	Both
Wewahitchka	Gulf	FL	Alliance NRG PACE	Alliance NRG	Both
White City	Gulf	FL	Alliance NRG PACE	Alliance NRG	Both
Port St. Joe	Gulf*	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Gulf*	FL	Alliance NRG PACE	Alliance NRG	Both
Wewahitchka	Gulf*	FL	Alliance NRG PACE	Alliance NRG	Both
Brooksville	Hernando	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Hernando	FL	Alliance NRG PACE	Alliance NRG	Both
Weeki Wachee	Hernando	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Hillsborough County	FL	Alliance NRG PACE	Alliance NRG	Both
Bonifay	Holmes	FL	Alliance NRG PACE	Alliance NRG	Both
Esto	Holmes	FL	Alliance NRG PACE	Alliance NRG	Both
Noma	Holmes	FL	Alliance NRG PACE	Alliance NRG	Both
Ponce De Leon	Holmes	FL	Alliance NRG PACE	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
Unincorporated area	Holmes	FL	Alliance NRG PACE	Alliance NRG	Both
Westville	Holmes	FL	Alliance NRG PACE	Alliance NRG	Both
Alford	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Bascom	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Campbellton	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Compass Lake	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Cottondale	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Cypress	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Dellwood	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Graceville	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Grand Ridge	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Greenwood	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Jacob City	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Malone	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Marianna	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Oakdale	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Round Lake	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Simsville	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Sneads	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Two Egg	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Webbville	Jackson	FL	Alliance NRG PACE	Alliance NRG	Both
Alma	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Ashville	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Aucilla	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Capps	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Casa Blanco	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Cody	Jefferson	FL	Alliance NRG	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
			PACE		
Dills	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Drifton	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Fanlew	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Festus	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Fincher	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Jarrott	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Lamont	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Limestone	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Lloyd	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Lois	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Mintivilla	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Nash	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Thomas City	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Wacissa	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Waukeenah	Jefferson	FL	Alliance NRG PACE	Alliance NRG	Both
Monticello	Jefferson*	FL	Alliance NRG PACE	Alliance NRG	Both
Cape Coral	Lee	FL	Alliance NRG PACE	Alliance NRG	Both
Fort Myers	Lee	FL	Alliance NRG PACE	Alliance NRG	Commercial
Tallahassee	Leon	FL	Leon County PACE	Ygrene Energy Fund	Both
Bronson	Levy	FL	Alliance NRG PACE	Alliance NRG	Both
Inglis	Levy	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Levy	FL	Alliance NRG PACE	Alliance NRG	Both
Williston	Levy	FL	Alliance NRG PACE	Alliance NRG	Both
Bradenton Beach	Manatee	FL	Alliance NRG PACE	Alliance NRG	Both
Long Boat Key	Manatee	FL	Alliance NRG PACE	Alliance NRG	Both
Palmetto	Manatee	FL	Alliance NRG PACE	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
Unincorporated area	Manatee	FL	Alliance NRG PACE	Alliance NRG	Both
Amelia City	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
American Beach	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Andrews	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Becker	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Belleview	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Boulogne	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Bryceville	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Chester	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Crandall	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Crawford	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Dahoma	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Dunnellon	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Dyal	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Evergreen	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Franklintown	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Glenwood	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Gross	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Hedges	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Hero	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Ingle	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Italia	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Keene	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Kent	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Kings Ferry	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Lessie	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Mattox	Marion	FL	Alliance NRG	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
			PACE		
Nassau Village-Ratliff	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Nassauville	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
O'Neil	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Ocala	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Verdie	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Yulee	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Yulee Heights	Marion	FL	Alliance NRG PACE	Alliance NRG	Both
Bay Harbor Islands	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Biscayne Park	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
City of Miami	Miami-Dade	FL	Alliance NRG PACE	Alliance NRG	Both
Coral Gables	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Cutler Bay	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
El Portal	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Hialeah	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Hialeah Gardens	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Homestead	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Key Biscayne	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Miami	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Miami Beach	Miami-Dade	FL	Alliance NRG PACE	Alliance NRG	Both
Miami beach	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Miami gardens	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Miami Lakes	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Miami Shores	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Miami Springs	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
North Bay Village	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
North Miami	Miami-Dade	FL	Alliance NRG PACE	Alliance NRG	Both
North Miami	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
North Miami Beach	Miami-Dade	FL	Alliance NRG PACE	Alliance NRG	Both
North Miami beach	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Opa-Locka	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Palmetto Bay	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Pinecrest	Miami-Dade	FL	Alliance NRG PACE	Alliance NRG	Both
Pinecrest	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
South Miami	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Surfside	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Sweetwater	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
West Miami	Miami-Dade	FL	Alliance NRG PACE	Alliance NRG	Both
West Miami	Miami-Dade	FL	Ygrene	Ygrene Energy Fund	Both
Islamorada	Monroe	FL	Alliance NRG PACE	Alliance NRG	Both
Key Colony Beach	Monroe	FL	Alliance NRG PACE	Alliance NRG	Both
Key West	Monroe	FL	Alliance NRG PACE	Alliance NRG	Both
Levy	Monroe	FL	Alliance NRG PACE	Alliance NRG	Both
Marathon	Monroe	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Monroe	FL	Alliance NRG PACE	Alliance NRG	Both
Amelia City	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
American Beach	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Andrews	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Becker	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Boulogne	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Bryceville	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Chester	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Crandall	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Crawford	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Dahoma	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Dyal	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Evergreen	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Franklintown	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Glenwood	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Gross	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Hedges	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Hero	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Ingle	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Italia	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
Keene	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Kent	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Kings Ferry	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Lessie	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Mattox	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Nassau Village-Ratliff	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Nassauville	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
O'Neil	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Verdie	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Yulee	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Yulee Heights	Nassau	FL	Alliance NRG PACE	Alliance NRG	Both
Callahan	Nassau*	FL	Alliance NRG PACE	Alliance NRG	Both
Fernandina Beach	Nassau*	FL	Alliance NRG PACE	Alliance NRG	Both
Hilliard	Nassau*	FL	Alliance NRG PACE	Alliance NRG	Both
Apopka	Orange	FL	Alliance NRG PACE	Alliance NRG	Both
Orlando	Orange	FL	Alliance NRG PACE	Alliance NRG	Both
Orlando	Orange	FL	Ygrene	Ygrene Energy Fund	Both
Winter Park	Orange	FL	Alliance NRG PACE	Alliance NRG	Both
Buenaventura Lakes	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Bull Creek	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Campbell	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Celebration	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Deer Park	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Harmony	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Holopaw	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Kenansville	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Kissimmee	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial

Municipality	County	State	Program Name	Lead Organization	Financing Type
Poinciana	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
St. Cloud	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Yeehaw Junction	Osceola	FL	Alliance NRG PACE	Alliance NRG	Commercial
Atlantis	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Belle Glade	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Boca Raton	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Boynton Beach	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Briny Breezes	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Cloud Lake	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Delray Beach	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Glen Ridge	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Golf	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Greenacres	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Gulf Stream	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Haverhill	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Highland Beach	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Hypoluxo	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Juno Beach	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Jupiter	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Lake Clarke Shores	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Lake Park	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Lake Worth	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Lantana	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Loxahatchee Groves	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Magnolia	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Manalapan	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
North Palm Beach	Palm Beach	FL	Alliance NRG	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
			PACE		
Ocean Ridge	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Pahokee	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Palm Beach	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Palm Beach Garden	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Palm Beach Shoes	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Palm Springs	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Riviera Beach	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Royal Palm Beach	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
South Bay	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
South Palm Beach	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Tequesta	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Unincorporated area	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Wellington	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
West Palm Beach	Palm Beach	FL	Alliance NRG PACE	Alliance NRG	Both
Blanton	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Branchborough	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Dade City	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Darby	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Gulf Harbors	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Hudson Beach	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Jessamine	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
New Port Richey	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Port Richey	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Richland	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
San Antonio	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Seven Springs	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
St. Joseph	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
St. Leo	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Trilacoochee	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Vitis	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Zephyrhills	Pasco	FL	Alliance NRG PACE	Alliance NRG	Both
Oviedo	Seminole	FL	Alliance NRG PACE	Alliance NRG	Both
Fort Pierce	St. Lucie	FL	SELF PACE Program	Solar & Energy Loan Fund	Commercial
Port St. Lucie	St. Lucie	FL	SELF PACE Program	Solar & Energy Loan Fund	Commercial
St. Lucie Village	St. Lucie	FL	SELF PACE Program	Solar & Energy Loan Fund	Commercial
Unincorporated Areas	St. Lucie	FL	SELF PACE Program	Solar & Energy Loan Fund	Commercial
Beachville	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Branford	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Dickert	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Dowling Park	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Ellaville	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Falmouth	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Fort Union	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Hildreth	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Houston	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Live Oak	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Luraville	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
McAlpin	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
O'Brien	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Padlock	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Pouchers Corner	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Rixford	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Slade	Suwannee	FL	Alliance NRG	Alliance NRG	Both

Municipality	County	State	Program Name	Lead Organization	Financing Type
			PACE		
Suwannee Springs	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Wellborn	Suwannee	FL	Alliance NRG PACE	Alliance NRG	Both
Edge Water	Volusia	FL	Alliance NRG PACE	Alliance NRG	Both
New Smyrna Beach	Volusia	FL	Alliance NRG PACE	Alliance NRG	Both
Argyle	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Bruce	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
DeFuniak Springs	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Eucheanna	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Freeport	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Glendale	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Grayton Beach	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Miramar Beach	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Mossy Head	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Paxton	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Santa Rosa Beach	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Seacrest	Walton	FL	Alliance NRG PACE	Alliance NRG	Both
Seaside	Walton	FL	Alliance NRG PACE	Alliance NRG	Both

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

Date: December 7, 2017

Mortgagee Letter 2017-18

To: All FHA-approved Mortgagees
All Direct Endorsement Underwriters
All FHA Roster Appraisers
All FHA Roster Inspectors
All FHA-approved 203(k) Consultants
All HUD-approved Housing Counselors
All HUD-approved Nonprofit Organizations
All Governmental Entity Participants
All Real Estate Brokers
All Closing Agents

Subject

Property Assessed Clean Energy (PACE)

Purpose

This Mortgagee Letter (ML) transmits revised policies for insuring mortgages secured by Single Family 1- 4 unit properties encumbered with Property Assessed Clean Energy (PACE) obligations.

Effective Date

This guidance is effective for case numbers issued thirty days after the date of this ML.

All policy updates will be incorporated into a forthcoming update of the HUD Single Family Housing Policy Handbook 4000.1 (Handbook 4000.1).

Public Feedback

HUD welcomes feedback from interested parties for a period of 30 calendar days from the date of issuance. To provide feedback on this policy document, please send any feedback to the FHA Resource Center at answers@hud.gov. HUD will consider the feedback in determining the need for future updates.

Continued on next page

Mortgagee Letter 2017-18

Affected Programs

This guidance applies to the origination of all FHA Title II forward mortgage programs, and the Home Equity Conversion Mortgage program (HECM).

Background

In ML 2016-11, FHA established requirements regarding the eligibility for FHA-insured mortgages of properties encumbered with PACE obligations that permitted, under some circumstances, a continuing obligation for repayment of the PACE obligation even after foreclosure and acquisition by FHA. These requirements were subsequently incorporated into the HUD Single Family Housing Policy Handbook 4000.1 (Handbook 4000.1).

FHA is concerned about the potential for increased losses to the Mutual Mortgage Insurance Fund due to the priority lien status given to such assessments in the case of default. FHA is also concerned with the lack of consumer protections associated with the origination of the PACE assessment, which are far less comprehensive than that of traditional mortgage financing products. FHA's involvement with accepting properties with PACE assessments may indirectly help to overshadow potential consumer abuses.

While the existence of FHA-insured financing for properties with PACE assessments creates additional choices for financing options, potential borrowers may face risk associated with the potential for property overvaluation due to the unknown or miscalculated effect of the PACE lien on the property value.

FHA is also aware of the need to provide guidance regarding the extinguishment of PACE obligations in association with forward mortgage refinances and HECMs.

Accordingly, FHA has revised its policies with respect to the insurance of mortgages on properties encumbered with PACE obligations.

The policies and procedures for the servicing of FHA-insured mortgages on properties encumbered with a PACE obligation as announced in ML 2016-06 are not impacted by this ML and remain in effect.

Mortgagee Letter 2017-18

Summary of Changes

Attached to this ML are additions and revisions to the Handbook 4000.1. The following is a summary of policy changes, which is provided for informational purposes only.

Outstanding PACE Obligations

Properties encumbered with PACE obligations will no longer be eligible for FHA-insured forward mortgages.

Refinances

Clarification is provided to identify PACE obligations as existing debt that may be paid off using a Rate and Term Refinance.

Current policies allowing the use of a Cash-Out refinance to pay off PACE obligations remain unchanged.

HECMs

The existing prohibition of properties encumbered with PACE obligations remains unchanged for HECMs.

Clarification is provided to identify PACE obligations as Mandatory Obligations that must be paid off at closing, and may be paid off using HECM proceeds.

Single Family Policy Handbook 4000.1

The attached updates to HUD's Single Family Housing Policy Handbook 4000.1 will be incorporated in a future publication of the Handbook.

HECM Program

Properties which will remain encumbered with a PACE obligation are not eligible for an FHA-insured HECM.

The payoff of a PACE obligation is a Mandatory Obligation and it must be paid off at closing, and may be paid off using HECM proceeds.

Mortgagee Letter 2017-18

Paperwork Reduction Act

The information collection requirements contained in this document are approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB control numbers 2502-0059 and 2502-0524. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to a collection of information unless the collection display a currently valid OMB control number.

Questions

For additional information on this ML, please visit www.hud.gov/answers or call FHA's Resource Center at 1-800-CALLFHA (1-800-225-5342). Persons with hearing or speech impairments may reach this number via TTY by calling the Federal Relay Service at 1-800-877-8339.

Signature

Dana T. Wade
General Deputy Assistant Secretary for Housing

Attachment

Green Corridor Property Assessment

(Clean Energy)

PARCEL PAYOFF QUOTE

Ownership Information: PERCIFIELD,ROBERT S H/E & PERCIFIELD,NANNETTE M

Assessor's Parcel Number: 49-42-11-06-3170 **Project:** Clean Energy Broward

District: Green Corridor

Project ID No.	Original Lien Amount	Remaining Principal	Redemption Premium	Redemption Amount	Remaining Balance
FL-15-T6EK96	$21,408.64	$20,909.90	0.00%	$0.00	$20,909.90

Escrow/Custodial Fee:	55.00
Balance of Administrative Fee:	25.00
PAYOFF AMOUNT:	**$20,989.90**

PAYOFF AMOUNT IS GOOD THROUGH JUNE 30, 2018

PLEASE READ THE FOLLOWING TO BETTER UNDERSTAND YOUR PAYOFF QUOTE

1. Please pay the amount on this payoff quote to Zions Bank, per the instructions below.

2. If applicable, please pay the special tax assessment along with your other property taxes on your County Property Tax Bill, for fiscal year (July 1 – June 30) directly to the County Tax Collector's office.

3. Once payoff payment and current special tax assessments (and any delinquent special tax assessments, if applicable) have been received and cleared, the lien on your property will be released.

REMITTANCE INFORMATION

Payment may ONLY be made via cashier's check, money order, or title/escrow company check. Personal checks are not accepted. YOUR PAYMENT WILL BE RETURNED, if check has a different amount than what is on the quote. Wire transfers are not accepted.

Please make your check payable to: Zion's Bank as Trustee for Green Corridor

Remit your payment, along with a copy of your payoff statement, to Zions Bank at the address shown below:

Zions Bank, National Association
Attention: Corporate Trust Department
550 South Hope Street, Ste 2875
Los Angeles, CA 90071

Please reference your Project ID number(s) on your payment. If you need a new payoff, or have any questions, please feel free to call the undersigned at (866) 807-6864.

Cordially,

Jason Aznoff, Analyst
Willdan Financial Services

WILLDAN

Florida HERO Financing Program™ Application

P: 855-HERO-411 **A:** 16409 W. Bernardo Drive, San Diego, CA, 92127 **E:** info@heroprogram.com

The Florida HERO Program (the "Program") finances installation of renewable energy, energy efficient, and wind-resistant improvements that are permanently fixed to a property owner's real property ("Eligible Products"). The cost of the purchase and installation of Eligible Products (the "Project Cost") will be financed upon the property owner's signing of a financing agreement with the Florida Development Finance Corporation ("FDFC") and the Florida Resiliency and Energy District ("FRED" or the "Local Government") ("Financing Agreement"). FDFC has retained Renovate America, Inc. ("Renovate America" or "Program Administrator") to facilitate the Program, and you will see this name throughout the Program materials. FDFC provides oversight of multiple Program Administrators for its non-exclusive PACE program and Renovate America serves as a Program Administrator.

Property Owner Acknowledgments

In order to participate in the Program, I understand that I need to meet the qualifications listed below. By signing this Application, I acknowledge and represent to the best of my knowledge that I and any other owner(s) and/or trustee(s) of the property (the "Property" which is the subject of this application) meet these qualifications and I authorize the Program Administrator to obtain a credit report for each of the Property owner(s) and/or trustees whose social security number is provided on this application.

1. Applicant(s) must be the owner(s) of record for the respective Property.
2. Property owner(s) must be current on all mortgage debt on the Property.
3. No notices of default or other evidence of property-based debt delinquency have been recorded during the preceding three years or the property owner's period of ownership, whichever is less.
4. Property owner(s) must be current on their property taxes and any other assessments levied on the same bill as property taxes are paid and property taxes must not have been delinquent for the preceding three years or the period of ownership, whichever is less.
5. Property owner(s) are not involved in bankruptcy proceedings.
6. The Property must not have any involuntary liens, including but not limited to, construction liens.

I understand that to qualify for the Program that the following requirements must be met:

a. The total amount of any non-ad valorem assessment for a property must not exceed 20 percent of the just value of the Property as determined by the county property appraiser. Household income is also a consideration and may affect application approval and maximum approval amounts.
b. The combined amount to be financed under the Program plus the mortgage-related debt must not exceed 100% of the value of the Property.
c. The all-in tax payment on the Property (including the assessment and any other assessments) must not exceed 5% of the value of the Property.
d. Property owner(s) must sign all required documentation including, but not limited to, the Application, and the Financing Agreement with all other required Financing Documents.
e. Following approval of the Application, the contractor or Property owner(s) must contact the Program to identify the Eligible Products the Property owner(s) would like to install, the Property owner(s) must sign a Financing Agreement, and receive Notification to Proceed from the Program before beginning the installation of any Eligible Products. Products which have not been approved by the Program will not be funded.
f. In Broward County, the total amount of annual PACE assessments must not exceed 4% of the total annual gross income of the Property owner in the prior calendar or fiscal year. In addition, the all-in tax payment on the Property (including the assessment and any other assessments) must not exceed 5% of the just value of the property, as determined by the county property appraiser or by other valuation method provided for in the Broward County PACE resolution.
g. For certain homeowners in Palm Beach County and for homeowners in the City of West Palm Beach, all mortgage-related debt on the Property may not exceed 90% of the value of the Property.

By signing this Application, I hereby declare under penalty of perjury under the laws of the State of Florida the following:

1. That the information provided in this Application is true and correct as of the date set forth opposite my signature on the Application and that I understand any intentional or negligent misrepresentation(s) of the information contained in this Application may result in civil liability and/or criminal penalties including, but not limited to, imprisonment, liability for monetary damages to FDFC, the Local Government, its agents, its administrators, or successors and assigns, insurers and any other person who may suffer any loss due to reliance upon any misrepresentation which I have made in this Application, or both.
2. I have the authority to authorize the Program Administrator to obtain a credit report for each of the Property owner(s) and/or trustee(s) whose social security number(s) is provided on this Application.
3. I understand that it is my responsibility to receive, read and understand all documents comprising the Program, which, in addition to information on the Program website, include the following:
   a. This Application;
   b. Privacy Policy Notice;
   c. Financing Agreement; and
   d. Program Handbook.

   I have had an opportunity to speak with Renovate America representatives and my legal counsel on any questions I have regarding the documents listed above. I am also aware that Property owners are encouraged to consult with legal counsel or a tax professional of their choice before entering into a Financing Agreement.
4. I am applying to participate in the Program. I have the authority, without the consent of any third party, to execute and deliver this Application, the Financing Agreement, and the various other documents and instruments referenced herein.
5. I understand that the financing provided pursuant to the Financing Agreement will be repayable through an assessment levied against the Property. I consent to, and understand that a Summary Memorandum of the Financing Agreement will be recorded in the public records of the county within

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SAMPLE

P: 855-HERO-411 A: 16409 W. Bernardo Drive, San Diego, CA, 92127 E: info@heroprogram.com

which the Property is located within five days after execution of the Financing Agreement with the FDFC and the Local Government and will be repayable through regular installments over the term of the Financing Agreement. The property tax bill (which will include the assessment payments) for the Property will increase by the amount of these assessment installment payments. The Financing Agreement will specify the amount of the assessment, the assessment installments and the interest on the assessment to be collected on the property tax bill for the Property each year during the term specified in the Financing Agreement. Pursuant to Section 163.08(4) of the Florida Statutes, the assessment shall not be subject to discount for early payment. The assessment, interest and any penalties thereon will constitute a lien against the Property until they are paid. As with all assessment liens, this lien will be senior to all existing and future private liens against the Property, including mortgages, deeds of trust and other security instruments.

6. If, as of the date of this Application or any time before the completion of the installation of Eligible Products on the Property to be financed through my HERO Financing Agreement, I have obtained or am in the process of obtaining additional financing for the installation of energy efficiency, renewable energy or wind-resistant improvements from a non-HERO Program the repayment of which will also be collected on my property tax bill through the levy of an additional assessment against the Property, I will notify the Program as part of my HERO Application process (or at such other time before the installation of my HERO financed Eligible Improvements is complete) and will provide all relevant information requested by the Program in order to determine if I have met the requirements listed above.

Disclosures

The following describes some (but not all) characteristics and risks of participation in the Program as well as laws to which the Program is subject. A full understanding of any item listed below can be gained only by reviewing the relevant laws, policy statements, and/or the contractual documents related to the Program. The Program Administrator is available to answer questions regarding the items listed below before you enter into a Financing Agreement, and invites you to ask Program representatives any questions regarding these items or if you need copies of any document related to the Program.

1. Program Disclosures and Disclaimers.

   a. **Existing Mortgage.** The Program establishes the manner by which FDFC may finance, pursuant to Sections 163.08 and 288.9602-288.9610, of the Florida Statutes, as amended and supplemented, the installation of Eligible Products. Eligible Products will be financed pursuant to a Financing Agreement between the Applicant(s), FDFC, and the Local Government.

   BEFORE COMPLETING A PROGRAM APPLICATION, YOU SHOULD CAREFULLY REVIEW ANY MORTGAGE AGREEMENT(S) OR OTHER SECURITY INSTRUMENT(S) WHICH AFFECT THE PROPERTY OR TO WHICH YOU AS THE PROPERTY OWNER ARE A PARTY. ENTERING INTO A FINANCING AGREEMENT WITHOUT THE CONSENT OF YOUR EXISTING LENDER(S) COULD CONSTITUTE AN EVENT OF DEFAULT UNDER SUCH MORTGAGE AGREEMENTS OR SECURITY INSTRUMENTS. DEFAULTING UNDER AN EXISTING MORTGAGE AGREEMENT OR SECURITY INSTRUMENT. IN ADDITION, FANNIE MAE AND FREDDIE MAC, THE OWNER OF A SIGNIFICANT PORTION OF ALL HOME MORTGAGES, STATED THAT THEY WOULD NOT PURCHASE HOME LOANS WITH ASSESSMENTS SUCH AS THOSE OFFERED BY THE PROGRAM. THIS MAY MEAN THAT PROPERTY OWNERS WHO SELL OR REFINANCE THEIR PROPERTY MAY BE REQUIRED TO PREPAY SUCH ASSESSMENTS AT THE TIME THEY CLOSE THEIR SALE OR REFINANCING.

   If your Lender requires an impound or escrow for your property taxes, please consider notifying them of the annual assessment payment amount so they can adjust your impound or escrow amount.

If there are any existing mortgages encumbering or otherwise secured by the Property, you acknowledge that you consent to the Program Administrator's providing to the holder or loan servicers of record of any existing mortgages encumbering or otherwise secured by the Property a notice of your intent to enter into a Financing Agreement together with the maximum principal amount to be financed and the maximum annual assessment necessary to repay that amount. The Program will provide this notice to any holder or loan servicers of record on your behalf upon your signature of financing documents.

Consent to Provide Notice to Lienholders	I consent to the Program Administrator's providing to the holder or loan servicers of record of any existing mortgages encumbering or otherwise secured by the Property a notice of my intent to enter into a Financing Agreement together with the maximum principal amount to be financed and the maximum annual assessment necessary to repay that amount.	PO INITIAL

   b. **Tax Sale.** The Property Owner acknowledges that if any assessment installment is not paid when due, the enforcement and collection procedures set forth in the Uniform Assessment Collection Act (Section 197.3632, Florida Statutes) may be employed which could result in a sale of tax certificates for the Property and the ultimate sale of the Property for the payment of the delinquent assessment installments, associated penalties, interest and other costs.

   c. **Interest Rate.** You will be charged a fixed interest rate on your total financed amount. Your interest rate will be provided in your financing documents and may be subject to change until you have signed financing documents.

   d. **Program Administration Fee.** At the time of closing, the Program will charge a one-time program administration fee of 4.99% of the Project Cost to cover the cost of administering the Program. This fee will be included in the principal amount of the assessment.

   e. **Recording and Initial Assessment Administration Fee.** At the time of closing, the Program will pass-through the assessment recording fee of approximately $60.00 to you to cover the costs of recording the assessment which will be added to the assessment amount. At the time of closing,

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an initial assessment administration fee of $35.00 will also be added to the assessment amount. You will not be charged for the state documentary stamp tax; the Florida HERO Program will pay this cost on your behalf.

f. **Ongoing Assessment Administration Fee and Tax Collection Administration Fee.** Each year, an annual assessment administration fee will be added to the assessment lien amount on your property tax bill. This fee is currently $35.00, but is subject to increase to an amount not to exceed $95.00. Each year, an annual tax collection administration fee may also be added to the assessment lien amount on your property tax bill. This fee is collected by your local county tax collector as part of the ordinary tax collection process, and generally ranges between 0– 2% of the annual assessment payment amount (depending upon the county where the Property is located), but is subject to change in subsequent years. However, the tax collection administration fee may exceed this estimate. The Program does not determine or guarantee the amount of the fee, which may vary by year depending upon the county where the Property is located. Please contact your local county tax collector for more information.

g. **Interest Before First Payment:** Interest before first payment will be added to your assessment amount for the period between the closing date and May 2nd of the year you make your first assessment payment. The maximum amount of interest will be disclosed in your financing documents. Depending on the date the assessment is recorded on your Property, your first assessment payment may not be due until the following tax year.

h. **Valuation Disclosure.** You have the right to a copy of the automated valuation model (AVM) report used in connection with your application for credit. If you want to obtain a copy, please email or write to us at the address we have provided. We must hear from you no later than 90 days after we provide you with a notice of the action taken on your application or a notice of incompleteness, or in the case of a withdrawn application, 90 days after the withdrawal. An AVM is not an appraisal. It is a computerized property valuation system that is used to derive a real property value.

i. **Prepayment.** You have the option to pay off your assessment amount at any time in full, or in any amount of at least $2,500. A prepayment is calculated to include the principal amount of the assessment to be prepaid (Assessment Prepayment Amount) and interest on the Assessment Prepayment Amount to the second business day of the second month following the date the prepayment is made.

j. **No Endorsement, Warranty or Liability.** FDFC, the Local Government, the Program Administrator, and the Program do not endorse any manufacturer, contractor, product, or system, or in any way warranty such equipment, installation, or the efficiency or production capability of any equipment. FDFC, the Local Government, the Program Administrator and the Program make no representations and have no responsibility regarding the equipment and its installation, including the quality, safety, cost savings, efficiency or production capability of any equipment; or any compliance of the equipment or its installation with any applicable laws, regulations, codes, standards or requirements. Further, FDFC, the Local Government, the Program Administrator and the Program shall not be in any way liable for any incidental or consequential damages resulting from the equipment or its installation. The assessment may or may not affect the overall value of the Property.

k. **Validation.** The Program Administrator may validate that installed Eligible Products meet Program eligibility requirements including requiring the Applicant to provide additional sales receipts, contractor invoices, home improvement contracts, serial numbers or other identifying details, portions of packages or stickers originally attached to the installed Eligible Products beyond what the Program already requires to be provided. The Program Administrator reserves the right to perform independent on-site validation(s) of any Eligible Products financed by the Program even if permit inspections have already been completed. If a validation visit is required, Program Administrator staff will schedule any such on-site validation visit with the Property owner, at any reasonable time and with reasonable notice. In addition, the Program reserves the right to perform online monitoring of any installed renewable energy systems' generation data, if applicable, as well the tracking of energy consumption impacts and utility usage for any installed/financed product via property utility bill data. You, by submitting this application, consent to any such onsite validations, online monitoring, and utility bill energy usage analysis. By submitting this application, you also agree to sign the authorization form to participate in utility billing energy usage analysis to measure Program impact savings and participant satisfaction.

l. **Additional Property Owner Information Disclosure.** Please see the Renovate America Website Privacy Policy for additional information on disclosure practices.

m. **Property Transfers, Notice, and Acknowledgement.**

Per Florida Statutes Section 163.08(14), you agree that at or before the time a prospective purchaser executes a contract for the sale and purchase of the Property and the Property has an unpaid balance due for the assessment, you shall give the prospective purchaser a written disclosure statement in the following form, which shall be set forth in the contract or in a separate writing:

> QUALIFYING IMPROVEMENTS FOR ENERGY EFFICIENCY, RENEWABLE ENERGY, OR WIND RESISTANCE. The property being purchased is located within the jurisdiction of a local government that has placed an assessment on the property pursuant to s. 163.08, Florida Statutes. The assessment is for a qualifying improvement to the property relating to energy efficiency, renewable energy, or wind resistance, and is not based on the value of property. You are encouraged to contact the county property appraiser's office to learn more about this and other assessments that may be provided by law.

You understand and acknowledge that the assessment and obligation to pay the assessment pursuant to such Financing Agreement, runs with the land and upon sale or transfer of the Property or any interest therein, any subsequent owner or transferee shall be required to pay the assessment pursuant to such Financing Agreement. If a subsequent owner or transferee fails to pay the assessment pursuant to such Financing Agreement, then the provisions of the Financing Agreement, including the "Tax Sale" provision listed above, shall apply to the subsequent owner or transferee's interest in the Property to the extent permitted by law. You further understand and acknowledge that a subsequent purchaser or transferee, or any interested party to the sale or transfer (such as a lender), may require as a condition of sale or transfer that the assessment be paid in full prior to sale or transfer. Information regarding assessment prepayment can be found in the section of the Financing Agreement pertaining to Prepayments.

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n. **Contractor Fee.** IN CONNECTION WITH THIS TRANSACTION, RENOVATE AMERICA MAY REQUIRE THAT YOUR CONTRACTOR PAY RENOVATE AMERICA A FEE. THIS FEE MAY BE DEDUCTED FROM THE AMOUNT TO BE PAID TO YOUR CONTRACTOR. TO THE EXTENT YOUR CONTRACTOR IS REQUIRED TO PAY RENOVATE AMERICA A FEE, YOUR CONTRACTOR HAS AGREED NOT TO INCLUDE, ADD, CHARGE, OR OTHERWISE TRANSFER TO YOU THE COST OF SUCH FEE.

2. Legal Disclosures

a. **Communications with Legal Advisers.** If you have any questions about any agreements or security instruments which affect the Property or to which you are a party, or about your authority to execute the Program Application or enter into a Financing Agreement with FDFC and the Local Govemment without the prior consent of your existing lender(s), the Program strongly encourages you to consult with your own legal counsel and your lender(s). Program staff cannot provide you with advice about existing agreements or security instruments.

b. **Monitoring and Recording Telephone Calls.** The Program may monitor or record telephone calls for security and customer service purposes. By applying for HERO Financing, you consent to have any phone conversations with the Program recorded or monitored.

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Arbitration Agreement

Please read this Section ("Arbitration Agreement") carefully. It is part of this Application and affects your rights. It contains A JURY TRIAL WAIVER and procedures for MANDATORY BINDING ARBITRATION AND A CLASS ACTION WAIVER.

a. Arbitration Agreement. Before asserting a claim against Renovate America in any proceeding, you agree that you shall engage in a good faith attempt to resolve the claim. All claims and disputes between you and Renovate America that cannot be resolved informally or in small claims court shall be resolved by binding arbitration on an individual basis under the terms of this Arbitration Agreement. This Arbitration Agreement applies to you (including any of your successor(s) in interest) and Renovate America (including any of Renovate America's parents, subsidiaries, affiliates, agents, privities, employees, predecessors, successors, assigns, contractors and sub-contractors).
b. Waiver of Jury Trial. YOU HEREBY WAIVE THE CONSTITUTIONAL AND STATUTORY RIGHTS TO GO TO COURT AND HAVE A TRIAL IN FRONT OF A JUDGE OR A JURY, instead electing that all claims and disputes shall be resolved by arbitration under this Arbitration Agreement. Arbitration procedures are typically more limited, more efficient and less costly than rules applicable in court and are subject to very limited review by a court.
c. Arbitration Rules. The Federal Arbitration Act governs the interpretation and enforcement of this dispute resolution provision. Arbitration shall be initiated through JAMS, Inc., an established alternative dispute resolution provider ("ADR Provider"). If the selected ADR Provider is not available to arbitrate, Renovate America shall select an alternative ADR Provider. The rules of the ADR Provider shall govern all aspects of this arbitration, except to the extent such rules are in conflict with this Application or to the extent that application of this Application provisions would result in the unenforceability of this Arbitration Agreement. The JAMS rules governing the arbitration are available online at www.jamsadr.com or by calling JAMS at 1-800-352-5267. Any arbitration hearing will be held in your federal judicial district. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.
d. Decision of Arbitrator. The arbitrator shall issue a written award and statement of decision describing the essential findings and conclusions on which the award is based. The arbitrator has the same authority to award relief on an individual basis that a judge in a court of law would have. The award of the arbitrator is final and binding upon the Property owner and Renovate America.
e. Waiver of Class or Consolidated Actions. ALL CLAIMS AND DISPUTES WITHIN THE SCOPE OF THIS ARBITRATION AGREEMENT MUST BE ARBITRATED ON AN INDIVIDUAL BASIS AND NOT ON A CLASS BASIS, AND ARBITRATION CLAIMS OF MORE THAN ONE PROPERTY OWNER CANNOT BE ARBITRATED OR LITIGATED JOINTLY OR CONSOLIDATED WITH THOSE OF ANY OTHER PROPERTY OWNER.
f. Severability. If any part or parts of this Arbitration Agreement other than the Waiver of Class or Consolidated Actions are found under the law to be invalid or unenforceable, then such specific part or parts shall be of no force and effect and shall be severed and the remainder of the Arbitration Agreement shall continue in full force and effect. If the Waiver of Class or Consolidated Actions is found to be unenforceable, then as to the specific dispute in which that ruling of unenforceability was made, this entire Arbitration Agreement shall be unenforceable.
g. Survival of Agreement. This Arbitration Agreement shall survive the termination of this Application.
h. Small Claims Court. Notwithstanding the foregoing, you or Renovate America may bring an individual action in small claims court.
i. Property Owner's Right to Opt Out of Arbitration. You may opt out of this Arbitration Agreement by sending a written notice of your election to do so, signed by all application hereunder, within 30 days of the date of this Application. Such election shall be sent to Renovate America, Attn: Compliance Department, at 16409 W. Bernardo Drive, San Diego, CA, 92127.

By signing below, you acknowledge and agree to the terms set forth in this Arbitration Agreement.

Property Owner Signature(s)

I declare that (i) I have received, read and understand the risks and characteristics of the Program described in the Property Owner Acknowledgments and Disclosures set forth in this Application and (ii) I have been informed that I must take the sole responsibility to satisfy myself that executing the Financing Agreement, receiving financing for Eligible Products, and consenting to the assessment levied against the Property will not constitute a default under any other agreement or security instrument (specifically the terms of any mortgage on the Property) which affects the Property or to which I am a party.

	Joe Smith	Date	Property Owner 2	Date
	Property Owner 3	Date	Property Owner 4	Date

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Florida HERO Financing Program™ Application

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FOR CONTRACTOR CALL IN ONLY	**HERO ID#:** FL00900000

Property Address

Single Family Home Property Type		
123 Blueberry Ln Property Address		
Satellite Beach City	**FL** State	**32937** Zip Code

Property Owner

Ownership Type: **Individual**			
Joe First Name	M. Initial	**Smith** Last Name	
XXX-XX-XXXX Social Security Number	**XX/XX/XXXX** Birth Date (mm/dd/yyyy)	**(555) 123-4567** Home Phone Number	
joe_smith@rasampledocs.com Email Address			
123 Blueberry Ln Mailing Address			
Satellite Beach City	**FL** State	**32937** Zip Code	

Property Owner 2

First Name	M. Initial	Last Name	
Social Security Number	Birth Date (mm/dd/yyyy)		

Property Owner Signature(s)

I declare that I have the authority, without the consent of any third party which has not been previously obtained, to execute and deliver the Application, Financing Agreement, and the various documents and instruments referenced therein.

	Joe Smith	Date	Property Owner 2	Date
	Property Owner 3	Date	Property Owner 4	Date

If you do NOT wish to receive email communications from the Program and would prefer all communications to occur through the U.S. mail instead, please contact us.

☐ Please check this box if you do NOT want to receive newsletters or other marketing materials from the Program or Renovate America, Inc.

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A SUMMARY MEMORANDUM OF THIS FINANCING AGREEMENT SHALL BE RECORDED IN THE PUBLIC RECORDS OF THE COUNTY IN WHICH THE PROPERTY DESCRIBED ON EXHIBIT A HERETO IS LOCATED WITHIN FIVE (5) DAYS OF EXECUTION OF THIS FINANCING AGREEMENT.

THE APPLICABLE FLORIDA DOCUMENTARY STAMP TAX WILL BE PAID BY THE FLORIDA HERO PROGRAM UPON SUCH RECORDING.

THE PROPERTY OWNER SIGNING THIS FINANCING AGREEMENT SHOULD READ THIS FINANCING AGREEMENT IN ITS ENTIRETY. THIS FINANCING AGREEMENT WILL RESULT IN THE IMPOSITION OF A NON-AD VALOREM ASSESSMENT AT THE REQUEST OF THE PROPERTY OWNER ON THE REAL PROPERTY DESCRIBED IN EXHIBIT A.

FLORIDA HOME ENERGY RENOVATION OPPORTUNITY (HERO) PROGRAM
FINANCING AGREEMENT

THIS FINANCING AGREEMENT (this "Financing Agreement") is made and entered into by and between the Florida Development Finance Corporation, a public body corporate and politic and a public instrumentality organized and existing under the laws of the State of Florida or its designee ("FDFC"), the Florida Resiliency and Energy District ("FRED" or the "Local Government"), and the record owner(s) (the "Property Owner") of the fee title to the real property identified on EXHIBIT A hereto (the "Property").

RECITALS

WHEREAS, pursuant to Section 163.08, Florida Statutes, as amended (the "Florida PACE Act"), the Florida Legislature found that in order to make qualifying renewable energy, energy conservation and efficiency and wind resistance improvements (collectively, "Qualifying Improvements") more affordable and assist real property owners who wish to undertake such improvements, there is a compelling State of Florida ("State") interest in enabling property owners to voluntarily finance such improvements with local government assistance; and

WHEREAS, under the Florida PACE Act, the Florida Legislature determined that the actions authorized under the Florida PACE Act, including, but not limited to, the financing of Qualifying Improvements through the execution of financing agreements between property owners and local government entities and the resulting imposition of voluntary, non-ad valorem assessments are reasonable and necessary to serve and achieve a compelling State interest and are necessary for the prosperity and welfare of the State and its property owners and inhabitants; and

WHEREAS, FDFC has established a Property Assessed Clean Energy program ("FDFC PACE Program") in accordance with the Florida PACE Act and other applicable provisions of law, and has further selected Renovate America, Inc. as a Program Administrator (the "Program Administrator") under its FDFC PACE Program pursuant to which it operates the Florida Home Energy Renovation Opportunity Program (the "Florida HERO Program") on its behalf, and pursuant to which FDFC will issue special assessment revenue bonds ("Bonds") in order to finance Qualifying Improvements under the Florida PACE Act; and

WHEREAS, the Florida PACE Act, Sections 288.9605 and 288.9606, Florida Statutes, as amended and supplemented, and the Florida HERO Program provide that a real property owner of a lot or parcel that wishes to voluntarily finance Qualifying Improvements with local government assistance may do so through the execution of a financing agreement and the related imposition of voluntary non-ad valorem assessments by the Local Government; and

WHEREAS, FDFC, together with the Local Government, shall conduct the proceedings required by the Florida PACE Act and Sections 197.3632 and 197.3635, Florida Statutes, as amended and supplemented (the "Uniform Assessment Collection Act") with respect to the Property identified in EXHIBIT A hereto owned by the Property Owner, which has elected to participate in the Florida HERO Program; and

WHEREAS, the Property is located in the jurisdictional boundaries of the Local Government and the Local Government has consented to (A) owners of real property within its jurisdiction (the "Participating Property Owners") participating in the FDFC PACE Program, including the Florida HERO Program, and (B) the Local Government conducting assessment proceedings in accordance with the Florida PACE Act and the Uniform Assessment Collection Act; and

WHEREAS, pursuant to the Florida PACE Act and the Florida HERO Program, FDFC, the Local Government and the Property Owner wish to enter into a financing agreement pursuant to which the Property Owner would agree to pay a non-ad valorem

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assessment in order to finance the purchase and installation on the Property of the Qualifying Improvements described in EXHIBIT A hereto (the "Improvements") and FDFC would agree to provide financing, all on the terms set forth in this Financing Agreement; and

WHEREAS, FDFC has entered into a program administration agreement with the Program Administrator pursuant to which the Program Administrator shall act on behalf of FDFC with respect to the Florida HERO Program.

NOW, THEREFORE, in consideration of the foregoing and the material covenants hereinafter contained, the Property Owner and FDFC formally covenant, agree and bind themselves and their successors and assigns as follows:

SECTION 1. PURPOSE. The Property Owner, the Local Government and FDFC are entering into this Financing Agreement for the purpose of financing the purchase and installation of the Improvements identified on EXHIBIT A hereto on the Property. Except as expressly authorized pursuant to Section 6 hereto, the Florida HERO Program will not finance the purchase and installation of improvements other than those Improvements listed on EXHIBIT A.

SECTION 2. THE PROPERTY. This Financing Agreement relates to the Property identified on EXHIBIT A hereto. The Property Owner has supplied the Program Administrator current evidence of its ownership of fee title to the Property and possesses all legal authority necessary to execute this Financing Agreement as (or on behalf of) the Property Owner.

SECTION 3. CONTRACT TO PAY NON-AD VALOREM ASSESSMENT; PREPAYMENT; NON-COMPLETION ASSESSMENT.

(A) Payment of Non Ad-Valorem Assessment. The Property Owner hereby freely and willingly agrees to pay the non-ad valorem assessment set forth in the Assessment Payment Schedule in EXHIBIT B hereto (the "Assessment"). The Assessment shall equal the total amount disbursed by FDFC to pay for (i) the Qualifying Improvements identified on EXHIBIT A to the Financing Agreement, plus (ii) all costs, fees and interest associated therewith as reflected on EXHIBIT B to the Financing Agreement. FDFC will not provide financing in an amount in excess of the Assessment. Except as otherwise set forth in this Financing Agreement, the Assessment will be paid in the installments set forth in the Assessment Payment Schedule in EXHIBIT B hereto (each, an "Assessment Installment"). Interest will accrue on the Assessment at the interest rate set forth on EXHIBIT B hereto beginning on the date on which FDFC issues the Bonds to finance the purchase and installation of the Improvements.

(B) Administrative Expenses. The Property Owner hereby acknowledges that, pursuant to the Florida PACE Act and the Uniform Assessment Collection Act, amounts may be added to an annual installment of the Assessment in order to pay the reasonable costs of collecting and administering the Assessment for the Florida HERO Program as part of the FDFC PACE Program. These amounts include but are not limited to an annual assessment administration fee and an annual tax collection administration fee.

(C) Prepayment of the Assessment. The Assessment may be prepaid, in any amount of at least $2,500 at any time upon the payment of (i) the whole or a portion of the unpaid principal component of the Assessment, (ii) and interest on the Assessment Prepayment Amount to the second business day of the second month following the date the prepayment is made.

(D) Absolute Obligation. THE PROPERTY OWNER HEREBY ACKNOWLEDGES AND AGREES THAT THE ASSESSMENT WILL NOT BE SUBJECT TO REDUCTION, OFFSET OR CREDIT OF ANY KIND IN THE EVENT THAT THE BOND OR BONDS SECURED THEREBY ARE REFUNDED OR FOR ANY OTHER REASON.

(E) Assessment Proceeds. The Local Government agrees to take all necessary action to impose the Assessments pursuant to the Uniform Assessment Collection Act and further acknowledges that all proceeds of the Assessments received by it pursuant to the Uniform Assessment Collection Act shall be directed to FDFC or its designee.

SECTION 4. EXISTING MORTGAGE DISCLOSURE. The Florida HERO Program may finance the purchase and installation of Qualifying Improvements for Property Owners, including the Improvements pursuant to this Financing Agreement.

BEFORE EXECUTING THIS FINANCING AGREEMENT, THE PROPERTY OWNER SHOULD CAREFULLY REVIEW ANY MORTGAGE AGREEMENT(S) OR OTHER SECURITY INSTRUMENT(S) WHICH AFFECT THE PROPERTY OR TO WHICH THE PROPERTY OWNER IS A PARTY. ENTERING INTO THIS FINANCING AGREEMENT WITHOUT THE CONSENT OF EXISTING LENDER(S) COULD CONSTITUTE AN EVENT OF DEFAULT UNDER SUCH MORTGAGE AGREEMENTS OR SECURITY INSTRUMENTS. DEFAULTING UNDER AN EXISTING MORTGAGE AGREEMENT OR SECURITY INSTRUMENT COULD HAVE SERIOUS CONSEQUENCES TO THE PROPERTY OWNER.

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IN ADDITION, FANNIE MAE AND FREDDIE MAC, THE OWNERS OF A SIGNIFICANT PORTION OF ALL HOME MORTGAGES, STATED THAT THEY WOULD NOT PURCHASE HOME LOANS WHERE THE PROPERTY WAS ENCUMBERED BY A NON-AD VALOREM ASSESSMENT SUCH AS THE NON AD-VALOREM ASSESSMENTS THAT WILL BE IMPOSED AS A RESULT OF ENTERING INTO THIS FINANCING AGREEMENT. THIS MAY MEAN THAT PROPERTY OWNER(S) WHO SELL OR REFINANCE THEIR PROPERTY MAY BE REQUIRED TO PREPAY THE ENTIRE AMOUNT OF SUCH ASSESSMENT AT THE TIME THEY CLOSE THEIR SALE OR REFINANCING.

Pursuant to Section 13 of the Florida PACE Act, if there are any existing mortgages encumbering or otherwise secured by the Property, the Property Owner acknowledges that he or she has consented to allow the Program Administrator to provide to the holder or loan servicers of record of any existing mortgages encumbering or otherwise secured by the Property a notice of the Property Owner's intent to enter into this Financing Agreement together with the maximum principal amount to be financed and the maximum annual assessment necessary to repay that amount. Also pursuant to Section 13 of the Florida PACE Act, a provision in any agreement between a mortgage or other lienholder and Property Owner, or otherwise now or thereafter binding upon the Property Owner, which allows for acceleration of payment of the mortgage, note, or lien or other unilateral modification solely as a result of entering into a financing agreement as provided for in Section 13 of the Florida PACE Act is not enforceable. This subsection does not limit the authority of the holder or loan servicer to increase the required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment.

If the Property Owner's lender requires an impound or escrow account for the Property Owner's property taxes, the Property Owner acknowledges that the Property Owner will notify (or provide consent to allow the Program Administrator to notify) of, or otherwise comply with the contractual terms of its agreement with its lender with respect to, the annual Assessment payment amount so such lender may, if necessary, adjust the Property Owner's impound or escrow amount to include the annual Assessment payment.

SECTION 5. DISBURSEMENT AMOUNT. Upon receipt of the fully executed and final Completion Certificate (as described in the current version of the Florida HERO Program Handbook, referred to herein as the "Handbook"), the Program Administrator, on behalf of FDFC, shall calculate and disburse payments to those entitled to receive them (the "Actual Disbursement Amount") hereunder. If at any time after executing this Financing Agreement but before the Program Administrator pays any portion of the Actual Disbursement Amount, the Property Owner changes the Improvements to be installed from those originally appearing on EXHIBIT A, but (i) the Improvement categories and the Improvement types do not change from those originally selected, and (ii) the "Revised Estimated Disbursement Amount" (which means the amount anticipated to be the Actual Disbursement Amount based on the changed Improvements) is less than or equal to the Estimated Disbursement Amount, the parties do not need to execute the Addendum described in Section 6 below, and this Financing Agreement remain unmodified and the Assessment shall be calculated as described above in this Section 5. If, however, any such change meets the provisions of Section 6 below, then an Addendum will be required.

SECTION 6. ADDENDUM. At the request of the Property Owner, the parties hereto agree to execute an addendum to this Financing Agreement (the "Addendum") if at any time after executing this Financing Agreement, but before the Actual Disbursement Amount is released for disbursement: (i) the Improvement categories or the Improvement types change from those appearing in Exhibit A; (ii) the Revised Estimated Disbursement Amount is greater than the Estimated Disbursement Amount but does not exceed the Maximum Disbursement Amount stated in EXHIBIT B; or (iii) it becomes necessary to correct the name, capacity, title, party or clerical errors identified therein. In any such case, the Program Administrator, on behalf of FDFC, shall prepare an Addendum: (i) setting forth an accurate description of the Improvements installed; (ii) confirming that the Assessment does not exceed the Maximum Disbursement Amount; (iii) all Improvements and parameters remain eligible for this type of financing; and (iv) as necessary, correcting the names, capacities, titles, parties and other clerical corrections appearing in the original documentation comprising this Financing Agreement. The Program Administrator on behalf of FDFC, shall prepare and provide such Addendum to the Property Owner for review and signature. Once signed by the Property Owner, FDFC and the Local Government shall approve and execute the Addendum as appropriate, which shall become part of, and be incorporated into, this Financing Agreement as if it originally appeared therein.

SECTION 7. COLLECTION OF ASSESSMENT; LIEN. The Property Owner acknowledges that once a summary memorandum of this Financing Agreement is recorded pursuant to this Section, the Florida PACE Act provides that the recorded memorandum provides constructive notice that the Assessment to be levied shall constitute a lien of equal dignity to county taxes and assessments from the date of recordation. These Assessments shall be collected and secured in the same manner and at the same time

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as general taxes and other special assessments of the city or county on real property in conformity with the Uniform Assessment Collection Act.

The Property Owner acknowledges that if any Assessment installment is not paid when due, the enforcement and collection procedures set forth in the Uniform Assessment Collection Act may be employed which could result in a sale of tax certificates for the Property and the ultimate sale of the Property for the payment of the delinquent Assessment installments, associated penalties, interest and other costs. Notwithstanding the foregoing, a delinquency shall not accelerate the remaining outstanding balance of the Assessment and the expiration of this Financing Agreement under Section 10(A) below.

SECTION 8. FINANCING OF THE IMPROVEMENTS.

(A) Contract to Finance Improvements. FDFC hereby agrees to use the Assessment, together with any administrative fees (including all annual assessment administration fees and all annual tax collection administration fees) to finance the Improvements, including the payment of FDFC's reasonable costs of collecting and administering the Assessment for the Florida HERO Program as part of the FDFC PACE Program.

(B) Assessment Installments. The Property Owner acknowledges that FDFC will issue Bonds to finance the purchase and installation of the Improvements. The interest rate used to calculate the Assessment installments is set forth on EXHIBIT B hereto. If FDFC determines in its sole, reasonable discretion that the Assessment installments may be reduced because the applicable interest rate on the Bonds issued to finance the purchase and installation of the Improvements is lower than the interest rate specified in EXHIBIT B hereto, or if the cost of the Improvements, as shown in a final Completion Certificate provided to the Program Administrator by the Property Owner, is less than the amount shown on EXHIBIT B hereto, then, concurrently with the disbursement of funds to the Property Owner (or the contractor installing the Improvements on behalf of the Property Owner or another designee), the Program Administrator may provide the Property Owner with a schedule of annual Assessment installments that provides for annual installments that are less than those set forth in the attached EXHIBIT B hereto. Any Assessment Installment payments in excess of the amount necessary to finance the Qualifying Improvements may be used in furtherance of the Florida HERO Program and will not be refunded to the Property Owner.

SECTION 9: MULTIPLE CONTRACTORS AND IMPROVEMENTS.

Notwithstanding anything to the contrary in this Financing Agreement, if the Property Owner engages one or more contractors (each, a "Contractor," which term includes any designee thereof) to install more than one Improvement, the installation of which Improvements will not be completed simultaneously, the Property Owner and FDFC agree as follows:

(A) Upon receipt of the initial Completion Certificate from a Contractor and the Property Owner (the "First Installation Completion Certificate") acknowledging installation of the first type or category of Improvements, then:

(1) The "Investor" (which means any person or entity who has entered into an agreement with FDFC to purchase bonds under the Florida HERO Program) shall deposit the payments to those entitled to receive them (the "Actual Disbursement Amount") with the Trustee for the Florida HERO Program;
(2) FDFC shall cause Bonds to be issued and sold to the Investor in the amount equal to the Actual Disbursement Amount deposited with such Trustee for the Florida HERO Program;
(3) FDFC shall cause all instruments, documents and agreements described in Section 12 of this Financing Agreement to be recorded;
(4) FDFC shall cause the amount reflected in the First Installation Completion Certificate to be disbursed to the Contractor who installed such Improvements; and
(5) FDFC shall cause all administrative, recording and other fees described on line 6 of EXHIBIT B to be paid.

(B) Upon receipt of a subsequent Completion Certificate from the Property Owner and the Contractor (each, a "Subsequent Installation(s) Completion Certificate") acknowledging installation of the subsequent types or categories of Improvements, FDFC shall cause the Trustee for the Florida HERO Program to disburse amount(s) reflected in each such Subsequent Installation Completion Certificate to the Contractor who installed such Improvements

(C) Upon receipt of the Final Completion Certificate from the Contractor and the Property Owner (the "Final Installation Completion Certificate") acknowledging installation of the final types or categories of Improvements, then:

SAMPLE

(1) FDFC shall cause the amount reflected in such Final Installation Completion Certificate to be disbursed to the Contractor who installed such Improvements; provided, however, that:

(a) If the remaining balance of the Actual Disbursement Amount the Investor has deposited with the Trustee for the Florida HERO Program exceeds the amount reflected in the Final Installation Completion Certificate, FDFC shall cause such excess to be applied, at the discretion of the Investor, (i) to the Property Owner's next assessment payment due under this Financing Agreement, or (ii) to the reduction of the outstanding balance of the Assessment determined in accordance with Sections 3 and 5 of this Financing Agreement; or

(b) If the remaining balance of the Actual Disbursement Amount the Investor has deposited with the Trustee for the Florida HERO Program is less than the amount reflected in the Final Installation Completion Certificate, the Property Owner shall be individually responsible for paying such difference to the applicable Contractor, and such payment shall be excluded from the Assessment under this Agreement.

(D) If for any reason any one or more of the categories or types of Improvements planned to be installed under this Section 9 is not installed by the expiration date reflected in the Notice to Proceed, then the Investor shall have the option to declare the financing of the Improvements complete, in which case the Trustee shall be notified to apply any remaining balance of the Actual Disbursement Amount held by such Trustee to reduce the Property Owner's outstanding Assessment.

SECTION 10. TERM; CONTRACT RUNS WITH THE LAND; SUBDIVISION.

(A) Except as otherwise set forth in this Financing Agreement, this Financing Agreement shall expire upon the final payment or full prepayment of the Assessment.

(B) This Financing Agreement establishes rights and obligations that are for the benefit of the Property and, therefore, such rights and obligations run with the Property pursuant to the Uniform Assessment Collection Act and are not due and payable upon the sale of the land from one property owner to another, provided however, that such obligation to pay may be impacted by certain interested parties, as described in Sections 4 and 11 hereof.

(C) In the event the Property is subdivided prior to final payment or prepayment in full of the Assessment, the Assessment will be assigned to the parcel upon which the Improvements are located. If the Improvements no longer exist, or it cannot be reasonably determined on which resulting parcel the Improvements are located, the Assessment will be allocated to each of the newly-created parcels on a per-acre basis, unless the Local Government, in its sole discretion, determines that the Assessment should be allocated in an alternate manner; provided, however, no allocation shall occur and the Assessment shall remain with the original parcel unless the following requirements are met: (1) each resulting parcel must have a unique ad valorem property tax identification number; (2) the Assessment may not be reallocated to a parcel proposed for dedication to the public or to common use of the subdivided parcels; and (3) evidence of the foregoing information must be provided to the Program Administrator and Local Government.

SECTION 11. PROPERTY TRANSFERS, NOTICE, AND ACKNOWLEDGMENT. The Property Owner agrees that at or before the time a prospective purchaser executes a contract for the sale and purchase of the Property and the Property has an unpaid balance due for the Assessment, Property Owner shall give the prospective purchaser a written disclosure statement in the following form, which shall be set forth in the contract or in a separate writing:

QUALIFYING IMPROVEMENTS FOR ENERGY EFFICIENCY, RENEWABLE ENERGY, OR WIND RESISTANCE. The property being purchased is located within the jurisdiction of a local government that has placed an assessment on the property pursuant to s. 163.08, Florida Statutes. The assessment is for a qualifying improvement to the property relating to energy efficiency, renewable energy, or wind resistance, and is not based on the value of property. You are encouraged to contact the county property appraiser's office to learn more about this and other assessments that may be provided by law.

SAMPLE

The Florida HERO Program does not impose limitations or restrictions on the transfer of the Property and Assessment to a new homeowner. The Property Owner acknowledges that the Assessment and the Annual Assessment Administrative Fee and the obligation to pay the Assessment and Annual Assessment Administrative Fee pursuant to this Financing Agreement runs with the Property and, upon sale or transfer of the Property or any interest therein, any subsequent owner or transferee shall be required to pay the Assessment pursuant to this Financing Agreement. If a subsequent owner or transferee fails to pay the Assessment pursuant to this Financing Agreement, then the provisions of this Financing Agreement shall apply to the subsequent owner or transferee's interest in the Property to the extent permitted by law. The Property Owner further acknowledges that a subsequent purchaser or transferee, or any interested party to the sale or transfer (such as the lender) may require as a condition or sale or transfer that the Assessment be paid in full prior to such sale or transfer.

SECTION 12. RECORDATION OF DOCUMENTS. The Property Owner hereby authorizes and directs FDFC and the Local Government, through the Program Administrator, to cause a summary memorandum of this Financing Agreement to be recorded in the public records of the county in which the real property described in EXHIBIT A hereto is located ("Summary Memorandum"). The Summary Memorandum shall contain the final Assessment amount on the Property, and this amount shall be consistent with the amount provided to the Property Owner at the conclusion of the project in the Final Payment Summary. A form of this Summary Memorandum will be provided to the Property Owner. The applicable State of Florida documentary stamp tax will be paid by the Florida HERO Program upon the recording of the Summary Memorandum.

SECTION 13. WAIVERS, ACKNOWLEDGMENT AND CONTRACT. Because this Financing Agreement reflects the Property Owner's request to the Local Government to impose the voluntary Assessment and the Property Owner's agreement to pay the Assessment, the Property Owner hereby waives, to the extent allowable under applicable law, any otherwise applicable requirements of the Uniform Assessment Collection Act or any other provision of Florida law for a notice, public hearing, protest or ballot.

The Property Owner acknowledges that construction of the Improvements will provide a special benefit to the Property and that access to the Florida HERO Program and payment of the Assessments on the tax bill provides an additional special benefit by allowing the Property Owner the ability to finance the Improvements over a term of years and have the Assessment remain with the Property in the event of sale of the Property. The Property Owner acknowledges that all terms of this Financing Agreement are fair and reasonable in relation to the special benefits thus described. The Property Owner acknowledges and agrees that the cost of financing the Improvements is equal to or less than the benefits to be received by the Property Owner.

The Property Owner hereby waives its right to repeal the Assessment by initiative or any other action, or to file any lawsuit or other proceeding to challenge the Assessment or any aspect of the proceedings of the Local Government and FDFC (or the Program Administrator on behalf of the Local Government and FDFC) undertaken in connection with the Florida HERO Program, the Florida PACE Act or the Uniform Assessment Collection Act. The Property Owner hereby agrees that the Property Owner and its successors in interest to fee title in the Property shall be solely responsible for the installation, operation, use and maintenance of the Improvements. The Property Owner hereby acknowledges that the Property Owner will be responsible for payment of the Assessment, regardless of whether the Improvements are properly permitted, installed, operated, used or maintained as warranted or anticipated.

The Property Owner hereby agrees that FDFC and the Local Government are entering into this Financing Agreement solely for the purpose of assisting the Property Owner with their request to finance the purchase and installation of the Improvements through the imposition of the Assessments on the Property, and that FDFC and the Local Government have no responsibility of any kind for, and shall have no liability arising out of, the installation, operation, use, financing, refinancing or maintenance of the Improvements.

GENERAL RELEASE AND WAIVER

BASED UPON THE FOREGOING, THE PROPERTY OWNER HEREBY WAIVES THE RIGHT TO RECOVER FROM AND FULLY AND IRREVOCABLY RELEASES THE STATE, FDFC, THE LOCAL GOVERNMENT AND ANY AND ALL AGENTS, OFFICERS, EMPLOYEES, CONSULTANTS, GOVERNING BOARD MEMBERS, ATTORNEYS, PROGRAM ADMINISTRATORS, FINANCIAL ADVISORS, REPRESENTATIVES AND SUCCESSORS AND ASSIGNS OF FDFC AND THE LOCAL GOVERNMENT FROM ANY AND ALL LOSSES, LIABILITIES, CLAIMS, DAMAGES (INCLUDING CONSEQUENTIAL DAMAGES), PENALTIES, FINES, FORFEITURES, COSTS AND EXPENSES (INCLUDING ALL REASONABLE OUT-OF-POCKET LITIGATION COSTS AND REASONABLE ATTORNEY'S FEES), RELATING TO THE SUBJECT MATTER OF THIS FINANCING AGREEMENT THAT THE PROPERTY OWNER MAY NOW HAVE OR HEREAFTER ACQUIRE AGAINST THE STATE, FDFC, THE LOCAL GOVERNMENT AND ANY AND ALL AGENTS, OFFICERS, EMPLOYEES, CONSULTANTS, ATTORNEYS, PROGRAM ADMINISTRATORS, FINANCIAL ADVISORS,

SAMPLE

REPRESENTATIVES AND SUCCESSORS AND ASSIGNS OF FDFC OR THE LOCAL GOVERNMENT. IT IS THE INTENTION OF THE PROPERTY OWNER THAT THE FOREGOING WAIVERS AND AGREEMENTS WILL BE EFFECTIVE AS A BAR TO ANY AND ALL LOSSES, LIABILITIES, CLAIMS, DAMAGES (INCLUDING CONSEQUENTIAL DAMAGES), PENALTIES, FINES, FORFEITURES, COSTS AND EXPENSES (INCLUDING ALL REASONABLE OUT-OF-POCKET LITIGATION COSTS AND REASONABLE ATTORNEY'S FEES), OF WHATEVER CHARACTER, NATURE AND KIND, KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED, AND PROPERTY OWNER AGREES TO WAIVE ANY AND ALL SUCH RIGHTS AND BENEFITS CONFERRED UPON THE PROPERTY OWNER UNDER FLORIDA LAW.

SECTION 14. ARBITRATION AGREEMENT. Please read this Section ("Arbitration Agreement") carefully. It is part of this Financing Agreement and affects the Property Owner's rights. It contains A JURY TRIAL WAIVER and procedures for MANDATORY BINDING ARBITRATION AND A CLASS ACTION WAIVER.

Before asserting a claim in any proceeding Property Owner ("Property Owner" includes any successor in interest to the Property Owner) and FDFC, and the Local Government ("FDFC" and the "Local Government" includes any of FDFC's and the Local Government's parents, subsidiaries, affiliates, agents, privities, employees, consultants, governing board members, predecessors, successors, assigns, contractors and sub-contractors) agree that they shall engage in good faith attempt to resolve the claim.

(A) Arbitration Agreement. All claims and disputes arising out of or relating to the Florida HERO Program, the Financing Agreement and/or the Improvements that cannot be resolved informally or in small claims court shall be resolved by binding arbitration on an individual basis under the terms of this Arbitration Agreement. This Arbitration Agreement applies to the Property Owner and FDFC and the Local Government.

(B) Waiver of Jury Trial. PROPERTY OWNER AND FDFC AND THE LOCAL GOVERNMENT HEREBY WAIVE THEIR CONSTITUTIONAL AND STATUTORY RIGHTS TO GO TO COURT AND HAVE A TRIAL IN FRONT OF A JUDGE OR A JURY, instead electing that all claims and disputes shall be resolved by arbitration under this Arbitration Agreement. Arbitration procedures are typically more limited, more efficient and less costly than rules applicable in court and are subject to very limited review by a court.

(C) Arbitration Rules. The Federal Arbitration Act governs the interpretation and enforcement of this dispute resolution provision. Arbitration shall be initiated through *JAMS*, *Inc*., an established alternative dispute resolution provider ("ADR Provider"). If the selected provider is not available to arbitrate, the Parties shall select an alternative ADR Provider. The rules of the ADR Provider shall govern all aspects of this arbitration, except to the extent such rules are in conflict with the Financing Agreement ("Arbitration Rules") or to the extent that application of the Financing Agreement provisions would result in the unenforceability of this Arbitration Agreement. The JAMS rules governing the arbitration are available online at www.jamsadr.com or by calling JAMS at 1-800-352-5267. Any arbitration hearing will be held in the Property Owner's federal judicial district. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

(D) Decision of Arbitrator. The arbitrator shall issue a written award and statement of decision describing the essential findings and conclusions on which the award is based. The arbitrator has the same authority to award relief on an individual basis that a judge in a court of law would have. The award of the arbitrator is final and binding upon the Property Owner and FDFC and the Local Government.

(E) Waiver of Class or Consolidated Actions. ALL CLAIMS AND DISPUTES WITHIN THE SCOPE OF THIS ARBITRATION AGREEMENT MUST BE ARBITRATED ON AN INDIVIDUAL BASIS AND NOT ON A CLASS BASIS, AND ARBITRATION CLAIMS OF MORE THAN ONE PROPERTY OWNER CANNOT BE ARBITRATED OR LITIGATED JOINTLY OR CONSOLIDATED WITH THOSE OF ANY OTHER PROPERTY OWNER.

(F) Severability. If any part or parts of this Arbitration Agreement other than the waiver of class or consolidated rights are found under the law to be invalid or unenforceable, then such specific part or parts shall be of no force and effect and shall be severed and the remainder of the Arbitration Agreement shall continue in full force and effect. If the waiver of class or consolidated rights is found to be unenforceable, then as to the specific dispute in which that ruling of unenforceability was made, this entire Arbitration Agreement shall be unenforceable.

(G) Survival of Agreement. This Arbitration Agreement shall survive the termination of this Financing Agreement.

(H) Small Claims Court. Notwithstanding the foregoing, either Property Owner or FDFC and the Local Government may bring an individual action in small claims court.

SAMPLE

(I) Property Owner's Right to Opt Out of Arbitration. Property Owner may opt out of this Arbitration Agreement by sending a written election of the Property Owner's election to do so, signed by all Property Owners, within 15 days of the date of this Financing Agreement. Such election shall be sent to Attn: Executive Director, Florida Development Finance Corporation; 800 North Magnolia Avenue; Suite 300; Orlando, FL 32803.

By initialing below, the Property Owner acknowledges and agrees to the terms set forth in Sections 4, 11, 13 and 14 above and Section 15 below.

Joe Smith Initials:	_____	Initials:	_____
Initials:	_____	Initials:	_____

SECTION 15. INDEMNIFICATION. The Property Owner agrees to indemnify, defend, protect, and hold harmless the State, FDFC, the Local Government and any and all agents, officers, employees, consultants, governing board members, attorneys, representatives, program administrators and successors and assigns of FDFC or the Local Government, from and against all losses, liabilities, claims, damages (including consequential damages), penalties, fines, forfeitures, costs and expenses (including all reasonable out-of-pocket litigation costs and reasonable attorney's fees) and any demands of any nature whatsoever related directly or indirectly to, or arising out of or in connection with (A) the Property Owner's participation in the Florida HERO Program, (B) the Assessment, (C) the Improvements, or (D) any other fact, circumstance or event related to the subject matter of this Financing Agreement, regardless of whether such losses, liabilities, claims, damages (including consequential damages), penalties, fines, forfeitures, costs and expenses (including all reasonable out-of-pocket litigation costs and reasonable attorney's fees) accrue before or after the date of this Financing Agreement.

The provisions of this Section 15 shall survive the termination of this Financing Agreement.

SECTION 16. RIGHT TO INSPECT PROPERTY. As an additional level of consumer protection, the Property Owner hereby grants to Program Administrator, acting on behalf of FDFC, its agents and representatives the right to enter at any reasonable time, upon reasonable notice, to inspect the Improvements. The Property Owner further hereby grants to Program Administrator, acting on behalf of FDFC, its agents and representatives the right to examine and copy any documentation relating to the Improvements.

SECTION 17. FLORIDA HERO PROGRAM APPLICATION. The Property Owner hereby represents and warrants that the information set forth in the Florida HERO Program Application submitted to the Program Administrator on behalf of FDFC in connection with the Property Owner's request for financing is true and correct as of the date hereof, and that the representations set forth in the Florida HERO Program Application with respect to the Property and the Property Owner are true and correct as of the date hereof as if made on the date hereof. The Property Owner acknowledges that FDFC, Local Government, and the Program Administrator are relying on such information and representations in connection with the transactions contemplated by this Financing Agreement. For Property Owners in Broward County, by signing this Financing Agreement, the Property Owner attests that the total amount of annual PACE assessments do not exceed four percent (4%) of the total annual gross income of the Property Owner in the prior calendar or fiscal year.

SECTION 18. AMENDMENT. Except as set forth in Section 3 or as provided for in Exhibit A pertaining to a fully executed and final Completion Certificate, this Financing Agreement may be modified only by an addendum (as provided in Section 5) or other written agreement of FDFC, the Local Government, and the Property Owner.

SECTION 19. BINDING EFFECT; ASSIGNMENT. This Financing Agreement inures to the benefit of and is binding upon FDFC, the Property Owner and their respective successors and assigns. FDFC has the right to assign any or all of its rights and obligations under this Financing Agreement without the consent of the Property Owner. The obligation to pay the Assessment and

SAMPLE

any and all administrative fees (including but not limited to all annual assessment administration fees and all annual tax collection administration fees) set forth in this Financing Agreement is an obligation that runs with the Property and no agreement or action of the Property Owner will be competent to impair in any way FDFC's and the Local Government's rights, including, but not limited to, the right to cause the enforcement of the collection of the Assessment or any installment thereof against the Property.

SECTION 20. EXHIBITS. The Exhibits to this Financing Agreement are incorporated into this Financing Agreement by this reference as if set forth in their entirety in this Financing Agreement.

SECTION 21. SEVERABILITY. If any provision of this Financing Agreement is held invalid or unenforceable by any court of competent jurisdiction, such holding will not invalidate or render unenforceable any other provision of this Financing Agreement.

SECTION 22. CORRECTIVE INSTRUMENTS. FDFC, the Local Government and the Property Owner and their respective successors and assigns agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required in order to carry out the expressed intention of this Financing Agreement.

SECTION 23. GOVERNING LAW; VENUE. This Financing Agreement is governed by and construed in accordance with the laws of the State of Florida. Any legal action brought under this Financing Agreement must be instituted in Orange County, Florida.

SECTION 24. COUNTERPARTS. This Financing Agreement may be executed in several counterparts, each of which is an original and all of which constitutes one and the same instrument.

SECTION 25. EXISTING INSTRUMENTS. As previously disclosed in Section 4 above, the Property Owner acknowledges that entry by the Property Owner into this Financing Agreement without the consent of an existing lender could constitute an event of default under existing mortgage agreements or other security instruments ("Existing Instruments") and that defaulting under an Existing Instrument could have serious consequences to the Property Owner. The Property Owner further acknowledges Fannie Mae and Freddie Mac, the owner of a significant portion of all home mortgages, have stated that they will not purchase home loans where the property was encumbered by a non ad-valorem assessment such as the non ad-valorem assessment that will be imposed as a result of entering into this Financing Agreement. This may mean that property owners who sell or refinance their property may be required to prepay the entire amount of such assessment at the time they close their sale or refinancing.

SECTION 26. MONITORING AND RECORDING OF TELEPHONE CALLS. The Program Administrator may monitor and/or record telephone calls with the Property Owner for security and customer service purposes. By executing this Financing Agreement, the Property Owner agrees to have their telephone calls with the Program Administrator monitored and/or recorded.

SECTION 27. FINANCING DOCUMENTS. The Property Owner understands and acknowledges that the entire agreement between Property Owner, FDFC, and the Local Government includes each and every document specified in the List of Documents contained in EXHIBIT B to this Financing Agreement (collectively, the "Financing Documents").

By executing this Financing Agreement, the Property Owner acknowledges and agrees that:

(A) The Property Owner has had sufficient time to review and has reviewed, along with its own attorneys if desired, each of the Financing Documents and has had the opportunity to ask any questions to the Program Administrator that Property Owner may have regarding such Financing Documents.

(B) The Property Owner has reviewed, understands and agrees to each and every additional requirement and term contained in APPENDIX B to the Handbook delivered to the Property Owner.

(C) The Property Owner has reviewed, understands, agrees to and affirms each and every representation and warranty contained in the Property Owners application and the Handbook.

SECTION 28. FLORIDA DOCUMENTARY STAMP TAX. The State of Florida documentary stamp tax will be paid by the Florida HERO Program. Such documentary stamp tax will be paid when the Summary Memorandum is recorded in the public records.

SAMPLE

Property Owner(s) must execute and return this Financing Agreement to Program Administrator at the address set forth in the "Notice Information" section of Exhibit A hereto so that it is received by the Program Administrator not later than 11/13/2018. If the Property Owner fails to return the signed Financing Agreement to the Program Administrator by the indicated date the Florida HERO Program reserves the right to require the Property Owner to enter into a new Financing Agreement. All signatures of the Property Owner must be notarized by a duly licensed notary unless the Property Owner has previously successfully completed the identify verification process approved by the FDFC.

Prior to executing this Financing Agreement, I/we, as the Property Owner, have read and understand the Property Owner's Acknowledgments and Disclosures contained in (a) the Application, (b) this Financing Agreement, (c) the Privacy Notice and (d) the Handbook.

IN WITNESS WHEREOF, Property Owner has caused this Financing Agreement to be executed as of the date first above written.

Owner 1:

Joe Smith, Signature

Date: _____
Month/Day/Year

Identity Verification Code:

SAMPLE

IN WITNESS WHEREOF, Florida Development Finance Corporation has caused this Financing Agreement to be executed by and on behalf of the FDFC by the authorized signatory identified below.

Florida Development Finance Corporation: Executive Director and/or his or her designee:

Name *(Please Print)*

FDFC: Signature

Date of Execution by **FDFC**:

SAMPLE

IN WITNESS WHEREOF, the Florida Resiliency and Energy District has caused this Financing Agreement to be executed by and on behalf of the Florida Resiliency and Energy District by the authorized signatory identified below.

Florida Resiliency and Energy District ("FRED") Executive Director and/or his or her designee**:**

_____
Name *(Please Print)*

_____ _____
FRED Signature Date of Execution by FRED

SAMPLE

EXHIBIT A TO FINANCING AGREEMENT

DESCRIPTION OF PROPERTY, DESCRIPTION OF THE PRODUCTS, AND NOTICE INFORMATION

Description of Property:

Owner(s) Name(s): Joe Smith

Property Address: 123 Blueberry Ln, Satellite Beach, FL 32937

Parcel Number: xxx-xxx-xxx-xxx

County: Brevard

Description of Improvement(s):

The Product(s) include the following:

PRODUCT #1	
Product Category Type:	Heating, Cooling & Ventilation - Air Conditioners

Or similar energy efficient product which is allowed under the Program Handbook.

All terms set forth in the fully executed and final Completion Certificate shall supersede and take precedence over any term in this Exhibit A that conflicts with, is not covered by, or is otherwise contrary to, the terms set forth in such Completion Certificate, and such Completion Certificate shall become part of, and be incorporated into, this Exhibit A as if they originally appeared therein.

SAMPLE

Notice Information:

Florida Development Finance Corporation
800 North Magnolia Avenue, Suite 1100
Orlando, Florida 3280
Attention: PACE Manager

Renovate America, Inc.
16409 W. Bernardo Drive
San Diego, CA, 92127

Joe Smith
123 Blueberry Ln
Satellite Beach, FL 32937

EXHIBIT B

LIST OF FINANCING DOCUMENTS, DISBURSEMENT, AND ASSUMPTIONS APPLICABLE TO THE SCHEDULE OF ANNUAL ASSESSMENT INSTALLMENTS

List of Financing Documents:

The Financing Documents shall consist of the following documents:

This Financing Agreement and all exhibits hereto;

Any Addendum entered into pursuant to Section 6 of Financing Agreement;

The Summary Memorandum of Financing Agreement;

The Florida HERO Program Application;

The Right to Cancel;

The Completion Certificate;

The Financing Estimate;

The Final Payment Summary;

The Florida HERO Program Handbook, current version; and

The HERO Program website located at http://www.renovateamerica.com

Disbursement:

The "Maximum Disbursement Amount" under this Financing Agreement is $500,000.00, which means that FDFC shall not cause the Trustee to disburse any amount that exceeds this figure.

The "Estimated Disbursement Amount" under this Financing Agreement is $11,559.47, which was based upon the Improvements and pricing set forth on the table below in this Exhibit B.

The Estimated Disbursement Date is April 22, 2019, which date is used in the table below.

Assumptions Applicable to the Schedule of Estimated Maximum Annual Assessment Installments:

The schedule of the estimated maximum Annual Assessment Installments is based on the following assumptions:

1. FDFC will cause its Trustee to disburse all or a portion of the Estimated Disbursement Amount to Property Owner or Contractor; or reimburse the Program Administrator for such disbursements ("Improvement Disbursements").

2. Interest totaling a maximum of $965.47 will be added to Property Owner's assessment amount for the period between the closing date and May 2nd of the year Property Owner makes his or her first assessment payment. That amount will be added to Property Owner's Estimated Disbursement Amount.

3. FDFC will cause its Trustee to make Improvement Disbursements to Property Owner, Contractor or the Program Administrator on the Estimated Disbursement Date.

4. The Assessment Interest Rate is 7.69%.

5. The Annual Percentage Rate ("APR") of your Assessment is 9.26%. APR is the annual interest rate the Property Owner actually pays on the Assessment, including fees required in order to participate in the Florida HERO Program.

SAMPLE

6. Fees added to your Assessment (including a recording fee, one-time program administration fee, and initial assessment administration fee, as applicable) are: $594.00.

Assessment Payment Schedule

Tax Year*	Total Annual Payment**	Interest Portion of Annual Payment***
2020	$1,733.69	$1,698.69
2021	$1,733.69	$982.35
2022	$1,733.69	$759.59
2023	$1,733.69	$687.37
2024	$1,733.69	$609.60
2025	$1,733.69	$525.85
2026	$1,733.69	$435.66
2027	$1,733.69	$338.54
2028	$1,733.69	$233.94
2029	$1,733.68	$121.30

* The estimated initial Tax Year is based upon the Estimated Disbursement Date. The actual initial Tax Year will be based upon the actual disbursement date.

** Includes the annual Assessment Installments due in the Tax Year and current annual assessment administration fee of $35.00 (subject to changes). The annual payment due for this assessment will be collected with property taxes that are due annually each year for your real property, or in accordance with your regular property tax payment schedule. This does not include the current annual tax collection administration fee.

*** This column includes annual interest and any prepaid interest if financed. Consult your tax advisor about potential tax deductibility and any other tax benefits.

FOLLOWING THE DISBURSEMENT OF THE ACTUAL DISBURSEMENT AMOUNT, THE PROGRAM ADMINISTRATOR WILL ADJUST THE ASSESSMENT AND THE ESTIMATED MAXIMUM ANNUAL ASSESSMENT INSTALLMENTS, IF NECESSARY, TO REFLECT THE ACTUAL ASSESSMENT BASED UPON THE ACTUAL DISBURSEMENT AMOUNT, THE ACTUAL DATE OF DISBURSEMENT AND THE ACTUAL AMOUNT OF INTEREST DUE AND PAYABLE BEFORE THE FIRST PAYMENT ADDED TO THE ACTUAL DISBURSEMENT AMOUNT. FOLLOWING THIS ADJUSTMENT, THE PROGRAM ADMINISTRATOR SHALL DELIVER TO PROPERTY OWNER A FINAL ASSESSMENT STATEMENT AND THE SCHEDULE OF THE ACTUAL ANNUAL ASSESSMENT INSTALLMENTS.

Prepayment:

You have the right to pay off your assessment amount at any time in full, or in any amount of at least $2,500 in accordance with Section 3 of the Financing Agreement. However, if you do so, you will have to pay the principal amount of the Assessment to be prepaid (the "Assessment Prepayment Amount") and interest on the Assessment Prepayment Amount to the second business day of the second month following the date the prepayment is made.

SAMPLE

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

Property Owner

STATE OF FLORIDA }ss.

COUNTY OF _____ }

On _____, before me, _____,

Notary Public, personally appeared

_____, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of FLORIDA that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (This area for official notarial seal)

SAMPLE

RECORDING REQUESTED BY AND WHEN RECORDED MAIL TO:

Broad & Cassel LLP
390 North Orange Avenue
Suite 1400
Orlando, Florida 32801

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

SUMMARY MEMORANDUM OF THE FLORIDA HERO PROGRAM FINANCING AGREEMENT

The Florida Resiliency and Energy District ("FRED" or the "Local Government"), a separate legal entity and local government formed under Florida Statute Section 163.01, hereby provides notice of the levy and collection by the Local Government of a voluntary non ad-valorem assessment for Property Assessed Clean Energy ("PACE") qualifying improvements, authorized pursuant to Section 163.08, Florida Statutes, as amended (the "Florida PACE Act"), and Florida Statutes Sections 197.3632 and 197.3635, as amended and supplemented (the "Uniform Assessment Collection Act").

The Local Government, using the Florida Development Finance Corporation's ("FDFC") PACE Program in partnership with Renovate America, Inc. ("Renovate America" or "Program Administrator") and their Florida Home Energy Renovation Opportunity Program ("HERO") Program (the "Program") will allow financing of certain renewable energy, energy efficiency, and wind resistance improvements that are permanently fixed to real property (the "Improvements") through the levy and collection of voluntary non ad-valorem assessments pursuant to the Florida PACE Act and the Uniform Assessment Collection Act.

The Local Government, FDFC, and the record owner(s) (the "Property Owners") of the real property described on Exhibit "A" to this Notice (the "Property") have entered into that certain Financing Agreement dated _____ (the "Financing Agreement"). Pursuant to Section 12 of the Financing Agreement and with the consent of Property Owner(s), the Local Government hereby records this summary memorandum of the Financing Agreement ("Summary Memorandum").

Pursuant to the Financing Agreement, the Property Owner hereby freely and willingly agrees to pay the assessment (the "Assessment") as provided in Exhibit B to the Financing Agreement. The Assessment shall equal the total amount disbursed by FDFC to pay for (i) the Improvements identified on Exhibit A to the Financing Agreement, plus (ii) all costs, fees and interest associated therewith as reflected on Exhibit B to the Financing Agreement, which total amount is also known as the Actual Disbursement Amount (defined below).

Upon receipt of the fully executed and final Completion Certificate, as described in the current version of Florida HERO Program Handbook (referred to herein as the "Handbook"), the Program Administrator shall calculate and FDFC shall verify and cause the Trustee to disburse payments to those entitled to receive them (the "Actual Disbursement Amount") hereunder subject to such revisions as are agreed to pursuant to the Financing Agreement and subject to any Addendum to the Financing Agreement provided for under the Financing Agreement agreed to and executed by the parties hereto. The Property Owner shall comply with all requirements for contracting for the installation of the Improvements as required in the Financing Agreement and shall deliver such Completion Certificates as are provided for in the Financing Agreement. The FDFC and the Program Administrator shall comply with all disbursement and recording requirements provided for in the Financing Agreement.

NOTICE IS FURTHER GIVEN that the Assessment shall constitute a lien of equal dignity to county taxes and assessments from the date of recordation against the Property until they are paid. The Assessment shall have the lien priority as set forth in the Florida PACE Act, and shall be collected, secured and enforced through the Uniform Assessment Collection Act in the same manner and at the same time as general taxes and other special assessments of the city or county on real property, that could result in the sale of the Property for payment of the delinquent installments, and all penalties, and interest. Notwithstanding the foregoing, a delinquency shall not accelerate the remaining outstanding balance of the Assessment or the expiration of the Financing Agreement under the next paragraph below.

SAMPLE

Except as otherwise set forth herein or in the Financing Agreement, the Financing Agreement shall expire upon (i) the final Assessment payment as provided in the Financing Agreement or (ii) a full prepayment of the entire balance of the Assessment, provided that such prepayment is meant to be permanent and the party who is then the Property Owner does not execute a document confirming the assumption and continuation of the Financing Agreement and the Assessment.

The Financing Agreement establishes rights and obligations that are for the benefit of the Property and, therefore, such rights and obligations run with the Property pursuant to the Florida PACE Act. If the Property is subdivided while the Assessment remains unpaid, the Assessment will be assigned to the newly-created parcel as provided in the Financing Agreement. The Program does not impose limitations or restrictions on the transfer of the Property and Assessment to a new homeowner.

The Financing Agreement sets forth the maximum principal amount that can be financed, the estimated interest rate on the Assessment, and the estimated amount payable annually on the Assessment. Pursuant to Section 12 of the Financing Agreement, the parties agreed that all such amounts would be finalized in this Summary Memorandum.

The Property is subject to an Assessment levied against the Property in the total financed amount of $11,559.47 as is set forth in the Final Payment Summary to be provided to Property Owner.

The specific contact information for the Program Administrator and more information regarding the non ad-valorem assessment may be obtained from the Program Administrator at Renovate America, Inc.; 16409 W. Bernardo Drive; San Diego, CA, 92127.

SAMPLE

IN WITNESS WHEREOF, Florida Development Finance Corporation has caused this Summary Memorandum to be executed by and on behalf of the FDFC by the authorized signatory identified below.

Florida Development Finance Corporation: Executive Director and/or his or her designee:

_____
Name *(Please Print)*

_____ _____
FDFC: Signature Date of Execution by **FDFC**:

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF FLORIDA }ss.

COUNTY OF _____ }

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Florida that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (This area for official notarial seal)

SAMPLE

IN WITNESS WHEREOF, the Florida Resiliency and Energy District has caused this Summary Memorandum to be executed by and on behalf of the Florida Resiliency and Energy District by the authorized signatory identified below.

Florida Resiliency and Energy District ("FRED") Executive Director and/or his or her designee**:**

_____
Name *(Please Print)*

_____ _____
FRED Signature Date of Execution by FRED

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF FLORIDA }ss.

COUNTY OF _____ }

On _____, before me, _____, Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Florida that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (This area for official notarial seal)

SAMPLE

EXHIBIT "A"

IDENTIFICATION OF PROPERTY OWNERS AND PROPERTY DESCRIPTION

Record Owner(s) Names: Joe Smith

Address: 123 Blueberry Ln, Satellite Beach, FL 32937

Parcel Number xxx-xxx-xxx-xxx

County: Brevard

Legal Description:

SAMPLE

EXHIBIT B

SCHEDULE OF ANNUAL ASSESSMENT INSTALLMENTS

Tax Year	Total Annual Payment*	Interest Portion of Annual Payment**
2020	$1,733.69	$1,698.69
2021	$1,733.69	$982.35
2022	$1,733.69	$759.59
2023	$1,733.69	$687.37
2024	$1,733.69	$609.60
2025	$1,733.69	$525.85
2026	$1,733.69	$435.66
2027	$1,733.69	$338.54
2028	$1,733.69	$233.94
2029	$1,733.68	$121.30

* Includes the annual Assessment Installments due in the Tax Year and current annual assessment administration fee of $35.00 (subject to changes). The annual payment due for this assessment will be collected with property taxes that are due annually each year for your real property, or in accordance with your regular property tax payment schedule. This does not include the current annual tax collection administration fee.

** This column includes annual interest and any prepaid interest if financed. The Property Owner should consult a tax advisor about potential tax deductibility and any other tax benefits.

SAMPLE

Smith, Joe
FL00900000

Florida HERO Program

ADDENDUM TO THE FINANCING AGREEMENT
Addendum No. 1

All terms set forth below in this Addendum (i) shall supersede and take precedence over any term(s) in the Financing Agreement by and between the Florida Development Finance Corporation, a public body corporate and politic and a public instrumentality organized and existing under the laws of the State of Florida (the "FDFC"), the Florida Resiliency and Energy District ("FRED" or the "Local Government"), and **Joe Smith** entered into on the Effective Date (defined within the Financing Agreement) (the “Agreement”) that conflicts with, is not covered by, or is otherwise contrary to, the terms set forth herein and (ii) shall become part of, and be incorporated into, the Agreement as if they originally appeared therein. For the avoidance of doubt, name, capacity, title, party and clerical corrections appearing below in this Addendum shall become part of, and be incorporated into, the Agreement as if they originally appeared therein. For purposes of this Addendum, “Exhibit A” and “Exhibit B” refer to Exhibits A and B within the Agreement.

RECITALS:

WHEREAS, FDFC, the Local Government, and Property Owner have executed the Agreement to finance the purchase and installation of Improvement(s) on the Property; and

WHEREAS, (i) the Improvement(s), Improvement types, and/or Improvement categories appearing in Exhibit A differ from those appearing in this Addendum, and/or (ii) the Estimated Disbursement Amount appearing in this Addendum is greater than the Estimated Disbursement Amount originally listed in Exhibit B; and

NOW, THEREFORE, in consideration of the premises and the mutual agreements contained herein, the parties hereto agree as follows:

1. Defined Terms. Capitalized terms used in this Addendum and not otherwise defined herein shall have the meanings given to them in the Agreement.

2. Addendum.

   a. The Improvement(s) and Improvement Amounts appearing in this Addendum shall replace the Improvement(s) listed in Exhibit A, and shall become part of, and incorporated into, Exhibit A as if they originally appeared herein.

   b. The Revised Estimated Disbursement Amount listed in this Addendum shall replace the Estimated Disbursement Amount listed in Exhibit B, and shall become part of, and be incorporated into, Exhibit B as if it originally appeared therein.

   c. The name, capacity, title, party and other clerical corrections (if any) appearing in the signature block of this Addendum shall supersede and take precedence over those originally appearing in the Agreement and shall become part of, and be incorporated into, the Agreement as if they originally appeared therein.

SAMPLE

Smith, Joe
FL00900000

3. Miscellaneous. The existing Agreement, as amended by the Addendum, remains in full force and effect. Any reference to the Agreement from and after the date hereof shall be deemed to refer to the Agreement as amended hereby.

4. Representations and Warranties.

   a. Property Owner hereby represents and warrants that (i) the terms, conditions and information contained in this Addendum are true and correct, and (ii) the Property Owner affirmatively authorized installation of the Improvements identified herein and in the fully executed and final Completion Certificate.

   b. Property Owner hereby confirms that (i) each of its representations, warranties and covenants set forth in the Agreement, after giving effect to this Addendum are true and correct as of the date first written above with the same effect as though each has been made as of such date, and (ii) all terms and conditions of the Agreement shall remain in full force and effect and the Property Owner hereby ratifies the obligations thereunder.

5. Estimated Disbursement Amount. The Revised Estimated Disbursement Amount under this Agreement is **$11,559.47**, which is based upon the Improvements and pricing set forth in this Addendum. The Estimated Disbursement Date is April 22, 2019, which date is used in the table below.

6. Interest before first payment in the amount of **$965.47** will be added to the Property Owner's assessment amount for the period between the closing date and May 2nd of the year the Property Owner makes his or her first assessment payment. Total one-time program administrative fee, initial assessment administration fee and recording fee added to your assessment is **$594.00**.

Property Owner Information:

Date:	**11/03/2018**
Property Owner:	**Joe Smith**
Property Address:	**123 Blueberry Ln, Satellite Beach, FL 32937**
HERO ID:	**FL00900000**
Application Date:	**11/03/2018**
Expiration Date:	**04/22/2019**
Parcel Number:	**xxx-xxx-xxx-xxx**

Summary:

Financing Term	Interest Rate	Annual Amount Added to Property Tax Bill
10 years	7.69%	$1,733.69

SAMPLE

Smith, Joe
FL00900000

Description of Products:

PRODUCT #1	
Product Category Type:	Heating, Cooling & Ventilation - Air Conditioners

Assessment Payment Schedule:

Tax Year*	Total Annual Payment**	Interest Portion of Annual Payment***
2020	$1,733.69	$1,698.69
2021	$1,733.69	$982.35
2022	$1,733.69	$759.59
2023	$1,733.69	$687.37
2024	$1,733.69	$609.60
2025	$1,733.69	$525.85
2026	$1,733.69	$435.66
2027	$1,733.69	$338.54
2028	$1,733.69	$233.94
2029	$1,733.68	$121.30

* The estimated initial Tax Year is based upon the Estimated Disbursement Date. The actual initial Tax Year will be based upon the actual disbursement date.

** Includes the annual Assessment Installments due in the Tax Year and current annual assessment administrative fee of $35.00 (subject to change). The annual payment due for this assessment will be collected with property taxes that are due annually each year for your real property, or in accordance with your regular property tax payment schedule.

*** This column includes annual interest and any prepaid interest if financed. Consult your tax advisor about potential tax deductibility and any other tax benefits.

SAMPLE

Smith, Joe
FL00900000

Owner 1:

Joe Smith, Signature

Date: Month/Day/Year

Identity Verification Code:

SAMPLE

Smith, Joe
FL00900000

Florida Development Finance Corporation: Executive Director and/or his or her designee**:**

Name *(Please Print)*

FDFC Signature

Date of Execution by FDFC

SAMPLE

Smith, Joe
FL00900000

Florida Resiliency and Energy District ("FRED") designee**:**

Name *(Please Print)*

FRED Signature

Date of Execution by FRED

SAMPLE

Smith, Joe
FL00900000

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

Property Owner

STATE OF FLORIDA }ss.

COUNTY OF _____ }

On _____, before me, _____,

Notary Public, personally appeared

_____, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of FLORIDA that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (This area for official notarial seal)

SAMPLE

Financing Estimate and Disclosure

16409 W. Bernardo Drive, San Diego, CA, 92127 — Save this Financing Estimate and Disclosure to compare with your Final Payment Summary.

DATE ISSUED	11/03/2018	**TERM**	10 years
PROPERTY OWNERS	Joe Smith 123 Blueberry Ln Satellite Beach, FL 32937	**PURPOSE**	Home Improvement
		PRODUCT	HERO Program
		IDENTIFICATION #	FL00900000
PROPERTY ADDRESS	123 Blueberry Ln Satellite Beach, FL 32937	**RATE LOCK**	☐ NO ☒ YES, until 04/22/2019 After the expiration date interest rates and closing costs can change.

Product Cost

Product Cost Financed *(Including labor/installation)*	$10,000.00	• Heating, Cooling & Ventilation - Air Conditioners

Assessment Terms

Assessment Amount	$11,559.47
Closing Costs Financed	$1,559.47
Interest Rate	7.69%
Balloon Payment	$0.00

Projected Payments

Payment Calculation	
Principal & Interest (including Closing Costs Financed)	$1,698.69
Annual Assessment Administration Fee	+$35.00
Estimated Total Annual Payment	**$1,733.69**

Note: This financing arrangement will result in an assessment against your real property. The annual payment due for this assessment will be collected with property taxes that are due annually each year for your real property, or in accordance with your regular property tax payment schedule. See the "Other Considerations" section below for more information about the increased mortgage payments that your mortgage servicer may require you to make each month, if your mortgage payments include property taxes the servicer collects and pays on your behalf from an escrow (impound) account.

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Financing Estimate and Disclosure

16409 W. Bernardo Drive, San Diego, CA, 92127 — Save this Financing Estimate and Disclosure to compare with your Final Payment Summary.

Assessment Costs

A. Administration Fees	**$534.00**
One-time Program Administration Fee	$499.00
Initial Assessment Administration Fee	$35.00
B. Origination Charges	**$0.00**
Application Fee	$0.00
C. Services	**$0.00**
Appraisal Fee	$0.00
Credit Report Fee	$0.00
D. TOTAL FINANCING COSTS (A + B + C)	**$534.00**

Closing Costs

H. TOTAL CLOSING COSTS (D + G)	**$1,559.47**

Calculating Cash to Close

Total Closing Costs (H)	$1,559.47
Closing Costs Financed *(Paid from your Assessment Amount)*	-$1,559.47
Down Payment/Funds from Property Owner	$0.00
Estimated Cash to Close	**$0.00**

Other Costs

E. Accumulated Interest Charges	**$965.47**
Interest Before First Payment[1]	$965.47
F. Government Fees[2]	**$60.00**
One-time Recording Fee	$60.00
G. TOTAL OTHER COSTS (E + F)	**$1,025.47**

[1] Interest before first payment will be added to your assessment amount for the period between the closing date and May 2nd of the year you make your first assessment payment.

[2] You will not be charged for the state documentary stamp tax; the Florida HERO Program will pay this estimated cost of $40.46 on your behalf.

Other Terms

Prepayment Fee	☒ NO ☐ YES	*Interest will accrue until the 2nd day of the 2nd month following payoff*
Annual Assessment Administration Fee	☐ NO ☒ YES	*Annual assessment administration fee of $35.00 is subject to change[3]*
Annual Tax Collection Administration Fee	☐ NO ☒ YES	*Annual tax collection administration fee generally ranges between 0% – 2% of the annual assessment payment amount[4]*

Additional Information About this Assessment

Use this information to compare to other financing options

Total amount you will have paid over the term of the assessment		$10,594.00	*Principal you will have paid off (excluding Interest Before First Payment).*
	+	$6,392.89	*Amount of interest you will have paid (including Interest Before First Payment).*
	+	$350.00	*Annual Assessment Administration Fees you will have paid.*
	=	$17,336.89	*Total you will have paid in principal, interest, and Annual Assessment Administration Fees.*
Annual Percentage Rate		9.26%	*Your costs over the assessment term expressed as a rate. This is not your interest rate.*
Total Interest Percentage		36.87%	*As a percentage of all payments you will have made.*

[3] The annual assessment administration fee is subject to increase to an amount not to exceed $95.

[4] The tax collection administration fee is collected by your local county tax collector as part of the ordinary tax collection process, and generally ranges between 0% – 2% of the annual assessment payment amount (depending upon the county where the Property is located), but is subject to change in subsequent years. However, the tax collection administration fee may exceed this estimate. The Program does not determine or guarantee the amount of the fee, which may vary by year depending upon the county where the Property is located. Please contact your local county tax collector for more information.

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Financing Estimate and Disclosure

16409 W. Bernardo Drive, San Diego, CA, 92127 — Save this Financing Estimate and Disclosure to compare with your Final Payment Summary.

FINANCING PROVIDER	Renovate America: HERO Program
EMAIL	info@heroprogram.com
PHONE	(855) HERO-411

Other Considerations

Tax Payments and Monthly Mortgage Payments	**Your payments will be added to your property tax bill.** Whether you pay your property taxes through your mortgage payment, using an escrow (impound) account, or if you pay them directly to the tax collector, you will need to save an estimated $1,733.69 for your first tax year. If you pay your property taxes through an escrow (impound) account you should contact your mortgage servicer to confirm how and when it will adjust your monthly mortgage payment to cover this increase to your annual property tax bill.	PO INITIAL
Home Sale or Refinancing	I understand that I may be required to pay off the remaining balance of this obligation by the mortgage lender refinancing my home. If I sell my home, the buyer or their mortgage lender may require me to pay off the balance of this obligation as a condition of sale.	PO INITIAL
Estimated Cost Savings	I understand that any utility bill savings I might experience as a result of any installed product(s) financed through the Florida HERO Program will depend on my usage, utility rates, and the efficiency of such product(s). Any estimated savings are not guaranteed and will not reduce my assessment payments or my total assessment amount.	PO INITIAL
Tax Benefits	Consult your tax advisor regarding potential tax credits, credits and deductions, tax deductibility, and other tax benefits available for the Florida HERO Program. Making an appropriate application for any benefit is your responsibility.	PO INITIAL
Statutory Penalties	If your property tax payment is late, the enforcement and collection procedures set forth in the Florida Uniform Assessment Collection Act may be employed which could result in a sale of tax certificates for the Property and the ultimate sale of the Property for the payment of the delinquent assessment installments, associated penalties, interest and other costs.	PO INITIAL
Right to Cancel	You, the property owner, may cancel the financing agreement at any time prior to your signing of the Completion Certificate. To cancel this transaction, you may mail or deliver a signed and dated copy of the financing agreement with notice of cancellation to: 16409 W. Bernardo Drive San Diego, CA, 92127 You may also cancel the contract by sending notification of cancellation by email to the following email address: info@heroprogram.com.	PO INITIAL
Project Pricing	I confirm that my home improvement contractor(s) did not quote me a different price because I selected HERO instead of paying cash or using a different financing option. If my contractor(s) did quote a different price for a different payment option, I agree to call 844-805-4376 immediately, before proceeding with my project.	PO INITIAL

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Financing Estimate and Disclosure

16409 W. Bernardo Drive, San Diego, CA, 92127 Save this Financing Estimate and Disclosure to compare with your Final Payment Summary.

Confirm Receipt

This confirms the receipt of the information in this form. You do not have to accept this financing just because you acknowledge that you have received or signed this form, and it is not a contract.

Joe Smith	Date	Property Owner 2	Date
Property Owner 3	Date	Property Owner 4	Date

Customer Service Toll-Free Telephone Number and Email
In the event you have a consumer complaint, questions about your financing obligations related to the assessment or your contractual rights under the terms of your financing agreement, you can contact either this toll-free telephone number or email address provided below and receive a response within one business day.

Toll-free telephone number: (855) HERO-411
Customer service email address: info@heroprogram.com

SAMPLE

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Florida HERO Financing Program™ Right to Cancel

P: (855) HERO-411 F: (858) 815-6860 E: info@heroprogram.com A: 16409 W. Bernardo Drive
San Diego, CA, 92127

Date: **11/03/2018**
Property Owner(s): **Joe Smith**
Property Address: **123 Blueberry Ln, Satellite Beach, FL 32937**
HERO ID: **FL00900000**
Application Date: **11/03/2018**
Expiration Date: **04/22/2019**

Your Right to Cancel:

You are entering into a financing agreement that will result in the imposition of a non ad-valorem assessment with the Florida Development Finance Corporation ("FDFC") and Florida Resiliency and Energy District ("FRED" or "Local Government") for HERO Financing under the Florida HERO Program ("Program") that will result in a lien on the property at 123 Blueberry Ln, Satellite Beach, FL 32937.

You may cancel this transaction, without cost at any time prior to your signing of the Completion Certificate.

If you cancel the transaction, the Local Government, within 20 calendar days after the Renovate America, Inc. (the "Program Administrator") receives notice of cancellation, must take the steps necessary to reflect the fact that, if recorded, the lien on your property has been discharged and removed from the tax rolls, and the Local Government or the Program Administrator must return to you any money you have given in connection with your application, not including any application processing fee. After the Local Government or the Program Administrator has completed these steps, you must return any money paid to you or on your behalf, whether to your contractor or any other person. All money must be returned to the address below.

Exercising this right to cancel does not affect your payment obligations to your contractor(s) and does not cancel or in any way affect any contract you may have signed with any other parties, including your contractor(s). It is your responsibility to contact any applicable contractor(s) regarding your obligations under any home improvement contract(s) that you may have signed.

If you cancel the transaction:

- You will not be charged a cancellation fee; and
- You will be refunded any money you have given, excluding any application and processing fees as applicable.

Acknowledgement of Receipt

I/We hereby acknowledge reading and receiving a complete copy of this Notice of Right to Cancel.

Joe Smith	Date	Property Owner 2	Date
Property Owner 3	Date	Property Owner 4	Date

How to Cancel

To cancel this transaction, you may submit this form to the Florida HERO Program in writing at:
Florida HERO Program
ATTN: Right to Cancel Notification
Email: cancellations@heroprogram.com
Fax Number: 858-815-6860
Address: 16409 W. Bernardo Drive
San Diego, CA, 92127

You may also cancel by calling 855-HERO-411 (855-437-6411) and speaking with a HERO representative.

By signing below, you are cancelling your HERO Financing transaction. This does not cancel any contract with any other parties, such as your contractor(s). It is your responsibility to contact any additional parties regarding your obligations under any home improvement contract(s) that you may have signed.

SAMPLE

© 2017 Renovate America, Inc.

Florida HERO Financing Program™ Right to Cancel

P: (855) HERO-411 **F:** (858) 815-6860 **E:** info@heroprogram.com **A:** 16409 W. Bernardo Drive
San Diego, CA, 92127

I Wish to Cancel (ONLY SIGN HERE IF YOU ARE CANCELLING YOUR FINANCING)

	Joe Smith	Date	Property Owner 2	Date
	Property Owner 3	Date	Property Owner 4	Date

SAMPLE

© 2017 Renovate America, Inc.

Florida HERO Financing Program™ Completion Certificate

P: (855) HERO-411 **A:** 16409 W. Bernardo Drive, San Diego, CA, 92127 **E:** herofunding@heroprogram.com

Date:	11/03/2018	**HERO ID:**	FL00900000
Property Owner(s):	Joe Smith	**Application Date:**	11/03/2018
Property Address:	123 Blueberry Ln, Satellite Beach, FL 32937	**Expiration Date:**	04/22/2019

Completion Certificate Instructions

AFTER all work has been completed, the contractor and one of the property owners must sign this Completion Certificate. This Completion Certificate and all required attachments listed below must then be submitted to the Program. The Program will then approve the Completion Certificate and process payment.

Required attachments:

- A fully executed home improvement contract, including all pages and addendums from all contractor(s)
- Product related attachments, if applicable (see Product Details below)
- Initial or final permit(s), as applicable

Contractor

Company Name:	Jaime's Contractor Services	**Phone:**	(555) 555-5555
License No:	xxxxxxx	**Address:**	456 Peach Ln, Satellite Beach, FL 32937

Payment Instructions: On file and can be updated from within the contractor portal or if payment is to be made to the Payment Designee as set forth in the Payment Designee section below.

The undersigned contractor hereby certifies that:

1. It has no reason to believe that the products installed on the property are not complete to the satisfaction of the property owner;
2. The property owner(s) signed this Completion Certificate after the installation of the products and it has no reason to believe that any signature on this Certificate is not genuine;
3. It has the correct licensing/certifications from the applicable state or local licensing board to install the products listed on this Completion Certificate;
4. The undersigned individual has the authority to sign this Completion Certificate on behalf of contractor;
5. It has provided all the applicable required attachments listed above with this Completion Certificate and the attached documents are true and correct copies thereof;
6. It hereby transfers and assigns its right to receive HERO Funding to the Payment Designee for the Total Approved Financing Amount for this Completion Certificate if the instructions below indicate that payment should be paid to the Payment Designee; and
7. It hereby transfers and assigns its rights to Program Fund Moneys to Renovate America, Inc. or its affiliates.

Authorized Contractor Representative Signature _____ Date _____ Printed Name _____

HERO Funding Amount to be paid:

☐ **Contractor** _____

☐ **Property Owner** _____

☐ **Payment Designee** _____

Payment Designee:

Company Name:

Contact Name:

Phone:

Address:

SAMPLE

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Installed HERO Product Details

Heating, Cooling & Ventilation - Air Conditioners	
Product Category Type:	Heating, Cooling & Ventilation - Air Conditioners
AHRI Number:	5434998
Trade/Brand:	Lx Series
Outdoor Unit Manufacturer:	Luxaire By Johnson Controls
Outdoor Unit Model:	TCJF48S41S4
Indoor Unit Manufacturer:	
Indoor Unit Model:	FC64D+TXV
Furnace Model:	T*(8,L)C*C20
Cooling Capacity (BTUh):	4.00
SEER:	15.7500
EER:	13.0000
Quantity:	1
Programmable Thermostat:	Yes

I agree the products listed above have been installed and the work is complete. I agree that payments should be made for the products and labor.	Property Owner Initial

SAMPLE

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Property Owner

HERO Products Installed	
1	Heating, Cooling & Ventilation - Air Conditioners

Total Requested Product Amount	**$10,000.00**
Florida HERO Program administration costs and recording fees[1]	$594.00
Interest before first payment[2]	$965.47
TOTAL AMOUNT TO BE FINANCED FOR THIS PROJECT[3]	**$11,559.47**

HERO Payment to Contractor (HERO pays to contractor or other payee upon project funding)[4]	**$10,000.00**

1. Program costs to provide financing for your improvement. These costs include bond issuance costs and the cost of processing your paperwork. It also includes the fees paid to the county to record and process the financing documents. The Florida HERO Program will pay the cost of the state documentary stamp tax in the estimated amount of $40.46.
2. Interest before first payment will be added to your assessment amount for the period between the closing date and May 2nd of the year you make your first assessment payment.
3. All amounts are estimates based on a project expiration date of 04/22/2019. Actual amounts will be calculated based on the actual project completion date, and will be listed on the Final Payment Summary.
4. In connection with this transaction, Renovate America, Inc. may require that your contractor pay Renovate America, Inc. a fee. This fee may be deducted from the amount to be paid to your contractor. To the extent your contractor is required to pay Renovate America a fee, your contractor has agreed not to add, charge, or otherwise transfer to you the cost of such fee in order to participate in this Program.

IMPORTANT NOTICE: PLEASE DO NOT SIGN THIS DOCUMENT UNTIL THE WORK IS COMPLETE

I, the undersigned, certify that:

1. The products listed above and installed on my property are completed to my satisfaction;
2. I understand that the selection of the contractor and acceptance of the materials used and the work performed is my responsibility and that the Florida HERO Program, the Florida Development Finance Corporation, the Florida Resiliency and Energy District, and/or Renovate America, Inc. do not endorse any contractor or any other person involved with the products, the design of the products, or warrant the economic value, energy savings, safety, durability or reliability of the products;
3. I understand that the Florida HERO Program has the right to inspect any installed products listed on this Completion Certificate;
4. The products listed above are the products installed on my property;
5. My contractor or I have obtained, or will obtain, all necessary final permits and/or inspections required in my jurisdiction;
6. As indicated above, I hereby transfer and assign my right to HERO Funding to the Contractor and/or Payment Designee for the Total Approved Financing Amount for this Completion Certificate if I indicated that payment should be paid to the Contractor and/or Payment Designee above;
7. I hereby transfer and assign my right to Program Fund Moneys to Renovate America, Inc. or its affiliates; and
8. **I have the authority to make all certifications and sign this Completion Certificate for and on behalf of all other Property Owners**.

Joe Smith _____ Date _____

SAMPLE

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Consumer Financial Protection Bureau

FOR IMMEDIATE RELEASE:
March 4, 2019

MEDIA CONTACT:
Office of Communications
Tel: (202) 435-7170

CONSUMER FINANCIAL PROTECTION BUREAU ISSUES ADVANCE NOTICE OF PROPOSED RULEMAKING ON PROPERTY ASSESSED CLEAN ENERGY FINANCING

WASHINGTON, D.C. – Today the Consumer Financial Protection Bureau (Bureau) issued an Advance Notice of Proposed Rulemaking (ANPR) on residential Property Assessed Clean Energy (PACE) financing.

"Today's action is the next step in the Bureau's efforts to implement the Economic Growth, Regulatory Relief and Consumer Protection Act as expeditiously as possible," said CFPB Director Kathleen L. Kraninger. "I look forward to reviewing the comments in response to the questions we are asking to facilitate the required rulemaking."

The Economic Growth, Regulatory Relief, and Consumer Protection Act, signed into law in May 2018, directed the Bureau to prescribe certain regulations for PACE financing.

The Bureau will consider the information it receives in response to today's ANPR to develop a Notice of Proposed Rulemaking. The information solicited will enable the Bureau to better understand the market and unique nature of PACE financing. This will help the Bureau formulate proposed regulations that not only would achieve statutory objectives but also would reflect a careful consideration of costs and benefits.

The public will have 60 days to comment after publication of the ANPR in the Federal Register.

The ANPR is available at:
https://files.consumerfinance.gov/f/documents/cfpb_anpr_residential-property-assessed-clean-energy-financing.pdf

###

The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work by regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations, by making rules more effective, by consistently enforcing federal consumer financial law, and by empowering consumers to take more control over their economic lives. For more information, visit consumerfinance.gov.

BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Docket No. CFPB-2019-0011

RIN 3170-AA84

Advance Notice of Proposed Rulemaking on Residential Property Assessed Clean Energy Financing

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this Advance Notice of Proposed Rulemaking (ANPR) to solicit information relating to residential Property Assessed Clean Energy (PACE) financing. The Bureau will consider the information it receives in response to this ANPR in implementing section 307 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). In relevant part, EGRRCPA section 307 amends the Truth in Lending Act (TILA) to mandate that the Bureau prescribe certain regulations relating to PACE financing. Specifically, the regulations must carry out the purposes of TILA's ability-to-repay (ATR) requirements, currently in place for residential mortgage loans, with respect to PACE financing, and apply TILA's general civil liability provision for violations of the ATR requirements the Bureau will prescribe for PACE financing. The regulations must "account for the unique nature" of PACE financing. This ANPR solicits information to better understand the PACE financing market and the unique nature of PACE financing.

DATES: Comments must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: You may submit responsive information and other comments, identified by

Docket No. CFPB-2019-0011, by any of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email*: *PACEFinancingANPR@cfpb.gov*. Include Docket No. CFPB-2019-0011 in the subject line of the message.
- *Mail*: Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.
- *Hand Delivery / Courier*: Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.

Instructions: When responding to a particular question, please note the question number at the top of the response. Also, where applicable, please note whether any information provided is relevant to a PACE financing program that is specific to a particular jurisdiction or administrator.

You are not required to answer all questions to receive consideration of your comments. The Bureau encourages the early submission of comments. All submissions must include the document title and docket number.

Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *http://www.regulations.gov*. In addition, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10:00 a.m. and 5:00 p.m. eastern standard time. You can make an appointment to inspect the documents by telephoning 202–435–7275.

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as

account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Rachel Ross, Attorney-Advisor; Joel Singerman, Counsel; or Nora Rigby, Senior Counsel; at (202)–435–7700. If you require this document in alternative electronic format, please contact *CFPB_Accessibility.cfpb.gov*.

SUPPLEMENTARY INFORMATION: The Bureau is issuing this ANPR to solicit information relating to residential PACE financing.[1] The Bureau will consider the information it receives in implementing EGRRCPA section 307, which was enacted by Congress on May 22, 2018, and signed into law on May 24, 2018.[2]

As defined in EGRRCPA, PACE financing is "financing to cover the costs of home improvements that results in a tax assessment on the real property of the consumer."[3] Section 307 amends TILA to direct regulatory action on PACE financing. It provides in relevant part that the Bureau shall prescribe regulations that (1) carry out the purposes of TILA section 129C(a), and (2) apply TILA section 130 with respect to violations under TILA section 129C(a) with respect to PACE financing, which shall account for the unique nature of PACE financing.[4]

This provision directs the Bureau to prescribe regulations that achieve two objectives and account for the unique nature of PACE financing. As to the first objective, the regulations must "carry out the purposes of" TILA's existing ATR requirements. In general, the existing ATR

[1] Although some jurisdictions may make PACE financing available for commercial projects, this ANPR solicits information relating only to residential PACE financing, in accord with EGRRCPA section 307, which defines PACE financing as available for home improvements. The Bureau is not soliciting information about commercial PACE financing.

[2] Pub. L. No. 115–174, 132 Stat. 1296 (2018).

[3] EGRRCPA section 307, amending TILA section 129C(b)(3)(C)(i), 15 U.S.C. 1639c(b)(3)(C)(i).

[4] EGRRCPA section 307, amending TILA section 129C(b)(3)(C)(ii), 15 U.S.C. 1639c(b)(3)(C)(ii). EGRRCPA section 307 also includes amendments authorizing the Bureau to "collect such information and data that the Bureau determines is necessary" in prescribing the regulations and requiring the Bureau to "consult with State and local governments and bond-issuing authorities."

requirements prohibit creditors from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan according to its terms, and all applicable taxes, insurance, and assessments.[5] In making that determination, a creditor is required to consider specific factors about the consumer's finances, including, for example, the consumer's income, assets, and debt obligations, and to verify the income or asset amounts it relied upon to determine the consumer's repayment ability.[6] TILA states that the purpose of the ATR requirements is "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive."[7]

As to the second objective, the regulations implementing EGRRCPA section 307 must apply TILA's general civil liability provision for violations of the ATR rules that will apply to PACE financing. That provision sets forth damages for TILA violations generally,[8] as well as specific penalties for violations of the current ATR requirements.[9]

The Bureau is soliciting information through this ANPR that it believes will be helpful in developing a proposed rule that will meet these objectives and accounts for the unique nature of PACE financing. The Bureau is seeking five categories of information: (1) written materials associated with PACE financing transactions; (2) descriptions of current standards and practices

[5] The ATR requirements are set forth in TILA section 129C(a), 15 U.S.C. 1639c(a). The Bureau has issued regulations implementing TILA's ATR requirements. *See* 12 CFR 1026.43.

[6] *See* TILA section 129C(a), 15 U.S.C. 1639c(a).

[7] TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

[8] *See generally* TILA section 130, 15 U.S.C. 1640.

[9] *See* TILA section 130(a)(4), 15 U.S.C. 1640(a)(4) (providing liability for failure to comply with requirements in the ATR provisions in "an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material."); *see also* TILA section 130(k), 15 U.S.C. 1640(k) (generally providing that consumers facing foreclosure may assert a violation of the ATR provisions, among other provisions, as a defense by recoupment or setoff).

in the PACE financing origination process; (3) information relating to civil liability under TILA for violations of the ATR requirements in connection with PACE financing, as well as rescission and borrower delinquency and default; (4) information about what features of PACE financing make it unique and how the Bureau should address those unique features; and (5) views concerning the potential implications of regulating PACE financing under TILA. The Bureau anticipates that the information solicited will enable the Bureau to better understand the market and unique nature of PACE financing. This will help the Bureau formulate proposed regulations in a balanced manner, achieving the statutory objectives discussed above while avoiding the imposition of unnecessary or undue burden on industry.

The Bureau hopes to receive information reflecting the diversity of residential PACE financing transactions in the market. Where applicable, please specify whether any information provided applies to a PACE financing program that is specific to a particular jurisdiction or administrator. When responding to a particular question, please note the question number at the top of the response.

The Bureau invites comment on all aspects of the ANPR from all interested parties, including consumers, consumer advocacy groups, State and local governments, other PACE financing industry participants, or other members of the public. In the event that a respondent may have concerns about revealing proprietary or personal information, the Bureau welcomes comments from attorneys, consumer advocacy organizations, trade associations, or other representatives that do not identify their clients.

I. Written materials associated with PACE financing transactions.

To better understand PACE financing transactions and potential areas of consumer risk, the Bureau is interested in receiving samples of any written materials used in PACE financing

transactions. Please consider submitting samples of, for example, any contractual agreements, written materials provided to consumers before they sign a PACE financing agreement, and bills or statements that provide payment information to consumers. Please redact any personally identifiable information before submission.

II. Current standards and practices in the PACE financing origination process.

As described above, EGRRCPA section 307 requires the Bureau to prescribe regulations for PACE financing that carry out the purposes of TILA's existing ATR requirements while accounting for the unique nature of PACE financing. In general, TILA's existing ATR requirements prohibit creditors from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan according to its terms, and all applicable taxes, insurance, and assessments.[10] Developing an ATR rule for PACE financing that takes into account its unique nature will require a thorough understanding of origination and underwriting processes, including the roles and responsibilities of participating parties. Questions in this category solicit information to that end.

1. Please provide information about the process of obtaining a consumer's application for PACE financing, including what documentation is required from consumers or third parties, what information is verified, and how any information is collected. What information gathered as part of the application process relates to the consumer's ability to repay? Which parties collect the application information? How are policies and procedures relevant to the application process established?

[10] *See* TILA section 129C(a), 15 U.S.C. 1639c(a).

2. Please describe current underwriting standards and how they are established. Does underwriting commonly include a determination of consumers' ability to repay the financing? If so, which parties conduct that analysis, and what factors are considered in that determination?
3. Please provide information about the process for approving or denying PACE financing applications. For example, which parties determine consumer eligibility or make any offer to the consumer? Which parties are involved in determining the financing terms, and how do they do so for each consumer?
4. Please provide information about any written information provided to consumers before they sign a PACE financing agreement, including relevant contracts or written disclosures. Who delivers these materials, in what format, and when during the origination process?
5. Please describe any information provided to consumers orally before they sign a PACE financing agreement. Who provides the information and at what point during the origination process?
6. TILA's existing ATR requirements apply to "creditors," defined in part as the parties to whom debt obligations are "initially payable on the face" of the agreements.[11] In PACE financing transactions, to which parties may the obligations be made "initially payable on the face" of the financing agreements? Please describe any requirements in State or local law governing to which parties PACE financing obligations may be made initially payable on the face of the financing agreements.

[11] *See* 15 U.S.C. 1602(g).

7. To the extent not addressed above, please describe the role of State or local governments in the origination and underwriting of PACE financing.
8. Please describe any relationship between the PACE financing agreement and the home improvement agreement. For example, do they involve separate contracts? Do consumers sign them concurrently? If a consumer is denied for the PACE financing, what is the effect on the consumer's obligations under the home improvement contract?
9. To the extent not already addressed, please provide any information that may help the Bureau understand the origination process or any risks or benefits it produces for consumers.

III. Civil liability under TILA for violations of ATR requirements in connection with PACE financing, as well as rescission and borrower delinquency and default.

As noted above, EGRRCPA section 307 requires that the Bureau prescribe regulations that apply TILA section 130 to violations of the ATR rules that will apply to PACE financing, and that account for the unique nature of PACE financing. Section 130 sets forth TILA's general civil liability requirements; and, with respect to violations of the existing ATR requirements, it allows for recovery of an amount equal to the sum of all finance charges and fees paid by the consumer and provides borrowers a foreclosure defense. In conjunction with questions elsewhere in this ANPR, the information solicited in this category is intended to help the Bureau identify the parties in a PACE financing transaction to whom TILA section 130 might apply and which parties would in fact bear the risk of any such liability. Additionally, this category of questions solicits information about any rescission rights available to consumers and what occurs when a homeowner becomes delinquent on a PACE financing obligation.

10. Please provide any information about the assignment or sale, including securitization, of PACE financing agreements or the rights and obligations therein, and the circumstances surrounding any assignment or sale.
11. Please describe any indemnification agreements that are commonly part of PACE financing transactions, whether involving local governments, private parties administering PACE financing programs, secondary market participants, home improvement companies, or others.
12. Please describe any rescission rights available to consumers with respect to PACE financing agreements or home improvement contracts, whether by virtue of the agreements or applicable State or local law.
13. Please provide information about what happens to PACE financing obligations when a consumer becomes delinquent or defaults. For example, please provide information about any loss mitigation programs available to consumers, any pre-foreclosure collection attempts, or foreclosure processes when applicable. Which parties are involved, and what are their roles?

IV. Features of PACE financing that make it unique and how the Bureau should address those unique features.

As noted above, the regulations implementing EGRRCPA section 307 must account for the "unique nature" of PACE financing. Questions in this category solicit information that may be relevant to understanding the unique nature of PACE financing. They include questions about the structure, funding, and repayment of PACE financing transactions, and the relationship to local property tax systems.

14. EGRRCPA section 307 defines PACE financing as "financing to cover the costs of home improvements that results in a tax assessment on the real property of the consumer." Please identify any public or private financing options that may satisfy this definition, whether or not commonly understood to be PACE financing.
15. Please provide information about the source of funding for PACE financing transactions. For example, are the transactions funded with public or private capital? Which parties supply the capital used to pay the contractors installing the home improvement projects?
16. Please describe the role of public bonds in PACE financing transactions. Please identify the bond-issuing authorities. What is the timing of bond issuance? Who purchases the bonds, and what effect does the purchase have? Where public bonds are not involved in PACE financing transactions, please describe the role of any other public financing mechanisms.
17. Please provide information about consumer repayment. For example:
    i. When does repayment begin after the financing agreement is signed?
    ii. How frequently are payments made?
    iii. Are payments roughly equal throughout a consumer's full financing term, or can payments change? Are interest rates fixed or variable? Are balloon payments required? If so, in what circumstances? Do PACE financing agreements always provide for full amortization?
    iv. To which parties do consumers make payments? Does the party to which consumers make payments ever change over the life of the financing agreement? If so, in what circumstances does this occur and why?

v. After a consumer remits a payment, how is the payment distributed, and by whom?

vi. Please describe any changes to payments or payment processes when a consumer becomes delinquent or defaults.

vii. Please describe any differences to payments or payment processes when a consumer has a mortgage loan with an escrow account for taxes.

18. Please describe how PACE financing is integrated with local property tax systems and how specific information about the PACE financing obligation is distinguished from other real property tax obligations in the tax system. Who monitors repayment of the PACE financing?

19. To the extent not addressed above, please describe the role of State and local governments in PACE financing programs or individual PACE financing transactions following origination. Please identify any State or local government entities with regulatory or oversight authority over PACE financing or industry participants.

20. Please describe any financial costs to consumers that may be associated with PACE financing transactions, including, for example, costs resulting from interest, points, fees, or penalties. How do costs for home improvement projects financed using PACE financing compare to costs for comparable projects financed through other means?

21. Please describe any cost savings associated with home improvement projects funded with PACE financing, including, for example, utility savings or tax credits authorized under State or Federal law for PACE-eligible projects. Are projected savings calculated before PACE financing contracts are executed? If so, how, and over what

period of time? Are actual savings tracked, and, if so, how do they compare with the projections?

22. In general, does the addition of PACE financing affect consumers' ability to meet their financial obligations? Please describe any such effects and why they may occur.
23. Please provide information about the liens associated with PACE financing. How do they differ from liens securing other property tax obligations that may encumber residential real property? Do PACE financing liens arise by operation of law or contract?
24. Please provide information about the treatment of PACE financing obligations by servicers of mortgage loans responsible for servicing mortgages that were placed on the property before the PACE financing encumbrance. For example, do mortgage servicers typically administer PACE financing obligations through escrow accounts? Please describe the relevant processes and any effects on the mortgage servicer or the consumer. How quickly after PACE assessments are added do mortgage servicers learn about the increase to the consumer's property tax bill? How quickly do mortgage servicers adjust consumers' escrow payments, where applicable, to reflect the change?
25. To the extent not already addressed, please provide any additional information about the unique nature of PACE financing, how the Bureau's regulations should account for the unique nature, and any risks or benefits to consumers or industry participants attributable to the unique nature.

V. Potential implications of regulating PACE financing under TILA.

As described above, EGRRCPA section 307 requires the Bureau to issue regulations applying TILA's ATR and general civil liability provisions (as implemented through Regulation Z) to PACE financing, accounting for the unique nature of PACE financing. In this category of questions, the Bureau solicits information relating to how the existing TILA and Regulation Z provisions could be applied to PACE financing to implement EGRRCPA section 307. This information will assist the Bureau in developing a proposed rule adapting existing TILA and Regulation Z standards in light of potential impacts on consumers and industry and any implementation challenges specific to PACE financing.

26. If existing ATR requirements in TILA and Regulation Z were to apply to PACE financing transactions, please describe any likely effects on State and local governments or bond-issuing authorities.
27. Please describe any likely effects of such application on consumers or PACE financing industry participants.
28. If applied to PACE financing transactions, which specific ATR provisions under TILA and Regulation Z, if any, would conflict with existing State or local legal requirements, and how? What steps could the Bureau take to mitigate those conflicts?
29. Which specific ATR provisions under TILA and Regulation Z would be difficult for market participants to apply to current PACE financing origination practices, bond processes, or laws and practices implicating real property tax systems, and why would they be difficult to apply?

30. Which specific ATR provisions under TILA and Regulation Z, if any, would be beneficial for consumers, and how? Which, if any, would not provide consumer benefits, and why not?
31. How could TILA's existing ATR requirements be tailored to account for the unique nature of PACE financing? Are there unique aspects of PACE financing that are relevant to whether and how the existing ATR requirements should apply, including the documentation and verification requirements or the specific information required as part of the analysis?
32. As described above, EGRRCPA section 307 requires the Bureau to apply TILA section 130 to violations of the ATR requirements that the Bureau will prescribe for PACE financing. Please provide your views on any likely impacts on consumers or PACE financing market participants of applying TILA section 130. Please describe any other concerns associated with applying TILA liability to PACE financing, including but not limited to TILA section 130.
33. Please share your views on whether the Bureau should address the application of TILA and Regulation Z provisions other than the ATR requirements to PACE financing, including any potential impacts on consumers, industry, or other stakeholders that may result from any such application.
34. Please share any other comments or concerns about implementing EGRRCPA section 307 under TILA and Regulation Z.

[THIS SIGNATURE PAGE PERTAINS TO THE ADVANCE NOTICE OF PROPOSED RULEMAKING TITLED "ADVANCE NOTICE OF PROPOSED RULEMAKING ON RESIDENTIAL PROPERTY ASSESSED CLEAN ENERGY FINANCING"]

Dated: March __, 2019.

Kathleen L. Kraninger,

Director, Bureau of Consumer Financial Protection.

Instr# 115475521 , Page 1 of 4, Recorded 11/30/2018 at 03:51 PM
Broward County Commission

CLEAN ENERGY GREEN CORRIDOR BY YGRENE

RECORDED AND PREPARED BY AND AFTER RECORDATION RETURN TO:

Ygrene Energy Fund Florida, LLC
3390 Mary Street #124
Miami, FL 33133

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

SUMMARY MEMORANDUM OF AGREEMENT

This Summary Memorandum of Agreement, dated 08/20/2018, is between the Green Corridor Property Assessment Clean Energy (PACE) District, a public body corporate and politic duly organized and existing under the laws of the State of Florida (the "**District**") and all of the persons or entities identified below as the record owner(s) (the "**Owner**") of the fee title to the real property identified herein.

The district and the Owner entered into an Agreement to Pay Assessments and Finance Qualifying Improvements (the "**Agreement**") for the purpose of installing on the Property the Qualifying Improvements listed in Exhibit B.

Owner No. 1: KENNETH EDLEMAN		
Owner No. 2: JOSEPH B. SCHIMMEL		
Owner No. 3:		
Owner No. 4:		
Trust:		
Legal Entity: Weston Commercial Properties, Ltd		
Project ID No.: FL-293-D76KCV	**Folio Number:** 49-39-35-06-0010	
Property Street Address: 2900 GLADES CIR		
City: WESTON	**State:** FL	**Zip:** 33327

The parties agreed that the District will collect a non-ad valorem special assessment to repay the costs for funding the Qualifying Improvements. The assessment to be levied on the Property constitutes a lien of equal dignity to county taxes and assessments that is effective from the date of recordation of this Summary Memorandum of Agreement. The final principal amount of the assessment and payment schedule will be set forth in an addendum to the Financing Agreement to be recorded in the public records of the applicable county upon completion of the installation of the Qualifying Improvements. Except as otherwise provided in the Financing Agreement, the Financing Agreement shall expire upon the final payment or prepayment of the non-ad valorem special assessment.

DESCRIPTION OF ESTIMATED COSTS AND TERMS OF FINANCING

INTEREST RATE: 6.84 % **REPAYMENT TERM:** 25 years

Maximum Annual Assessment*	$45,919.07

Ask the program administrator for the current collection fees being charged.

IN WITNESS WHEREOF, the parties hereto have respectively executed this memorandum effective as of the date of the last party to sign.

www.YgreneWorks.com

GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT

IMPORTANT SIGNATURE INSTRUCTIONS: PLEASE SIGN YOUR NAME EXACTLY AS DISPLAYED IN THE SIGNATORY FIELDS BELOW, INCLUDING THE TITLE IF APPLICABLE.

IF YOU ARE A TRUSTEE, PLEASE INCLUDE THE TITLE "TRUSTEE" AFTER YOUR SIGNATURE. EXAMPLE: John M. Smith, Trustee

E-SIGNATURE

WET SIGNATURE

SIGNATURE

DATE 9/25/18

Name of Signatory: Paul Winkelman

Title of Signatory: DISTRICT OFFICER

DISTRICT

NOTARY ACKNOWLEDGEMENT

STATE OF FLORIDA)
)SS
COUNTY OF)

The foregoing instrument was acknowledged before me this 25th day of Sept , 20 18 , by Paul Winkelman , who is/are personally known to me or who has/have produced as identification.

[SEAL]

C Montalvan
Notary Public, State of Florida

CAROLINA MONTALVAN
State of Florida-Notary Public
Commission # GG 001332
My Commission Expires
June 13, 2020

Carolina Montalvan
PRINT NAME OF NOTARY

6/13/2020
COMMISSION EXPIRES

COMMISSION NUMBER

EXHIBIT A

PROPERTY (LEGAL DESCRIPTION)

SECTORS 3 & 4 BOUNDARY PLAT 146-18 B PORTION OF PARCEL A DESC AS COMM AT NW COR OF PAR A,SE 265 ALG NLY/L OF TR A,SW 35,NW 9.

EXHIBIT B

INITIAL DESCRIPTION OF QUALIFYING IMPROVEMENTS

Wind Resistant Roofing

Instr# 115566009 , Page 1 of 3, Recorded 01/22/2019 at 11:56 AM
Broward County Commission

CLEAN ENERGY GREEN CORRIDOR

RECORDED AND PREPARED BY AND AFTER RECORDATION RETURN TO:

Ygrene Energy Fund Florida, LLC
3390 Mary Street #124
Miami, FL 33133

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

ADDENDUM TO FINANCING AGREEMENT

This Addendum to the Financing Agreement, dated 01/07/2019, is between the Green Corridor Property Assessment Clean Energy (PACE) District, a public body corporate and politic duly organized and existing under the laws of the State of Florida (the "**District**") and all of the persons or entities identified below as the record owner(s) (the "**Owner**") of the fee title to the real property identified herein.

The District and the Owner entered into an Agreement to Pay Assessments and Finance Qualifying Improvements (the "**Agreement**") dated 09/25/2018 for the purpose of installing on the Property the Qualifying Improvements initially listed in **Exhibit B** to the Financing Agreement (the "**Initial Description of Qualifying Improvements**"). A Summary Memorandum Agreement, summarizing appropriate terms of the Financing Agreement, was recorded in the public records of Broward County on 11/30/2018 in Instrument # 115475521, Pages 1-4.

Owner No. 1:

Owner No. 2:

Owner No. 3:

Owner No. 4:

Trust:

Legal Entity: Weston Commercial Properties, Ltd

Project ID No.: FL-293-D76KCV	**Folio Number:** 49-39-35-06-0010

Property Street Address: 2700 - 2900 GLADES CIR

City: WESTON	**State:** FL	**Zip:** 33327

The parties agreed in the Financing Agreement that the Preliminary List of Improvements would be modified and finalized in an Addendum to the Financing Agreement upon completion of the installation of Qualifying Improvements (the "**Final Improvements**") on the Property, and the Property Owner agreed to the imposition by the District of a special non-ad valorem assessment on the Property (the "**Assessment**") in order to repay the costs incurred by the District with respect to financing the installation of the Final Improvements.

The Financing Agreement set forth the maximum principal amount to be financed, the estimated interest rate on the Assessment, the estimated amount payable annually on the Assessment based upon the estimated interest rate, the preliminary list of improvements, and the initial term of the assessment. The parties agreed that all such amounts would be modified and finalized in an Addendum to the Financing Agreement after the cost of the Final Improvements was determined.

Accordingly, the parties hereto are entering into this Addendum, which replaces said Summary Memorandum Agreement and sets forth (a) the Final Improvements in **Exhibit B** hereto and (b) the final amount of the Assessment and the final term of the Assessment in **Exhibit C** hereto.

IN WITNESS WHEREOF, the parties hereto have respectively executed this Addendum effective as of the date of the District's signature.

(SIGNATURE PAGE FOLLOWS)

www.ygrene.com

GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT

Signature of Authorized Person:

Print Name and Title of Authorized Person: District Officer Paul Winkeljohn

Date: 1/10/19

NOTARY ACKNOWLEDGEMENT

STATE OF FLORIDA)
)SS
COUNTY OF Broward)

The foregoing instrument was acknowledged before me this 10 day of Jan, 20 19, by Paul Winkeljohn, who is/are personally known to me or who has/have produced ..... as identification.

JONI D. HAYWORTH
Notary Public - State of Florida
Commission # GG 017533
My Comm. Expires Nov 24, 2020

Joni D. Hayworth
Notary Public, State of Florida

PRINT NAME OF NOTARY

COMMISSION EXPIRES

COMMISSION NUMBER

EXHIBIT A

PROPERTY (LEGAL DESCRIPTION)

SECTORS 3 & 4 BOUNDARY PLAT 146-18 B PORTION OF PARCEL A DESC AS COMM AT NW COR OF PAR A,SE 265 ALG NLY/L OF TR A,SW 35,NW 9.

EXHIBIT B

FINAL DESCRIPTION OF QUALIFYING IMPROVEMENTS

Wind Resistant Roofing

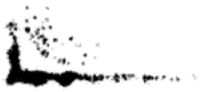


EXHIBIT C

REPAYMENT TERM: .....25..... **years**

Annual Special Assessment* .....$15,777.59.....

*NOTE: Collection fees may be added to the final assessment amount. These fees vary and are based on changes in the Tax Collector's fees schedules and policies.

Ask the program administrator for the current collection fees being charged.

Instr# 114494626 , Page 1 of 4, Recorded 07/11/2017 at 04:45 PM
Broward County Commission

DocuSign Envelope ID: 68FFC718-955D-4CB8-93ED-FA864CCC1B87

CLEAN ENERGY GREEN CORRIDOR

RECORDED AND PREPARED BY AND AFTER RECORDATION RETURN TO:

Ygrene Energy Fund Florida, LLC
3390 Mary Street #124
Miami, FL 33133

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

SUMMARY MEMORANDUM OF AGREEMENT

This Summary Memorandum of Agreement, dated 05/09/2017, is between the Green Corridor Property Assessment Clean Energy (PACE) District, a public body corporate and politic duly organized and existing under the laws of the State of Florida (the "**District**") and all of the persons or entities identified below as the record owner(s) (the "**Owner**") of the fee title to the real property identified herein.

The district and the Owner entered into an Agreement to Pay Assessments and Finance Qualifying Improvements (the "**Agreement**") for the purpose of installing on the Property the Qualifying Improvements listed in Exhibit B.

Owner No. 1: Anne	Gorman
Owner No. 2: Oudine	Matthew
Owner No. 3:	
Owner No. 4:	
Trust:	
Legal Entity:	
Project ID No.: FL-336-4YDM4Z	**Folio Number:** 48-41-17-04-0640
Property Street Address: 10971 NW 38TH CT	

City: CORAL SPRINGS	**State:** FL	**Zip:** 33065

DocuSign Envelope ID: 68FFC718-955D-4CB8-93ED-FA864CCC1B87

The parties agreed that the District will collect a non-ad valorem special assessment to repay the costs for funding the Qualifying Improvements. The assessment to be levied on the Property constitutes a lien of equal dignity to county taxes and assessments that is effective from the date of recordation of this Summary Memorandum of Agreement. The final principal amount of the assessment and payment schedule will be set forth in an addendum to the Financing Agreement to be recorded in the public records of the applicable county upon completion of the installation of the Qualifying Improvements. Except as otherwise provided in the Financing Agreement, the Financing Agreement shall expire upon the final payment or prepayment of the non-ad valorem special assessment.

DESCRIPTION OF ESTIMATED COSTS AND TERMS OF FINANCING

INTEREST RATE: 7.94 % **REPAYMENT TERM:** 20 years

Maximum Annual Assessment* $5,905.01

Ask the program administrator for the current collection fees being charged.

IN WITNESS WHEREOF, the parties hereto have respectively executed this memorandum effective as of the date of the last party to sign.

DocuSign Envelope ID: 68FFC718-955D-4CB8-93ED-FA864CCC1B87

www.YgreneWorks.com

GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT

IMPORTANT SIGNATURE INSTRUCTIONS: PLEASE SIGN YOUR NAME EXACTLY AS DISPLAYED IN THE SIGNATORY FIELDS BELOW, INCLUDING THE TITLE IF APPLICABLE.

IF YOU ARE A TRUSTEE, PLEASE INCLUDE THE TITLE "TRUSTEE" AFTER YOUR SIGNATURE. EXAMPLE: John M. Smith, Trustee

E-SIGNATURE

WET SIGNATURE

SIGNATURE

6/14/17
DATE

Name of Signatory: Richard Hans

Title of Signatory: DISTRICT OFFICER

DISTRICT

NOTARY ACKNOWLEDGEMENT

STATE OF FLORIDA)
)SS
COUNTY OF Broward)

The foregoing instrument was acknowledged before me this 14 day of June, 20 17, by Richard Hans, who is/are personally known to me or who has/have produced as identification.

[SEAL]

JONI D. HAYWORTH
Notary Public - State of Florida
Commission # GG 017533
My Comm. Expires Nov 24, 2020

Joni D. Hayworth
Notary Public, State of Florida

PRINT NAME OF NOTARY

COMMISSION EXPIRES

COMMISSION NUMBER

DocuSign Envelope ID: 68FFC718-955D-4CB8-93ED-FA864CCC1B87

EXHIBIT A

PROPERTY (LEGAL DESCRIPTION)

THE WINDINGS 70-44 B LOT 14 BLK B

EXHIBIT B

INITIAL DESCRIPTION OF QUALIFYING IMPROVEMENTS

____	BOILER	____	CONTROL SYSTEMS	____	ENERGY EFFICIENT WINDOWS & DOORS	____	HVAC	✔	IMPACT WINDOWS & DOORS	____	INSULATION
____	LIGHTING	____	REFLECTIVE COATING	____	ROOFING	____	SOLAR	____	WATER CONSERVATION	____	HURRICANE PROTECTION
____	ENERGY STORAGE	____	OTHER	PLEASE DESCRIBE:							

Instr# 115332694 , Page 1 of 3, Recorded 09/19/2018 at 11:18 AM
Broward County Commission

CLEAN ENERGY GREEN CORRIDOR BY YGRENE

RECORDED AND PREPARED BY AND AFTER RECORDATION RETURN TO:

Ygrene Energy Fund Florida, LLC
3390 Mary Street #124
Miami, FL 33133

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

ADDENDUM TO FINANCING AGREEMENT

This Addendum to the Financing Agreement, dated 08/29/2018, is between the Green Corridor Property Assessment Clean Energy (PACE) District, a public body corporate and politic duly organized and existing under the laws of the State of Florida (the "**District**") and all of the persons or entities identified below as the record owner(s) (the "**Owner**") of the fee title to the real property identified herein.

The District and the Owner entered into an Agreement to Pay Assessments and Finance Qualifying Improvements (the "**Agreement**") dated 06/14/2017 for the purpose of installing on the Property the Qualifying Improvements initially listed in **Exhibit B** to the Financing Agreement (the "**Initial Description of Qualifying Improvements**"). A Summary Memorandum Agreement, summarizing appropriate terms of the Financing Agreement, was recorded in the public records of Broward County on 07/11/2017 in Instrument # 114494626, Pages 1-4.

Owner No. 1:	Anne	Gorman
Owner No. 2:	Oudine	Matthew
Owner No. 3:		
Owner No. 4:		
Trust:		
Legal Entity:		
Project ID No.: FL-336-4YDM4Z	**Folio Number:** 48-41-17-04-0640	
Property Street Address: 10971 NW 38TH CT		
City: CORAL SPRINGS	**State:** FL	**Zip:** 33065

The parties agreed in the Financing Agreement that the Preliminary List of Improvements would be modified and finalized in an Addendum to the Financing Agreement upon completion of the installation of Qualifying Improvements (the "**Final Improvements**") on the Property, and the Property Owner agreed to the imposition by the District of a special non-ad valorem assessment on the Property (the "**Assessment**") in order to repay the costs incurred by the District with respect to financing the installation of the Final Improvements.

The Financing Agreement set forth the maximum principal amount to be financed, the estimated interest rate on the Assessment, the estimated amount payable annually on the Assessment based upon the estimated interest rate, the preliminary list of improvements, and the initial term of the assessment. The parties agreed that all such amounts would be modified and finalized in an Addendum to the Financing Agreement after the cost of the Final Improvements was determined.

Accordingly, the parties hereto are entering into this Addendum, which replaces said Summary Memorandum Agreement and sets forth (a) the Final Improvements in **Exhibit B** hereto and (b) the final amount of the Assessment and the final term of the Assessment in **Exhibit C** hereto.

IN WITNESS WHEREOF, the parties hereto have respectively executed this Addendum effective as of the date of the District's signature.

(SIGNATURE PAGE FOLLOWS)

www.YgreneWorks.com

GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT

Signature of Authorized Person:

Print Name and Title of Authorized Person: District Officer Paul Winkeljohn

Date: 8/30/18

NOTARY ACKNOWLEDGEMENT

STATE OF FLORIDA)
)SS
COUNTY OF)

The foregoing instrument was acknowledged before me this 30th day of August, 20 18, by Paul Winkeljohn, who is/are personally known to me or who has/have produced ..... as identification.

[SEAL]

C. Montalvan
Notary Public, State of Florida

CAROLINA MONTALVAN
State of Florida-Notary Public
Commission # GG 001332
My Commission Expires
June 13, 2020

C. Montalvan
PRINT NAME OF NOTARY

6/13/2020
COMMISSION EXPIRES

COMMISSION NUMBER

EXHIBIT A

PROPERTY (LEGAL DESCRIPTION)

THE WINDINGS 70-44 B LOT 14 BLK B

EXHIBIT B

FINAL DESCRIPTION OF QUALIFYING IMPROVEMENTS

High-Impact Windows, High-Impact Doors

EXHIBIT C

REPAYMENT TERM: .....20..... years

Annual Special Assessment* .....$2,427.21.....

*NOTE: Collection fees may be added to the final assessment amount. These fees vary and are based on changes in the Tax Collector's fees schedules and policies.

Ask the program administrator for the current collection fees being charged.

BROWARD COUNTY **2017 Paid Real Estate** Folio: 34332
Notice of Ad Valorem Tax and Non-Ad Valorem Assessments

484117-04-0640 CL-0040189 2812

GORMAN,ANNE
MATTHEW,OUDINE
10971 NW 38 CT
CORAL SPRINGS, FL 33065-2702

PAYMENTS MUST BE MADE IN US FUNDS AND DRAWN ON US BANK ACCOUNT.

10971 NW 38 CT
THE WINDINGS 70-44 B
LOT 14 BLK B

BROWARD COUNTY GOVERNMENT					
COUNTYWIDE SERVICES	5.46230	291,180	0	291,180	1,590.51
VOTED DEBT	0.20670	291,180	0	291,180	60.19
BROWARD CO SCHOOL BOARD					
GENERAL FUND	4.97400	291,180	0	291,180	1,448.33
CAPITAL OUTLAY	1.50000	291,180	0	291,180	436.77
VOTER APPROVED DEBT LEVY	0.06540	291,180	0	291,180	19.04
SO FLORIDA WATER MANAGEMENT					
EVERGLADES C.P.	0.04410	291,180	0	291,180	12.84
OKEECHOBEE BASIN	0.13840	291,180	0	291,180	40.30
SFWMD DISTRICT	0.12750	291,180	0	291,180	37.13
NORTH BROWARD HOSPITAL	1.24830	291,180	0	291,180	363.48
CHILDREN'S SVCS COUNCIL OF BC	0.48820	291,180	0	291,180	142.15
CITY OF CORAL SPRINGS					
CORAL SPGS OPER	5.87320	291,180	0	291,180	1,710.16
DEBT SERVICE	0.27530	291,180	0	291,180	80.16
FL INLAND NAVIGATION	0.03200	291,180	0	291,180	9.32
	20.43540				$5,950.38

28 CORAL SPRGS FIRE SERV ASSMT		180.00
CRS CORAL SPRINGS SOLID WASTE	@ 248.0000	248.00
S SUNSHINE DRAINAGE 1	@ 235.6000	235.60
		$663.60
		$6,613.98

If Postmarked By Nov 30, 2017
Please Pay $0.00

Paid 11/30/2017 Receipt # EEX-17-00000675 $6,349.42
Paid By CORELOGIC

BROWARD COUNTY **2017 Paid Real Estate** Folio: 34332
Notice of Ad Valorem Tax and Non-Ad Valorem Assessments
Paid 11/30/2017 Receipt # EEX-17-00000675 $6,349.42
Paid By CORELOGIC

PAY YOUR TAXES ONLINE AT:
broward.county-taxes.com

BROWARD COUNTY TAX COLLECTOR
GOVERNMENTAL CENTER ANNEX
115 S. ANDREWS AVENUE, ROOM # A100
FORT LAUDERDALE, FL 33301-1895

484117-04-0640

If Postmarked By Please Pay
Nov 30, 2017 $0.00

Return with Payment

PAYMENTS MUST BE MADE IN US FUNDS AND DRAWN ON US BANK ACCOUNT

GORMAN,ANNE
MATTHEW,OUDINE
10971 NW 38 CT
CORAL SPRINGS, FL 33065-2702

BROWARD COUNTY **2018 Paid Real Estate** Folio: 34332
Notice of Ad Valorem Tax and Non-Ad Valorem Assessments

484117-04-0640 CL-0031455 2812

GORMAN,ANNE
MATTHEW,OUDINE
10971 NW 38 CT
CORAL SPRINGS, FL 33065-2702

PAYMENTS MUST BE MADE IN US FUNDS AND DRAWN ON US BANK ACCOUNT.

10971 NW 38 CT
THE WINDINGS 70-44 B
LOT 14 BLK B

Paid 11/27/2018 Receipt # EEX-18-00000499 $9,442.45
Paid By CORELOGIC

BROWARD COUNTY GOVERNMENT					
COUNTYWIDE SERVICES	5.47920	320,290	0	320,290	1,754.93
VOTED DEBT	0.18980	320,290	0	320,290	60.79
BROWARD CO SCHOOL BOARD					
GENERAL FUND	4.77500	339,440	0	339,440	1,620.82
CAPITAL OUTLAY	1.50000	339,440	0	339,440	509.16
VOTER APPROVED DEBT LEVY	0.12790	339,440	0	339,440	43.41
SO FLORIDA WATER MANAGEMENT					
EVERGLADES C.P.	0.04170	320,290	0	320,290	13.36
OKEECHOBEE BASIN	0.13100	320,290	0	320,290	41.96
SFWMD DISTRICT	0.12090	320,290	0	320,290	38.72
NORTH BROWARD HOSPITAL	1.08550	320,290	0	320,290	347.67
CHILDREN'S SVCS COUNCIL OF BC	0.48820	320,290	0	320,290	156.37
CITY OF CORAL SPRINGS					
CORAL SPGS OPER	5.87320	320,290	0	320,290	1,881.13
DEBT SERVICE	0.26520	320,290	0	320,290	84.94
FL INLAND NAVIGATION	0.03200	320,290	0	320,290	10.25
	20.10960				$6,563.51

28 CORAL SPRGS FIRE SERV ASSMT		200.00
CRS CORAL SPRINGS SOLID WASTE	@ 260.0000	260.00
GRC PACE GREEN CORRIDOR		2,466.92
S SUNSHINE DRAINAGE 1	@ 242.6700	242.67
		$3,169.59
		$9,733.10

If Postmarked By Nov 30, 2018
Please Pay $0.00

BROWARD COUNTY **2018 Paid Real Estate** Folio: 34332
Notice of Ad Valorem Tax and Non-Ad Valorem Assessments
Paid 11/27/2018 Receipt # EEX-18-00000499 $9,442.45
Paid By CORELOGIC

PAY YOUR TAXES ONLINE AT:
broward.county-taxes.com

BROWARD COUNTY TAX COLLECTOR
GOVERNMENTAL CENTER ANNEX
115 S. ANDREWS AVENUE, ROOM # A100
FORT LAUDERDALE, FL 33301-1895

484117-04-0640

If Postmarked By	Please Pay
Nov 30, 2018	$0.00

Return with Payment

PAYMENTS MUST BE MADE IN US FUNDS AND DRAWN ON US BANK ACCOUNT

GORMAN,ANNE
MATTHEW,OUDINE
10971 NW 38 CT
CORAL SPRINGS, FL 33065-2702

Instr# 115554323 , Page 1 of 3, Recorded 01/15/2019 at 07:41 AM
Broward County Commission

CLEAN ENERGY GREEN CORRIDOR

RECORDED AND PREPARED BY AND AFTER RECORDATION RETURN TO:

Ygrene Energy Fund Florida, LLC
7200 Corporate Center Drive, Suite 510
Miami, FL 33126

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

TERMINATION OF FINANCING AGREEMENT

The Green Corridor Property Assessment Clean Energy (PACE) District, a public body corporate and politic duly organized and existing under the laws of the State of Florida (the "District"), and all of the persons or entities identified below as the record owner(s) (the "Property Owner") of the fee title to the real property identified herein entered into an Agreement to Pay Assessments and Finance Qualifying Improvements (the "Agreement") dated .....10/12/2018..... for the purpose of financing the installation of certain Qualifying Improvements on the Property. In the Financing Agreement, the parties agreed that a non-ad valorem special assessment ("Assessment") shall be collected by the District to repay the cost for funding the improvements. A Summary Memorandum of Agreement, summarizing appropriate terms of the Financing Agreement, was recorded in the public records of .....Broward..... County on .....11/21/2018..... in .....Instrument..... # .....115458790....., Pages .....1-4.....

Owner No. 1:

Owner No. 2:

Owner No. 3:

Owner No. 4:

Trust:

Legal Entity: GOD'S SHELTER MISSIONARY CHURCH, INC.

Project ID No.: FL-433-MTVDDY	**Folio Number:** 51-42-16-01-1170

Property Street Address: 814 S DIXIE HWY

City: HOLLYWOOD	**State:** FL	**Zip:** 33020

The Financing Agreement is being terminated hereby dated .....11/30/2018..... with the mutual agreement of the parties thereto. Accordingly, by its execution hereof, the District hereby releases, relinquishes and discharges its interest in said Financing Agreement, Addendum and Assessment.

(SIGNATURE PAGE FOLLOWS)

www.YgreneWorks.com

GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY (PACE) DISTRICT

Signature of Authorized Person:

Print Name and Title of Authorized Person: Paul Winkeljohn

Date: 12/3/18

NOTARY ACKNOWLEDGEMENT

STATE OF FLORIDA)
)SS
COUNTY OF Broward)

The foregoing instrument was acknowledged before me this 3 day of Dec 20 18 by Paul Winkeljohn, who is/are personally known to me or who has/have produced ..... as identification.

[SEAL]

JONI D. HAYWORTH
Notary Public - State of Florida
Commission # GG 017533
My Comm. Expires Nov 24, 2020

Joni D Hayworth
Notary Public, State of Florida

PRINT NAME OF NOTARY

COMMISSION EXPIRES

COMMISSION NUMBER

EXHIBIT A:

LEGAL DESCRIPTION

HOLLYWOOD LITTLE RANCHES 1-26 B LOT 3 BLK M

Back to Speaker Topics

PACE

Property Assessed Clean Energy

WHAT IS PACE?

Property Assessed Clean Energy (PACE) is a financing mechanism that enables low-cost, long-term funding for energy efficiency, renewable energy and water conservation projects. PACE financing is repaid as an assessment on the property's regular tax bill, and is processed the same way as other local public benefit assessments (sidewalks, sewers) have been for decades. Depending on local legislation, PACE can be used for commercial, nonprofit and residential properties.

HOW DOES IT WORK?

PACE is a national initiative, but programs are established locally and tailored to meet regional market needs. State legislation is passed that authorizes municipalities to establish PACE programs, and local governments have developed a variety of program models that have been successfully implemented. Regardless of model, there are several keystones that hold true for every PACE program.

- PACE is voluntary for all parties involved.
- PACE can cover 100% of a project's hard and soft costs.
- Long financing terms up to 20 years.
- Can be combined with utility, local and federal incentive programs.
- Energy projects are permanently affixed to a property.
- The PACE assessment is filed with the local municipality as a lien on the property.

WHY IS IT SO POPULAR?

Property owners love PACE because they can fund projects with no out-of-pocket costs. Since PACE financing terms extend to 20 years, it's possible to undertake deep, comprehensive retrofits that have meaningful energy savings and a significant impact on the bottom line. The annual energy savings for a PACE project usually exceeds the annual assessment payment, so property owners are cash flow positive immediately. That means there are increased dollars that can be spent on other capital projects, budgetary expenses, or business expansion.

Local governments love PACE because it's an Economic Development initiative that lowers the cost of doing business in their community. It encourages new business owners to invest in the area, and creates jobs using the local workforce. PACE projects also have a positive impact of air quality, creating healthier, more livable neighborhoods.

HOW CAN I GET PACE?

www.PACENation.us has all the tools and resources you need to get started with PACE. Check to see if your state has passed a PACE statute, and if your area has an active program. If not, contact us to find out if there is a local initiative in development and we may be able to put you in touch with a working coalition. We look forward to hearing from you!

BENEFITS OF PACE

WORKFORCE DEVELOPMENT:
Creates local jobs

ECONOMIC DEVELOPMENT:
Lowers cost of doing business

BUILDING STOCK:
Maintained and upgraded

BOTTOM LINE:
Directly impacts local businesses

HEALTHY AIR:
Environmental impact

PACENation
Building the clean energy economy

PACENation is the national, nonprofit advocate for PACE financing. We provide leadership, data, support and resources for the growing marketplace.

www.pacenation.us
info@pacenow.org

Back to Speaker Topics

Fund Assembly

Insuring Leases: Valuation, Endorsements, and Other Consideration

Jacqueline Marzan, *Associate Underwriting Manager, Commercial Services, The Fund*

Mishele Schutz, *Senior Underwriting Counsel, Commercial Services, The Fund*

Back to Speaker Topics

Speaker Information

Insuring Leases: Valuation, Endorsements, and Other Considerations

Jacqueline Marzan

Associate Underwriting Manager, Commercial Services, The Fund

Jacqueline Marzan is an Associate Underwriting Manager, Commercial Services with Attorneys' Title Fund Services, LLC. Ms. Marzan is responsible for the management and support of complex commercial transactions as necessary to meet the needs of Fund Members. Prior to joining The Fund, Ms. Marzan practiced law in the areas of finance and real estate, having worked on numerous commercial transactions throughout Florida. In addition, Ms. Marzan has substantial multi-jurisdictional experience gained while with a prestigious national law firm and has also advised numerous community associations as general in-house counsel. Ms. Marzan is an active member of several committees of the Real Property and Probate Law Section of The Florida Bar. A graduate of St. John's University and St. John's University School of Law, Ms. Marzan is fluent in Spanish and is licensed to practice law in the States of New York and Florida.

Mishele Schutz

Senior Underwriting Counsel, Commercial Services, The Fund

Mishele Schutz is a Senior Commercial Services Underwriting Counsel at The Fund. She has engaged in the practice of law in Florida for more than thirty years. She graduated from the University of Massachusetts-Amherst with a Bachelor of Science in Legal Studies, and received her law degree from the Antioch School of Law in Washington, DC.

Prior to joining The Fund, Ms. Schutz owned and managed her own title insurance agency where she conducted closings and provided title agency services for commercial, residential, and utility power line easement transactions throughout Florida. She is experienced in issues involving commercial real estate, bankruptcy, 1031 exchanges, and lien resolution.

Fund Assembly

Insuring Leases

Jacqueline Marzan

Associate Underwriting Manager and Sr. Underwriting Counsel, Commercial Services

Mishele Schutz

Sr. Underwriting Counsel, Commercial Services

Takeaway Goals

- Necessity for a policy with leasehold endorsement because a lease is the purchase of an interest in real estate.
- Leasehold endorsement coverage for all leases.

Takeaway Goals

- Estimating potential future damages to determine amount of policy.
- The Fund will accept reasonable estimates of future damages for purposes of determining the amount of coverage of leasehold coverage to purchase.
- Evaluating the commitment and closing the lease transaction.

Florida Law on Leasehold Estates

"During the life of a lease, the lessee holds an outstanding leasehold estate in the premises, which for all practical purposes is equivalent to absolute ownership. The estate of the lessor during such time is limited to his reversionary interest, which ripens into perfect title at the expiration of the lease."

Trump Enterprises, Inc. v. Publix Supermarkets, Inc., 682 So. 2d 168, 169 (Fla. 4th DCA 1996), citing headnote in *Rogers v. Martin*, 87 Fla. 204, 99 So. 551 (1924).

Mortgaging Leaseholds

"The Supreme Court of Florida has specifically recognized the mortgaging or pledging of leasehold interests in realty." *Oliver v. Mercaldi*, 102 So.2d 665, 667 (1958).

