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# Real Property: 1993 Survey of Florida Law

Ronald B. Brown

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# Real Property: 1993 Survey of Florida Law

Ronald Benton Brown\*

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## I. INTRODUCTION

This survey presents recent developments in the law that should be of particular interest to the real estate lawyer or real estate professional.<sup>1</sup> It includes decisions of the Florida Supreme Court, the district courts of appeal, and statutes, from the period of August 1, 1992 to July 31, 1993.

## II. FLORIDA SUPREME COURT DECISIONS

### A. Attorney's Fees

*Ganz v. HZJ, Inc.*<sup>2</sup> Chief Justice Barkett and Justices Overton, Shaw, Grimes, Kogan, and Harding concurred in this per curiam decision. Justice McDonald dissented without an opinion.

A delinquent taxpayer, HZJ, Inc., had sued to prevent the sale of tax certificates on its land by the Dade County tax collector.<sup>3</sup> After the trial court found the suit to be without merit, the tax collector filed a motion for attorney's fees based upon section 57.105(1) of the Florida Statutes, which provided: "The court shall award a reasonable attorney's fee . . . in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party . . . ."<sup>4</sup> Because the tax collector had not specifically pleaded that he was entitled to attorney's fees in his answer to the complaint as required by the supreme court's 1991 opinion in *Stockman v. Downs*,<sup>5</sup> the motion was denied.

The supreme court, however, ruled that a claim for attorney's fees need not be pleaded specifically.<sup>6</sup> Such a requirement would make little sense because:

[i]t is only after the case has been terminated that a sensible judgment can be made by a party as to whether the adverse party raised nothing but frivolous issues in the cause, and, if so, to file an appropriate mo-

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1. This article does not include a discussion of family law issues, such as the distribution of property upon divorce, of probate and trust law issues, or of the significant legislative amendments to the planning and growth management process encompassed in Chapter 93-206 of the Florida Laws.

2. 605 So. 2d 871 (Fla. 1992).

3. *Id.* at 872.

4. FLA. STAT. § 57.105(1) (1991).

5. 573 So. 2d 835 (Fla. 1991).

6. *Ganz*, 605 So. 2d at 872-73.

tion . . . seeking an entitlement to said attorney's fees under Section 57.015 . . . .<sup>7</sup>

## B. Condominiums

*Falk v. Beard*.<sup>8</sup> This unanimous per curiam decision involved review of a final order of the Florida Public Service Commission ("PSC").<sup>9</sup>

A condominium management company was contractually obligated to provide, *inter alia*, for electric service to the common areas of a condominium community. The contract provided that if the electric rate charged by the local electric company increased by at least five percent, the management company was then entitled to distribute that additional cost to the unit owners. A condominium unit owner challenged the increase by complaining to the PSC that the management company was involved in the sale of electricity.

The PSC made a preliminary finding that it had jurisdiction to investigate the complaint.<sup>10</sup> When the management company sought to enjoin the PSC, the supreme court held that the circuit court did not have jurisdiction.<sup>11</sup> After completing its investigation, the PSC concluded that the management company was not in the business of selling electricity and, therefore, it had no regulatory role over the management fee.<sup>12</sup> The condominium owner challenged the PSC conclusion as arbitrary and capricious based upon the contention that it contradicted the original finding of jurisdiction.<sup>13</sup> The supreme court gave short shrift to this argument. It was one matter to conclude that the PSC had jurisdiction because a sale of electricity might be involved and a completely different matter to decide after a full investigation whether a sale of electricity was in fact involved.<sup>14</sup>

The unit owner further challenged the conclusion based upon the evidence. The supreme court pointed out that its role in reviewing findings of the PSC was to simply determine if the order was supported by competent, substantial evidence.<sup>15</sup> The record included evidence that: (1) the

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7. *Id.* (quoting *Autorico, Inc. v. Government Employees Ins. Co.*, 398 So. 2d 485, 487-88 (Fla. 3d Dist. Ct. App. 1981)).

8. 614 So. 2d 1086 (Fla. 1993).

9. *Id.* at 1087.

10. *Id.* at 1089.

11. *Florida Pub. Serv. Comm'n v. Bryson*, 569 So. 2d 1253, 1254 (Fla. 1990).

12. *Falk*, 614 So. 2d at 1087.

13. *Id.* at 1089.

14. *Id.*

15. *Id.* at 1088.

management company had to absorb any rate increase that was less than the triggering five percent;<sup>16</sup> (2) there was no separate charge for the use of the recreational facilities;<sup>17</sup> (3) there was no separate charge for electricity consumed in using the recreational facilities;<sup>18</sup> and (4) the maintenance fee increase was related to an electric rate increase rather than a consumption increase.<sup>19</sup> The fact that the increase was due to a rising electric rate and not a consumption increase made this case easily distinguishable from *Fletcher Properties, Inc. v. Florida Public Service Commission*.<sup>20</sup> In *Fletcher*, the manager wanted to charge tenants for water based on their individual consumptions as determined by meters.

In addition, in *Falk*, the unit owner claimed that the Florida Administrative Code<sup>21</sup> required a contrary finding. The supreme court reiterated that the court's role in reviewing a PSC interpretation of rules that apply to the PSC is merely to determine if the interpretation was clearly erroneous. Without going into a detailed analysis, the court simply stated that under the circumstances, the court could not rule that the PSC's interpretation was erroneous or unauthorized.<sup>22</sup>

### C. Eminent Domain

*City of Ocala v. Nye*.<sup>23</sup> This was a per curiam opinion. Justice Kogan dissented without writing an opinion.

In order to widen a street, the city brought a condemnation action to acquire part of a tract of land. The tenants of the property made a claim for the special damages to their business. Pursuant to section 73.071(3)(b) of the Florida Statutes, these damages would be available only if part of a landowner's property is condemned, not if the entire tract had been condemned. After determining that paying the business damages was more expensive than taking the entire property, the city amended its petition to seek condemnation of the entire property. The Fifth District Court of

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16. *Id.* at 1087.

17. *Falk*, 614 So. 2d at 1088.

18. *Id.*

19. *Id.*

20. 356 So. 2d 289 (Fla. 1978).

21. FLA. ADMIN. CODE ANN. r. 25-6.049 (1993).

22. *Falk*, 614 So. 2d at 1089.

23. 608 So. 2d 15 (Fla. 1992). The facts are all taken from the Florida Supreme Court opinion.

Appeal held that condemning the entire property when only part is needed exceeded the city's condemnation authority.<sup>24</sup>

The Florida Supreme Court reached a different conclusion. The court observed that the Florida Constitution expressly granted every municipality authority "to conduct municipal government, perform municipal functions and render municipal services . . . ."<sup>25</sup> Except when that power is expressly limited by law,<sup>26</sup> the only requirement is that the powers be used solely in the furtherance of "municipal purposes."<sup>27</sup> Section 166.021(2) of the Florida Statutes defines municipal purpose as "any activity or power which may be exercised by the state or its political subdivisions."<sup>28</sup> The Department of Transportation had been expressly granted the power to acquire entire tracts of land for the purpose of minimizing acquisition costs<sup>29</sup> and the counties had been expressly given similar powers of eminent domain.<sup>30</sup> Logically, saving the taxpayers money was also a valid municipal purpose.<sup>31</sup> Thus, the lack of statutory authorization for the city to take more property than it needed for this project did not prohibit it from doing so in order to minimize the costs.

*Florida Department of Revenue v. Orange County.*<sup>32</sup> Justice Kogan wrote the unanimous decision. Chief Justice Barkett and Justices Overton, McDonald, Shaw, Grimes, and Harding concurred.

Threatened with condemnation proceedings, a landowner agreed to sell its property to the county. Under the sale agreement, the county was to pay any documentary stamp tax that might be owed, although both parties believed the transaction was immune from such tax. The Department of Revenue disagreed and claimed the tax with interest and penalties.

The district court certified a question that narrowly focused upon the facts of this case, i.e., it included the contractual provision that the county was obligated to pay the tax if one was owed.<sup>33</sup> The supreme court

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24. *Nye v. City of Ocala*, 559 So. 2d 360, 362 (Fla. 5th Dist. Ct. App. 1990).

25. *Nye*, 608 So. 2d at 16 (quoting FLA. CONST. art. VIII, § 2(b)).

26. *Id.* at 17 (relying upon FLA. STAT. § 166.021(1) (1991)).

27. *Id.* (quoting *State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla. 1978)).

28. FLA. STAT. § 166.021(2) (1989).

29. *Id.* § 337.27(2).

30. *See id.* § 127.01(b).

31. *Nye*, 608 So. 2d at 17.

32. 620 So. 2d 991 (Fla. 1993).

33. *Orange County v. Florida Dep't of Revenue*, 605 So. 2d 1333 (Fla. 5th Dist. Ct. App. 1992). The Fifth District certified the following question:

rephrased the question to be: "Is a property transfer immune from the documentary stamp tax if it occurs as a result of an out-of-court settlement in a condemnation proceeding?"<sup>34</sup> The supreme court answered this rephrased question affirmatively.

The court noted that in the absence of a contrary contractual provision, the seller would be obligated to pay the tax.<sup>35</sup> However, if the seller must pay the tax out of its sale proceeds, then the seller would not be fully compensated for the lost land as is required by the Florida Constitution.<sup>36</sup> That logic had led earlier to an administrative rule that the documentary stamp tax could not be assessed when the transfer was pursuant to a condemnation judgment.<sup>37</sup> The public policy of encouraging parties to settle rather than to litigate would be defeated if settlement was subject to a tax that would not be imposed on a judgment. Consequently, the court prohibited the assessment of the documentary stamp tax on a conveyance made under threat of condemnation proceedings.<sup>38</sup>

#### D. *Ethics*

*The Florida Bar v. St. Laurent.*<sup>39</sup> This was an unanimous per curiam opinion.

