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Real Property: 1992 Survey of Florida Law

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Abstract

This survey examines cases of the Florida Supreme Court which should be of particular interest to the real estate lawyer or real estate professional.

KEYWORDS: contracts, landlord, mortgages

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I. INTRODUCTION

This survey examines cases of the Florida Supreme Court which should be of particular interest to the real estate lawyer or real estate professional.[1] Additionally, this article includes three cases from other courts in order to sound a warning, hopefully one which is not too late, about the development of a federal doctrine which could have a significant effect upon real estate finance. The time period covered by this survey is from July, 1991 to July, 1992.

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1. It does not include a discussion of family law, e.g., the distribution of property upon divorce, or of probate and trust law issues.

II. FLORIDA SUPREME COURT

A. *Brokers*

Bidon v. Department of Professional Regulation.[2] Justice McDonald wrote the unanimous opinion.

Bidon's broker refused to return the deposits from two failed deals, and Bidon successfully sued the broker and won. The amended final judgment awarded her the return of the deposits, interest, costs and attorney's fees. She filed a claim with the Real Estate Commission, but it refused to pay the attorney's fees part of her judgment.

The Florida Legislature created the Real Estate Recovery fund to protect the public from the improper conduct of licensed real estate brokers or salesmen. An individual may recover from the fund when he or she has been unable to recover from the broker or salesman if he or she meets the statutory conditions. The statute had been amended in 1988 to specifically exclude attorney's fees, but Bidon's claim arose before the amendment.[3]

The court recognized that the critical question in interpreting a statute was what the legislature had intended. This statute provided reimbursement only for "actual or compensatory damages." Those terms do not ordinarily include attorney's fees. It is generally presumed that the legislature understood the ordinary meaning of the terms it used when enacting a statute, so the legislature probably did not intend to include attorney's fees here by providing for "actual or compensatory damages." Furthermore, the legislature did expressly provide for attorney's fees in the other statute, so it would have included them in this statute if that was what was intended. Consequently, the broker's victim could not recover her attorney's fees from the fund.

B. *Condominiums*

Palma Del Mar Condominium Ass'n #5 v. Commercial Laundries, Inc.[4] Justice Overton wrote the opinion for the unanimous court.

The 1985 version of section 718.3025 of the Florida Statutes provided that contracts made with a condominium association for maintenance services, management services, "or property serving the unit owners" would

2. 596 So. 2d 450 (Fla. 1992).
3. *Id.* at 452 n.2.
4. 586 So. 2d 315 (Fla. 1991).

not be valid and enforceable unless the contract included certain express provisions.[5] The third district had interpreted that section to include contracts to provide coin-operated laundries. The legislature responded to that ruling by amending the statute. The amendment stated that the legislature intended that the statute not apply to contracts "for services or property made available for the convenience of unit owners . . . such as coin-operated laundry . . . ."[6] Subsequently, the second district concluded that the legislature had not intended that the pre-amendment statute apply to a lease of laundry space at the condominium. The conflict in decisions was certified to the supreme court.

The supreme court held that, when trying to interpret a statute, it was appropriate for a court to consider subsequent legislation as evidence of the legislature's original intent. It found consideration of a legislative reaction to a judicial decision, as occurred here, to be particularly appropriate. Further, the supreme court held that when a court is faced with two reasonable interpretations of statutory language, the court should choose the one which would least restrict the right to contract. Both factors led to the approval of the second district's interpretation that the statute did not apply to the laundry lease.

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5. FLA. STAT. § 718.3025(1) (1985).
Section 718.3025(1)(a)-(e) provides:

(1) No written contract between a party contracting to provide maintenance or management services and an associate which contract provides for operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium shall be valid or enforceable unless the contract:

(a) Specifies the services, obligations, and responsibilities of the party contracting to provide maintenance or management services to the unit owners.

(b) Specifies those costs incurred in the performance of those services, obligation, or responsibilities which are to be reimbursed by the association to the party contracting to provide maintenance or management services.

(c) Provides an indication of how often each service, obligation, or responsibility is to be performed, whether stated for each service, obligation, or responsibility, or in categories thereof.

(d) Specifies a minimum number of personnel to be employed by the party contracting to provide maintenance or management services for the purpose of providing service to the association.

(e) Discloses any financial or ownership interest which the developer, if the developer is in control of the association, holds with regard to the party contracting to provide maintenance or management services.

FLA. STAT. § 718.3025(1)(a)-(e) (1985).

6. 1986 Fla. Laws ch. 86-175; FLA. STAT. § 718.3025(4).

Maison Grande Condominium Ass'n, Inc. v. Dorten, Inc.[7] This was a per curiam opinion in which Chief Justice Shaw, and Justices Overton, Barkett, Grimes, Kogan and Harding concurred. Justice McDonald concurred in part and dissented in part without issuing a written opinion.

The third district had certified the following question:

> IS AN ESCALATION CLAUSE IN A CONDOMINIUM RECREATION LEASE THAT WAS ENTERED INTO BEFORE 1975 ENFORCEABLE AFTER OCTOBER 1, 1998, FOR THE ENTIRE TERM OF THE NINETY-NINE YEAR LEASE, WHERE THE LESSOR HAS NOT AGREED TO BE BOUND BY FUTURE CHANGES IN THE CONDOMINIUM ACT?[8]

The supreme court quickly concluded the answer was yes.

The Florida statute provided that a lease to a condominium of recreational facilities could not contain rent escalation clauses if the condominium declaration was recorded after June 3, 1975, and also prohibited the escalation, after October 1, 1988, of rental fees based upon an escalation clause recorded before June 4, 1975.[9] The supreme court relied upon the precedent, in which this statute's predecessor was invalidated,[10] to hold that retroactive application of an escalation clause prohibition would violate the contracts clause of the Florida and United States Constitutions. However, the difficult question was whether the lessor would be entitled to recover attorney's fees.

The lease provided for attorney's fees and costs "in any proceeding arising by reason of an alleged failure of the lessee to perform any of its duties . . . or by reason of an alleged breach . . . ."[11] The supreme court recognized that the lessee, in refusing to pay the escalated rent, was relying upon a statute which was still valid at that moment. Logically if the statute was then valid, the prohibited escalation clause was then void. The lessee "must be excused"[12] for its nonperformance of a void clause and, consequently, the lessee should not have been ordered to pay the lessor's attorneys' fees and costs for the litigation in which the statute was declared unconstitutional.

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7. 600 So. 2d 463 (Fla. 1992).
8. Maison Grande Condominium Ass'n v. Dorten, Inc., 580 So. 2d 859, 862 (Fla. 3d Dist. Ct. App. 1991).
9. FLA. STAT. § 718.4015 (1988 Supp.).
10. Fleeman v. Case, 342 So. 2d 815 (Fla. 1976).
11. *Dorten*, 600 So. 2d at 464.
12. *Id.*

While this conclusion may be justified on public policy grounds, it is difficult to accept that this was a valid interpretation of the agreement itself. Does Florida public policy require that parties who rely upon a statute which is later declared invalid cannot be bound by an agreement to pay their opponent's attorneys' fees for that litigation, or is that merely the rule in the absence of an express agreement to the contrary? The latter seems the more reasonable rule, but it should not apply to this case.

Furthermore, the lease provided for attorneys' fees and costs "in any proceeding." This clause, however, failed to expressly include attorneys' fees and costs on appeal, even though the ordinary use of the term "any proceeding" would seem to include an appellate proceeding. Florida adhered to the rule that if attorneys' fees and costs are not expressly provided for on appeal, they are not included.[13] Consequently, the Maison Grande Condominium lessee was not held liable for them.

C. *Construction Liens*[14]

Aetna Casualty & Surety Co. v. Buck.[15] Justice Harding wrote the majority opinion in which Justices McDonald, Barkett and Kogan concurred. Justice Grimes wrote an opinion, concurring in part and dissenting in part, in which Chief Justice Shaw and Justice Overton joined.

The Florida statute[16] provided that a person who was not in privity with the landowner could not perfect a mechanics' lien without first serving the owner with a notice setting forth the basis of the claim.[17] In this case, a material supplier claimed a mechanics' lien even though he had failed to serve the notice on the joint venture which was the landowner. One man, Vincent J. Pappalardo, was the president and sole shareholder of the managing partner of the landowner, and also the sole shareholder of the general contractor, Pappalardo Construction Company. Consequently, the supplier claimed the notice requirement was inapplicable. The supreme court agreed.

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13. *See* Ohio Realty Inv. Corp. v. Southern Bank, 300 So. 2d 679, 682 (Fla. 1974).

14. In 1990, the Florida legislature adopted the term "Construction Lien" to replace the term "Mechanic's Lien." 1990 Fla. Laws ch. 90-109, creating FLA. STAT. § 713.001. The author is following the spirit of that legislative change by using the new term, but the author must note that it is not a term which has yet been widely accepted.

15. 594 So. 2d 280 (Fla. 1992).

16. FLA. STAT. § 713.06 (1987).

17. The notice would have to include the lienor's name and address, describe the real property and also describe the services or materials which had been, or were to be, furnished.

The supreme court reiterated that mechanics' liens are "purely creatures of the statute,"[18] and consequently, "they must be strictly construed."[19] However, the term "privity" was not defined by the statute. The purpose of the notice provision was to alert the landowner that there was a subcontractor involved. Having been informed, the landowner could avoid making payments to the contractor which actually should have been made to the subcontractor. Thus, the landowner would be protected from having to pay twice for the goods or services provided by the subcontractor.

