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2006-2007 Survey of Florida Law Affecting Business Owners

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2006–2007 SURVEY OF FLORIDA LAW AFFECTING BUSINESS OWNERS

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I. INTRODUCTION

This survey reviews Florida appellate court decisions and legislation enacted during 2006 and 2007 of potential, immediate interest to business owners and their counsel. A quick glance at the table of contents reminds the reader of a few of the many distinct areas of the law that have a direct, or at least a significant peripheral impact, on doing business in Florida.

The survey does not include every case decided by the Supreme Court of Florida and the five District Courts of Appeal that could be said to affect business owners. Only those cases that appear to be of special interest, have

unusual facts, involve conflicts certified to the Supreme Court of Florida by the District Courts of Appeal, clarify or expand existing principles of law, or address matters of first impression made the cut. Several federal court decisions have also been included, the first case in the survey being a decision of the United States Supreme Court.[1]

There were also important legislative developments that persons engaging in business in Florida will need to consider. Therefore, an overview of some of the legislation enacted in 2006 and 2007 has been included. The reader's own in-depth analysis of the statutes is strongly suggested.

II. ALTERNATIVE DISPUTE RESOLUTION

A. *Arbitration*

In *Buckeye Check Cashing, Inc. v. Cardegna* (*Cardegna I*),[2] Mr. Cardegna (Cardegna) entered into an agreement with Buckeye Check Cashing, Inc. (Buckeye) that purported to require submission of all controversies to binding arbitration pursuant to the Federal Arbitration Act (FAA), if a party to the agreement (or certain third parties) elected arbitration.[3] The agreement also provided that the FAA would apply.[4] Cardegna sued Buckeye in Florida state court claiming that "Buckeye charged usurious interest rates."[5] He also alleged that the agreement violated various other Florida laws and was "criminal on its face."[6] Buckeye asked the court to order arbitration.[7] The trial court ruled that a court, not an arbitrator, decides if "a contract is illegal and void *ab initio*."[8] The Fourth District Court of Appeal reversed the trial court, but the Supreme Court of Florida reversed the Fourth District Court of Appeal.[9] The Supreme Court of Florida, ruling in favor of Cardegna, concluded that it would violate Florida public policy and contract law to enforce an arbitration clause in a contract challenged as unlawful.[10] The United States Supreme Court granted Buckeye's petition for certiorari.[11]

1. Buckeye Check Cashing, Inc. v. Cardegna (*Cardegna I*), 546 U.S. 440 (2006).
2. *Id.*
3. *Id.* at 442–43 (citing 9 U.S.C. §§ 1–16 (2000)).
4. *Id.*
5. *Id.* at 443.
6. *Cardegna I*, 546 U.S. at 443.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 446.
11. *Cardegna I*, 546 U.S. at 443.

Justice Scalia stated the issue as, "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality."[12] The United States Supreme Court, relying on its decisions in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[13] and *Southland Corp. v. Keating*,[14] reversed the Supreme Court of Florida.[15] The United States Supreme Court reaffirmed its position that an arbitration clause in a contract involving a transaction subject to the FAA is severable from the contract as a whole.[16] This is so even if the contract is alleged to be void and illegal under state law.[17] Under the FAA, the issue of the validity of the contract itself is to be heard in the first instance by the arbitrator, and this applies in both state and federal courts.[18] Had the challenge been to the validity of the arbitration clause, a court would have been the proper forum in the first instance.[19]

The Court noted that there is also a distinction between the issue of the validity of the contract, which is to be determined by the arbitrator, and the issue of the existence of a contract in the first place.[20] Included in the latter category are determinations such as whether the person against whom the contract was sought to be enforced ever signed the contract, whether the person signing had the authority to sign on behalf of an alleged principal, and issues of capacity.[21] The Court declined to rule on whether the courts or the arbitrator should decide questions regarding the existence of contract.[22] Justice Thomas dissented, stating that it remains his position that the Federal Arbitration Act (FAA) does not apply in state court proceedings.[23]

In light of the United States Supreme Court's decision in *Cardegna I*, Florida's appellate courts reviewed some of their decisions under the FAA.[24]

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12. *Id.* at 442.
13. 388 U.S. 395 (1967).
14. 465 U.S. 1 (1984).
15. *Cardegna I*, 546 U.S. at 448–49.
16. *Id.* at 445.
17. *Id.* at 446.
18. *Id.* at 445–46.
19. *Id.* at 445.
20. *Cardegna I*, 546 U.S. at 444.
21. *Id.* at 444 n.1.
22. *Id.*
23. *Id.* at 449 (Thomas, J., dissenting).
24. *See, e.g.*, Betts v. Fastfunding the Co. (*Betts I*), 950 So. 2d 379 (Fla. 2006) (remanding to the Fifth District Court of Appeal in light of *Cardegna I*, 546 U.S. 440); Cardegna v. Buckeye Check Cashing, Inc. (*Cardegna II*), 930 So. 2d 610 (Fla. 2006) (on remand from the United States Supreme Court); Fastfunding the Co. v. Betts (*Betts II*), 951 So. 2d 116 (Fla. 5th Dist. Ct. App. 2007) (on remand from the Supreme Court of Florida, remanding to the trial court to refer to arbitration pursuant to *Cardegna I*). The Supreme Court of Florida in turn

In addition, several important decisions involving the Florida Arbitration Code were rendered.[25] The Supreme Court of Florida, in *O'Keefe Architects, Inc. v. CED Construction Partners, Ltd.*,[26] addressed the issue of whether the arbitrator or the trial court should have ruled on a statute of limitations defense to arbitration.[27] The case was before the Supreme Court of Florida based on conflict certified by the Fifth District Court of Appeal with the Fourth District Court of Appeal's decision in *Reuter Recycling of Florida, Inc. v. City of Dania Beach*.[28] *O'Keefe Architects, Inc.* involved a claim by CED, a contractor, against O'Keefe, an architect, for damages arising from alleged negligent design and construction.[29] The arbitration clause in question[30] provided in part that, "[i]n no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations."[31]

CED filed a demand for arbitration with the American Arbitration Association.[32] O'Keefe objected, arguing that arbitration was barred by the

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remanded *Cardegna II* to the Fourth District Court of Appeal. *Cardegna II*, 930 So. 2d at 611. The Fourth District Court of Appeal remanded the matter to the trial court, which entered an order compelling arbitration and staying proceedings. Order Granting Defendant Buckeye Check Cashing, Inc.'s Motion For An Order Compelling Arbitration And Staying Proceedings at 1, Cardegna v. Buckeye Check Cashing, Inc., No. 502001CA001162XXXOCAJ (Fla. 15th Cir. Ct. June 23, 2006); *see also* Reuter v. McKenzie Check Advance of Fla., L.L.C., 825 So. 2d 1070 (Fla. 4th Dist. Ct. App. 2002), *rev. denied*, 930 So. 2d 610 (Fla. 2006).

25. *See, e.g.*, O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd., 944 So. 2d 181 (Fla. 2006); Alterra Healthcare Corp. v. Bryant, 937 So. 2d 263 (Fla. 4th Dist. Ct. App. 2006); *see also infra* notes 27, 39, 61.

26. 944 So. 2d 181 (Fla. 2006).

27. *Id.* at 183.

28. 859 So. 2d 1271 (Fla. 4th Dist. Ct. App. 2003).

29. *O'Keefe Architects, Inc.*, 944 So. 2d at 183. CED fixed certain problems on a construction project upon demand of the property owners and the property owners assigned to CED their claim against O'Keefe, the architect. *Id.* The Supreme Court of Florida declined to address O'Keefe's contention that the claim was not assignable, since the issue was not included in the conflict certified by the Fifth District Court of Appeal. *Id.* at 183 n.2.

30. *Id.* The arbitration clause was contained in two contracts between O'Keefe Architects, Inc., as the architect, and Vero Club Partners Ltd. and Clearwater Phase I Partners Ltd., the property owners who had assigned their claims against O'Keefe to CED Construction Partners, Ltd. *Id.* at 183. CED Construction Partners, Ltd. was not a party to the agreements that contained the arbitration clauses. *O'Keefe Architects, Inc.*, 944 So. 2d at 183.

31. *Id.* at 184. The parties agreed, and the Court confirmed, that the *Florida Arbitration Code*, not the Federal Arbitration Act, applied, there being no interstate commerce involved. *Id.*; *see also* FLA. STAT. §§ 682.01–.22 (2005).

32. *O'Keefe Architects, Inc.*, 944 So. 2d at 183.

statute of limitations, but the arbitrator disagreed.[33] O'Keefe then filed a complaint in the Circuit Court, seeking a ruling that the trial court, not the arbitrator, was required to decide the statute of limitations issue.[34] The trial court declined to grant the requested relief and O'Keefe appealed.[35] The Fifth District Court of Appeal agreed with the trial court, but certified conflict with *Reuter Recycling of Florida, Inc.*[36] The Supreme Court of Florida, interpreting the Florida Arbitration Code and citing *Stinson-Head, Inc. v. City of Sanibel*,[37] upheld the decision of the Fifth District Court of Appeal.[38] In resolving the conflict, the Court noted that both cases involved arbitration provisions with "similar language regarding timelines,"[39] and concluded that under the broad clauses in question, the arbitrator was the proper arbiter of the statute of limitations defense.[40]

Alterra Healthcare Corp. v. Bryant[41] arose from Mrs. Bryant's residency at Alterra Healthcare Corp's (Alterra) Vero Beach facility and later, another Alterra facility in Vero Beach.[42] Mrs. Bryant's husband, acting under a durable power of attorney given to him by Mrs. Bryant, checked her into both facilities.[43] Mr. Byrant signed a residency agreement on Mrs. Bryant's behalf when she entered the first facility, but no agreement was signed when she moved to the second facility.[44] Mr. Bryant, as his wife's attorney-in-fact, sued Alterra, alleging violation of the Assisted Living Facilities Act and negligence.[45] The residency agreement contained arbitration provisions,

33. *Id.* The arbitrator ruled against O'Keefe on another issue as well as the statute of limitations defense. *Id.* at 184.

34. *Id.* O'Keefe also argued that CED could not demand arbitration "because the contracts were not assignable." *Id.*

35. *O'Keefe Architects, Inc.*, 944 So. 2d at 184.

36. *Id.*

37. 661 So. 2d 119 (Fla. 2d Dist. Ct. App. 1995).

38. *O'Keefe Architects, Inc.*, 944 So. 2d at 185–86, 188.

39. *Id.* at 184.

40. *Id.* at 188. The Court noted that there were three threshold issues that a court has to consider with respect to a motion to compel arbitration. *Id.* at 185. First, is there "a valid written agreement to arbitrate"; second, is there an arbitrable issue; and third, was the right to arbitrate waived. *Id.* (citing Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999)). The Court noted that there was agreement between CED and O'Keefe that all of these requirements were satisfied. *O'Keefe Architects, Inc.*, 944 So. 2d at 185 n.4.

41. 937 So. 2d 263 (Fla. 4th Dist. Ct. App. 2006).

42. *Id.* at 265.

43. *Id.*

44. *Id.* at 270. The trial court also found that the residency agreement applied to Mrs. Bryant's stay at the second facility as well as the first facility. *Id.* at 271. See *infra* note 398–401 and accompanying text.

45. *Alterra Healthcare Corp.*, 937 So. 2d at 265.

and Alterra moved to compel arbitration.[46] The arbitration provisions purported to prohibit punitive damages, limit non-economic damages, prohibit attorney's fees, waive the right to appeal, and limit discovery.[47] The trial court found that these provisions were void as against public policy under chapter 400 of the *Florida Statutes* and the Nursing Home Resident's Rights Act, and were "egregiously unconscionable."[48] However, the residency agreement had a severance clause that essentially provided that the invalidity of some parts of the agreement would not affect the validity of other parts.[49] The trial court severed the unenforceable provisions from the enforceable portions of the arbitration clause and ordered that the parties proceed to binding arbitration.[50] Alterra appealed and Mrs. Bryant cross-appealed.[51] The Fourth District Court of Appeal stated that the remedial nature of the Assisted Living Facilities Act was a matter of first impression for the Florida appellate courts.[52] Analogizing the Assisted Living Facilities Act to the Nursing Home Residents Act, sections 400.022 and 400.023 of the *Florida Statutes*, the court held that the former was also a remedial statute designed to protect its subjects.[53] As a remedial statute, it had the effect of voiding, as against public policy, the arbitration agreement's punitive damages prohibition, limit on non-economic damages, attorney's fee award limitation, and restrictions on discovery.[54] In addition, the Florida Arbitration Code was expressly made applicable by the agreement.[55] The Florida Arbitration Code allows "a limited right of appeal."[56] Thus, prohibiting the appeal was also void as against public policy.[57]

Alterra argued that the arbitrator, not the court, should have decided the validity of the limitations contained in the contract.[58] The Fourth District Court of Appeal stated that limit of liability provisions are proper for the arbitrator, not the trial court, unless they are part of the arbitration clause

46. *Id.*
47. *Id.*
48. *Id.* at 265–66.
49. *Id.* at 270.
50. *Alterra Healthcare Corp.*, 937 So. 2d at 265–66.
51. *Id.* at 265.
52. *Id.* at 266.
53. *Id.* The Nursing Home Resident's Act was held to be remedial in *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62, 63 (Fla. 4th Dist. Ct. App. 2003).
54. *Alterra Healthcare Corp.*, 937 So. 2d at 265.
55. *Id.* at 267.
56. *Id.*
57. *Id.*
58. *Id.* at 267–68.

itself.[59] The Fourth District Court of Appeal concluded that the limit of liability provisions were part of the arbitration clause itself, and therefore, the trial court's consideration of the clauses in the first instance, even before severing them, was proper. In an attempt to convince the court to rule to the contrary, Alterra argued that the United States Supreme Court's decision in *Cardegna I* applied, and under *Cardegna I*, a challenge to the validity of the contract had to go to the arbitrator.[60] The Fourth District distinguished *Cardegna I* since Mrs. Bryant's challenge was to the provisions of the arbitration clause itself.[61]

The Fourth District Court of Appeal's comments regarding *Cardegna I* are interesting. Before distinguishing the facts of *Alterra* from those of *Cardegna I*, a case that had been before the Fourth District Court of Appeal and whose opinion was affirmed by the United States Supreme Court, [62] the Fourth District Court of Appeal said that "[i]n [*Cardegna I*], the Supreme Court of the United States reaffirmed the principle that 'regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.'"[63]

However, in *Cardegna I*, the United States Supreme Court had before it an agreement subject to the FAA.[64] The agreement in *Alterra* expressly provided that the Florida Arbitration Code applied.[65] Did the Fourth District Court of Appeal in *Alterra* hold that the principle of *Cardegna I* applies to proceedings in Florida state courts subject to the Florida Arbitration Code? Or was the implication that even if *Cardegna I* applied, the facts were distinguishable because the challenge, in the court's view, was to the arbitration

59. *Alterra Healthcare Corp.*, 937 So. 2d at 267; *but see* O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd., 944 So. 2d 181, 188 (Fla. 2006) (statute of limitations defense based on a provision contained within the arbitration clause was proper for the arbitrator in the first instance). *See also supra* notes 31–33 and accompanying text. *Alterra Healthcare Corp.* was decided on September 13, 2006, about a month before *O'Keefe Architects, Inc.* was decided by the Supreme Court of Florida on October 19, 2006. *O'Keefe Architects, Inc.*, 944 So. 2d at 181; *Alterra Healthcare Corp.*, 937 So. 2d at 263. *Cardegna I* was decided by the United State Supreme Court on February 21, 2006. Buckeye Check Cashing, Inc. v. Cardegna (*Cardegna I*), 546 U.S. 440 (2006).

60. *Alterra Healthcare Corp.*, 937 So. 2d at 268.

61. *Id.* Had the limitations been somewhere else in the agreement, would the result have been different? This is reminiscent of Judge Schwartz's dissent in *Cutler v. Cutler*, 32 Fla. L. Weekly D583, D586 (3d Dist. Ct. App. Feb. 28, 2007) (Schwartz, J., dissenting). *See also infra* note 1296 and accompanying text.

62. *Cardegna I*, 546 U.S. at 443.

63. *Alterra Healthcare Corp.*, 937 So. 2d at 268.

64. *See id*; *Cardegna I*, 546 U.S. at 442–43.

65. *Alterra Healthcare Corp.*, 937 So. 2d at 267.

clause itself rather than the contract? The issue of severability was also considered by the Second District Court of Appeal in *Reeves v. Ace Cash Express, Inc.*[66] Mary Reeves, alleging violations of the Florida Consumer Collection Practices Act (FCCPA), sued Ace Cash Express, Inc.[67] The trial court required her to arbitrate her dispute with Ace Cash Express, Inc. and she appealed.[68] She argued on appeal that enforcement of the arbitration clause violated public policy, claiming that the arbitration clause failed to afford her all of the rights and remedies provided under the FCCPA.[69] The Second District Court of Appeal first noted that under *Seifert v. U.S. Home Corp.*,[70] a court, before compelling arbitration, must determine that: 1) there is a valid written agreement to arbitrate; 2) there is an arbitrable issue; and 3) the right to arbitration has been waived.[71] With respect to prong two of the test,[72] Ms. Reeves contended that the issues were not arbitrable because of the alleged failure to provide the rights available under the FCCPA, which caused the arbitration agreement to be against public policy.[73]

The court, before considering the public policy argument, addressed the question of whether, as a matter of law, claims under the FCCPA are not arbitrable.[74] The court drew an analogy to its reasoning in *Orkin Exterminating Co. v. Petsch*,[75] a case involving arbitration under the Florida Deceptive and Unfair Trade Practices Act.[76] There, as in *Reeves*, the Second District Court of Appeal concluded that there was no express provision in the applicable statute that would demonstrate the legislature's intent to preclude arbitration.[77] Having so determined, the court in *Reeves* noted that the question of whether arbitration of FCCPA claims was against public policy was an issue of first impression.[78]

The court concluded that the arbitration agreement did not, with one exception, prevent Reeves from asking for relief otherwise available under the

66. 937 So. 2d 1136, 1138 (Fla. 2d Dist. Ct. App. 2006), *rev. denied* 952 So. 2d 1191 (Fla. 2007).
67. *Id.* at 1137.
68. *Id.*
69. *Id.*
70. 750 So. 2d 633 (Fla. 1999).
71. *Reeves*, 937 So. 2d at 1137 (citing *Seifert*, 750 So. 2d at 636).
72. The Second District Court of Appeal affirmed the trial court's determination under prong one of the test that there was a valid written agreement to arbitrate. *Reeves*, 937 So. 2d at 1137.
73. *Id.*
74. *Id.*
75. 872 So. 2d 259 (Fla. 2d Dist. Ct. App. 2004).
76. *Id.* at 261; *see also* FLA. STAT. §§ 501.201–.213 (2007).
77. *Petsch*, 872 So. 2d at 261; *see also Reeves*, 937 So. 2d at 1137.
78. *Reeves*, 937 So. 2d at 1137.

FCCPA.[79] The exception related to the portion of the arbitration clause that precluded class actions, which provision was contrary to the FCCPA.[80] Since the arbitration agreement contained a severability clause, the class action prohibition could be severed, leaving the remaining portions of the arbitration agreement intact.[81] With respect to all of the other forms of relief that Reeves claimed were not available in arbitration, the court observed that although the arbitration clause did not specifically state the types of relief an arbitrator may grant, an arbitrator generally has the power to fashion equitable remedies.[82] The court rejected the public policy argument and affirmed.[83]

The Third District Court of Appeal, in *Roth v. Cohen*,[84] in determining if a party had waived arbitration, considered both prong two and prong three of the *Seifert* test.[85] Mr. Roth entered into a contract with Mr. Cohen's company pursuant to which Mr. Cohen would provide home decoration services and obtain design items for Mr. Roth.[86] The design items were to be provided at cost.[87] The contract contained an arbitration clause.[88] After Mr. Cohen and Mr. Roth had a falling out, Mr. Roth and his wife, who was not a party to the contract, met with, and later sent a letter to, the third-party who had recommended Mr. Cohen.[89] At the meeting and in the letter, the Roths questioned both Mr. Cohen's billing practices and the continued referral of Mr. Cohen's services by the third person to others in their community.[90] Mr. Cohen then sued the Roths for libel, slander, and tortious interference.[91] The Roths filed a counterclaim against Mr. Cohen, alleging, among other claims,

79. *Id.* at 1137–38.
80. *Id.* at 1138.
81. *Id.*
82. *Id.* at 1137. The court also noted that an arbitrator could award punitive damages for a statutory tort under the FCCPA, even though the arbitration agreement did not specifically so provide. *Reeves*, 937 So. 2d at 1138. The court relied on its recent decision in *Morton v. Polivchak*, where the court held that an arbitrator may award punitive damages for fraud. 931 So. 2d 935, 941 (Fla. 2d Dist. Ct. App. 2006).
83. *Reeves*, 937 So. 2d at 1137–38.
84. 941 So. 2d 496 (Fla. 3d Dist. Ct. App. 2006).
85. *Id.* at 500.
86. *Id.* at 498.
87. *Id.*
88. *Id.* The relevant clause provided for arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement or the breach thereof." *Roth*, 941 So. 2d at 498 (emphasis and quotations omitted).
89. *Id.* at 498–99.
90. *Id.*
91. *Id.* at 499. The category of the tortious interference claim is not specified in the opinion. *See id.* at 498–501.

breach of contract, fraud, and fraud in the inducement.[92] The Roths also filed a third-party complaint on these grounds against Mr. Cohen's company.[93]

Mr. Cohen and his company moved to compel arbitration of the Roths' counterclaim and third-party complaint.[94] The trial court ordered the parties to arbitration on the counterclaim and third-party complaint, and the Roths appealed.[95] Mr. Cohen argued on appeal that under *Seifert,* his libel and slander claims against the Roths were not subject to arbitration.[96] Therefore, he could not, by filing suit with respect to those claims, be said to have waived arbitration of the counterclaim and third-party complaint.[97] The Third District Court of Appeal quoted the Supreme Court of Florida in *Seifert,* where the court stated that even if there are "'broad arbitration provisions, the determination of whether a particular claim must be submitted to arbitration . . . depends on the existence of some nexus between the dispute and the contract containing the arbitration clause.'"[98] The Third District Court of Appeal allowed that under *Seifert,* for a tort claim to be subject to an arbitration clause, there has to be at least an issue "'the resolution of which requires reference to . . . the contract itself.'"[99] The court found that Mr. Cohen's claims against the Roths had sufficient nexus with the contract to bring it within the provisions of the arbitration clause.[100] Further, by filing suit against the Roths, Mr. Cohen waived his right to arbitration.[101] Mr. Cohen could not insist that the Roths arbitrate the counterclaim and third-party complaint and at the same time proceed to court for resolution of his claims against the Roths.[102] The Third District Court of Appeal reversed the trial court's order compelling arbitration.[103]

92. *Roth,* 941 So. 2d at 499.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 500.
97. *See Roth,* 941 So. 2d at 500.
98. *Id.* at 499 (quoting Seifert v. U.S. Home Corp., 750 So. 2d 633, 638 (Fla. 1999)).
99. *Id.* (quoting *Seifert,* 750 So. 2d at 638).
100. *Id.* at 500.
101. *Id.* at 501.
102. *Roth,* 941 So. 2d at 501.
103. *Id.* The appellate court reversed only as to the counterclaim against Mr. Cohen, not the arbitrability of the third-party complaint against his company, since the Roths did not argue this issue on appeal. *Id.* at 498 n.1.

B. *Mediation*

An agreement reached in mediation was reduced to writing and signed by the parties and their attorneys in *Raho of Pass-A-Grille, Inc. v. Pass-A-Grille Beach Motel, Inc.*[104] A consent order adopting the mediation agreement was signed by the trial judge.[105] However, when presented with motions by both parties to enforce the agreement, the trial judge held that there was no agreement because there was no "real meeting of the minds."[106] The Second District Court of Appeal found that while the agreement was ambiguous in certain respects, it was not void.[107] The parties were in agreement as to the essential terms and intended that the agreement bind them.[108] The parties' subsequent disagreement about the meaning of the terms and what was required under the agreement did not warrant the conclusion that there was no meeting of the minds.[109] The trial court should have resolved any ambiguities based on the evidence introduced rather than concluding that there was no agreement.[110] Therefore, the decision was reversed and remanded for the court to consider the evidence and resolve the ambiguity.[111]

The First District Court of Appeal held that the party seeking to enforce a mediation settlement agreement failed to meet its "strict burden" of proof that the other party's attorney had "'clear and unequivocal authority to settle'" the case in *Fivecoat v. Publix Super Markets, Inc.*[112] In this workers' compensation case, the Judge of Compensation Claims (JCC) concluded that a valid settlement agreement had been reached during mediation between the claimant and her employer.[113] The JCC ordered the claimant to sign the settlement papers.[114] The claimant appealed.[115] The appellate court found that the record showed both a misunderstanding between the claimant and her attorney and that the attorney did not have the requisite authority to settle.[116] The First District Court of Appeal, did, however, observe that "[a]dherence

104. 923 So. 2d 564, 565 (Fla. 2d Dist. Ct. App. 2006).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Raho of Pass-A-Grille, Inc.*, 923 So. 2d at 565 (citing Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp., 302 So. 2d 404, 408 (Fla. 1974)).
110. *Id.*
111. *Id.* at 565–66.
112. 928 So. 2d 402, 403 (Fla. 1st Dist. Ct. App. 2006) (quoting Sharick v. Se. Univ. of Health Servs., Inc., 891 So. 2d 562, 565 (Fla. 3d Dist. Ct. App. 2004)).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 403–04.

to this rule does not preclude the application of principles of equity when a party has relied to its irreparable detriment on the representations of the opposing attorney."[117] The First District Court of Appeal reversed and remanded.[118]

In *DVDPlay, Inc. v. DVD 123 LLC*,[119] the Third District Court of Appeal held that a mediation clause in a franchise agreement survived the termination of the agreement.[120] The agreement contained a survival provision that expressly referred by section number to the mediation clause.[121] DVD 123 LLC requested mediation of issues involving alleged breaches of performance under the franchise agreement.[122] DVDPlay, Inc. refused to mediate, taking the position that as the result of DVD 123 LLC's breach of the agreement and DVDPlay, Inc.'s termination of the agreement, there was nothing to mediate.[123] The Third District Court of Appeal disagreed with that argument, but concluded that mediation had been waived by DVD 123 LLC.[124] By not seeking judicial assistance in compelling the mediation, and filing suit instead, DVD 123 LLC waived mediation.[125]

C. *Enforcement of Settlement Agreements*

In *Architectural Network, Inc. v. Gulf Bay Land Holdings II, Ltd.*,[126] the trial court was asked to enforce a purported settlement agreement.[127] Architectural Network, Inc. alleged that its attorney did not have the authority to settle on its behalf.[128] The trial court did not hold an evidentiary hearing before it ruled that there was a valid settlement agreement and entered an order enforcing the agreement.[129] On appeal, Gulf Bay Land Holdings II, Ltd. argued that the existence of the contract was undisputed.[130] The Second District Court of Appeal cited *Fivecoat*, noting that the transcript failed to show that Gulf Bay Land Holding II, Ltd. had demonstrated that the exis-

117. *Fivecoat*, 928 So. 2d at 404. The court noted that application of this exception would require factual determinations and therefore "is appropriately raised" at the trial level. *Id.*
118. *Id.*
119. 930 So. 2d 816 (Fla. 3d Dist. Ct. App. 2006).
120. *Id.* at 819.
121. *Id.*
122. *Id.* at 817.
123. *Id.*
124. *DVDPlay, Inc.*, 930 So. 2d at 818.
125. *See id.* at 818–19.
126. 933 So. 2d 732 (Fla. 2d Dist. Ct. App. 2006).
127. *Id.* at 733.
128. *Id.*
129. *Id.* at 733–34.
130. *Id.* at 733.

tence of a valid settlement agreement was undisputed.[131] Architectural Network, Inc. was entitled to an evidentiary hearing on the issue of its attorney's authority to settle.[132]

In *Masztal v. City of Miami,*[133] the trial court set aside a settlement based upon breach by the original plaintiffs in what was to be a class action, and their attorneys, of the fiduciary duty owed by them to Mr. Masztal and the others in the class.[134] The Third District Court of Appeal agreed with the trial court that the attorneys breached their fiduciary duty to those other class members.[135] This was true even though the class had not been certified at the time the settlement agreement was concluded.[136] The trial court found that this "was an implied class action."[137] The original lawsuit had been brought as a class action and certification was certain; it was a mere ministerial act.[138]

III. BUSINESS ENTITIES AND AGREEMENTS

A. *Franchises*

In addition to the waiver of mediation issue discussed earlier in the survey, the Third District Court of Appeal, in *DVDPlay, Inc.* was called upon to determine if a forum selection provision survived the termination of a franchise agreement.[139] The principal places of business of DVDPlay, Inc., the franchisor, and DVD 123 LLC, the franchisee, were California and Florida, respectively.[140] The franchise agreement between DVDPlay, Inc. and DVD 123 LLC provided that any legal action instituted under the agreement must be brought in California.[141] The agreement also stated that disputes between the parties were "first . . . subject to non-binding mediation."[142] Disputes arose and the parties accused each other of breach of contract.[143] DVDPlay, Inc. refused to go to mediation and declared that the agreement was terminated.[144] DVD 123 LLC, alleging breach of contract, sued DVDPlay, Inc. in

131. *Architectural Network, Inc.*, 933 So. 2d at 733.
132. *Id.* at 733–34.
133. 32 Fla. L. Weekly D1881 (3d Dist. Ct. App. Aug. 8, 2007).
134. *Id.* at D1881, D1883.
135. *Id.* at D1884.
136. *Id.* at D1883.
137. *Id.*
138. *Masztal*, 32 Fla. L. Weekly at D1883.
139. DVDPlay, Inc. v. DVD 123 LLC, 930 So. 2d 816, 817 (Fla. 3d Dist. Ct. App. 2006).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *DVDPlay, Inc.*, 930 So. 2d at 817.

