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## 2009-2010 Survey of Florida Law Affecting Business Owners

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## 2009–2010 SURVEY OF FLORIDA LAW AFFECTING BUSINESS OWNERS

BARBARA LANDAU\*

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## I. INTRODUCTION

This year's survey of cases includes a number of important decisions affecting business owners' interests in personal and real property. For example, in *Olmstead v. Federal Trade Commission*,<sup>1</sup> the Supreme Court of Florida held, but not without a strong dissenting opinion—and not without creating uncertainty as to the right of a creditor to reach the membership interest of a member of a multi-member limited liability company (LLC)<sup>2</sup>—that a judgment creditor may reach the entire membership interest of the owner of a single-member of a Florida LLC.<sup>3</sup> A Florida district court of appeal decided in *Robertson v. Deeb*<sup>4</sup> that an individual retirement account (IRA) beneficiary's interest in an "inherited IRA" is subject to garnishment by creditors.<sup>5</sup> And in *State v. Hanson*,<sup>6</sup> another Florida district court of appeal held that enforcement of a foreign income tax judgment in Florida was not against Florida's public policy.<sup>7</sup> On the takings front, in *M & H Profit, Inc. v. City of Panama City*,<sup>8</sup> yet another Florida district court of appeal held that the Bert J. Harris, Jr. Private Property Rights Protection Act (Bert Harris Act) did not apply where the property owner had not formally filed its development application at the time the city enacted a height and set-back ordinance,<sup>9</sup> but dissent was voiced here as well.<sup>10</sup>

This year's survey addresses, with only limited exceptions, cases of first impression, cases certifying or identifying conflicts between the Florida District Courts of Appeal, and questions certified to the Supreme Court of Florida by the Florida District Courts of Appeal or the United States Court of Appeals for the Eleventh Circuit.

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1. 44 So. 3d 76 (Fla. 2010); *see infra* note 63 and accompanying text.

2. *See Olmstead*, 44 So. 3d at 86 (Lewis, J., dissenting, in whose opinion Polston, J., concurred).

3. *Id.* at 83 (majority opinion).

4. 16 So. 3d 936 (Fla. 2d Dist. Ct. App. 2009); *see infra* note 521 and accompanying text.

5. *Robertson*, 16 So. 3d at 939–40.

6. 36 So. 3d 879 (Fla. 5th Dist. Ct. App. 2010) (per curiam).

7. *Id.* at 880.

8. 28 So. 3d 71 (Fla. 1st Dist. Ct. App. 2009).

9. *Id.* at 73, 76.

10. *Id.* at 78 (Thomas, J., dissenting).

## II. ALTERNATIVE DISPUTE RESOLUTION

In a contract dispute, the parties agreed to the abatement of litigation and the submission of the case to arbitration.<sup>11</sup> After the arbitrator rendered his decision in favor of Commercial Interiors Corp. of Boca Raton (Commercial), Pinkerton & Laws, Inc. (Pinkerton) successfully moved the trial court to set aside the order of the arbitrator.<sup>12</sup> Pinkerton's argument was that the contracts were illegal under section 489.128 of the *Florida Statutes* because Commercial did not have a contractor's license.<sup>13</sup> The trial court concluded that the arbitration provision in both contracts and the contracts themselves—which were on forms that Pinkerton drafted—were unenforceable, finding that “the arbitrator had misapplied section 489.128.”<sup>14</sup> Commercial appealed, and the Fifth District Court of Appeal reversed.<sup>15</sup> In *Buckeye Check Cashing, Inc. v. Cardegna*,<sup>16</sup> the Supreme Court of the United States held that under the Federal Arbitration Act, also applicable to cases brought in state court, “the issue of [a] contract's validity is [decided] by the arbitrator in the first instance” and not by the court.<sup>17</sup> This rule has also been applied to decisions under the *Florida Statutes*.<sup>18</sup> Here, the arbitrator had in the first instance decided that the contracts were valid.<sup>19</sup> Next, the appellate court listed the five grounds under section 682.13 of the *Florida Statutes* for asking the court to set aside the arbitrator's decision:

- (a) the award was procured by corruption, fraud, or other undue means; (b) there was evident partiality by the arbitrator appointed, corruption in any of the arbitrators or umpire, or misconduct pre-

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11. *Commercial Interiors Corp. of Boca Raton v. Pinkerton & Laws, Inc.*, 19 So. 3d 1062, 1063 (Fla. 5th Dist. Ct. App. 2009).

12. *Id.*

13. *Id.* Section 489.128 of the *Florida Statutes* provided that “[a]s a matter of public policy,” contracts made by unlicensed contractors are unenforceable by the contractor. FLA. STAT. § 489.128 (2002) (amended 2003).

14. *Commercial Interiors Corp. of Boca Raton*, 19 So. 3d at 1063.

15. *Id.* at 1063, 1065.

16. 546 U.S. 440 (2006).

17. *Id.* at 446; *Commercial Interiors Corp. of Boca Raton*, 19 So. 3d at 1063; *accord Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778–79 (2010).

18. *See Commercial Interiors Corp. of Boca Raton*, 19 So. 3d at 1064. The Fifth District Court of Appeal did not rule as to whether this case was governed by the Federal Arbitration Act (FAA), but that on the issue of who decides the contract's validity, the law is effectively the same, and on the other issue—the grounds to set aside an arbitration award—it did not matter whether the Florida statute or the FAA applied, since “the grounds for relief are essentially the same.” *Id.* at 1063–64, 1064 n.2.

19. *Id.* at 1063.

judicing the rights of any party; (c) the arbitrators or the umpire in the course of exercising jurisdiction exceeded their powers; (d) the arbitrators or the umpire in the course of her or his jurisdiction refused to postpone the hearing upon sufficient cause being shown or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 682.06, as to prejudice substantially the rights of a party; (e) there was no agreement or provision for arbitration subject to this law . . . .<sup>20</sup>

It appeared to the Fifth District Court of Appeal that the trial judge “simply disagreed with the arbitrator’s application of the law to the facts.”<sup>21</sup> That was not enough to set aside the arbitrator’s ruling.<sup>22</sup> In conclusion, the district court noted that under *Schnurmacher Holding, Inc. v. Noriega*,<sup>23</sup> the arbitrator’s error of law was insufficient to set aside an arbitration award.<sup>24</sup>

In another arbitration case, a provision in an arbitration agreement allowed the contesting parties to each choose an arbitrator, and the two arbitrators so chosen would then pick a “neutral arbitrator.”<sup>25</sup> Another provision directed that claims under the agreement be decided by a “neutral panel of arbitrators.”<sup>26</sup> One party objected to the other’s choice of an arbitrator as being biased.<sup>27</sup> The other party argued that the arbitrator selected by a party did not have to be neutral.<sup>28</sup> The trial court agreed with the objecting party and ordered that another arbitrator be chosen.<sup>29</sup> The Second District Court of Appeal affirmed the trial court per curiam.<sup>30</sup> Judge LaRose, in a specially concurring opinion written in support of the per curiam decision, noted that the American Arbitration Association allows for the parties to select non-neutral arbitrators if the parties so agree, but there was no agreement to that effect here.<sup>31</sup>

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20. *Id.* at 1064.

21. *Id.*

22. *Commercial Interiors Corp. of Boca Raton*, 19 So. 3d at 1064.

23. 542 So. 2d 1327 (Fla. 1989).

24. *Commercial Interiors Corp. of Boca Raton*, 19 So. 3d at 1064 (citing *Schnurmacher Holding, Inc.*, 542 So. 2d at 1329).

25. *Whitehead v. Smith*, 23 So. 3d 1281, 1281 (Fla. 2d Dist. Ct. App. 2010) (per curiam) (LaRose, J., specially concurring) (quoting the parties’ arbitration agreement).

26. *Id.* (quoting the parties’ arbitration agreement).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Whitehead*, 23 So. 3d at 1281 (per curiam) (denying the petitioners’ writ of certiorari).

31. *Id.* at 1281–82 (LaRose, J., specially concurring).

## III. ATTORNEYS' FEES

In *BDO Seidman, LLP v. Bee*,<sup>32</sup> Mr. Bee (Partner) had been a Florida partner in BDO Seidman, LLP (Partnership), and Partner and Partnership had executed a three-page agreement titled "Understanding Regarding Continued Employment" (the Understanding).<sup>33</sup> The Understanding provided compensation to Partner that included a guaranteed payment for the following four years and a bonus for the fiscal year in which the agreement was signed.<sup>34</sup> Partnership sought to rescind the Understanding and to "terminat[e] [Partner]'s partnership interest for cause."<sup>35</sup> After prevailing in arbitration, Partner sued Partnership for attorney's fees under section 448.08 of the *Florida Statutes*.<sup>36</sup> Section 448.08 allows an award of costs and attorney's fees in a suit seeking unpaid wages.<sup>37</sup> Neither the Understanding nor the partnership agreement contained a provision regarding an award of costs and attorney's fees to the prevailing party should a dispute arise under the agreements.<sup>38</sup> The trial court awarded Partner \$286,655.50 as attorney's fees based on section 448.08, and Partnership appealed.<sup>39</sup> The Third District Court of Appeal stated the question before it as "whether an attorney's fee statute applicable to an action for 'unpaid wages' . . . applies to a compensation dispute between a partner and an LLP."<sup>40</sup> Partnership asserted that Partner was a co-owner asking for partnership profits, not an employee claiming unpaid salary.<sup>41</sup> Partner testified that he reported his income from Partnership based on the information provided in the partnership Form Schedule K-1 provided to him.<sup>42</sup> Noting that this appeared to be a matter of first impression, the Third District, based on the record presented, decided that section 448.08 did apply.<sup>43</sup> The arbitrator had determined that the Understanding existed separately from the partnership agreement, and the trial court found that the Understanding could be characterized as an employment agreement.<sup>44</sup> The arbitrator's findings of fact or law, even if mistaken, were not within Florida's sta-

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32. 24 So. 3d 1278 (Fla. 3d Dist. Ct. App. 2010).

33. *Id.* at 1279.

34. *Id.*

35. *Id.* at 1280.

36. *Id.* at 1281; FLA. STAT. § 448.08 (2008).

37. *BDO Seidman, L.L.P.*, 24 So. 3d at 1279 n.1.

38. *Id.* at 1280.

39. *Id.* at 1281.

40. *Id.* at 1279 (citations omitted).

41. *Id.* at 1281.

42. *BDO Seidman, L.L.P.*, 24 So. 3d at 1280.

43. *Id.* at 1279, 1281.

44. *Id.*

tutory grounds for setting aside an arbitration award under section 682.13 of the *Florida Statutes*.<sup>45</sup> The Third District Court affirmed the fee award, adding that if partnerships wish to avoid the effect of section 448.08, “it may be advisable to put that intention in writing.”<sup>46</sup>

#### IV. BUSINESS ENTITIES, ARRANGEMENTS, AND AGREEMENTS

##### A. *Administratively Dissolved Foreign Corporation: Right to Maintain Suit in Florida*

Once a foreign corporate plaintiff has been administratively dissolved, may it continue to pursue an action in court? Under the facts presented in *Selepro, Inc. v. Church*,<sup>47</sup> the Fourth District Court of Appeal answered yes.<sup>48</sup> Selepro, Inc. (Corporation), a Delaware corporation, qualified in 2003 to do business in Florida.<sup>49</sup> In 2004, Corporation sued an officer/shareholder, a former employee, and another corporation alleging breach of contract and several torts, including conversion and misappropriation.<sup>50</sup> Corporation filed amended complaints, and in 2005, at the time of the filing of its Third Amended Complaint, Corporation was a valid corporation in Delaware and was still “authorized to do business in Florida.”<sup>51</sup> However, in March 2006, approximately five years after it had incorporated in Delaware, Corporation’s existence was terminated by the State of Delaware.<sup>52</sup> About six months later, in September 2006, Florida administratively revoked Corporation’s authority to do business in Florida.<sup>53</sup> More than a year later, in December 2007, the two non-corporate defendants successfully moved for summary judgment relying on sections 607.1501 and 607.1502(1) of the *Florida Statutes*.<sup>54</sup> The

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45. *Id.*; FLA. STAT. § 682.13 (2010).

46. *BDO Seidman, L.L.P.*, 24 So. 3d at 1281.

47. 17 So. 3d 1267 (Fla. 4th Dist. Ct. App. 2009).

48. *Id.* at 1268.

49. *Id.*

50. *Id.* at 1268, 1268 n.1. The other claims were “diversion of corporate assets, . . . fraud, . . . defamation, and tortious interference with business opportunity.” *Id.* at 1268.

51. *Selepro, Inc.*, 17 So. 3d at 1268.

52. *Id.*

53. *Id.*

54. *See id.* at 1269. Section 607.1501 of the *Florida Statutes* provides that “[a] foreign corporation may not transact business in [Florida] until it obtains a certificate of authority from the Department of State.” *Id.* at 1270 (quoting FLA. STAT. § 607.1501(1) (2010)). Under section 607.1502(1) of the *Florida Statutes*, if a foreign corporation engages in business without obtaining such certificate, “the corporation ‘may not maintain a [court] proceeding’” until a certificate has been obtained. *Selepro, Inc.*, 17 So. 3d at 1270 (quoting FLA. STAT. § 607.1502(1)). However, section 607.1501(2)(a) says that “[m]aintaining, defending, or set-



Fourth District reversed.<sup>55</sup> The district court cited *Allied Roofing Industries, Inc. v. Venegas*<sup>56</sup> for the proposition that under sections 607.1421(3) and 607.1405(1) of the *Florida Statutes*, winding up of a dissolved corporation's business may include suing and defending claims connected to the winding up of the corporation's business.<sup>57</sup> The Fourth District said that "an administratively dissolved corporation has the capacity to sue . . . [if] necessary" in winding up its business and liquidating.<sup>58</sup> Although the statutory provisions relied on by the defendants require that a foreign corporation "transacting business" in Florida keep its Florida authorization to do so, in effect, if it desires to maintain actions in Florida courts, Corporation was not transacting business.<sup>59</sup> Rather, it was winding up its business affairs, and as part of that process was permitted by section 607.1421(3) of the *Florida Statutes* to maintain a court action.<sup>60</sup> The Fourth District Court said that "[i]n conclusion, the plaintiff filed suit when it was in good standing" and "[w]hen the defendants filed their motion for summary judgment," the plaintiff was no longer transacting business.<sup>61</sup> Accordingly, Corporation "should be permitted to maintain the proceeding solely to wind up its affairs [under] section 607.1421(3)."<sup>62</sup>

#### B. *Execution on Member's Entire Interest in Single-Member LLC*

"Whether Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's single-member limited liability company to satisfy an outstanding judgment" was the rephrased question certified by United States Court of Appeals for the Eleventh Circuit to the Supreme Court of Florida in *Olmstead*.<sup>63</sup> The Supreme Court of Florida

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ting any proceeding" is not transacting business under Chapter 607. *Id.* at 1270 (quoting FLA. STAT. § 607.1501(2)(a)).

55. *Id.* at 1270.

56. 862 So. 2d 6 (Fla. 3d Dist. Ct. App. 2003).

57. *Selepro, Inc.*, 17 So. 3d at 1269 (citing *Allied Roofing Indus., Inc.*, 862 So. 2d at 8); see also FLA. STAT. §§ 607.1405(1), .1421(3).

58. *Selepro, Inc.*, 17 So. 3d at 1269. Did the Fourth District Court of Appeal intend to limit its holding to situations where the plaintiff-corporation's suit had been filed prior to its administrative dissolution?

59. *Id.* at 1270.

60. *Id.* (citing FLA. STAT. § 607.1421(3)). Section 607.1421(3) of the *Florida Statutes* provides that a dissolved corporation may not engage in "business except [as] . . . necessary to wind up and liquidate." FLA. STAT. § 607.1421(3).

61. *Selepro, Inc.*, 17 So. 3d at 1270.

62. *Id.* (citing FLA. STAT. 607.1421(3)).

63. *Olmstead v. Fed. Trade Comm'n*, 44 So. 3d 76, 78 (Fla. 2010); see also *supra* note 1 and accompanying text.

answered in the affirmative.<sup>64</sup> The court looked to section 56.061 of the *Florida Statutes*, which noted that “real and personal property, including ‘stock in corporations, shall be subject to levy [by a judgment creditor] and sale under execution.’”<sup>65</sup> The court stated that “[a]n LLC is a type of corporate entity,” and an LLC ownership interest constitutes personal property “reasonably understood to fall within the scope of ‘corporate stock.’”<sup>66</sup> In the Florida Revised Uniform Partnership Act and the Florida Revised Limited Partnership Act, a charging order giving the judgment creditor access only to the judgment debtor’s rights to profits and distributions from the partnership is made the exclusive remedy available to a judgment creditor with respect to partnership and limited partnership interests.<sup>67</sup> Section 608.433(4) of the *Florida Statutes* authorizes a charging order against an LLC member’s interest similar to that available to a judgment creditor against partnership and limited partnership interests.<sup>68</sup> However, unlike partnership charging orders, LLC charging orders are not stated to be the exclusive remedy available to judgment creditors with respect to LLC interests.<sup>69</sup> Therefore, a judgment creditor may proceed under section 56.061 against the judgment debtor member’s entire right title and interest in the LLC.<sup>70</sup> Justice Lewis, joined by Justice Polston, wrote a strong dissent.<sup>71</sup> The ramifications of this decision remain to be seen.<sup>72</sup>

### C. *Statutory Indemnification of Corporate Officer/Employee*

The United States alleged that the vice president and general manager (Officer/Employee) of Banco Industrial de Venezuela, C.A. (Bank) for its Miami agency “facilitated the deposit” of drug money into accounts at Bank.<sup>73</sup> Officer/Employee was prosecuted by the United States for alleged money laundering.<sup>74</sup> The jury found her guilty on each of the ten counts, but “the trial judge granted [her] motion for judgment of acquittal [on] all

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64. *Olmstead*, 44 So. 3d at 78.

65. *Id.* at 80 (quoting FLA. STAT. § 56.061 (2008)).

66. *Id.*

67. *See id.* at 82 (citing FLA. STAT. §§ 620.8504, .1703).

68. *Id.* at 81; FLA. STAT. § 608.433(4) (2010).

69. *Olmstead*, 44 So. 3d at 82.

70. *See id.*

71. *See id.* at 83 (Lewis, J., dissenting, joined by Polston, J.).

72. *See supra* note 2 and accompanying text.

73. *Banco Indus. de Venez., C.A., v. de Saad*, 21 So. 3d 46, 47 (Fla. 3d Dist. Ct. App. 2009), *reh’g granted* by 28 So. 3d 44 (Fla. 2010).