Relying on the purpose of the provision, the court held that "privity [between the supplier and the landowner] is established where, for all practical purposes, a common identity exists between the owner and the contractor."[20] There were sufficient facts in the record to adequately support the trial court's finding of fact that the owner and contractor shared a common identity. An apparently crucial fact was that if the supplier had attempted to give the notice to the owner, the notice would logically have been given to Pappalardo. It should be noted that the court also agreed with, but did not rely upon, the definition found in *Harper Lumber & Manufacturing Co. v. Teate*,[21] that "privity requires both knowledge by an owner that a particular subcontractor is supplying services or materials to the job site and an express or implied assumption by the owner of the contractual obligation to pay for those services or materials."[22]

The court also dealt with confusion that had been created when the legislature amended the statute in 1987.[23] Prior to that amendment, when a lien had been transferred to a surety bond, the statute[24] provided 1) that the bond must include $100 to cover costs, 2) that attorney's fees were to be taxed as costs and 3) costs were not to exceed $100. The sum of those three provisions had been interpreted as a $100 limit on attorneys' fees. The 1987 amendment raised the bond to include $500 to cover costs, but deleted the limitation on costs. The supreme court here concluded that there was evidence of legislative intent to eliminate the limit on attorney's fees.

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18. *Aetna Casualty*, 594 So. 2d at 281 (quoting Sheffield-Briggs Steel Prods. Inc. v. Ace Concrete Serv. Co., 63 So. 2d 924, 925 (Fla. 1953)).
19. *Id.*
20. *Id.* at 282.
21. 125 So. 21 (1921); *see also* First Nat'l Bank v. Southern Lumber & Supply Co., 145 So. 594 (Fla. 1932); Floridaire Mechanical Sys., Inc. v. Alfred S. Austin-Draper Tampa, Inc., 470 So. 2d 717 (Fla. 2d Dist. Ct. App. 1985), *rev. denied*, 480 So. 2d 1293 (Fla. 1985).
22. *Aetna Casualty*, 594 So. 2d at 282.
23. 1987 Fla. Laws ch. 87-74.
24. FLA. STAT. § 713.24 (1986).

However, the surety could be liable only to the extent of the $500 bond intended to cover costs.

The dissenters agreed on the attorneys' fees issue, but could not accept the majority's definition of privity. Their point seems to be that the majority opinion illustrated the old adage that hard cases make bad law. It was hard, under these circumstances, for a judge to deny this supplier a mechanic's lien because he failed to give the statutory notice. However, by introducing a new test for privity the majority was introducing unnecessary uncertainty into mechanic's lien law, an area which already had many too problems. Moreover, the dissenters accuse the majority of doing it by the process of liberal construction after they had acknowledged that the statute should be strictly construed.

DiStefano Construction, Inc. v. Fidelity & Deposit Co.[25] Justice Harding wrote the unanimous opinion.

DiStefano Construction claimed a mechanic's lien and, as was allowed by the statute, the landowner transferred the lien to a bond. It was issued by Fidelity Deposit Company for $26,060 plus costs. DiStefano successfully foreclosed upon the lien, and the trial court, relying on a provision[26] in the Florida Insurance Code,[27] awarded attorney's fees and costs of $52,400 and ordered Fidelity to increase the bond to cover that amount.

The supreme court, however, held that the Insurance Code did not govern attorney's fees awards in mechanic's lien litigation, even if that litigation was against a bond-issuing insurer licensed by the state. The applicable provision was section 713.29 of the Florida Statutes which provided that the prevailing party would be entitled to recover a reasonable attorney's fee which "must be taxed as part of his costs."[28] As the court had decided earlier in the year in *Aetna Casualty & Surety Co. v. Buck*,[29] the 1987 amendment to the statute had eliminated the limitation on costs and, consequently, had eliminated the limitation on the amount of attorney's fees which could be recovered. However, that did not make those costs recoverable from the bond issuer. It could be held liable only for the face amount of the bond. Consequently, Fidelity should not have been ordered to increase the bond, and the amount that this foreclosure judgment had exceeded the bond was simply an unsecured judgment.

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25. 597 So. 2d 248 (Fla. 1992).
26. FLA. STAT. § 627.428 (1987).
27. *Id.* § 627.401-.429
28. *Id.* § 713.29.
29. 594 So. 2d 280 (Fla. 1992); *see supra* text accompanying notes 15-24.

In determining the amount of the attorney's fee, the trial court had not provided compensation for the hours spent on the issue of the late service of the contractor's affidavit, an issue which had arisen through the fault of that attorney. The supreme court reiterated that the award of attorney's fees is committed to the sound discretion of the judge. Precedent had already established that attorney's hours could be reduced if the courts found the hours to be "excessive or unnecessary."[30] This record contained did not support any claim that trial judge had abused his discretion in finding these hours unnecessary.

D. *Contracts of Sale*

Rybovich Boat Works, Inc. v. Atkinsy.[31] Justice Kogan wrote the unanimous opinion.

The buyer had an option to purchase which, apparently, had been exercised, establishing a contract of sale. The contract required that the buyer give notice to set a closing date not later than December 5, 1987, but he had failed to do so. On February 12, 1988, the seller sent the buyer a letter declaring the contract to be in default. Then the seller tried to sell the property to a third person, but the sale fell through because buyer's attorney called the title insurer and told them about the buyer's "interest." On May 4, 1988, the seller brought this suit against the buyer for breach of contract, tortious interference with the second sale and slander of title.

On May 10, 1989 (over a year later), the buyer counterclaimed for specific performance, breach of contract, and tortious interference with a business relationship. Because section 95.11(5)(a) of the Florida Statutes[32] required that an action for specific performance be brought within one year, the trial court granted summary judgment for the seller on specific performance issue. The Fourth District Court of Appeal reversed, holding the statute did not apply. It analogized the situation to allowing an otherwise time-barred counter-claim for recoupment.

The supreme court disagreed. It found two factors militated against allowing a time-barred counter-claim for specific performance: the public policy in favor of free alienability of property, and that the remedy of specific performance is not a matter of right. However, in dicta, the court suggested that other remedies remain available to the buyer, including

30. 597 So. 2d at 250 (citing Florida Patient's Comp. Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985)).

31. 585 So. 2d 270 (Fla. 1991).

32. FLA. STAT. § 95.11(5)(a) (1985).

rescission which would be subject to a longer statute of limitations.[33] However, rescission, like specific performance, is an equitable remedy. But since both may be barred in a shorter time by the doctrine of laches,[34] it might not be as available as this dicta might suggest.

Moritz v. Hoyt Enterprises, Inc.[35] Justice Overton wrote the unanimous opinion.

This case concerned a contract for the purchase of a single-family house already under construction by the seller when the contract was entered. The buyers made a ten percent deposit of $57,877.45, but unfortunately, they soon became dissatisfied. Claiming a breach of the contract, they repudiated the contract and demanded the return of their deposit. After selling the house to another purchaser for a lower price, the seller offered to return only what remained of the buyers' deposit after deducting its damages due to the buyers' breach. The buyers rejected that offer and sued for breach of contract and misuse of escrowed funds. The seller counterclaimed for breach of contract, claiming the entire deposit as liquidated damages.

The trial court rejected the buyers' claim based upon misuse of the escrowed funds. It found that the buyers had not suffered any harm from the sellers' use of the funds and also that the buyers, knowing of the misuse, had failed to demand that the amount be returned to the escrow account. The trial court also rejected seller's claim that the deposit constituted liquidated damages and also rejected the buyers' claim that the seller had committed a material breach which would excuse the buyers from performing. Therefore, the buyers' repudiation had constituted a breach of the contract which entitled the seller to recover damages in the amount of the contract price of the house less its reasonable value at the time of the breach, plus interest. That totaled $20,579.56. However, the buyers were entitled to recover the balance of their deposit from the seller which amounted to $45,525.90. Subsequently, the trial court granted the seller's motion to tax costs and attorney's fees against the buyers because it was the prevailing party.

The question on appeal was whether the seller was really the prevailing party. In *Casavan v. Land O'Lakes Realty, Inc.*,[36] the Fifth District Court

33. It would seem to be either five years under § 95.11(2)(b) or four years under § 95.11(3)(j), (k) or (l). *Id.* §§ 95.11(2)(b), (3)(j)-(l).
34. *Id.* § 95.11(6).
35. 604 So. 2d 807 (1992).
36. 542 So. 2d 371 (Fla. 5th Dist. Ct. App. 1989).

of Appeal held that the party who recovers the larger portion of the sum in dispute was the prevailing party. Here, the buyer had recovered more than twice as much as the seller. However, the Fourth District Court of Appeal[37] concluded that the seller was the prevailing party because it had been awarded damages based upon the buyers' breach of the contract. That, of course, created a conflict among the districts.

The supreme court, in settling this conflict, decided that "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees."[38] This test had also been used by the United States Supreme Court in *Hensley v. Eckerhart*.[39] Applying the *Hensley* test, the Florida Supreme Court held that the seller had prevailed on the issues of the buyer's breach of contract, the seller's not breaching the contract, and the seller's misuse of escrow claims. Therefore, the trial judge "was within his discretion" in granting the seller attorney's fees and costs.

E. *Co-Tenants*

Kelly v. Kelly.[40] Justice McDonald wrote the majority opinion in which Chief Justice Shaw and Justices Barkett, Grimes and Kogan concurred. Justice Harding expressed his dissent in an opinion with which Justice Overton concurred.

The landowners had been divorced and the decree had converted their ownership into a tenancy in common. The decree also provided that the former wife would have possession of the house until the minor child reached age eighteen when the house would be sold and the proceeds divided equally. Until then, the former spouses were to divide the burden of tax and insurance payments. Shortly before the child was to reach eighteen, the former wife sought a declaratory judgment that, when the proceeds from the sale were divided, she should get credit for the mortgage payments she had made.