St. Laurent, an attorney, was the president, director, and sole shareholder of a company that developed and marketed a time share condominium. The Florida Bar filed two complaints against St. Laurent, alleging that he

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WHEN A PROPERTY OWNER CONVEYS PROPERTY TO A COUNTY UNDER THREAT OF CONDEMNATION AND IN LIEU OF EMINENT DOMAIN PROCEEDINGS AND THE COUNTY IS CONTRACTUALLY BOUND TO PAY ANY DOCUMENTARY STAMP TAX ASSESSED BY THE DEPARTMENT OF REVENUE ON THE TRANSACTION, IS THE TRANSACTION IMMUNE FROM SUCH TAXATION EVEN THOUGH THE DEPARTMENT OF REVENUE IMPOSES THE TAX DIRECTLY UPON THE PROPERTY OWNER?

*Id.* at 1335.

34. *Florida Dep't of Revenue*, 620 So. 2d at 992.

35. *Id.*

36. *Id.* (relying on FLA. CONST. art. X, § 6). Article X, section 6 of the Florida Constitution provides: "(a) No private property shall be taken except for a public purpose and with *full compensation* therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." FLA. CONST. art. X, § 6(a) (emphasis added).

37. *Florida Dep't of Revenue*, 620 So. 2d at 992; *see* FLA. ADMIN. CODE ANN. r. 12B-4.014(14) (1993).

38. *Florida Dep't of Revenue*, 620 So. 2d at 992.

39. 617 So. 2d 1055 (Fla. 1993).

prepared and executed time-share warranty deeds purporting to transfer clear titles to properties that were actually encumbered, that he misused escrow funds, and that he failed to use the funds received to pay off the underlying mortgages. He pleaded "no contest" to the allegations and the referee recommended he be given a public reprimand and a forty-five day suspension, followed by two years of probation. The Bar wanted him disbarred and appealed.

The conduct at issue did not involve the practice of law. However, because he was a member of the bar at the time, he was subject to discipline for violating the rules of professional responsibility.<sup>40</sup> Because the attorney had no experience in real estate law, had no previous disciplinary record, had suffered severely during the pendency of the proceeding, which had taken four years, had shown remorse, and the misconduct was based, at least in part, on an honest mistake, the supreme court decided on a ninety-one day suspension followed by probation, rather than disbarment.<sup>41</sup>

#### E. *Homestead*

*Butterworth v. Caggiano*.<sup>42</sup> Chief Justice Barkett wrote the majority opinion in which Justices Overton, McDonald, Shaw, Kogan, and Harding joined. Justice Grimes wrote a dissenting opinion.

After Mr. Caggiano was convicted of racketeering, the state initiated forfeiture proceedings against his residence. Caggiano's defense was that the property was his homestead and thus was exempt from forfeiture because article X, section 4(a) of the Florida Constitution provides that homestead property:

shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty . . . .<sup>43</sup>

Although the trial court rejected this argument, the Second District Court of Appeal reversed in Caggiano's favor. The appellate court certified the question, "Whether forfeiture of homestead under the RICO Act is forbidden

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40. *Id.* at 1055.

41. *Id.* at 1056, 1057.

42. 605 So. 2d 56 (Fla. 1992).

43. FLA. CONST. art. X, § 4(a).

by article X, section 4 of the Florida Constitution?"<sup>44</sup> The supreme court agreed with the appellate court that the question should be answered in the affirmative and approved the district court's decision.<sup>45</sup>

Because the constitutional provision does not deal explicitly with forfeiture, the court applied the tools of statutory and constitutional construction to reach its conclusions. First, words are to be given their usual and obvious meaning unless the text suggests they have been used in a technical sense.<sup>46</sup> The language used in the homestead exemption appeared to be broad and nonlegal. Therefore, the term "forced sale" should not be used in a narrow, technical sense. Moreover, by statute, all forfeited property is sold by the state, so forfeiture does result in a forced sale.<sup>47</sup>

Second, the homestead provision is to be liberally construed, leading to the conclusion that forfeiture should be included, in the event of doubt, within the term "forced sale." Third, using the purpose approach, the homestead provision was intended to protect the family and to benefit the public by providing families with greater security in their homes.<sup>48</sup> This purpose would best be furthered by protecting the homestead from forfeiture to the state, as well as from levying creditors. In addition, forfeiture provisions are to be strictly construed,<sup>49</sup> leading to the conclusion that they should not apply in the event of ambiguity.

Furthermore, article X, section 4 of the Florida Constitution provides three express exceptions to homestead protection from forced sale. Forfeiture is not included. Invoking the rule, *expressio unius est exclusio alterius*,<sup>50</sup> the logical conclusion is that forfeiture was not intended to be one of the exceptions and, therefore, was to be included in the protection. Accordingly, homestead property cannot be the subject of a RICO forfeiture.

In his dissent, Justice Grimes pointed out that a RICO forfeiture does not precisely fit the homestead provision because there is "no judgment, decree, or execution which purports to be a lien on the property."<sup>51</sup> The history of the homestead provision demonstrates a purpose of protection from economic misfortune. However, forfeiture is not caused by economics,

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44. *Caggiano v. Butterworth*, 583 So. 2d 347, 348 (Fla. 2d Dist. Ct. App. 1991).

45. *Caggiano*, 605 So. 2d at 57.

46. *Id.* at 58 (quoting *City of Jacksonville v. Continental Can Co.*, 151 So. 488, 489-90 (Fla. 1933)).

47. *Id.* at 59.

48. *Id.* at 60.

49. *Id.* at 58.

50. The expression of one thing is the exclusion of others.

51. *Caggiano*, 605 So. 2d at 61.

but by misconduct.<sup>52</sup> Florida courts have long imposed equitable liens on homesteads based on the owner's fraud or reprehensible conduct.<sup>53</sup> Logically, this protection should not extend to a criminal's homestead that was being used as an instrument of crime, as occurred in the instant case. No innocent persons were in need of protection in this case because the owner did not even have a family.<sup>54</sup>

*Palm Beach Savings & Loan Ass'n v. Fishbein.*<sup>55</sup> Justice Grimes wrote the majority opinion with which Justices Overton, McDonald, and Harding concurred. Justice Shaw wrote a dissenting opinion with which Chief Justice Barkett and Justice Kogan concurred.

Mr. Fishbein owned a valuable home, which was subject to several mortgages. Although it knew that the Fishbeins were involved in marriage dissolution proceedings, Palm Beach Savings & Loan loaned \$1,200,000 to Mr. Fishbein on the security of a mortgage that appeared to have been executed by both Mr. and Mrs. Fishbein. Although witnessed and acknowledged, Mrs. Fishbein's signature was a forgery. Mr. Fishbein used \$930,000 of the loaned money to pay off the existing mortgages and the property taxes.

When the bank brought foreclosure proceedings, Mrs. Fishbein claimed the property as homestead. The circuit court, however, allowed the bank an equitable lien for the \$930,000 which Mr. Fishbein had used to pay the existing mortgages and property taxes. The circuit court stayed foreclosure proceedings for six months to allow Mrs. Fishbein to try to effect a sale. The Fourth District Court of Appeal rejected the equitable lien based upon Mrs. Fishbein's innocence of any wrongdoing.<sup>56</sup> The supreme court, finding that the district court failed to look at the constitutional language, reversed and reinstated the circuit court's order.<sup>57</sup>

The court reiterated that equitable liens can be imposed upon homesteads "where equity demands it" even though it is not expressly provided for by the constitution.<sup>58</sup> In this case, equity demanded it, regardless of Mrs. Fishbein innocence, in order to avoid her being unjustly enriched.

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52. *Id.* at 62.

53. *Id.* at 61.

54. *Id.* at 62.

55. 619 So. 2d 267 (Fla. 1993).

56. *Fishbein v. Palm Beach Sav. & Loan Ass'n*, 585 So. 2d 1052, 1055 (Fla. 4th Dist. Ct. App. 1991).

57. *Fishbein*, 619 So. 2d at 270, 271.

58. *Id.* at 270.

Allowing an equitable lien to the extent that the money was used to pay existing mortgage debts and tax burdens would not place Mrs. Fishbein in a worse position than she had been before Mr. Fishbein acquired the loan. Conversely, denying the equitable lien would result in Mrs. Fishbein receiving a windfall of \$930,000.

Justice Shaw, in his dissenting opinion, noted that there are three express exceptions to homestead protection from the imposition of a lien:<sup>59</sup> “the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty . . . .”<sup>60</sup> These must be strictly construed. A careful analysis of case law revealed that virtually every precedent was based upon one of the express exceptions.<sup>61</sup> Since the bank could not claim to fit within one of the express exceptions, it should not have been able to get an equitable lien on the property.<sup>62</sup>

#### F. *Leases*

*The Florida Bar re Advisory Opinion-Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions.*<sup>63</sup> This was an unanimous per curiam opinion.

A petition presented the following question to The Florida Bar Standing Committee on the Unlicensed Practice of Law:

Whether it constitutes the unlicensed practice of law for a property manager, with or without a power of attorney, to draft and serve a Three Day Notice, draft and file a Complaint for Eviction and Motion for Default and obtain a Final Judgment and Writ of Possession for the landlord in an uncontested residential eviction and, if so, whether the practice should be authorized.<sup>64</sup>

When the Committee produced a proposed advisory opinion, the petitioner objected.

The supreme court concluded that, under current law, a property manager could draft and serve a three-day eviction notice. It was, however, unlicensed practice of law for a nonlawyer to draft and to file a complaint

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59. *Id.* at 271.

60. FLA. CONST. art. X, § 4(a).

61. *Fishbein*, 619 So. 2d at 271-72.

62. *Id.* at 272.

63. 605 So. 2d 868 (1992).