74. *Id.*

counts.”<sup>75</sup> The United States appealed the trial court’s judgment.<sup>76</sup> Officer/Employee subsequently agreed with the government that she would plead guilty to a single “count of money structuring,” and the government would withdraw its appeal.<sup>77</sup> Officer/Employee, being unsuccessful in her subsequent request that Bank indemnify her for her attorney’s fees incurred in the federal prosecution and pay her past wages under the employment contract, brought an action against Bank.<sup>78</sup> Her claim for indemnification was based on section 607.0850 of the *Florida Statutes*.<sup>79</sup> In summary, this section provides that if a person is brought into an action by a third party “by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation,” the person is entitled to corporate reimbursement of his or her defense expenses “[if] successful on the merits or otherwise” in defending against such claims.<sup>80</sup> On motion for summary judgment, the trial court awarded Officer/Employee almost \$3 million as indemnification and more than \$1.6 million as indemnification to the assignee of Officer/Employee’s right to attorney’s fees and costs.<sup>81</sup> The Third District Court of Appeal affirmed, relying heavily on the Delaware case of *Perconti v. Thornton Oil Corp.*,<sup>82</sup> that the Third District said interpreted a Delaware statute quite similar to section 607.0850 under facts similar to the case before it.<sup>83</sup> The appellate court determined that Officer/Employee had been “successful on the merits or otherwise” in the federal proceeding and that she had been prosecuted by the government “by reason of the fact” that she was an officer of Bank.<sup>84</sup> The Third District quoted *Perconti* for the proposition that the statute “does not require a determination that the corporate officer was ‘innocent.’”<sup>85</sup> Officer/Employee’s plea deal did not change the result.<sup>86</sup> Thus, the Third District followed the Delaware court’s holding when the court con-

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75. *Id.*

76. *Id.*

77. *Id.* at 47–48.

78. *Banco Indus. de Venez., C.A.*, 21 So. 3d at 48.

79. *Id.*

80. *Id.* (alteration in original) (quoting FLA. STAT. § 607.0850(1), (3) (1999)).

81. *Id.* The assignee-attorney—who had defended Officer/Employee in the criminal action—intervened in Officer/Employee’s action against Corporation. *Id.* at 48 n.2 (citing *Beeler v. Banco Indus. de Venez.*, 834 So. 2d 952 (Fla. 3d Dist. Ct. App. 2003), *reh’g granted* *Banco Indus. de Venez., C.A., v. de Saad*, 28 So. 3d 44 (Fla. 2010) (unpublished table decision)).

82. No. Civ. A. 18630–NC, 2002 WL 982419 (Del. Ch. May 3, 2002).

83. *Banco Indus. de Venez., C.A.*, 21 So. 3d at 48–49.

84. *Id.* at 49.

85. *Id.* (quoting *Perconti*, 2002 WL 982419, at \*4).

86. *See id.*

cluded that for purposes of *Florida Statutes* section 607.0850, dismissal equals “success on the merits” as does “any result other than conviction.”<sup>87</sup>

Another issue in the case was Officer/Employee’s claim for breach of her employment contract for which the lower court awarded her more than \$1 million.<sup>88</sup> Apparently, Bank had only suspended Officer/Employee without pay and had not actually fired her under the terms of her employment contract.<sup>89</sup> The breach of employment contract award was also affirmed.<sup>90</sup> Judge Schwartz specially concurred, expressing considerable displeasure over the result on the breach of contract claim.<sup>91</sup> “Legal consequences are ‘determined not by what [something] is called, but by what it does’ and is.”<sup>92</sup>

#### D. *Statute of Limitations: Florida Securities Law*

Sellers sold several Millennium Tower Condominium Hotel units to Purchasers in 2004.<sup>93</sup> In 2008, after reading an article in *The Wall Street Journal* to the effect that “sale of the condominium could be considered the sale of securities,” Purchasers sued Sellers alleging that Purchasers had not received the required securities registration documentation.<sup>94</sup> Purchasers relied on Chapter 517 of the *Florida Statutes*, the Florida Securities and Investor Protection Act, which requires, among other things, that purchase agreements be registered by securities sellers, and that purchasers be provided a prospectus.<sup>95</sup> The suit was dismissed with prejudice as barred by the applicable statute of limitations.<sup>96</sup> Purchasers appealed, and the Third District Court of Appeal affirmed.<sup>97</sup> Under section 95.11(4)(e), the statute of limitations for a violation of Chapter 517 is two years, and it begins to run “from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence.”<sup>98</sup> The statute of limitations is not tolled when the plaintiffs “are ignorant of the law on

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87. *Id.*

88. *Banco Indus. de Venez., C.A.*, 21 So. 3d at 48.

89. *Id.* at 50.

90. *Id.*

91. *Id.* (Schwartz, J., specially concurring).

92. *Id.* at 51 (quoting *Miami-Dade Cnty. v. Valdes*, 9 So. 3d 17, 18 n.2 (Fla. 3d Dist. Ct. App. 2009)).

93. *GLK, L.P. v. Four Seasons Hotel Ltd.*, 22 So. 3d 635, 636 (Fla. 3d Dist. Ct. App. 2009).

94. *Id.*

95. *Id.*; see FLA. STAT. §§ 517.011, 517.07(2) (2010).

96. *GLK, L.P.*, 22 So. 3d at 636.

97. *Id.*

98. *Id.* at 637 (quoting FLA. STAT. § 95.11(4)(e)).

which their claim is based” if they have “all the facts necessary to determine whether they have a cause of action.”<sup>99</sup> Purchasers had “the necessary factual information” by the closing date of the sale in 2004.<sup>100</sup> There was no concealment of the facts by Sellers because Purchasers “broadly alleged concealment [and] failed to plead fraud with particularity.”<sup>101</sup> The delayed discovery doctrine, which applies in cases of fraud, would have delayed accrual of the statute of limitations only until Purchasers discovered or should have discovered a violation, and then only if Purchasers were blameless.<sup>102</sup> The Third District Court of Appeal, citing *McCullough v. Leede Oil & Gas, Inc.*,<sup>103</sup> said that the delayed discovery rule is inapplicable here because “[a] seller of securities cannot conceal the fact that the securities . . . are not registered.”<sup>104</sup> The Third District held that Purchasers, having had possession in 2004 of all documents necessary to determine whether Purchasers had a claim, “cannot be considered blamelessly ignorant and invoke the delayed discovery rule for their nonregistration claim.”<sup>105</sup>

## V. CHOICE OF LAW AND CONFLICT OF LAWS

### A. *Recognition of Out-of-Country Judgment*

Agri-Source Fuels, LLC (Buyer), a Florida limited liability company, with its principal office in Pensacola, Florida, conducted business in Florida only.<sup>106</sup> Buyer bought steel tanks from a California company.<sup>107</sup> The tanks were in Canada, and Buyer entered into an oral contract with EOS Transport, Inc. (Transporter), a Canadian company, under which Transporter would ship the tanks to Florida.<sup>108</sup> Buyer never did business in Canada, but there were numerous communications between Buyer and Transporter regarding the shipments of the tanks, and payment was to be made in Canada.<sup>109</sup> Buyer disputed payment for several of the shipments, and Transporter sued Buyer

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99. *Id.* (citing *Chidiac v. Cadillac Gage Co.*, 541 So. 2d 650, 650–51 (Fla. 3d Dist. Ct. App. 1989) (per curiam)).

100. *Id.*

101. *GLK, L.P.*, 22 So. 3d at 637.

102. *Id.* (citing *Hearndon v. Graham*, 767 So. 2d 1179, 1184 (Fla. 2000) (per curiam)).

103. 617 F. Supp. 384 (W.D. Okla. 1985).

104. *GLK, L.P.*, 22 So. 3d at 637–38 (quoting *McCullough*, 617 F. Supp. at 387).

105. *Id.* at 638.

106. *EOS Transp., Inc. v. Agri-Source Fuels L.L.C.*, 37 So. 3d 349, 351 (Fla. 1st Dist. Ct. App. 2010).

107. *Id.*

108. *Id.*

109. *Id.*

in the Supreme Court of British Columbia for breach of contract.<sup>110</sup> Buyer did not defend in Canada, and a default judgment was entered against it.<sup>111</sup> Transporter tried to have the judgment recognized under the Florida Uniform Out-of-Country Foreign Money-Judgment Act, sections 55.601–.607 of the *Florida Statutes*.<sup>112</sup> The Escambia County Circuit Court concluded that the Canadian court did not have personal jurisdiction over Buyer, and the Canadian judgment was held unenforceable.<sup>113</sup> Transporter appealed, and the First District Court of Appeal affirmed.<sup>114</sup> A mandatory basis for not enforcing a foreign judgment is that the foreign court did not have personal jurisdiction over the defendant.<sup>115</sup> Thus, there first needed to be a determination as to which country’s law applies when determining if it was proper for the foreign court to exercise personal jurisdiction.<sup>116</sup> Second, did the Canadian court properly exercise personal jurisdiction over Buyer?<sup>117</sup> The appellate court observed that the Act does not address which country’s law applies in making the determination of the acquisition of personal jurisdiction, and that this was an issue that has not been “squarely addressed” by any Florida court.<sup>118</sup> The First District then discussed two approaches that have been used in other United States forums where similar statutes were involved.<sup>119</sup> One line of cases first applies the law of the foreign jurisdiction but adds a due process “minimum contacts” requirement.<sup>120</sup> The other approach applies the law of the forum asked to recognize the foreign judgment.<sup>121</sup> The First District chose the first approach.<sup>122</sup> The necessary minimum contacts with Canada by Buyer were not found.<sup>123</sup> Purchases made from the forum state (Canadian) entity and contracting with the forum-state entity, whether

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110. *Id.*

111. *EOS Transp., Inc.*, 37 So. 3d at 351.

112. *Id.* at 351–52 (citing Uniform Out-of-Country Foreign Money-Judgment Recognition Act, FLA. STAT. § 55.601–.607 (2009)).

113. *Id.* at 351.

114. *Id.* at 351, 355.

115. *Id.* at 352.

116. *EOS Transp., Inc.*, 37 So. 3d at 352.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *EOS Transp., Inc.*, 37 So. 3d at 352 (citing *Evans Cabinet Corp. v. Kitchen Int’l, Inc.*, 593 F.3d 135, 142 n.10 (1st Cir. 2010)).

122. *Id.* at 352–53.

123. *Id.* at 354.

considered separately or together, were not sufficient to establish Buyer's minimum contacts with Canada.<sup>124</sup>

**B. Choice of Law: Provision in Mortgage but Not in Related Note**

Mortgagors, who were Florida residents, borrowed against real property they owned in Georgia.<sup>125</sup> The second mortgage they signed contained a Georgia choice of law provision.<sup>126</sup> However, the mortgage note they signed was silent as to choice of law.<sup>127</sup> Mortgagors defaulted on the first and second mortgages, and the first mortgagee, in Georgia proceedings, foreclosed on its mortgage.<sup>128</sup> The assignee of the second mortgage and promissory note, New Falls Corporation (Assignee), did not participate in the Georgia proceedings, and its mortgage lien was extinguished.<sup>129</sup> Assignee did subsequently bring suit against Mortgagors in the Circuit Court in Miami-Dade County to enforce the note.<sup>130</sup> Mortgagors argued that the suit on the note was time barred by the five-year statute of limitations of section 95.11(2)(b) of the *Florida Statutes* for a suit based "on a contract, obligation, or liability founded on a written instrument."<sup>131</sup> Assignee contended that the action was timely instituted, claiming that the Georgia statute of limitations of six years applied because the choice of law provision in the mortgage also applied to the note.<sup>132</sup> The trial court found that the Georgia six-year statute of limitations applied to the note and entered summary judgment in favor of Assignee.<sup>133</sup> Mortgagors appealed, and the Third District Court of Appeal reversed.<sup>134</sup> The appellate court agreed with Mortgagors that the Florida

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124. *Id.* (citing *Bohlander v. Robert Dean & Assocs. Yacht Brokerage, Inc.*, 920 So. 2d 1226, 1229 (Fla. 3d Dist. Ct. App. 2006) (per curiam); *Aluminator Trailers, L.L.C. v. Loadmaster Aluminum Boat Trailers, Inc.*, 832 So. 2d 822, 824 (Fla. 2d Dist. Ct. App. 2002); *Bruzzone Roldos v. Americargo Lines, Inc.*, 698 So. 2d 1368, 1370 (Fla. 3d Dist. Ct. App. 1997) (per curiam); *Marsh Supermarkets, Inc. v. Queen's Flowers Corp.*, 696 So. 2d 1207, 1209 (Fla. 3d Dist. Ct. App. 1997)).

125. *Sims v. New Falls Corp.*, 37 So. 3d 358, 359 (Fla. 3d Dist. Ct. App. 2010).

126. *Id.* at 360–61.

127. *Id.* at 360.

128. *Id.* at 359.

129. *Id.*

130. *Sims*, 37 So. 3d at 360. No document other than the promissory note was attached to Assignee's complaint. *Id.*

131. *Id.* at 360 n.2 (quoting FLA. STAT. § 95.11(2)(b) (2007)).

132. *Id.* at 360 n.2, 361. The provision in the mortgage provided that "[t]he state and local laws applicable to *this Deed* shall be the laws of the jurisdiction . . . [where] the Property is located." *Id.* at 360 (emphasis added).

133. *Sims*, 37 So. 3d at 363 (Cope, J., dissenting).

134. *Id.* at 362 (majority opinion).

statute of limitations applied, and the suit was time-barred.<sup>135</sup> The mortgage and note were separate documents not to be read *in pari-materia*.<sup>136</sup> “Florida follows the doctrine of *lex loci contractus*,” which calls for choosing Florida’s law to apply to the promissory note.<sup>137</sup> Justice Cope dissented.<sup>138</sup>

## VI. CONSUMER RIGHTS

### A. *Truth in Lending Act Disclosures*

Mortgagor was married, but was the sole owner of the couple’s principal residence in Florida.<sup>139</sup> Mortgagees loaned money to Mortgagor in 2005 and took back a second mortgage on the homestead.<sup>140</sup> Both Mortgagor and Mortgagor’s wife (Wife) signed the mortgage, but only Mortgagor signed the mortgage note.<sup>141</sup> Mortgagor defaulted, and Mortgagees instituted the subject foreclosure action in 2008.<sup>142</sup> In 2006, however, Wife “purportedly exercised her right to cancel the transaction” because she had not been provided federal Truth in Lending Act (TILA)<sup>143</sup> disclosures.<sup>144</sup> Wife claimed that she had been entitled to the TILA disclosures and thus “was entitled to TILA’s extended three-year time period for cancellation,” and the trial court agreed, granting summary judgment in favor of Wife in the foreclosure action.<sup>145</sup> Mortgagees appealed, taking the position that they were not required to provide TILA disclosures to Wife because she did not have an “ownership interest in the property at the time of the mortgage execution.”<sup>146</sup> Thus, the issue before the Fourth District Court of Appeal was whether Wife qualified as a “consumer” within the meaning of TILA and Regulation Z promulgated

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135. *Id.*

136. *Id.* at 364.

137. *Id.* at 360. The appellate court noted that although Mortgagors were Florida residents when they signed the note, “they actually signed the documents while traveling to New Jersey, there [was] no contention made that the place of contract was New Jersey.” *Sims*, 37 So. 3d at 360 n.3.

138. *Id.* at 362 (Cope, J., dissenting).

139. *Gancedo v. Del Carpio*, 17 So. 3d 843, 844 (Fla. 4th Dist. Ct. App. 2009).

140. *Id.* There apparently was no question that the property was in fact Mortgagor’s homestead. *Id.* at 845.

141. *Id.* at 844.

142. *Id.*

143. Truth in Lending Act of 1968, Pub. L. 90–321, § 101, 82 Stat. 146, 146 (1968) (codified as amended at 15 U.S.C. § 1601 (2006)).

144. *Gancedo*, 17 So. 3d at 844. Mortgagees did not provide the required disclosures to either Mortgagor or Wife. *Id.*

145. *Id.*

146. *Id.*



under TILA by the Federal Reserve Board.<sup>147</sup> Only if Wife so qualified would she have been entitled to a TILA disclosure.<sup>148</sup> To be a consumer, Wife had to have an ownership interest in the property.<sup>149</sup> The Fourth District, on motion for rehearing, found the necessary ownership interest by reason of Wife's homestead interest under article X, section 4(c) of the Florida Constitution, and the summary judgment of the trial court was affirmed.<sup>150</sup> Wife's ownership interest when she signed the mortgage made her a TILA consumer entitled to disclosure.<sup>151</sup> Wife, therefore, could rescind the mortgage transaction and was entitled to the extended rescission period available in the case of TILA non-disclosure.<sup>152</sup>

### B. *Deposit in Escrow*

"Whether the escrow deposit requirement of Section 501.1375, *Florida Statutes*, applies to general contractors who contract to build a single-family residence upon land owned by the consumer at the time the contract is signed" was the question certified by the trial court to the Fourth District Court of Appeal, as restated by the District Court, in *JPG Enterprises, Inc. v. McLellan*.<sup>153</sup> The Fourth District answered "no" to the question.<sup>154</sup> Section 501.1375 of the *Florida Statutes* requires "building contractor[s]" and "developer[s]" of single-family and two-family residences to hold in escrow, deposits made with them by purchasers—absent a waiver of the requirement

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147. *Id.* Judge May specially concurred to express her concern that the issue of homestead was "raised for the first time [on the] motion for rehearing." *Gancedo*, 17 So. 3d at 845 (May, J., specially concurring). Judge May stated that, while issues not raised in the brief of a party "are deemed waived and may not be considered for the first time in a motion for rehearing," *Id.* (citing *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th Dist. Ct. App. 1983)), she pointed out, relying on *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644–45 (Fla. 1999), that "[a]s an appellate court, however, we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue." *Gancedo*, 17 So. 3d at 845 (May, J., specially concurring).

148. *Gancedo*, 17 So. 3d at 844 (majority opinion).

149. *Id.* at 844–45. Regulation Z defines "consumer" as:

a cardholder or a natural person to whom consumer credit is offered or extended. However, for purposes of rescission under [sections] 226.15 and 226.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest.

*Id.* (quoting 12 C.F.R. § 226.2(a)(11) (2010)).

150. *Id.* at 845.

151. *Id.*

152. *Gancedo*, 17 So. 3d at 845.

153. 31 So. 3d 821, 822 (Fla. 4th Dist. Ct. App. 2010) (emphasis omitted).