The former husband counterclaimed, inter alia, for credit for the rental value of the home while it was occupied by the former wife. Without elaboration, the court pointed out that a co-tenant who has been ousted from possession by a court order is not entitled to rental value unless that is

37. Relying upon Reinhart v. Miller, 584 So. 2d 1176 (Fla. 4th Dist. Ct. App. 1989).
38. *Moritz*, 604 So. 2d 809.
39. 461 U.S. 424 (1983).
40. 583 So. 2d 667 (Fla. 1991).

provided for by the order. This divorce decree did not mention credit for the rental value, so the former husband would not get that it.

The problem, of course, was that the original divorce decree also failed to deal with mortgage payments. The court, in a footnote[41] directed trial judges in the future to explicitly address the question of who should have the burden of making mortgage payments and whether a party should get credit for payments of principal and/or interest at the time of sale. The court noted that the general rule for tenancies in common is that all owners are to contribute equally to the maintenance of the property. Consequently, these tenants in common had equal responsibility to make the mortgage payments, and the former wife was entitled to credit for her payments of principal and interest when the property was sold.

Justice Harding dissented, not because he disagreed with the law, but because he interpreted the final divorce judgment as indicating that the wife not get credit for the mortgage payment because the decree had provided that the "net proceeds" from the sale should be divided equally. Moreover, courts have recognized that the party out of possession, due to divorce, should be relieved of the burden of mortgage payments if his financial contributions to the party in possession enabled her to make them, as had occurred here.

F. *Development*

St. Johns County v. Northeast Florida Builders Ass'n, Inc.[42] Justice Grimes wrote the unanimous opinion.

The fifth district had certified, as being of great public importance, the question of validity of an impact fee on new residential construction to be used for new school facilities. The county ordinance provided that building permits would be issued only upon the payment of an impact fee. The fees were to be spent by the school board for school needs caused by new development. However, the ordinance would not go into effect in any municipality until the municipality agreed with the county to collect the fees. A private builder and an association of builders filed suit to invalidate the ordinance.

The Florida Supreme Court stated that "[t]he use of impact fees has become an accepted method of paying for public improvements that must

41. *Id.* at 668 n.*.

42. 583 So. 2d 635 (Fla. 1991); Joseph Livio Parisi, Comment, *St. Johns County v. Northeast Florida Builders Ass'n and Florida School Impact Fees: An Exercise in Semantics*, 16 NOVA L. REV. 569 (1991).

be constructed to serve new growth," but "the propriety of imposing impact fees to finance new schools is an issue of first impression in Florida."[43] The court held that impact fees would be upheld if they satisfied a dual rational nexus test. A rational nexus is a reasonable connection. A dual rational nexus test simply requires two reasonable connections. Under the test, the local government attempting to collect an impact fee from the developer of a subdivision must demonstrate: 1) a rational nexus between the need for the facilities to be funded by the fees and the growth in population generated by the subdivision; and 2) a rational nexus between the expenditure of the collected fees and the benefits accruing to the subdivision. The question was whether this ordinance could pass the test.

Not all new homes would house children. The builders had argued that those new homes without children would not add to the need for additional schools and, therefore, the ordinance would fail the first prong of the test. The supreme court disagreed. Even if a home did not immediately house students, it might at some later time. Moreover, the county had calculated that for every one hundred new units built, forty-four students would be produced who would need to be educated at the public schools. That statistic was a sufficient rational nexus between the new housing and the need to construct new educational facilities.

However, the ordinance failed to satisfy the second prong. The ordinance, by its own terms, was not effective in any municipality which was not a party to an agreement with the county to collect them. However, there was nothing in the ordinance to prevent the impact fees from being spent to accommodate the needs of new development within a nonparticipating municipality. Consequently, the court held that the fees could not be collected until "substantially all of the population of St. Johns County is subject to the ordinance."[44]

In a footnote,[45] the court acknowledged the possibility that the county might be able to satisfy the second prong by proving that substantially all development would occur in the part of the county where the fee was being collected. However, if development might occur in a nonparticipating municipality, even prohibiting the expenditure of the funds for schools to service that development would be inadequate. New schools in the nonparticipating municipalities would have to be paid for out of county-wide ad valorem taxes and the burden of those taxes would also fall on those paying

43. *Id.* at 638.
44. *Id.* at 639.
45. *Id.* at 639 n.5.

the impact fees. Thus, those subject to the impact fees would be unfairly subjected to a double burden.

The court rejected the claim that the use of impact fees to finance public educational facilities would violate the Florida Constitution's requirement of "free public schools."[46] Obviously, that provision did not prohibit the government from raising money to pay for schools. What it prohibited was charging tuition. That was not being done because attendance at public school was not conditioned upon any payment.

However, the ordinance contained a provision, section 7(B), which allowed the school board to decrease the fee, or even eliminate it, for a location if evidence was submitted that no children living there would attend public schools. If resident children later did attend public school, the impact fee would become due. That narrowed the burden of paying to those who might use the public schools. That did make it into a user fee which violated the "free public schools" provision.

But the ordinance contained a severance clause, a provision expressing the legislative preference that, if the statute violated the constitution, the court, if possible, should invalidate only offensive clause or clauses rather than of the entire statute. While a court would not be bound by such a clause, it would be considered "highly persuasive" and should be followed if severance would "not impair the operation and effectiveness of the ordinance."[47] The stated intent was "implementation of the . . . Comprehensive Plan."[48] The stated purpose was "to assure that new development bears a proportional share of the cost of capital expenditures necessary to provide public educational sites and facilities . . . ."[49] The supreme court concluded that these could be accomplished even without section 7(B) and so invalidated only that section.

The court rejected the argument that the ordinance violated the Florida Constitution's requirement that the free system of public education be "uniform."[50] The court pointed out the provision did not require that physical plant or curriculum be uniform from county to county. Nor did it require that counties have the same sources or methods of financing. What the provision required was only that every student have "an equal chance to

46. FLA. CONST. art. IX, § 1.
47. *St. Johns County*, 583 So. 2d at 640.
48. *Id.* (quoting ST. JOHNS COUNTY, FLA., ORDINANCE 87-60 § 3(A) (Oct. 20, 1987)).
49. *Id.* (quoting ST. JOHNS COUNTY, FLA., ORDINANCE 87-60 § 3(B) (Oct. 20, 1987)).
50. FLA. CONST. art. IX, § 1.

achieve basic educational goals prescribed by the legislature."[51] That requirement had not been violated.

The court also held that the fact that this was an ordinance passed by the board of county commissioners, rather than the school board, was not a fatal flaw. While it was true that the constitution gave school boards the power to levy taxes to finance schools,[52] that was only a grant of power to the school board, not a limit on the powers of the county commission. Nor was there any unlawful delegation of power by the county commission to the school board. The structure provided by the ordinance sufficiently limited the discretion of the school board when spending these funds raised by the county commission to implementing the policy decisions made by the commission.

G. *Eminent Domain*

Shick v. Department of Agriculture & Consumer Services.[53] This was a per curiam opinion in which Chief Justice Shaw and Justices Overton, McDonald, Grimes and Harding concurred. Justice Kogan wrote a dissenting opinion with which Justice Barkett concurred.

The Department of Agriculture's program of spraying ethylene dibromide on orange groves resulted in the contamination of the Shicks' well, so they claimed, inter alia, a partial inverse condemnation and, at trial, they prevailed. In awarding attorney's fees,[54] the court computed a figure based upon a rate and the number of hours involved. It then multiplied that number by a "contingency risk" multiplier to reach the final figure. The Department appealed. The district court reversed that decision because the trial court had failed to make specific findings to justify using a fee multiplier.[55] On remand, the trial court issued a detailed order which supported its use of the multiplier. Again the department appealed.

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51. *St. Johns County*, 583 So. 2d at 641 (citing School Bd. v. State, 353 So. 2d 834 (Fla. 1977)).

52. FLA. CONST. art. IX, § 4(b).

53. 599 So. 2d 641 (Fla. 1992).

54. FLA. STAT. § 73.091 (1987) provided that the condemning authority must pay reasonable costs of the condemnation proceeding including a reasonable attorney's fee. The department conceded that the successful plaintiff in an inverse condemnation action was entitled to attorney's fees under this statute. *Schick*, 599 So. 2d at 642 n.3.

55. Department of Agric. & Consumer Serv. v. Schick, 553 So. 2d 361 (Fla. 1st Dist. Ct. App. 1989).

This time the district court also had to consider a new supreme court decision, *Standard Guaranty Insurance Co. v. Quanstrom*,[56] which held that when the legislature has set forth specific criteria for determining a reasonable attorney's fee, a multiplier cannot be used if the statute does not provide for it. The statute here provided[57] only that:

> In assessing attorney's fees in eminent domain proceedings, the court shall consider:
> (1) Benefits resulting to the client from the services rendered. However, under no circumstances shall the attorney's fees be based solely on a percentage of the award.
> (2) The novelty, difficulty, and importance of the questions involved.
> (3) The skill employed by the attorney in conducting the case.
> (4) The amount of money involved.
> (5) The responsibility incurred and fulfilled by the attorney.
> (6) The attorney's time and labor reasonably required adequately to represent the client.[58]

The enumerated criteria did not include a contingency fee multiplier, so the district court concluded it should not have been used. However, it certified the following question:

> IN DETERMINING THE REASONABLENESS OF AN ATTORNEY'S FEE AWARD MADE PURSUANT TO THE PROVISIONS OF SECTION 73.092, FLORIDA STATUTES, IS THE ROWE CONTINGENCY RISK MULTIPLIER APPLICABLE IN AN INVERSE CONDEMNATION ACTION, BASED UPON A RECORD IN WHICH IT IS CLEARLY APPARENT THAT IT WAS INITIALLY HIGHLY UNCERTAIN WHETHER THE CLAIMANTS WOULD PREVAIL ON THE THRESHOLD ISSUE OF A TAKING?[59]

The supreme court held that the answer was no; the Rowe multiplier should not have been used. "[W]here, as here, the legislature specifically sets forth the criteria it deems will result in a reasonable award and will further the purpose of the fee-authorizing statute, only the enumerated

