Property Law

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2000 Survey of Florida Law: Real Property

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I. INTRODUCTION

This survey covers Florida judicial decisions and legislation that appeared between July 1, 1999 and June 30, 2000. As in past years, the volume is huge. So many cases and statutes can have an impact on real estate that we had to limit our coverage to what we thought would be of particular interest to the real estate community.¹ Our goal is to inform our readers of what has happened and, on occasion when we thought it was needed, to voice agreement, disagreement, or suggestions for the future. As always, we urge you to read the original cases and acts. As readers will discover, real estate law continues to develop in interesting ways.

II. ATTORNEYS’ FEES

A. In General

Munao v. Homeowners Ass’n of La Buona Vita Mobile Home Park.² Owners of mobile homes who rented spaces in a mobile home park challenged the rent as unreasonable because the landlord had reduced the amenities.³ The trial court ruled in their favor and ordered a rent reduction, retroactively and prospectively until repairs were made.⁴ The court also ordered the payment of attorneys’ fees.⁵ The fees were challenged on the ground that the plaintiff tenants had not proved all the defects they had alleged in their complaint.⁶ The district court pointed out that “the test is whether the party ‘succeed[ed] on any significant issue in litigation which

¹. Some areas, such as land use planning, are excluded because they are to be covered by separate survey articles. Other areas, like regulation of the construction industry, are too specialized to be of interest to our readers.
². 740 So. 2d 73 (Fla. 4th Dist. Ct. App. 1999).
³. Id. at 75. The landlord and tenant issues of this case are discussed in the Landlord and Tenant section of this article. See discussion infra Part XIII.
⁴. Munao, 740 So. 2d at 75.
⁵. Id.
⁶. Id. at 78.
achieves some of the benefit the parties sought in bringing suit." The plaintiff had won a rent reduction and the restoration of amenities, which was enough to make it a prevailing party.

The landlord also challenged the use of a multiplier in the calculation of attorneys' fees because the plaintiffs' attorneys' fee agreement was only partly based on a contingency fee. The district court found the use of the multiplier to be proper because the trial court had carefully explained the factors used to conclude that a contingency risk multiplier was warranted and justified the use of those factors based upon the expert witness testimony, Rule 4-1.5 of the *Florida Rules of Professional Conduct*, section 57.104 of the *Florida Statutes*, and relevant Florida case law.

*Tri-County Development Group, Inc. v. C.P.T. of South Florida, Inc.*
The tenant was a corporation owned by Barrett Hess. The landlord sued the tenant for a breach of the lease. Included as defendants were Mr. Hess, C.P.T., and Profitable Investment Corporation, another company that Hess owned. The defendants' answer denied the landlord's claims and also stated, "[t]he claims against DEFENDANTS, HESS AND CPT, are wholly without factual and/or legal merit and the DEFENDANTS should be awarded attorney's fees pursuant to F.S. 57.105." The trial court awarded $75,000 in attorneys' fees and costs to tenant Profitable Investment Corporation based upon the attorneys' fees provision in the lease. The landlords appealed claiming that the tenant had failed to properly plead its claim for attorneys' fees and, therefore, waived its attorneys' fees claim. The unsuccessful appeal was based on two theories.

First, the answer did not specify whether attorneys' fees were sought based upon the contract or upon a statute. To the extent that section 57.105 of the *Florida Statutes* was mentioned, the answer did not specify under

7. *Id.* (quoting Moritz v. Hoyt Enters., Inc., 604 So. 2d 807, 809–10 (Fla. 1992)).
8. *Id.* at 79.
10. *Id.* at 79–80.
12. *Id.* at 573.
13. *Id.*
14. *Id.* at 573–74.
15. *Id.* at 574.
17. *Id.*
18. *Id.*
19. *Id.*
which subsection attorneys' fees were being sought. The district court found this unpersuasive. Waiver benefited the tenant rather than the landlord. The court stated:

[W]here a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead the entitlement, that party waives any objection to the failure to plead a claim for attorney's fees.

Any challenges to or questions about that claim could have and should have been raised by a responsive pleading. Failure to do so resulted in waiver of the objections. Moreover, section 57.105(1) of the Florida Statutes provided for attorneys' fees based on bringing a frivolous claim or action, and subsection two of the same statute provided for attorneys' fees under a contract where the contract would have allowed the other party to recover attorneys' fees for prevailing. Thus, claiming attorneys' fees under section 57.105 of the Florida Statutes effectively gives notice that a claim is being made for either or both statutory or contractual attorneys' fees.

The next theory was that the answer only mentioned the claims against Hess and C.P.T. as being without merit and, therefore, Profitable Investment Corporation had not made any claim for attorneys' fees. However, the answer said that "the DEFENDANTS should be awarded attorney's fees." The tenant was one of the defendants. In fact, the tenant was the only defendant who was a party to the lease that was the subject of the suit and which contained the attorneys' fees provision to which subsection two of the statute would apply. Thus, the claim was sufficient to give the landlord notice that all three defendants were seeking attorneys' fees.

20. Id.
22. Id. at 574.
23. Id.
24. See id. at 575.
25. Id.
27. Id.
28. Id. at 574.
29. Id.
30. Id.
31. Tri-County Dev. Group, Inc., 740 So. 2d at 575.
32. Id.
B. *Eminent Domain*

*Reese v. Department of Transportation.* The Department of Transportation ("DOT") began proceedings to take the entire property. Reese challenged the taking, but the DOT prevailed after an evidentiary hearing. The tenant appealed. The parties reached an agreement that the appeal would be dismissed in exchange for the DOT allowing the tenants to remain two additional months. During that period, the tenant realized a profit of $58,098. The tenant then claimed attorneys' fees equal to thirty-three percent of that profit. The trial court rejected the attorneys' fees claim and the district court affirmed.

Under section 73.092(1) of the *Florida Statutes*, attorneys' fees in an eminent domain proceeding are to be based on the benefit the attorney achieved for the client. That benefit could be monetary or nonmonetary, but in this case the court could find neither, characterizing the profit achieved during the extended period of possession as betterment that the tenant had achieved for itself by its own efforts.

The district court also rejected the argument that the statute produced an unconstitutional result in this case. The argument was raised for the first time on appeal. Failure to raise the issue in the trial court would constitute waiver unless the trial court had made a fundamental error. In the lease, the tenant assigned any condemnation settlement or award, except business damages. However, the Florida Constitution does not require the payment of business damages or attorneys' fees incurred in recovering them. Business damages are a benefit provided by the legislature and

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33. 743 So. 2d 1227 (Fla. 4th Dist. Ct. App. 1999).
34. *Id.* at 1228.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Reese*, 743 So. 2d at 1228.
39. *Id.*
40. *Id.*
41. *Id.* at 1229; see FLA. STAT. § 73.092(1) (2000).
42. *Reese*, 743 So. 2d at 1229.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 1228.
47. *Reese*, 743 So. 2d at 1228.
failure of the court to award them without being asked would not be fundamental error.\textsuperscript{48}

\textit{Department of Transportation v. Lakepointe Associates.}\textsuperscript{49} As noted, section 73.092(1) of the \textit{Florida Statutes} provides that attorneys’ fees should be calculated based “solely on the benefits achieved for the client.”\textsuperscript{50} It goes on to provide that “benefits means the difference... between the final judgment or settlement and the last written offer made by the condemning authority.”\textsuperscript{51} In this case, the landowner had received a letter purporting to be a “summary of the Department’s offer” for the property.\textsuperscript{52} The letter had a line for the signature of the District Right of Way Administrator, but that person had not signed it because such letters were routinely sent out without signatures.\textsuperscript{53} The landowner’s attorneys claimed that this was not a valid offer and that the attorneys’ fees should therefore be based on the final judgment, i.e., calculate the benefit as if the offer had been zero.\textsuperscript{54} The trial court agreed that there had not been a valid offer.\textsuperscript{55} The statute did not specify what to do in such a case, so the trial court decided to calculate fees based on the difference between the final judgment and the figure testified to by the DOT’s expert.\textsuperscript{56}

The district court disagreed, concluding there had been a valid offer.\textsuperscript{57} Focusing on the purpose of the statute and reading it \textit{in pari materia} with section 119.07(3)(n) of the \textit{Florida Statutes}, the court concluded that the letter was an offer within the meaning of this attorneys’ fees statute.\textsuperscript{58} The statute did not require an offer that could, by mere acceptance, ripen into a contract.\textsuperscript{59} In fact, what was anticipated was that a formal contract would be executed if the landowner agreed to the terms of the offer.\textsuperscript{60} “Moreover, it is

\footnotesize

\textsuperscript{48} \textit{Id.} at 1229.
\textsuperscript{49} 745 So. 2d 364 (Fla. 1st Dist. Ct. App. 1999).
\textsuperscript{50} \textit{Fla. Stat.} § 73.092(1) (2000).
\textsuperscript{51} § 73.092(1)(a).
\textsuperscript{52} \textit{Lakepointe Assocs.,} 745 So. 2d at 365.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} at 366.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} at 367.
\textsuperscript{57} \textit{Lakepointe Assocs.,} 745 So. 2d at 367.
\textsuperscript{58} \textit{Id.} at 368. Section 119.07 of the \textit{Florida Statutes} provides that a contract to purchase property acquired by eminent domain shall not be formalized for 30 days by the condemning agency in order to give the public time to review the transaction. \textit{Fla. Stat} § 119.07(3)(n) (2000).
\textsuperscript{59} \textit{Lakepointe Assocs.,} 745 So. 2d at 367–68.
\textsuperscript{60} \textit{Id.} at 368.
clear from the circumstances that the letter was intended as a binding offer, despite the absence of a signature. Thus, the court managed to avoid dealing with the difficult problem of how to calculate attorneys' fees if the condemnor makes no offer.

C. Homeowner Associations

Southpointe Homeowners Ass'n, Inc. v. Segarra. The issue here was whether the trial court properly concluded and did not abuse its discretion when it awarded $785 for attorneys' fees and $133 for costs, due to the fact that the homeowner had attempted to settle the matter and that the association had been quick to file suit.

The dispute arose over a $294 arrearage for maintenance and dues that the homeowner owed the association. The homeowner testified that she had made efforts to determine the exact amount she owed so that she could pay it but had difficulty in obtaining this information from the association's law firm. The association sought $4646 in attorneys' fees and $689 in costs. The trial court observed that the association had been quick to file suit and that the amount of fees claimed over $294 was outrageous. The law firm sought fees for 29.4 hours. The court awarded three hours for the lawyer's time and two hours for paralegal time.

The court held that the trial court properly concluded the case and that it did not abuse its discretion when it found the homeowner was sincere in her efforts to settle and the association was too quick to file suit. It based this on the fact that the trial court is able, based on its familiarity with the type of litigation involved, to determine that some work was unnecessary.

61. Id.
62. See id.
63. 763 So. 2d 1186 (Fla. 4th Dist. Ct. App. 2000).
64. Id. at 1186.
65. Id.
66. Id.
67. Id.
68. Segarra, 763 So. 2d at 1186.
69. Id.
70. Id.
71. Id. at 1187.
72. Id; see Wiederhold v. Wiederhold, 696 So. 2d 923 (Fla. 4th Dist. Ct. App. 1997).
III. CONDOMINIUMS

_Gulf Island Resort, L.P. v. Gulf Island Beach & Tennis Club Condominium Ass’n II, Inc._ The issue was whether the trial court properly held that the association could file a complaint seeking alternate remedies of lien foreclosure or money judgment, and could elect different remedies on different delinquent units in the same action.

The association brought suit against Gulf for delinquency in maintenance assessments on forty-one units that Gulf owned. The association sought alternate remedies of lien foreclosure or a money judgment on different units based on the amount of equity in the units. The trial court entered two partial final judgments of foreclosure on twenty-two units and a monetary judgment of $53,593.49 against Gulf which was the delinquent amount owed on the other units. Gulf appealed this judgment, arguing that the final decision must either be foreclosure on all units or a monetary judgment.

The appellate court held that the trial court was correct and that the association was entitled to seek alternate remedies and elect the judgment of foreclosure on some units and a monetary judgment for remaining assessments in the same action. The court based its opinion on section 718.116(6)(a) of the Condominium Act.

_Wellington Property Management v. Parc Corniche Condominium Ass’n._ The issue here was whether a bare majority of condominium owners could amend the declaration pursuant to a provision in the declaration by “add[ing] a new provision which permits the common elements to be amended or altered and, by applying this new provision retroactively, defeat the vested rights of the pre-amendment purchasers.”

In this case, the condominium association made an amendment to the declaration that would allow the association to alter the common elements by

73. 740 So. 2d 64 (Fla. 2d Dist. Ct. App. 1999).
74. Id. at 64.
75. Id.
76. Id.
77. Id.
78. Gulf Island Resort, L.P., 740 So. 2d at 65.
79. Id.
81. 755 So. 2d 824 (Fla. 5th Dist. Ct. App. 2000).
82. Id. at 825.
a fifty-one percent vote of the board of directors. The court held that due to the importance placed on the common elements, when interpreting a general power to amend in the declaration, the court must "consider the statutory law and other provisions of the declaration and by-laws applicable when the condominium was purchased in order to determine existing rights." The court found that a purchaser should be able to rely on the provisions of the declaration at the time of purchase, so the purchaser may determine its ability to afford the unit. In its interpretation of section 718.110(4) of the Florida Statutes, which provides for the alteration of the declaration as provided by the declaration, the court found the legislature was talking about a provision existing in the declaration at the time of purchase. The court reversed and remanded this case.

Legislation affecting condominiums includes the addition of a new section for multicondominium associations and statutory authority for transferring limited common elements. Also, there is a definition of a "successor or assignee" of a first mortgagee who takes title to a condominium by foreclosure and receives limited liability for outstanding association assessments. For that protection one must be a successor holder of the first mortgage.

IV. CONSTRUCTION

Sunshine–Jr. Stores, Inc. v. Autopump Services Co. Sunshine operated convenience stores with self-service gasoline stations. It had contracted for the removal of its old filling station equipment and the installation of new tanks, pumps, and a protective canopy at one of its stores. After a subcontractor put in the tanks and pumps, the contractor

83. Id.
84. Id. at 826.
85. Id.
87. Id. at 828.
89. Id. § 56, 2000 Fla. Laws at 3149 (codified at Fla. Stat. § 718.116 (2000)).
92. Id. at 790.
93. Id.
began work on the protective canopy, which was the source of the dispute.\textsuperscript{94} Sunshine became concerned about the quality and quantity of the bracing.\textsuperscript{95} After an unsuccessful conference with the contractor, it hired a structural engineer who found the design questionable and the construction substandard.\textsuperscript{96} The contractor claimed the construction was completed, or at least ninety percent completed, and refused to remedy the problems or remove the canopy.\textsuperscript{97} Sunshine terminated the contract.\textsuperscript{98} It then hired a structural engineer to make new drawings for the canopy and remove and replace the old one.\textsuperscript{99}

The court decided that Florida law applied and the first step should be to determine if the case was controlled by Article 2 of the Uniform Commercial Code ("U.C.C.").\textsuperscript{100} Construction contracts are typically dominated by the services element rather than by the provision of goods for the construction.\textsuperscript{101} Consequently, the court applied contract law and not the U.C.C. to the damages and breach issues.\textsuperscript{102}

Under Florida law, Sunshine would have been entitled to terminate the contract if the contractor had materially breached.\textsuperscript{103} It found that the primary purpose of the canopy was to have a safe and operational self-service station.\textsuperscript{104} The canopy was intended to provide protection for the customers and the gas tanks.\textsuperscript{105} A dangerous canopy would defeat the purpose of the contract.\textsuperscript{106} The contractor did not produce a safe canopy and, in fact, showed no concern about doing so.\textsuperscript{107} It treated the drawings and the code requirements as mere formalities to be circumvented.\textsuperscript{108} Moreover, the contractor was given ample opportunities to remedy the

\textsuperscript{94.} Id. at 791.  
\textsuperscript{95.} Id. at 792.  
\textsuperscript{96.} Sunshine–Jr. Stores, Inc., 240 B.R. at 793.  
\textsuperscript{97.} Id.  
\textsuperscript{98.} Id.  
\textsuperscript{99.} Id. at 794.  
\textsuperscript{100.} Id.  
\textsuperscript{102.} Id.  
\textsuperscript{103.} Id.  
\textsuperscript{104.} Id. at 795.  
\textsuperscript{105.} Id.  
\textsuperscript{107.} Id.  
\textsuperscript{108.} Id.
deficiencies and refused. The contractor was in breach and the termination of the contract was justified.

Under the circumstances, Sunshine was entitled to be put in the position it expected to be in under the contract. So long as it did not constitute unreasonable economic waste, Sunshine could recover what it cost to get the construction it had bargained for. Here, Sunshine had expected to get the work done for $67,500 and it had already paid $25,000 to the contractor. To get the job completed properly, it had to pay the structural engineer $62,608.12. Consequently, Sunshine was entitled to recover $20,108 so that its total cost would not exceed the original price.

Sunshine also sought lost profits. To recover lost profits it would have to prove that the contractor’s breach had caused that loss and there had to be a standard for calculating the amount of damages. The evidence was insufficient to meet the test. Even if the pumps had been operational on schedule, the inside of the store was still being remodeled during the period when lost profits were sought. So the amount of profits which might have been attributable to the inoperable pumps could not be determined.

V. CONVERSION AND MERGER OF BUSINESS ENTITIES

Legislation now provides that there is no need to record a deed for title to transfer by merger or conversion of business entities.

VI. COVENANTS AND RESTRICTIONS

Boyce v. Simpson. The issue here was whether the trial court properly denied Boyce’s request for a permanent injunction against the

109. Id. at 796.
110. Id.
112. Id.
113. Id.
114. Id.
115. Id.
117. Id.
118. Id.
119. Id.
120. Id.
122. 746 So. 2d 507 (Fla. 4th Dist. Ct. App. 1999).
Simpsons' proposed use of their dwelling as an Adult Congregate Living Facility ("ACLF").

The Simpsons purchased their single family dwelling to both live in and to operate as an ACLF for up to six non-family members as allowed by sections 419.01 and 400.401 of the Florida Statutes. The Boyces objected to the use of the home as an ACLF and sought to enforce the applicable restrictive covenant within their residential neighborhood. The covenant provided:

**USE RESTRICTIONS.** Lots may be used for dwelling units and pertinent uses and for no other purposes. No business buildings may be erected in the subdivision and no business may be conducted on any part thereof, nor shall any dwelling unit or any portion thereof be used or maintained as a professional office.

The dispute centered around "whether the phrase 'on any part thereof' applies to the term 'business building' or the word 'subdivision.'" The trial court denied the request for the permanent injunction ruling that any ambiguity should be resolved in favor of the homeowner.

The appellate court held that the trial court was correct in denying the request for the permanent injunction. This was based on the fact that restrictive covenants are to be strictly construed in favor of the homeowners.

**Loren v. Sasser.** The issue here was whether to grant an amended motion for a preliminary injunction on Loren's First Amendment claim to be allowed to place a "for sale" sign on her property without violating the community's judicially enforceable deed restriction ban on all homeowner signs.

The court had previously recognized that judicial enforcement in Florida of rules and restrictions banning or restricting free speech constitutes

123. Id. at 508.
124. Id.
125. Id.
126. Id. (emphasis supplied).
127. Boyce, 746 So. 2d at 508.
128. Id.
129. Id.
132. Id. at D241.
state action. Therefore, the constitutional validity of the speech ban or restriction is properly subject to federal scrutiny under the First and Fourteenth Amendments in an action under section 1983 of Title 42 of the United States Code.

The court denied the amended motion for preliminary injunction. It reasoned that Loren had not met the burden of showing it would suffer irreparable harm absent the Association's being enjoined from interfering with her First Amendment rights to place a "for sale" sign on her property.

VII. DEEDS

Griem v. Zabala. The question was whether the trial court erred when it denied a quiet title petition involving two condominium units, when the sellers of one unit did not sign the deed and had not met or been in the presence of the notary who notarized the deed, and for the second unit, the grantees did not introduce the deed into evidence or adequately explain why it was missing.

In 1978, Griem purchased condominium unit numbers 106 and 110, the units at issue. After his wife's death, Griem quitclaimed these units to himself and his two daughters. Afterwards, Griem entered into an agreement with a real estate agent to manage, maintain, and rent the units. From 1980 to 1989, Griem visited Miami annually to check on the properties and receive statements from the real estate agent as to the properties' status. These reports stopped in 1989. From 1989 to 1996, Griem did not visit Miami due to health and business problems. Additionally, Griem owned six other condominium units located in Pointe South which were also...