64. *Id.* at 869.

for eviction or a motion for default, or to obtain a final judgment and writ of possession. The court decided to conduct an experiment. For one year, it would allow property managers to do these things, for example file a complaint, in uncontested residential evictions based upon the nonpayment of rent if the court-approved forms<sup>65</sup> were used. The court invited comments on the practice to be filed with its clerk during that year. It will be interesting to hear the outcome of this experiment. Perhaps allowing property managers to handle simple uncontested residential evictions will save money, which will result in a savings to landlords and tenants. However, this author suspects that the savings will not trickle down very far.

### G. *Lis Pendens*

*Chiusolo v. Kennedy*.<sup>66</sup> This was a per curiam opinion in which Chief Justice Barkett and Justices Overton, McDonald, Shaw, Grimes, and Kogan concurred. Justice Harding wrote an opinion expressing his concurrence in part and his dissent in part.

Louis Chiusolo claimed that he was to have received stock in a corporation in exchange for having advanced money to the corporation for the purchase of some land. When the stock was not delivered, Chiusolo filed suit seeking a resulting and constructive trust on the property.<sup>67</sup> With the suit, he filed a notice of lis pendens, but the circuit court discharged it.

The district court reversed, quashed and remanded<sup>68</sup> and held that the proponent of the challenged lis pendens has two burdens: (1) demonstrating that the claim affects the real property; and (2) that there is a substantial likelihood of success on the merits. The second requirement was based upon section 48.23(3) of the Florida Statutes. Section 48.23(3) provides:

When the initial pleading does not show that the action is founded on a duly recorded instrument or on a lien claimed under part I of chapter 713 [i.e., a mechanic's or construction lien], the court may control and discharge the notice of lis pendens as the court may grant and dissolve injunctions.<sup>69</sup>

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65. See The Florida Bar re Approval of Forms Pursuant to Rule 10-1.1(b) of The Rules Regulating The Florida Bar, 591 So. 2d 594 (Fla. 1991).

66. 614 So. 2d 491 (Fla. 1993).

67. *Id.* at 492.

68. *Chiusolo v. Kennedy*, 589 So. 2d 420, 421-22 (Fla. 5th Dist. Ct. App. 1991).

69. FLA. STAT. § 48.23(3) (1991).

The supreme court accepted the case based upon conflict jurisdiction<sup>70</sup> and rejected the second burden. The court pointed out that the doctrine of *lis pendens* serves not only to protect a plaintiff from intervening liens, but also to protect future purchasers and encumbrancers from “buying” a lawsuit, even a lawsuit that they would win.<sup>71</sup> The court concluded that the statutory reference to injunctions existed to allow a court to impose a bond as a condition of a continuation of the *lis pendens*, just as it could impose a bond as a condition of granting an injunction.<sup>72</sup> Consequently, “the *lis pendens* cannot be dissolved if, in the evidentiary hearing on request for discharge, the proponent can establish a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit.”<sup>73</sup>

Justice Harding’s point of dissent was with the court’s having placed the burden of proving a fair nexus on the proponent of the *lis pendens*.<sup>74</sup> He would place the burden of showing the lack of a fair nexus on the one challenging the *lis pendens*. However, proving the lack of a connection means negating all possibilities. This may impose an impossible burden, and for that reason, this author concludes that the court was correct.

#### H. *P.U.D. Litigation*

*Londono v. Turkey Creek, Inc.*<sup>75</sup> Justice Harding wrote the unanimous decision.

Dissident homeowners in a planned unit development filed an unsuccessful suit over its operation against the developer who was awarded its costs in the final judgment. The developer subsequently brought this action seeking damages for malicious prosecution, tortious interference with contractual rights, tortious interference with an advantageous business relationship, civil conspiracy, and slander of title. The questions presented to the supreme court were: (1) whether the developer’s election to tax costs in the earlier suit barred it from bringing this malicious prosecution suit; (2) whether the developer’s complaint had failed to state a claim for tortious interference claims or civil conspiracy; and (3) whether the developer’s

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70. The Fifth District’s *Chiusolo* opinion conflicted with *Cacaro v. Swan*, 394 So. 2d 538 (Fla. 4th Dist. Ct. App.), *review dismissed*, 402 So. 2d 608 (Fla. 1981). *Cacaro* was disapproved to the extent that it was in conflict with this supreme court decision.

71. *Chiusolo*, 614 So. 2d at 492.

72. *Id.* at 493.

73. *Id.* at 492.

74. *Id.* at 493.

75. 609 So. 2d 14 (Fla. 1992).

claim for slander of title was a compulsory counterclaim in the earlier action.<sup>76</sup>

The first issue provided the court with its conflict jurisdiction.<sup>77</sup> The court distinguished its holding in *Cate v. Oldham*<sup>78</sup> with the case at bar. *Cate* prohibited a state official, who had been sued only in his or her official capacity and had recovered costs, from bringing a malicious prosecution suit. That holding would bar the official from a double recovery because the official could seek no more than the recovery of costs. However, the situation in *Londono* was different. The *Londono* developer was seeking compensatory and punitive damages, plus interest and costs.<sup>79</sup> These damages were different from and additional to the costs it had recovered in the first action; therefore, the damages were not barred by the developer's election to seek costs in the first action.

The tortious interference and civil conspiracy counts were based on allegations that the homeowners made numerous intentional and malicious false statements to third parties and local government officials for the purpose of harming the developer's economic interests. The homeowners, joined by the Attorney General as *amicus curiae*, argued that the homeowners' complaints to zoning officials were protected by the First Amendment and that this suit was an intimidation suit. Because the developer was a private person, in *Nodar v. Galbreath*<sup>80</sup> the court required the plaintiff to show that the defendant had acted with express malice. However, the complaint was facially sufficient when the allegations were accepted as true and in the light most favorable to the plaintiff, which was the appropriate standard in determining whether the complaint stated a cause of action upon which relief could be granted.<sup>81</sup> Consequently, the trial court should not have dismissed the complaint.

The third issue in *Londono* was whether the claim was barred under the Florida Rules of Civil Procedure because the slander of title claim was a compulsory counterclaim in the earlier action.<sup>82</sup> The question turned on

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76. *Id.* at 16.

77. The district court decision, *Turkey Creek, Inc. v. Londono*, 567 So. 2d 943 (Fla. 1st Dist. Ct. App. 1990), was in conflict with *Cypher v. Segal*, 501 So. 2d 112 (Fla. 4th Dist. Ct. App. 1987), giving the supreme court conflict jurisdiction under article V, section 3(b)(3) of the Florida Constitution.

78. 450 So. 2d 224 (Fla. 1984).

79. *Id.* at 224.

80. 462 So. 2d 803 (Fla. 1984).

81. *Id.*

82. *Londono*, 609 So. 2d at 19. The Florida Rules of Civil Procedure provide:

the “logical relationship test,” but the court pointed out that “stating this test is far easier than determining if a claim passes [it].”<sup>83</sup> The test was:

[A] claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.<sup>84</sup>

The claims in the homeowners’ initial suit were based upon their allegations that the developer had mismanaged the development. The claims focused upon the developer’s alleged misconduct. In this suit, the claims were based upon the developer’s allegations that the homeowners had intentionally and maliciously spread false and defamatory information about the developer and the development, i.e., it focused upon the homeowners’ alleged misconduct. Consequently, this was not a compulsory counterclaim because it failed the logical relationship test.

### I. *Tax Certificates and Deeds*

*Dawson v. Saada*.<sup>85</sup> Justice Harding wrote the unanimous opinion.

Following a tax sale, a tax deed to the Saadas’ property was issued to the Dawsons who subsequently brought this action to quiet their title. The Saadas defended on the basis that the notice of the sale had not been served by the sheriff, as required by section 197.522(2) of the Florida Statutes.<sup>86</sup> The question certified to the supreme court was:

WHETHER FAILURE TO COMPLY WITH THE NOTICE REQUIREMENTS OF SECTION 197.522, FLORIDA STATUTES, INVALID-

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A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

FLA R. CIV. P. 1.170(a).

83. *Londono*, 609 So. 2d at 20.

84. *Id.* (quoting *Neil v. South Fla. Auto Painters, Inc.*, 397 So. 2d 1160, 1164 (Fla. 3d Dist. Ct. App. 1981) (quoting *Revere Copper & Brass, Inc. v. Aetna Casualty and Sur. Co.*, 426 F.2d 709, 715 (5th Cir. 1970))).

85. 608 So. 2d 806 (Fla. 1992).

86. *Id.*; see also FLA. STAT. § 197.522 (1987).

DATES THE ISSUANCE OF A TAX DEED NOTWITHSTANDING THE LANGUAGE IN SECTIONS 197.404 AND 65.081(3), FLORIDA STATUTES?<sup>87</sup>

In *Dawson*, there had been compliance with section 197.522(1), which required that the clerk, by certified mail with return receipt requested, notify all the persons listed in the tax collector's statement twenty days prior to the tax sale. The court concluded that the notice given to the Saadas was sufficient to satisfy the requirements of due process.<sup>88</sup> Furthermore, the plain language in section 197.522(2) indicated that the Legislature intended that its notice provision was to be directory only, not mandatory.<sup>89</sup> Consequently, failure to give that notice did not invalidate the tax deed.<sup>90</sup>

The court went on to provide some interesting *dicta* in order to completely answer the certified question. Both section 197.404 and section 65.081(3) of the Florida Statutes seemed to provide that the tax deed could not be attacked due to lack of notice. Section 65.081(3) provided:

No defense to the action [in chancery to quiet the title to land included in a tax deed] or attack upon the tax deed shall be made except the defense that the taxes assessed against the property had been paid by the former owner before issuance of the tax deed.<sup>91</sup>

Section 197.404 had provided:

A sale or conveyance of real or personal property for nonpayment shall not be held invalid except upon proof that: (1) The property was not subject to taxation; (2) The taxes had been paid before the sale of personal property; or (3) The tax certificate on the real property had been redeemed before the execution and delivery of a deed based upon a certificate issued for nonpayment of taxes.<sup>92</sup>

The court concluded that these sections must be read in light of the constitutional requirement of notice. These statutes could not preclude an attack on a tax deed that was void for lack of notice required by section 197.522(1) because that notice was constitutionally required.