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56. 555 So. 2d 828 (Fla. 1990).
57. It should be noted that the statute has been significantly amended. *See* 1990 Fla. Laws ch. 90-136; *see also* 1990 Fla. Laws ch. 90-303 § 3.
58. *Schick*, 599 So. 2d at 643 n.5.
59. *Id.* at 641 (citing Florida Patient's Comp. Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), *modified by* Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990)).

factors may be considered."[60] This author cannot help noticing that there is nothing in the wording of the statute or mentioned by the court to suggest that the legislature ever intended that the list of factors to be exclusive. Perhaps the court was relying upon the ancient principal embodied in the maxim "expressio unius est exclusio alterius."[61]

The court noted that the trial court had relied upon a number of the statutory factors in reaching its conclusions, but it was unclear how those would have been considered if the court had been aware that it could not use a multiplier to enhance the total. Consequently the case was remanded so the trial court could redetermine the fees based solely upon the statutory criteria, but stated in closing, "as we noted in *Quanstrom*, 'the principles to be utilized in computing [the] fees must be flexible to enable the [court] to consider rare and extraordinary cases with truly special circumstances.'"[62]

Justice Kogan dissented. He noted that, in general, a contingency fee multiplier is not justified in an eminent domain case because the attorney is assured of a fee when the action commences, like in family law or trusts and estates cases.[63] However, "[i]nverse condemnation actions clearly do not belong in this category because entitlement to a fee is not assured until the property owner prevails on the threshold issue of a taking."[64] Furthermore, inverse condemnation cases are not the ordinary type of condemnation cases for which the language in the statute was drafted. *Quanstrom* contemplated special circumstances would justify a flexible approach to accomplish the purpose of the fee-authorizing statute which was to make the property owner whole. Unfortunately, Justice Kogan does not explain why the property owner would not be made whole without the multiplier.

It could be that property owners will be unable to entice attorneys to take inverse condemnation cases without either a big retainer guaranteeing that the attorney would be paid or a contingent fee arrangement giving the attorney a share of the award, in addition to the statutory attorney's fee, to

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60. *Id.* at 644.

61. "Expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 692 (4th ed. 1968).

62. *Schick*, 599 So. 2d at 644.

63. *Compare id.* at 644 *with In re* Estate of Harvey S. Warwick, 586 So. 2d 327 (Fla. 1991) *and In re* Estate of Lester Platt, 586. So. 2d 328 (Fla. 1991). Justice Overton wrote the opinions which provided that a reasonable compensation for attorneys and personal representatives could not be computed solely on the basis of a percentage of the amount of the probate estate; the Lodestar approach is appropriate to determine the amount of the fee; and the use of a fee multiplier is improper where there is no risk of nonpayment of the fee. Justice McDonald dissented.

64. *Schick*, 599 So. 2d at 644. (Kogan, J., dissenting).

offset the risk of receiving nothing if the case is lost. Since few landowners will be able to afford paying a big retainer, most will have to use the contingent fee arrangement. But paying a contingent fee would leave the property owner with less than just compensation for the property taken. So the point of the multiplier is to provide an alternative to contingent fees. However, that is a serious concern with which the court should deal directly.

H. *Forfeiture—RICO*

Department of Law Enforcement v. Real Property.[65] Justice Barkett wrote the unanimous opinion. The name of this case unintentionally reflects the current serious conflict. The issue was whether the possible discouragement of criminal conduct was of such great importance that it outweighed society's need for individual security in the ownership of private property.

After arresting Charles DeCarlo on drug trafficking charges, the state began forfeiture proceedings against a number of properties and filed a notice of lis pendens against them. The circuit court issued warrants to seize these based solely upon the affidavit of a Florida Department of Law Enforcement agent. Judge Tench of the Eighth Judicial Circuit dismissed the forfeiture action because he concluded that the forfeiture statute, as amended in 1989,[66] facially violated the guarantees of the due process clauses of the state and federal constitutions. Specifically the circuit court found that:

> 1) As a penal sanction, the Act fails to provide substantive due process required of penal statutes;
> 2) if not purely penal, the Act is quasi-criminal and fails to provide the requisite procedural guidelines; and
> 3) the act is void for vagueness, requiring parties to guess the proper procedures and protections, and insufficiently requires notice as to what specific property is subject to forfeiture.[67]

The panel of the First District Court of Appeal split and, consequently, failed to decide the case on the merits. However, it certified the issue to the Florida Supreme Court.

The supreme court expressed concern over "the multitude of procedural deficiencies in the Act."[68] It framed the issue as whether "the Act can reasonably be construed to comport with the minimal due process require-

65. 588 So. 2d 957 (Fla. 1991).
66. FLA. STAT. §§ 932.701-.704 (1989) (the Florida Contraband Forfeiture Act).
67. *Department of Law Enforcement*, 588 So. 2d at 959.
68. *Id.* at 968.

ments."[69] The court recognized the difficulty in applying apparently contradictory rules of statutory interpretation. Forfeitures are not favored in law or in equity, so forfeiture statutes should be strictly construed. But a statute should be construed so that it may be found to be constitutional, whenever that is reasonably possible. Moreover, the court is limited by the separation of powers doctrine which prevents the court from legislating so as to save a statute from constitutional challenge.

The Act enabled the state to "seize" real or personal property, but the Act had not provided many details about pre-trial or trial procedure and even the word "seize" was not clearly defined. "The Act can be read to mean that seizure immediately ousts property owners or lienholders of any right or interest they have in the subject property."[70] The court rejected the argument that such a seizure need only satisfy the limits placed on search and seizure by the Fourth Amendment of the United States Constitution.

The court concluded that "[e]ven temporary or partial impairments to property rights are sufficient to merit due process protection."[71] Moreover, "[p]roperty rights are among the basic substantive rights expressly protected by the Florida Constitution."[72] Not only are property rights entitled to the protections of procedural safeguards including notice and an opportunity to be heard, "the means by which the state can protect its interests must be narrowly tailored to achieve its objective through the least restrictive alternative where such basic rights are at stake."[73] The court then provided the details of what would be required from the preliminary "seizure" to the trial on the merits.

It provided, inter alia, that: notice of hearings must be served on all interested parties, including all persons whom the agency knows or with reasonable investigation should know have a legal interest in the property; notice and an opportunity for an adversarial hearing must occur before the seizure of real property; the adversarial probable cause hearing must be expeditiously completed; the least restrictive means available must be used to restrain the property through the preliminary stage; the forfeiture petition must be verified and supported by affidavit; the ultimate issue of forfeiture must be decided by a jury trial, unless waived; and the burden of proof on the state is no less than clear and convincing evidence.

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69. *Id.* at 962.
70. *Id.* at 961 (citing FLA. STAT. § 932.703(1) (1989)).
71. *Id.* at 964.
72. *Department of Law Enforcement*, 588 So. 2d at 964 (citing FLA. CONST. art. I., § 2).
73. *Id.*

The court, thereby, exercised its power to control judicial procedure to uphold the constitutionality of the statute. The substantive due process challenge was not really addressed, apparently because the court believed that the procedure would protect property owners from being victims of fundamental unfairness. The court concluded: "We hold that the Act is facially constitutional provided that it is applied consistent [sic] with the minimal due process requirements of the Florida Constitution as set forth in this opinion."[74] However, because the claimants in this case had not been given notice or an opportunity to be heard before their real property was seized, the trial court was correct in dismissing the forfeiture action.

It should be noted that Justice Barkett also wrote the unanimous opinion in *In re Forfeiture of 1969 Piper Navajo, Model PA-31-310, S/N-31-395, U.S. Registration N-1717G*,[75] which does address a substantive due process challenge. While this case did not concern real estate, it is of interest because of its implications. The Broward County sheriff seized an aircraft under section 330.40 of the Florida Statutes because it had fuel tanks which did not conform to the FAA regulations. The purpose of the regulations was the enhancement of flight safety in air commerce. Because the Florida Constitution provides protection for the ownership of private property[76] and for individual privacy from government intrusion,[77] government intrusion on property ownership must be narrowly tailored to the least restrictive means which would accomplish the goal. No court imposed procedural safeguards could save this statute. In the court's judgment, forfeiture of the aircraft for this violation was not sufficiently narrowly tailored to the objective of flight safety to satisfy the requirements of substantive due process.

Also, in *In re Forfeiture of 1985 Ford Ranger Pickup Truck*,[78] the court decided that the "innocent owner" exception could be interpreted so as to withstand constitutional challenge. At issue in this case was the forfeiture of a truck owned jointly by a father and son. The statute provided:

> "Property titled or registered jointly between husband and wife by use of the conjunctives 'and,' 'and/or,' or 'or' shall not be forfeited if the coowner establishes that he neither knew, nor should have known after

74. *Id.* at 959.
75. 592 So. 2d 233 (Fla. 1992).
76. FLA CONST. art. I, §§ 2, 9.
77. FLA. CONST. art. I, § 23.
78. 598 So. 2d 1070 (Fla. 1992).

a reasonable inquiry, that such property was employed or was likely to be employed in criminal activity."[79]

The trial court had held that this provision violated due process and equal protection by exempting only some co-owned property from forfeiture.

The district court reiterated the principle that if a statute can be fairly construed so as to comply with the constitution, the court should do so to avoid having to declare it unconstitutional. The subsection provided, in addition to the one sentence quoted above, that "[n]o property shall be forfeited . . . if the owner of such property establishes that he neither knew, nor should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity."[80] The supreme court approved the district court's decision that the sub-section should be construed to prohibit the forfeiture of the interest of any innocent co-owner.

I. *Landlord and Tenant*

Goodman v. Brasseria La Capannina, Inc.[81] Justice McDonald wrote the unanimous opinion.