Florida.[145] DVDPlay, Inc. moved to dismiss the complaint alleging improper venue based on the forum selection clause.[146] The trial court denied the motion holding that because DVDPlay, Inc. "had repudiated the agreement, it could not enforce the forum selection clause."[147] The trial court, in ruling for DVD 123 LLC, relied on *Aberdeen Golf & Country Club v. Bliss Construction, Inc.*[148] for the proposition that when the contract was terminated, the forum selection clause was also terminated.[149] The Third District Court of Appeal distinguished *Aberdeen* by noting that the arbitration clause involved there was intended to function during the term of the agreement.[150] Furthermore, the court noted how the *Aberdeen* court stressed the lack of a survival clause in the agreement.[151] The Third District Court of Appeal reversed.[152] The forum selection provision will survive unless it is expressly or implicitly provided in the agreement that the forum selection clause is not intended to survive termination of the agreement.[153] The trial court must enforce a mandatory forum selection clause absent a showing that it would be unreasonable or unfair, as the result of unequal bargaining positions of the parties to enforce the provision—an argument the Third District Court of Appeal noted had not been raised by DVD 123 LLC.[154]

B. *Limited Liability Companies*

The operating agreement of a limited liability company specified as an event of dissolution the "'sale or other disposition of all or substantially all of [the company's] property and assets.'"[155] The agreement also provided that the company's "net cash flow" after taxes would be reinvested or, at the election of the members, distributed to them.[156] The company purchased some real estate, and then it sold the real estate at a profit.[157] As a result, the company then held only cash.[158] A member sought to have the sale declared a

145. *Id.*
146. *Id.*
147. *Id.*
148. 932 So. 2d 235 (Fla. 4th Dist. Ct. App. 2005).
149. *DVDPlay, Inc.*, 930 So. 2d at 818.
150. *Id.* at 819.
151. *Id.*
152. *Id.* at 820.
153. *Id.* at 819–20.
154. *DVDPlay, Inc.*, 930 So. 2d at 818.
155. O'Neal v. Blackerby, 950 So. 2d 424, 425 (Fla. 1st Dist. Ct. App. 2006).
156. *Id.*
157. *Id.* at 425–26.
158. *See id.* at 426.

dissolution event, alleging there were no assets.[159] The other parties asserted that the cash was being held for reinvestment, was an asset, and was a substantial asset.[160] The trial court, on motion for summary judgment, ruled, as a matter of law, that the cash was not a company asset and the sale was a dissolution event.[161] The First District Court of Appeal reversed.[162] The operating agreement was ambiguous on the issue of whether cash would be excluded from the definition of assets for purposes of triggering a dissolution event, and therefore summary judgment was inappropriate.[163] Judge Benton concurred in the reversal, but observed that after considering all evidence on the point, the trial judge might very well again rule the same way.[164]

Recent legislation modified the method of identifying limited liability companies.[165] The only approved abbreviation or designation is now "LLC" or "L.L.C." used as the last words of the name of every limited liability company.[166] "L.C." and "limited company" are no longer approved.[167] "Limited Liability Company" and "Ltd. Liability Co."—or some combination of the words and abbreviations—may still be used as the last words.[168] "The name of the limited liability company must be distinguishable on the records of the . . . Department of State" except they do not have to be distinguishable from 1) "fictitious name registrations filed pursuant to [section] 865.09" of the *Florida Statutes*, and "general partnership registrations filed pursuant to [section] 620.8105" of the *Florida Statutes*; or 2) when use of an indistinguishable name is consented to in writing by the "owner entity" and "filed with the Department of State" at the time the limited liability company registers its name.[169] Except for names falling within those exceptions, the Department of State may no longer disregard other recorded names.[170]

For limited liability companies formed before July 1, 2007, the distinguishability of names requirement will not apply unless and until that limited liability company files documents after June 30, 2007, that affect its name.[171]

159. *Id.*
160. *O'Neal*, 950 So. 2d at 426.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* (Benton, J., concurring).
165. Act effective Jan. 1, 2008, ch. 2007-134, § 1, 2007 Fla. Sess. Law Serv. 1115, 1116–17 (West) (amending FLA. STAT. § 608.406 (2007)).
166. *Id.* § 1, 2007 Fla. Sess. Law Serv. at 1116 (amending FLA. STAT. § 608.406(1)(a)).
167. *Id.*
168. *Id.*
169. *Id.* (amending FLA. STAT. § 608.406(2)).
170. Ch. 2007-134, § 1, 2007 Fla. Sess. Law Serv. 1117 (amending FLA. STAT. § 608.406(3)).
171. *Id.* (amending FLA. STAT. § 608.406(4)).

A conforming amendment was made to section 608.407 of the *Florida Statutes* with respect to the name of the limited liability included in the articles of incorporation.[172]

C. *Partnerships*

The Fourth District Court of Appeal, in the context of a partnership dissolution, considered the issue of modification of the terms of a partnership agreement by the subsequent conduct of the partners.[173] Rhodes entered into a partnership agreement with BLP Associates, Inc.[174] The written general partnership agreement provided that if money, in addition to the initial capital contributions, was necessary for partnership operations, "then such additional sums . . . may be (but shall not be required to be) advanced as loans from the Partners."[175] Rhodes, as managing partner, requested more money from the partners, but he described his requests as "capital calls" and "capital contributions."[176] The partners, including Rhodes, sent money, with one of the other partners referring to the payment as a capital contribution.[177] No partner referred to these payments as loans, and no one objected to Rhodes' characterization of the payments.[178] In addition, the partnership's federal income tax returns for the pertinent years classified the additional contributions as capital contributions.[179] The partnership was eventually dissolved, a receiver was appointed, and the receiver submitted a final accounting.[180] The trial court determined that for the purpose of distributing partnership funds, the additional contributions were capital contributions, not loans.[181]

Rhodes appealed, alleging that these contributions were loans.[182] The Fourth District Court of Appeal had no difficulty confirming the trial court's ruling on the characterization of the payments as capital contributions.[183] The court observed that a written agreement can "be modified by the [later] conduct or course of dealing of the parties," provided there is mutual consent and consideration for the modification, even when the agreement purports to

172. *Id.* § 2, 2007 Fla. Sess. Law Serv. at 1117 (amending FLA. STAT. § 608.407 (2007)).
173. Rhodes v. BLP Assocs., Inc., 944 So. 2d 527, 530 (Fla. 4th Dist. Ct. App. 2006).
174. *Id.* at 528.
175. *Id.* at 529.
176. *Id.*
177. *Id.*
178. *Rhodes*, 944 So. 2d at 529.
179. *Id.*
180. *Id.* at 528.
181. *Id.*
182. *See id.* at 528–29.
183. *See Rhodes*, 944 So. 2d at 530.

allow only written modification.[184] The court disagreed with *Cox v. CSX Intermodal, Inc.*[185] and *Flagship National Bank v. Gray Distribution Systems, Inc.*[186] to the extent that those cases suggested "that a written contract cannot be modified by the subsequent course of conduct of the parties" if the conduct is inconsistent with the terms of the agreement.[187] Furthermore, the court noted that even if *Cox* stated the law correctly, the rule would be inapplicable.[188] There was nothing inconsistent between the language of the partnership provision at issue and the parties' subsequent conduct treating the additional funds as capital contributions.[189]

A second issue in the case involved a loan by the other partners to Rhodes that enabled Rhodes to make his initial capital contribution.[190] The promissory note given by Rhodes to the other partners provided that the obligation matured when "capital contributions were 'paid in full.'"[191] The other partners persuaded the trial court to retain Rhodes' share of the partnership capital distributions until their suit against him on the note was concluded.[192] The Fourth District Court of Appeal reversed on this issue, finding that neither the promissory note nor the partnership agreement provided for this hold back.[193] The trial court was not permitted to aid the other partners in the collection of debt in that manner.[194]

D. *Corporations and Shareholder/Buy-Sell Agreements*

In *Alvarez v. Rendon*,[195] two pathologists formed a professional association for the practice of medicine.[196] Dr. Rendon owned a slight majority of the stock.[197] The employment contract Dr. Alvarez subsequently signed provided that he could be terminated for cause and specified what would constitute cause.[198] His employment could also be terminated without cause, but in that event, Dr. Alvarez would be entitled to notice and compensation during

184. *Id.*
185. 732 So. 2d 1092 (Fla. 1st Dist. Ct. App. 1999).
186. 485 So. 2d 1336 (Fla. 3d Dist. Ct. App. 1986).
187. *Rhodes*, 944 So. 2d at 531.
188. *Id.*
189. *Id.*
190. *Id.* at 529.
191. *Id.*
192. *Rhodes*, 944 So. 2d at 531.
193. *Id.* at 532.
194. *Id.*
195. 953 So. 2d 702 (Fla. 5th Dist. Ct. App. 2007).
196. *Id.* at 705.
197. *Id.* Rendon owned 51% and Alvarez owned 49% of the stock. *Id.*
198. *Id.*

the notice period.[199] The doctors also entered into a buy-sell agreement under which Dr. Alvarez would be paid a specified sum for his shares in the event of termination without cause, but would only receive half of that amount in the event of termination for cause or his voluntary termination.[200] The buy-sell agreement contained a noncompete provision effective upon redemption of shares, but not conditioned on the reason for termination of employment.[201]

Dr. Rendon, acting as the professional association's president, terminated Dr. Alvarez's employment and attempted to begin making "for cause" buy-out payments.[202] Dr. Alvarez did not accept the payments because he claimed he was improperly fired for cause and therefore entitled to the larger—without cause—buy-out amount.[203] After Dr. Alvarez left the practice, he began working in South Florida for a medical laboratory that had clients in the geographic area specified in the noncompete clause.[204]

Dr. Alvarez sued Dr. Rendon and the professional association alleging breach of the employment contract based on alleged improper termination for cause and improper reduction of his salary.[205] He also claimed that they breached the buy-sell agreement.[206] Dr. Rendon and the professional association counterclaimed, alleging breach of the noncompete provision by Dr. Alvarez.[207] The jury found that Dr. Rendon was not justified in terminating Dr. Alvarez for cause.[208] Dr. Alvarez was awarded the difference in the amount Dr. Rendon tendered and the amount Dr. Alvarez would have received for the buy-out without cause, plus damages based on the wrongful termination for cause.[209] The jury also found that Dr. Alvarez was bound by, and violated, the restrictive covenant.[210] The trial court awarded damages to Dr. Rendon and granted her motion for a permanent injunction.[211] Dr. Alvarez appealed, and Dr. Rendon and the professional association cross-appealed.[212]

199. *Alvarez*, 953 So. 2d at 705.
200. *Id.*
201. *Id.*
202. *Id.* (internal quotations omitted).
203. *Id.*
204. *Alvarez*, 953 So. 2d at 705.
205. *Id.*
206. *Id.*
207. *Id.* at 706.
208. *Id.*
209. *Alvarez*, 953 So. 2d at 706.
210. *Id.*
211. *Id.* at 707. The effect of the monetary awards was a net judgment to the professional association of $602,970.48. *Id.*
212. *Id.* at 708.

The Fifth District Court of Appeal reversed and remanded, concluding that the jury's verdict was inconsistent.[213] The jury could not have found that Dr. Alvarez violated the noncompete clause if they also found that Dr. Rendon's termination for cause was improper.[214] Since Dr. Alvarez was not terminated for cause, he was entitled to a greater payment for his shares under the agreement, and since that amount was not paid, and his shares were not redeemed, his obligations under the noncompete clause could not have arisen.[215] The proper remedy for the inconsistent verdict was a new trial.[216] However, in order to preserve the issue of inconsistency in the verdict for review on appeal, the party alleging the inconsistency must have raised it before the jury was discharged, which the Fifth District Court of Appeal concluded that Dr. Alvarez did.[217]

In an unusual case, *Henao v. Professional Shoe Repair, Inc.*,[218] it was the buyer of a business who was prohibited from soliciting business from existing customers of the business he was buying.[219] The buyer and the seller had been in business together, and their corporation had a very lucrative contract with a customer.[220] It was that relationship that formed the basis for the restrictive covenant and the litigation.[221] The seller sold his equal share of the business to the buyer, and the buyer assigned to the seller all of the buyer's interest in the contract with the customer.[222] The buyer also agreed that he would not solicit that customer for ten years.[223] The seller sought an injunction, alleging that the Buyer breached the covenant not to compete.[224] The trial court found that the covenant was void and unenforceable.[225] The Fifth District Court of Appeal was called upon to determine if the provisions of section 542.335 of the *Florida Statutes*, with respect to enforcement of restrictive covenants against a "seller," also apply to enforce restrictive covenants against a buyer.[226] Based on the purpose stated in the statute to construe restrictive covenants in a manner that will provide "rea-

213. *Alvarez*, 953 So. 2d at 707, 713.
214. *See id.* at 710.
215. *See id.*
216. *Id.* at 712.
217. *Id.* at 711.
218. 929 So. 2d 723 (Fla. 5th Dist. Ct. App. 2006).
219. *Id.* at 725.
220. *Id.* at 724.
221. *See id.*
222. *Id.*
223. *Henao*, 929 So. 2d at 724.
224. *Id.* at 724–25.
225. *Id.* at 725.
226. *Henao*, 929 So. 2d at 727; *see also* FLA. STAT. § 542.335(1)(d)(3) (1999).

sonable protection to all legitimate business interests," the court concluded that the provisions apply to buyers as well as sellers.[227] Furthermore, although the duration of the restrictive covenant was in excess of seven years and therefore presumptively unreasonable under section 542.335 of the *Florida Statutes*, the seller showed that the noncompete provision protected a legitimate interest of the seller and the provision was therefore not void or unenforceable.[228] The court had the authority to cut the agreement back to a reasonable period of time.[229] Another issue arose because the agreement only gave the buyer the right to enforce the covenant, and it was the buyer who was subject to the covenant.[230] The court noted that was an obvious misnaming of the parties and the seller could enforce the agreement.[231]

IV. CHOICE OF LAW AND CONFLICT OF LAWS

A. *Actions Based on Contract*

Mr. and Mrs. Hodges were Indiana residents.[232] They purchased a second home in Florida in 1993 where they spent about five and one-half months each year.[233] Their automobile insurance was issued to them by State Farm Mutual Automobile Insurance (State Farm) in Indiana.[234] During their 2001 stay in Florida, Mr. and Mrs. Roach, the Hodges' neighbors, while passengers in the Hodges' car, were involved in a crash with another car.[235] Mr. and Mrs. Roach were injured and they sued both Mr. Hodges, who was driving the car, and the driver of the other car.[236] They also claimed uninsured motorist benefits under the Hodges' Indiana insurance policy.[237] Because the Indiana and Florida uninsured motorist laws differed, the Roaches could receive compensation under Florida law that they could not receive under Indiana law.[238] The Second District Court of Appeal ruled that Florida law could apply to the Indiana policy, provided that Florida had a "significant connection" to the insurance policy, and State Farm had "reasonable

227. *Henao*, 929 So. 2d at 727 (quoting FLA. STAT. § 542.335(1)(h)).
228. *Id.* at 728.
229. *Id.*
230. *Id.*
231. *Id.*
232. State Farm Mut. Auto. Ins. Co. v. Roach, 945 So. 2d 1160, 1168 (Fla. 2006).
233. *Id.* at 1162.
234. *Id.*
235. *Id.* Mrs. Hodges died in the accident. *Id.*
236. *Roach*, 945 So. 2d at 1162.
237. *Id.*
238. *See id.*

notice" of the Hodges' Florida connection.[239] The Second District Court of Appeal remanded the case to the trial court to make this determination,[240] and the question certified to the Supreme Court of Florida was restated by the Supreme Court of Florida as follows: "Where residents of another state who reside in Florida for several months of the year execute an insurance contract in that state, may they invoke Florida's public policy exception to the rule of *lex loci contractus* to invalidate an exclusionary clause in the policy?"[241]

The Supreme Court of Florida said no, holding that the rule providing that the law of the place where the contract was made—*lex loci contractus*—governs the insurance contract unless the public policy exception applies.[242] In other words, *lex loci contractus* is the law in Florida, but a departure from this rule can be made to enforce some paramount public policy with respect to Florida citizens.[243] The Hodges were not Florida citizens and that resolved the matter.[244] Therefore, it was not necessary to determine if Indiana law offended some paramount rule of Florida public policy.[245] The court did note, however, that in the context of insurance contracts, the exception applies only if the insurer had "reasonable notice that the insured is a Florida citizen."[246] The Hodges' Indiana citizenship made that question moot.[247]

Justice Pariente concurred, but stated that "if [she] were to write on a clean slate, [she] would apply the 'significant relationship' test."[248] Justice Pariente agreed that the result reached by the majority was required, absent receding from the Court's precedent.[249] She concluded, however, that even under the "significant relationship" test, Indiana law would have applied.[250]

Although this case did not arise in a business context, the Supreme Court of Florida's continued rejection of the "most significant relationship" test of the Restatement (Second) of Conflict of Laws, in contract cases, in-

239. *Id.* at 1163.
240. *Id.*
241. *Roach*, 945 So. 2d at 1162.
242. *Id.* at 1164–65, 1168.
243. *Id.* at 1164–65.
244. *Id.* at 1168.
245. *Id.* at 1168–69.
246. *Roach*, 945 So. 2d at 1165.
247. *Id.* at 1168. The opinion did not state if the Roaches were Florida citizens, or, if they were, if that would have changed the result. *See id.* at 1168. It would seem that the Hodges were third-party beneficiaries under the contract between the Hodges and State Farm Insurance Company. *See id.* at 1162.
248. *Id.* at 1169 (Pariente, J., concurring).
249. *Roach*, 945 So. 2d at 1169 (Pariente, J., concurring).
250. *Id.* at 1169–70.

surance related, and otherwise, is significant.[251] Justice Lewis, concurring in the result only, noted that the majority was applying "the doctrine of *lex loci contractus* in Florida more rigidly than ever before."[252] Justice Lewis' discussion regarding *Decker v. Great American Insurance Co.*,[253] a case involving a Georgia business with a Florida traveling salesman, makes a compelling argument for adopting the "significant relationship" test.[254]

B. *Tort Actions*

The First District Court of Appeal was asked to determine whether the "modified" comparative negligence law of Georgia or the "pure" comparative negligence rule of Florida applied to a car accident in Georgia between residents of Florida and Georgia.[255] The Florida resident, Mr. Connell, was commuting from his home in Florida to a project on which he was working in Georgia when his truck collided in Georgia with a compact car driven by Caleb Riggins, the Georgia resident.[256] Mr. Riggins was injured and he brought an action in Florida against Mr. Connell.[257] Mr. Connell filed a motion seeking a ruling that Georgia law applied with respect to all questions related to negligence and damages.[258] Under the Georgia rule, if the defendant and plaintiff are found to be equally negligent, or the defendant's negligence is less than the plaintiff's, then the plaintiff cannot recover from the defendant.[259] Mr. Riggins argued that Georgia law applied to some issues, but that Florida's comparative negligence law applied.[260] If Florida law applied, then liability would have been divided "according to each party's percentage of negligence."[261] The trial court found that Florida law applied to those issues.[262] After final judgment was entered in favor of Mr. Riggins, Mr. Connell appealed, alleging, among other errors, that the trial court improperly applied Florida law to the issues of comparative negligence and damages.[263]

251. *Id.* at 1163–64; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).
252. *Roach,* 945 So. 2d at 1170–71 (Lewis, C.J., concurring).
253. 392 So. 2d 965 (Fla. 2d Dist. Ct. App. 1980).
254. *Roach,* 945 So. 2d at 1173 (Lewis, C.J., concurring).
255. Connell v. Riggins, 944 So. 2d 1174, 1176–77 (Fla. 1st Dist. Ct. App. 2006).
256. *Id.* at 1176.
257. *Id.* Mr. Connell's employer was also named as a defendant. *Id.*
258. *Id.* at 1178.
259. *Connell,* 944 So. 2d at 1177.
260. *Id.* at 1178.
261. *Id.* at 1177.
262. *Id.* at 1180.
263. *Id.* at 1176.

The First District Court of Appeal relied heavily on *Bishop v. Florida Specialty Paint Co.*[264] in concluding that Georgia law applied.[265] The court observed that the Supreme Court of Florida, in *Bishop*, rejected the old *lex loci delicti* rule in favor of the "significant relationship" test found in sections 145 and 146 of the Restatement (Second) of Conflict of Laws.[266] Under the "significant relationship" test of the Restatement (Second), the question is which state's law "has the most significant relationship to the occurrence and the parties under the principles" set forth in the Restatement (Second).[267] In making the choice of law, *Bishop* advises consideration of: "1) 'the place where the injury occurred,' 2) 'the place where the conduct causing the injury occurred,' 3) 'the domicil, residence, nationality, place of incorporation and place of business of the parties,' and 4) 'the place where the relationship, if any, between the parties is centered.'"[268] "The state where the injury occurred" will usually be the primary factor in resolving the conflict of law issue.[269]

Applying the four-factor test, the First District Court of Appeal held, "[a]s a matter of law, Florida [did] not have a more significant relationship than Georgia to the [event] and to the parties" and certainly not enough to overcome the consideration that had to be given to Georgia as the place where the injury occurred.[270]

V. CONSUMER RIGHTS

A. *Telephone Solicitation and Telemarketing*

In 2000, Cricket's Termite Control, Inc. (Cricket's) leased an automated telemarketing system to use in offering pest control services to potential customers.[271] After Cricket's began using the system, it received a notice from the Florida Department of Agriculture and Consumer Services that complaints had been received that Cricket's was making automated sales solicita-

264. 389 So. 2d 999 (Fla. 1980).
265. *See Connell,* 944 So. 2d at 1180.
266. *Id.* at 1177; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145–46 (1971).
267. *Connell,* 944 So. 2d at 1176.
268. *Id.* at 1177 (quoting Bishop v. Fla. Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980)).
269. *Id.*
270. *Id.* at 1180.
271. De Lage Landen Fin. Servs., Inc. v. Cricket's Termite Control, Inc., 942 So. 2d 1001, 1002 (Fla. 5th Dist. Ct. App. 2006).

tion calls in violation of section 501.059 of the *Florida Statutes*.[272] Cricket's was ordered to stop making calls in violation of the statute and advised that failure to do so could result in an injunction against it and civil penalties of as much as $10,000 per call.[273] Cricket's not only immediately stopped making such calls, it stopped making lease payments to the lessor of the system, De Lage Landen Financial Services, Inc. (DLL).[274] DLL sued Cricket's to collect the lease payments.[275] Cricket's defense was that the lease was illegal and unenforceable because the intended use of the leased property turned out to be illegal.[276] The trial court agreed, refusing to enforce the lease, and awarded Cricket's attorney's fees.[277] DLL appealed and the Fifth District Court of Appeal framed the issue as "whether the lease agreement is an enforceable contract, or if it is void for violating Florida Statutes or Florida public policy."[278] The court determined that the lease violated neither.[279] The lease agreement was purportedly governed by Oregon law.[280] The court noted that Oregon's automated call statute is similar to the Florida statute.[281] Both statutes contain exceptions to the prohibition of automated calls so that automated calling systems can be put to legal uses.[282]

The court, in reaching its decision, looked to a case with similar facts[283] in which the Supreme Court of Arkansas concluded that just because an item subject to a sales contract can be put to illegal uses does not render the contract void.[284] There are, however, two similar, although not identical, exceptions to this rule.[285] Under the first exception, if a seller knows of the buyer's illegal purpose and that illegal purpose "'involves the commission of a serious crime or an act of great moral turpitude,'" the seller cannot enforce

272. *Id.* at 1002–03; *see also* FLA. STAT. § 501.059 (2007).

273. *Cricket's Termite Control, Inc.*, 942 So. 2d at 1003.

274. *Id.* The lease, originally between Cricket's and U.S. Bancorp, was assigned to De Lage Financial Services, Inc. *Id.* at 1002.

275. *Id.* at 1003.

276. *Id.*

277. *Cricket's Termite Control, Inc.*, 942 So. 2d at 1003.

278. *Id.*

279. *Id.* at 1005–06.

280. *Id.* at 1004 n.1.

281. *Id.*; *see also* OR. REV. STAT. § 759.290 (2003).

282. *See* FLA. STAT. § 501.059 (2007); OR. REV. STAT. § 759.290 (2003).

283. *Cricket's Termite Control, Inc.*, 942 So. 2d at 1004; *see also* Potomac Leasing Co. v. Vitality Centers, Inc., 718 S.W.2d 928 (Ark. 1986).

284. *Potomac Leasing Co.*, 718 S.W.2d at 929.

285. *Cricket's Termite Control, Inc.*, 942 So. 2d at 1005–06. One exception is mentioned in the body of the *Cricket's* decision, and the other is in a footnote. *Id.* at 1005, 1006 n.3.

the contract.[286] The second exception applies when the seller of the product knows that the buyer's use of the product will be a "'flagrant violation of the fundamental rights of man and society.'"[287] The court in *Cricket's* found that there was no indication that either "DLL or U.S. Bancorp, [the original lessor,] knew of Cricket's planned use of the System."[288] Even if they had, Cricket's use of the automated call system would have to have constituted a "'flagrant violation of the fundamental rights of man and society'" to void the lease. [289]

The court found additional reasons to reverse the trial court.[290] Section 680.1031(1)(g) of the *Florida Statutes* and section 72A.1030 of the *Oregon Revised Statutes* do not permit a finance lessee to refuse payments to the finance lessor if the goods in question turn out not to be as expected.[291] The lessor's covenants to the finance lessee are also irrevocable and independent of any defense the lessee may have against a third-party seller.[292] Finally, the court noted, with apparent approval, the finance lessor's broad boiler plate liability disclaimers set out in the lease agreement.[293]

TSA Stores, Inc. v. Department of Agriculture and Consumer Services,[294] also decided by the Fifth District Court of Appeal, raised several questions of first impression.[295] As in *Cricket's,* section 501.059 of the *Florida Statutes* was involved.[296] The Department alleged that TSA violated the automated calling provisions and the do-not-call list rules.[297] The parties agreed that all of the calls originated from California.[298] TSA had its princi-

286. *Id.* at 1005 (quoting *Potomac Leasing Co.*, 718 S.W.2d at 930). The Arkansas court, in turn, cited 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1519 (1962), in support of its holding. *Potomac Leasing Co.*, 718 S.W.2d at 929–30. Corbin notes that even "a fountain pen can . . . be used for . . . criminal purposes." 6A CORBIN, *supra*, § 1519.

287. *Cricket's Termite Control, Inc.*, 942 So. 2d at 1006 n.3 (quoting *Potomac Leasing Co.*, 718 S.W.2d at 929).

288. *Id.*

289. *Id.* Although not stated in the opinion, it would seem that the Florida court agreed with the Supreme Court of Arkansas that the Arkansas flagrant violation of human rights test was "essentially the same" as the Corbin serious crime or moral turpitude test. *See Potomac Leasing Co.*, 718 S.W.2d at 929–30.

290. *Cricket's Termite Control, Inc.*, 942 So. 2d at 1006.

291. *Id.*; *see also* FLA. STAT. § 680.1031(1)(g) (2007); OR. REV. STAT. § 72A.4070 (2003).

292. *Cricket's Termite Control, Inc.*, 942 So. 2d at 1006 (citing FLA. STAT. § 680.407 (2007); OR. REV. STAT. § 72A.4070 (2003)).

293. *Id.* at 1006–07.

294. 957 So. 2d 25 (Fla. 5th Dist. Ct. App. 2007).

295. *Id.* at 26.

296. *Id.*; *see also* FLA. STAT. § 501.059 (2004).