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87. *Dawson*, 608 So. 2d at 807.

88. *Id.*

89. *See id.* at 810.

90. *Id.*

91. FLA. STAT. § 65.081(3) (1987).

92. FLA. STAT. § 197.404 (1989) (repealed 1991).

As that notice had been provided in this case, the validity of the tax deed was upheld. Therefore, the certified question would have to be answered both "yes" and "no." Although failure to comply with the notice requirements of section 197.522(1) of the Florida Statutes would invalidate the issuance of a tax deed, notwithstanding the language in sections 197.404 and 65.081, the failure to comply with the notice requirements of section 197.522(2) does not.

*Walker v. Palm Beach Commerce Center Associated.*<sup>93</sup> Justice Kogan wrote the majority opinion in which Chief Justice Barkett, and Justices Overton, Shaw, Grimes, and Harding concurred. Justice McDonald wrote an opinion concurring in part and dissenting in part.

When Palm Beach Commerce Center contested the 1990 tax assessment valuation of its property, it sought a temporary injunction against the issuance of tax certificates. The trial court denied the temporary injunction on the ground that the Center had failed to establish the likelihood that it would ultimately succeed on the merits. On appeal, the district court disagreed. It held that section 194.211 of the Florida Statutes<sup>94</sup> required only that the taxpayer make a good faith payment of the estimated taxes due as the taxpayer had done here.

The court rephrased the certified question, breaking it into two parts. The first part asked:

MAY A TAXPAYER SEEKING TO ENJOIN THE SALE OF TAX CERTIFICATES PENDING A CHALLENGE TO THE ASSESSED VALUATION OF ITS PROPERTY PROCEED UNDER SECTION 194.211?<sup>95</sup>

The Florida Supreme Court answered this question in the affirmative. The statute did not explicitly apply to the sale of tax certificates. The tax appraiser had argued that, based upon the history of the statute, a temporary

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93. 614 So. 2d 1097 (Fla. 1993).

94. Section 194.211, Florida Statutes, provided:

In any tax suit, the court may issue injunctions to restrain the sale of real or personal property for any tax which shall appear to be contrary to law or equity, and in no case shall any complaint be dismissed because the tax assessment complained of, or the injunction asked for, involves personal property only.

FLA. STAT. § 194.211 (1989).

95. *Walker*, 614 So. 2d at 1098.

injunction should be available only to prevent sale of the property two years<sup>96</sup> after the sale of the tax certificates, and not to prevent the sale of the tax certificates. The court, however, rejected the tax appraiser's argument.

Having answered the first part in the affirmative, the court proceeded to the second part of the question, which was:

WHAT SHOWING IS NECESSARY FOR THE ISSUANCE OF THE  
TEMPORARY INJUNCTION?<sup>97</sup>

Relying on the plain language of the statute,<sup>98</sup> the court concluded that the traditional requisites for a temporary injunction need not be established when seeking relief under this statute. A taxpayer is entitled to a temporary injunction if he has made "a showing of a substantial likelihood of success in the underlying tax suit" as well as having made a good faith payment of the taxes due.<sup>99</sup> The unfortunate taxpayer here lost because he had only done the latter.

In *Hotelerama Associates v. Bystrom*,<sup>100</sup> the third district had reached the opposite conclusion. Consequently, it was overruled "to the extent it conflicts with this decision."<sup>101</sup>

Although Justice McDonald concurred in the result, his rationale differed in the following way.<sup>102</sup> First, he pointed out that section 194.211 applied to the sale of property but the issuance of a tax certificate merely imposed a lien on property. Consequently, this section should not provide a basis for an injunction against the issuance of a tax certificate. Second, the Legislature explicitly provided an adequate remedy at law, i.e., the cancellation of tax certificates under sections 197.443 and 197.444. Third, the general requirements for obtaining a preliminary injunction should apply because there was nothing to indicate that the Legislature intended otherwise

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96. Actually two years after April 1 of the year of issuance, if the tax certificate has not been redeemed by the landowner. FLA. STAT. § 197.502(1) (Supp. 1992).

97. *Walker*, 614 So. 2d at 1098.

98. "In any tax suit, the court may issue injunctions to restrain the sale of real or personal property for any tax which shall appear to be contrary to law or equity . . ." FLA. STAT. § 194.211 (1991).

99. *Id.*

100. 449 So. 2d 836 (Fla. 3d Dist. Ct. App.), *review denied*, 458 So. 2d 271 (Fla. 1984).

101. *Walker*, 614 So. 2d at 1100 (quoting *Hotelerama Assocs. v. Bystrom*, 449 So. 2d 836 (Fla. 3d Dist. Ct. App. 1984)).

102. *Id.*

and these requirements included, *inter alia*, the unavailability of an adequate remedy at law.<sup>103</sup>

*Securities & Exchange Commission v. Elliott*.<sup>104</sup> Justice Shaw wrote the majority opinion in which Justices Overton, Kogan, and Harding concurred.<sup>105</sup> Chief Justice Barkett wrote a dissenting opinion in which Justices McDonald and Grimes joined.<sup>106</sup>

Charles Elliott tendered tax certificates, endorsed in blank before a notary public, as collateral for loans. When Elliott's assets were placed in receivership, the lenders discovered that the tax certificates had been frozen by court order. The receiver claimed that the lenders were unsecured creditors because the lenders had not perfected their security interest in the certificates by filing with the Secretary of State as required for security interests in general intangibles by Article 9 of the Uniform Commercial Code.<sup>107</sup>

The United States Court of Appeals for the Eleventh Circuit posed the following question to the Florida Supreme Court:

Does a Florida Tax certificate represent an interest in land for purposes of the Florida Uniform Commercial Code, so that Article 9 does not govern the creation of a security interest therein by virtue of § 679.104(10)?<sup>108</sup>

The majority answered the question in the affirmative and held that Article 9 did not govern. Under section 197.102(3), a tax certificate is a lien on real property. However, Article 9 does not apply "to the creation or transfer of a . . . lien on real estate . . ." <sup>109</sup> The plain language of these sections would seem to exclude the creation of a security interest in a tax certificate from Article 9. Moreover, section 679.102(2) provides that Article 9 does not generally apply to statutory liens. The majority rejected the claim that commercial lenders might be harmed by finding Article 9 inapplicable, because that had not occurred in this case, and any lender considering the land as collateral would know of the existence of the tax certificate and its implications.

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103. *Id.*

104. 620 So. 2d 159 (Fla. 1993).

105. *Id.*

106. *Id.*

107. *Id.*; see also FLA. STAT. § 679.102 (1991).

108. *Elliott*, 620 So. 2d at 159.

109. FLA. STAT. § 679.104(10) (1991).

The dissent considered that a tax certificate being used to secure a loan was analogous to a mortgage being used to secure a debt. It relied, as did the majority, on the official comment to section 679.102 to justify the conclusion, although the official comment fails to support clearly either the majority or the dissent.

*Capital City Country Club, Inc. v. Tucker.*<sup>110</sup> Justice Grimes wrote the opinion in which Chief Justice Barkett and Justices Overton, Shaw, Kogan, and Harding concurred. Justice McDonald was recused.

The court was presented with two certified questions. The first certified question asked:

IS LAND OWNED BY A MUNICIPALITY EXEMPT FROM REAL ESTATE TAXATION IF IT WAS LEASED TO A PRIVATE PARTY PRIOR TO APRIL 15, 1976, AND IS USED FOR NONGOVERNMENTAL PURPOSES?<sup>111</sup>

The Florida Supreme Court answered this question in the negative. The golf course was leased from the City of Tallahassee under a ninety-nine year lease. It was admittedly not being used for public or municipal purposes, so it did not fit within the tax exemption provided by article VII, section 3 of the Florida Constitution. Nor did the court find that it fit within the exemption provided by Florida Statute section 196.199(4).<sup>112</sup>

The second certified question presented to the court was:

IF THE LAND IS SUBJECT TO REAL ESTATE TAXATION, SHOULD THE VALUE OF THE LEASEHOLD INTEREST BE EXCLUDED FROM THE APPRAISAL IN ORDER TO ARRIVE AT A LEGAL ASSESSMENT?<sup>113</sup>

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110. 613 So. 2d 448 (Fla. 1993).

111. *Id.* at 450.

112. Section 196.199(4), Florida Statutes, provides:

Property owned by any municipality, agency, authority, or other public body corporate of the state which becomes subject to a leasehold interest or other possessory interest of a nongovernmental lessee other than that described in paragraph (2)(a), after April 14, 1976, shall be subject to ad valorem taxation unless the lessee is an organization which uses the property exclusively for literary, scientific, religious, or charitable purposes.

FLA. STAT. § 196.199(4) (1991).

113. *Tucker*, 613 So. 2d at 450.

This was also answered in the negative.<sup>114</sup>

The taxpayer had argued that failing to subtract the value of the lease from the valuation of the property to arrive at the real property tax assessment would subject it to unconstitutional double taxation because it was also being taxed on the leasehold under the intangible tax. The court rejected this argument. The intangible tax was imposed upon the lessee's interest and would be collected by the state. The real estate tax was imposed on the land itself and would be collected by the county. The only reason that the lessee was obligated to pay the real estate tax was that it had contractually obligated itself to make that payment.

### III. DISTRICT COURT OF APPEAL DECISIONS

#### A. *Caveat Emptor*

*Haskell Co., v. Lane Co.*<sup>115</sup> The roof of a commercial building collapsed during a severe rainstorm, injuring two shoppers as well damaging the property of the tenant. The district court felt required by existing law to hold that the tenant and the successor landlord could not recover from the original landlord due to the doctrine of *caveat emptor*. Noting that *caveat emptor* has been abrogated in residential real estate transactions, the court agreed that a similar change might be due, perhaps by adopting section 353 of the Restatement (Second) of Torts,<sup>116</sup> in the law of commercial real

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114. *Id.* at 452.