Property Interests In Leases: Good and Fixtures

Florida Uniform Commercial Code Chapter 680:

"Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures

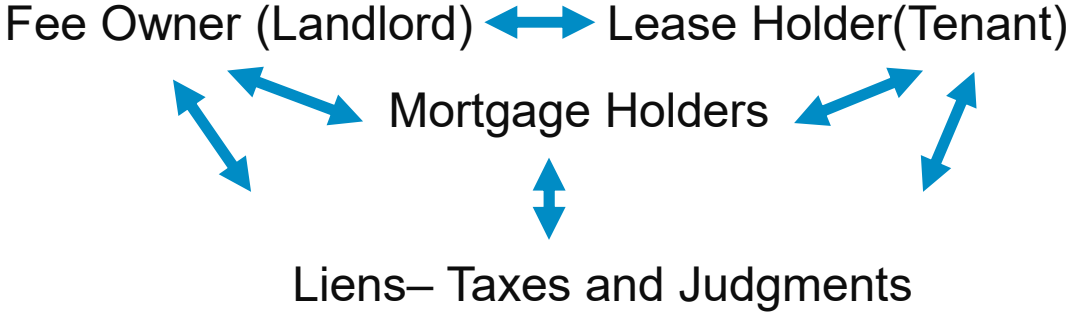
(Sec. 680.309, F.S.) . . ." Sec. 680.1031, F.S.,

-and-

"Goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law." Sec. 680.309, F.S.

Parties in Interest

Parties in Interest to the Leasehold Estate



The Fee Holder – Landlord

Lease clauses that limit tenant's rights:

- Limit the right to mortgage the leasehold.
- Remove improvements upon the termination.
- Automatically subordinates the lease to all future lenders of the landlord.
- Subject the lease to Declarations of Conditions, Covenants, and Restrictions (CCRs).
- Prohibit assignments and subleases.
- Impact tenant's rights if evicted.

The Landlord's Mortgage Holder

- Mortgages on the fee.
- Recorded before the lease: priority.
- Recorded after the lease: subordinate.
- Automatic subordination of lease to future mortgages.
- The Subordination, Non-Disturbance, and Attornment Agreement – the "SNDA."

Liens Against Landlord

- Judgment liens.
- Unpaid property taxes.
- Tax liens – IRS and state.
- Municipal liens, development orders, environmental liens.

Liens Against Tenant

- Judgment liens.
- Commercial landlord's lien for unpaid rent – Sec. 83.08, F.S.
- Unpaid property taxes.
- Tax liens – IRS and state.
- Municipal liens and environmental liens.
- Subordination of leasehold collateral.

Need for Title Policy with Leasehold Endorsement

- Risks of entering leasehold are the same as purchasing any real estate in fee simple.
- The commitment gives you the roadmap of the prior recorded interests.
- The policy with Leasehold Endorsement provides insurance coverage for the leasehold owner and the leasehold lender.
- Potential damages dictate need for the title insurance
- Available for all leases- residential, commercial, vacant land, ground leases, cooperatives (co-op).

The Leasehold Endorsement

- History of the product pre-2001 “Leasehold Policy.”
- Present:
  - ALTA 13-06: Owner’s Policy with Leasehold Endorsement.
  - ALTA 13.1-06: Lender’s Policy with Leasehold Endorsement.

The Jacket Coverage

- Same jacket coverage as the owner’s and lender’s policy – same jacket.
- Same ten covered risks in any policy.
- Same five exclusions in any policy.
- The ALTA owner’s jacket defines “Land” as an interest that by law constitutes real property.
- The Leasehold Endorsement adds provisions to apply the standard owner’s and lender’s policies to leaseholds.

The Leasehold Endorsements – "Eviction"

- Definition of "Evicted" or "Eviction."
- "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case as a result of a matter covered by this policy.

The Leasehold Endorsements – "Claims"

- Paragraph 2: The value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction.

Plus, Without Duplication:

- Paragraph 3: Specific Items of Loss Lists Seven Specific Types of Damages that are Recoverable in Subparagraphs (a), (b), (c), (d), (e), (f), and (g).

The Leasehold Endorsements – "Claims"

- **Endorsement Paragraph 3 (a):**

The reasonable cost of (i) removing and relocating any Personal Property that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction, (ii) transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, (iii) repairing the Personal Property damaged by reason of the removal and relocation, and (iv) restoring the Land to the extent damaged as a result of the removal and relocation of the Personal Property and required of the Insured solely because of the Eviction.

The Leasehold Endorsements – "Claims"

- **Endorsement Paragraph 3 (b):**

Rent or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.

The Leasehold Endorsements – "Claims"

- **Endorsement Paragraph 3 (c):**

The amount of rent that, by the terms of the Lease, the Insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the Insured has been Evicted.

The Leasehold Endorsements – "Claims"

- **Endorsement Paragraph 3 (d):**

The fair market value, at the time of the Eviction, of the estate or interest of the Insured in any lease or sublease permitted by the Lease and made by the Insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

The Leasehold Endorsements – "Claims"

- **Endorsement Paragraph 3 (e):**

Damages caused by the Eviction that the Insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease permitted by the Lease and made by the Insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

The Leasehold Endorsements – "Claims"

- **Endorsement Paragraph 3 (f):**

The reasonable cost to obtain land use, zoning, building and occupancy permits, architectural and engineering services and environmental testing and reviews for a replacement leasehold reasonably equivalent to the Leasehold Estate.

The Leasehold Endorsements – "Claims"

- **Endorsement Paragraph 3 (g):**

If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the Insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering services, construction management services, environmental testing and reviews, and landscaping.

The Leasehold Endorsements – "Claims"

Remember:

The losses covered are capped by the coverage amount.

Valuing the Leasehold

- Valuing the leasehold.
- Locating comparable space.
- Remaining term of lease.
- Relocating improvements.
- Replacing improvements.

Valuing the Leasehold

"It may not be an easy task to definitely determine the amount of insurance, but The Fund does not question any reasonable estimate." TN 19.03.03.

Valuing the Leasehold

Valuation of leasehold – definition:

"The value of the leasehold estate is the difference between the fair market rental value for the remainder of the lease term and the amount to be paid under the lease for the same period." TN 19.03.03.

Valuing the Leasehold

- Cost of removing and relocating personal property.

Valuing the Leasehold

- Cost to secure replacement leaseholds; real estate commissions, expenses.

Sample Estimation of Value

- 5 year lease.
- $100,000 annual rent CPI escalators.
- $150,000 in tenant improvements.
- What is coverage amount?

Sample Estimation of Value

- First estimate: value of the remaining lease term:
- The tenant estimates that replacing the space will cost an additional $10,000.00 per year over CPI escalators.
- 5 years @ $10,000.00 per year =$50,000 for rising rental rates in excess of CPI.

Sample Estimation of Value

- Second estimate: tenant improvements.
- $150,000 tenant improvements – cost to replace or move - $150,000.00.

Sample Estimation of Value

Additional costs:

- Realtor fees/permits/licenses/relocation costs.

Sample Estimation of Value

- $50,000 (Increase in market value of rent over life of lease).
- $150,000.00 (Purchasing or moving tenant improvements).
- $100,000.00 (Realtor, licensing and permitting fees).
- $50,000 (Unidentified recoverable damage).
- $350,000.00 Coverage.

The Commitment

- Commitment is a standard:
  - Owner's commitment.
  - Lender's commitment.

The Commitment - Requirements

- Execution and Recordation of a Lease, Memorandum of Lease, or Assignment of Lease.
- Lease must have description of land.
- Persons signing for Landlord and Lessor must have authority.
- If for more than one year, Lease must have two witnesses (See *Skylake* Case, 23 So.3d 175 (Fla. 3rd DCA 2009)).
- Notices of Commencement.
- Estoppel letters, Satisfactions of Prior Mortgages, Affidavits of No Lien, Co-op Transfer Documents.

The Commitment - Requirements

Exceptions

- Plat.
- Rights of Fee Simple Owner and Prior Mortgages.
- Conditions, Covenants, Restrictions.
- Other leases.
- Terms and Conditions of the Lease.
- Mortgages.
- SNDAs.
- Taxes – Personal and Real Estate.
- Easements.
- Survey issues.
- Tax Liens.
- Judgments.
- NOCs.

The Commitment - Exceptions

- CCRs – Use Restrictions?
- Other Leases – Protected Territories or Types of Businesses?
- Prior mortgages – Does Tenant need an SNDA?
- Access?

The Commitment – Cover Letter and Schedule A

- Cover letter refers to federal tax lien search when insuring a leasehold:

  When the interest you are insuring is a personal property interest (such as a mortgage, a leasehold or cooperative interest), a federal tax lien search of the Secretary of State's records may be required. See Fund Title Note 30.02.08.

- Proposed Insured:

  The estate or interest in the Land described or referred to in this Commitment is **LEASEHOLD** (Identify estate covered, i.e., fee, leasehold, etc.).

The Commitment - Requirements

Instrument to be insured: Lease

4. Documents satisfactory to the Company that convey the Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.

A. Execution, delivery, and recording of assignment of lease from ABC, Inc., a North Carolina corporation in favor of the proposed insured lessee(s) of the existing lease evidenced by Memorandum of Lease recorded in O.R. Book 2532, Page 1799, as affected by Assignment and Assumption of Lease recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida, with respect to the subject property together with consent to assignment from the lessor or ground lease lessee.

The Commitment - Requirements

Instrument to be insured: Leasehold Mortgage

4. Documents satisfactory to the Company that convey the Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.

B. Leasehold Mortgage from ABC Edges Partners, LLC, a Delaware limited liability company to the proposed insured mortgagee(s).

The Commitment - Requirements

Recordation of any necessary extensions by exercise of options on lease:

6. Record evidence that the term of that certain lease evidenced by the Memorandum of Lease recorded in O.R. Book 2532, Page 1799, as affected by Assignment and Assumption of Lease recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida, has been extended by exercise of extension options pursuant to the Lease.

The Commitment - Requirements

Recordation of affidavit that lease is current:

7. Affidavit, contemporaneous with the transaction to be insured, from the lessor and the lessee to the effect that: (i) there are no unrecorded amendments, modifications, or transfers affecting the lease; and (ii) there has been no breach of any covenants, conditions, stipulations or other provisions of the lease on either side thereof and that said lease is in full force and effect.

The Commitment - Requirements

Required endorsements for leasehold endorsements:

21. FOR INFORMATIONAL PURPOSES ONLY: The following endorsements will be issued with the loan policy upon compliance with all underwriting requirements: Leasehold – Owners ALTA 13 -06.

22. FOR INFORMATIONAL PURPOSES ONLY: The following endorsements will be issued with the loan policy upon compliance with all underwriting requirements: Leasehold – Loan ALTA 13.1 -06.

The Commitment - Exceptions

Terms and Conditions of the lease are excepted from coverage:

5. Terms and conditions contained on unrecorded Lease from Food Brothers Limited Partnership, a Florida limited partnership, and Healthy Foods, Inc., a Florida corporation, as evidenced by Memorandum of Lease recorded in O.R. Book 2882, Page 1799, as affected by Assignment and Assumption of Lease from Fast Food of America, LLC, a Delaware limited liability company, successor by conversion to Fast Food of America, Inc., a Delaware corporation, successor by merger to Poco, Inc., a Florida corporation, successor by merger to New Food, Inc., a Florida corporation, successor by merger to Way Good Foods Inc., a Florida corporation in favor of ABC, Inc., a North Carolina corporation recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida.

The Commitment - Exceptions

Interest of fee simple holder and disclaimer on search of tenant's name of recorded lease:

8. Interest of fee simple owner and any encumbrances affecting the fee simple as follows: Warranty Deed in favor of Busy Realty Corporation Inc. recorded in O.R. Book 7256, Page 2265, Public Records of Volusia County, Florida.

10. Unless affirmatively indicated to the contrary, no search was made of the tenant's name as disclosed in a recorded lease or memorandum of lease included as an exception herein.

Review of Takeaway Goals

- Necessity for a policy with leasehold endorsement because a lease is the purchase of an interest in real estate.
- Leasehold endorsement coverage for all leases.

Review of Takeaway Goals

- Estimating potential future damages to determine amount of policy.
- The Fund will accept reasonable estimates of future damages for purposes of determining the amount of leasehold coverage to purchase.
- Evaluating the commitment and closing the lease transaction.

FA
Thank You!
for attending

PRACTICAL TIPS AND CONSIDERATIONS IN INSURING LEASEHOLDS

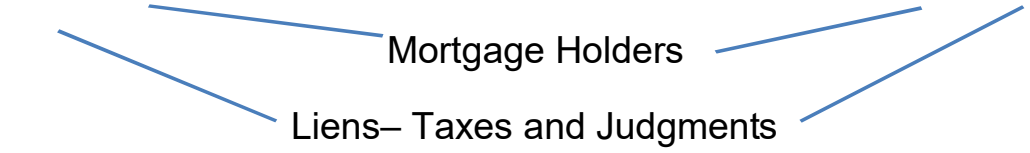
1. Property interests in leases: Goods and Fixtures

Practical Tip: To analyze potential future damages to the tenant in the event of the failure of title to the leasehold, one component of this analysis is to analyze the tenant's property that can be removed if there is an eviction and the tenant makes a claim under the leasehold endorsement. This relates to the tenant's property that stays with the real estate or that otherwise is rendered valueless by the loss of the lease, and the property that the tenant can remove and relocate. The tenant's right to remove property is often controlled by express terms of the lease. Some leases, for example, provide that certain types of improvements become the property of the landlord. In the event of an eviction and a claim on the title policy, the terms of the lease may not control, but instead, Florida law of fixtures may apply to deem the tenant's moveable goods to be fixtures of the real estate and not removeable.

This analysis comes into play when the potential damages to a tenant are estimated under the leasehold endorsement in order to determine the proper amount of coverage for the owner's and lender's policies with the leasehold endorsements.

Practical Tip: Attorneys should recognize that this is perhaps the most significant reason a leasehold interest should be insured by a tenant given that the prevention of use of lease space may cost a tenant more than the mere loss of the space for the lease term.

2. Parties in Interest to the Leasehold Estate: Identifying the type of Lease and the Parties in Interest



Practical Tip: It is important to immediately identify the parties in interest to the lease. Examining a Leasehold estate involves all six of these classes of parties, whether they exist, and how their interests interact with one another and impact the leasehold. In addition, consider that as to the parties listed above, a leasehold interest can be a direct lease with the fee simple owner, a ground lessor, or an assignment of a lease.

3. The Fee Holder: The Landlord

Practical Tip: Consider whether you will have the ability to negotiate non-standard terms with large retail stores that occupy vast amounts of square footage and often serve as anchors in shopping centers, so called “big box” tenants, which will likely force attorneys to review and comment on the form “big box” leases that are routinely used by those companies irrespective of State; therefore, it is important to consider whether the form is compliant with Florida law or addresses your client’s concerns should there be a dispute.

4. The Landlord’s Mortgage Holders

Practical Tip: In evaluating mortgages on the fees, and the SNDAs, in analyzing a commitment for a leasehold endorsement, we offer practical tips in reviewing the transaction:

Consider the following questions:

- Who is in the priority position, the lease or the mortgage?

- Is there an SNDA?
- Is there an automatic subordination clause for future lenders?

Many leases provide that the lease is not only subordinate to the current lender, but if the fee holder obtains a new mortgage in the future, the lease automatically becomes subordinated to the new lender without the consent, or even the knowledge, of the tenant. In your materials we have included some sample automatic subordination clauses. For these clauses to be effective, we look at the following elements:

- Does the SNDA survive future assignments of the mortgage?
- Does the SNDA survive future refinancings? That is, if there is a good SNDA that protects the leasehold, can the fee holder eliminate those rights by simply refinancing the property, and thereby automatically subordinate the lease to the new mortgage without the protection of an SNDA? We are looking to see if the SNDA protects the lease in the event of future assignments or refinancing of the fee. A practical tip here is to consider taking a holistic or whole-picture analysis of SNDAs or automatic subordination clauses such as the language itself and the definitions used as contemplating future or post-lease financings. In addition, we consider facts relating to the tenancy itself: is it a “big box” deep pocket tenant, is there a significant lease term remaining, including possible options to extend, and if not a “big box” tenant then is this tenant otherwise of no concern to landlord, that is, not apt to be disruptive or problematic and also has a shorter lease term.

5. Lease Holder, Leasehold Mortgages, Leasehold Liens

Practical tip: Consider that some leases permit the lessor to gain a security interest and file a UCC in connection with the collateral that may not initially have been paid with a leasehold mortgage but may later, such as by way of improvement or expansion, be so financed. In this case, a practitioner will want to be sure that the lease does not contain such rights given future improvements may require financing. These issues should be considered at the inception of the lease in order to avoid the need to negotiate with landlord after the execution of initial lease. As an example, a restaurant purchases a built-in ice machine with a leasehold mortgage, and the landlord subordinates any

landlord's lien claims to the leasehold mortgage. Later, the tenant trades that ice machine in for a new one, and obtains a future advance from the secured lender. Make sure that the subordination clauses in the lease protect that type of future advance, or alternatively, decide whether there is a need to obtain a new subordination agreement from the landlord for later loans.

6. Valuing the Leasehold

To apply the language of the commitment to a specific lease, we look to at least five elements: valuing the leasehold, the cost of locating and leasing comparable space, the amount of time remaining on the lease, relocating personal property and improvements, and replacing improvements that cannot be relocated.

Practical Tip: Consider having an appraisal performed to assist you in determining amount of insurance coverage. There are appraisers who specialize in these types of appraisals, which may make sense for long-term leases in developing areas where market is not entirely predictable because there are no reasonable comparables or "comps."

Practical tip: Execute the memorandums of lease, as well as assignments of lease, in the manner as you would a deed. This prevents future required corrective documents from having to be obtained in order to insure.

7. The Need for the Commitment and Coverage

Practical tip: The risks of entering a lease are the same as purchasing any real estate in fee simple. The commitment for the owner's and lender's policy with the leasehold endorsement provides a roadmap of the prior recorded interests and exceptions to the leasehold title. In the event of the failure of the title to the fee, and any resulting failure of title to the leasehold, the owner's policy and the lender's policy with the Leasehold Endorsement provides insurance coverage for the Leasehold Owner and the Leasehold Lender. Where the leasehold endorsement diverges with a standard owner's policy is primarily in the

calculation of damages. The potential damages, such as relocating to a new space, moving personal property, and losing the value of tenant improvements, are addressed by the title policies with the Leasehold Endorsement. Importantly, while a title policy with the leasehold endorsement is often associated only for long-term leases such as big box stores, coverage is available for all leases- residential, commercial, vacant land, ground leases, co-ops- all leases.

The question to ask when considering whether to order a title policy with leasehold endorsement is this: In any lease, if the title to the lease fails, will the tenant sustain damages if the tenant has to move to new space? Is there a chance that the tenant's use will be restricted even if the tenant is still responsible for the rent? If the answer to either of these questions is yes, then an owner's policy with the leasehold endorsement is important to consider for the protection of both the tenant and the tenant's lender.

8. The Leasehold Endorsement: Coverage

Practical tip: The endorsement itemizes the actual coverage in the event of a covered eviction, including relocating personal property, the fair market value of the lease, loss of the tenant's leasehold improvements, the reasonable cost to obtain permits, engineering, and other expenses of relocating as defined in the Endorsement. The amount of coverage caps the amounts that can be claimed under the lease.

9. Evaluating the Commitment

For leases, the evaluation of the exceptions may be slightly different than evaluating exceptions for fee policies.

Practical tip: Review all of the instruments in order to determine if they align with tenant's intended use or possible intended use, as a practical matter. An example of this is where a salon tenant may want to supplement its services potentially with tanning services or selling costume jewelry, which not an immediate use but is a foreseeable one.

Though not an insurance matter, this analysis will assist your client in determining contemplated uses at lease negotiation.

10. Closing the Lease Transaction

Practical tip: The lease has to be entered by persons with authority, entities must be in good standing, the lease must describe the property and there has to be a recording, either the full lease or a memorandum. A lease for more than one year requires two witnesses.

ATTORNEYS' TITLE FUND SERVICES, LLC

211 E. Main Street, Suite 300
Lakeland, FL 33801
(863)583-9195
(407)241-8673

Law Firm Member, P.A.
600 Main Street,
Delray, FL 34401

Date: January 4, 2019
Fund File Number: xxxxxx
County: Volusia
Reference: #130

Dear Fund Member:

We have examined title to the property described in Schedule A attached and prepared these schedules to be used exclusively for the purpose of issuing a commitment or policy of title insurance underwritten by Old Republic National Title Insurance Company.

Please review the schedules before signing and inserting in an ALTA 2016 Commitment (CF6R) jacket. Subject to your agency authorization, you must:

A. Add additional requirements and/or exceptions to Schedule B that you find necessary from your analysis of the present transactions.

B. Evaluate Schedule A and B and issue endorsements as may be appropriate, deleting or modifying the Schedules.

C. Obtain an ALTA 2016 Commitment (CF6R) jacket, which must be included with Schedules A & B of the ALTA 2016 Commitment.

DoubleTime users must be on version 7.0.6 or later to obtain CF6R jackets electronically. You may upgrade for free by going to www.thefund.com/dt.

Non DoubleTime users can obtain and track ALTA 2016 Commitment (CF6R) jackets by using ePolicyManager. You may also download and print the CF6R jacket by clicking here.

Our examination of title reflects only those matters recorded in the Official Records Books. You are responsible for such other off-record examinations and checks as you may find necessary pursuant to underwriting procedures. When the interest you are insuring is a personal property interest (such as a mortgage, a leasehold or cooperative interest), a federal tax lien search of the Secretary of State's records may be required. See Fund Title Note 30.02.08.

Where the amount of insurance is $3 million or under, a 20-year judgment and lien search was not performed on the proposed insured purchaser if a mortgage is not associated with the purchase or if the mortgage appears to be 100% purchase money in nature.

The Fund appreciates this opportunity to be of service. Please contact us if you have any questions.

Sincerely,

Attorneys' Title Fund Services, LLC
(Examiner's Name)
(800) 282-3830 x (Examiner's Phone Extension), (Examiner's Email)@TheFund.com

Reference to Federal tax lien search when insuring a leasehold.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

AMERICAN LAND TITLE ASSOCIATION
COMMITMENT

Schedule A

Transaction Identification Data for reference only:

Commitment Number:	**Revision Number:**	**Issuing Office File Number:**	**Issuing Office:**
000-xxx-000	None	#xxx	xxx
Property Address:	**Loan ID Number:**	**ALTA Universal ID:**	**Issuing Agent:**
Blank Address City, FL 00000		None	Law Firm Member, P.A.

1. Commitment Date: **December 28, 2018 at 11:00 PM**

2. Policy to be Issued: Proposed Policy Amount:

   OWNER'S: **ALTA Owner's Policy (06/17/06). (With Florida Modifications)** **$3,000,00.00**

   Proposed Insured: **ABC Edges Partners, LLC, a Delaware limited liability company**

   MORTGAGEE: **ALTA Loan Policy (06/17/06). (With Florida Modifications)** **$1,000,000.00**

   Proposed Insured: **National Bank, National Association, as Administrative Agent, its successors and/or assigns, as their interest may appear**

   MORTGAGEE:

   Proposed Insured:

Identification of the interest to be insured

3. The estate or interest in the Land described or referred to in this Commitment is **LEASEHOLD** (Identify estate covered, i.e., fee, leasehold, etc.)

4. Title to the estate or interest in the Land is at the Commitment Date vested in:
   ABC, Inc., a North Carolina corporation

5. The Land is described as follows:
   See Exhibit A

Old Republic National Title Insurance Company
400 Second Avenue South, Minneapolis, Minnesota 55401, (612) 371-1111

_____

AUTHORIZED SIGNATORY
Law Firm Member, P.A.

This page is only a part of a 2016 ALTA Commitment for Title Insurance. This Commitment is not valid without the Notice; the Commitment to Issue Policy; the Commitment Conditions; Schedule A; Schedule B, Part I – Requirements; and Schedule B, Part II – Exceptions.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

AMERICAN LAND TITLE ASSOCIATION
COMMITMENT

Schedule B-I

Issuing Office File Number: TB #130

Requirements

All of the following Requirements must be met:

1. The Proposed Insured must notify the Company in writing of the name of any party not referred to in this Commitment who will obtain an interest in the Land or who will make a loan on the Land. The Company may then make additional Requirements or Exceptions.

2. Pay the agreed amount for the estate or interest to be insured.

3. Pay the premiums, fees, and charges for the Policy to the Company.

4. Documents satisfactory to the Company that convey the Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.

Assignment Consent

Instrument to be insured

A. Execution, delivery, and recording of assignment of lease from ABC, Inc., a North Carolina corporation in favor of the proposed insured lessee(s) of the existing lease evidenced by Memorandum of Lease recorded in O.R. Book 2532, Page 1799, as affected by Assignment and Assumption of Lease recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida, with respect to the subject property together with consent to assignment from the lessor or ground lease lessee.

Leasehold Mortgage to be insured

B. Leasehold Mortgage from ABC Edges Partners, LLC, a Delaware limited liability company to the proposed insured mortgagee(s).

Written consent must be obtained and recorded with respect to the assignment of lease to the proposed insured, per Section 3 of Assignment and Assumption of Lease recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida.

Recordation of necessary option

6. Record evidence that the term of that certain lease evidenced by the Memorandum of Lease recorded in O.R. Book 2532, Page 1799, as affected by Assignment and Assumption of Lease recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida, has been extended by exercise of extension options pursuant to the Lease.

Affidavit, contemporaneous with the transaction to be insured, from the lessor and the lessee to the effect that: (i) there are no unrecorded amendments, modifications, or transfers affecting the lease; and (ii) there has been no breach of any covenants, conditions, stipulations or other provisions of the lease on either side thereof and that said lease is in full force and effect.

Affidavit requirement

8. Satisfactory evidence must be furnished establishing that ABC, Inc., a North Carolina corporation is duly organized, valid existing, and in good standing under the laws of North Carolina (at date of acquisition of the interest or lien on the insured property and at the present time, or at date of purchase and at date of sale). If there is no governmental agency in charge of business entity records from which a certificate of good standing can be obtained, then an attorney or notary public in th state or country of origin, who has examined the appropriate business entity records, can provide the certificate.

9. In addition to the requirements set forth for Florida entities, compliance with any requirements necessitated by the laws of the foreign jurisdiction with regard to the specific entity involved in the transaction to be insured must be confirmed.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

AMERICAN LAND TITLE ASSOCIATION
COMMITMENT

Schedule B-I

Issuing Office File Number: TB #130

10. Record corporate resolution of the Board of Directors of ABC, Inc., a North Carolina corporation authorizing the execution of Assignment of lease, if required by TN 11.05.03.

11. Satisfactory evidence must be furnished establishing that the subject property does not constitute all or substantially all of the assets of ABC, Inc., a North Carolina corporation. If it does, satisfactory evidence must be provided showing compliance with the laws of the state or country of incorporation.

12. Affidavit to be executed by knowledgeable person stating: 1) There are no matters pending against the affiant that could give rise to a lien that would attach to the property between the effective date of this commitment and the recording of the interest to be insured. 2) That the affiant(s) have not and will not execute any instruments that would adversely affect the interest to be insured.

13. Closing funds are to be disbursed by or at the direction of the Title Agent identified at bottom of Schedule A.

14. Affidavit from the owner of the subject property, or some other person having actual knowledge, establishing that no person other than the owner is in possession.

15. Affidavit from a reliable person must be furnished establishing that more than 90 days has elapsed since the completion of all improvements for which payment has not been made in full.

16. A survey meeting The Fund's Title Notes requirements must be furnished. If such survey reveals any encroachments, overlaps, boundary line disputes, or other adverse matters, they will appear as exceptions in the policy to be issued based upon this commitment.

17. Title Agent is to record the insured instruments as soon as possible after closing.

18. Satisfactory evidence must be furnished establishing that ABC Edges Partners, LLC, a Delaware limited liability company is duly organized, validly existing, and in good standing under the laws of Delaware (at date of acquisition of the interest or lien on the insured property and at the present time, or at date of purchase and at date of sale). If there is no governmental agency in charge of business entity records from which a certificate of good standing can be obtained, then an attorney or notary public in the state or country of origin, who has examined the appropriate business entity records, can provide the certificate.

19. For foreign limited liability companies: (1) confirm the proper persons to execute a deed, mortgage, or other instruments to be insured on behalf of a limited liability company by the laws of the jurisdiction of formation of the company. This may require a legal opinion from an attorney licensed to practice law in the jurisdiction of formation of the foreign limited liability company. (2) Determine that the LLC is not a debtor in bankruptcy, and for an LLC that is one of a family of entities, determine that none are debtors in bankruptcy and, if any are, Fund Under writing Counsel must approve the transaction before title is insured. (3) For a sole member LLC, a determination must be made that there are no creditors who have acquired or attempted to acquire control of the LLC by execution of the Member's interest or otherwise.

20. FOR INFORMATIONAL PURPOSES ONLY: Taxes for the year 2018 have been paid under receipt number xxxxxxxx , on 12/24/2018, Parcel/Account ID #9999-9933, the gross amount being $10,000.00.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

AMERICAN LAND TITLE ASSOCIATION
COMMITMENT

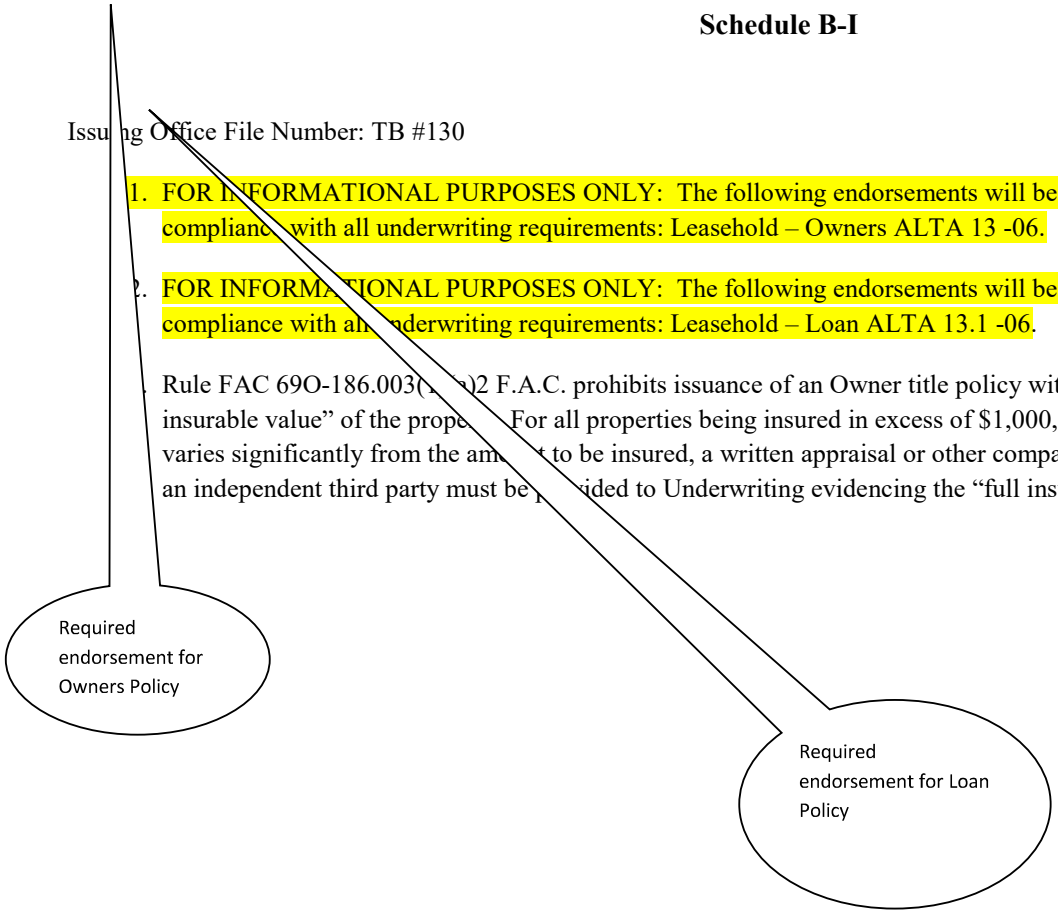
Schedule B-I

Issuing Office File Number: TB #130

1. FOR INFORMATIONAL PURPOSES ONLY: The following endorsements will be issued with the loan policy upon compliance with all underwriting requirements: Leasehold – Owners ALTA 13 -06.

2. FOR INFORMATIONAL PURPOSES ONLY: The following endorsements will be issued with the loan policy upon compliance with all underwriting requirements: Leasehold – Loan ALTA 13.1 -06.

Rule FAC 69O-186.003(2)2 F.A.C. prohibits issuance of an Owner title policy with coverage more or less than "full insurable value" of the property. For all properties being insured in excess of $1,000,000 where the tax roll market valuation varies significantly from the amount to be insured, a written appraisal or other comparable valuation document prepared by an independent third party must be provided to Underwriting evidencing the "full insurable value" of the land.



OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

AMERICAN LAND TITLE ASSOCIATION
COMMITMENT

Schedule B-II

Issuing Office File Number: #130

Exceptions

THIS COMMITMENT DOES NOT REPUBLISH ANY COVENANT, CONDITION, RESTRICTION, OR LIMITATION CONTAINED IN ANY DOCUMENT REFERRED TO IN THIS COMMITMENT TO THE EXTENT THAT THE SPECIFIC COVENANT, CONDITION, RESTRICTION, OR LIMITATION VIOLATES STATE OR FEDERAL LAW BASED ON RACE, COLOR, RELIGION, SEX, SEXUAL ORIENTATION, GENDER IDENTITY, HANDICAP, FAMILIAL STATUS, OR NATIONAL ORIGIN.

The Policy will not insure against loss or damage resulting from the terms and provisions of any lease or easement identified in Schedule A, and will include the following Exceptions unless cleared to the satisfaction of the Company:

Terms and conditions of the lease are excepted from coverage

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the Public Records or attaching subsequent to the Commitment Date hereof but prior to the date the Proposed Insured acquires for value of record the estate or interest or Mortgage thereon covered by this Commitment.

2. a. General or special taxes and assessments required to be paid in the year **2019** and subsequent years.
   b. Rights or claims of parties in possession not recorded in the Public Records.
   c. Any encroachment, encumbrance, violation, variation or adverse circumstance that would be disclosed by an inspection or an accurate and complete land survey of the Land and inspection of the Land.
   d. Easements or claims of easements not recorded in the Public Records.
   e. Any lien, or right to a lien, for services, labor or material furnished, imposed by law and not recorded in the Public Records.

3. Any Owner's Policy issued pursuant hereto will contain under Schedule B the following exception: *Any adverse ownership claim by the State of Florida by right of sovereignty to any portion of the Land insured hereunder, including submerged, filled and artificially exposed lands, and lands accreted to such lands.*

4. Covenants, conditions, and restrictions recorded in O.R. Book 2310, Page 778, Public Records of Volusia County, Florida, which contain provisions creating easements and/or assessments.

5. Terms and conditions contained on unrecorded Lease from Food Brothers Limited Partnership, a Florida limited partnership, and Healthy Foods, Inc., a Florida corporation, as evidenced by Memorandum of Lease recorded in O.R. Book 2882, Page 1799, as affected by Assignment and Assumption of Lease from Fast Food of America, LLC, a Delaware limited liability company, successor by conversion to Fast Food of America, Inc., a Delaware corporation, successor by merger to Poco, Inc., a Florida corporation, successor by merger to New Food, Inc., a Florida corporation, successor by merger to Way Good Foods Inc., a Florida corporation in favor of ABC, Inc., a North Carolina corporation recorded in O.R. Book 8997, Page 894, Public Records of Volusia County, Florida.

6. Unrecorded Asset Purchase Agreement dated May 14, 2018 referred to in Assignment and Assumption of Lease recorded in O.R. Book 8597, Page 822, Public Records of Volusia County, Florida.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

AMERICAN LAND TITLE ASSOCIATION
COMMITMENT

Schedule B-II

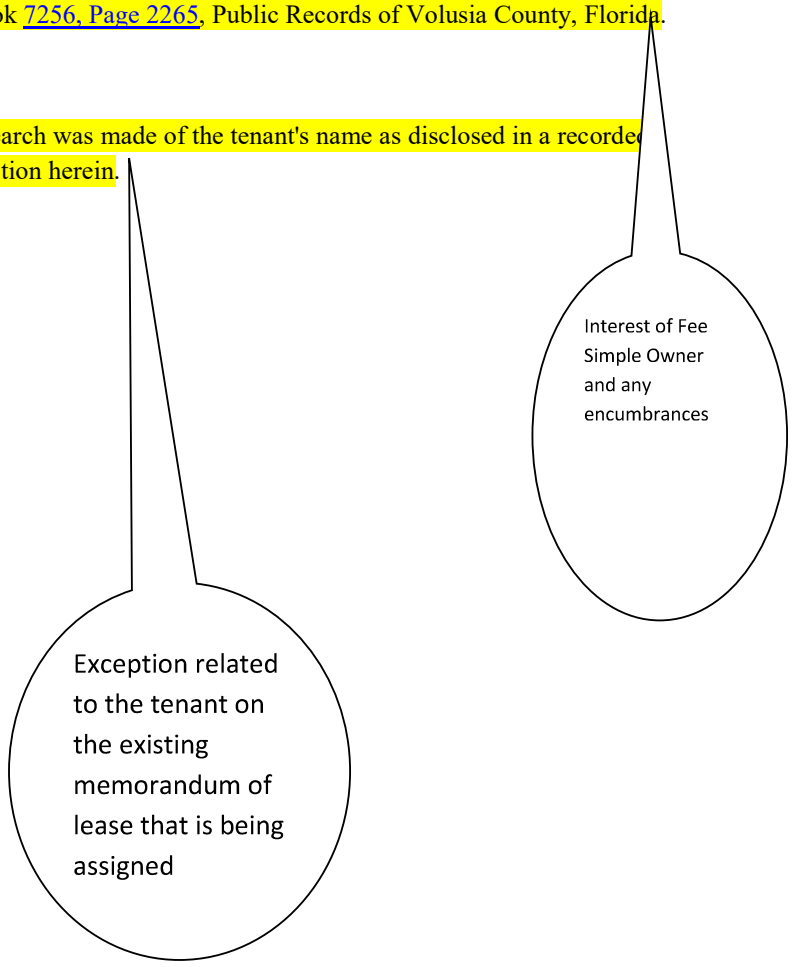
Issuing Office File Number: TB #130

7. Right of Way as shown in Order of Taking recorded in O.R. Book 3764, Page 776, Public Records of Volusia County, Florida.

8. Interest of fee simple owner and any encumbrances affecting the fee simple as follows: Warranty Deed in favor of Busy Realty Corporation Inc. recorded in O.R. Book 7256, Page 2265, Public Records of Volusia County, Florida.

9. Rights of the lessees under unrecorded leases.

10. Unless affirmatively indicated to the contrary, no search was made of the tenant's name as disclosed in a recorded lease or memorandum of lease included as an exception herein.



OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

COMMITMENT

Exhibit A

Commitment Number:	**Issuing Office File Number:**
675433-3	#130

A parcel of land in Section 56, Township 27 South, Range 88 East, Volusia County, Florida, being more particularly described as follows:

For a point of reference, commence at the Northwest corner of "Green Land" as recorded in Plat Book 75, Page 75, of the Public Records of said Volusia County; thence South 0°13'57" West along the West line of said "Green Land", and the Southerly prolongation of said West line, a distance of 674.37 feet; thence North 89°46'03" West a distance of 1046.50 feet to the Point of Beginning of the herein described parcel; thence North 0°13'57" East, a distance of 233.00 feet; a distance of 75.00 feet to a point of tangency with a curve, concave Westerly, having a radius of 4244.69 feet; thence Southerly, along the arc of said curve, through a central angle of 0°52'33", an arc distance of 68.00 feet; thence South 90°46'03" East, a distance of 200.00 feet to the Point of beginning of the herein described parcel.

OWNER'S POLICY OF TITLE INSURANCE

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 18 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, a Florida corporation (the "Company") insures, as of Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection

   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce but only to the extent of the violation or enforcement referred to in that notice.

(Covered Risks continued)

In Witness Whereof, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, has caused this policy to be signed and sealed as of Date of Policy shown in Schedule A, the policy to become valid when countersigned by an authorized signatory of the Company.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

By C Monroe *President*

Attest David Wold *Secretary*

SERIAL

OF6 - 41

(Covered Risks continued)

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. Title being vested other than as stated in Schedule A or being defective

   (a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or

   (b) because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
   (i) to be timely, or
   (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

   (i) the occupancy, use, or enjoyment of the Land;

   (ii) the character, dimensions, or location of any improvement erected on the Land;

   (iii) the subdivision of land; or

   (iv) environmental protection;

   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters

   (a) created, suffered, assumed, or agreed to by the Insured Claimant;

   (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;

   (c) resulting in no loss or damage to the Insured Claimant;

   (d) attaching or created subsequent to Date of Policy; or

   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.
4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is

   (a) a fraudulent conveyance or fraudulent transfer; or

   (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.
5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Sections 10 and 11 of these Conditions.

(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.

(c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) "Insured": The Insured named in Schedule A.

(i) the term "Insured" also includes

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured,

(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or

(4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) with regard to (A), (B), (C), and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

(e) "Insured Claimant": An Insured claiming loss or damage.

(f) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(g) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. 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, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(h) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(i) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(j) "Title": The estate or interest described in Schedule A.

(k) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of

(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured, 44

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In addition to the extent of liability under (a) and (b), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment.

11. LIABILITY NONCUMULATIVE

The Amount of Insurance shall be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy.

12. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Company's right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

14. ARBITRATION

Unless prohibited by applicable law, arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association may be demanded if agreed to by both the Company and the Insured at the time of the controversy or claim. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, and service of the Company in connection with its issuance or the breach of a policy provision or other obligation. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the Insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the Land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim whether or not based on negligence shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

16. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

17. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

18. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at 400 Second Avenue South, Minneapolis, Minnesota 55401-2499, Phone: (612) 371-1111.

Old Republic National Title Insurance Company

OWNER'S TITLE INSURANCE POLICY

For information about coverage or assistance in resolving complaints, call (612) 371-1111.

Offices at
400 Second Avenue South
Minneapolis, Minnesota 55401

46

ALTA ENDORSEMENT 13-06 LEASEHOLD - OWNER'S POLICY

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

1. As used in this Endorsement, the following terms shall mean:

   a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this Policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case as a result of a matter covered by this Policy.

   b. "Lease": the lease agreement described in Schedule A.

   c. "Leasehold Estate": the right of possession for the Lease Term.

   d. "Lease Term": the duration of the Leasehold Estate, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.

   e. "Personal Property": chattels located on the Land and property that, because of their character and manner of affixation to the Land, can be severed from the Land without causing appreciable damage to themselves or to the Land to which they are affixed.

   f. "Remaining Lease Term": the portion of the Lease Term remaining after the Insured has been Evicted as a result of a matter covered by this Policy.

   g. "Tenant Leasehold Improvements": Those improvements, including landscaping, required or permitted to be built on the Land by the Lease that have been built at the Insured's expense or in which the Insured has an interest greater than the right to possession during the Lease Term.

2. Valuation of Estate or Interest Insured:

If in computing loss or damage it becomes necessary to value the Title as the result of a covered matter that results in an Eviction of the Tenant, then that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The Insured Claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.

3. Additional items of loss covered by this Endorsement:

If the Insured is Evicted, the following items of loss, if applicable, shall be included in computing loss or damage incurred by the Insured, but not to the extent that the same are included in the valuation of the Title.

   a. The reasonable cost of removing and relocating any Personal Property that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction, the cost of transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, and the reasonable cost of repairing the Personal Property damaged by reason of the removal and relocation.

   b. Rent or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.

   c. The amount of rent that, by the terms of the Lease, the Insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the Insured has been Evicted.

   d. The fair market value, at the time of the Eviction, of the estate or interest of the Insured in any lease or sublease made by Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

   e. Damages that the Insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease made by the Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements caused by the Eviction.

   f. Reasonable costs incurred by the Insured to secure a replacement leasehold equivalent to the Leasehold Estate.

   g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the Insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering fees, construction management fees, costs of environmental testing and reviews, and landscaping costs.

This Endorsement is issued as part of the Policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the Policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the Policy or a previous endorsement is inconsistent with an express provision of this Endorsement, this Endorsement controls. Otherwise, this Endorsement is subject to all of the terms and provisions of the Policy and of any prior endorsements to it.

_____ _____

Name of Agent Agent No.

_____

Agent's Signature

Old Republic National Title Insurance Company

By **Carolyn Monroe**

President

LOAN POLICY OF TITLE INSURANCE

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 17 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, a Florida corporation (the "Company"), insures, as of Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection

   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

(Covered Risks continued)

In Witness Whereof, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, has caused this policy to be signed and sealed as of Date of Policy shown in Schedule A, the policy to become valid when countersigned by an authorized signatory of the Company.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
A Stock Company
400 Second Avenue South, Minneapolis, Minnesota 55401
(612) 371-1111

By C Monroe *President*

Attest David Wold *Secretary*

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48

(Covered Risks continued)

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage
   (a) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
   (b) failure of any person or Entity to have authorized a transfer or conveyance;
   (c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
   (d) failure to perform those acts necessary to create a document by electronic means authorized by law;
   (e) a document executed under a falsified, expired, or otherwise invalid power of attorney;
   (f) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
   (g) a defective judicial or administrative proceeding.
10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.
11. The lack of priority of the lien of the Insured Mortgage upon the Title as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either
   (a) contracted for or commenced on or before Date of Policy; or
   (b) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance.
12. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.
13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title
   (a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or
   (b) because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
      (i) to be timely, or
      (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this policy, but only to the extent provided in the Conditions.

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to:
      (i) the occupancy, use, or enjoyment of the Land;
      (ii) the character, dimensions, or location of any improvement erected on the Land;
      (iii) the subdivision of land; or
      (iv) environmental protection;

   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
   (a) created, suffered, assumed, or agreed to by the Insured Claimant;
   (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
   (c) resulting in no loss or damage to the Insured Claimant;
   (d) attaching or created subsequent to Date of Policy; or
   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.

5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.

6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is

(a) a fraudulent conveyance or fraudulent transfer, or

(b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.

7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records.

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b) or decreased by Section 10 of these Conditions.

(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.

(c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) "Indebtedness": The obligation secured by the Insured Mortgage including one evidenced by electronic means authorized by law, and if that obligation is the payment of a debt, the Indebtedness is the sum of
(i) the amount of the principal disbursed as of Date of Policy;

(ii) the amount of the principal disbursed subsequent to Date of Policy;

(iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance;

(iv) interest on the loan;

(v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law;

(vi) the expenses of foreclosure and any other costs of enforcement;

(vii) the amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title;

(viii) the amounts to pay taxes and insurance; and

(ix) the reasonable amounts expended to prevent deterioration of improvements;

but the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured.

(e) "Insured": The Insured named in Schedule A.

(i) The term "Insured" also includes

(A) the owner of the Indebtedness and each successor in ownership of the Indebtedness, whether the owner or successor owns the Indebtedness for its own account or as a trustee or other fiduciary, except a successor who is an obligor under the provisions of Section 12(c) of these Conditions;

(B) the person or Entity who has "control" of the "transferable record," if the Indebtedness is evidenced by a "transferable record," as these terms are defined by applicable electronic transactions law;

(C) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(D) successors to an Insured by its conversion to another kind of Entity;

(E) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured, or

(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity;

(F) any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not;

(ii) With regard to (A), (B), (C), (D) , and (E) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, or other matter insured against by this policy.

(f) "Insured Claimant": An Insured claiming loss or damage.

(g) "Insured Mortgage": The Mortgage described in paragraph 4 of Schedule A.

(h) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(i) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. 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, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(j) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(k) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(l) "Title": The estate or interest described in Schedule A.

(m) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title or a prospective purchaser of the Insured Mortgage to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured of any claim of title or interest that is adverse to the Title or the lien of the Insured Mortgage, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title or the lien of the Insured Mortgage, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose.

Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay; or

(ii) To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.

When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security.

Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in those subsections, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the least of

(i) the Amount of Insurance,

(ii) the Indebtedness,

(iii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy, or

(iv) if a government agency or instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage in satisfaction of its insurance contract or guaranty.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In the event the Insured has acquired the Title in the manner described in Section 2 of these Conditions or has conveyed the Title, then the extent of liability of the Company shall continue as set forth in Section 8(a) of these Conditions.

(d) In addition to the extent of liability under (a), (b), and (c), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, or establishes the lien of the Insured Mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(a) All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment. However, any payments made prior to the acquisition of Title as provided in Section 2 of these Conditions shall not reduce the Amount of Insurance afforded under this policy except to the extent that the payments reduce the Indebtedness.

(b) The voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions.

11. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

12. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) The Company's Right to Recover

Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Insured's Rights and Limitations

(i) The owner of the Indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title from the lien of the Insured Mortgage, or release any collateral security for the Indebtedness, if it does not affect the enforceability or priority of the lien of the Insured Mortgage.

(ii) If the Insured exercises a right provided in (b)(i), but has Knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Company shall be required to pay only that part of any losses insured against by this policy that shall exceed the amount, if any, lost to the Company by reason of the impairment by the Insured Claimant of the Company's right of subrogation.

(c) The Company's Rights Against Noninsured Obligors

The Company's right of subrogation includes the Insured's rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

The Company's right of subrogation shall not be avoided by acquisition of the Insured Mortgage by an obligor (except an obligor described in Section 1(e)(i)(F) of these Conditions) who acquires the Insured Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond, and the obligor will not be an Insured under this policy.

13. ARBITRATION

Unless prohibited by applicable law, arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association may be demanded if agreed to by both the Company and the Insured at the time of the controversy or claim. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, and service of the Company in connection with its issuance or the breach of a policy provision or other obligation. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the Insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the Land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or lien of the Insured Mortgage or by any action asserting such claim whether or not based on negligence shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

15. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

16. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title or the lien of the Insured Mortgage that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

17. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at 400 Second Avenue South, Minneapolis, Minnesota 55401-2499, Phone: (612) 371-1111.

Old Republic National Title Insurance Company

LOAN
TITLE INSURANCE
POLICY

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Offices at
400 Second Avenue South
Minneapolis, Minnesota 55401

53

ALTA ENDORSEMENT 13.1-06 LEASEHOLD - LOAN POLICY

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____ _____

1. As used in this Endorsement, the following terms shall mean:

   a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this Policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case, as a result of a matter covered by this Policy.

   b. "Lease": the lease agreement described in Schedule A.

   c. "Leasehold Estate": the right of possession for the Lease Term.

   d. "Lease Term": the duration of the Leasehold Estate, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.

   e. "Personal Property": chattels located on the Land and property that, because of their character and manner of affixation to the Land, can be severed from the Land without causing appreciable damage to themselves or to the Land to which they are affixed.

   f. "Remaining Lease Term": the portion of the Lease Term remaining after the Insured has been Evicted as a result of a matter covered by this Policy.

   g. "Tenant": the tenant under the Lease and, after acquisition of all or any part of the Title in accordance with the provisions of Section 2 of the Conditions of this Policy, the Insured Claimant.

   h. "Tenant Leasehold Improvements": Those improvements, including landscaping, required or permitted to be built on the Land by the Lease that have been built at the Insured's expense or in which the Insured has an interest greater than the right to possession during the Lease Term.

2. Valuation of Estate or Interest Insured:

If in computing loss or damage it becomes necessary to value the Title as the result of a covered matter that results in an Eviction of the Tenant, then that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The Insured Claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.

3. Additional items of loss covered by this Endorsement:

If the Insured acquires all or any part of the Title in accordance with the provisions of Section 2 of the Conditions of this Policy and thereafter is Evicted, the following items of loss, if applicable, shall be included in computing loss or damage incurred by the Insured, but not to the extent that the same are included in the valuation of the Title.

   a. The reasonable cost of removing and relocating any Personal Property that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction the cost of transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, and the reasonable cost of repairing the Personal Property damaged by reason of the removal and relocation.

   b. Rent or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.

   c. The amount of rent that, by the terms of the Lease, the Insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the Insured has been Evicted.

   d. The fair market value, at the time of the Eviction, of the estate or interest of the Insured in any lease or sublease made by Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

   e. Damages that the Insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease made by the Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements caused by the Eviction.

   f. Reasonable costs incurred by the Insured to secure a replacement leasehold equivalent to the Leasehold Estate.

   g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the Insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering fees, construction management fees, costs of environmental testing and reviews, and landscaping costs.

This Endorsement is issued as part of the Policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the Policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the Policy or a previous endorsement is inconsistent with an express provision of this Endorsement, this Endorsement controls. Otherwise, this Endorsement is subject to all of the terms and provisions of the Policy and of any prior endorsements .

_____ _____

Name of Agent Agent No.

_____ **Old Republic National Title Insurance Company**

Agent's Signature **By** **Carolyn Monroe**

Back to Speaker Topics

Fund Assembly

Marketing & Ethics Panel Discussion

Moderator:
Peggy Williams, *Senior Manager, Risk Analysis and Member Compliance, The Fund*

Panelists:
Gregory Oropeza, *Managing Partner, Oropeza, Stones & Cardenas, PLLC*
Michael Tidwell, *Attorney, Emerald Coast Title*
Sam Saad, III, *Managing Attorney,*
Law Office of Sam J. Saad III/Paradise Coast Title & Escrow

Back to Speaker Topics

Speaker Information

Marketing & Ethics Panel Discussion

Peggy Williams

Senior Manager, Risk Analysis and Member Compliance, The Fund

Margaret A. "Peggy" Williams manages The Fund's Risk Management and Member and Agent Services Departments. She received her undergraduate degree from Florida State University and her J.D. degree from the University of Florida College of Law. Ms. Williams joined The Fund's legal staff in 2000 as claims counsel, and has headed the Risk Management Department since 2005. She is co-editor of The Fund's monthly publication, The Fund Concept. Ms. Williams is an at-large member of The Florida Bar's Real Property, Probate and Trust Law Executive Council, and serves on several of its committees. She is a member of the Florida Land Title Association, and has served on a Florida Bar Grievance Committee for the 9th Circuit.

Gregory Oropeza

Managing Partner, Oropeza, Stones & Cardenas, PLLC

Gregory S. Oropeza is the managing partner of Oropeza, Stones & Cardenas, PLLC in Key West, Florida. A fourth generation native to Key West, Mr. Oropeza practices solely in the area of real estate transactional and land use law in the Keys.

Mr. Oropeza earned his bachelor's degree in economics from the University of Florida and Juris Doctor from Florida State University College of Law.

Michael Tidwell

Attorney, Emerald Coast Title and Michael D. Tidwell, P.A.

Mike Tidwell, owner of Michael D. Tidwell, P.A. and Emerald Coast Title, is a native Pensacolian who graduated from Woodham High School in 1975. After receiving his bachelor's degree from the University of Southwestern Louisiana, he continued his education at Tulane University in New Orleans, receiving his J.D. in 1991.

After becoming licensed in the state of Florida, Mr. Tidwell returned to Pensacola in 1991 and began his law practice at Bordelon and Tidwell in Gulf Breeze. In 1997, he founded Michael D. Tidwell, P.A. in downtown Pensacola where he specializes in probate, commercial litigation, corporate litigation, general civil litigation, and real estate law. Emerald Coast Title has been a Fund corporate member since 2002.

Sam Saad, III

Managing Attorney, Law Office of Sam J. Saad III/Paradise Coast Title & Escrow

Sam Saad has been an attorney for over fifteen years. He is the founder and managing attorney at the Law Office of Sam J. Saad III. He also owns and operates his title company, Paradise Coast Title & Escrow. Mr. Saad spends a great deal of time and resources marketing his firm and title company and has had great success by delivering a consistent message and high quality personalized service to his clients and referral base.

Marketing and Ethics
Panel Discussion
Table of Contents

1. Rule 4-7.21 – Firm Names and Letterhead 2
2. Rule 4-7.19 - Evaluations of Advertisements 6
3. Rule 4-7.20 – Exemptions from the Filing and Review Requirement 9
4. Rule 4-1.3 – Diligence 10
5. 12 U.S.C. Sec. 2607 – Prohibition against kickbacks and unearned fees 11
6. 12 CFR Sec. 1024.14 - Prohibition against kickbacks and unearned fees 15
7. 12 CFR Appendix B to part 1024 – Illustrations of Requirements of RESPA 18
8. RESPA Examples 22
9. Sec. 626.9541(1)(h) Unfair Methods of Competition and Unfair or Deceptive Acts - Unlawful Rebates 25
10. Ch. 69B-186.008 F.A.C. - Escrow Disbursements 27
11. Ch. 69B-186.010 F.A.C. – Unlawful Rebates and Inducements Related to Title Insurance 28

Not included in these Materials, but very useful – *Handbook on Lawyer Advertising and Solicitation* – a 132 page publication by The Florida Bar containing rules, procedures, examples, and checklists.

RULE 4-7.21 FIRM NAMES AND LETTERHEAD

(a) False, Misleading, or Deceptive Firm Names. A lawyer may not use a firm name, letterhead, or other professional designation that violates rules 4-7.11 through 4-7.15.

(b) Trade Names. A lawyer may practice under a trade name if the name is not deceptive and does not imply a connection with a government agency or with a public or charitable legal services organization, does not imply that the firm is something other than a private law firm, and is not otherwise in violation of rules 4-7.11 through 4-7.15. A lawyer in private practice may use the term "legal clinic" or "legal services" in conjunction with the lawyer's own name if the lawyer's practice is devoted to providing routine legal services for fees that are lower than the prevailing rate in the community for those services.

(c) Advertising Under Trade Names. A lawyer may not advertise under a trade or fictitious name, except that a lawyer who actually practices under a trade name as authorized by
subdivision (b) may use that name in advertisements. A lawyer who advertises under a trade or fictitious name is in violation of this rule unless the same name is the law firm name that appears on the lawyer's letterhead, business cards, office sign, and fee contracts, and appears with the lawyer's signature on pleadings and other legal documents.

(d) Law Firm with Offices in Multiple Jurisdictions. A law firm with offices in more than 1 jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm must indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(e) Name of Public Officer in Firm Name. The name of a lawyer holding a public office may not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(f) Partnerships and Business Entities. A name, letterhead, business card or advertisement may not imply that lawyers practice in a partnership or authorized business entity when they do not.

(g) Insurance Staff Attorneys. Where otherwise consistent with these rules, lawyers who practice law as employees within a separate unit of a liability insurer representing others pursuant to policies of liability insurance may practice under a name that does not constitute a material misrepresentation. In order for the use of a name other than the name of the insurer not to constitute a material misrepresentation, all lawyers in the unit must comply with all of the following:

(1) the firm name must include the name of a lawyer who has supervisory responsibility for all lawyers in the unit;

(2) the office entry signs, letterhead, business cards, websites, announcements, advertising, and listings or entries in a law list or bar publication bearing the name must disclose that the lawyers in the unit are employees of the insurer;

(3) the name of the insurer and the employment relationship must be disclosed to all insured clients and prospective clients of the lawyers, and must be disclosed in the official file at the lawyers' first appearance in the tribunal in which the lawyers appear under such name;

(4) the offices, personnel, and records of the unit must be functionally and physically separate from other operations of the insurer to the extent that would be required by these rules if the lawyers were private practitioners sharing space with the insurer; and

(5) additional disclosure should occur whenever the lawyer knows or reasonably should know that the lawyer's role is misunderstood by the insured client or prospective clients.

Comment

Misleading Firm Name

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name such as "Family Legal Clinic." Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in a law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

A sole practitioner may not use the term "and Associates" as part of the firm name, because it is misleading where the law firm employs no associates in violation of rule 4-7.13. *See Fla. Bar v. Fetterman*, 439 So. 2d 835 (Fla. 1983). Similarly, a sole practitioner's use of "group" or "team" implies that more than one lawyer is employed in the advertised firm and is therefore misleading.

Subdivision (a) precludes use in a law firm name of terms that imply that the firm is something other than a private law firm. Three examples of such terms are "academy," "institute" and "center." Subdivision (b) precludes use of a trade or fictitious name suggesting that the firm is named for a person when in fact such a person does not exist or is not associated with the firm. An example of such an improper name is "A. Aaron Able." Although not prohibited per se, the terms "legal clinic" and "legal services" would be misleading if used by a law firm that did not devote its practice to providing routine legal services at prices below those prevailing in the community for like services.

Trade Names

Subdivision (c) of this rule precludes a lawyer from advertising under a nonsense name designed to obtain an advantageous position for the lawyer in alphabetical directory listings unless the lawyer actually practices under that nonsense name. Advertising under a law firm name that differs from the firm name under which the lawyer actually practices violates both this rule and the prohibition against false, misleading, or deceptive communications as set forth in these rules.

With regard to subdivision (f), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

All lawyers who practice under trade or firm names are required to observe and comply with the requirements of the Rules Regulating the Florida Bar, including but not limited to, rules regarding conflicts of interest, imputation of conflicts, firm names and letterhead, and candor toward tribunals and third parties.

Insurance Staff Lawyers

Some liability insurers employ lawyers on a full-time basis to represent their insured clients in defense of claims covered by the contract of insurance. Use of a name to identify these lawyers is permissible if there is such physical and functional separation as to constitute a separate law firm. In the absence of such separation, it would be a misrepresentation to use a name implying that a firm exists. Practicing under the name of a lawyer inherently represents that the identified person has supervisory responsibility. Practicing under a name prohibited by subdivision (f) is not permitted. Candor requires disclosure of the employment relationship on letterhead, business cards, and in certain other communications that are not presented to a jury. The legislature of the State of Florida has enacted, as public policy, laws prohibiting the joinder of a liability insurer in most such litigation, and Florida courts have recognized the public policy of not disclosing the existence of insurance coverage to juries. Requiring lawyers who are so employed to disclose to juries the employment relationship would negate Florida public policy. For this reason, the rule does not require the disclosure of the employment relationship on all pleadings and papers filed in court proceedings. The general duty of candor of all lawyers may be implicated in other circumstances, but does not require disclosure on all pleadings.

Adopted January 31, 2013, effective May 1, 2013 (SC11-1327).

RULE 4-7.19 EVALUATION OF ADVERTISEMENTS

(a) Filing Requirements. Subject to the exemptions stated in rule 4-7.20, any lawyer who advertises services shall file with The Florida Bar a copy of each advertisement at least 20 days prior to the lawyer's first dissemination of the advertisement. The advertisement must be filed at The Florida Bar headquarters address in Tallahassee.

(b) Evaluation by The Florida Bar. The Florida Bar will evaluate all advertisements filed with it pursuant to this rule for compliance with the applicable provisions set forth in rules 4-7.11 through 4-7.15 and 4-7.18(b)(2). If The Florida Bar does not send any communication to the filer within 15 days of receipt by The Florida Bar of a complete filing, or within 15 days of receipt by The Florida Bar of additional information when requested within the initial 15 days, the lawyer will not be subject to discipline by The Florida Bar, except if The Florida Bar subsequently notifies the lawyer of noncompliance, the lawyer may be subject to discipline for dissemination of the advertisement after the notice of noncompliance.

(c) Preliminary Opinions. A lawyer may obtain an advisory opinion concerning the compliance of a contemplated advertisement prior to production of the advertisement by submitting to The Florida Bar a draft or script that includes all spoken or printed words appearing in the advertisement, a description of any visual images to be used in the advertisement, and the fee specified in this rule. The voluntary prior submission does not satisfy the filing and evaluation requirements of these rules, but once completed, The Florida Bar will not charge an additional fee for evaluation of the completed advertisement.

(d) Opinions on Exempt Advertisements. A lawyer may obtain an advisory opinion concerning the compliance of an existing or contemplated advertisement intended to be used by the lawyer seeking the advisory opinion that is not required to be filed for review by submitting the material and fee specified in subdivision (h) of this rule to The Florida Bar, except that a lawyer may not file an entire website for review. Instead, a lawyer may obtain an advisory opinion concerning the compliance of a specific page, provision, statement, illustration, or photograph on a website.

(e) Facial Compliance. Evaluation of advertisements is limited to determination of facial compliance with rules 4-7.11 through 4-7.15 and 4-7.18(b)(2), and notice of compliance does not relieve the lawyer of responsibility for the accuracy of factual statements.

(f) Notice of Compliance and Disciplinary Action. A finding of compliance by The Florida Bar will be binding on The Florida Bar in a grievance proceeding unless the advertisement contains a misrepresentation that is not apparent from the face of the advertisement. The Florida Bar has a right to change its finding of compliance and in such circumstances must notify the lawyer of the finding of noncompliance, after which the lawyer

may be subject to discipline for continuing to disseminate the advertisement. A lawyer will be subject to discipline as provided in these rules for:

(1) failure to timely file the advertisement with The Florida Bar;

(2) dissemination of a noncompliant advertisement in the absence of a finding of compliance by The Florida Bar;

(3) filing of an advertisement that contains a misrepresentation that is not apparent from the face of the advertisement;

(4) dissemination of an advertisement for which the lawyer has a finding of compliance by The Florida Bar more than 30 days after the lawyer has been notified that The Florida Bar has determined that the advertisement does not comply with this subchapter; or

(5) dissemination of portions of a lawyer's Internet website(s) that are not in compliance with rules 4-7.14 and 4-7.15 only after 15 days have elapsed since the date of The Florida Bar's notice of noncompliance sent to the lawyer's official bar address.

(g) Notice of Noncompliance. If The Florida Bar determines that an advertisement is not in compliance with the applicable rules, The Florida Bar will advise the lawyer that dissemination or continued dissemination of the advertisement may result in professional discipline.

(h) Contents of Filing. A filing with The Florida Bar as required or permitted by subdivision (a) must include:

(1) a copy of the advertisement in the form or forms in which it is to be disseminated, which is readily capable of duplication by The Florida Bar (e.g., video, audio, print media, photographs of outdoor advertising);

(2) a transcript, if the advertisement is in electronic format;

(3) a printed copy of all text used in the advertisement, including both spoken language and on-screen text;

(4) an accurate English translation of any portion of the advertisement that is in a language other than English;

(5) a sample envelope in which the written advertisement will be enclosed, if the advertisement is to be mailed;

(6) a statement listing all media in which the advertisement will appear, the anticipated frequency of use of the advertisement in each medium in which it will appear, and the anticipated time period during which the advertisement will be used;

(7) the name of at least 1 lawyer who is responsible for the content of the advertisement;

(8) a fee paid to The Florida Bar, in an amount of $150 for each advertisement timely filed as provided in subdivision (a), or $250 for each advertisement not timely filed. This fee will be used to offset the cost of evaluation and review of advertisements submitted under these rules and the cost of enforcing these rules; and

(9) additional information as necessary to substantiate representations made or implied in an advertisement if requested by The Florida Bar.

(i) Change of Circumstances; Refiling Requirement. If a change of circumstances occurs subsequent to The Florida Bar's evaluation of an advertisement that raises a substantial possibility that the advertisement has become false or misleading as a result of the change in circumstances, the lawyer must promptly re-file the advertisement or a modified advertisement with The Florida Bar at its headquarters address in Tallahassee along with an explanation of the change in circumstances and an additional fee set by the Board of Governors, which will not exceed $100.

(j) Maintaining Copies of Advertisements. A copy or recording of an advertisement must be submitted to The Florida Bar in accordance with the requirements of this rule, and the lawyer must retain a copy or recording for 3 years after its last dissemination along with a record of when and where it was used. If identical advertisements are sent to 2 or more prospective clients, the lawyer may comply with this requirement by filing 1 of the identical advertisements and retaining for 3 years a single copy together with a list of the names and addresses of persons to whom the advertisement was sent.

Comment

All advertisements must be filed for review pursuant to this rule, unless the advertisement is exempt from filing under rule 4-7.20. Even where an advertisement is exempt from filing under rule 4-7.20, a lawyer who wishes to obtain a safe harbor from discipline can submit the lawyer's advertisement that is exempt from the filing requirement and obtain The Florida Bar's opinion prior to disseminating the advertisement. A lawyer who files an advertisement and obtains a notice of compliance is therefore immune from grievance liability unless the advertisement contains a misrepresentation that is not apparent from the face of the advertisement. Subdivision (d) of this rule precludes a lawyer from filing an entire website as an advertising submission, but a lawyer may submit a specific page, provision, statement, illustration, or photograph on a website. A lawyer who wishes to be able to rely on The Florida Bar's opinion as demonstrating the lawyer's good faith effort to comply with these rules has the responsibility of supplying The Florida Bar with all information material to a determination of whether an advertisement is false or misleading.

Adopted January 31, 2013, effective May 1, 2013 (SC11-1327).

RULE 4-7.20 EXEMPTIONS FROM THE FILING AND REVIEW REQUIREMENT

The following are exempt from the filing requirements of rule 4-7.19:

(a) an advertisement in any of the public media that contains no illustrations and no information other than that set forth in rule 4-7.16;

(b) a brief announcement that identifies a lawyer or law firm as a contributor to a specified charity or as a sponsor of a public service announcement or a specified charitable, community, or public interest program, activity, or event, provided that the announcement contains no information about the lawyer or law firm other than the permissible content of advertisements listed in rule 4-7.16, and the fact of the sponsorship or contribution. In determining whether an announcement is a public service announcement, the following criteria may be considered:

(1) whether the content of the announcement appears to serve the particular interests of the lawyer or law firm as much as or more than the interests of the public;

(2) whether the announcement concerns a legal subject;

(3) whether the announcement contains legal advice; and

(4) whether the lawyer or law firm paid to have the announcement published;

(c) a listing or entry in a law list or bar publication;

(d) a communication mailed only to existing clients, former clients, or other lawyers;

(e) a written or recorded communication requested by a prospective client;

(f) professional announcement cards stating new or changed associations, new offices, and similar changes relating to a lawyer or law firm, and that are mailed only to other lawyers, relatives, close personal friends, and existing or former clients; and

(g) information contained on the lawyer's Internet website(s).

Adopted January 31, 2013, effective May 1, 2013 (SC11-1327).

RULE 4-1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

A lawyer's workload must be controlled so that each matter can be handled competently.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

Unless the relationship is terminated as provided in rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See rule 4-1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See rule 4-1.2.

Comment amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417).

12 U.S.C.
United States Code, 2011 Edition
Title 12 - BANKS AND BANKING
CHAPTER 27 - REAL ESTATE SETTLEMENT PROCEDURES
Sec. 2607 - Prohibition against kickbacks and unearned fees
From the U.S. Government Publishing Office, www.gpo.gov

§2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone,[1] (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the

written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Bureau, the Secretary, or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section. Except, to the extent that a person is subject to the jurisdiction of the Bureau, the Secretary, or the attorney general or the insurance commissioner of any State, the Bureau shall have primary authority to enforce or administer this section, subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5511 et seq.].

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

(Pub. L. 93–533, §8, Dec. 22, 1974, 88 Stat. 1727; Pub. L. 94–205, §7, Jan. 2, 1976, 89 Stat. 1158; Pub. L. 98–181, title IV, §461(b), (c), Nov. 30, 1983, 97 Stat. 1231; Pub. L. 100–242, title V, §570(g), Feb. 5, 1988, 101 Stat. 1950; Pub. L. 102–54, §13(d)(4), June 13, 1991, 105 Stat. 275; Pub. L. 104–208, div. A, title II, §2103(c)(2), (d), Sept. 30, 1996, 110 Stat. 3009–400; Pub. L. 111–203, title X, §1098(6), (7), July 21, 2010, 124 Stat. 2104.)

REFERENCES IN TEXT

The Consumer Financial Protection Act of 2010, referred to in subsec. (d)(4), is title X of Pub. L. 111–203, July 21, 2010, 124 Stat. 1955. Subtitle B of the Act is classified generally to part B (§5511 et seq.) of subchapter V of chapter 53 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

AMENDMENTS

2010—Subsec. (c)(5). Pub. L. 111–203, §1098(6), which directed substituting "Bureau" for "Secretary", was executed by making the substitution for "Secretary" the first time appearing, to reflect the probable intent of Congress.

Subsec. (d). Pub. L. 111–203, §1098(7)(A), inserted "Bureau and" before "Secretary" in heading that had been supplied editorially.

Subsec. (d)(4). Pub. L. 111–203, §1098(7)(B), added par. (4) and struck out former par. (4) which read as follows: "The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section."

1996—Subsec. (c)(4). Pub. L. 104–208, §2103(c)(2), substituted "affiliated business arrangements" for "controlled business arrangements".

Subsec. (c)(4)(A). Pub. L. 104–208, §2103(d), amended subcl. (A) generally. Prior to amendment, subcl. (A) read as follows: "at or prior to the time of the referral a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with the referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred, except that where a lender makes the referral, this requirement may be satisfied as part of and at the time that the estimates of settlement charges required under section 2604(c) of this title are provided,".

Subsec. (d)(6). Pub. L. 104–208, §2103(c)(2), substituted "affiliated business arrangements" for "controlled business arrangements".

1991—Subsec. (c)(5). Pub. L. 102–54 substituted "Secretary of Veterans Affairs" for "Administrator of Veterans' Affairs".

1988—Subsec. (c)(5). Pub. L. 100–242 substituted "clause (4)(B)" for "clause 4(B)".

1983—Subsec. (c). Pub. L. 98–181, §461(b), redesignated cl. (4) as (5), added cl. (4) and provisions following cl. (5), as so redesignated, relating to arrangements which shall not be considered a violation of cl. (4)(B).

Subsec. (d)(2). Pub. L. 98–181, §461(c), substituted provisions setting forth the liability of persons violating the prohibitions or limitations of this section for provisions setting forth liability, in addition to penalties provided in par. (1), of persons violating subsecs. (a) and (b) of this section, plus costs and attorney's fees.

Subsec. (d)(3) to (6). Pub. L. 98–181, §461(c), added pars. (3) to (6).

1976—Subsec. (c). Pub. L. 94–205 added cls. (3) and (4).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98–181 effective Jan. 1, 1984, see section 461(f) of Pub. L. 98–181, set out as a note under section 2602 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–205 effective Jan. 2, 1976, see section 12 of Pub. L. 94–205, set out as a note under section 2602 of this title.

TRANSFER OF FUNCTIONS

Federal Home Loan Bank Board abolished and functions transferred, see sections 401 to 406 of Pub. L. 101–73, set out as a note under section 1437 of this title.

[1] *So in original.*

12 CFR § 1024.14 - Prohibition against kickbacks and unearned fees.

- CFR
-
-
-

prev | next

§ 1024.14 Prohibition against kickbacks and unearned fees.

(a)Section 8 violation. Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. 2607).

(b)No referral fees. No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 1024.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

(c)No split of charges except for actual services performed. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(d)Thing of value. This term is broadly defined in section 3(2) of RESPA (12 U.S.C. 2602(2)). It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term “payment” is used throughout §§ 1024.14 and 1024.15 as synonymous with the giving or receiving of any “thing of value” and does not require transfer of money.

(e)Agreement or understanding. An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

(f)Referral.

(1) A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.

(2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see § 1024.2, "required use") a particular provider of a settlement service or business incident thereto.

(g)Fees, salaries, compensation, or other payments.

(1) Section 8 of RESPA permits:

(i) A payment to an attorney at law for services actually rendered;

(ii) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;

(iii) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;

(iv) A payment to any person of a **bona fide** salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;

(v) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers or between mortgage brokers.);

(vi) Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto; or

(vii) An employer's payment to its own employees for any referral activities.

(2) The Bureau may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (**i.e.,** the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

(3)Multiple services. When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person. For example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services, including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title

insurance company, and, where customary, issuance of the title commitment, and the conducting of the title search and closing.

(h)Recordkeeping. Any documents provided pursuant to this section shall be retained for five (5) years from the date of execution.

(i)Appendix B of this part. Illustrations in appendix B of this part demonstrate some of the requirements of this section.

12 CFR Appendix B_to_part_1024 - Illustrations of Requirements of RESPA

- CFR
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-

prev | next

Appendix B to Part 1024 - Illustrations of Requirements of RESPA

The following illustrations provide additional guidance on the meaning and coverage of the provisions of RESPA. Other provisions of Federal or state law may also be applicable to the practices and payments discussed in the following illustrations.

1. **Facts:** A, a provider of settlement services, provides settlement services at abnormally low rates or at no charge at all to B, a builder, in connection with a subdivision being developed by B. B agrees to refer purchasers of the completed homes in the subdivision to A for the purchase of settlement services in connection with the sale of individual lots by B.

Comments: The rendering of services by A to B at little or no charge constitutes a thing of value given by A to B in return for the referral of settlement services business, and both A and B are in violation of section 8 of RESPA.

2. **Facts:** B, a lender, encourages persons who receive federally related mortgage loans from it to employ A, an attorney, to perform title searches and related settlement services in connection with their transaction. B and A have an understanding that in return for the referral of this business A provides legal services to B or B's officers or employees at abnormally low rates or for no charge.

Comments: Both A and B are in violation of section 8 of RESPA. Similarly, if an attorney gives a portion of his or her fees to another attorney, a lender, a real estate broker or any other provider of settlement services, who had referred prospective clients to the attorney, section 8 would be violated by both persons.

3. **Facts:** A, a real estate broker, obtains all necessary licenses under state law to act as a title insurance agent. A refers individuals who are purchasing homes in transactions in which A participates as a broker to B, an unaffiliated title company, for the purchase of title insurance services. A performs minimal, if any, title services in connection with the issuance of the title insurance policy (such as placing an application with the title company). B pays A a commission (or A retains a portion of the title insurance premium) for the transactions or alternatively B receives a portion of the premium paid directly from the purchaser.

Comments: The payment of a commission or portion of the title insurance premium by B to A, or receipt of a portion of the payment for title insurance under circumstances where no substantial services are being performed by A, is a violation of section 8 of RESPA. It makes no difference whether the payment comes from B or the purchaser. The amount of the payment must bear a reasonable relationship to the services rendered. Here A really is being compensated for a referral of business to B.

4. **Facts:** A is an attorney who, as a part of his legal representation of clients in residential real estate transactions, orders and reviews title insurance policies for his clients. A enters into a contract with B, a title company, to be an agent of B under a program set up by B. Under the agreement, A agrees to prepare and forward title insurance applications to B, to re-examine the preliminary title

commitment for accuracy and if he chooses to attempt to clear exceptions to the title policy before closing. A agrees to assume liability for waiving certain exceptions to title, but never exercises this authority. B performs the necessary title search and examination work, determines insurability of title, prepares documents containing substantive information in title commitments, handles closings for A's clients and issues title policies. A receives a fee from his client for legal services and an additional fee for his title agent "services" from the client's title insurance premium to B.

Comments: A and B are violating section 8 of RESPA. Here, A's clients are being double billed because the work A performs as a "title agent" is that which he already performs for his client in his capacity as an attorney. For A to receive a separate payment as a title agent, A must perform necessary core title work and may not contract out the work. To receive additional compensation as a title agent for this transaction, A must provide his client with core title agent services for which he assumes liability, and which includes at a minimum, the evaluation of the title search to determine insurability of the title, and the issuance of a title commitment where customary, the clearance of underwriting objections, and the actual issuance of the policy or policies on behalf of the title company. A may not be compensated for the mere re-examination of work performed by B. Here, A is not performing these services and may not be compensated as a title agent under section 8(c)(1)(B). Referral fees or splits of fees may not be disguised as title agent commissions when the core title agent work is not performed. Further, because B created the program and gave A the opportunity to collect fees (a thing of value) in exchange for the referral of settlement service business, it has violated section 8 of RESPA.

5. **Facts:** A, a "mortgage originator," receives loan applications, funds the loans with its own money or with a wholesale line of credit for which A is liable, and closes the loans in A's own name. Subsequently, B, a mortgage lender, purchases the loans and compensates A for the value of the loans, as well as for any mortgage servicing rights.

Comments: Compensation for the sale of a mortgage loan and servicing rights constitutes a secondary market transaction, rather than a referral fee, and is beyond the scope of section 8 of RESPA. For purposes of section 8, in determining whether a **bona fide** transfer of the loan obligation has taken place, the Bureau examines the real source of funding, and the real interest of the named settlement lender.

6. **Facts.** A, a credit reporting company, places a facsimile transmission machine (FAX) in the office of B, a mortgage lender, so that B can easily transmit requests for credit reports and A can respond. A supplies the FAX machine at no cost or at a reduced rental rate based on the number of credit reports ordered.

Comments: Either situation violates section 8 of RESPA. The FAX machine is a thing of value that A provides in exchange for the referral of business from B. Copying machines, computer terminals, printers, or other like items which have general use to the recipient and which are given in exchange for referrals of business also violate RESPA.

7. **Facts:** A, a real estate broker, refers title business to B, a company that is a licensed title agent for C, a title insurance company. A owns more than 1% of B. B performs the title search and examination, makes determinations of insurability, issues the commitment, clears underwriting objections, and issues a policy of title insurance on behalf of C, for which C pays B a commission. B pays annual dividends to its owners, including A, based on the relative amount of business each of its owners refers to B.

Comments: The facts involve an affiliated business arrangement. The payment of a commission by C to B is not a violation of section 8 of RESPA if the amount of the commission constitutes reasonable compensation for the services performed by B for C. The payment of a dividend or the giving of any other thing of value by B to A that is based on the amount of business referred to B by A does not meet the affiliated business agreement exemption provisions and such actions violate section 8. Similarly, if the amount of stock held by A in B (or, if B were a partnership, the distribution

of partnership profits by B to A) varies based on the amount of business referred or expected to be referred, or if B retained any funds for subsequent distribution to A where such funds were generally in proportion to the amount of business A referred to B relative to the amount referred by other owners, such arrangements would violate section 8. The exemption for controlled business arrangements would not be available because the payments here would not be considered returns on ownership interests. Further, the required disclosure of the affiliated business arrangement and estimated charges have not been provided.

8. **Facts:** Same as illustration 7, but B pays annual dividends in proportion to the amount of stock held by its owners, including A, and the distribution of annual dividends is not based on the amount of business referred or expected to be referred.

Comments: If A and B meet the requirements of the affiliated business arrangement exemption there is not a violation of RESPA. Since the payment is a return on ownership interests, A and B will be exempt from section 8 if (1) A also did not require anyone to use the services of B, and (2) A disclosed its ownership interest in B on a separate disclosure form and provided an estimate of B's charges to each person referred by A to B (see appendix D of this part), and (3) B makes no payment (nor is there any other thing of value exchanged) to A other than dividends.

9. **Facts:** A, a franchisor for franchised real estate brokers, owns B, a provider of settlement services. C, a franchisee of A, refers business to B.

Comments: This is an affiliated business arrangement. A, B and C will all be exempt from section 8 if C discloses its franchise relationship with the owner of B on a separate disclosure form and provides an estimate of B's charges to each person referred to B (see appendix D of this part) and C does not require anyone to use B's services and A gives no thing a value to C under the franchise agreement (such as an adjusted level of franchise payment based on the referrals), and B makes no payments to A other than dividends representing a return on ownership interest (rather than, **e.g.,** an adjusted level of payment being based on the referrals). Nor may B pay C anything of value for the referral.

10. **Facts:** A is a real estate broker who refers business to its affiliate title company B. A makes all required written disclosures to the homebuyer of the arrangement and estimated charges and the homebuyer is not required to use B. B refers or contracts out business to C who does all the title work and splits the fee with B. B passes its fee to A in the form of dividends, a return on ownership interest.

Comments: The relationship between A and B is an affiliated business arrangement. However, the affiliated business arrangement exemption does not provide exemption between an affiliated entity, B, and a third party, C. Here, B is a mere “shell” and provides no substantive services for its portion of the fee. The arrangement between B and C would be in violation of section 8(a) and (b). Even if B had an affiliate relationship with C, the required exemption criteria have not been met and the relationship would be subject to section 8.

11. **Facts:** A, a mortgage lender is affiliated with B, a title company, and C, an escrow company and offers consumers a package of mortgage title and escrow services at a discount from the prices at which such services would be sold if purchased separately. Neither A, B, nor C requires consumers to purchase the services of their sister companies and each company sells such services separately and as part of the package. A also pays its employees (**e.g.,** loan officers, secretaries, **etc.**) a bonus for each loan, title insurance or closing that A's employees generate for A, B, or C respectively. A pays such employee bonuses out of its own funds and receives no payments or reimbursements for such bonuses from B or C. At or before the time that customers are told by A or its employees about the services offered by B and C and/or the package of services that is available, the customers are provided with an affiliated business disclosure form.

Comments: A's selling of a package of settlement services at a discount to a settlement service purchaser does not violate section 8 of RESPA. A's employees are making appropriate affiliated

business disclosures and since the services are available separately and as part of a package, there is not “required use” of the additional services. A's payments of bonuses to its employees for the referral of business to A or A's affiliates, B and C, are exempt from section 8 under § 1024.14(g)(1). However, if B or C reimbursed A for any bonuses that A paid to its employees for referring business to B or C, such reimbursements would violate section 8. Similarly, if B or C paid bonuses to A's employees directly for generating business for them, such payments would violate section 8.

12. **Facts.** A is a mortgage broker who provides origination services to submit a loan to a lender for approval. The mortgage broker charges the borrower a uniform fee for the total origination services, as well as a direct up-front charge for reimbursement of credit reporting, appraisal services, or similar charges.

Comment. The mortgage broker's fee must be reflected in the Good Faith Estimate and on the HUD-1 Settlement Statement. Other charges which are paid for by the borrower and paid in advance are listed as P.O.C. on the HUD-1 Settlement Statement, and reflect the actual provider charge for such services.

13. **Facts.** A is a dealer in home improvements who has established funding arrangements with several lenders. Customers for home improvements receive a proposed contract from A. The proposal requires that customers both execute forms authorizing a credit check and employment verification, and frequently, execute a dealer consumer credit contract secured by a lien on the customer's (borrower's) 1- to 4-family residential property. Simultaneously with the completion and certification of the home improvement work, the note is assigned by the dealer to a funding lender.

Comments. The loan that is assigned to the funding lender is a loan covered by RESPA, when a lien is placed on the borrower's 1- to 4-family residential structure. The dealer loan or consumer credit contract originated by a dealer is also a RESPA-covered transaction, except when the dealer is not a “creditor” under the definition of “federally related mortgage loan” in § 1024.2. The lender to whom the loan will be assigned is responsible for assuring that the lender or the dealer delivers to the borrower a Good Faith Estimate of closing costs consistent with Regulation X, and that the HUD-1 or HUD-1A Settlement Statement is used in conjunction with the settlement of the loan to be assigned. A dealer who, under § 1024.2, is covered by RESPA as a creditor is responsible for the Good Faith Estimate of Closing Costs and the use of the appropriate settlement statement in connection with the loan.

[76 FR 78981, Dec. 20, 2011, as amended at 78 FR 80105, Dec. 31, 2013]

RESPA Examples

Promotional Items v. Defraying Expenses

Q. Can a title company give a real estate agent note pads with the title agent's name on them?

A. Yes. Note pads with the title company's name on them would be considered normal promotional items and would not be prohibited under RESPA. However, note pads with the real estate agent's name on them would likely violate RESPA as they would "defray" the real estate agent's marketing expenses.

Joint Events/Sponsorship

Q. A local real estate agent hosts a group of clients for a golf tournament. They ask the title company to sponsor a hole. Is it OK?

A. Depends. Probably OK. The title company should make sure it can put signage up at the hole and be present at the tournament, and that it is paying to market its services.

Pro rata Marketing

Q. A real estate broker and a title company agree to jointly place a full-page advertisement in a local newspaper. Each company gets exactly one-half of the page to advertise its services. Each company pays one-half of the cost of the advertisement. Does this comply with RESPA?

A. Yes. However if one party is paying less than its pro rata share for the advertisement, there could be a RESPA violation.

Markup or Overcharge

Q. A lender collects from the borrower an appraisal fee of $200, listing the fee as $200 on the closing disclosure. If the appraisal is performed by a third party, and only costs $175, can the lender keep $25?

A. Not unless the lender is being paid for services performed. It would violate Section 8(b) for the lender to keep a portion of the appraisal fee other than for services rendered. If the lender keeps $25, and does not perform services, it would violate RESPA.

(This example also applies when substituting title agent for lender, and title search fee for appraisal fee.)

Tolerance Cure

Q. The loan originator estimates a title examination fee will be $150 on the Loan Estimate. The title examination ends up costing $200 and there is no changed circumstance. May the loan originator ask the title company to reduce its fee to prevent paying a tolerance cure?
A. Probably not. By asking the title company to reduce its fee to cover the tolerance cure, the loan originator is asking that a "thing of value" be given in exchange for future referrals.

Prizes and Gifts

Q. Can a lender set up a contest for real estate agents under which the agent who provides the lender with the most business will win a trip to Hawaii?
A. No. Under RESPA, the trip itself, and even the opportunity to win the trip, would be a thing of value given in exchange for the referral of business.

Prizes and Gifts to the Borrower

Q. Can a title company give the borrower an incentive, such as a chance to win a trip, for doing business with the title company?
A. Depends. RESPA does not prohibit a lender or settlement service provider from giving the borrower an incentive for doing business with it. However, this assumes the incentive is not based on the borrower referring business to the lender or settlement service provider.

Education

Q. A title company sponsors a continuing education class for real estate agents. At the class, the title company provides sandwiches from a local deli and provides the agents with company branded materials. RESPA compliant?
A. Depends. A title company can sponsor an educational event as a way to promote its services, so long as the costs associated with the event do not defray expenses that the real estate agent would otherwise encounter and are not conditioned on the referral of business. An event at a title company

office with a basic lunch would be different from an all-expenses paid educational event at a high-end resort.

Title XXXVII

INSURANCE

Chapter 626

INSURANCE FIELD REPRESENTATIVES AND OPERATIONS
626.9541 Unfair methods of competition and unfair or deceptive acts or practices

defined.-

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.-
The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

(h) Unlawful rebates.-

3.a. No title insurer, or any member, employee, attorney, agent, or agency thereof, shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as inducement to title insurance, or after such insurance has been effected, any rebate

or abatement of the premium or any other charge or fee, or provide any special favor or advantage, or any monetary consideration or inducement whatever.
b. Nothing in this subparagraph shall be construed as prohibiting the payment of fees to

attorneys at law duly licensed to practice law in the courts of this state, for professional services, or as prohibiting the payment of earned portions of the premium to duly appointed agents or agencies who actually perform services for the title insurer. Nothing in this subparagraph shall be construed as prohibiting a rebate or abatement of an attorney's fee charged for professional services, or that portion of the premium that is not required to be retained by the insurer pursuant to s. 627.782(1), or any other agent charge or fee to the person responsible for paying the premium, charge, or fee.

c. No insured named in a policy, or any other person directly or indirectly connected with the transaction involving the issuance of such policy, including, but not limited to, any mortgage broker, real estate broker, builder, or attorney, any employee, agent, agency, or representative thereof, or any other person whatsoever, shall knowingly receive or accept, directly or indirectly, any rebate or abatement of any portion of the title

insurance premium or of any other charge or fee or any monetary consideration or inducement whatsoever, except as set forth in sub-subparagraph b.; provided, in no event shall any portion of the attorney's fee, any portion of the premium that is not required to be retained by the insurer pursuant to s. 627.782(1), any agent charge or fee, or any other monetary consideration or inducement be paid directly or indirectly for the referral of title insurance business.

(m) Advertising and promotional gifts and charitable contributions permitted.-

2. The provisions of paragraph (f), paragraph (g), or paragraph (h) do not prohibit a title insurance agent or title insurance agency, as those terms are defined in s. 626.841, or a title insurer, as defined in s. 627.7711, from giving to insureds, prospective insureds, or others, for the purpose of advertising, any article of merchandise having a value of not more than $25.

CHAPTER 69B-186
TITLE INSURANCE

69B-186.008 Escrow Disbursements
69B-186.010 Unlawful Rebates and Inducements Related to Title Insurance Transactions

69B-186.008 Escrow Disbursements.

(1) For purposes of this rule, the term "settlement agent" refers to the title insurance licensee or licensee's designee who receives and disburses funds in accordance with section 626.8473, F.S.

(2) Any person disbursing escrow funds being held as part of a real estate transaction in which one or more title policies are to be issued must provide the parties to the transaction with the information required by this rule.

(3) A written statement by the settlement agent must certify that he or she has reviewed the forms prepared for the transaction and agrees to disburse the escrow funds in accordance with the terms of the transaction and Florida law. Compliance with the aforementioned certification requires the settlement agent to certify to the truth of the following statement: "I have reviewed the Closing Disclosure, the settlement statement, the lender's closing instructions and any and all other forms concerned with the funds held in escrow, including any disclosure of the Florida title insurance premiums being paid, and I agree to disburse the escrow funds in accordance with the terms of this transaction and Florida law."

(4) The title agency must provide the parties to the transaction with the following information no later than the time such funds are disbursed:

(a) The name and license number of the title insurance agency issuing the title insurance policy and/or holding and disbursing the escrow funds. If there is more than one title agency involved in the transaction, a separate form is to be provided by each agency. Any agency not holding any escrow funds should disclose that to the parties to the transaction at this time.
(b) The name, and when applicable, the license number of the settlement agent responsible for disbursing the escrow funds.

(5) All buyers, borrowers and sellers involved in the transaction must provide written approval authorizing the holding of escrow funds and disbursement of escrow funds by the named title agency.

(6) In addition to the requirements listed above, the title insurance agency must provide the parties to the transaction with the following information when a Closing Disclosure form is completed by the lender and the cost for the title insurance policies being purchased differs from the premium calculated pursuant to rule 69O-186.003, F.A.C.

(a) A written comparison of the cost of the lender's policy versus the cost of an equivalent policy based on Florida premium rates. The cost comparison must clearly disclose the premiums being charged for all endorsements in addition to the base policy.

(b) All sellers, buyers and borrowers involved in the transaction must acknowledge and authorize in writing that the title insurance premiums will be disbursed from the escrow funds in accordance with the premium disclosure certification.

(7) Any form or forms that satisfy the requirements of this rule will be considered part of a title insurance and escrow transaction in Florida. Such form or forms will not constitute loan documents.
(8) A completed and signed copy of the approved form or forms must be:
(a) Provided to the buyer, seller and lender who are named in the transaction; and,
(b) Maintained in the title insurance agency files for at least five (5) years.
(9) Form DFS-H1-2146, http://www.flrules.org/Gateway/reference.asp?No=Ref-05954, "Florida Insurance Premium Disclosure & Settlement Agent Certification," (Effective 10/03/2015), meets all of the requirements necessary to comply with this rule and is incorporated by reference herein. The form is available from the Department of Financial Services, Division of Insurance Agent and Agency Services, at http://www.myfloridacfo.com/Division/Agents.

Rulemaking Authority 624.308(1), 626.8473(6) FS. Law Implemented 626.8473 FS. History–New 10-28-15.

69B-186.010 Unlawful Rebates and Inducements Related to Title Insurance Transactions.

(1) The purpose of this rule is to interpret paragraph 626.9541(1)(h), F.S., which provides that it is an unfair method of competition and unfair or deceptive act or practice prohibited by section 626.9521, F.S., to engage in certain activities related to title insurance.

(2) All lists contained within this rule are intended as examples and are not exhaustive. This rule does not prohibit inducements or rebates provided by filed or approved rates or rating manuals, advertising gifts allowed by paragraph 626.9541(1)(m), F.S., or
inducements and rebates otherwise expressly allowed by law.

(3) For purposes of this rule, the term "referrer of settlement service business" means any person who is in a position to refer title insurance business incident to or part of a real estate transaction, or an associate of such person. A referrer of settlement service business may be a title insurance agent, title insurance agency, title insurance company, attorney, real estate broker, real estate agent, real estate licensee, broker associate, sales associate, mortgage banker, mortgage broker, lender, real estate developer, builder, property appraiser, surveyor, escrow agent, closing agent, or any other person or entity involved in a real estate transaction for which title insurance could be issued; or any employee, officer, director, or representative of such a person or entity.

(4) As they relate to the transaction of title insurance, the following activities, whether performed directly or indirectly, for or by any referrer of settlement service business, are inducements for the sale, placement or referral of title insurance business in violation of section 626.9521 and paragraph 626.9541(1)(h), F.S.:

(a) Facilitating any discount, reduction, credit, or paying any fee or portion of the cost of an inspection, inspection report, appraisal, or survey, including wind inspection, to or for a purchaser or prospective purchaser of title insurance.

(b) Providing membership in any organization, society, association, guild, union, alliance or club at a discount, reduced rate, or at no cost to a referrer of settlement service business.

(c) Making or offering to make a charitable or other tax-deductible contribution on behalf of the purchaser or prospective purchaser of title insurance.

(d) Providing or offering stocks, bonds, securities, property, or any dividend or profit accruing or to accrue thereon to a referrer of settlement service business. However, the use of lawful affiliated business arrangements that are permitted under the Federal Real Estate Settlement Procedure Act would not violate this subparagraph and would be allowable under subsection (2) of this rule.
(e) Providing or offering employment to a referrer of settlement service business in exchange for the purchase of title insurance.

(f) Providing or paying for the printing of bulletins, flyers, post cards, labels, etc. that promote the business of a referrer of settlement service business.

(g) Furnishing or paying for the furnishing of office equipment (fax machines, telephones, copy machines, etc.) to a referrer of settlement service business.
(h) Providing or paying for cellular telephone contracts for a referrer of settlement service business.

(i) Providing simulated panoramic home and property tours to real estate brokers or real estate sales associates that they utilize to promote their listings.

(j) Providing or paying for gift cards or gift certificates to or for a referrer of settlement service business or to a purchaser or prospective purchaser of title insurance.

(k) Sponsoring and hosting, or paying for the sponsoring and hosting, of open houses for real estate brokers or real estate sales associates to promote their listings.

(l) Providing or paying for food, beverages, or room rentals at events designed to promote the business of a referrer of settlement service business other than the title insurance agent or agency.

(m) Paying advertising costs to advertise and promote the listings of real estate brokers or real estate sales associates via publications, signs, emails, websites, web pages, banners, or other forms of media.

(n) Providing an endorsement, designation of preferred status, approved status, or featured partner status on publications, signs, emails, websites, web pages, banners or other forms of media promoting the business of real estate brokers or real estate sales associates.
(o) Paying a referrer of settlement service business to fill out processing (order) forms in exchange for title insurance contracts.
(p) Providing “leads” or mailing lists to or on behalf of a referrer of settlement service business at no cost or a reduced cost.
(q) Entering into any arrangement to provide unearned compensation to a referrer of settlement service business.

(r) Providing, or offering to provide, non-title services, without a charge that is commensurate with the actual cost, to a referrer of settlement service business.
(s) Waiving of fees, costs, or premium for title updates or endorsements requested after the issuance of the title insurance policy.
(t) Assuming any party’s responsibility to provide refunds to consumers under applicable laws and regulations.

(5) Except as prohibited by section 626.9541, F.S., expenditures for the following are not in violation of section 626.9521 and paragraph 626.9541(1)(h), F.S., or in violation of this rule:

(a) Promotional items with a company logo of the title insurance agent or agency, with a value not to exceed the amount allowed by paragraph 626.9541(1)(m), F.S., per item. “Promotional item” does not include a gift certificate, gift card, or other item
that has a specific monetary value on its face, or that may be exchanged for any other item having a specific monetary value.

(b) Furnishing educational materials, such as fliers, brochures, pamphlets, or Frequently Asked Question sheets, exclusively related to title insurance for a referrer of settlement service business that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by a referrer of settlement service business.

(c) Compensation paid to a referrer of settlement service business for goods and services actually performed at amounts not exceeding the reasonable fair market value of the goods and services and that is not intended to induce the referral of title insurance business.

(d) Any advertising or marketing activities that directly promote the title insurance business of the title insurance agent or agency, which may include joint participation in marketing with another party provided that the agent or agency pays the proportionate share or fair market value of the costs, and does not violate paragraph (5)(a) of this rule.

(e) A payment by a title insurance company to its duly appointed agent for services actually performed in the issuance of a title insurance policy.

(f) A payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

(6) A licensed and appointed title insurance agent is not prohibited under this rule to affix a notice to any contract or agreement, stating, “The terms of this contract are agreed to, but only to the extent that they do not violate the provisions of rule 69B-186.010, F.A.C., or paragraph 626.9541(1)(h), F.S.,” or substantially similar language.

Rulemaking Authority 624.308(1), 626.9611 FS. Law Implemented 626.9521, 626.9541(1)(h), (m) FS. History–New 2-9-16, Amended 5-13-18.

Back to Speaker Topics

Fund Assembly

Coulda, Shoulda, Woulda: Avoiding Claims of Legal Malpractice in Real Estate Transactions

Robert Rohan, *Regulatory Compliance Counsel, The Fund*

Back to Speaker Topics

Speaker Information

Coulda, Shoulda, Woulda: Avoiding Claims of Legal Malpractice in Real Estate Transactions

Robert Rohan

Regulatory Compliance Counsel, The Fund

Robert J. Rohan is The Fund's Regulatory Compliance Counsel. He earned a B.A. degree in history from the University of Florida and a J.D. degree from the University of Florida College of Law. Prior to joining The Fund, Mr. Rohan was in private practice, first in Miami, and later in Gainesville where his primary focus was residential real estate transactions. He has presented on a variety of topics at Fund Assembly, Fund Affiliate Assembly, and at American Land Title Association Annual Conventions. Mr. Rohan is a member of the Florida Bar's Real Property, Probate & Trust Law Section; the Eighth Judicial Circuit Bar Association; and the North Florida Association of Real Estate Attorneys. A life-long Florida resident, he currently resides in Micanopy, Florida.

Coulda, Shoulda, Woulda
Avoiding Claims of Legal Malpractice in Real Estate Transactions

Contents

1.	PowerPoint Slides

Case Law
(Reprinted from Westlaw with permission of Thomson Reuters)

2.	*Espinosa v. Sparber et al*., 612 So.2d 1378 (Fla. 1993)
3.	*Dean v. Dean*, 607 So.2d 494 (Fla. 4th DCA 1992)
4.	*Blackhawk v. Waltemyer*, 900 F.Supp. 414 (M.D. Fla., Apr. 17, 1995)
5.	*In re Lentek Int'l, Inc.,* 337 B.R. 396 (M.D. Fla., Oct. 1, 2007)
6.	*Dingle v. Dellinger*, 134 So.3d 484 (Fla. 5th DCA, 2014)
7.	*Nieburg v. Sulzberger*, 260 So.3d 363 (Fla. 3d DCA, 2018)
8.	*Silver Dunes v. Beggs and Lane*, 763 So.2d 1274 (Fla. 1st DCA, 2000)
9.	*Cowan, Liebowitz & Latman v. Kaplan*, 902 So.2d 755 (Fla. 2005)
10.	*Law Office of David J. Stern v. Security Nat*., 969 So.2d 962 (Fla. 2007)
11.	*Maillard v. Dowdell*, 538 So.2d 512 (Fla. 3d DCA 1988)
12.	*Rios v. McDermott, Will & Emery*, 613 So.2d 544 (Fla. 3d DCA 1993)
13.	*Lane v. Cold*, 882 So.2d 436 (Fla. 1st DCA 2004)
14.	*Boyd v. Brett-Major*, 449 So.2d 952 (Fla. 3d DCA 1984)

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Coulda, Shoulda, Woulda
Avoiding Claims of Legal Malpractice in Real Estate Transactions

15.	*Lawyers Professional Liability v. McKenzie*, 470 So.2d 752 (Fla. 3d DCA 1985)
16.	*Atkin v. Tittle and Tittle*, 730 So.2d 376 (Fla. 3d DCA 1999)
17.	*McCarty v. Browning*, 797 So.2d 30 (Fla. 3d DCA 2001)
18.	*Proto v. Graham*, 788 So.2d 393 (Fla. 5th DCA 2001)
19.	*Stake v. Harlan*, 529 So.2d 1123 (Fla. 2d DCA 1988)
20.	*Lorraine v. Grover, Ciment et al*., 467 So.2d 315 (Fla. 3d DCA 1976)
21.	*Bolves v. Hullinger*, 629 So.2d 198 (Fla. 5th DCA 1993)
22.	*Orr v. Black & Furci, P.A*., 876 F.Supp. 1270 (M.D. Fla., Feb. 3,1995)
23.	*Johnson v. Allen, Knudson et al*., 621 So.2d 507 (Fla. 2d DCA 1993)
Miscellaneous	
24.	Rule 4-5.7 Responsibilities Regarding Nonlegal Services, Rules Regulating The Florida Bar
25.	*Factsheet: Stress,* Law Care (Sept. 2018); https://www.lawcare.org.uk/information-and-support/stress, last accessed 3/13/19
26.	*Factsheet: Depression*, Law Care (Sept. 2018); https://www.lawcare.org.uk/information-and-support/depression, last accessed 3/13/19
27.	*Factsheet: Worried about someone else*, Law Care (Sept. 2018); https://www.lawcare.org.uk/information-and-support/worried-about-someone-else, last accessed 3/13/19

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Coulda, Shoulda, Woulda
Avoiding Claims of Legal Malpractice in Real Estate Transactions

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The Top Ten Causes of Malpractice – and How You Can Avoid Them, Mark C.S. Bassingthwaighte and Reba J. Nance, (Apr. 20-22, 2006), ABA Techshow 2006

How Incorporating These Best Practices Tips Will Help You Defend Against A Legal Malpractice Claim, Patrick Causey (Oct. 1, 2014), For The Defense, DRI Trial Tactics Magazine (Oct. 2014)

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Back to Speaker Topics

Fund Assembly

Coulda, Shoulda, Woulda

Avoiding Claims of Legal Malpractice in Real Estate Transactions

Robert Rohan
Regulatory Compliance Counsel, The Fund

Statistics

- Real property law has become the largest source of professional malpractice claims (20% of all claims)
- One in five attorneys will be faced with a claim during their careers

Source: ABA's Standing Committee on Lawyers Professional Liability

2

Back to Speaker Topics

Lawyer as Defendant

- Malpractice insurance is a "deep pocket"
- Jury prejudice
  - "He said, she said" usually resolved against attorney
  - "Reasonably prudent attorney" standard causes juries to expect more than the law requires

Real Estate Attorney Malpractice Claims

The Hanover Insurance Group
(April, 2018)

Lawyers Mutual Liability Co. of North Carolina
(Oct. 2017)

Back to Speaker Topics

Hanover Insurance Group

1. Inaccurate property description
2. Cash back at closing fraud
3. Vague lease language (use of forms)
4. Inadvertent attorney-client relationship
5. Attorney acting as escrow agent

5

Lawyers Mutual Liability Co.

1. Wire transfer security
2. Satisfaction of Home Equity Lines of Credit
3. Disbursements against uncollected funds
   - Caution: E&O Policy may exclude claims based upon disbursements of uncollected funds

6

Back to Speaker Topics

Professional Malpractice

Elements of a Cause of Action

1. Employment
2. Neglect of a reasonable duty
3. Proximate cause of loss

Dingle v. Dellinger
134 So.3d 484
(Fla. 5th DCA, 2014)

8

Back to Speaker Topics

Employment – Privity

- Word of art derived from common law of contracts and used to describe relationship of persons who are parties to a contract
- Plaintiff must either be in privity with the attorney (or) an intended third party beneficiary

Espinosa v. Sparber et al.
612 So.2d 1378
(Fla. 1993)

9

Employment – Client

- Any person who consults a lawyer with purpose of obtaining legal services or who is rendered legal services (Sec. 90.502(1)(b), F.S.)
  - Subjective intent of the client based upon reasonable conclusions

Dean v. Dean
607 So.2d 494
(Fla. 4th DCA 1992)

10

Back to Speaker Topics

Employment – Inadvertent relationship

- Attorney represented debtor and handled mortgage closing on behalf of client (partner) and partnership
  - Provided partnership with "clean" title commitment and unapproved mortgage
  - Did attorney represent partnership?

Blackhawk v. Waltemyer
900 F.Supp. 414
(M.D. Fla., Apr. 17, 1995)

11

Employment – Inadvertent relationship

- Law firm represented president in stock purchase from corporation
  - Legal services benefitted corporation which paid all law firm's bills
  - Did firm represent corporation?

In re Lentek Int'l, Inc.,
337 B.R. 396
(M.D. Fla., Oct. 1, 2007)

12

Back to Speaker Topics

Employment – 3rd party beneficiary

- Quitclaim deed failed because POA did not authorize gift
  - Attorney drafted and recorded it with POA
  - Was attorney liable to intended grantees?

Dingle v. Dellinger
134 So.3d 484
(Fla. 5th DCA 2014)

13

Employment – 3rd party beneficiary

- Estate planning, ante-nuptial agreement review and probate advice given by three law firms
  - Did frustrated heirs have standing to sue?

Nieburg v. Sulzberger
260 So.3d 363
(Fla. 3d DCA, 2018)

14

Back to Speaker Topics

Employment – 3rd party beneficiary

- Services provided to condominium association related to reconstruction following hurricane
  - Association owed fiduciary duty to owners
  - Did owners have standing to sue attorneys?

Silver Dunes v. Beggs and Lane
763 So.2d 1274
(Fla. 1st DCA, 2000)

15

Employment – Assignment of claim

- Attorneys prepared misleading private placement memoranda for corporation leading to bankruptcy
  - Corporation gives assignment for benefit of creditors
  - Was malpractice claim assignable?

Cowan, Liebowitz & Latman v. Kaplan
902 So.2d 755
(Fla. 2005)

16

Back to Speaker Topics

Employment – Assignment of claim

- Botched foreclosure caused loss of lien
  - While appeal of mortgage foreclosure dismissal was pending mortgage assigned
  - Was assignor's potential malpractice claim included in assignment of mortgage?

Law Office of David J. Stern v. Security Nat. 969 So.2d 962 (Fla. 2007)

17

Neglect of a reasonable duty

- Attorney and client (purchaser) were aware of suit between association and builder
  - Attorney closed purchase without investigating nature of lawsuit
  - Did attorney have duty to investigate?

Maillard v. Dowdell 538 So.2d 512 (Fla. 3d DCA 1988)

18

Back to Speaker Topics

Neglect of a reasonable duty

- Law firm unable to clear title in time to save contract of sale
  - Subsequent sale for $500K less
  - Was allegation attorney "failed to timely act" sufficient?

Rios v. McDermott, Will & Emery
613 So.2d 544
(Fla. 3d DCA 1993)

19

Neglect of a reasonable duty

- Attorney did not prepare buy-sell agreement to accompany formation of closely held corporation
  - Attorney had previously provided one for same clients on similar incorporation
  - Did attorney have duty absent client direction?

Lane v. Cold
882 So.2d 436
(Fla. 1st DCA 2004)

20

Back to Speaker Topics

Neglect of a reasonable duty

- Attorney hired to stall bail bond foreclosure
  - Failed to plead absolute defense to foreclosure
  - If instructions were followed is attorney liable for not asserting the absolute defense?

Boyd v. Brett-Major
449 So.2d 952
(Fla. 3d DCA 1984)

21

Neglect of a reasonable duty

- Legal description error fatal to validity of first foreclosure sale
  - Mortgagee "winning bid" set aside; reforeclosure resulted in mortgagor redemption
  - Was a duty to assist client in obtaining title reasonable?

Lawyers Professional
Liability v. McKenzie
470 So.2d 752
(Fla. 3d DCA 1985)

22

Back to Speaker Topics

Neglect of a reasonable duty

- Client closed on vacant lot and then was refused building permit because of lot size
  - Clause added to form contract allowed termination if lot non-conforming
  - Did lawyer have duty to investigate?

Atkin v. Tittle and Tittle
730 So.2d 376
(Fla. 3d DCA 1999)

23

Neglect of a reasonable duty

- Unpermitted downstairs enclosure in the keys cited following closing and had to be removed
  - Attorney reviewed mortgage documents with "client" at closing
  - Is attorney required to advise client of adverse legal problems of which the attorney becomes aware?

McCarty v. Browning
797 So.2d 30
(Fla. 3d DCA 2001)

24

Back to Speaker Topics

Neglect of a reasonable duty

- Investor caught up in mobile home mortgage fraud hired attorney to cut his losses
  - Attorney unsuccessful in negotiation loses at trial when unable to prove mortgagee complicity
  - Should attorney have recommended settlement?

Proto v. Graham
788 So.2d 393
(Fla. 5th DCA 2001)

25

Neglect of a reasonable duty

- "Due on sale" clause held enforceable by Florida Supreme Court on conflict certiorari
  - Mortgagee forecloses client who closed upon lawyer's assurance it was legally assumable
  - Does attorney awareness of unsettled law require disclosure?

Stake v. Harlan
529 So.2d 1123
(Fla. 2d DCA 1988)

26

Back to Speaker Topics

Proximate cause

- Homestead devise of life estate to mother fails when decedent's minor child survives
  - Alternative planning to benefit mother was possible
  - Is an attorney required to do more than carry out testator's expressed directions in will drafting?

Lorraine v. Grover, Ciment et al.
467 So.2d 315
(Fla. 3d DCA 1976)

27

Proximate cause

- Attorneys represented terminated employee in age discrimination administrative proceeding
  - Statute of limitations ran before civil proceedings filed
  - Was client required to prove age discrimination allegations to succeed in malpractice action?

Bolves v. Hullinger
629 So.2d 198
(Fla. 5th DCA 1993)

28

Back to Speaker Topics

Proximate cause

- Bankruptcy trustee alleges malpractice committed in criminal defense of debtor
  - Plea agreement did not protect defendant against tax consequences
  - Is a defendant's guilt proximate cause of damages?

Orr v. Black & Furci, P.A.
876 F.Supp. 1270
(M.D. Fla., Feb. 3,1995)

29

Statute of limitations

- Law firm took voluntary dismissal of suit for fees to eliminate counterclaim for malpractice
  - Compulsory counterclaim to suit for fees
  - Can otherwise barred malpractice claim stand alone as counterclaim to withdrawn suit for fees?

Johnson v. Allen, Knudson et al.
621 So.2d 507
(Fla. 2d DCA 1993)

30

Back to Speaker Topics

Top Ten Causes of Malpractice – and How You Can Avoid Them

Bassingthwaighte and Nance, ABA Techshow (April, 2006)

Bassingthwaighte and Nance

1. Missed deadlines
2. Lack of professionalism
3. Stress and substance abuse
4. Conflicts of interest
5. Poor client relations

32

Back to Speaker Topics

Bassingthwaighte and Nance

6. Substantive legal errors
7. Ineffective client screening
8. Malpractice counterclaim (suit for fees)
9. Inadequate documentation of work
10. Technology traps

33

Best Practices

Back to Speaker Topics

Screen prospective clients

- Demanding, emotionally invested, or unrealistic about outcome
- Engagements with other attorneys

How Incorporating These Best Practice Tips Will Help You Defend Against a Legal Malpractice Claim
Patrick Causey
DRI Trial Tactics(Oct. 2014)

35

Screen prospective clients

- Comfort with associated costs
- Acceptance of their obligations
- Communication expectations

DRI Trial Tactics(Oct. 2014)

36

Back to Speaker Topics

Keep expectations realistic

- Guaranteeing result creates a breach of contract cause of action
  - Attorney of ordinary skill standard irrelevant
  - Expert witness no longer necessary
- Don't oversell the strength of your representation

DRI Trial Tactics(Oct. 2014)

37

Document everything

- Nonengagement Letter
- Attorney-client relationship does not exist
  - Date of consultation • Matter discussed
  - Nonengagement decision • Seek other counsel

Avoiding Malpractice Traps
Lawyers Mutual Liability Co. of No. Carolina
(Oct. 2017)

38

Back to Speaker Topics

Document everything - Tip

- Begin every potential client conversation by gathering contact information
  - Name • Address • Phone number
  - General nature of the matter

Top Ten Causes of Malpractice
Bassingthwaighte and Nance
(ABA Techshow Apr. 2006)

39

Document everything

- Disengagement Letter
- Attorney-client relationship no longer exists
  - Limits client expectations
  - Starts statute of limitations clock

Avoiding Malpractice Traps

40

Back to Speaker Topics

Document everything

- Engagement Letter (retainer agreement)
- Memorializes relationship and scope of representation
  - Timelines • Matters discussed and agreed to
  - Fees and costs • Communication protocols

Avoiding Malpractice Traps

41

Document everything

- Client decisions and instructions
  - Engagement letter informs client all oral communications reduced to writing (letter or email)
  - Benefits clients with little experience in complex legal issues

DRI Trial Tactics(Oct. 2014)

42

Back to Speaker Topics

Document everything

- Client decisions and instructions
  - Claim: access easement noted on survey but no evidence on the ground; client tells his lawyer "don't worry about it"

Steer clear of conflicts

- Multiple parties
  - Request to "write the agreement for both of us"
    - Do not meet with both
      - Unintended attorney-client relationship
      - Conflict with one means conflict with all

Back to Speaker Topics

Steer clear of conflicts

- Attorney as settlement agent
  - Responsibilities regarding nonlegal services
    - Services not distinct from legal services
    - Services distinct from legal services
    - Services by nonlegal entity (e.g., title company)

Rule 4-5.7
Rules Regulating The Florida Bar

45

Substantive legal errors

- Don't dabble
  - No such thing as "simple will" or "simple contract"
  - Favors for friends or relatives also require professionalism

Top Ten Causes of Malpractice

46

Back to Speaker Topics

Substantive legal errors

- Prioritize CLE and take relevant courses
- Peer review your office's closed files
- Deal with mistakes immediately

Top Ten Causes of Malpractice

47

Professional internal communications

- Subject to discovery
- Attorney-client privilege waived
  - Mistakes made
  - Client criticism
  - Fee boasting

DRI Trial Tactics(Oct. 2014)

48

Back to Speaker Topics

Professional internal communications

- Subject to discovery
- Claim:
  - "We're already $200,000 over estimate"
  - "Churn that bill, baby!"
  - "That bill shall know no limits"

DRI Trial Tactics(Oct. 2014)

49

Professionalism

- Breach of confidentiality
- eMail (spelling and grammar; signature block)
- Poor housekeeping (uncluttered office; dress professionally, courtesy and civility)

Top five real estate attorney malpractice claims
The Hanover Insurance Group (April, 2018)

50

Back to Speaker Topics

Handling stress

- Time management
  - Calendar for “professional reading”, “business development”, and “personal time”
- Staffing
  - Adequate resources and training
  - Delegate

Top Ten Causes of Malpractice

51

Technology traps

- “Delete” does not delete
- Metadata
- Portable storage devices (e.g., “flash” drive)
- Confidentiality disclaimers (“chat” messaging)

Top Ten Causes of Malpractice

52

Back to Speaker Topics

Fee disputes

- Is amount collectible?
- Is amount substantial?
- Was a good result obtained?
- Has independent lawyer reviewed file?
- Invitation to a malpractice counterclaim

Avoiding Malpractice Traps

53

"He who represents himself has a fool for a client."

—Abraham Lincoln

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Estate of Schneider v. Finmann, N.Y., June 17, 2010

612 So.2d 1378
Supreme Court of Florida.

Marta ESPINOSA, et al., Petitioners,
v.
SPARBER, SHEVIN, SHAPO, ROSEN AND HEILBRONNER, et al., Respondents.

No. 79085.
|
Feb. 4, 1993.

Synopsis
Testator's children and estate brought legal malpractice action against attorney who prepared testator's will and his law firm. The Circuit Court, Dade County, Maria M. Korvick, J., granted summary judgment for attorney and law firm. Children and estate appealed. The District Court of Appeal, 586 So.2d 1221, affirmed in part and reversed and remanded in part. Question was certified. The Supreme Court, McDonald, J., held that daughter who was not named in will lacked standing to bring malpractice action but estate did have standing.

Question answered.

West Headnotes (6)

[1] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Attorney's liability for negligence in performance of his or her professional duties is limited to clients with whom attorney shares privity of contract.

11 Cases that cite this headnote

[2] Contracts
Privity of Contract in General

In legal context, term "privity" is word of art derived from common law of contracts and used to describe relationship of persons who are parties to a contract.

2 Cases that cite this headnote

[3] Attorney and Client
In general;limitations

To bring legal malpractice action, plaintiff must either be in privity with attorney, wherein one party has direct obligation to another, or, alternatively, plaintiff must be intended third-party beneficiary.

27 Cases that cite this headnote

[4] Wills
Ascertainment from words of will

To the greatest extent possible, courts and personal representatives are obligated to honor testator's intent in conformity with contents of will.

2 Cases that cite this headnote

[5] Attorney and Client
In general;limitations

Standing in legal malpractice actions involving wills is limited to those who can show that testator's intent as expressed in will is frustrated by negligence of testator's attorney.

18 Cases that cite this headnote

[6] Attorney and Client
In general;limitations

Testator's daughter, who was born between first and second codicils to will, was not in privity with attorney who drafted will and was not an intended third-party beneficiary and, thus, lacked standing to bring legal malpractice action against attorney for negligence in failing to provide for after-born children in will and first codicil and omitting provision for her in second codicil; however, testator's estate stood in shoes of testator and did have standing to bring such an action.

36 Cases that cite this headnote

Attorneys and Law Firms

***1378** Fred E. Glickman, Miami, for petitioners.

Jeffrey M. Weissman of Weissman, Lichtman & Dervishi, P.A., Fort Lauderdale, and Lenard H. Gorman of Lenard H. Gorman, P.A., Miami, for respondents.

Opinion

***1379** McDONALD, Justice.

We review *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner,* 586 So.2d 1221 (Fla. 3d DCA 1991), which involves the following question of great public importance certified in an unpublished order dated September 17, 1991:

> UNDER THE FACTS OF THIS CASE ... MAY A LAWSUIT ALLEGING PROFESSIONAL MALPRACTICE BE BROUGHT, ON BEHALF OF PATRICIA AZCUNCE, AGAINST THE DRAFTSMAN OF THE SECOND CODICIL?

We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. We answer the question in the negative and approve the decision of the district court.

Howard Roskin, a member of the Sparber, Shevin law firm, drafted a will for Rene Azcunce, the testator. At the time he signed his will, Rene and his wife, Marta, had three children, Lisette, Natalie, and Gabriel. Article Seventeenth of the Will specifically provided that:

> (a) References in this, my Last Will and Testament, to my children, shall be construed to mean my daughters, LISSETE AZCUNCE and NATALIE AZCUNCE, and my son, GABRIEL AZCUNCE.
>
> (b) References in this, my Last Will and Testament, to my "issue," shall be construed to mean my children [as defined in Paragraph (a), above] and their legitimate natural born and legally adopted lineal descendants.

Article Fourth of the will established a trust for the benefit of Marta and the three named children and also granted Marta a power of appointment to distribute all or a portion of the trust to the named children and their issue. In addition, the will provided that, upon Marta's death, the trust was to be divided into equal shares for each of the three named children.

Neither the will nor the first codicil to the will, executed on August 8, 1983, made any provisions for after-born children. On March 14, 1984, Patricia Azcunce was born as the fourth child of Rene and Marta. Rene contacted Roskin and communicated his desire to include Patricia in his will. In response, Roskin drafted a new will that provided for Patricia and also restructured the trust. However, due to a disagreement between Rene and Roskin on the amount of available assets, Rene never signed the second will. Instead, on June 25, 1986, he executed a second codicil drafted by Roskin that changed the identity of the co-trustee and co-personal representative, but did not provide for the after-born child, Patricia. When Rene died on December 30, 1986, he had never executed any document that provided for Patricia. [1]

Marta brought a malpractice action on behalf of Patricia and the estate against Roskin and his law firm. The trial court dismissed the complaint with prejudice for lack of privity and entered final summary judgment for Roskin and his firm. The Third District Court of Appeal reversed the dismissal with regard to the estate, affirmed it with regard to Patricia, and certified the question of whether Patricia has standing to bring a legal malpractice action under the facts of this case.

[1] **[2]** **[3]** An attorney's liability for negligence in the performance of his or her professional duties is limited to clients with whom the attorney shares privity of contract. *Angel, Cohen & Rogovin v. Oberon Investments, N.V.,* 512 So.2d 192 (Fla.1987). In a legal context, the term "privity" ***1380** is a word of art derived from the common law of contracts and used to describe the relationship of persons who are parties to a contract. *Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n, Inc.,* 581 So.2d 1301 (Fla.1991). To bring a legal malpractice action, the plaintiff must either be in privity with the attorney, wherein one party has a direct obligation to another, or, alternatively, the plaintiff

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must be an intended third-party beneficiary. In the instant case, Patricia Azcunce does not fit into either category of proper plaintiffs.

[4] In the area of will drafting, a limited exception to the strict privity requirement has been allowed where it can be demonstrated that the apparent intent of the client in engaging the services of the lawyer was to benefit a third party. *Rosenstone v. Satchell,* 560 So.2d 1229 (Fla. 4th DCA 1990); *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.,* 467 So.2d 315 (Fla. 3d DCA 1985). Because the client is no longer alive and is unable to testify, the task of identifying those persons who are intended third-party beneficiaries causes an evidentiary problem closely akin to the problem of determining the client's general testamentary intent. To minimize such evidentiary problems, the will was designed as a legal document that affords people a clear opportunity to express the way in which they desire to have their property distributed upon death. To the greatest extent possible, courts and personal representatives are obligated to honor the testator's intent in conformity with the contents of the will. *In re Blocks' Estate,* 143 Fla. 163, 196 So. 410 (1940).

[5] **[6]** If extrinsic evidence is admitted to explain testamentary intent, as recommended by the petitioners, the risk of misinterpreting the testator's intent increases dramatically. Furthermore, admitting extrinsic evidence heightens the tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator. For these reasons, we adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's attorney. Although Rene did not express in his will and codicils any intention to exclude Patricia, his will and codicils do not, unfortunately, express any affirmative intent to provide for her. Because Patricia cannot be described as one in privity with the attorney or as an intended third-party beneficiary, a lawsuit alleging professional malpractice cannot be brought on her behalf.

Rene's estate, however, stands in the shoes of the testator and clearly satisfies the privity requirement. Therefore, we agree with the district court's decision that the estate may maintain a legal malpractice action against Roskin for any acts of professional negligence committed by him during his representation of Rene. Because the alleged damages to the estate are an element of the liability claim and are not relevant to the standing question in this particular case, we do not address that issue.

For the reasons stated above, we answer the certified question in the negative and approve the decision of the district court.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

All Citations

612 So.2d 1378, 18 Fla. L. Weekly S98

Footnotes

1 Patricia brought suit in probate court to be classified as a pretermitted child, which would have entitled her to a share of Rene's estate. Her mother and adult sibling consented to Patricia's petition being granted. The probate court judge appointed a guardian ad litem for Patricia's two minor siblings, and the guardian opposed the petition. Subsequently, the court ruled that the second codicil destroyed Patricia's status as a pretermitted child, and the decision was upheld on appeal. *Azcunce v. Estate of Azcunce,* 586 So.2d 1216 (Fla. 3d DCA 1991).

We are not privy to the factors that the guardian ad litem considered in deciding not to consent to Patricia's classification as a pretermitted child, a decision that deprived Patricia of a share in the estate and ultimately led to costly litigation. We hope, however, that a guardian evaluating the facts of this case would not focus strictly on the financial consequences for the child, but would also consider such important factors as family harmony and stability.

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607 So.2d 494
District Court of Appeal of Florida,
Fourth District.

Ruth DEAN, and Barry Krischer, Petitioners,
v.
Roger DEAN, Respondent.

No. 92-0669.
|
Nov. 4, 1992.
|
Rehearing Denied Dec. 2, 1992.

Synopsis
Victim moved to compel attorney to identify person who engaged attorney to return victim's stolen property. The Circuit Court, Palm Beach County, Jack H. Cook, J., granted the motion, and attorney petitioned for writ of certiorari. The District Court of Appeal, Farmer, J., held that identity of client was privileged.

Writ granted, order quashed, and subpoena dismissed.

Glickstein, C.J., dissented and filed opinion.

West Headnotes (7)

[1] Privileged Communications and Confidentiality
Subject Matter;Particular Cases

For purposes of determining whether attorney was privileged from disclosing identity of caller seeking to return stolen goods, caller's reference to earlier matter in which attorney had asserted attorney client privilege to avoid disclosing name of hit-and-run driver indicated that caller was seeking legal advice and intended all communication with attorney, including identity, to be confidential. West's F.S.A. §§ 90.101-90.958; West's F.S.A. Bar Rule 4-1.6.

Cases that cite this headnote

[2] Privileged Communications and Confidentiality
Relation of Attorney and Client

Existence of attorney-client privilege does not depend on whether client actually hires attorney; it is enough if client merely consults attorney about legal question with a view to employing attorney professionally. West's F.S.A. §§ 90.101-90.958; West's F.S.A. Bar Rule 4-1.6.

6 Cases that cite this headnote

[3] Attorney and Client
What constitutes a retainer

Whether person who consults lawyer is a "client," for purposes of evidence code depends on subjective intent of person seeking consultation rather than what lawyer does. West's F.S.A. § 90.502(1)(b).

7 Cases that cite this headnote

[4] Privileged Communications and Confidentiality
Client information;retainer and authority

Under "last-link" exception to rule that client's identity is not privileged, attorney may not be compelled to disclose client's identity if mere identity of client might expose him to prosecution for criminal acts previously committed and for which client consulted attorney. West's F.S.A. §§ 90.101-90.958; West's F.S.A. Bar Rule 4-1.6.

2 Cases that cite this headnote

[5] Courts
Intermediate appellate court

In the absence of controlling precedent from its own district, trial court is required to follow decision of another District Court of Appeal regardless of district in which trial court sits.

1 Cases that cite this headnote

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[6] Privileged Communications and Confidentiality

Client information;retainer and authority

Despite contention that attorney merely acted as conduit for return of stolen property, identity of client who engaged attorney solely for purpose of returning stolen property was privileged from disclosure. West's F.S.A. §§ 90.101-90.958; West's F.S.A. Bar Rule 4-1.6.

1 Cases that cite this headnote

[7] Attorney and Client

What constitutes a retainer

Legal advice is a "legal service" for purposes of determining whether attorney-client relationship exists. West's F.S.A. §§ 90.101-90.958; West's F.S.A. Bar Rule 4-1.6.

7 Cases that cite this headnote

Attorneys and Law Firms

***495** Joel M. Weissman of Joel M. Weissman, P.A., West Palm Beach, and Barry E. Krischer of Salnick & Krischer, West Palm Beach, for petitioners.

Joseph D. Farish of Farish, Farish, and Romani, of West Palm Beach, for respondent.

Opinion

FARMER, Judge.

The issue raised here is whether the attorney-client privilege can be used to prevent the disclosure of the identity of a person who had previously consulted an attorney regarding the return of stolen property belonging to one of the parties in a civil case. As we explain along the way, under the circumstances of this case the privilege bars such disclosure.

[1] The facts are unusual, to say the least. During the pendency of the Deans' dissolution of marriage case, the husband's place of business was allegedly burgled, resulting in the loss of two duffel bags containing various personal items belonging to husband's daughter, and from $35,000 to $40,000 in cash. Sometime after the theft, an unidentified person telephoned Krischer at his office. He related the conversation as follows:

> I received a telephone call from an individual who knew that I was an attorney; knew I was an attorney that was involved in the Baltes[1] matter and the individual asked me for advice with regard to returning property. I advised this person on the telephone that the experience that I have had in the State Attorney's office was that the best avenue was to turn the property over to an attorney and let the attorney bring it to the State Attorney's office or to the law enforcement.

At another point, Krischer added:

> Obviously I have been through this before and I knew all the questions to ask this person and I got all the responses back which indicates to me this person knew I was a lawyer, was asking for legal advice and did not want their identity revealed.

Krischer met twice and had one telephone conversation with this person. Nearly six weeks after the second meeting, the two duffel bags containing only the daughter's personal property were delivered to Krischer's office by someone who told his receptionist that he "would know what they are." No cash was included with the returned items. Krischer then delivered the bags to the police, telling them that they "may have some connection with" husband.

In a twist of irony, these events came to light through Krischer's former secretary, who had also by then become a client of husband's lawyer. Soon after, husband's lawyer

served Krischer with a subpoena for a deposition, seeking the identity of Krischer's contact. Krischer asserted the privilege at the deposition. Husband then moved to compel the testimony. After a hearing, the trial court granted the motion, saying in part:

> The purpose of the attorney-client privilege is to encourage the free and full disclosure by clients of information to attorneys so that adequate legal representation can be supplied. It is not however the purpose of the attorney-client privilege to act as a vehicle by which individuals can use an attorney to insulate themselves from disclosure relative to activities which do not involve legal representation. In this case, Mr. Krischer did not appear in court or render any legal opinions; rather he merely advised the person to use an attorney as a conduit and then acted in that capacity to ***496** deliver stolen goods to the police. He did nothing and gave no opinions that could not have been done or given by any member of the public.
>
> There are other factors which weigh against the existence of an attorney-client relationship. Mr. Krischer testified that when he is hired by a new client it is his office procedure to create a three by five card with the name and address of the client; and to enter the name of the client in his computer system. None of these office procedures were followed with reference to this individual. Mr. Krischer also testified that he did not receive a fee for his services in this matter and that he does not expect to receive a fee in the future. While these facts certainly do not preclude the existence of an attorney-client relationship, I find them to be more consistent with Mr. Krischer having acted as a conduit than as an attorney in this matter.

The court concluded that there was no attorney-client relationship, and thus no privilege, and ordered Krischer to answer the questions as to the identity of his contact. Krischer and the wife in the dissolution proceedings have filed a petition for a common law writ of certiorari in which they seek to quash the decision and to uphold the privilege. [2]

The attorney-client privilege, though dating back to Elizabethan England, did not become developed in its present form until the nineteenth century. 8 Wigmore, *Evidence,* § 2290 (McNaughton rev. 1961) [Wigmore]. It rests on the theory that:

> "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit the disclosure except on the client's consent."

8 Wigmore at § 2291. One of the most eloquent formulations of the rationale for the privilege is thus:

> Let the person be who he may, strong or weak, learned or unlearned, wise or foolish, a man of influence and invested with authority, or destitute of means and utterly helpless, his claims are equally to be laid before the judge with all the power of advocacy of which they are susceptible. To accomplish this object, the first indispensable requisite is, that the client shall so state to his legal advisers *all* the facts of his case. Very few clients can perceive wherein their strength lies. They must state *the whole* to the legal adviser, and leave him to form his own judgment. * * * [E]very man can ascertain the law by consulting a lawyer. But then the condition, upon which this power of ascertaining the law will rest is, that he may make the inquiry without incurring any danger. The communication must be privileged to the utmost extent, or it will not be made. Thus it will be one consequence of [the failure to accord the privilege], that the law will be in no way open to the community at large: to them it will be a sealed book * * *. [e.o.]

8 Wigmore at § 2291.

By the early eighteen hundreds, it was generally understood that the privilege did not depend on the existence of a formal proceeding or even an incipient controversy; rather it was accepted that all "communications made in seeking *legal advice for any purpose* were within the principle of the privilege." [e.o.] 8 Wigmore at § 2294. As Wigmore describes this development, the privilege was in time extended:

> to include communications made, first during any other litigation; next, in contemplation of litigation; next, during a controversy but not yet looking to litigation; and, lastly, *in any consultation for legal advice,* wholly irrespective of litigation or even of controversy. [e.s.]

8 Wigmore at § 2290. In the words of the treatise, "[i]t has never since been doubted to be the law." *Id.*

[2] In short, since its modern development, the privilege is founded wholly on *subjective* considerations: "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of ***497** compelled disclosure by the legal advisers must be removed * * *." 8 Wigmore at § 2291. Or, as it was stated more recently:

> The [privilege] rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.

Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980). Hence, it logically follows that the privilege does not turn on the client actually hiring or engaging the attorney; it is enough if the client merely consulted the attorney about a legal question "with the view to employing [the attorney] professionally * * * although the attorney is not subsequently employed." *Keir v. State,* 152 Fla. 389, 394, 11 So.2d 886, 888 (1943).

[3] What thus originally began as the product of prudential rules devised by common law judges in recognition of these ideas has now become codified by statute,[3] as well as disciplinary rules governing the conduct of lawyers.[4] Although FEC section 90.102 provides generally that the Florida Evidence Code supersedes the common law, it is also generally accepted that FEC section 90.502 represents a codification of pre-code law on the privilege. *See* Charles W. Ehrhardt, *Florida Evidence,* § 502.1 (1992 Ed.). Under FEC section 90.502(1)(b), a "client" is defined as any person "who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." We construe this language as continuing the common law focus on subjective considerations, viz., on the person seeking consultation with a lawyer, rather than on what the lawyer does.

It is thus necessary in this case that we focus not on what Krischer did but on what the client intended. Krischer testified that his contact sought legal advice from him-which is, he contends, paradigmatically a legal service-and hence became his client for the purpose of invoking the privilege. We agree.

Krischer's testimony makes plain the intent of his client.

> Q. Is it true that the employment by you, by person "x" was predicated on the fact that you would keep person "x's" identity confidential?
>
> A. Yes, that was the condition of the employment.
>
> Q. Was your employment also a condition that you were person "x's" lawyer for all purposes?
>
> A. Correct. The individual called-I can expedite this if I can state a couple of things, judge. I had obviously been through this previously in another case. I was well aware of what was needed to be established in order to protect this ***498** client. I inquired of this client if that individual knew I was an attorney. That individual indicated that they did. I inquired if they were seeking legal advice. They indicated that they did. They discussed a legal problem with me. I gave them legal advice.
>
> A condition precedent to this person discussing the legal problem with me was that I not divulge their identity. This person came to me with knowledge of my previous

> actions in a previous case and felt that I could be trusted, and on that condition precedent I listened to the problem, gave advise [sic] and rendered legal services.

The trial judge obviously accepted this testimony as truthful, but said that he must look beyond Krischer's "conclusion in this regard to the underlying facts." In effect, the court decided that the issue should turn on what the undisclosed person sought to accomplish with the legal advice obtained or on what Krischer did in consequence of the contact, citing *Anderson v. State,* 297 So.2d 871 (Fla. 2d DCA 1974), and *Hughes v. Meade,* 453 S.W.2d 538 (Ky.1970).

Anderson is nearly, but not quite, the duplicate of this case. The petitioner there was charged with receiving and concealing stolen property. He retained Korones as his lawyer. Sometime after, the stolen property was delivered to Korones's office, and he turned it over to the police. He and his receptionist were thereupon subpoenaed by the state to testify at trial. After the trial judge refused to quash the subpoenas and compelled their testimony, he sought common law certiorari review of the order. The Second District granted the writ and quashed the order compelling the testimony.

Initially the court disposed of the notion that the return of the stolen property was not an act of communication, but was instead conduct unprotected by the privilege. The court squarely concluded that the return of the goods to the attorney's receptionist constituted communication contemplated by the privilege. Illustrating the point that there is a conflict in the theories when clients give physical evidence to attorneys, the court cited the decisions in *Hughes v. Meade,* 453 S.W.2d 538 (Ky.1970), and *State v. Olwell,* 64 Wash.2d 828, 394 P.2d 681 (1964).

Judge (now Justice) Grimes explained *Hughes* as involving the use of a lawyer to return stolen property merely because the attorney was good friends with the police department, and not out of any desire to use the attorney for the rendition of legal services. In *Olwell,* the attorney was representing a person under investigation in a knife murder, and the attorney was subpoenaed by the state to appear at a coroner's inquest and bring with him all knives in his possession and relating to his client. The Washington court recognized that the privilege applied to testimony by the attorney as to the delivery of the knife, but the privilege did not prevent the knife itself being obtained from the attorney, so long as he was protected against disclosure as to how he acquired it.

[4] At that point in *Anderson,* Judge Grimes observed that making Korones tell who gave him the stolen property amounted to little more than requiring an attorney to identify his client, a kind of disclosure that traditionally has not been protected by the privilege. He concluded, however, that there is a recognized exception to the client identity rule where the mere identity of the person may expose him to prosecution for criminal acts previously committed and for which the person has consulted the attorney. 297 So.2d at 874 (citing *Sepler v. State,* 191 So.2d 588 (Fla. 3d DCA 1966)). [5]

The *Anderson* court concluded that the exception governed and that the privilege barred the disclosure. The court noted that the person had consulted the attorney concerning an already completed criminal act and not a future one. Equally important, the court noted, was that the revelation of the identity might lead to the conviction of the person "because of an action he ***499** took in connection with a matter for which he retained Korones in the first place." As Judge Grimes wrote:

> In the final analysis, the petitioner would not have delivered the items to Mr. Korones any more than he would have talked to Mr. Korones about them except for the fact that Mr. Korones was representing him as his attorney. Therefore, we hold that neither Mr. Korones nor his receptionist can be required to divulge the source of the stolen items. * * *

297 So.2d at 875. We find this rationale directly applicable to this case.

[5] And yet the trial court rejected *Anderson* in favor of *Hughes.* Apart from the fact of the court failing to follow Florida precedent in favor of another state's, [6] we conclude that the trial court has misinterpreted the privilege and the policies underlying it. It is indisputable that his contact, like the client in *Anderson,* consulted

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Krischer as an attorney. It is indisputable that the client sought legal advice about a specific matter. It is indisputable that the specific matter concerned a crime that had already been committed, not a planned or future act which might be a crime. And it is indisputable that the client insisted on confidence.

[6] **[7]** The focus, as we have seen from the common law development of the privilege and our own FEC section 90.502 definition of "client", is on the perspective of the person seeking out the lawyer, not on what the lawyer does after the consultation. As we have also seen, it has long been understood that the representation of a client in a court or legal proceeding is not indispensable for the invocation of the privilege. That Krischer's client sought him out for purely legal advice was enough. Legal advice, after all, is by itself a legal service. It is not necessary to the existence of the privilege that the lawyer render some additional service connected with the legal advice. Nor, as we know, is it even necessary that the lawyer appear in court or contemplate some pending or future legal proceeding.

And even if it were, the engagement of an attorney to effect the return of stolen property should certainly qualify. Surely there is a public purpose served by getting stolen property in the hands of the police authorities, even if the identity of the thief is not thereby revealed. Here the consultation resulted in exactly that. Krischer advised his client to turn over the property to the state attorney or the police. A lawyer's advice can be expected to result in the return of the property if the confidentiality of the consultation is insured.

At the same time, even if the person who returns the property is the thief, there is an equal privilege against self incrimination as well as a right to the effective assistance of counsel in defending against the criminal charge. That the criminal charge is not yet pending when the thief seeks to return previously stolen property after consultation with a lawyer is, as we have seen, irrelevant to the privilege. Thus, the mere fact that the consulted attorney acts as a "conduit" for the return of stolen property does not support the conclusion that the attorney has engaged in unprotected consultation with the person seeking the advice. [7] A legal service has been rendered just as surely as when the lawyer represents the accused thief in a criminal trial.

We need not be long detained by Krischer's failure to follow his usual procedures ***500** for enrolling new clients, or that he did not expect to receive a fee for his services. These facts dwell on Krischer's actions, not on his client's purpose in contacting him. The failure of Krischer to memorialize his dealings with this client is not surprising in view of the obvious need for confidentiality in the matter, coupled with the limited amount of time and work necessary for Krischer to render his services to the client. Payment of a fee has never been indispensable to the relationship or the existence of the privilege. Charles W. Ehrhardt, *Florida Evidence,* § 502.2 (1992 Ed.).

We find that the trial court departed from the essential requirements of law in compelling disclosure of Krischer's client. We grant certiorari, quash the order requiring Krischer to reveal the identity of his client, and dismiss the subpoena.

CERTIORARI GRANTED; ORDER QUASHED; SUBPOENA DISMISSED.

GUNTHER, J., concurs.

GLICKSTEIN, C.J., dissents with opinion.

GLICKSTEIN, Chief Judge, dissenting.
The attorney in this case described his participation as a "conduit," who had been contacted by an unnamed party, to deliver stolen property to the police, and who subsequently delivered the property to the police. The attorney's participation was concluded when the stolen property was turned over to the police. The attorney was not paid a fee for his participation, and he did not expect to be paid a fee. Furthermore, standard office procedures regarding new clients were not followed in this matter.

In my view, the evidence in this case clearly shows that the unnamed party intended for the attorney to act merely as an agent or conduit for the delivery of property which was completely unrelated to legal representation. The evidence also shows that the attorney in this case was not acting in his professional capacity. For these reasons, I believe the attorney-client privilege does not apply to these circumstances. *See Skorman v. Hovnanian of Florida, Inc.,* 382 So.2d 1376, 1378 (Fla. 4th DCA 1980); *In re Witness Before Grand Jury No. 82-5,* 558 F.Supp.

1089 (S.D.Fla.1983); *Hughes v. Meade,* 453 S.W.2d 538 (Ky.1970).

All Citations

607 So.2d 494, 17 Fla. L. Weekly D2533

Footnotes

1 This refers to a widely publicized case in which a hit-and-run driver consulted Krischer for advice and, afterwards, Krischer asserted the attorney-client privilege when asked to disclose the name of the driver. The fact that the person consulting Krischer in this case referred to the widely publicized case when Krischer kept the identity of his contact confidential might reasonably be taken as evidencing the contact's strong interest in confidentiality.

2 We agree with husband and the trial court that the wife has no standing to assert the privilege, so her presence in these proceedings can safely be discounted.

3 *See* Section 90.502, Florida Statutes (1991), which provides in relevant part:

> (2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

All references to the Florida Evidence Code, sections 90.101-90.958, Florida Statutes (1991), are thus: "FEC section 90.502."

4 *See* Rule Regulating The Florida Bar 4-1.6, which provides:

> (a) A lawyer shall not reveal such information relating to representation of a client except as stated in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client.
> (b) A lawyer shall reveal such information to the extent the lawyer believes necessary:
> (1) To prevent a client from committing a crime;
> (2) To prevent a death or substantial bodily harm to another.
> (c) A lawyer may reveal such information to the extent the lawyer believes necessary:
> (1) To serve the client's interest unless it is information the client specifically requires not to be disclosed;
> (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;
> (3) To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
> (4) To respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (5) To comply with the Rules of Professional Conduct.
> (d) When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

5 This theory is sometimes described as the "last-link" exception, i.e. the identity is the last link in the chain of evidence needed to convict of the crime. *See Corry v. Meggs,* 498 So.2d 508 (Fla. 1st DCA 1986), *rev. denied,* 506 So.2d 1042 (Fla.1987).

6 In the absence of controlling precedent from its own district court, any trial court in Florida, irrespective of the district in which it sits, is required to follow the decision of any other district court of appeal in Florida. *Weiman v. McHaffie,* 448 So.2d 1127 (Fla. 1st DCA 1984), and *State v. Hayes,* 333 So.2d 51 (Fla. 4th DCA 1976).

7 In contrast, the attorney in *Hughes* testified that he had been contacted only to deliver stolen property to the police. His contact reached out for him, not because he was a lawyer, but instead because he was a good friend of many members of the police force. Unlike Krischer here, he gave no legal advice. His services amounted to a phone call informing the police that, if they were interested in the return of stolen property, they could pick it up on the attorney's front porch. Not surprisingly, the court determined that this attorney rendered no legal service, and therefore could not invoke the attorney-client privilege. 453 S.W.2d at 542.

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Declined to Extend by In re Lentek Intern., Inc., Bankr.M.D.Fla., October 1, 2007

900 F.Supp. 414
United States District Court,
M.D. Florida,
Fort Myers Division.
.

BLACKHAWK TENNESSEE, LTD. PARTNERSHIP,
a Tennessee Limited Partnership, Plaintiff,
v.
Roger L. WALTEMYER, individually
and O'Halloran, Johnson,
Waltemyer & Hussey, Defendants.

No. 93–313–CIV–FTM–17D.
|
April 17, 1995.

Synopsis
Partnership which had made loan to individual partner following filing of bankruptcy petition by partner brought action for fraud and legal malpractice action against attorney and law firm which had represented partner after validity of mortgage taken in connection with loan was challenged. Attorney and law firm moved for summary judgment, and the District Court, Kovachevich, J., held that: (1) fact issue as to existence of legal relationship between partnership and attorney was presented by evidence of partnership's intent that attorney represent it, and (2) fact issues as to whether attorney had made misrepresentations to partnership and whether damages to partnership were as result proximately caused precluded summary judgment.

Motion denied.

West Headnotes (11)

[1] Federal Civil Procedure
Ascertaining existence of fact issue

At summary judgment stage, function of judge is not to himself weigh evidence and determine truth of matter, but to determine whether there is genuine issue for trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[2] Federal Civil Procedure
Lack of cause of action or defense

Federal Civil Procedure
Presumptions

Summary judgment should only be entered when moving party has sustained its burden of showing absence of genuine issue as to any material fact when all evidence is viewed in light most favorable to non-moving party; all doubt as to existence of genuine issue of material fact must be resolved against moving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[3] Federal Civil Procedure
Lack of cause of action or defense

Movant is entitled to entry of summary judgment only when non-moving party has failed to articulate evidence as to essential element of its case. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[4] Attorney and Client
Pleading and evidence

Under Florida law, former client who brings legal malpractice claim generally must plead and prove attorney's employment, attorney's neglect of reasonable duty, and that attorney's negligence resulted in and was proximate cause of loss to client.

1 Cases that cite this headnote

[5] Attorney and Client
In general;limitations

Under Florida law, legal malpractice action requires either that plaintiff be in privity with attorney, wherein one party has legal

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obligation to another, or that plaintiff be intended third party beneficiary of legal obligation.

1 Cases that cite this headnote

[6] **Attorney and Client**
What constitutes a retainer

Under Florida law, existence of legal or attorney-client relationship depends on intent of prospective client, not on actions of lawyer.

2 Cases that cite this headnote

[7] **Federal Civil Procedure**
Tort cases in general

Fact issue as to whether attorney-client relationship existed under Florida law between partnership and attorney who had represented individual partner in connection with loan to individual partner by partnership and issuance of quitclaim deed in connection with loan, precluding summary judgment in legal malpractice action brought by partnership, was presented by evidence that partnership intended that attorney perform legal work for it, and that attorney prepared mortgage documents and title work in connection with transfer and forwarded fully executed title commitment to partnership.

1 Cases that cite this headnote

[8] **Fraud**
Elements of Actual Fraud

Under Florida law, false statements relied upon to one's detriment are actionable.

Cases that cite this headnote

[9] **Fraud**
Fraudulent Concealment

Under Florida law, silence can be equated with fraud where there is legal or moral duty to speak or where inquiry left unanswered would be intentionally misleading.

Cases that cite this headnote

[10] **Federal Civil Procedure**
Tort cases in general

Fact issue as to whether attorney who represented individual partner who received loan from partnership and issued quitclaim deed in connection with loan had made fraudulent or misrepresented statement to partnership regarding bankruptcy court approval of loan, precluding summary judgment on fraud, negligence, and misrepresentation claims asserted by partnership, was presented by dispute as to whether attorney told partnership loan had been approved, even though title commitment presented by attorney which did not contain exclusion for bankruptcy approval induced partnership to believe approval had been given.

Cases that cite this headnote

[11] **Federal Civil Procedure**
Tort cases in general

Fact issue as to whether partnership suffered damages which were proximately caused by alleged misrepresentations made by attorney for individual partner in connection with bankruptcy court approval of loan by partnership to partner, precluding summary judgment, was presented by evidence that partnership was general unsecured creditor of partner, that validity of partnership's mortgage obtained in connection with loan had been challenged, that partnership's insurance for mortgage had been denied, and that partner had failed to make payments on its loan.

Cases that cite this headnote

Attorneys and Law Firms

***416** Joseph C. Mason, Jr., Anne S. Mason, Mason & Associates, P.A., Clearwater, FL, Frank G. Abernathy,

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McMackin, Garfinkle, McLemore & Walker, Nashville, TN, for plaintiff.

Paul E. Liles, O'Halloran, Johnson, Waltemyer & Hussey, Ft. Myers, FL, E.E. Edwards, Edwards & Simmons, P.A., Nashville, TN, for Roger L. Waltemyer and O'Halloran, Johnson, Waltemyer & Hussey.

ORDER ON MOTION FOR SUMMARY JUDGMENT

KOVACHEVICH, District Judge.

This cause is before the Court on Defendants' Motion for Summary Judgment and memorandum in support thereof (Dkt. Nos. 37 and 38), and response thereto (Dkt. No. 46).

FACTS AND PROCEDURAL HISTORY

This is an action for fraud and legal malpractice in connection with a commercial real estate closing and the lending of money to a bankrupted debtor. In December of 1991, Hugh Lee Nathurst, III, Debtor, retained Defendant, Roger Waltemyer, to represent him in a bankruptcy filing in the Middle District of Florida. Mr. Waltemyer accepted and undertook such representation, submitting the paperwork, including the schedules signed by Debtor, to the Court to commence a Chapter 11 proceeding. Debtor is the brother of Plaintiff's limited partner.

The bankruptcy schedules filed with the Court list Debtor's fee simple interest in a real estate development called the "Blackhawk" project, as well as a 25% personal property interest in property held in trust known as Lofton's Island.

The Blackhawk development was designed to be a 73 site, single family home project. Debtor experienced difficulty with the development of Blackhawk and was unable to pay the mortgages held by the National Bank of Lee County (NBLC) when they fully matured on December 13, 1990. NBLC held a first mortgage over the Blackhawk property.

Ray C. Nathurst, Davis H. Carr, John M. Stewart, Jr., and Blackhawk–Tennessee, Inc., as general and limited partners, created Blackhawk–Tennessee, Ltd. (Plaintiff) on or about August 16, 1991. The purpose of this limited partnership was to acquire and develop the Blackhawk property. Davis H. Carr withdrew as a limited partner on or about April 3, 1992.

On or about September 6, 1991, Debtor transferred a fee simple interest in Blackhawk to Plaintiff. On October 16, 1991, Plaintiff filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Middle District of Tennessee, Case No. 391–09941, in order to restructure the mortgage on Blackhawk.

The venue of Plaintiff's Tennessee Chapter 11 case was challenged, and the case was transferred to the Middle District of Florida, Case No. 91–16308–9P1. The development was subsequently transferred to Debtor for valid consideration.

On December 10, 1991, Debtor filed a Chapter 11 Bankruptcy Petition in the Middle District of Florida. Defendants handled this bankruptcy action.

NBLC filed a Motion to Dismiss Plaintiff's Chapter 11, which was granted on January 10, 1992. On January 15, 1992, NBLC filed a motion for relief from the automatic stay in Debtor's bankruptcy case seeking permission to foreclose its mortgage on Blackhawk, or be given adequate protection.

Both parties knew that Plaintiff's loan to Debtor required Bankruptcy Court approval. On February 4, 1992, Plaintiff executed a quit-claim deed of the Blackhawk property to Debtor. The mortgage, which indicates Defendant as the preparer and recorder in connection ***417** with the closing, contained no condition concerning bankruptcy approval.

At a hearing on February 6, 1992, Defendant, appearing for Debtor, informed the Bankruptcy Court that a loan was being obtained which would allow Debtor to make adequate protection payments and forestall the foreclosure of the mortgage. Debtor orally agreed with counsel for NBLC to adequate protection payment schedule that would stay foreclosure proceedings until July 20, 1992. NBLC required Debtor to pay $35,506.26 for each periodic adequate protection payment. The first payment was due on March 1, the second on March 15, and four subsequent payments were due on the 15th day of April, May, June, and July.

The Bankruptcy Court accepted the agreement and entered an order on February 11, 1992. The order provided that by July 20, 1992, Debtor had to submit a contract for sale of the entire property without meaningful contingencies and which was acceptable to NBLC. If Debtor was unable to comply with the order, then NBLC would be allowed to foreclose.

On February 18, 1992, Plaintiff and Debtor signed a letter of intent that the loan would be at least $600,000.00. Wire instructions for having the adequate protection funds, due on March 1, sent to Debtor for Blackhawk, were sent to Plaintiff on February 28, 1992, at the request of Debtor. Plaintiff provided Debtor with protection payments for March 1 and March 15, although the loan closing was not completed until April 1, 1992.

Plaintiff obtained a loan commitment from the Bank of Nashville which was conditional on the express approval of the Bankruptcy Court enabling Plaintiff to receive super-priority treatment under the Bankruptcy Code. This was also essential to the validity of the Lofton's Island mortgage in Lee County, Florida.

On June 2, 1992, Defendant filed a Motion for Authorization to Obtain Credit for the loan from Plaintiff. At the August 6 hearing, the Bankruptcy Court denied the motion and formally issued its order on August 21, 1992. The case was converted from a Chapter 11 to a Chapter 7 on or about August 10, 1993.

In July 1992, NBLC sought relief from the Bankruptcy stay because Debtor had been unable to comply with the adequate protection order in that he was unable to secure a purchaser for Blackhawk by July 20, 1992. The Court granted relief. Several efforts to hold off foreclosure were considered and attempted, but none was successful. NBLC eventually foreclosed on Blackhawk and extinguished all other interests.

STANDARD OF REVIEW

[1] This Court authorizes summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "At the summary judgment stage the judge's function is not to himself weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

[2] This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the non-moving party. *Sweat v. Miller Brewing Co.,* 708 F.2d 655 (11th Cir.1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant,* 595 F.2d 994, 996–997 (5th Cir.1979), quoting *Gross v. Southern Railroad Co.,* 414 F.2d 292 (5th Cir.1969).

[3] The United States Supreme Court in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) put to rest any lingering doubts as to the strict requirements of Rule 56, Fed.R.Civ.P. The movant is entitled to entry of a summary judgment only where the other party has failed to articulate evidence as to an essential element of their case. *Id.* at 322–23, 106 S.Ct. at 2552–53.

*418 DISCUSSION

[4] "Generally, in a claim for legal malpractice, plaintiffs must plead and prove: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; (3) the attorney's negligence resulted in and was the proximate cause of loss to the client/plaintiff." *Orr v. Black & Furci, P.A.,* 876 F.Supp. 1270 (M.D.Fla.1995).

Choice of Law

Defendant asserts that the choice of law in this case must be Florida law under the Restatement (Second) Conflict of Laws, and the Florida Supreme Court's adoption of the Restatement's "most significant relationship" analysis. *Bishop v. Florida Specialty Paint Co.,* 389 So.2d 999 (Fla.1980). Since Plaintiff agrees to the resolution of the issues under Florida law, the Court will not address this issue further.

Legal Relationship

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[5] Under Florida law, a legal malpractice action requires the plaintiff either to be in privity with the attorney, wherein one party has a legal obligation to another, or alternatively, the plaintiff must be an intended third party beneficiary. *Espinosa v. Sparber, Shevin, Shapo, Rosen, and Heilbronner,* 612 So.2d 1378 (Fla.1993).

[6] Defendants claim they owed no duty to Plaintiff due to the lack of an attorney-client relationship between the parties. A legal relationship depends on the intent of the "client," not on the actions of the lawyer. *Dean v. Dean,* 607 So.2d 494 (Fla. 4th DCA 1992).

[7] Section 90.502(1)(b), Florida Evidence Code, defines "client" as any person "who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." In this instance, a factual dispute exists as to whether Defendants provided Plaintiff with the legal services of: (1) preparing the mortgage documents, (2) recording the mortgage documents after closing, (3) preparing the title work, and (4) forwarding the fully executed title commitment to Plaintiff.

However, Plaintiff's intent that Defendants provide these legal services establishes a sufficient attorney-client relationship between the parties to allow Plaintiffs to pursue a claim for legal malpractice. Defendants' failure to establish that Plaintiff lacked this intent precludes an entry of summary judgment based on an absence of an attorney-client relationship.

Misrepresentation, Fraud, or Negligence

Defendant also claims that the lack of evidence of a fraudulent or misrepresented statement bars summary judgment here. However, Plaintiff asserts that Defendants made several direct and indirect representations upon which Plaintiffs relied to its detriment.

[8] **[9]** Under Florida law, false statements relied upon to one's detriment are actionable. *George Hunt, Inc. v. Wash Bowl, Inc.,* 348 So.2d 910 (Fla. 2d DCA 1977). Silence can be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading. *U.S. v. Prudden,* 424 F.2d 1021 (11th Cir.) *cert. denied,* 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62 (1970).

[10] Defendants' presentation of a signed title commitment absent exclusions for bankruptcy approval and their recording of the unconditional mortgage of the property that was security for the loan induced Plaintiff to believe that bankruptcy approval had been met. All parties indicate their understanding that bankruptcy approval was a requirement for the loan transaction.

However, there remains some dispute as to whether Defendants told Plaintiff that the Bankruptcy Court had approved the loan. The remaining material factual issues in dispute preclude this Court from entering summary judgment for misrepresentations, fraud, and/or negligence.

Proximate Causation to Damages

[11] Finally, Defendants assert that Plaintiff has not sustained any damages as a result of the actions or omissions of Defendants. In response, Plaintiff claims but for Defendants' negligence and misrepresentations regarding the bankruptcy loan approval, ***419** they would not have incurred the following damages: (1) Plaintiff is a general unsecured creditor; (2) the validity of Plaintiff's mortgage has been challenged in the bankruptcy case; (3) Plaintiff's insurance for said mortgage has been denied; and (4) Plaintiff has suffered actual damages as a result of Debtor's failure to make payments on its loan. Since proximate causation is normally a factual issue, reasonable minds could differ as to the proximate causation of the damages incurred by Plaintiff.

CONCLUSION

In conclusion, the Court finds that Plaintiff has successfully established: (1) the legal relationship between the parties is at issue; (2) the negligence or fraudulence of Defendants remains in dispute; and (3) the acts or omissions of Defendants proximately caused damage to Plaintiff is in controversy. Accordingly it is

ORDERED that Defendants' Motion for Summary Judgment (Dkt. No. 37) is **denied.**

DONE and ORDERED.

All Citations

900 F.Supp. 414

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377 B.R. 396
United States Bankruptcy Court,
M.D. Florida,
Orlando Division.