297. *TSA Stores, Inc.*, 957 So. 2d at 26.

298. *Id.* at 30. The court noted that the automated calling provisions of the statute do not contain a preexisting relationship provision. *Id.*

pal place of business in Broward County, Florida, and the calls were made to people in Orange County, Florida, inviting them to a sale at TSA stores in Orange County.[299] TSA raised several defenses, including that the Federal Telephone Consumer Protection Act (TCPA) preempted section 501.059 of the *Florida Statutes*.[300] The court easily dismissed this argument because the TCPA expressly provides that it does not preempt state law.[301] Another issue was the interpretation of an exception to the do-not-call list rules that allow a telephone solicitor to call persons on the list with whom the solicitor "'has a prior or existing business relationship,'"[302] a phrase not defined by the statute.[303] TSA argued that the persons who were alleged to have been improperly called all consented to telephone solicitations by providing a telephone number to the sales clerks.[304] The court found that this did not constitute express consent, which is required by the statute, although it might be implied consent.[305] The court looked for guidance to the definition applicable under the TCPA of "established business relationship."[306] Relying on that definition, the Fifth District Court of Appeal concluded that if a person made a purchase from TSA within eighteen months prior to the telephone solicitation, solicitation was permissible, even to persons on the do-not-call list.[307]

With respect to the automated calls, TSA argued that Florida had no authority to regulate interstate calls that originated in California.[308] The court concluded that it did not need to address the issue of jurisdiction over calls emanating from outside of Florida, since these calls were otherwise covered by section 501.059 of the *Florida Statutes*.[309] The Florida provisions prevent a person from simply taking the automated machines out of Florida and calling consumers in Florida, as a way of avoiding the statute.[310] The Fifth District Court of Appeal held that the causation underlying this statutory violation involved a business in Orange County, Florida, Orange County consum-

299. *Id.* at 26.
300. *Id.*
301. *TSA Stores, Inc.*, 957 So. 2d. at 28 (citing 47 U.S.C. § 227(e)(1) (2000)).
302. *Id.* at 27.
303. *Id.* at 29.
304. *Id.*
305. *Id.*
306. *TSA Stores, Inc.*, 957 So. 2d at. at 29–30 (citing 47 C.F.R. § 64.1200(f)(4) (2006)).
307. *Id.* at 30.
308. *Id.*
309. *Id.*
310. *Id.*

ers, and a sale being held in Orange County.[311] The court concluded that the place from which the calls originated was irrelevant "in this context."[312]

There were two prohibitions added to Florida's telephone solicitation statute in 2006.[313] The first prohibition makes it unlawful, with limited exceptions, for telephone sales solicitors to fail to disclose their names and telephone numbers.[314] The second prohibition makes it unlawful to alter voices with intent to defraud or confuse.[315]

B. *Deceptive Trade Practices*

In *South Motor Co. of Dade County v. Doktorczyk*,[316] Doktorczyk brought an action against South Motors under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).[317] He claimed that when he purchased a used car, "South Motors misrepresented that the factory warranty . . . had expired" and persuaded him to buy an extended warranty.[318] The alleged misrepresentations were made almost six years before Doktorczyk filed his action.[319] Section 95.11(3)(f) of the *Florida Statutes* imposed a four year statute of limitations for FDUTPA claims and other statutory causes of action.[320]

Doktorczyk claimed that under section 95.051(1)(f) of the *Florida Statutes*, the statute of limitations was tolled by the installment payments he made for five years on the auto extended warranty purchase.[321] This section states that the statute of limitations is tolled by "payment of any part of the principal or interest of any obligation or liability founded on a written instrument."[322] The Third District Court of Appeal held that Doktorcyzk's claim was founded on a statutory cause of action, not on a written instrument, and therefore his action was filed too late.[323]

311. *TSA Stores, Inc.*, 957 So. 2d at 31.
312. *Id.*
313. FLA. STAT. § 501.059(7)(c), (d) (2007).
314. *Id.* § 501.059(7)(c).
315. *Id.* § 501.059(7)(d).
316. 957 So. 2d 1215 (Fla. 3d Dist. Ct. App. 2007).
317. *Id.* at 1216.
318. *Id.*
319. *Id.*
320. *Id.* at 1216–17 (citing FLA. STAT. § 95.11(3)(f) (Supp. 1996)).
321. *See Doktorczyk*, 957 So. 2d at 1217.
322. FLA. STAT. § 95.051(1)(f) (2004).
323. *Doktorczyk*, 957 So. 2d at 1217–18.

In another FDUTPA case, the Florida Attorney General, on behalf of small businesses, sued several leasing companies.[324] The trial court found that certain telecommunications equipment leases were not "consumer leases" because under the Florida Uniform Commercial Code, section 680.1031(e) of the *Florida Statutes*, they were not considered "consumer leases."[325] The First District Court of Appeal reversed, holding that it was error for the trial court to have relied on a statute other than the FDUTPA, since the FDUTPA contains its own definition of consumer, which is not limited to "personal, family or household purposes."[326]

C. *Warranties*

The Supreme Court of Florida was asked if an automobile lessee is entitled, under the Magnuson-Moss Warranty Act (Magnuson-Moss),[327] to enforce auto warranties.[328] The Second District Court of Appeal, having said yes, certified conflict between its decision and the First District Court of Appeal's decision in *Sellers v. Frank Griffin AMC Jeep, Inc.*,[329] to the contrary.[330] In *Cerasani*, Jennifer Cerasani leased a Honda Civic on a long-term lease basis.[331] She had problems with the automobile.[332] Unsuccessful attempts were made to repair the car, and Cerasani eventually sued the manufacturer, American Honda, under Magnuson-Moss for breach of written warranty and breach of implied warranty.[333] The trial court dismissed her complaint finding that the written warranty defined in Magnuson-Moss applied to automobile purchasers only, not to lessees.[334] The trial court also found "that Cerasani was not in privity of contract with Honda, as required" for an implied contract claim.[335] Cerasani appealed and the Second District Court of Appeal affirmed the dismissal of her claim with respect to the implied warranty, but reversed the dismissal of the express new-car warranty claim under

324. State v. Commerce Commercial Leasing, LLC, 946 So. 2d 1253, 1255 (Fla. 1st Dist. Ct. App. 2007).
325. *Id.* at 1258.
326. *Id.*
327. 15 U.S.C. § 2301–12 (2000).
328. Am. Honda Motor Co., v. Cerasani, 955 So. 2d 543, 544 (Fla. 2007).
329. 526 So. 2d 147 (Fla. 1st Dist. Ct. App. 1988).
330. *Cerasani*, 955 So. 2d at 544.
331. *Id.* at 545.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Cerasani*, 955 So. 2d at 545.

Magnuson-Moss.[336] It was the reversal that conflicted with *Sellers*. The Supreme Court of Florida held that an automobile lessee is entitled to enforce auto warranties under Magnuson-Moss.[337] The court also held that the narrow definition of "written warranty" contained in Magnuson-Moss yields to the broader definition under state law, specifically section 681.102(23) of the *Florida Statutes*, the Lemon Law.[338]

Magnuson-Moss, according to the Supreme Court of Florida, was designed "to enhance the enforceability of warranties on consumer products and protect the 'ultimate user of the product.'"[339] Nevertheless, only a "consumer" may sue under Magnuson-Moss.[340] The court noted that three categories of consumers are identified in Magnuson-Moss.[341] They are: 1) a buyer, as long as not bought for resale; 2) anyone to whom the consumer product is transferred while the warranty or service contract is in effect; or 3) "any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)."[342] The court placed Cerasani in the third category finding that under Florida's Lemon Law, auto lessees are entitled to enforce auto warranties.[343]

D. *Consumer Report Security Freeze*

In 2006, Florida enacted a "consumer report security freeze" statute, section 501.005 of the *Florida Statutes*, to allow a consumer to place a "security freeze" on his or her credit report.[344] The term "security freeze" refers to "a notice placed in a consumer report that prohibits a consumer reporting agency" from releasing specified consumer information without express authorization of the consumer.[345] A consumer's request for a security freeze is made by a request in writing sent by certified mail to a consumer credit reporting agency.[346] Except as otherwise provided by the numerous exceptions

336. *Id.*
337. *Id.* at 549.
338. *Id.* at 548–49 (citing FLA. STAT. § 681.102(23) (2006)).
339. *Id.* at 545.
340. *Cerasani*, 955 So. 2d at 546.
341. *Id.*
342. 15 U.S.C. § 2301(3) (2000).
343. *Cerasani*, 955 So. 2d at 548–49.
344. Act effective July 1, 2006, ch. 2006-124, §1, 2006 Fla. Laws 1621, 1621 (codified at FLA. STAT. § 501.005(1) (2007)). The meaning of the term "consumer report" is the same as contained in 45 U.S.C. § 1681a(d). *Id.*
345. FLA. STAT. § 501.005(1) (2007).
346. *Id.* § 501.005(2)(a).

contained in the statute,[347] the consumer's credit report cannot be released without the consumer's consent.[348] The freeze can last indefinitely.[349] The reporting agency can make it known to a third-party that a freeze has been put on the information.[350] The reporting agency may charge a fee of not more than ten dollars for the initial freeze, for a temporary freeze or removal of the freeze, and for the permanent removal of the freeze.[351] However, no fee for an initial placement or for removal of a freeze may be charged to a consumer who is at least sixty-five years old.[352] Violation of this law may result in an award of actual damages, costs, and attorneys fees, and in certain cases, punitive damages.[353]

E. *Gift Certificates*

In 2007, legislation was enacted that affects credit memos and gift certificates.[354] Under the new section 501.95 of the *Florida Statutes*, gift certificates and credit memos sold in Florida generally "may not have an expiration date, expiration period, or any type of post-sale charge or fee . . . [such as] service charges, dormancy fees, account maintenance fees, or cash-out fees."[355] Definitions of "credit memo" and "gift certificate" are provided.[356] If there is no consideration provided, the rule does not apply.[357] Some exceptions are provided.[358] For example, gift certificates that are charitable contributions may have an expiration date (of atleast three years) provided "the expiration date is prominently disclosed in writing to the consumer."[359] An expiration date is also permitted where a gift certificate is issued as part of an event of limited duration, such as a conference or vacation, provided that most of the consideration paid by the recipient of the gift certificate is

347. *E.g.*, *id.* § 501.005(8), (12).
348. *Id.* § 501.005(1).
349. *See id.* § 501.005(11).
350. FLA. STAT. § 501.005(1).
351. *Id.* § 501.005(13).
352. *Id.* § 501.005(13)(b)(1).
353. *Id.* § 501.005(16)(a)–(c), (e).
354. *Id.* §§ 501.95, 717.1045. Section 717.1045 of the *Florida Statutes* deals with gift certificates and credit memos from the standpoint of the unclaimed property statute. FLA. STAT. § 717.1045 (2007).
355. *Id.* § 501.95(2)(a).
356. *Id.* § 501.95(1)(a), (b).
357. *See id.* § 501.95(2)(a).
358. *Id.*
359. FLA. STAT. § 501.95(2)(a).

for the event, not the gift certificate.[360] There are also exceptions to these prohibitions for certain state-chartered banks and credit unions.[361]

VI. CONTRACTS

A. *Formation*

Hammond owned real estate in Indian River County.[362] He and DSY Developers, LLC., having its principal place of business in Miami-Dade County, negotiated for several months over the sale and purchase of Hammond's land.[363] There were offers and counteroffers and on November 11, 2004, DSY made another counteroffer and tendered a $25,000 deposit that required acceptance by Hammond by November 25, 2004.[364] Hammond changed the acceptance date for the contract to December 10, 2004, and mailed his counteroffer back to DSY on December 15, 2004.[365] On January 12, 2005, DSY faxed its acceptance in the form of an executed contract to Hammond.[366] Hammond refused to proceed with the deal on the grounds that the contract was void because DSY did not accept by December 10, 2004.[367] DSY sued Hammond in the Circuit Court in Miami-Dade County seeking specific performance.[368] The trial court ruled that a contract had been formed and ordered Hammond to convey title to the property to DSY.[369] The trial court's order also provided that the order would convey title if Hammond did not comply with the contract.[370]

On Hammond's appeal, the Third District Court of Appeal noted that the case presented an issue of first impression of "whether a deadline for accepting an offer may be waived by delivering the offer after the deadline has passed."[371] The question presented to the Third District Court of Appeal was whether Hammond, by not mailing the offer (counteroffer) until December 15, 2004,—after the date he had provided in his counteroffer for accep-

360. *Id.*
361. *See id.* § 501.95(2)(b).
362. Hammond v. DSY Developers, LLC., 951 So. 2d 985, 987 (Fla. 3d Dist. Ct. App. 2007).
363. *See id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. *Hammond*, 951 So. 2d at 987.
368. *See id.*
369. *Id.*
370. *Id.*
371. *Id.* at 988.

tance had passed—waived the requirement that the contract be accepted by a certain date.[372] The Third District Court of Appeal said yes and found, as a matter of law, that Hammond's late mailing of the offer was an "implied waiver" of the provision.[373] Furthermore, since the offer was then without an acceptance deadline, a "reasonable time" for acceptance would be implied.[374] The Third District Court of Appeal found as a matter of law, based on the undisputed dealings between the parties, that acceptance by January 12, 2005, was within a reasonable time, considering the Christmas holidays.[375]

The trial court's order granting summary judgment in favor of DSY and directing specific performance by Hammond was approved, but only to the extent it did not operate as a mandate transferring title.[376] The Third District Court of Appeal noted that the trial court had in personam jurisdiction over the parties in a suit for specific performance under a real estate contract.[377] However, the trial court did not have in rem jurisdiction over the property located in Indian River County.[378] Citing the "local action rule," the Third District Court of Appeal stated that if a court does not have in rem jurisdiction over the real property involved in the action, then the court does not have jurisdiction to convey title.[379] Therefore, if court action became necessary to enforce the order and to transfer title, then it would be necessary to transfer the case to the court having in rem jurisdiction, that court being the Circuit Court for Indian River County.[380]

In another offer and acceptance case, *Polk v. BHRGU Avon Properties, LLC*,[381] the Second District Court of Appeal considered whether offers, overlapping counteroffers, counter-counteroffers, counter-counter-counteroffers, a failure to reject counteroffers, and an alleged option contract resulted in the formation of a contract.[382] The facts were that Polk listed real estate for sale and on January 24, 2005, BHRGU Avon Properties, LLC. (Avon), offered to purchase Polk's real estate.[383] Polk made counteroffers on February 2, 2005, and February 3, 2005.[384] The counteroffers both provided that Avon's dead-

372. *Hammond*, 951 So. 2d at 987–88.
373. *Id.* at 988.
374. *Id.*
375. *Id.*
376. *Id.* at 989.
377. *Hammond*, 951 So. 2d at 989.
378. *Id.*
379. *Id.*
380. *Id.*
381. 946 So. 2d 1120 (Fla. 2d Dist. Ct. App. 2006).
382. *See generally id.*
383. *Id.* at 1121–22.
384. *Id.* at 1122.

line for acceptance of Polk's counteroffer and delivery of the acceptance was 5:00 p.m. on February 7, 2005.[385] Another offer was made by Avon to Polk on February 4.[386] That offer changed the material terms of Polk's counteroffers.[387] However, before the February 7, 2005, deadline, Avon signed and delivered both of Polk's counteroffers, and a $25,000 check was provided to Polk's attorney as a deposit."[388] Although the attorney took the check, it was not deposited, and, eventually, the attorney marked it "VOID."[389] Polk refused to perform under the terms of her February 2 and February 3 counteroffers, and Avon sought and was granted an order of specific performance.[390]

Polk appealed, arguing that there was never a contract formed for the court to enforce.[391] Avon argued that Polk's two counteroffers were, in fact, options to purchase the property, and the options were duly and timely exercised.[392] The Second District Court agreed with Polk and reversed the trial court.[393]

An option contract requires consideration and there was none.[394] The $25,000 check was clearly consideration for the purchase of the property, not for the purchase of an option.[395] The sequence of events as seen by the Second District Court of Appeal was: 1) offer by Avon; 2) counteroffers by Polk which served to reject Avon's offer; and 3) a second offer by Avon which served to reject Polk's counteroffers.[396] Since Avon's second offer was not accepted, there was no contract.[397]

In *Alterra Healthcare Corp.*, the arbitration case discussed earlier in this survey, Betsy Bryant argued that there was no signed written agreement that required arbitration with respect to her stay in the second facility.[398] Apparently the residency agreements for the second facility were virtually identical to the residency agreement for the first facility that had been signed by Betsy Bryant's husband, as her attorney-in-fact.[399] The Fourth District Court of

385. *Id.*
386. *Polk*, 946 So. 2d at 1122.
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Polk*, 946 So. 2d at 1122.
392. *See id.* at 1123.
393. *Id.* at 1125.
394. *Id.* at 1122–23.
395. *Id.* at 1123.
396. *See Polk*, 946 So. 2d at 1122–23.
397. *Id.* at 1125.
398. Alterra Healthcare Corp. v. Bryant, 937 So. 2d 263, 270 (Fla. 4th Dist. Ct. App. 2006); *see also supra* note 45 and accompanying text.
399. *See Alterra Healthcare Corp.*, 937 So. 2d at 270–71.

Appeal noted that Mr. Bryant had been given a residency agreement to sign for the second facility, but he did not get around to signing it.[400] Nevertheless, the Fourth District Court of Appeal did not disturb the trial court's finding that the Bryants and Alterra performed under the terms of one signed agreement at both facilities; therefore, the first residency agreement was applicable to the second residence as well.[401]

The First District Court of Appeal, in *De Vaux v. Westwood Baptist Church*,[402] was called upon to determine if a contract existed after the trial court dismissed with prejudice, the purported purchaser's complaint for specific performance.[403] The facts showed that by letter dated May 19, 2005, De Vaux offered to purchase certain real estate from Westwood for $535,000.[404] The letter set out several terms and conditions including Westwood taking back a mortgage from De Vaux with interest at a specified sum to be paid quarterly.[405] The letter stated that "[t]his contract will take precedent until a more detailed legal contract can be drawn up stating terms, conditions, dates and financing."[406] A church meeting was held six days later."[407] At the meeting, the sale of the property to De Vaux was approved.[408] The minutes noted the approval and also stated that the church trustees were "authorized to work out all the details" with De Vaux.[409] The First District Court of Appeal noted that the plaintiff did not allege that the church trustees communicated to him its "acceptance of his offer or the terms of the 'details' [of the deal still] to be worked out."[410] The First District Court of Appeal held that there was no contract to enforce.[411] It is fundamental that "acceptance of the offer must be communicated to the offeror."[412] Furthermore, even if acceptance had been communicated, the essential terms of the agreement had not been negotiated and there was "no meeting of the minds."[413] The court af-

400. *Id.* at 271. It is not stated in the opinion if the second residency agreement was signed by a representative on behalf of Alterra. *See generally id.*
401. *Id.*
402. 953 So. 2d 677 (Fla. 1st Dist. Ct. App. 2007).
403. *Id.* at 681.
404. *Id.* at 680.
405. *Id.*
406. *Id.*
407. *De Vaux*, 953 So. 2d at 680.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.* at 682.
412. *De Vaux*, 953 So. 2d at 682 (citing Kendel v. Pontious, 261 So. 2d 167, 169–70 (Fla. 1972)).
413. *Id.* at 681.

firmed the trial court's decision to dismiss the complaint with prejudice and remanded for a determination of appellate attorney's fees to Westwood.[414]

An interesting aspect of the case was Westwood's motion on appeal for an award, pursuant to section 57.105 of the *Florida Statutes*, of appellate attorney fees.[415] The court stated that with respect to the new statutory "'not supported by the material facts or would not be supported by application of then-existing law to those material facts' standard" that replaced the old "'frivolous' standard, . . . an all encompassing definition . . . defies us."[416] However, the court found it clear that there has been a lowering of the statutory bar for the imposition of this sanction.[417] The court determined that De Vaux's complaint and appeal were "wholly without merit," and thus, subject to sanction under either standard.[418] The court observed that once the requirements of section 57.105 of the *Florida Statutes* are satisfied, the court is required "to award fees to the prevailing party in equal amounts to be paid by the losing party and the losing party's attorney."[419] The matter was remanded for determination of the amount of the award of appellate attorney fees.[420]

B. *Modification*

Hadden and the radio station WSOS made an agreement in 1998 giving Hadden the exclusive right to sell the radio station for a 5% commission.[421] The agreement provided for termination by either party on thirty days prior written notice to the other.[422] The listing agreement provided that the agreement would remain in effect indefinitely absent such termination.[423] Hadden was entitled to his commission not only if the radio station was sold during the term of the agreement, but also in two other situations.[424] One situation was if Hadden presented an offer that satisfied the asking price and terms but the station declined the offer.[425] The other situation would apply if WSOS

414. *Id.* at 685.
415. *Id.* at 682–85; *see also* FLA. STAT. § 57.105 (2007).
416. *De Vaux*, 953 So. 2d at 683 n.6.
417. *Id.*
418. *Id.* at 684.
419. *Id.*; *see also* FLA. STAT. § 57.105(1).
420. *De Vaux*, 953 So. 2d at 685.
421. WSOS-FM, Inc. v. Hadden, 951 So. 2d 61, 62 (Fla. 5th Dist. Ct. App. 2007).
422. *Id.* The termination provision could not be used for the first 180 days of the agreement. *Id.*
423. *Id.*
424. *Id.*
425. *Hadden*, 951 So. 2d at 62.

entered into an agreement to sell the station within twenty-four months after the termination of the agreement, if the sale was to a buyer solicited by Hadden.[426] In September 2002, Hadden sent a fax to the WSOS station manager to advise him that Hadden had a potential buyer for $3,500,000.[427] The station manager sent a letter to Hadden the day he received the fax in which he took the position that the listing agreement between Hadden and WSOS had been cancelled during a telephone conversation between Hadden and the manager two years earlier.[428] Hadden wrote back that the agreement had not been cancelled two years earlier, but he would agree to treat the station manager's letter as a thirty day notice of termination of the agreement.[429] WSOS was sold for $4,000,000 about nine months later.[430] Hadden sued to collect his 5% commission.[431] The trial court found in favor of Hadden and WSOS appealed.[432]

The Fifth District Court of Appeal, like the Fourth District Court of Appeal in the *Rhodes* case,[433] relied on *Pan American Engineering Co. v. Poncho's Construction Co.*[434] in stating that written agreements prohibiting later oral modifications can nevertheless be modified orally.[435] The Fifth District Court of Appeal noted that such agreements can be modified orally only when modification "has been accepted and acted upon in such a manner that refusing to enforce it would constitute fraud upon either party."[436] The court reversed and remanded because it could not tell if the trial judge ruled that the oral modification was invalid due to the writing requirement or that there was no oral modification and termination in 2000.[437]

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426. *Id.*
427. *Id.*
428. *Id.*
429. *Id.* at 62–63.
430. *Hadden*, 959 So. 2d at 63. The opinion does not state that the sale was to a buyer Hadden had solicited or indicate upon which of the two grounds Hadden based his claim. *See id.*
431. *Id.* at 63.
432. *Id.*
433. *See supra* note 173 and accompanying text. In *Rhodes*, the Fourth District Court of Appeal considered whether a written agreement could "be modified by the subsequent conduct of the parties." Rhodes v. BLP Assocs., Inc., 944 So. 2d 527, 530 (Fla. 4th Dist. Ct. App. 2006). The court in *Rhodes* noted that mutual assent and consideration are required for such modification. *Id.*
434. 387 So. 2d 1052 (Fla. 5th Dist. Ct. App. 1980).
435. *Hadden*, 951 So. 2d at 63 (citing Pan Am. Eng'g Co. v. Poncho's Constr. Co., 387 So. 2d 1052, 1053 (Fla. 5th Dist. Ct. App. 1980)).
436. *Id.* at 63–64 (citing Prof'l Ins. Corp. v. Cahill, 90 So. 2d 916, 918 (Fla. 1956)).
437. *Id.* at 64.

C. *Remedies*

In *Ocean Communications, Inc. v. Bubeck,*[438] plaintiffs entered into a contract with defendant whereby defendant would provide advertising related services.[439] Plaintiffs sought damages and restitution of amounts paid under the contract, alleging breach of contract.[440] The trial court found there were breaches of contract by the defendant, but that restitution is an equitable remedy that is not available when there was an actual contract between the parties.[441] The Fourth District Court of Appeal, in reversing and remanding the case, discussed damages, restitution, and specific performance, the three remedies the court noted are available for breach of contract.[442] The first, damages, is intended to put the non-breaching party in as good a position as that party would have been in had the contract been performed.[443] The second, restitution, requires the breaching party to give back what that party received because this tends to put the non-breaching party in as good a position as that party "occupied before the contract was made."[444] Restitution is available as a remedy for breach of an express contract.[445] However, in this case, because restitution was sought, plaintiff was required to return to defendant the value, if any, of defendant's part performance.[446] The court, therefore, remanded the matter for an evidentiary hearing as to the value of defendant's services to be used to offset the restitution award to plaintiff.[447]

In *Key v. Trattmann,*[448] Key sought specific performance of an alleged oral agreement by Trattmann to convey real estate or the imposition of a resulting trust, and summary judgment was granted in favor of Trattmann.[449] On appeal–for purposes of determining whether the motion was properly granted by the trial court–the First District Court of Appeal "[took] as true" the allegations that "to help Mr. Trattmann obtain United States' citizenship"

438. 956 So. 2d 1222 (Fla. 4th Dist. Ct. App. 2007).
439. *Id.* at 1224.
440. *Id.* The claim for restitution was originally based on unjust enrichment, which the Fourth District Court of Appeal noted is not an available cause of action when there is an express contract. *Id.* But the trial court had permitted the plaintiff to amend its complaint to conform to the evidence by changing the claim from a claim for unjust enrichment seeking restitution to a claim for breach of contract seeking restitution. *Id.* at 1226.
441. *Bubeck*, 956 So. 2d at 1224.
442. *Id.* at 1225.
443. *Id.*
444. *Id.*
445. *Id.*
446. *Bubeck*, 956 So. 2d at 1226.
447. *Id.*
448. 959 So. 2d 339 (Fla. 1st Dist. Ct. App. 2007).
449. *Id.* at 341.

the following occurred: 1) Key purchased real estate in Tallahassee; 2) Key provided all of the consideration for the purchase and upkeep of the property; 3) Trattmann promised to convey the property to Key upon demand, but when demand was made, refused to convey; and 4) there was no written agreement between Key and Trattmann with respect to the property.[450] In the trial court, Key argued that a resulting trust had arisen and that he was the beneficiary.[451] The trial court found that Florida's four year statute of limitations under section 95.11 of the *Florida Statutes* applied and that Florida's statute of frauds contained in section 689.01 of the *Florida Statutes* also applied.[452]

The First District Court of Appeal reversed, observing that a resulting trust arises by operation of law.[453] The statute of frauds applies to actions arising from a contract.[454] Therefore, the statute of frauds does not apply to a resulting trust claim.[455] A resulting trust claim involving real estate can be proven by oral testimony.[456] The lack of a written contract was not fatal to Trattmann's case.[457] The court noted that with respect to the application of the statute of limitations, it was not clear from the record when the statute might first be said to have begun to run.[458] That would have been when Trattmann repudiated the trust or held the property adversely with Key's knowledge.[459] The court found that Key's allegations fit the definition of a resulting trust as set forth in *Steigman v. Danese,*[460] where it was stated that "where a person furnishes money to purchase property in the name of another, with both parties intending at the time that the legal title be held by the named grantee for the benefit of the unnamed purchaser of the property."[461] The First District Court of Appeal gave Key a chance to prove his allegations and, presumably gave the trial court the opportunity to revisit the statute of limitations defense.[462]

450. *Id.* at 341–342.
451. *Id.* at 342.
452. *Id.* at 342, 344, 346 n.4; *see also* FLA. STAT. §§ 95.11, 689.01 (2007).
453. *Key*, 959 So. 2d at 345.
454. *Id.*
455. *Id.*
456. *See id.*
457. *Id.*
458. *Key*, 959 So. 2d at 345–46.
459. *Id.* at 346.
460. 502 So. 2d 463 (Fla. 1st Dist. Ct. App. 1987).
461. *Key*, 959 So. 2d at 342–43 (quoting Steigman v. Danese, 502 So. 2d 463, 467 (Fla. 1st Dist. Ct. App. 1987)).
462. *Id.* at 346.