115. 612 So. 2d 669 (Fla. 1st Dist. Ct. App. 1993).

116. Restatement (Second) Torts, section 353, provides:

Undisclosed Dangerous Conditions Known to Vendor.

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the

estate, but that such a change should come from the Florida Supreme Court. Accordingly, the court certified the following question:

SHOULD THE COMMON LAW DOCTRINE OF CAVEAT EMPTOR CONTINUE TO APPLY TO COMMERCIAL REAL PROPERTY TRANSACTIONS; AND, IF NOT, WITH WHAT LEGAL PRINCIPLES SHOULD IT BE REPLACED?<sup>117</sup>

This author urges the supreme court to consider the question. It is time to eliminate the double standard. The same principles of good faith, duty to disclose, and implied warranties should apply equally to commercial property transactions.

### B. *Condominiums*

*BB Landmark, Inc. v. Haber.*<sup>118</sup> Under section 718.503(1)(a) of the Florida Statutes (1989), a buyer could avoid a contract to purchase a new condominium after receiving notice that the developer has amended the offering in a way that “materially alters or modifies the offering in a manner which is adverse to the buyer.” In this case, the developer unilaterally increased the cost of extras from \$10,384 to \$17,122. In response, the buyers sent proper written notice of their intent to cancel the contract. The developer, however, tried to avoid cancellation by announcing that it would honor the original price.

The court was faced with a case of first impression. It found the meaning of the statute to be clear and unambiguous and, therefore, the plain meaning of the terms should govern. A cost increase would be adverse to the buyer’s interest, and a 65% increase in the cost of the extras would be material. Once the developer had so amended the offering, the buyer had fifteen days to exercise the right to cancel. That right could not be extinguished by the developers taking the unilateral action of abandoning the proposed modifications. Consequently, the decision of the trial court was affirmed.

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condition and to take such precautions.

RESTATEMENT (SECOND) OF TORTS § 353 (1965).

117. *Haskell*, 612 So. 2d at 676.

118. 619 So. 2d 448 (Fla. 3d Dist. Ct. App. 1993).

*Carlandia Corp. v. Rogers & Ford Construction Corp.*<sup>119</sup> The district court was faced with a case of first impression in deciding whether a unit owner could maintain an action against the developer to recover for construction defects in the common elements or common areas. Under Florida Rule of Civil Procedure 1.210(a), a real party in interest may sue in his own name.<sup>120</sup> A unit owner does own an undivided share in the common elements, so it is a real party in interest. Additionally, there is nothing in the statute, authorizing the condominium association to bring suits, that would preclude a unit owner from bringing such a suit. Recognizing that this conclusion may produce "practical difficulties," the court certified the following question to the supreme court:

MAY AN INDIVIDUAL CONDOMINIUM UNIT OWNER MAINTAIN AN ACTION FOR CONSTRUCTION DEFECTS IN THE COMMON ELEMENTS OR COMMON AREAS OF THE CONDOMINIUM?<sup>121</sup>

However, the practical problems created for the court by such litigation are probably slight compared to the practical problems encountered by a unit owner trying to bring such a suit. The lack of precedent reveals how infrequently this situation arises and indicates that the supreme court's time is probably better spent on other issues.

### C. *Construction (Mechanic's) Liens*

*Coppenbarger Homes, Inc. v. Williamson.*<sup>122</sup> A subcontractor is sued to foreclose on a construction lien. The contractor posted a transfer bond and the landowner was dropped from the suit. The judgment entered was greater than the amount of the bond and the court allowed the excess to be an unsecured judgment against the contractor. The district court agreed, pointing out that the mechanism for increasing the transfer bond<sup>123</sup> was not intended to limit the amount of the judgment, but to provide a method by which a lienholder might preserve the adequacy of its security.

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119. 605 So. 2d 1014 (Fla. 4th Dist. Ct. App. 1992), *aff'd sub nom.* Rogers & Ford Constr. Corp. v. Carlandia Corp., No. 80,788, 1993 WL 458843 (Fla. 10, 1993).

120. Florida Rule of Civil Procedure 1.210(a) provides that "[e]very action may be prosecuted in the name of the real party in interest . . . ." FLA R. CIV. P. 1.210(a).

121. *Carlandia*, 605 So. 2d at 1016.

122. 611 So. 2d 33 (Fla. 1st Dist. Ct. App. 1992).

123. *Id.*; see also FLA. STAT. § 713.24(3) (1991).

*Davis Water & Waste Industries Inc. v. Embry Development Corp.*<sup>124</sup> A supplier claimed a construction lien on abutting land under Florida Statute section 713.04 regarding subdivision improvements. However, the developer's land was not actually contiguous with the land on which the materials were installed. The court concluded that the meaning of the statute was plain and that the supplier was not entitled to the lien.<sup>125</sup>

*Meyerowich v. Carrere General Contractors.*<sup>126</sup> In order to protect against the possibility of multiple suits when the materials are supplied by a partnership, all the partners are indispensable parties to a construction lien foreclosure. However, the court concluded that a partner whose claim has become barred by the statute of limitations is not indispensable. The contractor had raised nonjoinder of the materialman's partner at the close of the evidence. In response, the partner sought to intervene, but the trial court denied the motion even though the partner did not seek to introduce any new evidence.<sup>127</sup> Then the trial court dismissed for failure to join an indispensable party.<sup>128</sup> The district court held that the trial court had erred in both decisions.<sup>129</sup>

*Taylor v. T.R. Properties, Inc.*<sup>130</sup> The court held that a lienholder, who was defending his priority in foreclosure action brought by another lienholder, must, in its answer, make a demand for attorney's fees unless the opposing party has waived such demand. This is a logical extension of the current train of thought regarding claims for attorney's fees.

#### D. Covenants

*Palm Point Property Owners' Ass'n v. Pisarski.*<sup>131</sup> The Association's membership was made up of property owners who individually could have sued to enforce the restrictive covenants. However, the Association was apparently not itself a property owner. It was not a direct successor of the developer or of any its interests. And its existence was not contemplated in

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124. 603 So. 2d 1357 (Fla. 1st Dist. Ct. App. 1992).

125. *Id.* at 1359.

126. 611 So. 2d 41 (Fla. 4th Dist. Ct. App. 1992).

127. *Id.* at 41.

128. *Id.*

129. *Id.*

130. 603 So. 2d 1380 (Fla. 5th Dist. Ct. App. 1992).

131. 608 So. 2d 537 (Fla. 2d Dist. Ct. App. 1992), *approved by* 18 Fla. L. Weekly S547 (Fla. Oct. 21, 1993).

the development scheme.<sup>132</sup> These are the typical bases for finding that an association has standing to enforce the deed restrictions, so the Association's standing was challenged when it attempted to enforce the covenants against a landowner.

The district court noted that the Florida Supreme Court had adopted Rule 1.221,<sup>133</sup> to give condominium associations the standing to sue, and Rule 1.222,<sup>134</sup> to give mobile homeowners' associations the standing to sue. It would make sense to give a property owners' association similar standing but, absent such a rule, the district court felt obligated to conclude that it had no standing.<sup>135</sup> However, the district court invited the supreme court to consider such a rule by certifying as a question of great public importance:

ABSENT A SPECIFIC RULE OF PROCEDURE, DOES A PROPERTY OWNERS' ASSOCIATION THAT IS NOT A DIRECT SUCCESSOR TO THE INTERESTS OF THE DEVELOPER AND PROVISION FOR WHICH DOES NOT APPEAR IN THE GRANTOR'S ORIGINAL SUBDIVISION SCHEME HAVE STANDING TO SUE TO MAINTAIN AN ACTION TO ENFORCE RESTRICTIVE COVENANTS?<sup>136</sup>

Denying standing to this homeowners' association accomplished little other than wasting the time and resources of the litigants and the courts. If asked, this author would have urged the district court to reach a different conclusion. The supreme court should adopt a rule giving homeowners' associations standing where that will promote judicial efficiency and lessen the obstacles to enforcing valid restrictions.

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132. *Id.* at 538.

133. Florida Rule of Civil Procedure 1.221 provides in pertinent part: "After control of a condominium association is obtained by unit owners other than the developer, the association may institute, maintain, settle or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest . . ." FLA. R. CIV. P. 1.221.

134. Florida Rule of Civil Procedure 1.222 provides that "[a] mobile homeowners' association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all homeowners concerning matters of common interest . . ." FLA. R. CIV. P. 1.222.

135. *Palm Point Property Owners' Ass'n*, 608 So. 2d at 539.

136. *Id.*

### E. *Developer Liability*

*Robinson v. Palm Coast Construction, Inc.*<sup>137</sup> The purchasers of a new condominium unit discovered that they could not park two regular sized automobiles in their garage even though the condominium covenants required that the garage be big enough to do just that. The garage did, however, conform to the dimensions on the plans. The court was faced with the issue of “whether . . . purchasers of new condominium units from the developer, can have any cause of action where the units are built in accordance with the plans and specifications but violate the construction standards of the condominium’s restrictive covenants.”<sup>138</sup> While the purchaser could not recover on the theory of negligence under the economic loss rule, the district court concluded that the condominium developer had an implied duty to build in compliance with the condominium’s restrictive covenants. Failure to do so would be a breach of contract even if the condominium never tried to enforce the covenants.

### F. *Eminent Domain*

*Patel v. Broward County.*<sup>139</sup> The reasonable probability of obtaining rezoning is a factor that may be considered when the value of condemned land is being determined. But in this case, the government submitted evidence that severance damages should be reduced because the condemnee could relocate and reconstruct its lost parking facilities if it received a variance. The condemnees argued that based upon two first district cases,<sup>140</sup> the evidence should not have been admitted. The court, however, noted that the distinction between rezoning and the granting of a variance has become somewhat clouded, to say the least, and that such evidence would be admissible in at least two other states.<sup>141</sup> Consequently, it certified the following question to the Florida Supreme Court as being of great public importance:

MAY THE GOVERNMENT SUBMIT EVIDENCE THAT THE SEVERANCE DAMAGES OF A CONDEMNEE MAY BE CURED OR LESSENED BY ALTERATIONS TO THE CONDEMNEE’S

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137. 611 So. 2d 1351 (Fla. 5th Dist. Ct. App. 1993).