The tenant operated a restaurant on the leased premises. When the tenant allegedly failed to pay the rent, the landlord claimed a lien on the personal property located there[82] and filed a verified complaint for a writ to distrain it. On the day that the complaint was filed, the court held an ex parte hearing and granted the distress writ.

Two days later, an emergency hearing was held on the tenant's motion to modify the distress writ to exclude the food and alcohol it needed to continue to operate its restaurant. The tenant was unsuccessful. A second emergency hearing was held the same day. That hearing concerned the bond which the tenant would have to post in order to replevy its property. But once the bond was set, the unfortunate tenant was unable to post it.[83]

A month later, the tenant sought to have the distress writ dissolved, claiming that the distress statute was unconstitutional. The trial court did not find the argument convincing, but the district court of appeal did, holding that the statute, on its face, violated the requirements of due process

79. *Id.* (citing FLA. STAT. § 932.703(2) (1989) (amended by Fla. Laws ch. 92-54, § 3 (July 1, 1992)).
80. *Id.* (citing FLA. STAT. § 932.703(2) (1989)).
81. 602 So. 2d 1245 (Fla. 1992).
82. *See* FLA. STAT. § 83.08 (1989) (used by landlord as authority for lien).
83. *Goodman*, 602 So. 2d at 1246.

provided by the United States Constitution.[84] The supreme court disagreed.

The appropriate due process requirements[85] had been summarized by the Florida Supreme Court in 1977 in *Phillips v. Guin & Hunt, Inc.*[86] as:

> (1) the writ shall not issue without judicial authorization;
> (2) the writ may issue only upon the allegation of specific facts;
> (3) the party seeking to invoke a writ is required to post a bond to guarantee the tenant's interests;
> (4) the tenant has the opportunity to obtain an immediate hearing to dissolve a writ; and
> (5) there is the opportunity for a prompt hearing on the merits, though not necessarily a predeprivation hearing.[87]

These requirements accommodated the conflicting needs and rights of the landlord and the tenant. The legislature had responded to *Phillips* by amending the statute to conform[88] and the landlord had complied with the statute. Here, the supreme court rejected any suggestion that *Phillips* needed to be modified.[89]

The tenant was unable to convince the supreme court that the due process clause required that the judicial officer weigh the varying interests of the parties before issuing the writ. The court did state that the judge has the "discretion" to make the required determinations even though section 83.12 seems to provide mandatory language.[90] However, once the judge has concluded that the landlord has satisfied the statutory requirements, the statute does not seem to give the judge any discretion about whether to issue the writ.

The 1980 amendment had included the addition of section 83.135 which provided that "the [tenant] may move for the dissolution of the distress writ at any time. The court shall hear the motion not later than the

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84. *Id.*

85. As explained by the United States Supreme Court in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

86. 344 So. 2d 568, 571 (Fla. 1977).

87. *Id.*

88. 1980 Laws of Fla. ch. 80-282.

89. The court distinguished Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), which required a hearing before an employee's wages could be garnished. *Goodman*, 602 So. 2d at 1249 n.8.

90. Section 83.12 provides that "[a] distress writ shall be issued . . . ." FLA. STAT. § 83.12 (1989).

day on which the sheriff is authorized . . . to levy on the property . . . ."[91] The supreme court recognized that the statute might still be applied in an unconstitutional way when the writ "completely prevents a tenant from conducting its business . . . ."[92] However, there had been "ample opportunity for immediate hearings"[93] and there had been judicial supervision "throughout the distress writ process,"[94] so this trial court had not violated the requirements of due process.

The Florida Bar; Re: Approval of Forms Pursuant to Rule 10-1.1(b) of the Rules Regulating the Florida Bar.[95] By this unanimous per curiam opinion, the supreme court approved for publication a number of forms, mostly landlord and tenant forms, for the use on non-lawyers. The landlord-tenant forms included: Notice From Landlord To Tenant-Termination For Failure to Pay Rent; Notice From Landlord To Tenant-Termination For Noncompliance Other Than Failure to Pay Rent; Notice From Tenant To Landlord-Termination For Failure of Landlord to Maintain Premises As Required By Florida Statute 83.51(1) Or Material Provisions Of The Rental Agreement; Notice From Tenant To Landlord-Withholding Rent For Failure of Landlord To Maintain Premises As Required By Florida Statute 83.51(1) Or Material Provisions of the Rental Agreement; Complaint For Landlord To Evict Tenants For Failure To Pay Rent And To Recover Past Due Rent; Complaint For Landlord to Evict Tenants For Failure To Comply With Lease (Other Than Failure to Pay Rent); Summons-Eviction Claim; Summons-Damages Claim; Final Judgment-Damages; Final Judgment Eviction; Writ of Possession; and Notice of Intention To Impose Claim On Security Deposit. The court also approved the following forms: Satisfaction of Mortgage; Satisfaction of Judgment-County Court; Satisfaction of Judgment-Circuit; and Document For Sale of Goods.[96] In addition, the court authorized the publication of instructions for filling out the forms prepared by The Florida Bar.

The court, however, expressly refused to state any opinion on the correctness of either the forms or the instructions. The court's disclaimer seems to be a giant step backwards in any attempt to make the courts more accessible to the public and to strengthen the public's confidence in the legal

91. *Id.* § 83.135 (1981).
92. *Goodman*, 602 So. 2d 1248.
93. *Id.* at 1249.
94. *Id.*
95. 591 So. 2d 594 (Fla. 1991).
96. *Id.* (These forms are included in the appendix to the case).

system. On being told that the supreme court had approved forms for publication but refused to say if they were correct, a member of the public would probably respond first with laughter, and then with the common complaints and expletives about the legal profession. It would seem that the supreme court's saying that these are correct forms ought to make these forms "correct" and if the court is not comfortable in doing that, it should not authorize these forms be published.

Furthermore, the court noted that use of the forms might vary from circuit to circuit due to local procedure, and so authorized the chief judge in each circuit to prepare supplemental directions which should be filed with the circuit court clerk. So much for simplifying things for the general public!

In a subsequent opinion, *The Florida Bar Re: Advisory Opinion-Nonlawyer Preparation of Residential Leases Up to One Year in Duration*,[97] the court also approved the publication of forms for leases, not exceeding one year, of: 1) a single family home or duplex; 2) a residential apartment, mobile home or unit in multiple unit housing, including a mobile home; or 3) a residential condominium or cooperative. The court authorized a non-lawyer to elicit factual information to help another to complete the form under Rule 10-1.1(b), so long as no legal advice about the meaning of the terms or drafting of addenda is involved.

J. *Mortgages*

Florida National Bank v. Bankatlantic.[98] Justice Overton wrote the majority opinion in which Justices McDonald, Barkett and Kogan concurred. Justice Grimes wrote a dissent with which Chief Justice Shaw concurred.

For the first time, the Florida Supreme Court was faced with the question of whether a lender could collect a prepayment penalty after having exercised its right to accelerate a mortgage obligation which had fallen into default. The case involved the mortgage on an apartment complex. The owner had decided the complex would be most valuable if converted from rentals to condominiums. Rather than do it himself, he decided to find a buyer who would undertake the conversion. To make the property more saleable, he did not renew leases which expired and he stopped leasing units to new tenants.

In planning for the sale, he repeatedly asked the lender to waive the prepayment penalty if the property was sold, but the lender always refused.

97. 602 So. 2d 914 (Fla. 1992).
98. 589 So. 2d 255 (Fla. 1991).

He found a buyer, contracted to sell the complex and stopped making the mortgage payments. The lender sent him routine default letters and then began a foreclosure action. In order to allow the sale to be consummated, the mortgagor agreed to escrow the prepayment penalty so the lender would agree to execute a mortgage satisfaction. This action was over the prepayment penalty.

The district court recognized thegeneral rule that, absent an express agreement to the contrary, a lender cannot both accelerate a debt and demand a prepayment penalty. The mortgage and note involved did not provide that the lender was entitled to both. However, the district court continued: "it is axiomatic that a party to a contract should not profit from his own intentional default."[99] The supreme court agreed. It pointed out that "[f]oreclosure actions are litigated in a court of equity, and chancellors of those courts traditionally have been granted the discretion and authority to do justice between the parties, particularly in circumstances where one party is attempting to profit from his own intentional misconduct."[100] The supreme court also noted that even if the default had ultimately been caused by the lack of cash flow, the cash shortage had been caused by the borrower's own decision to eliminate the tenants to make the property more saleable. Consequently, this default was intentional.

The certified question and the facts of this case involve only a mortgage on commercial property.[101] However, there is nothing in the reasoning which would seem to prevent this precedent from being applied to a mortgage on residential property. It should, however, be noted, that the

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99. Florida Nat'l Bank v. Bankatlantic, 577 So. 2d 596, 598 (Fla. 4th Dist. Ct. App. 1991).

100. *Bankatlantic*, 589 So. 2d at 259.

101. The certified question was:

> WHETHER IN COMMERCIAL VENTURES, WHERE THE NOTE CONTAINS BOTH A PROVISION FOR ACCELERATION AND A PROVISION FOR PREPAYMENT PENALTY FEES, AND THE MORTGAGEE HAS ELECTED TO ACCELERATE THE MORTGAGE BECAUSE OF AN INTENTIONAL DEFAULT BY THE MORTGAGOR, WHO SUBSEQUENT TO NOTIFICATION OF FORECLOSURE PROCEEDINGS BUT PRIOR TO A FORECLOSURE SALE, HAS CONSUMMATED A PRIVATE SALE OF THE PROPERTY, IS IT WITHIN THE COURT'S DISCRETIONARY POWER TO CONSIDER THE EQUITIES AND ALLOW BOTH PROVISIONS TO BE EFFECTUATED SIMULTANEOUSLY DUE TO THE PREMATURE TERMINATION OF THE MORTGAGE?

Id. at 256.