154. *Id.* at 823.

by the purchaser.<sup>155</sup> The Fourth District emphasized that the statute, in defining the terms “building contractors” and “developers” for the purpose of the section 501.1375 escrow provision, used the terms “purchase,” “purchaser,” “purchase price,” “sale,” and “seller,” and in related provisions, referred a number of times to the “closing.”<sup>156</sup> The “plain and ordinary sense” of these words “refer[s] to the purchase and sale of real property, in addition to” any structure that might be constructed on the land.<sup>157</sup> The Fourth District viewed this all as referring to transactions where the builder or developer was selling lots owned by the builder or developer—with buildings constructed or to be constructed on them—and not to transactions where the purchaser already owned the land.<sup>158</sup>

### C. FDUTPA Damages

Purchaser, in her fifth amended complaint, alleged that she bought a 2005 Bombardier Sea Doo Sportster (jet-boat), which started burning while she was riding it and later sank.<sup>159</sup> She sued Recovery Performance & Marine, LLC (Seller) under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)<sup>160</sup> asking for damages, which she described as her “down payment, payments on the loan, interest, [and the] balance on the loan.”<sup>161</sup> Seller successfully moved for summary judgment, Purchaser appealed,<sup>162</sup> and

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155. *Id.* (discussing FLA. STAT. § 501.1375(3) (2008)).

156. *Id.* at 824.

157. *Id.*

158. *McLellan*, 31 So. 3d at 825–26.

159. *Rodriguez v. Recovery Performance & Marine, L.L.C.*, 38 So. 3d 178, 179 (Fla. 3d Dist. Ct. App. 2010).

160. FLA. STAT. §§ 501.201–213 (2010).

161. *Rodriguez*, 38 So. 3d at 179.

162. *Id.* at 180. Purchaser also sought reversal of the trial court’s order that denied her motion to file a sixth amended complaint. *Id.* at 179–80. Purchaser claimed that the cause of action contained in the sixth amended complaint—breach of warranty—had not been alleged in any of the prior complaints, and therefore it was an abuse of discretion for the trial court to deny the motion. *Id.* at 181. The appellate court said that a review of the record showed that the cause of action had previously been raised in the fourth amended complaint with respect to which the trial court granted leave to amend. *Id.* Purchaser subsequently filed a fifth amended complaint that did not allege breach of warranty. *Rodriguez*, 38 So. 3d at 181. The Third District Court of Appeal, quoting its decision in *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d Dist. Ct. App. 1992) noted that “[w]hile there is no magical number of amendments which are allowed, we have previously observed that with amendments beyond the third attempt, dismissal with prejudice is generally not an abuse of discretion.” *Rodriguez*, 38 So. 3d at 181 (quoting *Kohn*, 611 So. 2d at 539). The trial court’s denial of Purchaser’s motion to file a sixth amended complaint was affirmed. *Id.* at 182.

the Third District Court of Appeal affirmed.<sup>163</sup> Purchaser was asking for consequential damages, but FDUTPA only allows recovery of actual damages.<sup>164</sup> Actual damages, in the context of FDUTPA, are defined by the case law as “the difference in the market value of the product . . . in the condition in which it was delivered and its market value in the condition in which it should have been delivered.”<sup>165</sup>

## VII. CONTRACTS

### A. *Broker's Commission*

Business Specialists, Inc. (Broker) alleged that it contracted with Land & Sea Petroleum, Inc. (Seller) to find a purchaser for Seller's real estate and business, and that Broker was to be paid a nine percent commission under the agreement.<sup>166</sup> Seller entered into a written contract to sell the real estate and business.<sup>167</sup> The contract with the prospective purchaser provided, among other things, that contract terms regarding Seller's partial financing of the sale and the contemplated employment by the purchaser of Seller's principal remained “to be negotiated during the due-diligence period.”<sup>168</sup> When the sale did not close, Broker sued for its commission, alleging that Seller breached the agreement between Seller and Broker by failing to take certain required action pursuant to Seller's agreement with the purchaser “during the due diligence period.”<sup>169</sup> Seller's motion for summary judgment was granted, and Broker appealed.<sup>170</sup> The Fourth District Court of Appeal affirmed.<sup>171</sup> An enforceable contract between purchaser and Seller had not been formed.<sup>172</sup> A meeting of the minds is required for the contract to be an enforceable contract, and if essential contract terms have not been agreed upon, there is no meeting of the minds.<sup>173</sup> The Fourth District, citing the Supreme Court of Florida's decision in *David v. Richman*,<sup>174</sup> held that for

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163. *Rodriguez*, 38 So. 3d at 182.

164. *Id.* at 180.

165. *Id.* (quoting *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. 3d Dist. Ct. App. 1984)).

166. *Bus. Specialists, Inc. v. Land & Sea Petroleum, Inc.*, 25 So. 3d 693, 694–95 (Fla. 4th Dist. Ct. App. 2010).

167. *Id.* at 695.

168. *Id.*

169. *Id.*

170. *Id.* at 694.

171. *Bus. Specialists, Inc.*, 25 So. 3d at 696.

172. *Id.* at 695.

173. *Id.*

174. 568 So. 2d 922 (Fla. 1990).

real estate transactions, terms of financing are essential.<sup>175</sup> The district court held that not only were the terms of financing essential, but the continued employment of the seller's principal was also an essential term.<sup>176</sup> Absent an enforceable sales contract, Broker was not entitled to a commission.<sup>177</sup> The Fourth District affirmed the trial court's order of summary judgment in favor of Seller, noting that although there were some disputed issues of fact, those issues "were not genuine issues of *material fact*" since without an enforceable contract between Seller and the prospective purchaser, disputes—such as whether or not Seller complied with its obligations during the due-diligence time frame—"were not material to the cause of action."<sup>178</sup>

### B. *Mutuality of Obligation Versus Mutuality of Remedies*

Buyers entered into essentially identical contracts with Redington Grand, LLP (Developer) to buy condominium units.<sup>179</sup> The contracts provided that if Developer defaulted, Buyers could choose between specific performance and repayment to them of their deposits, but if a Buyer defaulted, Developer could choose between specific performance and liquidated damages to be satisfied by keeping the Buyers' deposits.<sup>180</sup> The obvious difference between the two provisions was that Developer could recover damages upon default, but Buyers could not.<sup>181</sup> Developer claimed that it finished the building on time, but Buyers refused to close.<sup>182</sup> Buyers then sued Developer to recover their deposits, and Developer counterclaimed seeking specific performance, or alternatively, an award of damages.<sup>183</sup> On

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175. *Bus. Specialists, Inc.*, 25 So. 3d at 695. Broker alleged that the missing financing terms were agreed to verbally. See *id.* at 696 n.1. However, one reason why this did not matter was that the Statute of Frauds required that those terms be in writing. *Id.*

176. *Id.* at 696.

177. *Id.*

178. *Bus. Specialists, Inc.*, 25 So. 3d at 696.

179. *Redington Grand, L.L.P. v. Level 10 Prop., L.L.C.*, 22 So. 3d 604, 605 (Fla. 2d Dist. Ct. App. 2009).

180. *Id.* at 606. The contracts required two deposits: one at the inception and the second when the roof of a unit was finished. *Id.* at 605–06.

181. *Id.* at 606.

182. *Id.* When Developer informed Buyers that the roofs were done, Buyers refused to pay the additional deposits taking the position that the roofs were not finished. *Redington Grand, L.L.P.*, 22 So. 3d at 606. Buyers requested certain assurances, and when those were not forthcoming, Buyers declared Developer in default and demanded their deposits be returned to them. *Id.* Developer did not return the deposits and, prior to the originally agreed completion date, finished working, obtained certificates of occupancy, and set a closing date for the originally agreed to completion date. *Id.*

183. *Id.* at 606–07.

cross-motions for summary judgment, the trial court determined that “the default provisions in the contract[s] are] illusory and mutually unenforceable, as the [Developer] has no real obligation.”<sup>184</sup> The trial court thus concluded that the contracts were unenforceable, entered summary judgment for Buyers, and ordered Developer to return Buyers’ deposits.<sup>185</sup> Developer appealed, and the Second District Court of Appeal reversed and remanded.<sup>186</sup> The judgment below confused “mutuality of remedies,” which relates to the method of enforcement, with “mutuality of obligation,” which relates to the issue of consideration for the agreement.<sup>187</sup> Mutuality of obligation is essential to the formation of a valid contract, but remedies “may differ without necessarily affecting the reciprocal obligations of the parties.”<sup>188</sup> The district court concluded that there was no question that “mutuality of obligation” existed, based on the mutual promises of Developer and Buyers, to sell and buy the units.<sup>189</sup> The district court also held that even if there had been a lack of mutuality of obligation initially, complete performance under the contract by Developer would have cured the lack of mutuality, so that summary judgment in favor of Buyers would have been error.<sup>190</sup> Furthermore, Buyers alleged that performance by Developer was not completed, which may have created a question of material fact which would have precluded the entry of summary judgment in favor of Buyers.<sup>191</sup>

### C. *Indemnification Agreement*

Homeowners hired On Target, Inc. (On Target) to find and repair a water leak in their home.<sup>192</sup> The agreement Homeowners signed with On Target included an indemnification provision, which stated in part that “[p]roperty owner . . . hereby agrees to hold harmless On Target and On Target Technicians absolutely” with respect to any damages that might be caused by On Target’s work in locating the leak “and to defend same in any action which

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184. *Id.* at 607 (citations omitted).

185. *Redington Grand, L.L.P.*, 22 So. 3d at 607. The court ordered Developer to pay interest on the deposits from the date of the contracts. *Id.*

186. *Id.* at 605, 609.

187. *Id.* at 608.

188. *Id.* (quoting *Bacon v. Karr*, 139 So. 2d 166, 169 (Fla. 2d Dist. Ct. App. 1962)).

189. *Redington Grand, L.L.P.*, 22 So. 3d at 608.

190. *Id.*

191. *Id.* n.4; *see also* *Bus. Specialists, Inc. v. Land & Sea Petroleum, Inc.*, 25 So. 3d 693, 695 (Fla. 4th Dist. Ct. App. 2010).

192. *On Target, Inc. v. Allstate Floridian Ins. Co.*, 23 So. 3d 180, 181 (Fla. 2d Dist. Ct. App. 2009).

may develop pursuant to any of these activities.”<sup>193</sup> In doing the work, On Target found it necessary to drill a hole through a floor tile in the foyer of the residence.<sup>194</sup> When all the repair work was finished,<sup>195</sup> Homeowners were not able to find a tile that matched the damaged tile, and in response to the Homeowners’ insurance claim with their insurance carrier, Allstate Floridian Insurance Company (Insurance Company), Insurance Company approved retiling the entire foyer at a cost of over \$17,000.<sup>196</sup> Insurance Company, as Homeowners’ subrogee, then sought to recover that amount from On Target alleging breach of contract.<sup>197</sup> “On Target answered [the] complaint and filed a third-party complaint against [Homeowner seeking] indemnification.”<sup>198</sup> Insurance Company later dismissed its action against On Target, and On Target then sued Homeowners, seeking attorney fees and costs incurred in defense of the subrogation action brought against it by Insurance Company.<sup>199</sup> The trial court ruled against On Target, finding the indemnification language “vague and ambiguous” and thus not enforceable.<sup>200</sup> On Target appealed, and the Second District Court of Appeal reversed and remanded.<sup>201</sup> A number of cases hold that indemnity agreements will not be enforced “to indemnify a party against its own wrongful conduct,” unless the agreement so states clearly and unequivocally.<sup>202</sup> Here, however, the indemnification clause was specific enough to enforce.<sup>203</sup> The district court

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193. *Id.* at 181–82.

194. *Id.* at 182.

195. *Id.* On Target’s job was to be a temporary fix with permanent repairs to be provided independently by a plumber. *Id.*

196. *On Target, Inc.*, 23 So. 3d at 182.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 181–82.

201. *On Target, Inc.*, 23 So. 3d at 181, 186.

202. *Id.* at 183 (citing *Cox Cable Corp. v. Gulf Power Co.*, 591 So. 2d 627, 629 (Fla. 1992); *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*, 374 So. 2d 487, 489 (Fla. 1979); *Univ. Plaza Shopping Ctr., Inc. v. Stewart*, 272 So. 2d 507, 511 (Fla. 1973); *Gulf Oil Corp. v. Atl. Coast Line R.R. Co.*, 196 So. 2d 456, 457 (Fla. 2d Dist. Ct. App. 1967)).

203. *Id.* at 185. The Second District Court of Appeal distinguished the language in the *Gulf Oil Corp. v. Atlantic Coast Line Railroad Co.*, 196 So. 2d 456 (Fla. 2d Dist. Ct. App. 1967), indemnification agreement previously before that court, where the agreement was not enforced, from the agreement currently under review, saying that in the earlier case, there was no “reference to indemnifying against the indemnitee’s negligence.” *Id.* at 184. The appellate court also pointed out that the cases, *see supra* note 202 and accompanying text, all involved indemnification against negligent acts of the indemnitee, whereas, in the present case, Insurance Company’s action alleged breach of contract by On Target, Inc. *Id.* at 184. Even though “[t]he parties [did] not address the distinction between this case . . . and the other cases . . .

stated that “the indemnification provision in [the agreement] puts the [Homeowner] . . . on notice that the [work] may cause limited damage to the property and that On Target cannot be held liable for damage caused by it in performing the work that it was hired to do.”<sup>204</sup> Further, since Insurance Company’s lawsuit against On Target sought relief for damages resulting from the work done by On Target, in connection with locating the leak, “the indemnity clause was applicable to On Target’s defense of the lawsuit” brought by Insurance Company.<sup>205</sup>

#### D. Rescission

Seller “transferred” its lease interest, as tenant of certain business premises, to Buyer as part of the installment purchase by Buyer of Seller’s business.<sup>206</sup> Seller’s lease agreement with its landlord provided that Seller could not assign the lease nor sublet without the landlord’s consent, but Seller did not make written request for consent nor did Seller receive prior written consent from the landlord as required by the terms of the lease.<sup>207</sup> Nevertheless, Buyer took possession of the premises, began doing business there, and made rent payments directly to the landlord.<sup>208</sup> The landlord apparently did not object to Buyer’s occupancy of the premises.<sup>209</sup> After about seven months, Buyer stopped making rent payments.<sup>210</sup> Seller began to pay rent again, gave Buyer notice to vacate, started eviction proceedings against Buyer, and sought damages, alleging breach of contract.<sup>211</sup> Buyer counterclaimed seeking rescission of the contract based on Seller’s failure to obtain the landlord’s

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[Insurance Company’s] complaint could be interpreted as an attempt to plead an *intentional tort*” and “[v]iewed in this light, [Insurance Company’s] complaint does portray On Target’s conduct as ‘wrongful.’” *On Target, Inc.*, 23 So. 3d at 184 (emphasis added). If pleading an action in negligence was required to bring the case within the rules of the cited decisions, one might wonder if On Target, Inc., under the broad language of the “indemnification” agreement, could exculpate itself from intentional torts. See, e.g., *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th Dist. Ct. App. 2008); Barbara Landau, *2007–2008 Survey of Florida Law Affecting Business Owners*, 33 NOVA L. REV. 81, 127 (2008).

204. *On Target, Inc.*, 23 So. 3d at 185.

205. *Id.*

206. *AVVA-BC, L.L.C. v. Amiel*, 25 So. 3d 7, 8–9 (Fla. 3d Dist. Ct. App. 2009). The agreement for sale was a one-page handwritten document. *Id.* at 8.

207. *Id.* at 9 n.1.

208. *Id.* at 9.

209. See *id.* at 11. The appellate court found that there was conflicting evidence as to “whether the landlord acquiesced to [Buyer’s] tenancy,” but it does not appear that either Buyer or Seller claimed that the Landlord expressly objected to Buyer’s presence. *Amiel*, 25 So. 3d at 12.

210. *Id.* at 9.

211. *Id.*

consent to the lease “assignment.”<sup>212</sup> The trial court, on motion for summary judgment, granted rescission to Buyer.<sup>213</sup> The Third District Court of Appeal reversed and remanded.<sup>214</sup> “[R]escission will not be granted for breach of contract, in the absence of fraud, mistake, undue influence, multiplicity of suits, cloud on title, trust, or some other independent ground for equitable interference.”<sup>215</sup> Further, “rescission will not be granted ‘for failure to perform a covenant or promise to do an act in the future, unless the covenant breached is a dependent one.’”<sup>216</sup> The district court explained that a dependent covenant

goes to the whole consideration of the contract; where it is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted.<sup>217</sup>

The Third District concluded that the covenant to consent to the assignment could not be said to be dependent because the landlord never complained, and the lease assignment was not the “whole consideration,” but rather, it was part of a business purchase agreement.<sup>218</sup> In addition, Buyer’s actions over the seven months during which he knew that the landlord’s consent had not been obtained amounted to “a waiver of [any] right to rescind.”<sup>219</sup> Thus, the summary judgment granting Buyer’s request for rescission was reversed.<sup>220</sup> What remained was Buyer’s counterclaim that amounted to a breach of contract claim against Seller.<sup>221</sup> The Third District Court held that summary judgment would not be proper as to Buyer’s breach of contract counterclaim because of the existence of genuine issues of material fact.<sup>222</sup> Specifically, there remained “a factual dispute regarding

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212. *Id.* at 10.

213. *Id.*

214. *Amiel*, 25 So. 3d at 12.

215. *Id.* at 11 (quoting *Richard Bertram & Co. v. Barrett*, 155 So. 2d 409, 411–12 (Fla. 1st Dist. Ct. App. 1963)).

216. *Id.* (quoting *Steak House, Inc. v. Barnett*, 65 So. 2d 736, 737 (Fla. 1953)).

217. *Id.* (quoting *Steak House, Inc.*, 65 So. 2d at 738).

218. *Id.*

219. *Amiel*, 25 So. 3d at 11.

220. *Id.* at 12.

221. *Id.*

222. *Id.*



whether the landlord acquiesced to [Buyer's] tenancy, an issue that lies at the heart of this case."<sup>223</sup>

#### E. Plain Meaning Rule

Buyers contracted with Sellers to purchase a house that was being constructed.<sup>224</sup> The purchase price was \$620,000, and Buyers made a deposit of \$124,000.<sup>225</sup> Buyers insisted on inclusion of a provision that made the contract "contingent upon this property appraising for no less than \$620,000 to be conducted by a local appraiser."<sup>226</sup> Prior to closing, Buyers obtained a local appraisal that valued the property at \$560,000.<sup>227</sup> Sellers obtained an appraisal for \$635,000.<sup>228</sup> Buyers declared the agreement terminated based on the \$560,000 appraisal, and Sellers sued for breach of contract, asking the trial court to award them liquidated damages, consisting of Buyers' deposit.<sup>229</sup> The trial court considered parol evidence regarding "the parties' intent and conduct relating to the contingency" and ultimately ruled for Sellers.<sup>230</sup> The Second District Court of Appeal reversed and remanded.<sup>231</sup> Parol evidence should not have been allowed because there was nothing ambiguous about the contract.<sup>232</sup> The appellate court concluded that, as the contract was drafted, Buyers were entitled to walk away from the deal "if *any* appraisal valued the property at less than \$620,000."<sup>233</sup> Sellers argued that the court should read the language of the contract "to mean 'contingent upon any appraisal of at least \$620,000,'" but the appellate court declined to rewrite the contract to relieve Seller from the "apparent hardship of an improvident bargain."<sup>234</sup>

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223. *Id.* In addition, if Buyer "abandoned the premises" rather than being forced to leave, there may have been "no compensable injury" suffered by Buyer, and consequently, no recovery for breach of contract—an element of the cause of action being absent. *Amiel*, 25 So. 3d at 12 n.3. And that was not all. Even if there were damages to Buyer, there was still the issue of mitigation. *Id.*

224. *Gibney v. Pillifant*, 32 So. 3d 784, 784 (Fla. 2d Dist. Ct. App. 2010).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 785.