134. Id.
137. 744 So. 2d 1139 (Fla. 3d Dist. Ct. App. 1999).
138. Id. at 1140.
139. Id.
140. Id.
141. Id.
142. Griem, 744 So. 2d at 1140.
143. Id.
144. Id.
managed by the real estate agent.\textsuperscript{145} These units were severely damaged by Hurricane Andrew and "[t]here were no reserve funds nor incoming rents to pay the mortgage and maintenance assessments" on these units.\textsuperscript{146} Allegedly, the real estate agent sold units 106 and 110 to avoid foreclosure on the other units.\textsuperscript{147} In 1996, Griem came to Miami and discovered the units in question had been transferred to the Zabalas and to the Moraleses without his consent or knowledge.\textsuperscript{148} Further, he stated that he did not sign any deeds or powers of attorney.\textsuperscript{149} Griem filed suit to quiet title, to eject the Zabalas and the Moraleses, and to obtain declaratory relief against them.\textsuperscript{150} The trial court entered final judgment for the Zabalas and the Moraleses.\textsuperscript{151}

The appellate court held that the trial court erred in holding that the Zabalas and Moraleses had valid deeds to units 106 and 110.\textsuperscript{152} For there to be a transfer of a property interest, "a deed must be in writing and signed by the person conveying such interest."\textsuperscript{153} Further, section 117.05(6)(a) of the Florida Statutes prohibits a notary to notarize a signature if the person is not in his or her presence at the time the signature is notarized.\textsuperscript{154} The notary in this case testified that she did not know Griem and he was not in her presence when she notarized the deed.\textsuperscript{155} Therefore, the Zabalas did not have a valid deed for unit 106.\textsuperscript{156} Section 90.952 of the Florida Statutes requires the offering of an original writing or a sufficient explanation for its unavailability.\textsuperscript{157} The Moraleses failed to introduce their deed into evidence or adequately explain its absence.\textsuperscript{158} Therefore, there was no evidence to support a finding that the Moraleses owned unit 110.\textsuperscript{159}

\begin{flushright}
145. \textit{Id.}
146. \textit{Id.}
147. \textit{Griem, 744 So. 2d at 1140.}
148. \textit{Id.}
149. \textit{Id.}
150. \textit{Id.}
151. \textit{Id.}
152. \textit{Griem, 744 So. 2d at 1140.}
153. \textit{Id.; see Fla. Stat. § 689.01 (2000).}
154. \textit{Griem, 744 So. 2d at 1140; see also Fla. Stat. § 117.05(6)(a) (2000); The Fla. Bar v. Farinas, 608 So. 2d 22, 23 (Fla. 1992).}
155. \textit{Griem, 744 So. 2d at 1140.}
156. \textit{Id.}
158. \textit{Griem, 744 So. 2d at 1141.}
159. \textit{Id.}
\end{flushright}
A. Condemnation

*Alternative Networking, Inc. v. Solid Waste Authority.*160 The Authority condemned a building that was partially occupied by tenants.161 Three of those tenants had been found by Alternative Networking under a contract with the landowner that gave it fifteen percent of the monthly rents paid by any tenants it procured for as long as they remained tenants.162 Alternative Networking sought part of the condemnation award on the theory that it had a property interest, but the district court disagreed.163 It characterized the interest as merely a personal contract.164 Alternative Networking was not the beneficiary of a covenant that ran with the land because the covenant was only binding between Alternative Networking and the landowner.165 Alternative Networking did not have any land that was benefited by the contract.166 It could not enforce its right to payment by a lien on the land and any tenant could terminate its lease upon giving proper notice.167 By its terms, the lease lasted only as long as a tenant remained on the land, so the loss of the land in condemnation terminated Alternative Networking’s right to payment.168

*Brevard County v. A. Duda & Sons, Inc.*169 The county had obtained an order to take 240 acres of Duda’s land for the construction of artificial wetlands.170 After the order was entered, the county realized that it needed an easement for the flow of partially treated wastewater from those artificial wetlands to Lake Winder by way of a canal owned by Duda.171 So the county filed an amended complaint to acquire the easement.172 In determining the value of the easement, there was evidence that the government was considering more stringent pollution limits on water

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160. 758 So. 2d 1209 (Fla. 4th Dist. Ct. App. 2000).
161. Id. at 1210.
162. Id.
163. Id. at 1211.
164. Id.
165. *Alternative Networking, Inc.*, 758 So. 2d at 1211.
166. Id.
167. Id.
168. Id. at 1212.
169. 742 So. 2d 476 (Fla. 5th Dist. Ct. App. 1999).
170. Id. at 477.
171. Id.
172. Id.
flowing into Lake Winder from Duda’s canal.\textsuperscript{173} The effect of the county adding contaminants from its artificial wetlands, while the total contaminants allowed was reduced, would be to limit the amount of contaminants that could flow into the canal from Duda’s land; and that could “substantially impact Duda’s operations and future development of its Cocoa Ranch.”\textsuperscript{174}

The county attempted to reduce the amount of compensation ordered by having the taking order place restrictions on its use of the easement.\textsuperscript{175} Both parties submitted proposed language and the trial court adopted the county’s version.\textsuperscript{176} Duda appealed and the district court reversed, finding that the fatal error in the language adopted was that it would “exceed the plans, specifications and testimony presented at the hearing on the order of taking, and attempt to impose contractual obligations... in the absence of a contractual agreement.”\textsuperscript{177} In addition, from Duda’s perspective, the contractual language was so vague that future litigation to interpret it would be inevitable.\textsuperscript{178} The court concluded that “[t]he condemnee is entitled to just compensation now... not vague promises to act in the future to cure future problems in an attempt to limit compensation.”\textsuperscript{179}

\textit{Claussen v. Department of Transportation.}\textsuperscript{180} In this condemnation proceeding, the DOT sought to reduce its liability by showing that the landowner knew that a part of the land might be taken in a road widening project.\textsuperscript{181} On the stand, the landowner denied he had such knowledge.\textsuperscript{182} The DOT then produced a letter that had been written by an attorney to the DOT two years earlier complaining about the proposed road widening.\textsuperscript{183} At the time the letter was written, the attorney represented the prior landowner.\textsuperscript{184} Later, that attorney represented the current landowner in

\begin{verbatim}
173. Id. at 478.
174. A. Duda & Sons, Inc., 742 So. 2d at 478.
175. Id.
176. Id.
177. Id.
178. Id. at 479.
179. A. Duda & Sons, Inc., 742 So. 2d at 479.
180. 750 So. 2d 79 (Fla. 2d Dist. Ct. App. 1999).
181. Id. at 80.
182. Id. at 81.
183. Id.
184. Id.
\end{verbatim}
negotiations for the land's purchase. On appeal, the district court found
the use of the letter so tainted the trial that reversal was necessary.

The DOT claimed that the letter was used for impeachment purposes
and, therefore, it had no obligation to disclose the letter during discovery. The district court rejected both assertions. A witness can only be
impeached by the witness’s prior inconsistent statement. This letter was
written by another person, so it could not be used for impeachment. Even
if it could, disclosure in discovery would be necessary to avoid trial by
ambush, which is contrary to the current theory of civil litigation.

The DOT also claimed that the letter was admissible as a public
record. The district court rejected this argument because the letter was
based on information from an outside source. There is a hearsay
exception that allows an agency to "present proof of its activities by utilizing
its records or reports that demonstrate compliance by a government agency
with duties it was lawfully required to perform." That was not what the
letter was used for in this case.

The court also rejected the DOT’s claim that the letter was properly
used to refresh the witness’s memory. However, the statute allows such
use only when the witness expresses an inability to remember something.
Here, the witness made no such statement. To the contrary, he specifically
denied ever having knowledge of the road widening project. Moreover,
even if the letter had been properly used to refresh the witness’s memory, the
DOT still could not publish the letter’s contents to the jury as was done in
this case. In fact, the DOT’s lawyer went even further and “also provided
his own interpretation of its substance in the jury’s presence.” Such action

185. Claussen, 750 So. 2d at 82.
186. Id. at 80.
187. Id. at 81.
188. Id. at 81–82.
189. Id. at 81.
190. Claussen, 750 So. 2d at 82.
191. Id.
192. Id. at 81; see Fla. Stat. § 90.606 (2000).
193. Claussen, 750 So. 2d at 82.
194. Id.
195. Id.
196. Id.
198. Claussen, 750 So. 2d at 82.
199. Id.
200. Id.
201. Id.
was intended to prejudice the jury. Consequently, the landowner had been denied his constitutional right to a jury trial.

CSR Partnership v. Department of Transportation. The DOT made an offer of judgment. Under Rule 1.442 of the Florida Rules of Civil Procedure the offer of judgment was served too late. Under section 73.032 of the Florida Statutes the service was timely because it requires service no later than twenty days before trial. The circuit court applied the statute, but the district court reversed. It stated that "the supreme court has previously found that time limits for offers of judgment are procedural." While the legislature has primary authority over substantive matters, the court has primary authority over procedural matters. Thus, the rules promulgated by the supreme court, rather than the statute, control the timing of offers of judgment.

Department of Transportation v. Duplissey. The landowner sought severance damages. The DOT admitted liability and made a good faith deposit with the court. At trial, the landowner succeeded in excluding the proffered testimony of the DOT’s expert. The jury had only the testimony of the landowner’s expert to consider in determining the severance damages, but arrived at a figure that was lower than what the expert had calculated. In fact, it was lower than the good faith deposit. Faced with a case of first impression, the trial court granted the landowner’s motion for a new trial.

The district court, however, reversed. If the jury had the good faith deposit amount to consider, it would have been required to consider that the

202. Id.
203. Claussen, 750 So. 2d at 82.
204. 741 So. 2d 623 (Fla. 2d Dist. Ct. App. 1999).
205. Id. at 625.
206. Id; see FLA. R. CIV. P. 1.442 (requiring service no later than 45 days before trial).
207. CSR P'ship, 741 So. 2d at 623; see FLA. STAT § 73.032 (2000).
208. CSR P’ship, 741 So. 2d at 623.
209. Id. (citing Knealing v. Puleo, 675 So. 2d 593, 596 (Fla. 1996)).
210. See id.
211. Id. at 624.
212. 751 So. 2d 117 (Fla. 5th Dist. Ct. App. 2000).
213. Id. at 118.
214. Id.
215. Id.
216. Id. at 119.
217. Duplissey, 751 So. 2d at 119.
218. Id. at 118.
219. Id. at 119.
minimum award. However, the only evidence before the jury was the landowner's expert's testimony. The jury was not bound by that and could, based on the facts before it, reach its own conclusion. Here, the conclusion was for a lesser amount of severance damages. Excluding the DOT's expert's testimony had backfired.

**Seminole County v. Sanford Court Investors, Ltd.** The county engaged in a road widening project that required taking part of the parking lot owned by Cumberland Farms. At that time, Cumberland Farms had two tenants, Deis and Hancock Company. Deis' original written lease had expired and he was under a month-to-month lease. Hancock was under an extension of its original lease. After the filing of the condemnation action, Cumberland Farms notified these tenants that their leases would not be renewed because it was going to build a new and bigger store. However, but for the condemnation, the leases would have been renewed at least for the indefinite future.

In the condemnation proceeding, the tenants sought business damages. Their expert witness was allowed to testify about their business damages calculated on the theory that their leases would be continually renewed for the indefinite future. He based this on the past history of renewals. The district court found that the admission of this testimony was error. A tenant is entitled to recover business damages based only upon its leasehold interest at the time of the taking. Thus, Deis, who had a

220. *Id.*
221. *Id.* at 118.
222. *Duplissey*, 751 So. 2d at 120.
223. *Id.*
225. *Sanford Court Investors, Ltd.*, 743 So. 2d at 1167.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Sanford Court Investors, Ltd.*, 743 So. 2d at 1168.
231. *Id.* at 1167.
232. *Id.* at 1168.
233. *Id.*
234. *Id.*
235. *Sanford Court Investors, Ltd.*, 743 So. 2d at 1169.
month-to-month lease, was entitled to business damages suffered over a one-
month period, and Hancock was entitled to business damages for what
remained of its two-year term.\footnote{236} The tenants’ claim for moving expenses was found to be without
merit.\footnote{237} Moving expenses could be recovered “if the tenant[s] [are]
required to move [their] possessions off the property or to move them from
one part of the property to another as a result of the taking.”\footnote{238} There was no
evidence indicating that had occurred here.\footnote{239}

In order to vacate the premises, the tenants had auctioned off their
inventory and trade fixtures.\footnote{240} The tenants had suffered a loss because the
auction prices were so low and their expert had included this loss in his
calculation of business damages.\footnote{241} That was an error.\footnote{242} Recovery for the
trade fixtures would be severance damages, not business damages.\footnote{243} The
jury was not given a special verdict form that separated severance damages
from business damages.\footnote{244} Consequently, the case was reversed and
remanded.\footnote{245}

\textit{M.J. Stavola Farms, Inc. v. Department of Transportation.}\footnote{246} This case
involved the partial taking of land that had been leased out as a limerock
mine.\footnote{247} The expert for the tenant testified that the tenant would suffer
business damages calculated on the amount of limerock located in the taken
land.\footnote{248} The landowners and lessees appealed based on the trial judge’s
order to strike that testimony. The district court disagreed and held that the
trial court had not erred.\footnote{249} The testimony revealed that the tenant had
consistently been removing about six hundred thousand tons of limerock per
year and that there was no evidence that it would ever mine more than that
annual amount.\footnote{250} At the current rate, the tenant could continue to remove

\begin{footnotes}
\item[236] \textit{Id.}
\item[237] \textit{Id.} at 1171.
\item[238] \textit{Id.}
\item[239] \textit{Id.}
\item[240] \textit{Sanford Court Investors, Ltd.,} 743 So. 2d at 1170.
\item[241] \textit{Id.}
\item[242] \textit{Id.}
\item[243] \textit{Id.}
\item[244] \textit{Id.}
\item[245] \textit{Sanford Court Investors, Ltd.,} 743 So. 2d at 1171.
\item[246] 742 So. 2d 391 (Fla. 5th Dist. Ct. App. 1999).
\item[247] \textit{Id.} at 392–93.
\item[248] \textit{Id.} at 394.
\item[249] \textit{Id.} at 395.
\item[250] \textit{Id.} at 393.
\end{footnotes}
limerock for the next twenty-five years without being affected by the taking.\(^{251}\) In year twenty-six the tenant would run out of limerock and suffer business damages for the remaining nineteen years of the lease.\(^{252}\) At the current rate, the tenant would never have removed all the limerock in the taken land, so its business damages should not have been calculated on all the limerock in the taken land.\(^{253}\) Its business damages should only have been calculated on its income from the limerock it would have removed in the last nineteen years, but for the taking.\(^{254}\) Basing business damages on the possibility that the tenant might begin removing limerock at a faster rate would be speculation, and damages cannot be based on speculation.\(^{255}\)

\textit{Owens v. Orange County.}\(^{256}\) The county brought this condemnation as part of a road widening project.\(^{257}\) The landowners claimed business damages and hired a certified public accountant as their business damages expert.\(^{258}\) The parties reached a mediated settlement with two components.\(^{259}\) First, the landowners would be paid \$90,000 in full settlement of all claims except attorneys' fees, experts' fees, and costs.\(^{260}\) Second, the county would make certain improvements to the landowners' remaining property.\(^{261}\) The landowners filed a motion for expert fees due to their business damages expert, but the county objected, arguing that the landowners had abandoned their claim for business damages based on an inference from the amount of the settlement.\(^{262}\) The statute provided for payment of a reasonable accountant's fee only when business damages were compensable.\(^{263}\) Accepting that argument, the trial court denied the motion.\(^{264}\)

The district court, however, reversed, finding that there had never been an express abandonment of business damages.\(^{265}\) The nature of the

\begin{footnotes}
\item 251. \textit{M.J. Stavola Farms, Inc.}, 742 So. 2d at 395.
\item 252. \textit{Id.}
\item 253. \textit{Id.}
\item 254. \textit{Id.}
\item 255. \textit{Id.}
\item 256. 747 So. 2d 467 (Fla. 5th Dist. Ct. App. 1999).
\item 257. \textit{Id. at 467.}
\item 258. \textit{Id. at 468.}
\item 259. \textit{Id. at 467.}
\item 260. \textit{Id.}
\item 261. \textit{Owens}, 747 So. 2d at 467.
\item 262. \textit{Id. at 468.}
\item 263. \textit{Id.; see FLA. STAT. § 73.091 (2000).}
\item 264. \textit{Owens,} 747 So. 2d at 469.
\item 265. \textit{Id. at 470.}
\end{footnotes}
settlement indicated that the county was to make the promised improvements to avoid having to pay business damages.\textsuperscript{266} Accepting an alternative to money did not suggest abandonment of the claim.\textsuperscript{267} Rather, it suggested that the claim was compromised.\textsuperscript{268} Lawyers would be well advised to avoid similar disputes in the future by expressly addressing the abandonment issue in the settlement agreement.

B. \textit{Inverse Condemnation}

\textit{Burnham v. Monroe County.}\textsuperscript{269} The county adopted a "Rate of Growth Ordinance" that limited the number of building permits that could be issued.\textsuperscript{270} A point system existed to allocate the permits.\textsuperscript{271} Points could be earned by including certain design features, such as solar hot water heaters or low flow plumbing fixtures.\textsuperscript{272} These landowners unsuccessfully sought a building permit.\textsuperscript{273} They were repeatedly informed by the county that a few design changes would give them a high enough score to get the permit, but they declined to make the changes and instead brought this suit.\textsuperscript{274} The circuit court found the ordinance constitutional and that no taking had occurred.\textsuperscript{275} The Third District Court of Appeal affirmed.\textsuperscript{276} The ordinance was constitutional because it "substantially advance[d] the legitimate state interests of promoting water conservation, windstorm protection, energy efficiency, growth control, and habitat protection."\textsuperscript{277} Moreover, to prevail on their claim that a taking had occurred, the landowners had the burden of showing "that the challenged regulation denies \textit{all} economically beneficial or productive use of land."\textsuperscript{278} They failed to make that showing.\textsuperscript{279}

\begin{itemize}
\item \textsuperscript{266} Id.
\item \textsuperscript{267} Id.
\item \textsuperscript{268} Id.
\item \textsuperscript{269} 738 So. 2d 471 (Fla. 3d Dist. Ct. App. 1999).
\item \textsuperscript{270} Id. at 472.
\item \textsuperscript{271} Id.
\item \textsuperscript{272} Id. at 472 n.1.
\item \textsuperscript{273} Id. at 472.
\item \textsuperscript{274} Burnham, 738 So. 2d at 472.
\item \textsuperscript{275} Id.
\item \textsuperscript{276} Id.
\item \textsuperscript{277} Id.
\item \textsuperscript{278} Id.
\item \textsuperscript{279} Burnham, 738 So. 2d at 472.
\end{itemize}
Saboff v. St. John's River Water Management District. As mandated by the Florida legislature, the Water Management District created Riparian Habitat Protection Zones. The landowners’ land was in one of these zones. Consequently, in order to build a residence, the landowners needed a permit from the District, but the District would issue the permit only if the landowners would mitigate the loss of wildlife habitat caused by the construction. The District demanded a conservation easement over part of the landowners’ undeveloped land. The landowners complied but challenged the requirement by filing suit in state court claiming inverse condemnation, denial of substantive due process, and denial of equal protection. The District removed the case to federal court based on federal question jurisdiction and then moved to dismiss the federal due process and equal protection claims as unripe. The landowners voluntarily dismissed their federal claims and the case was remanded to state court which dismissed the case for failure to state a claim. The district court of appeal affirmed. The District’s defense was that these claims were barred by the doctrine of res judicata.

Two rules created a dilemma for the landowners. A federal court plaintiff is required “to pursue any available state court remedies that might lead to just compensation prior to bringing suit in federal court for a takings claim.” However, res judicata prevents a party from bringing a claim in federal court that has already been litigated in state court. The dismissal of the landowners’ claims was an adjudication on the merits against the landowner. The doctrine of res judicata in Florida “bars subsequent litigation where there is (1) identity of the thing sued for, (2) identity of the

280. 200 F.3d 1356 (11th Cir. 2000).
281. Id. at 1358.
282. Id. at 1359.
283. Id.
284. Id.
285. Saboff, 200 F.3d at 1358.
286. Id.
287. Id.
288. Id.
289. Id.
290. Saboff, 200 F.3d at 1359.
291. Id.
292. Id.
293. Id. at 1360.
cause of action, (3) identity of persons and parties to the action, and (4) identity of the quality or capacity of the person for or against whom the claim is made. Of the four, there was only a question as to whether there was identity of cause of action, but the court decided it existed since the facts underlying the federal and state claims were identical.

To avoid state court litigation preventing any subsequent federal claim, a narrow exception to res judicata has been created. To claim the exception, the landowner had to make a "Jennings reservation" by expressly reserving on the state court records the federal claims for subsequent litigation in federal court. The landowners, however, had not reserved their rights on the record. Their assertions that there was an off the record agreement or that the reservation was implicit were not enough to satisfy the rule and qualify for the exception.

Department of Transportation v. S.W. Anderson, Inc. A bridge building project resulted in the relocation of a state road. The landowner claimed that the effect of the relocation was the loss of access to its commercial property, amounting to a taking and entitling it to compensation. The claim encountered two roadblocks. First, the plaintiff's land did not abut the state road. The landowner tried to establish abutter's status by claiming it had an easement by reason of necessity to the state road across a neighbor's land. However, that easement had not previously been established and it could not be established in this litigation because the servient landowner was not a party. Thus, the landowner had failed to establish this crucial element of its case.

Even if this case involved land abutting the state road, the landowner had failed to demonstrate that its access had been substantially diminished. That is a factual determination, but it requires a showing of

294. Id. (citing Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1997)).
295. Saboff, 200 F.3d at 1360.
297. Saboff, 200 F.3d at 1360.
298. Id.
299. 744 So. 2d 1098 (Fla. 1st Dist. Ct. App. 1999).
300. Id. at 1098.
301. Id.
302. Id. at 1099.
303. Id.
304. S.W. Anderson, Inc., 744 So. 2d at 1099.
305. Id.
306. Id. at 1102.
more than a change to a less convenient route or a diminished flow of traffic passing by. The plaintiff here showed that getting from the state road to its front door involved more turns and increased distance, but that was not enough.

IX. ENVIRONMENTAL LAW

Coastal Petroleum Co. v. Florida Wildlife Federation, Inc. The issue here was a challenge to an order of the Department of Environmental Protection ("DEP") denying Coastal's application for a drilling permit "because oil extraction is potentially too dangerous to the environment." Coastal contended that the order was unconstitutional because the DEP's interpretation of the applicable statute was an unconstitutional taking of its property.