The next three cases deal with liquidated damages. The first two involved real estate contracts and the third arose in the context of an alleged breach of a noncompete agreement.[463]

In the first case, *Hot Developers, Inc. v. Willow Lake Estates, Inc.*,[464] the Fourth District Court of Appeal reviewed a summary judgment that allowed a seller of commercial real estate to retain deposits of $550,000 as liquidated damages.[465] The buyer claimed that allowing the seller to retain the deposit was improper because the forfeiture amounted to an unenforceable penalty and was unconscionable.[466] Hot Developers, Inc., as purchaser, had entered into an agreement with Willow Lake to buy real estate for $5,700,000.[467] The contract was not conditioned upon Hot Developers obtaining financing, and time was stated to be of the essence.[468] Hot Developers made the first deposit of $100,000, which would be refunded if Hot Developers cancelled the contract for any reason within a "due diligence" period.[469] After that period expired, Hot Developers, not having cancelled the contract, made a $200,000 deposit in accordance with the contract.[470] It was apparently only then that Hot Developers had problems with an appraisal and asked for an extension of the original closing date.[471] The contract also provided that if Hot Developers extended the closing date, it would pay "an additional non-refundable deposit" of $250,000.[472] That amount was paid, and unlike the first two deposits, the contract called for immediate distribution of that money to Willow Lake to be credited against the purchase price.[473] Hot Developers was unable to close on the first extended closing date.[474] Because there was no provision in the agreement regarding another extension, the parties signed an addendum to the agreement for a short additional extension date, which provided that Hot Developers agreed to the release as nonrefundable deposits of the first two deposits that were being held in escrow.[475]

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463. *See* Hot Developers, Inc. v. Willow Lake Estates, Inc., 950 So. 2d 537 (Fla. 4th Dist. Ct. App. 2007); Burzee v. Park Ave. Ins. Agency, Inc., 946 So. 2d 1200 (Fla. 5th Dist. Ct. App. 2006); Bradley v. Sanchez, 943 So. 2d 218 (Fla. 3d Dist. Ct. App. 2006).

464. 950 So. 2d 537 (Fla. 4th Dist. Ct. App. 2007).

465. *Id.* at 539.

466. *Id.*

467. *Id.* at 538.

468. *Id.*

469. Hot Developers, Inc., 950 So. 2d at 538.

470. *Id.* Unlike the initial deposit, apparently the contract was silent with respect to refund of the $200,000 deposit. *See id.*

471. *Id.*

472. *Id.*

473. *Hot Developers, Inc.*, 950 So. 2d at 538.

474. *Id.*

475. *Id.* at 538–39.

Hot Developers failed to close on the second extended date, and Willow Lake exercised its option under the contract to terminate the contract and retain the $550,000 as "liquidated and agreed damages."[476] The Fourth District Court of Appeal noted that it has been held that it is not unreasonable for a payment to be required in exchange for an extended closing.[477] However, when that deposit will be forfeited if closing does not occur, forfeiture may amount to "an unenforceable penalty in certain circumstances."[478] The court agreed with Willow Lake that, as a matter of contract interpretation, the funds were not refundable.[479]

The remaining issue was whether the forfeiture was a penalty.[480] That required a *Hyman v. Cohen*[481] "liquidated damages analysis" based on the circumstances that existed when the contract was made.[482] The provisions will be upheld under *Hyman v. Cohen* if the damages were not then "readily ascertainable"[483] and the amount of the liquidated damages were not "grossly disproportionate"[484] to what seller's damages might be, unless enforcement would be unconscionable.[485] The court concluded that the deposit amount, being under 10% of the purchase price, was "well within the range of liquidated damages approved by Florida courts."[486] Both parties to the transaction were commercial entities with no apparent difference in bargaining power between them.[487] The remaining question then was whether, based on circumstances existing at the time of the breach, equity required a finding that the liquidated damages, although not unenforceable penalties, were nevertheless unconscionable.[488] The court concluded that there also was nothing to support a finding of unconscionability.[489] This analysis included, in part, a comparison of the forfeiture amount to the contract price, similar to the test applied in determining if a forfeiture is an unenforceable penalty.[490] The

476. *Id.* at 539.
477. *Id.* (citing Waksman Enters., Inc. v. Or. Props., Inc., 862 So. 2d 35, 41 (Fla. 2d Dist. Ct. App. 2003)).
478. *Hot Developers, Inc.*, 950 So. 2d at 539 (quoting *Waksman Enters., Inc.*, 862 So. 2d at 42).
479. *Id.* at 540.
480. *See id.* at 539–40.
481. 73 So. 2d 393 (Fla. 1954).
482. *Hot Developers, Inc.*, 950 So. 2d at 540.
483. *Id.* (quoting Hutchison v. Tompkins, 259 So. 2d 129, 132 (Fla. 1972)).
484. *Id.* (quoting Hyman v. Cohen, 73 So. 2d 393, 401 (Fla. 1954)).
485. *Id.*
486. *Id.* at 541.
487. *Hot Developers, Inc.*, 950 So. 2d at 540–41.
488. *Id.* at 541.
489. *Id.*
490. *Id.* n.2.

court cited cases where liquidated damages of 50% and 55% of the contract price were unconscionable, but others with forfeitures of 18.2% and 22% were upheld.[491] The court also noted that the fact that the value of the property had appreciated in value over the relevant period did not make the liquidated damages unconscionable.[492] In *Bruce Builders, Inc. v. Goodwin*,[493] a seller was entitled to liquidated damages even though the seller found another buyer and made a net profit of about $2500.[494]

In *Bradley v. Sanchez*,[495] the Bradleys entered into a written agreement with Mr. Sanchez on December 4, 2002, to purchase a home from Mr. Sanchez for $10,500,000.[496] The agreement was contingent on the Bradleys obtaining financing for 50% of the purchase price, with application to be made by December 9, 2002.[497] The Bradleys paid a "deposit of $10,000 on November 27, 2002," and were required to make an additional deposit of $500,000 on December 20, 2002.[498] The closing was originally set for March 1, 2003, but at Mr. Sanchez's request, the executed contract provided for a June 2, 2003, closing.[499] The contract stated that binding modifications to it had to be written and signed.[500]

The buyers delayed in applying for financing.[501] They claimed that the seller's agent told them on December 17, 2002, that they could wait until closer to closing to apply for a loan.[502] The agent claimed she never said that, and denied having the authority to say that.[503] "On December 12, 2002, the [buyers] were served with a federal search warrant" which they claimed made the requirement that they apply for a loan moot.[504] They argued that they would have been required to disclose to the bank the facts of the federal investigation, which would have made it impossible for them to qualify "for a large home mortgage."[505] On December 20, 2002, the Bradleys tried to

491. *Id.* at 541–42.
492. *Hot Developers, Inc.*, 950 So. 2d at 542.
493. 317 So. 2d 868 (Fla. 4th Dist. Ct. App. 1975). The liquidated damages were 4.1% of the contract price. *Id.* at 870. It would seem that a combination of the forfeiture percentage and a profit on sale might lead to a different result in an appropriate case. *See id.*
494. *Id.*
495. 943 So. 2d 218 (Fla. 3d Dist. Ct. App. 2006).
496. *Id.* at 220.
497. *See id.*
498. *Id.*
499. *Id.*
500. *Sanchez*, 943 So. 2d at 220.
501. *Id.* As it turned out, they never applied. *See id.*
502. *Id.*
503. *Id.*
504. *Sanchez*, 943 So. 2d at 220.
505. *Id.*

cancel the contract and demanded the return of the $10,000 deposit.[506] Mr. Sanchez refused and demanded the $500,000 additional deposit due that day.[507] The Bradleys sued for the return of the $10,000.[508] Mr. Sanchez filed a counterclaim alleging breach of contract.[509] Mr. Sanchez asked to keep the $10,000 deposit and for payment of the $500,000 deposit.[510] Mr. Sanchez moved for summary judgment on his breach of contract counterclaim.[511] His motion was granted by the court and a final judgment was entered awarding him both the $10,000 and the $500,000 deposits plus prejudgment interest.[512] The Bradleys moved to amend their complaint before final judgment was entered to allege that Mr. Sanchez sold the house on April 18, 2005 for $10,400,000 and was therefore unjustly enriched.[513] The trial court denied the motion, and the Bradleys appealed.[514] The Third District Court of Appeal affirmed, finding that "there were no genuine issues of material fact."[515] The events upon which the buyers relied to excuse their failure to apply for financing took place after the time to apply for the loan had passed.[516] Any waiver of the financing provision was required to have been in writing.[517] The court noted that it was aware that under certain circumstances, a later oral modification of a written contract would be upheld, but none of those circumstances were present.[518] The court also found that the liquidated damages amount of 4.85% of the contract price was neither an impermissible penalty nor unconscionable.[519]

In *Burzee v. Park Avenue Insurance Agency, Inc.*,[520] Ms. Burzee entered into a written noncompete agreement with her then employer, Park Avenue Insurance Agency, Inc.[521] The agreement provided that for two years after her employment ended, she would not communicate with any customers of Park Avenue Insurance Agency, Inc. who were customers during her period

506. *Id.* at 220–21.
507. *Id.* at 221.
508. *Id.*
509. *Sanchez*, 943 So. 2d at 221.
510. *Id.*
511. *Id.*
512. *Id.*
513. *Id.* at 221–22.
514. *Sanchez*, 943 So. 2d at 220.
515. *Id.* at 221.
516. *Id.*
517. *Id.* at 222.
518. *Id.*
519. *Sanchez*, 943 So. 2d at 222.
520. 946 So. 2d 1200 (Fla. 5th Dist. Ct. App. 2006).
521. *Id.* at 1201. Her employment contract was not in writing. *Id.*

of employment.[522] The agreement also contained an agreed measure of damages clause if Ms. Burzee breached the agreement.[523] Park Avenue Insurance Agency, Inc. would be entitled to the sum of all commissions earned by it on the accounts sold or serviced by Ms. Burzee during the two years prior to her termination, plus $10,000.[524] Ms. Burzee's employment was terminated by Park Avenue Insurance Agency, Inc. and she got a job with another insurance agency.[525] Park Avenue Insurance Agency, Inc. claimed that Ms. Burzee breached the noncompete agreement.[526] The trial court agreed, and based on the damages clause, awarded $161,572.88 in damages to Park Avenue Insurance Agency, Inc.[527] On appeal, Ms. Burzee argued that the damages award amounted to an unenforceable penalty and the Fifth District Court of Appeal agreed.[528] A liquidated damages clause that results in an amount "so grossly disproportionate to any damages that might reasonably be expected" will be deemed a penalty and unenforceable.[529] The court, in addressing the proportionality issue, pointed out that the same damage amount would apply regardless of the number of customers with which Ms. Burzee communicated, even if none of those customers actually became customers of her new employer.[530] The court concluded that "[t]he absence of proportionality is patent."[531] In addition, even if this provision in some circumstances might be considered enforceable, it could not have been enforceable under the circumstances of this case.[532] "[E]quity may 'relieve against [a] forfeiture'" if what might otherwise have been a proper liquidated damages provision "'appears unconscionable . . . at the time of the breach.'"[533] The court reversed insofar as the trial court had found that the damages clause was a valid liquidated penalty provision and remanded the matter.[534]

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522. *Id.*
523. *Id.* at 1201–02.
524. *Burzee*, 946 So. 2d at 1201–02.
525. *Id.* at 1202.
526. *See id.*
527. *Id.*
528. *Id.* The legal effect of this contractual provision is an issue of law reviewed de novo. *Burzee*, 946 So. 2d at 1202.
529. *Id.*
530. *Id.* at 1203.
531. *Id.*
532. *Id.* at 1203.
533. *Burzee*, 946 So. 2d at 1203 (quoting Hutchison v. Tompkins, 259 So. 2d 129, 132 (Fla. 1972)).
534. *Id.* Ms. Burzee also appealed the trial court's finding of civil contempt for violation of an injunction and the fine imposed. *Id.* at 1201. The Fifth District Court of Appeal affirmed these portions of the trial court's decision without discussion. *Id.* at 1203.

D. *Right of First Refusal*

In 1977, a right of first refusal had been granted to Old Port Cove Condominium Association One, Inc. (Association) with respect to land adjacent to Association's property, title to which had some time later vested in the developer, Old Port Cove Holdings, Inc. (Developer).[535] The option agreement provided that the property would first be offered to Association on the same terms and conditions as it would be offered to the public.[536] Association had thirty days to accept the offer.[537] Failure to timely accept the offer would terminate the right of first refusal.[538] Developer brought an action to have the right of first refusal declared void from the inception as being in violation of the common law rule against perpetuities.[539] The trial court ruled in favor of Developer.[540] On appeal, the Fourth District Court of Appeal in *Old Port Cove Condominium Ass'n One, Inc. v. Old Port Cove Holding, Inc.*,[541] expressed doubt that the rule against perpetuities ever applied to this kind of right of first refusal.[542] Nevertheless, the court went on to subject the grant to a rule against perpetuities analysis.[543] The court held that in 2000 the legislature abrogated the common law rule against perpetuities when it amended section 689.225 of the *Florida Statutes*, and the abrogation of the rule clearly was meant to be retroactive.[544] Therefore, by statute, the common law rule against perpetuities did not apply to the right of first refusal.[545] The court acknowledged that its decision regarding the retroactivity of the 2002 amendment was in conflict with *Fallschase Development Corp. v. Blakey*,[546] and certified conflict to the Supreme Court of Florida.[547]

535. Old Port Cove Condo. Ass'n One, Inc. v. Old Port Cove Holdings, Inc., 954 So. 2d 742, 742–43. (Fla. 4th Dist. Ct. App. 2007). The grant was made by Developer's predecessor in interest. *Id.* at 742–43. The court noted that Developer was aware of the grant for more than a decade before it instituted this action. *Id.* at 744.

536. *Id.* at 742.

537. *Id.*

538. *Old Port Cove Holdings, Inc.*, 954 So. 2d at 742.

539. *Id.* at 743.

540. *Id.*

541. 954 So. 2d 742 (Fla. 4th Dist. Ct. App. 2007).

542. *Id.* at 743.

543. *Id.* at 744–46.

544. *Id.* at 745 (citing FLA. STAT. § 689.225(7) (2005)).

545. *Id.* at 744. The Florida statutory rule against perpetuities excludes these types of restraints. Although there was a period of time during which the option existed that the law was otherwise, Developer failed to act under that statute to reform the option. *Old Port Cove Holdings, Inc.*, 954 So. 2d at 744.

546. 696 So. 2d 833 (Fla. 1st Dist. Ct. App. 1997).

547. *Old Port Cove Holdings, Inc.*, 954 So. 2d. at 746–47.

The court went on to say that the right of first refusal might be suspect as an unreasonable restraint on alienation.[548] The court concluded that the Association's option did not impose any burden on the sale of the property.[549] In reversing and remanding, the court noted that Developer would either get its price from the Association or from some other buyer, but the price would be based upon market value, not a value fixed in the option.[550] Therefore, the right of first refusal was not an unreasonable restraint on alienation.[551] Had the right of first refusal allowed purchase at a fixed price for an unlimited period of time, the result would have been different.[552]

VII. DEEDS AND MORTGAGES

A. *Deeds*

The Fifth District Court of Appeal was called upon to sort out the issue of superiority of title as between two purchasers of the same real estate from the same transferor, Virginia Schwartz (Seller).[553] Seller's husband, a resident of North Carolina, owned real estate in Marion County, Florida when he died in 1994.[554] Seller's husband devised all of his property to Seller, but according to the court's opinion, the husband's will was never probated.[555] On June 25, 2004, Seller signed a contract to convey the Marion County real estate to Mr. Rice, and on August 4, 2004, Seller delivered a warranty deed to Mr. Rice.[556] Almost two months later, Seller entered into another contract to sell the same real estate, only this time, to Mr. Greene.[557] On October 28, 2004, Mr. Greene paid for the real estate and received a warranty deed from Seller.[558] His deed was recorded on November 8."[559] Mr. Rice, however, did not get around to recording his deed until several weeks after Mr. Greene recorded his.[560] So which purchaser had priority of title?

548. *Id.* at 746.
549. *Id.* at 743.
550. *Id.* at 746.
551. *Id.*
552. *Old Port Cove Holdings, Inc.*, 954 So. 2d. at 746 (quoting Iglehart v. Phillips, 383 So. 2d 610, 615 (Fla. 1980)).
553. Rice v. Greene, 941 So. 2d 1230 (Fla. 5th Dist. Ct. App. 2006).
554. *Id.* at 1230.
555. *Id.*
556. *Id.* Apparently Mrs. Schwartz entered into the contract "on behalf of her deceased husband." *Id.* (internal quotations omitted).
557. *Rice*, 941 So. 2d at 1231.
558. *Id.*
559. *Id.*
560. *Id.*

The trial court granted summary judgment to Mr. Greene, purchaser number two, declaring his rights superior as between the two purchasers, and Mr. Rice appealed.[561] Mr. Rice argued that Seller did not have title to the real estate, and therefore, common law, not the recording statute applied.[562] The Florida recording statute provides that, with respect to the rights of purchasers of the same property, a subsequent purchaser of property for value and without notice of the prior transaction has priority over an earlier purchaser when the subsequent purchaser's deed is recorded first.[563] Mr. Rice's argument was grounded on section 733.103(1) of the *Florida Statutes*, which provides that a decedent's will is "ineffective to prove title . . . or the right to possession of" the decedent's property until the will is admitted to probate.[564] The result, Mr. Rice concluded, was that Seller did not have title to convey to Mr. Greene, so she could not have conveyed anything to make the recording statute applicable; consequently, common law applied and Mr. Rice had priority under his purchase agreement.[565]

The court looked instead to section 732.514 of the *Florida Statutes* which states that it is "'[t]he death of the testator . . . [that serves to] vest[] the right to devises'" in the devisees, unless the will provides otherwise.[566] The court, reading those two sections of the Florida Probate Code *in pari materia* observed that because the will was never probated, Seller "lacked marketable title to the property."[567] The Third District Court of Appeal, in affirming the trial court, stated "[h]owever, she clearly acquired equitable title to the property upon her husband's death, assuming, as have the parties, that Mr. Schwartz's will, which was presented to the court below, is authentic."[568]

Therefore, under the recording statute, as between Mr. Greene and Mr. Rice, Mr. Green had the priority claim to the property, which was the only question the court had before it.[569]

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561. *Id.* at 1230.
562. *Rice*, 941 So. 2d at 1232.
563. *Id.* (citing FLA. STAT. § 695.01(1) (2004)).
564. *Id.* at 1231 (quoting FLA. STAT. § 733.103(1) (2004)).
565. *Id.*
566. *Id.* (quoting FLA. STAT. § 732.514 (2004)).
567. *Rice*, 941 So. 2d at 1231.
568. *Id.* But what if the will was subsequently determined not to have been authentic? Would Seller still have had equitable title so that the recording statute could have applied? Some facts relevant to the court's determination may not have been recited in the opinion.
569. *Id.* at 1232. It is important to bear in mind that the court's ruling addressed only the claim of priority as between the two purchasers, not any issue of marketable title or breach of contract claims against seller. *Id.* at 1231.

B. *Mortgages*

The Third District Court of Appeal, in *Feinstein v. New Bethel Missionary Baptist*,[570] held, as a matter of first impression, that an express provision that imposes a prepayment penalty in the event of acceleration of the mortgage and note by the payee is enforceable.[571] New Bethel Missionary Baptist Church (New Bethel) defaulted on its payments on a mortgage and note.[572] Feinstein, the holder of the note and mortgage, accelerated the debt pursuant to the terms of the promissory note and began foreclosure proceedings.[573] The note not only imposed a prepayment fee if New Bethel prepaid the note, it provided that the prepayment fee would apply if the payments were accelerated by the mortgagee on default.[574] The trial court entered a final judgment of foreclosure in favor of Feinstein, but denied Feinstein the prepayment fee on the accelerated amount, which he had also requested.[575] On appeal, the Third District Court of Appeal observed that it could not find any Florida decisions directly holding "that an express provision of a promissory note . . . call[ing] for a prepayment fee" upon acceleration of debt payments is enforceable.[576] The court noted that there were, however, cases including a Supreme Court of Florida case, *Florida National Bank v. Bankatlantic*,[577] that opened the door for that result by "indicat[ing] that such would be [their] holding" if a case with these facts presented itself.[578] On the invitation and authority of those cases, the Third District Court of Appeal reversed the trial court.[579]

VIII. EMINENT DOMAIN

Three District Court of Appeal cases were similar because all of the land owners sought damages as a result of a change in traffic flow.[580] The

570. 938 So. 2d 562 (Fla. 3d Dist. Ct. App. 2006).
571. *Id.* at 563; *see also* Feinstein v. Ashplant, 961 So. 2d 1074 (Fla. 4th Dist. Ct. App. 2007) (enforcing a prepayment on acceleration penalty sought by the same lender under a provision similar to that involved in, and referring to, the decision of the Third District Court of Appeal in *Feinstein v. New Bethel Missionary Baptist*).
572. *Feinstein*, 938 So. 2d at 563.
573. *Id.*
574. *Id.*
575. *Id.*
576. *Id.*
577. 589 So. 2d 255 (Fla. 1991).
578. *Feinstein*, 938 So. 2d at 563–64.
579. *Id.* at 564–65.
580. Dep't of Transp. v. Fisher, 958 So. 2d 586, 589 (Fla. 2d Dist. Ct. App. 2007); City of Jacksonville v. Twin Rests., Inc., 953 So. 2d 720, 720–21 (Fla. 1st Dist. Ct. App. 2007); City

first two—related, if not the same—cases were condemnation cases,[581] while the third was an inverse condemnation case.[582] A fourth case considered a tenant's compensable interest and valuation.[583]

In the first condemnation case, *City of Jacksonville v. Twin Restaurants, Inc.* (Twin),[584] the City took some of the land owner's property in connection with a road project.[585] As part of the project, the City would build a median that would change the traffic flow to Twin's property.[586] Twin alleged that the change in traffic flow impeded its business.[587] The jury awarded Twin $143,420 for the property taken plus $685,000 in "severance damages" for the change in traffic flow.[588] The City appealed the severance damage award.[589] The First District Court of Appeal reversed, citing *Department of Transportation v. Capital Plaza, Inc.*[590] The court held that severance damages may not be awarded for a change in the traffic flow resulting from a median.[591] It was the construction of the median, not the taking of the property, that caused the change of traffic flow.[592]

In *Department of Transportation v. Fisher*,[593] the Department of Transportation (DOT) was involved in a project to elevate part of U.S. 19 and building frontage roads on the elevated portion.[594] The Fishers operated a carwash on U.S. 19 in Pinellas County.[595] Before the project, the Fishers' customers could get to the car wash from U.S. 19, but after the project, customers had to travel on a frontage road to get to the car wash.[596] The Fishers alleged that this amounted to inverse condemnation and they sought compensation based on a taking of access.[597] The court noted that "inverse condem-

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of Jacksonville v. Westland Park Assocs., II, 32 Fla. L. Weekly D440, D440 (1st Dist. Ct. App. Feb. 12, 2007).

581. *Twin Rests., Inc.*, 953 So. 2d at 721; *Westland Park Assocs., II*, 32 Fla. L. Weekly at D440.

582. *Fisher*, 958 So. 2d at 588.

583. Dames v. 926 Co., 925 So. 2d 1078, 1079 (Fla. 4th Dist. Ct. App. 2006).

584. 953 So. 2d 720 (Fla. 1st Dist. Ct. App. 2007)

585. *Id.*

586. *Id.*

587. *Id.* at 720–21.

588. *Id.* at 720.

589. *Twin Rests., Inc.*, 953 So. 2d at 720.

590. *Id.* at 724 (citing *Dep't of Transp. v. Capital Plaza, Inc.*, 397 So. 2d 682, 683 (Fla. 1981)).

591. *Id.* at 721.

592. *Id.*

593. 958 So. 2d 586 (Fla. 2d Dist. Ct. App. 2007).

594. *Id.* at 588.

595. *Id.*

596. *Id.*

597. *Id.* at 589.

nation [occurs] when governmental action causes a substantial loss of access to" the owner's property.[598] A physical taking of the owner's property is not required to establish the right to compensation from the government.[599] When there is a taking of property, plus a loss of access, money awarded for the access loss will be termed severance damages.[600] To be compensable, the loss of access need not be total but at least "substantially diminished."[601] Therefore, the question was whether DOT's actions on its property, as opposed to the Fishers' property, amounted to a taking of access.[602] There was no question that the most convenient route to the car wash was eliminated.[603] The issue, however, was whether or not access to the Fishers' property had been substantially diminished.[604] Based on the record, the court found that access to the Fishers' property was not substantially diminished.[605]

In *Dames v. 926 Co.*,[606] the Fourth District Court of Appeal considered the relevant date for determining who the holders of compensable interests were for the property known as 910 West Atlantic Avenue, Delray Beach, which was taken by eminent domain.[607] The compensable interest issue arose out the Dames' purchase in 1998 of Delray Coin Laundry, Inc. from the Millanises.[608] As part of the purchase, the Dames gave the Millanises a $75,000 promissory note secured by a chattel mortgage.[609] Delray Coin Laundry, Inc. was then the lessee of the subject property and 926 Company, Inc., the property owner, was the lessor.[610] In connection with the purchase by the Dames, Delray Coin Laundry, Inc. assigned the lease to the Dames

598. *Fisher*, 958 So. 2d at 589 (quoting Palm Beach County v. Tessler, 538 So. 2d 846, 849 (Fla. 1989)). Can construction of a median, with or without an actual taking ever support a claim for inverse condemnation? Although it did not use the term inverse condemnation, the court in *Twin Restaurants* also concluded that the access of Twin's customers would not be "substantially diminished." City of Jacksonville v. Twin Rests., Inc., 953 So. 2d 720, 722–23 (Fla. 1st Dist. Ct. App. 2007) (citing *Fisher*, 958 So.2d at 589)). It appears that the cite to *Fisher* is to the original opinion, which was withdrawn and substituted with a later opinion after the denial of the motion for rehearing because Judge Isom dissented from the denial of the motion. *See Fisher*, 958 So. 2d. at 593–94.

599. *Id.* at 589.

600. *See id.*

601. *Id.*

602. *Id.*

603. *Fisher*, 958 So. 2d at 591.

604. *Id.* at 589.

605. *Id.* at 590–91.

606. 925 So. 2d 1078 (Fla. 4th Dist. Ct. App. 2006).

607. *Id.* at 1079–81.

608. *Id.* at 1079.

609. *Id.* at 1079–80.

610. *Id.* at 1079.

individually.[611] In 2002, the Delray Beach Community Redevelopment Agency (Agency) instituted an eminent domain proceeding with respect to the property and included Mr. and Mrs. Dames among the respondents.[612] On July 17, 2003, Agency deposited $567,163 into the registry of the court pursuant to the court's Agreed Order of Taking.[613] 926 Company, Inc. was awarded compensation of $615,000 for the property taken by Agency.[614] The deposit by Agency allowed it title and possession as of July 17, 2003.[615] In June 2003, the Dames defaulted on their installment obligation to the Millanises, and in December 2003, the Millanises sought to foreclose upon the chattel mortgage.[616] The Millanises' foreclosure action resulted in their retaking of the leasehold interest.[617]

With respect to the compensable interests issue, 926 Company, Inc. claimed that the Dames were not entitled to any portion of the amount of an award.[618] Although tenants are entitled to a share of condemnation proceeds, 926 Company, Inc. argued, and the trial court agreed, that the Dames "were not entitled to compensation."[619] The Dames appealed and the Fourth District Court of Appeal reversed and remanded.[620] The court held that July 17, 2003, the date on which proceeds were deposited with the clerk, which was the date for valuation and the date that title was transferred under sections 73.071(2) and 74.061 of the *Florida Statutes*, respectively, was also the date for determining compensable interests in the property.[621] As of July 17, 2003, the Dames were the lessees of the property under a lease that was then in full force and effect.[622] They were entitled to a share of the condemnation

611. *Dames*, 925 So. 2d at 1080. The landlord argued that the Dames' were not the lessees, but rather Delray Coin Laundry, Inc., the corporation that the Dames' had purchased, was the lessee. *Id.* The court easily disposed of this issue, finding that Delray Coin Laundry, Inc. had assigned the lease to the Dames, individually, as part of the sale of the corporation and business assets. *Id.*

612. *Id.* at 1079.

613. *Id.*

614. *Dames*, 925 So. 2d at 1079.

615. *Id.*

616. *Id.* at 1081.

617. *Id.* at 1080.

618. *Id.*

619. *Dames*, 925 So. 2d at 1080.

620. *Id.* at 1082.

621. *Id.* at 1080–81.