The court responded, "[w]e have jurisdiction, answer the question in the affirmative, and approve the district court's decision." *Id.* (citation omitted).

court created only a limited exception to the general rule "under the special circumstances of this [case]."[102] The case seemed to indicate only that a lender could collect a prepayment penalty if the facts indicate that the borrower tried to reap the benefits of prepaying by forcing the lender into foreclosing.

Justice Grimes dissented. He agreed with the majority's statement of the general rule and the exception. However, he concluded that "if evidence such as this is sufficient to prove an intentional default, the exception will swallow the rule."[103] He simply found evidence that the default was intentional to be insufficient by applying the following logic. The complex was purchased as a tax shelter, not to generate revenue and the revenue had never been sufficient to cover the mortgage and operating expenses. The borrower had subsequently sustained a significant reversal of fortune. He missed mortgage payments because he was broke, rather than as a subterfuge to avoid the prepayment penalty. Selling the complex had become the only alternative to losing it to creditors. Furthermore, "[t]he bank officials' testimony that in retrospect that they believed that Gordon intentionally defaulted in order to avoid the prepayment penalty was irrelevant, if not inadmissible."[104]

What both the majority and dissent failed to discuss was the nature of the prepayment penalty clause.[105] The common law rule was that a borrower had no right to prepay a mortgage debt, unless the parties had specifically agreed to permit it, because the mortgagee was entitled to receive the benefit of the loan agreement, i.e., the payment of principal and interest as agreed. Therefore, the practice evolved of allowing the borrower to purchase the privilege of prepaying for a certain price. This gave the borrower the option of performing by paying over the full term of the mortgage or prepaying with the agreed "penalty." With this in mind, the analysis of the case should have focused, not upon whether the borrower's conduct was wrongful, but rather upon whether the lender was entitled to the prepayment penalty as part of the bargained-for benefit of this contract. Clearly, both parties anticipated that the lender would be entitled to recover the penalty if the property was sold unless the lender agreed to allow the buyer to assume the obligation. Since that did not occur, this lender was entitled to the penalty.

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102. *Id.* at 259.

103. *Id.* at 260 (Grimes, J., dissenting).

104. *Bankatlantic*, 589 So. 2d at 260.

105. *See generally* GEORGE E. OSBORNE ET. AL., REAL ESTATE FINANCE LAW §§ 6.1-6.3 (1979).

K. *Professional Responsibility*

The Florida Bar v. Belleville.[106] This was an unanimous per curiam opinion.

An attorney was retained by the buyer after the terms of an apartment building purchase had already been agreed upon. The attorney drew up the closing documents which provided that the seller would receive only an unsecured promissory note which would become unenforceable upon seller's death. Interest was to be deferred for four months without any provision for interest to accumulate. The seller would pay the closing costs, which the seller and his attorney interpreted to include the attorney's fee. Furthermore, the closing documents included the conveyance of not only the seller's apartment building, as the parties had agreed, but also the seller's residence which was across the street.

The elderly seller signed the closing documents without realizing that his residence was included. The closing documents were not explained to him by the attorney who merely sent a paralegal to handle the closing. In fact, the buyer never even met this attorney. When the seller subsequently complained that the note and documents did not reflect their agreement, the buyer tried to evict him from his residence. Disciplinary proceedings were commenced against the attorney for his part in the transaction. From the record, it could not be determined if the attorney did any more than follow his client's instructions. Consequently, the referee recommended no discipline be imposed because of the lack of an attorney-client relationship between the attorney and the seller.[107] That logic was rejected by the supreme court.[108]

The essential facts were not in dispute, so the question was entirely one of law. The supreme court concluded that the facts were so one-sided that Belleville should have suspected that unconscionability was involved. Under those circumstances, he had two duties to the unrepresented opposing party: 1) to explain that he represented only his client, the seller; and 2) to explain the material terms of the documents "so that the opposing party understands their actual effect."[109] Those duties arose even though an agreement by one party to pay the other's attorney's fees does not necessarily create a dual representation situation. The breach of those duties by the attorney compelled the imposition of a thirty day suspension from practice.

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106. 591 So. 2d 170 (Fla. 1991).
107. *Id.* at 171.
108. *Id.* at 172.
109. *Id.*

It is interesting to note what the court did not do. It did not go so far as to require that attorneys who prepare closing documents attend the closing in order to explain the documents.[110] Nor did it require that attorneys refrain from participating in transactions which they perceive to be unconscionable. Perhaps the court should.

The Florida Bar v. Crabtree.[111] This was an unanimous per curiam opinion.

A client hired an attorney to secretly "repatriate $1.5 million from Europe." There was no allegation that the purpose was illegal,[112] but to do it, the lawyer devised numerous complex transaction which involved another client and which also gave the lawyer a personal interest in the assets. He failed to reveal these facts to either client. In addition, he created phony letters to disguise the transactions. Although none of the parties involved filed any complaint, the referee concluded that the lawyer had violated: Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation; Disciplinary Rule 5-104(A) by entering into a business transaction with a client without making full disclosure to the client or obtaining the client's consent; and Disciplinary Rule 5-105(B) by simultaneously representing two clients who could have adverse interests without their knowledge or consent.[113]

The supreme court concluded that the referee's findings of fact were supported by the record. Noting that the lawyer had already received a private reprimand for similar conduct, the court concluded that the referee's recommendations of disbarment were also supported by the record and, consequently, the court ordered the lawyer disbarred.[114]

This case was decided under the Code of Professional Responsibility which was replaced on January 1, 1987 by the Rules Regulating The Florida Bar.[115] However, there should be no doubt, although there is no dicta to that effect, that similar results would also be reached under the new rules. Rule 4-4.1 prohibits a lawyer from making a false statement of material fact to a third person. Rule 4-1.8 provides that a lawyer may not enter into a

110. *Id.* at 172 n.2.
111. 595 So. 2d 935 (Fla. 1992).
112. *Id.* at 936.
113. *Id.*
114. *Id.*
115. The Florida Bar; Re: Rules Regulating The Florida Bar, 494 So. 2d 977, 978 (Fla. 1986).

business transaction with a client unless "the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client . . . ."[116] and the client "consents in writing thereto."[117] Rule 4-1.7 prohibits a lawyer from representing clients with conflicting interests unless each client has consented "after consultation."[118] Further this rule provides that the consultation "shall include explanation of the implications of the common representations and the advantages and risks involved."[119]

Hopefully no lawyer needs to be reminded that producing phony documents in order to mislead the innocent is prohibited conduct. However, potential conflict of interest situations may be more difficult for the lawyer to avoid or resist. It may not be unusual for a lawyer to consider the investing in a client's project which has the earmarks of success. Nor is it unusual for a real estate lawyer to be asked to handle a real estate sale for both the buyer and the seller. However, lawyers need to be reminded that these are potential minefields. Full disclosure is the minimum, and even full disclosures rarely are successful at making the disclosee understand the impact of a potential conflict of interest. If the client does not understand, then the lawyer has failed as a advisor. It is essential to remember that:

> A lawyer preforms various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealing with others. As an intermediary between clients, a lawyer seeks to reconcile their interests as an adviser and, to a limited extent, as a spokesman for each client. A lawyer acts as an evaluator by examining a client's legal affairs and reporting them to the client or to others.[120]

Even following the fullest disclosure, a disappointed party may subsequently fix the blame for the disappointment on the real or imagined failure of his attorney to perform one of those functions properly.

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116. RULES REGULATING THE FLORIDA BAR Rule 4-1.8(a)(1) (1991).
117. *Id.* Rule 4-1.8(a)(2).
118. *Id.* Rule 4-1.7(a)(2).
119. *Id.* Rule 4-1.7(c).
120. RULES REGULATING THE FLORIDA BAR, ch. 4 (Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities).

L. *Purchase Options*

Taylor v. Fusco Management Co.[121] Justice Harding wrote the unanimous opinion.

The ninety-nine year lease provided that the lessee would have the option to purchase the property:

> [U]pon an appraisal made by three competent MIA Appraisers, one of whom shall be appointed by Lessors, one appointed by Lessee, each of whom shall mutually select a third such appraiser, but in no event shall the sum be less than $720,000.00 net to Lessors, their heirs or assigns, and Purchasers to assume all unpaid mortgage obligations against said property.[122]

Litigation over exercising the option had begun in state court but was removed to federal court by the defendant, a successor lessee. The United States Court of Appeals for the Eleventh Circuit determined that the case was controlled by Florida law, but that there was no Florida precedent to follow. Consequently, it certified the following question to the Florida Supreme Court:

> WHETHER THE FAIR MARKET VALUE OF LEASED PROPERTY AT THE TIME A LESSEE EXERCISES AN OPTION TO PURCHASE THE PROPERTY IS THE VALUE OF THE FEE SIMPLE ESTATE UNENCUMBERED BY THE LEASE OR THE VALUE OF THE FEE ESTATE ENCUMBERED BY THE LEASE.[123]

The court pointed out that it had decided a similar case, *Lassiter v. Kaufman*,[124] just last year. Justice Harding also wrote that opinion which had involved interpreting a lessee's option to purchase the "fee title." But, this case, *Taylor*, did not involve similar contractual language to interpret.[125]

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121. 593 So. 2d 1045 (Fla. 1992).

122. *Id.* at 1046.

123. *Id.* at 1046; *see also* Taylor v. Fusco Management Co., No. 90-3288, slip op. at 4 (11th Cir. Feb. 22, 1991) (providing the certified question).

124. 581 So. 2d 147 (Fla. 1991); *see also* Ronald B. Brown, *Real Property: 1991 Survey of Florida Law*, 16 NOVA L. REV. 399, 405-07 (1991).

125. The *Lassiter* court answered the following certified question in the affirmative:
> IN THE DETERMINATION OF FAIR MARKET VALUE OF LEASED PROPERTY AT THE TIME OF THE EXERCISE OF A LESSEE'S OPTION TO PURCHASE, MAY THE TRIAL COURT CONSIDER THE PRESENT VALUE OF THE FEE UNENCUMBERED BY THE LEASE?