The statute at issue here was section 377.241 of the Florida Statutes, which gives the following three criteria to guide the DEP when issuing permits:

(1) The nature, character and location of the lands involved; whether rural, such as farms, groves, or ranches, or urban property vacant or presently developed for residential or business purposes or are in such a location or of such a nature as to make such improvements and developments a probability in the near future.

(2) The nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized.

(3) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.

Coastal argued that in the past the DEP had issued permits when all three of these criteria were met. Yet, when the DEP announced its intention to

307. Id.
308. Id.
309. 766 So. 2d 226 (Fla. 1st Dist. Ct. App. 1999).
310. Id. at 227.
311. Id.
313. Coastal Petroleum Co., 766 So. 2d at 228.
issue a permit in this case, due to the environmental groups challenging the decision, the DEP reconsidered its past practice and stated that just meeting the criteria was not legally sufficient, but that this must be balanced against the danger to the coastal environment.\textsuperscript{314}

The court held that the DEP correctly determined that its previous practice was not consistent with the proper interpretation of the statute and that the DEP had adequately explained why it made this determination.\textsuperscript{315} Further, the court held that Coastal did have a contract to explore for and extract oil from submerged sovereignty lands, but that the DEP’s action was not unconstitutional unless just compensation is not paid.\textsuperscript{316} Therefore, the matter was to be resolved in circuit court.\textsuperscript{317}

X. FORECLOSURE

\textit{Ahmad v. Cobb Corner, Inc.}\textsuperscript{318} The question here was whether a mortgagee holding guarantees as collateral is entitled to a deficiency judgment when he has sold the property and made a reasonable return on his investment.\textsuperscript{319}

In this case, the mortgagee, Ahmad, purchased the note and mortgage in a pool of loans.\textsuperscript{320} When the mortgagor, Cobb Corner, defaulted, the mortgagee sued for foreclosure, purchasing the property for $100 in the foreclosure sale.\textsuperscript{321} Six months later, the mortgagee sold the property for $775,000.\textsuperscript{322} The mortgagee then filed for a deficiency judgment against the guarantors, Resolution Trust Corporation.\textsuperscript{323}

The Fourth District Court of Appeal held that the return on investment made cannot be the determining factor as to a mortgagee’s right to recover.\textsuperscript{324} The court also held that the mortgagee is entitled to recover the

\textsuperscript{314.} Id.

\textsuperscript{315.} Id.; see Fl. STAT § 120.68(12) (2000). \textit{Cf.} Dept’ of Admin. v. Albanese, 445 So. 2d 639, 641 (Fla. 1st Dist. Ct. App. 1984) (finding “the Department, however, possesses only such authority as is specifically delegated to it by statute and cannot promulgate rules that go beyond that grant of authority or are contrary to the intent of the legislature”).

\textsuperscript{316.} Coastal Petroleum Co., 766 So. 2d at 228; see Fl. CONST. art. X, § 6.

\textsuperscript{317.} Coastal Petroleum Co., 766 So. 2d at 228.

\textsuperscript{318.} 762 So. 2d 944 (Fla. 4th Dist. Ct. App. 2000).

\textsuperscript{319.} Id. at 945.

\textsuperscript{320.} Id.

\textsuperscript{321.} Id. at 945–46.

\textsuperscript{322.} Id. at 946.

\textsuperscript{323.} Ahmad, 762 So. 2d at 946.

\textsuperscript{324.} Id. at 947.
entire contract amount through any avenue available to him and his recovery is not limited by the amount he has invested. 325

Bowman v. Saltsman. 326 The issue here was whether the trial court properly granted Saltsman's request to reform deeds previously given, and properly denied Bowman's purchaser any relief, thereby denying Bowman his right of redemption because foreclosure was not required. 327

Bowman desired an easement across Saltsman's property. 328 However, "Saltsman would not convey an easement but agreed to sell the entire parcel to Bowman if the deal could be arranged as a tax free exchange." 329 They entered into an agreement for deed under which Bowman would pay $425,000 to a trustee who would purchase property desired by Saltsman. 330 When all the money had been paid, Bowman would get legal title to the property. 331 At that time Saltsman would get the property he desired with no tax consequence. 332 Bowman made over $300,000 in payments before breaching. 333 Saltsman claimed ownership of both parcels and filed an action to reform certain deeds pursuant to the agreement, instead of declaring a default and foreclosing the mortgage. 334 Bowman counterclaimed for, among other things, specific performance of the land contract. 335 The trial court found Bowman had defaulted by not making all the payments that were due, denied him relief, and granted Saltsman's request to reform the deeds. 336 Bowman was denied his right of redemption because foreclosure was not required. 337

The appellate court held the agreement for deed was a mortgage and carried all the burdens of such, including the right of redemption. 338 Since Bowman's equitable interest in the land had not been foreclosed and Bowman sought to resume payments under the agreement, even though he

325. Id.
326. 736 So. 2d 144 (Fla. 5th Dist. App. 1999).
327. Id. at 146.
328. Id. at 145.
329. Id.
330. Id.
331. Bowman, 736 So. 2d at 145.
332. Id.
333. Id.
334. Id. at 146.
335. Id. at 145.
336. Bowman, 736 So. 2d at 145.
337. Id. at 146.
338. Id.
had defaulted, his rights needed to be enforced under the agreement.\footnote{339} The appellate court emphasized that "the secured party may either waive the default or declare a default and foreclose," but cannot "treat the default as an automatic termination of the buyer's interest."\footnote{340}

\textit{Caple v. Tuttle's Design-Build, Inc.}\footnote{341} The issue here was whether the Third District Court of Appeal properly held that section 702.10(2) of the \textit{Florida Statutes}, which allows a commercial mortgagee to request a court order requiring the mortgagor to continue payments pending litigation, post bond, or relinquish possession of the property, is unconstitutional because it does not adequately protect the due process rights of the mortgagor and impermissibly conflicts with the supreme court's rulemaking authority.\footnote{342}

Tuttle purchased a plant nursery from Caple for a price of seventeen million dollars.\footnote{343} "The purchase was financed by a bank, with three promissory notes to Caple Enterprises, and one promissory note to George Caple."\footnote{344} Tuttle subsequently defaulted on one of the notes to Caple Enterprises and the one note to George Caple.\footnote{345} Caple filed an action for foreclosure and requested, pursuant to section 702.10(2) of the \textit{Florida Statutes}, an order to show cause.\footnote{346} Tuttle answered asserting various affirmative defenses.\footnote{347} The court ordered Tuttle to either pay Caple interest retroactive to the date of the request of the order or alternatively post a bond in the amount of $6,865,572, which was the amount of the unpaid mortgage principal and interest.\footnote{348}

Tuttle appealed the Third District Court of Appeal's decision.\footnote{349} The Third District found the statute unconstitutional under the United States and Florida Constitutions, "because it forces a mortgagor who wants to retain possession of the property to make payments without due process protection in the form of a mortgagee's bond or sequestration."\footnote{350} Further, the court held that "because it only provides for an excessive bond to stay the
payments, that the section impermissibly regulates matters of practice and procedure.\textsuperscript{351}

The Supreme Court of Florida held that section 702.10(2) of the \textit{Florida Statutes} was constitutional based on two analyses.\textsuperscript{352} First, “[i]t is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional.”\textsuperscript{353} The supreme court opined that, based on the totality of the statute as a whole, this statute gives some flexibility to the court and, therefore, does not violate due process rights.\textsuperscript{354} Further, the court stated that if the statute is “substantive and that it operates in an area of legitimate legislative concern,” it is “precluded from finding it unconstitutional.”\textsuperscript{355} Substantive law has been defined to include the “rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.”\textsuperscript{356} The Supreme Court of Florida held the statute “created substantive rights and any procedural provisions [were] directly related to the definition of those rights.”\textsuperscript{357} Therefore, the statute does not infringe on the court’s rulemaking authority and is constitutional.\textsuperscript{358}

\textit{Edwards v. Federal Deposit Insurance Corp.}\textsuperscript{359} The issue here was whether the trial court properly calculated the deficiency judgment amount in a foreclosure when it failed to reduce the property’s fair market value by the amount of delinquent ad valorem taxes.\textsuperscript{360} The appellate court concluded the trial court failed to follow proper procedure in this case by not including the amount of unpaid ad valorem taxes in its deficiency calculation.\textsuperscript{361} The Fourth District further held the trial court has discretion with respect to granting or denying a deficiency judgment.\textsuperscript{362} “However, granting a deficiency judgment is more the rule than the exception.”\textsuperscript{363}

\begin{itemize}
  \item \textsuperscript{351} \textit{Caple}, 753 So. 2d at 51.
  \item \textsuperscript{352} \textit{Id.}
  \item \textsuperscript{353} \textit{Id.; see VanBibber v. Hartford Accident & Indem. Ins. Co., 439 So. 2d 880, 883 (Fla. 1983)}.
  \item \textsuperscript{354} \textit{Caple}, 753 So. 2d at 52–53.
  \item \textsuperscript{355} \textit{Id. at 53} (citing \textit{VanBibber}, 439 So. 2d at 883).
  \item \textsuperscript{356} \textit{Id. at 54} (citing \textit{Adams v. Wright}, 403 So. 2d 391 (Fla. 1981)).
  \item \textsuperscript{357} \textit{Caple}, 753 So. 2d at 55.
  \item \textsuperscript{358} \textit{Id.}
  \item \textsuperscript{359} 746 So. 2d 1157 (Fla. 4th Dist. Ct. App. 1999).
  \item \textsuperscript{360} \textit{Id. at 1157}.
  \item \textsuperscript{361} \textit{Id. at 1158}.
  \item \textsuperscript{362} \textit{Id.}
  \item \textsuperscript{363} \textit{Id. at 1157}; \textit{see Chidnese v. McCollem, 695 So. 2d 936, 938 (Fla. 4th Dist. Ct. App. 1997)}.
\end{itemize}
Further, the court held that "'[e]quitable considerations upon which the trial court might deny a deficiency should be presented after the potential deficiency is determined (amount of judgment on note less fair market value of property).""\textsuperscript{364} Prior to that "'the trial court would not be able to determine what set-off might be appropriate.'\textsuperscript{365} Pursuant to this case, the appellate court remanded for recalculation of the deficiency amount after which the appellants might appeal the deficiency judgment.\textsuperscript{366}

\textit{Hamilton v. Hughes.}\textsuperscript{367} The issue here was whether the trial court properly awarded excess mortgage foreclosure sale proceeds to Hughes and no portion of the excess sale proceeds to Hamilton.\textsuperscript{368}

The action started with Chase Manhattan Mortgages Corporation's ("Chase") mortgage foreclosure complaint.\textsuperscript{369} Originally, Hamilton and her former husband had mortgaged their property to Chase during their marriage.\textsuperscript{370} Later, the couple divorced and the husband defaulted on the $26,000 mortgage.\textsuperscript{371} Further, Dolphin Hamilton, the former husband, obtained a mortgage from the Hughes after the dissolution of the marriage.\textsuperscript{372} This mortgage was only signed by Dolphin Hamilton.\textsuperscript{373} The Hughes agreed to pay Chase $31,000 for assignment of the first mortgage.\textsuperscript{374} Hamilton received copies of all significant filings in this case and did not make any appearance through the trial.\textsuperscript{375} Yet, she did inform the court by letter that she could not afford an attorney but claimed a fifty percent interest in the encumbered property.\textsuperscript{376} The property sold for more than the outstanding mortgages held by the Hughes.\textsuperscript{377} The trial court made disbursements to the Hughes and the state to satisfy the amounts owed to them.\textsuperscript{378} It retained $5600 in excess funds.\textsuperscript{379} The Hughes requested a disbursement of $5500 to

\textsuperscript{364} \textit{Id.} at 1158.
\textsuperscript{365} \textit{Id.} at 1158 (quoting \textit{Chidnese}, 695 So. 2d at 938).
\textsuperscript{366} \textit{Id.}
\textsuperscript{367} \textit{Id.}
\textsuperscript{368} \textit{Id.}
\textsuperscript{369} \textit{Id.}
\textsuperscript{370} \textit{Id.}
\textsuperscript{371} \textit{Id.}
\textsuperscript{372} \textit{Hamilton}, 737 So. 2d 1248 (Fla. 5th Dist. Ct. App. 1999).
\textsuperscript{373} \textit{Id.}
\textsuperscript{374} \textit{Id.}
\textsuperscript{375} \textit{Id.}
\textsuperscript{376} \textit{Id.}
\textsuperscript{377} \textit{Id.}
\textsuperscript{378} \textit{Id.}
\textsuperscript{379} \textit{Id.}
Hamilton filed a response noting her half interest in the property and that she and her former husband had owned the property as tenants in common, requesting $3338. The Fifth District Court of Appeal held that Hamilton should be awarded the entire $5600 in excess proceeds. It reasoned that "one tenant in common cannot properly sell or dispose of more than his or her own interest in the common property to a third person unless authorized to do so." Further, the Second District held that foreclosure defendants who failed to answer the first foreclosure complaint do not waive their right to excess proceeds. Because Hamilton only contested the $5500 disbursement, that was all that was reviewed. The Hughes had constructive notice of Hamilton's interest in the property. Thus, their contention that they relied on her silence was not valid.

Mody v. California Federal Bank. The issue here was whether the trial court properly concluded, when it vacated the sale of foreclosed property, that the foreclosure sale bid was grossly inadequate and that the inadequacy resulted from a mistake by the bank.

On February 19, 1999, the bank's bidding agent attended a foreclosure sale with the intention of bidding up to $239,200 on the subject property. The bidding agent was to bid on three other pieces of property at the foreclosure sale. But, the agent failed to bid on the property because he had been furnished a different case name. Mody and Cava were the highest bidders with a bid of $202,000. The bank filed an objection to the

380. Id.
381. Id.
382. Hamilton, 737 So. 2d at 1250.
383. Id. (citing 86 C.J.S. Tenancy in Common § 138); see Cadle Co. II v. Stauffenberg, 581 N.E.2d 882, 884 (Ill. 3d Dist. Ct. App. 1991) (holding that "where a cotenant who owns less than the entire interest attempts to mortgage the whole, the mortgage is valid [only] as to the actual interest [of the mortgagor]").
385. Hamilton, 737 So. 2d at 1251.
386. Id.
387. Id.
388. 747 So. 2d 1016 (Fla. 3d Dist. Ct. App. 1999).
389. Id. at 1017.
390. Id.
391. Id.
392. Id.
393. Mody, 747 So. 2d at 1017.
sale and moved to have it vacated because the Mody and Cava bid was grossly inadequate.\textsuperscript{394} The trial court was presented with several different values for the property.\textsuperscript{395}

Mody and Cava's expert valued the property at $225,000.\textsuperscript{396} The bank's expert valued the property at $300,000.\textsuperscript{397} The property's assessed value for tax purposes was $252,612.\textsuperscript{398} On June 22, 1999, the trial court entered an order vacating the foreclosure sale and ordering a new sale.\textsuperscript{399}

The Third District Court of Appeal held that it was error to vacate the foreclosure sale bid where it was not shown that the bid was grossly or startlingly inadequate.\textsuperscript{400} In order to vacate a foreclosure sale the trial court is required to find that "the foreclosure sale bid was grossly or startlingly inadequate" and "the inadequacy of the bid resulted from some mistake, fraud or other irregularity in the sale."\textsuperscript{401} The court noted that the Supreme Court of Florida had found that a foreclosure bid of seventy percent of the value of the property is not a startling inadequacy.\textsuperscript{402} Further, the Third District Court of Appeal had similarly found that a foreclosure sale bid of seventy-two percent of the value of the foreclosed property is not startlingly or grossly inadequate.\textsuperscript{403} Here, even though the trial court did not assign the property one of the proposed values, that was not necessary.\textsuperscript{404} Even if the highest appraisal value of $300,000 was used, the foreclosure bid price was 67.3\% and was not grossly or startlingly inadequate.\textsuperscript{405} Further, if one of the other possible values of $225,000 or $252,612 were used, the foreclosure bid would have been 89.8\% or 80\% respectively.\textsuperscript{406}

\textit{Parsons v. Whitaker Plumbing of Boca Raton, Inc.}\textsuperscript{407} The issue here was whether the trial court properly amended its foreclosure judgment on a

\begin{itemize}
\item \textsuperscript{394} \textit{Id.}
\item \textsuperscript{395} \textit{Id.}
\item \textsuperscript{396} \textit{Id.}
\item \textsuperscript{397} \textit{Id.}
\item \textsuperscript{398} \textit{Mody, 747 So. 2d at 1017.}
\item \textsuperscript{399} \textit{Id.}
\item \textsuperscript{400} \textit{Id. at 1018.}
\item \textsuperscript{401} \textit{Id. at 1017–18; see Arlt v. Buchanan, 190 So. 2d 575, 577 (Fla. 1996); Maule Indus., Inc. v. Seminole Rock & Sand Co., 91 So. 2d 307, 311 (Fla. 1956).}
\item \textsuperscript{402} \textit{Mody, 747 So. 2d at 1018; see Maule Indus., Inc., 91 So. 2d at 311.}
\item \textsuperscript{403} \textit{Mody, 747 So. 2d at 1018; see Moody v. Glendale Fed. Bank, 643 So. 2d 1149 (Fla. 3d Dist. Ct. App. 1994).}
\item \textsuperscript{404} \textit{See Mody, 747 So. 2d at 1018.}
\item \textsuperscript{405} \textit{Id.}
\item \textsuperscript{406} \textit{Id.}
\item \textsuperscript{407} \textit{751 So. 2d 655 (Fla. 4th Dist. Ct. App. 1999).}
\end{itemize}
mechanics’ lien to include attorneys’ fees after the judgment debtors already exercised their right of redemption for the judgment entered for labor and material provided by the mechanic’s lienor. 408

Whitaker filed an action against Parsons and DeFalco to foreclose on a mechanics’ lien for plumbing work performed on Parsons’ and DeFalco’s property. 409 On March 24, 1998, the trial court entered a final judgment of foreclosure, finding that Whitaker held a lien for $3117.43, including interests and costs on Parson’s property. 410 On April 22, 1998, Parson and DeFalco “exercised their statutory right of redemption by paying the total amount due under the March 24 final judgment of foreclosure, plus a clerk’s fee.” 411 The clerk issued a certificate of redemption. 412 “On August 6, 1998... the court entered an amended final judgment of foreclosure, awarding Whitaker $12,000 in attorney’s fees and setting a foreclosure sale to satisfy this debt.” 413

The Fourth District Court of Appeal determined the entry of an amended foreclosure judgment for attorneys’ fees was proper procedurally and in correct form. 414 Parsons and DeFalco, exercising their redemption rights regarding the first judgment, did not preclude the trial court from entering the second judgment. 415 The redemption only satisfied the specified debt in the first judgment and not the liability for the attorneys’ fees which remained unpaid as of August 6, 1998. 416 Whitaker sought to foreclose a lien created by section 713.05 of the Florida Statutes. 417 When there is an action to foreclose this type of lien, “the prevailing party is entitled to recover a reasonable fee for the services of her or his attorney for trial and appeal... in an amount to be determined by the court, which fee must be taxed as part of the prevailing party’s costs, as allowed in equitable actions.” 418 Attorneys’ fees and costs awarded under section 713.29 are included within the lien which is created by the statute. 419

408. Id. at 655.
409. Id.
410. Id.
411. Id.
412. Parsons, 751 So. 2d at 655.
413. Id.
414. Id. at 657.
415. Id.
416. Id.
417. Parsons, 751 So. 2d at 656.
418. Id. (quoting Fla. Stat. § 713.29 (2000)).
419. Id. at 656; Zalay v. Ace Cabinets of Clearwater, Inc., 700 So. 2d 15, 17–18 (Fla. 2d Dist. Ct. App. 1997) (examining section 713.06(1) of the Florida Statutes). The language
Texas Commerce Bank National Ass'n v. Nathanson. In this case there was a request for a rehearing which was denied. However, the appellate court issued a clarification of its original opinion.

The issue here was whether the trial court properly ruled that the clerk did not err when he refused to accept the highest bid in a foreclosure sale on the grounds that the bidder, Texas Commerce Bank National Association ("TCBNA"), tendered a law firm check rather than cash for the clerk's fee. The trial court overruled TCBNA's objection to the foreclosure sale.

TCBNA offered the highest bid at $151,000 for a piece of property sought by both TCBNA and Jupiter Assets. Jupiter Assets "objected to TCBNA paying the $40 clerk's fee for the sale with a law firm cost account check as opposed to cash." The deputy clerk on the scene refused to accept the check and Jupiter Assets was declared the successful bidder. TCBNA filed motions to correct the mistake and the trial court declined to grant it relief, despite the clerk of the court's acknowledgment on the record that erred in rejecting the cost check and bid submitted on behalf of TCBNA. The trial court found that, because "TCBNA had prepared the proposed form of the final judgment in the foreclosure case, which was signed as submitted, and which provided that the Clerk's fee would be paid in cash and in advance of the sale," TCBNA failed to comply under contract law with the terms of the agreement.

The Fourth District Court of Appeal held the trial court grossly abused its discretion and reversed with an order requiring the clerk to accept TCBNA's bid and cost payment and declaring it the successful bidder on the

in section 713.06(1) is almost identical to that of section 713.05 and the reasons stated in Zalay are equally applicable to the lien at issue and the court adopts them. See Parsons, 751 So. 2d at 656. Further, under section 713.29 of the Florida Statutes fees may properly be taxed after the entry of a final judgment in a foreclosure lien action. NCN Elec., Inc v. Leto, 498 So. 2d 1377, 1377-78 (Fla. 2d Dist. Ct. App. 1986).