In re LENTEK INTERNATIONAL, INC., Debtor.
Michael Moecker, as Liquidating Trustee
for Lentek International, Inc., Plaintiff,
v.
Greenspoon, Marder, Hirschfeld, Rafkin,
Ross, Berger & Abrams Anton P.A., a
Florida Professional Association, and
Gregory Blodig, Individually, Defendants.
Michael Moecker, as Liquidating Trustee
for Lentek International, Inc., Plaintiff,
v.
Greenspoon, Marder, Hirschfeld, Rafkin,
Ross, Berger & Abrams Anton P.A., Defendant.

Bankruptcy No. 6:03–bk–08035–KSJ.
|
Adversary Nos. 05–190, 05–81.
|
Oct. 1, 2007.

Synopsis

Background: Liquidating trustee in Chapter 11 case filed by corporate debtor brought adversary proceeding to recover for malpractice allegedly committed by law firm during its representation of debtor, and law firm defended on theory that it had not represented debtor, but had attorney-client relationship only with debtor's principal.

Holdings: The Bankruptcy Court, Karen S. Jennemann, J., held that:

[1] liquidating trustee failed to establish existence of attorney-client relationship between law firm and corporate debtor; and

[2] statement that law firm had made, in interrogatory relating to liquidating trustee's fraudulent transfer claims against it, that it had accepted challenged payments from Chapter 11 debtor-corporation in good faith for legal services that directly or indirectly benefited debtor, was not necessarily inconsistent with its subsequent position, in defense of liquidating trustee's legal malpractice claims, that it did not have attorney-client relationship with debtor.

So ordered.

West Headnotes (13)

[1] Attorney and Client
In General;Limitations

In proceeding brought by liquidating trustee of corporate Chapter 11 debtor to recover for alleged malpractice of law firm that purportedly represented debtor in connection with stock purchase transaction, Florida law supplied and controlled legal standard applicable for determining whether the requisite attorney-client relationship existed between law firm and debtor.

Cases that cite this headnote

[2] Attorney and Client
What Constitutes a Retainer

Test used by Florida courts to determine whether attorney-client relationship exists in absence of formal retainer is subjective one, that hinges on client's reasonable belief that he is consulting lawyer in that capacity and his manifested intention to seek professional legal advice.

Cases that cite this headnote

[3] Attorney and Client
What Constitutes a Retainer

Under Florida law, actual consultation between putative client and alleged attorney is prerequisite to client's forming the reasonable belief required to support existence of attorney-client relationship.

Cases that cite this headnote

[4] Attorney and Client

What Constitutes a Retainer

Post-consultation, it is the subjective, reasonable belief of putative client that is paramount consideration under Florida law in determining whether attorney-client relationship exists, not lawyer's actions.

1 Cases that cite this headnote

[5] Attorney and Client

What Constitutes a Retainer

Under Florida law, mere fact that law firm may have performed legal work that benefited putative client is not alone sufficient, irrespective of putative client's subjective intent, to establish existence of attorney-client relationship.

1 Cases that cite this headnote

[6] Attorney and Client

What Constitutes a Retainer

Under Florida law, while fact that attorney renders legal services to putative client may carry some weight as factor in assessing reasonableness of putative client's subjective belief that attorney-client relationship exists between parties, it does not conclusively establish existence of attorney-client relationship.

1 Cases that cite this headnote

[7] Attorney and Client

What Constitutes a Retainer

Liquidating trustee suing to recover for alleged malpractice of law firm that purportedly represented corporate Chapter 11 debtor in connection with stock purchase transaction between its two principals failed to establish existence of attorney-client relationship between law firm and corporation, though some of work which law firm performed on shareholder's behalf may have benefited corporation, though corporation paid all of law firm's bills, and though shareholders, to extent that they retained counsel to represent them individually only and not to represent corporation, may have breached their fiduciary duties to corporation, where shareholders, the only two persons with authority to hire attorney on corporation's behalf, testified clearly and consistently that they did not believe that law firm represented corporation.

Cases that cite this headnote

[8] Estoppel

Claim Inconsistent with Previous Claim or Position in General

Judicial estoppel is equitable doctrine invoked at court's discretion, that precludes party from asserting inconsistent claims in legal proceedings.

Cases that cite this headnote

[9] Estoppel

Claim Inconsistent with Previous Claim or Position in General

Courts can invoke doctrine of judicial estoppel to protect integrity of judicial process by prohibiting parties from deliberately changing positions.

1 Cases that cite this headnote

[10] Estoppel

Claim Inconsistent with Previous Claim or Position in General

Doctrine of judicial estoppel should not be invoked when party's allegedly inconsistent prior position was result of inadvertence or good faith mistake.

1 Cases that cite this headnote

[11] Estoppel

Claim Inconsistent with Previous Claim or Position in General

Courts generally consider two factors in deciding whether to apply judicial estoppel in particular case: whether allegedly inconsistent position was asserted under oath in prior

proceeding, and whether such inconsistencies are shown to have been calculated to make mockery of judicial system.

1 Cases that cite this headnote

[12] Estoppel
Claim Inconsistent with Previous Claim or Position in General

Courts must consider all circumstances in deciding whether to apply judicial estoppel.

Cases that cite this headnote

[13] Estoppel
Claim Inconsistent with Previous Claim or Position in General

Statement that law firm had made, in interrogatory relating to liquidating trustee's fraudulent transfer claims against it, that it had accepted challenged payments from Chapter 11 debtor-corporation in good faith for legal services that directly or indirectly benefited debtor, was not necessarily inconsistent with its subsequent position, in defense of liquidating trustee's legal malpractice claims, that it did not have attorney-client relationship with debtor but was retained solely as counsel to debtor's principal; accordingly, law firm's answer to interrogatory did not judicially estop it from denying that it had acted as debtor's counsel for purpose of malpractice claims.

Cases that cite this headnote

Attorneys and Law Firms

***398** Chad K. Alvaro, David M. Landis, Jon E. Kane, Mateer & Harbert PA, Orlando, FL, for Plaintiff.

Brian L. Wagner, Marshall Dennehey Warner Coleman & Goggi, Marty A. Stone, Greenspoon Marder, Victor S. Kline, Orlando, FL, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING WHETHER DEFENDANTS HAD AN ATTORNEY–CLIENT RELATIONSHIP WITH DEBTOR

KAREN S. JENNEMANN, Bankruptcy Judge.

In these adversary proceedings asserting claims for malpractice and fraudulent transfer,[1] the sole issue is whether the defendants, a law firm, Greenspoon, Marder, Hirschfeld, Rafkin, Ross, Berger & Abrams Anton, P.A. ("Greenspoon Marder"), and one of its lawyers, Gregory J. Blodig ("Blodig"), ever established an attorney-client relationship with the corporate debtor, Lentek International, Inc. Greenspoon Marder certainly represented Lentek's president, Louis Lentine, in his purchase of Lentek's stock. The parties dispute, however, whether the law firm also represented Lentek, the corporation, in addition to representing Mr. Lentine, individually.

According to the plaintiff, Michael Moecker, as Lentek's liquidating trustee,[2] Lentine improperly used Lentek's assets to purchase shares of Lentek stock that Lentine later sold at a substantial profit.[3] The profits benefitted Lentine individually to the possible detriment of Lentek. If Greenspoon Marder represented Lentek in this transaction and Lentek was harmed, the law firm arguably is liable for Lentek's damages. However, Greenspoon Marder argues that no attorney-client relationship ***399** ever existed between Lentek and the law firm. The Court agrees and concludes that the defendants never held an attorney-client relationship with Lentek, rather, they represented only Lentine and his interests, individually, during the stock transaction and at all other relevant times.

As a threshold matter, the parties disagree on the relevant legal standard to use in determining whether an attorney-client relationship exists under Florida law. Defendants' counsel, citing *Lombardo v. U.S.,* 222 F.Supp.2d 1367, 1385 (S.D.Fla.2002), *Gonzalez v. Chillura,* 892 So.2d 1075 (Fla.2d DCA 2004); *The Florida Bar v. Beach,* 675 So.2d 106 (Fla.1996); *Bartholomew v. Bartholomew,* 611 So.2d 85, 86 (Fla.2d DCA 1992); and *Jackson v. BellSouth Telecommunications,* 372 F.3d 1250, 1281–83 (11th Cir.2004) argues that the criteria for establishing

an attorney-client relationship is limited to the putative client's subjective, reasonable beliefs and the client's manifestation, or absence of manifestation, of his or her intent to seek legal advice. Plaintiff's counsel, on the other hand, citing, most relevantly, *State v. Branham,* 952 So.2d 618, 620–21 (Fla.2d DCA 2007); *Keepsake Inc. v. P.S.I. Industries, Inc.,* 33 F.Supp.2d 1033 (M.D.Fla.1999); *Blackhawk Tenn. Ltd. Partnership v. Waltemyer,* 900 F.Supp. 414 (M.D.Fla.1995); and *In re Lawrence,* 217 B.R. 658, 664 (Bankr.S.D.Fla.1998), argues that the test is broader and disjunctive, and that an attorney-client relationship may be present either where: (i) a person consults with an attorney for the purpose of obtaining legal services, *or* (ii) an attorney has rendered legal services to a person.

Essentially, the plaintiff argues that merely performing legal services that may inure to the benefit of Lentek *alone* is enough to establish an attorney-client relationship, irrespective of the subjective intent of both the law firm, who never agreed to represent the debtor, and the principals of Lentek, who never sought to hire the law firm on behalf of the corporation. The difference between the two arguments is significant because both of the debtor's representatives with authority to hire an attorney for the debtor specifically testified that Greenspoon Marder did *not* represent the debtor and that they never asked the law firm to represent the debtor. Applying the defendants' version of the test would then end the inquiry because Lentek's representatives never hired the defendants on Lentek's behalf. Under the plaintiff's version of the test, however, the Court would be permitted to make a finding of an attorney-client relationship if it found that the defendants rendered legal services to the debtor, regardless of the subjective intent of either of Lentek's representatives. After a careful consideration of the relevant law, the Court concludes that the proper test for determining the existence of an attorney-client relationship is the test articulated by the defendants, and not the test advocated by the plaintiff, for the reasons explained below.

[1] **[2]** **[3]** **[4]** Florida law supplies and controls the legal standard applicable in this case for determining whether an attorney-client relationship is present. *The Florida Bar v. Beach,* 675 So.2d 106, 109 (Fla.1996) (*citing Bartholomew. v. Bartholomew,* 611 So.2d 85 (Fla.2d DCA 1992)). In a decision binding on this Court, *Jackson v. BellSouth Telecommunications,* 372 F.3d 1250, 1281–83 (11th Cir.2004), the Court of Appeals for the Eleventh Circuit articulated the test used by Florida courts "to determine whether a lawyer-client relationship exists in the absence of a formal retainer."[4] *Jackson,* 372 F.3d at 1281. ***400** According to the Eleventh Circuit, the applicable test "is a subjective one and hinges upon the client's [reasonable] belief that he is *consulting* a lawyer in that capacity and his *manifested intention* is to seek professional legal advice." 372 F.3d at 1281 (*citing Bartholomew,* 611 So.2d at 86 (other citation and internal quotation marks omitted)). In a footnote, notably, the Eleventh Circuit Court stated that "[t]he subjective belief test is applied only *after* a putative client consults with an attorney, and is used to emphasize that, following a consultation, it is the belief of the putative client *and not the lawyer's actions* that determines whether a lawyer-client relationship has developed." *Jackson,* 372 F.3d at 1281, n. 29 (*citing Dean v. Dean,* 607 So.2d 494, 496–97 (Fla. 4th DCA 1992)) (second emphasis added). Thus, an actual consultation is a prerequisite to forming a reasonable belief supporting an attorney-client relationship. Post-consultation, the subjective, reasonable belief of the putative client is the paramount consideration in determining whether or not an attorney-client relationship is present, not the lawyer's actions.

Indeed, three of the cases cited by the plaintiff recite the very same test articulated by the Eleventh Circuit in *Jackson. See Blackhawk,*[5] 900 F.Supp. at 418 ("A legal relationship depends on the intent of the client,' not on the actions of the lawyer."); *Lawrence,*[6] 217 B.R. at 664 ("The ***401** test for determining whether the attorney-client relationship exists is based in part upon the subjective belief that the client is being represented by an attorney. However, this belief must be a reasonable one."); *Keepsake,* 33 F.Supp.2d at 1036 (In Florida, the existence of an attorney-client relationship hinges "upon the client's reasonable subjective belief that he is consulting a lawyer in that capacity with the intention of seeking professional legal advice.").

[5] Not one case cited by the plaintiff actually holds that a law firm performing legal work *alone* and irrespective of a client's subjective intent is sufficient to establish an attorney-client relationship. Rather, the plaintiff supports his argument relying on the definition of "client" contained in Section 90.502 of the Florida

Evidence Code, titled "Lawyer-client privilege." Section 90.502(1)(b) of the Florida Evidence Code, intended to assist parties and the courts in determining when an attorney properly may claim an attorney-client privilege against testifying, defines a "client" as "any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services *or who is rendered legal services by a lawyer.*" (emphasis added). Here, the plaintiff argues that, based on the evidence, the Court can conclude that the defendants performed legal services for Lentek. As such, they "rendered legal services," and the Court should find they established an attorney-client relationship with Lentek, regardless of Lentek's representatives' lack of intent to hire Greenspoon Marder on Lentek's behalf.

The Court rejects this argument finding that the definition of a "client" supplied in Florida Statute Section 90.502 pertains specifically to the proper use of the attorney-client privilege and does not articulate the test for determining whether an attorney-client relationship exists under the law of Florida and the Eleventh Circuit. Indeed, Section 90.502, by its own limiting language, states that the test was for the purpose of that particular section only. As such, Section 90–502 does not control, nor should it.

[6] The proper test to use in determining whether an attorney-client relationship was formed is whether the putative client formed a reasonable, subjective belief that an attorney-client relationship existed. How can a client hire a lawyer if the requisite intent is lacking' Certainly, whether or not an attorney actually rendered legal services can be considered in connection with whether or not a putative client's subjective belief is reasonable. Following a consultation, and in the absence of an executed retainer agreement, if no services were performed by the attorney, the putative client's argument that an attorney-client relationship existed may seem less reasonable. Conversely, applying the same scenario where no retainer exists following a consultation, if an attorney does render legal services and the services span a significant period of time, a client's subjective belief that he or she was represented by that attorney may be quite reasonable. Thus, although the fact that an attorney renders legal services may carry some weight as a factor in assessing the reasonableness of a person's subjective belief, it does not conclusively establish the existence of an attorney-client relationship. The issue, therefore, as stated by the Eleventh Circuit Court of Appeals, is whether ***402** Lentek held a "subjective but reasonable belief" that Blodig and Greenspoon Marder represented it.

[7] In this case, assessing the reasonableness of a client's belief is complicated by the fact that the putative client is a corporation, Lentek, controlled by two principals, Lentine and Joseph Durek, and by the fact that the disputed transaction involved Lentine's purchase of Durek's stock in order to gain control of Lentek's operations. Certainly, the nature of these transfers among insiders obfuscates the issue.

Prior to October 2002, Lentine and Durek shared control of Lentek. Both were the sole officers and substantial shareholders of the corporation each owning 45 percent of the corporate shares. In September 2002, the relationship between the insiders had deteriorated to the point that Durek was willing to sell his Lentek shares to Lentine and, from that point onwards, to allow Lentine to manage the business. The shareholders agreed to the basic terms of a stock transfer on September 16, 2002. (Plaintiff's Ex. No. 3).

Both gentlemen then hired lawyers. Durek hired Steven Lee of the Dean, Mead, Egerton, Capouano & Bozarth, P.A. law firm. Lentine hired Greg Blodig with Greenspoon Marder. (Plaintiff's Ex. No. 5).

Mr. Lee maintained the corporate records of Lentek and drafted the necessary corporate resolutions as well as the initial version of the documents related to the stock transfer. Mr. Blodig then reviewed the proposed drafts and made responsive comments on behalf of Lentine. (Plaintiff's Ex. Nos. 14 to 19). Most of the comments focused on the Stock Purchase Agreement, which was the primary document executed by both Lentine and Durek. (Plaintiff's Ex. No. 19). However, Blodig's comments also address three related agreements—a Non–Solicitation Agreement, a Consulting Agreement, and a Representation Agreement, each initially drafted by Durek's lawyer. (Plaintiff's Ex. Nos. 20–22).

These related agreements were solely between Durek and Lentek. Lentine signed them only in his capacity as President of Lentek. The related agreements promised Durek certain continuing financial benefits and incentives after he sold his stock to Lentine. [7] Lentek was primarily liable for performing these obligations; however, Lentine

also remained individually liable pursuant to his agreement to indemnify Durek for any breach by Lentek.

The plaintiff asserts that Blodig's editorial comments on the related agreements constituted legal work rendered by the defendants on behalf of Lentek. Given Lentine's continuing financial obligations for these corporate obligations to Durek, however, it appears more likely that Blodig was simply protecting Lentine, rather than protecting Lentek. Nothing in the evidence indicated that Blodig ever familiarized ***403** himself with Lentek's financial structure or i n any way evaluated the impact this stock transfer would have on Lentek's operations. He did not act as if he represented the corporation in the stock transfer.

Moreover, the only two people able to hire lawyers on behalf of Lentek, Durek and Lentine, did not believe Blodig represented Lentek. The testimony of both Lentine and Durek on this point was consistent and clear. Lentine hired Blodig to represent his individual interests, not the interests of Lentek. Similarly, Durek testified that he hired Lee to represent his individual interests, not Lentek's interests. As the sole officers of Lentek, neither gentleman thought to hire separate legal representation for the company in this stock transfer, although Lentek likely needed separate counsel; neither gentleman had any reasonable, subjective belief that Blodig or Greenspoon Marder represented Lentek at any time in the transaction. Although these men may have breached their fiduciary duty in failing to get proper counsel for the company, the evidence is unrebutted that neither man hired a lawyer to represent Lentek. Certainly neither of them hired Greenspoon Marder or Mr. Blodig to represent Lentek.

In an attempt to demonstrate that the defendants represented Lentek, the plaintiff called two witnesses, Steven Lee, Durek's attorney, and Randa King, the former controller for Lentek, both of whom testified that they believed, for different reasons, that the defendants *did* represent Lentek in the stock transfer. With all due respect for these witnesses, their testimony regarding whether the defendants represented Lentek was irrelevant, as argued by the defendants at trial. Neither Lee nor King possessed any ability or authority to hire counsel for Lentek or to speak for Lentek. Notwithstanding, their testimony is summarized below.

Lee was retained by Durek to represent Durek individually in connection with Lentine's purchase of Durek's stock. (Plaintiff's Ex. No. 1, retainer agreement specifying Lee/Dean Mead represented Durek, individually; Plaintiff's Ex. No. 2, check to Dean Mead drawn on Durek's personal SunTrust account). Lee testified that he personally believed that Blodig/ Greenspoon Marder represented Lentek based on Blodig's comments to the agreements related to the Stock Purchase Agreement signed only by Lentek, not Lentine in his individual capacity, and because Blodig was required to receive notice if Lentek defaulted in its obligations under the Stock Purchase Agreement. However, at no time did Lee have a conversation that would confirm his understanding that Blodig represented Lentek. Moreover, assuming Blodig indeed did hold himself out as a lawyer for Lentek, Lee's perception, even if accurate, is simply irrelevant. It is the subjective intent of the client, here either Lentine or Durek, which counts, not the opinion of Durek's lawyer.

Similarly, Ms. King's testimony as a former controller of Lentek is irrelevant. She was first employed at Lentek via a temporary agency in January, 2004, almost two years *after* the stock transfer occurred. She was permanently employed by Lentek in May 2004, in part to reconcile the company's 2002 financial data and to assist in preparing Lentek for an audit. During the course of her work, she came across $1.2 million in unclassified financial entries occurring in 2002, some of which were attributable to bills for legal services rendered by the defendants in connection with the stock transfer. Without dispute, Lentek paid for all of Lentine's individual legal expenses relating to the stock transfer. (Plaintiff's Ex. Nos. 6, 7, 8, 9 and 10). ***404** However, the company had not allocated those expenses prior to King's work in preparing for the upcoming audit. She merely reclassified these bills as corporate legal expenses for accounting purposes. Lentine never advised her that the expenses were for legal services rendered to him, personally, and not the company. Nor did Lentine tell King that she should issue a 1099 Form to him personally so that he could properly report the income for his own individual federal income tax purposes. The Court suspects that Lentine likely was trying to avoid these federal tax consequences. King merely was making a reasonable assumption that, because Lentek paid a lawyer, the legal services rendered were for the company. She had no personal knowledge either way, and, as such, her testimony is irrelevant.

As a final argument, the plaintiff argues that, at the very least, the defendants should be judicially estopped from denying that they represented Lentek in connection with the stock transaction because of the answers to interrogatories (Plaintiff's Ex. No. 24) Greenspoon Marder signed i n Adversary Proceeding 05–81, in which the plaintiff alleged Greenspoon Marder received actually or constructively fraudulent transfers when it accepted Lentek's payments for legal services rendered to Lentine individually. The issue whether Greenspoon Marder provided a reasonably equivalent value, or any value, to the debtor for the payments it received from Lentek will be addressed in the context of the plaintiff's fraudulent transfer claims in that separate adversary proceeding. Here, however, on the issue of attorney-client representation, the only relevant issue is whether the defendants' interrogatory answers should judicially estop them from denying that they represented Lentek. Specifically, Interrogatory Number 6 asks:

> Identify each person with any knowledge of the facts relevant to the issues in this adversary proceeding or to any Transfers and provide a general description of the facts and/or subject matter known by each such person.

In their Answer to Interrogatory Number 6, the defendants stated:

> Mr. Marder, Mr. Blodig, and Mr. Nordt rendered legal services which directly or indirectly benefited Lentek International, Inc.

Multiple other interrogatories (for example, Interrogatory Numbers 7, 8, 9, and 10) from the plaintiff directed the defendants to state why the transfers were not actually or constructively fraudulent under the Bankruptcy Code and Florida law. In response to those interrogatories, the defendants stated:

> "Lentek International, Inc., made payments to Greenspoon Marder who took the payments in good faith for legal services which directly or indirectly benefited Lentek International, Inc. Thus, there was no actual intent to hinder, delay, or defraud Lentek's creditors. Lentek did not receive less than a reasonably equivalent value in exchange for payment of GM's fees. Thus, there were no damages to Lentek International Inc.'s creditors as a result of its payment of attorney's fees to Greenspoon Marder. Moreover, pursuant to Lentek International, Inc.'s Amended and Restated By Laws adopted April, 2003, Lentek International, Inc., agreed to indemnify any officer or director, including Lou Lentine, or any former officer or director, to the full extent permitted by law. All documents responsive to this Interrogatory have been produced herewith in lieu of identifying the documents."

[8] **[9]** **[10]** The Eleventh Circuit Court of Appeals discussed judicial estoppel in *Parker* ***405** *v. Wendy's Intern'l, Inc.,* 365 F.3d 1268 (11th Cir.2004)[8] and in *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir.2002). "Judicial estoppel is an equitable doctrine invoked at a court's discretion" that precludes a party from asserting inconsistent claims in legal proceedings. *Burnes,* 291 F.3d at 1285–86 (*citing New Hampshire v. Maine,* 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). Courts can invoke the doctrine "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions." *Burnes,* 291 at 1285–87 (*citing New Hampshire,* 532 U.S. at 749–50, 121 S.Ct. 1808; *American Nat'l Bank of Jacksonville v. Federal Dep. Ins. Corp.,* 710 F.2d 1528, 1536 (11th Cir.1983) ("judicial estoppel applies to the calculated assertion' of divergent positions")). The doctrine should not be invoked when the prior position was a result of inadvertence or good faith mistake. *Burnes,* 291 F.3d at 1285–87 (citations omitted).

[11] **[12]** While not an exact science, courts in the Eleventh Circuit generally consider two factors in determining whether to apply judicial estoppel to a particular case. *Parker,* 365 F.3d at 1271 (*citing New Hampshire,* 532 U.S. at 750, 121 S.Ct. 1808); *Burnes,* 291 F.3d at 1285 (*citing Salomon Smith Barney, Inc. v. Harvey, M.D.*, 260 F.3d 1302, 1308 (11 th Cir.2001)). "First, it must be shown that the allegedly inconsistent positions were made under oath i n a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes,* 291 F.3d at 1285–86 (*citing Salomon,* 260 F.3d at 1308). These factors do not represent an exhaustive list. Instead, courts must consider all circumstances when determining whether to apply judicial estoppel. *Burnes,* 291 F.3d at 1286; *New Hampshire,* 532 U.S. at 750–51, 121 S.Ct. at 1815 (Noting that courts typically consider: (1) whether the present position is "clearly inconsistent"

with the earlier position; (2) whether the party succeeded in persuading a tribunal to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding creates the perception that either court was misled; and (3) whether the party advancing the inconsistent position would derive an unfair advantage on the opposing party).

[13] Judicial estoppel is not appropriate here. The defendants have not asserted divergent or inconsistent positions in the two adversary proceedings such as would make a mockery of the judicial system. Although the defendants stated that they accepted the payments "in good faith for legal services which directly or indirectly benefited Lentek," this is not equivalent to stating that they did, in fact, represent Lentek. Rather, they simply stated that value was rendered in exchange for the payments they received. I n addition, this Court has not accepted or relied on the defendants' assertion that Lentek received value for the exchange in any way. An example of where judicial estoppel *may* be appropriate in the context of the two adversary proceedings here is if, following this ruling, Greenspoon Marder changed its position and attempted to claim they *did* represent Lentek and, as a result, ***406** Lentek received something of value by way of their legal services. However, that is not what Greenspoon Marder has done to date. They merely have stated in interrogatory answers that Lentek "directly or indirectly" received some benefit from their services. This statement is not tantamount to professing that they represented Lentek in the stock transfer, and the Court finds no inconsistent position and certainly no statement calculated to make a mockery of the judicial system.

The test to determine whether the defendants represented Lentek is whether Lentek, through its authorized officers, Durek and Lentine, held a subjective, reasonable belief that the company hired the law firm. The unrebutted evidence is that neither man hired the defendants and that no attorney-client relationship was established between the defendants and Lentek. The facts that some of the defendants' legal work pertained to Lentek, that the officers were focused on their own self-interest, and not on Lentek's interests, or that other third parties, such as Lee or King, believed the defendants represented Lentek, are irrelevant. Lentek had no attorney-client relationship with Greenspoon Marder or Mr. Blodig.

A status conference is scheduled for **October 25, 2007, at 10:00 a.m.** At that time, the parties can present their positions on the remaining actions needed to resolve these two related adversary proceedings i n light of this ruling. A separate order consistent with these findings of fact and conclusions of law shall be entered.

All Citations

377 B.R. 396, 48 Bankr.Ct.Dec. 285, 21 Fla. L. Weekly Fed. B 45

Footnotes

1 On April 18, 2007, the Court entered an Order (Adv. Pro. 05–190, Doc. No. 131) Consolidating Adversary Proceeding Nos. 05–190 and 05–81 for the purpose of resolving the factual issue of whether the defendants represented Lentek. The plaintiff filed Adversary Proceeding 05–81 against Greenspoon Marder alleging that Lentek paid Greenspoon Marder for legal services rendered to Lentine, personally, and that Lentek received no corresponding value for these payments. Therefore, the plaintiff seeks to recover the transfers/payments pursuant to Bankruptcy Code Sections 548, 550, and Florida Statute Sections 726.105 and 726.106. In Adversary Proceeding 05–190, the plaintiff again sued Greenspoon Marder, and additionally, Blodig. In that Complaint, the plaintiff alleges the defendants breached fiduciary duties owing to Lentek and committed professional malpractice and are liable pursuant to Bankruptcy Code Sections 541, 544, 548, 550, and Florida Statutes 726.105 and 726.106.

2 Michael Moecker was appointed as a liquidating trustee to gather assets for distribution to Lentek's creditors under the plan of reorganization confirmed by the Court on June 21, 2004 (Doc. No. 466). He has filed numerous adversary proceedings to collect assets in performance of his job, including these two related adversary proceedings.

3 Lentine allegedly financed his individual purchase of 225 shares of Lentek stock by using Lentek's assets. The sale price was approximately $2.4 million. Lentine later sold the same shares to RMS Limited Partnership ("RMS") for $5,000,000, resulting in profits to Lentine personally of $2.6 million, perhaps with no corresponding benefit to Lentek or its creditors.

4 In this case, no retainer agreement was executed between Lentek and the defendants. However, Plaintiff's Exhibit No. 5 is a letter, dated October 10, 2002, from the defendants and addressed to Lentine, as president of Lentek, confirming their retention. The letter starts with "Dear Lou," and then states "Thank you very much for retaining this firm *to assist you*

in its present shareholder restructuring transactions." (emphasis added). Although not the most clearly worded sentence, the Court finds the letter was intended to reflect that Mr. Blodig and Greenspoon Marder represented Lentine, personally, not Lentek, in Lentine's efforts to buy the corporation's stock.

5 In *Blackhawk,* similar to this case, the defendant/attorneys sought a summary judgment that the plaintiff's malpractice allegations failed because no attorney-client relationship existed. The District Court for the Middle District of Florida denied the motion for summary judgment, concluding that the plaintiff/client's "*intent* that the Defendants provide [certain] legal services establishes a sufficient attorney-client relationship between the parties to allow Plaintiff[ ] to pursue a claim for legal malpractice" where the defendants failed "to establish that Plaintiff lacked this *intent*." 900 F.Supp. at 418. (emphasis added). Thus, summary judgment was denied because the defending attorneys could not prove an absence of intent. *Id.* In finding that a factual dispute existed concerning whether the defendants actually provided legal services to the plaintiff, the District Court referenced the definition of "client" supplied in Section 90.502(1)(b) of the Florida Evidence Code. However, the Court did not conclude that Section 90.502(1)(b) of the Florida Evidence Code supplied the test for finding an attorney-client relationship. Rather, citing *Dean,* 607 So.2d 494, the District Court stated that the "legal relationship [between the parties] depends on the intent of the client,' not on the actions of the lawyer." 900 F.Supp. at 418. In *Blackhawk,* the critical fact was whether the plaintiff/client intended services to be rendered, not whether they were or were not, in fact, rendered.

6 In *In re Lawrence,* 217 B.R. 658, 664 (Bankr.S.D.Fla.1998), the Bankruptcy Court for the Southern District of Florida addressed whether a law firm had to be disqualified from representing a Chapter 7 trustee where the firm hired an attorney who had previously represented the debtor's mother. The court articulated a two pronged test for disqualification, which is not applicable here, and only tangentially addressed the test for demonstrating an attorney-client relationship, acknowledging that the test is "based in part upon the subjective belief [which must also be reasonable] that the client is being represented by the attorney." 217 B.R. at 664 (*citing Bartholomew,* 611 So.2d at 86). The court did not elaborate upon or detail additional factors for consideration in determining whether an attorney-client relationship was present. The attorney-client relationship was discussed only because it constituted one of the two prongs of the test for disqualification.

7 The Stock Purchase Agreement also imposed substantial obligations upon Lentek and, by its own terms, was "duly and validly executed and delivered by the Purchaser [Lentine] and the Corporation [Lentek] and constitutes the legal, valid and binding obligation of the Purchaser and the Corporation, enforceable in accordance with its terms." (Plaintiff's Ex. No. 19, p. 5, ¶ 5(b)). Among other things, the Stock Purchase Agreement specified that Lentek would pay Durek's health insurance for 18 months following the closing of the Agreement (p. 8, ¶ 7(e)), that Lentek would purchase a van owned by Durek and would assume the debt on the van (p. 8, ¶ 7(f)), that Lentek would transfer to Durek the office and computer equipment in Durek's office as additional compensation to Durek (p. 8, ¶ 7(g)), and that Durek would be repaid the sum of $80,492.96 he had earlier loaned to Lentek (p. 9, ¶ 7(h)).

8 In *Parker,* the Eleventh Circuit Court of Appeals declined to invoke the doctrine to preclude a Chapter 7 trustee from pursuing an employment discrimination claim that the debtor initially failed to disclose as an asset on her bankruptcy schedules. 365 F.3d at 1269. The Court ruled that the claim was an asset of the debtor's bankruptcy estate and that the trustee, as the real party in interest, should not be estopped from pursuing the claim since the trustee had not asserted divergent or inconsistent positions in any legal proceedings.

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134 So.3d 484
District Court of Appeal of Florida,
Fifth District.

Robert DINGLE and Janet L. Dingle, Appellants,
v.
Jacqueline C. DELLINGER, et al., Appellees.

No. 5D13–1725.
|
Feb. 7, 2014.
|
As Corrected on Denial of Rehearing Feb. 27, 2014.

Synopsis

Background: Grantees brought action against grantor's agent's attorney and attorney's law firm, alleging claims for legal malpractice, vicarious liability, and negligent training and supervision arising from attorney's alleged failure to draft enforceable quitclaim deed gifting real property from grantor to grantees. Attorney and firm moved to dismiss. The Circuit Court, Sumter County, William H. Hallman, III, J., granted motion and dismissed action with prejudice. Grantees appealed.

Holdings: The Fifth District Court of Appeal, Orfinger, J., held that:

[1] complaint sufficiently alleged that grantees were intended third-party beneficiaries, and thus trial court committed reversible error in dismissing legal malpractice claim, and

[2] complaint alleged facts sufficient to sustain vicarious liability claim against firm as principal for acts of attorney.

Affirmed in part, reversed in part, and remanded.

West Headnotes (19)

[1] Appeal and Error
De novo review

Appellate court reviews de novo a trial court's order dismissing a complaint with prejudice.

2 Cases that cite this headnote

[2] Appeal and Error
Pleading

To determine the sufficiency of a pleading, an appellate court accepts as true all well-pled allegations of the complaint.

Cases that cite this headnote

[3] Attorney and Client
Elements of malpractice or negligence action in general

In order to properly state a cause of action against an attorney for professional negligence, a plaintiff must plead sufficient facts to establish three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence as the proximate cause of the client's loss.

Cases that cite this headnote

[4] Attorney and Client
Duties and liabilities to adverse parties and to third persons

An attorney's liability for professional negligence is generally limited to clients with whom the attorney shares privity of contract.

2 Cases that cite this headnote

[5] Attorney and Client
In general;limitations

Because the party who retains an attorney is in privity with that attorney, that party may bring a negligence action for legal malpractice.

1 Cases that cite this headnote

[6] Attorney and Client
Duties and liabilities to adverse parties and to third persons

If the parties are not in privity, to bring a legal malpractice action, the plaintiff must

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be an intended third-party beneficiary of the lawyer's services.

2 Cases that cite this headnote

[7] **Contracts**
Grounds of action

To assert a third-party beneficiary claim, the complaint must allege: (1) a contract; (2) an intent that the contract primarily and directly benefit the third party; (3) breach of the contract; and (4) resulting damages to the third party.

4 Cases that cite this headnote

[8] **Contracts**
Agreement for Benefit of Third Person

A party is an intended beneficiary of a contract only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong.

3 Cases that cite this headnote

[9] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Although an intended third-party beneficiary may maintain a legal malpractice action in theories of either tort (negligence) or contract (third-party beneficiary), the contractual theory is conceptually superfluous because the crux of the action must lie in tort, as there can be no recovery without negligence.

1 Cases that cite this headnote

[10] **Contracts**
Agreement for Benefit of Third Person

It is not necessary to name a third-party beneficiary in the contract; rather, the parties' pre- or post-contract actions may establish their intent to primarily and directly benefit a third party.

2 Cases that cite this headnote

[11] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons
Attorney and Client
In general;limitations

The privity of contract requirement for a legal malpractice claim has been relaxed most frequently in will-drafting situations, but the third-party intended beneficiary exception to the rule of privity is not limited to will-drafting cases.

1 Cases that cite this headnote

[12] **Negligence**
Privity

Although privity of contract may create a duty of care providing the basis for recovery in professional negligence, the lack of privity does not necessarily foreclose liability if a duty of care is otherwise established.

Cases that cite this headnote

[13] **Contracts**
Agreement for Benefit of Third Person

A person who is not a party to a contract may not sue for breach of that contract where that person receives only an incidental or consequential benefit from the contract.

1 Cases that cite this headnote

[14] **Appeal and Error**
Amended Pleadings
Attorney and Client
Duties and liabilities to adverse parties and to third persons

Grantees' third amended complaint contained sufficient ultimate facts, which, if proved, showed that grantees were intended third-party beneficiaries of contract for legal representation between attorney and grantor's agent, and thus trial court committed

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reversible error in dismissing grantees' legal malpractice claim against attorney and attorney's law firm, in action arising from attorney's alleged failure to draft enforceable quitclaim deed gifting real property from grantor to grantees; complaint asserted that primary intent of agent in hiring attorney was to directly benefit grantees, that neither agent nor grantor directly benefited from hiring attorney, and that agent or grantor's donative intent was frustrated by alleged negligence of attorney and firm in not preparing enforceable quitclaim deed as they were contracted to do.

Cases that cite this headnote

[15] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Generally, an attorney is not liable to third parties for negligence or misadvice given to a client concerning an inter vivos transfer of property.

Cases that cite this headnote

[16] Attorney and Client
Duties and liabilities to adverse parties and to third persons

As a general rule, when a transaction involves two interests to be protected, an attorney employed by one of the parties to the transaction cannot be held responsible to other parties unless it is alleged and proved that the attorney committed some nonnegligent tort such as fraud or theft.

Cases that cite this headnote

[17] Attorney and Client
Duties and liabilities to adverse parties and to third persons

An attorney owes a duty to a third party if the attorney was hired for the purpose of benefiting a third party.

Cases that cite this headnote

[18] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Because the intended benefit rule requires a specific intent to benefit a third party, an attorney is not liable to a third party for malpractice alleged to have occurred during adversarial proceedings on the rationale that adversaries would never desire to benefit one another.

Cases that cite this headnote

[19] Attorney and Client
Liability of firm

Grantees' third amended complaint alleged facts sufficient to sustain vicarious liability claim against law firm as principal for acts of attorney, in action arising from attorney's alleged failure during her representation of grantor's agent to draft enforceable quitclaim deed gifting real property from grantor to grantees, where complaint alleged facts sufficient to sustain legal malpractice claim against attorney.

Cases that cite this headnote

Attorneys and Law Firms

***486** Craig A. Brand, of The Brand Law Firm, P.A., Miami, for Appellants.

***487** Joseph M. Mason, Jr. and Carole Joy Barice, of McGee & Mason, P.A., Brooksville, for Appellee, Jacqueline C. Dellinger.

Ryan J. Millhorn, of The Millhorn Law Firm, The Villages, for Appellees, Michael Millhorn, Eric Millhorn and The Millhorn Law Firm, L.L.C.

Opinion

ORFINGER, J.

Robert and Janet Dingle appeal the dismissal with prejudice of their legal malpractice claims against attorney

Jacqueline Dellinger and the Millhorn Law Firm, L.L.C. We affirm in part, reverse in part, and remand.

This suit arose out of the alleged failure of Dellinger to properly draft documents gifting property to the Dingles. According to the Dingles' third amended complaint, John P. Kyreakakis, the sole shareholder and agent of Whiteway Investments, Inc., a Panamanian corporation, retained Dellinger, an employee or agent of Millhorn, to prepare a quitclaim deed to gift a piece of real property from Whiteway to the Dingles. Kyreakakis provided Dellinger with an English translation of a power of attorney, originally drafted in Spanish in Panama, to evidence his authority to transfer Whiteway's property to the Dingles. Dellinger drafted and recorded the quitclaim deed following its execution. Several months later, Kyreakakis died and his widow challenged the conveyance. Ultimately, this Court concluded that the power of attorney did not authorize Kyreakakis to make a gift on Whiteway's behalf and determined that the conveyance was invalid. *See Dingle v. Prikhdina,* 59 So.3d 326 (Fla. 5th DCA 2011). The Dingles then sued Dellinger and Millhorn, alleging legal malpractice. Dellinger and Millhorn moved to dismiss, arguing that because the Dingles were not parties to the attorney-client relationship, Millhorn and its employees or agents owed them no duty. The trial court agreed and, after several amendments, dismissed the Dingles' causes of action with prejudice.

[1] [2] [3] We review de novo a trial court's order dismissing a complaint with prejudice. *E.g., Wendler v. City of St. Augustine,* 108 So.3d 1141, 1143 (Fla. 5th DCA 2013). To determine the sufficiency of a pleading, we accept as true all well-pled allegations of the complaint. *Kinney v. Shinholser,* 663 So.2d 643, 645 (Fla. 5th DCA 1995). In order to properly state a cause of action against an attorney for professional negligence, a plaintiff must plead sufficient facts to establish three elements: 1) the attorney's employment; 2) the attorney's neglect of a reasonable duty; and 3) the attorney's negligence as the proximate cause of the client's loss. *Law Office of David J. Stern, P.A. v. Sec. Nat'l Servicing Corp.,* 969 So.2d 962, 966 (Fla.2007); *Moscowitz v. Oldham,* 48 So.3d 136, 138 (Fla. 5th DCA 2010). In this case, the issue on appeal involves the second element—whether Dellinger and Millhorn owed any duty to the Dingles. While the Dingles concede no attorney/client relationship existed between them and either Dellinger or Millhorn, they claim that they were the intended third-party beneficiaries of the contract between Whiteway and its attorneys.

[4] [5] [6] [7] [8] [9] [10] An attorney's liability for professional negligence is generally limited to clients with whom the attorney shares privity of contract. *See Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner,* 612 So.2d 1378, 1379 (Fla.1993). Because the party who retains an attorney is in privity with that attorney, that party may bring a negligence action for legal malpractice. *Angel, Cohen & Rogovin v. Oberon Inv., N.V.,* 512 So.2d 192, 194 (Fla.1987). If the parties are not in privity, to bring a legal malpractice action, the plaintiff must be an intended third-party beneficiary ***488** of the lawyer's services. *See Espinosa,* 612 So.2d at 1380. To assert a third-party beneficiary claim, the complaint must allege: (1) a contract; (2) an intent that the contract primarily and directly benefit the third party; (3) breach of the contract; and (4) resulting damages to the third party. [1] *See, e.g., Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.,* 647 So.2d 1028, 1031 (Fla. 4th DCA 1994). A party is an intended beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong. *See id.; see also Jenne v. Church & Tower, Inc.,* 814 So.2d 522, 524 (Fla. 4th DCA 2002) (explaining that courts look to nature or terms of contract to find parties' clear or manifest intent that it is for third party's benefit). Thus, it is not necessary that the third-party beneficiary is named in the contract. *See Fla. Power & Light Co. v. Mid–Valley, Inc.,* 763 F.2d 1316, 1321 (11th Cir.1985). Rather, the parties' pre- or post-contract actions may establish their intent. *Id.*

[11] [12] [13] The privity requirement has been relaxed most frequently in will drafting situations, but "the third party intended beneficiary exception to the rule of privity is not limited to will drafting cases." *Hodge v. Cichon,* 78 So.3d 719, 722 (Fla. 5th DCA), *review denied,* 99 So.3d 942 (Fla.2012); *Winston v. Brogan,* 844 F.Supp. 753, 756 (S.D.Fla.1994) (citing *Greenberg v. Mahoney Adams & Criser, P.A.,* 614 So.2d 604, 605 (Fla. 1st DCA 1993)). Although privity of contract may create a duty of care providing the basis for recovery in negligence, the lack of privity does not necessarily foreclose liability if a duty of care is otherwise established. *See Baskerville–Donovan Eng'rs, Inc. v. Pensacola Exec. House Condo. Ass'n,* 581 So.2d 1301, 1303 (Fla.1991). Still, "[a] person who is not a party to a contract may not sue for breach

of that contract where that person receives only an incidental or consequential benefit from the contract." *Taylor Woodrow Homes Fla., Inc. v. 4146–A Corp.*, 850 So.2d 536, 543–44 (Fla. 5th DCA 2003) (quoting *Caretta Trucking*, 647 So.2d at 1030–31); *see Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So.2d 399, 400 (Fla. 2d DCA 2000) ("To find the requisite intent, it must be shown that both contracting parties intended to benefit the third party; it is insufficient to show that only one party unilaterally intended to benefit the third party.").

In a case very similar to the one before us, the Iowa Supreme Court held that a third party, alleging legal malpractice in preparation of donative nontestamentary instruments of conveyance, could assert a claim for legal malpractice by establishing that the donor specifically identified the third party as the object of the donor's intent and that the third party's expectancy was lost or diminished as a result of the lawyer's professional negligence. *Holsapple v. McGrath*, 521 N.W.2d 711 (Iowa 1994). In so holding, the Iowa Supreme Court wrote:

> [W]e note[ ] two basic problems with recognizing third-party suits against lawyers: without the privity requirement, parties to a contract for legal services could easily lose control over their agreement. In addition, the imposition of a duty to the general public could ***489** expose lawyers to a virtually unlimited potential for liability.
>
> On the other hand, we note[ ] the policy consideration supporting such a claim, primarily giving effect to the intent of the testator to transfer the property.
>
> ....
>
> In deciding whether to recognize such a claim, we look to ... the desirability of effecting the grantor's intent, the general policy of providing a remedy for a loss, and the need for an effective deterrent to future negligence. These concerns are as pertinent in a nontestamentary context as they [are in a testamentary context].
>
> On the other hand, the dangers inherent in an overbroad recognition of liability are as real in this case as they are in a testamentary disposition case, and any recognition of a claim in these circumstances must be tempered accordingly. Primarily, we must be concerned that such a claim be so circumscribed as not to "expose lawyers to a virtually unlimited potential for liability." *See [Schreiner v. Scoville*, 410 N.W.2d 679,] 681 [(Iowa 1987)].
>
> *Schreiner* required, in order to limit the scope of recognizable third-party plaintiffs, that a plaintiff be a "specifically identifiable" beneficiary "as expressed in the testator's testamentary instruments." *Id.* at 682. Thus, more than an unrealized expectation of benefits must be shown; a plaintiff must show that the testator (or here, the grantor) attempted to put the donative wishes into effect and failed to do so only because of the intervening negligence of a lawyer ....
>
> Second, under *Schreiner*, "a cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence ... the [benefit] is ... lost, [in whole or in part]." *Id.* at 683....
>
> Interpolating the requirements for a cause of action to the circumstances of this case, we hold that a plaintiff must establish that (1) the plaintiff was specifically identified, by the donor, as an object of the grantor's intent; and (2) the expectancy was lost or diminished as a result of professional negligence.

Id. at 713–14 (internal citations omitted); *see Speedee Oil Change No. 2, Inc. v. Nat'l Union Fire Ins. Co.*, 444 So.2d 1304 (4th Cir.1984) (holding that corporation, as intended third-party beneficiary of promoter's contract with attorney, could sue attorney based on incorrect advice to promoters as attorney understood that legal advice was intended for use and benefit of corporation, and that corporation, rather than individual promoters, would act upon advice); *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 266 (Minn.1992) (explaining that intended third-party beneficiary may bring action for legal malpractice where client's sole purpose is to benefit third party directly, and attorney's negligent act caused beneficiary to suffer loss; determination is matter of balancing extent to which transaction was intended to affect beneficiary, foreseeability of harm to beneficiary, degree of certainty that beneficiary suffered injury, closeness of connection between attorneys' conduct and injury, and policy of preventing future harm); *see also Red River Valley Bank v. Home Ins. Co.*, 607 So.2d 892, 896 (La.App.Ct.1992) (indicating that attorney may be liable for malpractice to third-party beneficiary of attorney's work); *Onita Pac. Corp. v. Trs. of Bronson*, 315 Or. 149, 843 P.2d 890, 896–97 (1992) (en banc) (ruling that

attorney owes duty not only to client but also to intended beneficiaries of work done for client).

***490** **[14]** We conclude that the Dingles' third amended complaint makes allegations sufficient to bring it within this narrow exception to the privity requirement in legal malpractice cases. The Dingles' third amended complaint contains sufficient ultimate facts, which, if proved, show that they were the intended beneficiaries of Whiteway's contract with Dellinger and Millhorn. The Dingles' third amended complaint asserts that the primary intent of Whiteway in hiring Millhorn was to directly benefit them. Accepting, without finding, the complaint's allegations as true, there was no direct benefit to Whiteway or Kyreakakis, making this transaction similar to a gift or devise made in a trust or in a will. Whiteway or Kyreakakis's intent was frustrated by the alleged negligence of Dellinger and Millhorn in not preparing an enforceable quitclaim deed as they were contracted to do.[2] *See First Fla. Bank, N.A. v. Max Mitchell & Co.,* 558 So.2d 9, 15 (Fla.1990) (holding accounting firm could be liable for negligence to persons whom it knows and intends will rely on its opinions); *Rosenstone v. Satchell,* 560 So.2d 1229, 1230 (Fla. 4th DCA 1990) (explaining that attorney may be held liable for breach of duties to one who he knows is intended beneficiary of legal services); *Admiral Merchs.,* 494 N.W.2d at 266 ("[A]n intended third-party beneficiary may bring an action for legal malpractice in those situations when the client's sole purpose is to benefit the third party directly, and the attorney's negligent act caused the beneficiary to suffer a loss."); *see also Donahue v. Shughart, Thomson & Kilroy, P.C.,* 900 S.W.2d 624, 625 (Mo.1995) (holding that beneficiaries of trust have standing to sue settlor's attorney for malpractice because attorney did not effectuate his client's wishes for transfer of property).

Still, Dellinger insists that she did not have a duty of care to the Dingles because the requirement of privity in attorney malpractice actions has only been relaxed where there is only one "side" to a transaction (e.g., wills, trusts, estate planning and adoptions), and this case involved a two-sided real estate transaction. Thus, Dellinger contends that because she was employed by Whiteway, she could not ethically represent the Dingles' interests or be held responsible to them.

[15] **[16]** **[17]** **[18]** Generally, an attorney is not liable to third parties for negligence or misadvice given to a client concerning an *inter vivos* transfer of property. *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.,* 467 So.2d 315, 317 (Fla. 3d DCA 1985). Courts usually reject the contention that the attorney for a seller, buyer, lender, or mortgagor owed a duty to another party. Thus, as a general rule, when a transaction involves two interests to be protected, an attorney employed by one of the parties to the transaction cannot be held responsible to other parties unless it is alleged and proved that the attorney committed some nonnegligent tort such as fraud or theft. *See, e.g., Adams v. Chenowith,* 349 So.2d 230, 231 (Fla. 4th DCA 1977). As the court in *Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A.,* 367 So.2d 633, 635 (Fla. 2d DCA 1979), explained:

> Just as in *Adams,* there was more than one 'side' of the transaction before us. The law firm's obligation ran to its client. There is no suggestion that the buyer was harmed by any type of fraudulent conduct. It may be that in transactions such as this the buyer often chooses to rely on the expertise of the lender's lawyer on the premise that the lawyer would not approve the title for the loan unless the title were clear. ***491** However, this is a calculated risk, and if it proves to be unfounded, the buyer has no claim that the lawyer violates a duty owed to him. To hold otherwise would place the lawyer in an untenable position, particularly when it is well known that lawyers will often pass certain title defects when examining a title for a loan but refuse to do so when representing a purchaser.

While the general rule in Florida is that an attorney owes a duty of care only to his client and not to third parties, an attorney owes a duty to a third party if the attorney was hired for the purpose of benefitting a third party. *See, e.g., Espinosa,* 612 So.2d at 1379–80; *Oberon,* 512 So.2d at 194. Because the intended benefit rule requires the specific intent to benefit the third party, it is accepted that an attorney is not liable to the third party for malpractice alleged to have occurred during adversarial proceedings on the rationale that adversaries would never desire to benefit one another. *Wild v. Trans World Airlines, Inc.,* 14

S.W.3d 166, 168 (Mo.App.Ct.2000); *Donahue v. Shughart, Thomson & Kilroy, P.C.,* 900 S.W.2d 624, 625 (Mo.1995); *Onita,* 843 P.2d at 897.

This case involved a real estate transaction, typically a two-sided transaction. However, here, based on the allegations contained in the complaint, there was no adversarial relationship or differing interests to be protected, as the Dingles' interests were not in conflict with Whiteway or Kyreakakis, thus suggesting a one-sided transaction. *See generally Freedom Mortg. Corp. v. Burnham Mortg., Inc.,* 720 F.Supp.2d 978 (N.D.Ill.2010) (holding that mortgage lender sufficiently pled that primary purpose and intent of attorney's representation of mortgage broker and title insurer were to influence lender, giving rise to duty of care running from attorney to lender, as third-party beneficiary of attorney-client relationship; although broker and title insurer hired attorney as closing agent presumably to act in their best interests, attorney's work was nonadversarial as to lender in sense that attorney's services as closing agent were typically relied upon by all parties to real estate transaction); *Kirby v. Chester,* 174 Ga.App. 881, 331 S.E.2d 915 (1985) (concluding that closing attorney owed duty to nonclient lender that relied on attorney's title certification to loan money); *Flaherty v. Weinberg,* 303 Md. 116, 492 A.2d 618, 629–30 (1985) (determining that unrepresented mortgagor-buyer's complaint, which alleged that mortgagee-lender retained attorney to intentionally benefit both parties, who had identical interests in the property, alleged sufficient facts to survive dismissal); 4 *Legal Malpractice* § 34:4 (2013 ed.) ("The rule of privity of contract prevails where a nonclient sues the attorney for errors in handling a transfer of property interests, in creating a security interest, searching title or representing a client in the transaction, who is sued by another party to the transaction.") (collecting cases); *see also Jimerson v. First Am. Title Ins. Co.,* 989 P.2d 258, 261 (Colo.App.1999) (explaining that professional supplier of information may be liable for its negligence to person with whom it has no contractual relationship, providing that supplier of information knows that recipient of information will provide it to that person or knows that information is to be used to influence transaction); *Stuart v. Freiberg,* 142 Conn.App. 684, 69 A.3d 320 (2013) (holding that genuine issue of material fact existed as to whether estate beneficiaries were intended beneficiaries of accountant's work for estate executor, and therefore, whether accountant owed them duty of care, precluded summary judgment in professional malpractice claim against accountant).

***492 [19]** The Dingles' claim of negligence against Millhorn as principals for the acts of their agent, Dellinger, depends upon the claim for professional negligence against Dellinger. As the Dingles have asserted a cause of action for professional negligence, they have alleged facts sufficient to sustain their vicarious liability claim. *See, e.g., Aetna Ins. Co. v. Holmes,* 59 Fla. 116, 52 So. 801, 802 (1910) ("The acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal."). However, we affirm without discussion, the trial court's dismissal of the Dingles' negligent training and negligent supervision claim.

In summary, on the unique facts before this Court, we conclude the trial court erred in dismissing the professional negligence (count I), and the vicarious liability (count II), claims of the Dingles' third amended complaint. We reverse this matter for reinstatement of these causes of action. We affirm the dismissal of the negligent supervision and training (count III) claim.

AFFIRMED in part; REVERSED in part; REMANDED.

SAWAYA and EVANDER, JJ., concur.

All Citations

134 So.3d 484, 39 Fla. L. Weekly D322

Footnotes

1 Although an intended third-party beneficiary may maintain a legal malpractice action in theories of either tort (negligence) or contract (third-party beneficiary), the contractual theory is conceptually superfluous because the crux of the action must lie in tort as there can be no recovery without negligence. *McAbee v. Edwards,* 340 So.2d 1167, 1169 (Fla. 4th DCA 1976).

2 Whether an enforceable deed could have been drafted has not been determined.

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260 So.3d 363
District Court of Appeal of Florida, Third District.

Lauren NIEBURG and Neil Nieburg, Appellants,
v.
Eric W. SULZBERGER, et al., Appellees.

No. 3D16-1905
|
Opinion filed October 31, 2018

Synopsis

Background: Relatives of clients, relatives' mother and step-father, brought legal malpractice and breach of fiduciary duty action against attorneys and law firms that drafted the clients' estate and marriage documents. The Circuit Court, Miami-Dade County, Jerald Bagley, J., No. 11-37956, dismissed the complaint with prejudice. Relatives appealed.

Holdings: The District Court of Appeal held that:

[1] relatives were not third-party beneficiary's of the services performed by the attorneys and law firms, and

[2] trial court acted within its discretion by denying relatives' leave to amend pleadings upon dismissal of claims.

Affirmed.

West Headnotes (6)

[1] Attorney and Client
Elements of malpractice or negligence action in general

An attorney's liability for negligence in the performance of his or her professional duties is limited to clients with whom the attorney shares privity of contract.

Cases that cite this headnote

[2] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Exception to the general rule requiring privity of contract between the client and attorney for a legal malpractice claim is when the plaintiff is the intended third-party beneficiary of the services performed by the attorney.

Cases that cite this headnote

[3] Contracts
Agreement for Benefit of Third Person

A party is an intended third-party beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong.

Cases that cite this headnote

[4] Contracts
Agreement for Benefit of Third Person

To find the requisite intent to establish an intended third-party beneficiary, it must be shown that both contracting parties intended to benefit the third party; it is insufficient to show that only one party unilaterally intended to benefit the third party.

Cases that cite this headnote

[5] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Relatives of clients, relatives' mother and step-father, were not third-party beneficiary's of the services performed by the attorneys and law firms in drafting client's estate and marriage documents, where the attorneys and law firm did not express an intent to primarily and directly benefit the relatives when they represented clients.

Cases that cite this headnote

[6] Pretrial Procedure

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Amendment or pleading over

Trial court acted within its discretion by denying relatives of clients' leave to amend pleadings upon dismissal of legal malpractice and breach of fiduciary duty claims against law firms and attorneys on allegations surrounding the drafting of clients' estate and marriage documents, where any amendment would be futile with the underlying contracts not showing an intent by the law firms or attorneys to primarily or directly benefit the relatives.

Cases that cite this headnote

***364** An Appeal from the Circuit Court for Miami-Dade County, Jerald Bagley, Judge. Lower Tribunal No. 11-37956

Attorneys and Law Firms

Broad and Cassel, and Barbara Viota-Sawisch, Adam G. Rabinowitz, and Joseph H. Picone (Fort Lauderdale), for appellants.

DLD Lawyers, and Pete L. DeMahy, Kenneth R. Drake, Coral Gables, and Richard N. Conforti, for appellee, Eric W. Sulzberger d/b/a Sulzberger and Sulzberger.

Boyd Richards Parker & Colonnelli, P.L., and W. Todd Boyd, Miami, and Gissell Jorge, for appellees Neal Sandberg and Simon, Schindler & Sandberg, LLP.

Carlton Fields Jorden Burt, P.A., and Charles M. Rosenberg, Naomi Berry, and Steven M. Blickensderfer, Miami, for appellees David Scully and Jack R. Loving, P.A.

Before LOGUE, LUCK and LINDSEY, JJ.

Opinion

PER CURIAM.

****1** Lauren and Neil Nieburg appeal the trial court's order dismissing their first amended complaint with prejudice. We affirm.

The Nieburgs alleged that three attorneys and two law firms committed legal malpractice and breached fiduciary duties. Eric Sulzberger was alleged to have been negligent in drafting the Nieburgs' mother and stepfather's estate and marriage documents. Neal Sandberg and his firm were alleged to have been negligent in reviewing and advising the Nieburgs' mother to sign an ante-nuptial agreement. And David Scully and his firm were alleged to have been negligent in advising the Nieburgs' mother about, and letting the statute of limitations lapse on, contesting their stepfather's estate and trust.

[1] **[2]** **[3]** **[4]** In general, "[a]n attorney's liability for negligence in the performance of his or her professional duties is limited to clients with whom the attorney shares privity of contract." Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So.2d 1378, 1379 (Fla. 1993). "The exception to this general rule requiring privity of contract between the client and attorney is when the plaintiff is the intended third-party beneficiary of the services performed by the attorney." Driessen v. Univ. of Miami School of Law Children & Youth Law Clinic, No. 3D18-999, — So.3d ——, ——, 2018 WL 4608760, at *1 (Fla. 3d DCA Sept. 26, 2018). "A party is an intended beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong." Dingle v. Dellinger, 134 So.3d 484, 488 (Fla. 5th DCA 2014). "To find the requisite intent, it must be shown that both contracting parties intended to benefit the third party; it is insufficient to show that only one party unilaterally intended to benefit the third party." Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So.2d 399, 400 (Fla. 2d DCA 2000).

[5] Based on the complaint and the underlying contracts in the record, the attorneys ***365** and law firms did not clearly express an intent to primarily and directly benefit the Nieburgs when they represented the Nieburgs' mother and stepfather. At best, the Nieburgs were incidental beneficiaries, which is insufficient. See Dingle, 134 So.3d at 488 ("Still, a person who is not a party to a contract may not sue for breach of that contract where that person receives only an incidental or consequential benefit from the contract." (quotation omitted)).

[6] The Nieburgs contend they should be allowed to amend their complaint, and normally they would be able to, but the trial court had the discretion to deny leave to amend where the "amendment would be futile." JVN Holdings, Inc. v. Am. Const. & Repairs, LLC, 185

So.3d 599, 601 (Fla. 3d DCA 2016) (quotation omitted). Here, the underlying contracts say what they say, and no amount of creative pleading can get around the fact that they do not evidence an intent to primarily and directly benefit the Nieburgs.

The trial court's order dismissing the Nieburgs' complaint with prejudice is affirmed.

**2 Affirmed.

All Citations

260 So.3d 363, 2018 WL 5623938, 43 Fla. L. Weekly D2421

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763 So.2d 1274
District Court of Appeal of Florida,
First District.

SILVER DUNES CONDOMINIUM
OF DESTIN, INC. et al., Appellants,
v.
BEGGS AND LANE, Attorneys and Counselors
at Law, and John Daniel, individually, Appellees.

No. 1D99-4494.
|
Aug. 14, 2000.

Synopsis

Twenty individual condominium unit owners filed action against law firm representing corporate condominium association alleging malpractice. The Circuit Court, Okaloosa County, Thomas T. Remington, J., granted summary judgment for law firm. Individual unit owners appealed. The District Court of Appeal held that unit owners were not apparent intended third-party beneficiaries of legal services contract between association and law firm.

Affirmed.

West Headnotes (3)

[1] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Attorney's liability for negligence in the performance of his or her professional duties is generally limited to individuals or entities with whom the attorney shares privity of contract, but a narrow exception to this privity requirement exists for individuals or entities who can demonstrate that they were intended and apparent third-party beneficiaries of the legal services contract.

1 Cases that cite this headnote

[2] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Individual condominium unit owners were not apparent intended third-party beneficiaries of legal services contract between corporate condominium association and law firm, and thus unit owners could not bring malpractice suit against law firm, even though association was at all times acting on behalf of and for benefit of unit owners as fiduciary, where law firm was hired to represent association during process of rebuilding condominiums following hurricane, legal interests of association and unit owners were in conflict during law firm's representation of association, and as result of conflict, law firm threatened legal action against some unit owners, and other unit owners threatened legal action against association.

3 Cases that cite this headnote

[3] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Evidence of a conflict of interest between the rights of the claimed third-party beneficiary and the rights of the attorney's actual client undercuts any claim that the legal services were undertaken for the express benefit of the claimed third-party beneficiary.

1 Cases that cite this headnote

Attorneys and Law Firms

***1274** Douglas L. Stowell and Stephen L. Spector, Tallahassee, for appellants.

Alan R. Horky of Fuller, Johnson & Farrell, P.A., Pensacola, and ***1275** Patrick J. Farrell of Fuller, Johnson & Farrell, P.A., Tallahassee, for appellees.

Opinion

PER CURIAM.

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The issue in this case is whether the trial court should have concluded that appellants, 20 individual condominium unit owners, were the intended third-party beneficiaries of a legal services contract between the corporate condominium association, Silver Dunes Condominium of Destin, Inc. (hereinafter "association"), and appellee John Daniel of the law firm of Beggs and Lane. [1] We conclude that the undisputed facts in this case demonstrate that the individual unit owners were not the intended third-party beneficiaries of the legal services contract between the association and its attorney. We, therefore, affirm the trial court's entry of summary judgment against the individual unit owners in this legal malpractice action.

The Silver Dunes Condominium complex, located in Destin, Florida, is comprised of five separate buildings: Buildings A, B, C, D, and the high-rise. The complex is operated, managed, and maintained by the association. The association is a nonprofit corporation. The owners of each individual unit of the complex are, as required by statute, shareholders of the corporate association. *See* § 718.111(1)(a), Fla. Stat. (1995). The affairs of the association are managed by a board of directors (hereinafter "board") elected from the membership/shareholders of the association. The officers of the association are elected by the board. The officers and directors of the association have a fiduciary relationship to the unit owners/shareholders. *See id.*

In October 1995, Hurricane Opal hit the Florida coastline near Destin causing substantial damage to many homes, businesses, and condominiums in the area including the Silver Dunes Condominium complex. Buildings B and C of the complex, situated closest to the coastline, were almost completely destroyed and were immediately condemned by the city of Destin. According to the Declaration of Condominium for the complex, the association was solely responsible for the reconstruction of the condemned units. In fact, under the Declaration of Condominium, the individual unit owners of those condemned units were prohibited from rebuilding their units.

Within a month of the hurricane, the association, through its board, hired appellee John Daniel of the law firm of Beggs and Lane to provide legal representation on all matters relating to the reconstruction and repair of the damaged and destroyed buildings in the complex. According to Melinda Bagley, the former president of the association, the board expressed to Daniel its obligation to rebuild the destroyed and damaged units efficiently and cost effectively. Ms. Bagley explained in an affidavit:

> At all times, our concern was for the rebuilding expenses incurred by the individual unit owners and lost use of the units by the individual unit owners. It was in furtherance of these concerns that the Association hired legal counsel to obtain legal assistance for Silver Dunes on rebuilding the damaged units and structures as quickly as possible in accordance with the applicable law.

According to Daniel, he did not represent the individual unit owners in any of their individual claims arising out of the destruction of their units because the interests of the unit owners often diverged from that of the association. Daniel knew, however, that the board had a fiduciary duty to all members of the association to rebuild the damaged structures as expeditiously as possible and to make the cost to all the owners as low as reasonably possible under the circumstances.

As the plans for reconstruction and repair proceeded, the board discovered that the insurance coverage maintained by the ***1276** association on the complex would be insufficient to rebuild the destroyed structures in accordance with current building code requirements. In response to the discovery of this insurance shortfall, the board and Daniel made plans for the reconstruction of Buildings B and C with additional units for sale to the public to generate income to offset the shortfall.

During the board's attempts to have the reconstruction plan with the additional units approved by the membership, Daniel wrote letters to some initially dissenting unit owners threatening legal action on behalf of the association if they did not change their vote. These unit owners ultimately voted in favor of the expansion plan. Two different groups of unit owners then later threatened their own legal action against the association in connection with the association's attempt to rebuild the destroyed units.

In their legal malpractice claim against appellees, appellants contend that Daniel provided erroneous legal advice to the board in connection with the reconstruction

expansion plan, which led to a delay in the ultimate reconstruction of the destroyed units and a resulting loss in rental income to the affected unit owners. Appellees contend that they owed no duty of care to appellants because no privity of contract existed between appellees and appellants, and appellants were not the intended third-party beneficiaries of the legal services contract between the association and appellees. The trial court entered summary judgment in favor of appellees as to the legal malpractice claims filed by appellants.

[1] **[2]** An attorney's liability for negligence in the performance of his or her professional duties is generally limited to individuals or entities with whom the attorney shares privity of contract. *See Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner,* 612 So.2d 1378, 1379 (Fla.1993); *Angel, Cohen & Rogovin v. Oberon Inv., N.V.,* 512 So.2d 192, 194 (Fla.1987). A narrow exception to this privity requirement exists, however, for individuals or entities who can demonstrate that they were intended and apparent third-party beneficiaries of the legal services contract. *See Espinosa,* 612 So.2d at 1380; *Oberon,* 512 So.2d at 194. In this case, the individual unit owners argue that they were the apparent intended third-party beneficiaries of the legal services contract between the association and appellees because the association was at all times acting on behalf of and for the benefit of the unit owners as their fiduciary. Appellees argue on the other hand that the fiduciary relationship between the association and the unit owners did not automatically establish that the legal services contract was intended to benefit the unit owners and that the record does not otherwise support a finding that the unit owners were the apparent intended third-party beneficiaries of the contract.

Given that the association is a closely held corporation, the outcome here is governed, at least in part, by the decision in *Brennan v. Ruffner,* 640 So.2d 143 (Fla. 4th DCA 1994). In *Brennan,* a shareholder of a closely held corporation filed a legal malpractice action against the corporation's attorney after the shareholder was involuntarily terminated as a shareholder and employee of the corporation pursuant to a shareholder's agreement prepared by the attorney. *See id.* at 145. In deciding that the trial court had properly entered final summary judgment in favor of the corporation's attorney, the fourth district held:

> Although never squarely decided in this state, we hold that where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually. While there is no specific ethical prohibition in Florida against dual representation of the corporation and the shareholder if the attorney is convinced that a conflict does not ***1277** exist, an attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders. The duty of an attorney for the corporation is first and foremost to the corporation, even though legal advice rendered to the corporation may affect the shareholders.

Id. at 145-46 (footnote omitted). This decision undercuts appellants' argument that they were the apparent intended third-party beneficiaries of the legal services contract between the association and appellees simply by virtue of the fact that the association had a fiduciary obligation to act in their best interests. *See Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,* 742 So.2d 381, 389 (Fla. 4th DCA 1999)(holding that "[a]n attorney who represents a corporation is 'not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually.' ").

[3] In light of the decision in *Brennan,* the trial court's entry of summary judgment in this case can only be deemed error if the record otherwise demonstrates that the unit owners were the apparent intended third-party beneficiaries of the legal services contract between the association and appellees. Yet, the record here cannot support such a finding because it shows that the legal interests of the association and the individual unit owners

were in conflict during appellees' representation of the association. Evidence of a conflict of interest between the rights of the claimed third-party beneficiary and the rights of the attorney's actual client undercuts any claim that the legal services were undertaken for the express benefit of the claimed third-party beneficiary. *See Oberon,* 512 So.2d at 194; *Brennan,* 640 So.2d at 146.

During his representation of the association, Daniel threatened legal action against some unit owners and other unit owners threatened their own legal action against the association, all in connection with the association's attempts to rebuild the damaged and destroyed structures of the complex. This court cannot conclude that Daniel was representing the legal interests of the individual unit owners while at the same time threatening to sue them on behalf of the association and while they were themselves threatening to sue the association for its actions during the reconstruction process.

We, therefore, conclude that the individual unit owners were not the apparent intended third-party beneficiaries of the legal services contract between the association and appellees. The trial court's final summary judgment entered in favor of appellees on the individual unit owners' claims of legal malpractice is affirmed.

BENTON and BROWNING, JJ., and SHIVERS, DOUGLASS B., Senior Judge, concur.

All Citations

763 So.2d 1274, 25 Fla. L. Weekly D1943

Footnotes

1 The association is not a party to this appeal.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Arch Insurance Company v. Kubicki Draper, LLP, Fla.App. 4 Dist., January 23, 2019

902 So.2d 755
Supreme Court of Florida.

COWAN LIEBOWITZ & LATMAN, P.C., et al., Petitioners,
v.
Donald KAPLAN, etc., Respondent.

No. SC03-59.
|
March 17, 2005.
|
Rehearing Denied May 10, 2005.

Synopsis
Background: Insolvent corporation executed assignment for benefit of creditors, and assignee brought legal malpractice suit against corporation's attorneys for failing to disclose in private placements that money raised was used for unsecured loans to chief executive officer (CEO). The Circuit Court, Miami-Dade County, Steve Levine, J., granted attorneys' motions to dismiss. Assignee appealed. The District Court of Appeal, Fletcher, J., 832 So.2d 138, reversed and remanded. Review was granted based on conflict of decisions.

[Holding:] The Supreme Court, Cantero, J., held that the malpractice claims were assignable.

Approved and remanded.

Lewis, J., concurred in result only and filed opinion.

West Headnotes (2)

[1] Assignments
For Tort

Legal malpractice claims against attorneys who had prepared private placement memoranda for sale of corporate shares were assignable; the attorneys produced the private placement memoranda knowing they would be distributed to the public and that potential investors would rely on them, they owed a duty to the public, and concerns for confidentiality did not apply.

14 Cases that cite this headnote

[2] Attorney and Client
Nature and Term of Office

Attorneys owed a duty to the public when advising corporation and preparing the private placement memoranda.

6 Cases that cite this headnote

Attorneys and Law Firms

***756** Laura Besvinick of Hogan and Hartson, LLP, Miami, FL on behalf of Cowan, Liebowitz and Latman, P.C.; Robert Michael Klein and Marlene S. Reiss of Stephens, Lynn, Klein, Lacava, Hoffman and Puya, Miami, FL on behalf of Stephen M. Rosenberg and James J. D'Esposito; Caryn Bellus of Kubicki Draper, P.A., Miami, FL on behalf of Franzino and Rosenberg, P.C.; and Deborah Poore Knight of Walton, Lantaff, Schroeder and Carson Corporate Center, Fort Lauderdale, FL on behalf of Marshall Platt, Marshall Douglas Platt, P.A., Jack B. Packer, P.A. and Packer and Platt, for Petitioner.

Steven E. Stark and David A. Friedman of Fowler White Burnett, P.A., Miami, FL, for Respondent.

Daniel S. Green of Ullman and Kurpiers, LLC and Tracy Raffles Gunn of Fowler, White, Boggs and Banker, P.A, Tampa, FL on behalf of Florida Defense Lawyers' Association and Paul Steven Singerman, Ilyse M. Homer and Paul A. Avron of Berger Singerman, P.A., Miami, FL on behalf of the Business Law Section of the Florida Bar, as Amici Curiae.

Opinion

CANTERO, J.

In this case, we decide whether a potential plaintiff may assign a legal malpractice claim involving the preparation of private placement memoranda. In two prior cases, we allowed the assignment of other types of claims,

contrasting them to claims for legal malpractice, which we stated were *not* assignable. *See Forgione v. Dennis Pirtle Agency, Inc.,* 701 So.2d 557 (Fla.1997) (permitting the assignment of claims against an insurance agent); *KPMG Peat Marwick v. Nat'l Union Fire Ins. Co.,* 765 So.2d 36 (Fla.2000) (permitting the assignment of claims against an accountant conducting an independent audit). In the decision below, the Third District Court of Appeal permitted the assignment of a legal malpractice claim, analogizing an attorney preparing private placement memoranda to the accountant conducting an independent audit we described in *KPMG. See Kaplan v. Cowan Liebowitz & Latman, P.C.,* 832 So.2d 138, 140 (Fla. 3d DCA 2002). That holding expressly and directly conflicts with our statements in *KPMG* and *Forgione* (albeit in dictum) implying a blanket prohibition against assignment of legal malpractice claims. Therefore, we accepted jurisdiction. *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 844 So.2d 645 (Fla.2003) (table); *see* art. V, § 3(b)(3), Fla. Const; *see also Watson Realty Corp. v. Quinn,* 452 So.2d 568, 569 (Fla.1984) (accepting jurisdiction based on conflict between the district court opinion and dictum in a prior Supreme Court case and receding from the dictum). For the reasons explained below, we approve the district court's decision. ***757** We agree that because lawyers preparing private placement memoranda, like independent auditors, owe a duty to those who rely on statements contained in their published documents, parties may assign claims for legal malpractice committed in preparing them. We therefore recede from the broad dicta in *KPMG* and *Forgione* purporting to prohibit the assignment of *all* legal malpractice claims. Nevertheless, we stress that the vast majority of legal malpractice claims remain unassignable because in most cases the lawyer's duty is to the client.

I. FACTS

Medical Research Industries, Inc. (MRI), a Florida corporation, developed and marketed homeopathic medical products. To raise money for capital improvements, MRI decided to issue a private placement of shares in the company. MRI's majority shareholder, William Tishman, consulted attorneys who prepared private placement memoranda. Through four private placements between 1996 and 1998, MRI raised over $50 million from about 2000 shareholders. Later, Tishman borrowed about $18 million in unsecured loans from MRI, leading to its eventual insolvency. MRI sued Tishman to recover the loan amount and obtained a judgment. Unable to satisfy the judgment, however, MRI executed an "Assignment for the Benefit of Creditors" to Donald Kaplan.[1] Kaplan then sued for legal malpractice the attorneys who prepared the private placement memoranda. The trial court granted the attorneys' motions to dismiss, concluding that legal malpractice claims are personal and not assignable and are exempt from levy and sale under an execution of assignment.

On appeal, the Third District reversed. It held that Kaplan had standing to bring the legal malpractice claims against the attorneys "[b]ecause the legal services at issue [were] not personal in nature but involved the publication of corporate information to third parties, i.e., the investors" and therefore "the policies underlying the prohibition of bare assignment of legal malpractice claims are inapplicable." *Kaplan,* 832 So.2d at 140. The district court relied on *KPMG's* holding that the relationship of a corporate client to an independent auditor does not implicate the same confidentiality concerns as the typical attorney-client relationship. *Id.; see KPMG,* 765 So.2d at 38. The court concluded that such concerns were not present in this case either, because the attorneys shared their information with third parties-i.e., shareholders and the investing public. The court also held that because Kaplan, as an assignee for the benefit of creditors, was charged with gathering and liquidating MRI's assets, "Kaplan is no different from a trustee in bankruptcy who has full standing to bring a debtor's legal malpractice claim." 832 So.2d at 140.

II. ANALYSIS

We agree with the district court that the public policy concerns with permitting the ***758** assignment of legal malpractice claims are substantially attenuated, if they exist at all, when attorneys prepare private (or public) placement memoranda. In such circumstances, attorneys act much as accountants do in performing independent audits. That is, they act not just for the corporation's benefit, but for the benefit of all those who rely on the representations in their documents-in this case, potential shareholders. Because we approve the district court's holding on this ground, we need not consider the court's alternative theory of assignability: that an assignee for the

benefit of creditors is analogous to a bankruptcy trustee, to whom legal malpractice claims may be transferred. *See* 832 So.2d at 140; *In re Alvarez,* 224 F.3d 1273, 1279 (11th Cir.2000) (holding that a legal malpractice claim arising from bankruptcy counsel's alleged negligence was "property of the estate" under 11 U.S.C. 541(a)(1)).

Below we discuss (A) our previous cases addressing the assignability of legal malpractice claims; (B) the role and duties of attorneys preparing private placement memoranda; and (C) why assignments of claims against attorneys involved in private placement memoranda do not implicate the public policy concerns generally associated with the assignment of legal malpractice claims.

A. *Forgione* and *KPMG*

As noted above, we previously have discussed the assignability of legal malpractice claims in two cases that did not involve such claims. In *Forgione,* we considered whether an insured could assign a claim for negligence against an insurance agent for failure to obtain proper coverage. 701 So.2d at 558. We said yes, reasoning that parties can assign causes of action derived from a contract or statute. *Id.* at 559. We compared the relationship between a prospective insured and an insurance agent with the attorney-client relationship. We noted that in contrast to the former relationship, the attorney-client relationship is confidential and personal and thus cannot be assigned: "Florida law views legal malpractice as a personal tort which cannot be assigned because of 'the personal nature of legal services which involve highly confidential relationships.' " 701 So.2d at 559 (quoting *Washington v. Fireman's Fund Ins. Co.,* 459 So.2d 1148, 1149 (Fla. 4th DCA 1984)).

Several years later, we permitted the assignment of a claim against an independent auditor for professional malpractice in preparing an audit. *See KPMG,* 765 So.2d at 39. As in *Forgione,* we noted that legal malpractice claims are not assignable "because of the personal nature of legal services which involve a confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client." *KPMG,* 765 So.2d at 38. We found that unlike an attorney, who must zealously represent a client in an adversarial setting, "an independent auditor who is hired to give an opinion on a client's financial statements must do so with an independent impartiality which contemplates reliance upon the audit by interests other than the entity upon which the audit is performed." *Id.* We distinguished the public policy reasons discussed in *Forgione* that prohibit assignment of legal malpractice claims because "[r]ather than acting as an advocate with an undivided duty of loyalty owed a client, an independent auditor performs a different function." 765 So.2d at 38.

B. Private Placement Memoranda

[1] We agree with the district court that the role of the attorneys in this case was similar to that of the independent auditors in *KPMG.* The claim is based on the attorneys' preparation of private placement memoranda and communications surrounding ***759** their production.[2] The memoranda disclosed information to MRI's shareholders and many potential investors. Like the independent auditors in *KPMG,* the attorneys intended that third parties would rely on the representations made in the memoranda. The legal services at issue, therefore, were not personal but involved publication of corporate information.

In a similar context, securities lawyers have been held to owe a duty to the public. In *Securities & Exchange Commission v. Spectrum, Ltd.,* 489 F.2d 535, 541-42 (2d Cir.1973), the Second Circuit held:

> The legal profession plays a unique and pivotal role in the effective implementation of the securities laws. Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters.

See also Kline v. First W. Gov't Sec., Inc., 24 F.3d 480, 485-86 (3d Cir.1994) (concluding that "attorneys may be liable [to investors] for both misrepresentations

and omissions where the result of either is to render an opinion letter materially inaccurate or incomplete"); *Felts v. Nat'l Account Sys. Ass'n, Inc.*, 469 F.Supp. 54, 67 (N.D.Miss.1978) ("The lawyer for the issuer plays a unique and pivotal role in the effective implementation of the securities laws. As a result, special duties are imposed on the lawyer.").

As these examples illustrate, lawyers often have public duties beyond those owed to the clients. The attorneys in this case produced the private placement memoranda knowing they would be distributed to the public and that potential investors would rely on them.

C. The Specter of a Market for Legal Malpractice Claims

The circumstances of this case do not implicate the public policy concerns behind the prohibition on assignment of legal malpractice claims. The majority of state courts considering this issue prohibit the assignment of legal malpractice claims, mostly based on public policy concerns.[3] ***760** *See Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865, 867 (Tenn.1996) ("Public policy is ... the primary consideration upon which courts from other jurisdictions have focused in determining the assignability of a legal malpractice action."); *Wagener v. McDonald*, 509 N.W.2d 188, 190 (Minn.Ct.App.1993) (same).

Courts are mainly concerned about creating a market for legal malpractice claims. As one California court noted:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty.... The commercial aspect of assignability of ... legal malpractice [actions] is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Goodley v. Wank & Wank, Inc., 62 Cal.App.3d 389, 133 Cal.Rptr. 83, 87 (1976); *see also Can Do, Inc.*, 922 S.W.2d at 869 (noting that "assignment of legal malpractice actions would both endanger the attorney-client relationship and commercialize legal malpractice lawsuits").

We expressed similar concerns in *KPMG* and *Forgione*, although much more superficially because those cases did not ***761** involve legal malpractice. *See KPMG*, 765 So.2d at 38 (noting that legal malpractice claims are not assignable because of the personal nature of legal services, involving a "confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client"); *Forgione*, 701 So.2d at 559 (noting that Florida law views legal malpractice as a personal tort that cannot be assigned because of the personal

nature of legal services which involve highly confidential relationships).

[2] We reiterate these concerns. They continue to prevent the assignment of most legal malpractice claims. However, they do not arise in these circumstances. The claim MRI assigned to Kaplan does not involve personal services or implicate confidentiality concerns. As discussed above, the attorney's services for MRI involved publication of information to third parties. The attorneys owed a duty to the public when advising MRI and preparing the private placement memoranda.

With respect to confidentiality, this situation parallels that of securities lawyers claiming the attorney-client privilege in third-party suits based on inaccurate or misleading securities filings. The federal cases dealing with securities lawyers stress that information intended for release to third parties is not covered by the privilege. *See United States v. Moscony,* 927 F.2d 742, 752 (3d Cir.1991) ("The ultimate key to determining confidentiality is intent ..."). *In re Grand Jury Proceedings,* 727 F.2d 1352 (4th Cir.1984), involved the disclosure of attorney-client communications about the creation of a prospectus intended for use in a private placement. Even though the prospectus was never released, the court held that the communications were not privileged because the information in the prospectus was intended for public release: "[c]ourts have consistently 'refused to apply the privilege to information that the client intends his attorney to impart to others ...,' or which the client intends shall be published or made known to others." *Id.* at 1356 (citing *United States v. Pipkins,* 528 F.2d 559, 563 (5th Cir.), *cert. denied,* 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1191 (1976)); *see In re Micropro Sec. Litig.,* No. C-85-7428 EFL, 1988 WL 109973, at *2 (N.D.Cal.1988) (citing *In re Grand Jury Proceedings* and holding that preliminary drafts of public offering materials were not protected by the privilege because there was intent to disclose the information to third parties).

In this case, the documents the attorneys prepared not only were *intended* for release; they *were* released to third parties. Therefore, communications between MRI and the attorneys would not be protected in a third-party suit and concerns for confidentiality do not apply.

III. CONCLUSION

For the reasons stated, we approve the district court's holding that legal malpractice claims involving private placement memoranda may be assigned.[4] Because of our resolution of the case on this issue, we need not address the district court's alternative holding that the claims may be assigned because an assignee for the benefit of creditors is analogous to a trustee in bankruptcy, who can receive assignments of legal malpractice claims. *See* 832 So.2d at 140. The decision of the district court is approved and the case is remanded for ***762** further proceedings consistent with this opinion.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, QUINCE, and BELL, JJ., concur.

LEWIS, J., concurs in result only with an opinion.

LEWIS, J., concurring in result only.
While I concur in the result in this matter, I cannot subscribe to the broad reasoning employed by the majority and its unnecessary reliance on broad concepts of general assignability that I believe to be inapplicable to the instant matter. The question presented to the Court today can and should be resolved simply with the analysis and application of the governing statute-the Assignment for the Benefit of Creditors contained in Chapter 727 of the Florida Statutes. Giving effect to the plain meaning of that statute-as time-tested principles of statutory interpretation guide us to do, *see Holly v. Auld,* 450 So.2d 217 (Fla.1984)-permits the assignment of the legal malpractice claim at issue here. This Court need not and should not widen the scope of analysis to invoke principles that govern the discrete assignment of singular assets beyond the context of the Assignment for the Benefit of Creditors statute.

As the text of the Assignment for the Benefit of Creditors statute makes clear, the intent and purpose of the law is to "provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter." § 727.101, Fla. Stat. (2000). In almost all cases, the law is invoked in an overall

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liquidation, and does not apply in scenarios involving the assignment of single professional malpractice claims of the type at issue in *Forgione v. Dennis Pirtle Agency, Inc.,* 701 So.2d 557 (Fla.1997), and *KPMG Peat Marwick v. National Union Fire Insurance Co.,* 765 So.2d 36 (Fla.2000). For that reason, *Forgione* and *KPMG* and the dicta therein discussing the general unassignability of legal malpractice claims are, in my view, completely inapposite in the present analysis.

Examination of the plain language of the Assignment for the Benefit of Creditors statute-the legal construct applicable here-makes clear the debtor's ability to assign legal malpractice claims in this limited context. Under the statute, the assignee for the benefit of creditors must "[c]ollect and reduce to money the assets of the estate, whether by suit in any court of competent jurisdiction or by public or private sale." § 727.108(1), Fla. Stat. (2000). The assignee for the benefit of creditors has the power to conduct the debtor's business, marshal and liquidate its assets, and receive its claims. *See* § 727.108(1), (4)-(5), Fla. Stat. (2000). It naturally follows that the assignee should also have the right to seek recovery against any third party that may be responsible for those claims as an asset of the debtor. Indeed, I agree with Kaplan in the assertion that the assignee for the benefit of creditors cannot be made responsible for claims if he or she is not permitted to seek redress for damages from the responsible party on those claims. Concluding that a debtor may not assign a legal malpractice claim under the statute would clearly frustrate the intent of the law and the statutorily prescribed duties of the assignees.

Moreover, the statute clearly contemplates that a debtor's estate should include legal claims. According to the statute, the assets of the assignor include "claims and demands belonging to the assignor" without ***763** limitation. § 727.104(1)(b), Fla. Stat. (2000). In commencing a proceeding under the statute, the debtor must list items enumerated in the statute, including "claims, and choses in action." § 727.104(1)(d), Fla. Stat. (2000). Petitioners must fail in their contention that legal malpractice claims fall outside the ambit of the statute because the definition of "asset" explicitly excepts property "exempt by law from forced sale." § 727.103(1), Fla. Stat. (2000). Petitioners support their argument only with cases that assess the assignability of legal malpractice and personal tort claims generally, which, again, have no application in the present statutory context.

Kaplan acquired his interest in the legal malpractice claim along with all of MRI's other assets by operation of law. This is not a case governed by the general non-statutory concepts of assignability framing the debate in *Forgione* and *KPMG,* but by a specific statutory scheme governing the duties and liabilities of assignees for the benefit of creditors. Accordingly, I concur only with the result of the majority's decision today.

All Citations

902 So.2d 755, Blue Sky L. Rep. P 74,537, 30 Fla. L. Weekly S155

Footnotes

1 The assignment states:

> [The] Assignor, in consideration of the Assignee's acceptance of this Assignment, and for other good and valuable consideration, hereby grants, assigns, conveys, transfers, and sets over, unto the Assignee, his successors and assigns, all of its assets, except such assets as are exempt by law from levy and sale under an execution, including, but not limited to, all real property, fixtures, goods, stock, inventory, equipment, furniture, furnishings, accounts receivable, bank deposits, cash, promissory notes, cash value and proceeds of insurance policies, claims and demands belonging to the Assignor, wherever such assets may be located, hereinafter the "Estate", as which assets are to the best knowledge and belief of the Assignor, set forth on Schedule "B" annexed hereto.

2 The complaint alleges, among other things, that the attorneys published the private placement memoranda when they knew or should have known that the documents contained false and misleading information; included a "Use of Proceeds" section in the private placement memoranda indicating that the capital raised would be used to operate and expand MRI's business when the attorneys knew that a substantial amount of the money was being funneled into unsecured loans to Tishman; created a "loan program" under which Tishman could continually borrow substantial sums from MRI; continued participating in the "loan program" when the amounts loaned began reaching "irremediable levels"; and failed

to advise or warn disinterested shareholders of the harmful and illegal loans to Tishman and thereby placed third party interests above that of MRI.

3 A majority of the states that have examined this issue, including Florida, have held that legal malpractice claims are generally not assignable. These include **Arizona,** *see Schroeder v. Hudgins,* 142 Ariz. 395, 690 P.2d 114, 118 (Ct.App.1984), *abrogation on other grounds recognized by Franko v. Mitchell,* 158 Ariz. 391, 762 P.2d 1345, 1353-54 n. 1 (Ct.App.1988); **California,** *see Goodley v. Wank & Wank, Inc.,* 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976); **Colorado,** *see Roberts v. Holland & Hart,* 857 P.2d 492 (Colo.Ct.App.1993); **Connecticut,** *see Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves,* 709 F.Supp. 44 (D.Conn.1989); **Florida,** *see KPMG,* 765 So.2d at 36; *Forgione,* 701 So.2d at 557; **Illinois,** *see Brocato v. Prairie State Farmers Ins. Ass'n,* 166 Ill.App.3d 986, 117 Ill.Dec. 849, 520 N.E.2d 1200 (1998); **Indiana,** *see Picadilly, Inc. v. Raikos,* 582 N.E.2d 338 (Ind.1991); **Kansas,** *see Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson,* 250 Kan. 490, 827 P.2d 758 (1992); **Kentucky,** *see Coffey v. Jefferson County Bd. of Educ.,* 756 S.W.2d 155 (Ky.Ct.App.1988); **Michigan,** *see Joos v. Drillock,* 127 Mich.App. 99, 338 N.W.2d 736 (1983); **Minnesota,** *see Wagener v. McDonald,* 509 N.W.2d 188 (Minn.Ct.App.1993); **Missouri,** *see Scarlett v. Barnes,* 121 B.R. 578 (W.D.Mo.1990); **Nebraska,** *see Earth Sci. Labs., Inc. v. Adkins & Wondra, P.C.,* 246 Neb. 798, 523 N.W.2d 254 (1994); **Nevada,** *see Chaffee v. Smith,* 98 Nev. 222, 645 P.2d 966 (1982); **New Jersey,** *see Alcman Servs. Corp. v. Samuel H. Bullock, P.C.,* 925 F.Supp. 252 (D.N.J.1996) *aff'd,* 124 F.3d 185 (3d Cir.1997); **Tennessee,** *see Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith,* 922 S.W.2d 865 (Tenn.), *cert. denied,* 519 U.S. 929, 117 S.Ct. 298, 136 L.Ed.2d 216 (1996); **Texas,** *see Britton v. Seale,* 81 F.3d 602 (5th Cir.1996); and **Virginia,** *see MNC Credit Corp. v. Sickels,* 255 Va. 314, 497 S.E.2d 331 (1998).

A minority of jurisdictions allow assignment of legal malpractice claims: the **District of Columbia,** *see Richter v. Analex Corp.,* 940 F.Supp. 353 (D.D.C.1996); **Maine,** *see Thurston v. Cont'l Cas. Co.,* 567 A.2d 922 (Me.1989); **Massachusetts,** *see New Hampshire Ins. Co., Inc. v. McCann,* 429 Mass. 202, 707 N.E.2d 332 (1999); **New York,** *see Vitale v. City of New York,* 183 A.D.2d 502, 583 N.Y.S.2d 445 (N.Y.App.Div.1992); **Oregon,** *see Gregory v. Lovlien,* 174 Or.App. 483, 26 P.3d 180 (2001); **Pennsylvania,** *see Hedlund Mfg. Co. v. Weiser, Stapler & Spivak,* 517 Pa. 522, 539 A.2d 357 (Pa.1988); and **Rhode Island,** *see Cerberus Partners, L.P. v. Gadsby & Hannah,* 728 A.2d 1057 (R.I.1999).

4 We also approve the district court's holding that the claim in this case is not exempt from forced sale under section 727.104, Florida Statutes (2000), because, as discussed above, the claims in this case do not involve personal services or implicate the confidentiality concerns normally associated with the assignment of legal malpractice claims.

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969 So.2d 962
Supreme Court of Florida.

LAW OFFICE OF DAVID J. STERN, P.A., Petitioner,
v.
SECURITY NATIONAL SERVICING CORPORATION, Respondent.

No. SC06–361.
|
July 5, 2007.
|
Rehearing Denied Dec. 3, 2007.

Synopsis

Background: Assignee of loan brought malpractice action against attorney who was originally hired by a previous holder of loan, and who voluntarily dismissed a timely foreclosure action in favor of an untimely-filed action that was later dismissed on statute of limitations grounds. The Seventeenth Judicial Circuit Court, Broward County, Patti Englander Henning, J., awarded summary judgment to attorney. Assignee appealed. The District Court of Appeal, 916 So.2d 934,reversed and remanded. Attorney filed application for review.

Holdings: The Supreme Court, Bell, J., held that:

[1] assignee's attorney-client relationship with attorney did not give it standing to bring malpractice action based upon acts that occurred during attorney's representation of prior holder of note and mortgage, and

[2] policy concerns weighed against permitting assignment of legal malpractice claims arising in mortgage foreclosures.

Decision quashed.

Lewis, C.J., concurred in result only with an opinion.

Pariente, J., filed a dissenting opinion in which Quince, J., joined.

Quince, J., filed a dissenting opinion in which Pariente, J., joined.

West Headnotes (10)

[1] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Loan assignee's attorney-client relationship with attorney, which was formed during the appeal of the underlying foreclosure action, did not give assignee standing to bring a legal malpractice action based upon acts in foreclosing mortgage that occurred during attorney's representation of a prior holder of the note and mortgage.

Cases that cite this headnote

[2] **Attorney and Client**
Elements of malpractice or negligence action in general

A legal malpractice action has three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence as the proximate cause of loss to the client.

21 Cases that cite this headnote

[3] **Limitation of Actions**
Negligence in performance of professional services

For statute of limitations purposes, a cause of action for legal malpractice does not accrue until the underlying adverse judgment becomes final, including exhaustion of appellate rights; that is the first point at which there is a redressable harm.

3 Cases that cite this headnote

[4] **Attorney and Client**
Conduct of litigation

Until an underlying adverse judgment becomes final, a legal malpractice claim regarding that underlying action is hypothetical, and damages are speculative.

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2 Cases that cite this headnote

[5] **Attorney and Client**
Elements of malpractice or negligence action in general

In stating a claim for legal malpractice, it is not sufficient merely to assert an attorney-client relationship; the plaintiff must also allege that a relationship existed between the parties with respect to the acts or omissions upon which the malpractice claim is based.

8 Cases that cite this headnote

[6] **Assignments**
For Tort

Most legal malpractice claims are nonassignable.

2 Cases that cite this headnote

[7] **Assignments**
For Tort

Supreme Court would reject the minority, case-by-case approach of evaluating whether particular assignments of legal malpractice claims violated public policy concerns.

1 Cases that cite this headnote

[8] **Mortgages and Deeds of Trust**
Rights of Transferee

Mortgages and Deeds of Trust
Equities and Defenses Between Original Parties, Transfer as Subject to

Mortgages and Deeds of Trust
Rights and liabilities of transferor

Whereas the general assignment of a note and mortgage conveys to the assignee the rights of the assignor under the note and mortgage, subject to the equities and defenses of the obligor, such an assignment does not implicitly assign the attorney-client relationship between the assignor and his attorney.

4 Cases that cite this headnote

[9] **Attorney and Client**
Elements of malpractice or negligence action in general

The real basis and substance of a legal malpractice suit is a breach of the duties within the personal relationship between the attorney and client.

3 Cases that cite this headnote

[10] **Assignments**
For Tort

Policy concerns of protecting attorney-client confidences and preventing a market for legal malpractice claims weighed against permitting assignment of legal malpractice claims arising in mortgage foreclosures; Supreme Court would neither presume confidential information was not disclosed to assignee of loan nor find previous holder of loan impliedly waived attorney-client privilege when it conveyed note and mortgage by general assignment, and recognizing legal malpractice assignments under these circumstances would create incentive for both holders of impaired instruments and speculators to market these notes and mortgages with right to sue attorney in failed foreclosure action included as major factor in pricing transaction.

5 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

BELL, J.

Law Office of David J. Stern, P.A. (Stern) seeks review of the Fourth District Court of Appeal's decision in *Security National Servicing Corp. v. Law Office of David J. Stern, P.A.*, 916 So.2d 934 (Fla. 4th DCA 2005), on the ground that it expressly and directly conflicts with three decisions of this Court, *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755 (Fla.2005), *KPMG Peat Marwick v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 765 So.2d 36 (Fla.2000), and *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So.2d 557 (Fla.1997). We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

This case involves a legal malpractice claim arising out of an attempted mortgage foreclosure. Briefly, Security National alleges that Stern committed legal malpractice by filing an untimely foreclosure action and by voluntarily dismissing a previously filed, timely foreclosure action on the same mortgage. This blunder apparently occurred because Stern, having realized its error in filing the untimely action, intended to dismiss it but instead dismissed the timely foreclosure action by mistake. Stern continued to prosecute the untimely foreclosure action, and the trial court entered summary judgment against it. Meanwhile, the mortgage and note were assigned several times before Security National finally acquired them during the appeal in the foreclosure action. Security National retained Stern as counsel to represent its interests in the appeal. Ultimately, the Second District affirmed the trial court's decision on appeal.

Subsequently, Security National brought a legal malpractice action against Stern, claiming to have standing either (1) by virtue of its attorney-client relationship with Stern or (2) as the assignee of the mortgage and note involved in the underlying foreclosure action. The trial court entered summary judgment against Security National, but the Fourth District reversed. The Fourth District held that Security National has standing to sue Stern as the assignee of the mortgage and note. *See Stern*, 916 So.2d at 939.

Now Stern seeks review by this Court of the Fourth District's decision. For the reasons stated, we conclude that Security National lacks standing to sue Stern for legal malpractice either by attorney-client relationship or by assignment. Therefore, we quash the decision below.

FACTUAL AND PROCEDURAL BACKGROUND

The Fourth District described the facts of this case as follows:

> This legal malpractice action arises out of a botched mortgage foreclosure. Security ***965** National is the transferee of the underlying note and mortgage....
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> ... In 1997, the holder of the note and mortgage, UMLIC–SIX CORP., timely filed a mortgage foreclosure action. While that action was pending, UMLIC–SIX assigned the loan to EMC Mortgage. EMC hired Stern to foreclose the loan. Stern filed a second foreclosure action on the same note and mortgage on December 15, 1998. By this time, the statute of limitations had already expired, so that this 1998 foreclosure action was untimely.
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> On February 19, 1999, Stern substituted as counsel in the timely 1997 foreclosure suit, then five days later voluntarily dismissed that timely action, leaving only the untimely action intact. Stern essentially admits that this was malpractice.
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> On August 27, 1999, EMC assigned the loan to Universal Portfolio Buyers, Inc. (Universal). Stern continued on as Universal's counsel in the untimely 1998 action. On October 15, 1999, Universal assigned the loan to North American Mortgage Co. (North American). Stern remained as North American's counsel in the 1998 action.
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> On July 24, 2000, the owner of the encumbered property moved for summary judgment on statute of limitations grounds. On November 5, 2000, the trial court entered summary judgment for the defendant. North American appealed.
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> On April 30, 2001, while the appeal was pending, North American assigned the loan to Security National. The record does not reflect whether there was consideration for this transfer or whether Security National had knowledge of the status of the foreclosure at the time. Thereafter, Stern remained as counsel representing Security National, but only for a month or two.

> On December 7, 2001, the second district affirmed the final judgment. [On November 5, 2002,] Security National ... brought this legal malpractice action against Stern. The complaint alleges negligence in dismissing the timely 1997 action (at the time EMC owned the loan) and in failing to timely move to reinstate the 1997 action until after the motion for summary judgment was filed (potentially spanning the ownership of EMC, Universal, and North American).
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> Although the trial court stated in her order that she "may take issue with the fairness of such ruling," she felt bound to enter summary judgment on Stern's behalf because there was no attorney-client relationship between Stern and Security National "at the time the cause of action accrued."

Stern, 916 So.2d at 936 (citation omitted). On appeal, the Fourth District reversed, holding that under this Court's decision in *Kaplan,* Security National received a valid assignment of the legal malpractice claim against Stern. The Fourth District reasoned that "the malpractice action was transferred incident to the transfer of the note and mortgage," *Stern,* 916 So.2d at 936, and that the assignment in question did not implicate relevant policy concerns against legal malpractice assignments. *See id.* at 938–39.

On February 16, 2006, Stern filed a notice to invoke this Court's discretionary jurisdiction. Stern claims that the Fourth District misapplied and improperly extended our holding in *Kaplan,* which was expressly limited to the particular facts of that case. Stern argues that Security National does not have standing either (1) by its attorney-client relationship with Stern or (2) by an implied general assignment of the malpractice claim. We address both of ***966** these issues in turn. As stated earlier, we ultimately determine that Security National does not have standing to sue Stern for the legal malpractice it alleges.

STANDING BY ATTORNEY–CLIENT RELATIONSHIP

[1] [2] [3] [4] [5] The Fourth District properly concluded that Security National's attorney-client relationship with Stern did not give it standing to bring a legal malpractice action based upon acts that occurred during Stern's representation of a prior holder of the note and mortgage. As the Fourth District explained:

> A legal malpractice action has three elements: 1) the attorney's employment; 2) the attorney's neglect of a reasonable duty; and 3) the attorney's negligence as the proximate cause of loss to the client. *See Kates v. Robinson,* 786 So.2d 61, 64 (Fla. 4th DCA 2001). For statute of limitations purposes, a cause of action for legal malpractice does not accrue until the underlying adverse judgment becomes final, including exhaustion of appellate rights. *See Silvestrone v. Edell,* 721 So.2d 1173, 1175 n. 2 (Fla.1998). That is the first point at which there is a redressable harm. *Id.* at 1175. Until then, a malpractice claim is "hypothetical" and damages are "speculative." *Id.; see also Hold v. Manzini,* 736 So.2d 138, 142 (Fla. 3d DCA 1999) ("mere knowledge of possible malpractice is not dispositive of when a malpractice action accrues"). Security National points to this law and argues that because it owned the loan by the time the appeal was completed and the cause of action accrued, the law regarding the assignment of legal malpractice claims is irrelevant. Simply put, it claims that it was the owner of the loan at the critical point in time.
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> By contrast, Stern points to language from our decision in *Kates,* 786 So.2d at 64:
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> > In stating a claim for legal malpractice, it is not sufficient merely to assert an attorney-client relationship. The plaintiff must also allege that a relationship existed between the parties with respect to the acts or omissions upon which the malpractice claim is based.
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> *See also Maillard v. Dowdell,* 528 So.2d 512 (Fla. 3d DCA 1988). These cases rejected attempts by former clients to retroactively expand the scope of the attorney's representation. While they are factually different, the basic point seems sound: the time of the alleged negligent act or omission is the critical point for testing the scope and existence of the attorney-client relationship.

Stern, 916 So.2d at 936–37. We agree with the Fourth District's conclusion. Security National did not gain standing to sue Stern for prior acts of legal malpractice by forming an attorney-client relationship with Stern during the appeal of the underlying foreclosure action. Therefore, we approve the Fourth District's conclusion on this issue.

However, as explained below, we disagree with the Fourth District's extension of *Kaplan* into the context of general assignments of notes and mortgages.

STANDING BY ASSIGNMENT

We disapprove of the Fourth District's decision and conclude that Security National did not receive a valid assignment of the right to sue Stern for legal malpractice. First, in *Kaplan,* we did not adopt the minority, case-by-case approach regarding the assignment of legal malpractice claims. We continued to adhere to the majority view that legal malpractice claims are generally not assignable. Second, the Fourth District's reliance on *Kaplan* is ***967** further misplaced because the facts in *Stern* are significantly different from those in *Kaplan.* Third, the relevant policy considerations in cases such as this weigh against recognizing the assignment of a legal malpractice claim in a general assignment of a note and mortgage. We address each of these reasons in order.

First, the Fourth District misinterpreted our holding in *Kaplan* as an abandonment of the majority view which generally prohibits legal malpractice assignments in favor of the minority, case-by-case approach, which permits all legal malpractice assignments that do not violate relevant policy principles. As we explained in *Kaplan,* "[a] majority of the states that have examined this issue, including Florida, have held that legal malpractice claims are generally not assignable.... A minority of jurisdictions allows assignment of legal malpractice claims[.]" 902 So.2d at 759 n. 3; *see also KPMG,* 765 So.2d at 38 ("[L]egal malpractice claims are not assignable because of the personal nature of legal services which involve a confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client."); *Forgione,* 701 So.2d at 559 (quoting *Washington v. Fireman's Fund Ins. Co.,* 459 So.2d 1148, 1149 (Fla. 4th DCA 1984) ("Florida law views legal malpractice as a personal tort which cannot be assigned because of 'the personal nature of legal services which involve highly confidential relationships.' ")). The Fourth District read *Kaplan* as follows:

> The significance of *Kaplan* is not a narrow point pertaining to the attorney-client privilege, but rather the more broad view that *the door is now open to assignment of legal malpractice actions* in exceptional cases which do not fully implicate the core policy concerns underlying the general rule.

Stern, 916 So.2d at 938–39 (emphasis added). Contrary to the Fourth District's interpretation, the significance of *Kaplan* was indeed the narrow point pertaining to attorney-client privilege. *Kaplan* was not intended to proclaim that the door is now open to assignment of legal malpractice actions in exceptional cases.

Kaplan was the first and only case in which this Court permitted a limited exception to the general prohibition on legal malpractice assignments, and our holding was confined to the specific facts and circumstances of that case. Specifically, *Kaplan* involved the following facts:

> Medical Research Industries, Inc. (MRI), a Florida corporation, developed and marketed homeopathic medical products. To raise money for capital improvements, MRI decided to issue a private placement of shares in the company. MRI's majority shareholder, William Tishman, consulted attorneys who prepared private placement memoranda. Through four private placements between 1996 and 1998, MRI raised over $50 million from about 2000 shareholders. Later, Tishman borrowed about $18 million in unsecured loans from MRI, leading to its eventual insolvency. MRI sued Tishman to recover the loan amount and obtained a judgment. Unable to satisfy the judgment, however, MRI executed an "Assignment for the Benefit of Creditors" to Donald Kaplan. Kaplan then sued for legal malpractice the attorneys who prepared the private placement memoranda. The trial court granted the attorneys' motions to dismiss, concluding that legal malpractice claims are personal and not assignable and are exempt from levy and sale under an execution of assignment.

902 So.2d at 757 (footnote omitted). The trial court dismissed the action, concluding that legal malpractice actions are not assignable. ***968** On appeal, the Third District reversed, holding that the legal services at issue in *Kaplan* were not personal in nature but rather involved the publication of corporate information to third parties. Subsequently, we approved the Third District's holding

and receded from "broad dicta" in *Forgione* and *KPMG,* which purported to prohibit the assignment of all legal malpractice claims. *See Kaplan,* 902 So.2d at 757; *see also KPMG,* 765 So.2d at 38; *Forgione,* 701 So.2d at 559. In reaching our conclusion, we compared lawyers preparing private placement memoranda to independent auditors (as in *KPMG*), and reasoned that both types of professionals owe professional duties to intended third parties who rely on the statements contained in their published documents. We permitted the assignment of the legal malpractice claim because the information prepared in *Kaplan* was intended for release to third parties, and, therefore, the assignment did not violate attorney-client confidentiality. However, we stressed that "the vast majority of legal malpractice claims remain unassignable *because in most cases the lawyer's duty is to the client.*" *Kaplan,* 902 So.2d at 757 (emphasis added).

[6] **[7]** Thus, in *Kaplan* we reaffirmed our adherence to the majority view that most legal malpractice claims are nonassignable. In so doing, we necessarily rejected the minority, case-by-case approach of evaluating whether particular assignments violate public policy concerns. We do so again in this case.

Second, we also disapprove of the Fourth District's reliance on *Kaplan* because the factual circumstances in *Stern* are not analogous to those in *Kaplan.* In *Kaplan,* "[t]he attorneys owed a duty to the public when advising MRI and preparing the private placement memoranda." *Kaplan,* 902 So.2d at 761. We explained that attorneys preparing private (or public) placement memoranda "act not just for the corporation's *benefit,* but for the *benefit* of all those who rely on the representations in their documents—in this case, potential shareholders." *Id.* at 758 (emphasis added). Unlike the attorneys in *Kaplan,* Stern did not perform legal work for EMC with the intention of directly benefiting Security National or any other third party. Indeed, at the time Stern filed the untimely 1998 foreclosure action and voluntarily dismissed the timely 1997 foreclosure action, the duty Stern owed was solely to its client at the time, EMC.

[8] **[9]** *Kaplan* also differs from *Stern* in that the assignment of the legal malpractice claim in *Kaplan* was *express,* whereas Security National asserts an *implied* assignment of the legal malpractice claim through the general assignment of the note and mortgage. We find that the right to bring an action against Stern for legal malpractice is not one of the rights Security National acquired when it purchased the note and mortgage by general assignment. First, we note:

> As a general rule, the assignee of a nonnegotiable instrument takes it with all the rights of the assignor, and subject to all the equities and defenses of the debtor connected with or growing out of the obligation that the obligor had against the assignor at the time of the assignment.

State v. Family Bank of Hallandale, 667 So.2d 257, 259 (Fla. 1st DCA 1995) (citing *Dickerson, Inc. v. Federal Deposit Ins. Corp.,* 244 So.2d 748, 749 (Fla. 1st DCA 1971); *Guaranty Mortgage & Ins. Co. v. Harris,* 182 So.2d 450, 453 (Fla. 1st DCA), *rev'd on other grounds,* 193 So.2d 1 (Fla.1966)); *see also Rose v. Teitler,* 736 So.2d 122 (Fla. 4th DCA 1999). Whereas the general assignment of a note and mortgage ***969** conveys to the assignee the rights of the assignor under the note and mortgage (subject to the equities and defenses of the obligor), such an assignment does not implicitly assign the attorney-client relationship between the assignor and his attorney. As we have stressed before, " 'the real basis and substance of the malpractice suit' is a *breach of the duties within the personal relationship* between the attorney and client." *Forgione,* 701 So.2d at 559 (emphasis added) (quoting *Christison v. Jones,* 83 Ill.App.3d 334, 39 Ill.Dec. 560, 405 N.E.2d 8, 10 (1980)).

In *Stern,* the legal malpractice claim arose from the personal attorney-client relationship established when EMC hired Stern to enforce its rights under the note and mortgage. This attorney-client relationship was not inherent in those instruments themselves. In other words, the right to sue for legal malpractice is not "connected with or growing out of" the relationship between the mortgagor and mortgagee; rather, the legal malpractice claim is connected to and grows out of the separately established relationship between the attorney and the client. *See Family Bank of Hallandale,* 667 So.2d at 259.

[10] Third, we disapprove of the Fourth District's decision below because the relevant policy concerns weigh against permitting legal malpractice assignments. As we

noted in *Kaplan,* the following passage from California's Second District Court of Appeal well explains the policies against legal malpractice assignments:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty.... The commercial aspect of assignability of ... legal malpractice [actions] is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Kaplan, 902 So.2d at 760 (quoting *Goodley v. Wank & Wank, Inc.,* 62 Cal.App.3d 389, 133 Cal.Rptr. 83, 87 (1976)). In essence, the two major policy concerns justifying a general prohibition against the assignment of legal malpractice claims are (1) protecting attorney-client confidences and (2) preventing a market for legal malpractice claims. The Fourth District determined that these policy concerns were not present in *Stern.*

As to the first policy concern, the Fourth District reasoned that "[t]he case ... does not involve personal services. It also seems unlikely that EMC or North American shared privileged information ***970** with Stern." *See Stern,* 916 So.2d at 938. Given the complete absence of any record support for this reasoning, it is rather speculative. We are unwilling to presume that Stern's relationships with EMC and North American did not involve personal services or that confidential information was not disclosed. Likewise, we also are unwilling to determine, as the Fourth District necessarily did, that EMC impliedly waived the attorney-client privilege when it conveyed the note and mortgage by general assignment. *See id.* at 938. Finding such an implied waiver in the general assignment of a note and mortgage would permit numerous unforeseen assignees downstream to have access to the original assignor's confidential information and would expose the assignor's attorney to virtually limitless liability to parties with whom the attorney never owed a professional duty. *See Kaplan,* 902 So.2d at 760 (citing *Goodley,* 133 Cal.Rptr. at 87).

We also disagree with the Fourth District's conclusion that permitting legal malpractice assignments in this context would not tend to create a marketplace for legal malpractice claims. To the contrary, this is precisely the type of transaction that our precedent warns against. *See Kaplan,* 902 So.2d at 760; *KPMG,* 765 So.2d at 38; *Forgione,* 701 So.2d at 559. Recognizing legal malpractice assignments under these circumstances would create an incentive for both holders of such impaired instruments and speculators to market these notes and mortgages with the right to sue the attorney in the failed foreclosure action included as a major factor in pricing the transaction. As stated earlier, this would expose attorneys to liability to parties who had no connection to the underlying

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foreclosure action, "never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty." *Kaplan,* 902 So.2d at 760 (quoting *Goodley,* 133 Cal.Rptr. at 87). Permitting such a market to arise would create an "undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* (quoting *Goodley,* 133 Cal.Rptr. at 87).

In short, the assignment of legal malpractice claims that arise in mortgage foreclosures violates the two policy concerns underlying the general prohibition against such assignment.

CONCLUSION

For the reasons expressed above, we quash the Fourth District's decision and hold that Security National does not have standing to bring an action against Stern for legal malpractice either through an attorney-client relationship or by general assignment.

It is so ordered.

WELLS, ANSTEAD, and CANTERO, JJ., concur.

LEWIS, C.J., concurs in result only with an opinion.

PARIENTE, J., dissents with an opinion, in which QUINCE, J., concurs.

QUINCE, J., dissents with an opinion, in which PARIENTE, J., concurs.

LEWIS, C.J., concurring in result only.

I respectfully disagree with the holding of the majority that the assignment of the legal malpractice claim in the instant matter was not permissible under our previous decision in *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755 (Fla.2005). Although I dissented in *Kaplan* and disagree with the analysis it presents, it is ***971** now the law of Florida. I am of the opinion that the Fourth District below correctly followed *Kaplan* and concluded that the assignment was permissible under the reasoning of this Court in *Kaplan. See Sec. Nat'l Servicing Corp. v. Law Office of David J. Stern, P.A.,* 916 So.2d 934, 938 (Fla. 4th DCA 2006). Therefore, I concur in result only based on my continued belief, as expressed in my concurring in result only opinion in *Kaplan,* that the decision of this Court in *Kaplan* was overly broad and violated the long-standing principle in this State that legal malpractice claims are not assignable. *See Kaplan,* 902 So.2d at 762 (Lewis, J., concurring in result only) ("I cannot subscribe to the broad reasoning employed by the majority and its unnecessary reliance on broad concepts of general assignability that I believe to be inapplicable to the instant matter.").

Contrary to the assertions of the majority, the decision of this Court in *Kaplan* was not "confined to the specific facts and circumstances of that case." Majority op. at 967. Instead, the *Kaplan* decision established factors to be applied to permit the assignment of legal malpractice claims in situations where the legal services provided by the attorney are not personal in nature and therefore do not involve any confidential communications that would trigger the policy concern of protecting the attorney-client privilege, which generally justifies the prohibition against the assignment of legal malpractice claims. *See Kaplan,* 902 So.2d at 761 n. 4 (permitting the assignment of a legal malpractice claim where "[t]he claim[ ] ... [does] not involve personal services or implicate ... confidentiality concerns"). It is now too late for this Court to close the proverbial barn door by asserting that the *Kaplan* decision was limited only to the specific facts presented in that case without receding from that decision.

In the instant matter, as in *Kaplan,* the legal services provided were not personal in nature. *See id.* at 759. A mortgage foreclosure action requires only that the claimant be the owner and holder of the note and mortgage and that the mortgagee has defaulted on that note and mortgage. *See Chemical Residential Mortgage v. Rector,* 742 So.2d 300, 300 (Fla. 1st DCA 1998). In such actions, an attorney's duty is to the client only to the extent that the client is the owner and holder of the note and mortgage. The benefit or detriment of any actions taken by the attorney with regard to the foreclosure will clearly flow to any subsequent holders, and, accordingly, subsequent holders should be permitted to hold the attorney accountable for malpractice with regard to the foreclosure action if the *Kaplan* analytical factors are applied. Similar to the preparation of the private placement memoranda in *Kaplan,* an attorney

filing a foreclosure action acts for the benefit of not only the present client, but also any subsequent holder of the mortgage and note, who will rely on the representations contained in those documents.

Additionally, upon application of the underlying principles of *Kaplan,* the policy concerns that generally militate against permitting the assignment of legal malpractice claims are not present in the instant matter. As noted above, a foreclosure action requires only the mortgage and note, as well as a determination of whether the mortgagee has defaulted. *See Chemical,* 742 So.2d at 300. There is absolutely no reason to believe or assume that an attorney undertaking such an action will obtain confidential information from a client that would be protected under the attorney-client privilege. The assertion of the majority that the Fourth District's position that no attorney-client privileged information with regard to the foreclosure action was shared with Stern during his ***972** representation is "speculative," majority op. at 970, is simply not substantiated with any supporting evidence, nor is it supported by the reality of the information that is required to file a foreclosure action. Similarly, the majority's assertion that to permit the malpractice claim in the instant matter would create a marketplace for legal malpractice claims, *see* majority op. at 970, the other asserted policy concern against allowing such assignments, is also unsubstantiated by any reasoning or evidence. Even permitting the assignment in actions such as the instant matter, an attorney's duty in foreclosure actions would be far from unbounded because it would be limited to the present and any subsequent holders of the note and mortgage. The *Kaplan* factors are either valid or invalid and we should strive for stability.

Finally, the majority's attempt to distinguish the instant matter from *Kaplan* based on the fact that the assignment in *Kaplan* was express, whereas in the instant matter the assignment was implied, is a distinction without legal significance. In Florida, unless a writing is required by statute, an assignment can be implied. *See* 3A Fla. Jur.2d *Assignments* § 18 (2006). Florida also recognizes the right to freely assign common law and statutory rights unless such an assignment offends public policy concerns. *See VOSR Indus., Inc. v. Martin Props., Inc.,* 919 So.2d 554, 556 (Fla. 4th DCA 2005). Contrary to the assertion of the majority that the assignment in the instant matter would have constituted an impermissible assignment of the attorney-client relationship, *see* majority op. at 969, allowing the assigned malpractice claim to proceed would not have implicated any attorney-client confidentiality concerns because the legal services in the instant matter were not personal in nature. Therefore, there were no public policy concerns that would prevent the assignment.

In conclusion, the Fourth District below correctly applied the factors established by this Court in *Kaplan* and determined that the assignment in the instant matter was permitted under the reasoning of our earlier decision there. The legal services in the instant matter were not personal in nature and did not implicate confidentiality concerns. However, I concur in result only based on my continued objection to the broad reasoning employed by the majority of this Court in *Kaplan,* which has opened the door to the assignment of legal malpractice claims in potentially countless other contexts. We should either recede from *Kaplan* or apply the underlying factors used to support the *Kaplan* decision.

PARIENTE, J., dissenting.

I agree with Justice Quince's dissent and would approve the well-reasoned decision of the Fourth District in this case. The Fourth District followed our decision in *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755 (Fla.2005), in which we prohibited the assignment of *most* legal malpractice claims. Chief Justice Lewis correctly observes that the Fourth District's reasoning and ultimate result in this case is clearly permissible under our analysis in *Kaplan* because the claim is not personal in nature and none of the other public policy concerns that justify prohibiting the assignment of legal malpractice claims is present. *See* concurring in result only op. at 971. Although Chief Justice Lewis is correct that we opened the door in *Kaplan,* it is my view that this door was neither unwisely opened nor does it now need to be closed.

I would follow the sound reasoning of those jurisdictions that have allowed "the assignment of a claim for malpractice that is part of a general assignment in a commercial setting and transaction that encompasses ***973** a panoply of other assigned rights, duties, and obligations." *Cerberus Partners, L.P. v. Gadsby & Hannah,* 728 A.2d 1057, 1060 (R.I.1999). As astutely observed by the Massachusetts Supreme Court, the policy reasons justifying a blanket prohibition against the assignment of legal malpractice claims are in part based "on outmoded concepts and protectionism," such as the fear of "open

trading" of legal malpractice claims. *N.H. Ins. Co. v. McCann,* 429 Mass. 202, 707 N.E.2d 332, 337 (1999).

Further, as expressed by both of these courts, the attorney-client privilege is a non-issue given the commercial and transactional circumstances of these types of cases because the assignment operates as a waiver of any attorney-client privilege. *See id.; Cerberus Partners,* 728 A.2d at 1060. In fact, in rejecting the attorney-client privilege public policy concern as a basis for prohibiting the assignment of malpractice claims, the Supreme Court of Pennsylvania concluded: "We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected." *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak,* 517 Pa. 522, 539 A.2d 357, 359 (1988). I believe there is great wisdom in the analyses of these courts.

The facts of this case highlight why allowing the assignment of this type of legal malpractice claim violates no conceivable public policy. Here, the act of malpractice occurred in 1999 when attorney Stern voluntarily dismissed the timely 1997 foreclosure action, leaving only the untimely 1998 foreclosure action intact. At the time, EMC Mortgage Corporation held the mortgage. However, based on our decision in *Perez–Abreu, Zamora & De La Fe, P.A. v. Taracido,* 790 So.2d 1051 (Fla.2001), EMC could not bring a legal malpractice claim at that time because the cause of action did not accrue "until the conclusion of the ... underlying judicial proceeding." *Id.* at 1055. Thus, the legal malpractice cause of action in this case did not accrue until 2001, when the Second District affirmed the final judgment holding that the mortgage foreclosure case was barred by the statute of limitations. By then the mortgage had been assigned from EMC to Universal Portfolio Buyers, Inc., to North American Mortgage Company, and finally to Security National Servicing Corporation. Instead of working at cross purposes, all of these entities cooperated with Stern, the original lawyer who admitted to the legal malpractice, in an attempt to eliminate the harm caused by the malpractice through the litigation process.

Frankly, it would be difficult for an outside observer not to conclude that the perpetuation of a rule that prohibits the assignment of legal malpractice claims in this context serves only to protect a clearly negligent attorney at the expense of the mortgage holders, who were engaged in legitimate commercial transactions. For these reasons, I must respectfully dissent.

QUINCE, J., concurs.

QUINCE, J., dissenting.

I do not agree with the majority that the assignment of the legal malpractice claim in this case would violate policy concerns which underlie the general prohibition against the assignment of legal malpractice actions. Therefore, I would approve the decision of the Fourth District Court of Appeal, which followed our decision in *Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755 (Fla.2005). In *Kaplan* we allowed the assignment of a legal malpractice claim finding that "[t]he claim MRI ***974** assigned to Kaplan does not involve personal services or implicate confidentiality concerns." *Kaplan,* 902 So.2d at 761. The same is true in this case. In addition, I do not believe that concerns about the development of a market for legal malpractice claims outweigh the rights of the parties in this claim to their access to the courts for redress.

I agree with the majority that *Kaplan* is not an abandonment of Florida's general prohibition against the assignment of legal malpractice claims. Instead, in *Kaplan* we said in no uncertain terms that "most" or the "vast majority" of legal malpractice claims continue to be unassignable. This Court in *Kaplan* cited the prior cases from this Court that have addressed the assignability issue. We noted that in *Forgione v. Dennis Pirtle Agency, Inc.,* 701 So.2d 557 (Fla.1997), *receded from on other grounds by Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755, 757 (Fla.2005), a case that did not involve a legal malpractice issue, we said legal malpractice claims generally involve personal service and issues of confidentiality which preclude assignment. We reiterated the position in *KPMG Peat Marwick v. National Union Fire Insurance Co.,* 765 So.2d 36 (Fla.2000), *receded from on other grounds by Cowan Liebowitz & Latman, P.C. v. Kaplan,* 902 So.2d 755, 757 (Fla.2005), another case that did not involve a legal malpractice issue, that legal malpractice claims were generally not assignable because of the personal nature of the service rendered. With those principles in mind, we examined the nature of the services rendered by the lawyers in *Kaplan* and concluded that the services were more in the nature of the independent auditor that was examined in *KPMG.*

Moreover, we examined the notion that the assignment of legal malpractice claims would result in the creation of a market for these claims that would not bode well for the legal profession. And while we continued to express our concerns in these policy areas, we nonetheless found that the claim in *Kaplan,* the legal malpractice claim, was assignable.

As in *Kaplan,* neither the nature of the services nor the policy concerns require the nonassignability of the legal malpractice claim involved in this case. The majority is unwilling to presume that the law firm's representation in this case did not involve personal services or the disclosure of confidential information. As the Fourth District pointed out, the underlying service in this case is a botched mortgage foreclosure. The plaintiff in the malpractice action, Security National, is the transferee of the note and mortgage that was the subject of the foreclosure action. The law office, on the other hand, represented all of the holders of the note and mortgage beginning with EMC Mortgage. EMC, after getting an assignment of the note, asked the law firm to foreclose the loan. While the action was pending, EMC assigned the loan to Universal Portfolio Buyers, who in turn assigned the loan to North American Mortgage Company. While an appeal from the grant of summary judgment in favor of the property owner was pending, North American assigned the loan to Security. The Law Office of David J. Stern, P.A. continued to represent each entity in this chain of assignments. It is Stern's seamless, uninterrupted representation of EMC, Universal, North American, and Security in this matter that demonstrates that this type of representation for a commercial transaction lacks the unique and personal duties that characterize the typical malpractice claim that might be imperiled if we allowed the general assignment of legal malpractice claims.

The very nature of the mortgage industry itself further demonstrates a lack of unique and personal duties that often characterize ***975** confidential relationships. The sale of mortgage loans is a very common transaction in this country. Average homebuyers are aware that their mortgages are likely to be sold to a new mortgagee at any time. It is more likely than not that as a member of an industry in which selling mortgages is an everyday occurrence, EMC was aware that the same information given to its attorney in this foreclosure action would necessarily flow to any assignee purchasing the note and mortgage while the action was still pending.

If Stern, as attorney for a company in the business of acquiring then selling mortgage loans, was concerned about confidentiality, he could have advised his client, EMC Mortgage, or his subsequent client, Universal Portfolio Buyers, or his subsequent client, North American Mortgage, of their ability to not assign any potential malpractice claim if they opted to sell the mortgage. There would be no imperilment of the sanctity of the relationship between an attorney and a client when that client is advised that any information divulged to the attorney can readily be kept confidential if the client values confidentiality more than the ability to assign the claim. Kevin Pennell, Note, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem,* 82 Tex. L.Rev. 481, 500 (2003).

As to our public policy concern that we want to prevent creating a market for legal malpractice claims, I agree with the Fourth District that these concerns are more apparent when the legal representation and assignment occur in a non-commercial setting. *See Security Nat'l Serv. Corp. v. Law Office of David J. Stern, P.A.,* 916 So.2d 934, 937 (Fla. 4th DCA 2006) (quoting from *Kaplan* the California case of *Goodley v. Wank & Wank, Inc.,* 62 Cal.App.3d 389, 133 Cal.Rptr. 83, 87 (1976)). In the instant case it is an important distinction that we do not have the mere purchase of a malpractice claim, we have a commercial assignment of the lender's original agreement. The malpractice claim was not transferred to economic bidders who have never had a professional relationship with Stern. The malpractice cause of action did not accrue until December 2001, by which time Stern had established a professional relationship with Security National; clearly he is not defending himself against strangers. *Stern,* 916 So.2d at 936.

I also do not believe that the assignment of the malpractice claim here would encourage an unjustified lawsuit against Stern or promote champerty, [1] two additional concerns noted by the majority. The record indicates that Stern botched this foreclosure and that National Security held the mortgage and note on the property when the judgment resulting from Stern's negligence became final. It was at this point that National Security was precluded from recovering on its note and mortgage. *Id.* This malpractice claim is thus meritorious and there is no encouragement of an unjustified lawsuit. It is not unjust to require Stern to compensate the holder of the mortgage that, because of

his legal malpractice, is now unable to claim the property used to secure the mortgage.

Champerty requires a party unrelated to the lawsuit to form an agreement with a litigant in the suit to help pursue the litigant's claim in consideration for receiving part of the judgment. *Black's Law Dictionary* 246 (8th ed.2004). This is clearly not ***976** the situation here. The origin of this policy concern was the *Goodley* court, which was deciding the case in 1976 based on a claim for malpractice arising out of a divorce proceeding. *See Goodley* 133 Cal.Rptr. 83. The *Goodley* court was rightly concerned in a situation where a legal malpractice action was bought and brought by a stranger to a divorce action. Thirty years after *Goodley,* we should not be deciding a case in which the parties are operating in a commercial setting with the assignment of a commercial instrument on the same principal considerations used in a very personal divorce setting.

The majority also believes that allowing the assignment under these circumstances would create an incentive for both holders of mortgages and speculators to include the right to sue an attorney in failed foreclosures as a factor increasing the marketability of the mortgage. This seems highly speculative, and as one commentator notes:

> Legal malpractice claims are very suspect. Many more claims end in defeat rather [than] victory. Such claims are quite often vigorously contested.... [B]ecause a rational buyer-assignee of any such claim will expect a stiff fight at the courthouse, a stable, routine market for such claims is unlikely to develop.

Kevin Pennell, Note, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem,* 82 Tex. L.Rev. 481, 495–96 (2003) (quoting Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims,* 37 S. Tex. L.Rev. 1203, 1215–16 (1996)). Malpractice suits are an expensive and lengthy process, and the outcome is never certain. It is unlikely that sophisticated business entities will begin taking the extreme risk of purchasing mortgage notes solely to sue attorneys for malpractice. Narrowing our holding to allow claims to be brought only by assignees that have retained the attorney in question to represent them in the same matter further ensures that the majority's fear of a market for such claims will never be realized.

I would affirm the lower court's ruling and hold that pursuant to a commercial assignment, the assignee holding a commercial instrument at the time a cause of action accrues owns a legal malpractice claim if the attorney committing the alleged malpractice was retained by that current assignee in the same matter.

PARIENTE, J., concurs.

All Citations

969 So.2d 962, 32 Fla. L. Weekly S396

Footnotes

1 Defined in *Merriam–Webster's Collegiate Dictionary* (10th ed.) as "a proceeding by which a person not a party in a suit bargains to aid in or carry on its prosecution or defense in consideration of a share of the matter in suit."

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Atkin v. Tittle & Tittle, Fla.App. 3 Dist., March 31, 1999

528 So.2d 512
District Court of Appeal of Florida,
Third District.

Eugene MAILLARD and Patricia Lynch, husband and wife, Appellants,
v.
Thomas J. DOWDELL, III, and Bonefish Towers Condominium Association, Appellees.

No. 87-2152.
|
July 19, 1988.

Synopsis
After condominium unit purchasers learned unit contained serious structural defects, purchasers brought action against defendants including condominium association and attorney who represented purchasers in purchasing the unit. The Circuit Court, Monroe County, David P. Kirwan, J., dismissed association and attorney for failure to state cause of action, and purchasers appealed. The District Court of Appeal, Hendry, J., held that: (1) purchasers could not recover from condominium association on theory association had fiduciary duty to prospective purchasers to disclose information which association possessed concerning defective condition of condominium building prior to sale; (2) association was not entitled to attorney fees under provision of declaration of condominium awarding costs and fees to prevailing party in any proceeding arising because of alleged failure of apartment owner or association to comply with terms of declaration, as purchasers were prospective purchasers when their cause of action accrued; and (3) purchasers did not have legal malpractice cause of action against attorney based on attorney's alleged negligence by failing to use proper diligence to ascertain exact nature of construction defects and acquaint himself with true underlying facts of litigation involving condominium association and developers and builders of condominium.

Affirmed.

Schwartz, Chief Judge, filed opinion dissenting in part.

West Headnotes (4)

[1] Common Interest Communities
Persons or entities that must comply

Condominium unit purchasers, who learned unit they had recently purchased contained serious structural defects, could not recover from condominium association on theory the association had fiduciary duty to prospective purchasers to disclose information which association possessed concerning defective condition of condominium building prior to sale of condominium unit, although statute provides that officers and directors of condominium association have fiduciary relationship to unit owners. West's F.S.A. § 718.111(1)(a).

2 Cases that cite this headnote

[2] Common Interest Communities
Costs and attorney fees

Condominium association, which condominium unit purchasers had sued after learning condominium unit they purchased contained serious structural defects, alleging that association had fiduciary duty to prospective purchasers to disclose information that association possessed concerning defective condition of condominium building prior to sale of unit, was not entitled to attorney fees under provision of declaration of condominium awarding costs and fees to prevailing party in any proceedings arising because of alleged failure of apartment owner or association to comply with terms of declaration; purchasers were prospective purchasers, not unit owners, at time their cause of action accrued, so contractual provision awarding attorney fees would be inapplicable to purchasers.

2 Cases that cite this headnote

[3] Attorney and Client
Pleading and evidence

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To establish element of legal malpractice, employment of attorney, it is not sufficient merely to assert attorney-client relationship existed between parties; it is essential to allege that relationship existed with respect to acts or omissions upon which malpractice claim is based.

19 Cases that cite this headnote

[4] **Attorney and Client**
Acts and omissions of attorney in general

Condominium unit purchasers did not have legal malpractice cause of action against attorney who represented purchasers in purchasing unit on theory attorney was negligent by failing to use proper diligence to ascertain exact nature of construction defects and acquaint himself with true underlying facts of litigation involving condominium association and developers and builders of condominium, litigation which condominium unit vendor allegedly told purchasers and attorney of prior to sale was pending; no allegations were made that attorney was instructed to do anything other than represent purchasers in purchasing property, and purchasers did not claim attorney completely disregarded matters coming to his attention which should reasonably have put him on notice that purchasers would have legal problems that were not precisely or totally within scope of task attorney was employed to perform.

12 Cases that cite this headnote

Attorneys and Law Firms

***513** Sutton, Jamerson & Mullin and John O. Sutton, Coral Gables, for appellants.

Thomas J. Dowdell, III, Franklin D. Greenman, Marathon, for appellees.

Before SCHWARTZ, C.J., and HENDRY and NESBITT, JJ.

Opinion

HENDRY, Judge.

Plaintiffs, Eugene Maillard and Patricia Lynch, upon learning the condominium unit they had recently purchased contained serious structural defects, brought a multi-count complaint against numerous defendants, including Bonefish Towers Condominium Association and Thomas J. Dowdell, the attorney who represented the plaintiffs in purchasing the condominium unit. The trial court entered orders of dismissal in favor of defendants Bonefish Condominium and Dowdell for failure to state a cause of action. Plaintiffs appealed.

[1] Count five of plaintiffs' complaint alleged that Bonefish Towers Condominium Association had a fiduciary duty to plaintiffs as prospective purchasers to disclose information the association possessed concerning the defective condition of the condominium building prior to the sale. Bonefish Towers filed a motion to dismiss, claiming the condominium association owed no duty of disclosure to plaintiffs as prospective ***514** purchasers. In granting the motion to dismiss the trial court found that the statutory duty of condominium associations to their unit owners, pursuant to section 718.111(1)(a), Florida Statutes (1985), [1] does not extend to prospective purchasers. After considering plaintiffs' arguments on appeal and finding them unpersuasive, we affirm the trial court's order of dismissal.

[2] Bonefish Towers further claims they are entitled to attorney's fees under a provision of the declaration of condominium which awards costs and fees to the prevailing party "in any proceeding arising because of an alleged failure of an apartment owner of the association to comply with the terms of the Declaration." We cannot accept this argument. When this cause of action accrued, plaintiffs were prospective purchasers and not unit owners; consequently, this was not a "proceeding arising because of an alleged failure of an apartment owner ... to comply with the terms of Declaration." The contractual provision awarding attorney's fees would be inapplicable to plaintiffs. *Turnberry Towers Corp. v. Mechoulam,* 425 So.2d 1180 (Fla. 3d DCA 1983); *Pacheco v. Lincoln Palace Condominium, Inc.,* 410 So.2d 573 (Fla. 3d DCA 1982).

We turn now to the legal malpractice count against attorney Dowdell. The seller of the condominium unit, the William Creasy Agency, Inc., allegedly told the plaintiffs and Dowdell prior to the sale that the condominium association was involved in litigation in Dade Circuit Court with the developers and builders of the condominium to recover the costs of repairing minor cosmetic defects. After the sale, the plaintiffs learned the true purpose of the litigation was to recover considerable damages for serious structural defects. In count four of their complaint, plaintiffs alleged Dowdell was negligent in conducting his duties as an attorney in that he failed to use proper diligence to ascertain the exact nature of the construction defects and acquaint himself with the true underlying facts of the condominium action. The trial court granted Dowdell's motion to dismiss, finding the complaint:

> fails to allege facts which constitute legal malpractice in that an attorney employed as alleged, to represent the purchaser of the condominium parcel, has no duty to investigate structural defects or the content of the lawsuit filed by the Condominium Association in Dade County against developers, builders, and materialmen involving structural defects in the condominium improvements when the existence of the lawsuit had been made known to the purchaser and the attorney does not withhold any information known to him concerning the lawsuit, that was not already also known by or disclosed to the purchaser and the attorney was not hired specifically to look into the lawsuit or investigate the structure.

[3] In any legal malpractice suit the plaintiff is required to prove (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff. *Maryland Casualty Co. v. Price,* 231 F. 397 (4th Cir.1916), as adopted in *Weiner v. Moreno,* 271 So.2d 217 (Fla. 3d DCA 1973). In establishing the first element, the attorney's employment, it is not sufficient merely to assert an attorney-client relationship existed between the parties; it is essential to allege the relationship existed with respect to the acts or omissions upon which the malpractice claim is based. *Kurtenbach v. TeKippe,* 260 N.W.2d 53 (Iowa 1977). *See also Lawyers Professional Liability Ins. Co. v. McKenzie,* 470 So.2d 752 (Fla. 3d DCA 1985) (plaintiff had to prove attorney was hired for the specific purpose of getting back property and not merely recovering money owed); *Boyd v. Brett-Major,* 449 So.2d 952 (Fla. 3d DCA 1984) (attorney was hired to delay mortgage foreclosure action and not to win the case).

[4] In ruling on a motion to dismiss for failure to state a cause of action a court is ***515** bound in its consideration to the allegations found within the four corners of the complaint and must accept these allegations as true. *Copeland v. Celotex Corp.,* 447 So.2d 908 (Fla. 3d DCA 1984), *quashed on other grounds,* 471 So.2d 533 (Fla.1985); *Emile v. Florida Power & Light Co.,* 426 So.2d 1152 (Fla. 3d DCA 1983); *Dunnell v. Malone & Hyde, Inc.,* 425 So.2d 646 (Fla. 3d DCA 1983). The fundamental question a court must consider in ruling on a motion to dismiss is whether by proving the allegations in the complaint the plaintiff would establish a cause of action against the defendant. *Dykema v. Godfrey,* 467 So.2d 824 (Fla. 1st DCA 1985). We hold the trial court correctly concluded that plaintiffs had no cause of action against Dowdell.

Plaintiffs alleged Dowdell was employed to represent them in the purchase of the condominium. No allegations were made that Dowdell was instructed to do anything other than represent plaintiffs in the purchase of the property. Generally, the duties of an attorney employed to represent the buyer in a real estate transaction are "to investigate the title to real estate, to make a painstaking examination of the records and to report all facts relating to the title...." and give an opinion on the marketability of the title to the property, *St. Pius X House of Retreats v. Diocese of Camden,* 88 N.J. 571, 443 A.2d 1052, 1061 (1982), and to handle the real estate closing. Plaintiffs did not allege that Dowdell was negligent in performing these duties. Furthermore, plaintiffs did not allege Dowdell was employed to investigate or even inquire into the condominium association action or the structural soundness of the building. Nor did plaintiffs assert Dowdell knew of facts material to the purchase of the condominium but failed to disclose those facts to them.

Finally, the plaintiffs did not claim Dowdell completely disregarded matters coming to his attention which should reasonably have put him on notice that plaintiffs would have legal problems that were not precisely or totally within the scope of the task Dowdell was employed to perform. *See Daugherty v. Runner,* 581 S.W.2d 12 (Ky.App.1978). Accordingly, we find that plaintiffs have failed to allege a cause of action against Dowdell for legal malpractice, thus the trial court's order of dismissal is

Affirmed.

SCHWARTZ, Chief Judge (dissenting in part).
In my view, a jury could properly find that an attorney hired by out of state clients to represent them in the purchase of a condominium unit has the duty to exercise reasonable care to determine, in the light of information of which he is on actual notice, that the building was the subject of a well-justified claim of defective construction and that the value of the unit was therefore markedly less than the purchase price. In this case, in which this fact could have been discovered merely by examining the complaint and its attached exhibits in an action of which he was specifically aware, or by asking a representative of the condominium association, I believe also that there is a valid question as to whether that duty was breached. Contrary to the majority, I think the observation of the court in *Daugherty v. Runner,* 581 S.W.2d 12 (Ky.App.1978), is directly apropos:

> An attorney cannot completely disregard matters coming to his attention which should reasonably put him on notice that his client may have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney.

581 S.W.2d at 17. For this reason, I would reverse the dismissal of the complaint as to the attorney Dowdell.

I concur in the court's opinion as to the claim against the condominium association.

All Citations

528 So.2d 512, 13 Fla. L. Weekly 1695

Footnotes

1 Section 718.111(1) (a) in relevant part states:

"The officers and directors of the association have a fidiciary relationship to the unit owners."

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613 So.2d 544
District Court of Appeal of Florida,
Third District.

Ramon RIOS and Riversant Corp., N.V., Appellants,
v.
McDERMOTT, WILL & EMERY
and Charles Intriago, Appellees.

No. 91-2737.
|
Feb. 2, 1993.
|
Rehearing Denied March 16, 1993.

Synopsis

Property owner sued law firm he retained to clear title to property. The Circuit Court, Dade County, Carol R. Gersten, J., dismissed fifth amended complaint with prejudice. Property owner appealed. The District Court of Appeal, Levy, J., held that complaint failed to allege sufficient ultimate facts to state cause of action for legal malpractice.

Affirmed.

Nesbitt, J., filed dissenting opinion.

West Headnotes (3)

[1] Attorney and Client
Pleading and Evidence

Pleading
Statement of Cause of Action in General

Although formalistic rules of common law pleading have been replaced by more liberal notice pleading, it remains necessary in setting of legal malpractice case to plead more than the naked legal conclusion that the defendant was negligent.

5 Cases that cite this headnote

[2] Attorney and Client
Pleading and Evidence

Allegation that, as result of law firm's negligence, property owner who had retained firm to clear title suffered damage in nature of lost profits on final sale of property, as well as interest payments made by him to lenders from date of first offer until date property was finally sold was insufficient to state legal malpractice claim; allegation that law firm "failed to timely act" was insufficient, and complaint did not allege any of the ultimate facts necessary to permit law firm to frame an answer.

6 Cases that cite this headnote

[3] Attorney and Client
Pleading and Evidence

Allegation of violation of Code of Professional Responsibility does not state cause of action for legal malpractice.

3 Cases that cite this headnote

Attorneys and Law Firms

***544** Jerry B. Schreiber, Miami, for appellants.

Steel Hector & Davis and Brian J. Stack, Miami, for appellees.

Before NESBITT, JORGENSON and LEVY, JJ.

Opinion

LEVY, Judge.

Appellants, who were the plaintiffs below, were property owners who now appeal the dismissal, with prejudice, of their fifth amended complaint in a negligence action against the appellees, a law firm.

Appellants Ramos Rios and Riversant Corp., N.V., retained the law firm of McDermott, Will & Emery and Charles Intriago to clear title to some property, ***545** owned by Rios, called the Powergate Plaza. Rios was attempting to sell the Powergate Plaza when an unidentified third party recorded a lis pendens on the property. When Rios obtained a buyer for the property, the sale fell through because title had not been cleared.

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Thereafter, title was cleared by appellees, and Rios accepted a second offer to buy for $500,000.00 less than the prior offer. Rios filed a complaint against appellees, claiming that, as a result of the law firm's negligence, he was damaged for the lost profits on the final sale of the property, as well as interest payments made by Rios to his lenders from the date of the first offer until the date the property was finally sold. After several dismissal's of Rios' various amended complaints, the trial court dismissed the fifth amended complaint with prejudice because Rios failed to allege any of the "ultimate facts" necessary to permit appellees to frame an answer. Rios appeals the final order dismissing the action with prejudice.

[1] **[2]** We hold that the trial court properly dismissed the fifth amended complaint because it failed to state a cause of action.

First, the complaint failed to allege sufficient ultimate facts to state a cause of action for legal malpractice. Although "formalistic rules of common law pleading have been replaced by the more liberal 'notice pleading,' it remains necessary in the setting of a legal malpractice case to plead more than the naked legal conclusion that the defendant was negligent." *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp.*, 527 So.2d 211, 212 (Fla. 3d DCA 1987), *disapproved of on other grounds*, 537 So.2d 561 (Fla.1988). *See also Brown v. Gardens by the Sea South Condominium Ass'n*, 424 So.2d 181, 183 (Fla. 4th DCA 1983) ("Florida uses what is commonly considered as a notice pleading concept and it is a fundamental rule that the claims and ultimate facts supporting same must be alleged. The reason for the rule is to appraise [sic] the other party of the nature of the contentions that he will be called upon to meet, and to enable the court to decide whether same are sufficient."). The complaint does not state what appellees may have done wrong in its efforts to remove the lis pendens, and does not illuminate any of the specifics of the alleged malpractice. The allegation that appellees "failed to timely act" is an insufficient legal conclusion, and not an ultimate fact.

[3] The allegation that appellees did not render status reports is insufficient to support the legal malpractice claim because the alleged damages do not flow from the failure to give status reports. This Court has previously ruled that an alleged violation of the Code of Professional Responsibility does not state a cause of action for legal malpractice.

The trial court was also correct in rejecting Rios' attempts to use discovery as a substitute for requiring allegations of ultimate facts. *Romans v. Warm Mineral Springs, Inc.*, 155 So.2d 183 (Fla. 2d DCA 1963).

Affirmed.

JORGENSON, J., concurs.

NESBITT, Judge (dissenting):
I respectfully dissent. In any legal malpractice suit, the plaintiff is required to plead and prove (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff. *Weiner v. Moreno*, 271 So.2d 217 (Fla. 3d DCA 1973) (citing *Maryland Casualty Co. v. Price*, 231 F. 397 (4th Cir.1916)); *see also Riccio v. Stein*, 559 So.2d 1207 (Fla. 3d DCA), *review dismissed*, 567 So.2d 436 (Fla.1990); *Maillard v. Dowdell*, 528 So.2d 512 (Fla. 3d DCA), *review denied*, 539 So.2d 475 (Fla.1988). The allegations of the plaintiffs' complaint established their attorneys' employment, the attorneys' neglect of duty, and the loss proximately caused by the attorneys' negligence. Specifically, Rios had employed Intriago to close the transaction when a third party recorded a lis pendens. Obviously, either negotiation or legal action was required to clear that kind of problem. The amount of time required ***546** was obviously unpredictable. Consequently, the last amended complaint, which alleged that Intriago "failed to act timely," was the best and most a pleader could have meaningfully pled with respect to that aspect of the alleged negligence. Therefore, I think the allegations were sufficient to state a claim of legal malpractice under the circumstances. I would reverse the dismissal, with prejudice, of the plaintiffs' fifth amended complaint and require the defendant to answer.

All Citations

613 So.2d 544, 18 Fla. L. Weekly D438

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882 So.2d 436
District Court of Appeal of Florida,
First District.

Gary LANE, Appellant,
v.
Kathleen Holbrook COLD, Esquire, et al., Appellee.

No. 1D03-4540.
|
Aug. 30, 2004.
|
Rehearing Denied Sept. 24, 2004.

Synopsis

Background: Client brought legal malpractice claim against attorney, arising out of attorney's failure to prepare a buy-sell agreement in connection with incorporating a corporation for clients. The Circuit Court, Duval County, Frederick B. Tygart, J., awarded summary judgment to attorney. Client appealed.

[Holding:] The District Court of Appeal, Van Nortwick, J., held that attorney did not undertake to prepare a buy-sell agreement.

Affirmed.

West Headnotes (5)

[1] Attorney and Client
Acts and Omissions of Attorney in General

Attorney did not undertake to prepare a buy-sell agreement for clients in connection with incorporating a corporation for clients, and thus attorney's failure to prepare agreement could not serve as basis for a legal malpractice claim against her, even though attorney had prepared a buy-sell agreement for clients in connection with a different incorporation, and attorney asked clients if they wanted one for this corporation; clients never requested attorney to prepare a buy-sell agreement or told her of their interest in having one prepared, and attorney's inquiry did not create a duty to prepare an agreement.

Cases that cite this headnote

[2] Attorney and Client
Elements of Malpractice or Negligence Action in General

To recover in a legal malpractice action, the plaintiff must show: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) such negligence was the proximate cause of loss to the plaintiff.

3 Cases that cite this headnote

[3] Attorney and Client
Elements of Malpractice or Negligence Action in General

With respect to establishing an attorney's employment, as an element of a legal malpractice claim, it is not sufficient merely to show that an attorney-client relationship existed between the parties, it is essential that the plaintiff show that the relationship existed with respect to the acts or omissions upon which the malpractice claim is based.

4 Cases that cite this headnote

[4] Attorney and Client
Acts and Omissions of Attorney in General

An attorney's negligent act or omission in connection with a client's business planning may be the basis for a malpractice action.

Cases that cite this headnote

[5] Judgment
Presumptions and Burden of Proof

Where a movant for summary judgment offers sufficient evidence to support her claim of the nonexistence of a genuine issue of material fact, the opposing party must demonstrate the existence of an issue or issues either by

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countervailing facts or justifiable inferences from the facts presented.

1 Cases that cite this headnote

Attorneys and Law Firms

***437** Michael J. Davie, Jacksonville, for Appellant.

Francis J. Milon of Harris Brown, P.A., Jacksonville, for Appellee.

Opinion

VAN NORTWICK, J.

Gary Lane appeals a final summary judgment entered in favor of Kathleen Holbrook Cold, appellee, in Lane's legal malpractice action against Cold based upon her alleged failure to prepare a buy-sell agreement. Because no genuine issue of material fact exists as to whether Cold was retained to prepare such an agreement, we affirm.

[1] Cold prepared the necessary documents for the incorporation of Bobcat of North Florida, Inc., with Lane and his now deceased brother, Bobby Lane, as sole shareholders. Lane argues that genuine issues of material fact are in dispute as to whether Cold was negligent in failing to prepare a buy-sell agreement when she incorporated Bobcat to assure a plan of succession for the corporation in the event of the death of one of the brothers. The facts are undisputed that Cold had prepared ***438** a buy-sell agreement at the time of the incorporation of another corporation wholly-owned by the Lanes; that, at the time of the incorporation of Bobcat, Cold inquired of the Lanes as to whether they wished her to prepare a buy-sell agreement; and that no one requested Cold to prepare a buy-sell agreement relating to Bobcat. Although Gary Lane and the Lanes' accountant stated that the Lanes wanted a buy-sell agreement, Lane produced no evidence that either the Lanes, their accountant or anyone acting on their behalf had requested Cold to prepare the agreement or expressed to Cold an interest in having a buy-sell agreement in connection with Bobcat.

[2] **[3]** To recover in a legal malpractice action, the plaintiff must show (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) such negligence was the proximate cause of loss to the plaintiff. *Maillard v. Dowdell,* 528 So.2d 512, 514 (Fla. 3d DCA 1988). With respect to establishing the first element, it is not sufficient merely to show that an attorney-client relationship existed between the parties, it is essential that the plaintiff show that the relationship existed with respect to the acts or omissions upon which the malpractice claim is based. *Id.* Here, Lane has presented no evidence that Cold was retained to prepare a buy-sell agreement or that she otherwise agreed, expressly or implicitly, to undertake that responsibility.

[4] Further, although an attorney's negligent act or omission in connection with a client's business planning may be the basis for a malpractice action, *see, e.g., Conley v. Shutts & Bowen,* 616 So.2d 523 (Fla. 3d DCA 1993); *Viner v. Sweet,* 30 Cal.4th 1232, 135 Cal.Rptr.2d 629, 70 P.3d 1046 (2003); Lane does not allege that Cold gave him negligent advice. It is undisputed that Cold counseled with her clients with respect to the buy-sell agreement and asked her clients whether they wished one to be prepared. Cold's professional inquiry concerning the desire for a buy-sell agreement, without more, did not create a duty on her part to prepare the agreement. *See Boyd v. Brett-Major,* 449 So.2d 952, 954 (Fla. 3d DCA 1984)("It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law.") (quoting *Orr v. Knowles,* 215 Neb. 49, 337 N.W.2d 699, 702 (1983)).

[5] Where a movant for summary judgment (here, Cold) offers sufficient evidence to support her claim of the nonexistence of a genuine issue of material fact, the opposing party (in this case, Lane) must demonstrate the existence of an issue or issues either by countervailing facts or justifiable inferences from the facts presented. *Fleming v. Peoples First Financial Savings and Loan Association,* 667 So.2d 273, 274 (Fla. 1st DCA 1995). Here, Lane failed to present to the trial court any evidence showing that Cold was employed to prepare or otherwise had a professional obligation to prepare a buy-sell agreement for the Lanes and Bobcat. Accordingly, we find that there is no genuine issue of material fact as to one of the essential elements of Lane's cause of action and we affirm the final summary judgment.

AFFIRMED.

BARFIELD and PADOVANO, JJ., concur.

All Citations

882 So.2d 436, 29 Fla. L. Weekly D1985

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449 So.2d 952
District Court of Appeal of Florida,
Third District.

Ruth S. BOYD and John W. Boyd, Appellant,
v.
Lin BRETT-MAJOR and Lawyers Professional Liability Insurance Company, Appellees.

No. 83-835.
|
May 8, 1984.

Synopsis
The Circuit Court, Dade County, Phillip W. Knight, J., entered judgment in favor of an attorney and her insurer in legal malpractice action, and clients appealed. The District Court of Appeal, Ferguson, J., held that attorney, who acted in accordance with the instructions given to her by her clients, could not be found liable for legal malpractice for failure to plead an affirmative defense which would have been an absolute defense to mortgage foreclosure action.

Affirmed.

West Headnotes (1)

[1] Attorney and Client
Instructions of client

Attorney, who acted in accordance with the instructions given to her by her clients, could not be found liable for legal malpractice for failure to plead an affirmative defense which would have been an absolute defense to mortgage foreclosure action.

4 Cases that cite this headnote

Attorneys and Law Firms

***953** Michael A. Nuzzo, Miami, for appellant.

Conrad, Scherer & James and Joseph S. Kashi, Fort Lauderdale, for appellees.

Before HUBBART, FERGUSON and JORGENSON, JJ.

Opinion

FERGUSON, Judge.

Appeal is taken by the plaintiffs below from a judgment entered on a jury verdict for an attorney and her insurer in a legal malpractice action. The appeal challenges an affirmative defense, and jury instruction given in accordance with that defense. There is no challenge to the sufficiency of the evidence to support the instruction.

The salient facts are as follows. In May 1980, plaintiffs' son was required to post a criminal appearance bond in Palm Beach County. A bonding company agreed to post the $100,000 bond and in return plaintiffs signed a mortgage and promissory note encumbering their home. The bonding company failed to file an affidavit as required by Section 903.14, Florida Statutes (1983), thereby creating an absolute defense to any subsequent foreclosure action. When plaintiffs' son failed to appear in court, the bond was estreated. The bonding company unsuccessfully sought reimbursement from plaintiffs, and ultimately filed a mortgage foreclosure action.

Plaintiffs retained the defendant-attorney to represent them in the action. Plaintiffs claim on appeal that they wished to win the suit, and that the attorney assured them of success. Defendant-attorney contends, however, that because plaintiffs wished to maintain an ongoing relationship with the bonding company, they requested only that the action be delayed so that they could raise the funds to repay the debt. In any event, the attorney filed an answer in the foreclosure action, but failed to adequately plead Section 903.14 as an affirmative defense. A final summary judgment was entered against plaintiffs on the bonding company's motion. On appeal we affirmed the judgment. *Boyd v. International Fidelity Insurance Co.*, 412 So.2d 944 (Fla. 3d DCA 1982).

Plaintiffs thereafter filed a legal malpractice action against the attorney and her insurer. Defendants alleged as an affirmative defense to the claim:

> The Plaintiffs specifically instructed the Defendant, LIN BRETT-

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> MAJOR, to protect their interests in an agreement which they had negotiated with all the bondsmen, including Frank McGoey, the bondsman for International Fidelity Insurance Company, and at all times, the Defendant, LIN BRETT-MAJOR, acted in accordance with the instructions given to her by the Plaintiffs, after having explained various potential defenses to the foreclosure actions brought by the bondsmen.

At the conclusion of the evidence, the jury was instructed:

> The next issue for your consideration is that LIN BRETT-MAJOR was acting according to the specific instructions of her client and an attorney is duty bound to carry out the specific instructions of a client provided that criminal or fraudulent ends are not intended. If you find that LIN BRETT-MAJOR was carrying out the specific instructions of her client, ***954** then your verdict should be for the Defendant, LIN BRETT-MAJOR.

The proof at trial showed that the attorney was hired not to win the case but to delay the action (even though the bonding company's failure to file an affidavit created an absolute defense) because the clients intended to live up to their contractual obligation and wished to remain on good terms with the bondsman. Plaintiffs argue that to permit an affirmative defense such as that presented here, which is without legal precedence, would establish an untenable situation by which attorneys could avoid liability for their professional omissions simply by pleading that they followed a course of action desired by the client. We are not convinced that the door is opened to a parade of horribles unless we disapprove of, as a defense to a malpractice claim, that the course of action taken by counsel was at the direction of an otherwise well-advised client. The relevant inquiry is whether the attorney followed the explicit directions of his client, which presents a question of fact.

There are apparently no Florida cases directly on point, but defendants cite two cases from other jurisdictions which have addressed the question. In *Orr v. Knowles,* 215 Neb. 49, 337 N.W.2d 699, 702 (1983), the court held:

> It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law.

Accord Downton v. Perini, 511 F.Supp. 258 (N.D.Ohio 1981) (a lawyer may not force a client to pursue a given course of action even though the lawyer sincerely believes it is in the client's best interests to do so).

Affirmed.

All Citations

449 So.2d 952

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470 So.2d 752
District Court of Appeal of Florida,
Third District.

LAWYERS PROFESSIONAL
LIABILITY INSURANCE COMPANY
and Andrew M. Tobin, Appellants,
v.
Hazel McKENZIE, Appellee.

No. 84-1702.
|
May 28, 1985.
|
Rehearing Denied July 1, 1985.

Synopsis
Mortgagee brought legal malpractice action against attorney who was hired to foreclose on property on which mortgagee held mortgage and note. The Circuit Court, Monroe County, David P. Kirwan, J., entered judgment in favor of mortgagee, and attorney appealed. The District Court of Appeal held that attorney was not liable for legal malpractice, even though judicial sale at which mortgagee was highest bidder was set aside on basis of incorrect legal description of property and even though mortgagor was able to obtain purchaser for property before second judicial sale.

Reversed.

West Headnotes (1)

[1] **Attorney and Client**
Conduct of Litigation

Attorney who was hired by mortgagee to foreclose on property was not liable for legal malpractice, even though judicial sale at which mortgagee was highest bidder was set aside on basis of incorrect legal description of property and even though mortgagor was able to obtain purchaser for property before second judicial sale and thereafter satisfied mortgagee's judgment against him, as mortgagee received all that she was entitled to under terms of instrument and mortgagee did not prove that attorney's preparation of incorrect legal description was proximate cause of her failure to get property back. West's F.S.A. § 45.031.

7 Cases that cite this headnote

Attorneys and Law Firms

***752** Vernis & Bowling and Richard H.W. Maloy, Miami, for appellants.

Leesfield & Blackburn and Joseph A. Glick, Miami, for appellee.

Before SCHWARTZ, C.J., and HENDRY and DANIEL S. PEARSON, JJ.

Opinion

PER CURIAM.

The Lawyers Professional Liability Insurance Co. and Andrew M. Tobin appeal from a final judgment entered upon a jury verdict awarding damages to appellee in this legal malpractice action. We reverse.