138. *Id.* at 1353.

139. 613 So. 2d 582 (Fla. 4th Dist. Ct. App. 1993).

140. *Williams v. State Dep’t of Transp.*, 579 So. 2d 226 (Fla. 1st Dist. Ct. App. 1991), and *State Dep’t of Transp. v. Byrd*, 254 So. 2d 836 (Fla. 1st Dist. Ct. App. 1971).

141. *Patel*, 613 So. 2d at 583. The two states are New York and Connecticut.

PROPERTY WHEN THOSE ALTERATIONS REQUIRE THE GRANT OF A VARIANCE FROM THE APPROPRIATE GOVERNMENTAL ENTITY HAVING ZONING JURISDICTION OVER THE PROPERTY?<sup>142</sup>

This author suggests that the question is worthy of the supreme court's attention. It seems illogical to allow the admission of evidence regarding the effects of possible rezoning but not similar evidence regarding the effects of a variance that might be obtained. If the latter should be excluded because it is based upon speculation, then so should the former. Perhaps the Legislature can create a means for the government to obtain the rezoning or variance for the landowner. Absent that, it seems wrong to reduce the landowner's severance damages based on either rezoning or a variance, which might not materialize.

G. *Licenses and Easements*

*Tatum v. Dance*.<sup>143</sup> In a package deal, Dance bought parcel A from the architect who designed Dance's car dealership. Even though Dance did not expressly acquire a drainage easement, the dealership was designed to drain onto parcel B, which was still owned by the architect. Parcel B was later sold to Tatum who sold it to Dance. Tatum took back a purchase money mortgage that was the subject of this foreclosure action in which Dance sought a declaration recognizing his drainage rights. The district court affirmed the trial court's holding that an irrevocable license had been created by the construction of the automobile dealership in such a way that it drained onto parcel B. The court relied upon *Albrecht v. Drake Lumber Co.*<sup>144</sup> for the propositions that: (1) an irrevocable license is created when a permanent structure is constructed in reliance upon a parol license; and (2) an irrevocable license can not be revoked by the licensor's successor who took title with notice of the licensee's use.<sup>145</sup>

What caused a problem, however, was that *Albrecht* had also included the statement that an irrevocable license "becomes an easement."<sup>146</sup> However, a more recent case, *Moorings Ass'n v. Tortoise Island Communi-*

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142. *Id.*

143. 605 So. 2d 110 (Fla. 5th Dist. Ct. App. 1992), *review granted sub nom.* Dance v. Tatum, 617 So. 2d 318 (Fla. 1993).

144. 65 So. 98 (Fla. 1914).

145. *Id.* at 100; *Tatum* 605 So. 2d at 112.

146. *Albrecht*, 65 So. at 100.

*ties, Inc.*<sup>147</sup> had held that easements could not be created without a signed writing.<sup>148</sup> Logically, that would lead to the conclusion that an irrevocable license could not have been created here, as there was no writing. But the *Tatum* court decided that *Tortoise Island* dealt only with implied easements, not irrevocable licenses. It reasoned that an irrevocable license is the product of equitable relief.<sup>149</sup> It is not an easement, although in some circumstances it may be the functional equivalent of an easement. Because it is the product of equitable relief which is personal, the benefit of the license would not be transferred to a vendee of the land, as the trial court had suggested. However, the district court did certify the following question:

WHETHER, IN LIGHT OF *MOORINGS ASSOCIATION, INC. V. TORTOISE ISLAND COMMUNITIES . . .* THE STATEMENT IN *ALBRECHT V. DRAKE LUMBER CO., . . .* TO THE EFFECT THAT AN IRREVOCABLE LICENSE BECOMES AN EASEMENT BASED ON EQUITABLE ESTOPPEL, MEANS THAT AN IRREVOCABLE LICENSE CAN NO LONGER EXIST IN FLORIDA.<sup>150</sup>

Judge Sharp wrote a special concurrence.<sup>151</sup> She concluded that the license, which was created upon the construction of the dealership, was extinguished by merger when Dance acquired the servient land, parcel B. However, easements by necessity could still be created without a writing after *Albrecht*. So, when Tatum later acquired title to parcel B at the foreclosure sale, his title was subject to a newly created easement by necessity. Moreover, consistent with *Albrecht*, an easement could have been created without a writing by the construction of the dealership because performance would take that transaction out of the Statute of Frauds.<sup>152</sup> Consequently, she suggested that the certified question should have been:

WHETHER *MOORINGS ASSOCIATION, INC. V. TORTOISE ISLAND COMMUNITIES . . .* EXTINGUISHES THE CREATION OF ORALLY CREATED EASEMENT RIGHTS IN ALL SITUATIONS OTHER

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147. 460 So. 2d 961 (Fla. 5th Dist. Ct. App. 1984), *quashed sub nom.* Tortoise Island Communities, Inc. v. Moorings Ass'n, 489 So. 2d 22 (Fla. 1986) (approving the dissent below).

148. *Id.* at 969.

149. *Tatum*, 605 So. 2d at 112.

150. *Id.* at 113 (citations omitted).

151. *Id.* at 114 (Sharp, J., concurring specially).

152. *Id.* at 115.

THAN THOSE CREATED BY "NECESSITY" OR WHETHER AN EASEMENT CAN STILL BE CREATED BY EXECUTION, EXPENDITURES IN IMPROVEMENTS, AND RELIANCE ON AN ORAL LICENSE GIVEN BY THE SERVIENT LANDOWNER AS IN *ALBRECHT V. DRAKE LUMBER CO.* . . .<sup>153</sup>

This author agrees with Judge Sharp's analysis. It would allow successors in ownership to parcel A to benefit from the drainage easement unless, of course, they should fall victims to estoppel. However, the supreme court should consider taking the case to eliminate any confusion about the continued existence of irrevocable licenses under Florida law.

#### H. Mortgages

*Carteret Savings Bank v. Weiner.*<sup>154</sup> This involved the question of what is the effect of closing a home equity account. A line of credit had been given to a husband and wife. First the husband closed the account, but later reopened it and drew money. The wife then asked that the account be closed. When the account was reopened at the husband's insistence, the wife drew money. On default, the lender sought foreclosure. The defense was that reopening the account was a new agreement that could not encumber entireties property without the participation of both spouses.

The district court pointed out that neither party had pleaded or proved that a novation had occurred when the account was closed and subsequently reopened. The bank could not be barred from foreclosing as a matter of law by allowing the account to be repeatedly closed and reopened by one spouse because it had not been notified that the husband and wife were experiencing marital difficulties.<sup>155</sup> Consequently, attorneys should advise their co-borrower clients that, when closing a home equity line of credit, they should make sure that the lender acknowledges in writing that the closing is permanent and the account cannot be reopened without the agreement of both co-borrowers.

*Citibank Mortgage Corp. v. Carteret Savings Bank.*<sup>156</sup> Citibank's predecessor in interest obtained a judgment against Omni in 1987 and recorded a certified copy of the judgment in Palm Beach County. In 1988,

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153. *Id.* (citations omitted).

154. 601 So. 2d 1310 (Fla. 4th Dist. Ct. App. 1992).

155. *Id.* at 1312.

156. 612 So. 2d 599 (Fla. 4th Dist. Ct. App. 1992), *review granted sub nom.* *Carteret Sav. Bank v. Citibank Mortgage Corp.*, 18 Fla. L. Weekly 67 (Fla. Sept 22, 1993).

Omni become a joint venturer in developing a parcel of land acquired with part of the proceeds of a loan from Carteret. Carteret foreclosed and claimed priority, as a purchase money lender, over Citibank's judgment lien. The trial court agreed, but the Fourth District Court of Appeal held that Carteret was entitled to priority as a purchase money lender only to the extent that the loan proceeds had been used to acquire the property.<sup>157</sup> That amount included funds used to pay off what the seller still owed on the land.

Noting that this was a case of first impression in Florida, the court certified the following question as being of great public importance:

WHERE A THIRD PARTY MORTGAGE LOAN IS USED NOT ONLY FOR THE PURPOSE OF PURCHASING PROPERTY, BUT IN ADDITION, FOR CONSTRUCTING IMPROVEMENTS ON THE PROPERTY, IS THE ENTIRE AMOUNT OF THE MORTGAGE ENTITLED TO PRIORITY AS A PURCHASE MONEY MORTGAGE OVER A GENERAL JUDGMENT CREDITOR OF THE MORTGAGOR?<sup>158</sup>

The district court was correct in its application of the law and, therefore, the certified question should be answered in the negative. However, there is no conflict of authority in Florida, so there is no reason for the supreme court to consider this case.

*Commercial Laundries, Inc. v. Tiffany Square Investors Ltd. Partnership.*<sup>159</sup> After the mortgagee bought a large residential complex at a foreclosure, the operator of the coin operated laundry machines on the premises tendered a rent check. Seven years were left on its ten year unrecorded lease of the laundry facilities. To eliminate the lease, the foreclosure buyer brought this reforeclosure action. The district court correctly held that leasehold interests were subject to reforeclosure actions, even if the tenant was innocent of any misconduct and even if the buyer had notice of the lease's existence. Furthermore, the acceptance of rent by the buyer did not necessarily preclude the buyer from reforeclosing.

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157. *Id.* at 602.

158. *Id.*

159. 605 So. 2d 116 (Fla. 5th Dist. Ct. App. 1992), *review denied*, 614 So. 2d 504 (Fla. 1993).