420. 763 So. 2d 1107 (Fla. 4th Dist. Ct. App. 2000).
421. Id. at 1108.
422. Id.
423. Id.
424. Id.
425. Nathanson, 763 So. 2d at 1108.
426. Id.
427. Id.
428. Id.
429. Id.
property in question. Prior to this, the clerk established that a "for cash" requirement in Palm Beach County "is understood to be cash or check." Further, this is stated in Palm Beach County Administrative Order 95-3-R which provides that "[i]f you are an attorney and you (or your client) are the successful bidder, you may pay your deposit and bid...and costs and fees by a trust account check...or law firm account check." This order was in effect at the time of the sale.

Zerquera v. Centennial Homeowners' Ass'n. The issue here was whether the trial court erred when it entered a final judgment of foreclosure as to Zerquera for the total amount owed, including attorneys' fees and costs of $31,023.79 and ordered a foreclosure sale if Zerquera did not pay the judgment within three days of the order.

In 1989, Zerquera purchased Centennial property which was subject to a "Declaration of Covenants, Conditions, and Restrictions" ("Declaration"). The pertinent provisions were: "(1) assessments would be a continuing lien on the property; (2) Centennial could foreclose on the property if the continuing lien was not paid; and (3) Centennial could amend the Declaration in the future."

"In 1991, Centennial amended the Declaration to provide that violators of the Declaration's covenants could be fined and that said fines would be treated as assessments ...." In 1995, Centennial fined Zerquera $200 for keeping a boat and a truck on his property which violated the Declaration. Zerquera challenged these fines and on appeal the court held that the amendments to the Declaration were valid and enforceable. An award was affirmed against Zerquera for $21,400 which included the fine, attorneys' fees, and costs. On March 16, 1999, the trial court entered its final judgment of foreclosure against Zerquera for $31,023.79 and ordered a

430. Nathanson, 763 So. 2d at 1109.
431. Id. at 1108–09.
432. Id. at 1109.
433. Id.
434. 752 So. 2d 694 (Fla. 3d Dist. Ct. App. 2000).
435. Id. at 695.
436. Id.
437. Id.
438. Id.
439. Zerquera, 752 So. 2d at 695.
440. Id.
441. Id.; see also Zerquera v. Centennial Homeowners' Ass'n, Inc., 721 So. 2d 751 (Fla. 3d Dist. Ct. App. 1998).
foreclosure sale of his homestead property within three days if Zerquera did not pay the judgment.\textsuperscript{442}

The Third District Court of Appeal held that Zerquera's property may be foreclosed upon to satisfy the $31,023.79 judgment.\textsuperscript{443} A homestead "may be foreclosed to satisfy a continuing lien on the property if the homeowner had either actual or constructive notice of the covenant" that provides for the lien when the owner took title to the property.\textsuperscript{444} Here, Zerquera had at least constructive notice of the Declaration when he took title to the property in 1989.\textsuperscript{445} Further, based on the Declaration, Zerquera was on proper notice when this Declaration was later amended.\textsuperscript{446} He was aware that his homestead property was subject to foreclosure if fines were not paid.\textsuperscript{447}

XI. HOMEOWNER ASSOCIATIONS

Recent legislation prohibits homeowner associations from restricting respectful displays of the United States flag.\textsuperscript{448}

XII. HOMESTEAD

\textit{Bakst, Cloyd & Bakst, P.A. v. Cole.}\textsuperscript{449} The issue was whether the trial court correctly held that Cole's homestead property was not subject to her attorney's charging lien.\textsuperscript{450}

Bakst represented Cole in her divorce.\textsuperscript{451} As a result of that representation, Bakst obtained a charging lien.\textsuperscript{452} Bakst requested that Cole's homestead property be subject to attachment.\textsuperscript{453} The trial court
determined that Cole's homestead property should not be subject to the attorney's charging lien.\textsuperscript{454}

The Fourth District Court of Appeal affirmed that Cole's homestead property was not subject to the charging lien.\textsuperscript{455} A waiver of the homestead exemption was not enforceable on public policy grounds.\textsuperscript{456} The language in the contract was insufficient to establish a knowing waiver of an important constitutional right such as homestead protection.\textsuperscript{457}

\textit{In re Coin.}\textsuperscript{458} The issue here was whether the Coins, debtors in bankruptcy, were entitled to claim five contiguous lots and a house as part of a homestead exemption when they took affirmative steps to have each lot individually taxed and only claimed homestead exemption status on the lot with the house situated on it.\textsuperscript{459}

The Coins purchased their house and lots five through nine on December 20, 1985 in the same purchase transaction.\textsuperscript{460} Their house was located on lot seven, with lots five, six, eight, and nine being used as their driveway and front lawn.\textsuperscript{461} All of the lots were contiguous and the Coins never used lots five, six, eight, or nine other than for household purposes.\textsuperscript{462} In 1993, the Coins requested that Monroe County tax each lot separately and only claimed homestead exemption on lot seven.\textsuperscript{463} On May 5, 1999, the Coins filed for Chapter 7 bankruptcy and scheduled lots five through nine as exempt homestead under Article X, section 4(a)(1) of the Florida Constitution.\textsuperscript{464}

The court held that the Coins qualified for homestead exemption on lots five, six, eight, and nine and for their house on lot seven.\textsuperscript{465} It based its decision on Article X, section 4(a)(1) of the Florida Constitution which states in part:

\begin{flushright}
\textsuperscript{454} Cole, 750 So. 2d at 676. \\
\textsuperscript{455} Id. \\
\textsuperscript{456} Id. at 676–77; see also Sherbill v. Miller Mfg. Co., 89 So. 2d 28 (Fla. 1956). \\
\textsuperscript{457} Cole, 750 So. 2d at 677. \\
\textsuperscript{458} 241 B.R. 258 (Bankr. S.D. Fla. 1999). \\
\textsuperscript{459} Id. at 258–59. \\
\textsuperscript{460} Id. at 258. \\
\textsuperscript{461} Id. \\
\textsuperscript{462} Id. \\
\textsuperscript{463} Coin, 241 B.R. at 258. \\
\textsuperscript{464} Id. at 259. \\
\textsuperscript{465} Id. at 258.
\end{flushright}
SECTION 4. Homestead; exemptions —

(a) There shall be exempt . . . the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon . . . or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family.466

Further, the court held that the divisibility of the lots for zoning purposes and tax purposes did not defeat the homestead claim.467

Colwell v. Royal International Trading Corp.468 The issue here was whether married individuals living on two distinct noncontiguous parcels of property can be granted separate homestead exemptions, where their living arrangements were not known to be the subject of fraud, and there was no evidence brought forward to overcome the presumption in favor of the exception.469

The Colwells jointly filed for Chapter 7 bankruptcy.470 Although legal separations are not recognized under Florida law, the Colwells had been separated for three and one half years, and each had acquired a separate home and had obtained a separate homestead exemption on that home.471 Florida has chosen to opt out of federal exemptions and to apply its own.472 The bankruptcy court ruled there was no case law to support the dual exemptions.473 The Colwells appealed to the United States District Court for the Southern District of Florida which reversed the bankruptcy court.474

The district court held that the Colwells were each entitled to separate homestead exemptions when they were married but legitimately living apart in separate residences and there was neither fraud nor evidence to overcome the presumption in their favor.475 Florida state court decisions, as a matter of

466. FLA. CONST. art. X, § 4(a)(1).
468. 196 F.3d 1225 (11th Cir. 1999).
469. Id. at 1226.
470. Id. at 1225.
471. Id. at 1225–26.
472. Id. at 1226.
473. Colwell, 196 F.3d at 1226.
474. Id.
475. Id.
public policy, liberally construe the state’s homestead exemption. Additionally, there is a presumption in favor of the exemption.

In re Harrison. The issue here was whether Harrison could claim as exempt a residence located on Marco Island on which she did not reside but in which she still owned a half interest.

Harrison and Christopher Lewis Hoef, Harrison’s former spouse, were married in 1982 and had two children. They established their residence on Marco Island, and it remained their marital home until their divorce in 1997. Afterwards, Harrison continued to reside in the home until July 1998, when she moved to Naples and rented a home where she resided with the younger child. Harrison contended she was forced to move because the elder son’s drug related activities created a harmful environment for the younger child. Harrison’s former spouse and elder son still resided in the Marco Island home. Further, Harrison was to receive the first $7000 from the sale of the home.

The court held Harrison was entitled to claim interest in the Marco Island property as her homestead. The homestead exemption established by Article X, section 4 of the Florida Constitution places the burden on the objecting party to make a strong showing that Harrison was not entitled to claim exemption. Further, abandonment may only be proven by a strong showing that Harrison never intended to return to the residence and mere absence for financial, health, or family reasons is not abandonment. Harrison still owned a half interest in the property and resided there after the divorce. She left because of family reasons, which alone would not be deemed abandonment.

476. Id.
477. Id.; see also Snyder v. Davis, 699 So. 2d 999, 1002 (Fla. 1997).
479. Id. at 789.
480. Id.
481. Id.
482. Id.
483. Harrison, 236 B.R. at 789.
484. Id.
485. Id.
486. Id. at 790.
489. Harrison, 236 B.R. at 790.
490. Id.
The issue here was whether Hendricks would be allowed to claim homestead exemption in a bankruptcy suit where the claimed exempt property was owned as tenancy by the entireties by both Hendricks and the nondebtor spouse, and the claims from the creditors were only against Hendricks. Further, there was the issue of whether Hendricks' converting nonexempt assets into an exempt home caused Hendricks to lose her homestead exemption.

Prior to moving to Florida, Hendricks owned a residence in California. A large judgment was issued against Hendricks on August 7, 1997 in favor of her creditors. Shortly afterwards, Hendricks sold her California residence. In September 1997, Hendricks and her spouse purchased a home in Melbourne, Florida. Hendricks used her personal funds to make a cash payment. The home was jointly owned by Hendricks and her spouse as tenancy by the entireties. There was no dispute that Hendricks and her spouse owned the home as a tenancy by the entireties and also that there were no joint creditors of the couple.

The bankruptcy court held that Hendricks was entitled to summary judgment. It reasoned Article X, section 4 of the Florida Constitution does not provide that the right to exempt property is forfeited if property is acquired or improved with the intent to hinder creditors where the property qualified, as it did in this case, for homestead exemption. Further, the bankruptcy court opined that section 222.29 of the Florida Statutes does not apply to homestead property. Therefore, Hendricks established she was entitled to exempt the home from creditors.

The primary issue here was whether the trial court properly denied Havoco's objection to a claimed homestead exemption and tenancy by the entirety, on the ground that Hill converted...
nonexempt assets into exempt assets with the intent to hinder, delay, or defraud Havoco.\textsuperscript{505} Because of the property involved, the United States Court of Appeals for the Eleventh Circuit certified the following question to the Supreme Court of Florida:

\begin{quote}
DOES ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION EXEMPT A FLORIDA HOMESTEAD WHERE THE DEBTOR ACQUIRED THE HOMESTEAD USING NON-EXEMPT FUNDS WITH THE SPECIFIC INTENT OF HINDERING, DELAYING, OR DEFRAUDING CREDITORS IN VIOLATION OF FLA. STAT. § 726.105 OR FLA. STAT. §§ 222.29 and 222.30?\textsuperscript{506}
\end{quote}

The court held, however, that, in a case involving a tenancy by the entireties where the wife’s property rights may be terminated, her due process rights require that she be a party to the proceeding.\textsuperscript{507} Therefore, this court found that Hill’s wife was an indispensable party to Havoco’s claim and Havoco’s objection was denied.\textsuperscript{508} Havoco must seek to avoid this transfer in an adversarial proceeding with both Hill and his wife as parties.\textsuperscript{509} In the meantime, the court certified the aforementioned question to the Supreme Court of Florida.\textsuperscript{510}

\textit{Kellogg v. Schreiber.}\textsuperscript{511} There were two issues here.\textsuperscript{512} The first was procedurally oriented in determining whether the district court was correct when it held that the bankruptcy judge did not abuse his discretion in denying Kellogg’s motion for continuance and rehearing.\textsuperscript{513} The court held that missed deadlines for disclosing witnesses and evidence, and a last minute attempt to terminate his counsel did not warrant a continuance and affirmed.\textsuperscript{514} The second issue was whether the bankruptcy court was correct when it ordered the sale of Kellogg’s property, which exceeded the one-half acre homestead limitation, because if Kellogg selected one-half acre to be

\begin{footnotesize}
\begin{enumerate}
\item[505.] Id. at 1136-37.
\item[506.] Id. at 1144.
\item[507.] Id. at 1140.
\item[508.] Id.
\item[509.] Hill, 197 F.3d at 1140.
\item[510.] Id. at 1144.
\item[511.] 197 F.3d 1116 (11th Cir. 1999).
\item[512.] See id. at 1119–20.
\item[513.] Id. at 1120.
\item[514.] Id.
\end{enumerate}
\end{footnotesize}
exempt, the remaining nonexempt property would have no legal or practical use because it would violate local zoning laws. 515

In 1993, Schreiber obtained a judgment lien against Kellogg for $512,863 and had been trying to collect it since then. 516 In 1995, Kellogg filed a Chapter 7 bankruptcy petition claiming a Florida homestead exemption on his Palm Beach oceanfront property. 517 "Kellogg stated his homestead was approximately 1.3 'indivisible acres,'" and had a tax assessor's value of $799,432. 518 Schreiber objected to the claim because it exceeded Florida's exemption for municipal property, which is limited to one-half acre. 519 Kellogg's property was zoned R-AA. 520 "For R-AA property, Palm Beach's zoning laws required a minimum parcel size of 60,000 square feet with at least 150 feet fronting a road . . . ." 521 Kellogg's property could not be divided in a legal or practical manner to meet this requirement. 522 Therefore, the court ruled that Kellogg's property must be sold and the proceeds apportioned between Kellogg and the bankruptcy estate. 523

The Eleventh Circuit Court of Appeals held that Kellogg could not select a one-half acre portion of his property to be exempt homestead when the local zoning laws prohibited him from subdividing his property. 524 Therefore, the bankruptcy court correctly ordered the property sold and the proceeds divided. 525 This was based on the fact that Florida's homestead laws must be liberally construed, but not so liberally that they become "'instruments of fraud, an imposition on creditors, or a means to escape honest debts.'" 526 Further, Kellogg may reasonably designate his one-half acre portion of the property as homestead as long as the remaining portion

515. Id.
516. Kellogg, 197 F.3d at 1118.
517. Id.
518. Id.
519. Id.; see Fla. Const. art. X, § 4(a).
520. Kellogg, 197 F.3d at 1118.
521. Id.
522. Id. at 1118–19.
523. Id. at 1119.
524. Id. at 1120.
525. Kellogg, 197 F.3d at 1121.
526. Id. at 1120 (citing Frase v. Branch, 362 So. 2d 317, 318 (Fla. 2d Dist. Ct. App. 1978)).
has legal and practical use. Here, the nonexempt parcel would have no legal or practical use because it would violate local zoning laws.

_Law v. Law._ The issue here was whether, when the husband and wife separated and the husband moved from the home they had shared and claimed as their homestead (his mother's home), the home became the husband's homestead and therefore exempted the husband from any claim for support payments to his former wife.

In May 1995, Law and his present wife, Barbara, separated and he moved out of the home that the two of them owned in tenancy by the entireties and into his mother's home. He took his minor great grandson, for whom he was the legal guardian, with him. He received both his grandson's and his mail at this home. Law's mother became ill in February 1997 and Barbara moved into that home to help him care for his mother. Law received power of attorney and contracted to sell his mother's home. His mother died in March 1997 and Law inherited her home. The probate court entered an order on April 22 that the home had passed to Law as his mother's only heir. The house was sold pursuant to the contract on April 28.

The court held the home that Law had inherited was his homestead and, therefore, exempt from his ex-wife's judgment. The court stated that homestead exemption can be extended to each of two people who are married, but "legitimately" live apart in separate residences, if they meet the other requirements of the exemption. In this case there was evidence of a legitimate separation between Law and Barbara in May 1995, and ample evidence that Law was residing in his mother's home and that he intended to

527. _Id._ at 1120; _see_ Englander v. Mills, 95 F.3d 1028, 1032 (11th Cir. 1996).
528. _Kellogg_, 197 F.3d at 1120.
529. _738 So. 2d_ 522 (Fla. 4th Dist. Ct. App. 1999).
530. _Id._ at 523.
531. _Id._
532. _Id._
533. _Id._
534. _Law_, 738 So. 2d at 523.
535. _Id._
536. _Id._
537. _Id._ at 523–24.
538. _Id._ at 524.
539. _Law_, 738 So. 2d at 524.
540. _Id._ at 525; _see_ Isaacson v. Isaacson, 504 So. 2d 1309 (Fla. 1st Dist. Ct. App. 1987).
reside there until it was sold.\textsuperscript{541} There was no reason that Law could not have one homestead and that it be different than his wife's since their separation was bona fide and since Law intended to reside in the home he had inherited from his mother.\textsuperscript{542}

*In re Simms.*\textsuperscript{543} The issue here was whether the Simms should be allowed a claimed exemption in an annuity that was invested together with the net proceeds from the sale of their former homestead or, in the alternative, should they be denied their claim of homestead exemption on their Okeechobee property.\textsuperscript{544}

Prior to January 29, 1999, the Simms resided at 1802 Montague Lane, Lake Worth, Florida and used the Okeechobee property for recreational purposes.\textsuperscript{545} During the summer of 1998, they sold the Lake Worth property and established the Okeechobee property as their permanent residence.\textsuperscript{546} They sold their Lake Worth property on January 29, 1999.\textsuperscript{547} After paying off their mortgage, they received net sale proceeds of $65,467.57.\textsuperscript{548} The Simms endorsed this check over to USG Annuity and Life Company in exchange for the annuity.\textsuperscript{549} Both worked for John H. Simms, Inc., a janitorial service, which Mr. Simms owned.\textsuperscript{550} In March 1999, Mrs. Simms' health declined sharply and she was no longer able to work, causing the company to lose some major accounts.\textsuperscript{551} The Simms decided to file bankruptcy and filed for Chapter 7 on August 7, 1999.\textsuperscript{552}

The bankruptcy court held that the Simms were allowed both the exemption for the annuity and also the homestead exemption on the Okeechobee property.\textsuperscript{553} The court based the exemption for the annuity on the Simms' conversion of the nonexempt funds and net proceeds from the sale of the Lake Worth property, which was not done to hinder, delay, and defraud creditors in violation of sections 726.105, 726.108, 222.29, and

\begin{thebibliography}{99}
\bibitem{541} Law, 738 So. 2d at 525.
\bibitem{542} Id.
\bibitem{543} 243 B.R. 156 (Bankr. S.D. Fla. 2000).
\bibitem{544} Id. at 157.
\bibitem{545} Id.
\bibitem{546} Id.
\bibitem{547} Id. at 157–58.
\bibitem{548} Simms, 243 B.R. at 158.
\bibitem{549} Id.
\bibitem{550} Id.
\bibitem{551} Id.
\bibitem{552} Id.
\bibitem{553} Simms, 243 B.R. at 160.
\end{thebibliography}
222.30 of the Florida Statutes. The Simms continued to pay their creditors until March when Mrs. Simms became very ill. Therefore, the facts did not suggest any intent on the part of the Simms to hinder, delay, or defraud their creditors by purchasing the annuity. Further, the court noted the Simms' decision to sell their Lake Worth property and transfer their homestead to the Okeechobee property was made a year before the filing of the bankruptcy petition. Again, there did not seem to be any intent to defraud their creditors. The court acknowledged that Florida has very liberal exemption laws, and that absent legislative intervention, these laws must be applied with consistency.

Staten Island Savings Bank v. Morace. The issue here was whether the trial court properly held the establishment of homestead could not be defeated by statutory provisions for voiding a fraudulent transfer of nonexempt assets converted into homestead property, even when the intent of the debtor is to defeat creditors' claims.

The appellate court held that the trial court was correct on the above issues. The appellate court based its opinion on the fact that the Supreme Court of Florida's prior statements that neither the legislature nor the supreme court has the power to create an exception to the constitutionally provided homestead exemption.