229. *Gibney*, 32 So. 3d at 785.

230. *Id.*

231. *Id.* at 786.

232. *See id.* at 785.

233. *Id.*

234. *Gibney*, 32 So. 3d at 785–86 (quoting *Beach Resort Hotel Corp. v. Wieder*, 79 So. 2d 659, 663 (Fla. 1955) (en banc)).

### F. *Latent Versus Patent Ambiguity*

Ms. Barrington and Mr. Unger (Agents) entered into contracts to serve as real estate agents for Gryphon Investments, Inc. doing business as Re/Max Excellence (Re/Max).<sup>235</sup> Their independent contractor agreements with Re/Max provided in part, with respect to termination of the agreements, “that Re/Max ‘may retain 25% of the commission earned by [the Agent], above and beyond the amounts required in this Agreement, to cover [Re/Max’s] costs of bringing the transaction to closure after [the Agent’s] termination date.’”<sup>236</sup> Agents notified Re/Max that they were terminating the agreements, and after the notice, several transactions as to which Agents had previously been involved went to closing.<sup>237</sup> Agents sued Re/Max alleging breach of contract and failure to pay Agents more than \$46,000 due to them, claiming that Re/Max improperly withheld these amounts as commissions under the 25% provision in the agreement.<sup>238</sup> The court granted summary judgment in favor of Re/Max.<sup>239</sup> Agents appealed, and the Second District Court of Appeal reversed and remanded.<sup>240</sup> The Second District took the opportunity to discuss the difference between latent and patent contract ambiguities.<sup>241</sup> “[A] patent ambiguity is that which appears on the face of the instrument and arises from the use of defective, obscure, or insensible language.”<sup>242</sup> A latent ambiguity exists “‘where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings.’”<sup>243</sup> A latent ambiguity existed because of

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235. *Barrington v. Gryphon Invs., Inc.*, 32 So. 3d 668, 669 (Fla. 2d Dist. Ct. App. 2010).

236. *Id.*

237. *Id.*

238. *Id.* The claim for \$46,221.39 is a summation of \$18,550.07 from Barrington and \$27,671.32 from Unger. *Id.*

239. *Barrington*, 32 So. 3d at 670.

240. *Id.* at 670–71.

241. *Id.* The Second District Court of Appeal believed that the agreement contained a patent ambiguity because of what it considered two conflicting provisions. *Id.* at 670. One provision allowed Re/Max to retain, after termination of the agreements, 25% of the commission that the Agents earned. *Id.* However, a later provision said that the retaining of the commissions was to cover the costs of completing the transactions. *Barrington*, 32 So. 3d at 670. Thus, noted the appellate court, it was unclear whether Re/Max could keep the full 25% even if the actual costs were less than the full 25%. *Id.* But since “Agents did not raise this specific issue, it is not before us,” the court said. *Id.*

242. *Id.* (quoting *Crown Mgmt. Corp. v. Goodman*, 452 So. 2d 49, 52 (Fla. 2d Dist. Ct. App. 1984)).

243. *Id.* at 670–71 (quoting *Mac-Gray Servs., Inc. v. Savannah Assocs. of Sarasota, L.L.C.*, 915 So. 2d 657, 659 (Fla. 2d Dist. Ct. App. 2005)).

evidence submitted by affidavit on the motion for summary judgment to the effect that Re/Max had not withheld the full 25% in other instances, suggesting that perhaps it was not the intent of the parties to withhold the full 25% if actual costs of completing Agents' transactions were not that much.<sup>244</sup> Summary judgment should not have been granted in the face of the latent ambiguity.<sup>245</sup> "[W]hen an agreement contains a latent ambiguity, . . . the issue of the correct interpretation of the agreement is an issue of fact which precludes summary judgment."<sup>246</sup> Judge Kelly dissented.<sup>247</sup>

### VIII. DEEDS, MORTGAGES, AND LIS PENDENS

#### A. *Mortgage Foreclosure: Appointment of Receiver*

Lender held a mortgage on rental real estate, and when the mortgage went into default, the trial court ordered that Borrower (Landlord) comply with the assignment of rents clause in the mortgage.<sup>248</sup> This order, entered in January 2009, directed Borrower to use the rents only for the property's maintenance and operation.<sup>249</sup> Any rents not needed for those purposes were to go into the court registry.<sup>250</sup> Borrower was also to provide monthly accountings to Lender and the court.<sup>251</sup> Two months later, Lender, by emergency motion, asked the court to appoint a receiver.<sup>252</sup> Although there was no dispute about Borrower's failure to comply with the court's order,<sup>253</sup> the trial court refused Lender's emergency request for a receiver.<sup>254</sup> Lender appealed, and the Third District Court of Appeal reversed and remanded.<sup>255</sup> First, Lender demonstrated substantial likelihood of success on the merits of its case, a prerequisite for the appointment of a receiver.<sup>256</sup> In addition, in a

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244. *Barrington*, 32 So. 3d at 671.

245. *Id.*

246. *Id.* (quoting *Mac-Gray Servs., Inc.*, 915 So. 2d at 659–60).

247. *Id.* at 671–72 (Kelly, J., dissenting).

248. *Keybank Nat'l Ass'n v. Knuth Ltd.*, 15 So. 3d 939, 940 (Fla. 3d Dist. Ct. App. 2009). The order was entered in January 2009 but was made retroactive to December 15, 2008. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Keybank Nat'l Ass'n*, 15 So. 3d at 940.

253. *Id.* No rents had been deposited into the court registry, and no accountings had been given with respect to the three-month period between the December 2008 effective date of the court's order and the March hearing on the emergency motion seeking appointment of a receiver. *Id.*

254. *Id.*

255. *Id.* at 940–41.

256. *Keybank Nat'l Ass'n*, 15 So. 3d at 940.

mortgage default setting, if additional security is given in the form of a pledge of rents, a receiver should be appointed upon application if the rents are not being applied to the mortgage, unless the mortgagor makes it clear that the mortgaged real estate “will sell for enough to pay the debt and charges due the mortgagee” and the mortgagor establishes “that there is no equitable need to disturb the [mortgagor’s] possession.”<sup>257</sup> The mortgagor failed to do so.<sup>258</sup> The fact that the trial court had issued a contempt show cause order to the mortgagor was not a substitute for the appointment of a receiver.<sup>259</sup>

### B. *Mortgage Foreclosure: Disposition of Cash Surplus*

Mortgagor owned real estate subject to a first mortgage held by Wells Fargo Bank, N.A. (First Mortgagee) and to a second mortgage held by Mr. Suarez (Second Mortgagee).<sup>260</sup> Mortgagor defaulted on both mortgages, and in September 2007, a notice of lis pendens was filed by First Mortgagee, followed by the filing in January 2008 of foreclosure action naming Mortgagor and Second Mortgagee as defendants.<sup>261</sup> On the date of the filing of the lis pendens notice, Mortgagor owned the property.<sup>262</sup> Beginning approximately two months after First Mortgagee’s filing of its lawsuit, Second Mortgagee started an independent suit against Mortgagor to foreclose the second mortgage, obtained a final judgment of foreclosure, bought the property at the foreclosure sale, and received a certificate of title to the property from the Clerk of the Circuit Court.<sup>263</sup> This title was, of course, subject to First Mortgagee’s mortgage.<sup>264</sup> Then there was another foreclosure sale after First Mortgagee obtained its judgment of foreclosure, and Second Mortgagee again purchased the property.<sup>265</sup> This foreclosure sale resulted in a surplus of over \$20,000, and both Mortgagor and Second Mortgagee claimed the surplus.<sup>266</sup> The Third District Court of Appeal affirmed.<sup>267</sup> Section 45.032(1)(a)

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257. *Id.* at 940 (alteration in original) (quoting *Carolina Portland Cement Co. v. Baumgartner*, 128 So. 241, 249–50 (Fla. 1930), *superseded by statute*, Act effective July 1, 1993, ch. 93–88, § 1, 1993 Fla. Laws 468)).

258. *Id.* at 941.

259. *Id.*

260. *Suarez v. Edgehill*, 20 So. 3d 410, 410 (Fla. 3d Dist. Ct. App. 2009).

261. *Id.*

262. *Id.*

263. *Id.* at 410–11.

264. *Id.* at 411. On appeal, the Third District Court of Appeal noted, “There is no issue in this appeal regarding disposition of the proceeds from that sale.” *Suarez*, 20 So. 3d at 410.

265. *Id.* at 411.

266. *Id.*

of the *Florida Statutes*, as amended in 2006, provides that, for purposes of disposition of foreclosure surplus, the “owner of record” of the property is defined as “the person or persons who appear to be owners” on the date the lis pendens is filed.<sup>268</sup> Entitlement of the owner of record to the surplus after subordinate liens have been satisfied is a rebuttable legal presumption.<sup>269</sup> Here, Second Mortgagee was unable to overcome the presumption on any basis set forth in the statute as grounds for rebutting the presumption.<sup>270</sup> Second Mortgagee was the owner of the property at the time of the First Mortgagee’s foreclosure sale, but that is not what the statute requires.<sup>271</sup> To overcome the presumption, Second Mortgagee had to prove that he was a “grantee or assignee” of the right to the surplus as the result of an involuntary transfer or assignment such as by inheritance or the appointment of a guardian.<sup>272</sup> The Third District emphasized several times that the legislature “abrogate[ed] ‘the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale.’”<sup>273</sup>

### C. *Mortgage Foreclosure: Payment of Condominium Assessments*

Is a mortgagee liable for monthly condominium assessments during foreclosure proceedings on a condominium unit? In *U.S. Bank National Ass’n v. Tadmor*,<sup>274</sup> the Third District Court of Appeal said no, even though there had been more than a year’s delay in the activity of record with respect to the litigation.<sup>275</sup> The trial court had entered an order that the Mortgagee proceed with the foreclosure action within thirty days, and if it did not, it would be required to pay the monthly condominium assessments on the unit involved.<sup>276</sup> The Third District reversed because the condominium association conceded that the Mortgagee was not contractually obligated to pay the assessments, and section 718.116(1)(b) of the *Florida Statutes* requires such payments only after title is acquired.<sup>277</sup> The Third District, quoting the Su-

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267. *Id.* at 412.

268. *Id.* at 411 (quoting FLA. STAT. § 45.032(1)(a) (2008)).

269. *Suarez*, 20 So. 3d at 411 (quoting FLA. STAT. § 45.032(2) (2008)).

270. *Id.* (citing FLA. STAT. § 45.033(2)(b) (2008)).

271. *Id.*

272. *Id.* (quoting FLA. STAT. § 45.033(2)(b) (2008)).

273. *Id.* (quoting FLA. STAT. §§ 45.032(2), .033(1) (2008)).

274. 23 So. 3d 822 (Fla. 3d Dist. Ct. App. 2009).

275. *Id.* at 823.

276. *Id.* at 822.

277. *Id.* at 823. Nor, as confirmed by section 718.116(1)(b) of the *Florida Statutes*, is the mortgagee *legally* obligated to do so before obtaining title:

preme Court of Florida in *Flagler v. Flagler*,<sup>278</sup> said that “‘courts of equity have [no] right or power under the law of Florida to issue such order[s] it considers to be in the best interest of ‘social justice’ at the particular moment without regard to established law.’”<sup>279</sup> Several months later, when the Fourth District Court of Appeal in *Deutsche Bank National Trust Co. v. Coral Key Condominium Ass’n (at Carolina)*<sup>280</sup> was presented with the same question as the Third District, the Fourth District, relying on *U.S. Bank National Ass’n* and section 718.116(1)(b) of the *Florida Statutes*, also said no.<sup>281</sup>

A related issue involving unpaid common expenses that accrued or came due prior to the mortgagee’s acquisition of title to the mortgaged property was presented to the Second District Court of Appeal in *Coral Lakes Community Ass’n v. Busey Bank, N.A.*<sup>282</sup> In 2006, Busey Bank (Mortgagee) loaned the Mortgagors over \$250,000 for the purchase of property in Coral Lakes, and the loan was secured by a first mortgage and note.<sup>283</sup> Mortgagors were behind in their payments toward the mortgage and note as well as on homeowners’ association (the Association) assessments.<sup>284</sup> Mortgagee filed suit naming Mortgagors and the Association as defendants, and Mortgagee successfully foreclosed on Mortgagors’ property.<sup>285</sup> The Association sought to collect its past due assessments on the property from the Mortgagee.<sup>286</sup> Although section 720.3085(2) of the *Florida Statutes*, which became effective in 2007, would, on its face, seem to dispose of the matter, there was a question of the constitutionality of retroactive application of the statute.<sup>287</sup> Section 720.3085(2) provides that mortgages are subordinate to the claims for common expense assessments—with a cap provided by the statute.<sup>288</sup>

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(b) The liability of a first mortgagee . . . who acquire[s] title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that become due prior to the mortgagee’s acquisition of title is limited to the lesser of: 1. The unit’s unpaid common expenses and regularly periodic assessments which accrued or came due during the [six] months immediately preceding the acquisition of title . . . or 2. One percent of the original mortgage debt . . .

*Id.* (quoting FLA. STAT. § 718.116(1)(b) (2009)).

278. 94 So. 2d 592 (Fla. 1957) (en banc).

279. *U.S. Bank Nat’l Ass’n*, 23 So. 3d at 824 (quoting *Flagler*, 94 So. 2d at 594).

280. 32 So. 3d 195 (Fla. 4th Dist. Ct. App. 2010).

281. *Id.* at 196. The trial court, in *Deutsche Bank National Trust Co.* had, like the trial court in *U.S. Bank National Ass’n*, ruled that it was only “fair and equitable” to require the mortgagee to pay monthly assessments if the foreclosure proceedings were delayed without good reason. *Id.* at 195.

282. 30 So. 3d 579, 581 (Fla. 2d Dist. Ct. App. 2010).

283. *Id.*

284. *Id.*

285. *Id.* at 581, 583.

286. *Id.* at 582.

287. *Coral Lakes Cmty. Ass’n*, 30 So. 3d at 583.

288. FLA. STAT. § 720.3085(2)(a), (c) (2010).

The Declaration of Covenants and Restrictions of Coral Lakes Community Ass'n, Inc. (the Declaration), on the other hand, contained a provision that subordinated claims for unpaid homeowners' association assessments to a first mortgagee's claim upon foreclosure or deed in lieu of foreclosure.<sup>289</sup> The trial court held that the Declaration trumped the statute and ruled for Mortgagee.<sup>290</sup> The Second District affirmed, concluding that "[t]o hold otherwise would implicate constitutional concerns about impairment of vested contractual rights."<sup>291</sup>

#### D. *Mortgage Foreclosure: Right to Statutory Attorney Fees*

The Coastal Community Bank (Mortgagee) brought a foreclosure action, and the Mortgagors defaulted.<sup>292</sup> Mortgagee, relying on the attorney's fee provisions in the note securing the mortgage, then sought attorney's fees of ten percent of the principal amount remaining on the promissory note.<sup>293</sup> The note provided that "'reasonable attorneys' fees shall be construed to mean 10% of the principal sum named in this note."<sup>294</sup> The trial court found the 10% amount to be "unconscionable" and refused to enforce the attorney's fee provision of the promissory note.<sup>295</sup> Mortgagee did not put on any evidence regarding the claimed fees and instead on appeal relied on section 687.06 of the *Florida Statutes*.<sup>296</sup> This section states in part that "'it shall not be necessary for the court to adjudge an attorney's fee, provided in any note or other instrument of writing, to be reasonable and just, when such fee does not exceed [ten] percent of the principal sum named in said note, or other instrument in writing."<sup>297</sup> However, "'unconscionability is an affirmative defense'" that Mortgagors were required to raise in responsive pleadings, but Mortgagors, having defaulted, did not raise the defense.<sup>298</sup> On the other hand, the attorney's fee statute did not prevent the trial court from requiring

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289. *Coral Lakes Cmty. Ass'n*, 30 So. 3d at 581.

290. *Id.* at 583–584.

291. *Id.* at 584. The Association, in addition to arguing that the 2007 statute took priority over the Declaration, also argued that the revision of the statute in 2007 had the effect of re-writing the Declaration. *Id.* at 585 n.6. The Second District Court of Appeal said that it was not commenting on that argument since the argument "was not the basis of the trial court's summary judgment." *Id.*

292. *See Coastal Cmty. Bank v. Jones*, 23 So. 3d 757, 758 (Fla. 1st Dist. Ct. App. 2009).

293. *Id.*

294. *Id.* (quoting language from the promissory note at issue in the case).

295. *Id.*

296. *Id.*

297. *Coastal Cmty. Bank*, 23 So. 3d at 758 (quoting FLA. STAT. § 687.06 (2008)).

298. *Id.* at 759.

evidence showing an entitlement to a fee; that is, evidence that Mortgagee had paid its attorney any fees.<sup>299</sup> Therefore, the First District Court of Appeal affirmed the trial court but “[not] because the fee was unreasonable or unjust.”<sup>300</sup> Instead, the court “affirm[ed] because [Mortgagee] declined to demonstrate at all the fee due from it to its lawyers.”<sup>301</sup>

## IX. EMINENT DOMAIN

M & H Profit, Inc. (M & H) bought property that was not subject to any city restrictions as to height or setback.<sup>302</sup> About six weeks later, the City of Panama City (the City) enacted an ordinance that imposed such restrictions in the zoning district where M & H’s newly-purchased property was located.<sup>303</sup> When the City passed the ordinance, M & H had not yet applied to the City for development approval.<sup>304</sup> There were informal discussions between M & H and the City Planning Manager to the effect that M & H’s intended use would not satisfy the new restrictions.<sup>305</sup> M & H sued the City for damages under section 70.001 of the *Florida Statutes*, the Bert Harris Act (the Act).<sup>306</sup> The trial court granted the City’s motion to dismiss, and M & H appealed.<sup>307</sup> In *M & H Profit, Inc.*, the First District Court of Appeal was called upon to decide for the first time:

[W]hether a property owner can state a cause of action under . . . [the Bert Harris Act], based upon *mere* adoption of an ordinance of general applicability pursuant to the police powers of a city in a situation where that municipality has taken no further action concerning application of the ordinance to a particular piece of property.<sup>308</sup>

The First District affirmed.<sup>309</sup> The Act only compensates owners who suffer economic loss from the actual application of the regulation com-

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299. *See id.*

300. *Id.* The district court declined to address the issue of the reasonableness of the fee since no amount was shown as having been paid. *Id.*

301. *Coastal Cmty. Bank*, 23 So. 3d at 759.