*Howell v. Gaines*.<sup>160</sup> Three mortgages had a provision for the appointment of a receiver to collect the rents in the event of the mortgagor's default. Following the foreclosure sales in which the mortgagees had been the successful bidders, they sought the rents held by the receiver based upon the deficiency between the mortgagees' bids and the amounts of the foreclosure judgments. However, the mortgagor also claimed the rents, because the fair market value of the properties exceeded the amounts of the foreclosure judgments. The Third District Court of Appeal agreed with the mortgagor. The mortgagee was entitled to the rents only to the extent that it would be entitled to a deficiency judgment and the court may deny a deficiency judgment when the fair market value of the property exceeds the debts owed.<sup>161</sup>

*Truitt v. Metropolitan Mortgage Co.*<sup>162</sup> A borrower sued her mortgage broker, alleging that the broker had required her to pay for insurance and appraisals by companies in which the broker had a substantial ownership interest. The trial court dismissed the complaint based upon the statute of limitations, but the district court reversed. The complaint was based upon the mortgagee's alleged breach of the fiduciary duty by failing to disclose any information adverse to the mortgagor's interest. That would, if proved, have amounted to the fraudulent concealment of the information that would have tolled the statute of limitations. Consequently, the trial court erred in dismissing the complaint.

*Wells Fargo Credit Corp. v. Martin*.<sup>163</sup> At a foreclosure sale, an experienced representative of the mortgagee was given written instructions to make a bid of \$115,500. Unfortunately, the instructions were not written clearly. She misread them and instead bid only \$15,500. The winning bid was \$20,000. After the clerk announced that the property was sold, the representative realized her mistake and tried, unsuccessfully, to have the sale stopped. The mortgagee then moved to have the judicial sale set aside.

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160. 608 So. 2d 64 (Fla. 3d Dist. Ct. App. 1992).

161. The Third District Court of Appeal failed to mention section § 702.06, Florida Statutes, which provides in pertinent part: "In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound judicial discretion of the court . . . ." FLA. STAT. § 702.06 (1991).

162. 609 So. 2d 142 (Fla. 4th Dist. Ct. App. 1992).

163. 605 So. 2d 531 (Fla. 2d Dist. Ct. App. 1992).

The sale was confirmed and the Second District affirmed, holding that the trial court had not abused its discretion in denying the mortgagee relief under these circumstances. Furthermore, the court refused to certify that any conflict existed between the districts, because the decisions of the Third<sup>164</sup> and Fourth<sup>165</sup> Districts were factually distinguishable. In those cases, the mortgagees did not even make bids; the winning bids were for nominal amounts; and, most important, the trial courts had exercised their discretion to grant the mortgagees relief.<sup>166</sup> The court correctly recognized that the critical point was the limited role of an appellate court in supervising the exercise of judicial discretion.

### I. *Recording*

*First American Title Insurance Co. v. Dixon.*<sup>167</sup> This was a case of first impression. The Fourth District Court of Appeal decided that a court clerk, who failed to properly index a document that might affect title to land, was not protected by sovereign immunity against a negligence claim. The court reasoned that the clerk had a statutory duty to index every such document, and the clerk was required by statute to post a bond to cover all of his or her duties. Consequently, the Legislature must have intended the purpose of the indexing duty was to protect the limited class of persons who would rely upon the public records. Therefore, those harmed by the clerk's negligence could seek redress.<sup>168</sup>

### J. *Restraints on Alienation*

*Camino Gardens Ass'n v. McKim.*<sup>169</sup> The declaration of restrictions in a development provided that: (1) property in the subdivision could not be purchased or leased by anyone who was not a member in good standing of the homeowners' association; (2) that the association could, in the event of mortgage foreclosure, redeem the property from the mortgagee or purchase at the foreclosure sale for the amount due on the mortgage; and (3) that a

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164. *Van Delinder v. Albion Realty & Mortgage, Inc.*, 287 So. 2d 352 (Fla. 3d Dist. Ct. App. 1973).

165. *Fernandez v. Suburban Coastal Corp.*, 489 So. 2d 70 (Fla. 4th Dist. Ct. App. 1986).

166. *Martin*, 605 So. 2d at 534.

167. 603 So. 2d 562 (Fla. 4th Dist. Ct. App. 1992), *review denied sub nom. Dixon v. First Am. Title Ins. Co.*, 613 So. 2d 3 (Fla. 1993).

168. *Id.* at 566.

169. 612 So. 2d 636 (Fla. 4th Dist. Ct. App.), *review denied*, 620 So. 2d 760 (Fla. 1993).

mortgagee would have to give notice to the association before accepting a deed in lieu of foreclosure. Therefore, when the mortgagee took a deed in lieu of foreclosure, and then sold the property to buyers who had yet been admitted to membership, the association sued. Both the trial court and the district court had little difficulty recognizing that the first two provisions were invalid restraints on alienation.

Restraints on alienation are invalid if they are absolute or unreasonable. The first clause prohibited subsequent transfers without the prior approval of the association. That amounted to an absolute restraint on alienation. The second was essentially an option to purchase at the amount of the defaulted debt, which could be far below the fair market value. Because that would affect the willingness of lenders to make mortgage loans, it would affect the ability to develop and to sell the property. Consequently, it was an unreasonable restraint on alienation.

The trial court had also held the third provision invalid. The district court affirmed, although the reason for the affirmance is less clear. The court stated that "because the trial court declared the provision regarding purchase rights to be void, the court properly concluded that the declaration could not require the mortgagee to give any notice to the Association and its members before accepting a deed in lieu of foreclosure."<sup>170</sup> This seems only to indicate that the notice provision is inextricably connected to the other two provisions in this case. That is not a blanket statement that such a provision would necessarily be void. It is too bad that the court did not elaborate.

### K. Zoning

*Jensen Beach Land Co. v. Citizens for Responsible Growth.*<sup>171</sup> This case involved a challenge to a zoning order's consistency with the comprehensive plan. The district court held that such a challenge must be made to the entity that entered the order before it could be brought to a court.<sup>172</sup> This implicitly recognized that the agency has primary jurisdiction in such matters. Moreover, the challenger must exhaust its administrative remedies before resorting to the courts. The exception would be if the challenger was merely seeking a temporary restraining order to avoid immediate and irreparable harm.

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170. *Id.* at 642.

171. 608 So. 2d 509 (Fla. 4th Dist. Ct. App. 1992).

172. See FLA. STAT. § 163.3215 (1991).

*Caliente Partnership v. Johnston*.<sup>173</sup> A developer proposed an amendment to the county's comprehensive plan in order to accommodate its proposed development. The amendment was submitted to the Department of Community Affairs. It had forty-five days to determine whether to issue a notice of intent to contest the amendment,<sup>174</sup> but the notice arrived two days late.<sup>175</sup> The district court decided that the Department's having missed the deadline would not result in the amendment being approved by default. The developer must resort to other remedies. This conclusion eliminates the possibility of the plan being amended by administrative inaction, which could undermine the concept of comprehensive planning.

*Lee County v. Sunbelt Equities, II*.<sup>176</sup> A developer had requested rezoning of land it owned from agricultural to commercial use. The court concluded that the site-specific, owner-initiated rezoning requests were quasi-judicial proceedings that could be reviewed by the court. Moreover, the fact that the rezoning request was consistent with the comprehensive plan did not necessarily mean that the rezoning request must be granted.

#### IV. STATUTES

##### A. Leases

The Legislature appears to have provided tenants with a new remedy if the premises have become uninhabitable. The tenant may withhold the rent.<sup>177</sup> However, there are an overwhelming number of conditions to be met before the tenant is entitled to this remedy. The leased premises must have become "wholly untenable."<sup>178</sup> The lease must "affirmatively and expressly" place the obligation for maintenance and repairs on the landlord.<sup>179</sup> The landlord must have failed to make the needed repairs after being given at least twenty days written notice of the problem.<sup>180</sup> And the notice must include the threat to withhold rent.<sup>181</sup> Moreover, if the repairs

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173. 604 So. 2d 886 (Fla. 2d Dist. Ct. App. 1992).

174. See FLA. STAT. § 163.3184(8)(b) (1991).

175. *Johnston*, 604 So. 2d at 887.

176. 619 So. 2d 996 (Fla. 2d Dist. Ct. App. 1993).

177. Ch. 93-70 § 2, 1993 Fla. Laws 424 (to be codified at FLA. STAT. § 83.201).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

ever do get made, the tenant must pay the landlord the entire rent withheld.<sup>182</sup> This author predicts that this remedy will be, for all practical purposes, illusory.

The Legislature also created a procedure for paying the claimed rent into the registry of the court in any action for eviction.<sup>183</sup> Also, the landlord's acceptance of the full amount of rent that is past due will constitute waiver of any claim for eviction based on nonpayment of rent if the landlord knew of the breach when accepting the payment.<sup>184</sup>

Part II of chapter 83 is the Florida Residential Landlord and Tenant Act.<sup>185</sup> Section 83.49(3) governs the rights and responsibilities regarding the return of security deposits. It has been amended to provide that enforcement personnel "shall look solely to this subsection to determine compliance."<sup>186</sup> This should cut off complaints to the Florida Real Estate Commission that brokers or salespeople have violated other statutes or rules by complying with this one.

Section 83.49(3) was also amended to require that landlords give at least twelve hours notice of the intent to enter and to make repairs and that such repairs are to be made between 7:30 a.m. and 8:00 p.m.<sup>187</sup> Moreover, tenants with waterbeds will now be required to carry insurance against personal injury and property damage to the dwelling unit with a loss payable clause to the building owner.<sup>188</sup> Perhaps most interesting, the act allows a landlord, who has given notice of his intent to terminate a tenant's lease, to petition the county or circuit court for an injunction prohibiting the tenant from intentional damage or destruction of the property.<sup>189</sup>

Part III of chapter 83 is the Self-storage Facility Act,<sup>190</sup> which concerns the lease of space for the storage of personal property. The Legislature expanded this act to include the lease of a "self-contained storage unit," which is defined as:

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182. Ch. 93-70 § 2, 1993 Fla. Laws 424 (to be codified at FLA. STAT. § 83.201).