Appellee Hazel McKenzie hired appellant Tobin to foreclose on property on which she held the mortgage and note. Appellant did all of the relevant preparatory work and eventually obtained a final summary judgment against the mortgagor. The summary judgment ordered a judicial sale of the property to be held on May 14, 1981. Mrs. McKenzie had a credit for her existing judgment and also borrowed some additional funds so that she would have enough money, it was hoped, to be the highest bidder on the property at the judicial sale. Mrs. McKenzie had been negotiating with a prospective purchaser of the property but she did not have a contract for sale nor, in fact, had the parties settled on a price term.

***753** At the judicial sale, wherein appellee was the highest bidder, appellant realized that the legal description of the property was incorrect. The description had been taken from the final summary judgment which he had prepared for the court. After the sale appellant immediately notified appellee and counsel for the mortgagor of the error. He also filed a motion with the trial court to correct the order of summary judgment and the clerk's certificate of title.

On May 26, 1981, twelve days after the judicial sale, the mortgagor moved to set aside the judicial sale on the basis of the incorrect legal description of the property. This motion was granted and a second judicial sale was set for July 7, 1981. Before the second judicial sale the mortgagor was able to obtain a purchaser for the property and thereafter satisfied in full appellee's judgment against him. Thus, appellee received all monies, costs, and fees due to her under the note. In addition, appellant, who has at all times acknowledged his error, paid the interest charges on the money appellee borrowed before the judicial sale. Mrs. McKenzie later sued appellant Tobin for legal malpractice. The jury returned a verdict in favor of appellee and awarded her $55,000.

In order to prevail in her cause Mrs. McKenzie had to prove: 1). that she hired appellant in fact for the specific purpose of getting back the property and not merely recovering the money owed; 2). that appellant neglected a reasonable duty by preparing an incorrect legal description (conceded); 3). that appellant's negligence was a proximate cause of Mrs. McKenzie's injury; that is, that the mortgagor could not have redeemed the property before the clerk's certificate of title was issued to Mrs. McKenzie. Because two of these issues either were not or could not be proved, the jury had to speculate on possible outcomes in order to reach its verdict.

Issues one and three can be resolved by reference to section 45.031, Florida Statutes (1983). Section 45.031(1) outlines the procedure of a judicial sale and specifically states that the property may be redeemed at any time before the sale. Section 45.031(2) recites the form of the clerk's certificate of sale which is issued following the sale to the person who was the highest and best bidder for cash. Section 45.031(3) provides a ten day period following a judicial sale within which to file objections to the sale. If no objections are filed within the ten day period then the clerk issues a certificate of title to the person who holds the certificate of sale. Then, and only then, does the highest bidder actually obtain ownership of the property. Therefore, no attorney can guarantee that a mortgagee who forecloses on property actually will get the property. The mortgagor can redeem the property at any time until the certificate of title is issued, *Islamorada Bank v. Rodriguez,* 452 So.2d 61 (Fla. 3d DCA 1984); *Cooper Smith Properties, Ltd. v. Flower's Baking Co.,* 432 So.2d 683 (Fla. 5th DCA), *rev. dismissed sub nom Coble v. Cooper Smith Properties, Ltd.,* 438 So.2d 831 (Fla.1983), or someone else could be the highest bidder at the judicial sale.

The second issue that appellee had to prove was that but for the error in the legal description which gave the mortgagor more time to locate a buyer for the property, the mortgagor could not have redeemed the property within the ten day period following the first judicial sale. It is undisputed that he did not redeem the property before the sale and that he made no effort to redeem it after the sale. Here, however, the mortgagor knew immediately that there was a problem with the legal description which would require that the sale be set aside and a new judicial sale scheduled. Therefore, he was under no obligation to redeem within the ten day period allowed by section 45.031(3). The mortgagor was not called to testify at trial about his financial ability to redeem the property during those ten days. The only testimony on whether the mortgagor could have redeemed, but for the error, came from his attorney. We do not find the attorney's beliefs and assumptions about the mortgagor's inability to redeem the property within the ten day period following the judicial ***754** sale to be dispositive of this issue. This testimony was based on hearsay and it was restricted by the on-going attorney-client relationship. Without testimony stating categorically that the mortgagor was unable to redeem the property at that time, the jury was forced to assume that he wasn't able to redeem it, thus assuming that the injury to Mrs. McKenzie was caused by appellant's negligence.

We find that the attorney, though negligent, did in fact do what he was employed to do. He foreclosed on the mortgage and appellee received all that she was entitled to under the terms of the instrument. She did not prove that appellant's negligence was a proximate cause of her failure to get the property back. Therefore, the final judgment is reversed.

Reversed.

All Citations

470 So.2d 752, 10 Fla. L. Weekly 1339

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730 So.2d 376
District Court of Appeal of Florida,
Third District.

Dean ATKIN and Janet Atkin, his wife, Appellants,
v.
TITTLE & TITTLE, a Florida professional association, and Charles P. Tittle, individually, and Director of Tittle & Tittle, P.A., Appellees.

No. 97–3410.
|
March 31, 1999.

Synopsis
Clients sued attorney for legal malpractice, alleging that, in representing clients in their purchase of lot upon which they sought to build house, attorney negligently failed to determine that zoning prohibited lot's intended use. After jury returned verdict for clients, the Circuit Court, Monroe County, Steven Shea, J., granted attorney's motion for directed verdict. Clients appealed. The District Court of Appeal, Shevin, J., held that evidence supported jury's verdict.

Reversed and remanded.

West Headnotes (7)

[1] Trial
Nature and Grounds

The power to direct a verdict should be cautiously exercised.

1 Cases that cite this headnote

[2] Trial
Insufficiency to Support Other Verdict; Conclusive Evidence

A motion for a directed verdict should never be granted unless the evidence is such that under no view which the jury might lawfully take of the evidence favorable to the adverse party could a verdict for the latter party be sustained.

Cases that cite this headnote

[3] Attorney and Client
Elements of Malpractice or Negligence Action in General

To prevail in a legal malpractice action, the plaintiff must prove the attorney's employment with respect to the asserted negligent acts; the attorney's neglect of a reasonable duty; and damages proximately caused by the attorney's negligence.

2 Cases that cite this headnote

[4] Attorney and Client
Acts and Omissions of Attorney in General

Clients who brought legal malpractice action against attorney who represented them in purchase of lot upon which they sought to build house, alleging that attorney negligently failed to determine that zoning prohibited lot's intended use, presented sufficient evidence that attorney was employed with respect to asserted negligent acts; attorney undertook inquiry into whether lot was buildable by virtue of contingency concerning contiguous lot rule that he inserted in purchase contract, and clients presented expert testimony that if attorney had investigated contiguous lot rule issue, he would inevitably have learned that zoning of lot adversely affected his clients.

1 Cases that cite this headnote

[5] Attorney and Client
Acts and Omissions of Attorney in General

An attorney may not neglect to perform the services which he agrees to perform or which by implication he agrees to perform when he accepts employment.

2 Cases that cite this headnote

[6] Attorney and Client
Skill and Care Required

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An attorney may be held liable for damages incurred by a client based on the attorney's failure to act with a reasonable degree of care, skill, and dispatch.

Cases that cite this headnote

[7] Attorney and Client
Acts and Omissions of Attorney in General

An attorney may not disregard matters that arise and reasonably signal potential legal problems although those matters may not fall precisely within the general rule.

2 Cases that cite this headnote

Attorneys and Law Firms

***377** Kopplow & Flynn, Miami; Cooper & Wolfe and Nancy C. Ciampa and Sharon L. Wolfe, Miami, for appellants.

Randolph W. Sadtler, Tavernier, for appellees.

Before COPE, LEVY and SHEVIN, JJ.

Opinion

SHEVIN, Judge.

Dean and Janet Atkin appeal a final judgment setting aside a jury verdict and granting defendants Tittle & Tittle, P.A., and Charles Tittle, Esq. [collectively "Tittle"], a directed verdict in a legal malpractice action. We reverse.

The Atkins retained Charles Tittle to represent them in the 1989 purchase of a vacant lot located in Monroe County; they informed Tittle that they wished to build a home on the lot. Tittle was concerned about the contiguous lot rule, which might invalidate the lot purchase; in order to avoid any problems, he included a contingency as to that rule in the purchase contract that he drafted for the Atkins. The Atkins purchased the property. In 1992, the Atkins were denied a building permit to build a house because the lot was zoned SR; under that designation no house could be built because the property did not meet the required minimum lot size. They filed a legal malpractice action against Tittle for failure to determine that the zoning prohibited the lot's intended use.

The jury returned a verdict in the Atkins' favor. However, the trial court granted Tittle's directed verdict motion relying on *Maillard v. Dowdell*, 528 So.2d 512 (Fla. 3d DCA), *review denied*, 539 So.2d 475 (Fla. 1988), and concluding that Tittle "performed the duties for which he was employed, investigated issues brought to his attention, and was not required to render additional land use and zoning opinions for which he was not retained."

[1] [2] We disagree with the trial court's conclusion.

> The power to direct a verdict should be cautiously exercised, and a motion for a directed verdict should never be granted unless the evidence is such that under no view which the jury might lawfully take of the evidence favorable to the adverse party could a verdict for the latter party be sustained.

Edwards v. Orkin Exterminating Co., Inc., 718 So.2d 881, 883 (Fla. 3d DCA 1998)(quoting *Burch v. Strange*, 126 So.2d 898, 901 (Fla. 1st DCA 1961)); *Perry v. Red Wing Shoe Co.*, 597 So.2d 821 (Fla. 3d DCA 1992). *See Aurbach v. Gallina*, 721 So.2d 756 (Fla. 4th DCA 1998). Here, the record contains evidence from which the jury could lawfully find that Tittle neglected a reasonable duty and proximately caused the Atkins' damages.

[3] [4] [5] [6] To prevail in a legal malpractice action, the plaintiff must prove the attorney's employment; the attorney's neglect of a reasonable duty; and damages proximately caused by the attorney's negligence. *See Sure Snap Corp. v. Baena*, 705 So.2d 46 (Fla. 3d DCA 1997), *review denied*, 719 So.2d 288 (Fla. 1998); *Maillard*, 528 So.2d at 512; *Weiner v. Moreno*, 271 So.2d 217 (Fla. 3d DCA 1973). As to the first element, plaintiff must prove that the attorney was employed with respect to the asserted negligent acts. *Maillard*, 528 So.2d at 514–15. The trial court erred in finding that the Atkins failed to establish this element of their cause of action. In this case, Tittle undertook an inquiry into whether the lot was buildable by virtue of the contingency concerning

the contiguous lot rule that he inserted in the purchase contract. The Atkins presented evidence that Tittle's representation fell below the standard of care: Tittle failed to fulfil his obligation to represent the Atkins competently in their purchase of a vacant lot on which Tittle knew that they intended to build a home. The experts testified that if Tittle had investigated the contiguous lot rule issue, ***378** he would inevitably have learned that the zoning of the lot adversely affected his clients. An attorney may not "neglect[ ] to perform the services which he agrees to perform or which by implication he agrees to perform when he accepts employment." *Dykema v. Godfrey,* 467 So.2d 824, 825 (Fla. 1st DCA 1985). *See also Maillard,* 528 So.2d at 515. Even in the absence of such a purchase contract contingency provision, Tittle would still have been *obligated* to check out the zoning issue or to advise the Atkins to pursue the issue when he assumed the responsibility to represent the Atkins as to the lot buildability. "An attorney may be held liable for damages incurred by a client based on the attorney's failure to act with a reasonable degree of care, skill, and dispatch." *Crosby v. Jones,* 705 So.2d 1356, 1358 (Fla. 1998). The verdict is supported by competent evidence; the court erred in granting Tittle's directed verdict motion.

[7] Moreover, *Maillard* does not avail Tittle, who assumed the duty to check out the contiguous lot rule. Although *Maillard* provides the general rule as to an attorney's duties when representing a client in a real estate transaction, that rule is not absolute. An attorney may *not* disregard matters that arise and reasonably signal potential legal problems although those matters may not fall precisely within the general rule. *Maillard,* 528 So.2d at 515. Tittle's failure to fulfil his duty competently to the Atkins rendered him negligent.

Accordingly, we reverse the judgment with directions to enter judgment according to the jury's verdict.

Reversed and remanded.

All Citations

730 So.2d 376, 24 Fla. L. Weekly D846

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KeyCite Yellow Flag - Negative Treatment
Distinguished by In re SRC Holding Corp., D.Minn., April 6, 2007

797 So.2d 30
District Court of Appeal of Florida,
Third District.

Donald McCARTY, Appellant,
v.
Michael L. BROWNING, an individual, and Browning, Sireci, Guller, Klitenick & Thompson, P.A., a professional association, Appellees.

No. 3D00-2733.
|
Sept. 12, 2001.
|
Rehearing and Rehearing En Banc Denied Oct. 31, 2001.

Synopsis

Home buyer brought legal malpractice action against attorney who handled closing for purchase of home, alleging negligence in handling the closing for attorney's failure to discover and disclose existing code violation on property. The Circuit Court, Monroe County, Richard G. Payne, J., entered summary judgment for attorney. Buyer appealed. The District Court of Appeal, Fletcher, J., held that attorney was not liable for legal malpractice.

Affirmed.

West Headnotes (2)

[1] Attorney and Client
Conduct of Litigation

Attorney who handled closing for purchase of home was not liable to home buyer for legal malpractice in form of negligence, based on attorney's alleged failure to discover and disclose existing code violation on property, where attorney did not enter into attorney-client relationship with buyer for purpose of examining building permits or investigating applicable zoning and land use regulations to ensure that property was in code compliance, attorney represented at closing the lender, and assisted buyer's interest at closing only so far as preparing and reviewing loan documents, receiving and disbursing funds provided by lender, and overseeing actual closing transaction, and attorney was not aware of code violation.

3 Cases that cite this headnote

[2] Attorney and Client
Pleading and Evidence

Home buyer's allegation that attorney who handled closing for purchase of home "should have known" of existing code violation on property was insufficient to allege a duty on attorney, in buyer's action against attorney for legal malpractice in form of negligence, based on attorney's alleged failure to discover and disclose code violation.

1 Cases that cite this headnote

Attorneys and Law Firms

***30** Michael R. Barnes (Key West), for appellant.

Cole White & Billbrough and G. Bart Billbrough, for appellees.

Before SCHWARTZ, C.J., and COPE and FLETCHER, JJ.

Opinion

FLETCHER, Judge.

Donald McCarty appeals from an adverse summary judgment on his legal malpractice claim against Michael Browning, individually, and the law firm of Browning, Sireci, Guller, Klitenick & Thompson, P.A. [together Browning]. We affirm.

In December, 1992, Browning handled for McCarty the closing for McCarty's purchase of a home. After the purchase (in 1996) McCarty was cited by Monroe County for having an illegal downstairs enclosure [1] on the property, which enclosure pre-existed McCarty's purchase. ***31** McCarty, to bring the property into

code compliance, removed the offending enclosure, then filed a legal malpractice claim against Browning, alleging negligence in handling the closing for Browning's failure to discover and disclose the existing code violation on the property.

[1] First, the record shows that Browning did not enter into an attorney-client relationship with McCarty for the purpose of examining building permits or investigating the applicable zoning and land use regulations to ensure that the property was in code compliance. *See Kates v. Robinson,* 786 So.2d 61 (Fla. 4th DCA 2001)(in stating a claim for legal malpractice, it is not sufficient merely to assert an attorney-client relationship, but to also allege that the relationship existed with respect to the acts or omissions upon which the malpractice claim is based). Instead, the record shows that Browning represented at the closing Barnett Bank, the lender, and assisted McCarty's interest at the closing only so far as preparing and reviewing loan documents, receiving and disbursing funds provided by Barnett Bank, and overseeing the actual closing transaction.

[2] Second, McCarty's complaint alleges that Browning "knew or should have known" of the pre-existing code violation and thus had a duty to advise McCarty thereof. While it is correct that an attorney has a duty to advise the client of legal problems not within the scope of the task the attorney was retained to perform, but of which the attorney becomes aware, *see Maillard v. Dowdell,* 528 So.2d 512 (Fla. 3d DCA 1988), here the record reflects that Browning was not aware of the code violation. McCarty's allegation that Browning "should have known" of the violation is insufficient to allege a duty on Browning. If we were to hold to the contrary attorneys would be required not only to perform the services for which they were retained, but would be required for self-protection to unilaterally expand that task to investigate and analyze every issue conceivably related thereto. This unreasonable "duty" we decline to recognize or create.

Affirmed.

All Citations

797 So.2d 30, 26 Fla. L. Weekly D2194

Footnotes

1 Which enclosure had created a ground level living area, thus increasing the home's "useful" square footage.

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Proto v. Graham, 788 So.2d 393 (2001)
26 Fla. L. Weekly D1632

788 So.2d 393
District Court of Appeal of Florida,
Fifth District.

Francis R. PROTO, Appellant/Cross-Appellee,
v.
Richard S. GRAHAM, et al.,
Appellees/Cross-Appellants.

No. 5D00-1464.
|
June 29, 2001.

Synopsis
Former client sued attorney for malpractice, alleging that attorney's advice to stop making payments to bank on mortgage, and failure to negotiate settlement with bank, resulted in summary judgment against client in bank's foreclosure action, awarding bank attorney fees and costs in addition to amount of mortgage. Following trial, the Circuit Court, Volusia County, Joseph G. Will, J., denied attorney's motion for directed verdict, and entered judgment on jury verdict for client, after remittitur. Attorney appealed. The District Court of Appeal held that client failed to prove either negligence or causation.

Reversed.

West Headnotes (5)

[1] Attorney and Client
Elements of Malpractice or Negligence Action in General

Three basic elements of legal malpractice action are: (1) employment of attorney, (2) attorney's neglect of reasonable duty, and (3) proximate cause.

2 Cases that cite this headnote

[2] Attorney and Client
Acts and Omissions of Attorney in General

Attorney's good faith tactical decisions are not actionable as malpractice.

2 Cases that cite this headnote

[3] Attorney and Client
Pleading and Evidence

There was insufficient evidence to support finding that attorney committed legal malpractice by advising client to stop making mortgage payments to bank based on fraud of property developer and mortgage broker, and failing to negotiate settlement with bank, or that alleged malpractice caused summary judgment to be entered against client in bank's foreclosure action, awarding bank amount of mortgage plus attorney fees and costs; client's expert witness' testimony that attorney was negligent and caused client's damages was based on speculation and conjecture.

2 Cases that cite this headnote

[4] Negligence
In General;Degrees of Proof

Negligence actions follow the more likely than not standard of causation and require proof that negligence probably caused plaintiff's injury.

2 Cases that cite this headnote

[5] Negligence
Necessity of Causation

Negligence
Proximate Cause

Causation is essential element of negligence, of which plaintiff has burden of proof.

1 Cases that cite this headnote

Attorneys and Law Firms

***393** Ronnie H. Walker of Ronnie H. Walker, P.A., Orlando, for Appellant/Cross-Appellee.

Jennifer S. Carroll and Diane F. Medley, of Law Offices of Jennifer S. Carroll, P.A., West Palm Beach, and James

W. Smith, of Smith & Schoder, L.L.P., Daytona Beach, for Appellee/Cross-Appellants.

Opinion

PER CURIAM.

This is an appeal from the denial of a motion for a directed verdict in a legal malpractice action. Richard Graham and his law firm claim that the trial court erred, as a matter of law, by denying their motion for a directed verdict as to negligence. We agree and reverse.

In September of 1989, Dr. Francis Proto, a dentist from Connecticut, invested $80,000 in a double-wide, mobile home in Nature's Woods, a development in DeLand, ***394** Florida. Century Federal loaned Dr. Proto the money to buy the mobile home. Dr. Proto then agreed to lease the unit with the lease payments being applied to the mortgage. Pathfinder Services, Inc., was the agent and sales manager hired to manage the property, receive the rental payments and then make the mortgage payments directly to Century Federal. Although Century Federal had no direct connection to Nature's Woods, it had a written agreement with Americom, a mortgage broker, to generate mobile home credit transactions for Century Federal. Americom also prepared all the closing documents and handled the closing.

At the closing, Dr. Proto was told to make out his down payment check for 20% of the purchase price. That check was photocopied and then torn up and given back to Proto. He was then told to make another check for 5%. Thus, Dr. Proto knowingly participated in a scheme to defraud Century. Dr. Proto was informed at closing that his double-wide had not been finished, but he closed regardless and acknowledged to Century that one had been delivered.

After Pathfinder made several mortgage payments, it became apparent that Pathfinder and Americom had been defrauding both lenders and buyers and the whole project was in jeopardy. As it turned out, at least one of the lenders was in collusion with the Nature's Woods developer, Abb-Hitt. Century Federal was not.

Dr. Proto contacted his Connecticut lawyer who referred him to Graham's law firm which was already representing several Nature's Woods investors. Those investors had decided to stop making mortgage payments. Most indicated a willingness to give up their down payments and any payments made in exchange for being relieved of their obligation. Graham gave them no reassurances but promised to work on it.

On August 15, 1990, Graham wrote letters to the banks involved in some 70 loans, informing them of his representation and asking that the banks forego any action toward acceleration, collection, or foreclosure. He told them that he had discovered serious irregularities, and that the clients would like to settle amicably. The investors, including Dr. Proto, authorized Graham to settle for an exchange of the mobile homes, any payments made, and assignments of any claims against the developers and others in return for releases from personal liability.

By mid-September 1990, Graham wrote to Dr. Proto's Connecticut attorney that he had contacted Century Federal and found that Proto's loan was the only one placed with that bank. Century Federal, which had a longstanding relationship with the loan broker Americom, seemed willing to withhold enforcement of the loan. Graham wrote that "[t]here is some risk involved in discontinuing payments," but that this seemed the best way to put pressure on the bank. Graham's office advised Proto not to make any more payments to Century Federal.

Of the 70 loans, 67 were resolved favorably to the clients. Only two banks, involved in three of the loans, resisted. Century Federal was one of those two banks.

In late November 1990, Century Federal filed a foreclosure action against Dr. Proto. Graham's firm was employed by Dr. Proto to defend and counterclaimed against Century Federal. They also brought fraud claims against Abb-Hitt and Pathfinders and brought Americom into the lawsuit. In joining Americom, Graham believed he could establish that Americom was an agent of Century Federal.

Graham's belief was strengthened when discovery revealed that Americom was either ***395** in the same building or in the building next door to Century Federal. Business cards for Americom listed "Century Bank." A written agreement between Century Federal and Americom, entered into on August 10, 1989, about a month before the Proto closing, stated that Americom would generate credit transactions for Century

Federal and would relieve the bank of "outside manpower requirements." The document did not state that Americom was an independent contractor, which later turned out to be the case.

Century and Abb-Hitt moved for a summary judgment. To the surprise of Graham, the motion was granted and a foreclosure judgment in favor of Century was entered for $83,334.83 in principal and interest, together with $28,907.30 in fees and costs. Graham was authorized to appeal, and this court affirmed the summary judgment as to Century, but reversed the judgment in favor of Abb-Hitt. *Proto v. Century Federal Savings Bank,* 629 So.2d 921 (Fla. 5th DCA 1993). A final judgment was thereafter entered in favor of Century which added appellate fees and costs of $15,306.

Dr. Proto then sued Graham and his law firm seeking recovery of the final judgment against him. A jury returned a verdict of $122,446.47. The trial court granted a remittitur as to that portion of the jury verdict which included mortgage principal, interest and penalties, and entered a final judgment of $32,179.28. [1]

Graham argues that the trial court should have directed a verdict in his favor when Dr. Proto failed to put forth reasonable evidence to support a legal malpractice claim. Specifically, Graham claims Dr. Proto failed to prove that any negligence resulted in or was the proximate cause of his loss.

[1] Under Florida law, three basic elements are required to be proven in a legal malpractice action: (1) employment of the attorney; (2) attorney's neglect of a reasonable duty; and (3) proximate cause.

[2] Good faith tactical decisions are not actionable in Florida. *Crosby v. Jones,* 705 So.2d 1356 (Fla.1998). As stated by the court:

> Florida has long held that an attorney may be held liable for damages incurred by a client based on the attorney's failure to act with a reasonable degree of care, skill and dispatch. *Weekley v. Knight,* 116 Fla. 721, 156 So. 625 (1934); *Riccio v. Stein,* 559 So.2d 1207 (Fla. 3d DCA 1990). This does not mean, however, that an attorney acts as an insurer of the outcome of a case. Good faith tactical decisions or decisions made on a fairly debatable point of law are generally not actionable under the rule of judgmental immunity.

In *Kaufman v. Stephen Cahen, P.A.,* 507 So.2d 1152 (Fla. 3d DCA 1987), the court stated:

> An attorney who acts in good faith and in honest belief that his advice and acts are well-founded and in the best interest of his client is not answerable for a mere error in judgment or for a mistake in a point of law which has not been settled by the court of last resort in his state and on which reasonable doubt may be entertained by well-informed lawyers. *Hodges v. Carter,* 239 N.C. 517, 80 S.E.2d 144, 146 (1954).

[3] In the present case, Dr. Proto failed to prove two of the three elements: ***396** that Graham neglected any reasonable duty, or that Dr. Proto's damages were caused by Graham. In short, a view of all the evidence, including the testimony of Dr. Proto's expert, reveals that Proto failed to make a prima facie case of legal malpractice. *See Great Southern Peterbilt, Inc. v. Geiger,* 616 So.2d 1127, 1128 (Fla. 1st DCA 1993).

[4] **[5]** In Florida, all negligence actions "follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury." *Gooding v. University Hosp. Building, Inc.,* 445 So.2d 1015, 1018 (Fla.1984). Causation is an essential element of negligence, of which the plaintiff has the burden of proof and plaintiff

> must introduce evidence which affords a reasonable basis for the

> conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. *A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.*

Id. (quoting PROSSER, LAW OF TORTS § 41 (4th ed.1971) (emphasis supplied)).

The expert testimony of Proto's only expert, Stephen Bozarth, should have been rejected by the trial court in considering the motion for a directed verdict. His opinion was based on sheer speculation and facts or inferences not supported by the evidence.

Attorney Bozarth testified that although he was not critical of Graham's original advice to Proto not to make payments on the mortgage, the advice should have changed once Graham's office had had an opportunity to investigate the facts. Bozarth opined that a reasonable, prudent lawyer would have concluded that Century Federal's position was meritorious and that Proto had no chance to win against the lending institution. According to Bozarth, it was below the proper standard of care for Graham not to have negotiated a deal with Century Federal in June 1991 even if it meant conceding to all demands made by the lender. Bozarth concluded that the allegedly bad legal advice was the cause of the summary judgment and the judgments for costs and attorney's fees.

A careful review of the record reveals that, as a matter of law, the evidence presented at trial cannot support the jury finding of negligence. There is no competent substantial evidence that Graham neglected any reasonable duty, or that any alleged negligence "probably rather than possibly" caused Dr. Proto's alleged damages. Instead, there is merely speculation and conjecture, unsupported by the evidence, that bad legal advice was the cause of the summary final judgment of foreclosure.

We therefore reverse and remand for entry of a judgment in favor of Graham and his law firm.

REVERSED; REMANDED.

HARRIS, PLEUS and PALMER, JJ., concur.

All Citations

788 So.2d 393, 26 Fla. L. Weekly D1632

Footnotes

1 It is impossible to tell from the record how either the jury verdict or the amount of the final judgment was calculated.

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Stake v. Harlan, 529 So.2d 1183 (1988)
13 Fla. L. Weekly 1675

KeyCite Yellow Flag - Negative Treatment
Distinguished by Crosby v. Jones, Fla., January 15, 1998

529 So.2d 1183
District Court of Appeal of Florida,
Second District.

David J. STAKE and Deborah S. Stake, his wife, Appellants,
v.
Bruce M. HARLAN, Appellee.

No. 87–2714.
|
July 13, 1988.
|
Rehearing Denied Aug. 25, 1988.

Synopsis

Clients brought legal malpractice action against attorney alleging negligence in advice they received regarding purchase of condominium unit. The Circuit Court, Pinellas County, Crockett Farnell, J., dismissed complaint, and clients appealed. The District Court of Appeal, Lehan, J., held that attorney had duty to inform clients of his awareness of possible change in law through certification of question which could have materially adverse effect upon them.

Reversed and remanded.

Ryder, Acting C.J., and Frank, J., filed specially concurring opinions.

West Headnotes (1)

[1] **Attorney and Client**
Acts and Omissions of Attorney in General

Attorney had duty to inform his clients of his awareness of possible change in law through certification of question which could have materially adverse effect upon clients.

4 Cases that cite this headnote

Attorneys and Law Firms

***1184** Philip J. Maloney, Jr. of Ruiz, Skelton & Maloney, P.A., Tampa, for appellants.

John N. Jenkins of Marlow, Shofi, Smith, Hennen, Smith & Jenkins, P.A., Tampa, for appellee.

Opinion

LEHAN, Judge.

Plaintiffs appeal from the dismissal with prejudice of their amended complaint for legal malpractice. We reverse.

Negligence on the part of defendant attorney is alleged to have occurred through his advice to, and failure to advise, plaintiffs in connection with his representation of them in their purchase of a condominium unit. That purchase on April 11, 1985, involved their paying $5,000 cash, executing a promissory note for $12,000 secured by a balloon purchase money second mortgage due in 1990, and assuming a first mortgage which contained a "due-on-sale" clause. That clause required the prior written consent of the first mortgagee to plaintiffs' assumption of the mortgage. [1]

The amended complaint alleges that:

(a) Plaintiffs retained defendant as their attorney "for a compensation to be paid him therefore [sic], to review all documents pertaining to the purchase of certain condominium unit ... to protect their interests in the subject transaction: to advise them concerning the execution of certain documents relative to the subject transaction; and to represent them at the closing on the purchase of said unit...."

(b) Defendant advised plaintiffs that they need not comply with the assumption procedure required by the due-on-sale clause in the first mortgage and could effectuate a "quiet assumption" of that mortgage by tendering to the mortgagee the next monthly payment and informing the mortgagee that upon its acceptance of that payment, they would assume that the mortgagee had acquiesced to the purchase of the unit by plaintiffs. In addition, defendant advised plaintiffs to execute a release and hold harmless agreement, holding the sellers and the title company harmless from any responsibility should the

mortgagee declare the mortgage due and payable in full. Plaintiffs closed the purchase under those circumstances and executed such a hold harmless agreement.

(c) At the time of defendant's foregoing advice to plaintiffs and of the closing of the purchase of the condominium unit, Florida law was reflected in *Weiman v. McHaffie,* 448 So.2d 1127 (Fla. 1st DCA 1984), hereinafter called "*Weiman I.*" In that case the First District Court of Appeal, consistent with other district court of appeal decisions, held that due-on-sale clauses in mortgages are not enforceable in Florida without a showing that the mortgagor's transfer of the mortgaged property would impair the mortgagee's security.

(d) *Weiman I* certified to the Florida Supreme Court as of great public importance the question of the enforceability of such a clause. [2]

(e) Defendant had actual knowledge of the *Weiman I* certification as evidenced by his citation of that case in his letter to the first ***1185** mortgage holder tendering plaintiffs' monthly mortgage payment.

(f) On May 2, 1985, in *Weiman v. McHaffie,* 470 So.2d 682 (Fla.1985), hereinafter "*Weiman II,*" the Florida Supreme Court, answering that certified question in the affirmative, changed the law of Florida by deciding that such clauses are enforceable pursuant to their terms.

(g) Following the decision in *Weiman II* the holder of the first mortgage declared the entire sum due and payable. After plaintiffs' failure to pay, the mortgagee filed a foreclosure suit. Judgment of foreclosure was entered, resulting in loss to plaintiffs. As a result of plaintiffs' agreement to release and hold harmless the sellers, plaintiffs had no recourse against the sellers for their loss upon the foreclosure.

(h) Defendant breached his duty to make plaintiffs aware of the implications of the *Weiman I* certification "so that the Plaintiffs could make an informed decision whether or not to ... transact the subject real estate closing in the manner suggested by the Defendant."
The basis for the trial court's dismissal with prejudice appears to have been that "the gravamen of the amended complaint against the Defendant ... continues to be an allegation that he was under a duty to anticipate changes in the law of this State by this State's highest Court...." and that no such duty existed. The effect of the dismissal was to rule that there was no duty of defendant attorney to advise his clients of a possible change in the law even though he knew of that possibility from his knowledge of the certification by the district court of appeal. This was in effect an erroneous ruling under the alleged circumstances of this case that as a matter of law an attorney has no duty to give his clients the benefit of knowledge which he has and on the basis of which it may be foreseeable to him that the clients, if they had that knowledge, would avoid acting to their material detriment.

Circumstances under which an attorney does and does not have a duty to his client are generally described in *Feil v. Wishek,* 193 N.W.2d 218, 224 (N.D.1972), quoting *McCullough v. Sullivan,* 102 N.J.L. 381, 384, 132 A. 102, 103 (1926), as follows:

> A lawyer, without express agreement, is not an insurer. He is not a guarantor of the soundness of his opinions, or the successful outcome of the litigation which he is employed to conduct, or that the instruments he will draft will be held valid by the court of last resort. He is not answerable for an error of judgment in the conduct of a case or for every mistake which may occur in practice. He does, however, undertake in the practice of his profession of the law that he is possessed of that reasonable knowledge and skill ordinarily possessed by other members of his profession. He contracts to use the resonable [sic] knowledge and skill in the transaction of business which lawyers of ordinary ability, and skill possess and exercise. On the one hand, he is not to be held accountable for the consequences of every act which may be held to be an error by a court. On the other hand, he is not immune from responsibility, if he fails to employ in the work he undertakes that reasonable knowledge and skill exercised by lawyers of ordinary ability and skill.

See also 4 Fla.Jur.2d *Attorneys at Law* § 168 (1978).

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Defendant argues that *Kaufman v. Stephen Cahen P.A.,* 507 So.2d 1152 (Fla. 3d DCA 1987), supports the trial court's dismissal because *Kaufman* held that a lawyer has no duty to predict accurately a change in the law. That holding reflected the principle that "[a] lawyer does not guarantee the efficacy of his advice." *Dillard Smith Construction Co. v. Greene,* 337 So.2d 841, 843 (Fla. 1st DCA 1976). *See also Daytona Development Corp. v. McFarland,* 505 So.2d 464, 467 (Fla. 2d DCA 1987). But our holding does not depart from that principle. The basic issue on this appeal is not whether defendant had no duty to accurately predict a change in the law but is whether he had as a matter of law no duty to inform his clients of his awareness of a possible change in the law which could have a materially adverse effect upon them. By its certification ***1186** to the Florida Supreme Court quoted above, the First District Court of Appeal called attention to that possibility and also called attention to its significance by saying that "the question ... has far-reaching implications for ... the people of this state...." *Weiman I,* 448 So.2d at 1129.

Defendant nonetheless argues that the types of facts in *Kaufman* and those in the instant case are nearly identical in the sense that *Kaufman* also involved a supreme court decision which changed the law and which was pending at the time the defendant in that case rendered legal services. However, *Kaufman* involved a significantly different type of situation. *Kaufman* involved the law regarding the statute of limitations for a wrongful death action based upon medical malpractice having been changed by the Florida Supreme Court, so as to shorten the applicable limitations period and bar plaintiff's right to sue, apparently without there having been advance knowledge on the part of plaintiff's attorney, whether through a certified question or other means, that such a change might occur. Here, it is alleged that the defendant was aware of the pending question which had been certified in *Weiman I.*

This is not to indicate, or address whether, a lawyer may ever have a duty to be aware of questions certified by district courts of appeal to the Florida Supreme Court. That is not before us. Nor are other issues in a case like this, such as, proximate cause and damages, before us. *See Ard v. Aulls,* 477 So.2d 1032 (Fla. 5th DCA 1985).

Reversed and remanded for proceedings consistent herewith.

RYDER, A.C.J., concurs specially with opinion.

FRANK, J., concurs specially with opinion.

RYDER, Acting Chief Judge, concurring specially.
I concur in the result reached herein, but for different reasons. This case comes to us on appeal from a bare bones order granting a motion to dismiss for failure to state a cause of action.

I find it unnecessary to go further in this matter than a review of the question whether the complaint stated a cause of action and, if so, whether the trial court erred in his dismissal order.

"A legal malpractice cause of action has three elements: (1) the attorney's employment and (2) his neglect of a reasonable duty, which (3) is the proximate cause of loss to his client." *Hatcher v. Roberts,* 478 So.2d 1083, 1087 (Fla. 1st DCA 1985). My review of the second amended complaint reveals allegations fulfilling all elements. Thus, I would reverse and set aside the order of the trial court and allow the cause to proceed accordingly. To go further at this juncture seems ill-advised and untimely wherein we address ultimate issues which should be allowed to develop in subsequent proceeding below.

FRANK, Judge, concurring specially.

It is my opinion, simply stated, that although a lawyer cannot be held to a standard requiring certainty in anticipating the future state of the law, or an awareness of every question certified to a higher tribunal, when, as is the case here, the lawyer has actual knowledge that a question of law bearing upon a client's interests has been certified, a duty arises to advise the client that such certification may result in a change of the law.

All Citations

529 So.2d 1183, 13 Fla. L. Weekly 1675

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Footnotes

1 A due-on-sale clause is "a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 145, 102 S.Ct. 3014, 3018, 73 L.Ed.2d 664, 669 (1982).

2 The language of the First District in that regard was:

> However, because the question involved in this appeal has far-reaching implications for certain financial institutions and the people of this state we certify the following question to the Florida Supreme Court:
> IS A DUE–ON–SALE CLAUSE IN A FLORIDA MORTGAGE EXECUTED ON SEPTEMBER 8, 1980, TO A PRIVATE LENDER OR SELLER, ENFORCEABLE AS TO AN ATTEMPTED TRANSFER OCCURRING SUBSEQUENT TO OCTOBER 15, 1982, BUT BEFORE OCTOBER 15, 1985, WITHOUT A SHOWING THAT THE MORTGAGEE'S SECURITY WILL BE IMPAIRED BY THE TRANSFER?

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Passell v. Watts, Fla.App. 2 Dist., June 13, 2001

467 So.2d 315
District Court of Appeal of Florida,
Third District.

Olive LORRAINE, a beneficiary under the Last Will and Testament of Cecil Johnson, Appellant,
v.
GROVER, CIMENT, WEINSTEIN & STAUBER, P.A., Marvin Weinstein, individually, and INA Underwriters Insurance Company of Los Angeles, California (INAPRO), a foreign corporation, Appellees.

No. 84-975.
|
Feb. 5, 1985.
|
Rehearing Denied March 13, 1985.

Synopsis
Beneficiary under testator's will brought action against testator's attorney, his law firm, and their insurer after devise of testator's residence failed because it was testator's homestead. The Circuit Court, Dade County, Joseph J. Gersten, J., granted defendants' motion for summary judgment, and plaintiff appealed. The District Court of Appeal, Nesbitt, J., held that: (1) beneficiary was not entitled to recover for attorney's alleged negligent drafting of testator's will based on attorney's failure to advise testator about possibility of making inter vivos transfer of his residence failed, and (2) beneficiary was not entitled to recover for attorney's alleged negligent drafting of testator's will based on attorney's failure to advise testator about making devise to beneficiary of property other than his residence.

Affirmed.

Daniel S. Pearson, J., filed dissenting opinion.

West Headnotes (9)

[1] Attorney and Client
Elements of malpractice or negligence action in general

Generally, in a negligence action against attorney, plaintiff must prove: attorney's employment by plaintiff (privity); attorney's neglect of a reasonable duty owed to plaintiff; and that such negligence resulted in and was proximate cause of loss to the plaintiff.

6 Cases that cite this headnote

[2] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Attorney preparing a will has a duty not only to testator client, but also to testator's intended beneficiaries; therefore, in limited circumstances, intended beneficiary under a will may maintain a legal malpractice action against the attorney who prepared the will, if through the attorney's negligence a devise to that beneficiary fails.

2 Cases that cite this headnote

[3] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Beneficiary was not entitled to recover for attorney's alleged negligent drafting of testator's will based on attorney's failure to advise testator about possibility of making inter vivos transfer of his residence, although devise to beneficiary of residence failed because it was a homestead, since no privity existed between beneficiary and attorney with respect to inter vivos transfer of property. West's F.S.A. Const. Art. 10, § 4; West's F.S.A. § 732.401.

Cases that cite this headnote

[4] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Generally, attorney is not liable to third parties for negligence or misadvice given

to client concerning inter vivos transfer of property.

1 Cases that cite this headnote

[5] Attorney and Client
Duties and liabilities to adverse parties and to third persons

For beneficiary's action against attorney for negligent drafting of will to fall within exception to privity requirement, testamentary intent that has allegedly been frustrated must be expressed in the will and beneficiary's loss must be a direct result of, or proximately caused by attorney's alleged negligence.

9 Cases that cite this headnote

[6] Wills
Writings and declarations of testator

Declarations made by testator concerning disposition of his property are not admissible to show that he intended to dispose of his property in a particular manner not evidenced by the will.

Cases that cite this headnote

[7] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Attorney becomes liable to a testamentary beneficiary only if testamentary intent, as expressed in the will, is frustrated by attorney's negligence and beneficiary's legacy is lost or diminished as a direct result of that negligence.

1 Cases that cite this headnote

[8] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Beneficiary was not entitled to recover for attorney's alleged negligent drafting of testator's will based on attorney's failure to advise testator about making devise to beneficiary of property other than his residence, although devise of testator's residence failed because it was a homestead, since constitutional provision rather than negligence in drafting will frustrated testamentary intent. West's F.S.A. § 732.4015; West's F.S.A. Const. Art. 10, §§ 4, 4(c).

3 Cases that cite this headnote

[9] Attorney and Client
Duties and liabilities to adverse parties and to third persons

Attorney will be liable to intended beneficiary under a will only if attorney's negligence in drafting the will or having it properly executed directly results in plaintiff beneficiary's loss.

Cases that cite this headnote

Attorneys and Law Firms

***316** Fogle & Poole and Lewis H. Fogle, Jr., William Feldman, Miami, for appellant.

Marlow, Shofi, Ortmayer, Smith, Connell & Valerius and Joseph H. Lowe, Miami, for appellees.

Before HUBBART, NESBITT and DANIEL S. PEARSON, JJ.

Opinion

NESBITT, Judge.

The plaintiff appeals a summary final judgment entered in favor of the defendants on a claim of legal malpractice in drafting a will. We affirm.

The facts relevant to this appeal are undisputed. In March 1981, Johnson, while in the hospital, contacted Weinstein, an attorney, to have a will drawn up. A phone conversation ensued between Johnson, Weinstein and Weinstein's secretary, in which the secretary took notes on Johnson's testamentary wishes. In conformity with these expressed wishes, a will was drawn up and executed. Johnson died of cancer two weeks after the will was executed.

Prior to his death, Johnson shared his residence with his mother (the plaintiff) and his minor son. The will contained a provision which left his mother a life estate in the residence with the remainder going to his sons. In the probate proceedings, however, it was determined that the residence was Johnson's homestead and consequently was not subject to devise.[1] *See* Art. X, § 4, Fla. Const.; § 732.401-.4015, Fla.Stat. (1981). It therefore passed directly to Johnson's children pursuant to section 732.401, Florida Statutes (1981).[2]

The plaintiff, Johnson's mother, instituted this suit against Weinstein, his law firm, and their insurer. The complaint alleges that due to Weinstein's negligence and lack of skill in drafting the will, the devise of the life estate in the residence to the plaintiff failed. Upon motion, the trial court ***317** entered a summary final judgment in favor of the defendants. This appeal followed.

[1] **[2]** Generally, in a negligence action against an attorney, the plaintiff must prove: (1) the attorney's employment by the plaintiff (privity);[3] (2) the attorney's neglect of a reasonable duty owed to the plaintiff; and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff. *Drawdy v. Sapp,* 365 So.2d 461 (Fla. 1st DCA 1978); *Weiner v. Moreno,* 271 So.2d 217 (Fla. 3d DCA 1973). Florida courts have recognized, however, that an attorney preparing a will has a duty not only to the testator-client, but also to the testator's intended beneficiaries. In limited circumstances, therefore, an intended beneficiary under a will may maintain a legal malpractice action against the attorney who prepared the will, if through the attorney's negligence a devise to that beneficiary fails. *DeMaris v. Asti,* 426 So.2d 1153 (Fla. 3d DCA 1983); *McAbee v. Edwards,* 340 So.2d 1167 (Fla. 4th DCA 1976). Although it is generally stated that the action can be grounded in theories of either tort (negligence) or contract (third-party beneficiary), the contractual theory is "conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence." *McAbee,* 340 So.2d at 1169 (quoting *Heyer v. Flaig,* 70 Cal.2d 223, 449 P.2d 161, 74 Cal.Rptr. 225 (1969)). In effect, *McAbee* and *DeMaris* have established a limited exception in the area of will drafting to the requirement of the first element (the privity requirement) in a legal malpractice action.

On this appeal, the plaintiff argues that Weinstein was negligent in not advising Johnson of the prohibition against devising homestead property and of possible alternatives. As the plaintiff suggests, it may have been possible to structure a conveyance to avoid the constitutional provision by having Johnson make an *inter vivos* transfer of a vested interest in the residence to her. It is also possible that Johnson might have wanted to devise some other comparable property interest to his mother if he had known of the constitutional prohibition or that the devise might fail. Perhaps it could even be said that Weinstein's failure to advise Johnson of these possibilities was a breach of duty owed to Johnson.[4] These possibilities, however, do not aid the plaintiff's cause here.

[3] **[4]** With regard to the first possibility, there is no indication in the record of any desire on the part of Johnson to make a transfer of any interest in the residence prior to his death. Even if such a desire did exist, however, any alleged negligence attributable to Weinstein's failure to advise Johnson concerning the possibility of an *inter vivos* transfer falls outside the limited exception established in *McAbee* to the privity requirement in legal malpractice actions. Generally, an attorney is not liable to third parties for negligence or misadvice given to a client concerning an *inter vivos* transfer of property. *See Southworth v. Crevier,* 438 So.2d 1011 (Fla. 4th DCA 1983); *Drawdy.* Since no privity existed between the plaintiff and Weinstein and no duty was owed to the plaintiff, this action cannot be maintained by the plaintiff on an alleged breach of duty owed solely to Johnson.

[5] Under the limited exception to the privity requirement, this court has held that an attorney's

> liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the testamentary ***318** intent, *as expressed in the will,* is frustrated, and the beneficiary's legacy is lost or diminished as a direct result of that negligence.

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DeMaris, 426 So.2d at 1154. The holding in *DeMaris* encompasses two concepts. First, for an action to fall within the exception, the testamentary intent that has allegedly been frustrated must be "expressed in the will." Second, the beneficiary's loss must be a "direct result of," or proximately caused by the attorney's alleged negligence.

[6] **[7]** **[8]** In the present case, there is no indication that Johnson wished or intended any alternative property interest to pass to his mother under the will if the devise of the life estate in the residence failed. An intent to devise a comparable interest in other property upon the failure of the primary devise cannot reasonably be extrapolated from any of the provisions in Johnson's will. Furthermore, a disappointed beneficiary may not prove, by evidence extrinsic to the will, that the testator's testamentary intent was other than that expressed in the will. [5] *DeMaris.* In the instant case, Johnson's only testamentary intent expressed in the will that has been frustrated is his wish that his mother, the plaintiff, receive a life estate in his residence upon his death. [6]

[9] An attorney will be liable to an intended beneficiary under a will only if the attorney's negligence in drafting the will or having it properly executed directly results in the plaintiff-beneficiary's loss. *DeMaris,* 426 So.2d at 1154. In the case at bar, the plaintiff alleges in her complaint, as ***319** she must to fit within the exception to the privity requirement, that the devise of the life estate failed and, thus, Johnson's testamentary intent was frustrated, due to Weinstein's negligence in drafting the will. The probate court, however, determined that the residence was Johnson's homestead within the meaning of article X, section 4 of the Florida Constitution. Since Johnson was survived by a minor child, the homestead was not subject to devise. Art. X, § 4(c), Fla. Const.; § 732.4015, Fla.Stat. (1981). Accordingly, there was no means by which a will could have been drafted so that Johnson's testamentary intent, that a life estate in the homestead pass to his mother on his death, could have been accomplished. *Cf. Johns v. Bowden,* 68 Fla. 32, 66 So. 155 (1914) and *Estate of Johnson,* 397 So.2d 970 (Fla. 4th DCA 1981) (declaring invalid attempts (by means of trusts) to contravene the constitutional prohibition against testamentary disposition of homestead property). Johnson's testamentary intent was not frustrated by Weinstein's professional negligence, but rather by Florida's constitution and statutes. [7] Summary judgment for the defendants was therefore proper since any alleged negligence on the part of Weinstein in drafting the will could not have been the cause of the plaintiff's claimed loss.

Upon the foregoing analysis, the summary final judgment is affirmed.

DANIEL S. PEARSON, Judge, dissenting.

As I understand it, the majority opinion is bottomed on the legal premise that an attorney can be liable to an intended beneficiary under a will *only* if the beneficiary's loss resulted from the attorney's negligence in either drafting the will or seeing to its proper execution. Since here the will was indisputably composed in complete accordance with the testator's expressed wishes, and, of course, properly executed, it obviously follows, says the majority, that the appellant has no cause of action against the obedient scrivener. In other words, the majority declares the attorney to be immune from liability so long as, robot-like, he puts down on paper what the testator tells him to put down. And, according to the majority, if some law which was known or should have been known to the attorney prevents the testator's correctly recorded wishes from being carried out, it is the law, not the attorney, which has frustrated the testamentary intent.

I think it utterly indefensible to say that an attorney's failure to advise a testator that his desired devise is a nullity is any less negligent than an attorney's faulty draftsmanship or improper execution of a will. Whether a defendant can "be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." ***320** *McAbee v. Edwards,* 340 So.2d 1167, 1169 (Fla. 4th DCA 1976) (*quoting from Biakanja v. Irving,* 49 Cal.2d 647, 650, 320 P.2d 16, 19 (1958)). *See Licata v. Spector,* 26 Conn.Supp. 378, 225 A.2d 28 (C.P.1966). The liability of an attorney to an intended beneficiary under a will exists because:

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> "[w]hen an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests. Indeed, the executor of an estate has no standing to bring an action for the amount of the bequest against an attorney who negligently prepared the estate plan, since in the normal case the estate is not injured by such negligence except to the extent of the fees paid; only the beneficiaries suffer the real loss.... [U]nless the beneficiary could recover against the attorney in such a case, no one could do so and the social policy of preventing future harm would be frustrated."
>
> *Heyer v. Flaig,* 70 Cal.2d 223, 228, 74 Cal.Rptr. 225, 228-29, 449 P.2d 161, 164-65 (1969)

Not until today has any court suggested that an attorney's liability to an intended beneficiary of a will is limited to cases in which the attorney forgets or ignores the testator's specific instruction. Certainly, no important public policy is served by distinguishing between the negligence of an attorney who fails to do what the client has told him to do, and the negligence of an attorney who does what the client has told him to do in a negligent manner, or, as here, does what the client has told him to do, but fails to advise the client that what the client wants done cannot legally be done. Indeed, these latter forms of negligence are, as they should be, unhesitatingly recognized as actionable when brought by intended beneficiaries. *See Heyer v. Flaig,* 449 P.2d 161 (daughters, intended sole beneficiaries of estate, have cause of action against attorney who negligently failed to include in will provision to pretermit testator's "post-testamentary spouse"); *Lucas v. Hamm,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (1961) (doctrine of privity no bar to cause of action against attorney by intended beneficiaries under will where testamentary trust created therein was declared invalid as violating rule against perpetuities; cause of action barred, however, because confusion surrounding rule against perpetuities prevents finding of negligence); *Garcia v. Borelli,* 129 Cal.App.3d 24, 180 Cal.Rptr. 768 (1982) (child and grandchildren of testator have cause of action against attorney who "negligently and carelessly advised decedent" that declarations in will referring to testator's property as "separate" and "community" sufficiently established the character of the property so as to make it subject to testamentary disposition); *Bucquet v. Livingston,* 57 Cal.App.2d 914, 129 Cal.Rptr. 514 (1976) (beneficiaries of inter-vivos trust have cause of action against attorney who failed to advise settlor that provision giving power of revocation to settlor's wife rendered nonmarital half of trust includable in wife's estate resulting in adverse tax consequences and ultimate financial loss to beneficiaries); *McAbee v. Edwards,* 340 So.2d 1167 (daughter, intended sole beneficiary of estate, has cause of action against attorney who allegedly misadvised testator that it was unnecessary to change will in order to pretermit husband, whom testator married after will was executed).[7]

***321** I am equally, if not more, disturbed by the majority's conclusion that because there is no expression in the will as to what is to happen upon the failure of the "primary" devise "expressed in the will," that therefore Mr. Johnson had no intent to provide for his mother if a life estate in the homestead could not be devised. The majority's insistence that the appellant is an intended beneficiary of the will only if she could receive a life estate in the homestead is unfounded. Plainly, Mr. Johnson's intent to make his mother a substantial beneficiary of his estate is discernible from the will, and the reason, of course, that the will contains no secondary or alternative

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devise to the mother is that the testator allegedly was never informed that any was necessary.

In *Ogle v. Fuiten,* 102 Ill.2d 356, 80 Ill.Dec. 772, 466 N.E.2d 224 (1984), the reciprocal wills of Alma and Oscar Smith gave the survivor the estate of the other, if the survivor survived more than thirty days, and, in a separate clause, gave their nephews, the Ogles, the entire estates in the event that the Smiths died in a common disaster. Alma Smith died of cancer fifteen days after her husband died of a stroke. Since the wills contained no other dispositive provisions, the estates passed by intestacy to persons other than the Ogles. The Ogles sued the attorney who prepared the wills, asserting, *inter alia,* that it was the testators' intention that their property go to the Ogles if, as happened, neither of the Smiths survived the other by thirty days.

The attorney argued that the Ogles could not prevail, "because the testators' intent ... shows that plaintiffs were to benefit only under certain circumstances [common disaster] which did not occur," and that, therefore, "the intent of the testators to benefit plaintiffs is not, as required, ... 'clearly evident.' " *Id.* at 774, 466 N.E.2d at 226. He further argued that *Heyer, Lucas, Licata, McAbee* and the like, all permitting a cause of action by the intended beneficiary, were distinguishable on the ground that in each of those cases, "the intent of the testator was expressly shown by the will." *Id.* at 775, 466 N.E.2d at 227. The court, finding no authority supporting the rule urged by the attorney, rejected the attorney's argument.

The only possible justification for the requirement that the testamentary intent be "expressed in the will," *see DeMaris v. Asti,* 426 So.2d 1153, 1154 (Fla. 3d DCA 1983), is to guard against the onslaught of fraudulent claims. But where, as here, the claim is made by a person "whose benefit is so direct and substantial and so closely connected with that of the promisee [testator] that it is economically desirable to let [him or her] enforce it," *Stowe v. Smith,* 184 Conn. 194, 197, 441 A.2d 81, 83 n. 1 (1981) (*quoting* 4 A. Corbin, *Contracts* § 786 (Supp.1971)), and, a fortiori, where, again as here, the will on its face shows an intent by the testator to provide shelter or its equivalent for his mother during her lifetime in the event of his death, [8] the envisioned horribles are of no concern, and there is thus no justification whatsoever to preclude the mother's action. [9]

Although it may be said that to permit a finding of liability in this case is to contribute to the progressive "assault upon the citadel of privity," [10] it seems to me that to absolve the attorney is to take a giant step ***322** backwards. *See Licata v. Spector,* 225 A.2d at 31. As one court has reasoned:

> "First, neither of the rationales supporting the requirement of privity applies to the situation presented. This is not a case in which the ability of a nonclient to impose liability would in any way affect the control over the contractual agreement held by the attorney and his client, as the interests of the [testator] and the intended beneficiary with regard to the proper drafting and execution of the will are the same. [11] Additionally, this duty does not extend to the general public but only to a nonclient who was the direct and intended beneficiary of the attorney-client relationship.
>
> "Second, it is obvious that 'the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will....' "
>
> *Needham v. Hamilton,* 459 A.2d 1060, 1062-63 (D.C.1983) (footnote added; citations omitted).

Accordingly, I would reverse and remand for further proceedings.

All Citations

467 So.2d 315, 10 Fla. L. Weekly 327

Footnotes

1 There is no dispute over the determination that the residence was Johnson's homestead within the meaning of the Florida Constitution, and that it was not subject to devise because Johnson was survived by a minor child. Art. X, § 4(c), Fla. Const.; § 732.4015, Fla.Stat. (1981).

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2 It is apparent that either Johnson's spouse predeceased him or their marriage had been dissolved. Therefore, in accordance with the Florida Statutes, the homestead passed directly to Johnson's children. *See* § 732.401(1); § 732.103(1).

3 Proof of this first element generally establishes that the attorney owes a duty to the plaintiff. The two principal justifications relied upon for the retention of the privity requirement in legal malpractice actions are: (1) to allow such liability without privity would deprive the parties to the contract of control of their own agreement; and (2) a duty to the general public would impose a huge potential burden of liability on the contracting parties. *See generally* Annot., 45 A.L.R.3d 1181.

4 We make no determination as to whether Weinstein's action in the present case amounted to a breach of duty owed to his client. Such a determination is to be left to the finder of fact in an appropriate case.

5 Declarations made by the testator concerning the disposition of his property are not admissible to show that he intended to dispose of his property in a particular manner not evidenced by the will.

> While parol evidence is admissible for the purpose of interpreting something actually written in the will, it cannot be admitted for the purpose of adding to the will something which does not appear on the face of the instrument.
>
> It is not the rule of evidence which excludes extrinsic facts in contradiction to a will, but rather the Statute of Wills. The statute of wills requires all testamentary conveyances to be in writing and executed with certain prescribed formalities. [footnote omitted]
>
> 1 T.A. Thomas & D.T. Smith, Florida Estates Practice Guide ch. 16, § 38 (1984). *See* § 732.502, Fla.Stat. (1981). The danger of perjury is the reason behind the statutory provisions which regulate wills and is also generally considered the reason for the rule which prohibits the use of evidence extrinsic to the will to prove a testator's intent. *See* 4 Bowe-Parker; Page on Wills § 32.9, at 271 (4th ed. 1961).

6 The dissent would have us overrule a recent decision of this court which holds that in an action of this nature, the testamentary intent that has allegedly been frustrated must be expressed in the will. *See DeMaris.* The law is now established here and in most jurisdictions that an attorney becomes liable to a testamentary beneficiary only if the testamentary intent, *as expressed in the will,* is frustrated by the attorney's negligence and the beneficiary's legacy is lost or diminished as a direct result of that negligence. *DeMaris. Accord Ventura County Humane Soc'y for Prevention of Cruelty to Children & Animals v. Holloway,* 40 Cal.App.3d 897, 115 Cal.Rptr. 464 (Ct.App.1974). *See also supra* note 5. While we recognize that the plaintiff was in fact an intended beneficiary of the decedent's will, she may recover under this theory only the deficit that results from a frustrated testamentary intent *expressed in the will.* To permit the plaintiff to prove that the testamentary intent was other than that expressed in the will not only would run contrary to the avowed purpose of the statute of wills to guard against fraud, but also would open the door to "the fabled triplets of conjecture, speculation and surmise," *Pena v. Allstate Ins. Co.,* 463 So.2d 1256 (Fla. 3d DCA 1985) (Schwartz, C.J., dissenting), which have never entitled a litigant to affirmative relief.

> While the court in *Ogle v. Fuiten,* 102 Ill.2d 356, 80 Ill.Dec. 772, 466 N.E.2d 224 (1984), relied upon by the dissent, rejected the rule that only the testator's intent, as expressed in the will, is relevant in a legal malpractice action brought by an intended beneficiary, the court's decision was premised on its failure to find any authority supporting such a rule. In the present case, we have not only found authority for the rule, but that authority is a prior decision of this very court. *See DeMaris. Accord Holloway. See supra* note 5. In addition, we note that it was conceded in *Ogle* that under Illinois law privity is not a prerequisite to an action by a nonclient against an attorney. 80 Ill.Dec. at 774, 466 N.E.2d at 226. *See Pelham v. Griesheimer,* 92 Ill.2d 13, 64 Ill.Dec. 544, 440 N.E.2d 96 (1982). Florida law, however, is to the contrary. In fact, this court has specifically held that in a legal malpractice action, the plaintiff must prove the attorney's employment (privity). *Weiner,* 271 So.2d at 219. *Accord Drawdy.*

7 In this regard, *McAbee* is distinguishable. In *McAbee* a daughter sued her mother's attorney for the negligent preparation of the mother's will. The mother's testamentary intent, as expressed in the will, was that her entire estate go to the daughter. This intent was frustrated because the mother married after the execution of the will and on her death her husband claimed an interest in the estate as a pretermitted spouse. The mother had requested the attorney to redraft her will after her marriage so that the daughter would remain the sole beneficiary. The attorney advised her, however, that redrafting the will was not necessary. The court in *McAbee* held that the daughter could state a cause of action against the attorney. The attorney in McAbee could have drafted the will to avoid the husband's claim under the pretermitted spouse statute by inserting a provision in the will reflecting the testator's intent that the husband take nothing. This means of avoiding the pretermitted spouse's claim against the estate was provided for in the statute itself. *See* § 731.10, Fla.Stat. (1973). In contradistinction, there was no means by which Weinstein, the attorney in the present case, could have drafted the will to avoid the effect of Florida's statutes and constitutional provisions prohibiting the devise of homestead property.

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7 I concede that these cases, perhaps with the exception of *Lucas,* differ from the present case in that the attorneys there could have drafted wills which would have accomplished the testator's goal, while here no amount of will-drafting could have accomplished a testamentary devise of the homestead. But, unlike the majority, I think this difference is totally without legal significance.

8 It is certainly fair to presume this to be the broader intent of the testator, which, but for the attorney's failure to advise the testator that his intended devise would fail under Florida's homestead laws, would have been expressed in the will.

9 The majority concedes that the attorney's action or inaction, as the case may be, in this case may have amounted to a breach of duty to his *client. See* n. 4. Thus, it is only that the appellant does not come within an exception to the privity requirement, not the failure to allege negligence, that prevents the present action.

10 *Ultramares Corp. v. Touche,* 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

11 *Adams v. Chenowith,* 349 So.2d 230 (Fla. 4th DCA 1977), recedes from the rule in *McAbee* to the extent that the interests of the parties are opposing.

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629 So.2d 198
District Court of Appeal of Florida,
Fifth District.

Eric L. BOLVES, et al., Appellants,
v.
Roy Lee HULLINGER, Appellee.

No. 93-375.
|
Nov. 12, 1993.
|
Rehearing Denied Jan. 5, 1994.

Synopsis
Client filed malpractice action against attorneys who allegedly failed to file timely age discrimination suit against client's former employer. The Circuit Court, Orange County, William C. Gridley, J., entered judgment for the client and the attorneys appealed. The District Court of Appeal, Goshorn, J., held that the evidence was insufficient to show that the client had been the victim of willful age discrimination and, thus, the client failed to show that the failure to file timely age discrimination suit resulted in any damage such as the inability to recover liquidated damages under Age Discrimination in Employment Act (ADEA).

Reversed.

West Headnotes (5)

[1] Courts
Exclusive or Concurrent Jurisdiction

State and federal courts have concurrent jurisdiction over suits filed under federal Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.

Cases that cite this headnote

[2] Release
Operation and Effect in General

Release executed by client in his state age discrimination action did not release attorneys from liability for malpractice premised on failure to file timely age discrimination suit against client's former employer.

Cases that cite this headnote

[3] Attorney and Client
Elements of Malpractice or Negligence Action in General

Elements of legal malpractice are that attorney was employed, that attorney neglected reasonable duty, and that attorney's negligence resulted in and was proximate cause of loss to client.

8 Cases that cite this headnote

[4] Attorney and Client
Pleading and Evidence

Evidence was insufficient to show that client had been victim of willful age discrimination and, thus, client failed to show that attorneys' failure to file timely age discrimination suit against client's former employer resulted in any damage to client; client was unable to prove that, but for any negligence, he would have recovered liquidated damages under Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7(b), as amended, 29 U.S.C.A. §§ 621 et seq., 626(b).

5 Cases that cite this headnote

[5] Civil Rights
Discharge or Layoff

Civil Rights
Age Discrimination

Reorganization of employer's business and elimination of older employee based on employee's poor performance, when compared to his younger peers, is nondiscriminatory basis for discharge and presents no evidence of intentional or reckless disregard needed to recover liquidated damages under Age Discrimination

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in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7(b), as amended, 29 U.S.C.A. §§ 621 et seq., 626(b).

Cases that cite this headnote

Attorneys and Law Firms

***199** Patrick M. Magill, Orlando, for appellants.

Carlos R. Diez-Arguelles, Orlando, for appellee.

Opinion

GOSHORN, Judge.

Eric Bolves, Esquire, Ralph Leemis, Esquire, and the partnership of Leemis and Bolves appeal the final judgment rendered against them in the attorney malpractice action filed by Roy Hullinger. Hullinger successfully argued below that he had been damaged by appellants' failure to timely file a federal age discrimination suit against Hullinger's former employer, Ryder Truck Rental, Inc. We reverse.

Hullinger was terminated by Ryder in late April, 1983. Two months later Hullinger retained appellants to act on his behalf. Appellants filed an administrative complaint with the Florida Commission on Human Relations (FCHR) and an administrative complaint with the Federal Equal Employment Opportunity Commission (EEOC) asserting the alleged age discrimination. Appellants never filed a state or federal civil suit for age discrimination. The statute of limitations expired on a cause of action under the federal Age Discrimination in Employment Act while appellants represented Hullinger.

On November 26, 1986, appellants' employment was terminated by Hullinger. Hullinger hired substitute counsel in early January, 1987.

[1] **[2]** On January 16, 1987, FCHR issued a determination of "no cause," relating to its conclusion that there was no cause to find Hullinger had been discriminated against on the basis of age. That same date, substitute counsel filed a state civil suit against Ryder. [1] ***200** The filing of the civil suit divested FCHR of jurisdiction to proceed further, and it accordingly dismissed Hullinger's administrative case. The federal EEOC file was likewise closed.

Thereafter, Hullinger's state civil suit against Ryder was dismissed based on a statute of limitations defense. [2] Two days after the trial court's dismissal of Hullinger's suit against Ryder, Hullinger filed a legal malpractice suit against appellants. Count I of the amended complaint asserts appellants negligently failed to file a federal court suit pursuant to the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. [ADEA], as amended, or inform Hullinger of his right to a federal cause of action. Hullinger alleged that as a result of appellants' negligence, his right to a federal cause of action, including double damages, was "curtailed." The jury agreed, specifically finding that Ryder had willfully discriminated against Hullinger and that appellants' negligence in failing to timely file suit damaged Hullinger.

[3] **[4]** A cause of action for legal malpractice has three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence resulted in and was the proximate cause of loss to the client. *Weiner v. Moreno,* 271 So.2d 217 (Fla. 3d DCA 1973). To establish the third element, Hullinger had to prove that, but for appellants' negligence in failing to timely file the ADEA claim, he would have recovered liquidated damages in an ADEA suit.

Section 626(b) of the ADEA provides that liquidated damages [3] are payable only for *willful* violations of the chapter.

> Where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the Act. Nonetheless, in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some additional evidence of outrageous conduct.
> *Dreyer v. Arco Chem. Co.,* 801 F.2d 651 (3d Cir.1986), *cert. denied,* 480 U.S. 906, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987). *See also Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523

(1985). We find that the evidence offered by Hullinger to demonstrate willfulness fell short as a matter of law. The evidence Hullinger relied on to show the violation was willful was that (1) the decision to fire him was made quickly and (2) one of Hullinger's supervisors admitted the procedures in the personnel manual for termination were not followed, the personnel office was not contacted, and neither of Hullinger's supervisors considered the ADEA when terminating Hullinger.

[5] The speed with which the decision was made was immaterial. The admission that Ryder's policy manual for termination was not consulted or followed likewise is immaterial. There was no evidence of what the manual contained or that it was even applicable to terminations for other than disciplinary ***201** reasons. Contrary to Hullinger's assertion, Hullinger's supervisor testified that he had contacted the personnel department and that he was told there was no problem with terminating Hullinger because termination was not due to Hullinger's age. Presumably, the personnel department was aware of the ADEA because its advice was in accordance with ADEA provisions. The supervisors did not consider the ADEA because the issue of Hullinger's age never occurred to them.

It was unrebutted that the supervisors made a purely business decision necessitated by corporate reorganization. Reorganization of a business and the elimination of an older employee based on the employee's poor performance relative to younger peers is a nondiscriminatory basis for discharge of the protected employee. *Hanchey v. Energas Co.,* 925 F.2d 96 (5th Cir.1990); *Connell v. Bank of Boston,* 924 F.2d 1169 (1st Cir.), *cert. denied,* 501 U.S. 1218, 111 S.Ct. 2828, 115 L.Ed.2d 997 (1991). There was a complete absence of evidence of intentional or reckless disregard for whether Ryder's actions were in violation of the ADEA.

Because Hullinger would not have been entitled to recover liquidated damages under a federal cause of action, Hullinger should not have been permitted to recover damages from appellants in the legal malpractice suit. Appellants' negligence in allowing the statute of limitations to expire on the federal claim did not result in damage to Hullinger. Accordingly, the final judgment in favor of Hullinger is reversed.

REVERSED.

GRIFFIN and DIAMANTIS, JJ., concur.

All Citations

629 So.2d 198, 18 Fla. L. Weekly D2397

Footnotes

1 There is concurrent jurisdiction between the state and federal courts in age discrimination suits filed under the federal act. *Chapman v. City of Detroit,* 808 F.2d 459, 463 (6th Cir.1986) ("There can be no doubt that the state courts have concurrent jurisdiction with the federal courts under the ADEA"). Thus, the federal ADEA claim could have been pursued in state court had the claim been timely asserted.

2 On appeal from the dismissal, this court upheld the trial court's conclusion that a two-year statute of limitations governs claims brought under section 760.10. *Hullinger v. Ryder Truck Rental, Inc.,* 516 So.2d 1148 (Fla. 5th DCA 1987). The supreme court reversed this court's holding, finding instead that a four year statute of limitations applied. *Hullinger v. Ryder Truck Rental, Inc.,* 548 So.2d 231 (Fla.1989). Upon remand, Ryder and Hullinger settled the suit. For $65,000, Hullinger agreed to release Ryder. The release of Ryder did not act as a release of appellants. *See Keramati v. Schackow,* 553 So.2d 741 (Fla. 5th DCA 1989) (holding that clients were not barred by *res judicata,* collateral estoppel, or estoppel *in pais* from bringing legal malpractice action against attorneys who had represented them in earlier case, even though earlier case was settled and the clients had certified that the settlement was "full and just."). *See also King v. Jones,* 258 Or. 468, 483 P.2d 815 (1971) (holding that the client's release of an original tort-feasor after the statute of limitations has run does not bar the client's malpractice action against the attorneys responsible for letting the statute of limitations expire).

3 Liquidated damages, if allowed, are in the amount equivalent to the compensatory damages awarded plaintiff for his lost earnings and benefits. The jury here found the amount of damages sustained by Hullinger for "lost earnings and benefits" to be $139,500.

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876 F.Supp. 1270
United States District Court,
M.D. Florida,
Orlando Division.
.

James C. ORR, Trustee, Plaintiff,
v.
BLACK & FURCI, P.A., Roy Black, Defendants.

No. 93–642–CIV–ORL–18.
|
Feb. 3, 1995.

Synopsis
Chapter 11 trustee for debtor who pled guilty to money laundering sued debtor's criminal defense attorney alleging malpractice, breach of fee agreement, and seeking accounting of attorney's expenses and rescission of fee agreement. On attorney's motion for summary judgment, the District Court, G. Kendall Sharp, J., held that: (1) under Florida law, criminal defendant who pled guilty to crime was required to prove his innocence in order to maintain cause of action for malpractice against criminal defense attorney; (2) breach of contract claim against attorney that alleged only attorney's negligence had to contain allegation of innocence by criminal defendant; (3) fee agreement would not be rescinded on ground it was unconscionable; and (4) trustee was not entitled to accounting.

Motion granted.

West Headnotes (10)

[1] Attorney and Client
Conduct of Litigation

Under Florida law, trustee for Chapter 11 debtor who pled guilty to money laundering had to establish debtor's innocence in order to maintain legal malpractice action against debtor's criminal defense attorney.

Cases that cite this headnote

[2] Attorney and Client
Pleading and Evidence

Under Florida law, generally, in claim for legal malpractice, client must plead and prove attorney's employment; attorney's neglect of reasonable duty; and that attorney's negligence resulted in and was proximate cause of loss to client.

1 Cases that cite this headnote

[3] Attorney and Client
Trial and Judgment

Under Florida law, although proximate causation in legal malpractice action ordinarily is a factual issue, in certain cases proximate cause may be determined as matter of law, based on fairness and considerations of public policy.

2 Cases that cite this headnote

[4] Attorney and Client
Conduct of Litigation

Under Florida law, when criminal defendants plead guilty to crime, as malpractice plaintiffs, they must prove their innocence in order to maintain cause of action for legal malpractice against their criminal defense attorney.

3 Cases that cite this headnote

[5] Attorney and Client
Trial and Judgment

Under Florida law, breach of contract claims brought by trustee for Chapter 11 debtor who pled guilty to money laundering against criminal defense attorney that alleged only attorney's negligence in fulfilling his duties had to contain allegation of debtor's innocence.

Cases that cite this headnote

[6] Attorney and Client
Conduct of Litigation

Criminal defense attorney for Chapter 11 debtor could not be held liable for breaching

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fee agreement due to his failure to appear at debriefing sessions, where attorney was only retained to represent defendant in criminal proceedings then pending, and, in plea agreement between government and defendant both federal government and state agreed not to charge defendant with any crime to which defendant admitted during course of debriefing sessions, so that any information gleaned from defendant in debriefings could not be used in criminal proceedings for which defense counsel had been retained.

Cases that cite this headnote

[7] **Attorney and Client**
Making, Requisites, and Validity

Attorney fee agreement between Chapter 11 debtor and debtor's defense counsel could not be set aside as unconscionable after debtor pled guilty, even though debtor claimed that fee charged was excessive when one considered amount of work done by attorney to earn it, where fee agreement provided that no portion of fee would be returned if case was resolved without going to trial.

Cases that cite this headnote

[8] **Attorney and Client**
Requisites and Validity of Contract

Generally, reasonableness of attorney's fee agreements and other contracts is evaluated as it appeared to parties at time contract was entered into.

Cases that cite this headnote

[9] **Attorney and Client**
Construction and Operation

That criminal proceeding for which attorney was retained to represent defendant ended in entry of guilty plea and that defendant retained another attorney who performed substantial amount of work did not suggest that accounting was appropriate pursuant to request of criminal defendant's Chapter 11 bankruptcy trustee, where fee agreement specifically provided that attorney would represent defendant for flat fee of $250,000 plus costs and that if case were settled in any other manner than by contested trial, no part of fee was to be returned.

Cases that cite this headnote

[10] **Attorney and Client**
Construction and Operation

Under Florida law, that criminal defense attorney was terminated as defendant's counsel prior to providing full representation did not entitle bankruptcy trustee for criminal defendant to accounting, where money paid to attorney for representation of defendant was not retainer to be earned through hourly fee but instead was a flat fee for attorney's representation, payable regardless of number of hours spent working on case.

Cases that cite this headnote

Attorneys and Law Firms

***1272** Kevin F. Foley, Maguire, Voorhis & Wells, P.A., Orlando, FL, for plaintiff.

Robert A. Soriano, James B. Baldinger, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, FL, Scott A. Kornspan, Black & Seiden, P.A., Miami, FL, for defendants.

ORDER

G. KENDALL SHARP, District Judge.

This case is before the court on Defendants' motion for summary judgment. Plaintiff James C. Orr (Orr) is the Chapter 11 Trustee of Timothy S. Brumlik's (Brumlik) and Patricia Brumlik's estate in the related bankruptcy case, No. 91–03720–6C1. Orr brought this case against Defendants Black & Furci, P.A. and Roy Black (Black), alleging that Black was negligent in his representation of Brumlik in a federal criminal matter in 1990. Orr seeks damages for professional malpractice and for breach of contract, an accounting of Roy Black's expenses in

representing Brumlik, and rescission of the Fee Agreement between Black and Brumlik. Upon review of the case file and the applicable law, the court concludes that Defendants are entitled to summary judgment on all counts.

I. Facts

Timothy S. Brumlik was arrested on September 15, 1989, pursuant to an undercover operation conducted by the Florida Department of Law Enforcement (FDLE) and the Internal Revenue Service (IRS). This arrest ultimately led to a six count federal indictment for money laundering, forfeiture, wire fraud, and attempting to import cocaine. Brumlik's potential exposure under this indictment included life imprisonment. Brumlik retained Black & Furci, P.A. to represent him in the criminal proceeding in the United States District Court, Middle District of Florida in Orlando. On October 18, 1989, Roy Black and Brumlik signed a Fee Agreement wherein Black agreed to represent Brumlik in the specific criminal proceedings then against him in exchange for $250,000 plus expenses. The fee was to include representation "up to the filing and arguing of a motion for a new trial; it includes interlocutory appeals, but not an appeal from a final judgment of guilt...." (Fee Agreement). The Fee Agreement also provided that "should the case be settled in any other manner than by contested trial, no part of the fee is to be returned." The Brumliks ultimately paid $301,435 in fees and costs to Black & Furci. The Brumliks also retained James Russ (Russ) to serve as co-counsel in the case.

The lead FDLE agent in the investigation against Brumlik, Juan (Tony) Iturrey (Iturrey), also was arrested in late October 1989. Iturrey was charged with violating federal bribery laws, because he forced the confidential informant in the Brumlik case to pay a portion of the informant's reward to him. Conversations between Iturrey and the informant were recorded. Black filed a motion to require the government to provide copies of these tapes. The information contained on these tapes, including a statement by Iturrey that Brumlik was not a money launderer, was such that the government acknowledged that it might have to provide them to Brumlik's attorneys as exculpatory information under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Black and Russ began to investigate the facts and law of the case and to prepare for trial. Before translating all of the Iturrey-informant tapes (from Spanish), Black and Russ recommended that Brumlik plead guilty to a reduced charge. On January 12, 1990, Brumlik's attorneys met with Assistant United States Attorney Ronald Hayward and two IRS agents for a lengthy settlement conference. Out of this conference emerged a Plea Agreement, to which Brumlik agreed on January 19. On January 22, Brumlik pled guilty to a superseding information charging him with one count of money laundering in violation of 18 U.S.C. § 1956(a)(3)(B) (1988). At the arraignment, Brumlik admitted that he had committed the crime charged. Brumlik explained to the court that a man had approached him seeking to purchase real estate ***1273** with money obtained from illegal drug sales. Despite this fact, Brumlik agreed to sell a piece of real estate to the individual. With this explanation, the court accepted Brumlik's guilty plea.

The Plea Agreement specified that Brumlik would "cooperate fully with the government and ... testify ... in connection with the charges in this case in other matters.... and mak[e] himself available for interviews by law enforcement officials." In turn, the government agreed to consider whether such cooperation qualified as "substantial assistance," thus qualifying Brumlik for a reduced sentence. In addition, the government agreed not to charge Brumlik with any additional crimes to which he admitted during any interviews with the law enforcement personnel. The Plea Agreement did not provide for a shield protecting Brumlik from jeopardy assessments or immediate levies to be issued by the IRS based on information gained from the interviews.

In accordance with the Plea Agreement, Brumlik submitted to extensive debriefings by government agents. The government agents debriefed Brumlik for 16 or 17 full days; Black did not attend any of these sessions, while Russ attended the sessions for four days. While the plea negotiations were ongoing, Black and Russ consulted attorneys in Washington, D.C. who advised Brumlik with regard to communications matters. Black and Russ were concerned about the indirect impact of a guilty plea on Brumlik's television station licenses. The affidavit of Plaintiff's expert, John P. Hume, asserts that Black should have been aware that Brumlik also was exposing himself to potentially severe civil tax liability. Black did not advise

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Brumlik, however, of the potential civil tax consequences of Brumlik's debriefings.

Brumlik was sentenced on April 22, 1990. During the proceedings, Brumlik announced, "There's no question in my mind ... that I take responsibility for what I did." The court reduced Brumlik's sentence level by two units for Brumlik's acceptance of responsibility, ending with a Total Offense Level of 22, and a jail term of 48 months. The Eleventh Circuit affirmed the judgment of the court on appeal. *United States v. Brumlik,* 947 F.2d 912 (11th Cir.1991).

In conjunction with Brumlik's arrest the IRS had executed search warrants and seized a large amount of Brumlik's business records. The IRS was able to learn information previously unknown to it through the debriefings. On April 30, the IRS issued two jeopardy assessments, one to Brumlik and one to Brumlik and his wife, immediately executing on the Brumliks' remaining assets. On May 1, Brumlik sent a letter to Black terminating Black & Furci's representation.

Brumlik collaterally attacked his sentence pursuant to 28 U.S.C. § 2255 (1988), claiming that he received ineffective assistance of counsel. Brumlik claimed that his counsel had failed to object to the government's failure to file a downward departure motion or to recommend the lower end of the sentencing guidelines range, based on Brumlik's cooperation with law enforcement officials. Also, Brumlik asserted that his counsel had failed to object to the use of sting money to enhance his offense level. Both of these claims were denied by the court, holding that "Defendant has not met his burden of demonstrating that counsel's conduct fell below an objective standard of reasonableness.... [and] has not shown prejudice with regard to this matter, as it was within the Government's discretion to file a substantial assistance motion, and the Court was not required to accept the Government's recommendations."

II. Legal Discussion

Orr has filed suit as Chapter 11 Trustee of the Brumlik estate against Black & Furci, P.A. and Black, on four state law counts. Count I calls for an accounting of the funds Brumlik gave to Black for legal representation. Count II alleges breach of the Fee Agreement between Black and Brumlik, and requests damages on the agreement. Count III alternatively seeks rescission of the Fee Agreement. Finally, Count IV asserts that Defendants are liable for professional malpractice for Black's representation of Brumlik. Defendants have filed a motion seeking summary judgment on all counts pursuant to Federal Rule of Civil Procedure 56. The court will address the professional malpractice ***1274** claim first, followed by the contract claims and the request for an accounting.

A. *Summary Judgment Standards*

Summary judgment is authorized if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249, 106 S.Ct. at 2511. "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248, 106 S.Ct. at 2510.

The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552–53, 91 L.Ed.2d 265 (1986). In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513–14; *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587–88, 106 S.Ct. 1348, 1356–57, 89 L.Ed.2d 538 (1986). The moving party may rely solely on his pleadings to satisfy this burden. *Celotex,* 477 U.S. at 323–24, 106 S.Ct. at 2552–53; Fed.R.Civ.P. 56(c).

"[A]ll that is required [to proceed to trial] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson,* 477 U.S. at 249, 106 S.Ct. at 2510 (quoting *First Nat'l Bank v. Cities Serv.*

Co., 391 U.S. 253, 288–89, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968)). Summary judgment is mandated, however, "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552.

B. *Professional Malpractice*

[1] Orr has claimed that Black was negligent in representing Brumlik, because he failed to take proper account of the Iturrey tapes, and because he failed to properly protect Brumlik from the civil tax consequences of his guilty plea. In his motion for summary judgment, Black asserts that an attorney should not be liable for malpractice in a criminal case unless the prospective plaintiff is innocent of the crime for which he was tried. Black also claims that Orr is collaterally estopped from raising the issue of malpractice with regard to Black's representation of Brumlik in the criminal case, because Brumlik's motion for habeas corpus based on ineffective assistance of counsel was denied. Finally, Black asserts that he should not be held liable for any tax problems indirectly caused by Brumlik's debriefing because those issues were outside the scope of Black's responsibility, which was strictly limited to the criminal proceeding.

[2] Generally, in a claim for legal malpractice plaintiffs must plead and prove (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence resulted in and was the proximate cause of loss to the client/plaintiff. *See Mayo v. Engel,* 733 F.2d 807, 811 (11th Cir.1984) (interpreting Florida law). Black asserts that the court should determine as a matter of law that a malpractice plaintiff's criminal conduct is the proximate cause of any loss a plaintiff suffers as a result of that conduct. Although a number of states have considered the situation, the issue apparently is one of first impression in Florida. This court therefore must interpret Florida law to determine what rule Florida courts most would likely adopt. *See Nichols v. Anderson,* 837 F.2d 1372, 1375 (5th Cir.1988).

***1275** Most of the states considering the issue have determined that a plaintiff in a malpractice action must establish his innocence in order to establish the attorney's liability. Some state courts have fashioned requirements that malpractice plaintiffs obtain post-conviction relief from their criminal trials, including an exoneration of their criminal charge, before any "harm" can be established for a malpractice action. *See, e.g., Stevens v. Bispham,* 316 Or. 221, 851 P.2d 556 (1993); *Shaw v. State, Dep't of Admin.,* 816 P.2d 1358 (Alaska 1991); *but see Gebhardt v. O'Rourke,* 444 Mich. 535, 510 N.W.2d 900 (1994). This conclusion has been referred to as the "no relief-no harm" rule. Because the harm does not occur until post-conviction relief is granted, the statute of limitations for bringing a malpractice action is tolled until relief is granted. *See Stevens, supra,* 851 P.2d at 566.

Rather than declare that criminal defendants/malpractice plaintiffs have suffered no harm until their conviction has been overturned, other courts have held that plaintiffs who cannot prove their innocence have proximately caused whatever injury they suffer as a result of their conviction. *See, e.g., Streeter v. Young,* 583 So.2d 1339 (Ala.1991); *Carmel v. Lunney,* 70 N.Y.2d 169, 518 N.Y.S.2d 605, 511 N.E.2d 1126 (1987); *Peeler v. Hughes & Luce,* 868 S.W.2d 823 (Tex.Ct.App.1993). These courts have so ruled on the basis of various public policy rationales. In *Carmel,* for example, the New York Court of Appeals declared, "[B]ecause criminal prosecutions involve constitutional and procedural safeguards designed ... to protect criminal defendants from overreaching governmental actions ... criminal malpractice cases [are] unique, and policy considerations require different pleading and substantive rules." 518 N.Y.S.2d at 608, 511 N.E.2d at 1128; *see also* Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?,* 59 Fordham L.R. 719, 731 (1991). Courts have been reluctant to permit plaintiffs to sue their attorneys when they are guilty of the crime for which they were tried, or to which they pled guilty in order to avoid a trial. "[T]he purpose of criminal and civil trials is to discover the truth, and if the truth is that the defendant committed unlawful acts which constitute the crime ... charged, he will not be able to collect damages for the discovery of the truth." *Bailey v. Tucker,* 533 Pa. 237, 621 A.2d 108, 113 (1993). In cases where "a person is convicted of a crime because of the inadequacy of counsel's representation, justice is satisfied by the grant of a new trial." *Id.*

However, in *Krahn v. Kinney,* 43 Ohio St.3d 103, 538 N.E.2d 1058 (1989), the Ohio Supreme Court explicitly rejected the idea that criminal malpractice plaintiffs must prove their innocence to present a cognizable claim. The court reasoned that even though a plaintiff may plead

guilty to a crime, he may still have been harmed and should be able to maintain a malpractice action against his attorney. As the court stated, "[The plaintiff] may have made a valid plea on the day of trial, but she would have been better served had she accepted the earlier bargain.... [T]he injury in such a situation 'is not a bungled opportunity for vindication, but a lost opportunity to minimize her criminal record.' " *Krahn,* 538 N.E.2d at 1061 (quoting Court of Appeals). Ohio, therefore, legally recognizes that harm may result from negligent representation in a criminal trial even when the defendant is guilty of the crime.

Although no Florida court has ruled on this specific issue, the Florida Supreme Court has decided that collateral estoppel should apply to criminal defendants who raise unsuccessful ineffective assistance of counsel claims and then seek damages for attorney malpractice. *Zeidwig v. Ward,* 548 So.2d 209 (Fla.1989). As the court stated, "If we were to allow a claim in this instance, we would be approving a policy that would approve the imprisonment of a defendant for a criminal offense ... but which would allow the same defendant to collect from his counsel damages in a civil suit for ineffective representation because he was improperly imprisoned. To fail to allow the use of collateral estoppel in these circumstances is neither logical nor reasonable." *Zeidwig,* 548 So.2d at 214.

[3] In Florida, "proximate causation ... is concerned with whether and to what extent ***1276** the defendant's conduct foreseeably and substantially caused the specific injury that occurred." *McCain v. Florida Power Corp.,* 593 So.2d 500, 502 (Fla.1992). While proximate causation ordinarily is a factual issue, in certain cases proximate cause may be determined as a matter of law, based on fairness and considerations of public policy. *See Sakon v. Pepsico, Inc.,* 553 So.2d 163 (Fla.1989); *Stahl v. Metropolitan Dade County,* 438 So.2d 14 (Fla.Dist.Ct.App.1983). The policy announced in *Zeidwig* against permitting criminal defendants two opportunities to prove that their representation was inadequate dovetails with the policies announced by states requiring innocence to bring a malpractice claim. In accordance with this policy, it is the criminal defendant's guilty conduct that foreseeably and substantially causes the injuries that occur as a result of his conviction. The court concludes that Florida courts would agree with the majority rule, and "accept as the proximate cause ... of all damages which occurred to [plaintiff] by reason of [the indictment], his guilt and his guilt alone." *Weiner v. Mitchell, Silberberg & Knupp,* 114 Cal.App.3d 39, 170 Cal.Rptr. 533, 538 (1980).

[4] The appropriateness of this rule is particularly evident in this situation, where Brumlik pled to a superseding information that represented a significant reduction in his exposure to criminal liability. Presumably, this reduction was the result of negotiation by Brumlik's attorneys. Accordingly, the court holds that when criminal defendants plead guilty to a crime, as malpractice plaintiffs they must prove their innocence in order to maintain a cause of action against their attorney. The court limits its holding to situations in which the malpractice plaintiff pleads guilty, and does not speak to the somewhat different situation where a criminal defendant maintains his innocence throughout a criminal trial. Therefore, the court grants the Defendants' motion for summary judgment as to the professional malpractice claim. The court finds it unnecessary to evaluate Defendants' arguments as to collateral estoppel and the scope of Black's representation.

C. *Breach of Contract*

[5] Orr also asserts that Defendants breached the Fee Agreement into which they entered with Brumlik. Orr's claim focuses on an allegedly implied provision that Defendants "would represent Mr. Brumlik with professional due care in a manner normally exercised by similar (sic) situated attorneys." (Amended Complaint at 4). Because the Defendants allegedly failed to do so, Orr claims the fee that Defendants charged was unconscionable. Orr has both sought damages for breach of the contract and, alternatively, sought rescission of the contract.

This claim for breach of contract in essence restates the claim based on professional malpractice. Rather than assert that Defendants completely failed to fulfill any of their obligations under the Fee Agreement, Orr's claim rests on the allegation that Black was negligent in performing his duties. Since the court has held that criminal malpractice claims may not be maintained by plaintiffs who do not assert their innocence, it would be illogical to permit malpractice plaintiffs to circumvent this rule by alleging the same facts under a claim for breach of contract. Accordingly, the court holds that breach of contract claims that allege only an attorney's negligence

in fulfilling his duties must contain an allegation of innocence by the plaintiff.

[6] Orr may be understood to argue that Black failed to adhere to the contract by not appearing with Brumlik during the debriefing sessions. The contract makes clear, however, that Black was only retained to defend Brumlik in the criminal proceedings then pending. Under Florida law, "it is not sufficient merely to assert an attorney-client relationship existed between the parties; it is essential to allege the relationship existed with regard to the acts or omissions upon which the malpractice claim is based." *Maillard v. Dowdell,* 528 So.2d 512, 514 (Fla.Dist.Ct.App.1988), *rev. denied* 539 So.2d 475 (Fla.1988); *see also Dahl–Eimers v. Mutual of Omaha Life Ins. Co.,* 986 F.2d 1379, 1382 (11th Cir.1993) (noting that courts may not rewrite contracts to create ambiguity). In the Plea Agreement into which the government and Brumlik entered, both the federal ***1277** government and the State of Florida agreed not to charge Brumlik with any other crime to which the defendant admitted during the course of the debriefing sessions (Plea Agreement at 3, 5). Any information gleaned from Brumlik in the debriefings, then, could not be used against him in the criminal proceedings for which Black had been retained in the Fee Agreement. Therefore, Black cannot be held liable for breaching the Fee Agreement for his failure to appear at the debriefing sessions. Black did represent Brumlik at his arraignment and sentencing, and it is clear from the transcripts of both proceedings that Black was a zealous advocate in Brumlik's behalf. The court holds that Black did not breach the Fee Agreement.

[7] **[8]** Orr has not asserted that the Fee Agreement was unconscionable at the time the parties entered into it; rather he claims that the fee charged should be deemed excessive now when one considers the amount of work done by Black to earn it. As Plaintiff's expert claims, "[F]rom the date of the fee agreement, looking forward, the fee was not excessive; however, looking back today, it is obvious that due to Mr. Black's negligence, the fee was excessive." (Affidavit of John P. Hume at 3). Generally, however, the reasonableness of attorney's fee agreements and other contracts is evaluated "as it appeared to the parties at the time the contract was entered into." *Setzer v. Robinson,* 57 Cal.2d 213, 18 Cal.Rptr. 524, 368 P.2d 124, 127 (1962) (quoting *Youngblood v. Higgins,* 146 Cal.App.2d 350, 303 P.2d 637, 639 (1956)). The fee agreement contemplated that the case might be resolved without going to trial; in that event the contract provided that no portion of the fee be returned. The court cannot hold that the contract was unconscionable when the parties agreed to its terms. Further, holding that the agreement is unconscionable because of Black's alleged negligence is inappropriate for the reasons stated above. Accordingly, the court grants Defendants' motion for summary judgment with regard to Counts II and III of the amended complaint.

D. *Accounting*

[9] Orr has also requested an accounting, on the ground that the attorney's fee was grossly excessive and unreasonable, since the criminal proceeding ended in the entry of a guilty plea and because Brumlik retained another attorney who performed a substantial amount of the work. The Fee Agreement specifically provided that Black would represent Brumlik for a flat fee of $250,000 plus costs, and "should the case be settled in any other manner than by contested trial, no part of the fee is to be returned." (Fee Agreement). Brumlik also freely chose to retain Russ as Black's co-counsel. Neither of these factors suggest that an accounting is appropriate in this case.

[10] Orr asserts that he is entitled to an accounting because Black was terminated as counsel prior to providing full representation. The money paid to Defendants for their representation of Brumlik was not a retainer to be earned through an hourly fee; the fee agreement established a flat fee for Brumlik's representation, payable regardless of the number of hours spent working on the case. Orr cites *The Florida Bar v. Grusmark,* 544 So.2d 188 (Fla.1989), to support his position that even in this situation he is entitled to an accounting. In *Grusmark,* the client paid an attorney a flat fee of $5,000 to be represented in a criminal proceeding. The attorney worked four or five hours on the case, and prepared only for a bond hearing to release the client from jail. Immediately thereafter, the client terminated the attorney. The Florida Supreme Court held that because the attorney had been fired without having represented the client through the bulk of the criminal proceeding, the client was entitled to an accounting of funds that had not been reasonably expended. *Id.* at 190.

Though there are some similarities, *Grusmark* does not control this case. Here, Black represented Brumlik through plea negotiations, the entry of Brumlik's guilty plea, and sentencing. He fulfilled every obligation for

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which he was responsible under the Fee Agreement between the parties. The only recourse from the criminal proceedings that remained for Brumlik when Black was terminated ***1278** was an appeal from the judgment, for which Black explicitly was not responsible. Accordingly, the court holds that an accounting is not justified in this case, and grants Defendants' motion for summary judgment with regard to Count I.

III. Conclusion

The court **GRANTS** Defendants' motion for summary judgment (Doc. 127) on all four counts of Orr's complaint. Because Orr cannot allege Brumlik's innocence as to the underlying money laundering charge, Orr's professional malpractice claim cannot be maintained. Also, the court concludes as a matter of law that Black fulfilled the requirements of the Fee Agreement, and that the Fee Agreement was not unconscionable. Therefore, Orr's breach of contract claim and request for rescission must fail. Finally, the court finds that Orr is not entitled to an accounting of the funds paid to Defendants pursuant to the Fee Agreement. The court instructs the clerk of the court to enter judgment accordingly.

It is **SO ORDERED**.

All Citations

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621 So.2d 507
District Court of Appeal of Florida,
Second District.

Virginia E. JOHNSON, and Virginia E. Johnson,
as personal representative of the estate of
Philip H. Johnson, deceased, Appellants,
v.
ALLEN, KNUDSEN, DeBOEST, EDWARDS
& RHODES, P.A., f/k/a Allen, Knudsen,
Swartz, DeBoest, Rhodes & Edwards,
P.A., a Florida professional association,
and George T. Swartz, Appellees.

No. 92–02131.
|
July 2, 1993.

Synopsis
Law firm brought action against clients for payment of fees, and clients counterclaimed and brought third-party claims for legal malpractice. The Circuit Court, Lee County, R. Wallace Pack, J., dismissed counterclaim and third-party complaint, and clients appealed. The District Court of Appeal, 557 So.2d 872, dismissed portion of appeal seeking review of order dismissing counterclaim for lack of jurisdiction. The District Court of Appeal, 566 So.2d 327, subsequently vacated and remanded. Law firm dismissed complaint, thus order of dismissal of counterclaim became final and appealable. On appeal, the District Court of Appeal, 580 So.2d 333, vacated and remanded. After clients filed amended counterclaims and third-party claims, the trial court granted summary judgment for law firm and third-party defendant as based on applicable statutes of limitations. Clients appealed. The Second District Court of Appeal, held that clients' counterclaim survived law firm's dismissal of its complaint.

Reversed and remanded with directions.

West Headnotes (4)

[1] Set–Off and Counterclaim
Effect of Failure to Assert or Claim; Compulsory Counterclaim

Clients' legal malpractice counterclaim was based on same representation for which law firm sought to recover fees; therefore, it arose out of the same transaction or occurrence as law firm's original action, and was a compulsory counterclaim. West's F.S.A. RCP Rule 1.170.

4 Cases that cite this headnote

[2] Limitation of Actions
Set-Offs, Counterclaims, and Cross-Actions

Statutes of limitation do not apply to compulsory counterclaims.

3 Cases that cite this headnote

[3] Appeal and Error
Determination of Part of Controversy

Dismissal of compulsory counterclaim with prejudice is not considered a final disposition and is, thus, not appealable until a final disposition of the original cause has been obtained on the merits.

8 Cases that cite this headnote

[4] Appeal and Error
On Motion Relating to Pleadings

Pretrial Procedure
Counterclaim or Other Request for Affirmative Relief, Effect Of

Clients' counterclaim remained pending where it was dismissed with prejudice and clients could not seek review until disposition of law firm's original cause, and, thus, to allow a voluntary dismissal of the original cause to otherwise cut off clients' rights under the counterclaim would violate Rules of Civil Procedure. West's F.S.A. RCP Rule 1.420(a)(2).

6 Cases that cite this headnote

Attorneys and Law Firms

***507** J. Michael Coleman, Asbell, Hains, Doyle & Pickworth, P.A., Naples, for appellants.

Gerald W. Pierce, Henderson, Franklin, Starnes & Holt, P.A. Fort Myers, for appellees.

Opinion

PER CURIAM.

We find no error in the trial court's order granting summary judgment in favor of George T. Swartz, one of the appellees herein. We agree with the appellants, Philip H. and Virginia E. Johnson, however, that the trial court erred in granting summary judgment in favor of Allen, Knudsen, DeBoest, Edwards, & Rhodes, P.A. (Allen, Knudsen), the other appellee herein. We therefore reverse the trial court's order in part.

This case is before us for the fourth time on appeal. *Johnson v. Allen, Knudsen, DeBoest, Edwards & Rhodes, P.A.,* 580 So.2d 333 (Fla. 2d DCA 1991), hereinafter to be referred to as *Johnson III,* was the third such appeal. In *Johnson III,* this ***508** court succinctly set forth the relevant facts and procedural history of this case as follows:

> Allen, Knudsen ... sued the Johnsons for attorneys' fees earned by litigation in 1984 and 1985. The Johnsons counterclaimed for malpractice committed during the litigation and during real property transactions giving rise to the litigation. The Johnsons also filed a third party complaint against George Swartz, who was associated with the law firm at the time of the malpractice. The trial court, in a single order, dismissed the counterclaim and the third party complaint based on the defense of statute of limitations. The trial court also denied the Johnsons' motion to amend their counterclaim. The Johnsons attempted to appeal the nonfinal order dismissing their counterclaim, [1] but this court denied the appeal for lack of jurisdiction. *Johnson v. Allen, Knudsen, et al.,* 557 So.2d 872 (Fla. 2d DCA 1990) (*Johnson I*). The order however was final as to Swartz, and this court accepted review in *Johnson v. Allen, Knudsen, et al.,* 566 So.2d 327 (Fla. 2d DCA 1990) (*Johnson II*). Thereafter, the law firm dismissed its complaint, [2] and the order of dismissal of the Johnsons' counterclaim became final and appealable. This order is before us again for review.
>
> We reverse for the same reasons stated in *Johnson II:* that is, that the trial court erred in going outside the pleadings to determine the effect of the statute of limitations defense, and in denying the Johnsons' motion to amend their counterclaim.
> *Johnson III.*

After this court's holding in *Johnson III,* the Johnsons filed two amended counterclaims as to Allen, Knudsen and three amended third-party claims as to Swartz. Allen, Knudsen and Swartz thereafter filed motions for summary judgment, arguing, among other things, that the Johnsons' claims for malpractice and negligence were barred by all applicable statutes of limitation. In May 1992, the trial court entered an order granting summary final judgment in favor of both Allen, Knudsen and Swartz with regard to the Johnsons' second-amended counterclaim and third-amended third-party complaint, respectively. The Johnsons thus filed a timely notice of appeal in this court.

On appeal, the Johnsons argue that though a claim may be barred by the running of applicable statutes of limitation when that claim has been asserted in an independent action, such is not the case where that same claim is raised in a compulsory counterclaim. Though Allen, Knudsen agrees with that proposition, it argues that the Johnsons' counterclaim here was not a compulsory one. Specifically, Allen, Knudsen asserts that its original action to recover fees was based on an agreement in which the Johnsons promised to pay for services rendered at an hourly rate. Allen, Knudsen contends that the Johnsons' counterclaim for malpractice and negligence does not relate to that agreement—thus, it cannot be deemed compulsory.

[1] **[2]** A counterclaim is considered compulsory if "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction." Fla.R.Civ.P. 1.170. Since the Johnsons' counterclaim was based on the same representation for which Allen, Knudsen sought to recover fees, we must find that it arose out of the same transaction or occurrence as Allen, Knudsen's original action. The Johnsons' counterclaim was, therefore, a compulsory one. We must also find that since statutes of limitation do not apply to compulsory

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counterclaims pursuant to *Allie v. Ionata,* 503 So.2d 1237, 1240 (Fla.1987), Allen, Knudsen's argument that *Allie* is inapplicable to the instant case has no merit.

The Johnsons also contend that, despite Allen, Knudsen's argument to the contrary, ***509** Allen, Knudsen's voluntary dismissal of its original cause does not extinguish their right to now appeal the earlier dismissal of their counterclaim. Allen, Knudsen, of course, contends that since the Johnsons' counterclaim was dismissed with prejudice before Allen, Knudsen voluntarily dismissed its case, there was effectively no counterclaim pending at the time of the voluntary dismissal. It is, thus, Allen, Knudsen's position that the counterclaim cannot now be resurrected for purposes of this appeal.

[3] **[4]** The dismissal of a compulsory counterclaim with prejudice is not considered a final disposition and is, thus, not appealable until a final disposition of the original cause has obtained on the merits. *S.L.T. Warehouse Co. v. Webb,* 304 So.2d 97 (Fla.1974); *Taussig v. Insurance Company of North America,* 301 So.2d 21 (Fla. 2d DCA 1974); *Mermel v. Rifkin,* 603 So.2d 595 (Fla. 3d DCA 1992); *Del Castillo v. Ralor Pharmacy, Inc.,* 512 So.2d 315 (Fla. 3d DCA 1987); *Sarasota Cloth Fabric & Foam, Inc. v. Benes,* 482 So.2d 574 (Fla. 5th DCA 1986). *See also Johnson v. Allen, Knudsen,* 566 So.2d 327 (Fla. 2d DCA 1990) (*Johnson II*). Further, "if a counterclaim has been served by a defendant prior to service upon the defendant of the plaintiff's notice of dismissal, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court." Fla.R.Civ.P. 1.420(a)(2).

Since the Johnsons' counterclaim was dismissed with prejudice, the Johnsons were unable to seek review of the dismissal thereof until a final disposition of Allen, Knudsen's original cause. For that reason, the Johnsons' counterclaim must now be considered to be pending, as any remedy from the dismissal thereof with prejudice survived a final adjudication on the merits of the original complaint. To allow a voluntary dismissal of the original cause to otherwise cut off the Johnsons' rights under the counterclaim would be a clear violation of rule 1.420(a)(2). *See Johns v. Puca,* 143 So.2d 568 (Fla. 2d DCA 1962).

Since the issues addressed herein are dispositive of the case, we do not address the remaining issues raised in this appeal.

Accordingly, the trial court's entry of summary judgment in favor of Allen, Knudsen is hereby reversed and the cause remanded with directions consistent with this opinion.

SCHOONOVER, A.C.J., and HALL and PATTERSON, JJ., concur.

All Citations

621 So.2d 507, 18 Fla. L. Weekly D1555

Footnotes

1 The record reflects that the counterclaim in *Johnson III* was dismissed with prejudice.

2 This was a voluntary dismissal to which the Johnson's had objected.

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RULE 4-5.7 RESPONSIBILITIES REGARDING NONLEGAL SERVICES

(a) Services Not Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules Regulating The Florida Bar with respect to the provision of both legal and nonlegal services.

(b) Services Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) Services by Nonlegal Entity. A lawyer who is an owner, controlling party, employee, agent, or otherwise is affiliated with an entity providing nonlegal services to a recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Effect of Disclosure of Nature of Service. Subdivision (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient, preferably in writing, that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

Comment

For many years, lawyers have provided to their clients nonlegal services that are ancillary to the practice of law. A broad range of economic and other interests of clients may be served by lawyers participating in the delivery of these services. In recent years, however, there has been significant debate about the role the rules of professional conduct should play in regulating the degree and manner in which a lawyer participates in the delivery of nonlegal services. The

ABA, for example, adopted, repealed, and then adopted a different version of ABA Model Rule 5.7. In the course of this debate, several ABA sections offered competing versions of ABA Model Rule 5.7.

One approach to the issue of nonlegal services is to try to substantively limit the type of nonlegal services a lawyer may provide to a recipient or the manner in which the services are provided. A competing approach does not try to substantively limit the lawyer's provision of nonlegal services, but instead attempts to clarify the conduct to which the Rules Regulating The Florida Bar apply and to avoid misunderstanding on the part of the recipient of the nonlegal services. This rule adopts the latter approach.

The potential for misunderstanding

Whenever a lawyer directly provides nonlegal services, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the nonlegal services are performed may fail to understand that the services may not carry with them the protection normally afforded by the client-lawyer relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case. The risk of confusion is acute especially when the lawyer renders both types of services with respect to the same matter.

Providing nonlegal services that are not distinct from legal services

Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, confusion by the recipient as to when the protection of the client-lawyer relationship applies is likely to be unavoidable. Therefore, this rule requires that the lawyer providing the nonlegal services adhere to all of the requirements of the Rules Regulating The Florida Bar.

In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required elsewhere in these Rules Regulating

The Florida Bar, that of nonlawyer employees comply in all respects with the Rules Regulating The Florida Bar. When a lawyer is obliged to accord the recipients of such nonlegal services the protection of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules Regulating The Florida Bar addressing conflict of interest and to scrupulously adhere to the requirements of the rule relating to disclosure of confidential information. The promotion of the nonlegal services must also in all respects comply with the Rules Regulating The Florida Bar dealing with advertising and solicitation.

Subdivision (a) of this rule applies to the provision of nonlegal services by a lawyer even when the lawyer does not personally provide any legal services to the person for whom the nonlegal services are performed if the person is also receiving legal services from another lawyer that are not distinct from the nonlegal services.

Avoiding misunderstanding when a lawyer directly provides nonlegal services that are distinct from legal services

Even when the lawyer believes that his or her provision of nonlegal services is distinct from any legal services provided to the recipient, there is still a risk that the recipient of the nonlegal services will misunderstand the implications of receiving nonlegal services from a lawyer; the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Where there is such a risk of misunderstanding, this rule requires that the lawyer providing the nonlegal services adhere to all the Rules Regulating The Florida Bar, unless exempted by other provisions of this rule.

Avoiding misunderstanding when a lawyer is indirectly involved in the provision of nonlegal services

Nonlegal services also may be provided through an entity with which a lawyer is somehow affiliated, for example, as owner, employee, controlling party, or agent. In this situation, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of a client-

lawyer relationship. Where there is such a risk of misunderstanding, this rule requires that the lawyer involved with the entity providing nonlegal services adhere to all the Rules Regulating The Florida Bar, unless exempted by another provision of this rule.

Avoiding the application of subdivisions (b) and (c)

Subdivisions (b) and (c) specify that the Rules Regulating The Florida Bar apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if there is a risk that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Neither the Rules Regulating The Florida Bar nor subdivisions (b) or (c) will apply, however, if pursuant to subdivision (d), the lawyer takes reasonable efforts to avoid any misunderstanding by the recipient. In this respect, this rule is analogous to the rule regarding respect for rights of third persons.

In taking the reasonable measures referred to in subdivision (d), the lawyer must communicate to the person receiving the nonlegal services that the relationship will not be a client-lawyer relationship. The communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication, and preferably should be in writing.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of nonlegal services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and nonlegal services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

The relationship between this rule and other Rules Regulating The Florida Bar

Even before this rule was adopted, a lawyer involved in the provision of nonlegal services was subject to those Rules Regulating The Florida Bar that apply generally. For example, another provision of the Rules Regulating The Florida Bar

makes a lawyer responsible for fraud committed with respect to the provision of nonlegal services. Such a lawyer must also comply with the rule regulating business transactions with a client. Nothing in this rule (Responsibilities Regarding Nonlegal Services) is intended to suspend the effect of any otherwise applicable Rules Regulating The Florida Bar, such as the rules on personal conflicts of interest, on business transactions with clients, and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

In addition to the Rules Regulating The Florida Bar, principles of law external to the rules, for example, the law of principal and agent, may govern the legal duties owed by a lawyer to those receiving the nonlegal services.

Added effective April 25, 2002 (820 So.2d 210).

SEPTEMBER 2018

LawCare
Supporting the Legal Community

Factsheet: **Stress**

We can all get stressed at times. We all react differently to pressure and not all stress is bad – it can be motivating. However, serious and prolonged stress can be very upsetting and cause serious physical and mental health concerns

Stress is by far the most common reason for calls to the LawCare helpline. Many working or studying in the legal sector have a driven, perfectionist personality that makes them more prone to stress. They often work long hours in pressurised situations, and believe they should always be in control. Feeling unable to cope with work can be particularly difficult.

"After talking through my worries with LawCare, the burden lifted. They sent me practical advice and offered the support of a LawCare peer supporter. Ann called the next day and I really felt she was there for me. I had the one-to-one support I craved and was able to talk to her about what I might do to resolve my problems."

Symptoms of stress

SLEEP DEPRIVATION:	This is a vicious circle: worries about work lead to lack of sleep and lack of sleep makes it difficult to perform well at work.
PHYSICAL CHANGES:	Headaches, skin complaints, frequent colds, aching muscles and digestive problems are often indicators of stress.
DRINKING AND SMOKING:	Many lawyers turn to drinking and smoking to escape from the pressures of everyday life. However, alcohol is a depressant and smoking creates a new stress: the craving for a cigarette.
EATING:	You may find yourself comfort eating or skipping meals.
MOOD SWINGS:	You may become irritated and frustrated, get very angry one minute and feel fine the next. Other people may complain that you are short-tempered, selfish and difficult.
PANIC ATTACKS:	These can happen suddenly, for no clear reason. You may feel sick, short of breath, shake, sweat and experience a sense of unreality, as if you're detached from the world around you.

Managing stress

It is important to take steps to control stress before it overwhelms you. There may be little you can do to change external pressures, but you can learn how to deal with them. it is better for your health and career to deal with the situation and change things than to struggle on. You are not alone – support is available.

What's causing your stress? The first stage in managing stress is to identify the source so that you can plan a strategy to tackle it. Common issues identified by our callers include:

Job insecurity and lack of status

Long, antisocial or inflexible hours

Impossible targets

Lack of support or supervision

Unsupportive colleagues/manager or having no friends at work

Overwhelming responsibilities or difficulties at home

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Stress diary Keeping a stress diary over two or three weeks may help you to identify why you are stressed. When you feel that you're not coping, write down how you're feeling, including any physical symptoms. Note what you're doing and have just been doing. You can then start looking for clues to your stress. As you work through the diary, you may realise that something that appeared insignificant at the time could be a major stress trigger and you need to make changes.

Talk about it Don't stay silent. Legal professionals, in particular, may feel it's a sign of weakness to admit they aren't coping, but it's better to address problems early, before they get out of control.

Talk informally to a trusted colleague or your supervisor if you feel they might be helpful. Refer to your diary notes of triggers for stress or aspects of work you are finding overwhelming. Many callers find it difficult to tell their employers or chambers that they are stressed, fearing they will be unsympathetic. But when the stress escalates and perhaps becomes a problem, many partners, colleagues and supervisors say they had been unaware of the situation and would have offered support if they had known. Make sure they know.

If the stress is largely a response to your work being criticised, make a list of those criticisms and ask for a meeting with your supervisor to clarify what you are doing wrong and how you can improve. Analyse their responses. Are the criticisms justified or unfair? If justified, work out how to address the issue and request support and training if appropriate.

Tips

- Try to be objective: ask yourself why you are letting things annoy you
- Talk to someone you trust
- Prioritise: don't over commit; learn to say "no" or "I can't do that until next week unless I drop something else"
- Use your full holiday entitlement at work; or book time off from chambers, take a lunch break and short breaks during the day
- Do one thing at a time; break complex tasks down into manageable chunks
- Eat healthily, exercise, avoid alcohol and smoking
- Panic attacks: try to keep calm, slow your breathing, wait for it to pass
- Think through your options: should you change job within the legal profession or consider a different career entirely?

Crisis control

When you feel the stress building, stop, breathe deeply and slowly, and work through this list:

- What is the worst thing that could happen if I didn't do this?
- Will this still matter next month?
- Would I feel better about this if I broke it down into smaller sections and tackled it a piece at a time?
- Must this be done now, or can I delay it until I am feeling better about it?
- Can I pass this on to someone else?
- Am I trying to do too many things at once?
- Would talking to someone about this make me feel better?
- Do I need a holiday/good night's sleep before I tackle this?
- Don't procrastinate – the more you worry about it, the more time you have lost

Treatment for stress

Many people find counselling and **CBT** (cognitive behaviour therapy) helps with stress. **Mindfulness** can also help calm the mind. Check out the **Headspace** website **www.headspace.com** or app for more information.

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Factsheet: **Depression**

Depression is an illness, just as heart disease or diabetes are illnesses, and it is an illness that affects the entire body, not just the mind. One in five people will experience depression at some time in their life, and it's a major cause of alcohol and drug dependency. However, it can be successfully treated in the vast majority of cases. Depression is sometimes triggered by traumatic events or prolonged stress, but can happen to anyone and for no apparent reason.

Symptoms

Depression is characterised by lethargy, anxiety, despair, desperation, poor sleep, lack of motivation, loss of interest in things previously enjoyed, inability to concentrate and, in extreme cases, suicidal thoughts. If you are experiencing any of these symptoms seek help from your GP.

Treatment for Depression

Counselling

Counselling has been shown to be very effective in treating depression. Depression counselling should be future-orientated, time-limited and solution-focussed. Counselling is available on the NHS, although there may be a waiting list. Private counsellors can be found through groups such as the British Association for Counselling www.bacp.co.uk and Psychotherapy or United Kingdon Council for Psychotherapy (UKCP) www.psychotherapy.org.uk

Anti-Depressants

The most effective treatment is shown to be competently prescribed and monitored anti-depressant medication, coupled with regular counselling sessions.

All anti-depressants take between two and six weeks to show any effects. Often the first symptom to be diminished is insomnia, with elevation in mood taking several months to be established. It is important to be aware of any possible side-effects before you begin taking medication. Speak to your GP for more information about anti-depressants.

Alternative Treatment

For mild depression other treatments are recommended, and for those who prefer not to take medication these may help:

Exercise

Exercise raises mood as well as increasing fitness, and provides an outlet for negative feelings. Studies have shown that exercising outdoors in a green space is more beneficial than exercising indoors. Fresh air, sunlight and greenery have all been shown to raise mood, so enjoy your garden, local park or the countryside as much as possible.

Alternative Therapy

Alternative therapies such as reflexology homeopathy and herbal remedies may help too.

People and pets

Surround yourself with supportive people who like you. Pets can also be very helpful in providing company and reassurance.

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Factsheet: **Depression**

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Treatment for Depression

Relax

Depression is often related to stress, and learning to relax can be key in both overcoming the illness and preventing it recurring in future. From massage to taking up a new hobby to decluttering your life, anything which makes you feel relaxed could be beneficial.

Avoid Alcohol and Drugs

There is a tendency for some people with depression to drink more, in the belief that alcohol will help to relax them. However it is unwise to drink alcohol if you have depression, since alcohol is a depressant and will worsen your symptoms in the long term. It may also be contraindicated with your antidepressants - consuming alcohol may render medication less effective Other harmful substances should also be avoided.

Self-Help Books

There are hundreds of books available which claim to help you manage depression yourself; for example, by teaching you to challenge your negative thoughts, forgive yourself or let go of the need to be perfect. These are complementary to other types of therapy, but can be helpful.

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LawCare
Supporting the Legal Community

Factsheet: **Worried about a Colleague?**

If you are working with someone who appears to be struggling, is frequently anxious, short-tempered or low and may be depressed, please get in touch with LawCare, we can help.

How do I know there's a problem?

Out-of-character behaviour may include:

- **Irritability, mood swings, anger and short temper**
- **Lack of energy, concentration and motivation**
- **Frequent bouts of illness**
- **Failure to achieve targets despite apparent commitment and long hours**
- **Overconfidence despite making mistakes**
- **Withdrawal from normal social interaction**
- **Deteriorating relationships with managers and/or colleagues**
- **Neglect of personal dress and hygiene**
- **Coming into the workplace smelling of alcohol**
- **Over-reacting when challenged**

Consider asking your colleague in private what is wrong and how you might help. Suggest they discuss the situation with a trusted colleague in chambers or in the office, with HR or with an understanding supervisor and encourage them to phone LawCare's confidential helpline.

Possible causes

There could be many reasons for your colleague's behaviour, including:

Depression

Many people will experience depression at some point in their lives. It is not a character flaw, self-indulgent or a sign of a weak personality. Depression affects the entire body, not just the mind, and it can affect any one of us, all ages and genders, all ethnic backgrounds and economic groups. Many people will try to hide their depression from employers, managers and colleagues. Early treatment means less time lost at work, increased productivity and the avoidance of costly consequences both for the individual and the profession.

If you believe a colleague is showing signs of depression, encourage them to see their GP immediately. With effective medication and counselling, most people will recover. Most organisations will be willing to support a colleague receiving treatment for depression through their recovery, and will make reasonable adjustments to make their return to work as comfortable as possible.

Stress

Colleagues under stress can be short-tempered and will often not be doing their best work despite putting in long hours. A review of their workload can help, ideally with supervisors or senior staff, to ensure the colleague is not being expected to take on more work than is feasible, or take on work for which they have not been adequately trained or are not being adequately supervised. Staffing levels and holiday cover availability should also be addressed.

Different people have different tolerance for stress, and respond to stress in different ways. One person's motivating pressure can be another person's intolerable stress. It doesn't mean that anyone is stronger or weaker than anyone else, but people are entitled to work in an environment which does not put their mental health at risk. Encouraging your colleague to take a lunch break or a holiday can help, and to talk to someone when they feel things are getting on top of them.

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Factsheet: **Worried about a Colleague?**

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Bullying

At LawCare we hear from many legal professionals who tell us their mental health is being affected by a colleague who is making life unpleasant for them. Bullying takes many forms, from deliberately overloading someone with work to withholding information, constant criticism, or belittling the person in front of colleagues.
It can be overt or covert.

Firms and chambers can also be guilty of this behaviour. Employers who treat their staff badly – failing to provide them with training, equipment and support, or demanding that they do work for which they are not qualified or experienced – are, in effect, bullying them. Denying rights such as sick leave and holiday, or not having systems in place whereby individuals can safely air their grievances, can cause feelings of frustration and distress and may make some people ill, mentally or physically.

If you believe that bullying is a factor in your colleague's distress, encourage them to phone LawCare's helpline.

Addiction

Denial is common to many addicts, and getting the individual to admit they have a problem can be difficult. However, their legal career depends on their recovery and, with persuasion, many addicts will reach a point where they decide to access professional support.

One of the most successful programmes for alcoholism is the 12-step method employed by Alcoholics Anonymous and other organisations. AA is free and there are meetings all over the UK and Ireland. Other 12-step groups include Narcotics Anonymous and Gamblers Anonymous.

In-patient treatment and regular follow-up is very effective for addiction, but there are considerable costs involved. Some organisations may pay for rehabilitation, and certain types of private medical insurance cover treatment for alcoholism.

How to talk to a colleague about mental health

Talking about mental health at work can be difficult. Some may find it helps to be open, and feel relieved that things are not hidden any more, but they may also experience negative reactions. It's important for people to remember they're not alone, and that many people in work have mental health problems. It's the individual's choice to talk about their mental health with colleagues or employers, there are no set rules, but talking may help to get the practical support needed to stay healthy at work.

It is also not necessary to be an expert in mental health to talk to a colleague who may be experiencing an issue. People may feel anxious about starting the conversation, but it's important to remember that talking could make all the difference to a colleague's mental health.

The conversation could be started with a simple 'How are you?' Offering to make the person a cup of tea, inviting them somewhere private for a chat, or suggesting popping out to a nearby café or for a walk, can all get people talking. Setting aside enough time to talk and switching the phone off are also good things to do in this situation.

There are some useful tips on how to start that conversation from **Mental Health First Aid England** [MHFA]. The tips are:

Keep the discussion positive and supportive – explore the issues and how to help

Be mindful of body language – make sure it's open and non-confrontational

Be empathetic and take them seriously

Don't be tempted to say things like 'pull yourself together'

Ask questions such as 'How are you feeling at the moment?', 'How long have you been feeling like this?', 'Is there anyone you feel you can ask for support?', 'Are there any work issues that are contributing to how you are feeling?', and 'Is there anything I can do to help?'

Listen carefully, don't interrupt, and try to be non-judgmental

Be reassuring and signpost them to support such as LawCare, HR, another colleague, or suggest they visit their GP

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Back to Speaker Topics

Fund Assembly

Caught in The Dark Web – A Real Estate Attorney's View

Ron Frechette, *Founder and CEO, Goldsky Security*
Christopher Dix, *Shareholder, Smith, Hulsey & Busey*

Back to Speaker Topics

Speaker Information

Caught in The Dark Web – A Real Estate Attorney's View

Ron Frechette

Founder and CEO, Goldsky Security

Ron Frechette is Founder and CEO of GoldSky Security with over 10 years of experience conducting Security Risk Assessments and designing Cybersecurity Plans for various sized companies across North America. Known to many as "The Cyber Coach," he is constantly studying emerging cybersecurity trends and shares his knowledge through blogging platforms, local publications and speaking engagements across various industries.

Mr. Frechette's particular area of expertise has evolved from supporting large enterprise companies to helping small-midsized businesses with their IT security and compliance needs. He has assisted various companies in becoming compliant with frameworks such as FedRAMP, FISMA, GLBA, HIPAA/HITECH, HITRUST CSF, ISO27001, NIST 800-53, 800-171, NIST CSF, NERC-CIP, PCI-DSS and SSAE 18 (SOC1, SOC2, and SOC3).

Christopher Dix

Shareholder, Smith, Hulsey & Busey

R. Christopher Dix is a Shareholder with Smith, Hulsey & Busey in Jacksonville, Florida. Mr. Dix practices in the area of complex commercial litigation. His experience includes litigation of disputes involving contracts, real property, estates and trusts, fraudulent transfers, mechanics liens, corporate control and business entities.

Mr. Dix earned the CEDS (Certified E-Discovery Specialist) designation from the Association of Certified E-Discovery Specialists, and is President of the organization's local chapter, ACEDS Jacksonville. He advises clients on cybersecurity, data breaches, social media, information governance and compliance with e-discovery rules and disputes.

Back to Speaker Topics

Caught in the Dark Web

Presented by:

Ron Frechette
Founder & CEO
GOLDSKY CYBER SECURITY SOLUTIONS

&

Chris Dix, Esq.
Shareholder
SMITH HULSEY & BUSEY

Presenters

Ron Frechette, CEO
GoldSky Security, LLC
Ron is a cybersecurity and IT staffing entrepreneur who since 2010 has dedicated his career to helping companies reduce the risks of cyber attacks, malware threats, and data theft.

He has a strong knowledge base in all aspects of IT security and compliance to include: FedRAMP, FISMA, GDPR, GLBA, HIPAA/HITECH, HITRUST, ISO 27001/02, NIST CSF, NIST 800-53, PCI-DSS, and SSAE 18 (SOC 1, SOC 2).

Ron is an avid writer and blogger who studies emerging cybersecurity trends and shares his knowledge through local publications such as The Park Press and Orlando Medical News.

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Chris Dix is a technology-focused attorney and CPA with experience litigating business disputes, healthcare regulatory matters, bankruptcy and sports corruption arbitrations. He also advises clients regarding e-discovery, cybersecurity, data breaches (including HIPAA security and privacy issues), social media and other forms of electronic evidence.

Chris obtained a Bachelor of Science in Accounting, with honors, and a Master of Accounting from the University of Florida. Chris also obtained a Juris Doctorate, with honors, from the University of Florida College of Law.

Chris is a licensed CPA in Florida. He has also earned the CEDS designation from ACEDS, and was co-founder and President of the organization's local chapter, ACEDS Jacksonville.

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Overview

- The World Wide Web and the Dark Net
- What is Tor
- How Tor Works
- Live Dark Net Demo
- The Threat Actors
- Ethical Concerns
- Federal and State Compliance Laws
- Primary Objectives to Mitigate Risk
- A Cyber Risk Management System
- Security Tips - How to Mitigate Your Risk

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Formal Notice of a Data Breach

Dear Client:

Data privacy for our clients is at the center of our mission at X Law Group and we take seriously the confidentiality of the information we hold on your behalf. We regret to inform you that on September 01, 2018 we confirmed an unauthorized intrusion into our computer system. We took immediate action and are working closely with forensic experts and the FBI to investigate and address the situation.

While our investigation is ongoing, we have found evidence indicating that information such as company/customer names, addresses, email addresses, and dates of birth were potentially taken. In some cases the healthcare records, or social security number may also have been taken.

If you were a client of our company prior to July 2018, you may be affected. Our investigation is in its early stages, but we felt it was important to communicate what we know at this time. We regret any anxiety or frustration that this causes you and are committed to supporting you.

We are reaching out directly to those affected via mailed letters and are offering one year of free identity protection services, including credit monitoring for affected individuals. In this letter, we will also outline other steps you can take to protect your identity, as well as information on how to access the free identity protection services.

If you have any questions, we have established a dedicated call center, which can be reached by calling (844) 800-8080 between 9 a.m. and 9 p.m. ET, Monday-Friday.

Thank you for your patience and understanding as we work through our investigation and try to provide you the best information and support that we can. We will share further information as we are able.

Sincerely,

CEO, X Law Group

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The World Wide Web

Also referred to as: Clearnet

Also referred to as: The Dark Net or Onionland

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What is Tor?

- Tor is a service that helps you to protect your anonymity while using the Internet.
- Developed in the mid-1990s by United States Naval Research Laboratory to protect US intelligence communications online.
- Further developed by Defense Advanced Research Projects Agency (DARPA).
- Tor is comprised of two parts:
  1. Software you can download that allows you to use the Internet anonymously,
  2. a volunteer network of computers that makes it possible for that software to work.

Source: https://en.wikipedia.org/wiki/Tor_(anonymity_network)

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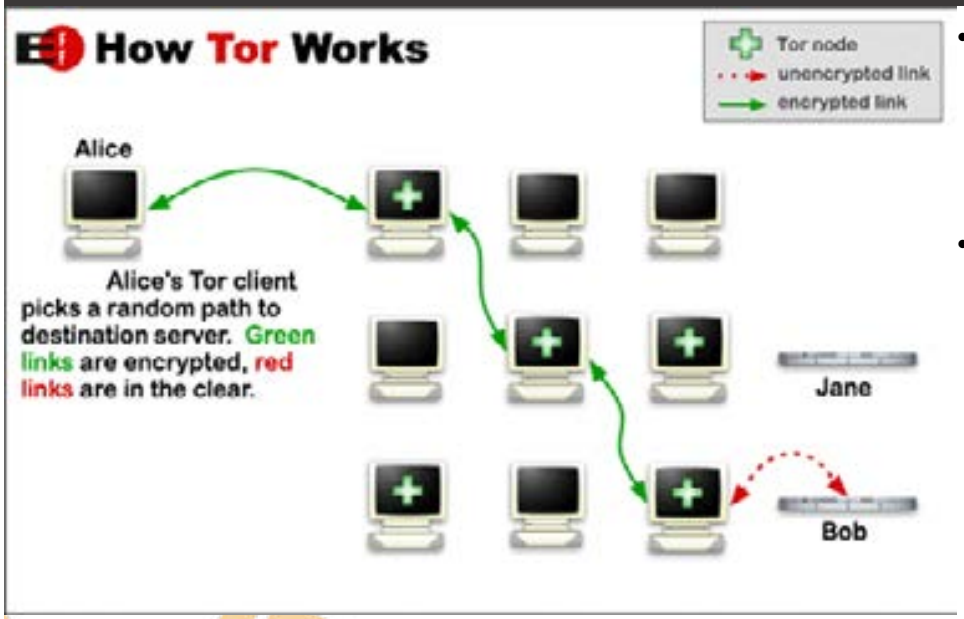
How Tor Works



- Encrypts and then randomly bounces communications through a network of relays run by volunteers around the globe.
- These onion routers employ encryption in a multi-layered manner (hence the onion metaphor) to ensure perfect forward secrecy between relays, thereby providing users with anonymity in network location

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Live Tor Demo

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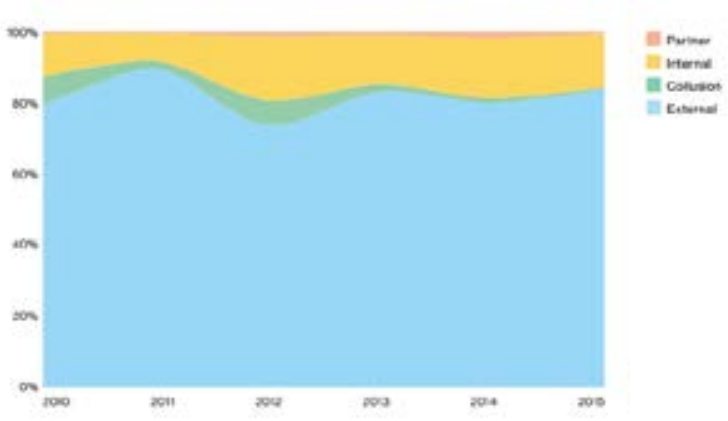
Who are the attackers?

- Organized Crime Organizations
  - Large syndicates of attackers
  - Hierarchical organizations; Mafia
- State-Sponsored Attackers
  - Government organizations
  - Russia, China, Iran, North Korea, etc...
- Script Kiddies
  - Use downloaded tools and scripts
  - Motivated by fame
- Other Professionals
  - Usually experimenting, learning, or shaming
- Hacktivists
  - All-the-above
  - Motivated by a social cause



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What are they attacking?

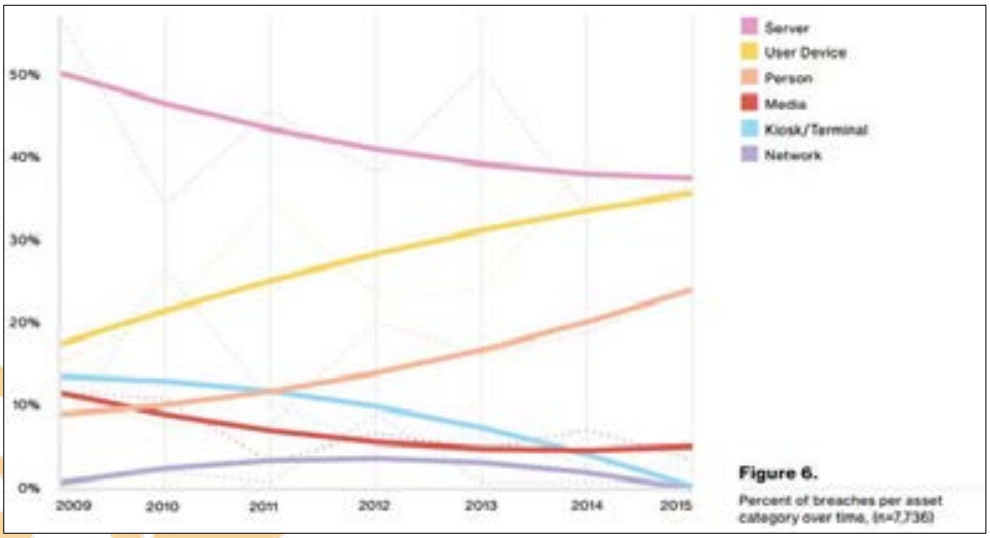

Figure 6.
Percent of breaches per asset category over time, (n=7,736)

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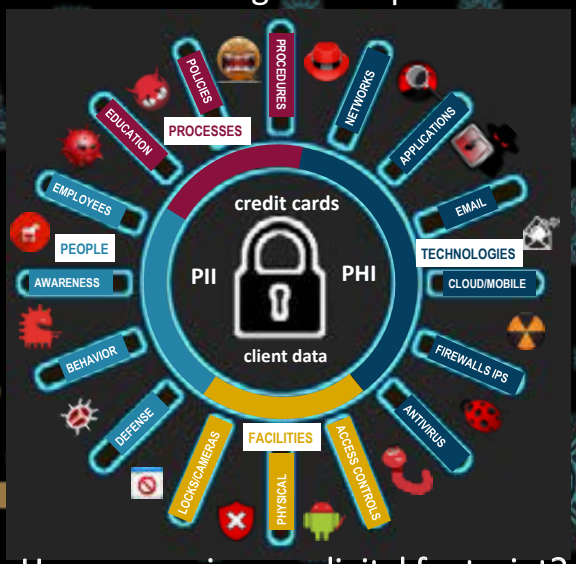
Digital Footprints in Cyber Space…

Four threat vectors around a digital footprint:



How secure is your digital footprint?

How are they attacking?

DELL SecureWorks

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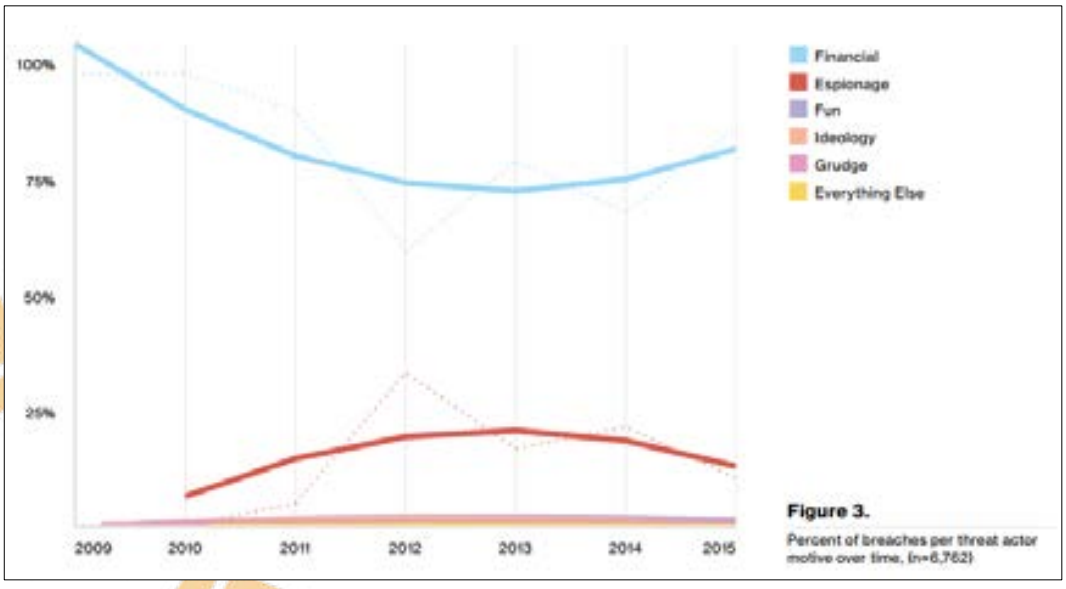
The Fund

Hacker Motives



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Hackers are selling access to law firm secrets on dark web sites…

CNBC

- Law firms in cities scattered all across the US databases for sale on the Dark Web.
- Hackers are offering access to a law firm's entire network for as low as $3,500.
- A criminal could use the info to trade on insider information, insurance fraud, among other things, says research firm.
- Sophisticated hackers are selling access on the Surface Web as well as the Dark Net.

Source: ***https://www.cnbc.com/2018/07/11/hackers-selling-access-to-law-firm-networks-on-dark-web-sites.html***

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You Are a Target!

THE FLORIDA BAR

The Florida Bar News

Advertising Rates • Classifieds • Attorneys Exchange • Archives • Subscribe • Journal

New email scam alert!

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Case Study: Dentons Money Wiring Scam

- $2.52 Million Fraudulent Wire Transfer
- 2017 Real estate transaction with Timbercreek Mortgage
- Dentons received emails from people who appeared to be affiliated with Timbercreek.
- Emails indicated that one of Timbercreek's accounts was subject to an audit and asked for Dentons to send the money to an international account in Hong Kong, held by a third-party called Yiguangnian Trade Co. Ltd.
- The Dentons side attempted to verify, leaving a voicemail at Timbercreek and seeking letters of authorization from the mortgage servicer and the Yiguangnian entity
- Received what appeared to be authorized letters from both parties.
- Although Dentons didn't receive a phone call back, it did receive what appeared to be authorization letters from Timbercreek and Yiguangnian decided to go ahead with transfer
- Several weeks passed, and Timbercreek wanted to know what happened to its money. That's when an associate realized that millions of dollars had been sent to a scam account.
- Denton's was able to recover a few hundred thousand dollars. Insurance coverage was denied because this situation doesn't fall under the computer fraud rider to the firm's policy.

https://abovethelaw.com/2019/01/biglaw-firm-duped-into-wiring-money-to-scam-account-loses-2-5-million-in-cyber-breach/

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Ethical Concerns

- You are a custodian of sensitive data
  - Financial Records
  - Medical Records (HIPAA)
  - Private and (potentially) damaging information
  - Credit Card Information (PCI)
- Have you taken reasonable measures to secure client data?
- Are you aware of all your legal and regulatory obligations?
- Do you know your own vulnerabilities?
- Are you aware of the threats to your data security?
- Do you have an Incident Response and/or Data Breach plan?
- Do you have a Disaster Recovery – Business Continuity Plan in place?

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ALTA 7 Pillars of Best Practices

1. **Licensing -** Establish and maintain current license(s)
2. **Escrow/Trust Accounts** - Adopt and maintain appropriate written procedures and controls
3. **Privacy & Information Security** - Adopt and maintain a written privacy and information security plan
4. **Recording & Pricing Procedures** - Adopt standard real estate settlement policies and procedures that ensure compliance with federal and state consumer financial laws, as applicable.
5. **Title Policy Procedures** - Adopt and maintain written procedures
6. **Professional Liability Insurance** - Maintain appropriate professional liability insurance and fidelity coverage.
7. **Resolving Consumer Complaints** - Adopt and maintain procedures for resolving consumer complaints.

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Pillar 3 - Privacy & Information Security

- Adopt and maintain a written privacy and information security plan to protect Non-public Personal Information as required by local, state and federal law.
  - Physical security of Non-public Personal Information
  - Network security of Non-public Personal Information
  - Disposal and Maintenance of Non-public Personal Information
  - Establish a disaster management plan
  - Appropriate management and training of employees to help ensure compliance with Company's information security program
  - Oversight of service providers to help ensure compliance with a Company's information security program
  - Audit and oversight procedures to help ensure compliance with Company's information security program
  - Notification of security breaches to customers and law enforcement
  - Policies & Procedures

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Pillar 3 - Privacy & Information Security

- Practical Suggestions
  - Establish a process to use strong passwords that change frequently
  - Close paper and electronic files containing NPI when away from the desk
  - Secure points of entry to buildings and offices
  - Appropriate firewalls within computer network system
  - Policy for independent service providers stating protection of NPI is their responsibility when documents are in their possession

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How Insurance Companies Rate Title Companies

- Insurance companies look at three specific matters when rating title companies' and law firms' premiums for Crime policies:
  1. Volume of data the firm handles
  2. The firm's policies and procedures
  3. How well the firm trains its staff
- So, the idea that law offices protect themselves through training and procedures is not only an ALTA Best Practice but is something that drives insurance premium.

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Florida Information Protection Act - FIPA (State)

- Florida Information Protection Act, Sec. 501.171, F.S.
  - Defines a security breach
  - Covered entity must give notice to each individual in Florida whose private information was, or which the entity reasonably believes to have been, accessed as a result of a security breach
  - Covered entity must provide notice to the Department of Legal Affairs of any security breach affecting 500 or more Florida individuals
  - Notification to Consumer Reporting Agencies required if security breach affects more than 1,000 persons at a single time

What is PII

- First & Last Name and one of:
  - SSN
  - Financial Account Number
  - Government ID number
  - Health Information or Insurance ID
- Username or Email Address, including password or security questions
  - Encrypted passwords are not considered PII!

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Problem

1. **Hackers are now targeting Law Firms due to the sensitivity of data and lack of security measures deployed by a majority of law firms.**
2. **Federal and State Compliance Regulators are beginning to enforce cybersecurity mandates on Law Firms and imposing civil penalties due to increased number of cyber breaches.**
3. **Cybersecurity Awareness and Education is severely lacking in the Law Firm space, perceived to be hard to implement and expensive. Another common misperception is their IT managed service provider has them covered.**

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How are Law Firm's dealing with the Cyber Theft Epidemic today…

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Not Much

Ignore the problem and hope it goes away

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Panic

Spend all the right money in all the wrong places

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Where do you fall?

Nothing

Ignore the problem and hope it goes away

Panic

Spend all the right money in all the wrong places

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Primary Objectives

Avoid Compromise
Costs and Brand Damage

Achieve Compliance
Follow the Law and Avoid Fines

Affordable Solutions
Custom Designed for SMBs

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The Right Approach

Evaluate, Identify, and Manage Risk

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SRA Methodology

How we help our clients evaluate, identify, and manage risk…

NIST National Institute of Standards and Technology U.S. Department of Commerce

NIST SP800-30 provides the Risk Assessment Methodology for all federal agencies to follow.

The private sector uses NIST as the foundation for all security controls and compliance frameworks in the US.

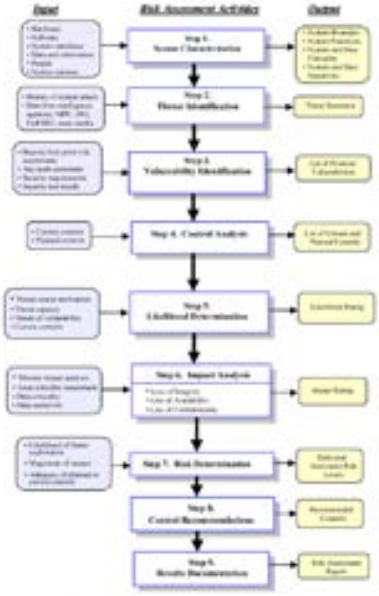

Figure 3-1. Risk Assessment Methodology Flowchart

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NIST Based Compliance Frameworks

NIST SP800-53 rev.5 - provides a catalog of security controls for all U.S. federal information systems except those related to national security.

Adopt a Cyber Risk Management System

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Types of Assessments

- **Security Risk Assessment**
  - Analyze the risk profile of your organization; develop actionable and prioritized remediation strategies.
- **Compliance Assessments**
  - Identifies gaps specific to a compliance framework that a company must adhere to
  - PCI-DSS, HIPAA/HITECH, HITRUST, ISO 27001, SOC, GLBA, FISMA, FedRAMP, GDPR
- **Vulnerability Assessment** (scheduled)
  - Automated and manual scanning on internal and external assets to find known vulnerabilities.
- **Penetration Testing**
  - Ethical hacking to attempt to gain access to your organization's networks and data.
- **Threat Modeling** and **Architecture Reviews**
  - Comprehensive attack simulation based on current or planned network architectures.

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Security Risk Assessment

- Classify all sensitive information (electronic and paper)
- Perform Comprehensive Inventories
  - Inventory all hardware & software in use or in storage
  - Inventory ALL cloud services (there are more than you think)
  - Inventory ALL partners you do business with
- "Footprint" your organization's IT infrastructure
- Assess from the outside-in, and inside-out for best practices
  - Think like a hacker!
- Perform a Qualitative or Quantitative Risk Analysis
  - e.g. Impact / Likelihood
- Decide on security controls to cover your highest areas of risk
- Schedule the implementation of all controls
- Repeat as changes are made; formal assessment at least annually!

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Sample SRA Report

NIST National Institute of Standards and Technology U.S. Department of Commerce

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Sample – Risk Analysis

Threat Event	Threat Source	Vulnerabilities and Predisposing Conditions	Mitigating Controls Implemented	Likelihood of Event Initiation	Likelihood of Event Success	Overall Likelihood	Level of Impact if Successful	Calculated Risk
Malware infiltration on networked devices Malware-directed internal reconnaissance	External Adversarial Internal Adversarial Internal Non-Adversarial	(1) Inconsistent use of AntiMalware software (2) Malware events not continually monitored (3) Local administrative users can disable malware detection (4) AntiMalware not deployed on server platforms	(1) Anti-Malware deployed on most workstations	Very High	Moderate	High	High	High
Exploit vulnerabilities on internal organizational information systems	External Adversarial Internal Adversarial	(1) No vulnerability management processes in place (2) No endpoint best practice policies applied to workstations or servers	Automatic updates help to prevent many vulnerabilities	High	Moderate	Moderate	Very High	High
Conduct Denial of Service (DoS) attack.	External Adversarial	No D/DoS services or firewalls in place	None	High	High	High	High	High

NIST National Institute of Standards and Technology U.S. Department of Commerce

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Sample – Compliance Analysis

Citation	(R/A)	Title	Description	Assessment	Recommendation	Status	Risk
164.308(a)(1)(ii)(A)	R	Risk analysis	Conduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information held by the covered entity or business associate	No security risk assessments have been performed.	Perform a formal security risk assessment annually, or whenever major network/compute changes occur.	Finding	High
164.308(a)(1)(ii)(B)	R	Risk Management	Implement security measures sufficient to reduce risks and vulnerabilities to a reasonable and appropriate level to comply with § 164.306(a).	Risks are presently unknown and therefore not controlled	(1) Perform a formal security risk assessment annually, or whenever major network/compute changes occur. (2) Perform continual risk management using the SRA as guidance	Finding	High
164.308(a)(1)(ii)(C)	R	Sanction Policy	Apply appropriate sanctions against workforce members who fail to comply with the security policies and procedures of the covered entity or business associate	Sanctions are listed in security Policy	Add a sanctions policy in your acceptable use policy	Not a Finding	Low

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Sample – Remediation Roadmap

Citation / Risk Area	Recommended Remediation	Assigned To	Due By	Completed On
164.308(a)(1)(ii)(A)	Perform annual risk analysis	A. Carter	5/7/2016	5/7/2016
Malware Defense	Implement advanced malware defense on all computers	A. Carter	30 Days	5/7/2016
Data Loss & 164.312(e)(2)(ii)	Update all computers to Windows 8 Pro or Windows 10 Pro and enable Bitlocker	A. Carter	60 Days	
Passwords & 164.308(a)(5)(ii)(D)	Enable passwords with standard windows complexity for all users	A. Carter	30 Days	
User Management	Create a unique user account for all users	J. Harrison	60 Days	
Least Privilege & 164.312(a)(2)(i)	Remove administrative user permissions from all computer non-admin staff.	J. Harrison	90 Days	
-- Truncated --				

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Cybersecurity Tips

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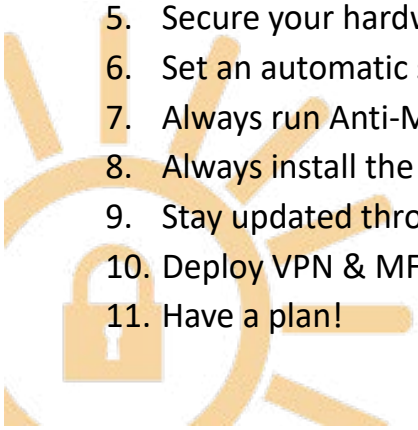
Cybersecurity Tips

1. Define what your critical data is and where it should be stored
2. Have written security policies and procedures in place to protect critical data
3. Purge data you don't need
4. Secure the data on encrypted drives or media
5. Secure your hardware with complex (unique) passwords
6. Set an automatic screensaver lock
7. Always run Anti-Malware software
8. Always install the latest OS and software updates
9. Stay updated through cybersecurity awareness training
10. Deploy VPN & MFA wherever possible
11. Have a plan!



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And remember…

Thank you for your time and attention today!

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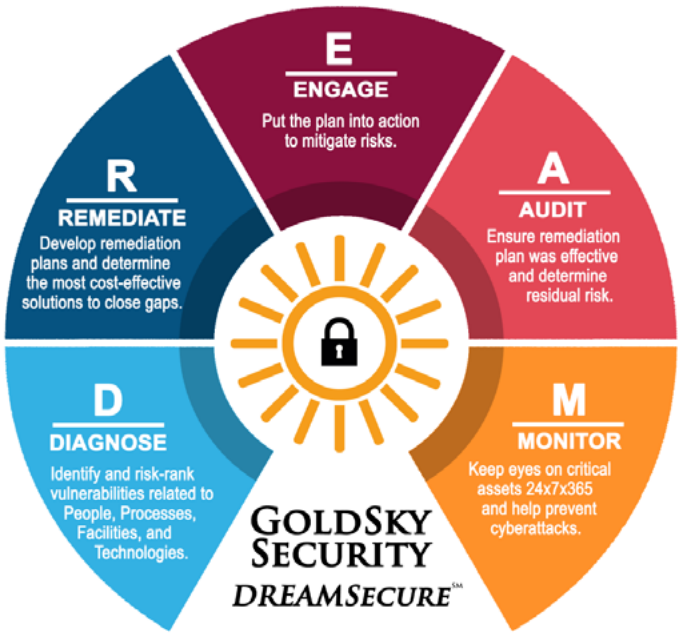
Data Sheet

GoldSky was founded by cybersecurity thought leaders who are passionate about educating and keeping small-midsize businesses (SMBs) safe in cyber space. After 2 years of extensive research and learning the most common cyber security threats to the SMB world, GoldSky security engineers developed the DREAMSecure℠ Cyber Risk Management System. DREAMSecure℠ CRMS examines and addresses every phase of the SMB cyber risk management and mitigation process.



Cyber Risk Management System

Key Benefits:

- **Easy to Understand, Easy to Implement**
- **Reduces Risks of Data Theft and Cyber Breaches**
- **Reduces Risks of Fines and Penalties for Non-Compliance**
- **Affordable for Small-Midsize Businesses**

For more information about GoldSky Security programs and services, contact us at: www.goldskysecurity.com or (407) 853-8404.

www.GoldSkySecurity.com

GOLDSKY SERVICES PORTFOLIO

Assessments	Remediation	Managed Security Services	CSOaaS℠	Continuous Monitoring	Incident Response
• Security Risk Assessments • Compliance Gap Assessments • Security Scorecard • Vendor & Supply Chain Assessments	• Security Architecture Reviews • Security Hardware and Software Installations • Firewall Ruleset Reviews • Endpoint Lock-downs	• Remote Monitoring • Internal/External Vulnerability Management • Security Awareness Training Program • Mobile Security • Penetration Testing	• On-Demand CSOs • Policy/Procedure Development • Security Infrastructure • Disaster Recovery • Business Continuity Planning • Cyber Insurance	• Security Monitoring (24x7x365) • End Point Protection • SEIM Advisory • IDS/IPS Advisory • SOC/NOC • Continuous Compliance	• Breach Response • Service Restoration • Digital Forensics • E-Discovery • Disaster Recovery • Business Continuity

Security Risk Assessment

Improve your security posture and achieve compliance with our security risk assessments. Our engineers use a threat-based methodology to conduct a 360-degree assessment on your organization's cybersecurity across four dimensions of security: ***people, processes, facilities and technologies.***

Compliance Gap Assessments

Your organization likely has one or more compliance mandates to adhere to. GoldSky performs compliance gap & readiness assessments for HIPAA, PCI, ISO 27001 EU-GDPR, and many other common compliance frameworks.

Remediation Advisory

GoldSky provides remediation advisory services to assist in closing gaps where compliance and security vulnerabilities have been found.

Vulnerability Assessments

Each Month GoldSky engineers perform automated vulnerability scans on the perimeter of your network. These scans look for the presence of the latest security risks that might be affecting your organization. At the conclusion of each scan, GoldSky engineers will assess the scan results to provide actionable advice on the risks discovered and how to address them.

Security Awareness Training

Training your staff on how to detect a security incident and what to do is a critical step in securing your business. Twice a year, GoldSky engineers hold security awareness programs for your staff. These programs are held on-site or as live webinars and designed to be entertaining and informative.

Penetration Testing

A Penetration Test (ethical hacking) is an assessment that exploits known and unknown vulnerabilities on a web application, operating system, web server, and network. Once a vulnerability has been exploited, a Penetration Test can then show what data can be accessed.

CSOaaS℠

On-Demand Chief Security Officer as a Services. Designed to assist in executive management Policy/Procedure Development and Security Infrastructure.

Disaster Recovery/Business Continuity Planning

Custom designed DR/BCP services available to assist in keeping critical assets and business operations running during unforeseen circumstances.

Continuous Monitoring 24x7x365

GoldSky provides a one-of-a-kind antivirus and endpoint security product that us usually only available to the largest enterprises. This service installs seamlessly and is monitored 24x7 by at datacenters around the world. The service is customized to each organization and provides for deep insight into the security of all your computers and servers. Our service uses an "application whitelisting" approach, which stops malware in it's tracks!

Incident Response

GoldSky offers a full suite of incident response services including 24 Hour Support Hotline and Retained Services.

www.GoldSkySecurity.com

GOLDSKY CYBER SECURITY SOLUTIONS

Back to Speaker Topics

Fund Assembly

Easements & Access from Title Insurer's Perspective

David Miller, *Shareholder, President and CEO, Peterson & Myers, P.A.*

Back to Speaker Topics

Speaker Information

Easements & Access from Title Insurer's Perspective

David Miller

Shareholder, President and CEO, Peterson & Myers, P.A.

David A. Miller is a shareholder of Peterson & Myers, P.A., and serves as the firm's President and CEO. Mr. Miller received a Bachelor of Science in Business Administration (Accounting) from Auburn University, a Master of Business Administration from Wake Forest University, and his law degree from Wake Forest University.

Mr. Miller practices in the firm's Lakeland office and represents clients throughout the state in the areas of real estate law, agriculture law; banking and finance; education law; and business law. Mr. Miller previously served as General Counsel for a commercial real estate and agricultural company.

Mr. Miller is a member in good standing with The Florida Bar and the North Carolina State Bar, and is admitted to the United States Supreme Court, the United States District Court for the Middle District of Florida, and the United States District Court for the Eastern District of North Carolina. He is a member of the Real Property, Probate and Trust Law Section of The Florida Bar, and is also a member of the Tenth Circuit Unlicensed Practice of Law Committee.

EASEMENTS AND ACCESS FROM THE TITLE INSURER'S PERSPECTIVE

Presented by: David A. Miller, Peterson & Myers, P.A.

Prepared by: David A. Miller and Catherine A. Simon, Peterson & Myers, P.A.

Fund Assembly, May 10, 2019

I. EASEMENTS

A. Definition of an Easement

An easement, by definition, is the right to use land owned by another. One Harbor Fin. Ltd. Co. v. Hynes Props., LLC, 884 So. 2d 1039, 1044 (Fla. 5th Dist. Ct. App. 2004), (citing *Black's Law Dictionary*).

An easement is an incorporeal, nonpossessory interest in land which concerns the use of the land of another. An easement is not an estate in land and does not convey title to land or dispossess the owner of the land subject to the easement. Instead, an easement only grants the right to use the property for some particular purpose or purposes. Sears, Roebuck and Co. v. Franchise Fin. Corp. of Am., 711 So. 2d 1189, 1191 (Fla. 2d Dist. Ct. App. 1998).

Although an easement is not an estate in land and its creation does not convey title, it is an interest that gives to one other than the owner a right to use the land for some specific purpose. Branscombe v. Jupiter Harbour, LLC, 76 So. 3d 942, 947 (Fla. 4th Dist. Ct. App. 2011).

An easement is a limited interest in land, it runs with the servient estate, and often times is permanent in nature.

B. Creation of an Easement

An easement is created in one of three ways: (1) by express grant, (2) by implication, or (3) by prescription. Canell v. Arcola Housing Corp., 65 So. 2d 849, 851 (Fla. 1953).

1. Express Grant. An express easement must be created by a written instrument and executed with the formalities of a deed (i.e. the grantor signing the instrument in the presence of two subscribing witnesses). Fla Stat. § 689.01 (2018).

   To create a permanent easement, the estate holder must have the fee or at least be able to dispose of the fee. Avery Dev. Corp. v. Village by the Sea Condo. Apartments, Inc., 567 So. 2d 447, 448 (Fla. 4th Dist. Ct. App. 1990).

   An express easement may be created by a grant or by reservation.

Generally all that is required to create an easement is a description which identifies the area involved and reflects the intention of the parties. There are no magical words that one must divine in order to create an express easement. All that is necessary are words showing the intention of the parties to create an easement on a sufficiently identifiable estate. Am. Quick Sign, Inc. v. Reinhardt, 899 So. 2d 461, 465 (Fla. 5th Dist. Ct. App. 2005); Hynes v. City of Lakeland, 421 So. 2d 505, 511 (Fla 2d Dist. Ct. App. 1984).

2. Implication (a/k/a Easement by Necessity). Common law and statutory ways of necessity are codified in Fla. Stat. § 704.01.

   a. *Implied Grant of Way of Necessity* – an implied grant exists where a person heretofore granted or hereafter grants lands to which there is no accessible right-of-way except over her or his land, or has heretofore retained or hereafter retains land which is inaccessible except over the land which the person conveys. Such an implied easement exists where there is no other reasonable and practicable way of egress, or ingress and same is reasonably necessary for the beneficial use or enjoyment of the part granted or reserved. An implied grant arises only where a unity of title exists from a common source other than the original grant from the state or United States; provided, however, that where there is a common source of title subsequent to the original grant from the state or United States, the right of the dominant tenement shall not be terminated if title of either the dominant or servient tenement has been or should be transferred for nonpayment of taxes either by foreclosure, reversion, or otherwise. Fla. Stat. § 704.01(1).

   b. *Statutory Way of Necessity* - Based on public policy, convenience, and necessity, a statutory way of necessity exclusive of any common-law right exists when any land, including land formed by accretion, reliction, or other naturally occurring processes, or portion thereof, which is being used or is desired to be used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stockraising purposes is shut off or hemmed in by lands, fencing, or other improvements by other persons so that no practicable route of egress or ingress is available therefrom to the nearest practicable public or private road in which the landlocked owner has vested easement rights. The owner or tenant thereof, or anyone in their behalf, lawfully may use and maintain an easement for persons, vehicles, stock, franchised cable television service, and any utility service, including, but not limited to, water, wastewater, reclaimed water, natural gas, electricity, and telephone service, over, under, through, and upon the lands which lie between the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which said lands are being put; and the use thereof, as aforesaid, shall not constitute a trespass; nor shall the party thus using the same be liable in damages for the use thereof, provided that such easement shall be used only in an orderly and proper manner. Fla. Stat. § 704.01(2).

c. *Establishment of Easement by Implication* – the elements required to establish an easement by implication are:

i. Unity of title.
ii. When dividing the property, the owner of the unified property caused one of the properties (as divided) to become landlocked.
iii. At the time the property was divided, the unified property had access to a public road.
iv. The only reasonable and practicable access to the public road from the dominant parcel is across the servient parcel. "Practicable" is defined to mean without the use of bridge, ferry, turnpike road, embankment, or substantial fill. Fla. Stat. § 704.03.

d. *Circumstances in which an Easement will be Implied.*
i. A duly executed writing that is ambiguous, but otherwise valid.
ii. A factual situation giving rise to the creation of a way of necessity as a matter of public policy.

e. *Absolute Necessity is Required* – to obtain an easement by implication, a landowner must demonstrate absolute necessity. Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc. 489 So. 2d 22, 22 (Fla. 1986); Picciolo v. Jones, 534 So. 2d 875, 878 (Fla. 3d Dist. Ct. App. 1988).