XIII. LANDLORD AND TENANT

3679 Waters Avenue Corp. v. Water Street Ovens, Ltd. Here, the tenant leased space for a restaurant in a shopping center, but never moved in. Both the landlord and the tenant claimed the other had breached, but, the trial court, finding the lease to be clear and unambiguous, held for the tenant and awarded damages because the landlord had failed to make certain improvements. The lease provided that the landlord was contemplating a

554. Id. at 159.
555. Id. at 160.
556. Id. at 159.
557. Id.
559. 745 So. 2d 467 (Fla. 4th Dist. Ct. App. 1999).
560. Id. at 468.
561. Id.
562. Id.
564. Id. at D441.
565. Id. at D441–42.
major renovation of the shopping center which might involve demolition of a portion of the leased building.\textsuperscript{566} It required the landlord to make certain improvements after demolition and to abate the rent at certain times during construction, but it never specifically required the landlord to demolish anything.\textsuperscript{567} Since this involved only the interpretation of the lease document, the district court was not obligated to defer to the trial court.\textsuperscript{568} After reviewing the language of the entire lease, it concluded that the lease was ambiguous as to whether the landlord was obligated to demolish anything and that, inferentially, demolition was the condition precedent to the landlord's obligation to make the improvements.\textsuperscript{569} Thus, the trial court's judgment that the landlord had breached that obligation was incorrect and the case was remanded so that parol evidence could be introduced to help in interpreting the lease.\textsuperscript{570}

\textit{Baldwin Sod Farms, Inc. v. Corrigan.}\textsuperscript{571} The commercial tenant filed for bankruptcy but the bankruptcy court granted the landlords limited relief from the automatic stay to the extent that they could proceed in rem to recover possession of the realty.\textsuperscript{572} The landlords subsequently filed a two count complaint in circuit court.\textsuperscript{573} The first count sought eviction and requested the court retain jurisdiction to determine damages when the bankruptcy court lifted the stay on that issue.\textsuperscript{574} The second count sought a temporary injunction to prevent the removal of certain personal property.\textsuperscript{575} The trial court found for the landlords and ordered eviction.\textsuperscript{576} That decision made the claim for injunctive relief moot.\textsuperscript{577}

On appeal, the tenant challenged the circuit court's subject matter jurisdiction.\textsuperscript{578} In eviction and equity matters, the county courts and circuit courts have concurrent jurisdiction, however, the circuit courts' jurisdiction extends only to cases that satisfy the statutory amount in controversy of

\textsuperscript{566} Id. at D442.
\textsuperscript{567} Id.
\textsuperscript{568} 3679 Waters Ave. Corp., 25 Fla. L. Weekly at D442.
\textsuperscript{569} Id.
\textsuperscript{570} Id.
\textsuperscript{571} 746 So. 2d 1198 (Fla. 4th Dist. Ct. App. 1999).
\textsuperscript{572} Id. at 1200.
\textsuperscript{573} Id. at 1201.
\textsuperscript{574} Id.
\textsuperscript{575} Id.
\textsuperscript{576} Corrigan, 746 So. 2d at 1202.
\textsuperscript{577} Id.
\textsuperscript{578} Id.; see Fla. Stat. § 34.011(1) (2000).
The complaint must state the grounds on which the circuit court’s jurisdiction is based, but the landlord’s complaint did not seek damages because to do so would have violated the stay. However, the landlord did ask that the court retain jurisdiction to determine damages. The three day notice letter, which was an exhibit to the complaint, and therefore incorporated into the complaint by reference, demanded the past due rent that was far in excess of the jurisdictional amount. According to the district court, that was enough to give the circuit court jurisdiction. Moreover, the claim for equitable relief was sufficient to invoke the circuit court’s jurisdiction under the circumstances because the allegations in the complaint were sufficient even though equitable relief was not granted.

The tenant also challenged the trial court’s denial of a jury trial. The tenant made a timely demand for a jury trial and the district court held the failure to remind the court of that demand did not constitute a waiver. But the district court was faced with the question of whether the tenant had a right to a jury trial. Neither chapter 51 nor chapter 83 of the Florida Statutes expressly provided for a right to a jury trial in an eviction. Chapter 51 merely provides when to make a demand for a jury trial “if a jury trial is authorized by law” and chapter 83, governing nonresidential tenancies, is silent in regards to the right to a jury trial. The question turned on “whether the right was recognized at common law, at the time the Florida Constitution was adopted.” No Florida case provided an answer, so the district court relied on a decision of the United States Supreme Court which concluded that a jury trial was required because a modern eviction action served the same function as a common law action of ejectment.

In this case, the tenant had claimed that the three day notice was improperly served, that it had not been given the notice of default required by the lease, that rent payments had been tendered but rejected, and that the

579. Corrigan, 746 So. 2d at 1202; Fla. Stat. §§ 34.01(c), .011(1) (2000).
580. Corrigan, 746 So. 2d at 1203.
581. Id.
582. Id.
583. Id.
584. Id.
585. Corrigan, 746 So. 2d at 1202.
586. Id. at 1206.
587. Id. at 1203–06.
588. Id. at 1203; see Fla. Stat §§ 51, 83 (2000).
590. Corrigan, 746 So. 2d at 1203.
591. Id. at 1205 (citing Pernell v. Southall Realty, 416 U.S. 363, 376 (1974)).
tenant had made accountings as required. Therefore, issues of fact existed for a jury to decide. Consequently, the case had to be reversed and remanded for a jury trial.

Carney v. Gambe. The plaintiff was the head of security for a country club community. The defendants lived in the community. The adult son of the defendants lived in their home. The plaintiff alleged that, while performing his duties, he was physically attacked by the defendants’ adult son. His claim against the defendants was based on the theory that the defendants owed him a duty of care, both as parents and as landlords, to protect him from the son’s reasonably foreseeable criminal conduct. The trial court disagreed and dismissed the complaint. The Fourth District Court of Appeal affirmed because it could find no precedent or reason for imposing a duty of care in the absence of a special relationship between the parents and their son. The son was an emancipated adult even though he was living with his parents. Therefore, they had no power to control him.

Grant v. Thornton. The landlord leased part of a duplex as a residence. The front door was secured with a double cylinder deadbolt which required a key to unlock the door from either side. That type of lock on exit doors of a residence was prohibited by the building code. A fire started in the kitchen, but the tenant’s keys were in the kitchen. Unable to escape through the locked front door, the tenant jumped through the living room window and was seriously injured. The tenant filed suit

592. Id.
593. Id.
594. Id. at 1206.
595. 751 So. 2d 653 (Fla. 4th Dist. Ct. App. 1999).
596. Id. at 654.
597. Id.
598. Id.
599. Id.
600. Carney, 751 So. 2d at 654.
601. Id.
602. Id.
603. Id.
604. Id.
605. 749 So. 2d 529 (Fla. 2d Dist. Ct. App. 1999).
606. Id. at 531.
607. Id. at 530.
608. Id.
609. Id.
610. Grant, 749 So. 2d at 530.
against the landlord for personal injuries.\(^6\) The landlord's motion for summary judgment was granted because the tenant had never notified the landlord that a dangerous condition existed and the landlord was unaware that the locks violated the code.\(^7\)

The second district reversed.\(^8\) The landlord had a duty to make the leased residence reasonably safe.\(^9\) State statute obligated the landlord to maintain the premises in compliance with the applicable code.\(^10\) The statute, in effect, created a statutory warranty of habitability, the violation of which might be considered evidence of negligence.\(^11\) The landlord gave the keys to the tenant, so it was clear that he knew about the locks.\(^12\) His claim that he did not know the locks violated the building code was not a valid defense.\(^13\) Consequently, summary judgment should not have been granted for the landlord.\(^14\)

*Investment Builders of Florida, Inc. v. S.U.S. Food Market Investments, Inc.*\(^15\) The president of the tenant corporation was sick and failed to send the notice needed to renew the lease.\(^16\) When his omission was called to his attention eight days after the renewal deadline had passed, he immediately sent the renewal notice.\(^17\) The landlord refused to renew the lease, so the tenant brought this action for declaratory judgment.\(^18\) Equity can provide relief from the consequences of a mistake, such as failing to give timely notice of renewal, when "(1) the tenant's delay is slight, (2) the delay did not prejudice the landlord, and (3) failure to grant relief would cause the tenant unconscionable hardship."\(^19\) The trial court held that the tenant had satisfied the test and the district court affirmed.\(^20\)

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6. 1. *Id.*
6. 2. *Id.* at 532.
6. 3. *Id.*
6. 4. *Id.*
6. 5. *Grant,* 749 So. 2d at 531; see *FLA. STAT.* § 83.51 (2000).
6. 6. *Grant,* 749 So. 2d at 531–32.
6. 7. *Id.* at 532.
6. 8. *Id.*
6. 9. *Id.*
6. 21. *Id.* at 759.
6. 22. *Id.*
6. 23. *Id.*
6. 24. *Id.* at 760.
6. 25. *Inv. Builders of Fla., Inc.,* 753 So. 2d at 760.
LPI/Key West Associates, Ltd. v. Sarah Luna, Inc. 626 Plaintiff was a tenant under a commercial lease which expressly provided that it would be the only tenant "whose main business purpose is the sale or distribution of bagels, or whose business otherwise functions as a 'bagel bakery.'" 627 Pursuant to that clause, the tenant unsuccessfully sought an injunction to prevent the landlord from leasing space to a Dunkin' Donuts franchise. 628 The district court reasoned that the plain language of the lease was controlling. 629 The testimony showed that Dunkin' Donuts would serve bagels, but its main business was the sale of donuts and Dunkin' Donuts would not be a "bagel bakery" because baking and selling bagels was not its primary function. 630 Consequently, leasing to Dunkin' Donuts would not breach the plaintiff's lease.

Magnolia Village Homeowners Ass'n v. Magnolia Village, Inc. 631 The owners of mobile homes who leased spaces in a mobile home park challenged the landlord's rent increase. 632 The judge certified the tenant class but limited its membership to current tenants who were there when the rent was increased. 633 The district court held that the class should be expanded to include assignees of leases from tenants who would have qualified as class members but for their having assigned their leases, so long as the assignees had paid the increased rent. 634 The court relied on statutory language that, "[t]he purchaser of a mobile home who becomes a resident of the mobile home park in accordance with this section has the right to assume the remainder of the term of any rental agreement then in effect." 635 Consequently, a lease assignee succeeds to the original tenant's right to challenge the propriety of the rent amount. 636

Mangum v. Susser. 637 The landlord sued the commercial tenant for possession and back rent. 638 The tenant vacated the property and defended

626. 749 So. 2d 564 (Fla. 3d. Dist. Ct. App. 2000).
627. Id. at 565.
628. Id.
629. Id.
630. Id.
631. 758 So. 2d 1201 (Fla. 5th Dist. Ct. App. 2000).
632. Id. at 1202. Such leases are regulated by chapter 723 of the Florida Statutes, entitled "Mobile Home Park Tenancies." See Fla. Stat. § 723 (2000).
633. Magnolia Vill. Homeowners Ass'n, 758 So. 2d at 1202.
634. Id.
635. Id. (citing Fla. Stat. § 723.059 (1997)).
636. Magnolia Vill. Homeowners Ass'n, 758 So. 2d at 1202.
637. 764 So. 2d 653 (Fla. 1st Dist. Ct. 2000).
638. Id. at 654.
the suit on the theory that the notice to vacate was defective. The trial court granted summary judgment for the tenant, but the district court reversed. The tenant had failed to follow the rules of civil procedure requiring affirmative defenses to be raised in the answer and that failure of a condition precedent, such as filing a notice to vacate, must be pled specifically. Therefore, the tenant had waived its affirmative defenses by failing to raise them properly. Moreover, the claim for possession had become moot when the tenant vacated, leaving only the claim for damages for overdue rent. A notice to vacate is not needed before the landlord can recover rent that is owed. The tenant had also claimed that the successor landlord could not be the assignee of a claim for rent without a writing, but the court could find no authority for the assertion that a rent claim could only be assigned by a writing.

Munao v. Homeowners Ass’n of La Buona Vita Mobile Home Park, Inc. The owners of mobile homes who rented space in a mobile home park challenged the rent as being unconscionable under section 723.033 of the Florida Statutes because the landlord had reduced the amenities. Subsequent to the 1990 amendment of the statute, which lowered the standard of the prohibition from “unconscionable” rent to “unreasonable” rent, the trial court allowed the tenants to amend their complaint to charge the rent was unreasonable. Then the trial court found that the unreasonable condition of the park necessitated a reduction in rent. On appeal the landlord challenged the application of the 1990 standard, inter alia, as an unconstitutional impairment of an existing contract. The district court rejected that challenge because the state had the reserved power to regulate the landlord-tenant relationship.

639. Id.
640. Id.
641. Id.
642. Mangum, 764 So. 2d at 655.
643. Id.
644. Id.
645. Id.
646. 740 So. 2d 73 (Fla. 4th Dist. Ct. App. 1999).
647. Id. at 75.
648. Id.
649. Id.
650. Id. at 76.
651. Munao, 740 So. 2d at 76.
The landlord also challenged the finding that the rent was unreasonable when it did not exceed what comparable parks charge.\textsuperscript{652} The district court found that the statute allowed the court to consider other factors, such as the condition of the amenities, in determining whether the rent was unreasonable.\textsuperscript{653} Moreover, the court found that section 723.033 of the \textit{Florida Statutes} still had sufficient standards to survive a vagueness challenge.\textsuperscript{654}

\textit{Ocwen Federal Bank v. LVWD, Ltd.}\textsuperscript{655} The lease provided that the tenant would pay "additional rent" which was defined as a pro-rata share of operating expenses.\textsuperscript{656} The lease divided operating expenses into twelve categories and limited to four percent the amount that certain expenses could be increased.\textsuperscript{657} The landlord had calculated the additional rent on a line by line, category by category basis for the first three years of the lease.\textsuperscript{658} The landlord then billed the tenant on an aggregate basis that produced a substantial rent increase.\textsuperscript{659} The tenant objected and filed this suit for declaratory judgment and damages.\textsuperscript{660}

The landlord demanded arbitration and the trial court agreed, although it characterized the arbitration clause as "fuzzy."\textsuperscript{661} On review, the district court noted that this was a question of contract interpretation, so the review would be de novo.\textsuperscript{662} It then reversed.\textsuperscript{663} The arbitration clause expressly restricted the arbitrator to specific issues, such as whether a particular item was improperly included in the calculation of additional rent.\textsuperscript{664} While doubts about whether the parties had agreed to submit a particular issue to arbitration should be resolved in favor of arbitration, arbitration should not be ordered where there is no doubt.\textsuperscript{665} The district court found no room for doubt.\textsuperscript{666} This complaint challenged the method by which the additional rent

\begin{thebibliography}{9}
\sbibitem{652} Id. at 76.
\sbibitem{653} Id. at 77.
\sbibitem{654} Id.
\sbibitem{655} 766 So. 2d 248 (Fla. 4th Dist. Ct. App. 2000).
\sbibitem{656} Id. at 248.
\sbibitem{657} Id. at 249.
\sbibitem{658} Id.
\sbibitem{659} Id.
\sbibitem{660} \textit{Ocwen Fed. Bank}, 766 So. 2d at 249.
\sbibitem{661} Id.
\sbibitem{662} Id.
\sbibitem{663} Id.
\sbibitem{664} Id.
\sbibitem{665} \textit{Ocwen Fed. Bank}, 766 So. 2d at 249.
\sbibitem{666} Id.
\end{thebibliography}
was calculated, not whether a particular item was properly included.\textsuperscript{667} Clearly, it was not within the scope of the arbitration clause.\textsuperscript{668}

\textit{Park Avenue BBQ & Grille of Wellington, Inc. v. Coaches Corner, Inc.}\textsuperscript{669} Coaches Corner operated a sports bar in a shopping center.\textsuperscript{670} Under the terms of its lease, the landlord was prohibited from leasing space to a restaurant or bar that devoted "'more than ten percent of its space to use as a sports bar/sports restaurant or for the viewing of sporting events.'"\textsuperscript{671} The new landlord subsequently sold the property.\textsuperscript{672} Later, Coaches Corner learned that the landlord intended to lease space to a restaurant that would have televisions showing sports events, so Coaches Corner's attorney sent a letter to the successor landlord reminding it of the restriction.\textsuperscript{673} The president of Park Avenue was made aware of the restriction and got the successor landlord to agree to a term in its lease allowing it to televise sports.\textsuperscript{674} Coaches Corner brought this action for an injunction against both Park Avenue and the landlord.\textsuperscript{675}

The first defense raised was laches.\textsuperscript{676} However, Coaches Corner had brought this action less than one month after Park Avenue had signed its lease and before it had opened for business.\textsuperscript{677} Since the plaintiff had acted promptly, laches was not a viable defense.\textsuperscript{678}

Park Avenue next raised lack of privity as a defense.\textsuperscript{679} Its point was that it had not undertaken an obligation to Coaches Corner to refrain from showing sports; its only contractual duties were to the landlord under the terms of its lease.\textsuperscript{680} This argument also failed.\textsuperscript{681} The evidence showed that Park Avenue took with notice of the restriction, that Coaches Corner would suffer irreparable injury from the violation of the restriction, and that

\begin{itemize}
  \item \textsuperscript{667} Id.
  \item \textsuperscript{668} Id.
  \item \textsuperscript{669} 746 So. 2d 480 (Fla. 4th Dist. Ct. App. 1999).
  \item \textsuperscript{670} Id. at 481.
  \item \textsuperscript{671} Id.
  \item \textsuperscript{672} Id. at 482.
  \item \textsuperscript{673} Id. at 481–82.
  \item \textsuperscript{674} Park Ave. BBQ & Grille, 746 So. 2d at 482.
  \item \textsuperscript{675} Id. at 481.
  \item \textsuperscript{676} Id.
  \item \textsuperscript{677} Id. at 482.
  \item \textsuperscript{678} Id. at 481.
  \item \textsuperscript{679} Park Ave. BBQ & Grille, 746 So. 2d at 482.
  \item \textsuperscript{680} Id.
  \item \textsuperscript{681} Id.
\end{itemize}
Coaches had no adequate remedy at law. In essence, Coaches Corner had demonstrated the essentials for equitable relief based on the logic that the restriction burdened the land with an equitable servitude.

*Springbrook Commons, Ltd. v. Brown.* The landlord brought this eviction action based on the tenant’s alleged failure to pay rent. Having failed twice to personally serve the tenant, the landlord effected service by posting the complaint on the front door of the leased premises. The tenant failed to respond to the complaint and the court awarded the landlord judgment for possession. The landlord, however, also wanted the court to award costs, but the court refused.

The landlord argued that it was entitled to costs under section 85.59(4) of the *Florida Statutes.* However, the court reasoned that service by posting did not confer personal jurisdiction on the court under the statute. The district court affirmed, reasoning, “[i]f this tenant had been personally served, the landlord would be entitled to costs under the statute, but in the absence of personal service, a costs judgment would violate due process.”

XIV. LIENS

*Betaco, Inc. v. Countrywide Home Loans, Inc.* The issue here was whether the trial court erred when it decided that an “execution sale” which occurs beyond the twenty year period from the recording of a judgment lien was ineffective because the judgment lien had expired before the execution sale occurred.

Betaco’s predecessor-in-interest recorded a judgment against the owner of the property on March 10, 1977. In May 1979, a writ of execution was

682. *Id.*
683. *Id.* at 482.
684. 761 So. 2d 1192 (Fla. 4th Dist. Ct. App. 2000).
685. *Id.* at 1193.
686. *Id.* Service by posting was allowed under section 48.183 of the *Florida Statutes.* FLA. STAT. § 48.183 (2000).
687. *Brown*, 761 So. 2d at 1193.
688. *Id.*
689. *See id.* at 1194; *see also* FLA. STAT. § 89.59(4) (2000).
690. *Brown*, 761 So. 2d at 1193.
691. *Id.* at 1194.
692. 752 So. 2d 696 (Fla. 2d Dist. Ct. App. 2000).
693. *Id.* at 697.
694. *Id.*
issued. Then, in 1993, the property owner mortgaged the property to Countrywide, who was the mortgage holder at the time of the default. On January 27, 1997, Betaco delivered instructions to the sheriff, who levied the property on February 18. This was recorded several days later. The sheriff’s sale was held on April 17, 1997. Betaco’s predecessor-in-interest took title through sheriff’s deed at that time, and Betaco subsequently took title to the property by warranty deed.

The appellate court held that the trial court was correct in deciding that the judgment lien on the property had expired before the execution sale, stating that the deed held by Betaco’s predecessor-in-interest was legally null because the lien had expired before the sheriff held the execution sale. “An execution is valid and effective only during the life of the judgment on which it is issued.” Further, the court referred to section 55.091 of the Florida Statutes, which provided that “no judgment...shall be a lien upon real...property within the state after the expiration of 20 years from the date of the entry of such judgment.” Therefore, since the life of the judgment expired on March 10, 1997, and the execution sale was not completed before that date, the lien was no longer valid when the execution sale took place.