622. *Id.* at 1081. The fact that the tenants abandoned the property after the date the title transferred, but prior to the date vacation of the premises was required under the Order of Taking, was irrelevant. *Id.* Also irrelevant was the fact that the tenants later defaulted on their payments to seller under the promissory note and chattel mortgage, and that the seller had instituted foreclosure proceedings in December 2003. *Dames*, 925 So. 2d at 1081. Fur-

proceeds, as the events occurring after July 17, 2003 were held to be irrelevant.[623]

The legislature amended Florida's eminent domain laws in 2006 in response to the United States Supreme Court decision in *Kelo v. City of New London*.[624] The United States Supreme Court held that the Fifth Amendment to the United States Constitution did not prohibit the city from taking private property by eminent domain for economic development, which the Court held to be a "public purpose," even though the property might be transferred to private individuals.[625] Among the revisions to the *Florida Statutes* are provisions that remove the authority to take property to eliminate public nuisance, slum, or blight conditions, or preservation or enhancement of the tax base,[626] and prohibit transfer of taken property to a private entity, with exceptions for common carriers, private and public utilities, and certain "special use" private entities.[627]

IX. EMPLOYMENT LAW

A. *Covenants Not to Compete*

There were numerous appellate cases decided during the survey period that involved covenants not to compete, some of which were entered into in the context of buy-sell agreements,[628] while in other cases, they arose solely out of an employment relationship where there was no ownership interest.[629]

In *Whitby v. Infinity Radio, Inc.*,[630] Whitby, who worked for WRMF-FM radio from 1980 to 1995, went to work for WEAT-FM in 1995.[631] The

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ther, the fact that the tenants were in default under the lease with owner was also irrelevant where owner had not taken any action to terminate the lease. *Id.* at 1081 n.1.

623. *Id.* at 1081.

624. 545 U.S. 469 (2005).

625. *Id.* at 484.

626. FLA. STAT. §§ 73.014(1)–(2), 163.335(7) (2007).

627. *Id.* § 73.013(1)–(2).

628. *See infra* note 660 and accompanying text.

629. *See, e.g.*, Whitby v. Infinity Radio, Inc., 961 So. 2d 349, 351 (Fla. 4th Dist. Ct. App. 2007); Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C., 939 So. 2d 268, 270, 273 (Fla. 4th Dist. Ct. App. 2006) (holding that the medical clinic had a legitimate interest to protect the existing patient goodwill in the specified geographic area); JonJuan Salon, Inc. v. Acosta, 922 So. 2d 1081, 1083–84 (Fla. 4th Dist. Ct. App. 2006) (affirming an order granting a temporary injunction against a former employee of a hair salon where salon demonstrated that a covenant was supported by legitimate interests of protecting goodwill and the substantial relationship with its customers, and the former employee breached covenant); Colucci v. Kar Kare Auto. Group, Inc., 918 So. 2d 431, 434 (Fla. 4th Dist. Ct. App. 2006).

630. *Whitby*, 961 So. 2d at 349.

1995 employment agreement between Whitby and the then owner of WEAT-FM contained a non-compete clause.[632] In 2000, four days before her employment contract with WEAT-FM was due to expire, Whitby entered into an employment agreement with the owner of WRMF-FM.[633] On the day the WEAT-FM agreement expired, Whitby started working for WRMF-FM.[634] Infinity Radio, Inc., the owner of WEAT-FM, sought and obtained a temporary injunction against Whitby, alleging violation of the non-compete agreement.[635] The trial court subsequently found that Whitby had violated the temporary injunction and was "in indirect civil contempt," and she was fined $100,000.[636] The order allowed Whitby to avoid the fine by committing no further violation of the temporary injunction.[637] Subsequently, the trial court found that Whitby had again violated the temporary injunction, directed payment of the fine, and threatened Whitby with jail upon nonpayment.[638] The court found that Whitby had the financial ability to pay the fine.[639]

Running parallel with the contempt proceeding was a breach of contract action against Whitby and her new employer.[640] Whitby argued that once the issues leading to the contempt citation had been resolved by the award in the parallel proceedings, the court lost jurisdiction to impose contempt sanctions.[641] The Fourth District Court of Appeal disagreed.[642] The trial court retained jurisdiction to conclude ancillary matters, which included the contempt proceeding.[643] Although the court must find that the contemnor has the ability to pay a coercive civil fine before enforcing it, the trial court so found in this case on competent evidence.[644] The Fourth District Court of Appeal also observed that threatening incarceration for nonpayment of a coercive civil contempt fine is not improper.[645]

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631. *Id.* at 351.
632. *Id.* There were several changes in ownership of WEAT-FM during the following few years, and in 1999, Whitby and the station's new owner, Infinity Radio, Inc., executed an amendment to the 1995 agreement reaffirming the 1995 agreement. *See id.*
633. *Id.*
634. *Whitby*, 961 So. 2d at 351.
635. *Id.*
636. *Id.* at 352, 355.
637. *Id.*
638. *Id.* at 355.
639. *Whitby*, 961 So. 2d at 352.
640. *Id.*
641. *Id.* at 353.
642. *Id.*
643. *Id.* at 353–54.
644. *Whitby*, 961 So. 2d at 354.
645. *Id.* at 356.

In another case, *Leighton v. First Universal Lending, LLC*,[646] a former employee of a lending company opened a lending business.[647] The former employer sought an injunction against the former employee and the employee's new company, although the employee's new company was not a party to the non-compete agreement and was not made a party to the lawsuit.[648] With respect to the injunction against the employee's new company, the court noted that a third party could be enjoined in connection with enforcing a non-compete agreement, but notice and an opportunity to be heard were required.[649] The former employee also claimed that the non-compete agreement was unenforceable because the former employer had breached the employment agreement.[650] With respect to the breach of contract defense, the court held that the former employer's breach of the employment contract was an equitable defense that could be raised by the former employee, but proof of the breach was required.[651] However, the former employee failed to demonstrate the breach of contract.[652]

In another covenant not to compete case, *Colucci v. Kar Kare Automotive Group, Inc.*,[653] Colucci sold his business to, and became an employee of, Kar Kare.[654] He then entered into a non-compete agreement with Kar Kare that, with the exception of a limited area in Florida, purportedly applied anywhere in the United States for five years after termination of his employment.[655] Kar Kare sought an injunction after Colucci left its employ, alleging that Colucci beached the covenant not to compete by conducting business in Florida that went beyond the scope agreed upon in the contract.[656] The employer, therefore, stopped making payments on a promissory note that was given in connection with the purchase of the business.[657] However, the original agreement between the parties provided that the covenant not to compete would not apply if the payments on the purchase agreement were not made.[658] The trial court granted the injunction and Colucci appealed.[659] The

646. 925 So. 2d 462 (Fla. 4th Dist. Ct. App. 2006).
647. *Id.* at 463.
648. *Id.* at 463–64.
649. *Id.* at 465.
650. *Id.* at 464.
651. *Leighton*, 925 So. 2d at 464.
652. *Id.*
653. 918 So. 2d 431 (Fla. 4th Dist. Ct. App. 2006).
654. *Id.* at 434.
655. *Id.*
656. *Id.* at 433–34.
657. *Id.* at 437.
658. *Colucci*, 918 So. 2d at 436–37. In this case, the covenant not to compete was effective upon the employee's termination of employment, even if that occurred before all payments under the promissory note given for the purchase of the business had been made. *See*

Fourth District Court of Appeal noted that a court may consider an employer's breach of an employment agreement when determining if an injunction should be granted.[660] If the breach is material, then the employee generally will be relieved from the covenant.[661] Further, the court noted that it must consider the defense if it is raised.[662] Colucci, however, did not claim that the employer's breach was a complete defense, so the court was required to consider whether the employer had met its burden of establishing that "it [would] suffer irreparable harm . . . ha[d] no adequate remedy at law . . . ha[d] a substantial likelihood of success on the merits; and . . . that . . . [granting the] temporary injunction [furthered] the public interest."[663] The appellate court stated that irreparable harm could not be said to exist in this case unless Kar Kare could demonstrate that it had a legitimate business interest to protect.[664] However, Kar Kare could not specify any lost clients or confidential business information, even though Colucci was using a similar name in the new business.[665] Therefore, Kar Kare did not show that it had suffered any irreparable harm, and thus could not qualify for the injunction.[666] Section 542.335(1)(b) of the *Florida Statutes* sets out a "nonexclusive list of 'legitimate business interests.'"[667] Case law has expanded that list.[668] The Fourth District Court of Appeal concluded that the record did not show that Kar Kare demonstrated that it had a legitimate business interest under the statute or case law.[669]

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id. at 436. In *Alvarez*, the covenant not to compete was not effective until the redemption occurred. Alvarez v. Rendon, 953 So. 2d 702, 710 (Fla. 5th Dist. Ct. App. 2007). Also, the payments for Rendon's stock in *Alvarez* would not have been required to have been made until the redemption. *Id.* The impact a subsequent default in payment would have had on Rendon's obligations under the covenant not to compete was not an issue. *See id.* In addition, the court did not specifically address Rendon's defense that the employer breached the agreement, as the court found that Rendon's obligation under the covenant could not have arisen there having been no redemption of stock. *Id.*

659. *Colucci*, 918 So. 2d at 433.

660. *Id.* at 437.

661. *Id.* (citing Benemerito & Flores v. Roche, 751 So. 2d 91, 93 (Fla. 4th Dist. Ct. App. 1999)).

662. *Id.*

663. *Id.* at 438 (quoting Net First Nat'l Bank v. First Telebanc Corp., 834 So. 2d 944, 949 (Fla. 4th Dist. Ct. App. 2003)).

664. *Colucci*, 918 So. 2d at 438.

665. *Id.* at 440. Even though that may have been evidence of Colucci's breach of the sale agreement, it did not result in irreparable harm. *Id.* at 440–41.

666. *Id.* at 441.

667. *Id.* at 438.

668. *Colucci*, 918 So. 2d at 439.

669. *Id.* at 440.

B. *Discrimination*

In *El Toro Exterminator of Florida, Inc. v. Cernada*,[670] El Toro Exterminator of Florida, Inc. (El Toro) provided pest control services for Miami-Dade County's bus fleet.[671] The contract between El Toro and the County contained restrictions on the products that could be used.[672] Mr. Cernada, El Toro's former service operations manager, testified that he was told to use and "conceal the use of" a particular pesticide and not to use protective gear so as not to alert the County.[673] The court found that when Mr. Cernada complained to the owners about the physical effects the pesticide was having on him, he was "subjected to racial and ethnic slurs" and given undesirable work schedules.[674] Finally, Mr. Cernada informed Miami-Dade County's Pest Control Manager of the probhibed use.[675] The court also found that one of the owners of El Toro threatened Mr. Cernada.[676] Mr. Cernada then quit his job.[677] He sued El Toro, alleging, among other claims, "retaliation under the Florida Private Sector Whistleblower's Act," section 448.102(3) of the *Florida Statutes*.[678] "At the conclusion of [Mr.] Cernada's case, . . . El Toro moved for a directed verdict on the . . . [whistleblower] claim" arguing that Mr. Cernada failed to prove his case as pled.[679] El Toro's position was that Mr. Cernada had not specifically identified the laws El Toro was said to have violated.[680] However, Cernada's lawyer had orally argued, without objection, the pertinent "ordinances and administrative code sections" El Toro was alleged to have violated.[681] The trial court denied El Toro's motion and allowed Mr. Cernada to amend his pleadings "to conform to the evidence."[682] El Toro appealed both rulings.[683] In affirming the trial court, the Third District Court of Appeal found that the trial court did not abuse its discretion by allowing Mr. Cernada to amend his pleadings.[684] "'Leave to amend shall be

670. 953 So. 2d 616 (Fla. 3d Dist. Ct. App. 2007).
671. *Id.* at 617.
672. *Id.*
673. *Id.*
674. *Id.*
675. *Cernada*, 953 So. 2d at 617.
676. *Id.*
677. *Id.*
678. *Id.* (citing FLA. STAT. § 448.102(3) (2002)). He also sought unpaid wages and alleged negligent supervision. *Id.*
679. *Cernada*, 953 So. 2d at 617.
680. *Id.*
681. *Id.*
682. *Id.*
683. *Id.*
684. *Cernada*, 953 So. 2d at 618.

freely given . . . ."[685] El Toro's conduct complained of in this case remained unchanged after the amendment of Mr. Cernada's pleadings.[686] Furthermore, El Toro was not prejudiced because the trial court allowed the amendment.[687] The allegations in the amendment should have come as no surprise to El Toro.[688]

El Toro next argued that Mr. Cernada's claim under the Whistleblower Act must fail because El Toro was not given "an opportunity to remedy [its alleged] offensive conduct."[689] The court observed that the record of Mr. Cernada's actions was contrary to El Toro's assertions.[690] This was a case for the jury.[691]

X. FIDUCIARY DUTY AND GOVERNANCE

In *Orlinsky v. Patraka*,[692] Orlinsky and Patraka were at one time both employed by their father-in-law's company.[693] Later, they decided to go into business together without their father-in-law.[694] They initially had a written agreement.[695] The agreement provided that they would have "equal salaries and benefits," and would share equally in business profits and losses from Visual Scene, Inc.[696] Patraka alleged that after several years, they decided to do without a written agreement and "orally agreed [that] they would be equal partners in any [business] they operated."[697] Indeed, for thirty years Orlinsky and Patraka were in business together sharing everything equally.[698] However, due to a financial reverse, and in order to keep their business going after a creditor foreclosed on the assets of Visual Scene, Inc., they decided that in order to buy back Visual Scene from the creditor, it was necessary to sell an interest in their business to investors who happened to be foreigners.[699] A new entity was formed, Visual Scene International (VSI), in which

685. *Id.* (quoting Fla. E. Coast Ry. Co. v. Shulman, 481 So. 2d 965, 967 (Fla. 3d Dist. Ct. App. 1986)).
686. *Id.*
687. *Id.*
688. *Id.*
689. *Cernada*, 953 So. 2d at 618.
690. *Id.*.
691. *Id.*
692. 32 Fla. L. Weekly D1637 (3d Dist. Ct. App. July 5, 2007).
693. *Id.* at D1638.
694. *Id.*
695. *Id.*
696. *Id.*
697. *Orlinsky*, 32 Fla. L. Weekly at D1638.
698. *Id.*
699. *Id.*

Orlinsky and Patraka "each received [a] 25.83% interest."[700] The upshot was that as part of a conversion from a "C" corporation to an "S" corporation, Orlinsky purchased the shares owned by the foreign investors in the operating company, VSI.[701] Orlinsky then owned a 69% share of VSI, and Patraka owned a minority interest.[702] Not long after that, the Articles of Incorporation were amended and all of the shareholders waived their preemptive rights.[703] Orlinsky and Patraka had a falling out and VSI's board of directors fired Patraka.[704] Patraka filed a complaint in court against Orlinsky.[705] He alleged breach of oral contract in count one, breach of fiduciary relationship in count two, sought imposition of a constructive trust in count three, and alleged tortious interference in count four.[706] The trial court granted Orlinsky's motion for a directed verdict as to counts one, three, and four, but allowed count two, breach of fiduciary duty, to go to the jury.[707] The jury returned a verdict for Patraka consisting of $887,000 for the VSI stock he did not receive as part of the conversion to an S corporation and $3,431,248 for benefits he did not receive because he was fired.[708] On appeal, the court determined that Orlinsky had not breached any fiduciary duty owed to Patraka and reversed the trial court's denial of a directed verdict on count two.[709] The Third District Court of Appeal discussed the fiduciary duty issue in four ways: 1) was there a general fiduciary duty?; 2) was there an agency relationship?; 3) was there a duty imposed on Orlinsky as majority shareholder?; and 4) was Orlinsky obliged to support the continued employment of Patraka?[710]

The court answered no to each of the questions.[711] The court found no evidence of breach of general fiduciary duty, concluding that this claim was no different from the breach of oral agreement claim that had been properly dismissed by the trial court.[712] As to agency, there was no evidence that Orlinsky agreed to act on Patraka's behalf in dealings with foreign investors.[713]

700. *Id.*
701. *Id.*
702. *Orlinsky*, 32 Fla. L. Weekly at D1638.
703. *Id.*
704. *Id.*
705. *Id.*
706. *Id.*
707. *Orlinsky*, 32 Fla. L. Weekly at D1638.
708. *Id.*
709. *Id.* at D1640.
710. *Id* at D1639–40.
711. *Id.*
712. *Orlinsky*, 32 Fla. L. Weekly at D1639.
713. *Id.*

Although Orlinsky, a majority shareholder, owed Patraka, a minority shareholder, a fiduciary duty, Orlinsky was a minority shareholder when he purchased the stock from the foreign investor shareholders.[714] "There was no shareholder agreement in place" that would have given Patraka the right to purchase an equal number of shares—preemptive rights having been waived.[715] Finally, and as a matter of first impression, the court adopted Delaware's rule that issues of wrongful employment termination are personal and contractual and are separate from any rights that the employee may have as a shareholder.[716] A majority shareholder's fiduciary duties are likewise separate from employment issues.[717]

XI. INSURANCE

Nob Hill Plaza (Landlord) leased shopping center space to New York Buffet (Tenant).[718] The lease agreement required Tenant to obtain casualty insurance covering the leased premises with the policy to name Nob Hill Plaza as an additional insured or loss payee.[719] Tenant bought the insurance from Lloyd's of London (Lloyd's), but failed to have the policy include the Landlord.[720] The premises were damaged by fire, and an insurance claim was filed by Tenant.[721] Lloyd's denied Tenant's claim, and Landlord sued Tenant for damages.[722] Tenant filed a third-party complaint against Lloyd's.[723] The trial court dismissed the third-party complaint.[724] The Fourth District Court of Appeal noted that it appeared that the trial court concluded that because Landlord did not qualify as a third-party beneficiary of Tenant's insurance policy, the third-party complaint was improper.[725] The Fourth District Court disagreed with the trial court.[726] Since Lloyd's may have to pay for the damage for which Landlord was suing Tenant, the third-

714. *Id.*
715. *Id.*
716. *Id.* at D1640.
717. *Orlinsky*, 32 Fla. L. Weekly at D1640.
718. N.Y. Buffet, Inc. v. Certain Underwriters at Lloyd's London, 950 So. 2d 438, 439 (Fla. 4th Dist. Ct. App. 2007).
719. *Id.*
720. *Id.*
721. *Id.*
722. *Id.*
723. *N.Y. Buffet, Inc.*, 950 So. 2d at 439.
724. *Id.*
725. *Id.*
726. *Id.*

party complaint was proper.[727] The Court added that "the trial court could sever the third-party action to prevent prejudice to [Lloyd's]."[728]

XII. INTELLECTUAL PROPERTY AND THE INTERNET

In 1991, Ms. Almeida's mother gave written permission to fashion photographer Fabrio Cabral to take and use Ms. Almeida's photograph for exhibit and publication.[729] Ms. Almeida was ten years old at the time.[730] Ms. Almeida's photo was published in a book, *Anjos Proibidos* (*Forbidden Angels*).[731] A second edition of *Anjos Proibidos* was published in 2000.[732] Ms. Almeida's photo was on the cover.[733] Amazon sold the second edition online on its website.[734] Amazon's product detail page displayed the second edition photograph of Ms. Almeida.[735] In addition, a quote was attributed to her.[736] Ms. Almeida's attorney sent a demand letter to Amazon for statutory damages under section 540.08 of the *Florida Statutes* "for its unauthorized use of Ms. Almeida's image."[737] Amazon responded by promptly removing the book's listing from its websites.[738] Ms. Almeida's lawyer sent a second letter to Amazon demanding damages pursuant to section 772.11 of the *Florida Statutes* for civil theft.[739] In November 2003, Ms. Almeida filed suit in Miami-Dade County Circuit Court alleging claims under both statutes relied upon by her attorney in his letters.[740] Amazon removed the case to federal district court based on diversity jurisdiction.[741] The federal district court granted Amazon's motion for summary judgment on all of Ms. Almeida's claims,[742] and the Eleventh Circuit Court of Appeals affirmed.[743]

The first issue was whether the Federal Communications Decency Act of 1996 (CDA) preempted Ms. Almeida's right of publicity claim under the

727. *Id.* at 440.
728. *N.Y. Buffet, Inc.*, 950 So. 2d at 440.
729. Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1318–19 (11th Cir. 2006).
730. *Id.* at 1318.
731. *Id.* at 1319.
732. *Id.*
733. *Id.*
734. *Almeida*, 456 F.3d at 1319.
735. *Id.*
736. *Id.*
737. *Id.* (citing FLA. STAT. § 540.08 (2006)).
738. *Id.*
739. *Almeida*, 456 F.3d at 1319 (citing FLA. STAT. § 772.11 (2006)).
740. *Id.*
741. *Id.*
742. *Id.*
743. *Id.* at 1328.

Florida law.[744] The court observed that the CDA was intended to grant immunity to any cause of action that would make internet service providers liable for information that originated with a third-party user of the service—in this case, Ophelia Editions.[745] The court also observed that the CDA was not intended to affect intellectual property rights.[746] Ms. Almeida argued that the federal statute did not preempt the Florida publicity right statute since a publicity right is an intellectual property right.[747] The court stated that "[w]hether the CDA immunize[d] an interactive service provider from a state law right of publicity claim" was a question of first impression for the Eleventh Circuit.[748] The court declined to decide the question because it found that Ms. Almeida's publicity right claim failed the requirements of the Florida statute.[749] The court concluded that Ms. Almeida's photograph was not used "for trade, commercial, or advertising purposes as those terms are used in the statute."[750] The court found that Amazon's use of book cover images only "simulates a customer's experience browsing book covers in a traditional book store."[751] The use of book covers is only "incidental to, and customary for," internet book sellers.[752] The court also rejected the civil theft claim under sections 812.012–812.037 and section 772.11 of the *Florida Statutes*, finding that Ms. Almeida failed to provide clear and convincing evidence of an injury that could have been caused by civil theft, and likewise failed to show felonious intent on Amazon's part.[753]

The Eleventh Circuit also affirmed the district court's award of attorney's fees to Amazon pursuant to section 772.11 of the *Florida Statutes*, finding that the civil theft claim was raised without substantial factual or legal support.[754]

Legislation was enacted in 2006 amending Florida's trademark law to make it more consistent with the Federal Trademark Act of 1946, as amended.[755] Chapter 495 of the *Florida Statutes* has been given the name

744. *Almeida*, 456 F.3d at 1320; *see also* 47 U.S.C. § 230 (2000).
745. *Almeida*, 456 F.3d at 1321.
746. *Id.* at 1323.
747. *See id.* at 1322; *see also* FLA. STAT. § 540.08 (2006).
748. *Almeida*, 456 F.3d at 1322.
749. *Id.* at 1324.
750. *Id.* at 1325.
751. *Id.* at 1326.
752. *Id.*
753. *Almeida*, 456 F.3d at 1327 (citing FLA. STAT. §§ 772.11, 812.012–.037 (2006)).
754. *Id.* at 1328.
755. Act effective Jan. 1, 2007, ch. 2006-191, § 20, 2006 Fla. Laws 1952, 1970 (amending FLA. STAT. § 495.181 (2006)).

"Registration and Protection of Trademarks Act."[756] The definitional section of the statute has been substantially reworded.[757] A trademark application review, amendment, and administrative hearing process has been created.[758] Notably, the duration of a registered mark has been reduced from ten years to five years.[759] A change of trademark name is to be filed with the Department of State.[760] The statute also now provides that a security interest in a mark may be created and perfected under the *Uniform Commercial Code*.[761] It also changes the law to allow an owner of a "famous mark" to pursue remedies, including an injunction, to prevent dilution of the mark.[762]

XIII. JURISDICTION AND VENUE

A. *Torts*

In *Hunt v. Cornerstone Golf, Inc.*,[763] Daly, a golfer and Tennessee resident, and Chamberland, an employee of John Daly Enterprises (JDE), a Florida corporation, granted two companies, Cornerstone, a Georgia corporation, and Hippo, a British corporation, owned partly by Hunt, overlapping "exclusive" rights to the use of Daly's name and likeness.[764] JDE terminated Cornerstone's trademark rights contract about six months before its scheduled expiration date, and Cornerstone brought suit in Broward County against Hippo, Hunt, a California subsidiary of Hippo, JDE, and Daly alleging tortious interference with its trademark license.[765] The trial court denied Hunt's motion to dismiss for lack of personal jurisdiction and Hunt appealed.[766] The issue was whether, under *Wendt v. Horowitz*,[767] Cornerstone satisfied the two-part jurisdictional test.[768] First, were sufficient jurisdictional facts alleged that Hunt committed a tortious act in Florida and that the cause of ac-

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756. *Id.* § 1, 2006 Fla. Laws at 1954 (codified at FLA. STAT. § 495.001 (2007)).
757. *Id.* § 2 (amending FLA. STAT. § 495.011 (2006)).
758. *Id.* § 6, 2006 Fla. Laws at 1958–59 (codified at FLA. STAT. § 495.035 (2007)).
759. *Id.* § 9, 2006 Fla. Laws at 1960 (amending FLA. STAT. § 495.071 (2006)).
760. Ch. 2006-191, § 10, 2006 Fla. Laws 1962 (amending FLA. STAT. § 495.081(3) (2006)).
761. *Id.* (amending FLA. STAT. § 495.081(5)).
762. *Id.* § 17, 2006 Fla. Laws at 1968–69 (amending FLA. STAT. § 495.151(1)–(2) (2006)).
763. 949 So. 2d 228 (Fla. 4th Dist. Ct. App. 2007).
764. *Id.* at 229.
765. *Id.*
766. *Id.* The decision of the Fourth District Court of Appeal addressed personal jurisdiction with respect to Hunt only. *Id.* The opinion does not mention if other defendants filed motions to dismiss. *See Hunt*, 949 So. 2d at 229–31.
767. 822 So. 2d 1252 (Fla. 2002).
768. *Hunt*, 949 So. 2d at 230.

tion arose from that alleged tortious act?[769] Second, were there minimum contacts between the defendant and Florida that would satisfy due process requirements?[770]

It was Cornerstone's burden to prove under the first part of the test that the alleged tortious interference took place in Florida.[771] Under *Wendt*, where a party asserts jurisdiction over another based on the commission of a tort in Florida that involves a communication originating outside of Florida and there is no physical presence of the other in Florida, the alleged tort must have arisen from that communication.[772] Hunt was never in Florida, but Hunt made telephone calls and sent two e-mails to Chamberland in Florida concerning JDE's contract with Cornerstone.[773] The question, therefore, was whether Cornerstone's claim arose from those contacts.[774] The Fourth District Court of Appeal held that because Hunt initially got in touch with an agent of Daly in Washington, D.C. and with Daly in Tennessee regarding Hunt's interest in the exclusive trademark rights, any claim for tortious interference should have been made where those initial communications occurred, not in Florida.[775] Having determined that Cornerstone failed the first part of the jurisdiction test, it was unnecessary for the Court to opine on the sufficiency of Hunt's contacts with Florida.[776]

In *Deloitte & Touche v. Gencor Industries, Inc.*,[777] Gencor Industries, Inc. (Gencor U.S.) acquired a United Kingdom company, which became Gencor ACP (Gencor U.K.).[778] As part of the transaction, Gencor U.K. engaged Deloitte & Touche (Deloitte & Touche U.K.), a United Kingdom partnership, to audit its books.[779] Gencor U.S.'s Florida auditor was Deloitte & Touche U.S.[780] Deloitte & Touche U.K. conducted the audit of Gencor U.K. and sent its audit report to Deloitte & Touche U.S. in Florida.[781] Deloitte & Touche U.S. passed the report on to Gencor U.S.[782] Gencor U.S. claimed that the Deloitte & Touche U.K.'s audit report was defective and brought suit

769. *Id.*
770. *Id.*
771. *Id.*
772. *Id.*
773. *Hunt*, 949 So. 2d at 230.
774. *See id.*
775. *Id.*
776. *Id.* at 231 n.2.
777. 929 So. 2d 678 (Fla. 5th Dist. Ct. App. 2006).
778. *Id.* at 679.
779. *Id.*
780. *Id.*
781. *Id.* at 681.
782. *Deloitte & Touche*, 929 So. 2d at 681.

against Deloitte & Touche U.S. and Deloitte & Touche U.K. in the Orange County Circuit Court alleging professional negligence and negligent misrepresentation.[783] The first issue was one of in personam jurisdiction, that is, whether or not Deloitte & Touche U.K.'s actions could be found to be the commission of a tortious act in Florida under the long-arm statute, section 48.193(1)(b) of the *Florida Statutes*.[784] The second issue was venue.[785]

The Fifth District Court of Appeal stated that, under *Wendt,* the alleged tort must have arisen from the "transmission" of that communication.[786] Deloitte & Touche U.K. argued that Gencor U.S. claimed only to have relied on a report received from Deloitte & Touche U.S.[787] Therefore, according to Deloitte & Touche U.K., the alleged tort could not have arisen out of any transmission by it to Gencor U.S. because its transmission of the report was to Deloitte U.S.[788] The court acknowledged that this case differed from the facts of *OSI Industries, Inc. v. Carter*,[789] and all other Florida cases it knew of, in that the communication from which the alleged misrepresentation was said to arise was not transmitted to the person claiming to have relied on the misrepresentation.[790] The Fifth District Court of Appeal concluded, based on "the peculiar nature of the particular tort at issue," that it did not matter that Deloitte & Touche U.K.'s audit report was not sent directly to Gencor U.S.[791] It was sufficient that Gencor U.S.'s unrefuted jurisdictional allegations were to the effect that "the reports were sent to Florida" and that Deloitte & Touche U.K. must have known "that [the] reports would be relied on in Florida by Gencor [U.S.] and they were relied upon in Florida by Gencor [U.S.]."[792]

Perhaps the most important aspect of the decision, however, is what the Fifth District Court of Appeal said with respect to liability of accountants for negligent misrepresentation.[793] In reaching its decision on the jurisdictional issue, the court noted that although the Supreme Court of Florida had not

783. *Id.* at 679.
784. *Id.*
785. *Id.*
786. *Id.* at 680. There was no claim that Deloitte & Touche U.K. had any physical presence in Florida or that anyone from Deloitte & Touche U.K. was ever in Florida in connection with any business dealings with Gencor U.S. or any of its subsidiaries, including Gencor U.K. *Deloitte & Touche*, 929 So. 2d at 680.
787. *Id.* at 680–81.
788. *Id.* at 681.
789. 834 So. 2d 362 (Fla. 5th Dist. Ct. App. 2003).
790. *Deloitte & Touche*, 929 So. 2d at 680–81.
791. *Id.* at 681.
792. *Id.* at 683.
793. *Id.* at 681.

made it perfectly clear whether Florida has adopted the Restatement (Second) of Torts[794] rule with respect to liability of accountants for negligent misrepresentation in connection with an audit,[795] based on Florida Supreme Court cases,[796] "it is difficult reasonably to reach any other conclusion."[797]

The other issue, venue, was based on the audit agreement between Gencor U.K. and Deloitte & Touche U.K., which provided that claims by a party would be litigated in the United Kingdom.[798] The trial court found that the provision did not apply to Gencor U.S. because it "was not a party to the contract."[799] The Fifth District Court of Appeal ruled that a non-party could be bound by a choice of forum clause if, as the court found with respect to Gencor U.S., "the interests of a non-party are directly related to or completely derivative of those of a contracting party."[800] Therefore, even though the Orange County Circuit Court acquired jurisdiction over Deloitte & Touche U.K., Gencor U.S.'s claim against Deloitte & Touche U.K. had to be litigated in the United Kingdom.[801]

In another Fifth District Court of Appeal case, *Thorpe v. Gelbwaks*,[802] the Thorpes sued Gelbwaks in Florida, in connection with the Thorpes' purchase of a franchise operation.[803] The Thorpes alleged, among other things, that Gelbwaks defrauded them in Florida.[804] Gelbwaks, a New Hampshire resident, moved to dismiss the complaint for lack of jurisdiction under Flor-

794. RESTATEMENT (SECOND) OF TORTS § 552 (1977). The Restatement (Second) rule extended liability of accountants for negligent misrepresentation (negligence) beyond the privity limitation set forth in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931). *See* First Fla. Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9, 11–12 (Fla. 1990). Under the Restatement (Second), liability extends to those with whom the alleged tortfeasor is in privity of contract, those to whom the tortfeasor intends to supply it, and those the alleged tortfeasor "knows that the recipient intends to supply it." RESTATEMENT (SECOND) OF TORTS § 552(2)(a) (1977).