3. Prescription. An easement by prescription requires the following:

a. the user has made a certain particular and actual use of lands owned by another,

b. such use has been continuous and uninterrupted for the full prescriptive period of 20 years,

c. during the whole prescribed period such use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use is imputed to the owner,

d. such use related to a certain limited and defined area of land or, if for a right-of-way, the use was of a definite route with a reasonably certain line, width and termini,

e. during the whole prescribed period such use has been adverse to the owner; that is, (a) the use has been made without the permission of the owner and under some claim of right *other than permission from the owner,* (b) the use has been either exclusive of the owner or inconsistent with the rights of the owner of the land to its use and enjoyment, and (c) the use has been such that, during the whole prescribed period, the owner had a cause of action

against the user for the use being made Downing v. Bird, 100 So. 2d 57, 64 (Fla. 1958); Crigger v. Fla. Power Corp., 436 So. 2d 937, 944–45 (Fla. 5th Dist. Ct. App.1983)

C. Statute of Frauds

An easement is a real property interest subject to the statute of frauds, and apart from prescription, requires a writing for its creation. One Harbor Fin. Ltd. Co., 884 So. 2d at 1044.

No action shall be brought whereby to charge any executor or administrator….upon any contract for the sale of lands, tenements or hereditaments, or any uncertain interest in or concerning them….unless the agreement or promise upon such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized. Fla. Stat. § 725.01 (2018).

Promissory estoppel is not an exception to the statute of frauds. DK Arena, Inc. v. EB Acquisitions I, LLC, 112 So. 3d 85, 94-95 (Fla. 2013). An oral promise to create an easement violates the Statute of Frauds. Dorsey v. Behm, 356 So. 2d 345, 345 (Fla 1st DCA 1978). An oral promise to create an easement is within the terms of the statue of frauds and thus cannot be enforced directly or indirectly. Canell, 65 So. 2d at 851.

D. Categories of Easements

1. In Gross. An easement in gross benefits an individual, or entity, or group of persons or entities, not a particular parcel of property. An easement in gross is independent of any possession in land. Examples of easements in gross include conservation easements, utility easements, or hunting easements. North Dade Water Co. v. Florida State Turnpike Auth., 114 So. 2d 458, 461 (Fla. 3d Dist. Ct. App. 1959).

2. Appurtenant. An appurtenant easement benefits the person who owns the dominant tenement and runs with the land. An easement is appurtenant when the right which it represents is attached to and belongs with some greater or superior right as a dominant estate. It is not personal to the original holder. Id. An example of an appurtenant easement is an access easement across a servient parcel for the benefit of a dominant parcel of land.

   The essential elements or qualities of appurtenant easements are as follows:
   (1) incorporeal interest in real property;
   (2) imposed upon corporeal property;
   (3) confers no right to a participation in the profits arising from such property;
   (4) imposed for the benefit of corporeal property; and

(5) must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests. J. C. Vereen & Sons v. Houser, 167 So. 45, 47 (Fla. 1936); Burdine v. Sewell, 109 So. 648, 652 (Fla. 1926).

3. Affirmative. An affirmative easement authorizes the easement holder to use the easement land for a particular purpose. An affirmative easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement. 25 Am. Jur. 2d Easements and Licenses in Real Property § 7.

4. Negative. A negative easement entitles the easement holder to prevent the owner of the servient land from conducting a particular act on the servient land. 25 Am. Jur. 2d Easements and Licenses in Real Property § 7.

E. Duration of an Easement

1. Default is Perpetual in Duration. The duration of an express easement is construed to be perpetual unless the easement expressly specifies the easement is not perpetual. Entzminger v. Thornberry, 734 So. 2d 1114, 1115 (Fla. 2d Dist. Ct. App. 1999).

2. Termination upon Specific Event or Contingency. An easement does not have to be permanent, but may terminate upon the happening of an event, condition, or contingency. Shiner v. Baita, 710 So. 2d 711, 712 (Fla. 1st Dist. Ct. App. 1998). If and easement is intended to be temporary, the drafter of the easement should draft the termination to be triggered upon the occurrence of an independently verifiable event (e.g. a date certain, issuance of a Certificate of Occupancy, transfer of the servient estate to a third party, etc.).

3. Termination by Mutual Agreement. An easement may terminate by mutual agreement of the easement holder and owner of the servient tenement. Sewell v. Burdine, 87 So. 143, 144 (Fla. 1920).

4. Termination when Necessity Terminates. Easements by necessity terminate when the necessity for any such easement terminates. Enzor v. Raspberry, 648 So. 2d 788, 792-92 (Fla. 1st Dist. Ct. App. 1994).

5. Termination by Unity of Title. An easement terminates by doctrine of merger when the dominant tenement and servient tenement have common ownership. Tyler v. Price, 821 So. 2d 1121, 1125 (Fla. 4th Dist. Ct. App. 2002); Lacy v. Seegers, 445 So. 2d 400, 401 (Fla. 5th Dist. Ct. App. 1984).

6. Termination by Abandonment. An easement may be terminated by abandonment, which being a question of intent is usually determined by a trier

of fact. Jewett v. Leisinger, 655 So. 2d 1210, 1212-13 (Fla. 4th Dist. Ct. App. 1995).

7. Termination by Condemnation. The condemnation or taking of the servient tenement by the condemning authority also terminates the easement interest held by the owner of the servient tenement, but the easement holder is entitled to compensation for the condemnation or taking of the easement interest.

8. Termination by MRTA. The Marketable Record Title Act ("MRTA") can terminate an easement in certain circumstances. Fla. Stat. § 712.04. However, MRTA cannot be used to eliminate easements in use, easement interests reserved or held by the State or a governmental entity, or easements preserved by filing the statutory notice for preserving the easement.

9. Termination by Tax Sale. An easement may be terminated by tax sale of the servient estate unless the tax deed includes an express reference that the conveyance of the land is subject to existing easements. Berger v. City of Coral Gables, 101 So. 2d 396, 397 (Fla. 3d Dist. Ct. App. 1958). *Caution*: there are exceptions to termination by tax sale which include the survival of conservation easements and easements established for a public purpose. Fla. Stat. § 197.572; Fla. Stat. § 704.01(1); Fla. Stat. § 704.06(4).

F. Scope of Easement

A burden created by an easement cannot be increased beyond that reasonably contemplated by the parties at the time of its creation. Easton v. Appler, 548 So. 2d 691, 695 (Fla. 3d Dist. Ct. App. 1989); Groff v. Moses, 344 So. 2d 951, 952 (Fla. 2d Dist. Ct. App. 1977).

A general principle governing all easements, whether acquired by use, express grant, dedication, or by implication from the circumstances of a particular transaction, is that the burden of a right of way upon the servient estate must not be increased to any greater extent than reasonably necessary and contemplated at the time of initial acquisition. Crutchfield v. F.A. Sebring Realty Co., 69 So. 2d 328, 330 (Fla. 1954). The owner of the dominant estate cannot increase the burden on the servient parcel to any greater extent than reasonably necessary and contemplated at the time the easement was granted. Avery Dev. Corp., 567 So. 2d at 448-49.

The rights of the owner of an easement over a servient estate are not absolute and unlimited but instead are limited so that each party may reasonably enjoy his or her respective property rights Tortoise Island Communities, Inc. v. Roberts, 394 So. 2d 568, 569 (Fla. 5th Dist. Ct. App. 1981).

The owner of an easement may not unduly burden the servient estate and the owner of the servient estate retains the right to use his land in any manner not inconsistent with the easement. Sinclair v. Clay Elec. Coop., Inc., 584 So. 2d 1065, 1066 (Fla. 5th Dist. Ct. App. 1991)

G. Exclusive v. Nonexclusive Easement

Generally, an easement is not intended to be exclusive unless the grant so provides. Easton, at 548 so. 2d 694. The general rule of law in Florida is that an instrument creating an easement must be construed as creating a nonexclusive easement unless the instrument clearly shows an intention that the easement is to be exclusive. Stephens v. Dobbins, 511 So. 2d 652, 652-53 (Fla. 2d Dist. Ct. App. 1987). If the easement is intended to be exclusive, the easement must be specifically drafted as an exclusive easement.

H. Transfer of Easements

1. Appurtenant Easements. The benefits of an appurtenant easement are transferred with the land when the dominant tenement is transferred, and the burdens are transferred with the land when the servient tenement is transferred.

2. Easements in gross – Easements in gross are personal to the holder and generally not assignable unless expressly otherwise stated in the easement agreement. North Dade Water Co., 114 So. 2d at 461. An easement in gross is unconnected with nor for the benefit of any dominant estate. Platt v. Pietras, 382 So. 2d 414, 417 (Fla. 5th Dist. Ct. App. 1980).

I. Lienholder Consent and Subordination

Holders of all recorded, preexisting mortgages and other liens affecting the burdened property (i) must consent to the granting of the easement, and (ii) to subordinate their rights to the easement. If a lender or other lienholder does not subordinate its lien to the easement, then the easement may be extinguished if there is a foreclosure. When property is subject to a mortgage, and subsequent to the mortgage lien being granted the owner of the mortgaged land creates an easement over the property, a foreclosure of the mortgage will extinguish the easement. United States v. Roberts, 788 F. Supp. 555, 556-57 (S.D. Fla. 1991). Accordingly, any title insurance policy insuring an easement created after the lien of a mortgage must show the mortgage as an exception to the insured easement.

J. Distinction between Easements and Licenses

The fundamental difference between a license and an easement is that a license is not a real property right. An easement constitutes an interest in land, is subject to

the statute of frauds, and runs with the land. A license is distinguished from an easement in that a license is merely a personal right to use the property of another for a specific purpose, is not an interest in land and, therefore, may not be assigned or conveyed. Dotson v. Wolfe, 391 So. 2d 757 759, (Fla. 5th Dist. Ct. App. 1980). A license only permits the licensee to use or access the property of another within the licensed area without being considered a trespasser. A license is generally revocable at the pleasure of the licensor, rather than a perpetual interest in the land. Keane v. President Condo. Ass'n, Inc., 133 So. 3d 1154, 1156 (Fla. 3d Dist. Ct. App. 2014). However, there instances in which a license may become irrevocable to escape an inequitable situation which might be created by the requirements of the statute of frauds, or where money has been spent in reliance on a license. Dotson, 391 So. 2d at 759 (citing Seaboard Air Line Ry. Co. v. Dorsey, 149 So. 759 (Fla. 1932); Dance v. Tatum, 629 So. 2d 127 (Fla. 1993).

II. ACCESS AND INSURABILITY OF EASEMENTS

A. Access Easement

An access easement is an affirmative easement authorizing the owner to do something that he or she would not otherwise be entitled to do. 20 Fla. Jur. 2d. Easements § 43.

B. Insuring Access

A risk covered by a title insurance policy is a lack of access to and from the insured fee simple land (Covered Risk 4 of the title insurance policy). When examining title, the agent should carefully determine whether access exists to the insured land from a public road. Access to the insured land may exist by the insured land abutting a public road, or by the insured land having access to a public road by way of an easement. If access does not exist to the insured land from a public road, an exception for lack of access must be included in Schedule B-II of the title insurance commitment and Schedule B of the title insurance policy. When insuring access based on an access easement, consider prior use of the access easement, current use of the easement, and proposed use of the access easement.

1. Public Road Defined. All roads which are open and available for use by the public and dedicated to the public use, according to law or by prescription, are hereby declared to be, and are established as, public roads. Fla. Stat. § 335.01(1).

   Public roads shall be divided into four systems (Fla. Stat. § 335.01(2):

   (a) The State Highway System (defined in Fla. Stat. § 334.03(24));
   (b) The State Park Road System (defined in Fla. Stat. § 334.03(25));
   (c) The county road system (defined in Fla. Stat. § 334.03(8)); and
   (d) The city street system (defined in Fla. Stat. § 334.03(3)).

2. Platted Roads - When a tract or parcel of land has been subdivided and a plat thereof bearing the dedication executed by the owners of record and mortgagees having a record interest in the lands subdivided, and when the approval of the governing body has been secured and recorded in compliance with this part, all streets, alleys, easements, rights-of-way, and public areas shown on such plat, unless otherwise stated, shall be deemed to have been dedicated to the public for the uses and purposes thereon stated. However, nothing herein shall be construed as creating an obligation upon any governing body to perform any act of construction or maintenance within such dedicated areas except when the obligation is voluntarily assumed by the governing body. Fla. Stat. § 177.081(3). Practice tip: Confirm whether the platted access has been dedicated to the public or if it remains private. If the platted access is private, confirm

whether plat confers a right of use to the insured land. Streets and other platted access ways may not be dedicated to public use and may not provide access to the insured land. Fla. Stat. § 177.031.

3. Roads Presumed to Be Dedicated – Fla. Stat. § 95.361:
   a. Constructed by a county, municipality, or the FDOT and maintained or repaired continuously and uninterruptedly for four (4) years.
   b. Road constructed by a nongovernmental entity, or where the road was not constructed by the entity currently maintaining or repairing it, or where it cannot be determined who constructed the road, and the road has been maintained or repaired continuously for the immediate past seven (7) years by a county, municipality, or the FDOT.
   c. The filing of a map in the office of the clerk of the circuit court of the county where the road is located reciting that the road has vested in the state, a county, or a municipality in accordance with Fla. Stat. § 95.361(1) or (2), or by other means of acquisition.

   Caution: A road privately constructed but governmentally maintained is not a public road. Balbier v. City of Deerfield Beach, 408 So. 2d 764, 765 (Fla. 4th Dist. Ct. App. 1982). A public road based solely on prescription may not be relied upon to insure access unless its status as a public road and its extent and location as an easement have been judicially determined. Jones v. Orem, 605 So. 2d 1017, 1018-19 (Fla. 5th Dist. Ct. App. 1992).

C. Examination of Easement

1. Factors to consider in determining whether an easement may be insured:
   a. Is the easement parcel appurtenant to the fee simple parcel being insured?
   b. Is title to the easement parcel in good condition and is the party granting the easement an owner of an interest in the easement parcel that allows the appurtenant easement to be properly granted to the insured?
   c. Is a survey required to address, add or delete any exceptions to the title insurance policy?

2. Title to the easement parcel must be examined in addition to the title search and examination conducted for the insured fee simple parcel.

3. Review the easement document for the following:

   a. Proper execution by a grantor who has the right to convey the easement; executed with the formalities of a deed (i.e. signed by the grantor and two subscribing witnesses).

b. The easement agreement must be properly acknowledged by a notary to be recorded.

c. The easement is an appurtenant easement. The easement instrument should include language evidencing the appurtenant nature of the easement (e.g. "for the benefit of the dominant parcel", "is a covenant running with the land and binds and benefits the parties hereto and their heirs, successors and assigns", or "which easement is an appurtenant easement and runs with the land"). Generally, an easement in gross is not insurable.

d. The easement agreement sufficiently describes the dominant tenement.

e. The easement agreement sufficiently describes the servient tenement.

f. The easement agreement contains an express grant of easement or reservation of easement. Look for granting words such as "grant", "convey", or similar language. Do not use "subject to" language. Example: Subject to a 25 foot wide easement for ingress and egress over and across Lot A. "Subject to" language does not constitute a grant of easement created by the grantor and therefore is likely not insurable. The words "subject to" are not sufficient to create an easement. Procacci v. Zacco, 324 So. 2d 180, 182 (Fla. 4th Dist. Ct. App. 1975); Behm v. Sali, 560 So. 2d 431, 432 (Fla. 5th Dist. Ct. App. 1990).

g. The easement agreement specifies a proper purpose for which the easement is being insured (e.g. an access easement that states the purpose is for access, ingress and egress by pedestrian traffic and motor vehicles). If the easement instrument does not state its purpose, or the purpose is overly broad (e.g. language such as "for recreational purposes") the easement is likely not insurable.

h. Confirm the easement is in effect and does not expire or terminate. If the easement terminates or expires, an appropriate exception must be included in the title insurance commitment and title insurance policy.

i. Determine any matters that require modification to Schedule B-I and/or Schedule B-II of the Title Commitment. *Remember*: standard exceptions (e.g. parties in possession, taxes, encroachments otherwise disclosed by survey, etc.) that apply to the fee title parcel also apply to the easement parcel unless properly eliminated (e.g. gap affidavit, survey, etc.).

j. Identify exceptions to include on Schedule B-II of the Title Commitment. Any title exceptions applicable to the easement parcel must be included on

Schedule B-II. Also, any obligations imposed on the insured fee simple parcel by the grant of easement should be identified and included on Schedule B-II as exceptions to the fee simple parcel.

D. Preparing the Title Insurance Commitment

1. Schedule A of the Title Commitment.

   a. Distinctly identify the insured fee simple parcel and the insured easement parcel. Example: "The estate or interest in the land described on attached Exhibit "A" is fee simple as to Parcel 1, and an easement as to Parcel 2."
   b. Identify the title owner for the Fee Simple Parcel and the title owner for the Easement Parcel (which may be one and the same, or may be different if the easement is being conveyed by a third party).
   c. Separately state the legal descriptions for the Fee Simple Parcel and the Easement Parcel and identify them with separate parcel numbers. An example of a common methodology used to separately identify the legal descriptions of the fee simple parcel and the easement parcel is to list them separately on Exhibit "A":

      Parcel 1 (Fee Simple Parcel): [insert legal description of fee simple parcel]
      Parcel 2 (Easement Parcel): [insert legal description of easement parcel]

      Another alternative is to describe the fee simple parcel(s) on Exhibit "A" attached to the Title Commitment and describe the insured easement parcel(s) on an attached Exhibit "B".

   d. It is a good practice to identify on Schedule A the purpose of the easement being insured, particularly if the easement agreement includes more than one type of easement [for example, Schedule A would specify something similar to the following: Parcel 2 (the easement parcel) is a perpetual nonexclusive easement for ingress and egress].

2. Schedule B-I of the Title Commitment.

   Modify Schedule B-I of the Title Commitment to include any requirements relating to the easement parcel. Examples include requirements such as (i) the execution of a new appurtenant easement agreement required to create the easement, (ii) the entity granting the easement must demonstrate authority to grant the easement (e.g. corporate resolution), or (iii) a lien encumbering the easement parcel either being released from the lien or the lienholder consenting to the grant of the easement and subordinating its lien to the easement.

3. Schedule B-II of the Title Commitment

Exceptions that are applicable to the easement parcel must be set forth on Schedule B-II, including standard exceptions and specific exceptions. All such exceptions must be properly addressed in order to be deleted or must otherwise remain as exceptions to the easement parcel in the title insurance policy. Also, an appropriate exception to the fee simple parcel must be included on Schedule B-II of the Title Commitment for the terms and conditions of the easement agreement creating the insured easement if it imposes obligations on the insured fee simple parcel (e.g. maintenance obligations, insurance obligations, etc.).

E. Survey

Obtaining a survey of the easement parcel and determining it connects the fee simple parcel to a public road is absolutely necessary when relying on the easement parcel to insure access. In order to provide affirmative survey coverage for the easement parcel, a survey of the easement area must be obtained and reviewed. The survey of the insured fee parcel should also include the legal description of the insured access easement parcel and depict the easement parcel providing uninterrupted access from the insured fee simple parcel to a public road. If the insured access easement does not properly connect the insured fee simple parcel to a public road and the insured fee simple parcel does not otherwise have legal access to a public road, then an appropriate exception must be included in Schedule B-II for lack of access.

The title insurance policy insures a right of access to and from the insured fee simple parcel (Covered Risk 4), which insures only the legal right of access and does not insure the quality, condition or location of physical access. Title insurance does not insure against defects in the physical condition of the land or against infirmities in legal right of access not shown by the public record. In addition, title insurance does not insure a particular means of access; for example, by way of a particular street. Title & Trust Co. of Florida v. Barrows, 381 So. 2d 1088, 1090 (Fla. 1st Dist. Ct. App. 1979); Krause v. Title & Trust Co. of Florida, 390 So. 2d 805, 806 (Fla. 5th Dist. Ct. App. 1980).

If the survey reveals no legal right of access exists, then the title insurance policy must include an exception that it does not insure any right of access to and from the insured fee simple parcel.

F. Unrecorded Easements

If the insured actually knew or should have known about an unrecorded easement, then the insured may not have coverage for that easement even if it is not listed on the Title Insurance Policy. Unrecorded easements that become known to the title agent should be added to the title insurance policy as exceptions.

G. Drafting the Access Easement Agreement

The following are items or topics to address when drafting an appurtenant easement agreement:

1. Correctly identify the grantor and grantee.

2. Include legal descriptions of both the dominant parcel and the servient parcel.

3. Clearly identify the location and boundary of the easement area. Generally, the grantor of an easement has the right to identify its location. If the grantor fails to do so, then the easement holder may select the location of the easement subject to the location being reasonable and not unreasonably interfering with the enjoyment of the servient estate. The description of the easement area should be sufficient to identify the land that is subject to the easement. A precise description of the easement area helps prevent future arguments between the owner of the dominant tenement and the owner of the servient tenement, and also avoids ambiguity when examining title and survey matters (e.g. determining whether the easement is being encroached upon by a building).

   The general rule is that the location of an easement once selected cannot be changed by either the land owner or the easement owner without the other's consent. The reason for this rule is that treating the location as variable would incite litigation and depreciate the value and discourage the improvement of the land upon which the easement is charged. Florida Power Corp. v. Hicks, 156 So. 2d 408, 410 (Fla. 2d Dist. Ct. App. 1963). Where the precise location of the easement is the crux of the dispute, either party may procure a decree adjudging the right affirmatively and specifically, and this of necessity authorizes a determination of the width of the easement within the ambit of contractual intent. Kingdon v. Walker, 156 So. 2d 208, 211 (Fla. 2d Dist. Ct. App. 1963).

4. State the purpose of the easement. For example, the purpose of an access easement could be stated as access, ingress and egress over, through and across the easement area for the benefit of the grantee, the dominant parcel, and the grantee's successors and assigns.

5. Specify if the easement is perpetual or temporary. If the easement is not for a specified period, it is not revocable by the grantor (i.e. not temporary). Russell v. Martin, 88 So. 2d 315, 317 (Fla. 1956).

6. Specify which party(ies) are responsible for maintenance of the easement area. It is the long established rule that the duty to improve or maintain an implied right-of-way or other easement rests on the owner of the easement. Morrill v. Recreational Dev., Inc., 414 So. 2d 590, 591 (Fla. 1st Dist. Ct. App. 1982). If the parties to the easement intend to modify the general rule, then it should be memorialized in the easement instrument.

7. Include any indemnification obligations as appropriate (and any insurance requirements if desired by the parties).

This document is prepared by
and should be returned to:

ACCESS EASEMENT AGREEMENT

THIS ACCESS EASEMENT AGREEMENT (the "**Agreement**") is made and entered into on _____, 20___, by and between _____, whose address is _____ ("**Grantor**"), and _____, whose address is _____ ("**Grantee**").

RECITALS

A. Grantee is the owner of certain real property located in _____ County, Florida, and being more particularly described in attached Exhibit "A" (the "**Grantee Property**").

B. Grantor is the owner of a parcel of real property located adjacent to the Grantee Property, as more particularly described in attached Exhibit "B" (the "**Grantor Property**").

C. Grantor agrees to grant to Grantee an easement for vehicular and pedestrian ingress and egress over, across and through portions of the Grantor Property to the Grantee Property, more particularly described attached Exhibit "C" (the **"Easement Area"**).

AGREEMENTS

NOW, THEREFORE, for and in consideration of the sum of Ten Dollars ($10.00), the covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantee and Grantor, intending to be legally bound, do covenant and agree as follows:

1. Recitals. The foregoing recitals are true and correct and by this reference are incorporated herein.

2. Grant of Easement. Grantor hereby grants and conveys to Grantee to and for the benefit of the Grantee Property a nonexclusive easement in and to the Easement Area, for the

purpose of providing access, ingress and egress by pedestrian traffic and motor vehicles on, over and across the Easement Area.

3. Term of the Easement. The easement granted herein is a perpetual easement.

4. Restrictions on Use of Easement. [*if applicable, insert any restrictions intended by the parties e.g. any limitation on size of vehicles or number of daily trips*].

5. Insurance. [*insert insurance requirements if applicable and desired by the parties*]

6. Indemnification**.** Grantee shall indemnify, defend, and hold Grantor harmless from and against any and all losses, costs, claims, actions, damages, liabilities and expenses (including without limitation reasonable attorney's fees actually paid and court costs) incurred by Grantor in connection with or arising out of the Grantee's exercise of the easement rights granted herein.

7. Maintenance and Repair. Grantee shall, at Grantee's expense, maintain and repair the Easement Area in good condition and state of repair. Grantor agrees that it shall not at any time erect, construct, or cause to be constructed, any fence, wall, curb or other barrier within the Easement Area or in an any manner interfere with or restrict the full and complete use and enjoyment by Grantee of the access, ingress, and egress easement granted herein.

8. Mortgage Subordination. Any mortgage or deed of trust affecting any portion of the property affected hereby shall at all times be subject and subordinate to the terms of this Agreement, except to the extent expressly otherwise provided herein, and any party foreclosing any such mortgage or deed of trust, or acquiring title by deed in lieu of foreclosure or trustee's sale, shall acquire title subject to all of the terms and provisions of this Agreement.

9. Non-Dedication. Nothing contained in this Agreement shall be deemed to be a gift or dedication of any property affected hereby, or any portion thereof, to the general public or for any public use or purpose whatsoever, it being the intention of the Agreement and its successors-in-title that nothing in this Agreement, expressed or implied, shall confer upon any person, other than the parties hereto and their successors-in-title, any rights or remedies or by reason of this Agreement.

10. Covenants Running with the Land. The easement granted herein, and the agreements herein contained, is an appurtenant easement running with and burdening the Grantor Property and shall inure to the benefit of Grantee and the Grantee Property, and their respective heirs, successors and assigns, and successors-in-title, including, without limitation, all persons claiming under such owner, and any tenants, ground lessee's and subtenants thereof.

11. Binding Effect. The benefits and burdens of the easement granted by this Agreement shall bind benefit the parties hereto and their respective successors, successors-in-title, legal representatives and assigns.

12. Waiver. The failure of Grantor or Grantee to exercise any right given hereunder or to insist upon strict compliance with any term, condition or agreement specified herein, shall not constitute a waiver of either party's right to exercise such right or to demand strict compliance with any such term, condition or agreement under this Agreement.

13. Notices. All notices under this Agreement shall be in writing and shall be deemed to have been properly given or served if (i) personally delivered or (ii) transmitted by postage prepaid, certified mail, return receipt requested, or (iii) transmitted by reliable commercial courier or express mail service, and addressed to the owner's address provided in the records of the _____ County Property Appraiser. Any notice shall be deemed to have been given on (x) the date of receipt if delivered personally or (y) the day it shall have been posted or transmitted by mail or commercial courier or express mail service.

14. Severability. If any provision of this Agreement, or the application thereof to any person or circumstance, shall be to any extent held invalid, inoperative or unenforceable, the remainder of this Agreement, or the application of such provision to any such persons or circumstances, shall not be affected thereby; it shall not be deemed that any such invalid provision affects the consideration for this Agreement; and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

15. Headings. The headings in this Agreement are for convenience only, shall in no way define or limit the scope or content of this Agreement, and shall not be considered in any construction or interpretation of this Agreement or any part hereof.

16. Incorporation of Exhibits. This Agreement shall be deemed to include all exhibits attached hereto, which exhibits are incorporated herein by reference.

17. Amendments. The provisions of this Agreement may be abrogated, modified, rescinded or amended in whole or in part only with the consent of the parties hereto (or their successors, assigns and successors-in-title as applicable) in a written instrument duly executed, delivered and recorded.

18. Governing Law. This Agreement shall be governed by and construed under the laws of State of Florida.

19. Attorneys' Fees and Costs. If any party seeks to enforce, declare, or interpret this Agreement or any of the terms hereof, the prevailing party shall be entitled to recover from the non-prevailing party all costs and expenses incurred, including, without limitation, reasonable attorney's fees at all levels of pre-litigation, litigation, post-litigation, appeal and at all alternative dispute resolution preparation and proceedings. Such costs and expenses include, but are not limited to, costs of appeal, court costs, and court reporter's fees and all actions and matters in the Bankruptcy Court.

20. Counterparts. This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original, but all of which together will constitute one instrument.

[Signature lines begin on the following page]

[SIGNATURE PAGE TO ACCESS EASEMENT AGREEMENT]

IN WITNESS WHEREOF, the Grantor has executed and delivered this Agreement under seal as of the day and year first above written.

Witnesses: _____ Print Name: _____ _____ Print Name: _____	**GRANTOR**: _____ By: _____ Print Name:_____ Title:_____

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me on _____ _____, 20__, by _____, as _____ of _____, on behalf of the company. Such person is personally known to me or has produced a valid driver's license as identification.

_____
Notary Public
My commission expires:

[SIGNATURE PAGE TO ACCESS EASEMENT AGREEMENT]

IN WITNESS WHEREOF, Grantee has executed and delivered this Agreement under seal as of the day and year first above written.

Witnesses: _____ Print Name: _____ _____ Print Name: _____	**GRANTEE**: By: _____ Print Name:_____ Title:_____

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me on _____, 20___, by _____, as _____ of _____, on behalf of the company. Such person is personally known to me or has produced a valid driver's license as identification.

_____
Notary Public
My commission expires:

CONSENT AND SUBORDINATION

_____ BANK ("**Lender**"), as owner and holder of that certain Real Estate Mortgage recorded in Official Records Book _____, Page _____, Public Records of _____ County, Florida (the "**Mortgage**"), does hereby consent to the recordation of the Access Easement Agreement by and between _____ ("**Grantor**"), and _____ ("**Grantee**") dated _____, 20__, (the "**Agreement**") and the imposition of the provisions thereof on the real property encumbered by the Mortgage; and Lender does consent to Grantor granting to Grantee easement described in the Agreement and to the subordination of the lien of the Mortgage to the provisions in the Agreement, except that (i) this subordination shall not be applicable to any liens or assessments created or arising under the Agreement, (ii) no violation of the Agreement shall defeat or render invalid the lien of the Mortgage, and (iii) should Lender acquire title to the property secured by the Mortgage, any liability Lender might have under the Agreement shall be nonrecourse except to the extent of its interest in such property. The execution of this Consent and Subordination by Lender shall not be deemed or construed to have the affect of creating any relationship of partnership or of a joint venture nor shall anything contained in this Consent and Subordination be deemed to impose upon Lender any of the liabilities, duties or obligations of Grantor under the Agreement. Lender has executed this Consent and Subordination solely for the purposes set forth above.

Lender has executed this Consent and Subordination on _____ ___, 20___.

LENDER:

Witnesses:

_____
Print Name: _____

_____
Print Name: _____

By: _____
Print Name: _____
Title: _____

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me _____ ___, 20_____, by _____, as _____ of _____, on behalf of the organization. Such officer is personally known to me or has produced a driver's license as identification.

_____
Notary Public
My Commission Expires:

Back to Speaker Topics

Fund Assembly

To All The Economists I've Loved

Dr. Anirban Basu, *Chairman & Chief Executive Officer,*
Sage Policy Group, Inc.

Back to Speaker Topics

Speaker Information

To All The Economists I've Love

Dr. Anirban Basu

Chairman & Chief Executive Officer, Sage Policy Group, Inc.

Anirban Basu is Chairman & CEO of Sage Policy Group, Inc., an economic and policy consulting firm headquartered in Baltimore, Maryland with offices in Pennsylvania and Cambodia. The firm provides strategic analytical services to energy suppliers, law firms, medical systems, government agencies, and real estate developers among others.

In 2014, Maryland Governor Larry Hogan appointed Mr. Basu to Chair the Maryland Economic Development Commission. He also serves as chairman of the Baltimore County Economic Advisory Committee. Mr. Basu is the Chief Economist to Associated Builders and Contractors and Chief Economic Advisor to the Construction Financial Management Association. He serves similar functions for Visit Baltimore, the Maryland Association of Realtors, and Marcum, LLC.

Mr. Basu lectures at Johns Hopkins University in Global Strategy and has also taught international economics, urban economics, micro- and macroeconomics at Hopkins. His radio show can be heard weekdays on 88.1FM, WYPR, Baltimore.

In both 2007 and 2016, the Daily Record newspaper selected Mr. Basu as one of Maryland's 50 most influential people. The Baltimore Business Journal named him one of the region's 20 most powerful business leaders in 2010.

Mr. Basu has served on many boards in the past and is currently on the boards of St. Mary's College, the University System of Maryland Foundation, the Center for Emerging Media, the Lyric Opera House and the Archdiocese of Baltimore School System.

Mr. Basu earned his B.S. in Foreign Service at Georgetown University in 1990. He earned his Masters in Public Policy from Harvard University's John F. Kennedy School of Government, and his Masters in Economics from the University of Maryland, College Park. His Juris Doctor was earned at the University of Maryland School of Law.

Back to Speaker Topics

Fund Assembly

Mastering Florida's Marketable Record Title Act

Melissa Scaletta, *Vice President and Chief Underwriting Counsel, The Fund*

Back to Speaker Topics

Speaker Information

Mastering Florida's Marketable Record Title Act

Melissa Scaletta

Vice President and Chief Underwriting Counsel, The Fund

Melissa S. Scaletta is Vice President and Chief Underwriting Counsel of Attorneys' Title Fund Services, L.L.C. She has served as a member of the Faculty & Steering Committee of the Florida Bar Real Property, Probate and Trust Law Section Real Estate Certification Review and Advanced Practice Course presenting on the topic of Florida's Marketable Record Title Act and Curative Acts since 2006. Ms. Scaletta serves as a co-vice chair of the Title Issues and Standards Committee of the Real Property, Probate and Trust Law Section.

Ms. Scaletta has authored numerous articles for Fund publications and serves on the editorial boards for the Fund Title Notes and Fund Concept. She has presented various seminars pertaining to transactional law and title insurance at the Fund Assembly and Fund Affiliate Assembly. Ms. Scaletta is the author of the Marketable Record Title Act and Uniform Title Standards chapter of Florida Real Property Title Examination & Insurance (Fla. Bar CLE 8th ed. 2016). Ms. Scaletta is a Florida board certified real estate lawyer.

Fund Assembly

Mastering Florida's Marketable Record Title Act

Melissa S. Scaletta
V.P., Chief Underwriting Counsel

The Utility of MRTA

2

Mastering MRTA

3

Mastering MRTA

4

Some Inspiration

5

Some More Inspiration

6

A Little More Inspiration

7

The History of MRTA

- Before MRTA was law in Florida practitioners relied on examination of abstracts
- Proposed in 1961 by the MRTA committee of RPPTL Section of the Florida Bar and approved by the Florida Legislature in 1963
- On July 1, 1965, Ch. 712, F.S., “Marketable Record Title to Real Property” became effective
- On October 1, 2018, officially named “Marketable Record Title Act”

8

MRTA Complexities

Goals of MRTA:
Enhance marketability by extinguishing ancient defects and stale claims

Application of MRTA requires an understanding of Ch. 712, F.S., as well as several other statutes and case law

Misconceptions concerning a MRTA search

Not just a 30 year search, must:

- Examine for exceptions to MRTA before the root of title
- Be aware of matters that are not recorded (possession, taxes, easements in use)

9

MRTA Compliant Examination of Title

Identify the root of title

To qualify as a root of title, an instrument must:

- Be a title transaction affecting title to an estate or an interest in land
- Describe the land sufficiently
- Describe the interest to be conveyed
- Be recorded for at least 30 years

10

Practice to Master – Vocabulary

"**Title transaction**" means any recorded instrument or court proceeding that affects title to any estate or interest in land and that describes the land sufficiently to identify its location and boundaries Sec. 712.01(7), F.S.

A title transaction may or may not be a muniment of title

11

Practice to Master

Do all quitclaim deeds qualify as a root of title?

12

Answer

No

An “ordinary” quitclaim deed does not specify what interest is being conveyed—it simply conveys whatever interest may exist

> “all of my right title and interest in Blackacre” is not an adequate description to qualify as a root of title

The more rarely encountered quitclaim deed describing the interest to be conveyed

> “my undivided one-half interest in Blackacre” is an adequate description to qualify as a root of title

Wilson v. Kelley, 226 So.2d 123, (Fla. 2nd DCA 1969)

13

MRTA Compliant Examination of Title

Once you have identified a root of title, divide your search:

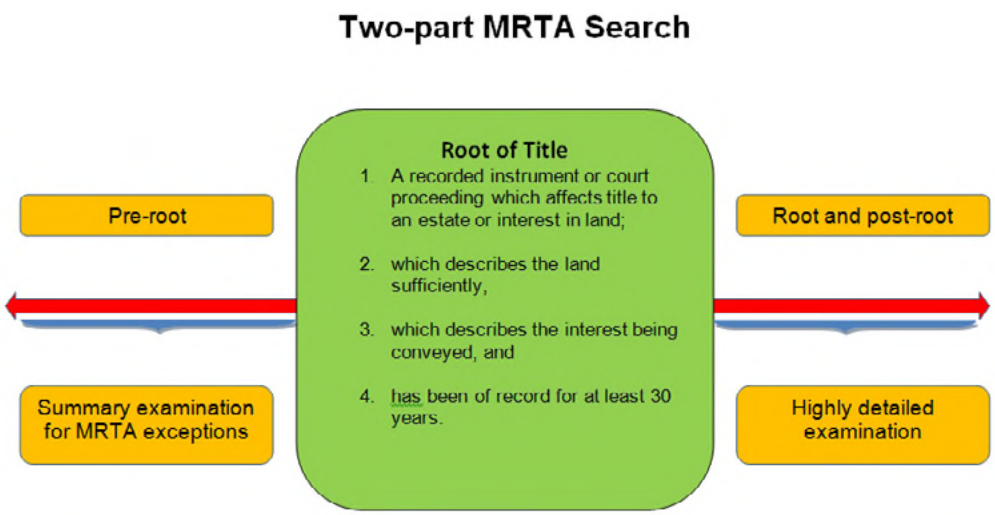
Pre-root—Seek out exceptions to MRTA including the following:

- Governmental interests
- Mineral interests held in fee
- Easements in use

Root of title and post-root—Examine and analyze every instrument thoroughly

14

MRTA Compliant Examination of Title



15

Know Your Title Information

- Prepared commitments often rely on title bases or prior policies
- MRTA searches are not routine
- Understand what is included in the search you are using
- Applying MRTA requires a complete MRTA search

16

Practice to Master

Does a title insurer have a duty to examine title beyond the parameters of MRTA?

17

Answer

No

Court held that as a consequence of MRTA the title insurer's obligation to search title is limited by root of title

Case involved a claim against Old Republic National Title Insurance Company confirming private ownership of the insured property against rights claimed by the county & city based upon a 1917 plat

Kahama VI, LLC v. HJH, LLC, 2016 WL 7104175, Case No. 8:11-cv-2029-T-30TBM, M.D. Fla. (Dec. 6, 2016)

18

The Power of MRTA

Marketable record title is free and clear of all estates, interests, claims, or charges that existed before the effective date of the root of title

Sec. 712.04, F.S.

With some exceptions created by statute and common law, MRTA can be applied to eliminate interests of individuals, corporate, and governmental entities

19

Exceptions to MRTA

Matters disclosed by or inherent in the root of title

Sec. 712.03(1), F.S.

General reference to matters, “subject to restrictions and reservations of record”, is not sufficient to preserve an interest which would otherwise be eliminated

Referenced matters are preserved after the root of title if they are expressly described or specifically identified by reference to a book and page of record on the public records, or by name or recorded plat

20

Practice to Master

Will MRTA eliminate property owners' obligations to pay annual maintenance assessments established in recorded restrictive covenants before the root of title and referred to in the owner's vesting deed?

21

Answer

No

A 1982 amendment to restrictive covenants obligating each property owner to pay annual assessments for maintenance was preserved based upon recitations in vesting deeds stating those deeds were subject to obligations of the lot owners at Silver Lakes Acres to the Silver Lakes Property Owners Association. This language did not constitute a general reference. The plain language set forth in the deeds with respect to restrictive covenants was not hidden.

Barney v. Silver Lakes Acres Property, 159 So.3d 181 (Fla. 5th DCA 2015)

22

Practice to Master

Were setback restrictions in a plat preserved when the plat was recorded before the root of title but the root of title and subsequent conveyances referred to the plat by name, and book and page of recording?

23

Answer

Yes

Setback restrictions shown on the face of the plat were preserved based on reference to that plat name, plat book and page in the legal description in the root of title and subsequent muniments of title

Sunshine Vistas Homeowners Ass'n v. Caruana, 623 So.2d 490 (1993)

24

Practice to Master – Vocabulary

A **muniment of title** is documentary evidence upon which title is based, as opposed to a title transaction, which is any recorded instrument affecting title

Cunningham v. Haley, 501 So.2d 649 (Fla. 5th DCA 1986)

25

Exceptions to MRTA

Matters preserved by the filing of a proper notice under MRTA

Sec. 712.03(2), F.S. and UTS 17.4.

- Secs. 712.05 and 712.06 F.S. outline preservation
- Any person with an interest in land may preserve by filing a notice
  - eff. Oct. 1, 1997, includes a homeowners' association
  - eff. Oct. 1, 2018, includes a property owners' association
- During the 30-year period after root of title

26

Practice to Master – Vocabulary

"**Property owners' association**" means a homeowners' association as defined in sec. 720.301, F.S., a corporation or other entity responsible for the operation of property in which the voting membership is made up of the owners of the property or their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, or an association of parcel owners which is authorized to enforce a community covenant or restriction that is imposed on the parcels

Sec. 712.01(5), F.S.

27

Practice to Master

Is the recordation of a written notice or summary notice pursuant to Sec. 712.05(2), F.S. the only way to preserve CCRs?

28

Answer

No

Sec. 712.05(2), F.S. as amended in 2018 provides options for achieving preservation of community covenants and restrictions by recording in the public records:

1. A written notice in accordance with sec. 712.06, F.S.;
2. A summary notice as required by sec. 720.3032(2), F.S.; or
3. An amendment to community covenant or restriction referencing the recording information for the covenant or restriction to be preserved

29

Practice to Master

But didn't the Second DCA hold a post-root of title amendment to restrictions were not extinguished by MRTA?

The Matissek case provided a post-root amendment was not a muniment of title and since the amended restrictions could not stand alone, both the pre-root restrictions and the post-root amendment were extinguished by MRTA

Matissek v. Waller, 51 So.3d 625 (Fla. 2nd DCA 2011)

30

Answer

Yes

The 2018 amendment to sec. 712.05(2), F.S. provides the option of an amendment referencing the recording information for the covenant or restriction as a method for preservation

31

Practice to Master

Can a property owner compel a homeowners association to preserve a declaration of restrictions?

32

Answer

Yes

Trial court's injunction requiring the homeowners association to preserve the declaration's restrictions was affirmed

The trial court stated that if parcels were allowed to drop out piecemeal from restrictions of the governing documents, "the Association would begin to resemble a piece of Swiss cheese," with some parcels bound and some parcels not bound to the declaration's restrictions

Southfields of Palm Beach Polo and Country Club Homeowners Ass'n, Inc. v. McCollough, 111 So.3d 283 (Fla. 4th DCA 2013)

33

Practice to Master

Does MRTA mandate a minimum of two-thirds approval by an association's board of directors to preserve CCRs pursuant to sec. 712.05, F.S.?

34

Answer

No

The 2018 amendment to MRTA removed a requirement formerly contained in sec. 712.05(2)(b) pertaining to two-thirds approval of an association's board of directors to consider preservation

However, sec. 720.303(2)(e), F.S. now requires that a board of directors annually consider the desirability of filing notices to preserve covenants or restrictions

35

Practice to Master

Can a property owners' association preserve restrictions by filing is preservation after 30 years from the root of title?

36

Answer

No

A notice of preservation must be filed within the 30 year period following the root of title. An association's untimely preservation cannot breath life back into restrictions after they extinguished by MRTA

Lyday v. Myakka Valley Ranches Improvement Ass'n. Inc., 233 So.3d 1052 (Fla. 2nd DCA 2019)

37

Practice to Master

Can CCRs be revived once they have lapsed because 30 years have run from the root of title with no preservation?

38

Answer

Yes

2018 statutory revisions:

- Sec. 712.12, F.S. added to MRTA to allow parcel owners who are not subject to a homeowners' association to revitalize covenants and restrictions
- Secs. 720.403 – .407, F.S. modified recognizing the application of covenant revitalization to property owners' associations

39

Covenant Revitalization, Secs. 720.403 – .407, F.S.

Available for private covenant or restriction, not required by a governmental agency as a condition of a development permit

Process is detailed in Ch. 720, Part III, F.S.

Process involves:

- Application to the Department of Economic Opportunity
- Culminating in the recordation of a revived declaration of covenants, articles of incorporation and bylaws of the association, letter of approval from the Department, and the legal description of the affected parcels

40

Covenant Revitalization, Secs. 720.403 – .407, F.S,

Indexing:

- Association as the grantee
- Parcel owners as grantors in the title transaction

41

Covenant Revitalization, Secs. 720.403 – .407, F.S.

Owners of any parcels that are no longer governed by a covenant or restriction as of Oct. 1, 2018, may bring an action to establish that revitalization would unconstitutionally deprive that owner of rights

Action must be brought by Oct. 1, 2019

A judicial determination of this nature will bar subsequent covenant revitalization

Sec. 712.12(3), F.S.

42

Covenant Revitalization, Secs. 720.403 – .407, F.S.

Second DCA interpreted the 2018 amendment to MRTA to eliminate an exclusive ownership requirement in applying covenant revitalization to common ownership in condominium common elements.

Eastwood Shores Property Owners Ass'n., Inc. v. Dept. of Economic Opportunity, 2019 WL 321031 (Fla. 2nd DCA 2019)

43

Covenant Revitalization, Secs. 720.403 – 407, F.S.

Recent Administrative Hearing Orders pertaining to proposed revitalization:

- *Young v. Springlake-Northwood Homeowners Ass'n, Inc.*, 2019 WL 164907, Case No. 18-5291, (Fla.Div.Admin.Hrgs. Jan. 4, 2019)
- *Villas of Social Club, Inc. v. Dept. of Economic Opportunity*, 2018 WL 3131859, Case No. 17-5576, (Fla.Div.Admin.Hrgs. Mar. 23, 2018)
- *Nikorowicz v. Antiquers Aerodrome, Inc.*, 2017 WL 838507, Case Nos. 15-7236 and 15-7237, (Fla.Div.Admin.Hrgs Feb. 24, 2017)

44

Recommended Reading

"The Marketable Record Title Act, Covenant and Restriction Preservation and Revitalization" 50 *Fund Concept* 97 (Oct. 2018)

45

Exceptions to MRTA

Rights of persons in possession are not eliminated by MRTA

Sec. 712.03(3), F.S.
TN 10.01.02
UTS 17.5

46

Exceptions to MRTA

Matters recorded subsequent to the root of title.

Sec. 712.03(4), F.S.
UTS 17.6.

To be preserved under MRTA, the matter must appear in the root or a post root **muniment of title**

Remember, a **muniment of title** is documentary evidence upon which title is based, as opposed to a **title transaction**, which is any recorded instrument affecting title

47

Exceptions to MRTA

Recorded or unrecorded easements, or rights, licenses or servitudes

Sec. 712.03(5), F.S.

48

Practice to Master

Does the easement, rights, licenses and servitudes exception apply to rights-of-way held in fee?

49

Answer

Yes

In 2015, Florida Supreme Court resolved that the sec. 712.03(5), F.S. exception is applicable to rights of way held in fee.

FDOT v. Clipper Bay Investments, LLC, 160 So.3d 858 (2015)

50

Exceptions to MRTA

Rights of any person assessed on the county tax rolls, for so long as assessed and three years after it is last assessed in that person's name

Sec. 712.03(6), F.S.

UTS 17.7

51

Exceptions to MRTA

Sovereignty lands

Sec. 712.03(7), F.S.

52

Practice to Master

Was the 1978 addition of sec. 712.03(7), F.S. exception for sovereignty lands an unconstitutional taking of rights to submerged lands that were already vested in private parties by earlier application of MRTA?

53

Answer

The 5th DCA ruled that any retroactive application of this MRTA exception would be an unconstitutional taking of private property rights previously vested under MRTA

Trustees of the Internal Improvement Trust Fund v. Paradise Fruit Co. Inc., 414 So.2d 10 (Fla. 5th DCA 1982), *reh'g denied* 432 So.2d 37 (Fla. 1983)

54

Answer

In 1986, the Florida Supreme Court ruled:

(i) there was an implied reservation of sovereignty lands in all State deeds – even those deeds which were absolute on their face; and

(ii) MRTA did not serve to quiet sovereignty lands into private ownership because sovereignty lands were never private property

Coastal Petroleum Co. v. American Cyanimid Co., 492 So.2d 339 (Fla. 1986) *cert. denied*, 479 U.S. 1065, 107 S.Ct. 950

55

Exceptions to MRTA

State and federal reservations

Sec. 712.04, F.S.

UTS 17.8

Reserved interests by the United States, Florida or any of its officers, boards, commission or other agencies, are excepted from application of MRTA

2010 amendment to sec. 712.03, F.S. added subsection (9) providing: "Any right, title or interest held by the Board of Trustees of the Internal Improvement Trust Fund, and water management district created under Ch. 373, or the United States" shall not be extinguished by MRTA

56

Practice to Master

Is it possible that any governmental interest may be eliminated by MRTA?

57

Answer

Yes, but this is limited

An interest reserved by the United States or Florida in any deed conveying property is not affected by MRTA; but an interest acquired and "not conveyed" might have been extinguished by MRTA prior to the 2010 amendment

Subsequent to the 2010 amendment, no federal or state interest could be extinguished by MRTA

58

Exceptions to MRTA

Environmental restrictions or covenants

Sec. 712.03(8), F.S.

59

Exceptions to MRTA

Mineral rights held in fee

Courts have held that mineral rights form a separate estate from the surface rights

These interests form a separate chain of title so they cannot be extinguished by MRTA

TN 10.01.02

60

Practice to Master

Are rights of entry to mineral interests subject to being extinguished by MRTA?

61

Answer

Sec. 704.05, F.S. provides rights of entry are an easement, given or reserved for mining, drilling, exploring, or developing for oil, gas, minerals, or fissionable materials are interests which are subject to extinguishment by MRTA

A right of entry is an interest in the nature of an easement, and therefore presumably subject to indefinite continuation so long as any part of it is used

TN 27.01.02

62

Exceptions to MRTA

Matters of governmental regulation

63

Practice to Master

Can a restrictive covenant that was required as part of a government imposed condition be eliminated by MRTA?

64

Answer

No

The Third DCA held that such a restriction constituted a governmental regulation with the force of law and was not an estate, interest, claim or charge to title to real property subject to MRTA

Appeal filed with the Florida Supreme Court

Save Calusa Trust v. St. Andrews Holdings, 193 So.3d 910 (Fla. 3rd DCA 2016), *reh'g denied*, (2016), *appeal docketed*, SC16-1189 (Fla. 2016), *reh'g denied*, 2016 WL 7474142 (Fla. 2016)

65

The Power of MRTA

What interests can be extinguished by MRTA?

66

MRTA Can Extinguish

Fee ownership including breaks in the chain of title prior to the root of title

67

MRTA Can Extinguish

Section 16 lands

On March 3, 1845 “An Act Supplementary to An Act for the Admission of Florida and Iowa to the Union and for Other Purposes” grants every 16th section throughout the State of Florida for the support of public schools. MRTA will permit the extinguishment of this interest.

Askew v. Sonson, 409 So.2d 7 (Fla. 1981)

68

MRTA Can Extinguish

Interest held by a governmental entity

"Person" is defined to include the state and any political subdivision or agency thereof sec. 712.01(4), F.S.

The application of MRTA to extinguish governmental interests is limited to interests that were not reserved and to those governmental interests that were eliminated prior to or outside of the application of the 2010 addition of sec. 712.03(9), F.S.

69

MRTA Can Extinguish

Cotenants and remaindermen

70

MRTA Can Extinguish

Restrictions and reverters

Extinguished only when

- No specific reference in muniments, beginning with the root of title, to the book and page of a recorded title transaction containing the restrictions or reverter,
- No CCR preservation or revitalization, and
- No recorded amendment to CCRs

71

Practice to Master

Is there any legal mechanism for eliminating reverters in advance of the operation of MRTA?

72

Answer

Yes

Sec. 689.18, F.S., limits reverters to 21 years from a deed

Application of this limitation period excludes governmental, literary, scientific, religious and certain public interest charitable corporations

Sec. 712.07, F.S., provides that MRTA shall not vitiate any other curative statute. Therefore, a shorter period of 21 years may eliminate a right of reverter, before MRTA

73

MRTA Can Extinguish

Easements including easements of necessity

74

Practice to Master

Are all easements by way of necessity eliminated by MRTA?

75

Answer

Common law way of necessity can be extinguished by MRTA

- *H & F Land, Inc. v. Panama City-Bay County Airport and Industrial District*, 706 So.2d 327 (Fla. 1st DCA 1998); *aff'd*, 736 So.2d 1167 (Fla. 1999)

Statutory ways of necessity are not extinguished by MRTA

- *Blanton v. City of Pinellas Park*, 887 So.2d 1224 (Fla. 2004)

76

Practice to Master

Are easements pursuant to sec. 704.08, F.S., providing relatives and descendants of those buried in cemeteries with visitation within a reasonable time and manner, eliminated by MRTA?

77

Answer

No

An insured developer made a title insurance claim concerning a cemetery that had been created in an instrument recorded over 100 years earlier, prior to the root of title

Court held that no title claim existed because no party asserted a legal right to access the cemetery and stated sec. 704.08, F.S., does not create an interest in real property

Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins. Co., 128 So.3d 107 (Fla. 3rd DCA 2013)

78

MRTA Can Extinguish

Rights of entry to explore for mineral rights

REMEMBER

Sec. 704.05, F.S., rights of entry for mining, drilling, exploring or developing subsurface rights are an easement subject to extinguishment by MRTA so long as no part is used

TN 27.01.02

79

MRTA Can Extinguish

Oil, gas and mineral leases

Leases can be eliminated by MRTA provided:

- no one claiming under the lease is in possession, or
- has been assessed real property taxes on the tax rolls for the current and three prior years

80

MRTA Can Extinguish

Homestead rights

A surviving spouse purchased tax certificates which formed root of title for MRTA to extinguish vested homestead remainder interests of children

- *Harrell v. Wester*, 853 F.2d 828, *modified* 861 F.2d 1546 (11th Cir. 1988)

A widow's deed to self formed a root of title for MRTA to extinguish vested homestead interests of children

- *ITT Rayonier, Inc. v. Wadsworth*, 386 F.Supp. 940 (M.D. Fla. 1975)

81

MRTA Can Extinguish

Rights of bankrupt's creditors

82

Attorney's Fee in Claims Related to MRTA

A court may award costs and reasonable attorney's fees to the prevailing party when any person has filed a false or fictitious claim

Sec. 712.08, F.S.

83

Practice to Master

Does an award of attorney's fees for filing a false or fictitious action based upon MRTA require deliberate untruthfulness?

84

Answer

An award of attorney's fees in a false or fictitious claim may be made where there was no deliberate untruthfulness, but instead a mistaken idea

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

85

86

Congratulations – you have mastered MRTA

87

Notice Pursuant to Sec. 712.06, F.S., by

Individual Claimant or Property Owners' Association

[Individual Claimant NOTICE OF CLAIM and STATEMENT OF MARKETABLE ACTION pursuant to F.S. 712.06(1)(b)]

_____, claimant, whose post office address is _____, files this notice of claim under the Marketable Record Title Act of Florida, F.S. Chapter 712, regarding the real property described below.

[Property Owners' Association Claimant STATEMENT OF MARKETABLE ACTION pursuant to F.S. 712.06(1)(b)]

The _____(name of property owners' association) (the "Association") has taken action to ensure that the _____(name of declaration, covenant, or restriction), recorded in Official Records Book _____ Page _____, of the public records of _____ County, Florida, as may be amended from time to time, currently burdening the property of each and every member of the Association, retains its status with regard to the affected real property. To this end, the Association shall cause the notice required by chapter 712, Florida Statutes, to be recorded in the public records of _____ County, Florida. Copies of this notice and its attachments are available through the Association pursuant to the Association's governing documents regarding official records of the Association.

Claimant gives notice that claimant has a claim affecting the following described property situated in _____ County, Florida:

[give legal description as required by F.S. 712.06(1)(c)]

The name and post office address of an owner, or the name and post office address of the person in whose name the property is assessed on the last completed tax assessment roll, are set forth below.

[see F.S. 712.06(1)(b)]

The nature, description, and extent of the claim are:

[describe claim; if for money, it is not necessary to show amount or terms of payment]

The claim is based on the following instrument:

[describe instrument]

which is recorded in Official Records Book _____, Page _____, of the Public Records of _____ County, Florida.

The undersigned witness has subscribed his or her name.

/s/_____

Claimant

Printed Name: _____

Address: _____

STATE OF FLORIDA

COUNTY OF _____

The foregoing instrument was acknowledged before me on _____(date). by _____(name of person acknowledging), who is personally known to me or who has produced _____(type of identification) as identification.

/s/_____

Notary Public—State of Florida

_____(name, typed or printed)

Seal

Notice Pursuant to Sec. 720.3032, F.S.

[Notice of NAME OF ASSOCIATION under F.S. 720.3032 and notice to preserve and protect covenants and restrictions from extinguishment under the Marketable Record Title Act, F.S. Chapter 712.]

Instructions to recorder: Please index both the legal name of the association and the names shown in item 3.

1. Legal name of association: _____.

2. Mailing and physical addresses of association: _____.

3. Names of the subdivision plats and condominiums, or, if none, common name of community: _____.

4. Name, address, and telephone number for current community association management or community association manager, if any: _____.

5. This notice [does/does not] constitute a notice to preserve and protect covenants or restrictions from extinguishment under the Marketable Record Title Act, Ch. 712, F.S.

6. The following covenants or restrictions affecting the community which the association desires to be preserved from extinguishment:

    [List of:

    Name of instrument and Official Records Book & Page where recorded.]

7. The legal description of the community affected by the listed covenants or restrictions is:

    [Legal description, which may be satisfied by reference to a recorded plat.]

This notice is filed on behalf of [Name of association] as of [Date].

(Name of association)

By:

[Name of individual officer]

[Title of officer]

STATE OF FLORIDA

COUNTY OF _____

The foregoing instrument was acknowledged before me on _____(date). by _____(name of person acknowledging), who is personally known to me or who has produced _____(type of identification) as identification.

/s/_____

Notary Public—State of Florida

_____(name, typed or printed)

Seal

Back to Speaker Topics

The Fund® CONCEPT
OCTOBER 2018 | VOL 50

THE MARKETABLE RECORD TITLE ACT, COVENANT AND RESTRICTION PRESERVATION AND REVITALIZATION

BY MELISSA S. SCALETTA, VICE PRESIDENT, CHIEF UNDERWRITING COUNSEL

On Mar. 21, 2018, Session Law Ch. 2018-55 (HB 617) was signed into law. Effective Oct. 1, 2018, this law officially names the "Marketable Record Title Act" (MRTA) with its long familiar moniker. The new law creates additional methods for preserving covenants and restrictions and creates opportunities for additional types of property owners to preserve and revitalize covenants and restrictions. Impacts of the new law alter portions of MRTA (Ch. 712, F.S.); the general provisions of the Homeowners' Association Act (Ch. 720, Part I, F.S.); and covenant revitalization (Ch. 720, Part III, F.S.).

Preservation of Community Covenants or Restrictions

The preservation process previously provided for interests and rights to be preserved by individuals only; and only homeowners' associations could preserve covenants and restrictions. The rights of all property owners' associations have been expanded to include the right to preserve community covenants and restrictions. Property owners' associations are defined as entities operating a property in which the voting membership is comprised of property owners or their agents and for which membership is mandatory, as well as associations of parcel owners authorized to enforce community covenants or restrictions. This change creates a method by which commercial property owners, and property owners bound to community covenants and restrictions without a mandatory association, can preserve their community covenants and restrictions before they are extinguished by the application of MRTA.

Sec. 712.05(2), F.S., provides three options for achieving preservation of community covenants and restrictions by recording in the public records: (1) a written notice in accordance with Sec. 712.06, F.S.; (2) a summary notice as required by Sec. 720.3032(2), F.S.; or (3) an amendment to a community covenant or restriction, indexed under the legal name of the property owners' association and referencing the recording information for the covenant or restriction to be preserved. To preserve the covenants or restrictions, each of these instruments must be recorded in the public records in the county where the property is located within the 30-year period immediately following the root of title. The addition of the option to file an amendment to a community covenant or restriction as a means to preserve an otherwise extinguished matter is in contrast to *Matissek v. Waller*, 51 So. 3d 625 (Fla. 2d DCA 2011). In *Matissek*, the Second District Court

(Continues on page 100)

IN THIS ISSUE

- Keeping Pace with P.A.C.E. Liens.....102
- Policies Over $1 Million Requirements.....104
- Closing Real Estate for Non-Attorneys.....106
- Title Teasers Part II.....107
- Chuck Kovaleski Joins ORI Board.....108

MRTA COVENANT REVITALIZATION...continued from page 97

held that an amendment to the community restrictions was neither a muniment of title nor a title transaction, and since the amended restrictions could not stand alone, both the pre-root restrictions and the post-root amendment were extinguished by MRTA.

The language of Sec. 712.06, F.S., including the notice form therein, is modified to replace "homeowners' association" with "property owners' association." The former requirement set forth in Sec. 712.05(1), F.S., pertaining to approval by two-thirds of the associations' board of directors, no longer exists. However, the newly enacted Sec. 720.303(2)(e), F.S., now requires that the board of directors annually consider the desirability of filing notices to preserve the covenants or restrictions.

Ch. 720, Part I, F.S., includes the general provisions of the Homeowners' Association Act. Sec. 720.3032, F.S., is a new section that provides a form notice that may be used by any property owners' association to preserve community covenants and restrictions. Sec. 712.05(2)(b), F.S., provides that summary notices pursuant to Sec. 720.3032(2), F.S., and amendments to community covenants or restrictions, are to be indexed under the legal name of the property owners' association, but that failure to be indexed to the current property owners of the affected property does not invalidate the notice.

Revitalization of Covenants or Restrictions

Sec. 712.12, F.S., is added to MRTA to allow parcel owners who are not subject to a homeowners' association to revitalize covenants and restrictions. Secs. 712.11, 720.403, 720.404, 720.405, 720.406 and 720.407, F.S., are modified to similarly recognize the application of covenant revitalization to property owners' associations. Covenant revitalization is available for a covenant or restriction that is imposed by a private party and not required by a governmental agency as a condition of a development permit. The covenant or restriction must be recorded in the public records in the county in which the property is located. The covenant revitalization process is detailed in Ch. 720, Part III, F.S., and provides a means for preserving a community, associated infrastructure, and common areas, with approval of the property owners. Covenant revitalization through Ch. 720, Part III, F.S, is achieved by compliance with a process involving application to the Department of Economic Opportunity (Department) and culminating in the recordation of a revived declaration of covenants, articles of incorporation and bylaws of the association, letter of approval from the Department, and the legal description of the affected parcels. For indexing purposes, the association is named as the grantee and the parcel owners named in the revived declaration are named as the grantors in the title transaction

Sec. 712.12(3), F.S., provides that, if commenced not later than Oct. 1, 2019, owners of any parcels that are no longer governed by a covenant or restriction as of Oct. 1, 2018, may bring an action to establish that the restriction or covenant did not govern as of Oct. 1, 2018, and revitalization would unconstitutionally deprive that owner of rights or property. A judicial determination of this nature will bar subsequent covenant revitalization as to the affected parcel owners.

Potential Traps

This statutory expansion of covenant revitalization, and recent case law, have complicated the issue of relying upon MRTA to extinguish covenants and restrictions.

The application of covenant revitalization to property owners' associations creates an opportunity for all types of communities and property associations to revive covenants and restrictions that were otherwise extinguished by MRTA. A parcel that is seemingly free of a covenant or restriction may later have that covenant or restriction reimposed. When purchasing a parcel or securing a mortgage lien on a parcel once governed by a covenant or restriction, one should consider the possibility that the covenant or restriction is subject to revitalization.

In *Save Calusa Trust v. St. Andrews Holdings*, 193 So. 3d 910 (Fla. 3d DCA 2016), the Court held that a restrictive covenant that was part of a government-imposed restriction for land use approval constituted a government regulation rather than an estate, interest, or claim to title and therefore was not extinguished by MRTA. Newly added Sec. 712.12(1)(b), F.S., defines "(c)ovenant or restriction" to exclude any agreement or limitation required by a governmental agency as a condition of a development permit. This new wrinkle in the application of MRTA can create a snare for those relying on the public record and

MRTA to extinguish covenants and restrictions, since there may often be no indication on the record that a covenant or restriction was required for and related to governmental approval for land use.

Analyzing Restrictions and Covenants for Insuring

When analyzing restrictions and covenants for insuring title, Fund Members should use the following process:

(1) Complete a comprehensive MRTA search and examination of title to the property. Approach the search and examination of title as two parts, pre-root of title and root of title forward.

(2) Carefully examine all recorded instruments, from the root of title forward to the current time. For insuring, the following instruments discovered in this portion of the title search and exam will require an exception to coverage:

- New covenants and restrictions;
- Statements of marketable title action pursuant to Sec. 712.06, F.S., with an exception also for underlying covenants and restrictions recorded prior to the root of title;
- Notice of Association under Sec. 720.3032, F.S., with an exception also for underlying covenants and restrictions recorded prior to the root of title; and
- Amendments to community covenants or restrictions.

Next, examine all instruments recorded prior to the root of title only to identify items that may be exceptions to extinguishment by MRTA. As stated in *Save Calusa Trust*, these exceptions to extinguishment will include covenants or restrictions that are required for land use approval or may be government imposed conditions of land use approval. Because these facts may not be readily apparent, one should carefully examine for evidence of that possibility. An exception to coverage should be made or any pre-root covenant or restriction that can be identified as required for, or imposed as a condition of, governmental land use.

More Changes on the Horizon?

Additional legislative adjustments to MRTA have been a popular topic of conversation in recent years. One suggested amendment would prevent the reimposition or preservation of an interest, easement, and use restriction, described within a muniment of title as an exception to warranties of title, if the instrument specifically provided that the grantor had no intent to reimpose or preserve those matters. The need for a *Save Calusa Trust* fix has also been mentioned. Observation of the 2019 legislative process may bring more changes to the application of MRTA with regard to covenants and restrictions. □

FinCEN Reporting Requirements

Fund Members are reminded to consider whether reporting is required under a current FinCEN GTO. When applicable, strict compliance with the terms is critical. The most current FinCen GTO information is available in the Member Only Fund Alert dated May 7, 2018. That alert can be accessed at *thefund.com*, by signing in with a valid User ID and password.

Contact Fund Underwriting Counsel for assistance with FinCEN-related inquiries. Email *FinCENinfo@thefund.com* or call (800) 432-9594.

TITL

TITLE INSURANCE THROUGH LAWYERS

**** Reminder****

If you have not sent in your contribution to Title Insurance Through Lawyers (TITL), please do so now.

Back to Speaker Topics

Fund Assembly

Legislative Update - 2019

Charles Nostra, *Senior Underwriting Counsel, The Fund*

Back to Speaker Topics

Speaker Information

Legislative Update - 2019

Charles Nostra

Senior Underwriting Counsel, The Fund

Charles D. Nostra is a Senior Underwriting Counsel located in the Fund's Palm Beach branch. He joined Attorneys' Title Fund Services, LLC in September 2014. His prior experience includes working as claims counsel for a national title insurance underwriter and in private law firms focusing his practice on title claims resolution, title curative measures and residential mortgage foreclosures representing lending institutions. He also spent more than nine years as Assistant Corporate Counsel for a national civil engineering firm.

Mr. Nostra obtained his B.A. degree from Florida Atlantic University and his J.D. degree from University of Miami, School of Law. He was admitted to the Florida Bar in 1990 and the United States District Court for the Southern District of Florida in 1995. Mr. Nostra is a member of The Florida Bar's Real Property, Probate & Trust Law Section and is Board Certified in Real Estate by the Florida Bar.

LEGISLATIVE UPDATE – 2019

BY

CHARLES D. NOSTRA

FUND SENIOR UNDERWRITING COUNSEL

A very special thanks for the contributions and valued assistance in the preparation of the following bill summaries from Michael E. Mirrington, Senior Underwriting Counsel; Jalinda (Jay) Davis, Senior Underwriting Counsel; Connie Clark, Senior Underwriting Counsel, Marilyn R. Israel, Senior Underwriting Counsel, Commercial Services and Colleen C. Sachs, Underwriting Counsel.

BUSINESS ORGANIZATIONS
HB 1009 – EFFECTIVE JANUARY 1, 2020

This is a comprehensive bill including revisions to Chapters 605, 607, 331, 339, 617, 620, 621, 628, 631, 654, 658, 662, 663 and 694 F.S. Of particular interest to real estate practitioners, it amends requirements governing corporations, partnerships, limited liability companies, professional service corporations, not for profit corporations and family trust companies.

MILITARY AFFAIRS
SB 620 - EFFECTIVE JULY 1, 2019

Of interest to real property practitioners, this bill amends Sec. 83.49, F.S. to expressly forbid a landlord from requiring a servicemember to pay a security deposit or advance rent that exceeds (in the aggregate) two month's worth of rent under the lease, excluding prorated rent. The bill also prohibits certain construction or activities that are incompatible with the mission of a military installation when the land lies within a defined area.

MILITARY-FRIENDLY INITIATIVES
HB 891 – EFFECTIVE JULY 1, 2019

This bill amends several statutes relating to the military. There are two provisions which are of interest to real estate attorneys. Sec. 197.572, F.S. is amended to provide that easements for certain military land survive tax sales and deeds.

The other provision of note is an amendment to Sec. 163.3175, F.S., which specifies additional military installations that may exchange certain information with local governments regarding compatibility of land development.

COURTS
HB 337 – EFFECTIVE JULY 1, 2019

This bill creates Sec. 25.025, F.S., to allow certain Supreme Court justices to have an appropriate facility in their district of residence designated as their official headquarters with certain provisions. In addition, this bill makes various amendments to Chapters 26, 28, 34, 44 and 45, F.S. dealing with the filing fees for appeals and increasing over time the monetary jurisdictional limits for cases heard in county courts. Filing fees for county court actions based on higher amounts in controversy are also amended. Guidelines are established for remittance of portions of certain filing fees collected by county court clerks to the State Courts Revenue Trust Fund. The jurisdictional amendments via this bill are expressly intended to apply with respect to the date of filing of a given cause of action irrespective of when the cause of action accrued.

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JUDICIAL PROCESS & LIS PENDENS
HB 91 – EFFECTIVE UPON BECOMING LAW

This bill amends and revises existing provisions of Secs. 48.23, 48.021, 48.031, 48.062, 48.194, 48.21 and 316.29545, F.S. relating to judicial process.

- Provides that a person who acquires a lien for value on property during the course of specified legal actions takes such lien free of claims of the party filing the action who failed to record a notice of lis pendens or whose notice expired or was withdrawn or discharged, in certain circumstances.
- Revises provisions relating to time requirements for intervention in certain proceedings and requires that the court grant the motion to intervene.
- Specifies that a valid recorded notice of lis pendens prosecuted to a judicial sale remains in effect through the recording of any instrument transferring title pursuant to the final judgment, such as a certificate of title in a foreclosure action, unless the lis pendens expires, is withdrawn, or is otherwise discharged.
- Amends the authority of a special process server and requires that civil witness subpoenas be served by certain persons.
- Requirements for substituted service on the spouse of the person to be served and requirements for documenting service of process were revised to allow substituted service if the spouse is also a party to the action and regardless of

whether the dwelling where the spouses reside is located in the county where substituted service is made.

- Revisions were made to the requirements for service on a domestic or foreign limited liability companies if the address of the registered agent is a virtual office, or an executive office or mini suite.
- The bill changes provisions specifying who may serve process outside of the state and requirements for documenting that service has been properly made outside the state.
- The requirements for return of service forms and authorizing certain persons to electronically sign return of service forms were amended.
- The bill exempts certified process servers from certain vehicle window sun screening restrictions.

ELECTRONIC LEGAL DOCUMENTS
HB 409 – EFFECTIVE JANUARY 1, 2020,
EXCEPT AS OTHERWISE PROVIDED IN THE ACT

This bill is of great import to all Florida real property practitioners. Numerous legal provisions are created authorizing online notarizations and associated procedures as well as identity verification requirements, qualification for online notaries, etc. In addition, legal provisions are added for the execution and maintenance of electronic wills and electronic witnessing and notarization of powers of attorney. Among other things, the bill:

- Creates general provisions under Sec. 117.01 – 117.08, F.S.;
- Creates Secs. 117.201 – 117.305, F.S., entitled “Online Notarizations.”;
- Defines, in the context of the bill, the terms “Audio-video communication technology”, “Credential analysis”, “Online notarization”, “Physical presence”, “Remote Online Notarization service provider” and other terms;
- Provides that an online notary public physically located in Florida may perform an authorized online notarization whether or not the principal or any witnesses are physically located within this state at the time of the notarization;
- Provides that Florida law shall govern the validity of the online notarization irrespective of the physical location of the principal or witnesses at the time of the notarial act;
- Creates qualification and registration requirements for online notaries public;
- Requires an online notary public to maintain one or more secure electronic journals of online notarizations performed by the online notary public and sets forth the required informational content for such electronic journals;

- Requires online notaries public to take reasonable steps to ensure the integrity, security and authenticity of online notarizations as well as the electronic journal(s);
- Provides that an online notary public may charge a fee of up to $20 for making and delivering electronic copies of electronic records, with exceptions;
- Creates Sec. 117.265, F.S. to provide specific online notarization procedures;
- Provides that an online notary public may charge a fee of up to $25 for performing an online notarization;
- Creates provisions for supervision of the witnessing of electronic records;
- Provides that the Florida Department of State may adopt rules necessary to implement the requirements of the new law, including identity and security issues and education and bonding for online notaries;
- Provides that the new online notarization law supersedes portions of the Federal Electronic Signatures in Global and National Commerce Act;
- Amends acknowledgment forms shown in Chapter 695, F.S. to facilitate online notarizations;
- Amends Sec. 731.201(40), F.S. to include an "electronic will" in the definition of "Will";
- Amends various sections of Florida's Probate Code - Chapter 732, F.S. - to provide for the execution of electronic wills and self-proving affidavits with online notarizations;
- Creates Sec. 732.524, F.S. to establish procedures appointing and governing qualified custodians for electronic wills in order to facilitate the custody and security of such wills from the time of their execution until they are needed for probate;

PUBLIC RECORDS PRIVACY
SESSION LAW CH. 2019-12 (SB 248)
EFFECTIVE JULY 1, 2019

This bill amends various sections of Chapter 119, F.S. to expand the exemption from public records requirements for active or former civilian personnel employed by a law enforcement agency and their spouses and children. A detailed definition is added to the statute for "Home addresses" of such persons. The bill also creates procedure for a person protected by the exemption to formally request release of otherwise exempt information to a designated party.

PUBLIC RECORDS- DEPARTMENT OF HEALTH
HB 7009 – EFFECTIVE OCTOBER 1, 2019

Currently, Sec. 119.071, F.S. provides an exemption from public record requirements for certain private and personal information of current and former Department of Health ("DOH") personnel, their spouses and children. Such protection is afforded to DOH personnel whose duties include, or result in, the determination or adjudication of eligibility for social security disability benefits, the investigation or prosecution of complaints filed against health care practitioners, or the inspection of health care practitioners or health care facilities licensed by the DOH. This bill saves the above referenced public record exemption from repeal on October 2, 2019, if the bill does not become law.

VEGETABLE GARDENS
SB 82 – EFFECTIVE JULY 1, 2019

By this bill, Sec. 604.71, F.S. is created to encourage the development of sustainable cultivation of fruits and vegetables at all levels of production, including for personal consumption. Except as otherwise provided by law, this bill prohibits the regulation of vegetable gardens on residential property by a county, municipality, or other political subdivision of the state. The bill further declares void and unenforceable existing ordinances or regulations governing vegetable gardens on residential property. The bill defines a vegetable garden as a plot of ground where herbs, fruits, flowers, or vegetables are cultivated for human ingestion. The bill does not preclude the adoption of local ordinances or regulations of a general nature that are not specific to vegetable gardens, such as limits on water use during drought conditions, fertilizer use, or control of invasive species.

PRIVATE PROPERTY RIGHTS – TREE MAINTENANCE
HB 1159 – EFFECTIVE DATE JULY 1, 2019

This bill amends Sec. 163.3209, F.S. to eliminate the proviso of local government approval for the performance of certain right-of-way tree maintenance by electric utilities. Sec. 70.002, F.S. is created to establish that a Property Owner Bill of Rights is to be displayed on the web site of each Property Appraiser and provide the form language for the Bill of Rights. Section 163.045, F.S. is created to limit the authority of

local governments regarding pruning, trimming or removal of trees on residential property under certain conditions.

BUILDING PERMITS
HB 447 - EFFECTIVE OCTOBER 1, 2019

This bill makes various amendments to existing Florida law on building permits. The new provisions deal with written notice sent by counties in order to inform owners of the pending expiration of a building permit and limit the search fees that the county may charge an owner. Sec. 489.103, F.S. is amended to create additional exemptions from application of the statute. Procedures dealing with the closure of open building permits based on completed work are also added.

PERMIT FEES
HB 127 – EFFECTIVE JULY 1, 2019

This bill amends Secs. 125.56 and 166.222, F.S. by requiring counties and municipalities to post on their websites by December 31, 2020, building permit and inspection fee schedules and newly created utilization reports containing certain information. Thereafter, local governments must update their utilization reports before adjusting their building permit and inspection fee schedules.

CONSTRUCTION BONDS
HB 1247 – EFFECTIVE OCTOBER 1, 2019

This bill amends various sections of Chapters 255, 627 and 713, F.S. concerning construction bonds. Among other things, this bill: requires a notice of nonpayment to be under oath; specifies that a claimant who serves a fraudulent notice of nonpayment forfeits his or her rights under a bond; provides that the service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against the bond; requires a notice of nonpayment to be in a prescribed form; provides that a provision relating to attorney fees applies to certain suits brought by contractors; deems contractors to be insureds or beneficiaries in relation to bonds for construction contracts; and revises certain terminology.

SMALL-SCALE COMPREHENSIVE PLAN AMENDMENTS
HB 6017 – EFFECTIVE JULY 1, 2019

This bill amends Sec. 163.3187, F.S. by removing the 120-acre limitations that apply to small-scale comprehensive plan amendments.

PROPERTY DEVELOPMENT
HB 7103 – EFFECTIVE JULY 1, 2019

This bill, relating to community development and affordable housing, amends various sections of Chapters 125, 163, 166, 420 and 553 of the Florida Statutes. Among other things, this bill: prohibits local governments from imposing certain requirements relating to affordable housing; provides minimum requirements for adopting impact fees; requires local government to increase impact or mobility fee credits previously awarded; revises the timeframe an owner or contractor must notify a building official of use of a private provider; revises timeframe for approval or denial of permit applications; and limits number of times a building official may audit a private provider.

COMMUNITY DEVELOPMENT DISTRICTS
HB 437 -- EFFECTIVE UPON BECOMING LAW

This bill provides a process for Community Development Districts (CDDs) to identify parcels expected to be added to the CDD within the next 10 years. Chapter 190, F.S. is amended to create provisions to govern the establishment of new community development districts of less than 2,500 acres and to amend the boundaries of existing CDD's. Supplemental provisions regarding merger of CDD's are also added.

IMPACT FEES
HB 207 – EFFECTIVE JULY 1, 2019

This bill amends Sec. 163.31801, F.S. concerning impact fees. It modifies the minimum requirements for adoption of impact fees by local governments. The new requirements include the fee having a rational nexus between the need for capital facilities and expenditures of revenues, and the increased impact generated by the new construction; prohibiting the requirement of the payment of the impact fee before the issuance of the building permit; and the earmarking of revenues to the capital facilities. Fees charged for connecting to water and sewer systems are excluded.

RIGHT OF ENTRY
HB 767 – EFFECTIVE JULY 1, 2019

Of import, this bill amends Sec. 270.11, F.S. to extend the provisions for release of the right of entry (as to interests reserved by operation of law under this statute) to local governments, water management districts or other agencies of the state.

WETLAND MITIGATION
HB 521 – EFFECTIVE JULY 1, 2019

This bill amends Sec. 373.4135, F.S. by providing legislative intent, authorizing local governments to allow permittee-responsible mitigation on lands purchased and owned by local government for conservation purposes under certain circumstances and providing an exception to provisions prohibiting a governmental entity from creating or providing mitigation for projects other than its own unless certain conditions are met.

COASTAL MANAGEMENT
HB 325 – EFFECTIVE JULY 1, 2019

This bill amends Secs. 161.101, 161.143 and 161.161, F.S. by revising the Department of Environmental Protection ("DEP") funding priority criteria for beach management and erosion control projects. The bill further provides for the following:

- DEP must update active project lists on its website quarterly;
- funding for certain projects must remain available for eighteen months;
- makes requirements revising DEP's method of ranking and funding certain inlet management projects;
- revises requirements for comprehensive long-term management plan; and
- requires DEP to submit to the Legislature a 3-year work plan and related financial forecast for availability of funding.

OGSR/FAMILY TRUST COMPANIES
HB 7033 – EFFECTIVE OCTOBER 1, 2019

In 2014, the Legislature created a regulatory program to authorize families to form and operate family trust companies ("FTCs") in Florida subject to various regulatory requirements. As part of the new regulatory framework, the Legislature

created a public record exemption for certain information related to FTCs. In connection with the Open Government Sunset Review Act ("OGSR"), this bill amends Sec. 662.148, F.S. to reenact the public record exemption which will repeal on October 2, 2019 if this bill does not become law.

QUALIFIED BLIND TRUSTS
SB 702 – EFFECTIVE JANUARY 1, 2020

This bill repeals Section 112.31425, F.S. as of 01/01/2020.

WARRANTY ASSOCIATIONS
HB 925 – EFFECTIVE JULY 1, 2019

This bill amends Secs. 634.3077 and 634.406, F.S. by revising the requirements for home warranty associations and service warranty associations including, account assets, types of accounts, and compliance with laws where they operate. In addition, new Sec. 634.346, F.S. is created to, among other things, prohibit home warranties sold in Florida from excluding coverage for presence of rust or corrosion and provide requirements for coverage exclusions of certain HVAC components.

HOMEOWNERS' INSURANCE POLICY DISCLOSURES
HB 617 – EFFECTIVE JULY 1, 2019

This bill addresses the conflict of requiring a notice that states a homeowner's policy does not include flood coverage when the policy does provide flood coverage. By this bill, Sec. 627.7011, F.S. is amended to require notice of no flood coverage only when the policy does not include flood coverage and further specifies that such notice must be provided with the initial issuance and every renewal of the policy.

INSURANCE
HB 301 – EFFECTIVE JULY 1, 2019

This is a comprehensive bill which amends various sections of Chapters 215, 319, 440, 624, 626, 627 and 921 of the Florida Statutes. Of interest to real property practitioners, Sec. 215.555, F.S. is amended to specify the required reimbursement of loss adjustment expenses in reimbursement contracts between the State Board of Administration and property insurers under the Florida Hurricane Catastrophe Fund.

Sec. 319.30, F.S. is amended to: specify the means by which an insurance company may forward certificates of title of certain salvage mobile homes to the Department of Highway Safety and Motor Vehicles; revise the effective date of certain procedures and requirements relating to certificates of title; and provide that certain electronic signatures satisfy certain signature requirements.

Note: This year the Legislature convened on March 5, 2019 and adjourned on May 3, 2019.

This summary is effective as of May 3, 2019. In addition, please note that this summary is not intended to cover every bill or every aspect of every bill that might be of interest to real estate attorneys. For purposes of this summary, the bills listed have passed at least one house at the time of printing or are perceived to be of significant interest to FUND Members. In order to become law, the bill must pass both houses and be signed into law by the Governor. For more complete information on a certain bill or to download and/or print complete bills, please go to www.myfloridahouse.gov or www.flsenate.gov. You can download and print the bills of both houses at either site. Both sites also have bill trackers so you can track bills for either house during the next legislative session.

Both the House and Senate have Facebook and Twitter as their official social channels.

Back to Speaker Topics

Fund Assembly

Digital Closings and Remote Online Notarization: The Latest and Greatest

Maggie Thumberg, *Senior Manager, Continuing Legal Education, The Fund*

Back to Speaker Topics

Speaker Information

Digital Closings and Remote Online Notarization: The Latest and Greatest

Maggie Thumberg

Senior Manager, Continuing Legal Education, The Fund

Maggie Thumberg is The Fund's Sr. Manager, Continuing Legal Education. She received her B.A. in history from the University of South Florida and her M.A. in history and J.D. from the University of Florida. Ms. Thumberg is a Florida Bar Board Certified Real Estate Lawyer and has been admitted to practice in the United States District Court for the Southern District of Florida. She is a member of the Real Property, Probate, and Trust Law Section of the Florida Bar and a Board Member of the Polk Area Real Estate Council.

While at The Fund, Ms. Thumberg has presented hundreds of live seminars and webinars, including the New Member Training Program, and has been a speaker at the 2011, 2012, and 2018 Affiliate Assemblies and the 2018 Fund Assembly and moderated panels at the 2016 and 2017 Fund Assemblies.

Prior to joining The Fund, Ms. Thumberg focused her practice in real estate and corporate matters including the representation of lenders and developers in financing and acquisition matters and borrowers in foreclosure defense and bankruptcy. Through her representation of non-profit affordable housing developers, Ms. Thumberg prepared a practical guide to mortgage foreclosure mitigation counseling and presented numerous seminars on foreclosure related topics, including the Truth-in-Lending Act and the Home Affordable Modification Program. Ms. Thumberg has also published an article on the Freedom of Information Act.

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Digital Closings

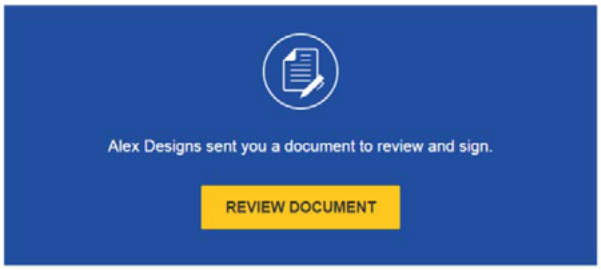
Florida Uniform Electronic Transactions Act (UETA) - Sec. 668.50, F.S.

- Records, signatures, & contracts may not be denied legal effect or enforceability solely because record or signature in electronic form or electronic record used to form contract
- If provision of law requires record to be in writing, electronic record satisfactory
- If provision of law requires signature, electronic signature satisfactory
- Allows, but does not require, government agencies to accept electronic records & signatures
- Sets forth framework for use of electronic negotiable instruments

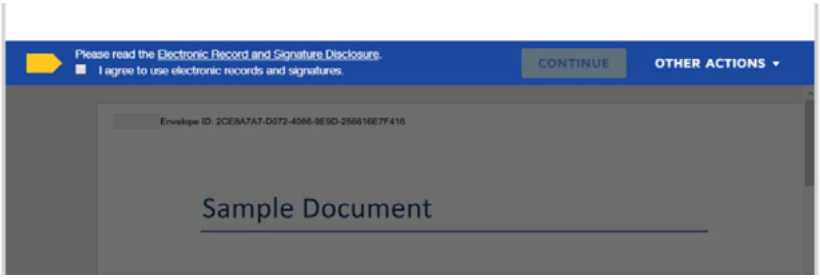
Federal Electronic Signatures in Global & National Commerce Act (E-SIGN Act) – 15 U.S.C., Secs. 7001, et. seq.

- Many similar provisions to UETA
- Consumer disclosures
  - Must affirmatively consent
  - Prior to consent must be provided notice consumer has right to withdraw consent & have paper record provided
  - Inform consumer how to withdraw consent
  - Inform consumer of hardware & software requirements
  - Consumer must demonstrate hardware & software requirements met in way they give consent

How It Works



Receive Invitation

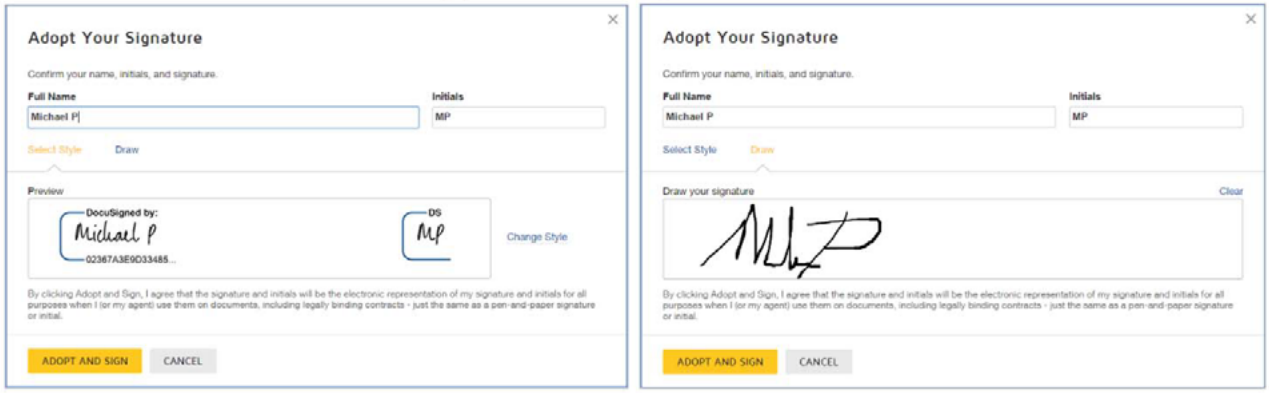


Consent

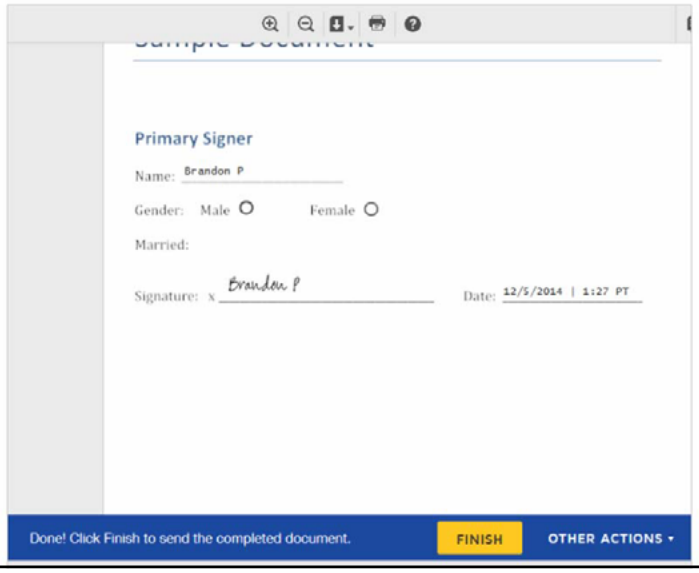
How It Works

Document Tags

Signature Options



How It Works



Signature Appears on Document

Benefits to Consumers

Promotion to Consumers	Reality
More convenient – do not have to go to office	May still have to "wet" sign certain documents
Review closing documents at home - on mobile device	Some documents must be witnessed/notarized; may need to coordinate signatures of other parties
No more pesky paper to keep up with	Documents not required to be delivered to consumer any earlier; still may not see documents until closing

Other Pluses for Consumers

Eventually, most documents will be available at least 12-24 hours before closing; consumer has more time to review, with less pressure of being "watched" by other parties

More time to ask questions before closing; experience not so "rushed" & impersonal

Reduction or elimination of printing/shipping/archiving fees

Benefits to Lenders & Settlement Agents

Lenders	Settlement Agents
Reduced processing costs	Better consumer experience
Decreased error rates	Consumers may be able to track "progress" – feel more informed
Fewer lost notes	Input/review information at their convenience – after hours/weekends
Speeds up time to secondary markets	May be able to read/review/sign documents earlier
Consumers see process as convenient/ meets their needs	Decreases manual data entry – more efficient for paralegals/closers
Regulators like it	Can be more convenient for remote parties
Fannie Mae/Freddie Mac	Can decrease incidence of fraud/forgery
CFPB	Decreases need for corrective/follow-up documents
	Closing & funding quicker

The Big 3

Note

Mortgage

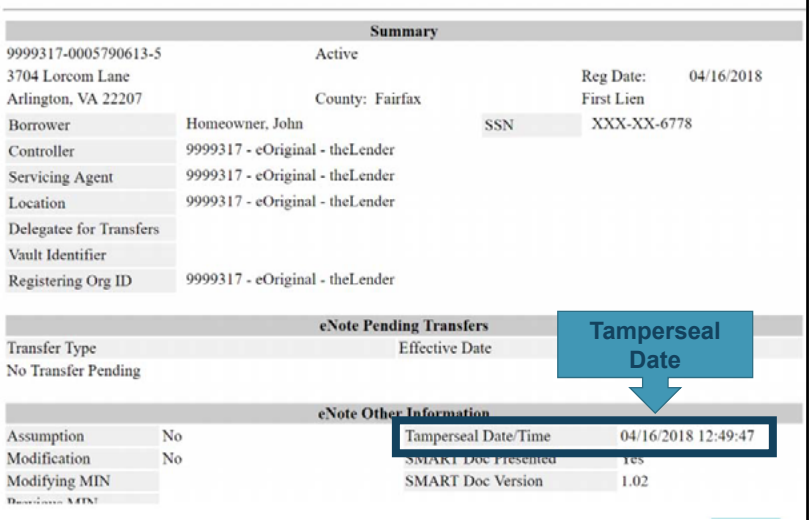
Deed

Promissory Note

- Fannie Mae/Freddie Mac approval required
- Tamper evident signature applied after borrower signs
- Registered on MERS eRegistry (centralized & authoritative home of information)
- Stored in private “eVault”

Promissory Note

- View in eVault



Summary

9999317-0005790613-5	Active		
3704 Lorcom Lane		Reg Date:	04/16/2018
Arlington, VA 22207	County: Fairfax	First Lien	
Borrower	Homeowner, John	SSN	XXX-XX-6778
Controller	9999317 - eOriginal - theLender		
Servicing Agent	9999317 - eOriginal - theLender		
Location	9999317 - eOriginal - theLender		
Delegatee for Transfers			
Vault Identifier			
Registering Org ID	9999317 - eOriginal - theLender		

eNote Pending Transfers

Transfer Type	Effective Date
No Transfer Pending	

Tamperseal Date

eNote Other Information

Assumption	No	Tamperseal Date/Time	04/16/2018 12:49:47
Modification	No	SMART Doc Presented	Yes
Modifying MIN		SMART Doc Version	1.02
Previous MIN			

Promissory Note

- Can also view/ produce PDF

with a record and executed or adopted by a person with the intent to sign a record; (iv) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and (v) "Transferable Record" means an electronic record that: (a) would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing and (b) I, as the issuer, have agreed is a Transferable Record.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED

John Homeowner

Click here

John Homeowner (Seal) - Borrower

[Sign Original Only]

Loan Originator Organization: theLender, NMLSR ID: 5555785

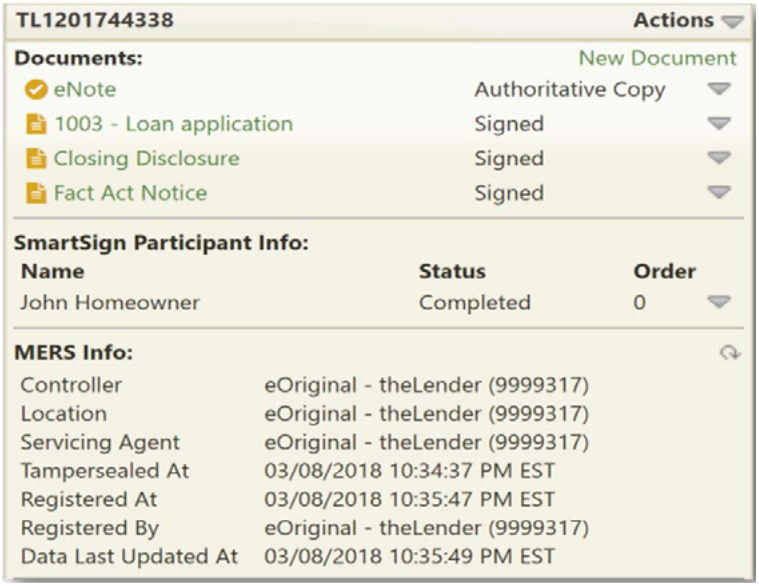
Individual Loan Originator's Name: Ollie Originator, NMLSR ID: 8675309

Form 3247e; Rev. 20170919
Virginia Fixed Rate eNote -- Single Family
Fannie Mae/Freddie Mac Uniform Instrument

eOriginal, Inc.
www.eOriginal.com

Promissory Note

- Servicer view



TL1201744338 **Actions**

Documents: New Document

eNote	Authoritative Copy
1003 - Loan application	Signed
Closing Disclosure	Signed
Fact Act Notice	Signed

SmartSign Participant Info:

Name	Status	Order
John Homeowner	Completed	0

MERS Info:

Controller	eOriginal - theLender (9999317)
Location	eOriginal - theLender (9999317)
Servicing Agent	eOriginal - theLender (9999317)
Tampersealed At	03/08/2018 10:34:37 PM EST
Registered At	03/08/2018 10:35:47 PM EST
Registered By	eOriginal - theLender (9999317)
Data Last Updated At	03/08/2018 10:35:49 PM EST

Mortgage

- Fannie Mae/Freddie Mac approval NOT required
- Generally e-recorded
- Electronic notarization barrier to use

In-Person Electronic Notarization

- Signatory & notary physically located in each other's presence
- Notary signs document electronically; applies electronic seal
- Authorized in Florida – Sec. 117.021, F.S.
- No separate authorization required by Fla. Sec. of State
- Certain technical requirements
- Utilize platform to obtain electronic seal & satisfy technical requirements

Deed

- Generally e-recorded
- Electronic notarization & electronic witness signatures barrier to use
  - Witnesses must also be physically located with signatory

Validity - *Rivera v. Wells Fargo Bank, N.A.*

- Electronic notes & mortgages can be foreclosed
- UETA expressly provides persons seeking to enforce electronic notes must:
  - Prove document would be promissory note under Ch. 673, F.S., if it was in writing
  - Borrower expressly agrees it is a transferrable record
  - Holder provides "reasonable proof" it is in control of record
    - Has access to authoritative copy
    - Related business records sufficient to review terms & establish identity of person having control

So, When?

What to Expect in 2019 & Beyond

- Moving to digital starts at home search & loan application
  - 43% conducted online research (general or visit primary FO website)
  - 67% somewhat or very comfortable completing loan application on laptop or desktop
  - 29% somewhat or very comfortable completing loan application on mobile device (but, 49% of millennials)

What to Expect in 2019

- The next frontier for lenders – mobile
  - 77% willing to answer security questions to verify ID
  - 59% willing to electronically sign documents
  - 53% willing to upload picture of driver's license
  - 51% willing to upload picture of loan documents
  - 47% willing to print docs from mobile
  - 43% willing to read docs on mobile

Source: Fiserv & Harris Poll, Expectations & Experiences: Borrowing & Wealth Management Survey, Mar. 2019

Remote Online Notarization

From Wild West to Coordinated Approach

A National Trend?

5 states in 2019 – so far

Idaho

Kentucky

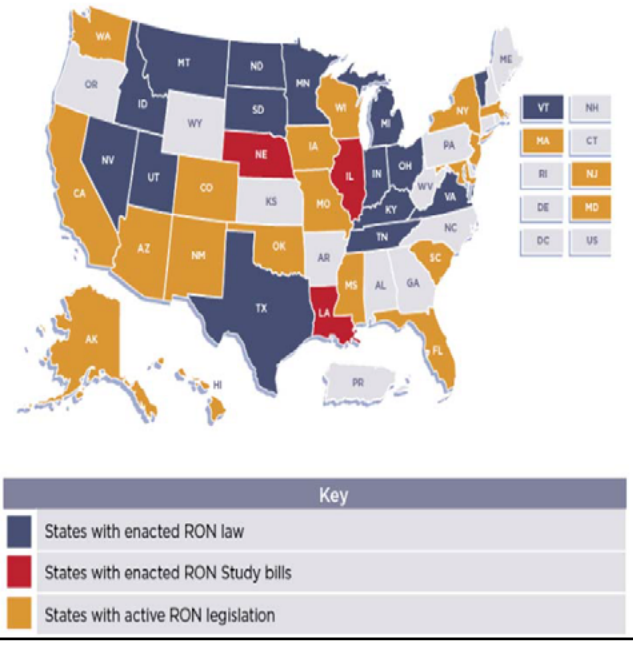
North Dakota

South Dakota

Utah

Adoption Map

Source: Mortgage Bankers Association



ULC's Principles for Future Legislation

- Recognition of consumer choice in using RON
- RON should receive same legal status as traditional notarization
- Inclusion of robust provisions for ID proofing & credential analysis
- Acknowledgments performed online can be readily identified & distinguished from those done in person
- Technology requirements not specific as to favor 1 vendor over another, nor so restrictive they impede improvements to security over time
- Legislation conforms to other legal standards & laws

Will 2019 Be the Year in Florida?

- HB 409 & SB 548

Underwriting Guidelines

- Florida transactions utilizing RON may not be insured on Old Republic
- If insuring transactions with notarizations from RON states make inquiries about circumstances of notarization & carefully inspect seal, acknowledgement, etc.
  - Ask signing party, contact notary, etc.
- Be proactive on closings; make sure buyer or seller do not utilize RON if not present for closing (until Florida law passed)
- If you have concerns or questions about a notarization, contact Fund Underwriting Counsel

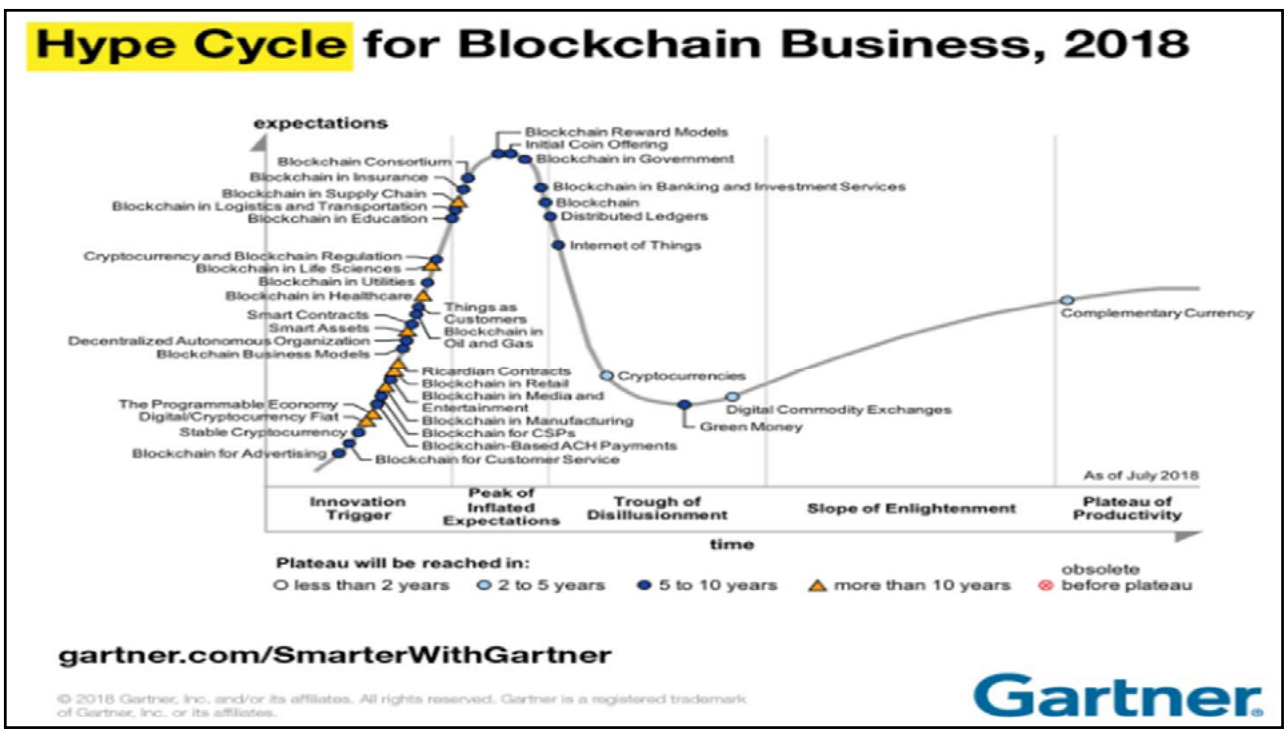
Why this Position?

- Constructive notice under Florida law
  - Sec. 695.03, F.S., requires parties executing instruments to be recorded to acknowledge execution "before" notary
  - Sec. 695.01, F.S., imparts constructive notice to instruments recorded "according to law"
  - Reminder – Sec. 117.107(9), F.S., makes it civil infraction subject to monetary penalty to notarize signature when signer "not in the physical presence" of notary

Mutual Indemnification Agreement

- Part IX revised Sep. 1, 2018 to expressly **exclude** "an acknowledgment taken remotely not expressly authorized by Florida Statutes and Rules"

Bonus! Blockchain



Blockchain Property Registry Initiatives

Australia – October 2018

New South Wales reports expected move to blockchain system by Summer 2019, with help from ChromaWay

India – October 2018

Andhra Pradesh announces partnership with Swedish startup ChromaWay to launch land registry pilot

Dubai – October 2018

Dubai Land Department announces it is developing system to record real estate transactions on blockchain

Vermont – March 2018

Pilot program completed first U.S. real estate deed transfer on Ethereum-based blockchain built by startup Propy

This conveyance has been recorded in smart contract 0xa188e5a3da203f8ebc72ec7578532926dc1d3bec of the public Ethereum blockchain.

IN WITNESS WHEREOF, the parties do hereby execute this Warranty Deed this 20th day of February, 2018.

Katherine M. Purcell

Katherine M. Purcell

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

On this 20th day of February, 2018, personally **KATHERINE M. PURCELL**, to me known to be the person who executed the foregoing instrument, and she acknowledged this instrument, by her signed, to be her free act and deed.

Before me: _____
Notary Public

Printed Name: Michelle N Farkas

Notary commission issued in Chittenden County
My commission expires: 2/10/19

Cook County, Illinois Pilot Findings

- Creating “digital property abstracts” can consolidate information from various government agencies
- Use of digital signatures can increase privacy & security, but there are downsides
- Until elected officials get behind efforts, not likely to happen

Other Potential Use Cases

- Use of SMART contracts for escrows
- Fractional rights more easily managed
- Wire fraud prevention (identity verification & bank authentication – SafeWire)
- Tokenized real estate ventures
  - St. Regis Aspen used blockchain-based trading system as broker-dealer to issue “Aspen Coin,” representing 1 share of common stock
  - Meridio offering tokenized coins representing rental income from single property – “single property REIT”

Back to Speaker Topics

(3) $15,000,000 for fiscal year 2002; and
(4) $15,000,000 for fiscal year 2003.

(Pub. L. 103–325, title I, § 180, as added Pub. L. 106–102, title VII, § 725, Nov. 12, 1999, 113 Stat. 1474.)

REFERENCES IN TEXT

This title, referred to in text, is title I of Pub. L. 103–325, Sept. 23, 1994, 108 Stat. 2163. Subtitle A (§§ 101–121) of title I, known as the Community Development Banking and Financial Institutions Act of 1994, is classified principally to subchapter I (§ 4701 et seq.) of chapter 47 of Title 12, Banks and Banking. Subtitle B (§§ 151–158) of title I, known as the Home Ownership and Equity Protection Act of 1994, enacted sections 1639 and 1648 of this title, amended sections 1602, 1604, 1610, 1640, 1641, and 1647 of this title, and enacted provisions set out as notes under sections 1601 and 1602 of this title. Subtitle C (§§ 171–181) of title I, known as the Program for Investment in Microentrepreneurs Act of 1999 or PRIME Act, is classified generally to this chapter. For complete classification of title I of Pub. L. 103–325 to the Code, see Tables.

§ 6910. Implementation

The Administrator shall, by regulation, establish such requirements as may be necessary to carry out this chapter.

(Pub. L. 103–325, title I, § 181, as added Pub. L. 106–102, title VII, § 725, Nov. 12, 1999, 113 Stat. 1475.)

CHAPTER 96—ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE

SUBCHAPTER I—ELECTRONIC RECORDS AND SIGNATURES IN COMMERCE

Sec.
7001. General rule of validity.
7002. Exemption to preemption.
7003. Specific exceptions.
7004. Applicability to Federal and State governments.
7005. Studies.
7006. Definitions.

SUBCHAPTER II—TRANSFERABLE RECORDS

7021. Transferable records.

SUBCHAPTER III—PROMOTION OF INTERNATIONAL ELECTRONIC COMMERCE

7031. Principles governing the use of electronic signatures in international transactions.

SUBCHAPTER I—ELECTRONIC RECORDS AND SIGNATURES IN COMMERCE

§ 7001. General rule of validity

(a) In general

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce—

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

(b) Preservation of rights and obligations

This subchapter does not—

(1) limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form; or

(2) require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.

(c) Consumer disclosures

(1) Consent to electronic records

Notwithstanding subsection (a) of this section, if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if—

(A) the consumer has affirmatively consented to such use and has not withdrawn such consent;

(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement—

(i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

(ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;

(iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and

(iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;

(C) the consumer—

(i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and

(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in

the electronic form that will be used to provide the information that is the subject of the consent; and

(D) after the consent of a consumer in accordance with subparagraph (A), if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record—

(i) provides the consumer with a statement of (I) the revised hardware and software requirements for access to and retention of the electronic records, and (II) the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under subparagraph (B)(i); and

(ii) again complies with subparagraph (C).

(2) Other rights

(A) Preservation of consumer protections

Nothing in this subchapter affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.

(B) Verification or acknowledgment

If a law that was enacted prior to this chapter expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).

(3) Effect of failure to obtain electronic consent or confirmation of consent

The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii).

(4) Prospective effect

Withdrawal of consent by a consumer shall not affect the legal effectiveness, validity, or enforceability of electronic records provided or made available to that consumer in accordance with paragraph (1) prior to implementation of the consumer's withdrawal of consent. A consumer's withdrawal of consent shall be effective within a reasonable period of time after receipt of the withdrawal by the provider of the record. Failure to comply with paragraph (1)(D) may, at the election of the consumer, be treated as a withdrawal of consent for purposes of this paragraph.

(5) Prior consent

This subsection does not apply to any records that are provided or made available to a consumer who has consented prior to the effective date of this subchapter to receive such records in electronic form as permitted by any statute, regulation, or other rule of law.

(6) Oral communications

An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided under applicable law.

(d) Retention of contracts and records

(1) Accuracy and accessibility

If a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, that requirement is met by retaining an electronic record of the information in the contract or other record that—

(A) accurately reflects the information set forth in the contract or other record; and

(B) remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.

(2) Exception

A requirement to retain a contract or other record in accordance with paragraph (1) does not apply to any information whose sole purpose is to enable the contract or other record to be sent, communicated, or received.

(3) Originals

If a statute, regulation, or other rule of law requires a contract or other record relating to a transaction in or affecting interstate or foreign commerce to be provided, available, or retained in its original form, or provides consequences if the contract or other record is not provided, available, or retained in its original form, that statute, regulation, or rule of law is satisfied by an electronic record that complies with paragraph (1).

(4) Checks

If a statute, regulation, or other rule of law requires the retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with paragraph (1).

(e) Accuracy and ability to retain contracts and other records

Notwithstanding subsection (a) of this section, if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

(f) Proximity

Nothing in this subchapter affects the proximity required by any statute, regulation, or other

Back to Speaker Topics

rule of law with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed.

(g) Notarization and acknowledgment

If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.

(h) Electronic agents

A contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.

(i) Insurance

It is the specific intent of the Congress that this subchapter and subchapter II of this chapter apply to the business of insurance.

(j) Insurance agents and brokers

An insurance agent or broker acting under the direction of a party that enters into a contract by means of an electronic record or electronic signature may not be held liable for any deficiency in the electronic procedures agreed to by the parties under that contract if—

(1) the agent or broker has not engaged in negligent, reckless, or intentional tortious conduct;

(2) the agent or broker was not involved in the development or establishment of such electronic procedures; and

(3) the agent or broker did not deviate from such procedures.

(Pub. L. 106–229, title I, §101, June 30, 2000, 114 Stat. 464.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (c)(2)(B), was in the original ''this Act'', meaning Pub. L. 106–229, June 30, 2000, 114 Stat. 464, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note below and Tables.

For the effective date of this subchapter, referred to in subsec. (c)(5), see Effective Date note below.

EFFECTIVE DATE

Pub. L. 106–229, title I, §107, June 30, 2000, 114 Stat. 473, provided that:

''(a) IN GENERAL.—Except as provided in subsection (b), this title [enacting this subchapter] shall be effective on October 1, 2000.

''(b) EXCEPTIONS.—

''(1) RECORD RETENTION.—

''(A) IN GENERAL.—Subject to subparagraph (B), this title [enacting this subchapter] shall be effective on March 1, 2001, with respect to a requirement that a record be retained imposed by—

''(i) a Federal statute, regulation, or other rule of law, or

''(ii) a State statute, regulation, or other rule of law administered or promulgated by a State regulatory agency.

''(B) DELAYED EFFECT FOR PENDING RULEMAKINGS.—If on March 1, 2001, a Federal regulatory agency or State regulatory agency has announced, proposed, or initiated, but not completed, a rulemaking proceeding to prescribe a regulation under section 104(b)(3) [15 U.S.C. 7004(b)(3)] with respect to a requirement described in subparagraph (A), this title shall be effective on June 1, 2001, with respect to such requirement.

''(2) CERTAIN GUARANTEED AND INSURED LOANS.—With regard to any transaction involving a loan guarantee or loan guarantee commitment (as those terms are defined in section 502 of the Federal Credit Reform Act of 1990 [2 U.S.C. 661a]), or involving a program listed in the Federal Credit Supplement, Budget of the United States, FY 2001, this title applies only to such transactions entered into, and to any loan or mortgage made, insured, or guaranteed by the United States Government thereunder, on and after one year after the date of enactment of this Act [June 30, 2000].

''(3) STUDENT LOANS.—With respect to any records that are provided or made available to a consumer pursuant to an application for a loan, or a loan made, pursuant to title IV of the Higher Education Act of 1965 [20 U.S.C. 1070 et seq., 42 U.S.C. 2751 et seq.], section 101(c) of this Act [15 U.S.C. 7001(c)] shall not apply until the earlier of—

''(A) such time as the Secretary of Education publishes revised promissory notes under section 432(m) of the Higher Education Act of 1965 [20 U.S.C. 1082(m)]; or

''(B) one year after the date of enactment of this Act [June 30, 2000].''

SHORT TITLE

Pub. L. 106–229, §1, June 30, 2000, 114 Stat. 464, provided that: ''This Act [enacting this chapter and amending provisions set out as a note under section 231 of Title 47, Telegraphs, Telephones, and Radiotelegraphs] may be cited as the 'Electronic Signatures in Global and National Commerce Act'.''

§ 7002. Exemption to preemption

(a) In general

A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law—

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if—

(i) such alternative procedures or requirements are consistent with this subchapter and subchapter II of this chapter; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the func-

Back to Speaker Topics

(b) Exceptions for actions by States as market participants

Subsection (a)(2)(A)(ii) shall not apply to the statutes, regulations, or other rules of law governing procurement by any State, or any agency or instrumentality thereof.

(c) Prevention of circumvention

Subsection (a) does not permit a State to circumvent this subchapter or subchapter II through the imposition of nonelectronic delivery methods under section 8(b)(2) of the Uniform Electronic Transactions Act.

(Pub. L. 106–229, title I, § 102, June 30, 2000, 114 Stat. 467.)

EFFECTIVE DATE

Section effective Oct. 1, 2000, with exceptions relating to record retention and certain loans, see section 107 of Pub. L. 106–229, set out as a note under section 7001 of this title.

§ 7003. Specific exceptions

(a) Excepted requirements

The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by—

(1) a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) a State statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law; or

(3) the Uniform Commercial Code, as in effect in any State, other than sections 1–107 and 1–206 and Articles 2 and 2A.

(b) Additional exceptions

The provisions of section 7001 of this title shall not apply to—

(1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;

(2) any notice of—

(A) the cancellation or termination of utility services (including water, heat, and power);

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;

(C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or

(D) recall of a product, or material failure of a product, that risks endangering health or safety; or

(3) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

(c) Review of exceptions

(1) Evaluation required

The Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall review the operation of the exceptions in subsections (a) and (b) to evaluate, over a period of 3 years, whether such exceptions continue to be necessary for the protection of consumers. Within 3 years after June 30, 2000, the Assistant Secretary shall submit a report to the Congress on the results of such evaluation.

(2) Determinations

If a Federal regulatory agency, with respect to matter within its jurisdiction, determines after notice and an opportunity for public comment, and publishes a finding, that one or more such exceptions are no longer necessary for the protection of consumers and eliminating such exceptions will not increase the material risk of harm to consumers, such agency may extend the application of section 7001 of this title to the exceptions identified in such finding.

(Pub. L. 106–229, title I, § 103, June 30, 2000, 114 Stat. 468.)

EFFECTIVE DATE

Section effective Oct. 1, 2000, with exceptions relating to record retention and certain loans, see section 107 of Pub. L. 106–229, set out as a note under section 7001 of this title.

§ 7004. Applicability to Federal and State governments

(a) Filing and access requirements

Subject to subsection (c)(2), nothing in this subchapter limits or supersedes any requirement by a Federal regulatory agency, self-regulatory organization, or State regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats.

(b) Preservation of existing rulemaking authority

(1) Use of authority to interpret

Subject to paragraph (2) and subsection (c), a Federal regulatory agency or State regulatory agency that is responsible for rulemaking under any other statute may interpret section 7001 of this title with respect to such statute through—

(A) the issuance of regulations pursuant to a statute; or

(B) to the extent such agency is authorized by statute to issue orders or guidance, the issuance of orders or guidance of general applicability that are publicly available and published (in the Federal Register in the case of an order or guidance issued by a Federal regulatory agency).

This paragraph does not grant any Federal regulatory agency or State regulatory agency authority to issue regulations, orders, or guidance pursuant to any statute that does not authorize such issuance.

(2) Limitations on interpretation authority

Notwithstanding paragraph (1), a Federal regulatory agency shall not adopt any regulation, order, or guidance described in paragraph (1), and a State regulatory agency is preempted by section 7001 of this title from adopting any regulation, order, or guidance described in paragraph (1), unless—

Back to Speaker Topics

(A) such regulation, order, or guidance is consistent with section 7001 of this title;

(B) such regulation, order, or guidance does not add to the requirements of such section; and

(C) such agency finds, in connection with the issuance of such regulation, order, or guidance, that—

(i) there is a substantial justification for the regulation, order, or guidance;

(ii) the methods selected to carry out that purpose—

(I) are substantially equivalent to the requirements imposed on records that are not electronic records; and

(II) will not impose unreasonable costs on the acceptance and use of electronic records; and

(iii) the methods selected to carry out that purpose do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures.

(3) Performance standards

(A) Accuracy, record integrity, accessibility

Notwithstanding paragraph (2)(C)(iii), a Federal regulatory agency or State regulatory agency may interpret section 7001(d) of this title to specify performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained. Such performance standards may be specified in a manner that imposes a requirement in violation of paragraph (2)(C)(iii) if the requirement (i) serves an important governmental objective; and (ii) is substantially related to the achievement of that objective. Nothing in this paragraph shall be construed to grant any Federal regulatory agency or State regulatory agency authority to require use of a particular type of software or hardware in order to comply with section 7001(d) of this title.

(B) Paper or printed form

Notwithstanding subsection (c)(1), a Federal regulatory agency or State regulatory agency may interpret section 7001(d) of this title to require retention of a record in a tangible printed or paper form if—

(i) there is a compelling governmental interest relating to law enforcement or national security for imposing such requirement; and

(ii) imposing such requirement is essential to attaining such interest.

(4) Exceptions for actions by government as market participant

Paragraph (2)(C)(iii) shall not apply to the statutes, regulations, or other rules of law governing procurement by the Federal or any State government, or any agency or instrumentality thereof.

(c) Additional limitations

(1) Reimposing paper prohibited

Nothing in subsection (b) (other than paragraph (3)(B) thereof) shall be construed to grant any Federal regulatory agency or State regulatory agency authority to impose or reimpose any requirement that a record be in a tangible printed or paper form.

(2) Continuing obligation under Government Paperwork Elimination Act

Nothing in subsection (a) or (b) relieves any Federal regulatory agency of its obligations under the Government Paperwork Elimination Act (title XVII of Public Law 105–277).

(d) Authority to exempt from consent provision

(1) In general

A Federal regulatory agency may, with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category or type of record from the requirements relating to consent in section 7001(c) of this title if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

(2) Prospectuses

Within 30 days after June 30, 2000, the Securities and Exchange Commission shall issue a regulation or order pursuant to paragraph (1) exempting from section 7001(c) of this title any records that are required to be provided in order to allow advertising, sales literature, or other information concerning a security issued by an investment company that is registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], or concerning the issuer thereof, to be excluded from the definition of a prospectus under section 77b(a)(10)(A) of this title.

(e) Electronic letters of agency

The Federal Communications Commission shall not hold any contract for telecommunications service or letter of agency for a preferred carrier change, that otherwise complies with the Commission's rules, to be legally ineffective, invalid, or unenforceable solely because an electronic record or electronic signature was used in its formation or authorization.

(Pub. L. 106–229, title I, §104, June 30, 2000, 114 Stat. 469.)

REFERENCES IN TEXT

The Government Paperwork Elimination Act, referred to in subsec. (c)(2), is title XVII of Pub. L. 105–277, div. C, Oct. 21, 1998, 112 Stat. 2681–749, which amended section 3504 of Title 44, Public Printing and Documents, and enacted provisions set out as a note under section 3504 of Title 44. For complete classification of this Act to the Code, see Tables.

The Investment Company Act of 1940, referred to in subsec. (d)(2), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

EFFECTIVE DATE

Section effective Oct. 1, 2000, with exceptions relating to record retention and certain loans, see section 107 of Pub. L. 106–229, set out as a note under section 7001 of this title.

Back to Speaker Topics

§ 7005. Studies

(a) Delivery

Within 12 months after June 30, 2000, the Secretary of Commerce shall conduct an inquiry regarding the effectiveness of the delivery of electronic records to consumers using electronic mail as compared with delivery of written records via the United States Postal Service and private express mail services. The Secretary shall submit a report to the Congress regarding the results of such inquiry by the conclusion of such 12-month period.

(b) Study of electronic consent

Within 12 months after June 30, 2000, the Secretary of Commerce and the Federal Trade Commission shall submit a report to the Congress evaluating any benefits provided to consumers by the procedure required by section 7001(c)(1)(C)(ii) of this title; any burdens imposed on electronic commerce by that provision; whether the benefits outweigh the burdens; whether the absence of the procedure required by section 7001(c)(1)(C)(ii) of this title would increase the incidence of fraud directed against consumers; and suggesting any revisions to the provision deemed appropriate by the Secretary and the Commission. In conducting this evaluation, the Secretary and the Commission shall solicit comment from the general public, consumer representatives, and electronic commerce businesses.

(Pub. L. 106–229, title I, §105, June 30, 2000, 114 Stat. 471.)

EFFECTIVE DATE

Section effective Oct. 1, 2000, with exceptions relating to record retention and certain loans, see section 107 of Pub. L. 106–229, set out as a note under section 7001 of this title.

§ 7006. Definitions

For purposes of this subchapter:

(1) Consumer

The term ''consumer'' means an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.

(2) Electronic

The term ''electronic'' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) Electronic agent

The term ''electronic agent'' means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time of the action or response.

(4) Electronic record

The term ''electronic record'' means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

(5) Electronic signature

The term ''electronic signature'' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

(6) Federal regulatory agency

The term ''Federal regulatory agency'' means an agency, as that term is defined in section 552(f) of title 5.

(7) Information

The term ''information'' means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(8) Person

The term ''person'' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(9) Record

The term ''record'' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) Requirement

The term ''requirement'' includes a prohibition.

(11) Self-regulatory organization

The term ''self-regulatory organization'' means an organization or entity that is not a Federal regulatory agency or a State, but that is under the supervision of a Federal regulatory agency and is authorized under Federal law to adopt and administer rules applicable to its members that are enforced by such organization or entity, by a Federal regulatory agency, or by another self-regulatory organization.

(12) State

The term ''State'' includes the District of Columbia and the territories and possessions of the United States.

(13) Transaction

The term ''transaction'' means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct—

(A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and

(B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.

(Pub. L. 106–229, title I, §106, June 30, 2000, 114 Stat. 472.)

EFFECTIVE DATE

Section effective Oct. 1, 2000, with exceptions relating to record retention and certain loans, see section 107 of Pub. L. 106–229, set out as a note under section 7001 of this title.

Back to Speaker Topics

SUBCHAPTER II—TRANSFERABLE RECORDS

§ 7021. Transferable records

(a) Definitions

For purposes of this section:

(1) Transferable record

The term ''transferable record'' means an electronic record that—

(A) would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing;

(B) the issuer of the electronic record expressly has agreed is a transferable record; and

(C) relates to a loan secured by real property.

A transferable record may be executed using an electronic signature.

(2) Other definitions

The terms ''electronic record'', ''electronic signature'', and ''person'' have the same meanings provided in section 7006 of this title.

(b) Control

A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) Conditions

A system satisfies subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that—

(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as—

(A) the person to which the transferable record was issued; or

(B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Status as holder

Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in section 1–201(20) of the Uniform Commercial Code, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under section 3–302(a), 9–308, or revised section 9–330 of the Uniform Commercial Code are satisfied, the rights and defenses of a holder in due course or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Obligor rights

Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(f) Proof of control

If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

(g) UCC references

For purposes of this subsection, all references to the Uniform Commercial Code are to the Uniform Commercial Code as in effect in the jurisdiction the law of which governs the transferable record.

(Pub. L. 106–229, title II, §201, June 30, 2000, 114 Stat. 473.)

EFFECTIVE DATE

Pub. L. 106–229, title II, §202, June 30, 2000, 114 Stat. 475, provided that: ''This title [enacting this subchapter] shall be effective 90 days after the date of enactment of this Act [June 30, 2000].''

SUBCHAPTER III—PROMOTION OF INTERNATIONAL ELECTRONIC COMMERCE

§ 7031. Principles governing the use of electronic signatures in international transactions

(a) Promotion of electronic signatures

(1) Required actions

The Secretary of Commerce shall promote the acceptance and use, on an international basis, of electronic signatures in accordance with the principles specified in paragraph (2) and in a manner consistent with section 7001 of this title. The Secretary of Commerce shall take all actions necessary in a manner consistent with such principles to eliminate or reduce, to the maximum extent possible, the impediments to commerce in electronic signatures, for the purpose of facilitating the development of interstate and foreign commerce.

(2) Principles

The principles specified in this paragraph are the following:

(A) Remove paper-based obstacles to electronic transactions by adopting relevant principles from the Model Law on Electronic Commerce adopted in 1996 by the United Nations Commission on International Trade Law.

Back to Speaker Topics

(B) Permit parties to a transaction to determine the appropriate authentication technologies and implementation models for their transactions, with assurance that those technologies and implementation models will be recognized and enforced.

(C) Permit parties to a transaction to have the opportunity to prove in court or other proceedings that their authentication approaches and their transactions are valid.

(D) Take a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions.

(b) Consultation

In conducting the activities required by this section, the Secretary shall consult with users and providers of electronic signature products and services and other interested persons.

(c) Definitions

As used in this section, the terms ''electronic record'' and ''electronic signature'' have the same meanings provided in section 7006 of this title.

(Pub. L. 106–229, title III, § 301, June 30, 2000, 114 Stat. 475.)

CHAPTER 97—WOMEN'S BUSINESS ENTERPRISE DEVELOPMENT

Sec.
7101. Establishment of the Interagency Committee.
7102. Duties of the Interagency Committee.
7103. Membership of the Interagency Committee.
7104. Reports from the Interagency Committee.
7105. Establishment of the National Women's Business Council.
7106. Duties of the Council.
7107. Membership of the Council.
7108. Definitions.
7109. Studies and other research.
7110. Authorization of appropriations.

CODIFICATION

This chapter is comprised of title IV of Pub. L. 100–533, as added by Pub. L. 103–403, title IV, § 413, Oct. 22, 1994, 108 Stat. 4193, and amended. Title IV of Pub. L. 100–533 was formerly set out as a note under section 631 of this title.

§ 7101. Establishment of the Interagency Committee

There is established an interagency committee to be known as the Interagency Committee on Women's Business Enterprise.

(Pub. L. 100–533, title IV, § 401, as added Pub. L. 103–403, title IV, § 413, Oct. 22, 1994, 108 Stat. 4193.)

PRIOR PROVISIONS

A prior section 401 of Pub. L. 100–533, title IV, Oct. 25, 1988, 102 Stat. 2694, related to the establishment of the National Women's Business Council, prior to the general amendment of title IV of Pub. L. 100–533 by Pub. L. 103–403. See section 7105 of this title.

SHORT TITLE OF 2000 AMENDMENT

Pub. L. 106–554, § 1(a)(9) [title VII, § 701], Dec. 21, 2000, 114 Stat. 2763, 2763A–701, provided that: ''This title [amending sections 7107, 7109, and 7110 of this title and repealing former section 7109 of this title] may be cited as the 'National Women's Business Council Reauthorization Act of 2000'.''

EX. ORD. NO. 12138. NATIONAL WOMEN'S BUSINESS ENTERPRISE POLICY AND NATIONAL PROGRAM FOR WOMEN'S BUSINESS ENTERPRISE

Ex. Ord. No. 12138, May 18, 1979, 44 F.R. 29637, as amended by Ex. Ord. No. 12608, Sept. 9, 1987, 52 F.R. 34617, provided:

In response to the findings of the Interagency Task Force on Women Business Owners and congressional findings that recognize:

1. the significant role which small business and women entrepreneurs can play in promoting full employment and balanced growth in our economy;

2. the many obstacles facing women entrepreneurs; and

3. the need to aid and stimulate women's business enterprise;

By the authority vested in me as President of the United States of America, in order to create a National Women's Business Enterprise Policy and to prescribe arrangements for developing, coordinating and implementing a national program for women's business enterprise, it is ordered as follows:

1–1. RESPONSIBILITIES OF THE FEDERAL DEPARTMENTS AND AGENCIES

1–101. Within the constraints of statutory authority and as otherwise permitted by law:

(a) Each department and agency of the Executive Branch shall take appropriate action to facilitate, preserve and strengthen women's business enterprise and to ensure full participation by women in the free enterprise system.

(b) Each department and agency shall take affirmative action in support of women's business enterprise in appropriate programs and activities including but not limited to:

(1) management, technical, financial and procurement assistance,

(2) business-related education, training, counseling and information dissemination, and

(3) procurement.

(c) Each department or agency empowered to extend Federal financial assistance to any program or activity shall issue regulations requiring the recipient of such assistance to take appropriate affirmative action in support of women's business enterprise and to prohibit actions or policies which discriminate against women's business enterprise on the ground of sex. For purposes of this subsection, Federal financial assistance means assistance extended by way of grant, cooperative agreement, loan or contract other than a contract of insurance or guaranty. These regulations shall prescribe sanctions for noncompliance. Unless otherwise specified by law, no agency sanctions shall be applied until the agency or department concerned has advised the appropriate person or persons of the failure to comply with its regulations and has determined that compliance cannot be secured by voluntary means.

1–102. For purposes of this Order, affirmative action may include, but is not limited to, creating or supporting new programs responsive to the special needs of women's business enterprise, establishing incentives to promote business or business-related opportunities for women's business enterprise, collecting and disseminating information in support of women's business enterprise, and insuring to women's business enterprise knowledge of and ready access to business-related services and resources. If, in implementing this Order, an agency undertakes to use or to require compliance with numerical set-asides, or similar measures, it shall state the purpose of such measure, and the measure shall be designed on the basis of pertinent factual findings of discrimination against women's business enterprise and the need for such measure.

1–103. In carrying out their responsibilities under Section 1–1, the departments and agencies shall consult the Department of Justice, and the Department of Justice shall provide legal guidance concerning these responsibilities.

The Fund® CONCEPT
MAY 2015 | VOL 47

ESIGN AND TRID: ELECTRONIC NOTICE AND DELIVERY AFTER AUGUST 1

BY MELISSA JAY MURPHY, FUND SR. VICE PRESIDENT, GENERAL COUNSEL

As we get closer to the implementation of the TILA-RESPA Integrated Disclosure (TRID) rules on Aug. 1, the logistics of compliance become increasingly important. Many of you are already aware that TRID contemplates increased use of electronic notifications and document delivery systems, not only to the borrower, but also between settlement agents and lenders. One of the technological concerns that I receive the most questions about deals with the electronic delivery of the Closing Disclosure (CD) to borrowers; particularly whether or not receiving an e-mail response from a borrower that they have received the CD meets the "evidence of receipt" requirement, allowing waiver of the additional three-day "mailbox rule" timeframe.

The answer in this case is no. The reason has to do with the Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. Secs. 7001 et. seq.). Although ESIGN is an unfamiliar law to many of us in the settlement services industry, it was enacted in 2000 and many lenders and other consumer credit companies have already built systems around ESIGN.

ESIGN generally allows the use of electronic records and signatures in interstate transactions, by stating that any notice or signature required by federal statute, regulation, or rule can be accomplished electronically, without any physical documents being printed or pen put to paper. However, in order to take advantage of ESIGN the creditor must comply with certain consent requirements outlined in the law.

Prior to a consumer receiving any required notice electronically (e.g. a CD), the consumer must receive a clear and conspicuous statement that the consumer has the right to additionally receive that notice in a non-electronic format and to later withdraw consent to receiving notice electronically. In addition, the consumer must receive a statement alerting them to the hardware and software requirements needed to access and retain the electronic records received. Any subsequent change in hardware or software requirements which affect the consumer's ability to access and retain electronic documents triggers a new informed consent process. Final-

(Continues on page 50)

IN THIS ISSUE

- Summary Revisions of Title Notes 2014.....45
- Title Q & As.....46
- New Seminar CFPB's Closing Disclosure..47
- Insuring Appurtenant Easements.....48
- Meet Your Fund Underwriting Attorneys....52

be included. Finally, an exception must be made for the terms and conditions of the easement agreement.

When issuing final policies, the additional descriptive information for the insured appurtenant easement on Schedule A must be carried over and proper exceptions relating to the appurtenant easement that were not eliminated prior to or at closing should be included.

Often, Fund Members encounter easement agreements entitled "Reciprocal Easement." As the name suggests, a reciprocal easement typically both benefits and burdens the fee title parcel. In the case of a reciprocal easement, the commitment should already include an exception for the easement because it burdens the fee title parcel – the fee title parcel has an easement running through it that benefits the adjoining parcel. If the buyer or lender requires coverage for an appurtenant easement arising out of the reciprocal easement agreement which benefits the fee title parcel, the legal description of the portion of the adjoining servient estate which is burdened by the easement should be shown on Schedule A. In this case, the guidelines discussed above should be considered in insuring that portion of the reciprocal easement that benefits the fee title parcel to be insured.

Conclusion

When insuring title involving property that is not a standard platted residential parcel, a Fund Member's early recognition of the parties' intent to transfer fee title along with an easement is key. This determination will help facilitate a much smoother transaction and allows Fund Members to gather the information necessary, including a survey, to undertake the proper analysis to determine the easement's appurtenant nature and to obtain proper title information in order to determine insurability. Upon your instruction, Fund examiners are available to assist in tailoring commitments to meet your needs to accomplish insuring title to the additional easement parcel. As always, Fund underwriting counsels are available to answer your questions regarding the insurability of an easement.

ESIGN AND TRID *...continued from page 41*

ly, consent or confirmation of consent must be given electronically in a manner which reasonably demonstrates the consumer can access the electronic record they will be receiving.

In practice, consumer credit companies who have taken advantage of ESIGN have used methods other than email to meet the final requirement regarding demonstration of access. These include sending links via email or having links posted on their website to .pdf documents consumers can access. When consumers click on those links, the IP address of the computer accessing the documents is electronically recorded and verification of access is noted in the consumer's electronic file. It is this final requirement, that the creditor have independent verification the consumer received the notice, that makes it unlikely creditors will rely on a simple email confirmation of receipt from the borrower.

Because all major lenders have announced their intention to provide the CD directly to consumers, in most cases settlement agents will not be responsible for sending the CD to consumers in advance of the closing and therefore will not need to obtain the informed consent of consumers. Furthermore, because a seller is not required to receive the CD three days in advance of closing, there is no ESIGN requirement related to delivery of the seller's CD. However, settlement agents must comply with the ESIGN requirements for those transactions where a small or private lender relies on the settlement agent to provide the CD to the borrower.

Special thanks to Robert J. Rohan, Fund Legal Education Attorney, for his contributions to this article. □

Select Year: 2018 Go

The 2018 Florida Statutes

Title X
PUBLIC OFFICERS, EMPLOYEES, AND RECORDS

Chapter 117
NOTARIES PUBLIC

View Entire Chapter

117.021 Electronic notarization.—

(1) Any document requiring notarization may be notarized electronically. The provisions of ss. 117.01, 117.03, 117.04, 117.05(1)-(11), (13), and (14), 117.105, and 117.107 apply to all notarizations under this section.

(2) In performing an electronic notarial act, a notary public shall use an electronic signature that is:

(a) Unique to the notary public;

(b) Capable of independent verification;

(c) Retained under the notary public's sole control; and

(d) Attached to or logically associated with the electronic document in a manner that any subsequent alteration to the electronic document displays evidence of the alteration.

(3) When a signature is required to be accompanied by a notary public seal, the requirement is satisfied when the electronic signature of the notary public contains all of the following seal information:

(a) The full name of the notary public exactly as provided on the notary public's application for commission;

(b) The words "Notary Public State of Florida";

(c) The date of expiration of the commission of the notary public; and

(d) The notary public's commission number.

(4) Failure of a notary public to comply with any of the requirements of this section may constitute grounds for suspension of the notary public's commission by the Executive Office of the Governor.

(5) The Department of State may adopt rules to ensure the security, reliability, and uniformity of signatures and seals authorized in this section.

History.—s. 1, ch. 2007-257.

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Select Year: 2018 Go

The 2018 Florida Statutes

Title X
PUBLIC OFFICERS, EMPLOYEES, AND RECORDS

Chapter 117
NOTARIES PUBLIC

View Entire Chapter

117.107 Prohibited acts.—

(1) A notary public may not use a name or initial in signing certificates other than that by which the notary public is commissioned.

(2) A notary public may not sign notarial certificates using a facsimile signature stamp unless the notary public has a physical disability that limits or prohibits his or her ability to make a written signature and unless the notary public has first submitted written notice to the Department of State with an exemplar of the facsimile signature stamp.

(3) A notary public may not affix his or her signature to a blank form of affidavit or certificate of acknowledgment and deliver that form to another person with the intent that it be used as an affidavit or acknowledgment.

(4) A notary public may not take the acknowledgment of or administer an oath to a person whom the notary public actually knows to have been adjudicated mentally incapacitated by a court of competent jurisdiction, where the acknowledgment or oath necessitates the exercise of a right that has been removed pursuant to s. 744.3215(2) or (3), and where the person has not been restored to capacity as a matter of record.

(5) A notary public may not notarize a signature on a document if it appears that the person is mentally incapable of understanding the nature and effect of the document at the time of notarization.

(6) A notary public may not take the acknowledgment of a person who does not speak or understand the English language, unless the nature and effect of the instrument to be notarized is translated into a language which the person does understand.

(7) A notary public may not change anything in a written instrument after it has been signed by anyone.

(8) A notary public may not amend a notarial certificate after the notarization is complete.

(9) A notary public may not notarize a signature on a document if the person whose signature is being notarized is not in the presence of the notary public at the time the signature is notarized. Any notary public who violates this subsection is guilty of a civil infraction, punishable by penalty not exceeding $5,000, and such violation constitutes malfeasance and misfeasance in the conduct of official duties. It is no defense to the civil infraction specified in this subsection that the notary public acted without intent to defraud. A notary public who violates this subsection with the intent to defraud is guilty of violating s. 117.105.

(10) A notary public may not notarize a signature on a document if the document is incomplete or blank. However, an endorsement or assignment in blank of a negotiable or nonnegotiable note and the assignment in blank of any instrument given as security for such note is not deemed incomplete.

(11) A notary public may not notarize a signature on a document if the person whose signature is to be notarized is the spouse, son, daughter, mother, or father of the notary public.

(12) A notary public may not notarize a signature on a document if the notary public has a financial interest in or is a party to the underlying transaction; however, a notary public who is an employee may notarize a signature for his or her employer, and this employment does not constitute a financial interest in the transaction nor make the notary a party to the transaction under this subsection as long as he or she does not receive a benefit other than his or her salary and the fee for services as a notary public authorized by law. For purposes of this subsection, a notary public who is an attorney does not have a financial interest in and is not a party to the underlying

transaction evidenced by a notarized document if he or she notarizes a signature on that document for a client for whom he or she serves as an attorney of record and he or she has no interest in the document other than the fee paid to him or her for legal services and the fee authorized by law for services as a notary public.

History.—s. 7, ch. 91-291; s. 4, ch. 92-209; s. 749, ch. 95-147; s. 19, ch. 95-280; s. 8, ch. 98-246; s. 33, ch. 2006-178.

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Select Year: 2018 Go

The 2018 Florida Statutes

Title XXXIX
COMMERCIAL RELATIONS

Chapter 668
ELECTRONIC COMMERCE

View Entire Chapter

668.50 Uniform Electronic Transaction Act.—

(1) SHORT TITLE.—This section may be cited as the "Uniform Electronic Transaction Act."

(2) DEFINITIONS.—As used in this section:

(a) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under provisions of law otherwise applicable to a particular transaction.

(b) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(c) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(d) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this act and other applicable provisions of law.

(e) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(f) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(g) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(h) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(i) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of this state, including a county, municipality, or other political subdivision of this state and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

(j) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or other similar representations of knowledge.

(k) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(l) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(m) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form, including public records as defined in s. 119.011.

(n) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information

in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(o) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(p) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, insurance, or governmental affairs.

(3) SCOPE.—

(a) Except as otherwise provided in paragraph (b), this section applies to electronic records and electronic signatures relating to a transaction.

(b) This section does not apply to a transaction to the extent the transaction is governed by:

1. A provision of law governing the creation and execution of wills, codicils, or testamentary trusts;
2. The Uniform Commercial Code other than s. 671.107 and chapters 672 and 680; or
3. The Uniform Computer Information Transactions Act.

(c) Except with respect to subsections (2), (9), and (11), this section does not apply to a transaction to the extent the transaction is governed by rules relating to judicial procedure.

(d) This section applies to an electronic record or electronic signature otherwise excluded under paragraph (b) to the extent such record or signature is governed by a provision of law other than those specified in paragraph (b).

(e) A transaction subject to this section is also subject to other applicable provisions of substantive law.

(4) PROSPECTIVE APPLICATION.—This section applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 1, 2000.

(5) USE OF ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES; VARIATION BY AGREEMENT.—

(a) This section does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This section applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this paragraph may not be waived by agreement.

(d) Except as otherwise provided in this section, the effect of any provision of this section may be varied by agreement. The presence in certain provisions of this section of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this section and other applicable provisions of law.

(6) CONSTRUCTION AND APPLICATION.—This section shall be construed and applied to:

(a) Facilitate electronic transactions consistent with other applicable provisions of law.

(b) Be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.

(c) Effectuate its general purpose to make uniform the law with respect to the subject of this section among states enacting similar legislation.

(7) LEGAL RECOGNITION OF ELECTRONIC RECORDS, ELECTRONIC SIGNATURES, AND ELECTRONIC CONTRACTS.—

(a) A record or signature may not be denied legal effect or enforceability solely because the record or signature is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in the formation of the contract.

(c) If a provision of law requires a record to be in writing, an electronic record satisfies such provision.

(d) If a provision of law requires a signature, an electronic signature satisfies such provision.

(8) PROVISION OF INFORMATION IN WRITING; PRESENTATION OF RECORDS.—

(a) If parties have agreed to conduct a transaction by electronic means and a provision of law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or the sender's information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a provision of law other than this section requires a record to be posted or displayed in a certain manner; to be sent, communicated, or transmitted by a specified method; or to contain information that is formatted in a certain manner, the following rules apply:

1. The record must be posted or displayed in the manner specified in the other provision of law.

2. Except as otherwise provided in subparagraph (d)2., the record must be sent, communicated, or transmitted by the method specified in the other provision of law.

3. The record must contain the information formatted in the manner specified in the other provision of law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, provided:

1. To the extent a provision of law other than this section requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under paragraph (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement.

2. A requirement under a law other than this section to send, communicate, or transmit a record by first-class mail, postage prepaid, or other regular United States mail, may be varied by agreement to the extent permitted by the other provision of law.

(9) ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND ELECTRONIC SIGNATURE.—

(a) An electronic record or electronic signature is attributable to a person if the record or signature was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under paragraph (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

(10) EFFECT OF CHANGE OR ERROR.—If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(a) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(b) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

1. Promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person.

2. Takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record.

3. Has not used or received any benefit or value from the consideration, if any, received from the other person.

(c) If paragraphs (a) and (b) do not apply, the change or error has the effect provided by the other provision of law, including the law of mistake, and the parties' contract, if any.

(d) Paragraphs (b) and (c) may not be varied by agreement.

(11) NOTARIZATION AND ACKNOWLEDGMENT.—

(a) If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized by applicable law to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record. Neither a rubber stamp nor an impression type seal is required for an electronic notarization.

(b) A first-time applicant for a notary commission must submit proof that the applicant has, within 1 year prior to the application, completed at least 3 hours of interactive or classroom instruction, including electronic notarization, and covering the duties of the notary public. Courses satisfying this section may be offered by any public or private sector person or entity registered with the Executive Office of the Governor and must include a core curriculum approved by that office.

(12) RETENTION OF ELECTRONIC RECORDS; ORIGINALS.—

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

1. Accurately reflects the information set forth in the record after the record was first generated in final form as an electronic record or otherwise.

2. Remains accessible for later reference.

(b) A requirement to retain a record in accordance with paragraph (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy paragraph (a) by using the services of another person if the requirements of paragraph (a) are satisfied.

(d) If a provision of law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with paragraph (a).

(e) If a provision of law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with paragraph (a).

(f) A record retained as an electronic record in accordance with paragraph (a) satisfies a provision of law requiring a person to retain a record for evidentiary, audit, or similar purposes, unless a provision of law enacted after July 1, 2000, specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

(13) ADMISSIBILITY IN EVIDENCE.—In a proceeding, evidence of a record or signature may not be excluded solely because the record or signature is in electronic form.

(14) AUTOMATED TRANSACTIONS.—In an automated transaction, the following rules apply:

(a) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(b) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(c) The terms of the contract are determined by the substantive law applicable to the contract.

(15) TIME AND PLACE OF SENDING AND RECEIVING.—

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when the record:

1. Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from

which the recipient is able to retrieve the electronic record.

2. Is in a form capable of being processed by that system.

3. Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when the record enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and is in a form capable of being processed by that system.

(c) Paragraph (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under paragraph (d).

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this paragraph, the following rules apply:

1. If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

2. If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under paragraph (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in paragraph (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under paragraph (a), or purportedly received under paragraph (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable provisions of law. Except to the extent permitted by the other provisions of law, the requirements of this paragraph may not be varied by agreement.

(h) An automated transaction does not establish the acceptability of an electronic record for recording purposes.

(16) TRANSFERABLE RECORDS.—

(a) For purposes of this paragraph, "transferable record" means an electronic record that:

1. Would be a note under chapter 673, or a document under chapter 677, if the electronic record were in writing.

2. The issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies paragraph (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

1. A single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in subparagraphs 4., 5., and 6., unalterable.

2. The authoritative copy identifies the person asserting control as the person to which the transferable record was issued or, if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred.

3. The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian.

4. Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control.

5. Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy.

6. Any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in s. 671.201(21), of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under s. 673.3021, s. 677.501, or s. 679.330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this paragraph.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

(17) CREATION AND RETENTION OF ELECTRONIC RECORDS AND CONVERSION OF WRITTEN RECORDS BY GOVERNMENTAL AGENCIES.—Each governmental agency shall determine whether, and the extent to which, such agency will create and retain electronic records and convert written records to electronic records.

(18) ACCEPTANCE AND DISTRIBUTION OF ELECTRONIC RECORDS BY GOVERNMENTAL AGENCIES.—

(a) Except as otherwise provided in paragraph (12)(f), each governmental agency shall determine whether, and the extent to which, such agency will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(b) To the extent that a governmental agency uses electronic records and electronic signatures under paragraph (a), the Agency for State Technology, in consultation with the governmental agency, giving due consideration to security, may specify:

1. The manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes.

2. If electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process.

3. Control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records.

4. Any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in paragraph (12)(f), this section does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.

(d) Service charges and fees otherwise established by law applicable to the filing of nonelectronic records shall apply in kind to the filing of electronic records.

(19) INTEROPERABILITY.—The governmental agency which adopts standards pursuant to subsection (18) may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the Federal Government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application.

(20) SEVERABILITY.—If any provision of this section or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

History.—s. 1, ch. 2000-164; s. 49, ch. 2004-335; s. 22, ch. 2007-134; s. 16, ch. 2008-116; s. 2, ch. 2010-131; s. 16, ch. 2012-100; s. 29, ch. 2014-221.

Select Year: 2018 Go

The 2018 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 695
RECORD OF CONVEYANCES OF REAL ESTATE

View Entire Chapter

695.03 Acknowledgment and proof; validation of certain acknowledgments; legalization or authentication before foreign officials.—To entitle any instrument concerning real property to be recorded, the execution must be acknowledged by the party executing it, proved by a subscribing witness to it, or legalized or authenticated by a civil-law notary or notary public who affixes her or his official seal, before the officers and in the form and manner following:

(1) WITHIN THIS STATE.—An acknowledgment or proof made within this state may be made before a judge, clerk, or deputy clerk of any court; a United States commissioner or magistrate; or a notary public or civil-law notary of this state, and the certificate of acknowledgment or proof must be under the seal of the court or officer, as the case may be. All affidavits and acknowledgments heretofore made or taken in this manner are hereby validated.

(2) WITHOUT THIS STATE BUT WITHIN THE UNITED STATES.—An acknowledgment or proof made out of this state but within the United States may be made before a civil-law notary of this state or a commissioner of deeds appointed by the Governor of this state; a judge or clerk of any court of the United States or of any state, territory, or district; a United States commissioner or magistrate; or a notary public, justice of the peace, master in chancery, or registrar or recorder of deeds of any state, territory, or district having a seal, and the certificate of acknowledgment or proof must be under the seal of the court or officer, as the case may be. If the acknowledgment or proof is made before a notary public who does not affix a seal, it is sufficient for the notary public to type, print, or write by hand on the instrument, "I am a Notary Public of the State of (state), and my commission expires on (date)."

(3) WITHIN FOREIGN COUNTRIES.—If the acknowledgment, legalization, authentication, or proof is made in a foreign country, it may be made before a commissioner of deeds appointed by the Governor of this state to act in such country; before a notary public of such foreign country or a civil-law notary of this state or of such foreign country who has an official seal; before an ambassador, envoy extraordinary, minister plenipotentiary, minister, commissioner, charge d'affaires, consul general, consul, vice consul, consular agent, or other diplomatic or consular officer of the United States appointed to reside in such country; or before a military or naval officer authorized by the Laws or Articles of War of the United States to perform the duties of notary public, and the certificate of acknowledgment, legalization, authentication, or proof must be under the seal of the officer. A certificate legalizing or authenticating the signature of a person executing an instrument concerning real property and to which a civil-law notary or notary public of that country has affixed her or his official seal is sufficient as an acknowledgment. For the purposes of this section, the term "civil-law notary" means a civil-law notary as defined in chapter 118 or an official of a foreign country who has an official seal and who is authorized to make legal or lawful the execution of any document in that jurisdiction, in which jurisdiction the affixing of her or his official seal is deemed proof of the execution of the document or deed in full compliance with the laws of that jurisdiction.

All affidavits, legalizations, authentications, and acknowledgments heretofore made or taken in the manner set forth above are hereby validated.

History.—RS 1973; ch. 5404, 1905; GS 2481; ss. 1, 2, ch. 7849, 1919; RGS 3823; CGL 5699; s. 7, ch. 22858, 1945; s. 1, ch. 28225, 1953; s. 1, ch. 69-79; s. 1, ch. 71-53; s. 26, ch. 73-334; s. 3, ch. 80-173; s. 1, ch. 84-97; s. 763, ch. 97-102; s. 21, ch. 98-246.

Select Year: 2018 Go

The 2018 Florida Statutes

Title XL
REAL AND PERSONAL PROPERTY

Chapter 695
RECORD OF CONVEYANCES OF REAL ESTATE

View Entire Chapter

695.01 Conveyances and liens to be recorded.—

(1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

(2) Grantees by quitclaim, heretofore or hereafter made, shall be deemed and held to be bona fide purchasers without notice within the meaning of the recording acts.

(3) A lien by a governmental entity or quasi-governmental entity that attaches to real property for an improvement, service, fine, or penalty, other than a lien for taxes, non-ad valorem or special assessments, or utilities, is valid and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration only if the lien is recorded in the official records of the county in which the property is located. The recorded notice of lien must contain the name of the owner of record, a description or address of the property, and the tax or parcel identification number applicable to the property as of the date of recording.

History.—ss. 4, 9, Nov. 15, 1828; RS 1972; GS 2480; RGS 3822; CGL 5698; s. 10, ch. 20954, 1941; s. 8, ch. 85-63; s. 2, ch. 2013-241.

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1N-5.001 Definitions.

(1) "Capable of independent verification" means any interested person may reasonably determine the notary's identity, the notary's relevant authority and that the electronic signature is the act of the particular notary identified by the signature.

(2) "Electronic document" means information that is created, generated, sent, communicated, received, or stored by electronic means.

(3) "Electronic notarization" and "electronic notarial act" means an official act authorized under section 117.021(1), F.S., using electronic documents and electronic signatures.

(4) "Electronic Notary System" means a set of applications, programs, hardware, software, or technology designed to enable a notary to perform electronic notarizations.

(5) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the electronic document or record.

(6) "Attached to or logically associated with" means the notary's electronic signature is securely bound to the electronic document in such a manner as to make it impracticable to falsify or alter, without detection, either the signature or the document.

(7) "Unique to the notary public" means the notary's electronic signature is attributable solely to the notary public to the exclusion of all other persons.

(8) "Retained under the notary public's sole control" means accessible by and attributable solely to the notary to the exclusion of all other persons and entities, either through being in the direct physical custody of the notary or through being secured with one or more biometric, password, token, or other authentication technologies in an electronic notarization system that meets the performance requirements of sections 117.021(2) and (3), F.S.

(9) "Public key certificate" means a computer-based record that:

(a) Identifies the certification authority issuing it;

(b) Names or identifies its subscriber;

(c) Contains the subscriber's public key; and

(d) Is digitally signed by the certification authority issuing it.

Rulemaking Authority 117.021(5) FS. Law Implemented 117.021 FS. History–New 1-26-10.

1N-5.002 Notary's Electronic Signature.

(1) In performing an electronic notarial act, a notary shall execute an electronic signature in a manner that attributes such signature to the notary public identified on the official commission.

(2) A notary shall take reasonable steps to ensure the security, reliability and uniformity of electronic notarizations, including, but not limited to, the use of an authentication procedure such as a password, token, card or biometric to protect access to the notary's electronic signature or the means for affixing the signature.

(3) The notary's electronic signature and seal information may be affixed by means of a public key certificate.

(4) The notary's electronic signature and seal information may be affixed by means of an electronic notary system.

(5) Any public key certificate or electronic notary system that is used to affix the Notary's electronic signature and seal information shall be issued at the third or higher level of assurance as defined by the U.S. National Institute of Standards and Technology (NIST) Special Publication 800-63-2 (NIST800-63-2), Electronic Authentication Guideline Version 1.0.2., effective 8-2013, available at NIST's website www.csrc.nist.gov which is incorporated by reference at: https://www.flrules.org/Gateway/reference.asp?No=Ref-07017, and may be accessed at the following URL: http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP800-63-2.pdf.

Rulemaking Authority 117.021(5) FS. Law Implemented 117.021 FS. History–New 1-26-10, Amended 6-27-16.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CARLOS M. RIVERA and **YANIRA J. PENA SANTIAGO,**
Appellants,

v.

WELLS FARGO BANK, N.A.,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INCORPORATED as Nominee for FDIC as Receiver for **AMTRUST BANK, SHAUGHNESSY VILLAGE HOMEOWNERS ASSOCIATION, INC.,** and **OLYMPIA MASTER ASSOCIATION, INC.,**
Appellees.

No. 4D14-2273

[April 20, 2016]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Howard H. Harrison, Senior Judge; L.T. Case No. 2010CA003319.

Brian Korte and Scott J. Wortman of Korte and Wortman, P.A., West Palm Beach, for appellants.

Donna L. Eng, Michael K. Winston and Dean A. Morande of Carlton Fields Jorden Burt, P.A., West Palm Beach, for appellee Wells Fargo Bank, N.A.

GERBER, J.

The borrowers appeal from the circuit court's final judgment of foreclosure in the bank's favor after a non-jury trial. The note upon which the foreclosure action was based was an electronic note ("e-note"). The borrowers argue, among other things, that the plaintiff, Wells Fargo Bank, N.A. ("the bank") did not prove the identity of the e-note's current owner or that the e-note's current owner authorized the bank to pursue the foreclosure. We conclude the borrowers' arguments lack merit. We affirm.

We present this opinion in four parts: (1) a description of the e-note; (2) a recitation of the instant case's procedural history; (3) a summary of the non-jury trial; and (4) our review of the borrowers' arguments.

1. The E-Note

On April 1, 2008, the borrowers executed an e-note in favor of Homebuyers Financial, LLC. The e-note included the following terms, in pertinent part:

> **12. ISSUANCE OF TRANSFERABLE RECORD; IDENTIFICATION OF NOTE HOLDER; CONVERSION FROM ELECTRONIC NOTE TO PAPER-BASED NOTE**
>
> (A) I expressly state that I have signed this electronically created Note (the "Electronic Note") using an Electronic Signature. By doing this, I am indicating that I agree to the terms of this Electronic Note. I also agree that this Electronic Note may be Authenticated, Stored and Transmitted by Electronic Means (as defined in Section 12(F)), and will be valid for all legal purposes, as set forth in the Uniform Electronic Transactions Act, as enacted in the jurisdiction where the Property is located ("UETA"), the Electronic Signatures in Global and National Commerce Act ("E-SIGN"), or both, as applicable. In addition, I agree that this Electronic Note will be an effective, enforceable and valid Transferable Record (as defined in Section 12(F)) and may be created, authenticated, stored, transmitted and transferred in a manner consistent with and permitted by the Transferable Records sections of UETA or ESIGN.
>
> (B) Except as indicated in Sections 12(D) and (E) below, the identity of the Note Holder and any person to whom this Electronic Note is later transferred will be recorded in a registry maintained by MERSCORP, Inc., a Delaware corporation or in another registry to which the records are later transferred (the "Note Holder Registry"). The authoritative copy of this Electronic Note will be the copy identified by the Note Holder after loan closing but prior to registration in the Note Holder Registry. If this Electronic Note has been registered in the Note Holder Registry, then the authoritative copy will be the copy identified by the Note Holder of record in the Note Holder Registry or the Loan Servicer (as defined in the Security Instrument) acting at the direction of the Note Holder, as the authoritative copy. The current identity of the Note Holder and the location of the authoritative copy, as reflected in the Note Holder Registry, will be available from the Note Holder or Loan Servicer, as

applicable. The only copy of this Electronic Note that is the authoritative copy is the copy that is within the control of the person identified as the Note Holder in the Note Holder Registry (or that person's designee). No other copy of this Electronic Note may be the authoritative copy.

(C) If Section 12(B) fails to identify a Note Holder Registry, the Note Holder (which includes any person to whom this Electronic Note is later transferred) will be established by, and identified in accordance with, the systems and processes of the electronic storage system on which this Electronic Note is stored.

(D) I expressly agree that the Note Holder and any person to whom this Electronic Note is later transferred shall have the right to convert this Electronic Note at any time into a paper-based Note (the "Paper-Based Note"). . . .

. . . .

(F) The following terms and phrases are defined as follows: (i) "Authenticated, Store and Transmitted by Electronic Means" means that this Electronic Note will be identified as the Note that I signed, saved, and sent using electrical, digital, wireless, or similar technology; (ii) "Electronic Record" means a record created, generated, sent, communicated, received, or stored by electronic means; (iii) "Electronic Signature" means an electronic symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign a record; (iv) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and (v) "Transferable Record" means an electronic record that: (a) would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing and (b) I, as the issuer, have agreed is a Transferable Record.

The e-note was secured by a mortgage. The mortgage identified Homebuyers as the lender and MERS as the mortgagee.

2. The Procedural History

In January 2010, the bank filed a complaint to foreclose the mortgage based on the borrowers' default. In the complaint, the bank did not refer to the fact that the note was an e-note. Instead, the bank alleged that it was the "servicer for the owner and acting on behalf of the owner with authority to do so" and was "the present designated holder of the note and mortgage with authority to pursue the present action." Although the bank attached to the complaint a copy of the mortgage, the bank did not attach to the complaint a copy of the e-note.