CDS & Associates of the Palm Beaches, Inc. v. 1711 Donna Road Associates, Inc. The issue here was whether the trial court properly held that a construction lien cannot be based on a contract implied in law. The appellate court noted that “[t]he trial court found as a factual matter that no contract was created in this case by the parties’ words or conduct, and that CDS was limited to quasi contractual remedies.” Therefore, CDS was not able to “enforce its quantum meruit recovery through the imposition of a mechanics’ lien.” First, section 713.05 of the Florida Statutes states:

695. Id.
696. Id.
697. Betaco, Inc., 752 So. 2d at 697.
698. Id.
699. Id.
700. Id.
701. Id.
702. Betaco, Inc., 752 So. 2d at 697; see FLA. STAT. § 56.021 (2000).
703. Betaco, Inc., 752 So. 2d at 697 (quoting FLA. STAT. § 55.091 (1977)).
704. Id.
705. 743 So. 2d 1223 (Fla. 4th Dist. Ct. App. 1999).
706. Id. at 1224.
707. Id. at 1225.
708. Id.
[A] contractor who complies with the provisions of this part shall, subject to the limitations thereof, have a lien on the real property improved for any money that is owed to him or her for labor, services, materials, or other items required by, or furnished in accordance with, the direct contract. 709

Second, section 713.01(5) defines a contract as "an agreement for improving real property, written or unwritten, express or implied, and includes extras or change orders." 710 Therefore, a contract under the mechanics' lien law requires an agreement. 711 No agreement, either express or implied, was found to exist in this case. 712 In regards to the quasi contractual claim, the court defined such contract as "a contract implied in law . . . ." 713 Further, a quasi contract does not require an agreement, as does the mechanics' lien statute. 714 Therefore, a quasi contract is not a contract for purposes of the mechanics' lien statute. 715

Diaz v. Plumhoff. 716 The issue here was whether the trial court properly "declared Plumhoff to be the owner of real property previously owned by Diaz, but deeded to Plumhoff by sheriff's sale under section 56.061, Florida Statutes." 717

This was a case of first impression. 718 Plumhoff obtained a money judgment against Diaz for a total of $8774. 719 The money judgment "did not constitute a lien on the property of Diaz because no certified copy containing the address of Plumhoff was ever recorded." 720 However, Plumhoff proceeded directly under section 56.061 of the Florida Statutes, which states, "[L]ands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations, shall be subject to levy and sale under execution." 721 The trial court held that Plumhoff was not required to proceed under section 55.10 of the Florida Statutes because

709. FLA. STAT. § 713.05 (2000).
710. § 713.01(5).
711. CDS & Assocs. of the Palm Beaches, Inc., 743 So. 2d at 1224.
712. Id. at 1225.
713. Id. at 1224.
714. Id. at 1224–25.
715. Id. at 1225.
716. 742 So. 2d 846 (Fla. 2d Dist. Ct. App. 1999).
717. Id. at 846.
718. Id.
719. Id.
720. Id. at 846–47.
721. Diaz, 742 So. 2d at 847; see also FLA. STAT. § 56.061 (2000).
perfecting the lien was not necessary for the sheriff to proceed under section 56.061 of the *Florida Statutes*. 722

The appellate court held that it was necessary for Plumhoff to comply with the requirements of section 55.10 of the *Florida Statutes* before proceeding under section 56.061. 723 Further, the appellate court stated that chapter 55 deals with the subject of judgments, and chapter 56 with final process. 724 The requirements of chapter 55 must be met before moving to chapter 56. 725

*Gulfside Properties Corp. v. Chapman Corp.* 726 The issue here was whether the trial court properly held that “Gulfside could not assert lack of proper notice to [the] owner as a defense to Chapman’s suit to enforce a construction lien against Gulfside’s property” where Gulfside failed to sign the notice of commencement as owner, as required by section 713.13(1)(g) of the *Florida Statutes*. 727

Gulfside, the owner of a real estate development, entered into an agreement with Willis Construction, Inc. (“Willis”) for the completion of phase seven of a beach villas project. 728 Ronnie Willis signed his own name on the line indicated for the owner’s signature on the notice of commencement. 729 This notice was filed and recorded in Walton County. 730 Willis and Chapman entered into a contract to provide materials and labor for the project. 731 Gulfside paid Willis in full. 732 Willis did not pay Chapman in full. 733 Chapman filed a lien against Gulfside. 734

The appellate court held that Chapman failed to comply with construction lien law by failing to serve a notice to the owner and that Gulfside could assert this as a complete defense. 735 Further, the court held that serving a notice to an owner would be a separate requirement under construction lien law and must be followed, even if there is another problem

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722. *Diaz*, 742 So. 2d at 847.
723. *Id.*
724. *Id.*
725. *Id.*
726. 737 So. 2d 604 (Fla. 1st Dist. Ct. App. 1999).
727. *Id.* at 605.
728. *Id.*
729. *Id.*
730. *Id.*
731. *Gulfside Props. Corp.*, 737 So. 2d at 605.
732. *Id.*
733. *Id.*
734. *Id.* at 606.
735. *Id.* at 607.
created by the other party.\footnote{Gulfside Props. Corp., 737 So. 2d at 607.} In this case, Gulfside was required to sign the notice of commencement as owner.\footnote{Id.} Because it failed to sign as owner, the notice of commencement was not valid.\footnote{Id.} The appellate court further noted that a notice to owner must be served as a prerequisite for recording of a lien, regardless of other violations, for the lien to be valid.\footnote{Id.} If it is not, this failure can be used as a complete defense by the other party.\footnote{Id.; see FLA. STAT. § 713.06(2)(a) (2000); see also Torres v. MacIntyre, 334 So. 2d 59 (Fla. 3d Dist. Ct. App. 1976).}

\textit{Klein Development v. Ellis K. Phelps & Co.}\footnote{761 So. 2d 441 (Fla. 2d Dist. Ct. App. 2000).} The issue here was whether a fax copy of a release of lien would be binding and would prevent the releasing party from later filing for foreclosure on that lien.\footnote{Id. at 442.}

In this case, the developer, Klein, stopped payment on its check to the general contractor.\footnote{Id.} The general contractor’s check to the subcontractor, Phelps, bounced when he tried to cash it.\footnote{Id.} The subcontractor then filed for foreclosure on the lien.\footnote{Id.} Klein tried to rely on the signed fax copy of a release of lien.\footnote{Klein Dev., 761 So. 2d at 442.}

The appellate court, after review of discovery, determined that the subcontractor never intended to give up its right to foreclose on the lien until the check it received had cleared.\footnote{Id. at 443.} Therefore, it affirmed the lower court’s decision in favor of the subcontractor.\footnote{Id. at 443.}

\textit{Lachance v. Desperado’s of Holly Hill, Inc.}\footnote{760 So. 2d 1023 (Fla. 5th Dist. Ct. App. 2000).} The issue here was which interest should have priority when there is a lien against a liquor license.\footnote{Id. at 1023.} In this case there was an assignment of a lease to a third party, with a provision requiring the license to be reconveyed to the assignor in the event of a default or at the end of the lease.\footnote{Id.}
The trial court found that the assignor had priority interest over an investor who made a loan to the third party with the license as collateral. The court said that having the agreement on file with the Division of Alcoholic Beverages and Tobacco Division and "available for any person to examine or inspect" was enough to establish priority, especially where the original lessor held an ownership interest and not a lien interest in the license and, therefore, had priority over the investor’s lien.

The appellate court agreed with the outcome of the case but for different reasons. The court found that the lessor should prevail because of the rule which allows for security interests in such licenses to exist and to be enough to put potential investors on notice that they should make an inquiry with the Department. The appellate court recommended in its decision that the legislature expand section 561.65 of the "Florida Statutes" so that persons having an interest in such a license other than security may record it with the division to provide notice to subsequent investors.

Sasso Air Conditioning, Inc. v. United Companies Lending Corp. The issue here was whether the trial court properly granted summary judgment in favor of the mortgagee, United, and against a lienor, Sasso, under a claim of lien, determining that while the notice of commencement was recorded prior to the mortgage, the notice did not comply with the mechanics' lien statute requiring the signature of all owners of the property.

Kevin and Sita Martin, as tenants by the entireties, executed a mortgage with United. This mortgage was recorded on February 21, 1996. Sita Martin had previously signed and recorded a notice of commencement on January 3, 1996. The notice listed Sita Martin as the owner of the property and Plumb, Level & Square, Inc. ("PLS") as the contractor. Kevin Martin owned PLS. The notice also provided that the owner

752. Id. at 1025.
753. Id.
754. Lachance, 760 So. 2d at 1025-27.
755. Id. at 1026.
756. Id. at 1027.
757. 742 So. 2d 468 (Fla. 4th Dist. Ct. App. 1999).
758. Id. at 469.
759. Id.
760. Id.
761. Id.
762. Sasso Air Conditioning, Inc., 742 So. 2d at 469.
763. Id.
appoint Kevin Martin to "receive notices required under the mechanics lien law and designated him to receive lienor's notices." 764

During September of 1996, Kevin Martin contracted with Sasso to replace his home's central air conditioning. 765 The contract listed PLS as the "job name" and stated the work was to be done on "Kevin's own house." 766 Kevin Martin signed the contract in his name and listed his residential address. 767 Sasso filed a claim of lien after the Martins failed to pay. 768 Eventually, the Martins stopped paying their mortgage and United foreclosed, listing Sasso as a junior lienor, because its claim of lien was filed after United recorded its mortgage. 769

The appellate court held Sasso had priority due to the notice of commencement being filed by Sita Martin before United filed its mortgage. 770 The court based this on the fact that United could have performed a title search and "[u]pon finding the earlier filed notice of commencement, United could have required the Martins to file a notice of termination pursuant to section 713.132 prior to United recording the mortgage." 771 Further, the appellate court noted that Sasso had "a notice of commencement which appeared regular and complete in all respects," and if the notice of commencement provided the lienor with necessary information enabling it to serve notice to owner, the lienor should be able to rely on this information. 772 "The law does not require every contractor to conduct a title search to verify that the information contained in the notice is true and correct." 773

XV. PARTITION

Biondo v. Powers. 774 The issue here was whether the trial court properly held that upon the partition and sale of jointly owned property,

764. Id.
765. Id.
766. Id.
767. Sasso Air Conditioning, Inc., 742 So. 2d at 469.
768. Id.
769. Id.
770. Id. at 471.
771. Id.
772. Sasso Air Conditioning, Inc., 742 So. 2d at 471; see FLA. STAT. § 713.13(1)(a) (2000).
773. Sasso Air Conditioning, Inc., 742 So. 2d at 471.
774. 743 So. 2d 161 (Fla. 4th Dist. Ct. App. 1999).
where a co-tenant made excess payments towards obligations of the property, it would be proper to increase her equity in the property.775

While Biondo and Powers were dating, they purchased real property in Palm Beach for approximately $650,000.776 They obtained a purchase money mortgage from the seller for $350,000.777 Both parties paid the balance due at closing equally.778 However, the deed named only Biondo as the grantee.779 At closing Biondo executed a handwritten note, also signed by Powers, saying he had received half of the closing money from Powers and that all monies received from the sale of the property would be divided equally, prorated as to invested amounts paid at closing.780 Subsequently, Powers paid off the mortgage.781 On the same day this occurred, Biondo executed a quitclaim deed of the property to both Powers and himself as joint tenants with right of survivorship, which was later recorded.782 Also, it was not disputed that the expenses paid by Powers exceeded those paid by Biondo;783 Biondo issued a note to Powers for $350,000 payable in five years with six and one-half percent interest and a mortgage on Biondo's interest in the property to secure the note.784

In July 1997, Powers brought suit against Biondo to foreclose on the note and mortgage, and to partition the property.785 The trial court concluded that Powers' investment in the property totaled $760,000, figuring that Biondo's investment was only his initial investment at closing of approximately $134,000.786 The trial court then ordered a distribution of the sale proceeds in proportion to the parties' respective investments—eighty-five percent to Powers and fifteen percent to Biondo.787

The appellate court held that the sale proceeds should have been divided equally between Powers and Biondo because each had an equal interest in the property.788 Biondo was required to reimburse Powers for his

775. Id. at 162.
776. Id.
777. Id.
778. Id.
779. Biondo, 743 So. 2d at 162.
780. Id.
781. Id.
782. Id.
783. Id. at 163.
784. Biondo, 743 So. 2d at 163.
785. Id.
786. Id.
787. Id. at 164.
788. Id.
proportionate share of the expenses for the property.\textsuperscript{789} It based this on section 64.071(1) of the \textit{Florida Statutes}, which states that the proceeds from such a sale shall be divided among the parties in proportion to their interests.\textsuperscript{790} Further, upon partition, a co-tenant is entitled to a credit from proceeds of the sale for the other co-tenant's proportionate share of expenses.\textsuperscript{791}

**XVI. QUIET TITLE**

\textit{Hardemon v. United Companies Lending Corp.}\textsuperscript{792} The issue here was whether the trial court properly entered a final judgment quieting title in favor of United.\textsuperscript{793}

Hardemon and Jacquelyn Harris, his girlfriend, bought a home in 1992 as tenants in common.\textsuperscript{794} Hardemon was incarcerated in 1994 as a result of a violent domestic dispute with Harris and was subsequently charged with attempted kidnapping and aggravated battery.\textsuperscript{795} Hardemon proposed to Harris that she drop the charges and pursue no further action.\textsuperscript{796} In exchange, he would execute a quitclaim deed to the property.\textsuperscript{797} Harris agreed.\textsuperscript{798} On the day he was released from jail, Hardemon conveyed to Harris a notarized quitclaim deed of his one-half interest in the property.\textsuperscript{799} All charges against Hardemon were dropped.\textsuperscript{800} Harris recorded the deed in April 1994.\textsuperscript{801} Nearly three months after the recording of the deed, United extended a first mortgage loan to Harris.\textsuperscript{802}

United performed a title search revealing that Harris was the sole and exclusive record owner at that time.\textsuperscript{803} Next, United recorded the

\textsuperscript{789} \textsuperscript{790} \textsuperscript{791} Biondo, 743 So. 2d at 164.
\textsuperscript{792} \textsuperscript{793} \textsuperscript{794} \textsuperscript{795} \textsuperscript{796} \textsuperscript{797} \textsuperscript{798} \textsuperscript{799} \textsuperscript{800} \textsuperscript{801} \textsuperscript{802} \textsuperscript{803} Id.; see FLA. STAT. § 64.071(1) (2000).
\textit{Hardemon}, 746 So. 2d at 1231; see Whitely v. Whitely, 329 So. 2d 352, 353 (Fla. 4th Dist. Ct. App. 1976).
\textsuperscript{794} \textsuperscript{795} \textsuperscript{796} \textsuperscript{797} \textsuperscript{798} \textsuperscript{799} \textsuperscript{800} \textsuperscript{801} \textsuperscript{802} \textsuperscript{803} Id.
\textsuperscript{794} \textsuperscript{795} \textsuperscript{796} \textsuperscript{797} \textsuperscript{798} \textsuperscript{799} \textsuperscript{800} \textsuperscript{801} \textsuperscript{802} \textsuperscript{803} Id.
In June 1994, almost a month after the mortgage was recorded, Hardemon filed a suit against Harris and obtained a default judgment against her setting aside the quitclaim deed. Hardemon claimed his signature was forged. Harris never contested the action.

United initiated the current action seeking to quiet title. The appellate court held that the trial court was correct when it entered a final judgment quieting title in favor of United. The evidence showed “United was a bona fide purchaser without notice of any alleged irregularities in the public record chain of title, and it is protected from claims outside that chain of title.”

XVII. REAL ESTATE BROKERS

The Florida legislature continues to tinker with the chapter that regulates real estate brokers. Chapter 2000-198 of the Laws of Florida clarifies that it is not an appraisal when a real estate broker or salesperson gives an opinion regarding the proper price for certain real estate or gives a comparative price analysis. It also provides a modification to the escape procedures that protect a real estate broker holding funds in escrow when a dispute arises over those funds. Ordinarily, to be protected from an administrative complaint by the escape procedures, the licensee must get an escrow disbursement order from the Florida Real Estate Commission, or have the matter submitted to litigation, arbitration, or mediation, or get the parties to agree to disbursement. However, the protection has been expanded to include returning the escrow deposit of the buyer of a new residential condominium who exercises his or her right to statutorily cancel the purchase under section 718.503 of the Florida Statutes.

804. Id.
805. Id.
806. Id.
807. Hardemon, 746 So. 2d at 1231.
808. Id.
809. Id. at 1232.
810. Id.; see Fla. Stat. § 695.01(1)(2000); see also Koschler v. Dean, 642 So. 2d 1119 (Fla. 2d Dist. Ct. App. 1994).
812. Id. § 1, 2000 Fla. Laws at 2026–27 (codified at Fla. Stat. § 475.25(1)(d) (2000)).
This year's act also changes the disclosure requirements for a licensee who does not have a brokerage relationship with the potential buyer or seller. The licensee must reveal that lack of relationship in writing before showing the property. The disclosure may be incorporated into other documents, but then it must be conspicuous. A number of exceptions to the disclosure requirements have been added. For example, the disclosure requirements do not apply: 1) when the licensee knows that the potential buyer or seller already is represented by a broker or under circumstances when the potential buyer should know from the setting that the licensee represents only the seller, such as the project's sales office; 2) to non-residential transactions; 3) in an "open house" or the showing of a model home that does not involve obtaining confidential information, executing an offer, and the like; and 4) to unanticipated casual conversations.

_Cabrerizo v. Fortune International Realty._ The brokerage contract allowed the seller to cancel by giving notice and paying a cancellation fee. The seller gave the cancellation notice on May 16 as the contract allowed and on May 29 delivered the cancellation fee to the broker. On May 20, the seller entered into a sales contract with the buyers. The contract showed a sales price of $140,000. Later the seller sued the buyers alleging that the sales price was actually $700,000 because part of the price was a check for $560,000. To the seller's consternation, the $560,000 check had been rejected by the bank. In that suit, the seller testified that he first heard the buyers were interested on May 14 and met with them on May 15.

When the broker learned about the contract and breach of contract suit, it filed suit for the brokerage commission. Based upon the seller's testimony in the breach of contract suit, the court granted summary judgment for the broker and awarded the commission based on the sale price of

815. _Id._ § 2, 2000 Fla. Laws at 2032 (codified at FLA. STAT. § 475.278(4)(b) (2000)).
816. _Id._
817. _Id._
818. _Id._ at 2033 (codified at FLA. STAT. § 475.278(5)(b)1, 2 (2000)).
819. 760 So. 2d 228 (Fla. 3d Dist. Ct. App. 2000).
820. _Id._ at 229.
821. _Id._
822. _Id._
823. _Id._
824. _Cabrerizo_, 760 So. 2d at 229.
825. _Id._
826. _Id._
827. _Id._

http://nsuworks.nova.edu/nlr/vol25/iss1/5 64
$700,000. The seller appealed claiming his affidavits in the current case contradicted his testimony in the breach of contract suit, so there was a genuine issue of fact as to when the sales contract was entered into and the amount of the sale price. The district court disagreed. It found that the seller's conduct, attempting to contradict his own sworn testimony, was inherently wrongful and he should not be allowed to benefit from it.

*Harris v. Schickedanz Bros.-Riviera Ltd.* Harris apparently was licensed as a salesman but not as a broker. He signed a contract with a developer under which he was to attempt to procure buyers for the developer's residential units (thereby earning a commission), market the development, and, if he kept expenses below a certain percentage of gross sales, earn a bonus. The developer terminated the contract and Harris sued.  

The first count of the complaint was dismissed because it sought a brokerage commission and Harris was not a broker. That ruling seemed unassailable, so Harris did not appeal that ruling. But Harris appealed the dismissal of the other counts. Count three was based on "quantum meruit for the marketing services rendered under the original [written] contract." However, quantum meruit is available only when there is no express contract. So this count was properly dismissed and the district court affirmed. Counts two and four sought compensation for marketing the development and the bonus for keeping marketing expenses low in relation to sales. This was an action for breach of contract.

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828. *Id.*
829. *Cabrerozo*, 760 So. 2d at 229.
830. *Id.* at 230.
831. *Id.*
832. 746 So. 2d 1152 (Fla. 4th Dist. Ct. App. 1999).
833. *See id.* at 1153–54.
834. *Id.* at 1153.
835. *Id.*
836. *Id.*; see *Fla. STAT.* § 475.41 (2000).
837. *Harris*, 746 So. 2d at 1153.
838. *Id.* Count five involved the claim by another plaintiff, ReMac, for the recovery of sums advanced to the developer who had agreed to repay. *Id.* at 1155. The trial court incorrectly held that this claim was barred by the Statute of Frauds provisions found in section 671.206 of the Florida Statutes, which applies only to the sale of goods, and section 687.0304 of the Florida Statutes, which applies only to credit agreements. *Id.* at 1155–56.
839. *Id.* at 1155.
840. *Harris*, 746 So. 2d at 1155.
841. *Id.* at 1156.
842. *Id.* at 1153, 1155.
843. *Id.*
provided were not the direct procurement of customers, they were not brokerage services under the statutory definition, and, therefore, this recovery was not prohibited by the brokerage act. The developer had, however, successfully raised a Statute of Frauds defense in the trial court. The claim was based on an unwritten reaffirmation of a written contract that had been terminated. The district court rejected the defense because the services had already been performed, taking the contract out of the Statute of Frauds. On these counts, the district court reversed.

**XVIII. REFORMATION**

*Florida Masters Packing, Inc. v. Craig.* The common grantors acquired the land, identified as the "parent tract." Out of that, they conveyed the "outparcel" to Wright. Unfortunately, the legal description in the deed was inaccurate. When Wright subsequently conveyed the outparcel to Haffield, the same erroneous description was used. Haffield lost the property through foreclosure. Throughout the foreclosure, the same erroneous description was used. The plaintiff was the buyer at the foreclosure sale. By the time the error was discovered, the common grantor had sold the parent tract to the defendants using a deed that described the land as the parent tract minus the outparcel according to the same erroneous description.

The plaintiff sued to reform its deed and to quiet its title. At the conclusion of the plaintiff's case, the trial court dismissed the case with prejudice and the plaintiff appealed. The district court focused upon

844. *Id.*; see *FLA. STAT.* § 475.01(1)(c), (d) (2000).
845. *Harris*, 746 So. 2d at 1155; see *FLA. STAT.* § 475.41 (2000).
846. *Harris*, 746 So. 2d at 1155; see *FLA. STAT.* § 725.01 (2000).
847. *Harris*, 746 So. 2d at 1154.
848. *Id.* at 1155.
849. *Id.* at 1156.
850. 739 So. 2d 1288 (Fla. 4th Dist. Ct. App. 1999).
851. *Id.* at 1289.
852. *Id.*
853. *Id.*
854. *Id.*
855. *Craig*, 739 So. 2d at 1289–90.
856. *Id.* at 1290.
857. *Id.*
858. *Id.*
859. *Id.*
860. *Craig*, 739 So. 2d at 1290.
reformation. Since it is an equitable remedy, it would not be available against a subsequent bona fide purchaser for value without notice. Here, the defendants did not have actual notice because no information revealing the problem had been communicated to them. The defendants did not have constructive notice because there was nothing in the record that might reveal the problem. According to the record, the common grantor could convey the title to the defendants that the deed purported to convey. Nor did the defendants have implied actual notice, i.e., actual notice of facts that would have led a prudent person to inquire and, consequently, discover the problem. Thus, defendants having paid for the land and taken without notice were bona fide purchasers and the plaintiff's reformation action should have failed.