795. *Deloitte & Touche*, 929 So. 2d at 681 (citing Nationsbank, N.A. v. KPMG Peat Marwick, LLP, 813 So. 2d 964, 967 (Fla. 4th Dist. Ct. App. 2002)).

796. *See, e.g.*, Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 339 (Fla. 1997); *First Fla. Bank, N.A.*, 558 So. 2d at 15.

797. *Deloitte & Touche*, 929 So. 2d at 681.

798. *Id.* at 680.

799. *Id.* at 683.

800. *Id.* at 684.

801. *Id.* at 683.

802. 953 So. 2d 606 (Fla. 5th Dist. Ct. App. 2007).

803. *Id.* at 608.

804. *Id.* The claims included "violation of the Sale of Business Opportunities Act," sections 559.80 to 559.815 of the *Florida Statutes*, and violation of the Florida Deceptive and Unfair Trade Practices Act, sections 501.201 to 501.213 of the *Florida Statutes*. *Id.* at 608 nn.2–3.

ida's long-arm statute.[805] Gelbwaks' supporting affidavit denied all allegations of wrongdoing.[806] The Thorpes filed the affidavit of Robert Gregg, a former employee of the same corporation that employed Gelbwaks.[807] Mr. Gregg's affidavit was to the effect that Gelbwaks was Vice President of Franchise Operations and would regularly stay in Florida during the work week.[808] The trial court granted Gelbwaks' motion to dismiss, finding that Gelbwaks' affidavit shifted to the Thorpes the burden of proving that Gelbwaks committed a tort in Florida, a burden that they did not carry.[809] In addition, the trial court concluded that Mr. Gregg's affidavit did not refute Gelbwaks' sworn denials of wrongdoing.[810] The Fifth District Court of Appeal reversed and remanded.[811] The trial court mistakenly believed that the Thorpes had the burden of proving that the Gelbwaks actually committed a tort in Florida.[812] However, the Thorpes need only prove that the acts alleged to have constituted the tort occurred in Florida to invoke the long-arm statute.[813] In addition, Gregg's affidavit established Gelbwaks' sufficient minimum contacts with the state.[814] Thus, the Thorpes passed the two-part jurisdictional test.[815]

B. *Contracts*

In *Woodard Chevrolet, Inc. v. Taylor Corp.*,[816] Woodard Chevrolet, a California company, and Taylor Corporation, a Florida corporation that does direct mail advertising from Florida, entered into a contract for Taylor to perform advertising services for Woodard Chevrolet.[817] Taylor had solicited Woodard's business with respect to mailing advertising to Woodard's potential California customers.[818] The contract was signed by Woodard Chevrolet in California, and "[n]o meetings were held in Florida" regarding the contract.[819] Taylor performed services and Woodard made some of the pay-

805. *Id.* at 608.
806. *Thorpe*, 953 So. 2d at 608.
807. *Id.*
808. *Id.* at 608–09.
809. *Id.* at 609.
810. *Id.*
811. *Thorpe*, 953 So. 2d at 612.
812. *Id.* at 611.
813. *Id.* at 609.
814. *Id.* at 611.
815. *Id.*
816. 949 So. 2d 268 (Fla. 4th Dist. Ct. App. 2007).
817. *Id.* at 269.
818. *Id.*
819. *Id.*

ments due to Taylor under the contract.[820] Taylor sued Woodard in Broward County for breach of contract.[821] Taylor alleged that there was jurisdiction based on Woodard Chevrolet's breach of contract by its failure to make payments that were required to be made in Florida.[822] The trial court ruled that it had jurisdiction over Woodard and Woodard appealed.[823]

The Fourth District Court of Appeal, once again relying on *Wendt*, observed that Florida has a two-part test for determining if "there is long-arm jurisdiction over a nonresident defendant."[824] First, are sufficient jurisdictional facts alleged?[825] Second, are there enough "minimum contacts between the defendant and Florida to satisfy . . . due process requirements[?]"[826] The allegations satisfied the first part of the test under section 48.193(1)(g) of the *Florida Statutes*.[827] However, the court was unable to find sufficient minimum contacts between Woodard and Florida to satisfy due process.[828] Taylor made contact with Woodard in California.[829] No one claiming to be a representative of Woodard was ever in Florida.[830] It could not be said that Woodard ever sought the privileges of doing business in Florida.[831] The second part of the test was not satisfied and the trial court's judgment was reversed.[832]

C. *Subject Matter Jurisdiction*

The case of *Hammond v. DSY Developers, LLC*,[833] discussed earlier in this survey,[834] dealt with the local action rule and in rem jurisdiction in a real estate matter.[835] The Third District Court of Appeal said that, "[a]lthough the trial court's jurisdiction to enter the order in question was not raised below or

820. *Id.*
821. *Taylor Corp.*, 949 So. 2d at 269–70.
822. *Id.* The court noted that the contract did not contain a choice of venue provision, "[a]lthough not dispositive to this appeal." *Id.* at 269 n.1.
823. *Id.* at 270.
824. *Id.* (citing Wendt v. Horowitz, 822 So. 2d 1252, 1257 (Fla. 2002)).
825. *Taylor Corp.*, 949 So. 2d at 270.
826. *Id.*
827. *Id.*
828. *Id.*
829. *Id.*
830. *Taylor Corp.*, 949 So. 2d at 270.
831. *Id.* at 270–71.
832. *Id.* at 271.
833. 951 So. 2d 985 (Fla. 3d Dist. Ct. App. 2007).
834. *See supra* Part VI.A and accompanying text.
835. *Hammond*, 951 So. 2d at 988–89.

on appeal, it is the duty of this [c]ourt to remain vigilant to the issue of subject-matter jurisdiction."[836]

The trial court was found to have subject matter jurisdiction with respect to the specific performance aspect of the action, an in personam cause of action.[837] However, while the trial court's summary judgment order in *Hammond* that directed specific performance was approved, the summary judgment was disapproved to the extent that it attempted to operate to transfer title.[838] The trial court did not have in rem jurisdiction over the property located in Indian River County.[839] Citing the "local action rule," if a court does not have in rem jurisdiction over the real property involved in the action, then the court does not have jurisdiction to convey title.[840] The court ruled that if court action became necessary to enforce the order and to transfer title, then it would be necessary to transfer the case to the court having in rem jurisdiction, that court being the Circuit Court for Indian River County.[841]

D. *Service of Process*

In *Mecca Multimedia, Inc. v. Kurzbard*,[842] Kurzbard alleged that he was injured in a slip-and-fall on Mecca's premises.[843] Kurzbard sued Mecca for negligence.[844] Kurzbard tried to serve Mecca's registered agent at the agent's address on file with the Florida Secretary of State.[845] The address turned out to be the address of the agent's parents, "who refused to accept service" or provide any information regarding their son, the named agent.[846] Kurzbard tried two more times "to serve an officer or employee of Mecca at" Mecca's business address in Miami, but no one was there.[847] Finally, Kurzbard resorted to substituted service on Mecca by serving the complaint on the Secretary of State as provided in section 48.181 of the *Florida Statutes*.[848] Effective substituted service on a corporation under that statute requires that

836. *Id.* at 988.
837. *Id.* at 989.
838. *Id.*
839. *Id.*
840. *Hammond*, 951 So. 2d at 989.
841. *Id.*
842. 954 So. 2d 1179 (Fla. 3d Dist. Ct. App. 2007).
843. *Id.* at 1180.
844. *Id.*
845. *Id.*
846. *Id.* at 1180–81.
847. *Kurzbard*, 954 So. 2d at 1181.
848. *Id.*; FLA. STAT. § 48.181(1) (2007).

a plaintiff plead and prove that service of the complaint in the normal way under section 48.081 of the *Florida Statutes* was not possible for one of the reasons enumerated in section 48.181; in this case, a defendant who concealed his or her whereabouts.[849] Kurzbard failed to allege in his complaint facts supporting substituted service.[850] Substituted service was held to be ineffective.[851]

E. *Comity*

Plaintiff sued defendant in New York for "breach of contract [and] tortious interference with a business relationship."[852] Defendant instituted an action in Florida with similar claims.[853] Plaintiff moved to stay the Florida proceeding pending the conclusion of the New York action on the ground that the Florida action involved basically the same parties and substantially the same issues as the New York action.[854] Plaintiff also claimed that the New York action would ultimately decide most of the claims involved in the Florida action.[855] The stay was denied because defendant's claims—brought by defendant as the Florida plaintiff—could not be brought in New York against certain Florida residents who were named as defendants in the Florida action.[856] The Third District Court of Appeal reversed on the basis of comity, stating that "[c]omity principles dictate that an action should be stayed, and a trial court departs from the essential requirements of law by failing to grant such a stay, when the first-filed lawsuit involves substantially similar parties and substantially similar claims."[857]

The Third District Court of Appeal noted that the policy discouraging forum shopping "would be meaningless if a party could avoid the dictates of comity [by simply] naming nominal defendants in a second-filed action."[858] While the addition of those parties would preclude an abatement of the Florida proceedings, it does not justify departure from the doctrine of comity.[859]

849. *Kurzbard*, 954 So. 2d at 1182.
850. *Id.*
851. *Id.* at 1182–83.
852. Pilevsky v. Morgans Hotel Group Mgmt., LLC, 961 So. 2d 1032, 1034 (Fla. 3d Dist. Ct. App. 2007).
853. *Id.*
854. *Id.*
855. *Id.*
856. *Id.*
857. *Pilevsky*, 961 So. 2d at 1035 (citing Cuneo v. Conseco Servs., LLC, 899 So. 2d 1139, 1141 (Fla. 3d Dist. Ct. App. 2005)).
858. *Id.*
859. *Id.*

The court observed that if the New York case does not resolve all issues concerning the Florida residents, then the Florida action may be pursued after the New York proceedings are concluded.[860]

XIV. LANDLORD AND TENANT RELATIONSHIP

A. *Assignment of Lease*

In *Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.*,[861] Tropic, as lessor (Landlord), entered into a commercial lease with Speedway, as lessee (Tenant).[862] The lease agreement contained a "no assignment" clause that required Tenant to obtain Landlord's prior written consent to Tenant's assignment of the lease.[863] This clause provided in part that "[a]ny such assignment without consent shall be void, and shall, at the option of the Lessor, terminate this lease."[864] Landlord refused to consent to the assignment, but Tenant nonetheless assigned the lease to Sunoco, Inc.[865] The trial court determined that Landlord had the unfettered right to refuse consent and granted summary judgment in favor of Landlord.[866]

The Second District Court of Appeal reversed and remanded, holding that there was an implied obligation of good faith on Landlord's part not to deny consent unreasonably.[867] If a lease doesn't resolve an issue, or if one party has discretion to act but no standards are set forth regarding the exercise of discretion, then the obligation of good faith will be implied.[868] Since the lease did not resolve the question in that it did not give Tropic the absolute discretion to withhold consent, and it did not contain any standard regarding the exercise of discretion, the obligation of good faith would be implied.[869] The implied covenant "is a gap-filling default rule" under these circumstances.[870] The court, quoting *Cox v. CSX Intermodal, Inc.*,[871] held that "[w]here the terms of [a] contract afford a party substantial discretion to

860. *Id.* at 1036.
861. 32 Fla. L. Weekly D1032 (2d Dist. Ct. App. April 20, 2007).
862. *Id.*
863. *Id.* at D1032–33.
864. *Id.* at D1033.
865. *Id.* at D1032–33.
866. *Speedway SuperAmerica, LLC*, 32 Fla. L. Weekly at D1032.
867. *Id.* at D1033–34.
868. *Id.* at D1033 (citing Publix Super Mkts., Inc. v. Wilder Corp., 876 So. 2d 652, 654 (Fla. 2d Dist. Ct. App. 2004)).
869. *Id.*
870. *Id.* (quoting *Wilder Corp.*, 876 So. 2d at 654).
871. 732 So. 2d 1092 (Fla. 1st Dist. Ct. App. 1999).

promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party."[872]

B. *Renewal Options*

In *PL Lake Worth Corp. v. 99Cent Stuff-Palm Springs, LLC*,[873] PL Lake Worth Corporation (Landlord) leased shopping center property to 99Cent Stuff-Palm Springs, LLC (Tenant).[874] The lease agreement gave Tenant an option to renew the lease.[875] In order to make an informed decision on the exercise of the option, Tenant needed and requested certain financial information from Landlord well in advance of the option exercise date.[876] The lease agreement did not explicitly require Landlord to provide the information and it refused to do so.[877] With judicial intervention, Tenant finally obtained the necessary information.[878] Almost immediately after receiving the information, Tenant exercised its option to renew the lease.[879] However, by that time the option date had passed.[880] Landlord sought to have the lease declared terminated.[881] The trial court ruled in favor of Tenant, holding that Landlord breached its implied duty to act in good faith by refusing to provide the necessary information to Tenant.[882] The Fourth District Court of Appeal affirmed citing *Bowers v. Medina*,[883] which held that "[a]n established contract principle is that a party's good-faith cooperation is an implied condition precedent to performance of the contract."[884] On the authority of *Sharp v. Williams*[885] and *Cox v. CSX Intermodal, Inc.*,[886] the Fourth District Court of Appeal dismissed Landlord's argument that the contract was silent and,

872. *Speedway SuperAmerica, LLC*, 32 Fla. L. Weekly at D1033 (quoting *Cox*, 732 So. 2d at 1097–98).
873. 949 So. 2d 1199 (Fla. 4th Dist. Ct. App. 2007).
874. *Id.* at 1200.
875. *Id.*
876. *Id.*
877. *Id.*
878. *PL Lake Worth Corp.*, 949 So. 2d at 1200–01.
879. *Id.* at 1201.
880. *Id.* at 1200.
881. *Id.*
882. *Id.* at 1201.
883. 418 So. 2d 1068 (Fla. 3d Dist. Ct. App. 1982).
884. *PL Lake Worth Corp.*, 949 So. 2d at 1201 (citing *Bowers*, 418 So. 2d at 1069).
885. 192 So. 476 (Fla. 1939).
886. 732 So. 2d 1092 (Fla. 1st Dist. Ct. App. 1999).

therefore, there was no duty to provide the information requested by Tenant.[887]

In *Peavey v. Reynolds*,[888] Peavey (Landlord) leased certain commercial property to Reynolds (Tenant).[889] Landlord claimed that provisions in the lease agreement amounted to "an unreasonable restraint on the alienation of property" and the lease was therefore void.[890] The lease was upheld by the trial court and Landlord appealed.[891] The Fifth District Court of Appeal reversed.[892] Under the terms of the lease agreement, Tenant had "the right to renew the lease indefinitely at [amounts] fixed by the . . . lease" agreement.[893] The agreement also provided that any successor landlord would be bound by the terms of the lease.[894] The court, citing *Seagate Condo Ass'n v. Duffy*,[895] stated that restraints on alienation are a matter of public policy.[896] The court observed that the lease terms gave little incentive to any landlord to make improvements to the property.[897] The court also noted that it was highly questionable that Landlord would ever be able to sell the property burdened as it was by the lease agreement.[898] The test is one of reasonableness and the Fifth District Court of Appeal, stating that the court knew of no case directly on point, concluded that the onerous terms of the lease agreement constituted an "unreasonable restraint on alienation" thereby voiding the lease.[899]

In *Chessmasters, Inc. v. Chamoun*,[900] the Chamouns (Landlord) leased certain commercial property to Chessmasters, Inc., (Tenant).[901] Landlord was the successor lessor as the result of its purchase of the property.[902]

887. *PL Lake Worth Corp.*, 949 So. 2d at 1201.
888. 946 So. 2d 1125 (Fla. 5th Dist. Ct. App. 2006).
889. *Id.* at 1126.
890. *Id.*
891. *Id.*
892. *Id.* at 1127.
893. *Peavey*, 946 So. 2d at 1127.
894. *Id.*
895. 330 So. 2d 484 (Fla. 4th Dist. Ct. App. 1976).
896. *Peavey*, 946 So. 2d at 1126 (citing *Duffy*, 330 So. 2d at 485).
897. *Id.* at 1127.
898. *Id.*
899. *Id.* at 1127, & n.1. The result in the case seems to be consistent with the observation of the Fourth District Court of Appeal in *Old Port Cove Condominium Ass'n One, Inc. v. Old Port Cove Holdings, Inc.*, regarding the impact a fixed price for the right of first refusal for an unlimited time may have had on the outcome of the case. 954 So. 2d 742, 746 (Fla. 4th Dist. Ct. App. 2007); *see also supra* note 547 and accompanying text.
900. 948 So. 2d 985 (Fla. 4th Dist. Ct. App. 2007).
901. *Id.* at 986.
902. *Id.*

Landlord sought to have the lease agreement declared void on the grounds that certain provisions granted to Tenant in the lease agreement amounted to "an unreasonable restraint on alienation."[903] The trial court agreed with Landlord that the lease could be renewed by Tenant in perpetuity and declared the lease void.[904] Tenant then appealed.[905] The offending lease renewal provision allowed for the automatic renewal of the lease for five additional years unless the Tenant gave the Landlord timely notice of non-renewal.[906] If the lease was renewed rent would increase by "not more than 10% current rental price."[907] The Fourth District Court of Appeal held that before a renewal right could be said to be perpetual and an unreasonable restraint on alienation, the lease agreement had to contain a clear and explicit right to perpetual renewals.[908] The subject lease agreement did not so state.[909] Therefore, the renewal right could not be said to be perpetual.[910] The court had to grapple with the fact that likewise, renewals were not expressly limited by the agreement.[911] How many renewals does the Tenant get? The court, citing *Schroeder v. Johnson*,[912] said only two.[913] However, unlike the lessee in *Schroeder*, Tenant gets only one extension because the lease refers to "period" in the singular, whereas the lease in *Schroeder* referred to "periods," allowing the grant of two extensions.[914]

C. *Restrictive Covenants*

Winn-Dixie (Tenant) was the "anchor" tenant at Crest Haven Shopping Plaza (Landlord).[915] Tenant's lease with Landlord gave Tenant "the exclusive right to sell groceries" in the shopping center, subject to one exception.[916] The exception allowed other stores to sell groceries in a space no larger than 500 square feet.[917] The lease also provided that Landlord's ex-

903. *Id.* at 985.
904. *Id.* at 986.
905. *Chamoun*, 948 So. 2d at 985.
906. *Id.* at 986.
907. *Id.*
908. *Id.* at 987.
909. *Id.*
910. *Chamoun*, 948 So. 2d at 987.
911. *See id.*
912. 696 So. 2d 498 (Fla. 5th Dist. Ct. App. 1997).
913. *See Chamoun*, 948 So. 2d at 987 (citing *Schroder*, 696 So. 2d at 499).
914. *Id.* at 987–88.
915. Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261 (Fla. 4th Dist. Ct. App. 2007).
916. *Id.* at 263.
917. *Id.*

clusive right was deemed to be a covenant running with the land.[918] A short form version of the lease was recorded in the Palm Beach County public records.[919] Dolgencorp then opened a Dollar General Store in the shopping center and began selling groceries from an area larger than 500 square feet.[920] Tenant sued Dolgencorp and Landlord, and the trial court entered summary judgment in favor of Dolgencorp.[921] Tenant appealed, and Dolgencorp argued that Tenant's exclusive right was not binding on Dolgencorp because Dolgencorp was not a party to the lease agreement between Tenant and Landlord.[922] Ruling in favor of Tenant, the Fourth District Court of Appeal determined that Tenant's exclusive right was a covenant running with the land and enforceable against Dolgencorp.[923] The court defined an "enforceable covenant running with the land" as a covenant: 1) "that touches and involves the land;" 2) that was created intentionally; and 3) notice of which is given to "the party against whom enforcement is sought."[924] Based on the record, the court found that Tenant satisfied the first two criteria but had a little more difficulty ruling that the third requirement, the notice requirement, had been satisfied.[925] Stating that notice can be constructive, actual, or implied actual, the Fourth District Court of Appeal determined that Dolgencorp had "at least implied actual notice" of Tenant's exclusive right.[926] The court based its conclusion on the fact that "Dolgencorp was an experienced commercial tenant" that had many of its sites in shopping centers, and it had a duty to inquire further.[927] In fact, Dolgencorp insisted on "exclusive[] [rights] in its own leases."[928] The Fourth District Court of Appeal also concluded that Dolgencorp had constructive notice, relying on sections 28.222(3)(a), 695.11, and 695.01(1) of the *Florida Statutes*.[929] A lease is "one kind of instrument that the clerk...is required to record" and therefore, it is notice under Section 695.11 of the *Florida Statutes* when it is "officially recorded."[930] For purposes of section 695.01(1) of the *Florida Stat-*

918. *Id.*
919. *Id.*
920. *Dolgencorp*, 964 So. 2d at 263.
921. *Id.* Dolgencorp sought an injunction, specific performance, and damages. *Id.* There was also a claim of unjust enrichment. *Id.*.
922. *Id.* The Landlord was involved in this appeal and claims against it remained unresolved. *Dolgencorp*, 964 So. 2d at 263.
923. *Id* at 264.
924. *Id.* at 265.
925. *Id.*
926. *Id* at 266..
927. *Id.*
928. *Dolgencorp*, 964 So. 2d at 266.
929. *Id.* at 266-67.
930. *Id.*

utes, "which describes the effect of recording a lease," the court concluded that "a lessee of real property is a 'purchaser' and "a recorded lease 'shall be good and effectual' against subsequent purchasers for value."[931]

In *Autozone Stores, Inc. v. Northeast Plaza Venture, LLC.*,[932] the retail lease agreement between Northeast Plaza Venture, LLC (Landlord) and Autozone Stores, Inc. (Tenant) identified and designated certain unoccupied areas in the shopping center as being reserved "for the exclusive joint use of all tenants."[933] Landlord later decided to develop part of the designated property.[934] Landlord filed a declaratory judgment action, alleging that Tenant threatened "to enjoin the sale of the [parcels] or to prevent construction" on the site.[935] Landlord sought and was granted the determination that Tenant had no right to injunctive relief because Tenant had "an adequate remedy at law in the form of mone[y] damages."[936] Tenant appealed, and the Second District Court of Appeal reversed.[937] The absence of an adequate remedy at law is not a condition precedent to enjoining the violation of a restrictive covenant.[938] This rule applies in commercial real estate contexts as well as residential.[939] Every piece of land has a peculiar value.[940]

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931. *Id.* Another issue presented in the case was whether Tenant's exclusive right violated the Florida Antitrust Act of 1980, section 542.335 of the *Florida Statutes*. *Id. at* 267–68. The Fourth District Court of Appeal held that section inapplicable to covenants running with the land. *Dolgencorp*, 964 So. 2d at 267–68.

932. 934 So. 2d 670 (Fla. 2d Dist. Ct. App. 2006).

933. *Id.* at 672.

934. *Id.*

935. *Id.*

936. *Id.*

937. *Autozone Stores, Inc.*, 934 So. 2d at 672, 675.

938. *Id.* at 673.

939. *Id.* at 674. Two of the three cases upon which the Second District Court of Appeal relied addressed restrictive covenants involving setbacks in residential developments. *Id.* at 673–674; *see also* Stephl v. Moore, 114 So. 455 (Fla. 1927); Daniel v. May, 143 So. 2d 536 (Fla. 2d Dist. Ct. App. 1962). The third case involved a commercial tenant. *Autozone Stores, Inc.*, 934 So. 2d at 674; *see also* Jack Eckerd Corp. v. 17070 Collins Ave. Shopping Ctr., Ltd., 563 So. 2d 103 (Fla. 3d Dist. Ct. App. 1990).

940. The landlord relied on an earlier Third District Court of Appeal decision, *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So. 2d 735 (Fla. 3d Dist. Ct. App. 1982), where, in a dispute involving a commercial lease, injunctive relief was denied. *Autozone Stores, Inc.*, 934 So. 2d at 674. The Second District Court of Appeal, in *Autozone Stores, Inc.*, distinguished *Jamko* without acknowledging agreement with the holding there, reasoning that the *Jamko* case was more in the nature of a non-compete clause rather than a real property restrictive covenant. *Id.* at 674–75. The Third District, in deciding *Jack Eckerd Corp.*, similarly distinguished the facts in *Jack Eckerd Corp.* from its earlier decision in *Jamko*. *Id.* at 674.