In *Lassiter*, Justice Grimes, in a concurring opinion, had unsuccessfully proposed the adoption of a general rule to eliminate the confusion produced by such vague option drafting. He stated, "in the absence of specific language to the contrary in the lease, I would hold that the option price would always be computed as if the property were unencumbered by the lease . . . ."[126] In *Taylor*, the court expressly adopted Justice Grimes' proposal. The court stated that "[a]ny intent to value the property otherwise [than unencumbered by the lease] should be clearly stated in the lease."[127]

M. *Quiet Title Actions and Defenses*

McIntosh v. Hough.[128] Justice Grimes wrote the majority opinion in which Chief Justice Shaw and Justices Barkett, Kogan and Harding joined. Justice McDonald wrote a dissent in which Justice Overton concurred.

Hough was a judgment debtor. To escape having to pay the judgment, he conveyed all of his property to his wife. When the judgment creditor sued to set aside the fraudulent conveyance, Hough made arrangements to obtain the money he needed to pay of the judgment. But rather than reconveying as she had agreed, Hough's wife conveyed the property to a corporation which she owned. So Hough sued to force a reconveyance. Notice of lis pendens was properly recorded.[129]

But the wife's corporation conveyed the property to Miles and Miles later conveyed a half interest to McIntosh. At this point, neither Miles nor McIntosh knew about Hough's claim or his suit to recover title. When Miles did learn about it, he petitioned to intervene, but was prevented from doing so because Hough objected. After the lis pendens expired, Miles conveyed his remaining interest to McIntosh who still did not know about Hough's suit. When Hough prevailed in the suit against his wife, he brought this quiet title action against McIntosh.[130]

The supreme court, agreeing with the district court,[131] held that the expiration of the lis pendens made it "ineffective for any purpose."[132] Therefore, the half interest which McIntosh acquired after the lis pendens expired was not subject to Hough's claim. However, the supreme court

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581 So. 2d at 147.

126. *Id.* at 149.

127. *Taylor*, 593 So. 2d at 1047.

128. 601 So. 2d 1170 (Fla. 1992).

129. *Id.*

130. *Id.* at 1171.

131. *Id.* at 1171 n.2.

132. *Id.*

rejected the district court's conclusion that McIntosh could not raise the defense of unclean hands. The district court had certified the question as being:

> WHEN A PURCHASER FOR VALUE AFTER LIS PENDENS BUT WITHOUT ACTUAL NOTICE PURCHASES PROPERTY FROM THE FRAUDULENT GRANTEE AND THEN IS DENIED THE OPPORTUNITY TO INTERVENE IN THE PENDING ACTION, MAY HE RAISE EQUITABLE ESTOPPEL BY VIRTUE OF THE UNCLEAN HANDS DOCTRINE IN A SUBSEQUENT ACTION BROUGHT BY THE FRAUDULENT GRANTOR?[133]

An action to quiet title is equitable in nature and a party seeking that relief must have clean hands. But the supreme court pointed out that this requirement did not make equitable relief unavailable to every party whose behavior has been disreputable in any way. Rather, it made equitable relief unavailable to a party whose conduct has been the cause of the harm. It did not matter that this harm was not intended. Here, McIntosh was not the intended victim of Hough's fraudulent conveyance, but was an incidental victim because "it was this fraud which ultimately convinced [McIntosh] to purchase the property . . . ."[134] Consequently, having unclean hands would be a valid defense to Hough's quiet title suit. The supreme court apparently recognized the distinction between the estoppel and clean hands and, consequently, did not apply estoppel to this case, despite the formulation of the certified question and the estoppel cases offered as authority by Hough.[135] However, it seems clear from the court's discussion of those precedents, that this court would also allow an incidental victim of fraud to raise equitable estoppel in an appropriate case.

Whether McIntosh will prevail upon remand is less than clear. The decision merely allows him to raise the unclean hands defense. Even if Hough cannot quiet his title, where does that leave McIntosh? He did not have clean hands either because he acquired an interest while the lis pendens was in effect, unless he performed a good faith title search and which failed due to no fault of his, such as misrecording or misindexing by the clerk. He too would be unable to quiet title to this land. That would produce a serious, and perhaps insoluble, title problem.

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133. *McIntosh*, 601 So. 2d at 1170.

134. *Id.* at 1173.

135. *See* Miller v. Berry, 82 So. 764 (Fla. 1919); Watkins v. Watkins, 166 So. 577 (Fla. 1936).

The dissent also focused upon the half interest that was conveyed to McIntosh while the lis pendens was in effect.[136] The doctrine of lis pendens provides that the purchaser of property which is subject to litigation takes title subject to the outcome of that litigation. Consequently, when Hough prevailed in that litigation, the outcome was binding on McIntosh too. While this author applauds the majority's interpretation of the availability of the clean hands doctrine, in this case the dissent was correct.

N. *Surveyors*

Garden v. Frier[137] This was a *per curiam* opinion in which Justices Overton, McDonald, Shaw, Grimes and Harding concurred. Chief Justice Barkett wrote a special concurrence in which Justice Kogan joined, but Justice Kogan also wrote an opinion concurring only with the court's result.

A land surveyor was sued for performing an allegedly negligent survey. Because the suit was commenced more than two years after the error was discovered, the surveyor raised the two-year statute of limitations applicable to "professional" malpractice[138] as an affirmative defense. The problem, however, was that term "professional" was not defined by the statute.

The court had earlier stated that for the purposes of this statute an occupation would be considered a profession "if, under the laws and administration of this state a person can be licensed to practice [the] occupation upon completion of a four-year college degree in that field . . ."[139] In *Garden*, the court specified that this would be an absolute requirement.[140] "[A] vocation is not a profession if there is *any* alternative method of admission that omits a required four-year undergraduate degree or a graduate degree."[141] Since the Florida statute[142] did allow alternatives, the court concluded surveying was not a profession to which the malpractice statute of limitations could be applied.

Chief Justice Barkett agreed that statute of limitations did not apply because, she concluded without explanation, that the professional malpractice statute of limitations was unconstitutional on its face. Justice Kogan also agreed, but explained that the statute was fatally vague. The legislature,

136. *McIntosh*, 601 So. 2d at 1173.
137. 602 So.2d 1273 (Fla. 1992).
138. FLA. STAT. § 95.11(4) (1989).
139. Pierce v. AALL Ins. Co., 531 So. 2d 84, 87 (Fla. 1988).
140. 602 So.2d at 1275.
141. *Id.* at 1276.
142. FLA. STAT. § 472.013 (1991).

by failing to define the term professional, had simply left too big a gap for the court to fill.

III. Conclusion

This small sampling of cases is not particularly revealing about the supreme court. It is somewhat surprising that almost two thirds of the decisions were unanimous. Justices Harding, McDonald and Overton each wrote three opinions. Justice Grimes wrote two. Justices Barkett and Kogan each contributed one. Chief Justice Shaw did not write an opinion or dissent, but that may reflect the degree to which administrative tasks have infringed upon his time.

More real property cases were decided by the court this year than in the recent past. Most cases involved interpretation of language, or the lack of language, in a statute or document. The court dealt with these problems in conventional and common-sense ways, but it would be helpful if the court would identify the methods of statutory interpretation being used by their traditional labels or Latin terms. It was also surprising how frequently attorney's fees was an issue, in almost one third of the cases. There was nothing in these cases which should take the real estate professional by surprise. In contrast, the following cases involving the *D'Oench* doctrine may be a very unpleasant surprise to many. Their existence should remind the real estate community that knowledge of only real estate law is no longer enough to protect our clients or ourselves.

IV. Post Script: A Word of Warning About The *D'Oench* Doctrine[143]

Three cases, not decided by the Florida Supreme Court, should also be of particular interest (or horror) to Florida real estate lawyers because they provide an introduction to the D'Oench doctrine. The doctrine originated in 1942 in *D'Oench, Duhme & Co. v. FDIC*.[144] In *D'Oench*, the Federal

143. The doctrine is also referred to as the *D'Oench, Duhme* doctrine, referring to the first two words of the seminal case rather than just the first word. This author will use the shorter identifying term.

144. 315 U.S. 447 (1942); *see also* Jane D. Goldstein, *Langley v. FDIC: FDIC Superpowers-A License to Commit Fraud*, 1989 Ann. Rev. Banking L. 559 (1989); Marsha Hymanson, *Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer*

Deposit Insurance Corporation received a demand note as part of the collateral securing a loan which the FDIC had made to a bank. When the FDIC subsequently tried to collect from the note's maker, it learned that the bank had agreed in writing that it would not sue on the note.[145]

The United States Supreme Court held that the maker could not assert that defense against the FDIC.[146] The court discovered a federal policy which existed to protect the FDIC against misrepresentations about the assets and liabilities of the banks which it insured or to which it made loans.[147] Therefore, as a matter of federal common law, the maker of the note could not rely upon an undisclosed agreement which diminished the value of the note to the detriment of the FDIC.[148]

The policy of *D'Oench* was the basis of Title 12 of the United States Code, section 1823(e), a part of Federal Deposit Insurance Act of 1950.[149] Section 1823(e) provided:

> No agreement which tends to diminish or defeat the interest of the Corporation [i.e., the FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

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When Banks Fail, 62 S. CAL. L. REV. 253 (1988); Stephen W. Lake, *Banking Law, The D'Oench Doctrine and 12 U.S.C. § 1823(e): Overextended, But Not Unconstitutional*, 43 OKLA. L. REV. 315 (1990).

145. *D'Oench*, 315 U.S. at 454.

146. *Id.* at 459, 461.

147. *Id.* at 457.

148. *Id.* at 459.