The court did not, however, explain why the defendants were not on inquiry notice. They did not have a survey done or even have the old one checked. The defendants did not even go to the land to check the boundaries. Monuments had been placed there by the surveyor and a minimal inspection might have raised doubts about the boundaries. The defendants never took any steps to check the physical boundaries. Their inaction would seem to be at odds with what a reasonably prudent person would do under the circumstances. Consequently, it seems that the burden should have shifted to the defendants to show that they were not negligent and, even if they were, that the problem would not have been discovered by their exercise of due diligence.

861. Id.
862. Id.
863. Id.
864. Id. at 1291.
865. Craig, 739 So. 2d at 1291.
866. Id.
867. Id.
868. Id.
869. Id.
870. Craig, 739 So. 2d at 1291.
871. Id.
872. Id.
873. Id.
XIX. RULE AGAINST PERPETUITIES

New legislation modifies the rule against perpetuities as it relates to trusts. The former ninety-year provision is modified to 360 years, thereby extending the permissible life of a trust.874

XX. SALES

Attanasio v. Excel Development Corp.875 Land buyers sued the developer based on a number of alleged misrepresentations.876 These included misrepresentations that: 1) each lot on the canal would have an easement across the land at the rear; 2) each lot would have the use of the canal; 3) the wooded area at the back of each lot would be a natural buffer; and 4) the maintenance fees paid to the association would cover the costs of water usage in the underground sprinkler system.877 The defendant pointed out that the sales contract contained an integration clause providing that the writing constituted the entire agreement.878 Then, it raised the defense that the plaintiffs' claims were barred by the Statute of Frauds.879 The trial court agreed, but the district court reversed.880

The Statute of Frauds requires any contract for the sale of any interest in land to be in writing.881 This case did not involve the breach of a promise to do something in the future, and it did not involve the transfer of an interest in land.882 The allegation here was that the defendant misrepresented a state of existing facts as an inducement to enter into a contract.883 Thus, the trial court should not have held the Statute of Frauds was a bar to the recovery of damages.884

Engle Homes, Inc. v. Krasna.885 The buyers signed a contract to have a custom home built in 1994.886 A year later, they closed on the contract,
accepted title, and moved in. They almost two years later, they learned that they might have a statutory right to rescission under the Interstate Land Sales Full Disclosure Act. They quickly decided to rescind, tendering title to the home back to the seller and demanding a full refund of the purchase price. Whether these buyers could rescind presented the court with a case of first impression.

The seller conceded that the Act applied. The Act required the buyers be given notice of their statutory right of rescission, and the seller conceded that buyers had not been given such notice. The Act also required that an action to enforce the rights it provided must be brought within three years after the contract is signed. These buyers gave the seller notice of rescission less than thirty-one months after signing the contract, yet the seller claimed that the action was barred by the statute of limitations. The court rejected the statute of limitations defense based on the plain language of the Act. The court similarly rejected the seller's waiver defense. These buyers did not know they had a right to rescission when they accepted the deed or started living in the house. Rescission is a knowing act, so these actions could not be the basis for rescission.

The court also rejected the seller's attempt to limit the buyers' recovery by invoking the liquidated damages clause in the contract and claiming a set-off for the buyers' use of the premises. Admittedly, the buyers had lived in the house for two years, but the statute was very clear that a rescinding buyer was entitled to "all money paid by him or her" if the property was returned substantially unchanged. The Act simply did not provide for any set-off for use and occupancy and it did not allow the seller to limit its liability by a liquidated damages clause.

887. Id.
889. Krasna, 766 So. 2d at 312.
890. Id.
891. Id.
892. Id.
893. Id.
894. Krasna, 766 So. 2d at 313.
895. Id.
896. Id.
897. Id.
898. Id.
899. Krasna, 766 So. 2d at 313.
900. Id. (quoting 15 U.S.C. § 1703(e) (1994)).
901. Krasna, 766 So. 2d at 313.
**Grosseibl v. J. Chris Howard Builders, Inc.**

When the buyer purchased the home, he got a warranty from the Preferred Builders Warranty Corporation. The warranty contained an arbitration clause that required any dispute "arising out of or related to this warranty" be submitted to arbitration. Problems did arise. The buyer claimed that the home was poorly built of substandard materials, not up to code, and on "improper and insufficient soil." The buyer apparently attributed the problems to the builder’s improperly filling the land after removing the swimming pool that had previously been on the property. The buyer did not file a claim against the warrantor. Instead, he filed this action against the builder/seller seeking damages for breach of contract, rescission of the sale, and damages for fraud based on alleged misrepresentations made in the seller’s disclosure statement. On the seller’s motion, the trial court stayed his suit pending arbitration, but the Second District Court of Appeal reversed.

In Florida, arbitration clauses are valid and enforceable. A party who has agreed to arbitration has no choice but to arbitrate. However, the critical question here was whether the buyer had agreed to arbitrate the controversies involved in this suit. "In determining whether a dispute must be submitted to arbitration, the scope of the arbitration provision governs." This arbitration provision only covered disputes "arising out of or related to this warranty." The warranty revealed that it specifically excluded from coverage defects caused by soil problems, and it did not warrant that the home complied with any building code. Nor did it cover misrepresentations that the builder might have made, and that formed the basis for the rescission and fraud claims. Attempts to avoid an arbitration

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902. 739 So. 2d 1255 (Fla. 5th Dist. Ct. App. 1999).
903. Id. at 1256.
904. Id.
905. Id.
906. Id.
907. Grosseibl, 739 So. 2d at 1256.
908. Id.
909. Id. at 1256–57.
910. Id. at 1256.
911. Id.
912. Grosseibl, 739 So. 2d at 1256.
913. Id.
914. Id.
915. Id.
916. Id.
clause by adding a fraud claim failed in cases involving an agreement to arbitrate all disputes, but this limited arbitration clause was clearly different. This plaintiff's claims went far beyond what the warranty covered, and the agreement to arbitrate only related to claims under the warranty.

XXI. SPECIAL ASSESSMENTS

_Pomerance v. Homosassa Special Water District._ The issue here was whether the trial court erred when it granted a final judgment in favor of the district for its special assessment for water lines by owners of property, which consisted primarily of wetlands that could not be developed.

In 1988, the District annexed Halls River Estates, located north of the Pomerance property. After annexing the property, the District ran water lines to serve Halls River Estates and to serve land that includes the Pomerance property which was previously within district boundaries. The District specially assessed the Pomerance property and other properties which abutted the water lines. The Pomerances sued for relief contending that their property would not be benefited by the water line because the property consisted mostly of wetlands which were not able to be developed. The trial court concluded that the Pomerances "did not prove by a preponderance of the evidence that there was no benefit to the property from the extension of water service to it."

The Fifth District held that the trial court properly found that the property owners did not prove by a preponderance of the evidence that they did not receive a benefit to their property from the extension of the water lines. The appellate court noted that the burden is on the property owner to overcome the rebuttable presumption that its property benefited from the improvement and the presumption that the district court correctly determined

917. _Grosseibl_, 739 So. 2d at 1257.
918. _Id._
919. 755 So. 2d 732 (Fla. 5th Dist. Ct. App. 2000).
920. _Id._ at 733.
921. _Id._
922. _Id._
923. _Id._
924. _Pomerance_, 755 So. 2d at 733.
925. _Id._ at 734.
926. _Id._
that the property received a special benefit. The court stated that the trial court’s finding was supported by the evidence and that the Pomerances did not overcome the presumptions.

XXII. SUBMERGED LANDS

West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund. The issue here was whether the Fourth District Court of Appeal properly concluded that the city’s dredging of submerged land did not constitute a permanent improvement under the Butler Act and, therefore, title to the submerged lands did not vest in the city.

In 1946, the city “obtained a permit to construct a municipal marina on state sovereignty lands submerged under the intracoastal waterway.” “The marina was built between 1947 and 1949, pursuant to the Butler Act and its predecessor Riparian Rights Act of 1856, which divested the State of . . . fee simple title to submerged lands upon which upland owners constructed certain improvements in the interest of encouraging” the development and improvement of Florida’s waterfront.

The Supreme Court of Florida held that dredging submerged lands did not constitute a permanent improvement and that fee simple ownership of submerged lands is properly confirmed in the Board of Trustees of the Internal Improvement Trust Fund. The court stated that “divestiture of sovereign lands under the Butler Act is in derogation of the public trust and the Butler Act ‘must be strictly construed in favor of the sovereign.’”

The reenacted Butler Act of 1921 added the condition that the submerged land was “actually bulk-headed or filled in or permanently improved continuously from high water mark in the direction of the channel.” Further, the Supreme Court of Florida stated that “permanently improved” denotes, at the very least, significant structures which are the

927. Id.; see Ass’n of Cmty. Orgs. for Reform Now/Acorn v. Fla. City, 444 So. 2d 37, 38–39 (Fla. 3d Dist. Ct. App. 1983) (citing Meyer v. Oakland Park, 219 So. 2d 417 (Fla. 1969)).
928. Pomerance, 755 So. 2d at 734.
929. 746 So. 2d 1085 (Fla. 1999).
930. Id. at 1087.
931. Id. at 1086.
932. Id.
933. Id. at 1091–92.
934. Bd. of Trs. of the Internal Improvement Trust Fund., 746 So. 2d at 1089 (citing Tsrs. of Internal Improvement Fund v. Claughton, 86 So. 2d 775, 786 (Fla. 1956)).
935. Id.; see Ch. 21-8537, § 1, 1921 Laws of Florida 332, 333.
functional equivalent of the "wharves...warehouses, dwellings, or other buildings," which are referred to in the first paragraph of section one of the Act. Finally, the court rejected the case by case basis which the district court of appeal adopted in State Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor, Inc.

XXIII. TAXATION

Bullock v. Houston Realty & Investment, Inc. The issue here was whether the trial court properly concluded that certain tax deeds were valid to Houston regardless of any interest by Bullock.

Houston filed suit to quiet title on property it had acquired by a quitclaim deed from PB Horizons, Inc., an entity which had purchased the property by a tax deed. Houston was aware that Bullock might have had an interest in the property by virtue of certain recorded final judgments. Bullock raised the affirmative defense that prior to the tax deed sale she had not received proper statutory notice of the sale. Notice of the sale should have been sent to her attorneys whose names and addresses appeared on the face of the final judgment. Bullock also counter-claimed "seeking cancellation of the tax deed and foreclosure of her final judgment." Further, the court "ordered Bullock to deposit $28,900 with the clerk of the court within thirty days 'as preliminary costs' required by section 197.602 of the Florida Statutes to invalidate a tax deed." Bullock failed to make the required deposit, and the court entered an Order on Validity of Tax Deeds. Further, it deemed Bullock had received notice of the tax sale prior to the sale and adjudged the tax deed held by Houston to be valid.

The appellate court held that Bullock had received notice of the tax sale. This was based on section 197.522(1)(a) of the Florida Statutes,

936. Bd. of Trs. of the Internal Improvement Tr. Fund, 746 So. 2d at 1090.
937. Id. at 1091–92.
938. 739 So. 2d 1251 (Fla. 4th Dist. Ct. App. 1999).
939. Id. at 1252.
940. Id.
941. Id.
942. Id.
943. Bullock, 739 So. 2d at 1252.
944. Id.
945. Id. at 1253.
946. Id.
947. Id.
948. Bullock, 739 So. 2d at 1253.
stating that if no address is listed in the tax collector’s statement then no notice is required. Further, Bullock subsequently received notice by virtue of the filing of Houston’s action to quiet title. Finally, though there is nothing in section 197.602 of the Florida Statutes that expressly imposes a requirement on a lienor to deposit the tax arrearage with the clerk of the court, the procedure was not inconsistent with the statute.

Department of Revenue v. Race. The issue here was whether the trial court properly held that taxes are not due when a husband files a quitclaim deed of his residence from himself to himself and his wife as tenants by the entirety where his wife’s name was left off the deed by error.

In 1991, the Races moved from California and purchased a home in Maitland, Florida. Karen, the wife, was pregnant at the time and it was anticipated she would not attend the closing. Therefore, “the deed, mortgage and note were prepared solely in David’s, the husband’s, name.” However, at the last moment Karen attended the closing. Her name was added to the signature page of the mortgage and its balloon rider but left off the promissory note and deed. Therefore, title to the property was not conveyed to Karen. To cure this, David executed a quitclaim deed and paid the minimum documentary stamp taxes. The deed recited that the transfer was “for and in consideration of the sum of $10.00.” Four months after this the Department of Revenue claimed documentary stamps were due, based on the value of the mortgage on the residence.

The court held that taxes were not due under section 201.02(1) of the Florida Statutes when a deed merely corrects an error and no new purchaser or new or additional consideration is involved. Further, the court held that

949. Id.
950. Id. at 1254.
951. Id. at 1254–55.
952. 743 So. 2d 169 (Fla. 5th Dist. Ct. App. 1999).
953. Id. at 169.
954. Id. at 170.
955. Id.
956. Id.
957. Race, 743 So. 2d at 170.
958. Id.
959. Id.
960. Id.
961. Id.
962. Race, 743 So. 2d at 170.
963. Id.; see Am. Foam Indus. v. Dep’t of Revenue, 345 So. 2d 343 (Fla. 3d Dist. Ct. App. 1977).
tax laws are to be construed strongly in favor of taxpayers and against the
government, with all ambiguities resolved in favor of taxpayers.964 Here,
Karen was already liable on the mortgage together with her husband, and
documentary stamp taxes had already been paid on this encumbrance.965
Karen’s name was left off due to error and there was no new, additional, or
previously nonexistent encumbrances which would have required a new
documentary tax due under section 201.02(1).966 Further, the Department’s
Rule 12A-4.014(3) provided that conveyances made to correct a deficiency
in a previous deed are subject only to the minimum tax due.967

Fuchs v. Robbins.968 The issue before this court dealt with whether the
lower court improperly upheld the property appraiser’s original assessment
and improperly declared section 192.042 of the Florida Statutes
unconstitutional.969

In 1992, Joel W. Robbins, a Miami Dade County property appraiser,
assessed the property in question.970 He assessed the land at a value of
$2,277,000 and the building at $3,790,227.971 The taxpayer appealed the
assessment to the value adjustment board, which reduced the assessment of
the building to a value of $50,000.972 Robbins brought an action in the
circuit court to defend the original assessment.973

At trial, Robbins established that he conformed to the eight factors
provided in section 193.011 of the Florida Statutes and when the taxpayer
argued that the value of the building set by the value adjustment board was
correct pursuant to section 192.042, Robbins alleged that section 192.042
was unconstitutional.974 The general master found that section 192.042 was
unconstitutional because the section improperly creates a class of property
not enumerated in Article VII, section 4 of the Florida Constitution.975 The
taxpayer challenged the order, alleging the property appraiser, as a

964. Race, 743 So. 2d at 171; see Dep’t of Revenue v. Ray Constr., 667 So. 2d 859
965. Race, 743 So. 2d at 171.
966. Id.
967. Id.
968. 738 So. 2d 338 (Fla. 3d Dist. Ct. App. 1998).
969. Id. at 339.
970. Id.
971. Id.
972. Id.
973. Fuchs, 738 So. 2d at 339.
974. Id.
975. Id.
constitutional officer, does not have standing to challenge the constitutionality of section 192.042. 976

Robbins did have standing because when a statute is brought into issue by another party, such as it was in the case at hand, an officer may question the validity of the statute as a defense. 977 In *Fuchs*, the taxpayer introduced section 192.042. 978 Section 192.042 provides that real property be assessed on January 1 of each year, with the exception that portions not substantially completed on January 1 shall not have any value. 979

In 1968 there was an amendment to the Florida Constitution which required that regulations secure a "just valuation" of all property. 980 This court found that section 192.042 is constitutional. 981 The statute in the case at hand treats all property not substantially completed the same, and therefore, a just valuation is present. 982 Therefore, this court reversed the lower court's decision holding that the property was not substantially completed and should not have been assessed pursuant to section 192.042. 983

*Gulf Coast Recycling, Inc. v. Turner.* 984 The issue here was whether the trial court erred when it entered a judgment reinstating the property appraiser's original ad valorem tax assessment that the property had a value of $1,704,166. 985

The property at issue here was the Normandy Park apartment complex. 986 Following receipt of the property appraiser's 1997 assessment of the property, Gulf Coast filed a petition with the value adjustment board to have the assessment reviewed. 987 Its argument was that the property was contaminated and that the cost of the cleanup required by the Environmental Protection Agency exceeded the value of the property. 988 Therefore, no potential purchaser would buy the property and it was without present cash value. 989 After an evidentiary hearing, the hearing master found that the

976. *Id.*
977. *Id.* at 340; see *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982).
978. *Fuchs*, 738 So. 2d at 340.
980. *Fuchs*, 738 So. 2d at 340.
981. *Id.*
982. *Id.*
983. *Id.* at 341.
985. *Id.*
986. *Id.*
987. *Id.*
988. *Id.*
989. *Turner*, 753 So. 2d at 712.
property appraiser had failed to consider all of the factors required in section 193.011 of the *Florida Statutes* when he made his assessment.\(^{990}\) He further found that Gulf Coast’s evidence concerning the cost of the required cleanup was convincing and reduced the assessed value of the property to a nominal $100.\(^{991}\) The value adjustment board later adopted these findings.\(^{992}\) The property appraiser filed suit under section 194.036 of the *Florida Statutes* requesting that the original assessment be reinstated because the property was currently being used as an apartment complex, and therefore, pursuant to section 193.011 of the *Florida Statutes*, its use had not been reduced due to the contamination.\(^{993}\) The trial court agreed and reinstated the original assessment.\(^{994}\)

The appellate court held that the trial court erred when it reinstated the original assessment by the property appraiser.\(^{995}\) The court based its opinion on the requirement by section 193.011 to consider all the factors listed in that section when reaching an assessment.\(^{996}\) The property appraiser failed to consider the property’s present cash value, which is the amount a willing purchaser would pay a willing seller for the property.\(^{997}\) Gulf Coast presented several experts that testified that the property had no present cash value.\(^{998}\) The presumption of the correctness of the property appraiser’s assessment is lost when he or she fails to consider all the factors in section 193.011, which occurred here.\(^{999}\)

*Havill v. Lake Port Properties, Inc.*\(^{1000}\) The question before this court was whether the trial court properly concluded that the property appraiser’s exclusive reliance on the cost approach was not appropriate and that the income approach was superior.\(^{1001}\)

Lake Port contended that its 1995 ad valorem tax assessment on Lake Port Square was in excess of “just value” and that the property appraiser failed to follow the requirements of section 193.011 of the *Florida Statutes*.

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990. *Id.*
991. *Id.*
992. *Id.* at 713.
993. *Id.*
994. *Turner*, 753 So. 2d at 713.
995. *Id.*
996. *Id.*
997. *Id.*; see *FLA. STAT.* § 193.011(1), (6) (2000).
998. *Turner*, 753 So. 2d at 713.
999. *Id.*
1000. 729 So. 2d 467 (Fla. 5th Dist. Ct. App. 1999).
1001. *Id.* at 467.
In particular, it contested the correctness of the assessment of the independent living facility. The property appraiser contended that the trial court erroneously placed the burden on him to prove the validity of his assessment, incorrectly placed emphasis on methodology, instead of proof of correctness of the value, failed to treat the assessment as presumptively correct, and made its determination on evidence insufficient to overcome that presumption.

There are three traditional approaches to value—cost, income, and market—that will individually, or in any combination, support an assessment. The property appraiser decides the weight given to each approach depending on the type of property being assessed.