D. *Taxes*

Wellington Realty Co. (Landlord) entered into a build-to-suit lease with ColorAll Technologies International, Inc. (Tenant) in 2000.[941] Landlord finished construction of the leased premises near the end of 2001 and Tenant occupied the premises on December 20, 2001.[942] Tenant was obligated to pay any real estate tax increase "after the base year of occupancy."[943] The real estate tax was $23,000 in 2001 and $32,300 in 2002.[944] Tenant paid its rent for 2002 in addition to "a pro-rated amount for [its] eleven days [of occupancy] in 2001."[945] However, Tenant refused to pay the almost $9300 real estate tax increase, claiming that 2002, not 2001, was the base year of occupancy.[946] The real estate tax increase was clearly due to the post-improvement value of the property assessed January 1, 2002.[947] Tenant was in possession under a 2001 certificate of occupancy, and the property "was 'substantially completed' in 2001."[948] Under these facts, the Fourth District Court of Appeal, in *Wellington Realty Co.*, had no difficulty determining that the base year of occupancy was 2001.[949] The court distinguished the facts from those in *Handelsman v. Royal Trust Bank of Palm Beach, N.A.*,[950] where the property was not substantially completed during the year of first possession, and the second year of possession was held to be the base year.[951] The court also stated "that *Handelsman* did not [create] a bright-line" test.[952]

XV. PIERCING THE CORPORATE VEIL

In *Carnes v. Fender*,[953] Mr. and Mrs. Carnes obtained a $3 million jury verdict against Great Harbour Cay Realty.[954] Unable to collect the judgment,

941. Wellington Realty Co. v. ColorAll Techs. Int'l, Inc., 951 So. 2d 921, 921 (Fla. 4th Dist. Ct. App. 2007).
942. *Id.* at 922–23.
943. *Id.* at 921–22.
944. *Id.* at 923.
945. *Id.* at 922.
946. *Wellington Realty Co.*, 951 So. 2d at 922.
947. *See id.* at 923.
948. *Id.*
949. *Id.*
950. 426 So. 2d 1220 (Fla. 4th Dist. Ct. App. 1983).
951. *Wellington Realty Co.*, 951 So. 2d at 922–923.
952. *Id.* at 923.
953. 936 So. 2d 11 (Fla. 4th Dist. Ct. App. 2006).
954. *Id.* at 13; *see also* Great Harbour Cay Realty & Inv. Co. v. Carnes, 862 So. 2d 63, 65 (Fla. 4th Dist. Ct. App. 2003).

they sued Mr. Fender, the principal of Great Harbour.[955] Mr. and Mrs. Carnes alleged that at one time Great Harbour was worth $30 million.[956] They also alleged that Mr. Fender was the sole shareholder of Great Harbour, made all corporate decisions, depleted Great Harbour's assets to defeat their claim, and used Great Harbour "as a sham to defraud investors."[957] Mr. Fender moved for summary judgment and conflicting evidence bearing on the plaintiffs' allegations was filed with the court.[958] The trial court granted the motion for summary judgment and the plaintiffs appealed.[959]

The Fourth District Court of Appeal reversed and remanded, noting that summary judgments are rare in fraudulent conveyance cases.[960] The evidence presented on this issue by Mr. Fender conflicted with evidence presented by Mr. and Mrs. Carnes.[961] Only "the scintilla of appreciable evidence [is] required to defeat a motion for summary judgment."[962] There was also conflicting evidence on the issue of the ability to pierce the corporate veil.[963] Summary judgment was inappropriate as a jury could reasonably have drawn an inference favoring Mr. and Mrs. Carnes from the evidence presented.[964]

In *Priskie v. Missry*,[965] Priskie and his wife owned forty percent of EXA.[966] From time to time, Priskie made capital contributions to EXA to keep it going.[967] Tiring of this, Priskie asked Missry, another shareholder, for a $20,000 loan to EXA.[968] Missry made the loan, although there was no contemporaneous documentation of the loan.[969] Loan proceeds were used for corporate purposes, and "EXA's board of directors" ratified the loan and EXA's obligation to repay Missry.[970] When EXA defaulted, Missry sought to hold both EXA and Priskie liable.[971] The trial court ruled in favor of Mis-

955. *Fender*, 936 So. 2d at 13.
956. *Id.*
957. *Id.*
958. *Id.*
959. *Id.* at 12.
960. *Fender*, 936 So. 2d at 14–15.
961. *Id.* at 14.
962. *Id.*
963. *Id.* at 15.
964. *Id.*
965. 958 So. 2d 613 (Fla. 4th Dist. Ct. App. 2007).
966. *Id.* at 614.
967. *Id.* at 615.
968. *Id.* at 614.
969. *Id.*
970. *Priskie*, 958 So. 2d at 615.
971. *Id.* at 614.

sry, and both EXA and Priskie appealed.[972] The Fourth District Court of Appeal reversed, holding that the corporate veil could not be pierced to impose liability on Priskie even though Priskie was instrumental in obtaining the loan.[973] In order for Missry to prevail, he would have to prove that: 1) the corporation had no independent existence—the corporation's shareholders being its alter egos; 2) the corporation was "used fraudulently or for an improper purpose[s]"; and 3) "the [fraud] or improper use of the" corporation caused Missry's injury.[974] Missry failed to meet his burden of proof.[975]

XVI. PRINCIPAL AND AGENT

In *Huffman v. Breezes Full Service Car Wash*,[976] the car wash was closed because of rain, and Cash, one of Breezes' owners, took several of the employees of the car wash out to lunch[977] Lackowski, another manager, was also there.[978] Alcoholic beverages were consumed during lunch.[979] After lunch, Lackowski was involved in car accident.[980] Melissa Jones, the driver of the other car, was killed.[981] Her son, who was a passenger in her car, was injured."[982] The personal representatives of the estate of Mrs. Jones sued Breezes for wrongful death,[983] "alleging that Breezes was vicariously liable for [the] negligent acts committed by" its employees.[984] In support of its motion for summary judgment, Breezes argued "that it could not be vicariously liable for the alleged negligence" of its employees because the facts demonstrated that the employees "ceased acting within the scope of their employment" before the lunch.[985] The trial court agreed and granted the motion.[986] The Fourth District Court of Appeal reversed, finding that "the

972. *Id.*
973. *Id.* at 615.
974. *Id.* at 614 (citing Seminole Boatyard, Inc. v. Christoph, 715 So. 2d 987, 990 (Fla. 4th Dist. Ct. App. 1998)).
975. *Priskie*, 958 So. 2d at 615.
976. 956 So. 2d 1204 (Fla. 1st Dist. Ct. App. 2007).
977. *Id.* at 1204.
978. *Id.*
979. *Id.*
980. *Id.*
981. *Huffman*, 956 So. 2d at 1204.
982. *Id.*
983. *Id.* at 1204–05.
984. *Id.* at 1205.
985. *Id.*
986. *Huffman*, 956 So. 2d at 1205.

trial court improperly resolved disputed issues of fact" on the scope of employment question where the record showed disputed issues of fact.[987]

In *Palafrugell Holdings, Inc. v. Cassel*,[988] the Third District Court of Appeal considered exceptions to the rule that a third party may rely on the apparent authority of an agent.[989] In this legal malpractice case, the attorney was dealing with a long-standing client, Hernandez—the agent—in connection with the attorney's representation of a new client, Palafrugell Holdings, Inc.—the principal.[990] Palafrugell Holdings, Inc.—through Hernandez—hired an attorney to represent the corporation in purchasing a "50% interest in a mortgage [from] AAX, Inc."[991] Hernandez also secured investors and arranged the mortgage purchase by Palafrugell Holdings, Inc., all with the knowledge of the investors that he had secured.[992] Hernandez claimed to be a majority shareholder of Palafrugell Holdings, Inc.[993] There was no question that Hernandez had the authority to hire the attorney as corporate counsel for Palafrugell Holdings, Inc.[994] The investors wired $350,000 of purchase funds to the attorney's trust account.[995] Hernandez directed the attorney to prepare a mortgage assignment in Hernandez's name alone, and to disburse the purchase funds to several payees, including $43,375 to Hernandez to repay advances.[996] Hernandez was not an officer or director of the corporation, but the attorney complied with Hernandez's directions without obtaining the consent of, or confirmation from, an officer of Palafrugell Holdings, Inc.[997] The attorney argued, and the trial court agreed, that Hernandez, as the corporation's agent, had at least apparent authority to direct the attorney as he did.[998] The Third District Court of Appeal, recognizing that "'[t]he acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal,'"[999] stated that there are circumstances where failure to make further inquiry into the agent's authority may preclude reliance on the agent's representations.[1000] One situation

987. *Id.*
988. 940 So. 2d 492 (Fla. 3d Dist. Ct. App. 2006).
989. *Id.* at 494.
990. *Id.* at 493. There were also causes of action alleging "negligent bailment" and "breach of fiduciary duty arising out of negligent disbursement of trust funds." *Id.*
991. *Id.*
992. *Palafrugell*, 940 So. 2d at 493.
993. *Id.*
994. *Id.* at 493–94.
995. *Id.* at 493.
996. *Id.* at 493, 494 n.2.
997. *Palafrugell*, 940 So. 2d at 493–94.
998. *See id.* at 494.
999. *Id.* (quoting Indus. Ins. Co. v. First Nat'l Bank, 57 So. 2d 23, 26 (Fla. 1952)).
1000. *Id.*

where there may be a duty to inquire further, is where an agent directs acts by the third-party that, on their face, are contrary to the interests of the principal.[1001]

The Third District Court of Appeal reversed, finding that summary judgment in favor of the attorney was improper.[1002] The trial court failed to consider whether Hernandez's actions should have raised a reasonable doubt as to the extent of Hernandez's authority and prompted the attorney to inquire further.[1003]

XVII. TAXES

In *Geiger v. Commissioner*,[1004] the Internal Revenue Service (IRS) determined a deficiency in Mr. Geiger's 2000 federal income tax of $159,008 and, pursuant to Section 6662(a) of the Internal Revenue Code, also assessed an accuracy related penalty of $31,802.[1005] Mr. Geiger's "S" corporation reported a theft loss of $1,645,986, which was passed through to Mr. Geiger and claimed by him as a deduction on his individual income tax return pursuant to section 165(c) of the Internal Revenue Code.[1006] On audit, the IRS allowed a theft loss of $5586, which resulted in the deficiency and the penalty.[1007] Mr. Geiger was required to establish that a theft, within the meaning of section 165, had occurred and the amount of the loss.[1008] The question of whether the actions alleged to have occurred constituted a theft turned on the definition of the crime under Florida law.[1009] The Tax Court held that Mr. Geiger failed to prove that a theft occurred under section 812.014 of the *Florida Statutes*.[1010] As the trier of fact, the United States Tax Court upheld the deficiency, finding Mr. Geiger's explanation of the theft loss to be incredible.[1011] The IRS has the burden of proving that the accuracy-related penalty is appropriate.[1012] In this case, because of Mr. Geiger's loss deduc-

1001. *Id.*
1002. *Palafrugell*, 940 So. 2d at 495.
1003. *Id.* at 494.
1004. 92 T.C.M. (CCH) 510 (2006).
1005. *Id.*
1006. *Id.* at 513.
1007. *Id.*
1008. *Id.* at 513.
1009. *Geiger*, 92 T.C.M. (CCH) at 513 (citing Monteleone v. Comm'r, 34 T.C. 688, 692 (1960)).
1010. *Id.*
1011. *Id.*
1012. *Id.* at 514 (citing I.R.C. § 7491(c) (2000)).

tion, Mr. Geiger paid no income tax for 2000.[1013] The 20% accuracy related penalty is appropriate if the tax is underpaid by more than the greater of either 10% of the tax due or $5000.[1014] Having not paid anything, Mr. Geiger "qualified" for the penalty.[1015] The penalty can be avoided if the taxpayer can show reasonable cause for the tax amount, if any, paid.[1016] Mr. Geiger claimed that he relied on the information provided to him by his then wife.[1017] However, his wife had no bookkeeping experience.[1018] Under the circumstances, it was unreasonable for Mr. Geiger to not consult an accountant or other tax professional, and the penalty was upheld.[1019]

The Florida annual intangible tax for individuals, businesses, and personal representatives has, with limited exceptions, been repealed, effective January 1, 2007.[1020] The exceptions cover leases of government owned property[1021] and a one-time intangible tax where notes are secured by mortgages on Florida real property.[1022] All obligations for years before 2007 remain in full force and effect subject to prior laws and rules regarding assessment and collection.[1023]

XVIII. TORTS

A. *Negligence, Products Liability, and Strict Liability*

In a case of first impression, *Vincent v. C.R. Bard, Inc.*,[1024] the Second District Court of Appeal concluded that a designer of a product may be liable to foreseeable users of a product, even if the designer does not have any subsequent involvement with the product.[1025] The court saw no distinction between a designer who is the manufacturer and a designer who is not

1013. *Id.*
1014. *Geiger*, 92 T.C.M. (CCH) at 514 (citing I.R.C. § 6662(d)(1)(A) (2000)).
1015. *Id.*
1016. *Id.* (citing I.R.C. § 6664(c)(1) (2000)).
1017. *Id.*
1018. *Id.*
1019. *Geiger*, 92 T.C.M. (CCH) at 514.
1020. FLA. STAT. §§ 199.012, .023, .032, .033, .042, .052, .057, .062, .103, .1055, .106, .175, .185 (2005), *repealed by* Act effective Jan. 1, 2007, ch. 2006-312, § 1, 2006 Fla. Laws 3167.
1021. FLA. STAT. § 196.199(2)(b) (2007).
1022. *Id.* § 199.133(1).
1023. *Id.* § 199.303(3).
1024. 944 So. 2d 1083 (Fla. 2d Dist. Ct. App. 2006).
1025. *Id.* at 1086. The trial court was unable to find that Bard was also a manufacturer. *Id.* at 1085.

the manufacturer.[1026] Where the designer is also the manufacturer, under existing Florida law, the designer has a duty to all foreseeable users, as well as intended users, to exercise reasonable care in the design of the product.[1027] However, with respect to the situation where the designer is not the manufacturer, the court could find no Florida case directly on point.[1028] Thus, the question, as framed by the Second District Court of Appeal, was whether or not "a designer of a product who did not manufacture, sell, distribute or have any other involvement in getting the product to the user may be liable in negligence for the defective design of the product."[1029] The action in *Vincent* was instituted after the plaintiff's son received an overdose from a patient controlled morphine pump while in the hospital.[1030] The overdose left the son "totally and permanently disabled."[1031] No record was made of the amount of morphine remaining in the pump, and "the pump permanently disappeared while in the custody of the hospital."[1032] The plaintiff sued C.R. Bard, Inc. (Bard) and Baxter Healthcare Corporation (Baxter) alleging negligent design of the pump.[1033] It was undisputed that either Bard or Baxter was the manufacturer of the pump used by the plaintiff's son.[1034] Plaintiff also sued Bard for negligent design of the pump.[1035] With respect to this claim, it was clear that Bard had designed the pump, even though it could not be determined who had manufactured the particular pump.[1036] The trial court entered summary judgment in favor of all of the defendants, and the plaintiff appealed.[1037]

The Court of Appeal held that summary judgment was properly granted on the negligent design issue in favor of Baxter and Bimeco, the distributor who was also named as a defendant, since the pump could not be

1026. *Id.* at 1085.
1027. *Id.* at 1086 (citing Ford Motor Co. v. Hill, 404 So. 2d 1049, 1052 (Fla. 1981)); *see also* Light v. Weldarc Co., 569 So. 2d 1302, 1303 (Fla. 5th Dist. Ct. App. 1990).
1028. *Vincent*, 944 So. 2d at 1085.
1029. *Id.*
1030. *Id.*
1031. *Id.*
1032. *Id.*
1033. *Vincent*, 944 So. 2d at 1084–85.
1034. *Id.* at 1085. Baxter had taken over the division of Bard that had designed and manufactured the pumps, so it could not be determined which of the two companies actually manufactured the missing pump. *Id.*
1035. *Id.*
1036. *Id.*
1037. *Vincent*, 944 So. 2d at 1085. The distributor of the pump, Bimeco, Inc. was also a named defendant, and the summary judgment was also granted to this defendant on the same grounds. *Id.*

found.[1038] However, as to Bard, the designer, the court disagreed.[1039] The court noted that a manufacturer, who is also the designer, is under a duty to foreseeable users to exercise reasonable care in the design of the product.[1040] The court could find no reason why the designer of a product who is not also the manufacturer should, for that reason, be relieved of liability to foreseeable users if the product was negligently designed.[1041] The plaintiff's son was a foreseeable user.[1042] With respect to the negligent design claim, the absence of the particular pump was not an insurmountable obstacle in light of an unopposed affidavit submitted by the plaintiff's expert, that in his opinion, the overdose was the result of a design error.[1043]

In *Saullo v. Douglas*,[1044] Mr. Douglas owned the tractor part of a tractor-trailer rig.[1045] Dart Transit Company (Dart), an interstate motor carrier, owned the trailer.[1046] Mr. Douglas agreed to permanently lease the tractor to Dart, and to drive the tractor exclusively to carry freight in trailers owned by Dart.[1047] The operating agreement between Mr. Douglas and Dart described Mr. Douglas as an independent contractor.[1048] While driving the rig for Dart in central Florida, Douglas responded to a call for help from his brother.[1049] Mr. Douglas detached the trailer from the tractor and, leaving the trailer parked in the far right-hand lane, left the tractor to assist his brother.[1050] In the early morning hours, Mr. Saullo, who was driving to his friend's apartment, swerved to avoid the trailer, hit a tree, and was killed.[1051] The court stated that Mr. Saullo was intoxicated, and that he was not wearing a seatbelt when the accident occurred.[1052] Mr. Saullo's personal representa-

1038. *Id.* Although not specifically stated, presumably the affirmance of the summary judgment on the issue of negligent design applies to Bard as well. *See id.* at 1085–86.
1039. *Id.* at 1085.
1040. *Vincent*, 944 So. 2d at 1085.
1041. *Id.*
1042. *Id.* at 1086.
1043. *Id.* The court noted that there was still, therefore, a genuine issue of material fact—"whether Bard breached its duty to" plaintiff's son. *Id.* The court did not address what impact the fact that the affidavit was uncontroverted might have on the breach of duty issue. *See Vincent*, 944 So. 2d at 1086. In any event, there presumably is also still the issue of proximate cause. *See id.*
1044. 957 So. 2d 80 (Fla. 5th Dist. Ct. App. 2007).
1045. *Id.* at 82.
1046. *Id.*
1047. *Id.*
1048. *Id.*
1049. *Saullo*, 957 So. 2d at 82.
1050. *Id.*
1051. *Id.*
1052. *Id.*

tive alleged liability on Dart's part by reason of federal regulations governing interstate trucking, and alternatively, that the principle of respondeat superior applied to the dangerous instrumentality doctrine.[1053] The trial court rejected both theories and granted summary judgment in favor of Dart.[1054]

On appeal, the Fifth District Court of Appeal observed that two lines of decisions had developed on the effect of pertinent federal regulations "on state tort law in negligence actions."[1055] One was a strict agency/lease liability paradigm, and the second was an application of "a state law respondeat superior/'scope of employment' analysis."[1056] Finding the choice between the two theories a matter of first impression in Florida, the Fifth District held that the better approach was respondeat superior/scope of employment.[1057] Clearly, Mr. Douglas acted outside the scope of employment regarding the trailer.[1058] The negligent use of a dangerous instrumentality by the agent, even if not within the scope of the agent's employment, can result in vicarious liability to the principal.[1059] The court noted that "[i]t is well-established in Florida...that the trailer [part] of the tractor-trailer rig [has been held] not [to be] a dangerous instrumentality.[1060] However, the tractor was a dangerous instrumentality."[1061] The court found that Dart, "owner of the trailer and . . . lessee of the tractor," put "Douglas in operational control of both," thereby subjecting it to vicarious liability.[1062] The court used the analogy of a dump truck that negligently deposited a load of gravel on the roadway resulting in injury to another driver, as to which the dangerous instrumentality doctrine would apply.[1063] The court said that "[j]ust because the trailer was dropped off rather than a load of stones should not change that result."[1064] Finding that the "case present[ed] an issue of causation," the court reversed and remanded the matter to the trial court.[1065]

In *Atlanta Gas Light Co. v. UGI Utilities, Inc.*,[1066] Atlanta Gas Light Company (Atlanta Gas) and the City of St. Augustine settled a pollution li-

1053. *Id.*
1054. *Saullo*, 957 So. 2d at 82.
1055. *Id.* at 85.
1056. *Id.*
1057. *Id.* at 86.
1058. *Id.*
1059. *Saullo*, 957 So. 2d at 86.
1060. *Id.* at 87.
1061. *Id.* at 88.
1062. *Id.* at 87.
1063. *Id.* at 88.
1064. *Saullo*, 957 So. 2d at 88.
1065. *Id.*
1066. 463 F.3d 1201 (11th Cir. 2006).

ability claim with the Environmental Protection Agency under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[1067] Atlanta Gas instituted suit against UGI Utilities, Inc. (UGI) and Center Point Energy Resources Corporation (Center Point) seeking contribution.[1068] The polluted land at issue had accommodated an energy producing plant since 1886.[1069] UGI and Center Point were successors to parent corporations that, at various times, controlled subsidiaries operating the plant.[1070] Under CERCLA, liability—and claims for contribution— for environmental pollution can be asserted against "owners" of the damaged property and "operators" of pollution causing facilities.[1071] Atlanta Gas did not assert ownership liability against UGI and Center Point because the predecessor corporations never owned the land involved.[1072] Atlanta Gas claimed that the predecessor corporations operated the pollution causing facilities by virtue of their subsidiary operators.[1073] The court, relying on the test created by *United States v. Bestfoods*[1074] to determine if the parent corporation is in fact the operator of its subsidiary's pollution-causing facility, stated that the parent must have "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[1075] Under this test, the parent may be subject to liability if: 1) the parent actually operated the facility alone or jointly with the subsidiary; 2) a person serving as an officer or director of the subsidiary and parent is serving only the parent; or 3) an agent of the parent is placed with the subsidiary to conduct operations.[1076] Atlanta Gas was unable to prove the defendants "passed" the test.[1077]

An interesting issue in the case was the liability of the defendant insurance company, Century Indemnity Company (Century).[1078] Century had issued indemnity policies to the subsidiaries for five years during the period from 1940–1947.[1079] The policies covered damage to the property caused by

1067. *Id.* at 1202.
1068. *Id.* at 1203.
1069. *Id.* at 1202.
1070. *Id.* at 1202–03, nn.1–2.
1071. *Atlanta Gas Light Co.*, 463 F.3d at 1204.
1072. *Id.*
1073. *Id.* at 1204–05.
1074. 524 U.S. 51 (1998).
1075. *Atlanta Gas Light Co.*, 463 F.3d at 1204–05 (quoting *Bestfoods*, 524 U.S. at 66–67).
1076. *Id.* at 1205 n.6.
1077. *See id.*
1078. *Id.* at 1208.
1079. *Id.*

accident.[1080] "'Accident' [was] not defined in the policy."[1081] The court noted that there was no evidence of contamination during policy coverage periods.[1082] There was expert testimony to the effect there must have been routine leakages and contaminants during the coverage period.[1083] However, routine leakages are not accidents—they are not unintentional, unexpected events.[1084] No liability was imposed on the insurance company.[1085]

B. *Misrepresentation and Fraud*

In *Morgan Stanley & Co. v. Coleman (Parent) Holdings, Inc.*,[1086] Sunbeam, Inc. (Sunbeam), "[p]ursuant to [a] merger agreement, . . . bought the Coleman [Company, Inc.] stock" owned by Coleman (Parent) Holdings, Inc.[1087] Sunbeam paid Parent "approximately half of the purchase price" with Sunbeam stock.[1088] The Sunbeam stock Parent received had an "estimated value of over $600 million."[1089] "The transaction closed on March 30, 1998."[1090] Parent was subject to a "lockup" restriction in the agreement.[1091] Parent could only sell the Sunbeam stock in increments over time and could not have sold all of it until 270 days after the transaction closed.[1092] The average per share price for Sunbeam from the time Sunbeam's deal with Parent publicly disclosed was $48.26.[1093] Parent had acquired 14.1 million shares.[1094] Almost immediately after the closing, bad news about Sunbeam began arriving.[1095] In April 1998, on poor sales reports, the stock price dropped to $34 per share.[1096] In June 1998, fraudulent bookkeeping was alleged, and the stock fell to $18 per share.[1097] Arthur Anderson, Sunbeam's

1080. *Atlanta Gas Light Co.*, 463 F.3d at 1208.
1081. *Id.*
1082. *Id.*
1083. *Id.* at 1209.
1084. *Id.* at 1210.
1085. *Atlanta Gas Light Co.*, 463 F.3d at 1210.
1086. 955 So. 2d 1124 (Fla. 4th Dist. Ct. App. 2007).
1087. *Id.* at 1126.
1088. *Id.*
1089. *Id.*
1090. *Id.*
1091. *Morgan Stanley & Co.*, 955 So. 2d at 1126.
1092. *Id.*
1093. *Id.* at 1127.
1094. *Id.*
1095. *Id.* at 1126.
1096. *Morgan Stanley & Co.*, 955 So. 2d at 1126.
1097. *Id.*

accountant, revoked its audit certificates for 1996 and 1997.[1098] Parent was unable to sell its Sunbeam stock even after the lockup because Arthur Anderson's actions had delayed having the stock registered for sale to the public.[1099] Registration "could not be completed until late 1999."[1100] On February 6, 2001, Sunbeam went bankrupt and its shares became worthless.[1101] Parent sued Morgan Stanley claiming that Morgan Stanley, Sunbeam's investment banker, helped Sunbeam carry out a "fraudulent scheme to inflate the price of [Sunbeam] stock until after the merger."[1102] The trial court denied Morgan Stanley's motion for a directed verdict, and the jury returned a verdict against Morgan Stanley for conspiracy and fraud.[1103] The jury awarded Parent $604,334,000 in compensatory damages and $850 million in punitive damages.[1104]

The Fourth District Court of Appeal reversed and remanded "with directions to enter judgment for Morgan Stanley."[1105] The court observed that "the flexibility theory of damages" is the law in Florida with respect to fraud.[1106] This theory allows a trial "court to use either the 'out-of-pocket' [rule] or the 'benefit-of-the-bargain' rule, depending [on] which is more likely to fully compensate the injured party."[1107] The trial court, at Parent's request, used the benefit-of-the-bargain rule.[1108]

Damages are then "measured by the difference between the value of the property as represented and the actual value of the property on the date of the transaction."[1109] Determining actual value is essential to arriving at a damages amount.[1110] The court found that Parent's expert on damages failed to opine on "the 'fraud-free' price of Sunbeam stock on the . . . closing" date.[1111] This required "event study" or "event analysis" to consider the economic effect each particular event might have had on the stock price, not just the effect of the alleged fraud.[1112] This type of analysis was not con-

1098. *Id.*
1099. *Id.*
1100. *Id.*
1101. *Morgan Stanley & Co.*, 955 So. 2d at 1127.
1102. *Id.* at 1125–26.
1103. *Id.* at 1126.
1104. *Id.* at 1127–28.
1105. *Id.* at 1133.
1106. *Morgan Stanley & Co.*, 955 So. 2d at 1128 (internal quotations omitted).
1107. *Id.* (quoting Nordyne, Inc. v. Fla. Mobile Home Supply, Inc., 625 So. 2d 1283, 1286 (Fla. 1st Dist. Ct. App. 1993)).
1108. *Id.*
1109. *Id.*
1110. *Id.*
1111. *Morgan Stanley & Co.*, 955 So. 2d at 1127.
1112. *Id.* at 1130.

ducted.[1113] Parent argued that the fraud-free value of the stock on the closing date did not matter because it could not have sold any of the stock on that day.[1114] It also argued that it should be allowed to collect damages measured by the decline in stock value from the closing date until it could first have been resold after December 1999.[1115] The court was not persuaded.[1116] "The bargain, in this case, included sale restrictions."[1117] Absent proof of the fraud-free value of Sunbeam on the transaction, the jury's damage award could not be correct.[1118] Parent was not entitled to a new trial.[1119] It had a chance to prove correct damages and failed.[1120] On the issue of punitive damages, the court ruled that the verdict could not stand where "no legally cognizable damage was shown as a result of the alleged fraud."[1121] Judge Shahood concurred without opinion.[1122] Judge Farmer dissented with an opinion.[1123]

C. *Slander and False Light Invasion of Privacy*

The next two cases, false light invasion of privacy cases, are pending in the Supreme Court of Florida.[1124] According to the renowned torts professor, Dean William Prosser, a category of the invasion of privacy tort is "false light."[1125] False light is said to be different from defamation in that the objectionable false light in which a person is put by the tortfeasor "may be based on a statement that is not defamatory."[1126] In this case, Mr. Anderson complained of articles about him that appeared in the *Pensacola News–Journal* between December 13, 1998, and July 12, 2000.[1127] Mr. Anderson

1113. *Id.*
1114. *Id.* at 1128–29.
1115. *Id.* at 1129.
1116. *Morgan Stanley & Co.*, 955 So. 2d at 1129.
1117. *Id.*
1118. *Id.* at 1131.
1119. *Id.*
1120. *Id.*
1121. *Morgan Stanley & Co.*, 955 So. 2d at 1132.
1122. *Id.* at 1133 (Shahood, J., concurring).
1123. *Id.* (Farmer, J., dissenting).
1124. Rapp v. Jews for Jesus, Inc., 944 So. 2d 460 (Fla. 4th Dist. Ct. App. 2006), *appeal docketed*, No. SC06-2491 (Fla. Dec. 20, 2006); Gannett Co. v. Anderson, 947 So. 2d 1 (Fla. 1st Dist. Ct. App. 2006), *appeal docketed*, No. SC06-2174 (Fla. Nov. 11, 2006). Both cases have been rescheduled for oral argument on March 6, 2008. Order at 2, Jews for Jesus, Inc. v. Rapp, No. SC06-2491 (Fla. Sept. 26, 2007).
1125. *Gannett Co.*, 947 So. 2d at 4.
1126. *Id.*
1127. *Id.* at 2.