302. *M & H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 73 (Fla. 1st Dist. Ct. App. 2009).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 74.

307. *M & H Profit, Inc.*, 28 So. 3d at 74.

308. *Id.* at 73 (emphasis added).

309. *Id.* at 78.



plained of to an owner's property.<sup>310</sup> Here, there had been no specific application of the zoning ordinance to M & H's property because M & H had not submitted a development plan for the property and been turned down.<sup>311</sup> The Act did not change any "land use classification or zoning category [with respect to] any particular piece of property."<sup>312</sup> "District-wide height and setback restrictions are normally considered" related to the general welfare.<sup>313</sup> M & H brought only a "facial challenge" to the ordinance when what was required to sustain its position was an "as-applied" challenge to the ordinance.<sup>314</sup> Judge Thomas dissented, saying that "[t]he Act establishes broad protection for property owners who suffer economic loss from governmental property regulations and actions that attempt to impose societal costs onto property owners. . . . It seems quite clear to me that this legislation has not excluded an ordinance of general applicability . . . ."<sup>315</sup> Judge Thomas concluded that the court "must simply enforce the plain terms of the statute."<sup>316</sup>

## X. EMPLOYMENT LAW

### A. *Benefits Accrued Prior to Termination of an At-Will Employee*

Mr. Patwary (Employee) entered into a contract with Evana Petroleum Corporation (Corporation) that provided, among other things, that Employee would manage a motel for Corporation in exchange for half of the motel's net profits, and should the motel be sold during the term of the agreement, Employee would receive half of the net sale proceeds.<sup>317</sup> In December 2001, Employee was told that a contract had been made to sell the motel.<sup>318</sup> In January 2002, Corporation fired Employee without prior notice.<sup>319</sup> The motel sale was completed, and Corporation refused to pay Employee any part of the net sale proceeds or any accrued net profits.<sup>320</sup> Employee sued to collect, and the trial court, on motion for summary judgment regarding these claims,

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310. *Id.* at 76.

311. *Id.* at 73, 76.

312. *M & H Profit, Inc.*, 28 So. 3d at 74.

313. *Id.* (citing *WCI Cmtys., Inc. v. City of Coral Springs*, 885 So. 2d 912, 915 (Fla. 4th Dist. Ct. App. 2004); *Moviematic Indus. Corp. v. Bd. of Cnty. Comm'rs*, 349 So. 2d 667, 669 (Fla. 3d Dist. Ct. App. 1977)).

314. *See id.* at 74-76.

315. *Id.* at 79 (Thomas, J., dissenting).

316. *Id.*

317. *Patwary v. Evana Petroleum Corp.*, 18 So. 3d 1237, 1238 (Fla. 2d Dist. Ct. App. 2009).

318. *Id.*

319. *Id.*

320. *Id.*

held that Employee's "claim was barred because it concerned . . . an agreement without a definite duration."<sup>321</sup> The Second District Court of Appeal reversed as to denial of the claim and remanded.<sup>322</sup> It was true that Employee worked as an employee at-will, and thus could not maintain an action for wrongful employment termination.<sup>323</sup> However, an employment at-will agreement does not bar recovery of employee compensation and benefits earned prior to termination.<sup>324</sup>

#### B. *Covenant Not to Compete: Attorney's Fees Against Third Party*

Section 542.335(1)(k) of the *Florida Statutes* was at issue in *Bauer v. Dilib, Inc.*<sup>325</sup> This section states that "[i]n the absence of a contractual provision authorizing an award of attorney's fees and costs to the prevailing party, a court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant."<sup>326</sup> *Dilib, Inc. (Former Employer)* had a written non-compete agreement with two of its employees.<sup>327</sup> The two employees were found by the trial court to have violated the agreement by going to work for Ms. Bauer (New Employer).<sup>328</sup> There was evidence to the effect that New Employer knew of the non-compete agreement, although New Employer denied this.<sup>329</sup> Former Employer succeeded in obtaining a permanent injunction against New Employer forbidding New Employer from associating with the two employees for a certain period of time.<sup>330</sup> New Employer then fired the two employees.<sup>331</sup> The trial court awarded Former Employer attorney's fees against New Employer based on section 542.335(1)(k).<sup>332</sup> New Employer appealed the fee award, and the Fourth District Court of Appeal reversed.<sup>333</sup> The cited section cannot be read in isolation; it must be read together with section 542.335(1)(a), which provides that a restrictive covenant

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321. *Id.*

322. *Patwary*, 18 So. 3d at 1239.

323. *Id.* at 1238–39 (citing *De Felice v. Moss Mfg., Inc.*, 461 So. 2d 209, 210 (Fla. 3d Dist. Ct. App. 1984) (per curium)).

324. *Id.* at 1238.

325. 16 So. 3d 318, 319 (Fla. 4th Dist. Ct. App. 2009).

326. *Id.* at 319 (quoting FLA. STAT. § 542.335(1)(k) (2007)).

327. *Id.*

328. *Id.*

329. *See id.*

330. *Bauer*, 16 So. 3d at 319.

331. *Id.* at 319.

332. *Id.* at 320.

333. *Id.* at 320, 322.

can only be enforced against a person who signs it.<sup>334</sup> Obviously, New Employer did not sign the agreement, and since the restrictive covenant could not be enforced against New Employer, Former Employer could not recover its attorney's fees from New Employer.<sup>335</sup> Although the restrictive covenant could not be enforced against New Employer, as a third party, an injunction is a proper remedy if that party "aids and abets the violation of a restrictive covenant,"<sup>336</sup> provided there is proper notice and "an opportunity to be heard."<sup>337</sup> The power to order injunctive relief in such cases derives from common law, not from section 542.335.<sup>338</sup> Thus, in the absence of a contractual fee agreement or a statute permitting a fee award, there was no basis to grant fees in connection with the injunction against New Employer.<sup>339</sup>

## XI. FIDUCIARY DUTY AND GOVERNANCE

Karten (Plaintiff) and Woltin and Karmin (Defendants) were the shareholders of 201 East Atlantic, Inc. (the Corporation).<sup>340</sup> Plaintiff owned 25% of the stock, and Defendants owned the remaining 75%.<sup>341</sup> The Corporation was in the restaurant business.<sup>342</sup> Plaintiff sued Defendants for breach of fiduciary duty, alleging that Defendants: 1) went into a competing restaurant and bar business but failed to give Plaintiff the chance to become an owner; 2) diverted the Corporation's assets to the competing business; 3) prevented Plaintiff from carrying out his responsibilities as a corporate officer and director; 4) agreed to "deprive" Plaintiff of his share of corporate profits; and 5) agreed to pay one of the Defendants a salary that was excessive.<sup>343</sup> Plaintiff alleged that only he—that is, no other shareholder—was harmed by the conduct of Defendants.<sup>344</sup> Defendants contended that Plaintiff's claims could only be pursued as a shareholder's derivative action under section 607.07401 of the *Florida Statutes* because Plaintiff did not "allege injuries separate and

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334. *Id.* at 320; FLA. STAT. § 542.335(1)(a) (2010).

335. *Bauer*, 16 So. 3d at 320.

336. *Id.* at 320–21.

337. *Id.* (quoting *USI Ins. Servs. of Fla., Inc. v. Pettineo*, 987 So. 2d 763, 767 (Fla. 4th Dist. Ct. App. 2008)).

338. *Id.* at 321.

339. *Id.* at 320.

340. *Karten v. Woltin*, 23 So. 3d 839, 840 (Fla. 4th Dist. Ct. App. 2009). The Corporation was not made a party to the action. *Id.* at 840 n.1.

341. *Id.* at 840.

342. *Id.*

343. *Id.*

344. *Karten*, 23 So. 3d at 840.

distinct from those suffered by all other shareholders.”<sup>345</sup> The trial court agreed, granting summary judgment to Defendants, and Plaintiff appealed.<sup>346</sup> The Fourth District Court of Appeal affirmed.<sup>347</sup> Shareholders may only sue directly in their own names for an injury done to them individually.<sup>348</sup> A lost business opportunity is an injury to the corporation, and the injury affects all of the corporation’s shareholders.<sup>349</sup> The district court concluded that Plaintiff’s allegations were not of “the type of individualized harm” that would permit him to sue directly rather than derivatively.<sup>350</sup>

## XII. INSURANCE

The Supreme Court of Florida was presented with a question certified to it by the United States Court of Appeals for the Eleventh Circuit concerning insurance coverage for violation of the Telephone Consumer Protection Act (TCPA).<sup>351</sup> Transportation Insurance Company (Insurance Company) issued a policy to Penzer’s assignor, its insured, providing the insured with coverage for, among other things, “[o]ral or written publication of material that violates a person’s right of privacy.”<sup>352</sup> The TCPA imposes monetary penalties on those who send unsolicited advertisements to fax machines.<sup>353</sup> The offending incident in question occurred when the insured was allegedly instrumental in the transmission of 24,000 “blast-fax” advertisements.<sup>354</sup> Insurance Company denied coverage under its policy, and Penzer sued seeking declaratory relief.<sup>355</sup> The Southern District Court of Florida ruled for Insurance Company, and Penzer appealed.<sup>356</sup> The Court of Appeals for the Ele-

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345. *Id.*

346. *Id.*

347. *Id.* at 841.

348. *Id.* at 840 (citing *Fort Pierce Corp. v. Ivey*, 671 So. 2d 206, 207 (Fla. 4th Dist. Ct. App. 1996)).

349. *Karten*, 23 So. 3d at 841 (citing *Braun v. Buyers Choice Mortg. Corp.*, 851 So. 2d 199, 203 (Fla. 4th Dist. Ct. App. 2003)).

350. *Id.* (citing *Orlinsky v. Patraka*, 971 So. 2d 796, 801–02 (Fla. 3d Dist. Ct. App. 2007)); see also Barbara Landau, *2006–2007 Survey of Florida Law Affecting Business Owners*, 32 NOVA L. REV. 21, 78–79 (2007).

351. *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1002 (Fla. 2010), *answering certified question from* 545 F.3d 1303 (11th Cir. 2008).

352. *Id.* at 1003.

353. *Id.* at 1003 n.2; Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 3, 105 Stat. 2394, 2396 (1991) (current version at 47 U.S.C. § 227(b)(1)(C) (2006)).

354. *Penzer*, 29 So. 3d at 1007.

355. *Id.* at 1003.

356. *Id.* at 1004.

venth Circuit then certified the question.<sup>357</sup> The Supreme Court of Florida ruled that the quoted policy coverage did apply to the alleged violation of the TCPA.<sup>358</sup> The unwanted fax advertisement intruded on the recipient's solitude and was thus a privacy violation.<sup>359</sup> In a concurring opinion, Justice Pariente wrote that Insurance Company could have avoided liability for the mere act of sending the faxes if the coverage clause had instead read: "Oral or written publication of material, *the content of which* violates the right of privacy."<sup>360</sup>

### XIII. INTELLECTUAL PROPERTY AND THE INTERNET

In *Internet Solutions Corp. v. Marshall*,<sup>361</sup> the Supreme Court of Florida answered a long-arm jurisdiction question certified to it by the United States Court of Appeals for the Eleventh Circuit.<sup>362</sup> As rephrased by the Supreme Court of Florida, the question was as follows:

Does a nonresident commit a tortious act within Florida for purposes of section 48.193(1)(b) when he or she makes allegedly defamatory statements about a company with its principal place of business in Florida by posting those statements on a website, where the website posts containing the statements are accessible and accessed in Florida?<sup>363</sup>

The Supreme Court of Florida answered yes.<sup>364</sup> Defendant, a Washington resident, owned and operated a noncommercial website on which she posted consumer information that allegedly defamed Plaintiff.<sup>365</sup> Plaintiff, a Nevada corporation engaged in the employment, recruiting, and advertising business, alleged that its principal place of business was in Orlando, Florida, and claimed that Defendant had defamed it by posting on her website claims of illegal conduct by Plaintiff.<sup>366</sup> The issue was whether Defendant had engaged in activity sufficient to subject her to personal jurisdiction in Florida

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357. *Id.* at 1005.

358. *Id.* at 1008.

359. *Penzer*, 29 So. 3d at 1007.

360. *Id.* at 1009 (Pariente, J., concurring in result only).

361. 39 So. 3d 1201 (Fla. 2010), *answering certified question from* 557 F.3d 1293 (11th Cir. 2009).

362. *Id.* at 1203.

363. *Id.* (emphasis omitted).

364. *Id.*

365. *Id.* at 1203–04.

366. *Internet Solutions Corp.*, 39 So. 3d at 1203–04.

under section 48.193 of the *Florida Statutes*.<sup>367</sup> The Supreme Court of Florida stated that:

[P]osting defamatory material on a website alone does not constitute the commission of a tortious act within Florida for purposes of section 48.193(1)(b), [of the] *Florida Statutes*. Rather, the material posted on the website about a Florida resident must not only be *accessible* in Florida, but also be *accessed* in Florida in order to constitute the commission of the tortious act of defamation within Florida under section 48.193(1)(b).<sup>368</sup>

It is the accessing of the information that constitutes the publication element of defamation—and the communication of the material into Florida—and thus the commission of the tortious act within Florida.<sup>369</sup> The Supreme Court of Florida was careful to point out that it dealt with only the first part of the personal jurisdiction inquiry.<sup>370</sup> The second part, a “minimum contacts” analysis, which requires that a court determine if its exercise of personal jurisdiction would offend due process, was beyond what the Eleventh Circuit asked of the Supreme Court of Florida in this case.<sup>371</sup>

#### XIV. JURISDICTION, VENUE, FORUM NON CONVENIENS, AND STANDING

##### A. Long-Arm Jurisdiction

In *Internet Solutions Corp.*, the previous case discussed, the United States Court of Appeals for the Eleventh Circuit certified a long-arm jurisdiction question to the Supreme Court of Florida that arose in the tort context.<sup>372</sup> In *Canale v. Rubin*,<sup>373</sup> the issue of communications into Florida was again presented, but in the context of a breach of contract claim.<sup>374</sup> The case provided the Second District Court of Appeal with the opportunity to discuss the requirements for both general and specific personal jurisdiction under the

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367. *Id.* at 1205.

368. *Id.* at 1203.

369. *Id.* at 1215.

370. *Id.* at 1216.

371. *Internet Solutions Corp.*, 39 So. 3d at 1216.

372. *Id.* at 1203; *see supra* note 363 and accompanying text.

373. 20 So. 3d 463 (Fla. 2d Dist. Ct. App. 2009).

374. *Id.* at 465. The amended verified complaint contained allegations sounding in tort as well as breach of contract. *Id.* However, the court held that it would be the defendant’s “communications” into Florida that were alleged to form a basis for jurisdiction based on section 48.193(1)(a), conducting a business in Florida, under the “specific jurisdiction” rules. *Id.* at 469.

long-arm statute, in addition to “minimum contacts” and burden of proof.<sup>375</sup> With respect to the two types of long-arm personal jurisdiction that could apply to this breach of contract case, specific and general, as described in sections 48.193(1)<sup>376</sup> and 48.193(2)<sup>377</sup> of the *Florida Statutes*, the district court noted that general jurisdiction is the more difficult to prove.<sup>378</sup> General jurisdiction must be established by proving that “the defendant engages in substantial and not isolated activities in Florida.”<sup>379</sup> General jurisdiction subjects the defendant to any claim brought in Florida.<sup>380</sup> General jurisdiction activities alleged to have taken place in Florida are unrelated to a specif-

375. *See id.* at 465, 469. One of the contracts involved provided that Florida law applied, and the parties consented to exclusive jurisdiction in Sarasota, Florida. *Canale*, 20 So. 3d at 468. The district court said that “[n]o one appears to dispute these facts.” *Id.* *See* Barbara Landau, 2008–2009 *Survey of Florida Law Affecting Business Owners*, 34 NOVA L. REV. 71, 121–24 (2009) [hereinafter Landau, 2008–2009 *Survey*], regarding the impact of such a provision under section 48.193, as well as under sections 685.101 and 685.102, of the *Florida Statutes*.

376. Section 48.193(1) of the *Florida Statutes* provides in relevant part:

Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts: (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state. (b) Committing a tortious act within this state. (c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state. (d) Contracting to insure any person, property, or risk located within this state at the time of contracting. (e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage. (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either: 1. The defendant was engaged in solicitation or service activities within this state; or 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use. (g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state. (h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

FLA. STAT. § 48.193(1) (2007).

377. Section 48.193(2) of the *Florida Statutes* provides that “[a] defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.” *Id.* § 48.193(2).

378. *Canale*, 20 So. 3d at 466.

379. *Id.* at 465–66.

380. *Id.* at 466 (citing *Christus St. Joseph’s Health Sys. v. Witt Biomedical Corp.*, 805 So. 2d 1050, 1052 (Fla. 5th Dist. Ct. App. 2002)).

ic lawsuit.<sup>381</sup> On the other hand, specific jurisdiction only requires proof that the defendant was “operating, conducting, engaging in, or carrying on a business or business venture in [Florida].”<sup>382</sup> Specific jurisdiction contemplates isolated acts by the defendant, involving the plaintiff in the lawsuit, with the cause of action arising from one of the statutorily enumerated acts in section 48.193(1).<sup>383</sup> The district court noted that the trial court found specific personal jurisdiction on account of the defendant having “made and received hundreds of business telephone calls to and from Florida, and engaged in ongoing facsimile and email communication with Florida.”<sup>384</sup> The problem with this finding was that communications to Florida would be pertinent to a tort claim against the defendant, rather than the contract claim involved in this case, based on doing business here.<sup>385</sup>

*Jaffe & Hough, P.C. v. Baine*,<sup>386</sup> which is also a long-arm jurisdiction case, is another example of the evidentiary burden-shifting involved in establishing—or failing to establish—personal jurisdiction over an out-of-state defendant.<sup>387</sup> Mr. and Mrs. Baine (Clients) of Polk County, Florida, retained Jaffe & Hough, P.C. (Law Firm), a Philadelphia law firm, to represent them in a products liability claim against Bausch & Lomb, Inc. (Defendants).<sup>388</sup> Clients signed the attorney fee agreement in Pennsylvania.<sup>389</sup> Clients discharged Law Firm and replaced it with Polk County counsel before suing Defendants.<sup>390</sup> Clients sued Defendants in Polk County, and they eventually settled the lawsuit.<sup>391</sup> Law Firm learned of the settlement and asked Defendants “to hold distribution of the settlement mon[ey]” to Clients until Law Firm’s lien issues could be resolved.<sup>392</sup> Clients responded by suing Law Firm in the Polk County Circuit Court to determine its “charging lien.”<sup>393</sup> Law Firm moved to dismiss the Polk County action arguing that Clients had

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381. *Id.* (citing *Madara v. Hall*, 916 F.2d 1510, 1516 n.7 (11th Cir. 1990)).