In November 2010, the bank filed an amended complaint. In the amended complaint, the bank alleged Federal National Mortgage Association ("Fannie Mae") "is the owner of the note"; the bank "is the servicer of the loan and is holder of the note"; and Fannie Mae "has authorized [the bank] to bring this action." The proposed amended complaint then contained counts for mortgage foreclosure and re-establishment of lost note. The lost note count alleged:

> [The bank] was in possession of the Mortgage Note and entitled to enforce it when loss of possession occurred or [the bank] has been assigned the right to enforce the Mortgage Note. (See the attached true copy of the Note.)
>
> . . . .
>
> At some point between April 1, 2008, and the present, the Mortgage Note has either been lost or destroyed and the [bank] is unable to state the manner in which this occurred. After due and diligent search, [the bank] has been unable to obtain possession of the Mortgage Note.

Attached to the amended complaint were copies of the mortgage and the e-note. The e-note's last page contained the following notations:

> Electronically signed by [borrower] Yanira J Pena Santiago on 4/1/2008 6:13:03 PM
>
> YaniraJPena Santiago (Seal) - Borrower
>
> Electronically signed by [borrower] Carlos M Rivera on 4/1/2008 6:13:29 PM
>
> CarlosMRivera (Seal) - Borrower

In 2011, the borrowers filed a suggestion of bankruptcy. In the bankruptcy case, the borrowers identified the e-note and mortgage as a debt to the bank. The bankruptcy court later discharged the borrowers from bankruptcy without discharging the borrowers' debt to the bank.

In June 2013, the bank filed an "E-NOTE CERTIFICATE OF AUTHENTICATION," in which the bank's assistant vice president attested:

> 1. . . . The Bank acts as a servicer for [Fannie Mae] with respect to the residential mortgage loan executed . . . by [the Borrowers] . . . . The promissory note evidencing the Borrowers' obligation to repay the Loan is an electronic record, as authorized by the federal ESIGN Act, 15 USC § 7001 et seq., and in particular 15 USC § 7021.
>
> 2. As part of its function as servicer, the Bank maintains a copy of the Borrowers' electronic promissory note on behalf of Fannie Mae. I am responsibilities [sic] for overseeing the process by which the Bank maintains the electronic promissory notes evidencing residential mortgage loans. ("Electronic Records").
>
> 3. Each Electronic Record is received in accordance with established procedures and processes for reliable receipt, storage and management of Electronic Records (the "Electronic Record Procedures"). The Electronic Record Procedures provide controls to assure that each Electronic Record is accurately received as originally executed and transmitted, and indexed appropriately for later identification and retrieval. Each Electronic Record is protected against undetected alteration by industry-standard encryption techniques and system controls. The Electronic Record is an official record of the Bank and is readily accessible for later reference.
>
> 4. Each Electronic Record is maintained and stored by the Bank in the ordinary course of business. The Electronic Records are maintained and stored by the Bank continuously from the time of receipt.
>
> 5. The paper copy of the Electronic Record attached . . . is a true and correct copy of the Borrowers' promissory note described above, as maintained and stored by the Bank in

> accordance with the procedures in Paragraphs 3 and 4 of this Certificate.

Attached to the sworn certificate of authentication was a copy of the e-note bearing the borrowers' electronic signatures. This copy of the e-note also bore a notation at the top of each page stating "Form 3210e – Florida Fixed Rate Note – Single Family – Fannie Mae UNIFORM INSTRUMENT." Also attached was a "Summary Information" sheet describing the bank as the "Controller" and "Delegatee" of the e-note; indicating that the e-note was located with the bank; identifying the property address; and containing the following information:

Registration Date:	04/01/2008 22:21
Borrower(s):	Pena Santiago, Yanira J
	Rivera, Carlos M

Also attached was a document from MERS showing that the bank had electronic possession of the e-note, and that the borrowers' electronic signatures on the e-note were successfully validated.

In October 2013, the borrowers answered the amended complaint, and alleged as an affirmative defense that the bank lacked standing. Specifically, the borrowers alleged that the bank "failed to allege ultimate facts as to how or why it came to be the owner and holder of the note and mortgage when the Note was secured." Another affirmative defense challenged the "lack of authenticity and/or validity of any signatures or indorsements on the Note . . . pursuant to Florida Statute 673.3081."

3. The Non-Jury Trial

At the non-jury trial, the bank stated it was voluntarily dismissing its lost note count because "[t]hat was an error." The borrowers then stipulated to the admissibility of five bank exhibits:

(1) a copy of the mortgage;
(2) a copy of the bank's pre-suit notice of default, acceleration, and right to reinstatement;
(3) a screen shot of the borrowers' loan payment history showing that the bank became the loan's servicer on August 1, 2008, and showing that the borrowers made payments to the bank until June 1, 2009;
(4) a screen shot documenting Fannie Mae's ownership of the note and mortgage, and a copy of Fannie Mae's

> appointment of the bank as Fannie Mae's attorney-in-fact to foreclose upon mortgages; and
> (5) a copy of the borrower's bankruptcy petition identifying the e-note and mortgage as a debt to the bank, and a copy of the bankruptcy court's order discharging the borrowers from bankruptcy without discharging the borrowers' debt to the bank.

However, the borrowers objected to the bank's sixth exhibit, which was comprised of a paper copy of the e-note, the certificate of authentication, and the certificate's attachments.

The bank called its loan verification analyst as a witness in an attempt to introduce the composite exhibit into evidence. The witness explained that the certificate of authentication

> illustrat[es] the recordkeeping of [the bank's] e-notes, and attest[s] to this e-note being in the electronic form. The e-note was attached to the certification, and right behind it [the bank] attached a document from MERS showing that [the bank] had the electronic possession of the e-note, as well as the signature validation, showing that the signature on the e-note was successfully validated.

Following that testimony, the bank offered the composite exhibit into evidence. The borrowers raised a hearsay objection. The court overruled the objection, and admitted the composite exhibit into evidence.

On cross-examination, the bank's witness agreed with the borrowers' counsel that because the note was an e-note, there was no hard copy original note, and there were no endorsements attached to it.

On re-direct, the bank's counsel asked its witness when the bank obtained the right to enforce the e-note. The borrowers objected under hearsay and the best evidence rule. The court reserved ruling on the objections. The bank's witness then testified: "The payment history contains an acquisition screen that's dated August 1, 2008. That's when [the bank] became the servicer of this loan with rights to enforce the note." The borrowers did not then seek to obtain a ruling on their objections. The borrowers also did not offer any evidence during the trial.

The trial court entered its final judgment of foreclosure in the bank's favor. This appeal followed.

4. Our Review of the Borrowers' Arguments

The borrowers argue that the bank failed to establish standing to file suit when this action was commenced because the bank did not prove that: (1) it had pre-suit possession of the e-note; (2) the e-note contained the borrowers' signatures; (3) the e-note's terms for electronic transfers of the e-note to later holders were met; or (4) Fannie Mae owned the e-note and authorized the bank to pursue the foreclosure.

The borrowers' first and third arguments were not raised in the trial court and thus are not cognizable on appeal. *See Aills v. Boemi*, 29 So. 3d 1105, 1108-09 (Fla. 2010) ("In order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

The borrowers' second and fourth arguments lack merit, applying our de novo review. *See Lamb v. Nationstar Mortg., LLC*, 174 So. 3d 1039, 1040 (Fla. 4th DCA 2015) ("This court reviews the sufficiency of the evidence to prove standing to bring a foreclosure action de novo.") (citation omitted).

On the borrowers' second argument, section 673.3081(1), Florida Statutes (2010), Uniform Commercial Code Comment, provides: "[U]ntil some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid." Here, the borrowers did not introduce any evidence to support a finding that their electronic signatures on the e-note were forged or unauthorized. Thus, the bank was not required to prove that their electronic signatures were valid.

On the borrowers' fourth argument, the bank presented competent, substantial evidence that Fannie Mae owned the e-note and authorized the bank to pursue the foreclosure. We base this conclusion on: (a) our examination of section 668.50, Florida Statutes (2010), otherwise known as the "Uniform Electronic Transactions Act"; and (b) our review of the bank's other evidence in the case. We address each in turn.

a. The Uniform Electronic Transactions Act

The Uniform Electronic Transactions Act provides, in pertinent part:

> (16) Transferable records.—
>
> (a) For purposes of this paragraph, "transferable record" means an electronic record that:

1. Would be a note under chapter 673, or a document under chapter 677, if the electronic record were in writing.

2. The issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies paragraph (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

1. A single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in subparagraphs 4., 5., and 6., unalterable.

2. The authoritative copy identifies the person asserting control as the person to which the transferable record was issued or, if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred.

3. The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian.

. . . .

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in s. 671.201(21), of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under s. 673.3021, s. 677.501, or s. 679.330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this paragraph.

> (e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.
>
> (f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

§ 668.50(16), Fla. Stat. (2010).[1]

Applying the Uniform Electronic Transaction Act here, the bank presented competent, substantial evidence proving that Fannie Mae owned the e-note and authorized the bank to pursue the foreclosure. The e-note, on its face, is a "transferable record" because it is an electronic record that would be a note under chapter 673 if it were in writing, and its issuer expressly agreed on its face that it was a transferable record. § 668.50(16)(a). The bank's evidence proved that Fannie Mae had control of the e-note by showing that the bank, as Fannie Mae's servicer, employed a system reliably establishing Fannie Mae as the entity to which the e-note was transferred. § 668.50(16)(b). According to the bank's evidence, the bank's system stored the e-note in such a manner that a single authoritative copy of the e-note exists which is unique, identifiable, and unalterable. § 668.50(16)(c)1. That authoritative copy, introduced into evidence by the bank as Fannie Mae's designated custodian, identified Fannie Mae as the entity to which the transferable record was most recently transferred. § 668.50(16)(c)2., 3. That authoritative copy was supplemented by the "Summary Information" sheet, describing the bank as the "Controller" and "Delegatee" of the e-note and indicating that the e-

[1] In 2014, after the trial court entered the final judgment in this case, our supreme court adopted Florida Rule of Civil Procedure 1.115, entitled "Pleading Mortgage Foreclosures." The new rule states, in pertinent part: "The term 'original note' or 'original promissory note' . . . *includes a transferable record, as defined by the Uniform Electronic Transactions Act in section 668.50(16), Florida Statutes*." Fla. R. Civ. P. 1.115(b) (2014) (emphasis added).

note was located with the bank, and by the document from MERS showing that the bank had electronic possession of the e-note.

Because the bank proved that Fannie Mae had control of the e-note, and that the bank was Fannie Mae's designated custodian, the bank is the e-note's holder, as defined in section 671.201(21), Florida Statutes (2010), and has the same rights as a holder of an equivalent record or writing under the Uniform Commercial Code. § 668.50(16)(d). Delivery, possession, and indorsement were not required to exercise any of those rights. *Id.*

b. The Bank's Other Evidence in This Case

The bank's other competent, substantial evidence in this case proved that Fannie Mae owned the e-note and authorized the bank to pursue the foreclosure. The borrowers stipulated to the admissibility of the bank's exhibits 2 through 5. Exhibit 2, which was the notice of default, acceleration, and right to reinstatement, was issued by the bank without objection. Exhibit 3, which was a screen shot of the borrowers' loan payment history, showed that the bank became the loan's servicer on August 1, 2008, and that the borrowers made payments to the bank until June 1, 2009. Exhibit 4 documented Fannie Mae's ownership of the note and mortgage and Fannie Mae's appointment of the bank as Fannie Mae's attorney-in-fact to foreclose upon mortgages. Exhibit 5, which was a composite of the borrowers' bankruptcy petition and the bankruptcy court's order discharging the borrowers from bankruptcy, respectively identified the e-note and mortgage as a debt to the bank, and indicated that the borrowers' debt to the bank was not discharged.

The bank's witness also provided competent, substantial evidence to prove that Fannie Mae authorized the bank to pursue the foreclosure. When the bank's counsel asked its witness on re-direct when the bank obtained the right to enforce the e-note, the bank's witness answered: "The payment history contains an acquisition screen that's dated August 1, 2008. That's when [the bank] became the servicer of this loan with rights to enforce the note." The borrowers did not challenge this testimony.

Based on the foregoing, the bank presented competent, substantial evidence that Fannie Mae owned the e-note and authorized the bank to pursue the foreclosure. We affirm on that argument and the other arguments addressed above.

Affirmed.

MAY and DAMOORGIAN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Back to Speaker Topics

Fund Assembly

Quiz on Recent Real Property Cases

Elizabeth Ramsay, *Underwriting Counsel, The Fund*
Jay St. Lawrence, *Legal Education Attorney, The Fund*

Back to Speaker Topics

Speaker Information

Quiz on Recent Real Property Cases

Elizabeth Ramsay

Underwriting Counsel, The Fund

Elizabeth S. Ramsay joined the Miami-Dade Branch of Attorney's Title Fund Services, LLC, as an underwriting counsel in January 2014. Ms. Ramsay obtained her B.A. degree in English Literature from Florida International University, and her J.D. degree from Nova Southeastern University. She has more than twenty years of experience in real estate law, including in lender (private and institutional) and homeowners' and condominium association foreclosures, and in commercial and residential real estate closings. Ms. Ramsay is a member of The Florida Bar's Real Property, Probate & Trust Law Section.

Jay St. Lawrence

Legal Education Attorney, The Fund

JOHN B. "JAY" ST. LAWRENCE earned degrees in journalism and law at the University of Florida and was admitted to the Florida Bar in 1995. Prior to coming to the Fund, Mr. St. Lawrence practiced bankruptcy and real estate law. He is a member of the Florida Bar's Real Property, Probate & Trust Law Section and has been admitted to all Florida Federal District Courts. He joined the Fund in 2004 as a claims attorney and now works with the Fund's Legal and Branch Education Department, where he has created and taught Fund programs on topics from cyber security to lien stripping in bankruptcy. He also currently co-teaches the Fund's New Member Training course and produces case law updates for the Fund Concept.

QUIZ ON
RECENT FLORIDA REAL PROPERTY CASES

By Elizabeth S. Ramsay and John B. "Jay" St. Lawrence

Instructions: For each statement, please circle "T" if you believe that the statement is "True" or circle "F" if you believe that the statement is "False." Please keep a running total of the number of questions you have answered correctly.

---

1. T or F A seller who fails to disclose a judgment lien at closing may be subject to liability that is non-dischargeable in bankruptcy.

Old Republic Title Insurance Company v. Fakhuri (In Re Fakhuri),
Bankruptcy Case No. 16 B 28526, Adv. Pro. 16 A 00624
(Bankr. N.D. Ill. 2018)

2. T or F It is unreasonable to rely on the authority of a principal's agent based on a handshake at a Florida State tailgate party when that agent refuses to give out his business card and purports to agree to a multi-million-dollar real estate transaction.

FPL v. McRoberts
43 Fla. L. Weekly D2278
(Fla. 4th DCA 2018)

3. T or F Where a Declaration provides homeowners' guests an easement for ingress and egress to the HOA fitness center, a homeowner's personal trainer is a licensee rather than an invitee and therefore may be excluded from the premises by the Association.

Charterhouse Associates, Ltd., Inc. v. Valencia Reserve Homeowners Association, Inc.,
43 Fla. L. Weekly D2645
(Fla. 4th DCA 2018)

4. T or F A decedent's devise of real property to a fiancée he later marries becomes void when they divorce.

Gordon v. Fishman
43 Fla. L. Weekly D1969
(Fla. 2d DCA 2018)

5. T or F When a common law public dedication is located on the edge of a plat, abutting property owners have title to the full width of the dedicated property, as opposed to "to the center line."

Pelican Creek Homeowners, et al. v. Pulverenti
243 So. 3d 467
(Fla. 5th DCA 2018)

6. T or F A recorded Notice of Interest in real property with a copy of an agreement between the parties attached is slander of title.

Trigeorgis v. Trigeorgis
240 So.3d 772
(Fla. 4th DCA 2018)

7. T or F A purchaser of real property has a duty to inquire into amounts that could be adjudged against the seller in pending lawsuits initially involving the property, even where the Notice of Lis Pendens has been discharged.

Villamizar vs. Luna Capital Partners, LLC
43 Fla. L. Weekly D2395
(Fla. 3rd DCA 2018)

8. T or F A 2016 legislative change to Sec. 95.18, FS Statutes permits adverse possession without color of title where the party making the claim has been in possession for less than 7 years.

Bank of America v. Eastridge,
43 Fla. L. Weekly D183
(Fla. 4th DCA 2018)

9. T or F A final judgment requiring a party to remove a portion of a fence blocking a neighbor's access easement, but allowing the fence to be rebuilt in another location also blocking access is "internally inconsistent" and therefore subject to reversal.

Borowski v. Ferrer
43 Fla. L. Weekly D2038
(Fla. 1st DCA 2018)

10. T or F At the conclusion of the inspection period, a buyer under a FR/Bar "AS IS" contract may tender a conditional deposit, requiring the Seller to pay for repairs or extend the closing.

Diaz v. Kosch
250 So. 3d 156
(Fla. 3d DCA 2018)

11. T or F When a family moves out of its homestead property due to city and county code lien violation orders declaring the property unsafe for habitation, they are deemed to have abandoned the homestead and the husband can sell without his wife's joinder.

Yost-Rudge v. A to Z Properties, Inc.
44 Fla. L. Weekly D393
(Fla. 4th DCA 2019)

12. T or F A wife is a party in interest in a lawsuit seeking to recover property in which she took title with her husband, even where she is not a party to the contract giving rise to the claim.

Chaudhry v. Pedersen
44 Fla. L. Weekly D405
(Fla. 5th DCA 2019)

13. T or F A summary judgment entered without a hearing is voidable.

Richard v. Bank of America, N.A.
43 Fla. L. Weekly D2531
(Fla. 4th DCA 2018)

14. T or F A lender cannot execute on both a judgment for damages and a judgment for foreclosure at the same time.

Schneider v. First American Bank
43 Fla. L. Weekly D1673
(Fla. 4th DCA 2018)

15. T or F A clerk of court may backdate time stamps on judgments to coincide with the time of the hearing upon which they are entered.

Guy v. Plaza Home Mortgage, Inc.
43 Fla. L. Weekly D1910
(Fla. 4th DCA 2018)

16. T or F Sec. 125.35, F.S., does not require a county selling land under its "county economic development powers" to adhere to the statute's competitive bidding requirement.

Matheson v. Miami-Dade County, FL
43 Fla. L. Weekly D2293
(Fla. 3d DCA 2018).

17. T or F Where a title examination misses a recorded mortgage in the back chain, the seller may be liable for breach of the warranty deed, unjust enrichment and fraud.

Winfield Investments, LLC v. Pascal-Gaston Investments, LLC
43 Fla. L. Weekly D1916
(Fla. 5th DCA 2018)

18. T or F Where an ex-wife paid off her ex-husband's prior mortgage on property granted to her in the divorce and then defaulted on the new loan, after which the property was returned to the ex-husband, the new lender has an equitable lien against the ex-husband, but cannot foreclose because the husband was never in default.

Rozanski v. Wells Fargo
43 Fla. L. Weekly D1417
(Fla. 2d DCA 2018)

19. T or F Debts indicated in a Ch. 13 Plan to be paid "outside the plan" are included in the debtor's discharge.

Dukes v. Suncoast Credit Union (In re: Dukes)
Case No. 16-16513
(11th Cir. 2018)

20. T or F An owner taking title by certificate of title in a junior lien foreclosure is bound by an assignment of rents clause in the superior mortgage.

Green Emerald Homes, LLC v. Residential Credit Opportunities Trust
43 Fla. L. Weekly D1444
(Fla. 2nd DCA 2018)

SELECTED RECENT REAL PROPERTY CASES

(January 2018 through March 2019)

John "Jay" St. Lawrence, Legal Education Counsel
Elizabeth Ramsay, Legal Underwriting Counsel
Attorneys' Title Fund Services, LLC

I. CLOSING AGENTS & TITLE INSURANCE

A. Debtor Not Entitled to Discharge of Judgment Where Creditor Proves False Pretenses or False Representations Made By Debtor. Judgment against debtor in favor of Old Republic National Title Insurance Company held to be excepted from discharge under 523(a)(2)(A), 11 U.S.C. where all the elements of false pretenses or false representation by the debtor were proven by a preponderance of the evidence. *Old Republic Title Insurance Company v. Fakhuri (In Re Fakhuri)*, 583 B.R. 915 (Bankr. N.D. Ill. 2018).

B. Arm's Length Purchaser Has No Legal Duty to Ensure Payment to Seller's Unsecured Creditors. An arm's length buyer, purchasing for value, had no duty to inquire into amounts claimed to be owed by seller in a pending lawsuit in the which counts for equitable liens against the property had been dismissed and the recorded Notice of Lis Pendens had been discharged by the court, and the remaining claim for collection under unsecured promissory note had not yet been reduced to judgment. *Villamizar vs. Luna Capital Partners, LLC*, 260 So.3d 355, (Fla. 3d DCA 2018).

C. No Slander of Title If No False Statement or No Inducement Not to Deal. The five elements that must be proven for a plaintiff's claim of slander of title (a/k/a disparagement of title or property action) to be successful are: (1) falsehood; (2) has been published; (3) publisher knows or reasonably should know that such falsehood will likely result in inducing others to not deal with the plaintiff; (4) the falsehood does result in a material and substantial inducement of others not to deal with the plaintiff; and (5) special damages are proximately caused by the publication of the falsehood. *Trigeorgis v. Trigeorgis*, 240 So.3d 772, (Fla. 4th DCA 2018).

II. CONDOS & CO-OPS

A. Letter Entered Into Evidence Purporting to Assign Parking Spaces in Condominium Was Not Sufficient to Meet the Burden of Proving the Absence of Any Genuine Issues of Material Fact Since Letter Was Not Properly Authenticated. Appellees failed to satisfy their burden of proving there were no genuine issues of material fact sufficient to result in summary judgment and order for award of attorney's fees in their favor, since the letter purporting to assigning parking spaces in a condominium to them was not created at the time of the purchase of the condominium unit and not properly authenticated. *Gidwani v. Roberts, et al.*, 248 So.3d 203 (Fla. 3d DCA 2018).

B. Original or Subsequent Holder of First Mortgage is a First Mortgagee. Where the plaintiff lender in a foreclosure establishes by supporting affidavit that it owned the loan through foreclosure sale, there is no genuine issue of material fact and summary judgment in favor of the plaintiff is proper. Such plaintiff is entitled to the safe harbor, under Sec. 718.116(1)(b), F.S. as the "first mortgagee" which is "simply one who holds the first mortgage, whether that be the original lender or a subsequent holder". *Hemingway Villa Condominium Owners Association, Inc. v. Wells Fargo Bank, N.A.,* 240 So.3d 104 (Fla. 3d DCA 2018)

C. Challenge to Condo Assessment Not Rendered Moot by Collection. A case will not be dismissed as moot, when collateral legal consequences flow from the issues to be resolved that may affect the rights of a party," such as when the "glacial pace of litigation" allowed a condominium to complete disputed expenditures before a lawsuit challenging the expenditures could be resolved. *Smulders for 129-31 Harrison Street, LLC v. Thirty–Three Sixty Condominium Association, Inc.*, 245 So.3d 802 (Fla. 4th DCA 2018).

III. EASEMENTS

A. No Easement by Necessity Where Alternate Means of Access Exist. Nearby unit owners with access to dock by water had no easement by necessity to cross other unit owner's property. *Goldman & Acosta v. Lustig*, 237 So.3d 381 (Fla. 4th DCA 2018).

B. A Final Judgment Containing Internal Inconsistencies May Be Reversed. A final judgment requiring a party to remove a portion of a fence encroaching into a neighbor's easement for access, but also providing for such party to be able to rebuild the fence in a place that still obstructs the neighbor's easement for access, is internally inconsistent and can be overturned. *Borowski v. Ferrer,* 255 So.3d 440 (Fla. 1st DCA 2018).

IV. HOMESTEAD

A. Devise to Fiancée Not Voided by Divorce under Sec. 732.507(2), F.S. Devises under a will executed before marriage to the settlor's then-fiancee whom he subsequently marries, then divorces, are not subject to Sec. 732.507(2), F.S., which provides that devises to the "spouse" of the decedent become void upon divorce, dissolution or annulment of the marriage. *Gordon v. Fishman*, 253 So.3d 1218 (Fla. 2d DCA 2018).

B. Injunction Against Occupancy Due to Code Violations Does Not Establish Abandonment. City and county code violation order deeming property unsafe for habitation did not eliminate wife's constitutional homestead protection absent an evidentiary showing of her intent not to return to the property. *Yost-Rudge v. A to Z Properties, Inc.*, 44 Fla. L. Weekly D393a (Fla. 4th DCA 2019).

C. No Requirement for Specific Devise of Homestead Property to Non-Heirs. Will devising homestead property and truck to "a friend" valid where decedent had no spouse or minor child. *Webb, Daniell, et al. v. Blue,* 243 So.3d 1054 (Fla. 1st DCA 2018).

D. No Homestead Protection for Corporate Property Occupied by Natural Person. Florida's Constitutional homestead protection does not apply to corporate-owned property when company owner took up residence shortly after lawsuit filed. *DeJesus v. A.M.J.R.K. Corp., et al*., 255 So.3d 879 (Fla. 2d DCA 2018).

V. JUDGMENTS

A. A Judgment That is Void Can Be Challenged at Any Time. Under Fla. R. Civ. P. 1.540(b)(4), a judgment entered on a motion for summary judgment, without a hearing, constitutes a denial of the due process guarantee of notice and an opportunity to be heard, resulting in such judgment being void. A judgment that is void can be challenged at any time without the necessity to show excusable neglect, a meritorious defense, or due diligence, even after seven years from the date that the judgment is entered. *Richard v. Bank of America, N.A*., 258 So.3d 485 (Fla. 4th DCA 2018).

B. Substitute Service Statutes Must Be Strictly Construed to Protect A Defendant's Due Process Rights, and an Insufficient Affidavit of Diligent Search Results in a Void Judgment. Substitute service statutes must be strictly construed and are an exception to the rule requiring personal service. Substitute service cannot be used if personal service can be made. Where an Affidavit for Service by Publication was clearly defective because it failed to state that the plaintiff knew of an alternative address for the defendant, constructive service is improper, and the court has no jurisdiction over the matter. A judgment entered in such an action is void. *Benavente v. Ocean Village Property Owners Association, Inc.*, 260 So.3d 313 (Fla. 4th DCA 2018).

C. Clerk's Office Should Not Backdate Judgments. Broward County clerks' practice of backdating time stamps on judgments to reflect the clerks' time of scanning the document for processing to the electronic case management system, instead of the time the instrument signed by the judge was actually received by the clerks, was found to be inconsistent with the Fla.R.App.P. 9.020(i) which provides that the rendition of an order occurs "when a signed, written order is filed with the clerk of the lower tribunal", and failure to do so could possibly prejudice an appellant since the time for appeal runs from the date of rendition, not the date the judgment is signed. *Guy v. Plaza Home Mortgage, Inc.*, 260 So.3d 280 (Fla. 4th DCA 2018).

VI. LEASES & LANDLORD/TENANT

A. County Court Lacks Jurisdiction over Eviction Not Pled in Complaint. The circuit court, not the county court, has subject matter jurisdiction over claims for ejectment. The county court has jurisdiction over claims for eviction under Chapter 83, Part II, Florida Statutes, the Florida Residential Landlord and Tenant Act, but not when such claim is voluntarily

dismissed, or when there is no landlord-tenant relationship between the parties. *Mesnikoff v. FQ Backyard Trading, LLC*, 239 So.3d 765 (Fla. 3d DCA 2018).

VII. LIENS

A. Equitable Lien May Not Be Foreclosed Without Default. The proceeds of a loan, secured by a mortgage encumbering property awarded to an ex-wife in her divorce, used to pay off the ex-husband's prior mortgage on the property, entitles the ex-wife's mortgagee only to an the imposition of an equitable lien against the property by virtue of subrogation, where it is later found that the ex-wife's judgment awarding her the property in the divorce was procured by fraud. There is, however, no right to foreclose that equitable lien where the ex-husband never defaulted under his prior mortgage. *Rozanski v. Wells Fargo Bank, N.A.*, 250 So.3d 747 (Fla. 2d DCA 2018).

VIII. MISCELLANEOUS

A. Promissory Note for Home Equity Line of Credit is a Non-Negotiable Instrument. Where the Note fails to include "an unconditional promise to pay a fixed amount of money, with or without interest", it is not a negotiable instrument and, therefore, not commercial paper codified under chapters 678 to 680 of the Uniform Commercial Code of the Florida Statutes, which is one of the exceptions to the authentication requirements under Sec. 90.901, F.S. *Third Federal Savings & Loan Association of Cleveland v. Koulouvaris,* 247 So.3d 652 (Fla. 2d DCA 2018).

B. The Right to Sue a Title Company is a Derivative Right that Belongs to the LLC, not to Its Members. A lawsuit stemming from injury to a limited liability company is a derivative action that can only be brought in the name of the company. The company's members lack standing to sue in their own names. *Home Title Company of Maryland, Inc. v. Lasalla*, 257 So.3d 640 (Fla. 2d DCA 2018).

C. Interested Non-Party to Contract May Be Made a Defendant. Wife in title with husband is a valid defendant in a specific performance case as she holds an interest adverse to the plaintiff, and her presence is necessary for complete and proper determination of the action, even if she was not a party to the contract. *Chaudhry v. Pedersen*, 44 Fla. L. Weekly D405a (Fla. 5th DCA 2019).

D. No Abuse of Discretion for Court to Deny Discharge of L.P. or Not Require a Bond. Where an action is not based on a duly recorded instrument (such as an allegation of fraud in connection with a conveyance of property) a notice of lis pendens can be maintained for more than one year upon a showing of a "fair nexus between the property and the dispute." It is within the trial court's discretion to determine whether a proponent must post a bond to maintain the notice of lis pendens. *Rodriguez v. Guerra,* 254 So.3d 521 (Fla. 3d DCA 2018).

E. Seven Years Actual Possession of the Property Required to Claim Adverse Possession. Where possessor fails to allege seven years of continuous possession of the property

in an adverse possession claim as required under Sec. 95.18, F.S., the trial court is required to consider the titleholder's defense of failure to state of cause of action, even after default, since a default only acts as an admission of well-pled allegations in a complaint. *Bank of America, N.A. v. Eastridge,* 253 So.3d 722 (Fla. 5th DCA 2018).

F. Twelve-Year Statute of Limitations Under 28 U.S.C. Sec. 2409 Runs from the Government's 1938 Easement, and Not from 2013 Permit Later Issued. A permit issued by the Government to a fee simple owner that was on notice of 1938 easement given to the government by a prior fee simple owner, does not entitle the latter owner to claim that the twelve-year statute of limitations under 28 U.S.C. Sec. 2409 runs from the date of the permit rather than the date of the easement, where the permit does not create any new adversity between the parties. *NE 32d Street, LLC v. U.S.*, 896 F.3d 1240 (11th Cir. 2008).

IX. MORTGAGES & MORTGAGE FORECLOSURES

A. Foreclosing Lender Not Entitled to Damages Occurring Outside of the Statute of Limitations. Foreclosure claims related to defaults older than five years may be subject to the statute of limitations period, and a final judgment for foreclosure should exclude from damages, of any defaults occurring beyond the statute of limitation. *Velden v. Nationstar Mortgage, LLC*, 234 So.3d 850 (Fla. 5th DCA 2018).

B. Error to Deny Vacating Foreclosure Upon Borrower's Timely Redemption. Error to deny vacating a foreclosure sale where there is no dispute that the default was cured on the day of the sale, prior to the issuance of the Certificate of Sale, which is the time the defendant's right to redeem expired per the foreclosure judgment. *Nationstar Mortgage LLC v. Roque*, 252 So.3d 342 (Fla. 3d DCA 2018).

C. Breach of Warranty Claim as to Recorded Mortgage No Basis for Fraud or Unjust Enrichment Claims. Missed mortgage in the back chain supports a claim for breach of the warranties under the deed, but not for unjust enrichment because there is no quasi-contract claim where a contract exists, nor for fraud because the missed mortgage was recorded and therefore obvious. *Winfield Investments, LLC, et al, v. Pascal-Gaston Investments, LLC,* 254 So.3d 589 (Fla. 5th DCA 2018).

D. Error to Admit Extrinsic Evidence to Construe Unambiguous Deed. The words "all lands… to the Channel of Clearwater Harbor" clearly includes the submerged lands laying within the boundaries of the legal description in the deed. *City of Clearwater v. BayEsplanade.com, LLC,* 251 So.3d 249 (Fla. 2d DCA 2018).

E. A Borrower Successful in Foreclosure Dismissal Due to Deed-In-Lieu Agreement With the Lender Cannot Be Awarded Attorney's Fees Under of Mortgage Estopped From Enforcement. When a party is estopped from enforcing an agreement containing a fee provision, the prevailing party cannot then recover fees based on the same fee provision. *Wells Fargo Bank, N.A. v. Moccia*, 258 So.3d 469 (Fla. 4th DCA 2018).

F. Mere Existence of Default Letter Insufficient to Support Foreclosure. A mere copy of a mortgagee's default letter entered into evidence is insufficient to show compliance with the condition precedent under paragraph 22 of the mortgage where there is no evidence that such letter was actually sent, or delivered, to the borrower. *Perez v. Deutsche Bank National Trust Company* 44 Fla. L. Weekly D493a (Fla. 2d DCA 2019).

G. Federal Statute Must be Raised as Defense to Reverse Mortgage; Spouse Signing as "Borrower" No Protection. Wife who signed reverse mortgage as "borrower" was held not to be a borrower where the other loan documents, including a non-borrower spouse certification, provided that she was not a borrower. Also, her failure to raise deferment of repayment until death of the borrowing homeowner's spouse pursuant to 12 U.S.C. Sec. 1715z-20(j) at trial, constituted a waiver of such defense. *OneWest Bank, FSB v. Palmero***,** 43 Fla. L. Weekly D827a (Fla. 3d DCA 2018).

H. Liability for Mortgages Not Provided For in a Chapter 13 Bankruptcy Plan Under Sec. 1328(a) U.S.C. Cannot be Discharged by the Plan. For a debt to be "provided for" under a plan, the plan must make a provision for or stipulate to the debt. Debts that are indicated to be paid "outside the plan" cannot be discharged. In addition, a discharge of a secured creditor's debt is a violation of Sec. 1322(b)(2) U.S.C. if the debtor does not provide value to the secured creditor or if the secured creditor does not consent, and creditors' debts secured by the debtors primary residence are expressly prohibited from being modified except where the creditor accepts the plan, or the plan provides that the creditor will receive full value of its claim and maintain its secured interest on the residence, or the debtor where the debtor surrenders the property. *Dukes v. Suncoast Credit Union (In re: Dukes)*, 909 F.3d 1306 (11th Cir. 2018).

I. Simultaneous Execution of Money Judgment and Foreclosure Judgment in Favor of Lender Not Allowed. A lender cannot be allowed to execute on a judgment for damages and a judgment for foreclosure at the same time, as doing so could result in the lender recovering more than the amount actually owed. *Schneider v. First American Bank,* 252 So.3d 264 (Fla. 4th DCA 2018).

J. Subsequent Owners Not Subject to Assignment of Rents Clause in Mortgage Not Assumed. An owner of a property that takes title by Certificate of Title in a junior lien foreclosure is not obligated to adhere to the terms of a superior mortgage that includes an assignment of rents clause, because such owner is neither a borrower nor mortgagor to said mortgage. *Green Emerald Homes, LLC v. Residential Credit Opportunities Trust,* 256 So.3d 211 (Fla. 2d DCA 2018).

K. Federal Law Limiting Reverse Mortgages that HUD May Insure Does not Restrict the Lender's Rights to Enforce the Contractual Terms of the Mortgage. 12 U.S.C. Sec. 1715z-20(j) only prohibits HUD from insuring reverse mortgages that do not provide for deferred repayment until the borrower dies or sells the mortgaged property, and do not include the borrower's spouse as a "borrower". It has no effect however, on a lender's right to enforce the contractual terms of such a reverse mortgage. *Estate of Jones v. Live Well Financial, Inc.,* 902 F.3d 1337 (11th Cir. 2018).

X. RESTRICTIONS & HOA

A. Without Express Delegation of Authority to Association, Restrictions Run with Land; Amendments Require Unanimous Consent of Lot Owners. Where there is no express delegation of authority to property owners' association to amend restrictive covenants, such covenants can only be amended by the consent of all the property owners in the subdivision. *5F, LLC v. Boca Grande Isle LLC, et al.,* 261 So.3d 654 (Fla. 2d DCA 2018).

B. Sec. 720.305(1) Attorneys' Fees Award Proper Even Where Association's Covenants Pre-date Statute. Action where association sued to redress an alleged failure of the Developer to adhere to the covenants, was *de facto* under Sec. 720, and application of the statute was in fact prospective, given that the lawsuit took place after the statute's effective date. *Holiday Isle Improvement Association v. Destin Parcel 160, LLC,* 254 So.3d 1109 (Fla. 1st DCA 2018).

C. Paid Personal Trainer Invited to Clubhouse Owned and Maintained by the Homeowner's Association is Business Invitee, not a Licensee. Determination as to whether a person is an invitee must be made by using the "invitation test" established over time by Florida courts to be preferable than the economic benefit test under common law. Under the invitation test, an invitee can be either a "public invitee" that is invited to enter upon a property as a member of the public for a purpose for which the property is held open to the public, or a "business invitee" that is invited to enter upon a property for a purpose directly or indirectly connected to business dealings with the possessor of the land. Where an Association declaration provides owners, their guests and invites an easement for "ingress and egress, enjoyment in, and use of the fitness center", a homeowner's personal trainer invited to enter the fitness center is a business invitee, not a licensee. *Charterhouse Associates, Ltd., Inc. v. Valencia Reserve Homeowners Association, Inc.*, 262 So.3d 761 (Fla. 4th DCA 2018)

XI. STATE TAXATION

A. Taxpayer Shall Be Party-Defendant in the County Appraiser's Actions to Appeal VAB Reductions. Sec. 194.181(2), F.S., states that the "taxpayer" shall be the party defendant in an action brought by the county property appraiser to appeal a decision of the Value Adjustment Board. Sec. 192.001(13) defines "taxpayer" as "the person or other legal entity in whose name property is assessed, including an agent of a timeshare period titleholder." Based on the precise language in these statutory provisions, the unit owners of the condominium units, and not the condominium association, are the proper parties to be named in a property appraiser's lawsuit to appeal the VAB valuation. *Central Carillon Beach Condominium Association, Inc. v. Garcia,* 245 So.3d 869 (Fla. 3d DCA 2018).

C. Business Entity Tax Certificate Bidders May Be Required to Provide Affidavit; Deposits for Each Sub-Entity. County can require deposits from each sub-entity bidding at tax sale and can require affidavits describing business entities. *Magnolia Florida Tax*

Certificates, LLC v. Florida Department of Revenue, 43 Fla. L. Weekly D1431a (Fla. 1st DCA 2018).

XII. VENDORS & PURCHASERS

A. No "Conditional Tender of Deposit" Under "As Is" Contract. Court found the Buyers' attempt to create a "conditional tender," whereby they could continue with the Contract but still demand repairs after the expiration of the Inspection Period, failed. After the Inspection Period, the Sellers were only required to assist in the resolution of any open or needed permits, not to pay for contemplated repairs or extend the closing. *Diaz v. Kosch,* 250 So.3d 156 (Fla. 3d DCA 2018).

B. Agent's Authority to Bind Principal Not Established by Handshake at 'Noles Tailgate Party. It is not reasonable to think that an agent could bind his principal based solely on a belief that the agent held a high position with the principal, or to conclude that the principal would enter into multi-million-dollar agreement over a handshake with such agent at a Florida State tailgate party, especially where the supposed agent refused to give out an office phone number and could only be reached through a third party. *Florida Power & Light Company v. McRoberts* 257 So.3d 1023 (Fla. 4th DCA 2018).

B. "Sale of Property" Means Any Sale, Including Foreclosure Sale, When Contract Does Not Define Terms. Where a contract does not define terms, the trial court cannot look to parole evidence when the plain and ordinary meaning of a term under such contract is clear. Looking at the meaning of the term "sale" in Black's Law Dictionary, and the fact that "foreclosure sale" is found within the definition, it was clear that the term "sale" under the contract included foreclosure sales, thereby triggering the payment obligation under the contract. *Morris v. MGZ Properties, LLC,* 251 So.3d 929 (Fla. 4th DCA 2018).

XIII. WATER & WATERCOURSES

A. Common Law Dedication on Edge of Plat Grants Fee Simple to Abutting Owners. Common law dedication by developer passed title to canal easement to successors in title, i.e., the property owners. When a public dedication is located on the edge of a plat, abutting property owners have title to the full width of the dedicated property, as opposed to the typical "to the center line" arrangement. *Pelican Creek Homeowners, et al. v. Pulverenti*, 243 So.3d 467 (Fla. 5th DCA 2018).

XIV. ZONING & LAND USE

A. Private Property Rights Protection Act Inapplicable to Rezoning of Neighboring Property. Homeowners in a community where a golf course was re-zoned for residential use could not prevail on their claim for government taking, under Sec. 70.001, F.S. (the "Private Property Rights Protection Act"), because the Act requires showing that the

government had inordinately burdened either the homeowners' existing use of the real property, or their vested right to a specific use of real property." *Vale, et al. v. Palm Beach County*, 259 So.3d 951 (Fla. 4th DCA 2018).

B. No Competitive Bid Process Required for County to Sell Land as Economic Incentive. Competitive bidding process required under Sec. 125.35, F.S. is not applicable if the sale of the County's land at below-market value is made for the public purpose of economic development under the "County economic development powers" pursuant to Sec. 125.045, F.S., which creates a separate right of the county to sell land without a competitive bidding process. *Matheson v. Miami-Dade County*, 258 So.3d 516 (Fla. 3d DCA 2018).

C. A Petition for Review by Certiorari to Prevent Annexation Ordinance Must Be Filed in Circuit Court Within 30 Days Following Passage of the Annexation Ordinance. The clear meaning of Sec. 171.081, F.S., is that a petition challenging an annexation ordinance must be filed no later than 30 days from the passage of the ordinance, not from the voter referendum. This allows the issue being brought to the municipality's attention prior to expending costs for the referendum. *The City of Palm Beach Gardens v. Oxenvad*, 259 So.3d 129 (Fla. 4th DCA 2018).

Back to Speaker Topics

Fund Assembly

Residential Track

Homestead - Conveyances, Mortgages and Disposition After the Death of the Titleholder

Ben Jepson, *Senior Underwriting Counsel, The Fund*

Back to Speaker Topics

Speaker Information

Homestead - Conveyances, Mortgages and Disposition After the Death of the Titleholder

Ben Jepson

Senior Underwriting Counsel, The Fund

Benjamin “Ben” Jepson is a Senior Underwriting Counsel for Attorney’s Title Fund Services, LLC, working in the Naples satellite office. Prior to joining The Fund, Mr. Jepson was a Fund Member for many years while running a private practice in Naples, Florida. During that time, his practice mainly focused on Real Estate, Estate Planning and Probate. Mr. Jepson obtained both his B.S. degree in Psychology and his J.D. degree from the University of Florida and was admitted to the Florida Bar in 2000. In 2018, he became a Board Certified Real Estate Attorney. Mr. Jepson has been a speaker at The Fund Assembly, a presenter for seminars on trusts, and is a member of the Real Property, Probate & Trust Law Section of the Florida Bar and the Collier County Bar Association.

Homestead Issues Related to Conveyance, Mortgage and Disposition Upon Death

Presented by: Benjamin T. Jepson

Senior Underwriting Counsel

Attorney's Title Fund Services, LLC

I. Introduction

A. Why is homestead treated differently?

i. How does that affect conveyances and/or mortgages?

ii. Hoes does the death of the owner affect homestead?

B. What “tools” are available to assist?

i. Sec. 732.7025. F. S.

ii. Enhanced Life Estate Deeds

iii. Revocable Living Trusts

C. Are there any limitations?

D. What are some of the Underwriting considerations?

II. Homestead: Why is it different?

A. The Florida Constitution

i. Article X, Section 4:

“(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child. The owner of homestead real estate, joined by their spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.”

ii. What is the purpose of Article X, Section 4 (c)?

a. Protection for the spouse and minor child(ren)

1) Stone v. Stone- Article X, Section 4 (c) “protects the surviving spouse and minor children from having the homestead property transferred out from under them by the other spouse (or parent) without the consent of both spouses.”

iii. Scenario #1 Example: Gary Groom and Betty Bride were married in 2016. Shortly after their wedding, Gary and Betty bought Dog Acre with the hope of living out their golden years there raising Golden Retrievers. After a health scare, Gary and Betty decide to convey Dog Acre into just Gary’s name for estate planning purposes. Gary now comes to you for assistance in closing on the refinance of the existing mortgage encumbering Dog Acre. Does Betty need to join on the mortgage?

Answer:

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iv. Scenario #2: Same facts as Scenario #1 except Gary has died. What changes? Who needs to sign now?

Answer:

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III. What "tools" are available to assist with the disposition of homestead after the death of the owner?

A. Sec. 732.7025, F.S.: Waiver of Homestead rights through deed

i. Background

a. Effective as of July 1, 2018

b. Not previously provided for under Sec. 732.702, F.S.

c. Creates a statutory presumption of a valid waiver

ii. How do you use it?

a. Include statutory language in the deed: "By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me."

iii. Limitations

a. The spouse that is waiving their homestead rights must join on the deed.

b. Does not work to waive the rights of the minor child, if any

c. During the lifetime of the homestead owner, you still need joinder of the spouse for mortgages or deeds.

iv. Scenario #3 Example: Same as Scenario #1, except the deed from Gary and Betty to just Gary also contained the statutory waiver language contained in Sec. 732.7025. Does Betty still need to join on the mortgage?

Answer:

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v. Scenario #4: Same facts as Scenario #3 except Gary has died and his estate has been probated and the personal representative has been discharged. Gary's Will provided that Dog Acre be devised to his 3 sons from a prior marriage, his only heirs except for Betty. Who would need to sign the mortgage now?

Answer:

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B. Life Estate Deeds

i. Simple v. Enhanced

i. Simple Life Estate Deeds

1) The gift to the remainderman is complete at the time of the conveyance that creates the life estate

2) At death, the decedent doesn't "own" anything

3) Homestead issues exist at the time of creation, not at the time of death

ii. Enhanced Life Estates

1) Generally, life tenant retains control of the property until the time of their death

2) The gift to the remainderman is not complete until the death of the enhanced life tenant

a) Transfer triggered by the death of the life tenant is equivalent to a devise

b) Devise of homestead is restricted by Article X, Section 4 (c) of the Florida Constitution

3) Scenario #5: Husband and Wife convey their homestead property to Wife for life with enhanced powers and the remainder, if any, to Wife's 2 adult daughters from a previous marriage. Wife dies. For the purposes of issuing title, who need to sign the deed to the new buyer?

Answer:

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4) Scenario #6: Husband and Wife convey their homestead property to Wife for life with enhanced powers and the remainder, if any, to Tom Trustee, as trustee of Wife's minor child's trust, with 689.073 powers. Shortly after that conveyance, Husband dies. Wife dies shortly thereafter. Can title be insured based on a deed from Tom Trustee?

Answer:

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5) Limitations

a) The Powers of the life tenant must be clearly stated in the vesting deed.

i. "Sell" is not the same as "Convey"

ii. "Convey" is not the same as "Gift"

iii. Standard language "without any liability for waste, and with full power and authority in said life tenant to sell, convey, mortgage,

lease or otherwise manage and dispose of the property herein, in fee simple, with or without consideration, without joinder of the remaindermen, and with full power and authority to retain any and all proceeds generated thereby...” does not contain the power to gift.

b) Was the life tenant survived by a spouse or minor child?

i. If yes, potential violation of Article X, Section 4 (c)

ii. If no, no homestead issues

C. Trusts

i. Single Settlor Revocable Trusts

a. During the Life of the Settlor

1) Joinder of spouse is required for conveyances or mortgages

b. After the death of the Settlor

2) Was the Settlor survived by a spouse or minor child?

c. Limitations

1) Aronson v. Aronson, 81 So. 3 515 (Fla. 3d DCA 2012)

a) Section 732.4015, F.S. – “Owner” includes the grantor of a trust.

2) In re: Estate of Johnson, 397 So. 2d 970 (Fla. 4th DCA 1981)

a) “You cannot do indirectly what you cannot do directly.”

3) If survived by a minor child, the devise of homestead property by the trust will violate the Constitutional restrictions.

a) Property will pass under Section 732.401

4) If survived by a spouse, but no minor child

a) Does the trust provide the surviving spouse get the homestead property in fee simple?

b) Did the surviving spouse validly waive their homestead rights as determined by a court of proper jurisdiction?

c) If yes to either, there is no violation of the Constitutional restrictions.

ii. Joint Revocable Trust with both spouses as Settlors and as Trustees

a. After the death of the first spouse to die

1) Scenario #7: Husband and Wife create a joint trust where they are both Settlors and Trustees of the Trust. After conveying their homestead property to themselves as trustees of their Trust, husband dies. The Trust provides that, after the death of the first spouse to die, the surviving spouse shall remain as the sole trustee and shall continue to have the power to revoke the trust and upon the death of the surviving spouse the trust assets go to Husband and Wife's adult children. Wife comes to you for help selling the homestead property. From whom will deeds be required in order to insure title?

Answer:

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2) Scenario #8: Same facts as Scenario #7 except Husband and Wife also had a minor child at the time Husband died. Who needs to sign now?

Answer:

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3) Was the deceased Settlor survived by a minor child?

a) If yes, the trust will result in a violation on the restriction of the devise of homestead.

b) If no, does the trust provide that the surviving spouse retains the power to revoke and amend the trust?

i. If yes, no violation of the Constitutional restrictions on the devise of homestead

D. Other Trusts

i. Qualified Personal Residence Trusts

a. Review the trust agreement to determine the "term" of the trust

1) Did the term end because of the death of the settlor or because the term expired?

a) If it was because the term expired, there is no violation of the Constitutional restrictions as long as there were not any homestead issues at the time of vesting

b) If it was the death of the Settlor, were they survived by a spouse or minor child?

ii. Irrevocable Trusts

a. The “gift” is complete at the time of conveyance, so, if no violations at that time, there are no homestead issues to resolve.

SECTION 4. Homestead; exemptions. —

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

History.—Am. H.J.R. 4324, 1972; adopted 1972; Am. H.J.R. 40, 1983; adopted 1984; Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

Back to Speaker Topics

157 So.3d 295

Dr. Ross G. STONE, Appellant
v.
Nancy STONE and Alma Stone, Appellees.

No. 4D11–4541.

District Court of Appeal of Florida, Fourth District.

Nov. 12, 2014.
Rehearing Denied March 16, 2015.

[157 So.3d 297]

William T. Viergever of Sonneborn Rutter Cooney & Smith, P.A., West Palm Beach, for appellant.

Edward Downey of Downey & Downey, P.A., Palm Beach Gardens, for appellee Nancy Stone.

Opinion

ROBINSON, MICHAEL A., Associate Judge.

Ross Stone appeals a final summary judgment in favor of Nancy Stone in a dispute involving the distribution of homestead property as part of the estate of their father Jerome Stone. The trial court held the transfer of the property to Nancy following Jerome's death was not an impermissible devise of homestead property. We find the trial court erred in part, but nevertheless affirm the result.

Facts

The property in dispute was initially titled in the name of Jerome Stone and his wife, Alma Stone, by warranty deed dated May 3, 1991. On March 27, 2000, Jerome and Alma executed a warranty deed conveying the property to themselves as tenants in common, each as to an undivided one-half interest. On the same day, Jerome executed the Jerome M. Stone Qualified Personal Residence Trust Agreement (hereinafter referred to as "QPRT") and then executed a warranty deed conveying his one-half tenancy in common interest in the property to himself and Alma as co-trustees of the QPRT. Nancy was the sole beneficiary of the QPRT. The term of the QPRT was the earlier of five years from its creation or Jerome's death. The trust agreement provided that if Jerome died before the end of the five-year term, the remaining balance of the trust would "revert and be distributed to the legal representative of Grantor's Estate, to be disposed of as part of the Grantor's Estate." Alma similarly executed her own QPRT and conveyed her one-half tenancy in common interest in the property to her QPRT. (Alma's one-half interest is not at issue in this appeal.).

Jerome died on February 10, 2005, survived by Alma and their two adult children, Ross and Nancy. Because Jerome failed to live the five years of the QPRT term, his one-half interest in the homestead property reverted to his estate. Pursuant to Jerome's will dated December 22, 2000, his probate assets poured over to

[157 So.3d 298]

a revocable living trust. Upon Jerome's death, the pour-over trust became irrevocable and the trust assets were then held in further trust for the benefit of Alma for her life. Upon her death, the trust was to terminate and be distributed, in default of Alma's exercise of a power of appointment, outright to Nancy. Both Jerome's will and the revocable trust agreement expressly make no provision for Ross. Alma died on June 18, 2009, survived by Ross and Nancy. Jerome's one-half interest in the homestead property then passed to Nancy pursuant to the terms of his will.

In Jerome's estate administration proceedings, Nancy filed a Petition for Instructions, Determination of Status of

fastcase

Back to Speaker Topics

Assets, and Other Relief, seeking a declaration that the disposition of Jerome's interest in the residence was not in violation of the devise restrictions on homestead property. Ross filed a Response and Counter–Petition for Determination of Homestead Status. The parties subsequently filed cross motions for summary judgment.

On November 18, 2011, the trial court entered a final summary judgment in favor of Nancy. The trial court found that the QPRT was an irrevocable trust, meeting the requirements of section 732.4017, Florida Statutes (2010). The trial court ruled that the QPRT owned the property at the time of Jerome's death and, therefore, the transfer of the property to Nancy was not a devise for the purpose of the homestead devise restrictions. Alternatively, the trial court found that Alma waived her homestead rights by executing the March 27, 2000 warranty deeds splitting the property into two one-half tenancy in common interests and transferring those separate interests to the two QPRTs. The trial court thus ruled that, even if the transfer of Jerome's interest in the property to Nancy following Jerome's death was a devise, the disposition did not violate the homestead devise restrictions. This timely appeal of the summary judgment order follows.

We review orders granting summary judgment *de novo*. *See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla.2000) ; *Philips Lake Worth, L.P. v. BankAtlantic*, 85 So.3d 1221, 1224–25 (Fla. 4th DCA 2012). Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. *See, e.g., Volusia Cnty.*, 760 So.2d at 130. The question before us is whether the trial court erred in finding that Nancy was entitled to judgment as a matter of law because the transfer of Jerome's interest in the property to her after Jerome's death was not an impermissible devise of homestead property. We find the trial court erred in part, but nevertheless affirm because Nancy is entitled to judgment as a matter of law.

Homestead Devise Restrictions

The meaning of homestead has different meanings depending on the context in which it is used: (1) exemption from ad valorem taxation, (2) protection from forced sale by creditors, and (3) limitations on alienation and devise. *Engelke v. Estate of Engelke*, 921 So.2d 693, 695–96 (Fla. 4th DCA 2006) (citing *Snyder v. Davis*, 699 So.2d 999 (Fla.1997)).

Florida law restricts the devise of homestead property. "Devise" is defined as "a testamentary disposition of real or personal property." § 731.201(10), Fla. Stat. (2011).[1] Article X, section 4 of the Florida Constitution provides:

[157 So.3d 299]

> § 4. Homestead; exemptions
>
> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located

fastcase

> within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;
>
> (2) personal property to the value of one thousand dollars.
>
> (b) These exemptions shall inure to the surviving spouse or heirs of the owner.
>
> (c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Sections 4(a) and 4 (b) protect Floridians from general creditors. Section 4 (c) protects the surviving spouse and minor children from having the homestead property transferred out from under them by the other spouse (or other parent) without the consent of both spouses.

The corresponding statutory provision is section 732.4015, Florida Statutes, entitled "Devise of homestead." It states:

> (1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.
>
> (2) For the purposes of subsection (1), the term:
>
> (a) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.
>
> (b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.
>
> (3) If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

§ 732.4015, Fla. Stat. (2011). This law recognizes the revocable trust as a will substitute and the grantor of such a trust as the equivalent of the testator of a will for purposes of the application of homestead laws. The law does not change the restrictions on the devise of homestead property. *See Engelke*, 921 So.2d at 697.

Inter Vivos Transfer of Homestead Property

Notwithstanding the homestead devise restrictions, property owners may

[157 So.3d 300]

give away or dispose of homestead property during their lifetimes, including by transfer to a trust. Section 732.4017, Florida Statutes, provides:

> (1) If the owner of homestead property transfers an interest in that property, including a transfer in trust, with or without consideration, to one or more persons during the owner's lifetime, the transfer is not a devise for purposes of s. 731.201(10) or s. 732.4015, and the interest transferred does not descend as provided in s. 732.401 if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.
>
> (2) As used in this section, the term "transfer in trust" refers to a trust under which the transferor of the homestead property, alone or in conjunction with another person, does not possess a right of revocation as that term is defined in s. 733.707(3)(e). A power possessed by the transferor which is exercisable during the transferor's lifetime to alter the beneficial use and enjoyment of the interest within a class of beneficiaries identified only in the trust instrument is not a right of revocation if the power may not be exercised in favor of the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate or exercised to discharge the transferor's legal obligations. This subsection does not create an inference that a power not described in this subsection is a power to revoke or revest an interest in the transferor.
>
> (3) The transfer of an interest in homestead property described in subsection (1) may not be treated as a devise of that interest even if:
>
> (a) The transferor retains a separate legal or equitable interest in the homestead property, directly or indirectly through a trust or other arrangement such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;
>
> (b) The interest transferred does not become a possessory interest until a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, the death of the transferor; or
>
> (c) The interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, survival of the transferor.
>
> (4) It is the intent of the Legislature that this section clarify existing law.

§ 732.4017, Fla. Stat. (2011).[2] This law clarifies that an *inter vivos* transfer of homestead property to other persons, including through a trust, is not a devise for homestead purposes, provided the transferor does not retain the power to revoke the transfer or revest title to the property in himself.

The Qualified Personal Residence Trust

A QPRT is an estate planning device whereby the settlor creates an irrevocable trust funded by the transfer of a personal residence, while retaining a right to reside on the property for a term of years.*See Nolte v. White*, 784 So.2d 493, 494 n. 1 (Fla. 4th DCA 2001) (citing Jeffrey

[157 So.3d 301]

A. Baskies, *Understanding Estate Planning with Qualified Personal Residence Trusts*, 73 Fla. B.J. 72 (1999)). At the end of the term stated in the trust instrument, the settlor no longer has the right to live in the residence; he must either vacate the property or pay rent to the trust. *See* Baskies, *supra*, at 72. The trust instrument may allow the settlor the power to sell the residence and reinvest the proceeds in a new residence, but the QPRT may not sell or transfer the residence back to the settlor. *Id.* at 72–73.

The use of a QPRT allows a homeowner to transfer property to his children while gaining significant estate, gift, and income tax advantages. *See Robbins v. Welbaum*, 664 So.2d 1, 1 (Fla. 3d DCA 1995) (citing I.R.C. § 2702 ; Peter A. Borrok, *Four Estate Planning Devices to Get Excited About*, N.Y.St.B.J., Jan. 1995, at 32; David C. Humphreys, Jr., *Qualified Personal Residence Trusts: "Have Your Grits and Eat Them, Too!,"* S.C. Law., Nov.-Dec.1994, at 45); *see also* Baskies, *supra*. However, if the settlor dies before the term of the trust expires, he will fail to receive the transfer tax savings and the full market value of the residence will be included in his estate at the time of his death. *See* Baskies, *supra*, at 75; Borrok, *supra*, at 36; Humphreys, *supra*, at 45. The settlor thus gains the tax advantages of a QPRT only by surviving the term of the trust.

QPRTs are permitted under Florida law by section 732.4017, Florida Statutes, and under the federal tax code by Internal Revenue Code section 2702(a)(3)(A)(ii) and Treasury Regulation section 25.2702–5(c). *See* Borrok, *supra*, at 35–36.

The Jerome M. Stone Qualified Personal Residence Trust, dated March 27, 2000, set forth in Article VII Jerome's intent to create a QPRT within the meaning of Internal Revenue Code section 2702(a)(3)(A)(ii) and Treasury Regulation section 25.2702–5(c), and provided that the provisions of the agreement should be interpreted to carry out that intent. Article VIII declared that the QPRT was irrevocable. Pursuant to Article I of the agreement, the term of the QPRT was the earlier of five years from its creation or Jerome's death, and during the term of the QPRT Jerome "shall be entitled to the exclusive use, possession and enjoyment of the personal residence held by Trustee." In Article XI(K), Jerome retained the power to substitute other property of an equivalent value as the trust principal, but Article XX explicitly prohibits the Trustee of the QPRT from selling or transferring the property back to Jerome. Pursuant to Article V(B), if Jerome died before five years from the creation of the trust (*i.e.* before March 27, 2005), the remaining balance of the trust "shall revert and be distributed to the legal representative(s) of Grantor's estate, to be disposed of as part of Grantor's estate."

Analysis

The issue before the trial court was whether the transfer of Jerome's interest in the property to Nancy after Jerome's death was an impermissible devise of homestead property. The court found that Jerome's

QPRT satisfied the requirements of section 732.4017, and, therefore, the QPRT was the owner of the property at the time of Jerome's death and the transfer of the property to Nancy was not a devise for the purpose of the homestead devise restrictions. On appeal, Ross argues that (1) given the control retained by Jerome, the trial court erred in applying section 732.4017 ; (2) the trial court erred in retroactively applying section 732.4017, which was enacted in 2010, to the QPRT created in 2000; and (3) because the property passed *to Nancy by devise* under

[157 So.3d 302]

Jerome's will, the constitutional and statutory limitations on the devise of homestead property necessarily apply. Ross asserts that Jerome attempted to devise the property to Nancy in a manner contrary to Florida law, and, therefore, the attempted devise should fail and the homestead property should descend as if Jerome had died intestate, pursuant to section 732.401, Florida Statutes (2011). If section 732.401 were applied, upon Jerome's death, Alma would take a life estate with a vested remainder to Ross and Nancy equally. *See* § 732.401(1), Fla. Stat.

We find the trial court improperly conflated what should be treated as two distinct transfers: (1) the initial transfer of Jerome's interest in the property to the QPRT; and (2) the subsequent transfer of Jerome's interest in the property to Nancy after Jerome's death, pursuant to his will. For the reasons set forth below, we hold the trial court correctly found that the transfer of Jerome's interest in the property to the QPRT was not a devise, but erred in extending that finding to the transfer of Jerome's interest in the property to Nancy after Jerome's death. The latter transfer should have been treated as a devise, subject to the homestead devise restrictions.

The trial court properly applied section 732.4017 to the initial transfer of Jerome's interest in the property to the QPRT. Section 732.4017(1) provides that an *inter vivos* transfer of homestead property to a trust will not be treated as a devise, provided the settlor did not retain a power to revest the property in himself. *See* § 732.4017(1), Fla. Stat. The trial court correctly found that Jerome did not retain the power to revoke or amend the QPRT or to revest the property in himself. Article XX of the trust agreement prohibits the trustee from selling or transferring the property back to Jerome. Section 732.4017(3)(a) expressly allows the settlor to retain an interest in the property in the form of a possibility of reverter. *See* § 732.4017(3)(a), Fla. Stat. The fact that Jerome retained such an interest does not place Jerome's transfer of the homestead property outside the parameters of section 732.4017.

Ross' argument that section 732.4017 should not have been applied retroactively is wholly without merit. The statute expressly states that it was intended to clarify existing law. *See* § 732.4017(4), Fla. Stat. (2010) ; *see also Fla. Ins. Guar. Ass'n v. Devon Neighborhood Ass'n*, 67 So.3d 187, 195 (Fla.2011) (explaining that a statute is presumed not to have retroactive application, but the presumption is rebuttable by clear evidence that the legislature intended that the statute be applied retroactively); *D & T Props., Inc. v. Marina Grande Assocs., Ltd.*, 985 So.2d 43, 47–48 (Fla. 4th DCA 2008) (finding that an express legislative statement that a statute is intended "to clarify existing law" should be taken as strong evidence of legislative intent that the statute should apply retroactively). Therefore, we find the trial court properly applied section 732.4017 to the transfer of Jerome's interest in the property to the QPRT and correctly held that this initial transfer was not a devise subject to the homestead devise restrictions.

However, we find the trial court erred in extending the application of section 732.4017 to the subsequent transfer of Jerome's interest in the property to Nancy after

Jerome's death. Nancy argues simply that the property was disposed of pursuant to section 732.4017 and, therefore, the entire transfer was not a devise for the purpose of the homestead devise restrictions. We would agree, if Jerome had survived the term of the QPRT and the property had passed to Nancy through the trust. *See Zuckerman v. Alter*, 615 So.2d 661, 663–64 (Fla.1993) ("If by the terms of

[157 So.3d 303]

the trust an interest passes to the beneficiary during the life of the settlor, although that interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not testamentary."). Ross concedes this point.

But, because Jerome failed to outlive the term of the QPRT, the transfer of the property was not completed pursuant to the terms of the trust as permitted by section 732.4017. *See generally* Baskies, *supra*. Jerome never gave his interest in the property completely to the trust. Although he did not have the power to revest title to the property in himself, he did have the power, until the end of the five-year term of the QPRT (or until the time of his death, as it happened), to control the disposition of the property by changing the terms of his will or the pour-over revocable trust. He could have amended his will or pour-over trust at any time before his death and designated someone other than Nancy to receive his interest in the property. The QPRT did not control the disposition of the property at the time of Jerome's death. If Jerome had survived the stated term of the QPRT, the transfer would have been completed and the property would have passed to Nancy through the trust pursuant to its terms. However, since Jerome died before the term of the QPRT, it is as if the QPRT never existed, at least for this purpose. Under the terms of the trust agreement, the property reverted back to Jerome's estate, and then passed to Nancy through the terms of his will. This is a devise—a testamentary disposition—on its face. To restrict the analysis to the initial transfer of Jerome's interest in the property to the QPRT would ignore the plain fact that, in this case, the property ultimately reverted back to the estate and passed to Nancy through the terms of Jerome's will, and would allow an improper circumvention of the homestead devise restrictions.

Although section 732.4017(3)(a) allows the settlor of a QPRT to retain a possibility of reverter, the statute does not speak to whether subsequent transfers of the property following such a reversion, pursuant to the terms of the settlor's will, should be treated as a devise. The statute provides only that the initial transfer of the property into the QPRT is not a devise. We have to assume the Legislature did not intend to remove any subsequent transfers from the broad definition of "devise" or from the purview of the homestead devise restrictions. *See State v. Burris*, 875 So.2d 408, 410 (Fla.2004) (stating that when a statute is clear, a court may not look behind the statute's plain language); *see also Snyder v. Davis*, 699 So.2d 999, 1002 (Fla.1997) ("[T]he homestead provision is to be liberally construed in favor of maintaining the homestead property."); *Public Health Trust v. Lopez*, 531 So.2d 946, 948 (Fla.1988) ("[T]he purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors.").

Therefore, we find the trial court erred in applying section 732.4017 to find that the transfer of Jerome's interest in the property to Nancy after Jerome's death, pursuant to the terms of Jerome's will, was not a devise. We hold that when a homeowner transfers property to a QPRT pursuant to section 732.4017 and the property later reverts back to the homeowner's estate because the homeowner fails to survive the term of the

QPRT, a subsequent disposition of the property pursuant to the homeowner's will is a devise. In this case, the transfer of Jerome's interest in the property to Nancy after Jerome's death was a devise, subject

[157 So.3d 304]

to the constitutional homestead devise restrictions.

Waiver

The trial court alternatively found that Alma waived her homestead rights for the purpose of the homestead devise restrictions and, therefore, the disposition of the residence was not in violation of the devise restrictions. We agree.

Alma waived her homestead rights by executing the March 27, 2000 warranty deed splitting the property into two one-half tenancy in common interests and then transferring her interest into her QPRT. Section 732.702, Florida Statutes, provides in part, that "[t]he rights of a surviving spouse to ... homestead ... may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses." § 732.702(1), Fla. Stat. (2011). Further, "[u]nless the waiver provides to the contrary, a waiver of 'all rights,' or equivalent language" may constitute a waiver of all homestead rights that would otherwise pass to the waiving spouse by intestate succession. *Id.* The deed Alma executed on March 27, 2000, provided that she "grants, bargains, sells, aliens, remises, releases, conveys, and confirms" the property "together with all the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining." We agree with the trial court that this constituted a waiver of any constitutional homestead rights Alma had in Jerome's one-half interest in the property.

Ross suggests that Alma did not intend to waive her constitutional homestead rights in 2000 because she continued to claim a homestead exemption from ad valorem taxation.[3] However, Florida law defines "homestead" in different ways depending on the context, so property that is considered homestead for the purpose of exemption from ad valorem taxation is not necessarily considered homestead for the purpose of devise restrictions. *See, e.g., Snyder v. Davis,* 699 So.2d 999 (Fla.1997) ; *In re Wartels' Estate,* 357 So.2d 708 (Fla.1978) ; *Willens v. Garcia,* 53 So.3d 1113 (Fla. 3d DCA 2011). In fact, we have held specifically that individuals conveying their residence to a QPRT may still be entitled to the homestead tax exemption. *Nolte v. White,* 784 So.2d 493, 494 (Fla. 4th DCA 2001) (citing *Robbins v. Welbaum,* 664 So.2d 1 (Fla. 3d DCA 1995)); *see* Baskies, *supra,* at 74. Therefore, the fact that Alma continued to claim a homestead exemption from ad valorem taxation does not affect our finding that she waived her homestead rights in Jerome's one-half interest in the property for the purpose of the constitutional homestead devise restrictions.

When there are no surviving minor children and the surviving spouse has waived her homestead rights, there is no constitutional restriction on the devise of the homestead. *City Nat'l Bank of Fla. v. Tescher,* 578 So.2d 701, 703 (Fla.1991) ; *see also Hartwell v. Blasingame,* 584 So.2d 6 (Fla.1991) (finding that an adult child was not entitled to seek the protection of the constitutional homestead devise restrictions where the surviving spouse had validly waived her homestead rights because

[157 So.3d 305]

the child was bound by the spouse's waiver); *Engelke v. Estate of Engelke,* 921 So.2d 693 (Fla. 4th DCA 2006) (holding that a spouse's waiver is the legal equivalent of predeceasing the decedent, so that the decedent may devise the homestead property free of the

constitutional restrictions). In this case, there were no surviving minor children and Alma waived her homestead rights. Ross, as an adult child, is not entitled to seek the protection of the homestead devise restrictions. Jerome thus was free to devise his interest in the homestead property, without any constitutional restriction, and the transfer to Nancy after Jerome's death was valid under Florida law.

Conclusion

In conclusion, we find the trial court erred in ruling that the transfer of Jerome's interest in the property to Nancy after Jerome's death was not a devise. We hold that when a homeowner transfers property to a QPRT pursuant to section 732.4017, Florida Statutes, and the property later reverts back to the homeowner's estate because the homeowner fails to survive the term of the QPRT, a subsequent disposition of the property pursuant to the homeowner's will is a devise, subject to the constitutional homestead devise restrictions. However, we affirm the trial court's finding in this case that Alma waived her spousal homestead rights and, therefore, the devise of the residence was not in violation of the homestead devise restrictions. Nancy is thus entitled to judgment as a matter of law. The trial court's summary judgment in her favor is, accordingly, affirmed.

Affirmed.

TAYLOR and CIKLIN, JJ., concur.

Notes:

[1] The language in the current versions of the relevant statute sections cited in this opinion have not been amended.

[2] This statute was enacted in 2010 and its language has remained unchanged.

[3] On October 18, 2000, Jerome and Alma executed a Certificate of Trust for the Palm Beach County Property Appraiser's Office certifying their entitlement to the use and occupancy of the property held in their respective QPRTs and their having a sufficient interest in the property to claim the homestead exemption from ad valorem taxation. Property records show they received a homestead tax exemption from 1994 until Jerome and Alma's deaths.

Select Year: 2018 Go

The 2018 Florida Statutes

Title XLII ESTATES AND TRUSTS | Chapter 732 PROBATE CODE: INTESTATE SUCCESSION AND WILLS | View Entire Chapter

732.7025 Waiver of homestead rights through deed.—

(1) A spouse waives his or her rights as a surviving spouse with respect to the devise restrictions under s. 4(c), Art. X of the State Constitution if the following or substantially similar language is included in a deed:

"By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me."

(2) The waiver language in subsection (1) may not be considered a waiver of the protection against the owner's creditor claims during the owner's lifetime and after death. Such language may not be considered a waiver of the restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner's spouse.

History.—s. 1, ch. 2018-22.

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The 2018 Florida Statutes

Title XLII ESTATES AND TRUSTS | Chapter 732 PROBATE CODE: INTESTATE SUCCESSION AND WILLS | View Entire Chapter

732.702 Waiver of spousal rights.—

(1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses. The requirement of witnesses shall be applicable only to contracts, agreements, or waivers signed by Florida residents after the effective date of this law. Any contract, agreement, or waiver executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country where it was executed, whether or not he or she is a Florida resident at the time of death. Unless the waiver provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

(2) Each spouse shall make a fair disclosure to the other of that spouse's estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.

(3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.

History.—s. 1, ch. 74-106; s. 39, ch. 75-220; s. 14, ch. 77-87; s. 56, ch. 2001-226.

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Back to Speaker Topics

Insuring Title Out of Enhanced Life Estates

By Benjamin T. Jepson, Fund Underwriting Counsel

Enhanced life estate deeds, also known as "Lady Bird deeds," continue to be a popular tool in estate planning. These enhanced life estate deeds also continue to create debate among real estate practitioners about their effect on title. The purpose of this article is to discuss some of the main issues that can arise while creating and insuring title out of enhanced life estates.

What Is an Enhanced Life Estate?

Many practitioners are familiar with standard life estate deeds where the grantor conveys property to another person and retains a life estate for themselves, giving the life tenant full use of the property during their lifetime. In an enhanced life estate, the life tenant also retains additional powers, including the power to "sell, convey, and mortgage" the subject property without the joinder or consent of the remaindermen. The concept of an enhanced life estate was originally proposed by Jerome Ira Solkoff in "Life Estate Deeds: Four Variations on a Theme," *The Elder Law Report*, Vol. VII, No. 3 (Oct. 1995), as a means of avoiding some of the common problems associated with a standard life estate deed. While there is no statutorily required language to create an enhanced life estate, The Fund has consistently insured conveyances of fee simple interests to bona fide purchasers for value by the life tenant when a property is conveyed to, or retained by, the life tenant for life:

without any liability for waste, and with full power and authority in said life tenant to sell, convey, mortgage, lease, or otherwise manage and dispose of the property described herein, in fee simple, with or without consideration, without joinder of the remaindermen, and with full power and authority to retain any and all proceeds generated thereby with the remainder to another person.

Underwriting Issues

When insuring title out of an enhanced life estate, issues typically stem from one of the following:

1. The language used to create the enhanced life estate;
2. The Constitutional restrictions on the devise of homestead;
3. Conveyances or mortgages out of an enhanced life estate after the death of the life tenant; and
4. Judgments against the remaindermen.

Creation of the enhanced life estate. The first thing to examine when insuring title out of an enhanced life estate is the powers actually retained by the life tenant. The language used when drafting an enhanced life estate deed can go a long way in determining what actions of the life tenant will be insurable. As discussed above, an enhanced life estate is established when the deed creating the estate includes specifically delineated powers retained by the life tenant. Powers retained by the life tenant may be interpreted by the courts in a manner similar to the way courts have interpreted the powers contained in powers of attorney (POA). See "Enhanced Life Estates - An Underwriting Update," 34 *Fund Concept* 149 (Nov. 2002). When interpreting the powers of an agent under a POA, the court in *Bloom v. Weiser*, 348 So.2d 651 (Fla. 3d DCA 1977) held that the

authority granted in a POA must be "plainly stated." Therefore, the powers retained by a life tenant should be plainly stated before they can be relied upon for the purposes of insuring title.

While the language referenced above is sufficient to create an enhanced life estate, it may not grant clear authority for the life tenant to do anything they wish with the subject property. Just as it has been held in regards to a POA, the power "to sell and convey" in an enhanced life estate is not the same as the power "to gift." See TN 4.02.03. The power of the life tenant is strictly limited to those powers "plainly stated" in the vesting deed. For the purpose of insuring title, the Fund Underwriting Department will look to the language used in creating an enhanced life estate as a starting point to determine whether or not the transaction is insurable.

The most common underwriting issue that arises from the retained powers of the life tenant is whether or not the life tenant has the power to divest the remaindermen of their interest and "convey" the remainder interest to a new person without joinder of the prior remaindermen; the so-called "fickle life tenant" problem. If the life tenant would like to retain the power to divest the remaindermen of their interest, it is imperative the life tenant expressly reserve such power in the deed creating the enhanced life estate for it to be relied upon for the purposes of insuring title. It is also recommended that the divesting deed "plainly state" that the purpose of the conveyance is to divest the remaindermen of their interest and establish the remainder interest in a new party. Transaction specific underwriting authorization will depend largely on the facts of each transaction to be insured. However, plainly stating that the power has been retained by the life tenant and the purpose of the divesting deed are certainly factors that the Underwriting Department will consider.

Homestead. Homestead issues must be considered in every transaction and enhanced life estates are no different. Art. X, Sec. 4(c), Fla. Const., restricts the devise of homestead property where the decedent is survived by a spouse or minor child. An enhanced life estate deed differs from a standard life estate deed in one major way; in an enhanced life estate deed, the life tenant retains the ability to divest the remaindermen of their interest in the property until the moment of their death. As such, the transfer to the remaindermen is not complete until the life tenant has died. Therefore, the enhanced life estate essentially becomes a substitute will for the life tenant and, upon the death of the life tenant, the "devise" of homestead property to the remaindermen may run afoul of the Constitutional restrictions on the devise of homestead property.

Due to these Constitutional concerns, The Fund will not insure title from an enhanced life estate after the death of the life tenant until any homestead issues have been resolved. These situations are treated similarly to cases like *Aronson v. Aronson*, 81 So.3d 515 (Fla. 3d DCA 2012), where the court invalidated the disposition of homestead property through a revocable trust after the death of the settlor. Much like in *Aronson* situations, The Fund will consider insuring title in cases where there are homestead issues if an affidavit listing all of the heirs of the deceased life tenant and deeds from the remaindermen and all of the heirs of the deceased life tenant are obtained. Fund Members should contact Fund Underwriting Counsel to discuss the facts of their case.
During the lifetime of the life tenant, The Fund may insure a sale or mortgage from the life tenant, without joinder of the remaindermen, to a third-party, bona fide purchaser for full value and consideration or to a third-party lender. This is true whether or not the life tenant has attempted to divest the remaindermen of their interest. For the purpose of insuring title, as long as the life tenant retained the power to "sell, convey, and mortgage" the subject property without the joinder of the remaindermen during their lifetime, the life tenant should not lose the power to convey or mortgage the fee simple title to a third party. When insuring a sale or mortgage of the fee by a life tenant of an enhanced life estate, Fund Members must collect information regarding the date of divestment of any remaindermen and signs of potential risk of litigation. It is recommended that the deed or mortgage from the life tenant to the third party state that "the entire fee simple interest" is being conveyed or encumbered, as the case may be.

The analysis for insuring a transaction after the death of the life tenant may involve additional risk. If there has been no change to the title since the enhanced life estate deed vested title in the life tenant and the remaindermen, The Fund will insure either a conveyance or mortgage of property that was not the homestead property of the life tenant from the remaindermen, upon the recording of a death certificate for the life tenant. When a conveyance or mortgage of fee simple title is to be insured from the last remainderman of record after the death of a "fickle life tenant" who has divested previous remaindermen, Fund Members must collect information regarding the date of divestment of the remaindermen and signs of potential risk of litigation, as previously discussed. Additionally, Fund Members must verify the life tenant retained the power to revoke the remainder interest in the deed creating the enhanced life estate; and that there is clear indication of record that it was the life tenant's intent to revoke the remainder interest. The goal is to establish facts that will show the risk of divested remaindermen claiming an interest in the subject property is sufficiently mitigated.

In all situations involving the sale or mortgage of fee simple interest and "fickle life tenants" Fund Members must contact The Fund Underwriting Department to discuss insuring requirements and whether a deed from divested remaindermen will be required for insuring.

Judgments. Judgments against the life tenant that have been properly perfected as liens on the property must be resolved. The same can be said about judgments perfected against the remaindermen where the life tenant is deceased; but what about judgments against the remaindermen of enhanced life estates during the lifetime of the life tenant? In situations where the judgment is relatively small, has been of record for more than one year and the creditor is not considered "aggressive," The Fund will generally insure a transaction from the life tenant without a release or satisfaction of a judgment against the remaindermen during the lifetime of the life tenant. For examples of the types of judgments and creditors that are considered aggressive see TN 16.04.08(A)(1). Fund Members should consult with Fund Underwriting Counsel concerning the necessity of release of judgments against remaindermen related to enhanced life estates for insuring subsequent transactions.

Conclusion

While title can be insured for many conveyances or mortgages out of enhanced life estates, the facts surrounding the specific transaction are important and must be seriously considered. Fund Members must examine the factors discussed above to determine if there are any issues that may affect the specific transaction's insurability. If there are any questions, Fund Members are encouraged to discuss them with Fund Underwriting Counsel.

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Select Year: 2018 Go

The 2018 Florida Statutes

Title XLIII
DOMESTIC RELATIONS

Chapter 744
GUARDIANSHIP

View Entire Chapter

744.301 Natural guardians.—

(1) The parents jointly are the natural guardians of their own children and of their adopted children, during minority, unless the parents' parental rights have been terminated pursuant to chapter 39. If a child is the subject of any proceeding under chapter 39, the parents may act as natural guardians under this section unless the court division with jurisdiction over guardianship matters finds that it is not in the child's best interests. If one parent dies, the surviving parent remains the sole natural guardian even if he or she remarries. If the marriage between the parents is dissolved, the natural guardianship belongs to the parent to whom sole parental responsibility has been granted, or if the parents have been granted shared parental responsibility, both continue as natural guardians. If the marriage is dissolved and neither parent is given parental responsibility for the child, neither may act as natural guardian of the child. The mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless the court enters an order stating otherwise.

(2) Except as otherwise provided in this chapter, on behalf of any of their minor children, and without appointment, authority, or bond if the amounts received in the aggregate do not exceed $15,000, natural guardians may:

(a) Settle and consummate a settlement of any claim or cause of action accruing to any of their minor children for damages to the person or property of any minor children;

(b) Collect, receive, manage, and dispose of the proceeds of any settlement;

(c) Collect, receive, manage, and dispose of any real or personal property distributed from an estate or trust;

(d) Collect, receive, manage, and dispose of and make elections regarding the proceeds from a life insurance policy or annuity contract payable to, or otherwise accruing to the benefit of, the child; and

(e) Collect, receive, manage, dispose of, and make elections regarding the proceeds of any benefit plan as defined in s. 710.102, of which the minor is a beneficiary, participant, or owner.

(3) In addition to the authority granted in subsection (2), natural guardians are authorized, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a commercial activity provider, or its owners, affiliates, employees, or agents, which would accrue to a minor child for personal injury, including death, and property damage resulting from an inherent risk in the activity.

(a) As used in this subsection, the term "inherent risk" means those dangers or conditions, known or unknown, which are characteristic of, intrinsic to, or an integral part of the activity and which are not eliminated even if the activity provider acts with due care in a reasonably prudent manner. The term includes, but is not limited to:

1. The failure by the activity provider to warn the natural guardian or minor child of an inherent risk; and

2. The risk that the minor child or another participant in the activity may act in a negligent or intentional manner and contribute to the injury or death of the minor child. A participant does not include the activity provider or its owners, affiliates, employees, or agents.

(b) To be enforceable, a waiver or release executed under this subsection must, at a minimum, include the following statement in uppercase type that is at least 5 points larger than, and clearly distinguishable from, the rest of the text of the waiver or release:

NOTICE TO THE MINOR CHILD'S
NATURAL GUARDIAN

READ THIS FORM COMPLETELY AND CAREFULLY. YOU ARE AGREEING TO LET YOUR MINOR CHILD ENGAGE IN A POTENTIALLY DANGEROUS ACTIVITY. YOU ARE AGREEING THAT, EVEN IF _(name of released party or parties)_ USES REASONABLE CARE IN PROVIDING THIS ACTIVITY, THERE IS A CHANCE YOUR CHILD MAY BE SERIOUSLY INJURED OR KILLED BY PARTICIPATING IN THIS ACTIVITY BECAUSE THERE ARE CERTAIN DANGERS INHERENT IN THE ACTIVITY WHICH CANNOT BE AVOIDED OR ELIMINATED. BY SIGNING THIS FORM YOU ARE GIVING UP YOUR CHILD'S RIGHT AND YOUR RIGHT TO RECOVER FROM _(name of released party or parties)_ IN A LAWSUIT FOR ANY PERSONAL INJURY, INCLUDING DEATH, TO YOUR CHILD OR ANY PROPERTY DAMAGE THAT RESULTS FROM THE RISKS THAT ARE A NATURAL PART OF THE ACTIVITY. YOU HAVE THE RIGHT TO REFUSE TO SIGN THIS FORM, AND _(name of released party or parties)_ HAS THE RIGHT TO REFUSE TO LET YOUR CHILD PARTICIPATE IF YOU DO NOT SIGN THIS FORM.

(c) If a waiver or release complies with paragraph (b) and waives no more than allowed under this subsection, there is a rebuttable presumption that the waiver or release is valid and that any injury or damage to the minor child arose from the inherent risk involved in the activity.

1. To rebut the presumption that the waiver or release is valid, a claimant must demonstrate by a preponderance of the evidence that the waiver or release does not comply with this subsection.

2. To rebut the presumption that the injury or damage to the minor child arose from an inherent risk involved in the activity, a claimant must demonstrate by clear and convincing evidence that the conduct, condition, or other cause resulting in the injury or damage was not an inherent risk of the activity.

3. If a presumption under this paragraph is rebutted, liability and compensatory damages must be established by a preponderance of the evidence.

(d) Nothing in this subsection limits the ability of natural guardians, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a noncommercial activity provider, or its owners, affiliates, employees, or agents, to the extent authorized by common law.

(4) All instruments executed by a natural guardian for the benefit of the ward under the powers specified in this section are binding on the ward. The natural guardian may not, without a court order, use the property of the ward for the guardian's benefit or to satisfy the guardian's support obligation to the ward.

History.—s. 1, ch. 74-106; s. 8, ch. 75-166; s. 7, ch. 75-222; s. 1, ch. 77-190; s. 3, ch. 79-221; s. 17, ch. 89-96; s. 22, ch. 92-200; s. 66, ch. 95-211; s. 73, ch. 97-170; s. 11, ch. 2002-195; s. 8, ch. 2005-101; s. 3, ch. 2006-178; s. 2, ch. 2010-27; s. 1, ch. 2012-48; s. 5, ch. 2015-112.

Note.—Created from former s. 744.13.

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Back to Speaker Topics

Kelley's Homestead Paradigm

Additional Information

If the homestead was owned as tenants by the entireties or JTWROS, this Paradigm does not apply. Title passes automatically to the surviving tenant or tenants free of decedent's creditors. 732.401(5). Ostyn v. Olympic, 455 So. 2d 1137.

Protected Homestead* NOT subject to probate (F.S. 733.608, McKean v. Warburton, 919 So. 2d 341), administrative expenses (Engelke v. Estate of Engelke, 921 So. 2d 693) or creditors' claims (Art. X sec. 4(b)).

NOT Protected Homestead* is subject to probate, administrative expenses, and creditors' claims.

* Protected Homestead is defined in F.S. 731.201(33). Also see 733.608.

Level Information:
At Level 2 — protected homestead may not be devised by will or rev trust 732.4015.**

At Level 3 — protected homestead may be devised only to spouse.** Art X § 4(c)

Below Level 3 — protected homestead may be freely devised.** Art X § 4(c)

** Devise of protected homestead is limited in the same manner whether title is held by an individual or by a revocable trust. F.S. 732.4015(2)(a).

*** The spouse may elect to take a ½ interest as tenant in common rather than a life estate. F.S. 732.401(2)

**** A disclaimed intestate or validly devised spousal interest passes pursuant to 739.201. Disclaimer of a surviving spouse's life estate does not divest a descendant's vested remainder interest. 732.401(4).

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Back to Speaker Topics

Kelley's Homestead Paradigm

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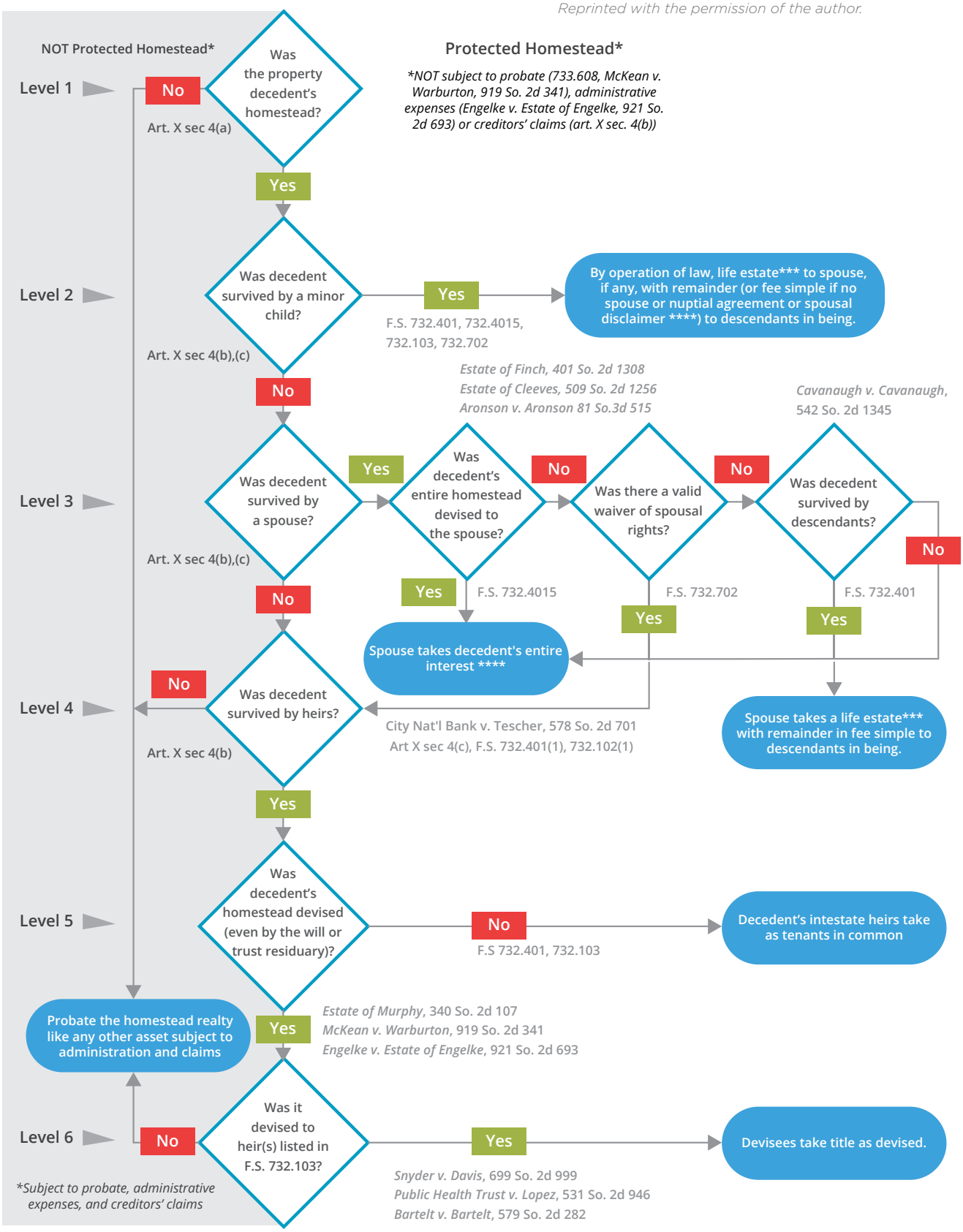

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Select Year: 2018 Go

The 2018 Florida Statutes

Title XLII ESTATES AND TRUSTS | Chapter 732 PROBATE CODE: INTESTATE SUCCESSION AND WILLS | View Entire Chapter

732.401 Descent of homestead.—

(1) If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

(a) The right of election may be exercised:

1. By the surviving spouse; or

2. With the approval of a court having jurisdiction of the real property, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse's probable lifetime.

(b) The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended except as provided in paragraph (c).

(c) A petition by an attorney in fact or by a guardian of the property of the surviving spouse for approval to make the election must be filed within 6 months after the decedent's death and during the surviving spouse's lifetime. If the petition is timely filed, the time for making the election shall be extended for at least 30 days after the rendition of the order allowing the election.

(d) Once made, the election is irrevocable.

(e) The election shall be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located. The notice must be in substantially the following form:

ELECTION OF SURVIVING SPOUSE
TO TAKE A ONE-HALF INTEREST OF
DECEDENT'S INTEREST IN
HOMESTEAD PROPERTY

STATE OF
COUNTY OF

1. The decedent, , died on . On the date of the decedent's death, The decedent was married to , who survived the decedent.

2. At the time of the decedent's death, the decedent owned an interest in real property that the affiant believes to be homestead property described in s. 4, Article X of the State Constitution, which real property being in County, Florida, and described as: _(description of homestead property)_.

3. Affiant elects to take one-half of decedent's interest in the homestead as a tenant in common in lieu of a life estate.

4. If affiant is not the surviving spouse, affiant is the surviving spouse's attorney in fact or guardian of the property, and an order has been rendered by a court having jurisdiction of the real property authorizing the undersigned to make this election.

(Affiant)

Sworn to (or affirmed) and subscribed before me this day of _(month)_, _(year)_, by _(affiant)_

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

(Type of Identification Produced)

(3) Unless and until an election is made under subsection (2), expenses relating to the ownership of the homestead shall be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with chapter 738. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.

(4) If the surviving spouse's life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent's descendants may not be divested.

(5) This section does not apply to property that the decedent owned in tenancy by the entireties or in joint tenancy with rights of survivorship.

History.—s. 1, ch. 74-106; s. 17, ch. 75-220; s. 37, ch. 2001-226; s. 12, ch. 2007-74; s. 7, ch. 2010-132; s. 3, ch. 2012-109.

Note.—Created from former s. 731.27.

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Back to Speaker Topics

81 So.3d 515

James ARONSON, et al., Appellants,
v.
Doreen ARONSON, Appellee.

No. 3D09–773.

District Court of Appeal of Florida, Third District.

Feb. 1, 2012.Rehearing Denied March 13, 2012.

[81 So.3d 516]

Buckingham, Doolittle & Burroughs and Michael D. Mopsick, Boca Raton, for appellants.

Shutts & Bowen and William Jay Palmer, Miami, for appellee.

[81 So.3d 517]

Before SHEPHERD, SUAREZ, and SALTER, JJ.

ON REHEARING GRANTED
SHEPHERD, J.

On consideration of Appellants' motion for rehearing, the Court withdraws its opinion issued on October 27, 2010, and substitutes the following opinion in its stead:

This appeal is a sequel to our decision in *Aronson v. Aronson,* 930 So.2d 766 (Fla. 3d DCA 2006) (*Aronson I*), in which we held that a husband's quitclaim in his individual capacity of a marital residence to his wife was a nullity because he previously had conveyed title to the property to a revocable trust. *Id.* at 769. We now decide whether the law permits the deceased husband's plan for the disposition of the property to be honored in the face of the widow's objection that the property is protected homestead, for which the dispositional terms for the property are delimited through article X, section 4(c) of the Florida Constitution.[1] We hold that the constitutional provision controls. A summary of the factual history of this case is necessary to explain our decision.

On July 2, 1996, while residing in Massachusetts with his wife, Doreen, Hillard J. Aronson created the Hillard J. Aronson Revocable Trust, naming himself as Trustee, and conveyed certain property, including a Key Biscayne condominium titled in his name alone, to the trust. On November 10, 2001, Hillard Aronson died, survived by his wife and two sons from a prior marriage, the appellants, James and Jonathan Aronson. James and Jonathan became the successor trustees by the terms of the Trust. The year before Hillard died, the couple sold their Massachusetts home, which had been titled in Doreen's name alone, and moved into the Key Biscayne condominium. Doreen applied $129,895 of the proceeds from the sale of the Massachusetts home to satisfy the then-existing mortgage on the condominium.

The trust document provided, upon Hillard's death, for a life interest in Doreen in all of the remaining assets of the trust after payment of last expenses and certain specific bequests (which appear to have lapsed for reasons immaterial to our decision). The trust instrument further provided, "Upon the death of the Settlor's said wife, the balance of the Trust property remaining in the hands of the Trustee shall be distributed to the Settlor's children, James D. Aronson and [Jonathan R.] Aronson in equal shares, share and share alike." At the time of Hillard's death, the sole remaining asset of the Revocable Trust was the Key Biscayne condominium. Thus, the trust document effectively gave a life estate in the Key Biscayne condominium to Doreen Aronson, with the remainder to the two sons. However, the Trust, in Article XII, section two, contained one additional provision in the same dispositive paragraph:

[81 So.3d 518]

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There shall also be paid or transferred to the Settlor's said wife, free and discharged of all trust, upon her written requisition delivered to the Trustee, such portions of the principal of said Trust fund as she may from time to time request, not exceeding, however, in valuation the greater of Five Thousand ($5,000.00) Dollars or five (5%) per cent of the market value of the principal of this Trust portion on the last day of the calendar year in which such withdrawal is requested, in any one calendar year, each such payment or transfer to be made thirty (30) days from the receipt of the requisition therefor. This right of withdrawal of principal shall be non-cumulative, and to the extent not exercised in any calendar year, shall terminate as to that year. In case of the death of the Settlor's said wife, before payment or transfer but after requisition, the distribution shall lapse and maintain a part of this Trust.

After Doreen's unsuccessful claim in *Aronson I*—that she received all of her deceased husband's right, title, and interest in the Key Biscayne condominium to the exclusion of the two sons by virtue of the quitclaim deed—Doreen began to make annual requisitions for a transfer of a five percent interest in the condominium unit to her pursuant to the above provision. She also demanded the Trust reimburse her in the amount of the mortgage pay-off on the condominium made prior to her husband's death, and for all taxes, special assessments, and other expenses of the condominium, all of which she claimed, based upon *Aronson I*, were obligations of the Trust. The trustees countered with a plan to sell the condominium pursuant to its general trust powers so the Trust could satisfy the annual requisitions and distribute the remaining sums to themselves. The controversy devolved into litigation by the end of 2006.

By her amended complaint, Doreen sought a declaration that the property she occupied was homestead property, not subject to sale by the successor trustees, for specific performance of her annual principal requisitions, return of the sums from the Massachusetts home owned by her, which was used to pay off the mortgage on the Key Biscayne condominium under the mistaken belief she owned the property in fee simple, and for all of her expenses in maintaining the condominium for the benefit of the titleholder Trust since the date of her husband's death. After a non-jury trial, the trial court found in an amended and clarified final judgment that Doreen's property was "the homestead of Doreen Anderson," ordered the Trust to reimburse her for the amount of the mortgage pay-off in the sum of $129,895, and ordered the Trust to pay Doreen an additional $136,519.67 for condominium repair and improvement expenses, but excluded annual property taxes, maintenance fees, special assessments, and insurance costs incurred by Doreen since she has occupied the condominium alone after her husband's death. The trial court also found she had the power to demand the trustees execute a deed transferring an interest in the trust principal equal to a five percent interest in the Key Biscayne condominium for each year she requests a principal distribution.

ANALYSIS

We reverse the judgments under review. First, it is undisputable the Key Biscayne condominium was the decedent's homestead at the time of his death.[2] Second,

[81 So.3d 519]

article X, section 4(c) of the Florida Constitution provides that "[t]he homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child." Art. X, § 4(c), Fla. Const. Third, the Florida legislature has made clear its command that this provision shall apply equally to property held by a revocable trust as to testamentary bequests. § 732.4015(2)(a), Fla. Stat. (2001);

Cutler v. Cutler, 994 So.2d 341, 343 (Fla. 3d DCA 2008); *Engelke v. Estate of Engelke*, 921 So.2d 693, 697 (Fla. 4th DCA 2006). Finally, section 732.401(1) of the Florida Statutes (2001), provides:

(1) **If not devised as authorized by law and the constitution,** the homestead shall descend in the same manner as other intestate property; **but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.** [3]

(emphasis added). Because the Key Biscayne condominium was Hillard's homestead and because his wife, Doreen, survived him, the condominium was not subject to disposition through the trust. *See In re Estate of Scholtz*, 543 So.2d 219, 221 (Fla.1989); *see also City Nat'l Bank of Fla. v. Tescher*, 578 So.2d 701, 703 (Fla.1991); *Ergos v. State*, 670 So.2d 1079, 1080 (Fla. 2d DCA 1996) (Altenbernd, J. concurring). At the moment of Hillard's death, his homestead property passed outside of probate, *see* §§ 733.607, .608, Fla. Stat. (2001); *Wilson v. Fla. Nat'l Bank & Trust Co. at Miami*, 64 So.2d 309 (Fla.1953); *Clifton v. Clifton*, 553 So.2d 192, 194 n. 3 (Fla. 5th DCA 1989), in a twinkle of an eye, as it were, to his wife for life, and thereafter to his surviving sons, James and Jonathan per stirpes. § 732.401(1), Fla. Stat. From that moment forward, the trustees had no power or authority with respect to the former marital home. The widow became responsible for the expenses of the property, and, of course, remains so for as long as she remains a life tenant. *See Schneberger v. Schneberger*, 979 So.2d 981, 983 (Fla. 4th DCA 2008) (affirming trial court judgment declaring that life tenant was responsible "to pay all ordinary and necessary expenses that inure to a homeowner, including taxes, insurance, homeowner's association fees, and general repairs for the upkeep and maintenance of the property"); *Williams v. Williams*, 120 So.2d 202, 205 (Fla. 3d DCA 1960) (stating life tenant who voluntarily made improvements to property during the course of (or after) her tenancy may not recover the cost thereof from remaindermen even if remaindermen knew the improvements were being

[81 So.3d 520]

made by the holder of the life estate and passively acquiesced); *see also* Henry P. Trawick, *Redfearn Wills & Admin. in Fla.*, § 9:3 (2011) (confirming that "[a life tenant] must pay the taxes, insurance, association fees, repairs for upkeep and maintenance during the tenancy unless the document creating the estate provides otherwise") (citing *Schneberger*, 979 So.2d at 982; *Williams*, 120 So.2d at 204–205). Finally, reasoning inductively from *Williams*, 120 So.2d at 205, in which we held that where a life tenant pays off a mortgage outstanding against the estate, he is entitled to reimbursement from the remaindermen, we find there is no basis in law to charge the remaindermen with the obligation to reimburse the widow for the amount she paid to satisfy the mortgage on the condominium **before** her husband's death, even if she did so under the mistaken belief that she was the titleholder to the property.

Reversed and remanded for proceedings in compliance herewith.

Notes:

[*] Judges Shepherd and Suarez did not participate in oral argument.

[1] The appellants argue certain of the widow's claims are barred by res judicata. Because the claims made in the amended complaint filed by her in this action are different from those made by the appellants

Back to Speaker Topics

in *Aronson I*, there is no res judicata defense available to the appellants in this case. *See AMEC Civil, LLC v. State Dep't of Transp.*, 41 So.3d 235, 245 (Fla. 1st DCA 2010); *Jones v. State ex rel. City of Winter Haven*, 870 So.2d 52, 55 (Fla. 2d DCA 2003); *Pipkin v. Wiggins*, 526 So.2d 1002, 1003 (Fla. 3d DCA 1988) (holding res judicata did not bar current litigation when prior litigation between the parties involved one breach of obligation under a joint venture agreement and instant litigation was based upon a different cause of action from a subsequent interference with the same agreement).

[2] Three requirements must be satisfied for real property to be impressed with the characteristics of homestead property under article X, section 4 of the Florida Constitution: (1) the property must be owned by a "natural person"; (2) the owner must have made, or intend to make the real property his or her permanent residence or that of his family; and (3) the property must meet the size and contiguity requirements of article X, section 4(a)(1) of the Florida Constitution. *Cutler v. Cutler*, 994 So.2d 341, 344 (Fla. 3d DCA 2008). The estate owned need not be fee simple, but may be any type of interest in the property, legal or equitable, so long as the interest is a possessory interest. *See Hill v. First Nat'l Bank of Marianna*, 73 Fla. 1092, 75 So. 614 (1917) (tenancy in common); *Smith v. Unkefer*, 515 So.2d 757 (Fla. 2d DCA 1987) (life estate); *Heiman v. Capital Bank*, 438 So.2d 932 (Fla. 3d DCA 1983) (equitable interest); *but see Aetna Ins. Co. v. LaGasse*, 223 So.2d 727 (Fla.1969) (remainder interest does not qualify).

[3] In 2010, section 732.401 was amended to allow the surviving spouse to elect an undivided one-half interest in the homestead property in lieu of the life estate. *See* Ch. 2010–132, § 7, Laws of Fla.

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Select Year: 2018 Go

The 2018 Florida Statutes

Title XLII ESTATES AND TRUSTS | Chapter 732 PROBATE CODE: INTESTATE SUCCESSION AND WILLS | View Entire Chapter

732.4015 Devise of homestead.—

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.

(2) For the purposes of subsection (1), the term:

(a) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.

(b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.

(3) If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

History.—s. 1, ch. 74-106; ss. 18, 30, ch. 75-220; s. 16, ch. 92-200; s. 959, ch. 97-102; s. 38, ch. 2001-226; s. 13, ch. 2007-74; s. 8, ch. 2010-132.

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Back to Speaker Topics

Page 970

397 So.2d 970
In re the ESTATE OF Reginald Hall JOHNSON, Deceased.
District Court of Appeal of Florida.
Fourth District.
April 15, 1981.
Rehearing Denied May 27, 1981.

Page 971

Law Offices Thomas J. Woolley, Jr., Boynton Beach and Stanley A. Tucker of Tucker & Slawson, P.A., West Palm Beach, for appellant Kathleen Ross Johnson.

Sam D. Phillips, Jr., West Palm Beach, for appellee Michelle Johnson Headley, as mother of Ross Johnson.

ANSTEAD, Judge.

This is an appeal by Kathleen Ross Johnson, the adult daughter of the deceased, from an order of the probate court setting aside an attempted conveyance of homestead property.

Reginald Hall Johnson, hereinafter referred to as the decedent, died testate in Palm Beach County on February 10, 1979, survived by five children, including a four year old minor, Ross, who was then residing with the decedent's second wife, Michelle Johnson Headley, in Dade County. The decedent's four other children, Kathleen, Reginald Jr., Judith and Diane, were the offspring of the decedent's first marriage. At the time of his death, the decedent owned a single-family residence located on real property less than one-half (1/2) acre situated in the municipality of Ocean Ridge.

On April 14, 1977, the decedent executed a revocable trust known as the "Reginald Hall Johnson Trust Agreement" wherein he designated himself as the trustee and lifetime beneficiary of the trust. The agreement provided for the disposition of trust assets upon the death of the decedent and included a provision that Kathleen, if she survived the decedent, was to receive the residence located in Ocean Ridge as a gift. Pursuant to the trust arrangement the decedent executed a quitclaim deed transferring his residence from himself, individually, to himself, as trustee. The quitclaim deed was delivered and recorded.

Upon his death, the decedent's former wife, Michelle Johnson Headley, as mother and next friend of the minor child Ross, filed a petition seeking a determination that the real property located in Ocean Ridge was homestead property. The probate court granted the petition and set out its reasons in a written order:

The decedent did during his lifetime endeavor to divest himself of any interest in the homestead property by executing a revocable trust instrument, as well as a quitclaim deed, to himself as trustee which was subject to revocation under the terms of the trust. By retention of the complete control of the property with the absolute right to revoke the trust instrument and the deed, it is apparent that the testator intended to circumvent the constitutional restriction on testamentary disposition of the homestead while at the same time treating the property as his own during his lifetime. Any statutory basis for permitting said transaction would abrogate the constitutional protection accorded to a homestead as provided in Article X, Section 4 of the Constitution of the State of Florida, which must prevail over any statutory enactment.

We believe the trial court was correct in both its decision and reasoning.

Article X, Section 4(c) of the 1968 Florida Constitution, as amended in 1972, provides:

Page 972

fastcase

Back to Speaker Topics

The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by his spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

The 1885 Constitution likewise allowed the holder of a homestead to alienate his homestead, although the term "gift" was not specifically included in its provisions.

In Johns v. Bowden, 68 Fla. 32, 66 So. 155 (1914), the decedent set up a revocable trust endeavoring to transfer his homestead to a trustee while his children were still living. By the terms of the trust, the decedent was to occupy the land for his own use and benefit during his lifetime, and the trustee, upon decedent's death, was to convey the property to the decedent's son for life, with the remainder going to the grandson then living. The other children of the decedent sought to set aside the property as homestead. In holding the transfer a nullity, the Florida Supreme Court stated the following:

Where the relation of husband and wife does not exist between the owner of property to which the homestead exemptions are attached and another living person, the constitution imposes no restrictions upon, but expressly recognizes, the power of the owner to alienate the property by a deed or mortgage executed by the owner alone, to take effect in the grantor's lifetime as a vested, irrevocable right. Under the constitution and statute, the property upon which the law imposes the homestead exemptions and limitations is not subject to testamentary disposition when the testator is the "holder" of the homestead and leaves a wife or a child. That which the law forbids to be done directly cannot lawfully be done by indirection. If an attempted conveyance of homestead real estate is in legal and practical effect and operation a will, it may not be effective when the owner of the homestead leaves a wife or child.

The conveyance alleged to have been made by Uriah Bowden to V. W. Shields as trustee carried if anything the bare legal title to the trustee, subject to the grantor's right during his lifetime to direct a conveyance of the title and the entire beneficial interest to others at his pleasure, as well as subject to ultimate disposition as directed by the trust deed made to the trustee. The interest attempted to be conveyed was not a vested right in the property to any of the beneficiaries named in the trust deed, but a contingent interest subject to the right of the grantor to direct a conveyance of the entire property to others at any time during the grantor's life. In effect the entire beneficial interest and right in the specific property remained in the grantor and could not pass at all, without his consent, till after his death, thus making the trust deed not an absolute conveyance of a vested right in presenti, of the property alleged to be a homestead. See Smith v. Crocker, (Crocker v. Smith), 94 Ala. 295, 10 S.R. 258, 16 L.R.A. 576; 40 Cyc. 1085; Tuttle v. Rush, (Tuttle v. Raish), 116 Iowa 331, 90 N.W.Rep. 66. Because of the retention of the entire beneficial estate in the grantor during his life, the instrument in practical effect, is in the nature of a testamentary disposition of property alleged to be a homestead, and a testamentary disposition of homestead property is forbidden by law when the testator leaves a wife or a child.

If the property was and continued to be in fact and in law a homestead, the alleged trust deed not being an absolute conveyance of any vested estate in the land to take effect during the grantor's life time, is apparently ineffectual for the purpose designed. 68 Fla. at 45-47, 66 So. 155. (Emphasis supplied).

fastcase

Back to Speaker Topics

We believe the interpretation placed upon the 1885 Constitution by the Johns

Page 973

court applies with equal force today and operates to prevent the attempted devise by trust at issue herein. The homestead provisions of the 1968 Constitution are not materially different from those of the 1885 Constitution. With one exception not pertinent here, the 1968 Constitution allows the unmarried owner of homestead property to alienate the homestead by mortgage, sale or gift, but such property is not subject to testamentary disposition where the owner leaves a spouse or minor child.

Appellant relies on Section 689.075, Florida Statutes (1977) to validate the conveyance. This section provides that a trust which is otherwise valid, including a trust the principal of which is composed of real property and which has been created by a written instrument, shall not be held invalid or an attempted testamentary disposition for any one or more of seven specified powers retained by the settlor, two of them being the power to revoke or amend the trust and the power of the settlor to retain the right to receive all or part of the income of the trust during his life or for any part thereof. Try as we may, we do not believe we can construe this statute to avoid the effect of the Supreme Court's decision in Johns v. Bowden, supra.

Just as in the Johns case, it is obvious that the decedent here, as the settlor, was retaining all equitable right, title, possession and interest in the property until his death. If Section 689.075 was construed to authorize the devise of homestead property in the manner involved herein, it would contravene the homestead provisions of the Florida Constitution, as interpreted by the Florida Supreme Court in Johns, supra. We hold only that Section 689.075 does not authorize a disposition of homestead property that is prohibited by the Florida Constitution.

Accordingly, for the reasons set out above, the judgment of the trial court is affirmed.

BERANEK and HERSEY, JJ., concur.

HERSEY, J., concurs specially with opinion.

HERSEY, Judge, concurring specially.

While I concur in the result reached here and agree, for the most part, with the rationale of the majority opinion, there is one point of departure that in my judgment requires a comment because of its potential effect in subsequent cases like this one. It seems to me that it is no longer correct to strike down the trust as a prohibited attempted testamentary disposition. Section 689.075 Florida Statutes (1979) provides that a trust containing various types of provisions like the one involved here "... shall not be held invalid or an attempted testamentary disposition ...."

This trust of the homestead is invalid because it was and is neither a sale nor a mortgage nor a gift. Alienation of the homestead under appropriate circumstances must take one of these three forms or it is constitutionally infirm. Article X, Section 4(c) of the Florida Constitution. By definition the transfer in trust was neither a sale nor a mortgage. It could not have been a gift because the trust was revocable.

Therefore I would invalidate the attempted alienation of the homestead involved here and affirm the order from which this appeal was taken, leaving open the question of whether this form of alienation of the homestead might be valid if the trust was irrevocable and all of the other elements of a gift in trust were present.

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Back to Speaker Topics

Fund Assembly

Residential Track

Representing Foreign Buyers – Choice of Entity and Compliance: What You Don't Know May Hurt You

George Moraitis, Jr., *Partner, Moraitis, Cofar, Karney, Moraitis & Quailey*

Back to Speaker Topics

Speaker Information

Representing Foreign Buyers – Choice of Entity and Compliance: What You Don't Know May Hurt You

George Moraitis, Jr.

Partner, Moraitis, Cofar, Karney, Moraitis & Quailey

George Moraitis is a partner with the law firm of Moraitis, Cofar, Karney, Moraitis, & Quailey where he practices primarily in the areas of real estate, probate, and estate planning. The firm has extensive experience representing foreign clients as purchasers and sellers of real estate in the southeast Florida region.

Mr. Moraitis was born and raised in Fort Lauderdale and is a graduate of Fort Lauderdale High School and the United States Naval Academy. After serving seven years on active duty as a submarine officer in the United States Navy during which he qualified as a Navy Nuclear Propulsion Engineer, Mr. Moraitis attended the University of Florida College of Law and then followed his father, George, Sr., into the practice of law.

Mr. Moraitis has been married to Heather Thompson for 23 years, and they are active members of Coral Ridge Presbyterian Church. They have two daughters, Alexis and Catherine.

Mr. Moraitis served as State Representative for the northeast portion of Broward County in the legislature from 2010 until 2018 and was a member of the Judiciary Committee as well as Vice Chair of the Finance and Taxation Committee.

Money Laundering Prevention Tips for Florida Real Estate Attorneys

By Nancy Stuparich, Former Fund Underwriting Counsel

The Patriot Act1 is the latest federal antimoney laundering law, whose primary purpose is to prohibit money laundering to finance terrorist activities. The Patriot Act, among other things, requires financial institutions to implement and maintain anti-money laundering programs. These programs at a minimum must include: 1) identification of an anti-money laundering compliance officer; 2) an employee anti-money laundering training program; 3) the development of internal anti-money laundering policies, procedures, and controls; 4) an independent audit feature; and 5) new customer identification standards and record keeping. Although the Patriot Act defines “financial institutions” to include “persons involved in real estate closings and settlements,” to date no federal regulations have been enacted to require real estate attorneys or closing agents to implement anti-money laundering compliance programs similar to those required of other defined financial institutions.

In Florida, illegal money laundering activity is criminalized by the Florida Money Laundering Act found in Ch. 896, F.S. The Florida Money Laundering Act applies to “financial transactions,” whose definition also includes “the transfer of title to any real property.” The Florida Money Laundering Act is similar to federal anti-money laundering laws. For example, Sec. 896.102, F.S., contains a reporting requirement for transactions involving more than $10,000 received in a trade or business. There is a similar provision in the federal Anti-Drug Abuse Act of 1988. Sec. 896.104, F.S., criminalizes structuring transactions to evade reporting requirements. The Bank Secrecy Act makes similar structuring activities a federal crime.

Are there risks of money laundering through real estate closings and settlements of which Florida real estate attorneys and closing agents should be aware? The consequences of an attorney’s involvement in illegal money laundering activities are serious and can include criminal and civil penalties, imprisonment, and forfeiture of assets as well as possible disbarment.

In response to a request for comment by the Financial Crimes Enforcement Network of the U.S. Department of Treasury (FINCEN) in Jun. 2003, The Florida Bar's Real Property, Probate & Trust Law Section and other real estate interests claimed real estate closings and settlements already have in place procedures to deter illegal money laundering activities. http:/ /www.fincen.gov/reg_352comments.html

For example, closing agents already file IRS Form 8300 when transferring money in excess of $10,000 to an individual or entity for services performed. See "Reporting Large Cash Transactions." 28 Fund Concept 167 (Nov. 1996). Title examiners and agents already check the "Specially Designated Persons and Blocked Persons List" maintained by the Office of Foreign Assets Control, Department of Treasury (OFAC), when searching the names of the grantors and grantees on automated title information data services. Closing agents follow approved escrow instructions and trust accounting practices when handling a client's money. Rules regulating members of The Florida Bar and rules promulgated by the Florida Department of Financial Services require frequent reconciliation of attorney trust accounts, which would disclose illegal money transfers.

Furthermore, most real estate transactions are funded by loans from financial institutions, which are already set up to screen transactions for money laundering activities, in accordance with the Patriot Act as well as other federal and state laws. Notaries, who acknowledge recordable documents, require photo identification of the individual signing the documents. In view of all these existing practices, where is the risk of money laundering in real estate closings and settlements?

With the assistance of the America Land Title Association, FINCEN identified several activities associated with a real estate closing and settlement, which appear to present the greatest risk for money laundering. Each activity identified by FINCEN follows with a prevention tip that is recommended, but not mandated:

1. PAYMENT FOR REAL ESTATE WITH FUNDS FROM A 'HIGH RISK COUNTRY', A NON-COOPERATIVE COUNTRY OR TERRITORY AS DESIGNATED BY THE FINANCIAL ACTION TASK FORCE OR A COUNTRY DESIGNATED BY THE SECRETARY OF THE TREASURY AS A COUNTRY OF PRIMARY MONEY LAUNDERING CONCERN PURSUANT TO SECTION 311 OF THE PATRIOT ACT.

Prevention Tip 1: All. Persons must comply with regulations promulgated by the OFAC and the failure to do so can result in civil and criminal penalties. OFAC publishes lists of persons and countries that are known or believed to be involved in money laundering or terrorist activities. Title search programs such as THE FUND's ATIDS automatically screen all searches for "blocked" persons and include a warning requiring the user to contact OFAC before proceeding with the transaction.

If not using THE FUND's ATIDS program, real estate attorneys should find out if the title search program they use includes this screening feature. If a manual search is completed, real estate attorneys should include in their closing procedures routine checking of OFAC lists. Regardless of whether the real estate attorney is using THE FUND's ATIDS or another title software search program, the real estate attorney should not continue with the transaction unless approval to continue is received from OFAC.

When funds are being wired in or out of a real estate attorney's escrow or trust account, the financial institution servicing the escrow or trust account will have also already examined the OFAC lists. Because a blocked country is usually not a buyer or seller in a transaction, the transaction will not be screened by ATIDS if a buyer or seller is sending or receiving funds from an OFAC blocked country. However, the financial institution servicing the real estate attorney's escrow or trust account will have checked the transaction against the blocked country list from which monies were received or disbursed, most likely blocked the funds, and notified OFAC.

In accordance with their anti-money laundering compliance programs, a financial institution may prepare a Suspicious Activity Report (SAR) when monies associated with a real estate transactions are received or disbursed to OFAC blocked persons or financial institutions located in OFAC blocked countries. The SAR is reviewed in accordance with the financial institution's money laundering compliance program, which usually also includes a final review by the Board of Directors. The Board of Directors determines if the transaction merits further reporting of suspicious activity to federal agencies. To mitigate the perception of the real estate attorney's involvement in an illegal money laundering activity in a SAR, as well as transactional delays due to blocked funding, a real estate attorney should consider notifying a financial institution involved in a real estate transaction immediately upon discovery of any OFAC blocked person, entity or country. Thereafter, the real estate attorney should consider cooperating with the financial institution's money laundering compliance procedures and resulting federal and state investigations to the extent such action does not violate the attorney-client privilege. (See Prevention Tip 3 below.)

2.WHERE THE SELLER REQUESTS THAT THE PROCEEDS OF A SALE OF REAL ESTATE BE SENT TO A "HIGH RISK COUNTRY."

Prevention Tip 2: See Prevention Tip 1 above. 3. WHERE A PERSON IS SEEKING TO PURCHASE REAL ESTATE IN THE NAME OF A NOMINEE AND HAS NO APPARENT LEGITIMATE EXPLANATION FOR THE USE OF A NOMINEE.

Prevention Tip 3: How much due diligence and inquiry should you as a lawyer ethically do and make regarding your client's business and their decisions to buy property in the name of a nominee without eroding the attorney-client privilege? The American Bar Association has strongly opposed any mandates upon attorneys to file Suspicious Transaction Reports (STR) regarding their client's business affairs since such reporting would erode the attorney-client privilege.2 In State of New Jersey v. Zwillman, the Superior Court of New Jersey held "[i]t is not an attorney's responsibility to decide the truth or falsity of a client's representation unless he has actual knowledge or unless from facts within his personal knowledge or his professional experience he should know or reasonably suspect that the client's representations are false. The duty of the attorney is to seek for his client all that the client is entitled to under the law and not to act in the first instance as judge and jury."3 Just imagine having to explain to a client your request for payment of investigation expenses that you, as their attorney, incurred related to investigation of the client's financial affairs and business activity.

Nevertheless, it is most likely not adverse to the attorney-client relationship for an attorney to document the explanation provided by the client for the use of a nominee or why a transaction is being structured in a particular manner in the transaction file. Documentation could include the fact that questions were asked as well as the responses received and whether or not the client was advised to seek independent legal and/or tax advice. Whether or not additional investigation into the client's business affairs is needed is a decision an individual attorney must make, carefully balancing his or her ethical responsibilities and preservation of the attorney client relationship. Specific ethical issues should be discussed with a Florida Bar staff attorney, especially if the real estate attorney suspects the client is being untruthful or otherwise engaging in illegal activity.

4. WHERE A PERSON IS ACTING OR APPEARS TO BE ACTING AS AN AGENT FOR AN UNDISCLOSED PARTY AND IS RELUCTANT OR UNWILLING TO PROVIDE INFORMATION ABOUT THE PARTY OR THE REASON FOR THE AGENCY RELATIONSHIP Prevention Tip 4: There is nothing inherently illegal or wrong with the use of a power of attorney or other agency relationship between a buyer or seller and a third party to complete a real estate transaction. See "The Power of Attorney—Primary Issues and Related Fund Guidelines" 37 Fund Concept 123 (Oct. 2005). However, as in Prevention Tip 3 above, the real estate attorney should evaluate his or her ethical duty to protect client confidences and then decide if he or she should further inquire into why the party wishes to use a power of attorney or other agency relationship. If a financial institution is involved in funding the transaction, the financial institution will most likely ask such questions anyway as part

of their due diligence associated with underwriting the loan. A simple telephone call to the principal may be all that is needed in some circumstances to avoid fraudulent documents and avert an opportunity to launder illegal funds.

Lastly, to avoid the illegal use of a power of attorney or other agency relationship, a real estate attorney or closing agent may draft the power of attorney to include witnesses to the principal's signature even when not required under Florida law as a cautionary measure to avoid fraudulent documents and involvement in illegal money laundering activities.

5. WHERE A PERSON DOES NOT APPEAR TO BE SUFFICIENTLY KNOWLEDGEABLE ABOUT THE PURPOSE OR USE OF THE REAL ESTATE BEING PURCHASED Prevention Tip 5. See Prevention Tip 3 above. 6. WHERE THE PERSON APPEARS TO BE BUYING AND SELLING THE SAME PIECE OF REAL ESTATE WITHIN A SHORT PERIOD OF TIME OR IS BUYING MULITIPLE PIECES OF REAL ESTATE FOR NO APPARENT LEGITIMATE PURPOSE.

Prevention Tip 6: Properties involved in transactions that are purchased and owned by an individual for a short period of time and then quickly sold are known as "flip" transactions. Not all flip transactions are illegal. See "Legal and Illegal Flip Transactions" 34 Fund Concept 160 (Nov. 2002); "Buy Low, Sell High? HUD Rule Attempts to Curb Land Flipping," 36 Fund Concept 53 (May 2004). How does a real estate attorney determine if a flip transaction or a multiple purchase is "part of money laundering scheme" rather than a legitimate real estate investment? Again, the response to this question depends on how much inquiry the real estate attorney can ethically make into the client's business decisions and affairs without adversely impacting the attorney-client relationship. Regardless, the real estate attorney must always show the origin of all funds accurately on a settlement statement and request independent evidence of the fair market value of the property if needed to justify the amount of documentary stamps paid on the deed or the amount of title insurance purchased. A sales price that is higher than the appreciation experienced in the market area may place the real estate attorney on notice that additional inquiry is warranted.

7. WHERE THE PROSPECTIVE PURCHASER OR SELLER SEEKS TO HAVE THE DOCUMENTS REFLECT SOMETHING OTHER THAN THE TRUE NATURE OF THE TRANSACTION.

Prevention Tip 7: Misrepresentation of information on real estate documents can not only be an indicator of illegal money laundering activities, but also an indicator of real estate fraud. Real estate attorneys examining titles must become familiar with indicators of fraud. See "Claims Prevention Guidelines" 22 Fund Concept 46 (May

1990). Indicators of fraud include the use of quitclaim deeds with minimal documentary stamps, instruments not prepared by nor returned to a title company or attorney, documents with handwritten changes that are not otherwise initialed by the parties, false identification, incomplete acknowledgements, etc. See TN 10.03.09; “Beware of the Mortgage Fraud Trap,” 30 Fund Concept 139 (Oct. 1998).

When faced with a transaction containing an indicator of fraud, a real estate attorney may need to contact the parties to verify all amounts and information contained in the settlement statement are correct. Closing expenses not paid at the time of closing through your escrow or trust account should be marked as Paid Outside of Closing (POC). Payments should not be made to third parties unless the payment to the third party is clearly shown on the settlement statement and authorized in writing by the parties. “Rush” transactions should always be treated with caution. 8. WHERE THE PERSON PROVIDES SUSPICIOUS DOCUMENTATION TO VERIFY HIS OR HER IDENTITY

Prevention Tip 8: An effective client identification procedure is necessary not only to prevent money laundering activities but also to prevent fraudulent transactions. Real estate attorneys should require several forms of identification to check the identity of individuals representing themselves to be the buyer and seller in a real estate transaction when the individuals are not personally known to the attorney. Driver’s licenses and passports are commonly used as identity documentation. However, these documents are susceptible to forgery in view of advances in today’s digital technology.

Verification of the identity of unknown buyers and sellers can be performed in advance of the closing by contacting the record parties, independently verifying the individual’s identity through the comparison of information provided by the individual with information obtained from a consumer reporting agency, public database, or other source, and checking references with other financial institutions. Financial institutions generally accept unexpired government-issued forms of identification from most banking customers. Real estate attorneys could consider adopting customer identification procedures similar to those adopted by financial institutions to assist staff in identifying parties in real estate transactions at closing.

CONCLUSION

Whether there is a risk of money laundering in real estate closings and settlements or not remains an area of debate as well as concern to real estate attorneys. If indeed a risk is identified, real estate attorneys should take measures to prevent involvement in such transactions or accept the consequences which can include civil and criminal

penalties, imprisonment and disbarment. While not mandated, minor changes to your existing real estate closing and settlement procedures can deter the possibility of money laundering as well as prevent fraudulent transactions. (Footnotes)

1 Pub L. No 107-56, 115 Stat. 272. (Oct. 26, 2001). The U.S. Patriot Act is formally known as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. In 2001, the Patriot Act joined other existing federal laws regulating money laundering activities associated with illegal activities such as the Bank Secrecy Act, the Money Laundering Control Act of 1986, and the Anti-Drug Abuse Act of 1988.

2 American Bar Association Task Force on Gatekeeper Regulations and the Profession, Section of Real Property, Probate and Trust Law, Criminal Justice Section, Section of Litigation Section of International Law and Practice, presented to the 2003 House of Delegates to the American Bar Association.

3 State of New Jersey v. Zwillman, 270 A.2d 284, 289 (J.J. App. Div. 1970).

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Financial Crimes Enforcement Network
U.S. Department of the Treasury

Washington, D.C. 20220

GEOGRAPHIC TARGETING ORDER

The Director of the Financial Crimes Enforcement Network ("FinCEN") hereby issues a Geographic Targeting Order ("Order") requiring TITLE INSURANCE COMPANY to collect and report information about the persons involved in certain residential real estate transactions, as further described in this Order.

I. AUTHORITY

The Director of FinCEN may issue an order that imposes certain additional recordkeeping and reporting requirements on one or more domestic financial institutions or nonfinancial trades or businesses in a geographic area. *See* 31 U.S.C. § 5326(a); 31 C.F.R. § 1010.370; and Treasury Order 180-01. Pursuant to this authority, the Director of FinCEN hereby finds that reasonable grounds exist for concluding that the additional recordkeeping and reporting requirements described below are necessary to carry out the purposes of the Bank Secrecy Act ("BSA") or prevent evasions thereof.[1]

II. ADDITIONAL RECORDKEEPING AND REPORTING REQUIREMENTS

A. Business and Transactions Covered by This Order

1. For purposes of this Order, the "Covered Business" means TITLE INSURANCE COMPANY and any of its subsidiaries and agents.

2. For purposes of this Order, a "Covered Transaction" means a transaction in which:

   i. Residential real property is purchased by a Legal Entity (as this term is defined in Section III.A of this Order);

   ii. The purchase price of the residential real property is in the amount of $300,000 or more in any of the following areas:

      1. The Texas counties of Bexar, Tarrant, or Dallas;

      2. The Florida counties of Miami-Dade, Broward, or Palm Beach;

[1] The Bank Secrecy Act is codified at 12 U.S.C. §§ 1829b, 1951-1959 and 31 U.S.C. §§ 5311-5314, 5316-5332. Regulations implementing the Bank Secrecy Act appear at 31 C.F.R. Chapter X.

3. The Boroughs of Brooklyn, Queens, Bronx, Staten Island, or Manhattan in New York City, New York;

4. The California counties of San Diego, Los Angeles, San Francisco, San Mateo, or Santa Clara;

5. The City and County of Honolulu in Hawaii;

6. The Nevada county of Clark;

7. The Washington county of King;

8. The Massachusetts counties of Suffolk, or Middlesex; or

9. The Illinois county of Cook;

iii. Such purchase is made without a bank loan or other similar form of external financing; and

iv. Such purchase is made, at least in part, using currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, a money order in any form, a funds transfer, or virtual currency.

B. Reports Required to be Filed by the Covered Business

1. If the Covered Business is involved in a Covered Transaction, then the Covered Business shall report the Covered Transaction to FinCEN by filing a FinCEN Currency Transaction Report, within 30 days of the closing of the Covered Transaction. Each Currency Transaction Report filed pursuant to this Order must be: (i) completed in accordance with the terms of this Order and the Currency Transaction Report instructions (when such terms conflict, the terms of this Order apply), and (ii) e-filed through the BSA E-Filing system.[2] To report a Covered Transaction, the Covered Business shall use the Currency Transaction Report template located at this link: https://bsaefiling.fincen.treas.gov/docs/GTO/RealEstate_GTO Template.pdf.

2. A Currency Transaction Report filed pursuant to this Order shall contain the information specified in this section II.B about the Covered Transaction (when completing Part I, a Covered Business should select the + field as necessary to allow for the reporting of multiple parties).

[2] In order to electronically file a Currency Transaction Report, a Covered Business will need a BSA E-Filing User account. To create a BSA E-Filing User account, please visit https://bsaefiling.fincen.treas.gov/Enroll.html. For more information on E-Filing, please visit https://bsaefiling.fincen.treas.gov/, and review the "Getting Started with BSA E-Filing" link.

Part I

3. A Covered Business must include in Part I information about the identity of the individual primarily responsible for representing the Legal Entity by selecting Field 2, box b ("Person conducting transaction for another"). The Covered Business also must obtain and record a copy of this individual's driver's license, passport, or other similar identifying documentation. A description of such documentation must be provided in Field 20.

4. A Covered Business also must include in Part I information about the identity of the Legal Entity by selecting Field 2, box c ("Person on whose behalf transaction was conducted"), and also selecting the "If entity" check box.

5. A Covered Business also must include in Part I information about the identity of the Beneficial Owner(s) (as defined in Section III.A of this Order) of the Legal Entity by selecting Field 2, box c. The Covered Business must obtain and record a copy of the Beneficial Owner's driver's license, passport, or other similar identifying documentation. A description of such documentation must be provided in Field 20 of the form.

Part II

6. Part II shall contain information about the Covered Transaction as follows:

    i. Field 23: Date of closing of the Covered Transaction.

    ii. Field 25.z: Total purchase price of the Covered Transaction and the method of payment (leave Fields 25 a – i blank).

Part III

7. Part III shall contain information about the Covered Transaction as follows (when completing Part III, if the Covered Transaction involves the purchase of multiple properties, a Covered Business should select the + field as necessary to allow for the reporting of multiple property addresses):

    i. Fields 33-37: Address of real property involved in the Covered Transaction.

    ii. Field 41: Total purchase price of the real property listed in Fields 33-37. This should reflect the same purchase price as Field 25.z, except where multiple properties are purchased in the same Covered Transaction. When reporting a purchase of multiple properties in the same Covered Transaction, report total purchase price in Part II, Field 25.z, and price per property in Field 41 for each property.

Part IV

8. Part IV shall contain information about the Covered Business. The Covered Business shall ensure the term "REGTO1118" remains in Field 45 of Part IV.

III. GENERAL PROVISIONS

A. Additional Definitions

1. For purposes of this Order:

   i. "Beneficial Owner" means each individual who, directly or indirectly, owns 25% or more of the equity interests of the Legal Entity purchasing real property in the Covered Transaction.

   ii. "Legal Entity" means a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state, or of the United States, or a foreign jurisdiction.

2. All terms used but not otherwise defined herein have the meaning set forth in 31 C.F.R. Chapter X.

B. Order Period

The terms of this Order are effective beginning November 17, 2018 and ending on May 15, 2019 (except as otherwise provided in Section III.C of this Order).

C. Retention of Records

The Covered Business must: (1) retain all records relating to compliance with this Order for a period of five years from the last day that this Order is effective (including any renewals of this Order); (2) store such records in a manner accessible within a reasonable period of time; and (3) make such records available to FinCEN, or any other appropriate law enforcement or regulatory agency, upon request.

D. No Effect on Other Provisions of the Bank Secrecy Act

Nothing in this Order otherwise modifies or affects any provision of the regulations implementing the BSA to the extent not expressly stated herein.

E. Confidentiality

This Order and its terms are not confidential.

F. Compliance

The Covered Business must supervise, and is responsible for, compliance by each of its officers, directors, employees, and agents with the terms of this Order. The Covered Business must transmit this Order to each of its agents. The Covered Business must also transmit this Order to its Chief Executive Officer or other similarly acting manager.

G. Penalties for Noncompliance

The Covered Business, and any of its officers, directors, employees, and agents, may be liable, without limitation, for civil or criminal penalties for violating any of the terms of this Order.

H. Validity of Order

Any judicial determination that any provision of this Order is invalid does not affect the validity of any other provision of this Order, and each other provision must thereafter remain in full force and effect. A copy of this Order carries the full force and effect of an original signed Order.

I. Paperwork Reduction Act

The collection of information subject to the Paperwork Reduction Act contained in this Order has been approved by the Office of Management and Budget ("OMB") and assigned OMB Control Number 1506-0056.

J. Questions

All questions about the Order should be directed to the FinCEN Resource Center at FRC@FinCEN.gov.

Dated: November 15, 2018

_____

Kenneth A. Blanco
Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury

WARNING: PRINTED VERSIONS OF THE BSA E-FILING FORMS ARE NOT FOR SUBMISSION AND WILL NOT BE PROCESSED BY FINCEN.

Currency Transaction Report

Version Number: 1.3

OMB No. 1506-0004, OMB No. 1506-0005, OMB No. 1506-0064

Steps to Submit Complete the report in its entirety with all requested or required data known to the filer. Click "Validate" to ensure proper formatting and that all required fields are completed.Sign with PIN.Click "Save"; filers may also "Print" a paper copy for their records.Click "Submit".

Filing Name

***1 Type of filing** [x] Initial report [ ] Correct/amend prior report [ ] FinCEN directed Backfiling

Prior report BSA Identifier

Save **Validate** **Print**

By providing my PIN, I acknowledge that I am electronically signing the BSA report submitted.

Sign with PIN

Release Date: 02/15/2018

WARNING: PRINTED VERSIONS OF THE BSA E-FILING FORMS ARE NOT FOR SUBMISSION AND WILL NOT BE PROCESSED BY FINCEN.

Part IV Filing Institution Contact Information

*52 Type of financial institution	**Other**
Other (specify)	**Title Insurance Company**
*43 Primary federal regulator	**Internal Revenue Service (IRS)**

53 If 52a - Casino/Card Club is checked, indicate type (check only one)

☐ State licensed casino ☐ Tribal authorized casino ☐ Card club ☐ Other

*44 Legal name of filing institution	
45 Alternate name, e.g. trade name, DBA	**REGTO1118**
*46 EIN	
*47 Address	
*48 City	
*49 State	
*50 ZIP Code	
*51 Country	
54 Filing institution ID type	
ID number	
*55 Contact office	
*56 Phone number	Ext.
*57 Date filed	(Date filed will be auto-populated when the form is signed.)

WARNING: PRINTED VERSIONS OF THE BSA E-FILING FORMS ARE NOT FOR SUBMISSION AND WILL NOT BE PROCESSED BY FINCEN.

Part III Transaction Location 1 of 1

*38 Type of financial institution	Other
Other (specify)	Property Address (Enter Address in Item 33 -37)
*29 Primary federal regulator	Unknown

39 If 38a - Casino/Card Club is checked, indicate type (check only one)

☐ State licensed casino ☐ Tribal authorized casino ☐ Card club ☐ Other

*30 Legal name of financial institution	N/A
31 Alternate name, e.g. trade name, DBA	
*32 EIN ☒ Unknown	
*33 Address	
*34 City	
*35 State	
*36 ZIP Code	
*37 Country	
40 Financial institution ID type	
ID number	
*41 Cash in amount for transaction location	
*42 Cash out amount for transaction location	

WARNING: PRINTED VERSIONS OF THE BSA E-FILING FORMS ARE NOT FOR SUBMISSION AND WILL NOT BE PROCESSED BY FINCEN.

Part I Person Involved in Transaction(s) 1 of 1 + -

*2 a ☐ Person conducting transaction on own behalf b ☐ Person conducting transaction for another c ☐ Person on whose behalf transaction was conducted d ☐ Common carrier

3 ☐ Multiple transactions

Check ☐ If entity

*4 Individual's last name or entity's legal name ☐ Unknown

*5 First name ☐ Unknown

6 Middle name

Suffix

7 Gender

8 Alternate name

9 Occupation or type of business

9a NAICS Code

*10 Address ☐ Unknown

*11 City ☐ Unknown

*12 State ☐ Unknown

*13 ZIP/Postal Code ☐ Unknown

*14 Country ☐ Unknown

*15 TIN ☐ Unknown

16 TIN type

*17 Date of birth ☐ Unknown

18 Contact phone number

Ext.

19 E-mail address

*20 Form of identification used to verify identity ☐ Unknown

☐ Driver's license/State ID ☐ Passport ☐ Alien Registration ☐ Other

Number Country Issuing State

21 Cash in amount for individual or entity listed in Item 4 $

Account number + -

22 Cash out amount for individual or entity listed in Item 4 $

Account number + -

WARNING: PRINTED VERSIONS OF THE BSA E-FILING FORMS ARE NOT FOR SUBMISSION AND WILL NOT BE PROCESSED BY FINCEN.

Part II Amount and Type of Transaction(s). Check all boxes that apply.

*23 Date of transaction

24 ☐ Armored car (FI Contract) ☐ ATM ☐ Mail deposit or shipment ☐ Night deposit ☐ Aggregated transactions ☐ Shared branching

*25 CASH IN: (in U.S. dollar equivalent)		*27 CASH OUT: (in U.S. dollar equivalent)	
a Deposit(s)	$ .00	a Withdrawal(s)	$ .00
b Payment(s)	.00	b Advance(s) on credit (including markers)	.00
c Currency received for funds transfer(s) out	.00	c Currency paid from funds transfer(s) in	.00
d Purchase of negotiable instrument (s)	.00	d Negotiable instrument(s) cashed	.00
e Currency exchange(s)	.00	e Currency exchange(s)	.00
f Currency to prepaid access	.00	f Currency from prepaid access	.00
g Purchases of casinos chips, tokens and other gaming instruments	.00	g Redemption(s) of casino chips, tokens, TITO tickets and other gaming instruments	.00
h Currency wager(s) including money plays	.00	h Payment(s) on wager(s) (including race and OTB or sports pool)	.00
i Bills inserted into gaming devices	.00	i Travel and complimentary expenses and book gaming incentives	.00
z Other (specify): **Enter Type of Instrument, e.g. check and/or wire)**	.00	j Payment for tournament, contest or other promotions	.00
		z Other (specify):	.00
Total cash in	$ .00	Total cash out	$ .00

26 Foreign cash in _____ Foreign Country _____ + -

28 Foreign cash out _____ Foreign Country _____ + -

Florida Statute 607.0505 (emphasis added below)

Registered agent; duties. —

(1)(a) Each corporation, foreign corporation, or alien business organization that owns real property located in this state, that owns a mortgage on real property located in this state, or that transacts business in this state shall have and continuously maintain in this state a registered office and a registered agent and shall file with the Department of State notice of the registered office and registered agent as provided in ss. 607.0501 and 607.0502. The appointment of a registered agent in compliance with s. 607.0501 or s. 607.1507 is sufficient for purposes of this section provided the registered agent so appointed files, in such form and manner as prescribed by the Department of State, an acceptance of the obligations provided for in this section.

(b) Each such corporation, foreign corporation, or alien business organization which fails to have and continuously maintain a registered office and a registered agent as required in this section will be liable to this state for $500 for each year, or part of a year, during which the corporation, foreign corporation, or alien business organization fails to comply with these requirements; but such liability will be forgiven in full upon the compliance by the corporation, foreign corporation, or alien business organization with the requirements of this subsection, even if such compliance occurs after an action to collect such liability is instituted. The Department of Legal Affairs may file an action in the circuit court for the judicial circuit in which the corporation, foreign corporation, or alien business organization is found or transacts business, or in which real property belonging to the corporation, foreign corporation, or alien business organization is located, to petition the court for an order directing that a registered agent be appointed and that a registered office be designated, and to obtain judgment for the amount owed under this subsection. In connection with such proceeding, the department may, without prior approval by the court, file a lis pendens against real property owned by the corporation, foreign corporation, or alien business organization, which lis pendens shall set forth the legal description of the real property and shall be filed in the public records of the county where the real property is located. If the lis pendens is filed in any county other than the county in which the action is pending, the lis pendens which is filed must be a certified copy of the original lis pendens. The failure to comply timely or fully with an order directing that a registered agent be appointed and that a registered office be designated will result in a civil penalty of not more than $1,000 for each day of noncompliance. A judgment or an order of payment entered pursuant to this subsection will become a judgment lien against any real property owned by the corporation, foreign corporation, or alien business organization when a certified copy of the judgment or order is recorded as required by s. 55.10. The department will be able to avail itself of, and is entitled to use, any provision of law or of the Florida Rules of Civil Procedure to further the collecting or obtaining of payment pursuant to a judgment or order of payment. The state, through the Attorney General, may bid, at any judicial sale to enforce its judgment lien, any amount up to the amount of the judgment or lien obtained pursuant to this subsection. All moneys recovered under this subsection shall be treated as forfeitures under ss. 895.01-895.09 and used or distributed in accordance with the procedure set forth in s. 895.09. A corporation, foreign corporation, or alien business organization which fails to have and continuously maintain a registered office and a registered agent as required in this section may not defend itself against any action instituted by the Department of Legal Affairs or by any other agency of this state until the requirements of this subsection have been met.

(2) Each corporation, foreign corporation, or alien business organization that owns real property located in this state, that owns a mortgage on real property located in this state, or that transacts business in this state shall, pursuant to subpoena served upon the registered agent of the corporation, foreign corporation, or alien business organization issued by the Department of Legal Affairs, produce, through its registered agent or through a designated representative within 30 days after service of the subpoena, testimony and records reflecting the following:

(a) True copies of documents evidencing the legal existence of the entity, including the articles of incorporation and any amendments to the articles of incorporation or the legal equivalent of the articles of incorporation and such amendments.

(b) The names and addresses of each current officer and director of the entity or persons holding equivalent positions.

(c) The names and addresses of all prior officers and directors of the entity or persons holding equivalent positions, for a period not to exceed the 5 years previous to the date of issuance of the subpoena.

(d) The names and addresses of each current shareholder, equivalent equitable owner, and ultimate equitable owner of the entity, the number of which names is limited to the names of the 100 shareholders, equivalent equitable owners, and ultimate equitable owners that, in comparison to all other shareholders, equivalent equitable owners, or ultimate equitable owners, respectively, own the largest number of shares of stock of the corporation, foreign corporation, or alien business organization or the largest percentage of an equivalent form of equitable ownership of the corporation, foreign corporation, or alien business organization.

(e) The names and addresses of all prior shareholders, equivalent equitable owners, and ultimate equitable owners of the entity for the 12-month period preceding the date of issuance of the subpoena, the number of which names is limited to the 100 shareholders, equivalent equitable owners, and ultimate equitable owners that, in comparison to all other shareholders, equivalent equitable owners, or ultimate equitable owners, respectively, own the largest number of shares of stock of the corporation, foreign corporation, or alien business organization or the largest percentage of an equivalent form of equitable ownership of the corporation, foreign corporation, or alien business organization.

(f) The names and addresses of the person or persons who provided the records and information to the registered agent or designated representative of the entity.

(g) The requirements of paragraphs (d) and (e) do not apply to:

1. A financial institution;

2. A corporation, foreign corporation, or alien business organization the securities of which are registered pursuant to s. 12 of the Securities Exchange Act of 1934, 15 U.S.C. ss. 78a-78kk, if such corporation, foreign corporation, or alien business organization files with the United States Securities and Exchange Commission the reports required by s. 13 of that act; or

3. A corporation, foreign corporation, or alien business organization, the securities of which are regularly traded on an established securities market located in the United States or on an

established securities market located outside the United States, if such non-United States securities market is designated by rule adopted by the Department of Legal Affairs;

upon a showing by the corporation, foreign corporation, or alien business organization that the exception in subparagraph 1., subparagraph 2., or subparagraph 3. applies to the corporation, foreign corporation, or alien business organization. Such exception in subparagraph 1., subparagraph 2., or subparagraph 3. does not, however, exempt the corporation, foreign corporation, or alien business organization from the requirements for producing records, information, or testimony otherwise imposed under this section for any period of time when the requisite conditions for the exception did not exist.

(3) The time limit for producing records and testimony may be extended for good cause shown by the corporation, foreign corporation, or alien business organization.

(4) A person, corporation, foreign corporation, or alien business organization designating an attorney, accountant, or spouse as a registered agent or designated representative shall, with respect to this state or any agency or subdivision of this state, be deemed to have waived any privilege that might otherwise attach to communications with respect to the information required to be produced pursuant to subsection (2), which communications are among such corporation, foreign corporation, or alien business organization; the registered agent or designated representative of such corporation, foreign corporation, or alien business organization; and the beneficial owners of such corporation, foreign corporation, or alien business organization. The duty to comply with the provisions of this section will not be excused by virtue of any privilege or provision of law of this state or any other state or country, which privilege or provision authorizes or directs that the testimony or records required to be produced under subsection (2) are privileged or confidential or otherwise may not be disclosed.

(5) If a corporation, foreign corporation, or alien business organization fails without lawful excuse to comply timely or fully with a subpoena issued pursuant to subsection (2), the Department of Legal Affairs may file an action in the circuit court for the judicial circuit in which the corporation, foreign corporation, or alien business organization is found or transacts business or in which real property belonging to the corporation, foreign corporation, or alien business organization is located, for an order compelling compliance with the subpoena. The failure without a lawful excuse to comply timely or fully with an order compelling compliance with the subpoena will result in a civil penalty of not more than $1,000 for each day of noncompliance with the order. In connection with such proceeding, the department may, without prior approval by the court, file a lis pendens against real property owned by the corporation, foreign corporation, or alien business organization, which lis pendens shall set forth the legal description of the real property and shall be filed in the public records of the county where the real property is located. If the lis pendens is filed in any county other than the county in which the action is pending, the lis pendens which is filed must be a certified copy of the original lis pendens. A judgment or an order of payment entered pursuant to this subsection will become a judgment lien against any real property owned by the corporation, foreign corporation, or alien business organization when a certified copy of the judgment or order is recorded as required by s. 55.10. The department will be able to avail itself of, and is entitled to use, any provision of law or of the Florida Rules of Civil Procedure to further the collecting or obtaining of payment pursuant to a judgment or order of payment. The state, through the Attorney General, may bid, at

any judicial sale to enforce its judgment lien, an amount up to the amount of the judgment or lien obtained pursuant to this subsection. All moneys recovered under this subsection shall be treated as forfeitures under ss. 895.01-895.09 and used or distributed in accordance with the procedure set forth in s. 895.09.

(6) Information provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to this section are confidential and exempt from the provisions of s. 119.07(1) while the investigation is active. For purposes of this section, an investigation shall be considered "active" while such investigation is being conducted with a reasonable, good faith belief that it may lead to the filing of an administrative, civil, or criminal proceeding. An investigation does not cease to be active so long as the department is proceeding with reasonable dispatch and there is a good faith belief that action may be initiated by the department or other administrative or law enforcement agency. Except for active criminal intelligence or criminal investigative information, as defined in s. 119.011, and information which, if disclosed, would reveal a trade secret, as defined in s. 688.002, or would jeopardize the safety of an individual, all information, records, and transcriptions become public record when the investigation is completed or ceases to be active. The department shall not disclose confidential information, records, or transcriptions of testimony except pursuant to the authorization by the Attorney General in any of the following circumstances:

(a) To a law enforcement agency participating in or conducting a civil investigation under chapter 895, or participating in or conducting a criminal investigation.

(b) In the course of filing, participating in, or conducting a judicial proceeding instituted pursuant to this section or chapter 895.

(c) In the course of filing, participating in, or conducting a judicial proceeding to enforce an order or judgment entered pursuant to this section or chapter 895.

(d) In the course of a criminal or civil proceeding.

A person or law enforcement agency which receives any information, record, or transcription of testimony that has been made confidential by this subsection shall maintain the confidentiality of such material and shall not disclose such information, record, or transcription of testimony except as provided for herein. Any person who willfully discloses any information, record, or transcription of testimony that has been made confidential by this subsection, except as provided for herein, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. If any information, record, or testimony obtained pursuant to subsection (2) is offered in evidence in any judicial proceeding, the court may, in its discretion, seal that portion of the record to further the policies of confidentiality set forth herein.

(7) This section is supplemental and shall not be construed to preclude or limit the scope of evidence gathering or other permissible discovery pursuant to any other subpoena or discovery method authorized by law or rule of procedure.

(8) It is unlawful for any person, with respect to any record or testimony produced pursuant to a subpoena issued by the Department of Legal Affairs under subsection (2), to knowingly and willfully falsify, conceal, or cover up a material fact by a trick, scheme, or device; make any false, fictitious, or fraudulent statement or representation; or make or use any false writing or document knowing the writing or document to contain any false, fictitious, or fraudulent

statement or entry. A person who violates this provision is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(9) In the absence of a written agreement to the contrary, a registered agent is not liable for the failure to give notice of the receipt of a subpoena under subsection (2) to the corporation, foreign corporation, or alien business organization which appointed such registered agent if such registered agent timely sends written notice of the receipt of such subpoena by first-class mail or domestic or international air mail, postage fees prepaid, to the last address that has been designated in writing to the registered agent by such appointing corporation, foreign corporation, or alien business organization.

(10) The designation of a registered agent and a registered office as required by subsection (1) for a corporation, foreign corporation, or alien business organization which owns real property in this state or a mortgage on real property in this state is solely for the purposes of this act; and, notwithstanding s. 48.181, s. 607.1502, s. 607.1503, or any other relevant section of the Florida Statutes, such designation shall not be used in determining whether the corporation, foreign corporation, or alien business organization is actually doing business in this state.

(11) As used in this section, the term:

(a) "Alien business organization" means:

1. Any corporation, association, partnership, trust, joint stock company, or other entity organized under any laws other than the laws of the United States, of any United States territory or possession, or of any state of the United States; or

2. Any corporation, association, partnership, trust, joint stock company, or other entity or device 10 percent or more of which is owned or controlled, directly or indirectly, by an entity described in subparagraph 1. or by a foreign natural person.

(b) "Financial institution" means:

1. A bank, banking organization, or savings association, as defined in s. 220.62;

2. An insurance company, trust company, credit union, or industrial savings bank, any of which is licensed or regulated by an agency of the United States or any state of the United States; or

3. Any person licensed under part III of chapter 494.

(c) "Mortgage" means a mortgage on real property situated in this state, except a mortgage owned by a financial institution.

(d) "Real property" means any real property situated in this state or any interest in such real property.

(e) "Ultimate equitable owner" means a natural person who, directly or indirectly, owns or controls an ownership interest in a corporation, foreign corporation, or alien business organization, regardless of whether such natural person owns or controls such ownership interest through one or other natural persons or one or more proxies, powers of attorney, nominees, corporations, associations, partnerships, trusts, joint stock companies, or other entities or devices, or any combination thereof.

(12) Any alien business organization may withdraw its registered agent designation by delivering an application for certificate of withdrawal to the Department of State for filing. Such application shall set forth:

(a) The name of the alien business organization and the jurisdiction under the law of which it is incorporated or organized.

(b) That it is no longer required to maintain a registered agent in this state.

COVER LETTER

TO: Registration Section
Division of Corporations

SUBJECT: _____
(Name of Alien Business Organization or Financial Institution)

Dear Sir or Madam:

The enclosed Designation of Registered Agent and Registered Office for Alien Business Organization or Financial Institution and fee(s) are submitted for filing.

Please return all correspondence concerning this matter to the following:

_____
(Name of Person)

_____
(Firm/Company)

_____
(Address)

_____
(City/State and Zip Code)

For further information concerning this matter, please call:

_____ at (_____) _____
(Name of Person) (Area Code & Daytime Telephone Number)

STREET/COURIER ADDRESS:
Registration Section
Division of Corporations
Clifton Building
2661 Executive Center Circle
Tallahassee, Florida 32301

MAILING ADDRESS:
Registration Section
Division of Corporations
P.O. Box 6327
Tallahassee, Florida 32314

Enclosed is a check for the following amount:

❑ $35.00 Filing Fee

❑ $43.75 Filing Fee & Certified Copy

INHS80 (7/16)

DESIGNATION OF REGISTERED AGENT AND REGISTERED OFFICE FOR ALIEN BUSINESS ORGANIZATION OR FINANCIAL INSTITUTION

PURSUANT TO SECTION 607.0505 OR 655.0201, FLORIDA STATUTES, THE UNDERSIGNED ALIEN BUSINESS ORGANIZATION OR FINANCIAL INSTITUTION SUBMITS THE FOLLOWING STATEMENT IN ORDER TO DESIGNATE ITS REGISTERED AGENT AND REGISTERED OFFICE IN THE STATE OF FLORIDA:

1. _____
(Name of alien business organization or financial institution)

2. _____ 3. _____
(State or country under which entity is organized) (FEI Number, if applicable)

4. _____
(Principal office address)

5. Name and Florida Street address of registered agent.

_____

_____

_____

6. The street address of the registered office and the street address of the business office of the registered agent are identical.

7. _____
(Signature of chairman, vice chairman, or officer)

8. _____
(Name and capacity of person signing in number 7 above)

9. Signature of registered agent: _____

I hereby accept the appointment as registered agent. I am familiar with and accept the obligations of section 607.0505 or 655.0201, Florida Statutes.

_____ _____
(Registered agent accepting appointment) (Date)

THE FILING OF THIS FORM WITH THE FLORIDA DEPARTMENT OF STATE DOES NOT AUTHORIZE THE ABOVE REFERENCED ENTITY TO TRANSACT BUSINESS IN THE STATE OF FLORIDA.

FILING FEE $35

Make checks payable to Florida Department of State and mail to:
Division of Corporations P. O. Box 6327 Tallahassee, FL 32314

INHS80 (7/16)

derived from sources within the United States by residents or corporations of such foreign country, and

(3) it is in the public interest to apply pre- 1967 tax provisions in accordance with the provisions of this subsection to residents or corporations of such foreign country,

the President shall proclaim that the tax on such similar income derived from sources within the United States by residents or corporations of such foreign country shall, for taxable years beginning after such proclamation, be determined under this subtitle without regard to amendments made to this subchapter and chapter 3 on or after the date of enactment of this section.

(b) Imposition of discriminatory taxes by foreign country

Whenever the President finds that—

(1) under the laws of any foreign country, citizens of the United States or domestic corporations (or any class of such citizens or corporations) are, with respect to any item of income, being subjected to a higher effective rate of tax than are nationals, residents, or corporations of such foreign country (or a similar class of such nationals, residents, or corporations) under similar circumstances;

(2) such foreign country, when requested by the United States to do so, has not acted to eliminate such higher effective rate of tax; and

(3) it is in the public interest to adjust, in accordance with the provisions of this subsection, the effective rate of tax imposed by this subtitle on similar income of nationals, residents, or corporations of such foreign country (or such similar class of such nationals, residents, or corporations),

the President shall proclaim that the tax on similar income of nationals, residents, or corporations of such foreign country (or such similar class of such nationals, residents, or corporations) shall, for taxable years beginning after such proclamation, be adjusted so as to cause the effective rate of tax imposed by this subtitle on such similar income to be substantially equal to the effective rate of tax imposed by such foreign country on such item of income of citizens of the United States or domestic corporations (or such class of citizens or corporations). In implementing a proclamation made under this subsection, the effective rate of tax imposed by this subtitle on an item of income may be adjusted by the disallowance, in whole or in part, of any deduction, credit, or exemption which would otherwise be allowed with respect to that item of income or by increasing the rate of tax otherwise applicable to that item of income.

(c) Alleviation of more burdensome or discriminatory taxes

Whenever the President finds that—

(1) the laws of any foreign country with respect to which the President has made a proclamation under subsection (a) have been modified so that citizens of the United States not residents of such foreign country or domestic corporations are no longer subject to more burdensome taxes on the item of income derived by such citizens or corporations from sources within such foreign country, or

(2) the laws of any foreign country with respect to which the President has made a proclamation under subsection (b) have been modified so that citizens of the United States or domestic corporations (or any class of such citizens or corporations) are no longer subject to a higher effective rate of tax on the item of income,

he shall proclaim that the tax imposed by this subtitle on the similar income of nationals, residents, or corporations of such foreign country shall, for any taxable year beginning after such proclamation, be determined under this subtitle without regard to such subsection. **(d) Notification of Congress required**

No proclamation shall be issued by the President pursuant to this section unless, at least 30 days prior to such proclamation, he has notified the Senate and the House of Representatives of his intention to issue such proclamation.

(e) Implementation by regulations

The Secretary shall prescribe such regulations as he deems necessary or appropriate to implement this section.

(Added Pub. L. 89–809, title I, §105(b), Nov. 13, 1966, 80 Stat. 1563; amended Pub. L. 94–455, title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834.)

REFERENCES IN TEXT

The date of enactment of this section, referred to in the provisions following subsec. (a)(3), is the date of enactment of Pub. L. 89–809, which was approved Nov. 13, 1966.

AMENDMENTS

1976—Subsec. (e). Pub. L. 94–455 struck out ''or his delegate'' after ''Secretary''.

EFFECTIVE DATE

Section applicable with respect to taxable years beginning after Dec. 31, 1966, see section 105(d) of Pub. L. 89–809, set out as an Effective Date of 1966 Amendment note under section 894 of this title.

§897. Disposition of investment in United States real property

(a) General rule (1) Treatment as effectively connected with United States trade or business

For purposes of this title, gain or loss of a nonresident alien individual or a foreign corporation from the disposition of a United States real property interest shall be taken into account—

(A) in the case of a nonresident alien individual, under section 871(B)(1),[1] or

(B) in the case of a foreign corporation, under section 882(a)(1),

as if the taxpayer were engaged in a trade or business within the United States during the taxable year and as if such gain or loss were effectively connected with such trade or business.