admitted that the articles were factually correct but the December 14, 1998, article was written so as to put him in the "false light" in that it "it falsely implied that he had murdered his wife and gotten away with it."[1128] His first complaint, filed on March 21, 2001, brought an action "for libel and tortious interference with a business relationship."[1129] Mr. Anderson amended his complaint "to include a . . . claim for invasion of privacy based on the false light theory."[1130] Some of the articles, including the December 14, 1998, article, were subject to the two-year defamation statute of limitations under section 95.11(4)(g) of the *Florida Statutes*.[1131] "The libel and tortious interference claims were voluntarily dismissed . . . ."[1132] However, relying on *Heekin v. CBS Broadcasting, Inc.*,[1133] Mr. Anderson argued that unlike defamation, a false light invasion of privacy action was an unspecified tort that was subject to the four-year statute of limitations found in section 95.11(3)(p) of the *Florida Statutes* and would thus bring the 1998 article back into the litigation.[1134] The trial court agreed, and the case went to the jury on the invasion of privacy count only.[1135] The jury awarded Mr. Anderson $18,280,000 in compensatory damages.[1136] The issue raised on appeal by *Gannett* was whether the statute of limitations was two years or four years.[1137] The First District Court of Appeal observed that thus far in Florida, only the Second District Court of Appeal in *Heekin* had recognized a false light invasion of privacy action.[1138] The court concluded that the Supreme Court of Florida has not directly held that this tort is cognizable in Florida.[1139] The court then conducted an extensive review of the law of other states and pointed out that North Carolina refuses to recognize false light as a tort.[1140] The court essentially found that defamation actions and false light claims are virtually indistinguishable and therefore the false light claim should be "subject to the two-year statute" of limitation.[1141] The court was

1128. *Id.* at 3.
1129. *Id.* 2.
1130. *Gannett Co.*, 947 So. 2d at 2.
1131. *Id.* at 4, 7; *see also* FLA. STAT. § 95.11(4)(g) (2007). Section 95.11(4)(g) places a two-year limitation to bring an action for libel or slander. FLA. STAT. § 95.11(4)(g).
1132. *Gannett Co.*, 947 So. 2d at 3.
1133. 789 So. 2d 355 (Fla. 2d Dist. Ct. App. 2001).
1134. *Gannett Co.*, 947 So. 2d at 4 (citing FLA. STAT. § 95.11(3)(p) (2006)); *see also Heekin*, 789 So. 2d at 358.
1135. *Gannett Co.*, 947 So. 2d at 3.
1136. *Id.* at 1.
1137. *Id.* at 3–4.
1138. *Id.* at 7.
1139. *Id.* at 6.
1140. *Gannett Co.*, 947 So. 2d at 4–5.
1141. *Id.* at 7.

also concerned with the ease with which a plaintiff could avoid the two year statute of limitation simply by making a false light invasion of privacy claim.[1142] Conflict with *Heekin* was acknowledged, and the First District Court of Appeal certified the following question to the Supreme Court of Florida: "Is an action for invasion of privacy based on the false light theory governed by the two-year statute of limitations that applies to defamation claims or by the four-year statute that applies to unspecified tort claims?"[1143] Judge Lewis concurred in the result only.[1144]

About a month after *Gannett* was decided, the Fourth District Court of Appeal issued its opinion in *Rapp v. Jews for Jesus, Inc.*[1145] Mrs. Rapp's stepson, Bruce Rapp, was employed by Jews for Jesus.[1146] In a Jews for Jesus newsletter published on the internet, Bruce claimed that Mrs. Rapp had converted from Judaism to Christianity.[1147] A relative of Mrs. Rapp saw the newsletter and informed her of what it said.[1148] Mrs. Rapp sued Jews for Jesus and after several amendments to her complaint, there remained counts for false light invasion of privacy, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent training and supervision.[1149] The trial court dismissed the complaint on First Amendment grounds.[1150] On appeal, the Fourth District Court of Appeal upheld the dismissal of all counts except the false light invasion of privacy claim and the negligent training and supervision claim.[1151] The court said that the lower court mistakenly applied the First Amendment to the United States Constitution.[1152] The First Amendment bars "'courts from resolving internal church disputes [requiring application] of religious doctrine.'"[1153] It does not apply to "'disputes between churches and third parties.'"[1154]

The court made fairly short work of Mrs. Rapp's defamation and emotional distress claims.[1155] The newsletter was held not to be defamatory because it "was intended for group members who would have" taken the news

1142. *Id.* at 8.
1143. *Id.* at 11.
1144. *Id.* (Lewis, J., concurring).
1145. 944 So. 2d 460 (Fla. 4th Dist. Ct. App. 2006).
1146. *Id.* at 462.
1147. *Id.*
1148. *Id.*
1149. *Id.* at 462–63.
1150. *Rapp*, 944 So. 2d at 462–63.
1151. *Id.* at 468–69.
1152. *Id.* at 464.
1153. *Id.*
1154. *Id.*
1155. *Rapp*, 944 So. 2d at 464–67.

about Mrs. Rapp in a positive way, utilizing the "common mind" rule.[1156] The court looked at how the information would be viewed by those to whom the ideas were intended to be conveyed.[1157] The intentional infliction of emotional distress did not rise to the level of atrociousness necessary to sustain it.[1158] False light invasion of privacy was another story, *Gannett* having been decided a month earlier.[1159] The court concluded that misrepresentation of a person's religious beliefs fell squarely within the definition of the tort of false light invasion of privacy.[1160] It was not as clear, however, to the court that the tort exists in Florida, even though the Supreme Court of Florida decisions seem to imply that the tort of false light invasion of privacy is recognized in Florida.[1161] The court allowed that if it was "writing on a blank slate" it would reject the cause of action.[1162] However, given the "toehold" that the cause of action has in Florida, the court certified the question as one of great public importance as follows: "Does Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of the Restatement (Second) of Torts?"[1163]

D. *Tortious Interference with Business Relationships*

In *Walters v. Blankenship*,[1164] the Walters owned four units in a condominium.[1165] They offered to sell all four at an auction which was to be without reserve.[1166] Each bidder was required to deposit $50,000 in order to participate, and more than twenty bidders participated.[1167] "On the day of the auction, the defendants" who were owners of other units in the condominium put "'for sale by owner' signs in front of their" units in violation of condo-

1156. *Id.* at 465 (internal quotations omitted).
1157. *Id.* This was true even though the newsletter was disseminated on the internet and persons other than the intended group saw the newsletter. *Id.* The court, having found no case where the Supreme Court of Florida adopted comment e to section 559 of the Restatement (Second) of Torts, declined to adopt the rule that a communication is defamatory if the "plaintiff is prejudiced in the eyes of a substantial and respectable minority of the community." *Id.* at 465–66. The court noted that if comment e applied, "a court might well find that the amended complaint stated a claim for defamation." *Rapp*, 944 So. 2d at 466.
1158. *Id.* at 466–67.
1159. *Id.* at 467–68.
1160. *Id.* at 468.
1161. *Id.*
1162. *Rapp*, 944 So. 2d at 468.
1163. *Id.*
1164. 931 So. 2d 137 (Fla. 5th Dist. Ct. App. 2006).
1165. *Id.* at 138–39.
1166. *Id.* at 139.
1167. *Id.*

minium rules.[1168] Immediately after the Walters' four units were sold at auction for an aggregate amount of more than $2 million, the defendants removed the "for sale" signs.[1169] The Walters sued the defendants alleging "tortious interference with a prospective economic advantage, intentional infliction of emotional distress, and civil conspiracy to commit [those torts]."[1170] They sought combined total compensatory and punitive damages totaling $6 million.[1171] The trial court dismissed the complaint with prejudice and the Walters appealed.[1172] The Fifth District Court of Appeal held that the Walters did state a cause of action for tortious interference with prospective economic advantage and civil conspiracy.[1173] A cause of action for tortious interference exists if the plaintiff alleges "1) the existence of a business relationship; 2) the defendant's knowledge of the [business] relationship; 3) the defendant's intentional and unjustified interference with the relationship; and 4) damages to the plaintiff as a result of the breach of the relationship."[1174] The court had no difficulty finding that the allegations fit the cause of action.[1175] The court then set out the elements of civil conspiracy, which could be based on tortious interference

> or as an independent tort . . . a conspiracy between two or more parties, to do an unlawful act or to do a lawful act by an unlawful means, the doing of some overt act in pursuance of the conspiracy, and damage to plaintiff as a result of the acts performed pursuant to the conspiracy.[1176]

Again, the court found the plaintiff's allegations sufficient to state this cause of action.[1177] One of the defendant owners was alleged to have said to another unit owner: "'you wait until the day of the sale and see what we are going to do to Dick Walters.'"[1178] The majority opinion did not discuss the plaintiff's claim for intentional infliction of emotional distress.[1179] Judge

1168. *Id.*
1169. *Walters*, 931 So. 2d at 139.
1170. *Id.*
1171. *Id.*
1172. *Id.* at 138.
1173. *Id.* at 139–40.
1174. *Walters*, 931 So. 2d at 139 (citing Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 814 (Fla. 1994)).
1175. *Id.*
1176. *Id.* at 140.
1177. *Id.*
1178. *Id.* at 139.
1179. *See generally Walters*, 931 So. 2d at 137.

Torpy concurred specially with an opinion.[1180] Judge Lawson dissented with an opinion.[1181]

E. *Negligent Hiring*

Mr. Copeland went into an Albertson's store, "brandish[ed] a knife, robbed a clerk, and fled."[1182] He was pursued by store employees who caught him in a neighboring parking lot.[1183] Copeland claimed that the employees attacked and injured him.[1184] The employees claimed that Copeland "threatened them with his knife" and that they were only trying "to restrain him and protect themselves."[1185] Copeland "was convicted of armed robbery and aggravated assault."[1186] He then sued the employees for assault and battery and Albertson's for negligent hiring and training of its employees.[1187] The defendants moved for summary judgment which was granted.[1188] The Second District Court of Appeal reversed and remanded.[1189] Section 776.085 of the *Florida Statutes* provides a defense to a civil action for damages based on personal injury if the injury happened to "a participant during the commission or attempted commission of a forcible felony."[1190] The defendants raised the statutory defense in the trial court, but they failed to plead it or to include it in their motion for summary judgment.[1191] "A defendant cannot present evidence of a statutory defense unless" pleaded.[1192] Rule 1.510 of the *Florida Rules of Civil Procedure* requires "substantial matters of law" be included in the motion and the motion be served at least twenty days before the hearing on it.[1193] The statutory defense was a substantial matter of law.[1194] The defendants argued that the summary judgment could be upheld anyway, since it was right, albeit for the wrong reason.[1195] The statute was a

1180. *Id.* at 141 (Torpy, J., concurring).
1181. *Id.* at 143 (Lawson, J., dissenting).
1182. Copeland v. Albertson's, Inc., 947 So. 2d 664, 665 (Fla. 2d Dist. Ct. App. 2007).
1183. *Id.*
1184. *Id.*
1185. *Id.*
1186. *Id.*
1187. *Copeland*, 947 So. 2d at 665.
1188. *Id.* at 665–66.
1189. *Id.* at 668.
1190. FLA. STAT. § 776.085(1) (2007).
1191. *Copeland*, 947 So. 2d at 666.
1192. *Id.*
1193. FLA. R. CIV. P. 1.510(c).
1194. *See Copeland*, 947 So. 2d at 666.
1195. *Id.*

total bar to Copeland's claim.[1196] Copeland argued that the statute would not apply because the forcible felony of which he was convicted occurred in the store, and the actions about which he complained occurred outside of the store after the felony had been committed.[1197] Copeland raised a question of fact concerning the applicability of the defense requiring reversal of the summary judgment.[1198]

F. *Vicarious Liability/Scope of Employment*

In *Huffman v. Breezes Full Service Car Wash,*[1199] Breezes was closed one day on account of rain, and one of the owners took several of the employees went out to lunch.[1200] Lackowski, a manager, was also there.[1201] Alchoholic beverages were consumed at lunch.[1202] After lunch, Lackowski left in his car and collided with another automobile.[1203] Melissa Jones, the driver of the other car, was killed.[1204] Her son, who was a passenger in her car was injured.[1205] The personal representatives of the estate of Melissa Jones sued Breezes, among others, for wrongful death, "alleging that Breezes was vicariously liable for negligent acts committed by" its employees.[1206] Breezes moved for summary final judgment arguing "that it could not be held vicariously liable for the alleged negligence" of its employees because the facts showed that the employees had ceased acting in the scope of their employment before the lunch.[1207] The trial court agreed and granted the motion for summary judgment.[1208] The appellate court, finding that "the trial court improperly resolved disputed issues of fact," reversed the summary judgment.[1209] The record did not resolve disputed issues of fact on the scope of employment issue.[1210]

1196. *Id.*
1197. *Id.* at 666–67.
1198. *Id.* at 667.
1199. 956 So. 2d 1204 (Fla. 1st Dist. Ct. App. 2007) (per curiam).
1200. *Id.*
1201. *Id.*
1202. *Id.*
1203. *Id.*
1204. *Huffman*, 956 So. 2d at 1204.
1205. *Id.*
1206. *Id.* at 1204–05. The managers, individually, and the restaurant were among the others named as defendants. *Id.* at 1204.
1207. *Id.* at 1205.
1208. *Huffman*, 956 So. 2d at 1205.
1209. *Id.*
1210. *Id.*

XIX. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS

Substantial changes were made to Florida's version of the *Uniform Commercial Code* (UCC) that take effect on January 1, 2008.[1211] An important change is the clarification that the substantive rules of chapter 671 of the *Florida Statutes* applies to all transactions governed by any chapter of the UCC.[1212] The UCC imposes "obligations of good faith, diligence, reasonableness, and care [on the parties]."[1213] These obligations may not be waived by contract.[1214] However, the parties may agree on a standard of performance that will be upheld unless it is "manifestly unreasonable"[1215] The new statute provides that if the UCC requires that an action be done within a reasonable time, the parties may set the time by agreement, as long as it is not "manifestly unreasonable."[1216]

There are extensive amendments to the definitions contained in section 671.201 of the *Florida Statutes*.[1217] In addition, the new section 671.209 contains detailed definitions of "notice" and "knowledge."[1218] "[A] person has notice of a fact if the person: a) [h]as actual knowledge of it; b) [h]as received a notice or notification of it;" or c) has reason to know of the existence of a fact based on other facts and circumstances "known to the person at the time."[1219] Knowledge is the same as actual knowledge.[1220] There are numerous other aspects of notice that are addressed by this new section, including when notice is considered provided and when notice is received or considered to have been received.[1221]

Notably, new section 671.211 of the *Florida Statutes* provides that "a person gives value for rights" if the rights are acquired "[a]s security for, or in . . . satisfaction of, a preexisting claim; [b]y accepting delivery under a preexisting contract; [i]n return for any consideration sufficient to support a simple contract; or [i]n return for a binding commitment to extend credit or

1211. *See generally* Act effective Jan. 1, 2008, ch. 2007-134, §§ 4–31, 2007 Fla. Sess. Law Serv. 1115, 1115–29 (West).
1212. *Id.* § 4, 2007 Fla. Sess. Law Serv. at 1117 (amending FLA. STAT. § 671.101 (2007)).
1213. *Id.* § 5, 2007 Fla. Sess. Law Serv. at 1117 (amending FLA. STAT. § 671.102(2)(b) (2007)).
1214. *Id.*
1215. *Id.*
1216. Ch. 2007-134, § 5, 2007 Fla. Sess. Law Serv. 1117.
1217. *See id.* § 8, 2007 Fla. Sess. Law Serv. at 1118–23 (amending FLA. STAT. § 671.201 (2007)).
1218. *Id.* § 15, 2007 Fla. Sess. Law Serv. at 1124 (to be codified at FLA. STAT. § 671.209).
1219. *Id.* (to be codified at FLA. STAT. § 671.209(1)(a)–(c)).
1220. *Id.* (to be codified at FLA. STAT. § 671.209(2)).
1221. Ch. 2007-134, § 15, 2007 Fla. Sess. Law Serv. 1124 (to be codified at FLA. STAT. § 671.209(4)–(6)).

for the extension of immediately available credit."[1222] There are exceptions provided for those situations elsewhere in the UCC where value has a different meaning, more specifically, with respect to negotiable instruments and bank collections.[1223]

New section 671.212 of the *Florida Statutes*, dealing with electronic signatures, provides that the UCC "modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act," except with respect to electronic delivery of certain notices.[1224]

There were substantial statutory revisions in 2007, effective July 1, 2007, with respect to a debtor's assignment of assets for the benefit of creditors.[1225] The statute prohibits levy, execution, and attachment by a judgment creditor, other than a consensual lienholder, against assets of the assignor that are in the possession or control of the assignee.[1226] Consensual lienholders may enforce their rights in the collateral subject to the lien.[1227] A definition of consensual lienholder was added.[1228] The definition of "assets" for purposes of chapter 727 of the *Florida Statutes* was amended to include "claims and causes of action," including tort claims.[1229] The statute also allows the assignee to make a secondary assignment of claims.[1230] Under the new statute, the assignee may operate the assignor's business for no more than fourteen days without court authorization.[1231] To operate the business for more than fourteen days, but less than forty-five days, court authorization and notice to creditors may become necessary depending upon whether any objections are made.[1232] After forty-five days, court authorization is required if there is an objection to the assignee's "motion for authority to operate the assignor's business."[1233] The statute allows an assignee to reject an unexpired lease.[1234] Unlike the prior statute, a limitation on damages is provided in the event the assignee rejects a lease or terminates employment con-

1222. *Id.* § 17, 2007 Fla. Sess. Law Serv. at 1125 (to be codified at FLA. STAT. § 671.211).
1223. *Id.*
1224. *Id.* § 18, 2007 Fla. Sess. Law Serv. at 1125 (to be codified at FLA. STAT. § 671.212).
1225. *See generally* Act effective July 1, 2007, ch. 2007-185, §§ 3–13, 2007 Fla. Sess. Law Serv. 1314, 1315–24 (West).
1226. FLA. STAT. § 727.105 (2007).
1227. *Id.*
1228. Ch. 2007-185, § 3, 2007 Fla. Sess. Law Serv. 1316 (amending FLA. STAT. § 727.103 (2007)).
1229. *Id.* (amending FLA. STAT. § 727.103(1)).
1230. FLA. STAT. § 727.108(1)(a) (2007).
1231. *Id.* § 727.108(4).
1232. *Id.*
1233. *Id.*
1234. *Id.* § 727.108(5).

tracts.[1235] There are also new provisions with respect to objections to claims and priority of claims, those sections having been rewritten.[1236]

Section 222.25 of the *Florida Statutes* increases to $4000—from $1000—the amount of personal property that a person can exempt from the claims of creditors, provided the person does not receive the benefit of the homestead exemption under article X, section 4 of the Florida Constitution.[1237] If the person does have a homestead exemption, then the personal property exemption is $1000, as provided in the Florida Constitution.[1238]

XX. WILLS, TRUSTS AND ESTATES, AND SPOUSAL RIGHTS

A. *Marital Agreements*

Florida enacted the Uniform Premarital Agreement Act, effective October 1, 2007, with prospective effect.[1239] The statute does not affect agreements made under sections 732.701 and 732.702 of the *Florida Probate Code*.[1240] The new statute sets forth both a nonexclusive list of subjects that may be covered by the agreement, such as property rights, spousal support, life insurance, choice of law, and grounds for invalidation.[1241] Premarital agreements must be in writing and signed by the parties, as must amendments and revocations.[1242]

B. *Dissolution of Marriage*

In *Haley v. Haley*,[1243] the Fifth District Court of Appeal was asked to decide if capital loss carry forwards, resulting from non-marital property, belong to the property-owning spouse or constitute marital property.[1244] John and Myra divorced.[1245] Myra had brought to the marriage, as non-marital property, an interest in Igo Family Partnership (Igo), a partnership formed by

1235. FLA. STAT. § 727.112(6)–(7).
1236. *Id.* §§ 727.113–.114.
1237. *Id.* § 222.25(4). The personal property exemption does not apply to claims for spousal or child support. *Id.*
1238. FLA. CONST. art. X, § 4(a)(2).
1239. Act effective Oct. 1, 2007, ch. 2007-171, §§ 1–3, 2007 Fla. Sess. Law Serv. 1244, 1244–45 (West) (codified at FLA. STAT. § 61.079 (2007)).
1240. FLA. STAT. § 61.079(10) (2007).
1241. *Id.* § 61.079(4), (7)–(8).
1242. *Id.* § 61.079(3), (6).
1243. 936 So. 2d 1136 (Fla. 5th Dist. Ct. App. 2006).
1244. *See id.* at 1137–38.
1245. *Id.* at 1137.

Myra's parents before Myra's marriage.[1246] "It was undisputed [that] John had no interest in Igo. . . ."[1247] The Igo passed through capital losses to Myra during the marriage, resulting in capital loss carry forwards.[1248] The issue was whether the capital loss carry forwards that could offset capital gains in later tax years were marital assets subject to equitable distribution between John and Myra.[1249] The trial court determined that the capital loss carry forwards were owned by John and Myra as tenants in common after the dissolution of marriage.[1250] The Fifth District Court of Appeal reversed.[1251] The court decided as an issue of first impression in Florida that capital loss carry forwards resulting from non-marital property belong to the property-owning spouse, that is, the carry forwards are not marital property.[1252] The court also cited section 1.1212-1 of the Treasury Regulations in support of its decision.[1253]

In *Wamsley v. Wamsley*,[1254] the Second District Court of Appeal held that it was proper for a husband to have excluded his distributive share of S corporation net income from his financial affidavits.[1255] The Second District Court of Appeal, relying on the Supreme Court of Florida's decision in *Zold v. Zold*,[1256] held that the trial court did not err in excluding undistributed pass-through income from the husband's gross income.[1257] *Zold* "set the standard for determining" if S corporation distributions are gross income under chapter 61 of the *Florida Statutes*.[1258] Under *Zold*, the burden is on the shareholder-spouse to show that the S corporation income was properly retained for business purposes, rather than "to avoid alimony, child support or attorney's fees obligations."[1259] Factors to be considered include the amount of control the shareholder has over the income, any statutory restrictions that would preclude distribution by the corporation, and any other reasons why the income is being "retained by the corporation."[1260] Husband, the chief executive officer and majority shareholder of an S corporation, explained

1246. *Id.*
1247. *Id.*
1248. *See Haley*, 936 So. 2d at 1137–38.
1249. *Id.* at 1137.
1250. *Id.* at 1138
1251. *Id.* at 1140.
1252. *Id.* at 1139–40.
1253. *Haley*, 936 So. 2d at 1139 n.3; *see also* Treas. Reg. § 1.1212-1 (as amended in 1980).
1254. 957 So. 2d 89 (Fla. 2d Dist. Ct. App. 2007).
1255. *Id.* at 91.
1256. 911 So. 2d 1222 (Fla. 2005).
1257. *Wamsley*, 957 So. 2d at 91.
1258. *Id.*
1259. *Id.*
1260. *Id.*

that there were business reasons why the income could not be distributed to him.[1261] The wife failed to rebut husband's evidence as to the corporation's need to retain the income for its corporate needs, and she failed to present evidence that husband caused the corporation to withhold distributions in order to avoid his obligations in connection with the divorce.[1262] The court held that *Zold* applied although it was decided after the *Wamsley* hearing in the trial court, since the facts demonstrated that the trial court could reasonably have reached the conclusion that the corporation was statutorily required to retain the income to meet its debts.[1263]

C. *Wills, Trusts, and Elective Share*

The Second District Court of Appeal in *Trenchard v. Estate of Gray*,[1264] relying on *Dempsey v. Dempsey*,[1265] held that the trial court's order determining that the decedent's interest in jointly held property was part of the elective estate was not a final, appealable order.[1266] The surviving joint tenant, claimed ownership of the property, and appealed the trial court's order.[1267] Issues regarding ownership, amount of elective share, and contribution had not been determined.[1268] Thus, the order was a non-final, non-appealable order.[1269]

The Second District Court of Appeal noted that the trial court had also entered an order allowing the surviving spouse to file a lis pendens.[1270] However, the appellant did not appeal that order.[1271]

D. *Homestead*

Mrs. Cutler died, survived by a son and a daughter.[1272] She was not survived by a spouse.[1273] Not long before she died, at a time when she was un-

1261. *See id.*at 91–92.
1262. *Wamsley*, 957 So. 2d at 92.
1263. *Id.* at 91–92 (citing FLA. STAT. § 607.06401(3)(a) (2005)).
1264. 950 So. 2d 1277 (Fla. 2d Dist. Ct. App. 2007).
1265. 899 So. 2d 1272 (Fla. 2d Dist. Ct. App. 2005) (stating that an order determining entitlement to elective share, which is a non-final and non-appealable order as judicial labor on issues involved, is not terminated).
1266. *Trenchard*, 950 So. 2d at 1278.
1267. *Id.*
1268. *Id.*
1269. *Id.*
1270. *Id.*
1271. *Trenchard*, 950 So. 2d at 1278.
1272. Cutler v. Cutler, 32 Fla. L. Weekly D583 (3d Dist. Ct. App. Feb. 28, 2007).
1273. *Id.*

married, she created the Cutler Irrevocable Land Trust naming herself and her two children as co-trustees.[1274] She deeded two parcels of real estate to the trust.[1275] The first parcel was her residence, in which she retained a life estate.[1276] The second parcel was a vacant lot adjacent to her residence.[1277] The trust agreement provided that all assets remaining in the trust when Mrs. Cutler died were to be distributed to her estate.[1278] Under the will, she specifically devised her residence to her daughter and the vacant lot to her son.[1279] The provision in the will that dealt with debts, administration expenses, and tax apportionment directed payment of these items from Mrs. Cutler's residuary estate.[1280] To the extent that the residuary was insufficient, then these items were to be charged in equal shares to the daughter's and son's devises.[1281] Naturally, there was a shortfall, and the son argued that both devises were required by the terms of the will to abate equally.[1282] The daughter's position was that her devise was of homestead property and was constitutionally protected from abatement.[1283] The trial court agreed with the daughter, and the son appealed.[1284] Referring to *Snyder v. Davis*,[1285] the Third District Court of Appeal reviewed the facts in evidence to determine if the real property was "protected homestead" exempt from forced sale for payment of creditor's claims after Mrs. Cutler died.[1286] It was the daughter's burden to prove: 1) the property was devised to her; 2) she is an heir within the meaning of the article X, section 4(b) of the Florida Constitution; and 3) when Mrs. Cutler died, the real estate was Mrs. Cutler's homestead.[1287] The court ruled that the daughter had proved each element.[1288] The son argued that to be protected homestead, the real property had to have been owned by a natural person and here it was held in an irrevocable trust.[1289] The court dismissed this argument by noting that Mrs. Cutler's life estate was a property interest eligible for homestead status—at least from the

1274. *Id.*
1275. *Id.*
1276. *Id.*
1277. *Cutler*, 32 Fla. L. Weekly at D583.
1278. *Id.*
1279. *Id.*
1280. *See id.* at D584.
1281. *Id.*
1282. *Cutler*, 32 Fla. L. Weekly at D584.
1283. *Id.*
1284. *Id.* at D583.
1285. 699 So. 2d 999 (Fla. 1997).
1286. *Cutler*, 32 Fla. L. Weekly at D584.
1287. *Id.*
1288. *Id.* at D586.
1289. *Id.* at D585.

standpoint of forced sale and the homestead real estate tax exemption—because she had resided on the property for many years, and thus was an "owner" of her residence for purposes of making a devise of protected homestead.[1290] The court also noted that other courts had ruled that real estate held in trusts, albeit revocable trusts,[1291] could retain its character as homestead.[1292] The Third District Court of Appeal saw no reason why this should be otherwise for real estate held in irrevocable trusts.[1293] Judge Schwartz dissented.[1294]

1290. *Id.*
1291. *Cutler*, 32 Fla. L. Weekly at D585.
1292. *Id.*
1293. *Id.*
1294. *Id.* at D586 (Schwartz, J., dissenting). With respect to another context where homestead issues have arisen, there are now contrary decisions between the District Courts of Appeal as to whether or not a cooperative apartment is homestead for purposes of article X, section 4(c) of the *Florida Constitution* and section 732.4015 of the *Florida Probate Code*. *See* Phillips v. Hirshon, 958 So. 2d 425, 426 (Fla. 3d Dist. Ct. App. 2007) (stating that a cooperative apartment is not homestead for purposes of devise and descent). The Third District Court of Appeal certified, conflicting with the Fifth District Court of Appeal's decision in *Southern Walls, Inc. v. Stilwell Corp.*, because of the different results that may be reached in the various contexts in which the determination of homestead is relevant. *Compare* Southern Walls, Inc. v. Stilwell Corp., 810 So. 2d 566 (Fla. 5th Dist. Ct. App. 2002), *with Phillips*, 958 So. 2d at 430.