149. Federal Deposit Insurance Act, ch. 967, § 2[13](e), 64 Stat. 889 (1950) (as amended in 12 U.S.C. § 1823 (e)). These provisions initially applied only to the Federal Deposit Insurance Corporation, but Congress made them applicable to the RTC in 1989. *See* 12 U.S.C. § 1441a(b)(4) (1989); Resolution Trust Corporation v. Murray, 935 F.2d 89, 93-94 (5th Cir. 1991).

(4) has been, continuously, from the time of its execution, an official record of the depository institution.[150]

In *Sunchase Apartments v. Sunbelt Service Corp.*,[151] Sunbelt Savings was created to acquire the assets of a failed savings and loan which was under the receivership of the Federal Savings and Loan Insurance Corporation (FSLIC). Sunbelt Savings operated under the supervision of the FDIC. Sunbelt Service Corporation was a wholly owned subsidiary of Sunbelt Savings and it brought this mortgage foreclosure action.

However, the mortgagor had a defense. It claimed that its agreement to purchase property, an apartment complex, from a third party was conditioned upon negotiating a satisfactory loan from Sunbelt and that, during negotiations with the lender, it had promised that it would modify the loan by reducing the principal and/or interest to allow at least a break-even cash flow if the mortgagor went through with the purchase, completed renovations and kept the loan current for four months. The mortgagor claimed it had purchased and had executed the mortgage in reasonable reliance upon those representations. The mortgagor also asserted that these facts not only established a defense to the foreclosure, but also provided the basis for a counter-claim for damages, rescission and reformation based upon the theories of estoppel, waiver, failure of consideration, and fraud in the inducement.

Unfortunately, the lender's records did not contain any documents reflecting such representations or agreements. Based upon the *D'Oench* doctrine, the trial court granted summary judgment to Sunbelt and the district court affirmed. It held that the mortgagor's defenses and counterclaims were based upon an alleged oral agreement with the lender or its employees. The *D'Oench* doctrine could be asserted by federal banking regulators, or their successors in the mortgaged property like the Plaintiff here.[152] The *D'Oench* doctrine prohibits any defense or counterclaim based upon secret or side agreements with a regulated bank, i.e., any agreement not in the banks official records or contained within the four corners of the loan documents. Therefore, the court properly granted summary judgment because the mortgagor had not raised any admissible defense or counterclaim.[153]

150. 12 U.S.C.A. § 1823(e) (West 1989).
151. 596 So. 2d 119 (Fla. 1st Dist. Ct. App. 1992).
152. *Id.* at 121.
153. *Id.* at 126.

A similar result was reached by the Fifth Circuit in *Resolution Trust Corp. v. McCrory*.[154] Charles McCrory and First Florida Management Association (FFMA) were the general partners in NPT, a Florida limited partnership. When NPT acquired property, it assumed the seller's mortgage obligations, but the lender simultaneously executed a letter agreement limiting the liability of FFMA and its general partners, Walter McCrory and Thomas Ryan.

The lender's files did not contain a copy of the agreement, but a copy of the agreement was in the file for "draft" documents of the attorney who handled the closing for the lender. In addition, two documents in the lender's files did refer to the letter agreement, but they did not disclose the limitation of liability. There was no record of the letter agreement or the liability limitation in the minutes of the loan committee. There was testimony that the loan committee had not considered or approved the assumption agreement because the transaction was not considered a restructuring of the original note, but that the chairman of the senior loan committee had approved the transaction, including the limitation of liability.

The Federal Home Loan Bank Board declared the lender insolvent and appointed FSLIC to be its receiver. The lender's assets, including the note which NPT had assumed, were transferred to Sunbelt pursuant to an acquisition agreement between FSLIC and Sunbelt. Following default on the payments, Sunbelt accelerated the indebtedness and sued to recover on the note. The district court entered summary judgment in favor of Sunbelt, finding that the absence of the letter agreement from Sunbelt's files entitled Sunbelt to the protection of the *D'Oench* doctrine which prevented FFMA, and its general partners Walter McCrory and Thomas Ryan, from relying on the letter agreement to limit their liability.[155]

Subsequently, the Office of Thrift Supervision (OTS) declared Sunbelt insolvent and appointed the Resolution Trust Corporation (RTC) as its receiver. RTC transferred the judgment on the note to Sunbelt Federal Savings, FSB (Sunbelt Federal). OTS placed Sunbelt Federal into conservatorship and appointed RTC conservator. RTC consequently succeeded to all rights of Sunbelt Federal, including the right to collect the final judgment in this case. RTC argued two grounds for affirmance. First, RTC contended that the district court properly applied *D'Oench* to the facts of this case. In the alternative, RTC invoked section 1823(e).[156]

154. 951 F.2d 68 (5th Cir. 1992).
155. *Id.* at 70.
156. *See supra* text accompanying notes 148—49.

Section 1823 was raised for the first time on appeal because it could not have been asserted by Sunbelt.[157] The statute did not apply until RTC stepped in as conservator and acquired the final judgment which had already been rendered. The court explained that, in such situations, federal regulators have been permitted to assert their special defenses under the statute for the first time on appeal, but when the district court's judgment establishes that an asset is void, federal regulators appointed after the entry of judgment have not been allowed to assert arguments based on *D'Oench* and section 1823(e) for the first time on appeal as an basis for reversing the district court's judgment.

The defendants argued that having the letter agreement in the files of the bank's attorney, who kept offices in the same building and on the same floor, should be sufficient to meet the requirement. The court rejected this argument, deciding to "hew closely to the 'plain terms of the statute.'"[158] It noted that the Supreme Court has been unwilling to provide any equitable exceptions to the operation of the statute because the statutory purpose "is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets"[159] and "[o]ften, such an evaluation must be done literally overnight."[160]

The defendants also disputed the correctness of the district court's interpretation of the *D'Oench* doctrine. But, the court avoided that "thornier question"[161] by relying upon the statute which it found provided "a clear statutory standard which is dispositive of the outcome in this case."[162]

In *Glen Johnson, Inc. v. Resolution Trust Corp.*[163] the act was interpreted to prevent a third mortgagee from asserting that the first mortgagee, an insolvent savings and loan, had made oral misrepresentations which might result in the first mortgage being equitably subordinated to the third mortgage. The third mortgagee, a contractor, was also the original owner of the property. It sold the property to the mortgagor and, as part of the deal, the contractor-seller was to build a hotel on the land. The deal, contingent on the obtaining construction financing, required that the

157. These provisions initially applied only to the Federal Deposit Insurance Corporation (FDIC), but Congress made them applicable to the RTC in 1989. *See* 12 U.S.C. § 1441[a](b)(4) (1989); Resolution Trust Corp. v. Murray, 935 F.2d 89, 93-94 (5th Cir. 1991).

158. *Resolution Trust Corp.*, 951 F.2d at 72.

159. *Id.* (quoting Langley v. FDIC, 484 U.S. 86, 91 (1987)).

160. *Id.*

161. *Id.*

162. *Id.*

163. 598 So. 2d 81 (Fla. 2d Dist. Ct. App. 1992).

construction lender "set aside" $1,000,000 to cover the balance of the purchase price and $3,700,00 for the cost of construction. Seller delivered an executed deed to the escrow agent with instructions not to release it until a "set aside letter" had been received from the lender, agreeing to set aside the funds mentioned above. Seller approved a draft of the set aside letter presented by the lender's attorney and authorized the release of the deed. However, the letter which was actually executed contained an additional term, a term which required the buyer provide a $1,000,000 letter of credit at closing. The lender, after recording the deed, partially funded the loan. Then the lender informed the mortgagor that it would make no further advances until it had received a $1,000,000 letter of credit.

The seller-contractor attempted to help the buyer obtain the letter of credit. Finally, the seller-contractor convinced the lender to continue funding the project by agreeing to pledge $250,000 as security, withheld from its first application for payment. In return, the seller-contractor obtained a third mortgage on the property. But upon completion, the seller-contractor was never reimbursed for the $250,000. Then buyer defaulted on the first mortgage and the construction lender, whose mortgage had been converted to a permanent first mortgage, began foreclosure, joining the seller-contractor as third mortgagee.

The seller-contractor-third mortgagee defended and sought affirmative relief. Its theory was that it had been misled by the set aside letter shown to it by the lender's attorney. It claimed that it never would have agreed to close if it had known about the requirement that the buyer have a $1,000,-000 line of credit and that, consequently, the lender's first mortgage should be equitably subordinated to its third mortgage. The trial court had agreed, but rejected the seller's claim for damages based upon the theory of promissory estoppel.[164] The third mortgagee appealed.

Subsequently, the lender, a federal savings bank, was declared insolvent and the Resolution Trust Corporation was appointed its receiver. The RTC filed a motion in the appellate court to dismiss the appeal because section 1823(e) shields the FDIC and the RTC from claims or defenses based upon an agreement not continuously in the official record of the lending institution. Unfortunately for the third mortgagee, the term "agreement" had been interpreted to include misrepresentations.[165] Consequently, the RTC was entitled to judgment.

164. *Id.* at 83.
165. *Id.* (construing *Langley*, 484 U.S. at 92-93).

These cases illustrate the problem for real estate lawyers in dealing with federally regulated lenders. It is imperative that the entire agreement be embodied in the basic loan documents. Side agreements may prove illusory because they cannot be asserted against a successor to the lender. But that is something that borrowers can understand and live with if they are aware of this doctrine before making the deal. That the agreements are on the side is a natural source of suspicion. The more difficult problem, though, is that *D'Oench* or its statutory offspring may cause subsequent modifications or additions to the original agreement to also become ineffective. How can the borrower possibly insure that these documents actually are placed in and continually remain in the files of the lender? Structuring the documentation of any subsequent modification or cancellation of the loan so that it is immune from the *D'Oench* doctrine may provide the ultimate challenge.