382. *Id.* at 468 (quoting FLA. STAT. § 48.193(1)(a) (2007)).

383. *See Canale*, 20 So. 3d at 466.

384. *Id.* at 468.

385. *Id.* (citing *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002)). It was these types of activities—telephone, electronic, and facsimile transmission—that the Court reviewed in *Internet Solutions Corp.* in arriving at its decision involving internet transmission of material in the tort context. *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1215–16 (Fla. 2010), *answering certified question from* 557 F.3d 1293 (11th Cir. 2009).

386. 29 So. 3d 456 (Fla. 2d Dist. Ct. App. 2010).

387. *Id.* at 459.

388. *Id.* at 457–58.

389. *Id.* at 458.

390. *Id.*

391. *Jaffe & Hough, P.C.*, 29 So. 3d at 458.

392. *Id.*

393. *Id.*



failed to establish personal jurisdiction over Law Firm.<sup>394</sup> The trial judge denied the motion, and Law Firm appealed.<sup>395</sup> The Second District reversed and remanded.<sup>396</sup> The appellate court succinctly described the hurdles that Clients needed to overcome before Law Firm could successfully and personally be brought before a Florida tribunal, all in the manner described by *Venetian Salami Co. v. Parthenais*,<sup>397</sup> *Kin Yong Lung Industries Co. v. Temple*,<sup>398</sup> *World-Wide Volkswagen Corp. v. Woodson*,<sup>399</sup> and section 48.193 of the *Florida Statutes*:<sup>400</sup>

(1) Plaintiff must allege jurisdictional facts sufficient to bring the out-of-state defendant into a Florida court under section 48.193.<sup>401</sup>

(2) Plaintiff must then allege that “defendant possesses [enough] minimum contacts with Florida to satisfy constitutional due process requirements,” at which point, the court must rule as to whether the defendant has been doing business in Florida, or acted in such manner that it could anticipate having to answer for its actions in a Florida court.<sup>402</sup>

(3) The burden then shifts to defendant to come up with evidence putting the accuracy of the jurisdictional facts plead by plaintiff at issue.<sup>403</sup>

Clients failed to plead enough facts to subject Law Firm to personal jurisdiction in Florida.<sup>404</sup>

In the next case, *Singer v. Unibilt Development Co.*,<sup>405</sup> the Fifth District Court of Appeal concluded that foreign entities that were no longer engaged in business in Florida were subject to the jurisdiction of the Florida court.<sup>406</sup> At issue in *Singer* was whether Florida’s “general” personal jurisdiction long-arm statute, section 48.193(2), applied to the plaintiff’s lawsuit against Michigan entities—a limited partnership and its corporate general partners—so as to allow plaintiff to sue the foreign partnership and its foreign general partners in Florida.<sup>407</sup> The trial court said no because at the time suit was filed, the evidence did not support a finding that the entities were engaged in

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394. *Id.*

395. *Id.*

396. *Jaffe & Hough, P.C.*, 29 So. 3d at 461.

397. 554 So. 2d 499, 501–02 (Fla. 1989).

398. 816 So. 2d 663, 666 (Fla. 2d Dist. Ct. App. 2002).

399. 444 U.S. 286, 291–292 (1980).

400. *Jaffe & Hough, P.C.*, 29 So. 3d at 458–59; see FLA. STAT. § 48.193 (2008).

401. *Jaffe & Hough, P.C.*, 29 So. 3d at 458.

402. *Id.* (quoting *Venetian Salami Co.*, 554 So. 2d at 500).

403. *Id.* at 459.

404. *Id.* at 457.

405. 43 So. 3d 784 (Fla. 5th Dist. Ct. App. 2010).

406. *Id.* at 789.

407. *Id.* at 786.

“substantial business activity” in Florida.<sup>408</sup> The trial court found that the entities “had ceased all activity in Florida,”<sup>409</sup> and relied on the Fourth District Court of Appeal’s decision in *Buckingham, Doolittle & Burroughs, LLP v. Kar Kare Automotive Group, Inc.*<sup>410</sup> The Fifth District reversed, concluding that the Fourth District had construed the statutory phrase “is engaged in substantial . . . activity” in the present tense, requiring that the defendant be “currently” engaged in substantial business activity.<sup>411</sup> The Fifth District refused to construe the statute “this narrowly,” noting that the partnership in this case: (1) was established to develop residential property in Orange County, (2) carried on business activities in Florida for twenty years, (3) conducted nearly all of its business in Florida, (4) “had a registered agent in [Florida] until shortly before this suit was filed” against it, and (5) had litigated in Florida courts.<sup>412</sup> The Fifth District concluded that the approach taken by the Fourth District was too focused on a temporal event—engagement in substantial business activities at the time suit was filed.<sup>413</sup> The Fifth District also acknowledged that how long a nonresident defendant must be continuously and systematically conducting activities in Florida prior to suit being filed in order to pass long-arm muster “is not subject to specific delineation.”<sup>414</sup> In analyzing the provision of the “general jurisdiction” statutory prong at issue in *Singer* that says “is engaged,” the district court concluded that “at a minimum, ‘is engaged’ must be interpreted to also involve past activities. We conclude that a better interpretation focuses on the activities of the nonresident during a reasonable period of time prior to filing the complaint, but not necessarily up until [the time] the complaint is filed.”<sup>415</sup> The Fifth District held that:

When the activities of the nonresident are of sufficient quality that it should in fairness expect to defend itself here, it should not make a difference that it happens to cease these activities prior to the fil-

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408. *Id.* at 787–88.

409. *Id.* at 788.

410. 987 So. 2d 818 (Fla. 4th Dist. Ct. App. 2008). The court in *Singer* noted that “[a]lthough it did not say so expressly, the *Buckingham* panel apparently adopted the same reasoning as used in *Arch Aluminum & Glass Co. v. Haney*, 964 So. 2d 228 (Fla. 4th Dist. Ct. App. 2007).” *Singer*, 43 So. 3d at 788.

411. *Id.* (quoting *Arch Aluminum & Glass Co.*, 964 So. 2d at 237).

412. *Id.* at 789.

413. *Id.* at 788.

414. *Id.*

415. *Singer*, 43 So. 3d at 789.

ing of the complaint, especially where the activities occur close in time to the events giving rise to the cause of action.<sup>416</sup>

The Fifth District found that both statutory and constitutional authority existed to permit the exercise of jurisdiction over the partnership and general partners.<sup>417</sup> Conflict was not certified with the Fourth District.<sup>418</sup>

*B. Forum and Jurisdiction Selection Clause: Mandatory Versus Permissive*

Celistics, LLC (Employer), which has its headquarters in Miami-Dade County, allegedly hired Mr. Gonzalez (Employee) to work in the United States pursuant to a written agreement providing that “[i]n the event of any doubt, question or conflict which may arise from the interpretation or implementation of this agreement, the parties agree to select the venue and jurisdiction of the Courts and Tribunals of the city of Madrid.”<sup>419</sup> Employee alleged that he relocated himself and his family from Argentina to Miami in reliance on oral and subsequent written assurances that his employment would not be for less than one year, but that his employment was ended by Employer after Employee had completed only five months of employment.<sup>420</sup> Employee sued Employer in the Miami-Dade Circuit Court.<sup>421</sup> Employer moved for dismissal based on the forum selection clause, but the trial court denied Employer’s motion “finding that the forum selection clause [was] permissive,” not mandatory.<sup>422</sup> Employer appealed, and the Third District Court of Appeal reversed and remanded.<sup>423</sup> The district court, relying on principles set out in *Golf Scoring Systems Unlimited, Inc. v. Remedio*<sup>424</sup> and *Sauder v. Rayman*,<sup>425</sup> determined that the forum selection case was mandatory, despite the absence of any “‘magic words’ of exclusivity, such as ‘shall’

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416. *Id.*

417. *Id.* The general partners of the Michigan limited partnership were Michigan corporations. *Id.* at 786.

418. *See id.* at 788–89.

419. *Celistics, L.L.C. v. Gonzalez*, 22 So. 3d 824, 825 (Fla. 3d Dist. Ct. App. 2009).

420. *Id.*

421. *Id.* Employee, in his four-count complaint, sought unpaid wages under section 448.08 of the *Florida Statutes*, alleged breach of two written agreements—one for employment and the other dealing with severance—and sought restitution based on equitable estoppel. *Id.*

422. *Id.*

423. *Celistics, L.L.C.*, 22 So. 3d at 824–25.

424. 877 So. 2d 827 (Fla. 4th Dist. Ct. App. 2004) (per curiam).

425. 800 So. 2d 355 (Fla. 4th Dist. Ct. App. 2001).

or ‘must’” or “‘to the exclusion of all others.’”<sup>426</sup> The “plain and unambiguous language” of the forum selection provision, including the words “‘agree’” and “‘select,’” made the clause mandatory.<sup>427</sup>

The Supreme Court of Florida, the Fifth District Court of Appeal, and the First District Court of Appeal have held that an “unambiguous and mandatory” forum selection clause may, nevertheless, be set aside if it is shown that it would not be reasonable, fair or just to enforce the provision.<sup>428</sup> Indeed, the Third District Court of Appeal so held in *Copacabana Records, Inc. v. Wea Latina, Inc.*<sup>429</sup> Presumably, the issue was not before the Third District in *Celistics, LLC v. Gonzalez*.<sup>430</sup>

## XV. LANDLORD AND TENANT RELATIONSHIP

### A. Formalities of Lease Execution: Limited Liability Company

NMB Plaza, LLC (Landlord LLC) entered into a written business lease with Skylake Insurance Agency, Inc. (Tenant).<sup>431</sup> The lease was for ten years, but had a delayed starting date of ninety days after completion of con-

426. *Celistics, L.L.C.*, 22 So. 3d at 826 (quoting *Golf Scoring Sys. Unlimited, Inc.*, 877 So. 2d at 829).

427. *Id.*

428. *Manrique v. Fabbri*, 493 So. 2d 437, 440 n.4 (Fla. 1986) (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)); *Travel Express Inv. Inc. v. AT&T Corp.*, 14 So. 3d 1224, 1227 (Fla. 5th Dist. Ct. App. 2009), discussed at Landau, 2008–2009 Survey, *supra* note 375, at 102; *Aqua Sun Mgmt., Inc. v. Divi Time Ltd.*, 797 So. 2d 24, 24–25 (Fla. 5th Dist. Ct. App. 2001) (per curiam); *Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627, 631 (Fla. 1st Dist. Ct. App. 1999).

429. 791 So. 2d 1179, 1180 (Fla. 3d Dist. Ct. App. 2001) (per curiam) (citing *Manrique*, 493 So. 2d at 440).

430. 22 So. 3d 824, 825 (Fla. 3d Dist. Ct. App. 2009). As the Supreme Court of Florida held in *Manrique*, while “forum selection clauses should be enforced in the absence of a showing that enforcement would be unreasonable or unjust,” *Manrique*, 493 So. 2d at 440, “the test of unreasonableness is not mere inconvenience or additional expense.” *Id.* at 440 n.4 (citation omitted). The Supreme Court of Florida quoted the Supreme Court of the United States in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972), where the Supreme Court of the United States said that:

[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

*Manrique*, 493 So. 2d at 440 n.4 (quoting *The Bremen*, 407 U.S. at 18).

431. *Skylake Ins. Agency, Inc. v. NMB Plaza, L.L.C.*, 23 So. 3d 175, 176 (Fla. 3d Dist. Ct. App. 2009). The lease was signed by a member of Landlord LLC and by the president and vice president of Tenant. *Id.*

struction of the building, which was under construction.<sup>432</sup> None of the signatures were witnessed, and shortly before construction was finished, the lease was repudiated by Landlord LLC based on the lack of subscribing witnesses.<sup>433</sup> Tenant sued for specific performance or alternatively for damages, alleging fraud.<sup>434</sup> On motion for summary judgment, the trial court ruled in favor of Landlord LLC.<sup>435</sup> Tenant appealed, and relying on section 608.4235 of the *Florida Statutes*, argued that two witnesses were not required since Landlord LLC was a limited liability company.<sup>436</sup> Section 608.4235(3) specifies who may “sign and deliver” documents transferring or affecting the interest of a limited liability company in real estate.<sup>437</sup> Unless otherwise provided in the articles of organization or a limited liability company’s operating agreement, if the company is member-managed, then any member may sign, and if it is a manager-managed company, then the manager may sign.<sup>438</sup> Chapter 608 does not mandate that the signatures be witnessed.<sup>439</sup> On the other hand, section 689.01 does require witnesses for real estate conveyances and leases for a term of more than a year, except for certain corporate conveyances.<sup>440</sup> The district court concluded that the exception for corporations was inapplicable.<sup>441</sup> Thus, on motion for rehearing, the Third District Court of Appeal held that the two subscribing witness requirement of section 689.01 was not satisfied.<sup>442</sup> In other words, while Chapter 608 of the *Florida Statutes*—which specifies how a limited liability company’s real estate interests may be conveyed—does not require that the member or manager sign in the presence of two subscribing witnesses, section 689.01 does.<sup>443</sup> Tenant also argued Landlord LLC should be estopped from raising the section 689.01 requirement because Landlord LLC not only drafted the lease, but also drafted it without signature lines.<sup>444</sup> Furthermore, Landlord LLC failed

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432. *Id.*

433. *Id.*

434. *Id.*

435. *Skylake Ins. Agency, Inc.*, 23 So. 3d at 176.

436. *Id.* at 177.

437. *Id.* (citing FLA. STAT. § 608.4235(3) (2003)). The lease was signed by a member of Landlord LLC. *Id.* Landlord admitted that the lease was signed, and no claim was made on behalf of Landlord LLC that the signature was unauthorized. *Id.*

438. *Skylake Ins. Agency, Inc.*, 23 So. 3d at 177 (citing FLA. STAT. § 608.4235(3) (2003)).

439. *Id.*

440. *Id.* at 178; FLA. STAT. § 689.01 (2003).

441. *See Skylake Ins. Agency, Inc.*, 23 So. 3d at 177.

442. *See id.* at 178. In light of the Third District Court of Appeal’s decision on rehearing, the discussion in this Survey of this decision supersedes the discussion reported in Landau, 2008–2009 Survey, *supra* note 375.

443. *Skylake Ins. Agency, Inc.*, 23 So. 3d at 177–78.

444. *Id.* at 178.

to have the signing member's signature witnessed.<sup>445</sup> The Third District held that in order to support an estoppel claim, "tenant must have changed [his or her] position in more than an insubstantial way."<sup>446</sup> The district court noted, "In the decided estoppel cases involving leases, the tenant took possession and the landlord accepted the rent."<sup>447</sup> The Third District found no such facts of the requisite changed position and upheld the trial court's summary judgment that denied Tenant's request for specific performance.<sup>448</sup> However, the Third District, relying on the Supreme Court of Florida's holding in *Reed v. Moore*,<sup>449</sup> concluded that the lease agreement did serve as a contract under section 725.01 of Florida's Statute of Frauds, even though it failed as the conveyance of real estate under section 689.01.<sup>450</sup> The Third District, citing its decision in *Cabrerizo v. Fortune International Realty*,<sup>451</sup> stated that "landlord will not be allowed to profit from its own wrong" in that Landlord could at anytime have corrected the lack of witnesses problem rather than relying on the problem "to disavow the contract."<sup>452</sup> The decision of the trial court granting summary judgment to Landlord LLC on Tenant's breach of contract and fraud claims was reversed.<sup>453</sup>

#### B. Purchase Option in Lease

A lease agreement gave Tenant the option to purchase the leased real estate "provided that the [Tenant] is not in default of any part of this Lease Agreement."<sup>454</sup> Tenant had paid the rent late several times, but in each case the default was cured.<sup>455</sup> Tenant attempted to exercise the option but was met with Landlord's objection that since Tenant had been in default under the lease, Tenant lost the right to exercise the option.<sup>456</sup> The Third District Court of Appeal held that the trial court erred in concluding that language of the option provision meant that any default by Tenant under the lease termi-

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445. *Id.*

446. *Id.*

447. *Id.*

448. *Skylake Ins. Agency, Inc.*, 23 So. 3d at 178.

449. 109 So. 86 (Fla. 1926).

450. *Skylake Ins. Agency, Inc.*, 23 So. 3d at 179 (citing FLA. STAT. §§ 725.01, 689.01 (2003)).

451. 760 So. 2d 228 (Fla. 3d Dist. Ct. App. 2000).

452. *Skylake Ins. Agency, Inc.*, 23 So. 3d at 179 (citing *Cabrerizo*, 760 So. 2d at 229).

453. *Id.*

454. *Welde v. Top Video & Prods. USA, Inc.*, 35 So. 3d 119, 120 (Fla. 3d Dist. Ct. App. 2010).

455. *Id.*

456. *Id.*

nated the option, and the trial court agreed with Landlord.<sup>457</sup> What the option provision meant was that Tenant could not be in default at the time Tenant exercised the option.<sup>458</sup> The Third District Court of Appeal reversed and remanded for a determination by the trial court as to whether or not Tenant was in default under any of the lease provisions at the time the option exercise was attempted.<sup>459</sup> If Tenant was not in default at even one of the times the option was exercised, then Tenant “was entitled to exercise the option.”<sup>460</sup>

## XVI. PIERCING THE CORPORATE VEIL

In this “reverse piercing” case, 17315 Collins Avenue, LLC (Subsidiary LLC) was the wholly owned subsidiary of Wavestone Properties, LLC (Parent LLC).<sup>461</sup> Parent LLC made an agreement with Fortune Development Sales Corporation (Sales) whereby Sales would have the exclusive right to market and sell condominium units owned by Parent LLC.<sup>462</sup> Parent LLC was found by the trial court to have breached the agreement, and Sales obtained a judgment against Parent LLC for more than \$1,500,000.<sup>463</sup> The trial court allowed Sales to record its judgment against Subsidiary LLC’s real estate, thus piercing the corporate veil of Parent LLC.<sup>464</sup> The Third District Court of Appeal affirmed.<sup>465</sup> Citing the Supreme Court of Florida in *Dania Jai-Alai Palace, Inc. v. Sykes*,<sup>466</sup> the appellate court stated: “To pierce the corporate veil under Florida law, it must be shown not only that the wholly-owned subsidiary is a mere instrumentality of the parent corporation but also that the subsidiary was organized or used by the parent to mislead creditors or to perpetrate a fraud upon them.”<sup>467</sup> It was determined that Parent LLC and Subsidiary LLC were alter egos, and “there was little distinction between” them.<sup>468</sup> The court found an improper use of Subsidiary LLC by Parent LLC when Parent LLC deposited with Subsidiary LLC \$250,000 of real

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457. *Id.*

458. *Id.*

459. *Welde*, 35 So. 3d at 120–21.