(2) Minimum tax on nonresident alien individuals (A) In general

In the case of any nonresident alien individual, the taxable excess for purposes of section 55(b)(1) shall not be less than the lesser of—

(i) the individual's alternative minimum taxable income (as defined in section 55(b)(2)) for the taxable year, or

(ii) the individual's net United States real property gain for the taxable year. **(B) Net United States real property gain**

For purposes of subparagraph (A), the term ''net United States real property gain'' means the excess of—

(i) the aggregate of the gains for the taxable year from dispositions of United States real property interests, over

(ii) the aggregate of the losses for the taxable year from dispositions of such interests.

(b) Limitation on losses of individuals

In the case of an individual, a loss shall be taken into account under subsection (a) only to the extent such loss would be taken into account under section 165(c) (determined without regard to subsection (a) of this section). **(c) United States real property interest**

[1] So in original. Probably should be ''871(b)(1),''.

For purposes of this section— **(1) United States real property interest (A) In general**

Except as provided in subparagraph (B) or subsection (k), the term ''United States real property interest'' means—

(i) an interest in real property (including an interest in a mine, well, or other natural deposit) located in the United States or the Virgin Islands, and

(ii) any interest (other than an interest solely as a creditor) in any domestic corporation unless the taxpayer establishes (at such time and in such manner as the Secretary by regulations prescribes) that such corporation was at no time a United States real property holding corporation during the shorter of—

(I) the period after June 18, 1980, during which the taxpayer held such interest, or (II) the 5-year period ending on the date of the disposition of such interest.

(B) Exclusion for interest in certain corporations

The term ''United States real property interest'' does not include any interest in a corporation if—

(i) as of the date of the disposition of such interest, such corporation did not hold any United States real property interests,

(ii) all of the United States real property interests held by such corporation at any time during the shorter of the periods described in subparagraph (A)(ii)—

(I) were disposed of in transactions in which the full amount of the gain (if any) was recognized, or

(II) ceased to be United States real property interests by reason of the application of this subparagraph to 1 or more other corporations, and

(iii) neither such corporation nor any predecessor of such corporation was a regulated investment company or a real estate investment trust at any time during the shorter of the periods described in subparagraph (A)(ii).

(2) United States real property holding corporation

The term ''United States real property holding corporation'' means any corporation if— (A) the fair market value of its United States real property interests equals or exceeds 50 percent of

(B) the fair market value of—

(i) its United States real property interests,

(ii) its interests in real property located outside the United States, plus

(iii) any other of its assets which are used or held for use in a trade or business.

(3) Exception for stock regularly traded on established securities markets

If any class of stock of a corporation is regularly traded on an established securities market, stock of such class shall be treated as a United States real property interest only in the case of a person who, at some time during the shorter of the periods described in paragraph (1)(A)(ii), held more than 5 percent of such class of stock.

(4) Interests held by foreign corporations and by partnerships, trusts, and estates

For purposes of determining whether any corporation is a United States real property holding corporation— **(A) Foreign corporations**

Paragraph (1)(A)(ii) shall be applied by substituting ''any corporation (whether foreign or domestic)'' for ''any domestic corporation''.

(B) Assets held by partnerships, etc.

Under regulations prescribed by the Secretary, assets held by a partnership, trust, or estate shall be treated as held proportionately by its partners or beneficiaries. Any asset treated as held by a partner or beneficiary by reason of this subparagraph which is used or held for use by the partnership, trust, or estate in a trade or business shall be treated as so used or held by the partner or beneficiary. Any asset treated as held by a partner or beneficiary by reason of this subparagraph shall be so treated for purposes of applying this subparagraph successively to partnerships, trusts, or estates which are above the first partnership, trust, or estate in a chain thereof.

(5) Treatment of controlling interests (A) In general

Under regulations, for purposes of determining whether any corporation is a United States real property holding corporation, if any corporation (hereinafter in this paragraph referred to as the ''first corporation'') holds a controlling interest in a second corporation—

(i) the stock which the first corporation holds in the second corporation shall not be taken into account,

(ii) the first corporation shall be treated as holding a portion of each asset of the second corporation equal to the percentage of the fair market value of the stock of the second corporation represented by the stock held by the first corporation, and

(iii) any asset treated as held by the first corporation by reason of clause (ii) which is used or held for use by the second corporation in a trade or business shall be treated as so used or held by the first corporation.

Any asset treated as held by the first corporation by reason of the preceding sentence shall be so treated for purposes of applying the preceding sentence successively to corporations which are above the first corporation in a chain of corporations. **(B) Controlling interest**

For purposes of subparagraph (A), the term ''controlling interest'' means 50 percent or more of the fair market value of all classes of stock of a corporation. **(6) Other special rules**

(A) Interest in real property

The term ''interest in real property'' includes fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon, and options to acquire leaseholds of land or improvements thereon.

(B) Real property includes associated personal property

The term ''real property'' includes movable walls, furnishings, and other personal property associated with the use of the real property.

(C) Constructive ownership rules

For purposes of determining under paragraph (3) whether any person holds more than 5 percent of any class of stock and of determining under paragraph (5) whether a person holds a controlling interest in any corporation, section 318(a) shall apply (except that paragraphs (2)(C) and (3)(C) of section 318(a) shall be applied by substituting ''5 percent'' for ''50 percent'').

(d) Treatment of distributions by foreign corporations (1) In general

Except to the extent otherwise provided in regulations, notwithstanding any other provision of this chapter, gain shall be recognized by a foreign corporation on the distribution (including a distribution in liquidation or redemption) of a United States real property interest in an amount equal to the excess of the fair market value of such interest (as of the time of the distribution) over its adjusted basis.

(2) Exceptions

Gain shall not be recognized under paragraph (1)— (A) if—

(i) at the time of the receipt of the distributed property, the distributee would be subject to taxation under this chapter on a subsequent disposition of the distributed property, and

(ii) the basis of the distributed property in the hands of the distributee is no greater than the adjusted basis of such property before the distribution, increased by the amount of gain (if any) recognized by the distributing corporation, or

(B) if such nonrecognition is provided in regulations prescribed by the Secretary under subsection (e)(2).

(e) Coordination with nonrecognition provisions (1) In general

Except to the extent otherwise provided in subsection (d) and paragraph (2) of this subsection, any nonrecognition provision shall apply for purposes of this section to a transaction only in the case of an exchange of a United States real property interest for an interest the sale of which would be subject to taxation under this chapter.

(2) Regulations

The Secretary shall prescribe regulations (which are necessary or appropriate to prevent the avoidance of Federal income taxes) providing—

(A) the extent to which nonrecognition provisions shall, and shall not, apply for purposes of this section, and

(B) the extent to which—

(i) transfers of property in reorganization, and

(ii) changes in interests in, or distributions from, a partnership, trust, or estate, shall be treated as sales of property at fair market value.

(3) Nonrecognition provision defined

For purposes of this subsection, the term ''nonrecognition provision'' means any provision of this title for not recognizing gain or loss.

[(f) Repealed. Pub. L. 104–188, title I, §1702(g)(2), Aug. 20, 1996, 110 Stat. 1873] (g) Special rule for sales of interest in partnerships, trusts, and estates

Under regulations prescribed by the Secretary, the amount of any money, and the fair market value of any property, received by a nonresident alien individual or foreign corporation in exchange for all or part of its interest in a partnership, trust, or estate shall, to the extent attributable to United States real property interests, be considered as an amount received from the sale or exchange in the United States of such property.

(h) Special rules for certain investment entities For purposes of this section— **(1) Look-through of distributions**

Any distribution by a qualified investment entity to a nonresident alien individual, a foreign corporation, or other qualified investment entity shall, to the extent attributable to gain from sales or exchanges by the qualified investment entity of United States real property interests, be treated as gain recognized by such nonresident alien individual, foreign corporation, or other qualified investment entity from the sale or exchange of a United States real property interest. Notwithstanding the preceding sentence, any distribution by a qualified investment entity to a nonresident alien individual or a foreign corporation with respect to any class of stock which is regularly traded on an established securities market located in the United States shall not be treated as gain recognized from the sale or exchange of a United States real property interest if such individual or corporation did not own more than 5 percent of such class of stock at any time during the 1-year period ending on the date of such distribution.

(2) Sale of stock in domestically controlled entity not taxed

The term ''United States real property interest'' does not include any interest in a domestically controlled qualified investment entity.

(3) Distributions by domestically controlled qualified investment entities

In the case of a domestically controlled qualified investment entity, rules similar to the rules of subsection (d) shall apply to the foreign ownership percentage of any gain.

(4) Definitions and special rules (A) Qualified investment entity

The term ''qualified investment entity'' means—

(i) any real estate investment trust, and (ii) any regulated investment company which is a United States real property holding corporation or which would be a United States real property holding corporation if the exceptions provided in subsections (c)(3) and (h)(2) did not apply to interests in any real estate investment trust and for purposes of determining whether a real estate investment trust is a domestically controlled qualified investment entity under this subsection or regulated investment company. **(B) Domestically controlled**

The term ''domestically controlled qualified investment entity'' means any qualified investment entity in which at all times during the testing period less than 50 percent in value of the stock was held directly or indirectly by foreign persons.

(C) Foreign ownership percentage

The term ''foreign ownership percentage'' means that percentage of the stock of the qualified investment entity which was held (directly or indirectly) by foreign persons at the time during the testing period during which the direct and indirect ownership of stock by foreign persons was greatest. **(D) Testing period**

The term ''testing period'' means whichever of the following periods is the shortest: (i) the period beginning on June 19, 1980, and ending on the date of the disposition or of the distribution, as the case may be, (ii) the 5-year period ending on the date of the disposition or of the distribution, as the case may be, or

(iii) the period during which the qualified investment entity was in existence. **(E) Special ownership rules**

For purposes of determining the holder of stock under subparagraphs (B) and (C)—

(i) in the case of any class of stock of the qualified investment entity which is regularly traded on an established securities market in the United States, a person holding less than 5 percent of such class of stock at all times during the testing period shall be treated as a United States person unless the qualified investment entity has actual knowledge that such person is not a United States person,

(ii) any stock in the qualified investment entity held by another qualified investment entity—

(I) any class of stock of which is regularly traded on an established securities market, or

(II) which is a regulated investment company which issues redeemable securities (within the meaning of section 2 of the Investment Company Act of 1940),

shall be treated as held by a foreign person, except that if such other qualified investment entity is domestically controlled (determined after application of this subparagraph), such stock shall be treated as held by a United States person, and

(iii) any stock in the qualified investment entity held by any other qualified investment entity not described in subclause (I) or (II) of clause (ii) shall only be treated as held

by a United States person in proportion to the stock of such other qualified investment entity which is (or is treated under clause (ii) or (iii) as) held by a United States person.

(5) Treatment of certain wash sale transactions (A) In general

If an interest in a domestically controlled qualified investment entity is disposed of in an applicable wash sale transaction, the taxpayer shall, for purposes of this section, be treated as having gain from the sale or exchange of a United States real property interest in an amount equal to the portion of the distribution described in subparagraph (B) with respect to such interest which, but for the disposition, would have been treated by the taxpayer as gain from the sale or exchange of a United States real property interest under paragraph (1).

(B) Applicable wash sales transaction

For purposes of this paragraph—

(i) In general

The term ''applicable wash sales transaction'' means any transaction (or series of transactions) under which a nonresident alien individual, foreign corporation, or qualified investment entity—

(I) disposes of an interest in a domestically controlled qualified investment entity during the 30-day period preceding the ex-dividend date of a distribution which is to be made with respect to the interest and any portion of which, but for the disposition, would have been treated by the taxpayer as gain from the sale or exchange of a United States real property interest under paragraph (1), and

(II) acquires, or enters into a contract or option to acquire, a substantially identical interest in such entity during the 61-day period beginning with the 1st day of the 30-day period described in subclause (I).

For purposes of subclause (II), a nonresident alien individual, foreign corporation, or qualified investment entity shall be treated as having acquired any interest acquired by a person related (within the meaning of section 267(b) or 707(b)(1)) to the individual, corporation, or entity, and any interest which such person has entered into any contract or option to acquire.

(ii) Application to substitute dividend and similar payments

Subparagraph (A) shall apply to— (I) any substitute dividend payment

(within the meaning of section 861), or

(II) any other similar payment specified in regulations which the Secretary determines necessary to prevent avoidance of the purposes of this paragraph.

The portion of any such payment treated by the taxpayer as gain from the sale or exchange of a United States real property interest under subparagraph (A) by reason of this clause shall be equal to the portion of the distribution such payment is in lieu of which would have been so treated but for the transaction giving rise to such payment.

(iii) Exception where distribution actually received

A transaction shall not be treated as an applicable wash sales transaction if the nonresident alien individual, foreign corporation, or qualified investment entity receives the distribution described in clause (i)(I) with respect to either the interest which was disposed of, or acquired, in the transaction.

(iv) Exception for certain publicly traded stock

A transaction shall not be treated as an applicable wash sales transaction if it involves the disposition of any class of stock in a qualified investment entity which is regularly traded on an established securities market within the United States but only if the nonresident alien individual, foreign corporation, or qualified investment entity did not own more than 5 percent of such class of stock at any time during the 1-year period ending on the date of the distribution described in clause (i)(I). **(i) Election by foreign corporation to be treated as domestic corporation**

(1) In general

If—

(A) a foreign corporation holds a United States real property interest, and

(B) under any treaty obligation of the United States the foreign corporation is entitled to nondiscriminatory treatment with respect to that interest,

then such foreign corporation may make an election to be treated as a domestic corporation for purposes of this section, section 1445, and section 6039C.

(2) Revocation only with consent

Any election under paragraph (1), once made, may be revoked only with the consent of the Secretary.

(3) Making of election

An election under paragraph (1) may be made only—

(A) if all of the owners of all classes of interests (other than interests solely as a creditor) in the foreign corporation at the time of the election consent to the making of the election and agree that gain, if any, from the disposition of such interest after June 18, 1980, which would be taken into account under subsection (a) shall be taxable notwithstanding any provision to the contrary in a treaty to which the United States is a party, and

(B) subject to such other conditions as the Secretary may prescribe by regulations with respect to the corporation or its shareholders.

In the case of a class of interest (other than an interest solely as a creditor) which is regularly traded on an established securities market, the consent described in subparagraph (A) need only be made by any person if such person held more than 5 percent of such class of interest at some time during the shorter of the periods described in subsection (c)(1)(A)(ii). The constructive ownership rules of subsection (c)(6)(C) shall apply in determining whether a person held more than 5 percent of a class of interest.

(4) Exclusive method of claiming nondiscrimination

The election provided by paragraph (1) shall be the exclusive remedy for any person claiming discriminatory treatment with respect to this section, section 1445, and section 6039C. **(j) Certain contributions to capital**

Except to the extent otherwise provided in regulations, gain shall be recognized by a nonresident alien individual or foreign corporation on the transfer of a United States real property interest to a foreign corporation if the transfer is made as paid in surplus or as a contribution to capital, in the amount of the excess of—

(1) the fair market value of such property transferred, over

(2) the sum of—

(A) the adjusted basis of such property in the hands of the transferor, plus

(B) the amount of gain, if any, recognized to the transferor under any other provision at the time of the transfer.

(k) Special rules relating to real estate investment trusts

(1) Increase in percentage ownership for exceptions for persons holding publicly traded stock

(A) Dispositions

In the case of any disposition of stock in a real estate investment trust, paragraphs (3) and (6)(C) of subsection (c) shall each be applied by substituting ''more than 10 percent'' for ''more than 5 percent''. **(B) Distributions**

In the case of any distribution from a real estate investment trust, subsection (h)(1) shall be applied by substituting ''10 percent'' for ''5 percent''.

(2) Stock held by qualified shareholders not treated as USRPI (A) In general

Except as provided in subparagraph (B)—

(i) stock of a real estate investment trust which is held directly (or indirectly through 1 or more partnerships) by a qualified shareholder shall not be treated as a United States real property interest, and

(ii) notwithstanding subsection (h)(1), any distribution to a qualified shareholder shall not be treated as gain recognized from the sale or exchange of a United States real property interest to the extent the stock of the real estate investment trust held by such qualified shareholder is not treated as a United States real property interest under clause (i). **(B) Exception**

In the case of a qualified shareholder with 1 or more applicable investors—

(i) subparagraph (A)(i) shall not apply to so much of the stock of a real estate investment trust held by a qualified shareholder as bears the same ratio to the value of the interests (other than interests held solely as a creditor) held by such applicable investors in the qualified shareholder bears to value of all interests (other than interests held solely as a creditor) in the qualified shareholder, and

(ii) a percentage equal to the ratio determined under clause (i) of the amounts realized by the qualified shareholder with respect to any disposition of stock in the real estate investment trust or with respect to any distribution from the real estate investment trust attributable to gain from sales or exchanges of a United States real property interest shall be treated as amounts realized from the disposition of United States real property interests.

(C) Special rule for certain distributions treated as sale or exchange

If a distribution by a real estate investment trust is treated as a sale or exchange of stock under section 301(c)(3), 302, or 331 with respect to a qualified shareholder—

(i) in the case of an applicable investor, subparagraph (B) shall apply with respect to such distribution, and

(ii) in the case of any other person, such distribution shall be treated under section 857(b)(3)(F)[2] as a dividend from a real estate investment trust notwithstanding any other provision of this title. **(D) Applicable investor**

For purposes of this paragraph, the term ''applicable investor'' means, with respect to any qualified shareholder holding stock in a real estate investment trust, a person (other than a qualified shareholder) which—

(i) holds an interest (other than an interest solely as a creditor) in such qualified shareholder, and

(ii) holds more than 10 percent of the stock of such real estate investment trust (whether or not by reason of the person's ownership interest in the qualified shareholder).

(E) Constructive ownership rules

For purposes of subparagraphs (B)(i) and (C) and paragraph (4), the constructive ownership rules under subsection (c)(6)(C) shall apply.

(3) Qualified shareholder

For purposes of this subsection—

(A) In general

The term ''qualified shareholder'' means a foreign person which—

(i)(I) is eligible for benefits of a comprehensive income tax treaty with the United States which includes an exchange of information program and the principal class of interests of which is listed and regularly traded on 1 or more recognized stock exchanges (as defined in such comprehensive income tax treaty), or

(II) is a foreign partnership that is created or organized under foreign law as a limited partnership in a jurisdiction that has an agreement for the exchange of information with respect to taxes with the United States and has a class of limited partnership units which is regularly traded on the New York Stock Exchange or Nasdaq Stock Market and such class of limited partnership units value is greater than 50 percent of the value of all the partnership units,

(ii) is a qualified collective investment vehicle, and

(iii) maintains records on the identity of each person who, at any time during the foreign person's taxable year, holds directly 5 percent or more of the class of interest described in subclause (I) or (II) of clause (i), as the case may be.

(B) Qualified collective investment vehicle

For purposes of this subsection, the term ''qualified collective investment vehicle'' means a foreign person—

(i) which, under the comprehensive income tax treaty described in subparagraph (A)(i), is eligible for a reduced rate of withholding with respect to ordinary dividends paid by a real estate investment trust even if such person holds more than 10 percent of the stock of such real estate investment trust,

(ii) which—

(I) is a publicly traded partnership (as defined in section 7704(b)) to which subsection (a) of section 7704 does not apply,

(II) is a withholding foreign partnership for purposes of chapters 3, 4, and 61,

(III) if such foreign partnership were a United States corporation, would be a United States real property holding corporation (determined without regard to paragraph (1)) at any time during the 5- year period ending on the date of disposition of, or distribution with respect to, such partnership's interests in a real estate investment trust, or

(iii) which is designated as a qualified collective investment vehicle by the Secretary and is either—

(I) fiscally transparent within the meaning of section 894, or

(II) required to include dividends in its gross income, but entitled to a deduction for distributions to persons holding interests (other than interests solely as a creditor) in such foreign person.

[2] See References in Text note below.

(4) Partnership allocations (A) In general

For the purposes of this subsection, in the case of an applicable investor who is a nonresident alien individual or a foreign corporation and is a partner in a partnership that is a qualified shareholder, if such partner's proportionate share of USRPI gain for the taxable year exceeds such partner's distributive share of USRPI gain for the taxable year, then

(i) such partner's distributive share of the amount of gain taken into account under subsection (a)(1) by the partner for the taxable year (determined without regard to this paragraph) shall be increased by the amount of such excess, and

(ii) such partner's distributive share of items of income or gain for the taxable year that are not treated as gain taken into account under subsection (a)(1) (determined without regard to this paragraph) shall be decreased (but not below zero) by the amount of such excess. **(B) USRPI gain**

For the purposes of this paragraph, the term ''USRPI gain'' means the excess (if any) of— (i) the sum of—

(I) any gain recognized from the disposition of a United States real property interest, and

(II) any distribution by a real estate investment trust that is treated as gain recognized from the sale or exchange of a United States real property interest, over

(ii) any loss recognized from the disposition of a United States real property interest.

(C) Proportionate share of USRPI gain

For purposes of this paragraph, an applicable investor's proportionate share of USRPI gain shall be determined on the basis of such investor's share of partnership items of income or gain (excluding gain allocated under section 704(c)), whichever results in the largest proportionate share. If the investor's share of partnership items of income or gain (excluding gain allocated under section 704(c)) may vary during the period such investor is a partner in the partnership, such share shall be the highest share such investor may receive.

(*l*) Exception for interests held by foreign pension funds (1) In general

This section shall not apply to any United States real property interest held directly (or indirectly through 1 or more partnerships) by, or to any distribution received from a real estate investment trust by—

(A) a qualified foreign pension fund, or

(B) any entity all of the interests of which are held by a qualified foreign pension fund. **(2) Qualified foreign pension fund**

For purposes of this subsection, the term ''qualified foreign pension fund'' means any

trust, corporation, or other organization or arrangement—

(A) which is created or organized under the law of a country other than the United

States,

(B) which is established to provide retirement or pension benefits to participants or beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered,

(C) which does not have a single participant or beneficiary with a right to more than five percent of its assets or income,

(D) which is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in the country in which it is established or operates, and

(E) with respect to which, under the laws of the country in which it is established or operates—

(i) contributions to such trust, corporation, organization, or arrangement which would otherwise be subject to tax under such laws are deductible or excluded from the gross income of such entity or taxed at a reduced rate, or

(ii) taxation of any investment income of such trust, corporation, organization or arrangement is deferred or such income is taxed at a reduced rate.

(3) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(Added Pub. L. 96–499, title XI, §1122(a), Dec. 5, 1980, 94 Stat. 2682; amended Pub. L. 97–34, title VIII, §831(a)(1), (b)–(d), (f), (g), Aug. 13, 1981, 95
Stat. 352–354; Pub. L. 97–248, title II, §201(d)(6), formerly §201(c)(6), Sept. 3, 1982, 96 Stat. 419, renumbered §201(d)(6), Pub. L. 97–448, title III,
§306(a)(1)(A)(i), Jan. 12, 1983, 96 Stat. 2400; Pub. L. 99–514, title VI, §631(e)(12), title VII,
§701(e)(4)(G), title XVIII, §1810(f)(1), Oct. 22, 1986, 100 Stat. 2275, 2343, 2826; Pub. L. 100–647, title I, §1006(e)(19), Nov. 10, 1988, 102 Stat. 3403; Pub. L. 101–508, title XI, §11801(a)(30), Nov. 5, 1990, 104 Stat. 1388–521; Pub. L. 103–66, title XIII, §13203(c)(2), Aug. 10, 1993, 107 Stat. 462; Pub. L. 104–188, title I, §1702(g)(2), Aug. 20, 1996, 110 Stat. 1873; Pub. L. 108–357, title IV, §§411(c), 418(a), Oct. 22, 2004, 118 Stat. 1504, 1512; Pub. L. 109–135, title IV, §403(p)(1), Dec. 21, 2005, 119 Stat. 2626; Pub. L. 109–222, title V, §§504(a), 505(a), 506(a), May 17, 2006, 120 Stat. 355, 357; Pub. L. 110–343, div. C, title II, §208(a), Oct. 3, 2008, 122 Stat. 3865; Pub. L. 111–312, title VII, §749(a), Dec. 17, 2010, 124 Stat. 3320; Pub. L. 112–240, title III, §321(a), Jan. 2, 2013, 126 Stat. 2332; Pub. L. 113–295, div. A, title I, §133(a), Dec. 19, 2014, 128 Stat. 4018; Pub. L. 114–113, div. Q, title I, §133(a), title III, §§322(a)(1), (2)(A), (b), 323(a), 325(a), Dec. 18, 2015, 129 Stat. 3055, 3098, 3101–3103; Pub. L. 115–97, title I, §12001(b)(3)(D), Dec. 22, 2017, 131 Stat. 2093.)

REFERENCES IN TEXT

Section 2 of the Investment Company Act of 1940, referred to in subsec. (h)(4)(E)(ii)(II), is classified to section 80a–2 of Title 15, Commerce and Trade.

Section 857(b)(3)(F), referred to in subsec. (k)(2)(C)(ii), was redesignated section 857(b)(3)(E) and a new subsec. (b)(3)(F) added by Pub. L. 115–97, title I,
§13001(b)(2)(K)(i), (iv), Dec. 22, 2017, 131 Stat. 2096, 2097.

AMENDMENTS

2017—Subsec. (a)(2)(A). Pub. L. 115–97 substituted ''section 55(b)(1)'' for ''section 55(b)(1)(A)'' in introductory provisions.

2015—Subsec. (c)(1)(A). Pub. L. 114–113, §322(a)(2)(A), inserted ''or subsection (k)'' after ''subparagraph (B)'' in introductory provisions.

Subsec. (c)(1)(B)(iii). Pub. L. 114–113, §325(a), added cl. (iii).

Subsec. (h)(4). Pub. L. 114–113, §322(b)(1)(B), inserted ''and special rules'' after ''Definitions'' in heading.

Subsec. (h)(4)(A). Pub. L. 114–113, §133(a), struck out cl. (i) designation and heading before ''The term 'qualified investment entity' means—'', redesignated subcls. (I) and (II) of former cl. (i) as cls. (i) and (ii), respectively, and struck out former cl. (ii). Prior to amendment, text of cl. (ii) read as follows: ''Clause (i)(II) shall not apply after December 31, 2014. Notwithstanding the preceding sentence, an entity described in clause (i)(II) shall be treated as a qualified investment entity for purposes of applying paragraphs (1) and (5) and section 1445 with respect to any distribution by the entity to a nonresident alien individual or a foreign corporation which is attributable directly or indirectly to a distribution to the entity from a real estate investment trust.''

Subsec. (h)(4)(A)(ii). Pub. L. 114–113, §322(b)(2), inserted ''and for purposes of determining whether a real estate investment trust is a domestically controlled qualified investment entity under this subsection'' after ''real estate investment trust''.

Subsec. (h)(4)(E). Pub. L. 114–113, §322(b)(1)(A), added subpar. (E).

Subsec. (k). Pub. L. 114–113, §322(a)(1), added subsec. (k).

Subsec. (*l*). Pub. L. 114–113, §323(a), added subsec. (*l*).

2014—Subsec. (h)(4)(A)(ii). Pub. L. 113–295 substituted ''December 31, 2014'' for ''December 31, 2013''. 2013—Subsec. (h)(4)(A)(ii). Pub. L. 112–240 substituted ''December 31, 2013'' for ''December 31, 2011''. 2010—Subsec. (h)(4)(A)(ii). Pub. L. 111–312 substituted ''December 31, 2011'' for ''December 31, 2009''. 2008—Subsec. (h)(4)(A)(ii). Pub. L. 110–343 substituted ''December 31, 2009'' for ''December 31, 2007''.

2006—Subsec. (h)(1). Pub. L. 109–222, §505(a)(1), in first sentence, substituted ''a nonresident alien individual, a foreign corporation, or other qualified investment entity'' for ''a nonresident alien individual or a foreign corporation'' and ''such nonresident alien individual, foreign corporation, or other qualified investment entity'' for ''such nonresident alien individual or foreign corporation'' and inserted second sentence and struck out former second sentence which read as follows: ''Notwithstanding the preceding sentence, any distribution by a real estate investment trust with respect to any class of stock which is regularly traded on an established securities market located in the United States shall not be treated as gain recognized from the sale or exchange of a United States real property interest if the shareholder did not own more than 5 percent of such class of stock at any time during the 1-year period ending on the date of the distribution.''

Subsec. (h)(4)(A)(i)(II). Pub. L. 109–222, §504(a), inserted ''which is a United States real property holding corporation or which would be a United States real property holding corporation if the exceptions provided in subsections (c)(3) and (h)(2) did not apply to interests in any real estate investment trust or regulated investment company'' after ''any regulated investment company''.

Subsec. (h)(4)(A)(ii). Pub. L. 109–222, §505(a)(2), inserted at end ''Notwithstanding the preceding sentence, an entity described in clause (i)(II) shall be treated as a qualified investment entity for purposes of applying paragraphs (1) and (5) and section 1445 with respect to any distribution by the entity to a nonresident alien individual or a foreign corporation which is attributable directly or indirectly to a distribution to the entity from a real estate investment trust.''

Subsec. (h)(5). Pub. L. 109–222, §506(a), added par. (5).

2005—Subsec. (h)(1). Pub. L. 109–135 substituted ''any distribution by a real estate investment trust with respect to any class of stock'' for ''any distribution by a REIT with respect to any class of stock'' and ''the 1- year period ending on the date of the distribution'' for ''the taxable year''.

2004—Subsec. (h). Pub. L. 108–357, §411(c)(5), substituted ''certain investment entities'' for ''REITS'' in heading.

Subsec. (h)(1). Pub. L. 108–357, §418(a), inserted at end ''Notwithstanding the preceding sentence, any distribution by a REIT with respect to any class of stock which is regularly traded on an established securities market located in the United States shall not be treated as gain recognized from the sale or exchange of a United States real property interest if the shareholder did not own more than 5 percent of such class of stock at any time during the taxable year.''

Pub. L. 108–357, §411(c)(1), substituted ''qualified investment entity'' for ''REIT'' in two places.

Subsec. (h)(2). Pub. L. 108–357, §411(c)(2), amended heading and text of par. (2) generally. Prior to amendment, text read as follows: ''The term 'United States real property interest' does not include any interest in a domestically-controlled REIT.''

Subsec. (h)(3). Pub. L. 108–357, §411(c)(2), amended heading and text of par. (3) generally. Prior to amendment, text read as follows: ''In the case of a domestically-controlled REIT, rules similar to the rules of subsection (d) shall apply to the foreign ownership percentage of any gain.''

Subsec. (h)(4)(A). Pub. L. 108–357, §411(c)(3), amended heading and text of subpar. (A) generally. Prior to amendment, text read as follows: ''The term 'REIT' means a real estate investment trust.''

Subsec. (h)(4)(B). Pub. L. 108–357, §411(c)(3), amended heading and text of subpar. (B) generally. Prior to amendment, text read as follows: ''The term 'domestically-controlled REIT' means a REIT in which at all times during the testing period less than 50 percent in value of the stock was held directly or indirectly by foreign persons.''

Subsec. (h)(4)(C), (D)(iii). Pub. L. 108–357, §411(c)(4), substituted ''qualified investment entity'' for ''REIT''. 1996—Subsec. (f). Pub. L. 104–188 struck out subsec. (f) which read as follows:

''(f) DISTRIBUTIONS BY DOMESTIC CORPORATIONS TO FOREIGN SHAREHOLDERS.—If a domestic corporation distributes a United States real property interest to a nonresident alien individual or a foreign corporation in a distribution to which section 301 applies, notwithstanding any other provision of this chapter, the basis of such United States real property interest in the hands of such nonresident alien individual or foreign corporation shall not exceed—

''(1) the adjusted basis of such property before the distribution, increased by

''(2) the sum of—

''(A) any gain recognized by the distributing corporation on the distribution, and

''(B) any tax paid under this chapter by the distributee on such distribution.''

1993—Subsec. (a)(2). Pub. L. 103–66 substituted ''Minimum'' for ''21-percent minimum'' in heading and ''the taxable excess for purposes of section 55(b)(1)(A) shall not be less than'' for ''the amount determined under section 55(b)(1)(A) shall not be less than 21 percent of'' in subpar. (A).

1990—Subsec. (k). Pub. L. 101–508 struck out subsec. (k) which read as follows: ''If—

''(1) a foreign corporation adopts, or has adopted, a plan of liquidation described in section 334(b)(2)(A), and

''(2) the 12-month period described in section 334(b)(2)(B) for the acquisition by purchase of the stock of the foreign corporation, began after December 31, 1979, and before November 26, 1980,

then such foreign corporation may make an election to be treated, for the period following June 18, 1980, as a domestic corporation pursuant to section 897(i)(1). Notwithstanding an election under the preceding sentence, any selling shareholder of such corporation shall be considered to have sold the stock of a foreign corporation.''

1988—Subsec. (*l*). Pub. L. 100–647 struck out subsec. (*l*) which provided special rule for certain United States shareholders of liquidating foreign corporations.

1986—Subsec. (a)(2). Pub. L. 99–514, §701(e)(4)(G), substituted ''21-percent'' for ''20-percent'' in heading and amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: ''In the case of any nonresident alien individual, the amount determined under section 55(a)(1) for the taxable year shall not be less than 20 percent of the lesser of—

''(i) the individual's alternative minimum taxable income (as defined in section 55(b)) for the taxable year, or

''(ii) the individual's net United States real property gain for the taxable year.''

Subsec. (d). Pub. L. 99–514, §631(e)(12), in heading, struck out '', etc.,'' after ''distributions'', and in text, struck out heading and designation for par. (1), redesignated subpar. (A) as par. (1), redesignated subpar. (B) as par. (2) and substituted ''paragraph (1)'' for ''subparagraph (A)'' in introductory provisions, redesignated cl. (i) and its subcls. (I) and (II) as subpar. (A) and cls. (i) and (ii), respectively, redesignated cl. (ii) as subpar. (B), and struck out former par. (2) which provided that section 337 not apply to any sale or exchange of a United States real property interest by a foreign corporation.

Subsec. (i)(1), (4). Pub. L. 99–514, §1810(f)(1), inserted reference to section 1445.

1982—Subsec. (a)(2)(A). Pub. L. 97–248 substituted ''section 55(a)(1) for the taxable year shall not be less than 20 percent of the lesser of—'' for ''section 55(a)(1)(A) for the taxable year shall not be less than 20 percent of whichever of the following is the least:'' in introductory provisions, in cl. (i) struck out ''(1)'' after ''section 55(b)'' and inserted ''or'' at the end, in cl. (ii) substituted a period for a comma and struck out ''or'' at the end, and struck out former cl. (iii), which had provided for the amount of $60,000 as a third alternative.

1981—Subsec. (c)(1)(A)(i). Pub. L. 97–34, §831(a)(1), defined ''United States real property interest'' to also mean an interest in real property located in the Virgin Islands.

Subsec. (c)(4)(B). Pub. L. 97–34, §831(b), substituted ''Assets'' for ''Interests'' in heading and in first sentence ''Under regulations prescribed by the Secretary, assets held by a partnership, trust or estate shall be treated as held'' for ''United States real property interests held by a partnership, trust, or estate shall be treated as owned'' before ''proportionately by its partners or beneficiaries'', and inserted provisions respecting treatment of an asset as used or held for use in a trade or business by a partner or beneficiary when used or held by the partnership, trust, or estate in a trade or business and attributing chain treatment of such trade or business to partnership, trust, or estate which are above the first such entity.

Subsec. (d)(1)(B). Pub. L. 97–34, §831(c), substituted ''Exceptions'' for ''Exception where there is a carryover basis'' in heading, inserted introductory text ''Gain shall not be recognized under subparagraph (A)'', inserted cls. (i)(I) and (ii), and substituted cl. (i)(II) the basis of the

distributed property in the hands of the distributee is no greater than the adjusted basis of such property before the distribution, increased by the amount of gain (if any) recognized by the distributing corporation'' for subpar. (B) provision ''Subparagraph (A) shall not apply if the basis of the distributed property in the hands of the distributee is the same as the adjusted basis of such property before the distribution increased by the amount of any gain recognized by the distributing corporation.''

Subsec. (i). Pub. L. 97–34, §831(d), in par. (1)(A) substituted ''holds a United States real property interest'' for ''has a permanent establishment in the United States'', in par. (1)(B) substituted ''treaty obligation of the United States the foreign corporation is entitled to nondiscriminatory treatment with respect to that interest'' for ''treaty, such permanent establishment may not be treated less favorably than domestic corporations carrying on the same activities'', in par. (3) inserted subpar. (A), designated existing provisions as subpar. (B), in subpar. (B) substituted ''such other conditions as the Secretary may prescribe by regulations with respect to the corporation or its shareholders'' for ''such conditions as may be prescribed by the Secretary'', and prescribed percentage interest required for making the requisite election and application of constructive ownership rules in determining existence of the required percentage of a class of interest.

Subsecs. (j) to (*l*). Pub. L. 97–34, §831(f), (g), added subsecs. (j) to (*l*).

EFFECTIVE DATE OF 2017 AMENDMENT

Amendment by Pub. L. 115–97 applicable to taxable years beginning after Dec. 31, 2017, see section 12001(c) of Pub. L. 115–97, set out as a note under section 11 of this title.

EFFECTIVE DATE OF 2015 AMENDMENT

Pub. L. 114–113, div. Q, title I, §133(b), Dec. 18, 2015, 129 Stat. 3055, provided that:

''(1) IN GENERAL.—The amendments made by this section [amending this section] shall take effect on January 1, 2015. Notwithstanding the preceding sentence, such amendments shall not apply with respect to the withholding requirement under section 1445 of the Internal Revenue Code of 1986 for any payment made before the date of the enactment of this Act [Dec. 18, 2015].

''(2) AMOUNTS WITHHELD ON OR BEFORE DATE OF ENACTMENT.—In the case of a regulated investment company—

''(A) which makes a distribution after December 31, 2014, and before the date of the enactment of this Act, and

''(B) which would (but for the second sentence of paragraph (1)) have been required to withhold with respect to such distribution under section 1445 of such

Code, such investment company shall not be liable to any person to whom such distribution was made for any amount so withheld and paid over to the Secretary of the Treasury.''

Amendment by section 322(a)(1), (2)(A) of Pub. L. 114–113 effective Dec. 18, 2015, and applicable to any disposition on and after Dec. 18, 2015, and any distribution by a real estate investment trust on or after such date which is treated as a deduction for a taxable year of such trust ending after such date, see section 322(c)(1) of Pub. L. 114–113, set out as a note under section 857 of this title.

Pub. L. 114–113, div. Q, title III, §322(c)(2), (3), Dec. 18, 2015, 129 Stat. 3102, provided that:

''(2) DETERMINATION OF DOMESTIC CONTROL.—The amendments made by subsection (b)(1) [amending this section] shall take effect on the date of the enactment of this Act [Dec. 18, 2015].

''(3) TECHNICAL AMENDMENT.—The amendment made by subsection (b)(2) [amending this section] shall take effect on January 1, 2015.''

Pub. L. 114–113, div. Q, title III, §323(c), Dec. 18, 2015, 129 Stat. 3103, provided that: ''The amendments made by this section [amending this section and section 1445 of this title] shall apply to dispositions and distributions after the date of the enactment of this Act [Dec. 18, 2015].''

Pub. L. 114–113, div. Q, title III, §325(b), Dec. 18, 2015, 129 Stat. 3103, provided that: ''The amendment made by this section [amending this section] shall apply to dispositions on or after the date of the enactment of this Act [Dec. 18, 2015].''

EFFECTIVE DATE OF 2014 AMENDMENT

Pub. L. 113–295, div. A, title I, §133(b), Dec. 19, 2014, 128 Stat. 4018, provided that:

''(1) IN GENERAL.—The amendment made by this section [amending this section] shall take effect on January 1, 2014. Notwithstanding the preceding sentence, such amendment shall not apply with respect to the withholding requirement under section 1445 of the Internal Revenue Code of 1986 for any payment made before the date of the enactment of this Act [Dec. 19, 2014].

''(2) AMOUNTS WITHHELD ON OR BEFORE DATE OF ENACTMENT.—In the case of a regulated investment company—

''(A) which makes a distribution after December 31, 2013, and before the date of the enactment of this Act, and

''(B) which would (but for the second sentence of paragraph (1)) have been required to withhold with respect to such distribution under section 1445 of such

Code, such investment company shall not be liable to any person to whom such distribution was made for any amount so withheld and paid over to the Secretary of the Treasury.''

EFFECTIVE DATE OF 2013 AMENDMENT

Pub. L. 112–240, title III, §321(b), Jan. 2, 2013, 126 Stat. 2332, provided that:

''(1) IN GENERAL.—The amendment made by subsection (a) [amending this section] shall take effect on January 1, 2012. Notwithstanding the preceding sentence, such amendment shall not apply with respect to the withholding requirement under section 1445 of the Internal Revenue Code of 1986 for any payment made before the date of the enactment of this Act [Jan. 2, 2013].

''(2) AMOUNTS WITHHELD ON OR BEFORE DATE OF ENACTMENT.—In the case of a regulated investment company—

''(A) which makes a distribution after December 31, 2011, and before the date of the enactment of this Act; and

''(B) which would (but for the second sentence of paragraph (1)) have been required to withhold with respect to such distribution under section 1445 of such

Code, such investment company shall not be liable to any person to whom such distribution was made for any amount so withheld and paid over to the Secretary of the Treasury.''

EFFECTIVE DATE OF 2010 AMENDMENT

Pub. L. 111–312, title VII, §749(b), Dec. 17, 2010, 124 Stat. 3320, provided that:

''(1) IN GENERAL.—The amendment made by subsection (a) [amending this section] shall take effect on January 1, 2010. Notwithstanding the preceding sentence, such amendment shall not apply with respect to the withholding requirement under section 1445 of the Internal Revenue Code of 1986 for any payment made before the date of the enactment of this Act [Dec. 17, 2010].

''(2) AMOUNTS WITHHELD ON OR BEFORE DATE OF ENACTMENT.—In the case of a regulated investment company—

''(A) which makes a distribution after December 31, 2009, and before the date of the enactment of this Act [Dec. 17, 2010]; and

''(B) which would (but for the second sentence of paragraph (1)) have been required to withhold with respect to such distribution under section 1445 of such

Code, such investment company shall not be liable to any person to whom such distribution was made for any amount so withheld and paid over to the Secretary of the Treasury.''

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–343, div. C, title II, §208(b), Oct. 3, 2008, 122 Stat. 3865, as amended by Pub. L. 113–295, div. A, title II, §211(a), Dec. 19, 2014, 128 Stat. 4032, provided that:

''(1) IN GENERAL.—The amendment made by subsection (a) [amending this section] shall take effect on January 1, 2008. Notwithstanding the preceding sentence, such amendment shall not apply with respect to the withholding requirement under section 1445 of the Internal Revenue Code of 1986 for any payment made before October 4, 2008.

''(2) AMOUNTS WITHHELD ON OR BEFORE DATE OF ENACTMENT.—In the case of a regulated investment company—

''(A) which makes a distribution after December 31, 2007, and before October 4, 2008, and

''(B) which would (but for the second sentence of paragraph (1)) have been required to withhold with respect to such distribution under section 1445 of such

Code, such investment company shall not be liable to any person to whom such distribution was made for any amount so withheld and paid over to the Secretary of the Treasury.''

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109–222, title V, §504(b), May 17, 2006, 120 Stat. 355, provided that: ''The amendment made by this section [amending this section] shall take effect as if included in the provisions of section 411 of the American Jobs Creation Act of 2004 [Pub. L. 108–357] to which it relates.''

Amendment by section 505(a) of Pub. L. 109–222 applicable to taxable years of qualified investment entities beginning after Dec. 31, 2005, except that no amount shall be required to be withheld under section 1441, 1442, or 1445 of the Internal Revenue Code of 1986 with respect to any distribution before May 17, 2006 if such amount was not otherwise required to be withheld under any such section as in effect before such amendments, see section 505(d) of Pub. L. 109–222, set out as a note under section 852 of this title.

Pub. L. 109–222, title V, §506(c), May 17, 2006, 120 Stat. 358, provided that: ''The amendments made by this section [amending this section and section 1445 of this title] shall apply to taxable years beginning after December 31, 2005, except that such amendments shall not apply to any distribution, or substitute dividend payment, occurring before the date that is 30 days after the date of the enactment of this Act [May 17, 2006].''

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–135 effective as if included in the provision of the American Jobs Creation Act of 2004, Pub. L. 108–357, to which such amendment relates, see section 403(nn) of Pub. L. 109–135, set out as a note under section 26 of this title.

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by section 411(c)(1) of Pub. L. 108–357 applicable to dividends with respect to taxable years of regulated investment companies beginning after Dec. 31, 2004, and amendment by section 411(c)(2)–(5) of Pub. L. 108–357 effective after Dec. 31, 2004, see section 411(d)(1), (3) of Pub. L. 108–357, set out as a note under section 871 of this title.

Amendment by section 418(a) of Pub. L. 108–357 applicable to any distribution by a real estate investment trust which is either treated as a deduction for a taxable year of such trust beginning after Oct. 22, 2004, or made after Oct. 22, 2004, and treated as a deduction under section 860 of this title for a taxable year of such trust beginning on or before Oct. 22, 2004, see section 418(c) of Pub. L. 108–357, as amended, set out as a note under section 857 of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–188 effective, except as otherwise expressly provided, as if included in the provision of the Revenue Reconciliation Act of 1990, Pub. L. 101–508, title XI, to which such amendment relates, see section 1702(i) of Pub. L. 104–188, set out as a note under section 38 of this title.

EFFECTIVE DATE OF 1993 AMENDMENT

Amendment by Pub. L. 103–66 applicable to taxable years beginning after Dec. 31, 1992, see section 13203(d) of Pub. L. 103–66, set out as a note under section 55 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99–514, to which such amendment relates, see section 1019(a) of Pub. L. 100–647, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 631(e)(12) of Pub. L. 99–514 applicable to any distribution in complete liquidation, and any sale or exchange, made by a corporation after July 31, 1986, unless such corporation is completely liquidated before Jan. 1, 1987, any transaction described in section 338 of this title for which the acquisition date occurs after Dec. 31, 1986, and any distribution, not in complete liquidation, made after Dec. 31, 1986, with exceptions and special and transitional rules, see section 633 of Pub. L. 99–514, set out as an Effective Date note under section 336 of this title.

Amendment by section 701(e)(4)(G) of Pub. L. 99–514 applicable to taxable years beginning after Dec. 31, 1986, with certain exceptions and qualifications, see section 701(f) of Pub. L. 99–514, set out as an Effective Date note under section 55 of this title.

Amendment by section 1810(f)(1) of Pub. L. 99–514 effective, except as otherwise provided, as if included in the provisions of the Tax Reform Act of 1984, Pub. L. 98–369, div. A, to which such amendment relates, see section 1881 of Pub. L. 99–514, set out as a note under section 48 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–248 applicable to taxable years beginning after Dec. 31, 1982, see section 201(e)(1) of Pub. L. 97–248, set out as a note under section 5 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Pub. L. 97–34, title VIII, §831(i), Aug. 13, 1981, 95 Stat. 355, provided that: ''The amendments made by this section [amending this section and sections 862 and 6039C of this title and provisions set out as a note below] shall apply to dispositions after June 18, 1980, in taxable years ending after such date.''

EFFECTIVE DATE

Pub. L. 96–499, title XI, §1125(a), (b), Dec. 5, 1980, 94 Stat. 2690, provided that:

''(a) IN GENERAL.—Except as provided in subsection (b), the amendments made by this subtitle [subtitle C (§§1121–1125) of title XI of Pub. L. 96–499, enacting this section and provisions set out as notes under this section, and amending sections 861, 871, 882 of this title] shall apply to dispositions after June 18, 1980.

''(b) REPORTING.—The amendments made by section 1123 [enacting section 6039C of this title and amending section 6652 of this title] shall apply to 1980 and subsequent calendar years. In applying such amendments to 1980, such calendar year shall be treated as beginning on June 19, 1980, and ending on December 31, 1980.''

SAVINGS PROVISION

For provisions that nothing in amendment by Pub. L. 101–508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101–508, set out as a note under section 45K of this title.

APPLICABILITY OF CERTAIN AMENDMENTS BY PUB. L. 99–514 IN RELATION TO TREATY OBLIGATIONS OF UNITED STATES

For applicability of amendment by section 701(e)(4)(G) of Pub. L. 99–514 notwithstanding any treaty obligation of the United States in effect on Oct. 22, 1986, with provision that for such purposes any amendment by title I of Pub. L. 100–647 be treated as if it had been included in the provision of Pub. L. 99–514 to which such amendment relates, see section 1012(aa)(2), (4) of Pub. L. 100–647, set out as a note under section 861 of this title.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1989

For provisions directing that if any amendments made by subtitle A or subtitle C of title XI [§§1101–1147 and 1171–1177] or title XVIII [§§1800–1899A] of Pub. L. 99–514 require an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after Jan. 1, 1989, see section 1140 of Pub. L. 99–514, as amended, set out as a note under section 401 of this title.

SPECIAL RULE FOR APPLYING SECTION 897

Pub. L. 99–514, title XII, §1228, Oct. 22, 1986, 100 Stat. 2560, as amended by Pub. L. 100–647, title I, §1012(m), Nov. 10, 1988, 102 Stat. 3513, provided that:

''(a) IN GENERAL.—For purposes of section 897 of the Internal Revenue Code of 1986, gain shall not be recognized on the transfer, sale, exchange, or other disposition, of shares of stock of a United States real property holding company, if—

''(1) such United States real property holding company is a Delaware corporation incorporated on January 17, 1984,

''(2) the transfer, sale, exchange, or other disposition is to any member of a qualified ownership group, ''(3) the recipient of the share of stock elects, for purposes of such section 897, a carryover basis in the transferred shares,

''(4) the transfer, sale, exchange, or other disposition is part of a single integrated plan, whereby the stock of the corporation described in paragraph (1) becomes owned directly by the 2 corporations specifically referred to in subsection (b) or by such 2 corporations and by 1 or both of their jointly owned direct subsidiaries,

''(5) within 20 days after each transfer, sale, exchange, or other disposition, the person making such transfer, sale, exchange, or other disposition notifies the Internal Revenue Service of the transaction, the date of the transaction, the basis of the stock involved, the holding period for such stock, and such other information as the Internal Revenue Service may require, and

''(6) the integrated plan is completed before the date 4 years after the date of the enactment of the Technical and Miscellaneous Revenue Act of 1988

[Nov. 10, 1988].

In the case of any underpayment attributable to a failure to meet any requirement of this subsection, the period during which such underpayment may be assessed shall in no event expire before the date 5 years after the date of the enactment of the Technical and Miscellaneous Revenue Act of 1988.

''(b) MEMBER OF A QUALIFIED OWNERSHIP GROUP.—For purposes of this section, the term 'member of a qualified ownership group' means a corporation incorporated on June 16, 1890, under the laws of the Netherlands or a corporation incorporated on October 18, 1897, under the laws of the United Kingdom or any corporation owned directly or indirectly by either or both such corporations.

''(c) [Repealed. Pub. L. 100–647, title I, §1012(m)(2), Nov. 10, 1988, 102 Stat. 3513.]

''(d) EFFECTIVE DATE.—The provisions of this section shall take effect on the date of the enactment of this section [Oct. 22, 1986].''

GAIN FROM DISPOSITION OF INVESTMENT IN UNITED STATES REAL PROPERTY BY NONRESIDENT ALIEN INDIVIDUALS AND FOREIGN CORPORATIONS

Pub. L. 96–499, title XI, §1125(c), Dec. 5, 1980, 94 Stat. 2690, as amended by Pub. L. 97–34, title VIII, §831(h), Aug. 13, 1981, 95 Stat. 355; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that:

''(1) IN GENERAL.—Except as provided in paragraph (2), after December 31, 1984, nothing in section 894(a) or 7852(d) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] or in any other provision of law shall be treated as requiring, by reason of any treaty obligation of the United States, an exemption from (or reduction of) any tax imposed by section 871 or 882 of such Code on a gain described in section 897 of such Code.

''(2) SPECIAL RULE FOR TREATIES RENEGOTIATED BEFORE 1985.—If—

''(A) any treaty (hereinafter in this paragraph referred to as the 'old treaty') is renegotiated to resolve conflicts between such treaty and the provisions of section 897 of the Internal Revenue Code of 1986, and

''(B) the new treaty is signed on or after January 1, 1981, and before January 1, 1985, then paragraph (1) shall be applied with respect to obligations under the old treaty by substituting for 'December 31, 1984' the date (not later than 2 years after the new treaty was signed) specified in the new treaty (or accompanying exchange of notes).''

ADJUSTMENT IN BASIS FOR CERTAIN TRANSACTIONS BETWEEN RELATED PERSONS

Pub. L. 96–499, title XI, §1125(d), Dec. 5, 1980, 94 Stat. 2691, as amended by Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that:

''(1) IN GENERAL.—In the case of any disposition after December 31, 1979, of a United States real property interest (as defined in section 897(c) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954]) to a related person (within the meaning of section 453(f)(1) of such Code), the basis of the interest in the hands of the per-

son acquiring it shall be reduced by the amount of any nontaxed gain.

''(2) NONTAXED GAIN.—For purposes of paragraph (1), the term 'nontaxed gain' means any gain which is not subject to tax under section 871(b)(1) or 882(a)(1) of such Code—

''(A) because the disposition occurred before June 19, 1980, or

''(B) because of any treaty obligation of the United States.''

§898. Taxable year of certain foreign corporations (a) General rule

For purposes of this title, the taxable year of any specified foreign corporation shall be the required year determined under subsection (c).

(b) Specified foreign corporation

For purposes of this section—

(1) In general

The term ''specified foreign corporation'' means any foreign corporation—

(A) which is treated as a controlled foreign corporation for any purpose under subpart F of part III of this subchapter, and

(B) with respect to which the ownership requirements of paragraph (2) are met.

(2) Ownership requirements (A) In general

The ownership requirements of this paragraph are met with respect to any foreign corporation if a United States shareholder owns, on each testing day, more than 50 percent of—

(i) the total voting power of all classes of stock of such corporation entitled to vote, or

(ii) the total value of all classes of stock of such corporation. **(B) Ownership**

For purposes of subparagraph (A), the rules of subsections (a) and (b) of section 958 shall apply in determining ownership.

(3) United States shareholder

The term ''United States shareholder'' has the meaning given to such term by section 951(b), except that, in the case of a foreign corporation having related person insurance income (as defined in section 953(c)(2)), the Secretary may treat any person as a United States shareholder for purposes of this section if such person is treated as a United States shareholder under section 953(c)(1).

(c) Determination of required year (1) In general

The required year is—

(A) the majority U.S. shareholder year, or (B) if there is no majority U.S. shareholder year, the taxable year prescribed under regulations.

(2) 1-month deferral allowed

A specified foreign corporation may elect, in lieu of the taxable year under paragraph (1)(A), a taxable year beginning 1 month earlier than the majority U.S. shareholder year.

(3) Majority U.S. shareholder year (A) In general

For purposes of this subsection, the term ''majority U.S. shareholder year'' means the

percent and shall be subject to such conditions as may be provided under regulations prescribed by the Secretary.

(Aug. 16, 1954, ch. 736, 68A Stat. 358; Pub. L. 91–172, title I, §§101(j)(22), 121(d)(2)(C), Dec. 30, 1969, 83 Stat. 528, 547; Pub. L. 94–455, title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834.)

AMENDMENTS

1976—Pub. L. 94–455 struck out ''or his delegate'' after ''Secretary'' in two places.

1969—Pub. L. 91–172, §101(j)(22), designated existing provisions as subsec. (a) and added subsec. (b).

Subsec. (a). Pub. L. 91–172, §121(d)(2)(C), substituted ''income'' for ''rents'' after ''this chapter shall apply to''.

EFFECTIVE DATE OF 1969 AMENDMENT

Amendment by section 101(j)(22) of Pub. L. 91–172 effective Jan. 1, 1970, see section 101(k)(1) of Pub. L. 91–172, set out as an Effective Date note under section 4940 of this title.

Amendment by section 121(d)(2)(C) of Pub. L. 91–172 applicable to taxable years beginning after Dec. 31, 1969, see section 121(g) of Pub. L. 91–172, set out as a note under section 511 of this title.

§1444. Withholding on Virgin Islands source income

For purposes of determining the withholding tax liability incurred in the Virgin Islands pursuant to this title (as made applicable to the Virgin Islands) with respect to amounts received from sources within the Virgin Islands by citizens and resident alien individuals of the United States, and corporations organized in the United States, the rate of withholding tax under sections 1441 and 1442 on income subject to tax under section 871(a)(1) or 881 shall not exceed the rate of tax on such income under section 871(a)(1) or 881, as the case may be.

(Added Pub. L. 97–455, §1(b), Jan. 12, 1983, 96 Stat. 2497; amended Pub. L. 100–647, title I, §1012(x), Nov. 10, 1988, 102 Stat. 3530.)

AMENDMENTS

1988—Pub. L. 100–647 struck out ''(as modified by section 934A)'' before ''shall not exceed''.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99–514, to which such amendment relates, see section 1019(a) of Pub. L. 100–647, set out as a note under section 1 of this title.

EFFECTIVE DATE

Section applicable to payments made after Jan. 12, 1983, see section 1(e)(2) of Pub. L. 97–455, set out as a note under section 934 of this title.

§1445. Withholding of tax on dispositions of United States real property interests (a) General rule

Except as otherwise provided in this section, in the case of any disposition of a United States real property interest (as defined in section 897(c)) by a foreign person, the transferee shall be required to deduct and withhold a tax equal to 15 percent of the amount realized on the disposition.

(b) Exemptions (1) In general

No person shall be required to deduct and withhold any amount under subsection (a) with respect to a disposition if paragraph (2), (3), (4), (5), or (6) applies to the transaction.

(2) Transferor furnishes nonforeign affidavit

Except as provided in paragraph (7), this paragraph applies to the disposition if the transferor furnishes to the transferee an affidavit by the transferor stating, under penalty of perjury, the transferor's United States taxpayer identification number and that the transferor is not a foreign person.

(3) Nonpublicly traded domestic corporation furnishes affidavit that interests in corporation not United States real property interests

Except as provided in paragraph (7), this paragraph applies in the case of a disposition of any interest in any domestic corporation if the domestic corporation furnishes to the transferee an affidavit by the domestic corporation stating, under penalty of perjury, that—

(A) the domestic corporation is not and has not been a United States real property holding corporation (as defined in section 897(c)(2)) during the applicable period specified in section 897(c)(1)(A)(ii), or

(B) as of the date of the disposition, interests in such corporation are not United States real property interests by reason of section 897(c)(1)(B).

(4) Transferee receives qualifying statement (A) In general

This paragraph applies to the disposition if the transferee receives a qualifying statement at such time, in such manner, and subject to such terms and conditions as the Secretary may by regulations prescribe.

(B) Qualifying statement

For purposes of subparagraph (A), the term ''qualifying statement'' means a statement by the Secretary that— (i) the transferor either—

(I) has reached agreement with the Secretary (or such agreement has been reached by the transferee) for the payment of any tax imposed by section 871(b)(1) or 882(a)(1) on any gain recognized by the transferor on the disposition of the United States real property interest, or

(II) is exempt from any tax imposed by section 871(b)(1) or 882(a)(1) on any gain recognized by the transferor on the disposition of the United States real property interest, and

(ii) the transferor or transferee has satisfied any transferor's unsatisfied withholding liability or has

provided adequate security to cover such liability.

(5) Residence where amount realized does not exceed $300,000

This paragraph applies to the disposition if—

(A) the property is acquired by the transferee for use by him as a residence, and

(B) the amount realized for the property does not exceed $300,000.

(6) Stock regularly traded on established securities market

This paragraph applies if the disposition is of a share of a class of stock that is regularly traded on an established securities market. **(7) Special rules for paragraphs (2), (3), and (9)**

Paragraph (2), (3), or (9) (as the case may be) shall not apply to any disposition— (A) if—

(i) the transferee or qualified substitute has actual knowledge that the affidavit referred to in such paragraph, or the statement referred to in paragraph (9)(A)(ii), is false, or

(ii) the transferee or qualified substitute receives a notice (as described in subsection (d)) from a

transferor's agent, transferee's agent, or qualified substitute that such affidavit or statement is false, or

(B) if the Secretary by regulations requires the transferee or qualified substitute to furnish a copy of such affidavit or statement to the Secretary and the transferee or qualified substitute fails to furnish a copy of such affidavit or statement to the Secretary at such time and in such manner as required by such regulations.

(8) Applicable wash sales transactions

No person shall be required to deduct and withhold any amount under subsection (a) with respect to a disposition which is treated as a disposition of a United States real property interest solely by reason of section 897(h)(5).

(9) Alternative procedure for furnishing nonforeign affidavit

For purposes of paragraphs (2) and (7)—

(A) In general

Paragraph (2) shall be treated as applying to a transaction if, in connection with a disposition of a United States real property interest—

(i) the affidavit specified in paragraph (2) is furnished to a qualified substitute, and

(ii) the qualified substitute furnishes a statement to the transferee stating, under penalty of perjury, that the qualified substitute has such affidavit in his possession. **(B) Regulations**

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out this paragraph.

(c) Limitations on amount required to be withheld (1) Cannot exceed transferor's maximum tax liability (A) In general

The amount required to be withheld under this section with respect to any disposition shall not exceed the amount (if any) determined under subparagraph (B) as the transferor's maximum tax liability.

(B) Request

At the request of the transferor or transferee, the Secretary shall determine, with respect to any disposition, the transferor's maximum tax liability. **(C) Refund of excess amounts withheld**

Subject to such terms and conditions as the Secretary may by regulations prescribe, a transferor may seek and obtain a refund of any amounts withheld under this section in excess of the transferor's maximum tax liability.

(2) Authority of Secretary to prescribe reduced amount

At the request of the transferor or transferee, the Secretary may prescribe a reduced amount to be withheld under this section if the Secretary determines that to substitute such reduced amount will not jeopardize the collection of the tax imposed by section 871(b)(1) or 882(a)(1). **(3)**

Procedural rules (A)

Regulations

Requests for—

(i) qualifying statements under sub-section (b)(4),

(ii) determinations of transferor's maximum tax liability under paragraph (1), and (iii) reductions under paragraph (2) in the amount required to be withheld,

shall be made at the time and manner, and shall include such information, as the Secretary shall prescribe by regulations. **(B) Requests to be handled within 90 days**

The Secretary shall take action with respect to any request described in subparagraph (A) within 90 days after the Secretary receives the request.

(4) Reduced rate of withholding for residence where amount realized does not exceed $1,000,000

In the case of a disposition—

(A) of property which is acquired by the transferee for use by the transferee as a residence,

(B) with respect to which the amount realized for such property does not exceed $1,000,000, and

(C) to which subsection (b)(5) does not apply,

subsection (a) shall be applied by substituting ''10 percent'' for ''15 percent''.

(d) Liability of transferor's agents, transferee's agents, or qualified substitutes (1) Notice of false affidavit; foreign corporations

If—

(A) the transferor furnishes the transferee or qualified substitute an affidavit described in paragraph (2) of subsection (b) or a domestic corporation furnishes the transferee an affidavit described in paragraph (3) of subsection (b), and

(B) in the case of— (i) any transferor's agent—

(I) such agent has actual knowledge that such affidavit is false, or

(II) in the case of an affidavit described in subsection (b)(2) furnished by a corporation, such corporation is a foreign corporation, or

(ii) any transferee's agent or qualified substitute, such agent or substitute has actual knowledge that such affidavit is false,

such agent or qualified substitute shall so notify the transferee at such time and in such manner as the Secretary shall require by regulations.

(2) Failure to furnish notice (A) In general

If any transferor's agent, transferee's agent, or qualified substitute is required by paragraph (1) to furnish notice, but fails to furnish such notice at such time or times and in such manner as may be required by regulations, such agent or substitute shall have the same duty to deduct and withhold that the transferee would have had if such agent or substitute had complied with paragraph (1).

(B) Liability limited to amount of compensation

An agent's or substitute's liability under subparagraph (A) shall be limited to the amount of compensation the agent or substitute derives from the transaction.

(3) Transferor's agent

For purposes of this subsection, the term ''transferor's agent'' means any person who represents the transferor—

(A) in any negotiation with the transferee or any transferee's agent related to the transaction, or

(B) in settling the transaction.

(4) Transferee's agent

For purposes of this subsection, the term ''transferee's agent'' means any person who represents the transferee—

(A) in any negotiation with the transferor or any transferor's agent related to the transaction, or

(B) in settling the transaction.

(5) Settlement officer not treated as transferor's agent

For purposes of this subsection, a person shall not be treated as a transferor's agent or transferee's agent with respect to any transaction merely because such person performs 1 or more of the following acts:

(A) The receipt and the disbursement of any portion of the consideration for the transaction.

(B) The recording of any document in connection with the transaction.

(e) Special rules relating to distributions, etc., by corporations, partnerships, trusts, or estates (1) Certain domestic partnerships, trusts, and estates

In the case of any disposition of a United States real property interest as defined in sec**§1445**

tion 897(c) (other than a disposition described in paragraph (4) or (5)) by a domestic partnership, domestic trust, or domestic estate, such partnership, the trustee of such trust, or the executor of such estate (as the case may be) shall be required to deduct and withhold under subsection (a) a tax equal to 35 percent (or, to the extent provided in regulations, 20 percent) of the gain realized to the extent such gain— (A) is allocable to a foreign person who is a partner or beneficiary of such partnership, trust, or estate, or

(B) is allocable to a portion of the trust treated as owned by a foreign person under subpart E of part I of subchapter J.

(2) Certain distributions by foreign corporations

In the case of any distribution by a foreign corporation on which gain is recognized under subsection (d) or (e) of section 897, the foreign corporation shall deduct and withhold under subsection (a) a tax equal to 35 percent of the amount of gain recognized on such distribution under such subsection.

(3) Distributions by certain domestic corporations to foreign shareholders

If a domestic corporation which is or has been a United States real property holding corporation (as defined in section 897(c)(2)) during the applicable period specified in section 897(c)(1)(A)(ii) distributes property to a foreign person in a transaction to which section 302 or part II of subchapter C applies, such corporation shall deduct and withhold under subsection (a) a tax equal to 15 percent of the amount realized by the foreign shareholder. The preceding sentence shall not apply if, as of the date of the distribution, interests in such corporation are not United States real property interests by reason of section 897(c)(1)(B). Rules similar to the rules of the preceding provisions of this paragraph shall apply in the case of any distribution to which section 301 applies and which is not made out of the earnings and profits of such a domestic corporation.

(4) Taxable distributions by domestic or foreign partnerships, trusts, or estates

A domestic or foreign partnership, the trustee of a domestic or foreign trust, or the executor of a domestic or foreign estate shall be required to deduct and withhold under subsection (a) a tax equal to 15 percent of the fair market value (as of the time of the taxable distribution) of any United States real property interest distributed to a partner of the partnership or a beneficiary of the trust or estate, as the case may be, who is a foreign person in a transaction which would constitute a taxable distribution under the regulations promulgated by the Secretary pursuant to section 897.

(5) Rules relating to dispositions of interest in partnerships, trusts, or estates

To the extent provided in regulations, the transferee of a partnership interest or of a beneficial interest in a trust or estate shall be required to deduct and withhold under subsection (a) a tax equal to 15 percent of the amount realized on the disposition.

(6) Distributions by regulated investment companies and real estate investment trusts

If any portion of a distribution from a qualified investment entity (as defined in section 897(h)(4)) to a nonresident alien individual or a foreign corporation is treated under section 897(h)(1) as gain realized by such individual or corporation from the sale or exchange of a United States real property interest, the qualified investment entity shall deduct and withhold under subsection (a) a tax equal to 35 percent (or, to the extent provided in regulations, 20 percent) of the amount so treated.

(7) Regulations

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subsection, including regulations providing for exceptions from provisions of this subsection and regulations for the application of this subsection in the case of payments through 1 or more entities. **(f) Definitions**

For purposes of this section—

(1) Transferor

The term ''transferor'' means the person disposing of the United States real property interest.

(2) Transferee

The term ''transferee'' means the person acquiring the United States real property interest.

(3) Foreign person

The term ''foreign person'' means any person other than—

(A) a United States person, and

(B) except as otherwise provided by the Secretary, an entity with respect to which section 897 does not apply by reason of subsection (l) thereof.

(4) Transferor's maximum tax liability

The term ''transferor's maximum tax liability'' means, with respect to the disposition of any interest, the sum of—

(A) the maximum amount which the Secretary determines could be imposed as tax under section 871(b)(1) or 882(a)(1) by reason of the disposition, plus

(B) the amount the Secretary determines to be the transferor's unsatisfied withholding liability with respect to such interest.

(5) Transferor's unsatisfied withholding liability

The term ''transferor's unsatisfied withholding liability'' means the withholding obligation imposed by this section on the transferor's acquisition of the United States real property interest or on the acquisition of a predecessor interest, to the extent such obligation has not been satisfied.

(6) Qualified substitute

The term ''qualified substitute'' means, with respect to a disposition of a United States real property interest—

(A) the person (including any attorney or title company) responsible for closing the transaction, other than the transferor's agent, and

(B) the transferee's agent.

(Added Pub. L. 98–369, div. A, title I, §129(a)(1), July 18, 1984, 98 Stat. 655; amended Pub. L. 99–514, title III, §311(b)(4), title XVIII,

§1810(f)(2)–(4)(A), (5), (6), (8), Oct. 22, 1986, 100 Stat. 2219, 2827, 2828; Pub. L. 100–647, title I, §1003(b)(3), Nov. 10, 1988, 102 Stat. 3384; Pub. L. 103–66, title XIII, §13221(c)(3), Aug. 10, 1993, 107 Stat. 477; Pub. L. 104–188, title I, §1704(c)(1), Aug. 20, 1996, 110 Stat. 1878; Pub. L. 105–34, title III, §311(c)(1), Aug. 5, 1997, 111 Stat. 835; Pub. L. 108–27, title III, §301(a)(2)(C), May 28, 2003, 117 Stat. 758; Pub. L. 109–222, title V, §§505(b), 506(b), May 17, 2006, 120 Stat. 356, 358; Pub. L. 110–289, div. C, title I, §3024(a)–(c), July 30, 2008, 122 Stat. 2895; Pub. L. 112–240, title I, §102(c)(1)(C), (3), Jan. 2, 2013, 126 Stat. 2319; Pub. L. 114–113, div. Q, title III, §§323(b), 324(a), (b), Dec. 18, 2015, 129 Stat. 3103.)

AMENDMENTS

2015—Subsec. (a). Pub. L. 114–113, §324(a), substituted ''15 percent'' for ''10 percent''.

Subsec. (c)(4). Pub. L. 114–113, §324(b), added par. (4).

Subsec. (e)(3) to (5). Pub. L. 114–113, §324(a), substituted ''15 percent'' for ''10 percent''.

Subsec. (f)(3). Pub. L. 114–113, §323(b), substituted ''any person other than—'' for ''any person other than a United States person.'' and added subpars. (A) and (B).

2013—Subsec. (e)(1). Pub. L. 112–240, §102(c)(1)(C), substituted ''20 percent'' for ''15 percent'' in introductory provisions.

Subsec. (e)(6). Pub. L. 112–240, §102(c)(3), substituted ''20 percent'' for ''15 percent (20 percent in the case of taxable years beginning after December 31, 2010)''.

2008—Subsec. (b)(7). Pub. L. 110–289, §3024(c)(1), amended par. (7) generally. Prior to amendment, par. (7) related to special rules for paragraphs (2) and (3).

Subsec. (b)(9). Pub. L. 110–289, §3024(a), added par. (9).

Subsec. (d). Pub. L. 110–289, §3024(c)(2)(C), substituted '', transferee's agents, or qualified substitutes'' for ''or transferee's agents'' in heading.

Subsec. (d)(1). Pub. L. 110–289, §3024(c)(2)(A), amended par. (1) generally. Prior to amendment, par. (1) related to notice of false affidavit; foreign corporations.

Subsec. (d)(2). Pub. L. 110–289, §3024(c)(2)(B), amended par. (2) generally. Prior to amendment, par. (2) related to failure to furnish notice.

Subsec. (f)(6). Pub. L. 110–289, §3024(b), added par. (6). 2006—Subsec. (b)(8). Pub. L. 109–222, §506(b), added par. (8).

Subsec. (e)(6), (7). Pub. L. 109–222, §505(b), added par. (6) and redesignated former par. (6) as (7).

2003—Subsec. (e)(1). Pub. L. 108–27 substituted ''15 percent'' for ''20 percent''.

1997—Subsec. (e)(1). Pub. L. 105–34 substituted ''20 percent'' for ''28 percent'' in introductory provisions.

1996—Subsec. (e)(3). Pub. L. 104–188 inserted at end ''Rules similar to the rules of the preceding provisions of this paragraph shall apply in the case of any distribution to which section 301 applies and which is not made out of the earnings and profits of such a domestic corporation.''

1993—Subsec. (e)(1), (2). Pub. L. 103–66 substituted ''35 percent'' for ''34 percent''.

1988—Subsec. (e)(1). Pub. L. 100–647 inserted ''(or, to the extent provided in regulations, 28 percent)'' after ''to 34 percent''.

1986—Subsec. (b)(3). Pub. L. 99–514, §1810(f)(2), amended par. (3) generally, substituting ''interests in corporation not United States real property interests'' for ''it is not a United States real property holding corporation'' in heading, striking out the comma before ''if the domestic corporation'' in introductory provisions, inserting subpar. (A) designation and adding subpar. (B).

Subsec. (d)(1)(A). Pub. L. 99–514, §1810(f)(3)(B), substituted ''paragraph (2)'' for ''paragraph (2)(A)''.

Subsec. (d)(1)(B)(i). Pub. L. 99–514, §1810(f)(3)(A), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: ''any transferor's agent, the transferor is a foreign corporation or such agent has actual knowledge that such affidavit is false, or''. Subsec. (e)(1). Pub. L. 99–514, §311(b)(4), substituted ''34 percent'' for ''28 percent''.

Pub. L. 99–514, §1810(f)(4), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''A domestic partnership, the trustee of a domestic trust, or the executor of a domestic estate shall be required to deduct and withhold under subsection (a) a tax equal to 10 percent of any amount of which such partnership, trustee, or executor has custody which is— ''(A) attributable to the disposition of a United States real property interest (as defined in section 897(c), other than a disposition described in paragraph (4) or (5)), and

''(B) either—

''(i) includible in the distributive share of a partner of the partnership who is a foreign person,

''(ii) includible in the income of a beneficiary of the trust or estate who is a foreign person, or

''(iii) includible in the income of a foreign person under the provisions of section 671.'' Subsec. (e)(2). Pub. L. 99–514, §311(b)(4), substituted ''34 percent'' for ''28 percent''.

Subsec. (e)(3). Pub. L. 99–514, §1810(f)(5), inserted ''The preceding sentence shall not apply if, as of the date of the distribution, interests in such corporation are not United States real property interests by reason of section 897(c)(1)(B).''

Subsec. (e)(4). Pub. L. 99–514, §1810(f)(6), substituted ''section 897'' for ''section 897(g)''.

Subsec. (e)(6). Pub. L. 99–514, §1810(f)(8), inserted ''and regulations for the application of this subsection in the case of payments through 1 or more entities''.

EFFECTIVE DATE OF 2015 AMENDMENT

Amendment by section 323(b) of Pub. L. 114–113 applicable to dispositions and distributions after Dec. 18, 2015, see section 323(c) of Pub. L. 114–113, set out as a note under section 897 of this title.

Pub. L. 114–113, div. Q, title III, §324(c), Dec. 18, 2015, 129 Stat. 3103, provided that: ''The amendments made by this section [amending this section] shall apply to dispositions after the date which is 60 days after the date of the enactment of this Act [Dec. 18, 2015].''

EFFECTIVE DATE OF 2013 AMENDMENT

Amendment by Pub. L. 112–240 applicable to taxable years beginning after Dec. 31, 2012 and applicable to amounts paid on or after Jan. 1, 2013, see section 102(d) of Pub. L. 112–240, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–289, div. C, title I, §3024(d), July 30, 2008, 122 Stat. 2896, provided that: ''The amendments made by this section [amending this section] shall apply to dispositions of United States real property interests after the date of the enactment of this Act [July 30, 2008].''

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by section 505(b) of Pub. L. 109–222 applicable to taxable years of qualified investment entities beginning after Dec. 31, 2005, except that no amount shall be required to be withheld under section 1441, 1442, or 1445 of the Internal Revenue Code of 1986 with respect to any distribution before May 17, 2006 if such amount was not otherwise required to be withheld under any such section as in effect before such amend-

ments, see section 505(d) of Pub. L. 109–222, set out as a note under section 852 of this title.

Amendment by section 506(b) of Pub. L. 109–222 applicable to taxable years beginning after Dec. 31, 2005, except that such amendments shall not apply to any distribution, or substitute dividend payment, occurring before the date that is 30 days after May 17, 2006, see section 506(c) of Pub. L. 109–222, set out as a note under section 897 of this title.

EFFECTIVE DATE OF 2003 AMENDMENT

Amendment by Pub. L. 108–27 applicable to amounts paid after May 28, 2003, see section 301(d)(2) of Pub. L. 108–27, set out as an Effective and Termination Dates of 2003 Amendment note under section 1 of this title.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–34 applicable only to amounts paid after Aug. 5, 1997, see section 311(d)(2) of Pub. L. 105–34, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

Pub. L. 104–188, title I, §1704(c)(2), Aug. 20, 1996, 110 Stat. 1878, provided that: ''The amendment made by paragraph (1) [amending this section] shall apply to distributions after the date of the enactment of this Act [Aug. 20, 1996].''

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–647, title I, §1003(b)(3), Nov. 10, 1988, 102 Stat. 3384, provided that the amendment made by that section is effective for taxable years beginning after Dec. 31, 1987.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 311(b)(4) of Pub. L. 99–514 applicable to payments made after Dec. 31, 1986, see section 311(c) of Pub. L. 99–514, as amended, set out as a note under section 1201 of this title.

Amendment by section 1810(f)(2), (3), (5), (6), (8) of Pub. L. 99–514 effective, except as otherwise provided, as if included in the provisions of the Tax Reform Act of 1984, Pub. L. 98–369, div. A, to which such amendment relates, see section 1881 of Pub. L. 99–514, set out as a note under section 48 of this title.

Pub. L. 99–514, title XVIII, §1810(f)(4)(B), Oct. 22, 1986, 100 Stat. 2827, provided that: ''The amendment made by subparagraph (A) [amending this section] shall apply to dispositions after the day 30 days after the date of the enactment of this Act [Oct. 22, 1986].''

EFFECTIVE DATE

Pub. L. 98–369, div. A, title I, §129(c)(1), July 18, 1984, 98 Stat. 660, provided that: ''The amendment made by subsection (a) [enacting this section] shall apply to any disposition on or after January 1, 1985.''

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1989

For provisions directing that if any amendments made by subtitle A or subtitle C of title XI [§§1101–1147 and 1171–1177] or title XVIII [§§1800–1899A] of Pub. L. 99–514 require an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after Jan. 1, 1989, see section 1140 of Pub. L. 99–514, as amended, set out as a note under section 401 of this title.

§1446. Withholding tax on foreign partners' share of effectively connected income (a) General rule

If—

(1) a partnership has effectively connected taxable income for any taxable year, and

(2) any portion of such income is allocable under section 704 to a foreign partner,

[§1564

IV, §401(c), (d), Dec. 30, 1969, 83 Stat. 602; Pub. L. 91–373, title I, §102(b), Aug. 10, 1970, 84 Stat. 696; Pub. L. 94–455, title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub. L. 98–369, div. A, title II, §211(b)(22), July 18, 1984, 98 Stat. 757; Pub. L. 99–514, title X, §1024(c)(17), Oct. 22, 1986, 100 Stat. 2408; Pub. L. 100–647, title I, §1018(s)(3)(A), Nov. 10, 1988, 102 Stat. 3587; Pub. L. 108–357, title VIII, §900(a), (b), Oct. 22, 2004, 118 Stat. 1650.)

AMENDMENTS

2004—Subsec. (a)(2). Pub. L. 108–357, §900(a), substituted ''possessing'' for ''possessing—'', struck out ''(B)'' before ''more than 50 percent of the total combined voting power'', and struck out subpar. (A) which read as follows: ''at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and''.

Subsec. (f)(5). Pub. L. 108–357, §900(b), added par. (5).

1988—Subsec. (d)(1)(B). Pub. L. 100–647 substituted ''paragraphs (1), (2), and (3) of subsection (e)'' for ''subsection (e)(1)''.

1986—Subsec. (b)(2)(D). Pub. L. 99–514 struck out ''or section 821'' after ''section 801''.

1984—Subsecs. (a)(4), (b)(2)(D). Pub. L. 98–369 substituted ''section 801'' for ''section 802''.

1976—Subsecs. (b)(4), (f)(3)(B). Pub. L. 94–455 struck out ''or his delegate'' after ''Secretary''.

1970—Subsec. (f)(1). Pub. L. 91–373 substituted ''by paragraphs (1) and (2) of section 2131(d)'' for ''in section 3306(i)''.

1969—Subsec. (a)(2). Pub. L. 91–172, §401(c), redesignated existing provisions with minor changes as par. (A) and added par. (B).

Subsec. (c)(2)(A)(iv). Pub. L. 91–172, §401(d)(1), added cl. (iv).

Subsec. (c)(2)(B). Pub. L. 91–172, §401(d)(2), substituted ''5 or fewer persons who are individuals, estates, or trusts (referred to in this subparagraph as 'common owners') own'' for ''a person who is an individual, estate, or trust (referred to in this paragraph as 'common owner') owns'' and in cl. (ii), substituted ''any of such common owners'', ''any of the common owners'' for ''such common owner'' and ''the common owner'', respectively and added cl. (iii).

EFFECTIVE DATE OF 2004 AMENDMENT

Pub. L. 108–357, title VIII, §900(c), Oct. 22, 2004, 118 Stat. 1650, provided that: ''The amendments made by this section [amending this section] shall apply to taxable years beginning after the date of the enactment of this Act [Oct. 22, 2004].''

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–647, title I, §1018(s)(3)(B), Nov. 10, 1988, 102 Stat. 3587, provided that: ''The amendment made by subparagraph (A) [amending this section] shall apply to taxable years beginning after the date of the enactment of this Act [Nov. 10, 1988].''

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–514 applicable to taxable years beginning after Dec. 31, 1986, see section 1024(e) of Pub. L. 99–514, set out as a note under section 831 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–369 applicable to taxable years beginning after Dec. 31, 1983, see section 215 of Pub. L. 98–369, set out as an

Effective Date note under section 801 of this title.

EFFECTIVE DATE OF 1969 AMENDMENT

Amendment by Pub. L. 91–172 applicable with respect to taxable years ending on or after Dec. 31, 1970, see section 401(h)(3) of Pub. L. 91–172, set out as a note under section 1561 of this title.

EFFECTIVE DATE

Section applicable with respect to taxable years ending after Dec. 31, 1963, see section 235(d) of Pub. L. 88–272, set out as an Effective Date of 1964 Amendment note under section 269 of this title.

[§1564. Repealed. Pub. L. 101–508, title XI, §11801(a)(38), Nov. 5, 1990, 104 Stat. 1388–521]

Section, added Pub. L. 91–172, title IV, §401(b)(1), Dec. 30, 1969, 83 Stat. 600; amended Pub. L. 94–455, title XIX, §§1901(b)(1)(J)(vi), (21)(A)(ii), 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1791, 1797, 1834, related to transitional rules in the case of certain controlled corporations.

SAVINGS PROVISION

For provisions that nothing in repeal by Pub. L. 101–508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101–508, set out as a note under section 45K of this title.

Subtitle B—Estate and Gift Taxes

Chapter		Sec.[1]
11.	Estate tax	2001
12.	Gift tax	2501
13.	Tax on generation-skipping transfers	2601
14.	Special valuation rules	2701
15.	Gifts and bequests from expatriates	2801

AMENDMENTS

2008—Pub. L. 110–245, title III, §301(b)(2), June 17, 2008, 122 Stat. 1646, added item for chapter 15. 1990—Pub. L. 101–508, title XI, §11602(c), Nov. 5, 1990, 104 Stat. 1388–500, added item for chapter 14.

1986—Pub. L. 99–514, title XIV, §1431(b), Oct. 22, 1986, 100 Stat. 2729, struck out ''certain'' after ''Tax on'' in item for chapter 13.

1976—Pub. L. 94–455, title XX, §2006(b)(1), Oct. 4, 1976, 90 Stat. 1888, added item for chapter 13.

CHAPTER 11—ESTATE TAX

Subchapter		Sec.[2]
A.	Estates of citizens or residents	2001
B.	Estates of nonresidents not citizens	2101
C.	Miscellaneous	2201

Subchapter A—Estates of Citizens or Residents

Part	
I.	Tax imposed.
II.	Credits against tax.
III.	Gross estate.
IV.	Taxable estate.

PART I—TAX IMPOSED

Sec.
2001. Imposition and rate of tax. 2002. Liability for payment.

AMENDMENTS

1976—Pub. L. 94–455, title XX, §2001(c)(1)(N)(i), Oct. 4, 1976, 90 Stat. 1853, substituted ''Imposition and rate of tax'' for ''Rate of tax'' in item 2001.

§2001. Imposition and rate of tax (a) Imposition

A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

(b) Computation of tax

The tax imposed by this section shall be the amount equal to the excess (if any) of—

(1) a tentative tax computed under subsection (c) on the sum of— (A) the amount of the taxable estate, and (B) the amount of the adjusted taxable gifts, over

(2) the aggregate amount of tax which would have been payable under chapter 12 with respect to gifts made by the decedent after December 31, 1976, if the modifications

[1] Section numbers editorially supplied.

[2] Section numbers editorially supplied.

described in subsection (g) had been applicable at the time of such gifts.

For purposes of paragraph (1)(B), the term ''adjusted taxable gifts'' means the total amount of the taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts which are includible in the gross estate of the decedent. **(c) Rate schedule**

If the amount with respect to which the tentative tax to be computed is:	The tentative tax is:
Not over $10,000	18 percent of such amount.
Over $10,000 but not over $20,000.	$1,800, plus 20 percent of the excess of such amount over $10,000.
Over $20,000 but not over $40,000.	$3,800, plus 22 percent of the excess of such amount over $20,000.
Over $40,000 but not over $60,000.	$8,200 plus 24 percent of the excess of such amount over $40,000.
Over $60,000 but not over $80,000.	$13,000, plus 26 percent of the excess of such amount over $60,000.
Over $80,000 but not over $100,000.	$18,200, plus 28 percent of the excess of such amount over $80,000.
Over $100,000 but not over $150,000.	$23,800, plus 30 percent of the excess of such amount over $100,000.
Over $150,000 but not over $250,000.	$38,800, plus 32 percent of the excess of such amount over $150,000.
Over $250,000 but not over $500,000.	$70,800, plus 34 percent of the excess of such amount over $250,000.
Over $500,000 but not over $750,000.	$155,800, plus 37 percent of the excess of such amount over $500,000.
Over $750,000 but not over $1,000,000.	$248,300, plus 39 percent of the excess of such amount over $750,000.
Over $1,000,000	$345,800, plus 40 percent of the excess of such amount over $1,000,000.

(d) Adjustment for gift tax paid by spouse

For purposes of subsection (b)(2), if—

(1) the decedent was the donor of any gift one-half of which was considered under section 2513 as made by the decedent's spouse, and

(2) the amount of such gift is includible in the gross estate of the decedent,

any tax payable by the spouse under chapter 12 on such gift (as determined under section 2012(d)) shall be treated as a tax payable with respect to a gift made by the decedent.

(e) Coordination of sections 2513 and 2035 If—

(1) the decedent's spouse was the donor of any gift one-half of which was considered under section 2513 as made by the decedent, and

(2) the amount of such gift is includible in the gross estate of the decedent's spouse by reason of section 2035,

such gift shall not be included in the adjusted taxable gifts of the decedent for purposes of subsection (b)(1)(B), and the aggregate amount determined under subsection (b)(2) shall be reduced by the amount (if any) determined under subsection (d) which was treated as a tax payable by the decedent's spouse with respect to such gift. **(f) Valuation of gifts**

(1) In general

If the time has expired under section 6501 within which a tax may be assessed under chapter 12 (or under corresponding provisions of prior laws) on—

(A) the transfer of property by gift made during a preceding calendar period (as defined in section 2502(b)); or

(B) an increase in taxable gifts required under section 2701(d),

the value thereof shall, for purposes of computing the tax under this chapter, be the value as finally determined for purposes of chapter 12.

(2) Final determination

For purposes of paragraph (1), a value shall be treated as finally determined for purposes of chapter 12 if—

(A) the value is shown on a return under such chapter and such value is not contested by the Secretary before the expiration of the time referred to in paragraph (1) with respect to such return;

(B) in a case not described in subparagraph (A), the value is specified by the Secretary and such value is not timely contested by the taxpayer; or

(C) the value is determined by a court or pursuant to a settlement agreement with the Secretary.

For purposes of subparagraph (A), the value of an item shall be treated as shown on a return if the item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

(g) Modifications to tax payable (1) Modifications to gift tax payable to reflect different tax rates

For purposes of applying subsection (b)(2) with respect to 1 or more gifts, the rates of tax under subsection (c) in effect at the decedent's death shall, in lieu of the rates of tax in effect at the time of such gifts, be used both to compute—

(A) the tax imposed by chapter 12 with respect to such gifts, and

(B) the credit allowed against such tax under section 2505, including in computing— (i) the applicable credit amount under section 2505(a)(1), and

(ii) the sum of the amounts allowed as a credit for all preceding periods under section 2505(a)(2).

(2) Modifications to estate tax payable to reflect different basic exclusion amounts

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out this section with respect to any difference between—

(A) the basic exclusion amount under section 2010(c)(3) applicable at the time of the decedent's death, and

(B) the basic exclusion amount under such section applicable with respect to any gifts made by the decedent.

(Aug. 16, 1954, ch. 736, 68A Stat. 373; Pub. L. 94–455, title XX, §2001(a)(1), Oct. 4, 1976, 90 Stat. 1846; Pub. L. 95–600, title VII, §702(h)(1), Nov. 6, 1978, 92 Stat. 2930; Pub. L. 97–34, title IV, §402(a)–(c), Aug. 13, 1981, 95 Stat. 300; Pub. L. 98–369, div. A, title I, §21(a), July 18, 1984, 98 Stat. 506; Pub. L. 100–203, title X, §10401(a)–(b)(2)(A), Dec. 22, 1987, 101 Stat. 1330–430, 1330–431; Pub. L. 103–66, title XIII, §13208(a)–(b)(2), Aug. 10, 1993, 107 Stat. 469; Pub. L. 105–34, title V, §§501(a)(1)(D), 506(a), Aug. 5, 1997, 111 Stat. 845, 855; Pub. L. 105–206, title VI, §6007(e)(2)(B), July 22, 1998, 112 Stat. 810; Pub. L. 105–277, div. J, title IV, §4003(c), Oct. 21, 1998, 112 Stat. 2681–909; Pub. L. 107–16, title V, §511(a)–(c), June 7, 2001, 115 Stat. 70; Pub. L. 111–312, title III, §302(a)(2), (d)(1), Dec. 17, 2010, 124 Stat. 3301,

3302; Pub. L. 112–240, title I, §101(c)(1), Jan. 2, 2013, 126 Stat. 2317; Pub. L. 115–97, title I, §11061(b), Dec. 22, 2017, 131 Stat. 2091.)

AMENDMENTS

2017—Subsec. (g). Pub. L. 115–97 amended subsec. (g) generally. Prior to amendment, text read as follows: ''For purposes of applying subsection (b)(2) with respect to 1 or more gifts, the rates of tax under subsection (c) in effect at the decedent's death shall, in lieu of the rates of tax in effect at the time of such gifts, be used both to compute—

''(1) the tax imposed by chapter 12 with respect to such gifts, and

''(2) the credit allowed against such tax under section 2505, including in computing— ''(A) the applicable credit amount under section 2505(a)(1), and

''(B) the sum of the amounts allowed as a credit for all preceding periods under section 2505(a)(2).''

2013—Subsec. (c). Pub. L. 112–240 substituted in table separate tentative tax rates for amounts over $500,000 but not over $750,000, over $750,000 but not over $1,000,000, and over $1,000,000, respectively, for single tentative tax rate for amounts over $500,000.

2010—Subsec. (b)(2). Pub. L. 111–312, §302(d)(1)(A), substituted ''if the modifications described in subsection (g)'' for ''if the provisions of subsection (c) (as in effect at the decedent's death)''.

Subsec. (c). Pub. L. 111–312, §302(a)(2), struck out par. (1) designation

and heading preceding table, substituted in table a single tentative tax rate for any amount over $500,000 for separate tentative tax rates for amounts ranging from over $500,000 to over $2,500,000, and struck out par. (2) which related to phasedown of maximum rate of tax.

Subsec. (g). Pub. L. 111–312, §302(d)(1)(B), added subsec. (g).

2001—Subsec. (c)(1). Pub. L. 107–16, §511(a), substituted in table provisions that if the amount on which the tax is computed is over $2,500,000, then the tentative tax is $1,025,800, plus 50% of the excess over $2,500,000 for provisions that if the amount on which the tax is computed is over $2,500,000 but not over $3,000,000, then the tentative tax is $1,025,800, plus 53% of the excess over $2,500,000, and if the amount on which the tax is computed is over $3,000,000, then the tentative tax is $1,290,800, plus 55% of the excess over $3,000,000.

Subsec. (c)(2). Pub. L. 107–16, §511(c), added par. (2).

Pub. L. 107–16, §511(b), struck out heading and text of par. (2). Text read as follows: ''The tentative tax determined under paragraph (1) shall be increased by an amount equal to 5 percent of so much of the amount (with respect to which the tentative tax is to be computed) as exceeds $10,000,000 but does not exceed the amount at which the average tax rate under this section is 55 percent.''

1998—Subsec. (f). Pub. L. 105–206, §6007(e)(2)(B), reenacted heading without change and amended text generally. Prior to amendment, text read as follows: ''If—

''(1) the time has expired within which a tax may be assessed under chapter 12 (or under corresponding provisions of prior laws) on the transfer of property by gift made during a preceding calendar period (as defined in section 2502(b)), and

''(2) the value of such gift is shown on the return for such preceding calendar period or is disclosed in such return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such gift,

the value of such gift shall, for purposes of computing the tax under this chapter, be the value of such gift as finally determined for purposes of chapter 12.''

Subsec. (f)(2). Pub. L. 105–277 inserted concluding provisions.

1997—Subsec. (c)(2). Pub. L. 105–34, §501(a)(1)(D), substituted ''the amount at which the average tax rate under this section is 55 percent'' for ''$21,040,000''.

Subsec. (f). Pub. L. 105–34, §506(a), added subsec. (f).

1993—Subsec. (c)(1). Pub. L. 103–66, §13208(a), substituted in table provisions that if the amount on which the tax is computed is over $2,500,000 but not over $3,000,000, then the tentative tax is $1,025,800, plus 53% of the excess over $2,500,000 and if the amount on which the tax is computed is over $3,000,000, then the tentative tax is $1,290,800, plus 55% of the excess over $3,000,000 for provisions that if the amount on which the tax is computed is over $2,500,000, then the tentative tax is $1,025,800, plus 50% of the excess over $2,500,000.

Subsec. (c)(2), (3). Pub. L. 103–66, §13208(b)(1), (2), redesignated par. (3) as (2), struck out ''($18,340,000 in the case of decedents dying, and gifts made, after 1992)'' after ''exceed $21,040,000'', and struck out former par. (2) which related to the rates of tax on estates under this section for the years 1982 to 1992.

1987—Subsec. (b)(1). Pub. L. 100–203, §10401(b)(2)(A)(i), substituted ''under subsection (c)'' for ''in accordance with the rate schedule set forth in subsection (c)''.

Subsec. (b)(2). Pub. L. 100–203, §10401(b)(2)(A)(ii), substituted ''the provisions of subsec. (c)'' for ''the rate schedule set forth in subsection (c)''.

Subsec. (c)(2)(A). Pub. L. 100–203, §10401(a)(1), substituted ''1993'' for ''1988''.

Subsec. (c)(2)(D). Pub. L. 100–203, §10401(a)(2), (3), substituted in heading ''After 1983 and before 1993'' for ''For 1984, 1985, 1986, or 1987'', and in text ''after 1983 and before 1993'' for ''in 1984, 1985, 1986, or 1987''.

Subsec. (c)(3). Pub. L. 100–203, §10401(b)(1), added par. (3).

1984—Subsec. (c)(2)(A), (D). Pub. L. 98–369 substituted ''1988'' for ''1985'' in subpar. (A) and substituted ''1984, 1985, 1986, or 1987'' for ''1984'' in heading and text of subpar. (D).

1981—Subsec. (b)(2). Pub. L. 97–34, §402(c), inserted ''which would have been'' before ''payable'' and '', if the rate schedule set forth in subsection (c) (as in effect at the decedent's death) had been applicable at the time of such gifts'' after ''December 31, 1976,''.

Subsec. (c). Pub. L. 97–34, §402(a), (b)(1), designated existing provision as par. (1), inserted heading ''In general'' and substituted in table provision that if the amount computed is over $2,500,000 then the tentative tax is $1,025,800 plus 50% of the excess over $2,500,000 for provisions that if the amount computed is over $2,500,000 but not over $3,000,000, then the tentative tax is $1,025,800 plus 53% of the excess over $2,500,000, over $3,000,000 but not over $3,500,000 then the tentative tax is $1,290,000 plus 57% of the excess over $3,000,000, over $3,500,000 but not over $4,000,000 then the tentative tax is $1,575,800 plus 61% of the excess over $3,500,000, over $4,000,000 but not over $4,500,000 then the tentative tax is $1,880,800 plus 65% of the excess over $4,000,000, over $4,500,000 but not over $5,000,000 then the tentative tax is $2,205,800 plus 69% of the excess over $4,500,000, over $5,000,000 then the tentative tax is $2,550,800 plus 70% of the excess over $5,000,000, and added par. (2).

1978—Subsec. (e). Pub. L. 95–600 added subsec. (e).

1976—Pub. L. 94–455 substituted provisions setting a unified rate schedule for estate and gift taxes ranging from 18 percent for the first $10,000 in taxable transfers to 70 percent of taxable transfers in excess of $5,000,000, with provision for adjustments for gift taxes paid by spouses, for provisions setting an estate tax of 3 percent of the first $5,000 of the taxable estate to 77 percent of the taxable estate in excess of $10,000,000.

EFFECTIVE DATE OF 2017 AMENDMENT

Pub. L. 115–97, title I, §11061(c), Dec. 22, 2017, 131 Stat. 2091, provided that: ''The amendments made by this section [amending this section and section 2010 of this title] shall apply to estates of decedents dying and gifts made after December 31, 2017.''

EFFECTIVE DATE OF 2013 AMENDMENT

Pub. L. 112–240, title I, §101(c)(3), Jan. 2, 2013, 126 Stat. 2318, provided that:

''(A) IN GENERAL.—Except as otherwise provided by in this paragraph, the amendments made by this subsection [amending this section and section 2010 of this title] shall apply to estates of decedents dying, generation-skipping transfers, and gifts made, after December 31, 2012.

''(B) TECHNICAL CORRECTION.—The amendment made by paragraph (2) [amending section 2010 of this title] shall take effect as if included in the amendments made by section 303 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 [Pub. L. 111–312].''

EFFECTIVE DATE OF 2010 AMENDMENT

Pub. L. 111–312, title III, §302(f), Dec. 17, 2010, 124 Stat. 3302, as amended by Pub. L. 113–295, div. A, title II, §206(b)(2), Dec. 19, 2014, 128 Stat. 4027, provided that: ''Except as otherwise provided in this section, the amendments made by this section [amending this section and sections 2010, 2502, 2505 and 2511 of this title] shall apply to estates of decedents dying, generation- skipping transfers, and gifts made, after December 31, 2009.''

EFFECTIVE DATE OF 2001 AMENDMENT

Pub. L. 107–16, title V, §511(f)(1), (2), June 7, 2001, 115 Stat. 71, provided that:

''(1) SUBSECTIONS (a) AND (b).—The amendments made by subsections (a) and (b) [amending this section] shall apply to estates of decedents dying, and gifts made, after December 31, 2001.

''(2) SUBSECTION (c).—The amendment made by subsection (c) [amending this section] shall apply to estates of decedents dying, and gifts made, after December 31, 2002.''

EFFECTIVE DATE OF 1998 AMENDMENTS

Amendment by Pub. L. 105–277 effective as if included in the provision of the Taxpayer Relief Act of 1997, Pub. L. 105–34, to which such amendment relates, see section 4003(*l*) of Pub. L. 105–277, set out as a note under section 86 of this title.

Amendment by Pub. L. 105–206 effective, except as otherwise provided, as if included in the provisions of the Taxpayer Relief Act of 1997, Pub. L. 105–34, to which such amendment relates, see section 6024 of Pub. L. 105–206, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1997 AMENDMENT

Pub. L. 105–34, title V, §501(f), Aug. 5, 1997, 111 Stat. 847, as amended by Pub. L. 105–206, title VI, §6007(a)(2), July 22, 1998, 112 Stat. 807, provided that: ''The amendments made by this section [amending this section and sections 2010, 2032A, 2102, 2503, 2505, 2631, 6018, and 6601 of this title] (other than the amendment made by subsection (d) [amending section 2631 of this title]) shall apply to the estates of decedents dying, and gifts made, after December 31, 1997.''

Pub. L. 105–34, title V, §506(e)(1), Aug. 5, 1997, 111 Stat. 856, as amended by Pub. L. 105–206, title VI, §6007(e)(1), July 22, 1998, 112 Stat. 809, provided that: ''The amendments made by subsections (a), (c), and (d) [enacting section 7477 of this title and amending this section and section 2504 of this title] shall apply to gifts made after the date of the enactment of this Act [Aug. 5, 1997].''

EFFECTIVE DATE OF 1993 AMENDMENT

Pub. L. 103–66, title XIII, §13208(c), Aug. 10, 1993, 107 Stat. 469, provided that: ''The amendments made by this section [amending this section and section 2101 of this title] shall apply in the case of decedents dying and gifts made after December 31, 1992.''

EFFECTIVE DATE OF 1987 AMENDMENT

Pub. L. 100–203, title X, §10401(c), Dec. 22, 1987, 101 Stat. 1330–431, provided that: ''The amendments made by this section [amending this section and section 2502 of this title] shall apply in the case of decedents dying, and gifts made, after December 31, 1987.''

EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98–369, div. A, title I, §21(b), July 18, 1984, 98 Stat. 506, provided that: ''The amendments made by subsection (a) [amending this section] shall apply to the estates of decedents dying after, and gifts made after, December 31, 1983.''

EFFECTIVE DATE OF 1981 AMENDMENT

Pub. L. 97–34, title IV, §402(d), Aug. 13, 1981, 95 Stat. 301, provided that: ''The amendments made by this section [amending this section] shall apply to estates of decedents dying after, and gifts made after, December 31, 1981.''

EFFECTIVE DATE OF 1978 AMENDMENT

Pub. L. 95–600, title VII, §702(h)(3), Nov. 6, 1978, 92 Stat. 2931, provided that: ''The amendments made by this subsection [amending this section and section 2602 of this title] shall apply with respect to the estates of decedents dying after December 31, 1976, except that such amendments shall not apply to transfers made before January 1, 1977.''

EFFECTIVE DATE OF 1976 AMENDMENT

Pub. L. 94–455, title XX, §2001(d)(1), Oct. 4, 1976, 90 Stat. 1854, provided that: ''The amendments made by subsections (a) [enacting section 2010, amending this section and sections 2012 and 2035, and repealing section 2052 of this title] and (c)(1) [amending sections 2011, 2012, 2013, 2014, 2038, 2044, 2101, 2102, 2104, 2106, 2107, 2206, 2207, and 6018 of this title] shall apply to the estates of decedents dying after December 31, 1976; except that the amendments made by subsection (a)(5) [amending section 2035 of this title] and subparagraphs (K) and (L) of subsection (c)(1) [amending sections 2038 and 2104 of this title] shall not apply to transfers made before January 1, 1977.''

SHORT TITLE

Pub. L. 91–614, §1(a), Dec. 31, 1970, 84 Stat. 1836, provided that: ''This Act [enacting section 6905 of this title, section 1232a of Title 15, Commerce and Trade, and section 1033 of former Title 31, Money and Finance,

§2002

amending sections 56, 1015, 1223, 2012, 2032, 2055, 2204, 2501, 2502, 2503, 2504, 2512, 2513, 2515, 2521, 2522, 2523, 4061, 4063, 4216, 4251, 4491, 6019, 6040, 6075, 6091, 6161, 6212, 6214, 6324, 6412, 6416, 6501, 6504, and 6512 of this title, and enacting provisions set out as notes under sections 56, 2032, 2204, 2501, 4063, 4216, 4251, 4491, and 6905 of this title] may be cited as the 'Excise, Estate, and Gift Tax Adjustment Act of 1970'.''

SPECIAL ELECTION WITH RESPECT TO ESTATES OF DECEDENTS DYING IN 2010

Pub. L. 111–312, title III, §301(c), Dec. 17, 2010, 124 Stat. 3300, provided that: ''Notwithstanding subsection (a) [amending sections 121, 170, 684, 1014, 1040, 1221, 1246, 1291, 1296, 4947, 6018, 6019, 6075, and 7701 of this title and repealing sections 1022, 2210, 2664, and 6716 of this title], in the case of an estate of a decedent dying after December 31, 2009, and before January 1, 2011, the executor (within the meaning of section 2203 of the Internal Revenue Code of 1986) may elect to apply such Code as though the amendments made by subsection (a) do not apply with respect to chapter 11 of such Code and with respect to property acquired or passing from such decedent (within the meaning of section 1014(b) of such Code). Such election shall be made at such time and in such manner as the Secretary of the Treasury or the Secretary's delegate shall provide. Such an election once made shall be revocable only with the consent of the Secretary of the Treasury or the Secretary's delegate. For purposes of section 2652(a)(1) of such Code, the determination of whether any property is subject to the tax imposed by such chapter 11 shall be made without regard to any election made under this sub-section.''

CLARIFICATION OF TREATMENT OF CERTAIN EXEMPTIONS FOR PURPOSES OF FEDERAL ESTATE AND GIFT TAXES

Pub. L. 98–369, div. A, title VI, §641, July 18, 1984, 98 Stat. 939, as amended by Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that:

''(a) GENERAL RULE.—Nothing in any provision of law exempting any property (or interest therein) from taxation shall exempt the transfer of such property (or interest therein) from Federal estate, gift, and generation-skipping transfer taxes. In the case of any provision of law enacted after the date of the enactment of this Act [July 18, 1984], such provision shall not be treated as exempting the transfer of property from Federal estate, gift, and generation-skipping transfer taxes unless it refers to the appropriate provisions of the Internal Revenue Code of 1986 [formerly I.R.C. 1954].

''(b) EFFECTIVE DATE.—

''(1) IN GENERAL.—The provisions of subsection (a) shall apply to the estates of decedents dying, gifts made, and transfers made on or after June 19, 1984.

''(2) TREATMENT OF CERTAIN TRANSFERS TREATED AS TAXABLE.—The provisions of subsection (a) shall also apply in the case of any transfer of property (or interest therein) if at any time there was filed an estate or gift tax return showing such transfer as subject to Federal estate or gift tax.

''(3) NO INFERENCE.—No inference shall arise from paragraphs (1) and (2) that any transfer of property (or interest therein) before June 19, 1984, is exempt from Federal estate and gift taxes.''

REPORTS WITH TRANSFERS OF PUBLIC HOUSING BONDS

Pub. L. 98–369, div. A, title VI, §642, July 18, 1984, 98 Stat. 939, provided that:

''(a) GENERAL RULE.—With respect to transfers of public housing bonds occurring after December 31, 1983, and before June 19, 1984, the taxpayer shall report the date and amount of such transfer and such other information as the Secretary of the Treasury or his delegate shall prescribe by regulations to allow the determination of the tax and interest due if it is ultimately determined that such transfers are subject to estate, gift, or generation-skipping tax.

''(b) PENALTY FOR FAILURE TO REPORT.—Any taxpayer failing to provide the information required by subsection (a) shall be liable for a penalty equal to 25 percent of the excess of (1) the estate, gift, or generation- skipping tax that is payable assuming that such transfers are subject to tax, over (2) the tax payable assuming such transfers are not so subject.''

§2002. Liability for payment

The tax imposed by this chapter shall be paid by the executor.

(Aug. 16, 1954, ch. 736, 68A Stat. 374; Pub. L. 98–369, div. A, title V, §544(b)(1), July 18, 1984, 98 Stat. 894; Pub. L. 101–239, title VII, §7304(b)(2)(A), Dec. 19, 1989, 103 Stat. 2353.)

AMENDMENTS

1989—Pub. L. 101–239 substituted ''The'' for ''Except as provided in section 2210, the''.

1984—Pub. L. 98–369 inserted exception phrase.

EFFECTIVE DATE OF 1989 AMENDMENT

Pub. L. 101–239, title VII, §7304(b)(3), Dec. 19, 1989, 103 Stat. 2353, provided that: ''The amendments made by this subsection [amending this section and section 6018 of this title and repealing section 2210 of this title] shall apply to estates of decedents dying after July 12, 1989.''

EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98–369, div. A, title V, §544(d), July 18, 1984, 98 Stat. 894, provided that: ''The amendments made by this section [enacting section 2210 of this title and amending this section and sections 6018 and 6166 of this title] shall apply to those estates of decedents which are required to file returns on a date (including any extensions) after the date of enactment of this Act [July 18, 1984].''

PART II—CREDITS AGAINST TAX

Sec.
2010. Unified credit against estate tax. [2011. Repealed.]
2012. Credit for gift tax.
2013. Credit for tax on prior transfers.
2014. Credit for foreign death taxes.
2015. Credit for death taxes on remainders. 2016. Recovery of taxes claimed as credit.

AMENDMENTS

2014—Pub. L. 113–295, div. A, title II, §221(a)(95)(A)(i), Dec. 19, 2014, 128 Stat. 4051, which directed amendment of part II of subchapter A of chapter 11 of this title by striking item 2011 from the table of sections for ''such subpart'', was executed by striking item 2011 ''Credit for State death taxes'' from the table of sections for this part, to reflect the probable intent of Congress. 2004—Pub. L. 108–311, title IV, §408(a)(20), Oct. 4, 2004, 118 Stat. 1192, added item 2011.

2001—Pub. L. 107–16, title V, §532(c)(13), June 7, 2001, 115 Stat. 75, struck out item 2011 ''Credit for State death taxes''.

1976—Pub. L. 94–455, title XX, §2001(c)(1)(N)(ii), Oct. 4, 1976, 90 Stat. 1853, added item 2010.

§2010. Unified credit against estate tax (a) General rule

A credit of the applicable credit amount shall be allowed to the estate of every decedent against the tax imposed by section 2001.

(b) Adjustment to credit for certain gifts made before 1977

The amount of the credit allowable under subsection (a) shall be reduced by an amount equal to 20 percent of the aggregate amount allowed

termined by deducting from the value of the gross estate the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). **(b) Period of limitations**

The deduction allowed by this section shall include only such taxes as were actually paid and deduction therefor claimed before the later of—

(1) 4 years after the filing of the return required by section 6018, or

(2) if—

(A) a petition for redetermination of a deficiency has been filed with the Tax Court within the time prescribed in section 6213(a), the expiration of 60 days after the decision of the Tax Court becomes final,

(B) an extension of time has been granted under section 6161 or 6166 for payment of the tax shown on the return, or of a deficiency, the date of the expiration of the period of the extension, or

(C) a claim for refund or credit of an overpayment of tax imposed by this chapter has been filed within the time prescribed in section 6511, the latest of the expiration of—

(i) 60 days from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of any part of such claim, (ii) 60 days after a decision by any court of competent jurisdiction becomes final with respect to a timely suit instituted upon such claim, or

(iii) 2 years after a notice of the waiver of disallowance is filed under section 6532(a)(3).

Notwithstanding sections 6511 and 6512, refund based on the deduction may be made if the claim for refund is filed within the period provided in the preceding sentence. Any such refund shall be made without interest.

(Added Pub. L. 107–16, title V, §532(b), June 7, 2001, 115 Stat. 73.)

EFFECTIVE DATE

Section applicable to estates of decedents dying, and generation-skipping transfers, after Dec. 31, 2004, see section 532(d) of Pub. L. 107–16, set out as an Effective Date of 2001 Amendment note under section 2012 of this title.

Subchapter B—Estates of Nonresidents Not Citizens

Sec.
2101. Tax imposed.
2102. Credits against tax.
2103. Definition of gross estate.
2104. Property within the United States.
2105. Property without the United States.
2106. Taxable estate.
2107. Expatriation to avoid tax.
2108. Application of pre-1967 estate tax provisions.

AMENDMENTS

1966—Pub. L. 89–809, title I, §108(h), Nov. 13, 1966, 80 Stat. 1574, added items 2107 and 2108.

§2101. Tax imposed (a) Imposition

Except as provided in section 2107, a tax is hereby imposed on the transfer of the taxable estate (determined as provided in section 2106) of every decedent nonresident not a citizen of the United States.

(b) Computation of tax

The tax imposed by this section shall be the amount equal to the excess (if any) of— (1) a tentative tax computed under section 2001(c) on the sum of—

(A) the amount of the taxable estate, and (B) the amount of the adjusted taxable gifts, over

(2) a tentative tax computed under section 2001(c) on the amount of the adjusted taxable gifts.

(c) Adjustments for taxable gifts (1) Adjusted taxable gifts defined

For purposes of this section, the term ''adjusted taxable gifts'' means the total amount of the taxable gifts (within the meaning of section 2503 as modified by section 2511) made by the decedent after December 31, 1976, other than gifts which are includible in the gross estate of the decedent.

(2) Adjustment for certain gift tax

For purposes of this section, the rules of section 2001(d) shall apply.

(Aug. 16, 1954, ch. 736, 68A Stat. 397; Pub. L. 89–809, title I, §108(a), Nov. 13, 1966, 80 Stat. 1571; Pub. L. 94–455, title XX, §2001(c)(1)(D), Oct. 4, 1976, 90 Stat. 1850; Pub. L. 100–647, title V, §5032(a), (c), Nov. 10, 1988, 102 Stat. 3669; Pub. L. 101–239, title VII, §7815(c), Dec. 19, 1989, 103 Stat. 2415; Pub. L. 103–66, title XIII, §13208(b)(3), Aug. 10, 1993, 107 Stat. 469; Pub. L. 107–147, title IV, §411(g)(2), Mar. 9, 2002, 116 Stat. 46.)

AMENDMENTS

2002—Subsec. (b). Pub. L. 107–147 struck out concluding provisions which read as follows: ''For purposes of the preceding sentence, there shall be appropriate adjustments in the application of section 2001(c)(2) to reflect the difference between the amount of the credit provided under section 2102(c) and the amount of the credit provided under section 2010.'' 1993—Subsec. (b). Pub. L. 103–66 substituted ''section 2001(c)(2)'' for ''section 2001(c)(3)'' in last sentence.

1989—Subsec. (b). Pub. L. 101–239 inserted at end ''For purposes of the preceding sentence, there shall be appropriate adjustments in the application of section 2001(c)(3) to reflect the difference between the amount of the credit provided under section 2102(c) and the amount of the credit provided under section 2010.''

1988—Subsec. (b). Pub. L. 100–647, §5032(a), substituted ''a tentative tax computed under section 2001(c)'' for ''a tentative tax computed in accordance with the rate schedule set forth in subsection (d)'' in pars. (1) and (2).

Subsec. (d). Pub. L. 100–647, §5032(c), struck out subsec. (d) which provided a rate schedule.

1976—Pub. L. 94–455 redesignated existing provisions as (a) to (d),

inserted provisions for adjustments for taxable gifts, revised the tax rate schedule, and struck out provisions relating to property held by Alien Property Custodian.

1966—Subsec. (a). Pub. L. 89–809 substituted table to be used in computing the tax imposed on transfer of taxable estate, determined as provided in section 2106, of every decedent nonresident not a citizen of the United States for provisions sending taxpayer to table in section 2001 for computation of tax imposed.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–147 effective as if included in the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, to which such amendment relates, see section 411(x) of Pub. L. 107–147, set out as a note under section 25B of this title.

EFFECTIVE DATE OF 1993 AMENDMENT

Amendment by Pub. L. 103–66 applicable in the case of decedents dying and gifts made after Dec. 31, 1992, see section 13208(c) of Pub. L. 103–66, set out as a note under section 2001 of this title.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–239 effective, except as otherwise provided, as if included in the provision of the Technical and Miscellaneous Revenue

Act of 1988, Pub. L. 100–647, to which such amendment relates, see section 7817 of Pub. L. 101–239, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–647, title V, §5032(d), Nov. 10, 1988, 102 Stat. 3670, provided that: ''The amendments made by this section [amending this section and section 2102 of this title] shall apply to the estates of decedents dying after the date of the enactment of this Act [Nov. 10, 1988].''

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–455 applicable to estates of decedents dying after Dec. 31, 1976, see section 2001(d)(1) of Pub. L. 94–455, set out as a note under section 2001 of this title.

EFFECTIVE DATE OF 1966 AMENDMENT

Pub. L. 89–809, title I, §108(i), Nov. 13, 1966, 80 Stat. 1574, provided that: ''The amendments made by this section [amending this section and sections 2102, 2104, 2105, 2106, and 6018 of this title and enacting sections 2107 and 2108 of this title] shall apply with respect to estates of decedents dying after the date of the enactment of this Act [Nov. 13, 1966].''

§2102. Credits against tax (a) In general

The tax imposed by section 2101 shall be credited with the amounts determined in accordance with sections 2012 and 2013 (relating to gift tax and tax on prior transfers).

(b) Unified credit (1) In general

A credit of $13,000 shall be allowed against the tax imposed by section 2101.

(2) Residents of possessions of the United States

In the case of a decedent who is considered to be a ''nonresident not a citizen of the United States'' under section 2209, the credit under this subsection shall be the greater of—

(A) $13,000, or

(B) that proportion of $46,800 which the value of that part of the decedent's gross estate which at the time of his death is situated in the United States bears to the value of his entire gross estate wherever situated.

(3) Special rules (A) Coordination with treaties

To the extent required under any treaty obligation of the United States, the credit allowed under this subsection shall be equal to the amount which bears the same ratio to the applicable credit amount in effect under section 2010(c) for the calendar year which includes the date of death as the value of the part of the decedent's gross estate which at the time of his death is situated in the United States bears to the value of his entire gross estate wherever situated. For purposes of the preceding sentence, property shall not be treated as situated in the United States if such property is exempt from the tax imposed by this subchapter under any treaty obligation of the United States. **(B) Coordination with gift tax unified credit**

If a credit has been allowed under section 2505 with respect to any gift made by the decedent, each dollar amount contained in paragraph (1) or (2) or subparagraph (A) of this paragraph (whichever applies) shall be reduced by the amount so allowed.

(4) Limitation based on amount of tax

The credit allowed under this subsection shall not exceed the amount of the tax imposed by section 2101.

(5) Application of other credits

For purposes of subsection (a), sections 2012 and 2013 shall be applied as if the credit allowed under this subsection were allowed under section 2010.

(Aug. 16, 1954, ch. 736, 68A Stat. 397; Pub. L. 89–809, title I, §108(b), Nov. 13, 1966, 80 Stat. 1572; Pub. L. 94–455, title XX, §2001(c)(1)(E)(i), Oct. 4, 1976, 90 Stat. 1851; Pub. L. 100–647, title V, §5032(b), Nov. 10, 1988, 102 Stat. 3669; Pub. L. 104–188, title I, §1704(f)(1), Aug. 20, 1996, 110 Stat. 1879; Pub. L. 105–34, title V, §501(a)(1)(E), Aug. 5, 1997, 111 Stat. 845; Pub. L. 107–16, title V, §532(c)(7), June 7, 2001, 115 Stat. 75.)

AMENDMENTS

2001—Subsec. (a). Pub. L. 107–16, §532(c)(7)(A), reenacted heading without change and amended text of subsec. (a) generally. Prior to amendment, text read as follows: ''The tax imposed by section 2101 shall be credited with the amounts determined in accordance with sections 2011 to 2013, inclusive (relating to State death taxes, gift tax, and tax on prior transfers), subject to the special limitation provided in subsection (b).''

Subsec. (b). Pub. L. 107–16, §532(c)(7)(B), redesignated subsec. (c) as (b) and struck out heading and text of former subsec. (b). Text read as follows: ''The maximum credit allowed under section 2011 against the tax imposed by section 2101 for State death taxes paid shall be an amount which bears the same ratio to the credit computed as provided in section 2011(b) as the value of the property, as determined for purposes of this chapter, upon which State death taxes were paid and which is included in the gross estate under section 2103 bears to the value of the total gross estate under section 2103. For purposes of this subsection, the term 'State death taxes' means the taxes described in section 2011(a).'' Subsec. (b)(5). Pub. L. 107–16, §532(c)(7)(C), substituted ''2012 and 2013'' for ''2011 to 2013, inclusive,''.

Subsec. (c). Pub. L. 107–16, §532(c)(7)(B), redesignated subsec. (c) as (b).

1997—Subsec. (c)(3)(A). Pub. L. 105–34 substituted ''the applicable credit amount in effect under section 2010(c) for the calendar year which includes the date of death'' for ''$192,800''.

1996—Subsec. (c)(3)(A). Pub. L. 104–188 inserted at end ''For purposes of the preceding sentence, property shall

not be treated as situated in the United States if such property is exempt from the tax imposed by this subchapter under any treaty obligation of the United States.''

1988—Subsec. (c)(1). Pub. L. 100–647, §5032(b)(1)(A), substituted ''$13,000'' for ''$3,600''.

Subsec. (c)(2). Pub. L. 100–647, §5032(b)(1), substituted ''$13,000'' for ''$3,600'' in subpar. (A) and ''$46,800'' for ''$15,075'' in subpar. (B).

Subsec. (c)(3). Pub. L. 100–647, §5032(b)(2), amended par. (3) generally, substituting provision relating to special rules for coordination with treaties and with gift tax unified tax credit for provision relating to a phase-in of the par. (2)(B) amount for decedents dying during 1977, 1978, 1979, and 1980.

1976—Subsec. (c). Pub. L. 94–455 added subsec. (c).

1966—Pub. L. 89–809 redesignated existing provisions as subsec. (a), inserted reference to special limitation provided in subsec. (b), and added subsec. (b).

EFFECTIVE DATE OF 2001 AMENDMENT

Amendment by Pub. L. 107–16 applicable to estates of decedents dying, and generation-skipping transfers, after Dec. 31, 2004, see section 532(d) of Pub. L. 107–16, set out as a note under section 2012 of this title.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–34 applicable to estates of decedents dying, and gifts made, after Dec. 31, 1997, see section 501(f) of Pub. L. 105–34, set out as a note under section 2001 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–647 applicable to estates of decedents dying after Nov. 10, 1988, see section 5032(d) of Pub. L. 100–647, set out as a note under section 2101 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–455 applicable to estates of decedents dying after Dec. 31, 1976, see section 2001(d)(1) of Pub. L. 94–455, set out as a note under section 2001 of this title.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–809 applicable with respect to estates of decedents dying after Nov. 13, 1966, see section 108(i) of Pub. L. 89–809, set out as a note under section 2101 of this title.

§2103. Definition of gross estate

For the purpose of the tax imposed by section 2101, the value of the gross estate of every decedent nonresident not a citizen of the United States shall be that part of his gross estate (determined as provided in section 2031) which at the time of his death is situated in the United States.

(Aug. 16, 1954, ch. 736, 68A Stat. 397.)

§2104. Property within the United States (a) Stock in corporation

For purposes of this subchapter shares of stock owned and held by a nonresident not a citizen of the United States shall be deemed property within the United States only if issued by a domestic corporation.

(b) Revocable transfers and transfers within 3 years of death

For purposes of this subchapter, any property of which the decedent has made a transfer, by trust or otherwise, within the meaning of sections 2035 to 2038, inclusive, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or at the time of the decedent's death. **(c) Debt obligations**

For purposes of this subchapter, debt obligations of—

(1) a United States person, or

(2) the United States, a State or any political subdivision thereof, or the District of Columbia,

owned and held by a nonresident not a citizen of the United States shall be deemed property within the United States. Deposits with a domestic branch of a foreign corporation, if such branch is engaged in the commercial banking business, shall, for purposes of this subchapter, be deemed property within the United States. This subsection shall not apply to a debt obligation to which section 2105(b) applies.

(Aug. 16, 1954, ch. 736, 68A Stat. 397; Pub. L. 89–809, title I, §108(c), Nov. 13, 1966, 80 Stat. 1572; Pub. L. 91–172, title IV, §435(b), Dec. 30, 1969, 83 Stat. 625; Pub. L. 93–17, §3(a)(1), Apr. 10, 1973, 87 Stat. 12; Pub. L. 93–625, §9(b), Jan. 3, 1975, 88 Stat. 2116; Pub. L. 94–455, title XX, §2001(c)(1)(L), Oct. 4, 1976, 90 Stat. 1853; Pub. L. 100–647, title I, §1012(q)(11), Nov. 10, 1988, 102 Stat. 3525; Pub. L. 104–188, title I, §1704(t)(38), Aug. 20, 1996, 110 Stat. 1889; Pub. L. 111–226, title II, §217(c)(3), Aug. 10, 2010, 124 Stat. 2402; Pub. L. 113–295, div. A, title II, §221(a)(98), Dec. 19, 2014, 128 Stat. 4051.)

AMENDMENTS

2014—Subsec. (c). Pub. L. 113–295 substituted ''Deposits'' for ''With respect to estates of decedents dying after December 31, 1969, deposits'' in concluding provisions.

2010—Subsec. (c). Pub. L. 111–226, in concluding provisions, struck out before period at end ''or to a debt obligation of a domestic corporation if any interest on such obligation, were such interest received by the decedent at the time of his death, would be treated by reason of section 861(a)(1)(A) as income from sources without the United States''.

1996—Subsec. (c). Pub. L. 104–188 substituted ''section 861(a)(1)(A)'' for ''subparagraph (A), (C), or (D) of section 861(a)(1)'' in concluding provisions.

1988—Subsec. (c). Pub. L. 100–647 substituted ''subparagraph (A), (C), or (D) of section 861(a)(1)'' for ''section 861(a)(1)(B), section 861(a)(1)(G), or section 861(a)(1)(H)''.

1976—Subsec. (b). Pub. L. 94–455 substituted ''and transfers within 3 years of death'' for ''and transfers in contemplation of death'' after ''Revocable transfers''.

1975—Subsec. (c). Pub. L. 93–625 inserted reference to section 861(a)(1)(H) of this title in last sentence.

1973—Subsec. (c). Pub. L. 93–17 made subsec. (c) inapplicable to debt obligations where interest on such obligations is treated as income from sources without the United States by reason of section 861(a)(1)(G) of this title.

1969—Subsec. (c). Pub. L. 91–172 substituted ''December 31, 1969'' for ''December 31, 1972'' in provisions deeming deposit with a domestic branch of a foreign corporation if such branch is engaged in the commercial banking business to be property within the United States.

1966—Subsec. (c). Pub. L. 89–809 added subsec. (c).

EFFECTIVE DATE OF 2014 AMENDMENT

Amendment by Pub. L. 113–295 effective Dec. 19, 2014, subject to a savings provision, see section 221(b) of Pub. L. 113–295, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–226 applicable to taxable years beginning after Dec. 31, 2010, with certain exceptions, see section 217(d) of Pub. L. 111–226, set out as a note under section 861 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99–514, to which such amendment relates, see section 1019(a) of Pub. L. 100–647, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–455 not applicable to transfers made before Jan. 1, 1977, see section 2001(d)(1) of Pub. L. 94–455, set out as a note under section 2001 of this title.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93–625 applicable with respect to estates of decedents dying after Jan. 3, 1975, see section 9(c) of Pub. L. 93–625, set out as a note under section 861 of this title.

EFFECTIVE DATE OF 1973 AMENDMENT

Pub. L. 93–17, §3(a)(2), Apr. 10, 1973, 87 Stat. 12, provided that: ''The amendment made by paragraph (1) [amending this section] shall apply with respect to estates of decedents dying after December 31, 1972, except that in the case of the assumption of a debt obligation of a foreign corporation which is treated as issued under section 4912(c)(2) after December 31, 1972, and before January 1, 1974, the amendment made by paragraph (1) [amending this section] shall apply with respect to estates of decedents dying after December 31, 1973.''

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–809 applicable with respect to estates of decedents dying after Nov. 13, 1966, see section 108(i) of Pub. L. 89–809, set out as a note under section 2101 of this title.

SHORT TITLE OF 1973 AMENDMENT

Pub. L. 93–17, §1(a), Apr. 10, 1973, 87 Stat. 12, provided that: ''This Act [enacting sections 4922 and 6689 of this title, amending this section and sections 4911, 4912, 4914, 4915, 4916, 4918, 4919, 4920, and 6611 of this title, and enacting provisions set out as notes under this section] may be cited as the 'Interest Equalization Tax Extension Act of 1973'.''

§2105. Property without the United States (a) Proceeds of life insurance

For purposes of this subchapter, the amount receivable as insurance on the life of a nonresident not a citizen of the United States shall not be deemed property within the United States.

(b) Bank deposits and certain other debt obligations

For purposes of this subchapter, the following shall not be deemed property within the United States—

(1) amounts described in section 871(i)(3), if any interest thereon would not be subject to tax by reason of section 871(i)(1) were such interest received by the decedent at the time of his death,

(2) deposits with a foreign branch of a domestic corporation or domestic partnership, if such branch is engaged in the commercial banking business,

(3) debt obligations, if, without regard to whether a statement meeting the requirements of section 871(h)(5) has been received, any interest thereon would be eligible for the exemption from tax under section 871(h)(1) were such interest received by the decedent at the time of his death, and

(4) obligations which would be original issue discount obligations as defined in section 871(g)(1) but for subparagraph (B)(i) thereof, if any interest thereon (were such interest received by the decedent at the time of his death) would not be effectively connected with the conduct of a trade or business within the United States.

Notwithstanding the preceding sentence, if any portion of the interest on an obligation referred to in paragraph (3) would not be eligible for the exemption referred to in paragraph (3) by reason of section 871(h)(4) if the interest were received by the decedent at the time of his death, then an appropriate portion (as determined in a manner prescribed by the Secretary) of the value (as determined for purposes of this chapter) of such debt obligation shall be deemed property within the United States.

(c) Works of art on loan for exhibition

For purposes of this subchapter, works of art owned by a nonresident not a citizen of the United States shall not be deemed property within the United States if such works of art are—

(1) imported into the United States solely for exhibition purposes,

(2) loaned for such purposes, to a public gallery or museum, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and

(3) at the time of the death of the owner, on exhibition, or en route to or from exhibition, in such a public gallery or museum.

(d) Stock in a RIC (1) In general

For purposes of this subchapter, stock in a regulated investment company (as defined in section 851) owned by a nonresident not a citizen of the United States shall not be deemed property within the United States in the proportion that, at the end of the quarter of such investment company's taxable year immediately preceding a decedent's date of death (or at such other time as the Secretary may designate in regulations), the assets of the investment company that were qualifying assets with respect to the decedent bore to the total assets of the investment company.

(2) Qualifying assets

For purposes of this subsection, qualifying assets with respect to a decedent are assets that, if owned directly by the decedent, would have been—

(A) amounts, deposits, or debt obligations described in subsection (b) of this section,

(B) debt obligations described in the last sentence of section 2104(c), or

(C) other property not within the United States.

(3) Termination

This subsection shall not apply to estates of decedents dying after December 31, 2011.

Back to Speaker Topics

Fund Assembly

Residential Track

Attorneys Are From Mars & Realtors® Are From Venus: Serving the Unique Legal Needs of Real Estate Agents

Moderator:
René Rutan, *Affiliate & Real Estate Council Relations Manager, The Fund*

Panelists:
Andrew Fisher, *Attorney, Fisher Law, P.A.*
Lew Oliver, *Principal Attorney, Oliver Title Law*
Kerry Anne Schultz, *Partner, Fountain, Schultz & Associates, P.L.*

Back to Speaker Topics

Speaker Information

Attorneys Are From Mars & Realtors® Are From Venus: Serving the Unique Legal Needs of Real Estate Agents

René Rutan

Affiliate & Real Estate Council Relations Manager, The Fund

Ms. Rutan graduated from the University of Florida in 1989 and has been in the real estate industry nearly her entire career. She handled commercial lending in South Florida, was a licensed real estate agent and a real estate paralegal. She has been active with a broad selection of industry organizations including ALTA, Florida Realtors® and the Florida Home Builders' Association and is Past Associate Vice President of the Builders' Association of North Florida.

For the past 21 years, Ms. Rutan has filled many roles for The Fund including Member Account Executive and Branch Manager. Currently the Affiliate & Real Estate Council Relations Manager, she manages Attorney's Real Estate Councils of Florida, Inc., the statewide umbrella organization representing 21 local real estate councils across the state. She oversees outreach to real estate agents and the public; promoting the use of real estate attorneys in real estate transactions through various channels including blogs, trade shows, social media, educational seminars and advertising.

Ms. Rutan is also responsible for The Fund's Affiliate Program, providing paralegals, closers, legal secretaries and licensed title agents with key resources and education to ensure they are equipped to support the success of the Fund Members who employ them. The program's flagship event is Affiliate Assembly, the largest educational event in Florida designed exclusively to educate real estate para-professionals.

Back to Speaker Topics

Andrew Fisher

Attorney, Fisher Law, P.A.

Andrew M. Fisher is a Florida Bar Board Certified Real Estate Attorney and a Florida Supreme Court Certified Civil Circuit Mediator with over 18 years of real estate related experience (including being a licensed real estate broker). In 2017, the Florida Bar appointed Mr. Fisher to the Florida Realtors®/Florida Bar Joint Committee which works on revisions and updates to the FR/BAR Contract.

Through Fisher Law, P.A., Mr. Fisher's real estate law practice focuses on issues related to opening, running, and managing a real estate brokerage office. He represents many real estate brokers (listing and selling agents, as well as property managers), buyers, and sellers. Fisher Law handles residential and commercial real estate closings, short sale negotiation, property management, as well as real estate professional issues related to DBPR & FREC. Fisher Law also handles residential and commercial closings throughout the state of Florida.

Mr. Fisher is also a member of the New York and New Jersey bars, and works with many out of state buyers and sellers with their Florida real estate needs.

Lew Oliver

Principal Attorney, Oliver Title Law

Lew Oliver is the Principal Attorney for Oliver Title Law in Orlando, Florida.

Raised an Air Force brat, Mr. Oliver lived in 8 different states and attended 7 elementary schools before his parents retired in Fort Walton Beach in the Florida Panhandle. A graduate of Stetson University and Georgetown Law School, he practiced in Atlanta, Georgia for 2 years before moving to Orlando in 1986, where he joined the Orlando City Attorney's Office.

While at the City, Mr. Oliver was responsible for a variety of land use, real estate, economic development, historic preservation and code enforcement matters. He also served at general counsel for the Downtown Development Board and the Community Redevelopment Agency. In 1989, Mr. Oliver moved to the Mayor's office to head the construction of the new City Hall across the street from this location. He was responsible for the filming of Lethal Weapon 3 and other exciting matters. The award-winning City Hall was months ahead of schedule and $1 million under budget.

Mr. Oliver left the City in 1992, while continuing to serve as a consultant for City departments. He then began an independent real estate practice serving developers and builders. In 2002, he joined an old law school chum to found the law firm now known as Oliver Title Law, a successful law firm focused entirely on title and closing work, primarily residential, but also a smattering of commercial.

Mr. Oliver has also served as the Chairman of the Board of Trustees of Valencia Community College, a job which is his fondest passion, is a past member of the Judicial Nominating Board for the 9th Judicial Circuit, and has been intensely involved in the political process in the state for many years.

Back to Speaker Topics

Kerry Anne Schultz

Partner, Fountain, Schultz & Associates, P.L.

Kerry Anne Schultz is a partner with Fountain, Schultz & Associates, P.L. She graduated Summa Cum Laude as Valedictorian with a Bachelor's degree in both History and Political Science from Oklahoma City University in 1998. She earned her Juris Doctor with honors from Thomas M. Cooley School of Law in 2000.

While attending Oklahoma City University, Ms. Schultz was the student body president and received several honors and awards. As a law student, Ms. Schultz received several jurisprudence awards, was selected to the Moot Court Board, and was Semi-Finalist in the Intra School Moot Court where she earned an honor for "Best Brief." Upon graduation from law school, Ms. Schultz served for one year as law clerk to Honorable Paul J. Clulo, in Midland, Michigan.

Ms. Schultz is a Fund Member, a frequent lecturer, and a member of the Florida Bar Association; American Bar Association and the Section of Real Property, Probate and Trust Law; Attorney-Realtor Committee of the Florida Bar Association; Pensacola Inns of Court; and many other legal and service organizations.

Ms. Schultz's practice is limited to business and corporate transactions, health law, commercial and residential real estate transactions and development, homeowner, condominium and community associations, and civil litigation.

Tech Meets Legal Meets Aggravation When Listings Have Surveillance Equipment Able to Record Video and Audio During Showings

By Andrew Fisher, J.D., MBA

What if your sellers learned that the blue glass backsplash in the kitchen they installed after watching their favorite home improvement show five years ago is considered dated; or the wonderful shag carpeting they so enjoyed with the kids is laughable; or that their pets are stinky? And what if they learned that things like this are turning off potential buyers?

In many ways it would be great for a seller to know what potential buyers are thinking and saying while viewing their home during a real estate showing or open house. Knowing that buyers consistently comment on certain negative aspects of the home can provide a clear roadmap of improvements and lead to a quicker sale. Watching and hearing a buyer experience the home, commenting on how much they love this and that or how perfect the space will be for the family, could also enhance the seller's ability to negotiate a better deal.

But, wait. Is it legal for the seller to surveil potential buyers in their home? Is there a difference legally between audio and video surveillance? What can sellers do with such recordings?

Surveillance cameras, nanny cams, and other recording devices are widely used in residential homes and are generally legal to install. However, when the home is for sale (or rent) and potential buyers (or tenants) are viewing the home they likely have some reasonable expectation of privacy that they are not being watched or heard.

Regarding the audio recording of the potential buyers, Florida has what is known as a two-party consent law. This means that the interception and disclosure of wire, oral, or electronic communications are prohibited, but there is a clear exception when all of the parties to the communication have given prior consent to such interception. *934.03(2)(d), Florida Statutes*

Video-only surveillance is generally permissible in the main areas of the home, provided that there is a written notice conspicuously posted on the premises stating that a video surveillance system has been installed for the purpose of security for the premises, or the video surveillance device is installed in such a manner that the presence of the device is clearly and immediately obvious. *810.145(5)(b) and (c), Florida Statutes*

Please note that video surveillance is definitely not permitted where a person definitely has a reasonable expectation of privacy, such as in the bathroom. *810.145(1)(c), Florida Statutes*

Violating video and audio surveillance laws can bring criminal penalties, and withholding showing information in order to assist a seller is not worth time in jail.

So what do you need to know as a listing agent? First, ask the seller if there are any surveillance devices in the home. You may not notice the camera in the stuffed giraffe in the play room or the odd mantel decor piece. If there are surveillance devices, make sure the audio is off, because likely there is no two-party consent as the buyers and their agents are likely viewing the property alone or if accompanied, without providing consent to an audio recording.

Next, if there are video surveillance devices, make sure all devices are clearly visible and obvious to anyone, and if not, provide conspicuous postings that there is video surveillance in the house. You should also include this disclosure on the sign-in sheet for open houses and showings, and even add it to the showing instructions in the MLS listing.

Andrew Fisher, J.D., MBA, Fisher Law, PA, is a Florida Bar Board Certified Real Estate Attorney and a frequent ORRA instructor. He can be reached at afisher@fisherlawpa.com. *This article originally appeared in Orlando Regional Realtor® Association Magazine May 2018.*

Back to Speaker Topics

Real Estate (FREC) Educational Requirements

Sales Associates:
Pre Licensure – As a condition of licensure sales associates must successfully complete a 63-Hour Pre Licensure Course based on the FREC I syllabus and pass the required end of course exam. **Post Licensure** – All sales associates must complete 45-hours of approved sales associate post licensure courses and required exam(s) within their first renewal period. **Continuing Education** – In each subsequent renewal period sales associates must complete 8-hours of specialty continuing education, 3-hours of Florida Law Core and 3-hour of Ethics and Business Practices..
Pre Licensure Requirement
63-hour course based on the FREC I syllabus Inclusive of Exam. These courses may be conducted in classroom and distance education environments. Please refer to Rule 61J2-3.008 Florida Administrative Code for detailed course, delivery mechanism and exam requirements.

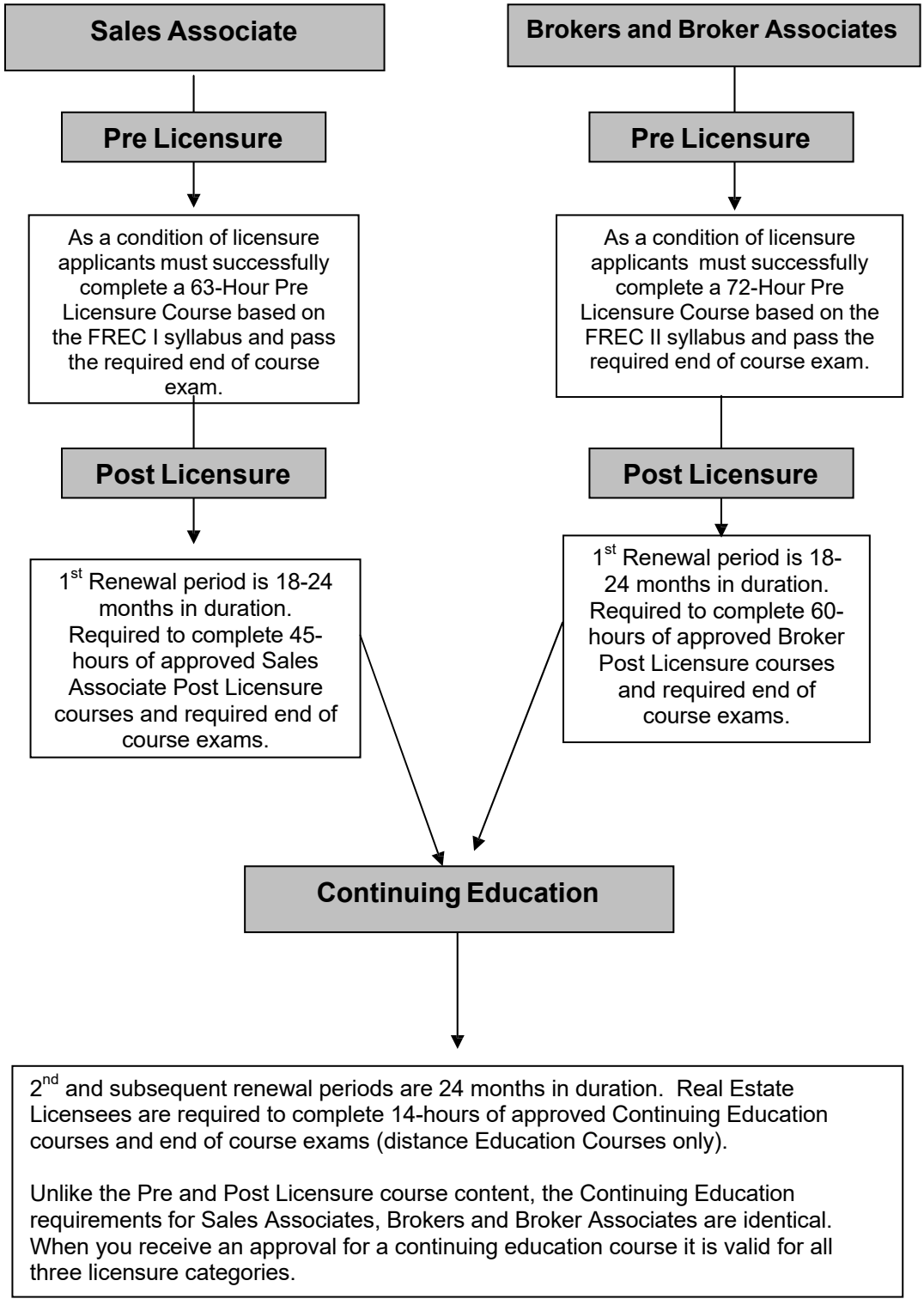
First renewal period (18-24 months)	2nd and subsequent renewal periods (24 months)
45-hours of sales associate post licensure courses inclusive of exam. These courses may be conducted in classroom and distance education environments. Please refer to Rule 61J2-3.020 Florida Administrative Code for detailed course, delivery mechanism and exam requirements.	14-hours of continuing education consisting of 8-hours of specialty credit, 3-hours dedicated to an update of Florida laws and 3-hours of Ethics and Business Practices. These courses may be conducted in classroom and distance education environments. Please refer to Rule 61J2-3.009 Florida Administrative Code for detailed course and exam requirements.

Brokers:
Pre Licensure – As a condition of licensure brokers must successfully complete a 72-Hour Pre Licensure Course based on the FREC II syllabus and pass the required end of course exam. **Post Licensure** – All brokers must complete 60-hours of approved sales associate post licensure courses and required exam(s) within their first renewal period. **Continuing Education** – In each subsequent renewal period brokers must complete 8- hours of specialty continuing education, 3-hours of Florida law update and 3-hours of Ethics and Business Practices.
Pre Licensure Requirement
72-hour course based on the FREC II syllabus Inclusive of Exam. These courses may be conducted in classroom and distance education environments. Please refer to Rule 61J2-3.008 Florida Administrative Code for detailed course, delivery mechanism and exam requirements.

First renewal period (18-24 months)	2nd and subsequent renewal periods (24 months)
60-hours or two 30-hour of brokers post licensure courses inclusive of exam. These courses may be conducted in classroom and distance education environments. Please refer to Rule 61J2-3.020 Florida Administrative Code for detailed course, delivery mechanism and exam requirements.	14-hours of continuing education consisting of 8-hours of specialty credit, 3-hours dedicated to an update of Florida laws and 3-hours of Ethics and Business Practices. These courses may be conducted in classroom and distance education environments. Please refer to Rule 61J2-3.009 Florida Administrative Code for detailed course and exam requirements.

Revised 06/2018

Back to Speaker Topics



Revised 06/2018

DRE (FREAB & FREC) PROVIDER INFORMATION

This document is designed to help outline the different classifications of educational providers approved under the Florida Real Estate Appraisal Board (FREAB) and Florida Real Estate Commission (FREC). Once you have determined what type of provider status is appropriate for your organization, please refer to the course content checklists to ensure that your application will be processed in a timely manner.

There are three general classifications of providers that must apply to the department for approval to offer FREAB and FREC Pre, Post and Continuing Education courses for credit:

1. Licensed Real Estate Schools
2. State or nationally recognized appraisal organizations
3. State approved course providers

Each classification has benefits and limitations. Once you have decided what classification is best for you and/or your organization, please familiarize yourself with the appropriate sections of the Florida Statutes and Florida Administrative Code.

Provider title and reference material	Courses available
License Real Estate School: • Must submit a complete School Application Package and receive approval as a licensed school prior to applying for courses. • Must use licensed instructors • Must teach at licensed locations • Subject to Licensure and Renewal fees School application packages can be obtained on the web at: http://www.MyFlorida.com/dbpr/re/forms. For additional application requirements please contact the DBPR Customer Contact Center at: 850.487.1395 or call.center@dbpr.state.fl.us.	• Sales Associate Pre Licensure • Sales Associate Post Licensure • Broker Pre Licensure • Broker Post Licensure • FREC Specialty Continuing Education • Florida Real Estate Law Core • Appraisal Pre Licensure • The 15-Hour National USPAP* • Appraisal Post Licensure • FREAB Specialty Continuing Education • Florida Real Estate Appraisal Law Update • The 7-Hour National USPAP Update*

Provider title and reference material	Courses available
State or nationally recognized appraisal organizations: • Must submit a complete Provider Application. Course applications can be submitted at the same time as your provider application • Must attain approval for individual instructors to teach individual courses. • Subject to course application and renewal fees Provider applications can be obtained on the web at: http://www.MyFlorida.com/dbpr/re/forms. For additional application requirements please contact the DBPR Customer Contact Center at: 850-487-1395 or call.center@dbpr.state.fl.us.	• Appraisal Pre Licensure • The 15-Hour National USPAP* • Appraisal Post Licensure • Specialty Continuing • Florida Real Estate Appraisal Law Update • The 7-Hour National USPAP Update*

Provider title and reference material	Courses available
Approved FREAB course Providers • Must submit a complete Provider Application. Course applications can be submitted at the same time as your provider application • Must attain approval for individual instructors to teach individual courses. • Subject to course application and renewal fees Provider applications can be obtained on the web at: http://www.MyFlorida.com/dbpr/re/forms. For additional application requirements please contact the DBPR Customer Contact Center at: 850-487-1395 or call.center@dbpr.state.fl.us.	• FREAB Specialty Continuing • Florida Real Estate Appraisal Law Update • The 7-Hour National USPAP Update*

Provider title and reference material	Courses available
Approved FREC course Providers • Must submit a complete Provider Application. Course applications can be submitted at the same time as your provider application • Must attain approval for individual instructors to teach individual courses. • Subject to course application and renewal fees Provider applications can be obtained on the web at: http://www.MyFlorida.com/dbpr/re/forms. For additional application requirements please contact the DBPR Customer Contact Center at: 850-487-1395 or call.center@dbpr.state.fl.us.	• Sales Associate Post Licensure • Broker Post Licensure • FREC Specialty Continuing Education

Back to Speaker Topics

FREC Classroom Education Checklist

Please use this document to determine what information you are required to submit to the Florida Department of Business and Professional Regulation when you are applying to offer a Florida Real Estate Commission (FREC) educational course for credit.
For courses offered via **classroom delivery:**

COURSE TYPE	CHECKLIST
Sales Associate Pre Licensure • These courses can only be offered by Real Estate Schools licensed pursuant to Chapter 475.451 Florida Statutes. • Courses are approved for a maximum of 63 hours. • All courses must be based on the FREC I syllabus available online at: http://www.myfloridalicense.com/DBPR/real-estate-commission/education/#1509107539445-96fb0862-9ee0	❑ Completed DBPR RE 18 application. ❑ One copy of the course material. ❑ Timeline justifying the hours requested on your application. (50 minute hours) ❑ Learning objectives (3-per hour) ❑ Two end of course examinations (multiple choice) and answer keys reflecting the page number where the answers can be found.
For detailed information concerning course and exam content please refer to Rule 61J2-3.008 Florida Administrative code.	

COURSE TYPE	CHECKLIST
Sales Associate Post Licensure • These courses can be offered by Real Estate Schools licensed pursuant to Chapter 475.451 Florida Statutes and approved providers. • Courses are approved for a maximum of 45-hours and a minimum of 15-hours.	❑ Completed DBPR RE 18 application. ❑ Completed DBPR RE 20 application for each instructor that will be involved in the delivery of the course. (this is a requirement for approved providers only, licensed real estate schools do not need to fulfill this requirement) ❑ Course application fee: $80.00 (this is a requirement for approved providers only, licensed real estate schools do not need to fulfill this requirement) ❑ One copy of the course material. ❑ Timeline justifying the hours requested on your application. (50 minute hours) ❑ Learning objectives (3-per hour) ❑ Two end of course examinations (multiple choice) and answer keys reflecting the page number where the answers can be found.

Revised 06/2018

For detailed information concerning course and exam content please refer to Rule 61J2-3.020 Florida Administrative code.

COURSE TYPE	CHECKLIST
Broker Pre Licensure • These courses can be offered by Real Estate Schools licensed pursuant to Chapter 475.451 Florida Statutes. • Courses are approved for a maximum of 72 hours. • All courses must be based on the FREC II syllabus available online at: http://www.myfloridalicense.com/DBPR/real-estate-commission/education/#1509107539445-96fb0862-9ee0	❑ Completed DBPR RE 18 application. ❑ One copy of the course material. ❑ Timeline justifying the hours requested on your application. (50 minute hours) ❑ Learning objectives (3-per hour) ❑ Two end of course examinations (multiple choice) and answer keys reflecting the page number where the answers can be found.

For detailed information concerning course and exam content please refer to Rule 61J2-3.008 Florida Administrative code.

COURSE TYPE	CHECKLIST
Broker Post Licensure • These courses can be offered by Real Estate Schools licensed pursuant to Chapter 475.451 Florida Statutes and approved providers. • Courses are approved for a maximum of 60-hours and a minimum of 15-hours.	❑ Completed DBPR RE 18 application. ❑ Completed DBPR RE 20 application for each instructor that will be involved in the delivery of the course. (this is a requirement for approved providers only, licensed real estate schools do not need to fulfill this requirement) ❑ Course application fee: $80.00 (this is a requirement for approved providers only, licensed real estate schools do not need to fulfill this requirement) ❑ One copy of the course material. ❑ Timeline justifying the hours requested on your application. (50 minute hours) ❑ Learning objectives (3-per hour) ❑ Two end of course examinations (multiple choice) and answer keys reflecting the page number where the answers can be found.

For detailed information concerning course and exam content please refer to Rule 61J2-3.020 Florida Administrative code.

Revised 06/2018

COURSE TYPE	CHECKLIST
Continuing Education • These courses can be offered by Real Estate Schools licensed pursuant to Chapter 475.451 Florida Statutes and approved providers. Only Licensed Real Estate Schools are allowed to offer the Florida Core Law Update courses. • Specialty Courses are approved for a maximum of 8-hours and a minimum of 2-hours. • Ethics and Business Practices is approved for a total of 3-hours. • Core Law is approved for a total of 3-hours.	❑ Completed DBPR RE 18 application. ❑ Completed DBPR RE 20 application for each instructor that will be involved in the delivery of the course. (this is a requirement for approved providers only, licensed real estate schools do not need to fulfill this requirement) ❑ Course application fee: $80.00 (this is a requirement for approved providers only, licensed real estate schools do not need to fulfill this requirement) ❑ One copy of the course material. ❑ Timeline justifying the hours requested on your application. (50 minute hours) ❑ Learning objectives (3-per hour)
For detailed information concerning course and exam content please refer to Rule 61J2-3.009 Florida Administrative code.	

Revised 06/2018

State of Florida
Department of Business and Professional Regulation
Florida Real Estate Commission
Education Course Approval Application
Form # DBPR RE-18

APPLICATION CHECKLIST – IMPORTANT – Submit all items on the checklist below with your application to ensure faster processing.

APPLICATION REQUIREMENTS
Applicants requesting course approval must submit:
❑ Fees: • Florida Real Estate Commission: $80 per initial application (Provider only, $0 for schools) • Florida Real Estate Commission: $80 per renewal per course (Provider only, $0 for schools) • Make check payable to the Florida Department of Business and Professional Regulation.
❑ Appropriate supporting documentation as per Section IV of the application.

Please mail your completed application, documentation and required fee(s) to:

Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, FL 32399-0750

State of Florida
Department of Business and Professional Regulation
Florida Real Estate Commission
Education Course Approval Application
Form # DBPR RE-18

If you have any questions or need assistance in completing this application, please contact the Department of Business and Professional Regulation, Customer Contact Center, at **850.487.1395**.
For additional information see the Instructions at the end of this application.

Section I – Application Board

CHECK ACTION REQUESTED
Board:
❑ Florida Real Estate Commission (FREC)

Section II – Applicant Information

REQUESTOR INFORMATION (Permit holder or point-of-contact)				
Identifying Number (school permit or provider number-if applicable)				
Last Name	First	Middle	Title	Suffix
Organization Name				
BUSINESS MAILING ADDRESS				
Street Address or P. O. Box				
Suite or Office Number				
City	State	Zip Code (+4 optional)		
County (if Florida address)	Country			
CONTACT INFORMATION				
Phone Number	Email Address			
PHYSICAL BUSINESS ADDRESS				
Street Address of P. O. Box				
Suite or Office Number				
City	State	Zip Code (+4 optional)		
County (if Florida address)	Country			

Section III – Course Information

COURSE INFORMATION FREC	
Type of Education (choose only one)	
Pre and Post-Licensure Education:	**Continuing Education:**
❑ Sales Associate Pre-Licensure ❑ Sales Associate Post-Licensure ❑ Broker Pre-Licensure ❑ Broker Post-Licensure	❑ Core Law ❑ Specialty ❑ Business Ethics ❑ Combination Law, Specialty and Business Ethics ❑ Reactivation ❑ Teaching Techniques
Delivery Mechanism (choose only one):	
❑ **Classroom** ❑ **Distance** ❑ **Livestream**	❑ Correspondence (continuing education only) ❑ Other: _____

Section IV – Application Type

Application Type (chose only one)		
❑ - NEW	❑ - RENEWAL	❑ - UPDATE
Course Title:		
Course Number (Updates and Renewals Only)	Hours Requested	
Title of Course Material		

Section V – Supporting Documentation

Directions: Please attach the following supporting documentation to this application. An application that is not supplemented with the proper supporting documentation will be deficient.

ALL INITIAL COURSE APPROVALS MUST SUBMIT:

1. **Course timed outline**
   a. Attach a course outline specifying subjects, major topics, and subtopics to be covered in the course.
2. **Learning Objectives**
   a. Three per hour.
3. **Course Materials including explanation of delivery method**
4. **Education Provider Approval Application form DBPR RE-19 (for Providers Only)**
5. **Instructor Information (for Providers Only)**
   a. Submit application number **DBPR RE-20,** for each instructor teaching each course, and a resume for each.
      i. The resume for each should include:
         1. Education history
         2. Any and all qualifying experience
         3. Publications (if applicable)
         4. Other information relative to his or her qualifications to teach the course
6. **Five end of course examinations (for distance continuing education courses only)**
   a. Each examination must be multiple choice and 4 answer choices per questions
7. **Two end of course examinations (for distance pre-licensing and post-licensing education courses only)**
   a. Each examination must be multiple choice and 4 answer choices per questions
8. **Answer Keys (for distance education courses only)**
   a. An answer key for each final exam.
   b. Must reference the page number(s) containing the information on which each question and correct answer is based.

Section V – Supporting Documentation - continued

ALL COURSE RENEWAL APPROVALS MUST SUBMIT:

1. **Current Approval Letter-** Attach a copy of the original course approval letter received from DBPR following the initial approval of the course.
2. **Instructor Information (if any changes from initial approval for Providers Only)**
   a. Request for Instructor Evaluation form **DBPR RE-20**
   b. List the instructors and alternative instructors for each course and attach a resume for each.
      i. The resume for each should include:
         1. Education history
         2. Any and all qualifying experience
         3. Publications (if applicable)
         4. Other information relative to his or her qualifications to teach the course
3. **Course Materials**
4. **Five End of Course Exams with answer keys (distance continuing education only)**
5. **Two End of Course Exams with answer keys (distance pre-licensing and post-licensing education only)**
6. **Summary of Changes**

Section VI – Permit Holder/Point of Contact Affirmation by Written Declaration

PERMIT HOLDER/POINT OF CONTACT AFFIRMATION BY WRITTEN DECLARATION	
I certify that I am empowered to execute this application as required by Section 559.79, Florida Statutes. I understand that my signature on this written declaration has the same legal effect as an oath or affirmation. Under penalties of perjury, I declare that I have read the foregoing application and the facts stated in it are true. **I understand that falsification of any material information on this application may result in criminal penalty or administrative action, including a fine, suspension or revocation of the license.**	
Signature:	Date:
Print Name:	

INSTRUCTIONS

*If you have any questions or need assistance in completing this application, please contact the Department of Business and Professional Regulation, Customer Contact Center, at **850.487.1395**.*

1. **General Requirements**
   - **a.** This form is required if you are an Education Provider or Real Estate School and you are applying to have a education course approved or renewal.
   - **b.** Course approval is valid for two (2) years from the date of issue, provided no substantial change is made in the course and the approval status of the provider has not expired, or been suspended or revoked.
2. **Application Instructions (by section)**
   - **a. Section I – Application Board**
     - i. Please check the appropriate board
   - **b. Section II- Applicant Information –Requestor Information**
     - i. Identifying Number – If you are a licensed real estate school, this will be your permit number; if you are a board approved Provider, this is your seven digit reporting number.
     - ii. Name Information – This is to be filled out by your point of contact.
     - iii. Organization Name – this is the name that appears on your school license or provider permit.
     - iv. Business Mailing Address – This is where all correspondence concerning this application will be mailed.
     - v. Contact Information – This is the most direct way for our staff to communicate with the person within your organization responsible for submitting this application (your point of contact). This information is not given to the public; it is strictly used for communicates concerning your application. Contact information is often used to quickly resolve questions with applications by telephone call or email. If contact information is not provided, questions regarding applications will be mailed to the business mailing address and may take longer to resolve.
     - vi. Physical Business Address – If your mailing address is different from your physical location, you will need to fill this section.
   - **c. Section III – Course Information**
     - i. Type of Education
       - (1) This is where you select the educational requirement your course is intended to fulfill.
       - (2) Continuing Education FREC – Real Estate licensees have three continuing education requirements: “Specialty” credit, “Law” credit and “Ethics and Business Practice” credit. Only permitted schools can teach the “Law” credit.
     - ii. Delivery Mechanism-When filling out this application, please be sure to indicate how this course will be presented to the students. This must be completed for all types of education.
   - **d. Section IV- Application Type – this indicates how you want to have your application evaluate by the Department**
     - i. New – This is for an initial request to have a course approved under your School/Provider.
     - ii. Renewal – This is to have a course renewed. Please note renewals can only be submitted 120 days prior to a course expiration date. If your course approval has lapsed or will lapse within 30 days of submitting the application you will need to file a new course application.
     - iii. Update – this is used if you have made signification changes to your course and need to have it evaluated by the Department prior to the 120 day renewal period.
     - iv. Course Title – this is the course name that will appear on any correspondence concerning this application, as well as on your approval letter.
     - v. Course Number – this is a seven digit number assigned by the department and only relevant for Update and Renewal applications.
     - vi. Hours Requested – the number of hours your course is to be evaluated/approved for.
     - vii. Title of Course Material – This information will appear on several different approval letters and is vital if you are using a course that was created by a course developer/publisher.

e. Section V- Supporting Documentation

i. Attach the required supporting documentation for your application type.

f. Section VI- Affirmation by Written Declaration

i. Each applicant must sign the affirmation by written declaration.

ii. Real Estate School requires Permit Holder's signature and Provider requires Point of contact's signature.