183. *Id.* § 5, 1993 Fla. Laws at 425 (to be codified at FLA. STAT. § 83.232).

184. *Id.* § 3, 1993 Fla. Laws at 424-25 (to be codified at FLA. STAT. § 83.202).

185. FLA. STAT. §§ 83.40-83.67 (1991).

186. Ch. 93-255 § 2, 1993 Fla. Laws 2494 (amending FLA. STAT. § 83.49(3) (1991)).

187. *Id.* § 4, 1993 Fla. Laws at 2494 (amending FLA. STAT. § 83.53(2) (1991)).

188. *Id.* § 5, 1993 Fla. Laws at 2495 (amending FLA. STAT. § 83.535 (1991)).

189. *Id.* § 8, 1993 Fla. Laws at 2496 (to be codified at FLA. STAT. § 83.681). This required amending section 34.011, Florida Statutes, to give the county court this limited equity jurisdiction. *Id.* § 9, 1993 Fla. Laws at 2497 (amending FLA. STAT. § 34.011 (1991)).

190. FLA. STAT. §§ 83.801-83.809 (1991).

not less than 600 cubic feet in size, including, but not limited to, a trailer, box, or other shipping container, which is leased by a tenant primarily for use as storage space whether the unit is located at a facility owned or operated by the owner or at another location designated by the tenant.<sup>191</sup>

The rights and remedies of a lessor and tenant of a self-contained storage unit are removed from the coverage of Article 2A of the Uniform Commercial Code,<sup>192</sup> which otherwise governs leases of personal property.

### B. *Mortgages*

The statutory procedure for mortgage foreclosure has been modified as of October 1, 1993.<sup>193</sup> The mortgagor's right of redemption has been clarified by the addition of a new section. It provides that the mortgagor may redeem the property until the filing of the certificate of sale by the court clerk or the time specified in the foreclosure decree, whichever is later.<sup>194</sup> This should eliminate any suggestion that Florida has any form of "statutory redemption." That term is commonly used to indicate a right to redeem during a statutory period that does not begin until the foreclosure sale is complete.<sup>195</sup>

It is, however, unfortunate that the phrase "cure the indebtedness" was used.<sup>196</sup> That may cause confusion over whether the Legislature intended to allow a mortgagor in default to de-accelerate the mortgage debt by curing the default, i.e., catching up on the missed payments. It is highly unlikely that the Legislature intended de-acceleration. This would be a significant change in redemption rights. If intended, this should be accomplished in unambiguous terms.

Statutes have been amended to add new technical details such as requiring that the creditor's current address be in a judgment or a recorded

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191. Ch. 93-238 § 1, 1993 Fla. Laws 2409 (amending FLA. STAT. § 83.803 (Supp. 1992)).

192. FLA. STAT. ch. 680 (1991) ("Uniform Commercial Code—Leases").

193. Ch. 93-250, 1993 Fla. Laws 2466.

194. Ch. 93-250 § 2, 1993 Fla. Laws at 2467-68 (to be codified at FLA. STAT. § 45.0315).

195. See GEORGE E. OSBORNE, MORTGAGES § 307 (2d ed. 1970); see also GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 8.4 (2d ed. 1985).

196. Ch. 93-250 § 2, 1993 Fla. Laws at 2468 (to be codified at FLA. STAT. § 45.0315).

affidavit in order to obtain a judgment lien,<sup>197</sup> and providing details of the method of obtaining *in rem* or *quasi in rem* jurisdiction over a person outside the state of Florida.<sup>198</sup> It also appears that a number of amendments are intended to speed up foreclosures. For example, foreclosure sales are now to be held no later than thirty-five days after the judgment of foreclosure;<sup>199</sup> the defendant is to file its written defenses within thirty days of the first publication of the notice of the foreclosure;<sup>200</sup> and notices of the foreclosure need be published for only two consecutive weeks, rather than four.<sup>201</sup> Most important, a mortgagee may now request an order to show cause why a final judgment of foreclosure should not be entered once the verified complaint has been filed.<sup>202</sup>

Two acts deal with modification of the assignment of rents statute.<sup>203</sup> Only a few different phrases distinguish the two acts. They provide that an assignment of rents is valid and that it is perfected against third parties when recorded. The assignee has the right to the rents if the mortgagor defaults and the mortgagee makes a written demand for the rents. In a foreclosure action, the court may require the rents deposited into the court registry and used to pay the mortgage or to operate and to preserve the property. This should clarify and simplify the law regarding assignment of rents in Florida.

### C. Time Shares

A number of amendments were made to chapter 721, the Florida Vacation Plan and Time-Sharing Act.<sup>204</sup> "Incidental benefits" have been defined<sup>205</sup> and subjected to statutory regulation.<sup>206</sup> Most important, the

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197. *Id.* § 10, 1993 Fla. Laws at 2471 (amending FLA. STAT. §§ 55.10(1)-55.10(3) (1991)).

198. *Id.* § 4, 1993 Fla. Laws at 2468 (amending FLA. STAT. § 48.194 (1991)).

199. *Id.* § 1, 1993 Fla. Laws at 2467 (amending FLA. STAT. § 45.031 (1991)).

200. *Id.* § 7, 1993 Fla. Laws at 2470 (amending FLA. STAT. § 49.09 (1991)).

201. Ch. 93-250 § 8, 1993 Fla. Laws at 2470-71 (amending FLA. STAT. § 49.10 (1991)).

202. *Id.* § 14, 1993 Fla. Laws at 2473 (to be codified at FLA. STAT. § 702.10).

203. Ch. 93-88, 1993 Fla. Laws at 468-69 (amending FLA. STAT. § 697.07 (1991)); Ch. 93-250 § 13, 1993 Fla. Laws at 2472-73 (amending FLA. STAT. § 697.07 (1991)).

204. FLA. STAT. § 721.01 (1991).

205. The Florida Statutes provide the following definition:

"Incidental benefit" means an accommodation, product, service, discount, or other benefit which is offered to a prospective purchaser of a time-share plan or to a purchaser of a time-share plan prior to the exchange of his initial 10-day voidability period pursuant to s. 721.10; which is not an exchange program as defined in subsection (15); and which complies with the provisions of s. 721.075. The term shall not include an offer of the use of accommodations and

act has been expanded by the addition of a Part II, called the "Florida Vacation Club Act,"<sup>207</sup> to this chapter to deal with the unique problems of multi-site plans. It attempts to protect time-share buyers from: (a) the developer's creditors; (b) misrepresentations of the developer; and (c) mismanagement (or malfeasance) of the developer. Multi-site time shares will be governed by both Parts I and II, with the latter controlling in the event of a conflict.<sup>208</sup> It appears to be a worthwhile expansion but only time will tell if this approach is workable.

#### D. *Uniform Land Sales Practices Law*

The Florida Uniform Land Sales Practices Law<sup>209</sup> was designed:

to provide safeguards regulating the disposition of any interest in subdivided lands, including financial operations entered into by companies and persons regulated by the Florida Uniform Land Sales Practices Law, to prevent fraudulent and misleading methods and unsound financing techniques which could detrimentally affect not only remote land purchasers, but also the land sales industry, the public, and the state's economic wellbeing.<sup>210</sup>

The law covers "subdivisions" and "subdivided lands," which it defines as having fifty or more "lots, parcels or units which are offered as part of a common promotional plan,"<sup>211</sup> but it also provides that certain acts are unlawful even in the offering for sale of twenty-five or more lots, units or interests. The Legislature has added two more types of prohibited conduct to the list: making or using false, fictitious or fraudulent statements, representations or documents; or falsifying, concealing or covering up by trick, scheme or device any material fact.<sup>212</sup> The Legislature also added requirements for obtaining exemptions<sup>213</sup> and requirements for purchase contracts.<sup>214</sup> The purchaser will now be given a seven day period in

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facilities of the time-share plan on a free or discounted one-time basis.

Ch. 93-58 § 2, 1993 Fla. Laws at 349 (amending FLA. STAT. § 721.05 (1991)).

206. *Id.* § 5, 1993 Fla. Laws at 353 (to be codified at FLA. STAT. § 721.075).

207. *Id.* § 12, 1993 Fla. Laws at 360 (to be codified at FLA. STAT. § 721.50).

208. *Id.*

209. FLA. STAT. ch. 498 (1991).

210. *Id.* § 498.113(3).

211. *Id.* § 498.005(19).

212. Ch. 93-190 § 2, 1993 Fla. Laws 1710 (amending FLA. STAT. § 498.022 (1991)).

213. *Id.* § 3, 1993 Fla. Laws at 1710-11 (amending FLA. STAT. § 498.025 (1991)).

214. *Id.* § 5, 1993 Fla. Laws at 1716 (to be codified at FLA. STAT. § 498.028).

which to cancel a purchase contract and, in the event of cancellation, all funds must be refunded to the purchaser within twenty days.<sup>215</sup> This is a right which buyers may actually decide to exercise after reading the contract carefully because the agreement, if title is not to be conveyed to the buyer within 180 days, must contain the following ominous warning:

YOU MAY NOT RECEIVE YOUR LAND UNDER THIS CONTRACT IF THE SUBDIVIDER FILES FOR BANKRUPTCY PROTECTION OR OTHERWISE IS UNABLE TO PERFORM UNDER THE TERMS OF THIS CONTRACT PRIOR TO YOUR RECEIVING A DEED EVEN IF YOU HAVE MADE ALL THE PAYMENTS PROVIDED FOR UNDER THE CONTRACT. IF YOU HAVE ANY QUESTIONS ABOUT THE MEANING OF THIS DOCUMENT, CONSULT AN ATTORNEY.<sup>216</sup>

Let us hope that prospective buyers take this warning seriously.

## V. CONCLUSION

This has been an interesting, if not earth-shattering, year in property law. The courts and the Legislature have been active. It appears that good common sense and consumer protection are the prevailing themes.

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215. *Id.*

216. *Id.*