460. *Id.* at 120.

461. 17315 Collins Ave., L.L.C. v. Fortune Dev. Sales Corp., 34 So. 3d 166, 167 (Fla. 3d Dist. Ct. App. 2010).

462. *Id.*

463. *Id.*

464. *Id.* at 167–68.

465. *Id.* at 170.

466. 450 So. 2d 1114 (Fla. 1984).

467. *Fortune Dev. Sales Corp.*, 34 So. 3d at 168 (quoting *Ocala Breeders’ Sales Co. v. Hialeah, Inc.*, 735 So. 2d 542, 543 (Fla. 3d Dist. Ct. App. 1999) (per curiam)).

468. *Id.*

estate sales commissions initially set aside to pay part of Sales' judgment, but later improperly used for Subsidiary LLC's operating expenses.<sup>469</sup>

## XVII. TAXES

The state of Maine obtained a tax judgment against Taxpayer for over \$64,000.<sup>470</sup> Maine recorded the judgment in Citrus County pursuant to section 55.503 of the *Florida Statutes*<sup>471</sup> and notified Taxpayer that it had done so.<sup>472</sup> Taxpayer successfully moved to have the judgment vacated.<sup>473</sup> The Fifth District Court of Appeal reversed and remanded.<sup>474</sup> Taxpayer persuaded the trial court that section 72.041 of the *Florida Statutes*, entitled "'Tax liabilities arising under the laws of other states,'" which reads in part "that '[a]ctions to enforce lawfully imposed sales, use, and corporate income taxes and motor and other fuel taxes of another state may be brought in a court of this state,'" meant that it was the policy of Florida not to enforce foreign taxes not mentioned in that section, that is, foreign individual income taxes.<sup>475</sup> The appellate court concluded that the trial court had misinterpreted section 72.041, and that section 55.503 applied, as did the requirement to give the judgment full faith and credit under the United States Constitution.<sup>476</sup>

## XVIII. TORTS

### A. *Claims Arising from Alleged Misrepresentations by Mortgage Lender*

Borrowers contracted with Builder to build them a home on North Captiva Island.<sup>477</sup> Builder's agent suggested Bank as a resource for obtaining construction financing and Bank provided Borrowers with construction financing, with the home to serve as collateral.<sup>478</sup> About ten months later,

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469. *Id.* at 169.

470. *State v. Hanson*, 36 So. 3d 879, 879 (Fla. 5th Dist. Ct. App. 2010) (per curiam).

471. Section 55.503(1) of the *Florida Statutes* provides for recording of a certified copy of a foreign judgment with the circuit court clerk of Florida and gives such judgment the "same effect" as a Florida circuit court or county court judgment, and subjects the foreign judgment to the same rules as such Florida judgments. FLA. STAT. § 55.503(1) (2008).

472. *Hanson*, 36 So. 3d at 879.

473. *Id.* at 880.

474. *Id.*

475. *Id.* (quoting FLA. STAT. § 72.041 (2008)).

476. *Id.*

477. *Ladner v. AmSouth Bank*, 32 So. 3d 99, 101 (Fla. 2d Dist. Ct. App. 2009).

478. *Id.*



Bank sued Borrowers in foreclosure, “alleging that the project had been abandoned and that the loan funds improperly had been diverted from” the project.<sup>479</sup> The foreclosure action was settled, but Borrowers had filed several counterclaims that were not settled.<sup>480</sup> Among the counterclaims were two counts alleging misrepresentations by Bank regarding the soundness of Builder that induced Borrowers into making the construction contract with Builder.<sup>481</sup> One claim alleged negligent misrepresentation and the other alleged fraudulent misrepresentation.<sup>482</sup> An additional count alleged that Bank “breached the loan agreement by making improper [loan] disbursements.”<sup>483</sup> The trial court dismissed all counts of the counterclaim.<sup>484</sup> The Second District Court of Appeal reversed and remanded.<sup>485</sup> The trial court correctly dismissed the counts alleging breach of the loan agreement, as well as the misrepresentation counterclaims based on the contract, because of the hold harmless and related provisions in the loan agreement and another document.<sup>486</sup> However, because of Borrower’s allegation of detrimental reliance on the alleged negligent and fraudulent misrepresentations with respect to Borrower’s entering into its contract with Builder, the trial court needed to further address these claims.<sup>487</sup> The appellate court noted that the trial court also found that all of the counterclaims were barred based upon the economic loss rule.<sup>488</sup> While that might bar all of the counterclaims that arose from the loan agreement,<sup>489</sup> “[w]hen . . . fraud occurs in . . . connection with misrepresentations, statements, or omissions which cause the complaining party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort.”<sup>490</sup> The cause of action is not barred by the economic loss rule.<sup>491</sup> Thus, Borrower’s counterclaim against Bank was reinstated.<sup>492</sup>

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479. *Id.*

480. *See id.*

481. *Id.*

482. *Ladner*, 32 So. 3d at 101.

483. *Id.*

484. *Id.*

485. *Id.* at 105.

486. *Id.* at 102.

487. *Ladner*, 32 So. 3d at 102.

488. *Id.* at 105.

489. *Id.* The district court did not have to “address whether the economic loss rule would bar [Borrower’s] tort claims” because the contract provisions barred the claims that arose from the contract. *Id.*

490. *Id.* (quoting *Output, Inc. v. Danka Bus. Sys., Inc.*, 991 So. 2d 941, 944 (Fla. 4th Dist. Ct. App. 2008)).

491. *Ladner*, 32 So. 3d at 105.

492. *Id.*

### B. *Product Liability and Negligence*

Decedent “was run over and killed by a huge mobile crane at the Port of Miami.”<sup>493</sup> Liebherr-America, Inc. (Seller) sold the crane to one of the other defendants and “agree[d] to keep it in good repair.”<sup>494</sup> Seller did not design or manufacture the crane, was not operating the crane when the accident occurred, and did not own or have control of the property where Decedent was killed.<sup>495</sup> Nevertheless, the jury found Seller partially liable for the death of Decedent.<sup>496</sup> Seller appealed, and the Third District Court of Appeal reversed, directing that judgment be entered in favor of Seller.<sup>497</sup> Since the “jury found that the crane was *not* defective at the time of the sale,” there could not be liability on the part of Seller, as “a seller and servicer.”<sup>498</sup> This is because “[t]he primary duty and responsibility of a seller and servicer of equipment like [Seller] is ordinarily found in the claim that, at the time of the sale, the equipment contained a defect which rendered it unreasonably dangerous to persons in the vicinity of the crane.”<sup>499</sup> As to the claim that Seller failed to properly perform its service obligations with respect to the crane, the evidence did not support such a claim.<sup>500</sup> There were allegations that a horn was not working correctly, but no evidence that the horn had failed was presented, or if it had failed, that Seller had prior notice of it.<sup>501</sup> In addition, there was no evidence of negligence in not repairing it.<sup>502</sup> Moreover, there was no evidence that the horn “was even *a* legal cause of the accident.”<sup>503</sup> “[T]here is simply no duty on the part of a seller—or anyone in the distributive chain—to warn of dangers presented by [the product’s] operation after it has passed from [the seller’s] control.”<sup>504</sup>

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493. *Liebherr-America, Inc. v. McCollum*, 43 So. 3d 65, 66 (Fla. 3d Dist. Ct. App. 2010).

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.*

498. *Liebherr-America, Inc.*, 43 So. 3d at 67.

499. *Id.*

500. *Id.* at 67–68.

501. *Id.* at 68.

502. *Id.*

503. *Liebherr-America, Inc.*, 43 So. 3d at 68.

504. *Id.*

### C. Professional Liability

In *Witt v. La Gorce Country Club, Inc.*,<sup>505</sup> the Third District Court of Appeal issued a replacement opinion for its earlier decision that was discussed in a prior survey.<sup>506</sup> The district court still held that a professional liability limitation in a contract does not apply to professionals involved in the work covered by the contract.<sup>507</sup>

## XIX. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS

### A. Jurisdiction Over Judgment Debtor

On December 6, 1988, Whitson & Whitson, P.A. (Creditor) obtained a judgment against Mr. Petersen (Judgment Debtor) in the Pinellas County Circuit Court.<sup>508</sup> The judgment was in excess of \$400,000.<sup>509</sup> When the action was started and when judgment was obtained, Judgment Debtor was a Florida resident.<sup>510</sup> Creditor assigned the judgment to Mr. Whitson (Judgment Creditor).<sup>511</sup> Judgment Debtor became a Georgia resident in 2007.<sup>512</sup> About ten months later, on April 25, 2008, which date was less than twenty years after the entry of the judgment in the original action, Judgment Creditor filed suit in Pinellas County Circuit Court seeking renewal of the original judgment.<sup>513</sup> Process was served on Judgment Debtor in Georgia, and he responded by filing a motion to dismiss.<sup>514</sup> Judgment Debtor asserted that he had moved to Georgia, and that “he had not ‘done any act which would submit himself to the jurisdiction’” under the long-arm statute, section 48.193 of the *Florida Statutes*, or otherwise.<sup>515</sup> The trial court denied his motion to dismiss, and the Second District Court of Appeal affirmed.<sup>516</sup> The Second District noted that the writ of *scire facias* had earlier been used to revive a judgment.<sup>517</sup> A petition for writ of *scire facias* was considered to be “a con-

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505. 35 So. 3d 1033 (Fla. 3d Dist. Ct. App. 2010).

506. *Id.* at 1035; see Landau, 2008–2009 Survey, *supra* note 375, at 138.

507. *Witt*, 35 So. 3d at 1039.

508. *Petersen v. Whitson*, 14 So. 3d 300, 301 (Fla. 2d Dist. Ct. App. 2009).

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

513. *Petersen*, 14 So. 3d at 301. The statute of limitations on a judgment entered by a court of record is twenty years. FLA. STAT. § 95.11(1) (2010).

514. *Petersen*, 14 So. 3d at 302.

515. *Id.*

516. *Id.* at 302–03.

517. *Id.* at 302.

tinuation of the original action,” not a new action.<sup>518</sup> The modern procedure is “by motion after notice” pursuant to Rule 1.100(d) of the *Florida Rules of Civil Procedure*.<sup>519</sup> Like the earlier procedure, the modern procedure for reviving a judgment—and thereby resetting the statute of limitations—should be viewed as “a continuation of the original action” and as such, personal jurisdiction over a judgment debtor continues as to the “court that rendered the judgment in the original action.”<sup>520</sup>

### B. Creditors’ Claims: Inherited IRA

Lender sued Borrower “on a promissory note and obtained a judgment against him [for over] \$188,000.”<sup>521</sup> Borrower had been named as the beneficiary of his late father’s Individual Retirement Account (IRA).<sup>522</sup> The account was administered by RBC Capital Markets Corporation (IRA Administrator).<sup>523</sup> IRA Administrator explained to Borrower his options concerning the IRA, and Borrower decided to transfer his father’s IRA to an “inherited IRA.”<sup>524</sup> When Lender sought to enforce his judgment against Borrower’s inherited IRA account, Borrower relied on section 222.21(2)(a) of the *Florida Statutes* to prevent levy on the account.<sup>525</sup> That section provides in part that “any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account,” referring to a fund or account exempt from federal income taxation under any of sections 401(a), 403(a), 403(b), 408, 408A, 409, 414, 457(b) and 501(a) of the *Internal Revenue Code*, “is exempt from all claims of creditors of the owner, beneficiary, or participant.”<sup>526</sup> The trial court ruled that an inherited IRA was no longer an IRA under that definition, and Borrower’s inherited IRA account was denied protection from levy.<sup>527</sup> The Second District Court of Appeal affirmed, holding that the Florida statutory protection from creditors accorded to an IRA was intended only for the original account or fund of the IRA owner.<sup>528</sup> The Second District also cited

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518. *Id.*

519. *Petersen*, 14 So. 3d at 302 n.3; FLA. R. Civ. P. 1.100(d).

520. *Petersen*, 14 So. 3d at 302–03.

521. *Robertson v. Deeb*, 16 So. 3d 936, 937 (Fla. 2d Dist. Ct. App. 2009).

522. *Id.*

523. *Id.*

524. *Id.*

525. *Id.* at 937–38.

526. *Robertson*, 16 So. 3d at 938 (quoting FLA. STAT. § 222.21(2)(a) (2008)).

527. *Id.* at 938.

528. *Id.* at 938–39.

several bankruptcy cases to the same effect with respect to state law creditor exemptions.<sup>529</sup>

### C. *Construction Lien: Strict Compliance*

A construction lien was recorded in favor of Designerick, Inc. (Lienor) against the Unnerstalls' real estate to secure payment of more than \$21,000 that Lienor claimed was due for installation of cabinets.<sup>530</sup> The Unnerstalls started proceedings for cancellation of the lien pursuant to section 713.21 of the *Florida Statutes*.<sup>531</sup> It was then up to Lienor to "strictly comply with the statute to [protect] its lien."<sup>532</sup> Lienor's response to the Unnerstalls' Complaint and the Order to Show Cause was an answer that contained affirmative defenses and counterclaims, but no request for foreclosure of its lien.<sup>533</sup> Nevertheless, the trial court concluded that the counterclaims were sufficient to prevent discharge of the lien.<sup>534</sup> The Second District Court of Appeal reversed, ruling that Lienor failed to strictly comply with the lien statute by not acting to enforce the lien within twenty days.<sup>535</sup> The district court noted that Lienor could, despite discharge of the lien, still pursue its counterclaims.<sup>536</sup>

The Fifth District Court of Appeal in *KA Properties, LLC v. USA Construction, Inc.*<sup>537</sup> also recently held that strict compliance with the statutory

529. *Id.* at 939; see *In re Kirchen*, 344 B.R. 908, 914 (Bankr. E.D. Wis. 2006); *In re Taylor*, No. 05-93559, 2006 WL 1275400, at \*2 (Bankr. C.D. Ill. May 9, 2006); *In re Greenfield*, 289 B.R. 146, 150 (Bankr. S.D. Cal. 2003); *In re Sims*, 241 B.R. 467, 470 (Bankr. N.D. Okla. 1999).

530. *Unnerstall v. Designerick, Inc.*, 17 So. 3d 900, 901 (Fla. 2d Dist. Ct. App. 2009).

531. *Id.* (citing FLA. STAT. § 713.21(4) (2008)).

532. *Id.* at 902 (citing *Ruffolo v. Parish & Bowman, Inc.*, 966 So. 2d 434, 436 (Fla. 1st Dist. Ct. App. 2007)).

533. *Id.* at 901. Lienor's counterclaim alleged "breach of [an] oral contract, open account, and unjust enrichment," and sought money damages. *Id.* at 901-02.

534. *Unnerstall*, 17 So. 3d at 901-02.

535. *Id.* at 902. The Second District Court of Appeal cited two decisions, *Brookshire v. GP Constr. of Palm Beach, Inc.*, 993 So. 2d 179 (Fla. 4th Dist. Ct. App. 2008), and *Dracon Constr., Inc. v. Facility Constr. Mgmt, Inc.*, 828 So. 2d 1069 (Fla. 4th Dist. Ct. App. 2002), in support of its ruling that the counterclaims did not constitute strict compliance. *Id.* In *Brookshire*, the Fourth District Court of Appeal held that the Lienor's filing of a motion to compel arbitration did not meet the statutory requirements of section 713.21 of the *Florida Statutes* to preserve the lien. *Brookshire*, 993 So. 2d at 180; see also Landau, 2008-2009 Survey, *supra* note 375, at 78 (discussing the potential issues that may arise where the parties involved in a statutory lien action are also parties to an agreement calling for binding arbitration).

536. *Unnerstall*, 17 So. 3d at 902 n.2.

537. 35 So. 3d 1015 (Fla. 5th Dist. Ct. App. 2010).

procedure is required to preserve the lien.<sup>538</sup> Lienor's answer to the complaint that the "lien was valid and not exaggerated" did not constitute strict compliance.<sup>539</sup>

#### D. *Usury*

A member of a law firm received money from two foreign individual "investors" under agreements that promised what would have amounted to annual returns of 600% in one case and 580% in another.<sup>540</sup> The agreements were purportedly made between each of the individuals and the law firm, with the law firm member signing as "trustee for" and initially, "on behalf of" an undisclosed client.<sup>541</sup> "Invested" funds were deposited "to the law firm's trust account."<sup>542</sup> There were extension agreements signed and the repayment amounts were increased, but the extension agreements did not refer to the law firm.<sup>543</sup> When repayment was not made pursuant to the agreements as a result of the law firm members' "fraudulent scheme," the two foreign individuals sued the law firm and the firm's clients, whose identities had been disclosed in the extension agreements.<sup>544</sup> The trial court, on the law firm and client's motions for summary judgment, held that the agreements amounted to usurious short-term loans and refused to enforce them.<sup>545</sup> The trial court also held that the firm member did not have authority to bind the firm to the agreements, the agreements were "clearly illegal," and the making of the agreements was not within the scope of the member's employment.<sup>546</sup> The Third District Court of Appeal affirmed.<sup>547</sup> Under section 687.071 of the *Florida Statutes*, annual simple interest called for on loans of this type exceeding 25% constitutes criminal usury rendering unenforceable the payment of principal and interest.<sup>548</sup> The Third District also rejected the

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538. *Id.* at 1016. The Fifth District Court of Appeal noted that Lienor did file a counterclaim after it filed its answer, but the counterclaim was too late, having been filed twenty-nine days after service of the summons. *Id.* The opinion does not disclose what the counterclaim alleged or if the counterclaim would have satisfied the strict compliance requirement had it been timely filed.

539. *Id.*

540. *Saralegui v. Sacher, Zelman, Van Sant Paul, Beily, Hartman & Waldman, P.A.*, 19 So. 3d 1048, 1050–51 n.1 (Fla. 3d Dist. Ct. App. 2009).

541. *Id.* at 1050.

542. *Id.*

543. *Id.*

544. *Id.* at 1050, 1052.

545. *Saralegui*, 19 So. 3d at 1050–51 n.1.

546. *Id.* at 1050–51.

547. *Id.* at 1053.