State of Florida
Department of Business and Professional Regulation
Florida Real Estate Commission
Education Provider Approval Application
Form # DBPR RE-19

CHECK ACTION REQUESTED
Board:
❑ Florida Real Estate Commission (FREC)

APPLICATION CHECKLIST – IMPORTANT – Submit all items on the checklist below with your application to ensure faster processing.

APPLICATION REQUIREMENTS
Providers who are applying to teach a course must also submit the Request for Instructor Evaluation Form # DBPR 20 with the Education Course Approval Application.

Please mail your completed application, documentation and required fee(s) to:

Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, FL 32399-0750

State of Florida
Department of Business and Professional Regulation
Florida Real Estate Commission
Education Provider Approval Application
Form # DBPR RE 19

If you have any questions or need assistance in completing this application, please contact the Department of Business and Professional Regulation, Customer Contact Center, at **850.487.1395**.
For additional information see the Instructions at the end of this application.

Section I – Application Types

CHECK ONE OF THE APPLICATION TYPES
❑ Continuing Education Provider – Individual **[2511/1020]**
❑ Continuing Education Provider – Organization **[2511/1020]**

Section II – Applicant Information

PERSONAL INFORMATION *(Provider/Owner)*				
Last Name	First	Middle	Title	Suffix
Company/Organization Name ; Doing Business as (D/B/A) Name				
Social Security Number (if applying as an Individual)*				
Federal Employer ID Number (if applying as an Organization)				
Email Address:	Phone Number: ( ) -			
GENERAL IDENTIFICATION				
Select one of the following: ❑ Individual Seeking Provider Status ❑ Organization Seeking Provider Status				
Is Provider approved by any other Board within the Department of Business and Professional Regulation to provide continuing education? ❑ Yes ❑ No				
If yes, what is the provider approval number?				
MAILING ADDRESS				
Company Name				
Street Address or P.O. Box				
Suite or Office Number				
City		State		Zip Code (+4 optional)
County (if Florida address)	Country			
BUSINESS LOCATION ADDRESS (IF DIFFERENT THAN MAILING ADDRESS)				
Street Address or P. O. Box				
Suite or Office Number				
City		State		Zip Code (+4 optional)
County (if Florida address)	Country			

Section II – Applicant Information- continued

CONTACT INFORMATION				
Last Name (Authorized Representative) First		Middle	Title	Suffix
Primary Phone Number	Primary E-Mail Address			
ADDITIONAL CONTACT INFORMATION (OPTIONAL)				
Alternate Phone Number	Fax Number			
Alternate E-Mail Address				

* The disclosure of your Social Security number is mandatory on all professional and occupational license applications, is solicited by the authority granted by 42 U.S.C. §§ 653 and 654, and will be used by the Department of Business & Professional Regulation pursuant to §§ 409.2577, 409.2598, 455.203(9), and 559.79(3), Florida Statutes, for the efficient screening of applicants and licensees by a Title IV-D child support agency to assure compliance with child support obligations. It is also required by § 559.79(1), Florida Statutes, for determining eligibility for licensure and mandated by the authority granted by 42 U.S.C. § 405(c)(2)(C)(i), to be used by the Department of Business & Professional Regulation to identify licensees for tax administration purposes.

Section III – Affirmation by Written Declaration

AFFIRMATION BY WRITTEN DECLARATION	
I certify that I am empowered to execute this application as required by Section 559.79, Florida Statutes. I understand that my signature on this written declaration has the same legal effect as an oath or affirmation. Under penalties of perjury, I declare that I have read the foregoing application and the facts stated in it are true. **I understand that falsification of any material information on this application may result in criminal penalty or administrative action, including a fine, suspension or revocation of the license.**	
Signature:	Date:
Print Name:	

INSTRUCTIONS

*If you have any questions or need assistance in completing this application, please contact the Department of Business and Professional Regulation, Customer Contact Center, at **850.487.1395**.*

1. **General Requirements**
   - **a.** To maintain Provider status in good standing, providers must adhere to all provider requirements outlined in Section 455.2178, Florida Statutes.
2. **Application Instructions (by section)**
   - **a. Section I- Application Types**
     - i. Continuing Education Provider – Individual
       - (1) Select this application type if you are an Individual applying to be a Continuing Education Provider
     - ii. Continuing Education Provider – Organization
       - (1) Select this application type if you are an Organization applying to be a Continuing Education Provider.
   - **b. Section II- Applicant Information**
     - i. Fill out each section completely.
     - ii. In the "Personal Information" section, applicants must use their name as it appears on his or her social security card. Do not use any nicknames or initials.
     - iii. If applying as an Organization or Company, provide the name of the company or organization that will provide educational services.
     - iv. A social security number is required in order to apply for any individual license within the Department of Business and Professional Regulation.
     - v. If you are applying as an Organization or Company you must provide the Federal Employer Identification Number (FEID) for the business.
     - vi. Select the appropriate category for identification.
     - vii. If the applicant provides other educational services for another board within the Department of Business and Professional Regulation, please provide those provider approval numbers.
     - viii. Provide your mailing address. This will be used for sending correspondence regarding your application.
     - ix. Applicants must provide their business location address.
     - x. Contact information is often used to quickly resolve questions with applications by telephone call or email. If contact information is not provided, questions regarding applications will be mailed to the applicant's mailing address and may take longer to resolve.
     - xi. Additional contact information is optional and will be used when the applicant cannot be reached using their primary contact information.
   - **c. Section III- Affirmation by Written Declaration**
     - i. Each applicant must sign the affirmation by written declaration.

State of Florida
Department of Business and Professional Regulation
Florida Real Estate Commission
Request for Instructor Evaluation
Form # DBPR RE-20

APPLICATION CHECKLIST – IMPORTANT – Submit all items on the checklist below with your application to ensure faster processing.

APPLICATION REQUIREMENTS
Providers applying to teach a course must also submit:
☐ Curriculum vitae or a resume listing the applicant's educational and work experience.

Please mail your completed application, documentation and required fee(s) to:

Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, FL 32399-0750

Section I – Board Type

CHECK ACTION REQUESTED
Board:
❑ Florida Real Estate Commission (FREC)
Course Number (only if adding instructors to a currently approved course):

Section II – Applicant Information

PERSONAL INFORMATION				
Instructor Number of Permit Number (if applicable)				
Last Name	First	Middle	Title	Suffix
MAILING ADDRESS				
Street Address or P. O. Box				
Suite or Office Number				
City	State	Zip Code (+4 optional)		
County (if Florida address)		Country		
CONTACT INFORMATION				
Phone Number		Fax Number		
Primary E-Mail Address				
RESIDENCE ADDRESS (IF DIFFERENT THAN MAILING ADDRESS)				
Street Address of P. O. Box				
City	State	Zip Code (+4 optional)		
County (if Florida address)		Country		

Section III – Educational Background

EDUCATIONAL BACKGROUND				
Name of College/Univ.	**Major/Minor**	**Begin Date**	**End Date**	**Degree**
Name of College/Univ.	**Major/Minor**	**Begin Date**	**End Date**	**Degree**
Name of College/Univ.	**Major/Minor**	**Begin Date**	**End Date**	**Degree**

TEACHING EXPERIENCE			
Name of College/Univ.	**Subject(s) Taught**	**Begin Date**	**End Date**
Name of College/Univ.	**Subject(s) Taught**	**Begin Date**	**End Date**
Name of College/Univ.	**Subject(s) Taught**	**Begin Date**	**End Date**

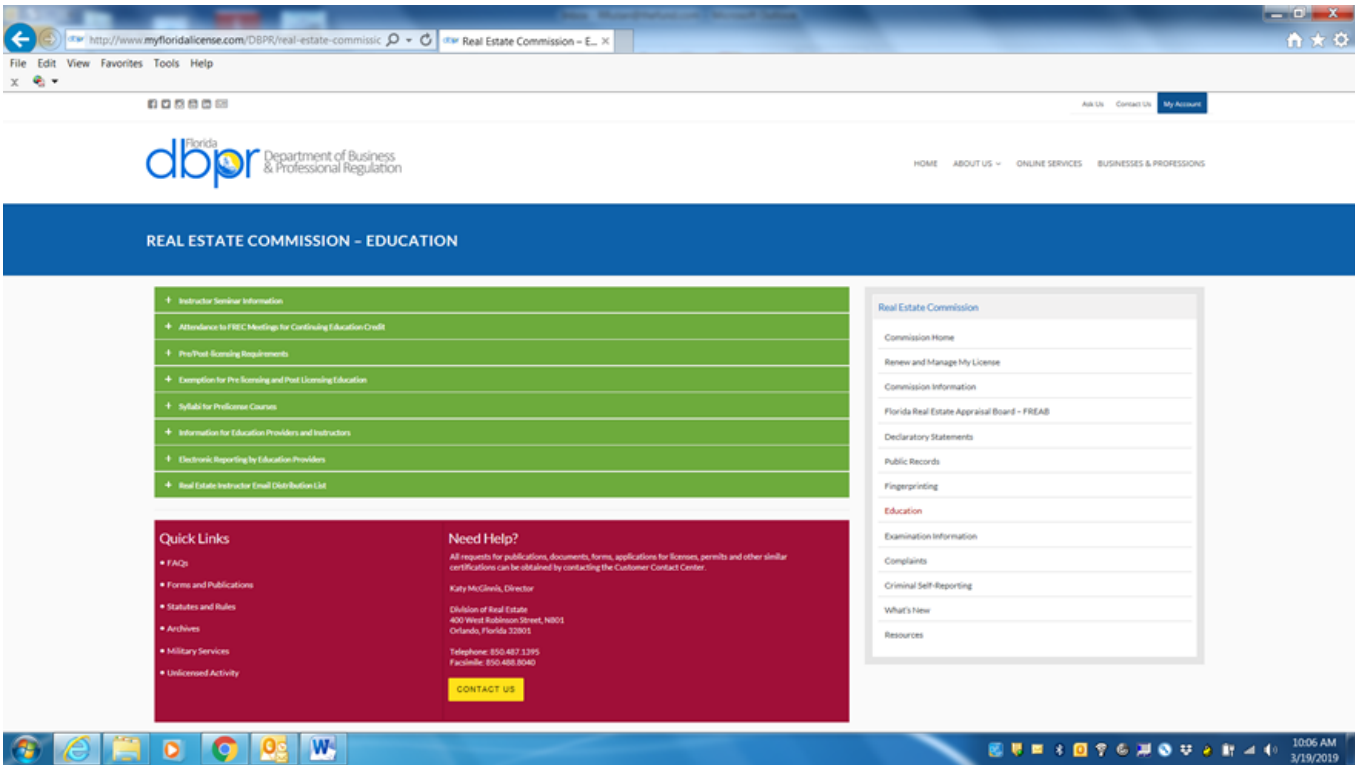
Please attach any additional information that justifies your educational and teaching history or makes you uniquely qualified to teach this course.

Section IV –Affirmation by Written Declaration

PERMIT HOLDER/POINT OF CONTACT AFFIRMATION BY WRITTEN DECLARATION	
I certify that I am empowered to execute this application as required by Section 559.79, Florida Statutes. I understand that my signature on this written declaration has the same legal effect as an oath or affirmation. Under penalties of perjury, I declare that I have read the foregoing application and the facts stated in it are true. **I understand that falsification of any material information on this application may result in criminal penalty or administrative action, including a fine, suspension or revocation of the license.**	
Signature:	Date:
Print Name:	

Back to Speaker Topics

Florida Department of Business & Professional Regulation Website



FloridaRealtors®
The Voice for Real Estate® in Florida

INSTRUCTOR

APPLICATION AND APPROVAL PROCESS

December 2018

General Overview:

Deadline for submittal of course material to audition will be 21 days out from audition date. Exceptions to the deadline for submittal of course material will require the approval of the Chair and Vice Chair of the Professional Development Committee. The applicant auditioning will be required to sign a disclaimer prior to audition that stipulates that they will audition with Florida Realtors® *copyrighted material ONLY or they will be disqualified. Applicants for audition who refuse to teach the* Florida Realtors® *copyrighted material will be disqualified and no audition scheduled.*

I. New Instructor Application Criteria

A. A completed application shall be submitted to Florida Realtors® with the required audition fee no later than 5 weeks prior to the date of the audition. The applicant must identify on the audition application what Florida Realtors® course(s) they will be auditioning. (NOTE: Only Florida Realtors® copyrighted material is permitted for use for auditions.) Once the application is approved, the applicant will identify the specific section of the class they will be presenting. Florida Realtors® Education Department will provide the appropriate materials for use at audition. In addition to their Audition Application, all prospective instructors are required to submit a copy of their resume and two references providing confirmation of their experience.

   The prospective new instructor will be interviewed by phone by a member of the Professional Development Committee proficient in the subject area in which the instructor wishes to audition. The Director of Professional Development will assign a member of the Professional Development Committee as the interviewer and will provide them with an interview questionnaire.

B. The applicant shall have completed a Florida Realtors® sponsored Learning Centered Instructor Workshop (LCIW) prior to auditioning or have equivalent experience in their respective subject matter area, vetted by Florida Realtors®.

C. The applicant shall have successfully completed/attended the course he/she is auditioning to instruct within the last 2 years, if the course has been available. If the course has not been available within the last two years, or the Instructor has not been able to take the course, the instructor would need the permission of Florida Realtors® to audition the course. One exception to this requirement is available if the course to be auditioned is newly approved by DBPR and has not been offered for instruction by Florida Realtors® or has been previously approved but not offered at all.

D. FOR GRI INSTRUCTOR APPLICANTS: The applicant shall have earned the GRI Designation/or the equivalent education/training/certification and have received the approval of Florida Realtors®.

E. FOR RETURNING INSTRUCTORS APPLYING TO EXPAND THEIR REPERTOIRE IN THEIR APPROVED SPECIFIC AREA: See Section VIII.

F. Participation in the Program and its benefits are offered at the sole discretion of Florida Realtors, Inc. and Florida Realtors, Inc. reserves the right to deny or revoke the participation of any individual(s) at any time and for any or no reason.

II. Audition Process

A. Instructor auditions are held twice per year, once during the Florida Realtors® Mid-Winter Business Meeting in January and once during the Annual Convention and Expo (usually in August).

B. The applicant shall audition before a panel of at least 5 people representing the Professional Development Committee and its subcommittees or people appointed by the Director of Professional Development based on the Panel Selection Criteria (Section VI). The Audition Panel Chairman for each audition room will be appointed by the Professional Development Chairman in conjunction with the Director of Professional Development.

C. After the audition, the applicant will leave the room and the panel members will complete the audition results form on the instructor candidate. The form will be turned into the Florida Realtors® staff member for tally. The chairman of the audition panel will only vote in the case of a tie.

D. The day-of audition process will include:
1. Ten (10) minutes of set up.
2. Thirty (30) minutes of live instructional presentation by the applicant.
3. Five (5) minutes to break down.
4. The applicant will be provided with the following: Windows-based laptop with Microsoft Office/Adobe software, LCD projector, clicker, Flipcharts, and Markers. Personal computers are permissible with a 14 day notice and approval by Florida Realtors®.
5. Applicant must bring their presentation on a compatible flash drive.

III. Audition Evaluation

A. Evaluation shall be based solely on the Audition Evaluation Criteria (See Section IV), which includes:
1. Communication and Podium Presence
2. Subject Knowledge

3. Clear and concise presentation of course materials
4. Time Management
5. Classroom Management including the handling of student questions.

B. Florida Realtors® will notify the applicant of the panel's decision within 24 hours.

C. The audition panel will report the results to the Program Development Subcommittee, who in turn reports to the Professional Development Committee. Results reported will be either:

1. Approved
2. Not-Approved

D. Approval as an instructor may not result in an immediate scheduling of an instructional assignment.

IV. Audition Evaluation Criteria for New Instructors

A. Communication and Podium Presence
1. Does the applicant convey sincerity and enthusiasm for the topic?
2. Is the applicant professionally attired; does he/she project an authoritative manner?
3. Does the applicant involve the students in interactive discussion?

B. Subject Knowledge
1. Does the applicant exhibit an understanding of the material?
2. Does the applicant provide examples of the subject in the context of usability?
3. Does the applicant demonstrate a wider knowledge base of the real estate industry?

C. Clear and concise presentation of course materials
1. Does the applicant present the materials in an orderly and understandable fashion?
2. Does the applicant demonstrate a high level of presentation skills and make adequate use of equipment and materials?
3. Does the applicant demonstrate knowledge of different student learning styles and adapt the presentation to meet student needs?

D. Time Management
1. Has the applicant allowed enough time for the topic, including questions and examples?

E. Classroom Management including the handling of student questions

1. Does the applicant set classroom expectations at the beginning?
2. How does the applicant handle a "challenging" student?
3. At any time, has the applicant lost control of the topic or the students?

V. Audition Scoring

Each member of the audition panel will score each applicant independently. For each of the 15 standards above, the panel will rate the person on a scale of 1 to 4; where 1 is "does not meet the requirements" and 4 being "exceeds requirement". Results are determined by majority vote. Once scores are totaled the applicant will be approved or not approved based on the scores below:

- **Approved** - equates to a score of 45 or higher
- **Not Approved**- equates to a score lower than 45

The threshold for approval is that the candidate "meets requirements" (See Scoring Form).

Each member of the audition panel will also write any comments on the applicant's performance and suggestions for improvement in the future. These comments will be provided to each applicant in writing within a week after the audition.

VI. Panel Selection Criteria

Each Panel shall consist of at least 5 and no more than 7 members, including a chairman, appointed by the Professional Development Chairman, based on the following:

A. Panel members shall have served on the Professional Development Committee and/or its subcommittees within the last 5 years.

B. Each panel shall be composed of a blend of current approved instructors, local association education directors and other committee members.

C. Panel members shall not include those members where there is an inherent conflict of interest. It is the obligation of the panelist to inform Florida Realtors® of a conflict in advance so another panelist may be appointed. Below are examples of conflict of interest:
   1. An owner, broker or manager of an applicant.
   2. A sales associate or employee of an applicant.
   3. A current instructor who teaches the same course.
   4. A member who has a familial relationship.

VII. Panel Orientation

If deemed necessary and no sooner than 10 days prior to the auditions, panel members will participate in an informational Webex or conference call pertaining to serving on an audition panel. At a minimum, the following information will be included:

A. Instructor and panel expectations
B. A review of the Audition Results Form
C. A question and answer period.

VIII. Faculty Member Written Audition Application Criteria

A. Once approved to instruct a topic in one of the Specific Subject Areas (noted on page 11) current Faculty Members need not live audition for courses and can interview by written audition before a panel of a minimum of 5 people representing the Professional Development Committee, if they meet the following criteria:

1. The applicant shall have completed the 2-year probationary period and shall have instructed at least four evaluated classes.

2. The applicant shall be current with the Florida Realtors® required instructor continuing education credits.

3. The applicant shall have received no disciplinary action during the 24 months prior to the written audition.

4. The applicant shall have averaged 95% or better on their evaluations for the past 2 years.

5. The written audition request falls within their existing approved Specific Subject Area.

B. Evaluation will be based solely on subject matter knowledge as demonstrated by the answers provided to panel questions. Results are determined by a total average score of 25 or higher.

C. The applicant shall have successfully completed/attended the course he/she is written auditioning to instruct within the last 2 years, if the course has been available. If the course has not been available within the last two years, or the Instructor has not been able to take the course, the instructor would need the permission of Florida Realtors® to audition the course. One exception to this requirement is available if the course to be auditioned has not been offered at all.

Florida Realtors
Index of CE & GRI Courses

Specific Subject Areas*

Appraisal

Brokerage Management

Commercial

Communication

Construction

Consumer Protection

Finance, Investments, and Taxes

Law & Ethics

Negotiation

Property Management & Common Ownership

Real Estate Technologies

Sales & Marketing

Specific Subject Area	Course	CE Hours
Appraisal	Florida Appraiser's State Law Update	3
	Working With the Bank's Appraiser and the Consumer	4
	GRI 301 Appraising	GRI
Brokerage Management	Risk Management - 3 Hour	3
	Risk Management - 4 Hour	4
	So You Want to Be a Broker?	3
	Step it Up - A Guide for Brokers	4
	To Team or Not To Team - That is The Question	3
	GRI 302 Brokerage Management	GRI
Commercial	Analyzing Commercial Investment	3
	Commercial Core Law	3
Communication	Communication Skills for Realtors	3
	Conflict Resolution for Realtors	3
	Meeting the Needs of Challenging Clients	3
	Success Series - Communication Skills	2
Construction	Navigating the Maze of Residential Construction	4
	Residential Construction from the Inside Out*	4
	Ride the Green Wave	4
	GRI 302 Intro to Single Family Construction	GRI
Consumer Protection	Clarifying Service Animals	3
	First Time Home Buyer Workshop	3
	Florida Military Specialist - FMS Specialization	4
	Realtor Safety - Smart Business	2
	Residential Community Associations: Issues, Impact and Relevance	4
	Scams, Fraud & Predatory Lending	3
	The ADA and Commercial Real Estate	4
	Understanding Buyer Agreements and How to Implement Them	3
	Understanding Buyer Agreements and How to Implement Them	4
	Your Home Loan Tool Kit	3
Finance, Investment & Taxes	A Convenient Path: Navigating the VA Loan Process	3
	An Introduction to Real Estate Finance	3
	Construction Loan Financing	4
	Credit Scoring: What Everyone Should Know	8
	FHA Mortgage Loans	3
	FHA/VA Financing	3
	FHA/VA Financing, Markets, & the Economy	4
	FNMA/FHLMC Conventional Loans	3
	Loan Qualification Workshop	3
	Overview of Lending Policy and Practices	4
	Real Estate Investment Analysis Made Easy	4
	Reverse Mortgages	4

Specific Subject Area	Course	CE Hours
Finance, Investment & Taxes	Single and Multi-Family Investing - 3 Hour	3
	Single and Multi-Family Investing - 4 Hour	4
	Tax Deferred Exchanges	4
	Taxes and Money - Pay Less and Keep More - 3 Hour	3
	Taxes and Money - Pay Less and Keep More - 4 Hour	4
	Types of Loans and How They Perform for the Buyer	4
	VA Mortgage Loans 100% Financing	3
	Working with Residential Investors	3
	GRI 103 Finance	GRI
	GRI 201 Tax	GRI
	GRI 202 Tax	GRI
	GRI 202 Investments	GRI
	GRI 301 Exchanging	GRI
Law & Ethics	Are You Grandfathered In? A Guide to Zoning, Non-Conforming Use and More	2
	Best Practices for Real Estate "How To Stay Out of Real Estate Jail"**	3
	Code of Ethics (English & Spanish Version)**	3
	Code of Ethics (English Version)**	3
	Comprehensive Riders: An "App" for Almost Every Sales Situation	3
	Contract for Residential Sale & Purchase	4
	Core Law - Avoiding the Danger Zone	3
	Core Law - Minimize Legal Risk	3
	Escrow Rules & Regulations: How to Stay Out of Trouble	3
	Florida Realtors® Florida Bar Contract for Sale & Purchase	4
	Foreclosure Crash Course	3
	Personal Assistants & the Law	3
	Professional Success Transaction by Transaction	3
	Short Sale Essentials	4
	Who Owns that Property? A Guide to Wills, Trusts and Probate	2
	GRI 101 Law	GRI
	GRI 101 Fair Housing & Diversity	GRI
	GRI 101 Professional Standards**	GRI
	GRI 103 Law	GRI
	GRI 302 Land, Environment & Private Property Rights	GRI
Negotiation	Negotiating Skills for Today's Real Estate Professional	4
	Success Series - Presenting and Negotiating the Offer	2
	GRI 103 Negotiating & Counseling	GRI
Property Management & Common Ownership	A Guide to Managing Short Term Rentals	4
	How to Make the Most of Your Property Management Business	4

Specific Subject Area	Course	CE Hours
	Property Management for the Real Estate Practitioner - 3 Hour	3
	Property Management for the Real Estate Practitioner - 4 Hour	4
	Property Management for the Real Estate Practitioner Span-3 Hr.	3
	Short Term Rentals Part 1 - Getting Started	2
	Short Term Rentals Part 2 - Day to Day Operations	2
	Tenants, Toilets and Tornados	3
	The Good the Bad the Ugly	3
	The Perfect Tenant	3
	You Gotta Go: Tenant Evictions	3
	GRI 301 Property Management & Common Ownership	GRI
Real Estate Technologies	Form Simplicity	3
	Foundations of Form Simplicity	2
	Supplement Your Income with MLS Advantage	2
	Increase Your Income with Virtual Assistants	2
	Optimizing Your Workflow with Form Simplicity	2
	RPR™: AVM's, RVM's and Showing Consumers the Difference	3
	Save Time and Money with Paperless Transactions	2
	Social Media - Are You At Risk?	2
	Supplement Your Income with MLS Advantage	2
	GRI 202 Technology Tools & Resources	GRI
Sales & Marketing	Completing an Effective Purchase & Sales Contract	4
	Goal Setting	3
	If You Can't List, You Can't Last!	3
	Introduction to International Real Estate	2
	Introduction to Social Media	3
	Jump Start Your Real Estate Career	4
	Master Your Market with Metrics*	2
	Negotiating Skills for Today's Real Estate Professional	4
	Newly Licensed? Now What? - 3 Hour	3
	Newly Licensed? Now What? - 4 Hour	4
	Preparing a Listing Contract	4
	Pricing in a Competitive Market	4
	Roadmap to a Successful Closing - 3 Hour	3
	Roadmap to a Successful Closing - 4 Hour	4
	Success Series - Answering Objections	2
	Success Series - Asking for and Obtaining Commitment	3
	Success Series - Elements of Successful Selling	2
	Success Series - Goal Setting	3
	Success Series - Marketing the Property - Servicing the Seller	2
	Success Series - Preparation and Presentation	2

Specific Subject Area	Course	CE Hours
Sales & Marketing	Success Series - Prospecting for and Qualifying Buyers	2
	Success Series - Prospecting for Listings	2
	Success Series - Selecting and Demonstrating Property	2
	Success Series - Telephone Techniques	2
	Success Series - Time Management	3
	Success Series - Understanding People	2
	Supplement Your Income with MLS Advantage	2
	Stats in a Flash: Creating An Effective Market Picture for Consumers*	4
	The Language of Listings	4
	Understanding Section 8 Housing	3
	Working with the Senior Citizen	3
	GRI 102 Contact to Contracts	GRI
	GRI 102 Goal Setting & Business Planning	GRI
	GRI 201 Personal Promotions	GRI
	GRI 201 Sales & Marketing	GRI
	GRI 302 International Real Estate	GRI

***This class is also approved for FREAB CE**

****This class fulfills the FREC 3 Hours of Ethics & Business Practices requirement**

New Instructor Audition Results Form

Name:

Course:

Date:

1 = STRONGLY DISAGREE
2 = DISAGREE
3 = AGREE
4 = STRONGLY AGREE

Communication and Podium Presence:

Is the applicant fully prepared including the power point presentation? Score: _____

Is the applicant professionally attired? Score: _____

Does the applicant involve the students in the interactive discussion? Score: _____

Subject Knowledge:

Does the applicant exhibit an understanding of the material? Score: _____

Does the applicant provide examples to demonstrate their knowledge of the subject? Score: _____

Does the applicant demonstrate a wider knowledge base of the real estate industry? Score: _____

Clear and Concise Presentation of Course Materials:

Does the applicant present the materials in an orderly and understandable fashion? Score: _____

Does the applicant demonstrate a high level of presentation skills and make adequate use of equipment and materials? Score: _____

Did the applicant convey sincerity and enthusiasm for the topic using good inflection and tone? Score: _____

Time/Material Management:

Did the applicant demonstrate good time management and cover all materials, questions and examples? Score: _____

Did the applicant use Florida Realtors® approved material? Score: _____

Did the applicant start and end the audition on time? Score: _____

Classroom Management Including the Handling of Student Questions:

Did the applicant set classroom expectations for what was to be learned at the beginning of their audition? Score: _____

Does the applicant project an authoritative manner – are they in control/command of the room? Score: _____

Did the applicant stay on topic? Score: _____

Total Score: _____

☐ Approved (equates to a score of 45 or higher)

☐ Not Approved (equates to a score of lower than 45)

The threshold for approval is that the candidate “meets the requirements”.

Recommendations and Comments:

Instructor Written Audition Results Form

Name: _____

Course: _____

Date: _____

☐ Approved (equates to a score of 25 or higher)
☐ Not Approved (equates to a score lower than 25)

1 = Does not meet requirements 3 = Meets requirements
2 = Meets minimum requirements 4 = Exceeds requirement

The threshold for approval is that the candidate "meets the requirements".

Subject Knowledge:

Does the applicant provide substantiation that they have experience in the subject? Score: _____

Does the applicant provide a list of qualifications to support them teaching the subject? Score: _____

Does the applicant have certifications or designations in the subject area? Score: _____

Clear and Concise Presentation of Written Audition Materials:

Does the applicant provide their materials in a neat, orderly, and understandable fashion that relates to the subject they wish to present? Score: _____

Does the applicant express themselves clearly and effectively in their documentation to support their desire to present the class? Score: _____

Does the applicant convey sincerity and enthusiasm for the topic? Score: _____

Experience:

Does the applicant have experience in teaching this subject for other groups or organizations? Score: _____

Does the applicant belong to any community organization or professional group that enables them to remain current on the topic? Score: _____

Does the applicant provide support they have been involved with the subject for a number of years? Score: _____

Total Score _____

Recommendations and Comments:

_____

_____

FloridaRealtors®
The Voice for Real Estate® in Florida

INSTRUCTOR CODE OF CONDUCT

January 2019

INTRODUCTION

To provide the highest level of education to our members, Florida Realtors has developed this Instructor Code of Conduct. It provides standards of professional conduct for Instructors of Florida Realtors programs, including participating member boards/associations that choose to adopt them.

This document has as its primary goal, the welfare of the individuals and groups with whom the Instructors work. It is the individual responsibility of each Instructor to aspire to the highest possible standards of conduct. Florida Realtors Instructors respect and protect the REALTOR® name, and do not knowingly participate in or condone practices that may potentially damage the REALTOR® reputation or harm the consumer.

To assist Instructors in attaining these goals, Florida Realtors shall:

1. Require training for all Instructors prior to their approval as Instructors for Florida Realtors-sponsored courses.
2. Completion of this training is a pre-requisite of authorization as a Florida Realtor Instructor. Authorization to teach is granted only upon written notification from Florida Realtors.
3. Present opportunities for new Instructors to observe existing faculty prior to their approval to teach for the purposes of continued growth and development.
4. Provide ongoing support and guidance.
5. Explain all national and local policies, regulations and procedures that relate to Instructor responsibilities.
6. Furnish the appropriate materials and supplies needed to meet the requirements of each course taught.
7. Offer ongoing professional development opportunities, exploring the latest trends in learning styles free of charge to all approved Instructors.
8. Regularly evaluate Instructors' teaching performance and provide appropriate feedback on an ongoing basis.
9. Notify Instructors of any discrepancies in teaching performance and provide adequate guidance and support.

A. Competence:

At all times, Florida Realtors faculty members shall:

1. Maintain high standards of teaching excellence.
2. Recognize the boundaries of individual competencies and expertise limitations.
3. Maintain subject matter knowledge related to the instruction they render.
4. Commit to continual professional growth and improvement.

B. Integrity:

At all times, Florida Realtors faculty members shall:

1. Act in accordance with the expectations of integrity, honesty, fairness and respect provided for in the REALTOR® Code of Ethics.
2. Always present a professional image to local REALTOR® associations and their students. Business attire is expected as the norm. If the situation permits, Florida Realtors or REALTOR® branded business-casual is acceptable.
3. FREC Rule: 61J2-17.015 states: *Recruiting for employment opportunities for any real estate brokerage firm must be accomplished outside the prescribed classroom instructional time. Non-compliance should be reported to the commission*. Florida Realtors' Instructors are not permitted to wear any clothing or accessories that contain a company logo, company name, or any other item that might identify their company affiliation. In addition, Instructors are not permitted to use, carry or disseminate any item which contains a company name or company logo.

C. Professional Responsibility:

At all times, Florida Realtors faculty members shall:

1. Follow all current policies, regulations and procedures of the National Association of REALTORS®, Florida Realtors and the hiring local board/association related to the conduct and administration of educational programs.
2. Teach only those courses they are authorized to teach, and only within those jurisdictions they are authorized by Florida Realtors and the Florida Real Estate Commission (FREC) to do so.
3. Recognize that all Florida Realtors materials are copyrighted. Content may be altered or reproduced only with the written permission of the Florida Realtors Education Department. This includes Power Point presentations.
4. Respect the operational policies set by Florida Realtors or local boards/associations.
5. Participate in developing, revising and updating course curriculum and course materials as requested by Florida Realtors. All changes to course curriculum, course materials and examinations must be submitted to Florida Realtors at least 60 days before the first scheduled program of the new calendar year. Changes made during the calendar year will be limited to those required by Federal or State legislative, regulatory or judicial actions, or urgent changes in business practice, that affect information in course curriculum or course materials that would otherwise make the materials outdate or obsolete.

D. Respect for the Learner:

At all times, Florida Realtors faculty members shall:

1. Respect the fundamental rights, dignity and worth of all learners, regardless of cultural differences, age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language and socio-economic status.

2. Follow through on all classes taught. This includes teaching the complete curriculum as approved by the Department of Business and Professional Regulation (DBPR) in the time allotted, providing adequate post-course student follow up, including providing any additional materials or handouts promised during instruction and reporting any recommended or necessary curriculum updates to Florida Realtors in a timely fashion.

3. Show sensitivity to differences in power between Instructor and learner during or after their professional interaction.

E. Other:

1. Florida Realtors faculty will not authorize the use of or use for the benefit or advantage of any person, the name, emblem, endorsement, services or property of Florida Realtors, except in conformance with Florida Realtors policy.
2. Florida Realtors faculty will not operate in any manner that is contrary to the best interest of Florida Realtors. If a faculty member's obligation to operate within the best interest of Florida Realtors conflicts with the interests of any organization in which he or she has a financial interest with or which he or she is affiliated, the faculty member shall disclose that information to Florida Realtors as soon as he or she becomes aware of it.
3. Florida Realtors faculty will not at any time or under any circumstances, in conversation or instruction, issue derogatory or untrue remarks about curriculum materials, other Instructors, other associations, Florida Realtors, the National Association of REALTORS®, or any real estate company or related business.

Violations and Enforcement:

A. Oversight:

Instructor performance shall be regularly monitored by the local board sponsor and the Professional Development Department of Florida Realtors. Quantitative and qualitative feedback shall be provided to Florida Realtors in the form of Instructor and subject evaluations to be completed by each student.

To protect the integrity of student responses on Instructor evaluations and create a comfortable and welcoming environment for students to provide constructive and honest feedback on Instructor evaluation forms, Instructors are prohibited from reviewing student evaluations until all students have left the classroom. Once students have left the classroom, Instructors may review the student feedback under the supervision of the course sponsor. The course sponsor may elect to either review evaluations with the Instructor or provide a copy of the evaluation data. Under no circumstances should an Instructor be allowed to review the original student evaluation forms unsupervised.

Once completed, evaluations should be collected and placed in an envelope to be forwarded to Florida Realtors for compilation. At the end of each course, Florida Realtors will review evaluation data to ensure quality teaching practices and adherence

to Florida Realtors and Department of Business and Professional Regulation policy. Evaluation data will be compiled, and a summary of scores and student feedback will be forwarded to the Instructor, the local board sponsor and placed in the Instructor file.

Historical Instructor evaluation data and feedback may be reviewed at any time by the Instructor, the Chairman of the Professional Development Committee, Chairman of the Faculty Development Subcommittee or Chairman of the Curriculum and Instructors Subcommittee. Additionally, any current sponsoring board or association may review Instructor evaluation data on the Florida Realtors Sugar Sync website, to aid them in evaluating potential Instructor for future instructional assignments.

Florida Realtors will continually monitor all Instructor performance and provide regular feedback to each Instructor. The intent of such feedback is to acknowledge exceptional teaching practices and to identify possible performance discrepancies before they become problematic.

B. Quantitative Feedback:

Instructor evaluations offer students the opportunity to provide feedback on the performance, knowledge ability and platform skills of individual Instructors. Students rate Instructors on the following areas:

1. Demonstrated in-depth knowledge of subject
2. Made the subject matter understandable
3. Was well-prepared for the presentation
4. Encouraged participation through questions/answers
5. Made students feel comfortable and at ease
6. Showed enthusiasm for the subject
7. Presented ideas clearly and understandably
8. Used varied techniques to keep student's attention
9. Demonstrated good management of the group

Acceptable Individual Course Scores (90% or higher):

Florida Realtors Instructors are expected to achieve a 90% or better rating on course evaluations. When Instructor evaluation scores fall below 90% on any course within a 12-month period, Florida Realtors will review the circumstances surrounding the low evaluations, by contacting course sponsors, monitors, Instructors and/or students and review evaluation forms. Florida Realtors will follow up as appropriate with the Instructor.

Follow up will be one or both of the following:

1. First below acceptable rating within 12 months – Written warning
2. Second below acceptable rating within 12 months – Written warning

After an Instructor receives two written warnings, a third below acceptable rating would require Florida Realtors forwarding the information to the Instructor Review Panel for their review, which shall result in corrective action including (but not limited to), probation, suspension or removal from the faculty pool.

Acceptable Cumulative Course Scores (90% or higher):

Florida Realtors Instructors are expected to maintain an average score of 90% or better on all instructional assignments. When Instructors fall below 90% on their cumulative average for the past 12 months (rolling), Florida Realtors will review the Instructor file and follow up as appropriate with the Instructor. The Instructor could be placed on probation and may be required to complete corrective action(s) at his/her own expense.

Convening the Instructor Review Panel (IRP)

The Instructor Review Panel shall consist of the Chairs of the Professional Development Committee, the Faculty Development Subcommittee and the Curriculum Development subcommittee.

If circumstances arise from the current review process or in writing from a concerned member or education director/staff member that Florida Realtors deems necessary for review by the IRP, Instructor in question will be notified, forwarded reviews, and/or correspondence and request a written response from the Instructor to address the charges. At that point, the panel will be notified; notification will include all evidence obtained by Florida Realtors.

A conference call or online meeting will then be scheduled for the IRP and the Instructor in question. The Instructor in question will be given an opportunity to speak at the beginning of the conference. The IRP will then discuss the situation and decide what, if any, disciplinary actions will be taken against the Instructor.

Florida Realtors will facilitate the meeting; however, staff will not participate in the decision as to the disciplinary actions to be taken. After the panel has deliberated and made their determination, Florida Realtors staff will contact Instructor by phone, and follow up with a written letter on the decision of the panel.

The Instructor then has 14 days to request an appeal of the IRP decision. If an appeal is made by the Instructor of the original IRP decision, an **Instructor Review Reconsideration Panel (IRRP)** shall be convened. This panel will consist of the Vice-Chairs of: The Professional Development Committee, the Faculty Development Subcommittee and the Curriculum Development Subcommittee.

Florida Realtors will then send out meeting notification and copies of all evidence included in the first IRP's discussion, along with correspondence sent to the Instructor and a copy of the Instructor's written appeal to the Instructor Review Reconsideration Panel.

A second conference call or on-line meeting will then be scheduled for members of the Instructor Review Reconsideration Panel (IRRP). Again, the Instructor may request to speak to this panel. In addition, the Chair of the Professional Development Committee may also speak at this time and provide justification for the original disciplinary action. However, the Chair of the Professional Development Committee may not deliberate with the IRRP.

After the IRRP has made their decision, Florida Realtors will call the Instructor and the Chair of the Professional Development Committee and notify them of the decision of the IRRP. This phone call will be followed up with a written letter. Disciplinary actions given will be monitored by Florida Realtors.

Instructor Probation

When an Instructor is placed on probation, they are prohibited from contracting any new instructional assignments sponsored by Florida Realtors (including, but not limited to, GRI courses, CE Express, iCE Virtual courses, REBAC courses, webinars, conferences or meetings), but can fulfill any existing contractual obligations that were executed prior to the date of probation. Additionally, any Instructor under probation will not be permitted to audition any new subjects.

The decision to place an Instructor on probation, and the terms of probationary action is the responsibility of the Instructor Review Panel (IRP). The Instructor Review Panel shall consist of the Chairs of the Professional Development Committee, the Faculty Development Subcommittee and the Curriculum Development Subcommittee (unless otherwise directed by the President of the Association).

Probationary actions may include, but are not limited to, one or more of the following actions to be completed at the expense of the Instructor:

1. Attend a Learning Centered Instructor Workshop (LCIW) refresher course
2. Audit the course subject (once per subject)
3. Audit different Instructor (once per subject)

The length of probation shall be determined by the IRP and shall not exceed 12 months from the date of probation. Should an Instructor fail to complete the prescribed probationary terms, or score below 90% during the probationary period, the faculty member may be immediately suspended from the faculty pool.

Instructor probation does not apply to courses not sponsored under the Florida Realtors education provider license, Florida Realtors school license or Florida Realtors REBAC license.

Instructor Suspension

When an Instructor is suspended from the faculty, they are prohibited from presenting any programs sponsored by Florida Realtors (including, but not limited to, GRI courses, CE Express, iCE Virtual courses, REBAC course, webinars, conferences or meetings). Additionally, any Instructor under suspension will not be permitted to audition any new subjects during the suspension period.

The decision to suspend an Instructor and the terms of suspension is the responsibility of the Instructor Review Panel (IRP). Suspension terms may include, but are not limited to, one of more of the following to be completed (at the expense of the Instructor if applicable):

1. Attend a Learning Centered Instructor Workshop (LCIW) refresher course
2. Audit the course subject (up to two times per subject)
3. Audit different Instructors (up to two times per subject)
4. Team-teach with another Instructor
5. Disapproval of the course, requiring the Instructor to re-audition.

The length of suspension shall be determined by the IRP and shall not exceed 12 months from the date of suspension. Should an Instructor fail to complete the prescribed corrective action during the suspension period, the faculty member will be removed from the faculty pool. Removal from the faculty pool will require the Instructor to complete the entire Instructor qualification process, including attending the Instructor Development Workshop and auditioning before the Professional Development Committee prior to re-instatement.

Instructor suspension does not apply to courses not sponsored under the Florida Realtors education provider license, school license or REBAC license.

C. Qualitative Feedback:

Instructor evaluations offer students the opportunity to provide feedback on the performance, knowledge ability and platform skills of individual Instructor. In addition to quantitative numerical feedback, students are free to answer multiple questions, including but not limited to the following:

1. General comments
2. What was enjoyed most about the Instructor
3. What was enjoyed least about the Instructor
4. If they would you recommend this Instructor to others
5. What areas could be improved

These answers provide feedback on Instructor performance and give the students the opportunity to express their personal thoughts and feelings on the Instructor's performance. This feedback also allows Florida Realtors to place quantitative scores into perspective and clarify any discrepancies in performance. Florida Realtors will review all Instructor comments that could indicate minor infringements, serious discrepancies or major violations as outlined below.

Minor Infringements:

1. Time management issues (i.e. failure to fulfill instructional time required by DBPR)
2. Failure to follow Florida Realtors classroom policies
3. Directly selling or referring to products, services or other materials owned by the Instructor or their business

Serious Discrepancies:

1. Continued minor infringements
2. Violations of the Instructor Code of Conduct
3. Failure to cover material presented as required by the DBPR

Major Violations:

1. Continued serious discrepancies
2. Violations of anti-trust laws
3. Violations of FREC Rules and Guidelines
4. Violation of Florida law governing development credit requirements

If student comments indicate possible discrepancies in Instructor performance, Florida Realtors will investigate the circumstances surrounding the comments by contacting course sponsors, monitors, Instructors and/or students. This information will be forwarded onto the IRP for review and to determine the appropriate disciplinary action.

Disciplinary Action:

Types of disciplinary action can vary depending on the severity and/or frequency of performance discrepancy. Warnings and corrective action may include, but are not limited to the following:

Minor Infringements:

1. Verbal warning
2. Written warning

Serious Discrepancies:

1. First written warning
2. Final written warning

Major Violations:

1. Probation of Instructor
2. Suspension of Instructor
3. Removal of Instructor from Faculty Pool

However, to protect the interests of the association and depending on the severity of the situation Florida Realtors can recommend disciplinary action. Should disciplinary action need to be taken for severe violations without prior performance issues, the President, along with the CEO of Florida Realtors will make such decisions on behalf of the IRP.

D. Instructor Recertification:

1. *Acceptable Cumulative Course Scores (90% or higher):*

Florida Realtors Instructors are expected to maintain an average score of 90% or better on all instructional assignments. When Instructors fall below 90% on their cumulative average for the past 12 months (rolling), Florida Realtors will review the Instructor file and follow up as appropriate with the Instructor. The Instructor could be placed on probation and may be required to complete corrective action(s) at his/her own expense.

2. Instructor Relevancy:

All Florida Realtor faculty are expected to teach at least ONE GRI class or ONE CE Express Class with the stipulated biennial time frames. The "Biennial" requirement (defined as occurring once every two years), expires on December 31st of every even year as follows:

1. January 1, 2017 – December 31, 2018
2. January 1, 2019 – December 31, 2020
3. January 1, 2021 – December 31, 2022
4. January 1, 2023 – December 31, 2024, etc.

Should an instructor be unable to present at least ONE GRI class or ONE CE Express class within the biennial time frame, they will be immediately removed from the faculty pool and placed in suspended status and prohibited from teaching. A letter from the Director of Professional Development would be sent to the instructor advising them of this action. The instructor will then automatically be referred to an Instructor Review Panel (IRP), where the instructor can present mitigating information, allowing the IRP to determine alternatives to the policy including the ability of the IRP to grant exceptions as needed.

Clarification: Instructors approved in JANUARY OR AUGUST OF THE FIRST YEAR of any biennial (that being 2017, 2019, 2021, etc.), will need to meet the requirement of presenting at least ONE GRI class or ONE CE Express class before the end of that biennial period. Instructors approved in JANUARY OR AUGUST OF THE SECOND YEAR of the biennial (that being 2018, 2020, 2022, etc.), will need to meet the requirement of presenting at least ONE GRI class or ONE CE EXPRESS class starting in JANUARY OF THE NEW BIENNIAL PERIOD (that being 2019, 2021, 2023, etc.).

3. *Instructor Development Credit:*

All Florida Realtors faculty are required to take **15 hours** of Florida Realtors® Instructor Development Credit every two years to maintain their faculty status. **(NOTE: If you are a realtor, this 15-hour development credit requirement has nothing to do with the 14 hours of CE you need to complete to renew your real estate license with the State of Florida)**.

The "Biennial" (defined as occurring once every two years) requirement expires on December 31st of every even year as follows:

1. January 1, 2017 – December 31, 2018
2. January 1, 2019 – December 31, 2020
3. January 1, 2021 – December 31, 2022
4. January 1, 2023 – December 31, 2024 and so forth.

Any faculty member newly approved at the January Mid-Winter meetings during the 2nd year of the "Biennial" requirement (that being January 2018, 2020, 2022, etc.) will be required to earn 7 hours of prescribed development credit before the end of the biennial.

Any faculty member newly approved at the August Conference during the 2nd year of the "Biennial" requirement (that being August 2018, 2020, 2022, etc.) will be required to earn their 15 hours of prescribed development credit starting in January of the following year (that being January 2015, 2017, 2019, etc.).

Definition:
Instructor development credit is considered training and development that enhances a faculty member's platform skills and is focused on the methodology and tools surrounding adult learning. Instructor development credit is NOT considered any program or training that enhances or reinforces subject area knowledge, technical competencies or marketing skills.

Sources:

Florida Realtors provides instructor development credit free of charge during the January Mid-Winter Business Meetings and during the August Convention. This will allow an Instructor to receive 8 hours of development credit every year, for a total of 16 hours during a two-year period.

Florida Realtors **may** also periodically offer Instructor development workshops and educational opportunities throughout the year. One such workshop is the LEARNING CENTERED INSTRUCTOR WORKSHOP. Existing faculty members who attend LCIW will receive 8 hours of Instructor Development Credit. Instructors may attend any of these Florida Realtors sponsored programs and receive credit; however, attendance at these programs will be at the Instructor's expense.

Substitutions and Exemptions:

Faculty may (with the prior approval of Florida Realtors) substitute certain other sources of professional development to meet the 15-hour requirement. Faculty may substitute up to 11-hours of outside professional development opportunities per two-year renewal cycle. However, 4 hours of Instructor development credit must come directly from Florida Realtors provided sources.

Eligible substitutions can include:

1. Faculty with a state of Florida issued Instructors Permit, are required by law to attend FREC prescribed renewal requirements to renew their State Instructor License. Should a faculty member hold an active Instructor permit with the State of Florida and attend the FREC prescribed renewal requirements to renew their State Instructor License (made up of 3 hours of Core Law and 4 hours of teaching techniques), 7 hours of the required Instructor's CE with the **state** will be credited. It is the responsibility of the instructor to provide Florida Realtors with proof of attendance at both of these programs for credit to be awarded.
2. As we allow four hours of "teaching techniques" to count for FR Instructor Development Credit for State Instructors, any faculty member who attends a FREC 4-hour "teaching techniques" seminar will receive four hours of FR Instructor Development Credit.
3. Faculty members who participate in curriculum review or curriculum review/development workshops will receive 4 hours of Instructor Development Credit (one per two-year period).
4. Faculty members who serve as a Chair or Vice-Chair of a Professional Development Committee, subcommittee or workgroup on the state or national level, will receive 4 hours of Instructor Development Credit (one per two-year period).
5. Faculty members who serve as a mentor will receive 4 hours of Instructor Development Credit per year of participation.

6. Faculty members may submit outside professional development opportunities (such as NAR workshops, REEA workshops, CRS Training, etc.) for up to 4 hours of Instructor Development Credit (one substitution per two-year period).
7. Faculty members may submit proof of attendance for one hour of CE for participation in the Florida Realtors "Teach to the Camera" workshop.

Should an Instructor fail to complete the appropriate 15 hours of development credit within the biennial time frame, they will be immediately removed from the faculty pool and placed in suspended status and prohibited from teaching until they complete the prescribed development credit requirement. The prescribed CE requirement of completing the 15 hours must be done within six months of the beginning of the next biennial. If the CE is not completed within six months of the beginning of the next biennial, the instructor is removed permanently from the faculty pool and would be required to start the process of becoming an instructor over again.

A letter from the Director of Professional Development would be sent to the instructor at the end of this six-month extension advising them of this action, along with instructions on how to recertify.

4. *Instructor License/Status Validation:*

If an instructor has been convicted of a felony, they must notify Florida Realtors® immediately. If convicted of a felony, the instructor will be automatically removed from the faculty pool. At the end of each "Biennial" period, FR Staff will send out an affidavit to each current instructor with the following information to certify the instructor is still an active/current licensed professional:

FOR REALTORS ONLY:

By checking this box, I certify I have an active license in good standing with the State of Florida. In addition, I certify that I am in compliance with Chapter 455.227(1)(t) that requires all licensees to report information to the DBPR within 30 days of being convicted or found guilty of or having plead nolo contendere or guilty to a crime (felony or misdemeanor) in any jurisdiction.

☐

FOR NON-REALTORS:

By checking this box, I certify I have an active license in good standing with the following authoritative licensing body:

License #: _____

Authoritative body: _____

☐

E. Instructor Right of Reconsideration:

In any instance of disciplinary action, an Instructor may request reconsideration of the disciplinary decision. In such instance, a written request must be received by Florida Realtors no later than 14 days from the original disciplinary notification. At that time, the Instructor Review Reconsideration Panel (IRRP), comprised of the Vice Chair of the Professional Development Committee, the Vice Chair of the Faculty Development Subcommittee and the Vice Chair of the Curriculum Development and Instructors Subcommittee, will schedule a meeting to discuss the issue with the Instructor. After hearing the Instructor's request and reviewing all documentation, the panel will determine if policy was correctly followed and the disciplinary action was justified. Should the panel find that policy was not appropriately followed, or extenuating circumstances were surrounding the performance(s) in question, the panel may elect to lessen or remove any corrective action previously prescribed.

CE Express, GRI FREAB Classes by Specific Subject Areas
Current as of August 2018

Specific Subject Area	Course	CE Hours
Appraisal	Florida Appraiser's State Law Update	3
	Working With the Bank's Appraiser and the Consumer	4
	GRI 301 Appraising	GRI
Brokerage Management	Risk Management - 3 Hour	3
	Risk Management - 4 Hour	4
	So You Want to Be a Broker?	3
	Step it Up - A Guide for Brokers	4
	To Team or Not To Team - That is The Question	3
	GRI 302 Brokerage Management	GRI
Commercial	Analyzing Commercial Investment	3
	Commercial Core Law	3
Communication	Communication Skills for Realtors	3
	Conflict Resolution for Realtors	3
	Meeting the Needs of Challenging Clients	3
	Millennials Are So Yesterday - Embracing the "Z" Generation	2
	Success Series - Communication Skills	2
Construction	Navigating the Maze of Residential Construction	4
	Residential Construction from the Inside Out*	4
	Ride the Green Wave	4
	GRI 302 Intro to Single Family Construction	GRI
Consumer Protection	Clarifying Service Animals	3
	First Time Home Buyer Workshop	3
	Florida Military Specialist - FMS Specialization	4
	Know your Boundaries - A Guide to Surveys	2
	Realtor Safety - Smart Business	2
	Residential Community Associations: Issues, Impact and Relevance	4
	Scams, Fraud & Predatory Lending	3
	The ADA and Commercial Real Estate	4
	Understanding Buyer Agreements and How to Implement Them	3
	Understanding Buyer Agreements and How to Implement Them	4
	Your Home Loan Tool Kit	3
Finance, Investment & Taxes	A Convenient Path: Navigating the VA Loan Process	3
	An Introduction to Real Estate Finance	3
	Construction Loan Financing	4
	Credit Scoring: What Everyone Should Know	8
	FHA Mortgage Loans	3
	FHA/VA Financing	3
	FHA/VA Financing, Markets, & the Economy	4
	FNMA/FHLMC Conventional Loans	3
	Loan Qualification Workshop	3
	Overview of Lending Policy and Practices	4
	Real Estate Investment Analysis Made Easy	4
	Reverse Mortgages	4
	Single and Multi-Family Investing - 3 Hour	3
	Single and Multi-Family Investing - 4 Hour	4

11/5/2018

CE Express, GRI FREAB Classes by Specific Subject Areas
Current as of August 2018

Specific Subject Area	Course	CE Hours
Finance, Investment & Taxes	Tax Deferred Exchanges	4
	Taxes and Money - Pay Less and Keep More - 3 Hour	3
	Taxes and Money - Pay Less and Keep More - 4 Hour	4
	Types of Loans and How They Perform for the Buyer	4
	VA Mortgage Loans 100% Financing	3
	Working with Residential Investors	3
	GRI 103 Finance	GRI
	GRI 201 Tax	GRI
	GRI 202 Tax	GRI
	GRI 202 Investments	GRI
	GRI 301 Exchanging	GRI
Law & Ethics	Are You Grandfarthered In? A Guide to Zoning, Non-Conforming Use and	2
	Best Practices for Real Estate Professionals "How to Stay Out of Real Estate Jail"**	3
	Code of Ethics (English Version)**	3
	Code of Ethics (Spanish Version)**	3
	Comprehensive Riders: An “App” for Almost Every Sales Situation	3
	Contract for Residential Sale & Purchase	4
	Core Law - Avoiding the Danger Zone	3
	Core Law - Minimize Legal Risk	3
	Escrow Rules & Regulations: How to Stay Out of Trouble	3
	Florida Realtors® Florida Bar Contract for Sale & Purchase	4
	Foreclosure Crash Course	3
	Personal Assistants & the Law	3
	Professional Success Transaction by Transaction	3
	Short Sale Essentials	4
	Who Owns that Property? A Guide to Wills, Trusts and Probate	2
	GRI 101 Law	GRI
	GRI 101 Fair Housing & Diversity	GRI
	GRI 101 Professional Standards**	GRI
	GRI 103 Law	GRI
	GRI 302 Land, Environment & Private Property Rights	GRI
Negotiation	Negotiating Skills for Today's Real Estate Professional	4
	Success Series - Presenting and Negotiating the Offer	2
	GRI 103 Negotiating & Counseling	GRI
Property Management & Common	A Guide to Managing Short Term Rentals	4
	How to Make the Most of Your Property Management Business	4
	Property Management for the Real Estate Practitioner - 3 Hour	3
	Property Management for the Real Estate Practitioner - 4 Hour	4
	Property Management for the Real Estate Practitioner Span-3 Hr.	3
	Short Term Rentals Part 1 - Getting Started	2
	Short Term Rentals Part 2 - Day to Day Operations	2
	Tenants, Toilets and Tornados	3
	The Good the Bad the Ugly	3
	The Perfect Tenant	3

11/5/2018

CE Express, GRI FREAB Classes by Specific Subject Areas
Current as of August 2018

	You Gotta Go: Tenant Evictions	3
Specific Subject Area	**Course**	**CE Hours**
Property Management & Common	GRI 301 Property Management & Common Ownership	GRI
Real Estate Technologies	Form Simplicity	3
	Foundations of Form Simplicity	2
	Supplement Your Income with MLS Advantage	2
	Increase Your Income with Virtual Assistants	2
	Optimizing Your Workflow with Form Simplicity	2
	RPR™: AVM's, RVM's and Showing Consumers the Difference	3
	Save Time and Money with Paperless Transactions	2
	Social Media - Are You At Risk?	2
	Supplement Your Income with MLS Advantage	2
	Supplement Your Income with MLS Advantage	3
	GRI 202 Technology Tools & Resources	GRI
Sales & Marketing	Boot Camp	4
	Completing an Effective Purchase & Sales Contract	4
	Goal Setting	3
	If You Can't List, You Can't Last!	3
	Introduction to International Real Estate	2
	Introduction to Social Media	3
	Master Your Market with Metrics*	2
	Negotiating Skills for Today's Real Estate Professional	4
	Newly Licensed? Now What? - 3 Hour	3
	Newly Licensed? Now What? - 4 Hour	4
	Preparing a Listing Contract	4
	Pricing in a Competitive Market	4
	Roadmap to a Successful Closing - 3 Hour	3
	Success Series - Answering Objections	2
	Success Series - Asking for and Obtaining Commitment	3
	Success Series - Elements of Successful Selling	2
	Success Series - Goal Setting	3
	Success Series - Marketing the Property - Servicing the Seller	2
	Success Series - Preparation and Presentation	2
	Success Series - Prospecting for and Qualifying Buyers	2
	Success Series - Prospecting for Listings	2
	Success Series - Selecting and Demonstrating Property	2
	Success Series - Telephone Techniques	2
	Success Series - Time Management	3
	Success Series - Understanding People	2
	Supplement Your Income with MLS Advantage	2
	Stats in a Flash: Creating An Effective Market Picture for Consumers*	4
	The Language of Listings	4
	Understanding Section 8 Housing	3
	Working with the Senior Citizen	3
	GRI 102 Contact to Contracts	GRI
	GRI 102 Goal Setting & Business Planning	GRI

11/5/2018

CE Express, GRI FREAB Classes by Specific Subject Areas
Current as of August 2018

	GRI 201 Personal Promotions	GRI
Specific Subject Area	**Course**	**CE Hours**
Sales & Marketing	GRI 201 Sales & Marketing	GRI
	GRI 302 International Real Estate	GRI

***This class is also approved for FREAB**

****This class fulfills the FREC 3 Hours of Ethics & Business Practices requirement**

11/5/2018

2019

MAY

SUN	MON	TUE	WED	THU	FRI	SAT
28			1	2	3 Effective Date of Contract	4
5	6 Earnest Money due to Closing Attorney	7	8	9	10 Title Commitment due to Lender and Buyer	11
12	13 WDO and Home Inspection Scheduled	14 Title Objection Deadline	15	16	17 Due Diligence Deadline	18
19	20 Financing Contingency Deadline	21 Survey Completed & Objection Deadline	22	23	24 Approved Contingency Deadline	25
26	27 **Seller Mail-Away Closing Package	28	29	30 **CLOSING** at Law Firm 2:00 CST	31	
2						

Listing's Agent Signature _____

Buyer's Agent Signature _____

Back to Speaker Topics

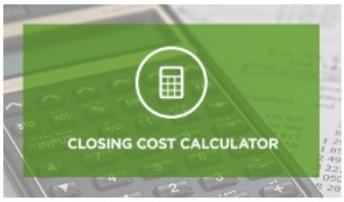
Florida ARECS Resources

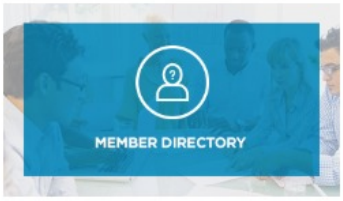
Attorney Members, Real Estate Professionals, Consumers

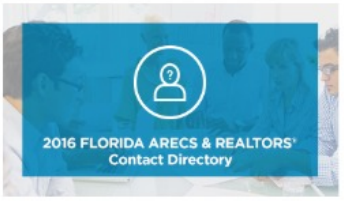
Florida ARECS is dedicated to providing the most up-to-date and relevant resources for its Attorney Members, as well as helping fellow Real Estate professionals and guiding consumers.

TOOLS | NEWS & BLOGS | VIDEOS | GUIDES & PUBLICATIONS | INDUSTRY NEWS | EXTERNAL RESOURCES

TOOLS







NEWS & BLOG

Florida ARECS News

Resource Feature - March
Florida Realtors® Legal News Advertising Campaign Late last year The Fund took another step in its support of Florida ARECS by launching an advertising campaign in the ...

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Congratulations to these new REC ...
Congratulations to these new REC Presidents for 2019! Bay Area Real Estate Council - Scott Fitzpatrick, Owens Law Group, P.A., Ruskin Broward Attorneys' Real Estate ...

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Latest REC News - March
Latest REC News - March The Attorneys' Real Estate Council of Miami-Dade County and the North Dade & Beaches Real Estate Council got the year off to a strong start ...

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NEWS UPDATES

Florida ARECS Blog

What is the Title Insurance Commitment ...
What is the Title Insurance Commitment Really Saying? By: Rene' Rutan, Real Estate Council Relations Manager, Florida ARECS In 2010, Florida was the last state in ...

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Keeping Pace with P.A.C.E. Loans
Keeping Pace with P.A.C.E. Loans By Charles D. Nostra, Attorneys' Title Fund Services, LLC As we discussed a few months ago Property Assessed Clean Energy (PACE) ...

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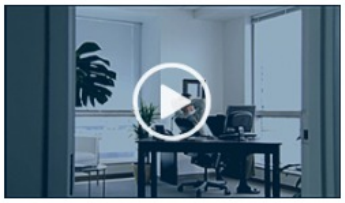
Videos

Recent Real Property Case Law & the Impact on Your Practice
Runtime: 1:19:46

Florida ARECS Overview
Runtime: 1:53

The Originator
Runtime: 3:44



Mary Stuart Day
Runtime: 1:27

Tommy Bryant's Story
Runtime: 1:20

The Palma Family's Story
Runtime: 1:16

Debbie Lanning's Story
Runtime: 1:31

Realtor Seminar: Dealing with Distressed Real Estate
Runtime: 5:27

The Importance of Title Insurance
Runtime: 6:40

Window to the Law: Cyberscams and the Real Estate Professional
Runtime: 7:10

Arm Your Clients Against Wire Fraud
Runtime: 1:50

GUIDES & PUBLICATIONS

"Tips on Buying a Home in Florida"
Marshall C. Deason, Jr., Board Certified Real Estate Lawyer Tampa Bay Business Law, LLP

"Tips on Selling a Home in Florida"
Marshall C. Deason, Jr., Board Certified Real Estate Lawyer Tampa Bay Business Law, LLP

EFI Trade Development: Regional Outlook 2015
Maxwell Stewart, International Trade & Development, Enterprise Florida, Inc.

Residential Inspections & Repairs: Procedures and Pitfalls

Realtor's Distressed Property Guide
This toolkit will give you legal and ethical options available for underwater mortgages.

Seller Interview
Interview sheet to help make the real estate selling experience a pleasant one.

Buyer Interview
Interview sheet to help make the real estate selling experience a pleasant one.

FIRPTA Flowchart
View each step in the FIRPTA transaction process.

Buyer Pre-Closing Checklist
Checklist of steps required before closing when selling a house.

Seller Pre-Closing Checklist
Checklist of steps required before closing when buying a house.

Why You Should Involve a Real Estate Attorney in Your Closing
Information on what a Real Estate Attorney can do for you when closing on a house.

Realtor® Education Library Guide
Summary of available Florida ARECS Realtor® programs.

Jeffrey A. Grebe, Esq.

National Flood Insurance Program Changes: Attachment A Summary
April 1, 2015

FAR/BAR Contract Preparation Manual
Real Estate Resource Order Form

Florida's Revised Limited Liability Company ('LLC') Act
James A Marx, Esq., Marx Rosenthal PLLC, Miami, Florida

INDUSTRY NEWS

Florida Realtors© News Feed

HUD wants to know how it can improve Opportunity Zones
Investors have flocked to the tax advantages offered by Opportunity Zones, and HUD is now taking public comments on how to maximize the benefits for...

Want to be a luxury agent? This might be the ideal time
Lots of money is being inherited or transferred, and real estate was the only asset class with a notable increase in high-net-worth allocation in...

Apartment rents climbing, poised to go higher
Good news for landlords – bad news for renters. The U.S. median rent climbed 3.4% in March year-to-year to $1,535, according to rental housing...

Housing Wire News Feed

Republican tax bill likely curtailed 2018 home sales, Fed economists say
Republican tax reform that capped mortgage and property deductions has curtailed the...

NAHB says homebuilders were more optimistic in April
Homebuilder confidence in the market for new single-family homes rose in April as...

Zillow begins buying and selling homes in Dallas
Homeowners in the Dallas/Fort Worth area can now bypass the traditional real estate...

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Back to Speaker Topics

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Revised February 2019

Realtor® Education Library Guide

WHAT'S NEW?

NEW Hot Spots & Cool Tips

This 50-minute program offers a review and comparison of the traditional and "AS-IS" Florida Realtors®/Florida Bar (FRBAR) Contracts

NEW 1031 Exchanges & FIRPTA

This 2-hour FREC-accredited presentation provides both an in-depth discussion of Tax Deferred Exchanges under Section 1031 of the Internal Revenue Service Code and how to comply with the Foreign Investment in Real Property Tax Act (FIRPTA) when there is a foreign seller in a real estate transaction.

NEW Insuring Against Mortgage Payoff Fraud, Business Email Compromise Fraud & Other Social Engineering Frauds

Cyber-crimes are increasing exponentially and courts are grappling with whom to blame, including real estate agents, when closing funds are misappropriated. This 50-minute program offers tips for shopping for this evolving form of insurance.

NEW Probate Pointers

This 50-minute program is specifically designed for real estate agents and offers a review of basic probate processes and how they impact the purchase and sale of real estate.

NEW Avoiding the Wrath of RESPA: What Real Estate Agents Need to Know About the Real Estate Settlement and Procedures Act

This 50-minute program covers the history, details and applications of RESPA and how real estate professionals can avoid running afoul of these federal rules prohibiting kickbacks and other unlawful incentives for the referral of business.

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Realtor® Education Library Guide

Stopping Cyber Fraud

$3 Billion has been lost since 2015 due to Business Email Compromise. This 45-minute program highlights cyber criminals' growing focus on the real estate settlement industry and why attorneys, real estate agents, buyers and sellers are so vulnerable. You will learn the latest techniques hackers use to try to gain access to your systems and best practices for preventing them from succeeding.

Understanding and Using the FR/BAR Residential Contract

This 3-hour FREC-accredited program provides a comprehensive review of the contract at the heart of what licensees do every day. We will explain the implications of various clauses and how to properly complete the form.

The Originator: Private and Seller Financing After Dodd-Frank

This 1-hour program specifically addresses the CFPB's new Loan Originator rule and its impact on seller and third-party financing in real estate transactions.

Foreign Investment in Real Property Tax Act (FIRPTA)

This 1-hour program explains what real estate agents need to know when working with foreign sellers and buyers to avoid liability and running afoul of the IRS.

What is Title Insurance and How Does it Protect Your Client

This 1-hour program explains the details of title insurance so real estate agents can be prepared to fully explain it to their clients. We discuss how to read the title commitment, as well as what title insurance covers and does not cover.

Residential Inspections & Repairs: Procedures & Pitfalls

Inspections and repairs in residential real estate transactions can be a major source of disputes between buyers and sellers. Many of these disputes arise simply because the parties do not understand or follow the inspection and repair procedures under the standard residential contract. This 1-hour program authored by Jeffrey A. Grebe, Esq. is paper-based so no audio visual equipment or PowerPoint experience is required.

Red Flags: How to Identify and Resolve Obstacles to Closing Early

This 45-minute program teaches real estate agents how to recognize issues that may adversely affect the parties' ability to close on time. We provide attendees with tools they can incorporate into their process to ensure their deals close on time.

If you would like to check out a program from the Realtor Education Library, please contact Rene Rutan,The Fund's REC Relations Manager at RECManager@flarecs.com

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CRITICAL SELLER DATES FOR "AS IS" CONTRACTS WITH FINANCING

By Lewis M. Oliver III ("Lew"), Esq., Oliver Title Law
407-249-5050 / olivertitlelaw.com

- Put all of these dates on your calendar / Assume all dates end at 5 pm on the date shown -

DEPOSIT DATE:_____

This is the date by which the Buyer must pay the Deposit to the Escrow Agent. If for some reason, you change your mind on selling the home (or selling it to THIS particular buyer), you MAY be able to cancel the contract and put the home back on the market (or take it off the market) if the buyer somehow forgets to submit the deposit by this date.

INSPECTION PERIOD END DATE:_____

This the date up until which the buyer can cancel the contract FOR ANY REASON OR NO REASON and still get their deposit back. It is effectively a kind of "free look period", so basically you should not get too attached to a buyer until this date has passed. Buyers do have a right to ASK you to make repairs or give credits for items (it's a free country) during this period, but under the "AS IS" contract, you do not have to agree to such requests. Many sellers do agree to such requests, but again you do not HAVE TO. That's the whole point of the "AS IS" contract.

LOAN APPROVAL PERIOD END DATE:_____

WATCH THIS DATE CAREFULLY!!!! This is the source of more conflicts in Florida residential contract law than any other part of the contract. This is the date by which the buyer has to determine whether or not they can get a loan to buy the property, and the buyer should TELL YOU one way or the other. There are 4 things that can happen on this date:

(1) Buyer notifies you in writing that they could not get the loan. In this case, many sellers are tempted to accuse the buyers of "not working hard enough in good faith" to get the loan, or even deliberately "sabotaging" the loan. This is a very hard thing to prove, and almost never worth the effort. If the buyer says they could not get the loan, just let it go, return the deposit and move on to another buyer. It's common practice for sellers to ASK FOR a denial letter from the buyer's lender, and buyers often deliver denial letters without your even asking, but it is NOT required by the contract. Buyers are allowed to say they can't get financing BEFORE this date if they want.

(2) The buyer notifies you or your realtor in writing that buyer DID get the loan (Or buyer notifies you that they are WAIVING the financing contingency). This means that Buyer can no longer cancel the contract and get their deposit back, even if they don't get their loan. The deposit is now AT RISK, and you will be entitled to it in most cases where buyer then fails to close. Many sellers and listing agents are tempted to ASK FOR A COPY OF the approval letter from the lender. The buyer is NOT required to deliver it (often it is just verbal anyway), and it is arguably not a good idea to ask for it anyway, because the letters are legal documents which neither you nor your realtor are qualified to interpret anyway, and the letters nearly always contain at least a generic "catch all" contingency that will alarm you. But it doesn't matter what the approval says, all that matters is that the buyer SAID THEY GOT THE LOAN.

(3) Buyer asks for a contract Addendum (Amendment) to get more time to get the loan commitment. You are not required to give additional time, though you may choose to do so. Depending on how "desperate" you are, you could either grant this freely OR you can ask for something in exchange for the additional time. You could ask for a bigger deposit, or for a fee, or you could ask that some or all of the deposit be given to you by the escrow agent THEN AND THERE (this way you are SURE you get the deposit if buyer defaults, instead of having to argue for it). This is your call.

(4) Buyer says nothing at all and just remains silent. This is VERY common: buyer has no news from buyer's lender, so buyer decides to say NOTHING. It is extremely important that you understand your rights in this case and that you therefore watch this date. If this happens, you can immediately cancel the contract and put the home back on the market, BUT BUT BUT (a) you must do it ***within 3 days*** AND (b) ***you must return the deposit***. Remember you you only have 3 days. This requires a "gut check" on your part: do you want to be patient or do you want to get rid of this buyer and put the home back on the market. If you ALSO decide to remain silent and do nothing for 3 days, you can no longer terminate the contract and put the home back on the market (but the buyer's depoosit is at risk). Either way, you should understand your options and make a conscious choice rather than being surprised by events.

SPECIAL CLOSING DATE WARNINGS

Under the FR/BAR contract standard language (assuming it has not been changed) there are two situations that can be an unpleasant surprise to sellers that you should be aware of/prepared for:

(1) if the home does not appraise, the buyer can cancel the contract literally up until the Closing Date and

(2) if the buyer's lender is unable to close on the contractual Closing Date because Closing Disclosure ("CD") was not issued 3 days before closing as required by law, the buyer has a RIGHT to extend closing 10 additional days AS LONG AS BUYER'S LENDER HAS ISSUED A CD/"clear to close" by the Closing Date.

CRITICAL BUYER DATES
FOR
"AS IS" CONTRACT WITH FINANCING

Prepared by Lew Oliver, Esq., Florida Attorney

- Put all of these dates on your calendar -
- Assume that all these days end at 5 pm -

DEPOSIT DUE DATE:_____

This is the date by which you need to get your deposit to the escrow agent named on page 1 of the contract. The deposit should be a ***WIRE, NOT A CHECK***. If you submit a check rather than a wire, it is POSSIBLE that a seller could terminate your contract and sell the home to a higher bidder because the contract requires "collected" funds by the deposit due date (which is normally either the signing date or 3 days after the signing date) and a check cannot be collected in less than 7 to 10 business days. ***SO SEND A WIRE***.

START LOAN APPLICATION DATE:_____

This is date by which you must contact a lender and start your loan application. You should be prepared to document that you have done this (emails for example), because if you do nothing by this date, or if you fail to pursue your loan with diligence, you may be in default under the contract and may be liable for loss of your deposit and also possibly even damages if you do not close.

INSPECTION PERIOD ENDS DATE:_____

It is VERY VERY IMPORTANT to watch this date CAREFULLY. Even though seller does not have to make repairs or give credits under an "AS IS" contract, it is nonetheless common for buyers to ask for some repairs or credits ANYWAY (it's just part of the game). However, if you do decide to require some concessions from the seller, it is NOT ENOUGH to simply SAY SO by the end of the Inspection Period, you must ALSO get a contract addendum signed by both parties before the end of the Inspection Period. If you do NOT get a signed addendum in time, seller does not have to do anything and you may lose your deposit. ***This is a common error***. The best way to request a seller concession (repair an item or give credit for it) is to say: "I need this:_____. If you (seller) do not agree to this, and we do not have a signed contract addendum saying so by the end of the Inspection Period, then you (seller) should consider this contract TERMINATED, and please return my deposit".

LOAN APPROVAL PERIOD ENDS DATE:_____

DANGER!!! This date is the cause of the greatest confusion and heartache . This is what this date really means: "***the date when I decide whether I am going to risk losing my deposit if don't get my loan***". If you have gotten a loan approval from your lender by this date, then you must notify the seller of this in writing before this date ends, and thereafter you will ***no longer be able to get your deposit back if you do not close*** (with a few rare exceptions). If you do NOT have a lender approval that you trust and BELIEVE in by this date, then ***before the date passes***, you need to do one of these 3 things IN WRITING to the seller:

(1) Terminate the contract and get your deposit back. This is self-explanatory. You can actually do this well before this date if you are pretty sure you won't be able to get the loan you specified in the contract; you do not have to keep working at it up to this date.

(2) Tell the seller that you are ***waiving*** the loan approval. The trade-off here is that the seller can no longer unilaterally cancel the contract, BUT if you do not close (for any reason, including inability to get the loan), you will lose your deposit. So if you choose this option, you risk losing your deposit, but at least you do not risk losing the house (as long as you close).

(3) Ask seller for a contract amendment to extend the loan commitment date to get additional time to get your loan approval. Sometimes sellers agree to do this, sometimes they don't, and sometimes they agree but want something from you in exchange (such as a larger deposit, a higher sales price, an extension fee, or that some or all of the deposit be given to the seller right then and there). Sellers are not REQUIRED to give you additional time. It is their choice. If you ask, ***be sure to do so and get an answer before the Loan Approval Period ends***, so if the seller says no, you have time to decide whether you want to try options (1) or (2) above.

Suppose you pick none of the above and simply do nothing? This is the worst of all possible worlds. ***Do not make this mistake!!!***. If you remain silent (either intentionally, or accidentally because you FORGOT about the date), you will be deemed to have WAIVED your loan approval and placed your deposit at risk, AND ALSO, for 3 days after this date, the seller can TERMINATE your contract without your consent and sell the home to someone else (however, they would have to refund your deposit). In other words, if you allow this date to pass without acting, you are in danger of losing EITHER the house (if the seller chooses to terminate) OR the your deposit (if you don't close), and YOU do not get to pick WHICH one happens. ***So do not remain silent or forget about this date!***

CLOSING DATE:_____

This is the date when you MUST close. If you do not, most times you will lose your deposit unless the delay was caused by the seller. It does not matter if your lender caused the delay, you are responsible for your lender since you picked them, so it does you no good to blame the lender. This is why it is VERY VERY IMPORTANT to make sure that when your lender says you are approved, that they are really DONE, and nothing else is needed.

HEY REALTORS!
USE THESE TIPS TO PITCH YOUR LISTING AND BUYER SERVICES TO YOUR CLIENTS BASED ON HAVING A ATTORNEY ON *YOUR* TEAM!

We know you have a choice between ordinary title companies and attorneys to refer your closing work. You probably already know several important advantages to you and your clients in choosing attorneys, but have you thought about how those advantages can help you pitch your clients in the beginning and put more money and time in your pockets? Why not make your choice of attorney part of your pitch to earn business? That which helps your client helps YOU.

Here's what's in it for your clients who have an attorney on their team:

"PEACE OF MIND". Home purchases are huge, stressful transactions for most people. Just knowing that a attorney is there to answer questions and solve problems and HELP is like having an extra "insurance policy" for free!

SAVE TIME ON THESE VERY COMMON ISSUES/PROBLEMS. Ever have a deal that falls apart while waiting for a legal answer On any of these VERY COMMON matters? ***(1) HOA docs, (2) divorce issues, (3) probate questions, (4) lien problems, (5) addendum language, (6) deposit disputes, (7) POA's, (8) entity and trust issues, (9) FIRPTA problems, (10) foreign buyers/sellers, (11) listing agreement interpretation, (12) "friendly threat letters", (13) responding to OTHER lawyers, (14) bankruptcy, etc.?*** Ever try to find an attorney on a weekend or after 5 pm? Ever scramble looking for answers on legal or title issues?

ANOTHER PAIR OF EYES/FEWER ERRORS. Attorneys are trained to know ALL the documents. Most lawyers review work done by already-competent para-legals or processors/closers. More eyes means fewer errors.

A GREAT DRAFTSMAN WHEN NEEDED. Attorneys are trained to write legal documents. It's very common to have to draft special contract language or addendums as things change. Everyone is better off if an attorney drafts the language, especially on complicated or important (expensive) matters.

A CREDIBLE AND FORCEFUL ADVOCATE IN CASE OF TROUBLE. Sometimes, things go wrong and conflicts arise. It's nice to know someone's got your back right away.

MORE INSURANCE, OVERSIGHT, TRAINING AND ACCOUNTABILITY. Attorneys have very extensive training, special E&O insurance and careful regulation by the Bar. They are usually very responsive if you need action.

Back to Speaker Topics

Fund Assembly

Commercial Track

Commercial Workflows, Tips & Efficiencies Panel Discussion

Moderator:
Robert D'Amore, *Senior Underwriting Counsel, Commercial Services, The Fund*

Panelists:
Elise Batsel, *Partner, Phelps Dunbar, LLP*
Tina Fischer, *Attorney, Partner, Fletcher & Fischer, P.L.*
Joseph Probasco, *Shareholder, Bush Ross, P.A*

Back to Speaker Topics

Speaker Information

Commercial Workflows, Tips & Efficiencies Panel Discussion

Robert D'Amore

Senior Underwriting Counsel, Commercial Services, The Fund

Robert D'Amore is a Fund Senior Commercial Services Underwriting Counsel. He earned his J.D. from Rutgers University and his B.A., with honors, from Montclair State University in New Jersey. He is currently licensed to practice law in New Jersey and Florida.

Prior to joining The Fund, Mr. D'Amore served as in-house counsel to commercial real estate developers and institutional investors. In between in-house positions, he was a senior attorney with regional law firms representing commercial real estate clients locally and nationally.

Mr. D'Amore has more than 30 years' experience in the commercial real estate industry, including development, asset management, and finance for malls and shopping centers, office and industrial centers, condominiums and hotel/condominiums, multi-family, and mixed-use projects. He is a member of The Florida Bar's Real Property, Probate and Trust Law Section; the International Council of Shopping Centers; NAIOP; the Urban Land Institute; and the Association of Corporate Counsel.

Back to Speaker Topics

Elise Batsel

Partner, Phelps Dunbar, LLP

S. Elise Batsel is a Partner at Phelps Dunbar, LLP, in Hillsborough County where she practices in the areas of land use, zoning and commercial real estate. She represents developers and lenders in all areas including real estate acquisitions, dispositions, financings, and leasing transactions.

Ms. Batsel has represented national and local developers before various governmental bodies and helped them obtain entitlements in more than 40 counties and municipalities throughout the state of Florida. Ms. Batsel's land use practice includes assisting clients with issues related to zoning, permitting and governmental affairs. She has successfully obtained entitlements for the owners and developers of multi-family commercial, industrial, hotel and mixed-use projects. Her practice includes assisting clients with the environmental aspects of real estate and business transactions, including the redevelopment of environmentally impacted sites and environmental and wetland permitting issues.

In the lending arena, Ms. Batsel's experience involves the representation of banks, finance companies and other institutional lenders in a variety of transactional specialties, including commercial/syndicated loans and construction and permanent financings. Notably, Ms. Batsel has represented institutional lenders with Shari'ah-compliant finance and investment transactions.

Prior to joining Phelps Dunbar, Ms. Batsel served as general counsel for Richmond Baking Company and Vice President of Legal and Business Affairs for FrankCrum.

Tina Fischer

Attorney, Partner, Fletcher & Fischer, P.L.

Tina Fischer is a founding member of Fletcher & Fischer, P.L., located in Saint Petersburg, Florida, and has been practicing commercial real estate, land use, and environmental law in Florida since 2005. Ms. Fischer represents clients throughout the entire process of purchase and development of commercial real estate - from due diligence, financing, land acquisition, title services, and closings - to permitting and land use approvals, development, and lease negotiations. Her commercial real estate clients include multi-family and marina developers and owners, office, retail and industrial developers, real estate investment trusts and property management companies.

Ms. Fischer served in the United States Air Force during the Gulf War as a C-141B Instructor Aircrew Member, on both active and reserve duty. During her time in service, she was involved in providing military support to the Intermediate-Range Nuclear Forces Treaty, Operation Desert Storm and Desert Shield, as well as providing airlift support for Presidential, State Department, aero medical missions and tactical missions.

Ms. Fischer is a member of The Florida Bar Real Property, Probate and Trust Law Section and is an active member of Commercial Real Estate Women (CREW) Tampa Bay, serving on the Board of Directors from 2017-2018. She is a member of the Advisory Board for Mission United Tampa Bay, and served as the 2017 and 2018 Chair of the Florida Bar Military Affairs Committee.

Back to Speaker Topics

Joseph Probasco

Shareholder, Bush Ross, P.A.

Joe Probasco is a shareholder with the law firm of Bush Ross, P.A. in Tampa, FL, practicing in the firm's commercial lending and real property group. His practice includes representation of purchasers, sellers, lenders, landlords and tenants in a variety of real estate transactions, including the purchase, sale, construction, financing, refinancing, and leasing of office buildings, multifamily projects, restaurants, industrial properties, manufacturing facilities and raw land. He also has experience in restructuring troubled real estate loans, including complex, multi-tiered loan restructurings, discounted payoffs, bankruptcy, and deficiency notes.

Mr. Probasco was born and raised in Cincinnati, Ohio and lives with his wife and three children in Tampa. He is heavily involved in the Tampa Bay community and currently serves as President of the Tampa Jewish Community Centers & Federation.

Back to Speaker Topics

Fund Assembly

Commercial Track

Negotiating Commercial Real Estate Loan Documentation: Bridging the Gap Between Borrowers and Lenders

Michael Workman, *Shareholder, Clark, Campbell, Lancaster & Munson, P.A.*

Back to Speaker Topics

Speaker Information

Negotiating Commercial Real Estate Loan Documentation: Bridging the Gap Between Borrowers and Lenders

Michael Workman

Shareholder, Clark, Campbell, Lancaster & Munson, P.A

Michael E. Workman is a shareholder with the law firm of Clark, Campbell, Lancaster & Munson, P.A., in Lakeland. He concentrates his practice in the areas of real estate and business transactions, and represents various parties in all aspects of real estate transactions. Mr. Workman has been board certified by The Florida Bar in the area of Real Estate Law since 2005 and is AV-rated by Martindale-Hubbell. He earned his B.B.A. in Accounting (1993) and his M.Acc. (1994) from Stetson University, and his J.D. (1997) from the University of Florida College of Law. Mr. Workman recently completed a term on The Florida Bar 10B Grievance Committee and served as Chair of the committee.

CLARK, CAMPBELL, LANCASTER & MUNSON, P.A.
ATTORNEYS AT LAW

MICHAEL E. WORKMAN
Board Certified Real Estate Attorney

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Negotiating Commercial Real Estate Loan Documentation: Bridging the Gap Between Borrowers and Lenders

Fund Assembly

May 11, 2019

Commercial Real Estate Track

DISCLAIMER: The provisions contained in this material are only examples of language which may be used in loan documentation. They do not fit every situation or any particular situation. They do not necessarily favor one particular party to a loan. These provisions may only be used with full consideration of the facts and circumstances applicable to the loan in question. Additionally, the views and opinions expressed by the speaker are the views and opinions of the speaker only and are not to be construed or interpreted as opinions of law.

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Negotiating Commercial Real Estate Loan Documentation: Bridging the Gap Between Borrowers and Lenders

General Overview

I. Know Your Client
   a. Know Their Business
   b. Know Their Personalities
   c. Know Their Sensitivities to Particular Loan Provisions

II. Know the Terms of the Loan
   a. Have a Copy of the Loan Commitment Letter/Term Sheet Before You Start Reviewing Loan Documents
   b. If They Provide One, the "Hello" Package from Lender's Counsel Can Also be Helpful (Additional Requirements re: Title, Survey, Insurance, etc.)

III. Negotiate Efficiently
   a. Limited Number of Turns of Blacklined Documents in the Early Negotiations
      i. Make Your Changes to the Lender's Form Documents
      ii. Lender's Counsel Makes Changes Showing What is Acceptable
   b. Then Probably Prudent to Schedule a Conference Call with the Business Folks and the Attorneys
   c. Don't Have a War of Blacklines Going Back and Forth with Lender's Counsel Putting in Provisions and Taking them Back Out

IV. Find a Way to Get It Done
   a. Maybe Cliché, but it's What We Need to Do
   b. Rarely Will You Encounter an Issue that is Truly a "Non-Starter"
   c. Time Kills Deals-Clients Get Anxious When Things Aren't Moving
   d. This is Where it Helps to Know Your Client and Their Business
      i. Perhaps Find a Creative Compromise that Helps Both Parties Get to Where They Need to Be
      ii. Know Which Outstanding Issues Are/Are Not Negotiable

V. Close the Loan
   a. This is Everyone's Objective (Lender, Borrower, Attorneys)
   b. Your Client can Move Forward with Their Business
   c. You Issue the Title Insurance (We're all Fund Member Agents and Your Client is Paying for the Lender's Mortgagee Policy)
   d. You Get Paid (Agent's Share of the Premium / Fees)

Sample Amendment to Lender's Internally Prepared (i.e. LaserPro) Loan Documents

AMENDMENT TO BUSINESS
LOAN AGREEMENT AND RELATED DOCUMENTS

THIS AMENDMENT TO BUSINESS LOAN AGREEMENT AND RELATED DOCUMENTS ("Amendment") is made and entered into by _____, LLC, a _____ limited liability company ("Borrower"), _____ ("Lender"), and _____ ("Guarantor") as of the _____ day of _____, 201__.

RECITALS

A. Lender and Borrower have entered into that certain Business Loan Agreement dated as of _____ (the "Loan Agreement"), regarding Loan No. _____ in the principal amount of _____ and 00/100 Dollars ($_____) from Lender to Borrower, as more particularly described in the Loan Agreement.

B. The Loan Agreement and the Related Documents (as that term is defined in the Loan Agreement) shall be collectively referred to herein as the "Loan Documents."

C. Borrower, Lender, and Guarantor have agreed to amend and modify the terms of the Loan Documents in accordance with this Amendment.

D. All capitalized terms used in this Amendment shall have the same meanings ascribed thereto in the Loan Agreement unless otherwise indicated herein to the contrary.

NOW, THEREFORE, in consideration of the premises and mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, do hereby agree as follows:

1. Recitals. The above-referenced recitals are true and correct and hereby incorporated into this Amendment for all purposes.

2. Death of a Guarantor. Notwithstanding anything contained in any of the Loan Documents to the contrary, the death of Guarantor shall not be an Event of Default provided the Borrower presents to the Lender within ninety (90) days after the death of Guarantor a plan to substitute a guarantor acceptable to the Lender or a reasonable plan to provide additional security to the Lender for the Indebtedness. The acceptance by Lender of either of the plans set forth in the preceding sentence shall be at the sole discretion of the Lender. Additionally, upon the death of Guarantor and in the event that a substitute guarantor or a plan to provide additional security for the Indebtedness is approved by the Lender in accordance with the preceding sentence, then the Commercial Guaranty the deceased Guarantor shall not bind the deceased Guarantor's estate.

3. Members of Borrower. Notwithstanding anything contained in any of the Loan Documents to the contrary: (a) the death of a member of Borrower shall not be an Event of

Default; (b) the withdrawal of a member of Borrower without Lender's prior consent shall not be an Event of Default so long as Lender is provided written notice of and consents to such withdrawal after such withdrawal; and (c) distributions to members without Lender's consent shall not be an Event of Default; provided, however, that no distribution shall be made to any member if, as a result, Borrower will be unable to comply with any financial covenant, condition, or requirement.

4. Environmental Inspections. Notwithstanding anything contained in any of the Loan Documents to the contrary, Borrower authorizes Lender and its agents to enter upon the Property to perform environmental inspections and tests as Lender may reasonably deem appropriate to determine compliance of the Property with the environmental provisions of the Loan Documents; provided, however, that such right shall only apply in the event that Lender reasonably believes there are environmental concerns with respect to the Property.

5. Event of Default. Notwithstanding anything contained in any of the Loan Documents to the contrary: (a) Borrower shall have five (5) days after receipt of written notice from Lender to cure a monetary default; (b) Borrower shall have thirty (30) days after receipt of written notice from Lender to cure a nonmonetary default; provided, however, that notwithstanding the foregoing Borrower shall have such additional time as may be reasonably necessary to cure such nonmonetary default so long as Borrower commences the cure of such nonmonetary default within thirty (30) days after receipt of written notice from Lender and thereafter proceeds to complete such cure; and (c) an Event of Default shall not be deemed to have occurred until after the expiration of applicable notice and cure periods, if any.

6. Appraisals. Notwithstanding anything contained in any of the Loan Documents to the contrary, upon the request of Lender (however not more often than annually), Borrower will have an independent appraiser satisfactory to Lender determine, as applicable, the actual cash value or replacement cost of any Collateral; provided, however, that such right shall only apply in the event that Lender reasonably believes the actual cash value or replacement cost, as applicable, of any Collateral has changed significantly since the date of the most recent appraisal thereof.

7. Guaranty Agreements. Notwithstanding anything contained in any of the Loan Documents to the contrary, Lender's right of setoff in all of the Guarantor's accounts with Lender shall not include any accounts that Guarantor holds as a tenancy by the entirety.

8. Choice of Venue. If there is a lawsuit, Borrower and Guarantor agree upon Lender's request to submit to the jurisdiction of the courts of Polk County, State of Florida.

9. Insurance and Condemnation Proceeds. Notwithstanding anything contained in any of the Loan Documents to the contrary, so long as an Event of Default has not occurred and is continuing beyond applicable notice and cure periods, if any, Borrower shall be entitled to receive any insurance and/or condemnation proceeds applicable to the Collateral and such proceeds shall be utilized by Borrower to repair and/or restore the Collateral as appropriate.

9. Financial Statements. Notwithstanding anything contained in the Loan Documents to the contrary, any Financial Statements to be provided by Borrower or Guarantor shall be company-prepared and certified to Lender by the appropriate Borrower's or Guarantor's representative as being true and correct in all material respects, and Borrower and Guarantor shall not be required to provide compiled financial statements prepared by a certified public accountant.

10. Due on Sale – Consent by Lender. Notwithstanding anything contained in the Loan Documents to the contrary, Lender may, at Lender's option, declare immediately due and payable all sums secured by the Mortgage upon the sale or transfer, without Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property. A "sale or transfer" means the conveyance of Real Property or any right, title, or interest in the Real Property; whether legal, beneficial, or equitable; whether voluntary or involuntary; whether by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three (3) years, lease-option contract, or by sale, assignment, or transfer of any beneficial interest in or to any land trust holding title to the Real Property, or by any other method of conveyance of an interest in the Real Property. If any Grantor is a corporation, partnership, or limited liability company, transfer also includes any change in controlling ownership of more than fifty percent (50%) of the voting stock, partnership interests or limited liability company interests, as the case may be, of such Grantor. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law or by Florida law.

11. Miscellaneous. Notwithstanding anything contained in the Loan Documents to the contrary: (a) unless otherwise specifically stated in the Loan Documents, Lender shall act reasonably with regard to: (i) requests made to Borrower pursuant to the Loan Documents; (ii) enforcement of its rights in accordance with the Loan Documents; and (iii) incurring attorneys' fees and costs in association with the enforcement of its rights in accordance with the Loan Documents; (b) unless otherwise specifically stated in the Loan Documents, Lender's consent shall not be unreasonably withheld, conditioned and/or delayed; and (c) Borrower shall not be deemed to have breached its obligations in accordance with the Loan Documents, and an Event of Default shall not be deemed to have occurred, with regard to false or misleading information provided by Borrower unless Borrower has intentionally provided such false or misleading information.

12. Ratification of Loan Documents. Except as specifically modified and amended hereby, the Loan Documents remain in full force and effect and are hereby ratified and confirmed. From and after the execution of this Amendment, all references to the Loan Documents shall be deemed to refer to the Loan Documents as amended by this Amendment.

13. Counterparts. To facilitate execution, the parties hereto agree that this Amendment may be executed and telecopied to the other party and that the executed telecopy shall be binding and enforceable as an original. This Amendment may be executed in as many counterparts as may be required and it shall not be necessary that the signature of, or on behalf of, each party appear on each counterpart; it shall be sufficient that the signature of, or on behalf of, each party appear on one or more of such counterparts. All counterparts shall collectively constitute a single agreement.

IN WITNESS WHEREOF, Borrower, Lender, and Guarantor have caused this Amendment to be executed as of the date first set forth above.

Witnesses:

_____
Name: _____
Witness #1 as to Lender

_____
Name: _____
Witness #2 as to Lender

LENDER

_____

By: _____

Name: _____

Title: _____

BORROWER

_____, LLC, a _____ limited liability company

_____
Name: _____
Witness #1 as to Borrower

By: _____, LLC, a _____
limited liability company, its Manager

_____
Name: _____
Witness #2 as to Borrower

By: _____
Print: _____
Title: _____

GUARANTOR

_____
Name: _____
Witness #1 as to Guarantor

_____
Print: _____

_____
Name: _____
Witness #2 as to Guarantor

Sample Amendments to Lender's Loan Documents Prepared by Outside Counsel

1. Promissory Notes

5. **Late Charge.** Except for any final balloon payment due on the Maturity Date, if any sum payable under this Note or any other Loan Document is not received by Lender by close of business on the fifth (5th) day after the date on which it was due, then Borrower shall pay to Lender an amount (the "**Late Charge**") equal to the lesser of (a) five percent (5%) of the full amount of such sum or (b) the maximum amount permitted by applicable law in order to help defray the expenses incurred by Lender in handling and processing such delinquent payment and to compensate Lender for the loss of the use of such delinquent payment. Any such Late Charge shall be secured by the Security Instrument and other Loan Documents. The collection of any Late Charge shall be in addition to, and shall not constitute a waiver of or limitation of, a default or Event of Default hereunder or a waiver of or limitation of any other rights or remedies that Lender may be entitled to under any Loan Document or applicable law.

6. **Default Rate.** During the continuance of an Event of Default (including the failure of Borrower to make full payment on the Maturity Date), Lender shall be entitled to receive and Borrower shall pay interest on the Outstanding Principal Balance at a rate per annum equal to the lesser of (a) the Maximum Legal Rate or (b) five percent (5%) above the Interest Rate (the "**Default Rate**"). Interest shall accrue and be payable on the Outstanding Principal Balance at the Default Rate from the occurrence of an Event of Default until all Events of Default have been waived in writing by Lender or cured (as determined by Lender in its discretion). Collection of interest at the Default Rate shall not be construed as an agreement or privilege to extend the Maturity Date or to limit or impair any rights and remedies of Lender under any Loan Documents. If judgment is entered on this Note, interest shall continue to accrue post-judgment at the applicable statutory judgment rate.

(d) **Prepayment Prior to Permitted Defeasance Date**. Provided no Event of Default shall then exist, and be continuing, Borrower shall have the right at any time during the period, if any, following the occurrence of the Permitted Release Date until the Permitted Defeasance Date, to prepay the Debt in whole (but not in part) upon not less than thirty (30) days and not more than ninety (90) days prior written notice to Lender specifying the projected date of prepayment and upon payment of an amount equal to the Yield Maintenance Premium.

(Note that while the provision above relates to defeasances, similar language about the existence and continuance of an event of default beyond applicable notice and cure periods can be used whenever a right of the borrower is tied to not being in default)

11. **Time of Essence.** Time is of the essence with regard to each provision contained in this Note. If the deadline or date for performance hereunder falls on a day other than a Business Day (as defined in the Security Instrument), then such deadline or date shall automatically be extended until the next following Business Day.

(Most loan documents have provisions for non-business days but some do not, so it pays to review carefully)

(a) **WAIVER OF JURY TRIAL. BORROWER HEREBY KNOWINGLY WAIVES THE RIGHT TO ASSERT ANY COUNTERCLAIM, OTHER THAN A COMPULSORY COUNTERCLAIM, IN ANY ACTION OR PROCEEDING BROUGHT AGAINST BORROWER BY LENDER OR ITS AGENTS. ADDITIONALLY, TO THE FULLEST EXTENT NOW OR HEREAFTER PERMITTED BY APPLICABLE LAW, BORROWER HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON THE LOAN OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH THE LOAN, THIS NOTE, THE SECURITY INSTRUMENT, OR ANY OTHER LOAN DOCUMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENT (WHETHER VERBAL OR WRITTEN), OR ACTION OF BORROWER OR LENDER. THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER'S MAKING OF THE LOAN**.

(It's worth trying to delete/modify provisions related to the borrower's waiver of counterclaims. If lender's counsel won't agree to delete, perhaps they will agree to a modifier of "Except as permitted by applicable law")

2. Mortgages/Loan Agreements (Generally there will be a separate loan agreement, but some lenders don't have a separate loan agreement and instead incorporate the provisions into the mortgage)

"**Administration and Enforcement Expenses**" shall mean all fees and expenses incurred at any time or from time to time by Lender, including legal (whether for the purpose of advice, negotiation, documentation, defense, enforcement or otherwise), accounting, financial advisory, auditing, rating agency, appraisal, valuation, title or title insurance, engineering, environmental, collection agency, or other expert or consulting or similar services, in connection with: (a) the negotiation and preparation of any amendments or modifications of the Loan or the Loan Documents, whether or not consummated; (b) the administration, servicing, or modification of the Loan Documents or any matter related to the Loan or the servicing thereof (which shall include the consideration of any requests for consents, waivers, modifications, approvals, or similar matters and any proposed transfer of the Property or any interest therein), (c) any litigation, contest, dispute, suit, arbitration, mediation, proceeding or action in any way relating to the Loan or the Loan Documents including in connection with any bankruptcy, reorganization, insolvency, or receivership proceeding; (d) any attempt to enforce any rights of Lender against Borrower or any other person that may be obligated to Lender by virtue of any Loan Document or otherwise, whether or not litigation is commenced in pursuance of such rights; (e) protection, enforcement against, or liquidation of the Property or any other collateral for the Loan, including any attempt to inspect, verify, preserve, restore, collect, sell, liquidate or otherwise dispose of or realize upon the Loan, the Property or any other collateral for the Loan; (f) Borrower's ongoing performance of and compliance with Borrower's respective agreements and covenants contained in this Security Instrument and the other Loan Documents on its part to be performed or complied with after the Closing Date, including confirming compliance with environmental and insurance requirements; and (g) all costs and expenses, liquidation fees, workout fees, special servicing fees, operating or trust advisor fees, or any other similar fees payable by Lender to Servicer which may be due and payable under any applicable servicing agreement (whether on a periodic or a continuing basis) as

a result of an Event of Default or anticipated Event of Default under the Loan, the Loan becoming specially serviced, the commencement or continuance of any enforcement action of any kind with respect to the Loan or any of the Loan Documents, a refinancing or a restructuring of the credit arrangements provided under this Security Instrument in the nature of a "work-out" of the Loan Documents, or any Bankruptcy Action involving Borrower, Guarantor or any of their respective principals or Affiliates.

"**Debt Service Coverage Ratio**" means a ratio for the applicable period in which: (I haven't included a specific definition here, but review carefully with your client to make sure they agree with how the DSCR is calculated and how it will be applied)

Financial Reporting. (a) Borrower shall keep and maintain or shall cause to be kept and maintained on a Fiscal Year basis, in accordance with the requirements for a Special Purpose Entity set forth herein and GAAP (or such other accounting basis acceptable to Lender and applied on a consistent basis), proper and accurate books, records and accounts reflecting all of the financial affairs of Borrower and all items of income and expense in connection with the operation of the Property. Lender shall have the right from time to time at all times during normal business hours upon reasonable written notice to examine such books, records and accounts at the office of Borrower or any other Person maintaining such books, records and accounts and to make such copies or extracts thereof as Lender shall desire. During the continuance of an Event of Default, Borrower shall pay any costs and expenses incurred by Lender to examine Borrower's accounting records with respect to the Property, as Lender shall determine to be necessary or appropriate in the protection of Lender's interest.

(b) Borrower shall furnish to Lender annually, within ninety (90) days following the end of each Fiscal Year of Borrower, a complete copy of Borrower's annual financial statements prepared in accordance with GAAP (or such other accounting basis acceptable to Lender and applied on a consistent basis) covering the Property for such Fiscal Year and containing statements of profit and loss for Borrower and the Property, an annual rent roll and a balance sheet for Borrower (provided that if Borrower consists of more than one entity, said balance sheet shall be an annual combined balance sheet of the Borrower entities (and no other entities) including a combined statement of members' capital). Such statements shall set forth the financial condition and the results of operations for the Property for such Fiscal Year, and shall include amounts representing annual net operating income, Net Cash Flow, gross income, and operating expenses. Any such records, books, or statements delivered pursuant to this Section 5.1.10(b) shall be accompanied by an Officer's Certificate stating that such items are true and correct as of the date of such certificate.

(This modifier can be used wherever an accounting method is referenced. Many borrowers do not strictly adhere to GAAP but it seems like most lenders will accept this modifier, especially if the borrower's initial financial statements have already been approved. Also make sure that the financial reporting covenants match the requirements of the term sheet/commitment letter)

"**Permitted Transfer**" means any of the following: (a) any transfer, directly as a result of the death of a natural person, of stock, membership interests, partnership interests or other ownership interests previously held by the decedent in question to the Person or Persons lawfully entitled thereto; and (b) any transfer, directly as a result of the legal incapacity of a natural person,

of stock, membership interests, partnership interests or other ownership interests previously held by such natural person to the Person or Persons lawfully entitled thereto; and c) any transfers for estate planning purposes so long as the cumulative effect of such transfers does not result in a change of Control in Borrower.

Litigation. Except as previously disclosed to Lender, there are no actions, suits or proceedings at law or in equity, arbitrations, or governmental investigations by or before any Governmental Authority or other agency now pending, filed, or, to Borrower's knowledge, threatened against or affecting Borrower, Guarantor or the Property, which actions, suits or proceedings, or governmental investigations, if determined against Borrower, Guarantor or the Property, might materially adversely affect (a) title to the Property; (b) the validity or enforceability of this Security Instrument; (c) Borrower's ability to perform under the Loan; (d) Guarantor's ability to perform under the Guaranty; (e) the use, operation or value of the Property; (f) the principal benefit of the security intended to be provided by the Loan Documents; or (g) the current principal use of the Property.

(Find out what the borrower has disclosed to lender and make sure the litigation representation matches the disclosure. It's likely that you will also need this information for your opinion of borrower's counsel)

Full and Accurate Disclosure. No statement of fact made by Borrower in this Security Instrument or in any of the other Loan Documents contains any intentionally untrue statement of a material fact or intentionally omits to state any material fact necessary to make statements contained herein or therein not misleading. There is no material fact presently known to Borrower which has not been disclosed to Lender which adversely affects, nor as far as Borrower can foresee, might adversely affect, the Property or the business, operations or condition of Borrower.

Enforceability. This Security Instrument and such other Loan Documents have been duly executed and delivered by or on behalf of Borrower. To the best of Borrower's actual knowledge, the Loan Documents are enforceable by Lender (or any subsequent holder thereof) in accordance with their respective terms. The Loan Documents are not subject to any right of rescission, set off, counterclaim or defense by Borrower or Guarantor, including the defense of usury, nor would the operation of any of the terms of the Loan Documents, or the exercise of any right thereunder, render the Loan Documents unenforceable, and neither Borrower nor Guarantor has asserted any right of rescission, set off, counterclaim or defense with respect thereto.

(Some of the borrower's representations can look suspiciously like legal opinions. Review and modify accordingly)

Existence; Compliance with Legal Requirements. Borrower shall do or cause to be done all things necessary to preserve, renew and keep in full force and effect its existence, rights, licenses, permits, authorizations, and franchises and materially comply with all Legal Requirements applicable to it and the Property, including all regulations, building and zoning codes and certificates of occupancy. Borrower hereby covenants and agrees not to commit, permit or suffer to exist any act or omission affording such right of forfeiture. Borrower shall at all times maintain, preserve and protect all franchises and trade names and preserve all the remainder of its property used or useful in the conduct of its business and shall keep the Property in good working

order and repair, and from time to time make, or cause to be made, all reasonably necessary repairs, renewals, replacements, betterments and improvements thereto, all as more fully provided in the Loan Documents. Borrower shall from time to time, upon Lender's request, provide Lender with evidence reasonably satisfactory to Lender that the Property materially complies with all Legal Requirements or is exempt from compliance with Legal Requirements. Borrower shall give prompt notice to Lender of the receipt by Borrower of any notice related to a violation of any Legal Requirements and of the commencement of any proceedings or investigations which relate to compliance with Legal Requirements.

(Generally, a materiality modifier will be acceptable other than with regard to environmental matters)

Alterations. Borrower shall obtain Lender's prior written consent to any alterations to any Improvements for which the total projected cost exceeds $100,000.00, which consent shall not be unreasonably withheld or delayed except with respect to alterations that may have a material adverse effect on Borrower's financial condition, the value of the Property or the Property's Net Operating Income.

(This is a business issue and not a legal one, but it could still be important to your client. Hopefully your client also reviews the draft loan documents, but it's also good to know and be involved with your client's business. You can provide value to your client beyond just the lawyer "stuff")

Death of a Guarantor. To the extent that any Guarantor is a natural person, the death or incapacity of such Guarantor shall be an Event of Default hereunder unless such Guarantor is replaced in accordance with this Section 5.2.7(g). Borrower shall be permitted to substitute a replacement guarantor (a "**Substitution**") and no Event of Default shall be deemed to have occurred hereunder, provided that each of the following terms and conditions are satisfied: (i) no Event of Default shall have occurred and be continuing or would occur as a result of such Substitution; (ii) within ninety (90) days after the occurrence of such death or incapacity, Borrower delivers to Lender notice of its intent to substitute such Guarantor and, concurrently therewith, gives Lender all such information concerning the proposed substitute guarantor as Lender may reasonably require, including, without limitation, certified financial statements detailing assets and liabilities; (iii) the replacement guarantor is a Satisfactory Replacement Guarantor; (iv) within thirty (30) days after delivery of the written notice described in the preceding clause (ii), such Satisfactory Replacement Guarantor (A) assumes the obligations of Guarantor under the Guaranty and the Environmental Indemnity for events or conditions occurring prior to, as of and after the Substitution or (B) executes and delivers to Lender a replacement guaranty and a replacement environmental indemnity in each case in form and substance the same as the Guaranty and the Environmental Indemnity, respectively, and otherwise reasonably acceptable to Lender, for events or conditions occurring prior to, as of and after the Substitution; (v) concurrently with such assumption or execution and delivery (A) such Satisfactory Replacement Guarantor delivers to Lender a spousal consent in form and substance acceptable to Lender, as and to the extent applicable, and (B) each of Borrower, the remaining Guarantors and/or such Satisfactory Replacement Guarantor, as applicable, affirms each of their respective obligations under the Loan Documents; (vi) Borrower shall have obtained prior written confirmation from the applicable Rating Agencies that such Substitution will not cause a downgrade, withdrawal or qualification of the then current rating of the Securities or any class thereof; (vii) if required by Lender or the

Rating Agencies, Borrower delivers to Lender an opinion from counsel, and in form and substance, in each case reasonably acceptable to Lender and acceptable to Lender stating, among other things, (A) that the Guaranty and the Environmental Indemnity (or the replacement guaranty and environmental indemnity, as the case may be) are enforceable against such Satisfactory Replacement Guarantor in accordance with their terms and (B) that any REMIC Trust formed pursuant to a Securitization will not fail to maintain its status as a "real estate mortgage investment conduit" within the meaning of Section 860D of the Code or be subject to tax as a result of such Substitution. No such death or replacement of a Guarantor shall hinder, impair, limit, terminate or effectuate a novation of the obligations or liabilities of any other Guarantor under any of the Loan Documents.

(The borrower should be able to replace a deceased or incapacitated guarantor. Time periods in the default provisions will almost always need to be increased, either to what you think you might actually be needed for a cure or perhaps to a longer period in anticipation of lender's counsel countering with a shorter time period)

Defaults. (ii) if any of the Taxes or Other Charges are not paid when the same are due and payable unless Lender is responsible for paying same

(Payment of taxes and insurance should not be an event of default if the lender is escrowing for them, assuming no other events of default)

Remedies. During the continuance of any Event of Default, Borrower agrees that Lender may take such action to the extent permitted by applicable law, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Lender may determine, in its discretion, without impairing or otherwise affecting the other rights and remedies of Lender

(Often there is an extensive list of remedies and sometimes there is little or no negotiation to be had with lender's counsel, especially if they're not Florida attorneys. Perhaps it's redundant to add this type of modifier, but it can't hurt)

3. Guaranty (A Few Points to Remember)

a. Make sure there is not a waiver of homestead. Lenders don't seem to include this much anymore, but you should negotiate it out if you see it.

b. Should have same/similar provisions as the loan agreement or mortgage regarding a replacement guarantor.

c. Financial reporting requirements should be consistent with the term sheet/commitment letter.

4. Environmental Indemnity (A Few Points to Remember)

a. Delete waiver of homestead waiver if it's included.

b. In many instances, "Hazardous Substances" can/should be permitted on the property so long as it's in accordance with applicable law.

5. Affidavits Other Than for Title Purposes

Some lenders will use these for organizational documents, financial statements, statements of no adverse change, etc. Unless an affidavit is absolutely necessary in a particular situation (such as a closing affidavit for title purposes), my recommendation is to just say no. A false statement under oath is a third-degree felony in Florida. In my opinion these types of documents should be properly styled as certifications and not affidavits, and watch out if they still want to include a notary acknowledgment on the certification. Even in the dark days of the global economic crisis and loan workouts I can't recall a lender's attorney ever declining my request for certifications in lieu of affidavits, although in some instances we had to threaten not to close. Don't let your client sign an affidavit that could turn a difficult civil matter into a potentially criminal matter.

Sample Exculpation Provision for Non-Recourse Loan

Section 13.1. Exculpation.

(a) Subject to the qualifications below, Lender shall not enforce the liability and obligation of Borrower to perform and observe the obligations contained in the Note, this Agreement, the Security Instrument or the other Loan Documents by any action or proceeding wherein a money judgment or any deficiency judgment or other judgment establishing personal liability shall be sought against Borrower or any principal, director, officer, employee, beneficiary, shareholder, partner, member, trustee, agent, or Affiliate of Borrower or any legal representatives, successors or assigns of any of the foregoing (collectively, the "**Exculpated Parties**"), except that Lender may bring a foreclosure action, an action for specific performance or any other appropriate action or proceeding to enable Lender to enforce and realize upon its interest under the Note, this Agreement, the Security Instrument and the other Loan Documents, or in the Property, the Rents, or any other collateral given to Lender pursuant to the Loan Documents; provided, however, that, except as specifically provided herein, any judgment in any such action or proceeding shall be enforceable against Borrower only to the extent of Borrower's interest in the Property, in the Rents and in any other collateral given to Lender, and Lender, by accepting the Note, this Agreement, the Security Instrument and the other Loan Documents, shall not sue for, seek or demand any deficiency judgment against Borrower or any of the Exculpated Parties in any such action or proceeding under or by reason of or under or in connection with the Note, this Agreement, the Security Instrument or the other Loan Documents. The provisions of this Section shall not, however, (1) constitute a waiver, release or impairment of any obligation evidenced or secured by any of the Loan Documents; (2) impair the right of Lender to name Borrower as a party defendant in any action or suit for foreclosure and sale under the Security Instrument; (3) affect the validity or enforceability of any indemnity, guaranty or similar instrument (including, without limitation, indemnities set forth in Article 12 hereof, Section 11.2 hereof, in the Guaranty and the Environmental Indemnity) made in connection with the Loan or any of the rights and remedies of Lender thereunder (including, without limitation, Lender's right to enforce said rights and remedies against Borrower and/or Guarantor (as applicable) personally and without the effect of the exculpatory provisions of this Article 13); (4) impair the rights of Lender to (A) obtain the appointment of a receiver and/or (B) enforce its rights and remedies provided in Articles 8 and 9 hereof; (5) impair the enforcement of the assignment of leases and rents contained in the Security Instrument and in any other Loan Documents; (6) impair the right of Lender to enforce Section 4.12(e) of this Agreement; (7) constitute a prohibition against Lender to seek a deficiency judgment against Borrower in order to fully realize the security granted by the Security Instrument or to commence any other appropriate action or proceeding in order for Lender to exercise its remedies against the Property; or (8) constitute a waiver of the right of Lender to enforce the liability and obligation of Borrower, by money judgment or otherwise, to the extent of any Loss incurred by Lender (including attorneys' fees and costs reasonably incurred) arising out of or in connection with the following:

(i) fraud or intentional misrepresentation by any Borrower Party in connection with the Loan;

(ii) the gross negligence or willful misconduct of any Borrower Party;

(iii) physical waste to the Property caused by the intentional acts or intentional omissions of any Borrower Party and/or the removal or disposal of any portion of the Property after an Event of Default;

(iv) the misapplication, misappropriation or conversion by any Borrower Party of (A) any insurance proceeds paid by reason of any loss, damage or destruction to the Property, (B) any Awards or other amounts received in connection with the Condemnation of all or a portion of the Property, (C) any Rents following an Event of Default or (D) any Tenant security deposits or Rents collected in advance;

(v) any act of arson by any Borrower Party or of which any Borrower Party had prior knowledge;

(vi) [Intentionally Omitted];

(vii) [Intentionally Omitted];

(viii) any security deposits, advance deposits or any other deposits collected with respect to the Property which are not delivered to Lender upon a foreclosure of the Property or action in lieu thereof, except to the extent any such security deposits were applied in accordance with the terms and conditions of any of the Leases prior to the occurrence of the Event of Default that gave rise to such foreclosure or action in lieu thereof;

(ix) any tax on the making and/or recording of the Security Instrument, the Note or any of the other Loan Documents or any transfer or similar taxes (whether due upon the making of the same or upon Lender's exercise of its remedies under the Loan Documents), but excluding any income, franchise or other similar taxes;

(x) the seizure or forfeiture of the Property, or any portion thereof, or Borrower's interest therein, resulting from criminal wrongdoing by any Borrower Party;

(xi) the failure to make any Balancing Payment unless such failure results solely from there being an insufficient amount of Rents to make such payment;

(xii) [Intentionally Omitted];

(xiii) [Intentionally Omitted];

(xiv) [Intentionally Omitted];

(xv) [Intentionally Omitted];

(xvi) if, after the occurrence of an Event of Default, Lender shall send a notification of Proposal to Accept Collateral in full or partial satisfaction of the Debt pursuant to Section 9-620 or 9-621 of the Uniform Commercial Code in effect (or any successor or parallel provision) and debtor named therein shall object to such acceptance of collateral; provided, that the provisions of this subsection (xvi) shall not apply to good

faith material objections made by such debtor to: (x) the valuation of the collateral, or (y) the amount of the relevant partial satisfaction specified by Lender.

(b) Notwithstanding anything to the contrary in this Agreement, the Note or any of the Loan Documents, (A) Lender shall not be deemed to have waived any right which Lender may have under Section 506(a), 506(b), 1111(b) or any other provisions of the Bankruptcy Code to file a claim for the full amount of the Debt or to require that all collateral shall continue to secure all of the Debt owing to Lender in accordance with the Loan Documents, and (B) the Debt shall be fully recourse to Borrower in the event that: (i) Borrower fails to comply with any provisions hereof relating to cash management or fails to appoint a new property manager upon the request of Lender, fails to cooperate with any New Manager or fails to comply with any limitations on instructing the property manager, each as required by and in accordance with, as applicable, the terms and provisions of, this Agreement, the Assignment of Management Agreement and the Security Instrument; (ii) any representation, warranty or covenant contained in Article 5 or Article 6 hereof is violated or breached, provided, however, that the Debt shall not become fully recourse to Borrower based solely on a breach or violation of Section 5(a)(vii)(4) if such failure results solely from there being an insufficient amount of Rents to make such payment; (iii) a Bankruptcy Event occurs; (iv) Sections 11.1 or 11.6 hereof are violated or breached; or (v) any litigation or other legal proceeding related to the Debt filed by Borrower or any affiliate thereof that delays, opposes, impedes, obstructs, hinders, enjoins or otherwise interferes with or frustrates the efforts of Lender to exercise any rights and remedies available to Lender as provided herein and in the other Loan Documents; provided that the limitations stated at subsection (v) shall not apply to any compulsory counterclaims or colorable defenses brought in good faith and which are ultimately successful in a final non-appealable judgment from a court of competent jurisdiction.

Sample Exculpation Provision for Non-Recourse Loan

Section 13.1. Exculpation.

(a) Subject to the qualifications below, Lender shall not enforce the liability and obligation of Borrower to perform and observe the obligations contained in the Note, this Agreement, the Security Instrument or the other Loan Documents by any action or proceeding wherein a money judgment or any deficiency judgment or other judgment establishing personal liability shall be sought against Borrower or any principal, director, officer, employee, beneficiary, shareholder, partner, member, trustee, agent, or Affiliate of Borrower or any legal representatives, successors or assigns of any of the foregoing (collectively, the "**Exculpated Parties**"), except that Lender may bring a foreclosure action, an action for specific performance or any other appropriate action or proceeding to enable Lender to enforce and realize upon its interest under the Note, this Agreement, the Security Instrument and the other Loan Documents, or in the Property, the Rents, or any other collateral given to Lender pursuant to the Loan Documents; provided, however, that, except as specifically provided herein, any judgment in any such action or proceeding shall be enforceable against Borrower only to the extent of Borrower's interest in the Property, in the Rents and in any other collateral given to Lender, and Lender, by accepting the Note, this Agreement, the Security Instrument and the other Loan Documents, shall not sue for, seek or demand any deficiency judgment against Borrower or any of the Exculpated Parties in any such action or proceeding under or by reason of or under or in connection with the Note, this Agreement, the Security Instrument or the other Loan Documents. The provisions of this Section shall not, however, (1) constitute a waiver, release or impairment of any obligation evidenced or secured by any of the Loan Documents; (2) impair the right of Lender to name Borrower as a party defendant in any action or suit for foreclosure and sale under the Security Instrument; (3) affect the validity or enforceability of any indemnity, guaranty or similar instrument (including, without limitation, indemnities set forth in Article 12 hereof, Section 11.2 hereof, in the Guaranty and the Environmental Indemnity) made in connection with the Loan or any of the rights and remedies of Lender thereunder (including, without limitation, Lender's right to enforce said rights and remedies against Borrower and/or Guarantor (as applicable) personally and without the effect of the exculpatory provisions of this Article 13); (4) impair the rights of Lender to (A) obtain the appointment of a receiver and/or (B) enforce its rights and remedies provided in Articles 8 and 9 hereof; (5) impair the enforcement of the assignment of leases and rents contained in the Security Instrument and in any other Loan Documents; (6) impair the right of Lender to enforce Section 4.12(e) of this Agreement; (7) constitute a prohibition against Lender to seek a deficiency judgment against Borrower in order to fully realize the security granted by the Security Instrument or to commence any other appropriate action or proceeding in order for Lender to exercise its remedies against the Property; or (8) constitute a waiver of the right of Lender to enforce the liability and obligation of Borrower, by money judgment or otherwise, to the extent of any Loss incurred by Lender (including attorneys' fees and costs reasonably incurred) arising out of or in connection with the following:

(i) fraud or intentional misrepresentation by any Borrower Party in connection with the Loan;

(ii) the gross negligence or willful misconduct of any Borrower Party;

Back to Speaker Topics

Fund Assembly

Commercial Track

Title Insurance Aspects of Florida's Construction Lien Law

John Brown, *Senior Underwriting Counsel, Commercial Services, The Fund*

Back to Speaker Topics

Speaker Information

Title Insurance Aspects of Florida's Construction Lien Law

John Brown

Senior Underwriting Counsel, Commercial Services, The Fund

John Brown is a Senior Commercial Services Underwriting Counsel for The Fund. He is a Florida board certified attorney in real estate and a member of both the Florida and Kentucky Bars. He earned his J.D. from Salmon P. Chase College of Law. Prior to joining the Fund, Mr. Brown represented national retailers in purchase contract negotiations, leasing, site evaluation, engineering, permitting, land use, environmental evaluation and compliance, survey review and title.

Mr. Brown has represented private and public companies negotiating the terms of operational and construction financing and was involved with issuance of municipal bonds for utility financing. His practice included structuring and consummating 1031 exchanges, joint development projects, cellular tower site evaluation and closings and hotel project development. Mr. Brown is a member of the Florida Real Property Probate and Trust Law Section of the Florida Bar, CREW Tampa Bay, Gulf Coast Builders Exchange and the International Council of Shopping Centers.

TITLE INSURANCE ASPECTS OF THE FLORIDA CONSTRUCTON LIEN LAW

By

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Board Certified Real Estate Attorney
Commercial Services Division
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I. INTRODUCTION

A. GENERALLY: The commencement of a construction project presents many title issues due to the lien rights of parties supplying labor, services or materials to improve the subject property that could result in claims on the title insurance policy. These challenges involve the propriety and priority of claim of liens over the rights of a purchaser or a mortgage lender. The liens of a given party are perfected in different ways as defined in Chapter 713, Florida Statutes. The Florida Statutes provide for numerous types of liens, but this outline is limited to the liens against real property arising out of construction improvements created under Chapter 713 Part I, known as the "Construction Lien Law".

B. ROLE OF TITLE INSURANCE: Title insurance is much like other forms of insurance. The subject matter in this case is the clarity of title to real property. An Owner's/Leasehold title insurance policy insures the title to the property is "marketable". A Loan policy of title insurance insures the lien of the lender is in the appropriate priority as to all other liens on real property. Coverage under title policies include court costs, attorney fees and expenses incurred in the defense of an insured matter.

II. REVIEW OF TITLE

A. PUBLIC RECORDS SEARCH: An examination is made of the public records to evaluate matters applicable to property, identify ownership and encumbrances and verify real property taxes are paid. Searches of federal court dockets and local government agencies are also necessary to identify matters affecting the parties to the transaction and potential unrecorded liens applicable to the property.

B. THE TITLE INSURANCE COMMITMENT: A title insurance commitment consists of three schedules. Schedule A identifies the names of the insured parties, the amount of coverage, the form of policy to be issued, the name of the current title holder and the legal description of the insured property. Schedule BI contains a list of the items that must be recorded in the public records and a list of the processes that must be undertaken in order to insure the title or the priority of the loan in the current transaction. Schedule BII identifies the matters of record that if not cleared will remain on the title to the property and encumber the fee simple interest of the owner or the lender's lien. Subject to the exclusions in the insurance contract, the Owner or Lender is insured against a loss or damage suffered as a result of the applicability of a matter not disclosed and listed on Schedule BII of the title commitment once the policy is issued.

C. WHERE TO FIND THE CONSTRUCTION RELATED ISSUES: Typically, evidence of construction related activity and concern are initially found in the specific requirements on Schedule BI of the commitment since this schedule contains requirements that must be fulfilled by the title agent to insure the title. Often corresponding exceptions are also placed on Schedule BII as well. Examples

of such requirements unique to the transaction include instructions for addressing outstanding Notice of Commencements, Lis Pendens, Claim of Liens and Code Enforcement liens/Notice of Violations. Additional requirements located on Schedule BI may include the need to secure curative documentation or list processes to evaluate or remedy matters in order to exclude them as exceptions on the final policies.

III. COMMENCEMENT OF THE PROJECT- NOTICE OF COMMENCEMENT

A. NOTICE OF COMMENCEMENT: The Owner or the owner's authorized agent shall file a Notice of Commencement (hereinafter "NOC") in accordance with Sec. 713.13, F.S., prior to commencing to improve any real property (with the exception of some improvements such as site work (Sec. 713.04, F.S.) or improvements costing less than $2,500.00 (F.S. 713.02)) or upon recommencing completion of any improvement after default or abandonment. The NOC is not a lien, cloud or encumbrance on the property (Sec. 713.13(3), F.S.). The NOC establishes a point of reference to which valid claim of liens filed against the property relate back for the purpose of establishing lien priority (Sec. 713.07, F.S.). The NOC provides information necessary for persons to perfect their lien rights. The NOC is valid for a period of 1 year (or longer if specified) (Sec. 713.13(6), F.S.). There appears to be no statutory authority for an owner to shorten the 1-year duration of a NOC except by the use of a Notice of Termination. The NOC is void if work is not commenced within 90 days from its recording (Sec. 713.13(2), F.S.). The NOC must include notice of any private construction bond.

B. DRAFTING CONSIDERATIONS: Confusion or unnecessary lien exposure can result from poorly drafted NOCs. Much of this results from the NOC being prepared by the contractor, as the owner's designated agent, who must have a signed NOC to satisfy government permitting requirements. Sometimes the owner may not be as familiar with its preparation and thus allow the contractor to prepare it out of convenience and without adequate or accurate information. Unfortunately, this process may lead to a poorly drafted NOC.

   a. When completing the NOC the preparer should attach or insert a complete and accurate legal description of the job site. Use of the street address, tax identification/folio number or a project name can be too vague or broad to narrowly define the location of the improvements. This can lead to subsequent liens attaching to property not otherwise part of the project. Also a vague "legal description" on a NOC can create title issues for adjacent property owners or other users on the same property not within the scope of the intended improvements.

   b. Clearly define the scope of work covered by NOC. A large construction project that involves a single general contractor and multiple subcontractors should use only one NOC. This will require the scope of work in the NOC include sufficient details to cover all of the components of the entire project. This approach should be effectively communicated to the local building

officials. Having multiple NOCs on a job site for work included in the scope of a single improvement creates unnecessary confusion establishing lien priority.

c. Always utilize the additional NOC paragraphs to insert the names and addresses of the Surety, the Lender and any additional parties designated to receive notice and documents.

IV. TERMINATION OF NOTICE OF COMMENCEMENT

A. GENERALLY: An owner may terminate the period of effectiveness of a Notice of Commencement by executing, swearing to, and recording of a Notice of Termination (hereinafter "NOT") in accordance with Sec. 713.132 F.S. A NOT can only be recorded after completion of construction or after construction ceases before completion and all lienors have been paid in full or paid pro rata (Sec. 713.132(3), F.S.). A NOT is only effective 30 days after the date it is recorded or longer if the effective date stated in the NOT so provides. (Sec. 713.132(4), F.S.) Further it is only effective to terminate a NOC if notice of its filing was properly served on lienors in privity and those filing a Notice to Owner.

B. PURPOSE AND USE: Filing a NOT can accomplish several purposes.

a. A NOT will shorten the 1-year duration of a NOC once work is complete and all lienors are paid.

b. A NOT is used for the restoration of priority of a mortgage loan when a NOC was recorded ahead of the construction mortgage to be insured.

c. A NOT is used when a mortgage originally recorded ahead of a NOC is sought to be extensively modified, creating a novation and loss of priority.

C. TITLE CONSIDERATIONS WHEN IMPROVMENTS ARE COMPLETE: Construction liens generated in active construction on real property pose a great deal of risk to the title underwriter since the right to file a claim of lien can accrue without any record title activity, be filed after a title closing event and relate back to a time in advance of the insured deed or mortgage.

a. Section 627.7842(1) (c), F.S., provides that no title insurance policy shall except from coverage any lien for services, labor or materials furnished which is imposed by law and not shown by the public records, if at closing the seller signs an affidavit swearing that no improvements have been made within the past 90 days for which payment has not been made in full. (See Appendix A) This procedure is not without some risk, and Fund Members are cautioned to exercise every reasonable effort to determine that the date of completion of construction is not solely based on the date of issuance of the certificate of occupancy, but encompasses the last

date on which any labor, services or materials were furnished on the job site. (See Appendix A)

b. Under the Construction Lien Law there is no apparent procedure for insuring the priority of a mortgage or deed within 90 days after completion of the improvements over unrecorded construction liens where a NOC has been filed. Title underwriters have developed guidelines to minimize the exposure to claims associated with such a situation since it is a common occurrence in today's business environment. Title insurers weigh the facts of each situation and devise a strategy after evaluating the owner's and contractor's financial strength, the size of the project/improvements, the status of construction payments and the posture of the parties. Additionally, the title underwriter will typically require:

   i. An affidavit signed by the owner containing the names and addresses of all persons serving notice to owner pursuant to Sec. 713.06(2), F.S., or if none received then the affidavit should so state. The affidavit should include a statement that the owner made a personal inspection of the property to determine whether persons posted a notice to owner on the property. The affidavit must state the name and addresses of all persons having privity of contract with the owner under Sec. 713.05, F.S., that all improvements described in the NOC are complete and include a statement that all persons serving notice to owner and all persons in privity of contract have been paid in full. (See Appendix B)

   ii. An affidavit signed by the contractor in compliance with Sec. 713.06 (3) (d) 1, F.S. and Sec. 713.20 (5), F.S. which evidences the contractor's receipt of final payment and lien waiver. The affidavit should also state all improvements described in the NOC are complete, all persons providing labor, services or materials have been paid in full and the lien of the contractor is unconditionally waived. Use of a form combining all of this information is recommended. (See Appendix C) In large projects, a progress payment report evidencing proof of payment along with signed lien waivers from all subcontractors and suppliers in accordance with Sec. 713.20(5) will be required. Securing a certified list of the parties supplying labor, services and materials to the contractor pursuant to Sec. 713.165, F.S. may be useful to verify all payments and waivers from the necessary parties were delivered.

   iii. In the event the contractor's final payment affidavit and lien waiver evidences sums due third parties then typically proof of payment and signed unconditional lien waivers in accordance with Sec. 713.20 (5), F.S. from all such parties will be required. (See Appendix D)

iv. In large project where the time for filing claims of liens has not expired and/or disbursement of final payments is being made at closing, proof of payment to parties providing labor, services or materials may also include a review of the certified list of subcontractors, contractor and subcontractor contracts, certified progress payment reports and evidence of financial stability of the owner and/or contractor. This is done on a case by case basis.

v. The owner and/or its principals will be required to sign and deliver an agreement of indemnity to the title insurer for any claim filed in relation to the recorded NOC.

D. WHEN IMPROVEMENTS ARE NOT COMPLETE-RESTORATION OF PRIORITY: Frequently a Fund Member must address an open NOC with active construction on the property, when the NOC is recorded ahead of the construction mortgage to be insured, or when a mortgage originally recorded ahead of the NOC is sought to be extensively modified, creating a novation and loss of priority. Fund Members may rely on the process prescribed in Sec. 713.07(4) F.S. relating to payment to the lienors pursuant to the procedures in Sec. 713.06(4) F.S. Additionally, the Fund generally requires the following to complete this process;

a. All construction on the project must cease.

b. The property owner must make diligent inquiry to obtain the identity of the persons who have provided labor, services or materials for the construction described in the NOC. This may be accomplished by;

i. Identifying all subcontractors and supplier of each contractor who has a direct contract with the owner by obtaining the list described in Sec. 713.165, F.S., and

ii. Identifying persons who served notice to owner on the owner or contractor.

c. The owner must pay each party described in paragraph b above in full for services rendered up to the time construction ceased and obtain Subcontractor's Final Payment Affidavit and Waiver of Lien certificates from each. It is highly recommended that each subcontractor's payment affidavit and lien waiver state that the lienor recognizes that the recorded NOC became null and void as of the date construction under the NOC ceased and that any further labor, services or material provided to the property shall be under a newly recorded NOC. (See Appendix D, with alternate paragraph 4)

d. The owner must then provide an affidavit reciting the facts that establish of record the date the construction ceased and that all parties described in

paragraph b above have been paid in full. See Sec. 713.07(4). F.S., and *Torres v. MacIntyre*, 334 So. 2d 59 (Fla. 3rd DCA 1976). (See Appendix E)

e. Before construction resumes, the mortgage, mortgage modification, deed or other interest sought to be restored to priority should be recorded.

f. The NOC for the recommenced construction must be recorded in the office of the clerk of court for the county in which the property is located subsequent to any re-recorded mortgage, mortgage modification agreement or other documented interest sought to be restored to priority. The original NOC posted on the property should be removed and replaced at the appropriate time by the newly recorded NOC for the recommenced construction.

g. The owner will be required to execute an indemnity agreement in favor of the underwriter. Financial statements of the owner will be required in connection with the indemnity to determine it is secured with sufficient assets. However, an indemnification and review of financial statements is not a substitute for restoring the statutory priority nor should the receipt of an indemnity be a substitution for requiring proof that adequate funds are available to complete construction.

h. A Contractor's Final Payment Affidavit and Lien Waiver in form described above in Section IV C. (b) (ii).

i. If required by Fund Underwriting counsel, a notice of termination of the NOC in accordance with Sec. 713.132 F.S. is completed and recorded along with a copy of the Contractor's Final Payment Affidavit and Lien Waiver. The notice of termination process requires that notice be served by the owner on the contractor and any lienor providing notice to owner prior to filing it in the public records.

j. In some instances, funds may be escrowed by a third party and disbursed at closing when all lienors have not been paid in full through the date work ceased as evidenced by their final payment affidavits and the contractor's final payment affidavit. This process can only be undertaken with approval by Fund Underwriting counsel.

V. CLAIM OF LIENS

A. GENERALLY: Claims of Lien affect the marketability of title. For title purposes all claims of lien are treated as valid because the coverage under a title policy includes the duty to defend.

B. REQUIREMENTS: The most common methods of the creation, perfection, duration and discharge of liens available under the Construction Lien Law are found in Sec. 713.05 through 713.12 Florida Statutes. According to Sec. 713.08 F.S., the Claim of Lien must be recorded by all lienors in the official records for the county in which the improvements are located in order to be valid. The contractor must be licensed in Florida to claim a lien. (See Sec. 713.02(7)) The form of the claim of lien mandated in Sec. 713.08, F.S. must be completed correctly and filed within 90 days after final furnishing of labor, services or material. Further the claim of lien must be served on the owner either before recording or within 15 days of filing. FOR TITLE PURPOSES, ALL CLAIMS OF LIEN FILED IN THE PUBLIC RECORDS ARE VALID.

C. SPECIAL RULES: The Construction Lien Law contains several unique rules applicable to certain types of lienors and contracted work.

a. Licensed professionals who perform services as architect, designer, engineer and surveyor in connection with a specific parcel have a lien on the property regardless if the property is actually improved. (See Sec. 713.03(2) F.S.) This professional lienor need not serve a notice to owner nor a final payment affidavit. The priority of this lienor's lien is effective at the time of recording. (See Sec 713.07(1) F.S.)

b. Contractors who perform services or furnish materials to property for the purposes of making it suitable as the site for the construction of improvements are entitled to a lien. Section 713.04 F.S. provides that no notice of commencement need be filed for such work, no serve of a notice to owner is required and the priority of this lien is effective the date of recording of the claim of lien. (See Sec. 713.07(1) F.S.)

c. The lien of a contractor who performs services or furnish materials to a tenant shall extend to, and only to, the right, and interest of the tenant in the property as of the commencement of the work. However, if the work was performed in accordance with an agreement with the lessor then the lessor's property interest is also subject to potential liens. Section 713.10 F.S. provides a safe harbor for excluding liens resulting from tenant contracted improvements. This mechanism is not without exception though. To take advantage of this provision the lease must expressly provide that the interest of the lessor is not subject to liens for tenant contracted improvements, notice of the lease provision must be given to the contractor, recorded in a memorandum of lease or recorded as part of a general statement covering all leases on the property prior to recording the notice of commencement. For more information on this topic see *Not All Harbors Are Safe- Insuring Commercial Properties with Sec. 713.10 (2013) Recorded Notices*, 46 Fund Concept 52 (June, 2014) and a follow up article by the same name in 46 Fund Concept 143 (December, 2014).

d. The interest of the owner of a mobile home park is not subject to the potential liens of contractors supplying labor, materials or services to a mobile home owner who is a tenant in the park. See Sec. 713.10(2)(b)(3).

D. DURATION OF LIENS: Sec. 713.22, F.S., states the lien provided under the act does not continue longer than 1 year from the date it is recorded or 1 year after the recording of an amended claim of lien that shows a later date of final furnishing of labor, services or materials. The filing of an action to enforce the lien prior to the expiration of 1 year will extend the lien on the property and be binding on the owner, creditors and subsequent purchasers provided a lis pendens is filed. The owner has the option to shorten the duration of the lien by recording in the clerk's office a notice of contest of lien. The clerk serves the notice of contest of lien on the lienor who must then initiate suit to enforce the lien within 60 days from service or the lien is extinguished automatically. The Fund will generally recognize this method to shorten the duration of the lien provide the notice was given in the form provided in the statute, the address of the lienor matches the one in the claim of lien, the clerk's certificate of service appears on the face of the recorded notice of contest of lien and no action was initiated as provided in Fla. R. Civ. P. 1.050 to enforce the lien within the 60 day period after the date of mailing shown on the clerk's certificate.

E. DISCHARGE OF LIEN: Sec. 713.21, F.S. describes the methods by which a lien will be discharged. The parties can file and record a satisfaction or release of lien to directly discharge the lien on the property. The failure to bring an action to enforce the lien within the one-year period results in automatic discharge of the lien. Also, any interested party my file a complaint and the clerk will issue a summons to the lienor to show cause within 20 days why their lien should not be enforced by action or vacated and canceled. The failure of the lienor to respond or show cause will result in the court entering the cancellation of the lien. Finally, the recording of an original or certified copy of a final judgment or decree showing a final determination of the action will discharge the lien.

F. OTHER OPTIONS: In the event the recorded claims of lien cannot be ignored or discharged then other options must be considered to avoid exposing the property to a lien that could affect the title of the owner or the priority of the lien of a lender. These other options include:

a. Escrows of Funds: This option is very risky for title insurers and has limited use. This method does not remove the lien from the property. Insurers will generally require the recorded lien be shown as an exception and grant affirmative coverage over the lien. This process requires the use an appropriate escrow agreement and receipt of adequate funds. This method is not always acceptable to purchasers or lenders.

b. Use of Bonds: Generally, the best protection of title is the use of bonds that eliminate or transfer the burden of the claim of lien from the property onto

the bond or security. These take the form of private, conditional and transfer.

i. Private bonds are authorized by Sec. 713.23, Florida Statutes. The use of private bonds under this provision is not an automatic guarantee a title insurer will accept the bond for insuring purposes notwithstanding that all statutory prerequisites are satisfied. Notice of this type of bond is recorded as an attachment to the notice of commencement. Liens of parties in privity with the contractor are transferred to the bond with the same effect of Sec. 713.24 F.S. by the contractor recording a Notice of Bond in the clerk of court's office. This bond does not exempt the owner from the lien of the contractor who furnished the bond and is limited to the liens under the direct contract of the contractor named as the principal in the bond. Typically, a title company will still require an exception on the title policy for the rights of lienors, if any, who were in privity with the owner and for the lien rights of the general contractor. This exception may be waived if the construction is complete, an owner's affidavit is obtained stating that there are no persons in privity with the owner other than the general contractor and the general contractor is paid in full and provides a final payment affidavit and lien waiver.

ii. Conditional Payment Bond are authorized under Sec. 713.245, Florida Statutes. Under these bonds, all claims of liens under the direct contract of the contractor, except that of the contractor, filed subsequent to recording of the payment bond, attached to the recorded notice of commencement, are transferred to the bond with the same effect as liens that are transferred under Sec. 713.24, F.S., provided that a Notice of Bond and Certificate of Payment to the Contractor, executed by the owner and joined by the contractor, are recorded evidencing that the full amount appearing in the claim of lien has been paid to the contractor and no Notice of Contest of Payment is filed by the claimant. Additionally, all prerequisites for the transfer of the lien as specified in Sec. 713.245, F.S., must have been fulfilled in a timely manner. Otherwise the lien will remain on the property and will not transfer to the bond.

For insuring purposes, satisfactory evidence must be provided that demonstrates full payment of all monies due under the contract between the owner and contractor has been paid to the contractor. If less than full payment on the contract between the owner and contractor has been made, then Fund Underwriting Counsel should be contacted before relying on a conditional payment bond to transfer the lien to bond. It is essential that downstream payments can be tracked to establish that the owner paid the general contractor

for the specific labor, services and materials referenced in the claim of lien.

iii. Transfer of liens to security is authorized by Sec. 713.24, Florida Statutes. This procedure provides the best method of eliminating liens from the property. Any interested person having an interest in the land or the contract under which the lien is claimed may transfer a lien from the real property to other security by either depositing a sum of money or filing a bond executed by a Florida licensed surety in an amount of equal to the amount demanded in the claim, plus interest at the legal rate for 3 years, plus $1000 or 25% of the demand amount, whichever is greater. The Clerk shall record a certificate showing the transfer of the lien from the real property to the security or bond and shall send a certificate of transfer to the lienor. Upon filing of the certificate of transfer, the real property is released from the claimed lien. The Fund will accept this method to insure the title without exception for the claimed lien.

iv. Withdraw, release or discharge of a lis pendens is required in order to issue a policy without exception for a claim of lien and the rights of the parties involved in the litigation if a lis pendens has been recorded or the Fund Member has knowledge of an action to foreclose the construction lien.

VI. CONCLUSION

Title insurance coverage applies to construction liens under the Construction Lien Law. Construction liens present a high claims risk for title insurers due to the off-record nature of the claim and the uncertainty of each individual lien filing deadline.

Review title products thoroughly to identify construction related requirements and exceptions. Construction related activities identified by the title search must be addressed as part of the closing process. Timely alert the owner and their agents as to title requirements that will involve their participation to satisfy or remove.

Be involved with the preparation of the notice of commencement to be sure complete and accurate information is inserted. Amend NOCs that contain inaccurate or incorrect information when possible.

From a title insurer's prospective, ALL FILED CLAIM OF LIENS ARE VALID. When insuring title care must be taken to account for payment to all possible lienors providing labor, services or materials to the insured property. Outstanding claim of liens can be addressed by payment or to some extent with surety bonds and the use of the transfer to security process. Potential liens can also be addressed using a Termination of the Notice of Commencement and the use of the restoration of

priority procedure when new financing is injected, or an existing mortgage is substantially modified during construction activities and prior to final payment to all lienors.

APPENDIX

A. Owner's Affidavit (Work not commenced within 90 Days or completed)
B. Owner's Affidavit (Construction completed less than 90 Days)
C. Contractor's Final Payment Affidavit and Waiver of Lien
D. Subcontractor's Final Payment Affidavit and Waiver of Lien
E. Owner's Affidavit- Restoration of Priority

APPENDIX A

Owner's Affidavit

[Construction — Over 90 Days — Notice of Commencement]

[Alternative for FS 713.13(2) and FS 627.7842(1)]

BEFORE ME, the undersigned authority, personally appeared _____ who, after being sworn, deposes and says:

1. I am the owner of the following described property:

   [i*nsert legal description of real property*]

2. This affidavit is made regarding the Notice of Commencement recorded _____ in O.R. _____, Page_____, and/or Instrument No. _____, of the Public Records of _____County, Florida.

3. A. _____ [i*nitial as applicable*] More than 90 days has elapsed since the recording of the Notice of Commencement set forth under item 1 above and no construction has commenced under said Notice of Commencement.

   B._____ [i*nitial as applicable*] More than 90 days has elapsed since the final furnishing of labor, services or materials to the property pursuant to the Notice of Commencement set forth under item 1 above.

4. This affidavit is given to induce Old Republic National Title Insurance Company, to insure title to the subject property. Affiant agrees to indemnify them for any loss or damages resulting from its reliance on this affidavit.

_____
(Affiant)

Print Name: _____

STATE OF FLORIDA
COUNTY OF _____

Sworn to, affirmed, and subscribed before me this ___ day of _____, 20___, by_____
_____, who is personally known to me or who has produced _____ as identification.

Notary Signature: _____

Print Name: _____

Notary Public, State of _____

My Commission Expires: _____

[PLACE NOTARIAL SEAL]

APPENDIX B

Owner's Affidavit

[TN 21.03.01]

BEFORE ME, the undersigned authority, duly authorized to take acknowledgments and administer oaths, personally appeared _____ ("Affiants"), who depose(s) and say(s) under penalties of perjury that:

1. That he/she is the owner of the property described in Exhibit A attached hereto being the same property described in that certain Notice of Commencement recorded _____ in O.R. _____, Page_____, and/or Instrument No. _____, of the Public Records of _____ County, Florida; or is the agent of the owner of that property and has knowledge of the matters sworn to herein and is authorized by the owner to provide this affidavit.

2. That the following list includes the names of all of the persons who have established privity with the owner (as set forth in Florida Statute 713.05) for providing labor, services or material for the improvements being constructed on the property described in Exhibit A.

(**Instructions**: *list the names next to the numbered lines in this paragraph, if additional space is needed continue list on the rear of this page, if the answer is "none" write "none" in any space provided in this paragraph*.)

1) _____ 6) _____
2) _____ 7) _____
3) _____ 8) _____
4) _____ 9) _____
5) _____ 10) _____

3. That the following list includes the names of all of the persons who have served notice to owner (as set forth in Florida Statute 713.06) on the owner.

(**Instructions**: *list the names next to the numbered lines in this paragraph, if additional space is needed continue list on the rear of this page, if the answer is "none" write "none" in any space provided in this paragraph*.)

1) _____ 6) _____
2) _____ 7) _____
3) _____ 8) _____
4) _____ 9) _____
5) _____ 10) _____

4. A certified copy of the recorded Notice of Commencement is properly posted on the construction site pursuant to requirement of Florida Statute 713.13. I have inspected the property described in Exhibit A during construction in order to determine whether

any notice to owner has been posted on the property and have listed all persons who posted a notice to owner on the property in Exhibit A in paragraph 3 above.

5. All construction on the property described in Exhibit A has been completed and the owner has obtained the final payment affidavit required by Sec. 713.06 (3) (d) 1., Florida Statutes from all parties, including but not limited to, the contractor, who have established privity with the owner (as set forth in Sec. 713.05 Florida Statutes).

6. The owner has paid in full all parties named in this affidavit.

7. This affidavit is given to induce Old Republic National Title Insurance Company, to insure title to the subject property. Affiant agrees to indemnify them for any loss or damages resulting from its reliance on this affidavit.

_____
(Affiant)

Print Name: _____

STATE OF FLORIDA
COUNTY OF _____

Sworn to, affirmed, and subscribed before me this ___ day of _____, 20___, by_____ _____, who is personally known to me or who has produced _____ as identification.

Notary Signature: _____

Print Name: _____

Notary Public, State of _____

My Commission Expires: _____

[PLACE NOTARIAL SEAL]

APPENDIX C

Contractor's Final Payment Affidavit and Lien Waiver

[TN 21.03.01 and TN 21.03.03]

BEFORE ME, the undersigned authority, duly authorized to administer oaths and take acknowledgements, personally appeared _____, who after being duly sworn, deposes and says:

1. I am the _____ of _____, a _____, ("Contractor") and as such am authorized to make this affidavit on behalf of the company and have personal knowledge of the matters described herein.

2. At all times material hereto, Contractor has been doing business in _____ County, Florida.

3. This Affidavit is made pursuant to Florida Statutes, for the purpose of acknowledging full payment to the Contractor from the Owner at the property described as:

   See Exhibit "A" attached hereto

4. That all lienors engaged by the Contractor to perform or provide labor, services and/or materials under the contract, including all extras and change orders, between Contractor and _____, a _____ ("Owner"), and pursuant to that certain Notice of Commencement recorded in Official Records Book _____, Page _____, or Instrument No. _____ of the Public Records of _____ County, Florida, have been **PAID IN FULL** and signed lien waivers have been provided to Contractor and Owner by each of said lienors, except as follows:

   See Exhibit "B" attached hereto (OR NONE)

5. For and in consideration of the contract amount paid by Owner the undersigned hereby acknowledges and does hereby waive, release, remise and relinquish any and all right to claim any lien or liens for work done or material furnished, or any kind of class of lien whatsoever on the property described above.

6. The undersigned certifies that all labor, services and/or materials described herein have been provided prior to execution and delivery of this document and that all construction on the property described above was completed on or before _____, ___, 201_.

7. Contractor agree to hold harmless Owner, (TITLE AGENT) and Old Republic National Title Insurance Company (the "Title Company") free from any and all loss, costs, damage and expense of every kind, including attorney's fees, which it shall or may suffer, including, as to the Title Company, under its said policy or policies now to be issued, or any reissue, renewal or extension thereof, or new policy at any time issued upon said real estate, part hereof or interest herein; arising, directly or indirectly, out of or on account of any such mechanics' or materialmen's liens.

FURTHER AFFIANT SAYETH NOT.

_____
Print Name: _____

STATE OF FLORIDA
COUNTY OF _____

Sworn to, affirmed and subscribed before me this _____ day of _____, 20__, by _____, who is personally known to me or who has produced _____ as identification.

_____
NOTARY PUBLIC
[Place Notary Seal]
Print Name: _____
My Commission Number: _____
My Commission Expires: _____

APPENDIX D

Subcontractor's Payment Affidavit And Lien Release

[TN 21.03.01 and Restoration of Priority TN 21.03.03]

BEFORE ME, the undersigned authority, personally appeared _____, who deposes and says under oath that He/She is _____of_____, having furnished labor, material or services under a direct contract with _____, for consideration, the receipt of which is hereby acknowledged, does hereby release and waive any lien or right to lien the undersigned now has under the Notice of Commencement recorded _____ in O.R. _____, Page_____ or Instrument Number _____, Public Records of _____ County, Florida, and against the property owned by _____, and legally described as follows:

SEE ATTACHED EXHIBIT "A"

The undersigned further acknowledges and certifies that:

1. This is a final waiver of lien rights which the undersigned has against the property described herein for all labor, material, and service furnished including all extras and change orders through _____, 20___, the date work ceased. All laborers employed by the undersigned have been **PAID IN FULL** through the date work ceased, and the undersigned has the right and authority to execute this waiver of lien.

2. All suppliers and sub-contractors to the undersigned who have furnished labor, material, and services for the undersigned in connection with the construction of improvements upon the aforesaid property have been **PAID IN FULL** through the date work ceased, or, if not, attached are the name(s) of the party or parties and the amount(s) to be paid: NONE

3. All parties who have filed a Notice to Owner as a Vendor to the undersigned are **PAID IN FULL** through the date the work ceased and their waivers of lien are attached.

4. The lienor recognizes that the Notice of Commencement recorded _____, 20__ in O.R. _____, Page_____ or Instrument Number _____, became null and void as of the date construction under the Notice of Commencement ceased and that any further labor, services or material provided to the property shall be done under a newly recorded notice of commencement.

The undersigned acknowledges that under Florida Statutes, Contractor, Owner, and Old Republic National Title Insurance Company have a right to rely on this Subcontractor's Payment Affidavit and Lien Waiver.

_____

BY:_____
TITLE:_____

STATE OF FLORIDA

COUNTY OF_____

Sworn to, affirmed and subscribed before me this ___ day of _____, by _____. who is personally known to me or who has produced_____, as identification and did take an oath.

Notary Signature: _____
Print Name: _____
Notary Public, State of _____
My Commission Expires: _____

[PLACE NOTARIAL SEAL]

APPENDIX E

Owner's Affidavit

[Restoration of Priority- TN 21.03.03]

BEFORE ME, the undersigned authority, personally appeared _____ who, after being sworn, depose(s) and says:

1. I am the owner of the property described in Exhibit A attached to this affidavit. This affidavit is made regarding the Notice of Commencement recorded _____ in O.R. _____, Page_____, and/or Instrument No. _____, of the Official Records of _____ County, Florida.

2. Construction under the Notice of Commencement ceased on _____ (**Instructions***: state date construction ceased in space provided in this paragraph*).

3. **All** parties who have established privity with me (as set forth in Florida Statute 713.05) relating to the construction described in the Notice of Commencement are **paid in full**.

4. Regarding construction under the Notice of Commencement, I have obtained a list of **all** subcontractors and suppliers (pursuant to Florida Statute 713.165) from each person who has established privity (as set forth in Florida Statute 713.05) with me. All of those subcontractors and suppliers are listed in this paragraph.
(**Instructions**: *list the names next to the numbered lines in this paragraph, if additional space is needed continue list on the rear of this page, if the answer is "none" write "none" in any space provided in this paragraph*.)

   1) _____ 6) _____
   2) _____ 7) _____
   3) _____ 8) _____
   4) _____ 9) _____
   5) _____ 10) _____

5. I made a personal inspection of the property to locate any notice to owner posted on the subject property.

6. Regarding construction described in the Notice of Commencement, all parties who have served notice to owner on me (as set forth in Florida Statute 713.06) or posted notice to owner on the subject property are listed in this paragraph.

(**Instructions**: *list the names next to the numbered lines in this paragraph, if additional space is needed continue list on the rear of this page, if the answer is "none" write "none" in any space provided in this paragraph*.)

1) _____ 6) _____
2) _____ 7) _____
3) _____ 8) _____
4) _____ 9) _____
5) _____ 10) _____

7. All parties listed in paragraphs 4 and 6 have provided a Contractor's Final Payment Affidavit as required by Sec. 713.06(3)(d)(1), F.S., and lien waivers as evidence that they have all been paid in full up to and including the date of cessation of construction stated in paragraph 2 and any further work, materials or labor shall relate to a new Notice of Commencement to be recorded subsequent to the recording of the mortgage to which the liens of any and all construction lienors are intended to be inferior.

8. This affidavit is given to induce Old Republic National Title Insurance Company, to insure title to the subject property. Affiant agrees to indemnify them for any loss or damages resulting from its reliance on this affidavit.

_____
(Affiant)
Print Name: _____

STATE OF FLORIDA
COUNTY OF _____

Sworn to subscribed and acknowledged before me this _____ day of _____, 20_____,
by_____,
who is/are personally known to me or who has/have produced _____ as identification.

Notary Signature: _____
Print Name: _____
Notary Public, State of _____
My Commission Expires: _____
[PLACE NOTARIAL SEAL]

Back to Speaker Topics

Fund Assembly

Accreditation

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561-5600
www.FLORIDABAR.org

Certificate of Accreditation for Continuing Legal Education

256131
Attorney's Title Fund Services
Robert Rohan
PO Box 628600
Orlando, FL 32862-8600

February 26, 2019

Reference Number:	1901413N
Title:	Fund Assembly 2019 (General Session)
Level:	Intermediate
Approval Period:	05/09/2019 - 11/30/2020

CLE Credits

General	11.5
Ethics	2.0
Technology	2.0

Certification Credits

Business Litigation	11.5
Condominium and Planned Development Law	11.5
Real Estate	11.5

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651 East Jefferson Street
Tallahassee, FL 32399-2300

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Certificate of Accreditation for Continuing Legal Education

256131
Attorney's Title Fund Services
Robert Rohan
PO Box 628600
Orlando, FL 32862-8600

March 11, 2019

Reference Number:	1901518N
Title:	Fund Assembly 2019 (Residential Track)
Level:	Intermediate
Approval Period:	05/09/2019 - 11/30/2020

CLE Credits

General	3.0

Certification Credits

Business Litigation	3.0
Condominium and Planned Development Law	3.0
Real Estate	3.0

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

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256131
Attorney's Title Fund Services
Robert Rohan
PO Box 628600
Orlando, FL 32862-8600

March 11, 2019

Reference Number:	1901519N
Title:	Fund Assembly 2019 (Commercial Track)
Level:	Intermediate
Approval Period:	05/09/2019 - 11/30/2020

CLE Credits

General	3.0

Certification Credits

Business Litigation	3.0
Condominium and Planned Development Law	3.0
Real Estate	3.0

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

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Executive Director

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256131
Attorney's Title Fund Services
Robert Rohan
PO Box 628600
Orlando, FL 32862-8600

March 11, 2019

Reference Number:	1901520N
Title:	Fund Assembly 2019 (Breakout Sessions)
Level:	Intermediate
Approval Period:	05/09/2019 - 11/30/2020

CLE Credits

General	4.0
Ethics	2.0
Technology	1.0

Certification Credits

Business Litigation	4.0
Condominium and Planned Development Law	4.0
Real Estate	4.0

Back to Speaker Topics

National Association of Legal Assistants, Inc.
1516 S. Boston, #200
Tulsa, OK 74119
www.nala.org
918-587-6828

Continuing Education

Request for Approval of Credit
of Continuing Legal Assistant
Educational Programs
for Certified Legal Assistants

Sponsor: Attorneys' Title Fund Services, LLC

Contact: Cindy Noland

Address: 6545 Corporate Centre Boulevard

City: Orlando	**State:** FL	**Zip:** 32822
Phone: 407-240-3863	**Fax:** 407-854-5015	**Email:** cnoland@thefund.com

Web address/link for this specific program: www.thefund.com/assembly

Description of Program

Category (Specialty practice area):

Title: 55th Annual Fund Assembly

Date: May 9, 10 and 11, 2019

Location: Hilton Orlando Bonnet Creek Resort

Approval is awarded for the above described program. Language advising this program has met the requirements of the Certifying Board for Legal Assistants may appear on promotional literature describing this program.

Maximum number of hours/credits.
12.0 Hours ____ Credits: Including 1.0 hours Ethics

Back to Speaker Topics

Certificate of Attendance Form

The following is the Certificate of Attendance form for CLAs to use to request continuing education credit. Print this form using the print button on your browser, complete it and send it to NALA Headquarters at 1516 S. Boston, Suite 200, Tulsa, OK 74119 (fax: 918-582-6772).

Certificate of Attendance

As a Certified Legal Assistant, proof of continuing education must be submitted for CLAE units. This form should be completed, including validation and all signatures, and submitted with documentation of continuing legal education in accordance with the Requirements to Maintain Certification.
If this form is being submitted for credit for attending a seminar, please complete the spaces below and attach a seminar brochure.

Session Hours	Session Topics (Description and Speakers)	Validation of Session Attendance (Signature of speaker or seminar official)
12.0 hours Including 1.0 hours Ethics	Refer to attached program for the 55th Annual Fund Assembly	

Name of CLA	Name of Seminar 55th Annual Fund Assembly
Signature of CLA	Name of Sponsor Attorneys' Title Fund Services, LLC
Address	Authorized Signature of Sponsor Representative Cindy Noland
Address	Date of Educational Event May 9, 10 and 11, 2019
NALA Account Number (if known)	Location Hilton Orlando Bonnet Creek Resort