548. *Id.* at 1051 n.1 (citing FLA. STAT. § 687.071(2) (2003)).

claim that the firm member acted as an apparent agent of the law firm.<sup>549</sup> There was no requisite representation of agency by the law firm in the particular transactions.<sup>550</sup> And as to both the usury issue and the apparent authority issue, the Third District said there were no genuine issues of material fact.<sup>551</sup> The district court acknowledged that although foreigners may be accustomed to lawyers in their countries acting in various non-legal business roles, “our system draws clear distinctions among these roles and clear boundaries between the legal representation of a lender and a borrower.”<sup>552</sup> Surely, “[h]ad the [‘investors’] retained a Florida lawyer [for] independent advice before making these loans . . . [the transaction] would have caused legal eyebrows to rise and the investors to flee.”<sup>553</sup>

#### E. *National Bank: Right to Sue in Florida*

770 PPR, LLC and 140 Associates, Ltd. (Mortgagors) obtained mortgage financing from Seacoast National Bank (National Bank) secured by their Florida real estate.<sup>554</sup> The mortgages went into default, and National Bank foreclosed on the mortgaged properties.<sup>555</sup> Mortgagors defended by claiming that National Bank had failed to obtain a “certificate of authority” as called for by section 607.1501(1) of the *Florida Statutes*.<sup>556</sup> Mortgagors argued that National Bank was a foreign corporation and thus the statute required it to get permission to do business, in Florida, by obtaining a certificate of authority from the Florida Department of State.<sup>557</sup> They argued that the penalty for failure to do so was to deny National Bank the right to sue in this state.<sup>558</sup> The trial court rejected Mortgagors’ argument, and the foreclo-

549. *See id.* at 1052.

550. *See Saralegui*, 19 So. 3d at 1052.

551. *Id.* at 1051. Regardless of what these transactions were called, they were loans, and the usury statute applied. *Id.* n.1. Further, “corrupt intent” does not require that the lenders know of the usury statutes or have “a specific intention to violate them.” *Id.* at 1051. What is required is proof of intent to collect payments on the loan that, when expressed as an annual simple rate of return, exceed the statutory amount. *Saralegui*, 19 So. 3d at 1051. “[I]gnorance of the usury statutes is not a defense.” *Id.* at 1051 n.2 (citing *Mickler v. Marantha Realty Assoc., Inc.*, 50 B.R. 818, 828 (Bankr. M.D. Fla. 1985); *Ross v. Whitman*, 181 So. 2d 701, 703 (Fla. 3d Dist. Ct. App. 1966)).

552. *Saralegui*, 19 So. 3d at 1053.

553. *Id.*

554. *770 PPR, L.L.C. v. TJC Land Trust*, 30 So. 3d 613, 615 (Fla. 4th Dist. Ct. App. 2010).

555. *Id.*

556. *Id.* at 616; FLA. STAT. § 607.1501(1) (2010).

557. *770 PPR, L.L.C.*, 30 So. 3d at 616.

558. *Id.*

tures were permitted.<sup>559</sup> The Fourth District Court of Appeal affirmed, stating that “this case presents a novel issue in Florida.”<sup>560</sup> The appellate court quoted from section 24 of the National Bank Act with respect to the powers of a national banking association: “Fourth. To sue and be sued, complain and defend, in any court of law and equity, as *fully as natural persons*.”<sup>561</sup> The National Bank Act preempted Florida’s requirement that foreign corporations obtain permission to do business in Florida before being allowed to sue.<sup>562</sup> The appellate court looked to decisions in other states to support its conclusion.<sup>563</sup>

#### F. “No Lien” Notice

In June, 2005, the then Owner (Landlord) of a Broward County shopping center, pursuant to section 713.10 of the *Florida Statutes*, recorded a notice to the effect that all leases Landlord had entered into with tenants contained language identical to that quoted in the notice stating Landlord’s interest in the property was not “subject to liens for improvements made by [t]enant[s].”<sup>564</sup> Landlord entered into a lease with a Tenant (Tenant) in 2006 that contained different “no lien” language than the recorded notice language.<sup>565</sup> In March 2007, Landlord sold the shopping center to Landlord’s Assignee, to whom all of the leases were assigned.<sup>566</sup> During this time, a sub-contractor (Subcontractor) had done construction work for Tenant.<sup>567</sup> When Subcontractor failed to receive payment for some of its work, it filed a claim of lien against the property leased to Tenant, now owned by Landlord’s Assignee.<sup>568</sup> Assignee was successful in having the lien discharged, relying on section 713.10.<sup>569</sup> The Fourth District Court of Appeal reversed because section 713.10 notice was defective.<sup>570</sup> The language of Tenant’s lease was “significantly different, and more conditional” than that contained

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559. *See id.* at 615.

560. *Id.* at 617, 619.

561. *Id.* at 617 (quoting 12 U.S.C. § 24 (2006)).

562. 770 PPR, L.L.C., 30 So. 3d at 618.

563. *Id.* at 617–18 (citing *e.g.*, *Ind. Nat’l Bank v. Roberts*, 326 So. 2d 802, 802–803 (Miss. 1976)).

564. *Everglades Elec. Supply, Inc. v. Paraiso Granite, L.L.C.*, 28 So. 3d 235, 236 (Fla. 4th Dist. Ct. App. 2010) (citing FLA. STAT. § 713.10 (2010)).

565. *See id.* at 236–37.

566. *Id.* at 236.

567. *Id.*

568. *Id.*

569. *Everglades Elec. Supply, Inc.*, 28 So. 3d at 237; *see generally* FLA. STAT. § 713.10 (2010).

570. *Everglades Elec. Supply, Inc.*, 28 So. 3d at 238.



in the recorded section 713.10 notice.<sup>571</sup> The district court noted that under section 713.10, Landlord could have shielded itself either by (1) recording Tenant's lease or a short form of the lease that contained the lien protection language or (2) by filing a notice containing "[t]he specific language contained in the various leases prohibiting such liability" for work done on the premises at the tenant's behest.<sup>572</sup> In this case, Landlord did not do any of the two.<sup>573</sup>

### G. Secured Party's Right to Consigned Property

A painting was consigned by its owner (Consignor) to an art gallery for sale.<sup>574</sup> At the time of the consignment, the gallery's inventory was subject to a perfected security interest in all of the gallery's inventory, securing \$300,000 in loans made by Lender to the gallery.<sup>575</sup> Consignor, unlike Lender, did not file a UCC-1 financing statement regarding his ownership of the painting.<sup>576</sup> The painting was not tagged or similarly identified as being on consignment, and no notice was posted by the art gallery.<sup>577</sup> After the gallery defaulted on the loan, Lender foreclosed its security interest, the trial court entered a judgment in favor of Lender, and a writ of replevin was issued for the gallery's inventory.<sup>578</sup> Consignor was allowed to intervene in the action, and the trial court declared his interest in the painting superior to Lender's interest.<sup>579</sup> The Fourth District Court of Appeal reversed.<sup>580</sup> Consignor could have protected himself by (1) filing UCC-1 financial statements with respect to his interest in the painting "or (2) prov[ing] that the [art gallery] was generally known by its creditors to be substantially engaged in

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571. *Id.*

572. *Id.* at 237–38 (quoting FLA. STAT. § 713.10(2)(c)).

573. *See id.* at 238.

574. *Rayfield Inv. Co. v. Kreps*, 35 So. 3d 63, 64 (Fla. 4th Dist. Ct. App. 2010).

575. *Id.*

576. *Id.*

577. *Id.* Section 686.502(2) of the *Florida Statutes*:

requires the cosignor of works of art to give notice to the public by: "affixing to such work of art a sign or tag which states that such work of art is being sold subject to a contract of consignment, or such consignee shall post a clear and conspicuous sign in consignee's place of business giving notice that some works of art are being sold subject to a contract of consignment."

*Id.* n.2 (quoting FLA. STAT. § 686.502(2)). What would the result have been if there had been a tag or notice posted? Would that have been enough to give owner priority of prior perfected security interests?

578. *Rayfield Inv. Co.*, 35 So. 3d at 64.

579. *Id.*

580. *Id.* at 64, 67.

selling the goods of others.”<sup>581</sup> He did neither.<sup>582</sup> The district court observed, “Some legal rules explicitly allow their application to be varied by individual circumstances, using equitable principles, but the commercial law on secured transactions is not among them.”<sup>583</sup>

#### H. Tolling of Statute of Limitations

Section 95.051(1) of the *Florida Statutes* provides in part: “(1) The running of the time under any statute of limitations except [sections] 95.281, 95.35 and 95.36 is tolled by . . . (f) [t]he payment of any part of the principal or interest of any obligation or liability founded on a written instrument.”<sup>584</sup> Mortgagors brought an action against Mortgagee alleging violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).<sup>585</sup> The problem faced by Mortgagors was that suit was filed eight years after the alleged violation and was thus apparently barred by the applicable statute of limitations.<sup>586</sup> Mortgagors attempted to avoid the limitations period by proving their regular monthly mortgage payments, which they claimed brought them

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581. *Id.* at 66. The district court stated that “[t]he consignor in this case could have defeated the priority of secured creditors *only* by proving that a majority of the gallery’s creditors knew that it was substantially engaged in consignment sales.” *Id.* (emphasis added). Was the district court saying that under the facts of this case where there was no UCC-1 filed, no tag or notice posted by consignee, the *only* remaining basis for defeating the Lender’s prior perfected security interest would have been satisfying the “generally known” test? It is submitted that just how much is required of a consignor in order to defeat a prior perfected security interest is open to debate. The district court in *Rayfield Investment Co.*, relying on *In re Valley Media, Inc.*, 279 B.R. 105 (Bankr. D. Del. 2002), a case the court considered “factually similar” to the case before it, said that the court in *In re Valley Media, Inc.* “observed that the consignors could have obtained a prior interest in their consigned goods if they had either (1) filed UCC-1 financing statements . . . or (2) proved that the consignee was generally known by its creditors to be substantially engaged in selling the goods of others.” *Rayfield Inv. Co.*, 35 So. 3d at 66 (citing *In re Valley Media, Inc.*, 279 B.R. at 123). The district court concluded that:

[t]he law creating the priority rule afforded consignor effective tools to avoid a prior security interest in gallery’s inventory. These tools were simple, not burdensome, and easily satisfied. He needed only to file a UCC-1 under Florida law. Aside from that, he could have required the gallery to affix a tag onto the painting and place a sign alerting prospective buyers of a consignment sale. He did none of these things.

*Id.* at 67.

582. *Id.*

583. *Id.*

584. FLA. STAT. § 95.051(1), (1)(f) (2010).

585. *Brown v. Nationscredit Fin. Servs. Corp.*, 32 So. 3d 661, 662 (Fla. 1st Dist. Ct. App. 2010).

586. *Id.*

under the tolling provisions of section 95.051(1)(f).<sup>587</sup> The trial court held that the statute of limitations applied and dismissed Mortgagors' complaint with prejudice.<sup>588</sup> The First District Court of Appeal affirmed.<sup>589</sup> The appellate court held that section 95.051(1)(f) only applied to creditors.<sup>590</sup> "Without the protection of the statute, a compassionate obligee that accepts sporadic part-payments from the obligor could risk jeopardizing its collection rights."<sup>591</sup> The appellate court acknowledged that the statute had to "be given its plain meaning to the extent its language is clear and unambiguous," unless doing that "would lead to an unreasonable or absurd result."<sup>592</sup> Judge Thomas dissented, stating that the plain wording of the section did not limit its effect to creditors.<sup>593</sup>

### I. *Disposition of Collateral*

Borrower borrowed \$840,000 from Bank and signed promissory notes that were guaranteed by several individuals (Guarantors) and secured by all of Borrower's then owned or later acquired "inventory, furniture, supplies, equipment, fixtures," and certain intangibles.<sup>594</sup> Borrower defaulted, and Bank, having been granted a "pre-judgment writ of replevin," took possession of the tangible property pledged as security and hired a company to do an inventory of the assets.<sup>595</sup> There were three auctions, and the auction proceeds from the sale of the collateral were approximately \$317,000, which was less than half of the amount owed on the notes.<sup>596</sup> Borrower and Guarantors alleged that several items of collateral taken by Bank were not auctioned, and no explanation was given for the omissions.<sup>597</sup> On motion for summary judgment, the trial court granted Bank a deficiency judgment, but the Third District Court of Appeal reversed, concluding that there was "a

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587. *Id.*

588. *Id.*

589. *Id.* at 664.

590. *See Brown*, 32 So. 3d at 664.

591. *Id.* (quoting *S. Motor Co. of Dade Cnty. v. Doktorczyk*, 957 So. 2d 1215, 1218 (Fla. 3d Dist. Ct. App. 2007)).

592. *Id.* at 662–63 (citing *Rollins v. Pizzarelli*, 761 So. 2d 294, 297 (Fla. 2000), *superseded by statute*, Act effective July 1, 1999, ch. 99-8, 1999 Fla. Laws 351, as recognized in *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 200 n.3 (Fla. 2001)); *Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006) (*per curiam*).

593. *Brown*, 32 So. 3d at 664 (Thomas, J., dissenting).

594. *Tropical Jewelers, Inc. v. Bank of Am., N.A. (Tropical II)*, 19 So. 3d 424, 425 (Fla. 3d Dist. Ct. App. 2009).

595. *Id.*

596. *Id.* at 425–26.

597. *Id.* at 426.

genuine issue of material fact as to whether the collateral was disposed of in a commercially reasonable fashion.”<sup>598</sup> On remand, the trial judge considered the missing and unsold items of collateral, the advertising efforts made by the auctioneer, and the degree of the auctioneer’s experience in disposing of similar items of collateral, and concluded that the collateral was not disposed of in a commercially reasonable fashion.<sup>599</sup> The Third District, in *Tropical Jewelers, Inc. v. Bank of America, N.A. (Tropical II)*,<sup>600</sup> affirmed the trial court’s decision denying Bank a deficiency judgment.<sup>601</sup>

#### J. Documentary Tax Stamps: Promissory Note

Although prevailing party attorney’s fees were at issue in *Glenn Wright Homes (Delray) LLC v. Lowy*,<sup>602</sup> the underlying issue presented to the Fourth District Court of Appeal arose from the institution of a suit seeking to enforce a promissory note prior to payment of the required documentary stamp tax.<sup>603</sup> Lender loaned \$300,000 to Borrower and took back an unsecured promissory note for that amount.<sup>604</sup> Thus, there was no recorded instrument securing the note.<sup>605</sup> Borrower defaulted and Lender sued Borrower.<sup>606</sup> At the time suit was filed—and at the time Lender filed a motion for summary judgment—Florida documentary tax stamps had not been paid on the note as required by sections 201.01 and 201.08 of the *Florida Statutes*.<sup>607</sup> Lender paid the stamp tax after the issue was raised by the court at the hearing on the motion for summary judgment, and the court entered judgment for Lender.<sup>608</sup> Although the trial court did not then award attorney’s fees to Lender, it reserved jurisdiction to do so.<sup>609</sup> Borrower did not appeal that judgment, but

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598. *Id.*; See also *Tropical Jewelers, Inc. v. Nationsbank, N.A. (Tropical I)*, 781 So. 2d 392, 394 (Fla. 3d Dist. Ct. App. 2000) (en banc), *aff’d sub nom. Tropical II*, 19 So. 3d 424 (Fla. 3d Dist. Ct. App. 2009).

599. *Tropical II*, 19 So. 3d at 426.

600. 19 So. 3d 424 (Fla. 3d Dist. Ct. App. 2009).

601. *Id.* at 427. The trial court also denied Borrower’s and Guarantors’ claims for damages equivalent to the “surplus” they alleged would have been received if the assets had not been disposed of in a commercially unreasonable fashion, as they “failed to prove any resulting damages.” *Id.* at 426. The Third District Court of Appeal did not specifically discuss this issue in *Tropical II*, but rather it “affirm[ed] on all other points.” *Id.* at 427.

602. 18 So. 3d 693 (Fla. 4th Dist. Ct. App. 2009).

603. *Id.* at 694–95.

604. *Id.* at 694.

605. *Id.*

606. *Id.*

607. *Lowy*, 18 So. 3d at 694–95.

608. *Id.* at 695.

609. *Id.*

after the trial court granted Lender's subsequently-filed motion seeking attorney's fees, Borrower appealed the fee award.<sup>610</sup> On appeal, Borrower argued that because documentary stamps had not been placed on the promissory note until after the hearing on Lender's motion for summary judgment, the note was unenforceable.<sup>611</sup> Thus, the question was how attorney fees could be awarded for trying to enforce an unenforceable promissory note.<sup>612</sup> The district court answered this question by noting the difference between subsections (a) and (b) in section 201.08(1) of the *Florida Statutes*.<sup>613</sup> Subsection (a) covers unsecured promissory notes while subsection (b) deals with "notes or instruments secured by an instrument filed in the public records."<sup>614</sup> Only subsection (b), which was not applicable in the present case, prevents the enforcement of a promissory note with respect to future advances as to which the documentary stamp tax has not been paid.<sup>615</sup> The Fourth District, in affirming the trial court, receded from its opinions in *Rappaport v. Hollywood Beach Resort Condominium Ass'n*<sup>616</sup> and *Bonfiglio v. Banker's Trust Co. of California*<sup>617</sup> to the extent they each held that an unsecured note was not enforceable in a Florida court prior to payment of the documentary stamp tax.<sup>618</sup> The district court also certified conflict with *Silber v. Cn'R Industries of Jacksonville, Inc.*,<sup>619</sup> *Somma v. Metra Electronics Corp.*,<sup>620</sup> and *Klein v. Royale Group, Ltd.*<sup>621</sup> as they, like *Rappaport* and *Bonfiglio*, "appear[ed] to misread the statute."<sup>622</sup> The Fourth District noted:

[Florida] has a substantial interest in ensuring collection of taxes owed. That is why it requires evidence of the payment of the tax prior to recordation of any taxable instrument. The state has

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610. *Id.*

611. *Id.*

612. *Lowy*, 18 So. 3d at 694.

613. *Id.* at 695–96.

614. *Id.* at 696.

615. *Id.* Section 201.08(1)(b) of the *Florida Statutes* also provides that "any person who fails or refuses to pay such tax due by him or her is guilty of a misdemeanor of the first degree." *Id.* (quoting FLA. STAT. § 201.08(1)(b) (2009)).

616. 905 So. 2d 1024 (Fla. 4th Dist. Ct. App. 2005), *overruled in part by* Glenn Wright Homes (Delray) L.L.C. v. Lowy, 18 So. 3d 693 (Fla. 4th Dist. Ct. App. 2009).

617. 944 So. 2d 1087 (Fla. 4th Dist. Ct. App. 2006).

618. *See Lowy*, 18 So. 3d at 696–97.

619. 526 So. 2d 974 (Fla. 1st Dist. Ct. App. 1988).

620. 727 So. 2d 302 (Fla. 5th Dist. Ct. App. 1999).

621. 578 So. 2d 394 (Fla. 3d Dist. Ct. App. 1991) (per curiam).

622. *Lowy*, 18 So. 3d at 696.

elected to enforce its taxes on unsecured promissory notes, however, through the use of its criminal laws and substantial penalties.<sup>623</sup>

The court went on to point out that the Legislature might elect to bring subsection (a) in line with subsection (b) of section 201.08(1).<sup>624</sup>

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623. *Id.*; accord FLA. STAT. § 201.17 (2010).

624. *Lowy*, 18 So. 3d at 696–97.