In this case, both sides agreed that the market approach was inappropriate because of the unique nature of the property and lack of comparable sales. Lake Port argued, and the trial court agreed, that the only valid way to appraise the facility was the income approach. The property appraiser stated that he considered but rejected the income approach for several reasons including: 1) a lack of comparable properties; 2) he did not believe he had been given all needed information; 3) the information supplied was incomplete or incorrect; and 4) the complex and unorthodox "income stream" of Lake Port Square made it difficult to accurately assess using the income method. Further, he pointed out that information supplied did not accurately reflect the integrated nature of the facility, but attempted to separate income related only to the living center. Indeed, Lake Port's expert testified at trial that he had only conducted an appraisal of the living center. Royce said that in his opinion this was a "special purpose" property, best valued using the cost approach. Finally,

1002. Id. at 468–69.
1003. Id. at 469.
1004. Id. at 469–70.
1005. Id.; see Bystrom v. Equitable Life Assurance Soc'y, 416 So. 2d 1133, 1144 (Fla. 3d Dist. Ct. App. 1982).
1006. Havill, 729 So. 2d at 470; see Atlantic Int'l Inv. Corp. v. Turner, 383 So. 2d 919, 921 (Fla. 5th Dist. Ct. App. 1980).
1007. Havill, 729 So. 2d at 470.
1008. Id.
1009. Id.
1010. Id. at 471.
1011. Id.
1012. Havill, 729 So. 2d at 471.
Royce testified the county may make a fifteen percent reduction based on the "eighth criteria adjustment" but this is done on a case by case basis.\textsuperscript{1013} The appellate court held that it is not for the trial court to determine which method is superior, as long as the property appraiser's valuation takes into account the statutory factors.\textsuperscript{1014} The property appraiser must rely on his judgment as to the best method and is given "great leeway" as long as he follows the requirements of the law.\textsuperscript{1015} Finally, the trial court overlooked the Second District's holding in Daniel v. Canterbury Towers, Inc.\textsuperscript{1016} The court held that the county appraiser was within his authority to use the cost approach to value a "nursing home" and treat it as a "special purpose" property.\textsuperscript{1017}

\textbf{Kerr v. Broward County.} \textsuperscript{1018} The issue in this appeal was whether a party claiming entitlement to property as an assignee of a judgment against the prior owner of the property can be denied his right to participate in a surplus, which existed after a tax sale was overbid, and where the party's address was not placed on the assignment of judgment.\textsuperscript{1019}

A tax sale was conducted on certain real property located in Broward County, for which there existed a surplus after all tax obligations on the property were paid.\textsuperscript{1020} The excess funds were placed in the court registry since both the county and Kerr made claims to the surplus funds.\textsuperscript{1021} Kerr, who claimed entitlement to the funds as the assignee of a judgment against the prior owner, did not have her address placed on the assignment of judgment or the assignment of note and mortgage, and therefore, Kerr's name was not in the tax collector's statement pursuant to section 197.502 of the Florida Statutes.\textsuperscript{1022} The county replied that Kerr did not qualify as a person entitled to excess proceeds of a tax sale under sections 197.582(2) or 197.522(1)(a) of the Florida Statutes.\textsuperscript{1023} The county further asserted that it

\begin{itemize}
\item \textsuperscript{1013} \textit{Id.}
\item \textsuperscript{1014} \textit{Id.; see} Walker v. Trump, 549 So. 2d 1098, 1103 (Fla. 4th Dist. Ct. App. 1989).
\item \textsuperscript{1015} Havill, 729 So. 2d at 471 (citing Walker, 549 So. 2d at 1103).
\item \textsuperscript{1016} \textit{Id.} (citing Daniel v. Canterbury Towers, Inc., 462 So. 2d 497 (Fla. 2d Dist. Ct. App. 1984)).
\item \textsuperscript{1017} \textit{Id.}
\item \textsuperscript{1018} 718 So. 2d 197 (Fla. 4th Dist. Ct. App. 1998).
\item \textsuperscript{1019} \textit{Id. at} 197.
\item \textsuperscript{1020} \textit{Id.}
\item \textsuperscript{1021} \textit{Id. at} 198.
\item \textsuperscript{1022} \textit{Id.}
\item \textsuperscript{1023} Kerr, 718 So. 2d at 198.
\end{itemize}
had two judgment liens against the prior owner of the property which were recorded in July and December of 1988. 1024

Both parties filed motions for summary judgment for declaratory relief to determine the rights of each party. 1025 The appellate court looked to sections 197.582, 197.522, and 197.502 of the Florida Statutes and found that the appellant, who had superior lien rights, should not be denied her right to participate in the excess funds merely because the instrument that created her liens did not contain her address. 1026

Furthermore, this court referenced two cases, Dawson v. Saada 1027 and DeMario v. Franklin Mortgage & Investment Co. 1028 In Dawson, the Supreme Court of Florida emphasized that only “notice reasonably calculated to apprise landowners of the pending deprivation of their property” is required. 1029 The DeMario court held that the clerk of the court is required to assemble all interested parties when there are excess funds so that the funds may be distributed according to the legal priorities of the claims. 1030 Therefore, this court reversed and remanded the grant of summary judgment with directions for the trial court to determine the priorities of the parties. 1031

Metropolitan Dade County v. Brothers of the Good Shepherd, Inc. 1032 The issue presented was whether the assignee of a ninety-nine year lease, who uses the property for charitable purposes, is entitled to a charitable exemption from ad valorem taxation under sections 196.012(1), 196.196, and 196.192(1) of the Florida Statutes. 1033 The appellate court found that, although the property was used for charitable purposes, the assignee was not the “equitable owner” of the property, and therefore was not entitled to the exemption. 1034

Northcutt v. Balkany. 1035 The issue presented before this court was whether tax certificates issued for unpaid ad valorem taxes were

1024. Id.
1025. Id.
1026. Id. at 199.
1027. 608 So. 2d 806 (Fla. 1992).
1028. 648 So. 2d 210 (Fla. 4th Dist. Ct. App. 1994).
1029. Dawson, 608 So. 2d at 808.
1030. DeMario, 648 So. 2d at 213.
1031. Kerr, 718 So. 2d at 199.
1032. 714 So. 2d 573 (Fla. 3d Dist. Ct. App. 1998).
1033. Id.
1034. Id. at 573–74; see Leon County Educ. Facilities Auth. v. Hartsfield, 698 So. 2d 526, 530 (Fla. 1997); Gautier v. Lapof, 91 So. 2d 324 (Fla. 1956).
1035. 727 So. 2d 382 (Fla. 5th Dist. Ct. App. 1999).
unenforceable when the owner of the tax certificates, who was involved in a bankruptcy proceeding for twenty months, failed to apply for a tax deed within the seven year limit under section 197.482(1) of the Florida Statutes.\textsuperscript{1036} The tax collector asserted that the bankruptcy tolled the seven year period.\textsuperscript{1037}

The landowner involved failed to pay ad valorem taxes in 1987 and 1988 and two certificates were issued.\textsuperscript{1038} The landowner filed for bankruptcy in 1991.\textsuperscript{1039} In 1992, the bankruptcy court ordered the property involved to be conveyed to the appellee, as trustee.\textsuperscript{1040} In 1992, the landowner was discharged from bankruptcy.\textsuperscript{1041} In February of 1997, the landowner, who was still the holder of the certificates, applied for tax deeds.\textsuperscript{1042} In order to avoid losing the property, the appellee paid for the tax deeds.\textsuperscript{1043} The appellee then filed a complaint against the tax collector for the expenses incurred in purchasing the tax deeds, attorneys' fees, and court costs.\textsuperscript{1044} The appellee alleged that the tax collector's refusal to declare the tax certificates null and void violated his duty under section 197.482 of the Florida Statutes.\textsuperscript{1045} The trial court granted summary judgment to the appellee.\textsuperscript{1046}

Section 197.482 provides that after seven years, if a tax deed is not applied for and no other legal proceeding has existed of record, the tax collector shall cancel the tax certificate.\textsuperscript{1047} The tax collector argued that the bankruptcy was a legal proceeding affecting the property covered by the certificates.\textsuperscript{1048} The appellate court agreed.\textsuperscript{1049}

Until 1973, the limitation time for applying for a tax deed was twenty years.\textsuperscript{1050} The former statute, section 197.430, provided a twenty year statute

\textsuperscript{1036} Id. at 383.
\textsuperscript{1037} Id.
\textsuperscript{1038} Id.
\textsuperscript{1039} Id.
\textsuperscript{1040} Balkany, 727 So. 2d at 383.
\textsuperscript{1041} Id.
\textsuperscript{1042} Id.
\textsuperscript{1043} Id.
\textsuperscript{1044} Id.
\textsuperscript{1045} Balkany, 727 So. 2d at 384.
\textsuperscript{1046} Id.
\textsuperscript{1047} FLA. STAT. § 197.482(1) (2000).
\textsuperscript{1048} Balkany, 727 So. 2d at 384.
\textsuperscript{1049} Id. at 386.
\textsuperscript{1050} Id. at 384.
of limitations but was very strict.\textsuperscript{1051} When the legislature changed the twenty year time period to seven years, it also expanded the scope of exceptional circumstances in which the normal limitation period would not apply.\textsuperscript{1052} The exceptions included a situation where a legal proceeding "has existed" affecting the property.\textsuperscript{1053} The appellate court found that since the legislature used the words "has existed" rather than "is pending" it provided for a tolling of the seven year limitation for periods where the property was the subject of a legal proceeding of record.\textsuperscript{1054} Therefore, since the court found that the bankruptcy proceeding acted as a stay of any legal actions regarding the property, and was never lifted, the seven year statute of limitations in section 197.482 was tolled during the period in which the property was subject to the bankruptcy's stay.\textsuperscript{1055} The final judgment was vacated and remanded for further proceedings consistent with the court's opinion.\textsuperscript{1056}

\textit{Sartori v. Department of Revenue.}\textsuperscript{1057} The issue that was decided by this court was whether it was correct to dismiss James Sartori's declaratory judgment action against the Department of Revenue ("DOR") and the Brevard County Tax Collector as untimely.\textsuperscript{1058} Sartori brought suit hoping to obtain an order directing the DOR to refund ad valorem taxes, which had been paid on pollution control equipment located on his dairy farm.\textsuperscript{1059} Sartori asserted that he filed the action within the applicable four year statute of limitations provided in section 197.182(1)(c) of the \textit{Florida Statutes}.\textsuperscript{1060} In 1990, Sartori installed pollution control equipment on his dairy farm and three years later the tax collector claimed that the equipment was subject to real estate taxes.\textsuperscript{1061} Sartori disagreed and asserted that he was not obligated to pay the taxes on the equipment pursuant to section 193.621 of the \textit{Florida Statutes} because his equipment was subject to taxation at salvage value rather than its fair market value.\textsuperscript{1062} However, the tax collector assessed taxes against Sartori's

\textsuperscript{1051} Id.  \\
\textsuperscript{1052} Id.  \\
\textsuperscript{1053} Balkany, 727 So. 2d at 385.  \\
\textsuperscript{1054} Id.  \\
\textsuperscript{1055} Id.  \\
\textsuperscript{1056} Id. at 386.  \\
\textsuperscript{1057} 714 So. 2d 1136 (Fla. 5th Dist. Ct. App. 1998).  \\
\textsuperscript{1058} Id. at 1137.  \\
\textsuperscript{1059} Id.  \\
\textsuperscript{1060} Id. at 1138.  \\
\textsuperscript{1061} Id. at 1137.  \\
\textsuperscript{1062} Sartori, 714 So. 2d at 1137.
property based upon the fair market value.\textsuperscript{1063} In June 1993, Sartori was directed to pay taxes for the years of 1990 through 1993.\textsuperscript{1064} Sartori first filed a petition with the county's value adjustment board, which was never presented.\textsuperscript{1065} Thereafter, in October 1993 the taxes were certified for collection.\textsuperscript{1066}

In the meantime, pursuant to section 193.621(6) of the \textit{Florida Statutes}, the tax collector filed a request with the state Department of Environmental Regulation ("DER") for a recommendation concerning the equipment and section 193.621.\textsuperscript{1067} Sartori paid the bill and in July 1994 the DER advised the tax collector that Sartori's argument was correct and that the equipment was subject to assessment at salvage value.\textsuperscript{1068} The tax collector requested that the DOR refund Sartori, however, the DOR denied the request as untimely.\textsuperscript{1069} Therefore, Sartori filed a declaratory judgment action requesting that DOR be directed to refund the taxes paid.\textsuperscript{1070} The trial court concluded that Sartori's suit was untimely filed pursuant to section 194.171 of the \textit{Florida Statutes} because the August 1996 suit constituted a "contest to a tax assessment" and that Sartori only had until December 18, 1993 to file the lawsuit.\textsuperscript{1071} Sartori argued that section 194.171 was not applicable because he was not asserting a "contest to a tax assessment," but rather was requesting a tax refund since the tax collector had improperly classified his equipment.\textsuperscript{1072} Further, Sartori asserted that under section 197.182 of the \textit{Florida Statutes} and rule 12D-8.021 of the \textit{Florida Administrative Code}, he had four years to institute a lawsuit for a refund.\textsuperscript{1073} This court looked to both of these authorities and section 95.11(3)(m) of the \textit{Florida Statutes}, which provides a four year statute of limitation for actions regarding money paid to a governmental authority by mistake or inadvertence.\textsuperscript{1074}

The DOR brought this court's attention to \textit{Department of Revenue v. Goembel}.\textsuperscript{1075} In that case, the Fifth District found that \textit{Goembel} did not

\begin{itemize}
  \item 1063. \textit{Id}.
  \item 1064. \textit{Id}.
  \item 1065. \textit{Id}.
  \item 1066. \textit{Id}.
  \item 1067. \textit{Sartori, 714 So. 2d at 1137}.
  \item 1068. \textit{Id}.
  \item 1069. \textit{Id}.
  \item 1070. \textit{Id. at 1138}.
  \item 1071. \textit{Id}.
  \item 1072. \textit{Sartori, 714 So. 2d at 1138}.
  \item 1073. \textit{Id}.
  \item 1074. \textit{Id. at 1138–39}.
  \item 1075. \textit{382 So. 2d 783 (Fla. 5th Dist. Ct. App. 1980)}.
\end{itemize}
discuss the specific issue that was presented in this case and was not controlling.\textsuperscript{1076} Therefore, the appellate court found for Sartori stating that his claim was not barred by the statute of limitation in section 194.171, since the suit did not challenge the tax collector’s valuation of his property.\textsuperscript{1077} In the past, courts had distinguished cases involving suits that contest tax assessments and suits contesting property classifications.\textsuperscript{1078} This court looked at past cases and the legislature’s intent to afford favorable tax status to owners of pollution control equipment.\textsuperscript{1079} This intent is seen in section 403.021 of the \textit{Florida Statutes}.\textsuperscript{1080} Further, both section 193.621 and section 193.441 of the \textit{Florida Statutes} explain that pollution control equipment is classified as a special class of property.\textsuperscript{1081} 

The appellate court also answered the DOR’s argument that the refund sought was based upon the retroactive application of a tax exemption and that such request falls within the limitation of time in section 194.171 of the \textit{Florida Statutes}.\textsuperscript{1082} However, the court stated that the tax status accorded to pollution control equipment is not by a tax exemption, but rather a favorable tax status because of the equipment’s classification.\textsuperscript{1083} Therefore, the appellate court reversed and remanded the case in favor of Sartori.\textsuperscript{1084}

\textit{Schultz v. Love PGI Partners.}\textsuperscript{1085} The issue before the Supreme Court of Florida was whether the Fifth District Court of Appeal decision, which conflicted with \textit{Robbins v. Yussem},\textsuperscript{1086} was correct that zoned use of land is not determinative of actual, good faith agricultural use of land for ad valorem tax assessment purposes.\textsuperscript{1087}

The Fifth District Court of Appeal held that when determining the actual, good faith use of the land for tax purposes, the zoned use is but one factor that an assessor or reviewing court may consider along with other factors specified in section 193.461(3)(b) of the \textit{Florida Statutes}, and that

\begin{itemize}
  \item \textsuperscript{1076} \textit{Sartori}, 714 So. 2d at 1139.
  \item \textsuperscript{1077} Id.
  \item \textsuperscript{1078} \textit{See Dep’t of Revenue v. Gerald Sohn}, P.A., 654 So. 2d 249 (Fla. 1st Dist. Ct. App. 1995); \textit{see also Dep’t of Revenue v. Stafford}, 646 So. 2d 803, 804 (Fla. 4th Dist. Ct. App. 1994).
  \item \textsuperscript{1079} \textit{Sartori}, 714 So. 2d at 1139.
  \item \textsuperscript{1080} Id. at 1140.
  \item \textsuperscript{1081} Id. at 1140–41.
  \item \textsuperscript{1082} Id. at 1141.
  \item \textsuperscript{1083} Id.
  \item \textsuperscript{1084} \textit{Sartori}, 714 So. 2d at 1141.
  \item \textsuperscript{1085} \textit{559 So. 2d 1185 (Fla. 1999).}
  \item \textsuperscript{1086} \textit{731 So. 2d 1270 (Fla. 1999).}
  \item \textsuperscript{1087} \textit{Schultz}, 731 So. 2d at 1271.
\end{itemize}
zoning alone is not determinative as a matter of law. The Fifth District reasoned that the assessment must be based on an evaluation of the various factors as provided in section 193.461(3)(b), which include: 1) the duration and continuity of the use; 2) the purchase price and size of the land; 3) whether the land is cared for in a matter to support the alleged use; 4) whether there is a lease, and, if so, its terms; and 5) "such other factors" as may be apparent. Since the zoned use of land was not included as a specific factor by the legislature, it enters the analysis in the catch-all category contained in section 193.461(3)(b). The Fifth District stressed that the key is the actual physical activity being conducted on the land and a determination based exclusively on zoned use as a matter of law would violate the broad examination required by the statute.

The Supreme Court of Florida held that the Fifth District Court of Appeal's reasoning was sound and consistent with Greenwood v. Oates. Therefore, it approved the Fifth District's decision below and disapproved Robbins to the extent it was inconsistent with its opinion.

Sebring Airport Authority v. McIntyre. This case addressed the constitutionality of section 196.012(6) of the Florida Statutes. The raceway applied for an ad valorem tax exemption under section 196.199 of the Florida Statutes and was denied. The trial court granted summary judgment to the property appraiser and the DOR under a declaratory judgment action.

The property was owned by the City of Sebring and leased to the raceway. It was used as a racetrack with permanent seating and annual races. Section 196.012(6) of the Florida Statutes provides that the use of property as a sports facility with permanent seating by a lessee is deemed a use that serves a governmental, municipal, or public purpose when it is open to the general public.

1088. Id.
1090. Shultz, 731 So. 2d at 1271.
1091. Id.
1092. 251 So. 2d 665 (Fla. 1971).
1093. Shultz, 731 So. 2d at 1272.
1094. 718 So. 2d 296 (Fla. 2d Dist. Ct. App. 1998).
1095. Id. at 297.
1096. Id.
1097. Id.
1098. Id.
1099. McIntyre, 718 So. 2d at 297.
The raceway fell within this provision, but the question before this court was whether the legislature can by statutory enactment change the meaning of the terms in Article VII, section 3(a) of the Florida Constitution. The state constitution permits the legislature to provide exemptions by general law in certain situations, however, there is nothing in Article VII, section 3 that allows the legislature to make such an exemption as it did in this case. Other than what is provided in the Florida Constitution, the legislature cannot enact general laws that permit exemptions from ad valorem taxation. The Supreme Court of Florida in Franks v. Davis stated that the state’s constitution is a limitation on the power of the legislature. The specifications of permissible exemptions in the constitution excludes other exemptions. The legislature cannot alter the tax exemption provisions of the constitution.

The Florida Constitution in Article VII, section 3 clearly establishes that exemptions are permissible for municipal property owned and used by the municipality. In the present case, the property was owned by the municipality but not used by the municipality and therefore should not have been entitled to an exemption. Therefore, the appellate court held that the statute was unconstitutional, since the legislature cannot by statutory enactment change or alter the meaning of a provision in the state constitution, as it did in McIntyre.

Turner v. Tokai Financial Services, Inc. The issue here was whether the property appraiser was required to make a deduction for the cost of sales when determining the fair market value.

In this case, Turner and Fuchs were sued by Tokai. Turner and Fuchs assessed the value of some 500 pieces of office equipment. Tokai

1101. McIntyre, 718 So. 2d at 297.
1102. Id. at 298.
1103. Id.
1104. 145 So. 2d 228 (Fla. 1962).
1105. McIntyre, 718 So. 2d at 298.
1106. Id.; see Hillsborough County Aviation Auth. v. Walden, 210 So. 2d 193 (Fla. 1968).
1107. McIntyre, 718 So. 2d at 298.
1108. Id. at 299.
1109. Id. at 299–300.
1110. Id. at 300.
1111. 767 So. 2d 494 (Fla. 2d Dist. Ct. App. 2000).
1112. Id. at 497.
1113. Id. at 496.
1114. Id.
disagreed with the value Turner and Fuchs appraised the equipment and based its claim under section 193.011(8) of the Florida Statutes, which identifies the net proceeds of the sale of property as one factor to be considered when determining just valuation or market value.\footnote{1115} The appellate court found that from the title of the section itself that the property appraiser need only consider the factors but does not have to apply them.\footnote{1116} Further, the method used for valuation and the weight given to the individual factors is left to the discretion of the tax appraiser.\footnote{1117} Therefore, the appellate court reversed the portion of the trial court's opinion that required a twenty percent reduction from the fair market value of Tokai's equipment.\footnote{1118}

XXIV. TIMEShaRES

New legislation impacts timeshares in various ways. There is no longer a prior review by the Department of Business Regulation of timeshare advertising.\footnote{1119} Liability of concurrent or successor timeshare developers is reduced.\footnote{1120} Additionally, timeshare disclosures are now simplified.\footnote{1121}

XXV. TITLE INSURANCE

\textit{Department of Insurance v. Keys Title & Abstract Co.} The issue here was whether the trial court properly held that section 627.782(8) of the Florida Statutes is unconstitutional on its face, because it imposes a burden on nonlawyer title insurance agents that is not also imposed on lawyers who sell title insurance.\footnote{1123} Title insurance can be sold in Florida either by a title insurance agent who is licensed by the Department of Insurance or by a lawyer who is in good standing with the Florida Bar.\footnote{1124} Title insurance rates are regulated by

\begin{itemize}
  \item \footnote{1115} \textit{Id.} (quoting FLA. STAT. § 193.011(8) (1997)).
  \item \footnote{1116} \textit{Turner}, 767 So. 2d at 497.
  \item \footnote{1117} \textit{Id.} (citing Valencia Ctr., Inc. v. Byström, 543 So. 2d 214, 216 (Fla. 1989)).
  \item \footnote{1118} \textit{Id.} at 500.
  \item \footnote{1119} Ch. 2000-302, § 17, 2000 Fla. Laws 3031, 3085-3086 (codified at FLA. STAT. § 721.11 (2000)).
  \item \footnote{1120} \textit{Id.} § 9, 2000 Fla. Laws at 3049 (codified at FLA. STAT. § 721.05 (2000)).
  \item \footnote{1121} \textit{See id.} § 6, 2000 Fla. Laws at 3039–41 (codified at FLA. STAT. § 719.503 (2000)).
  \item \footnote{1122} 741 So. 2d 599 (Fla. 1st Dist. Ct. App. 1999).
  \item \footnote{1123} \textit{Id.} at 600.
  \item \footnote{1124} \textit{Id.} at 600–01.
\end{itemize}
the Department of Insurance under chapter 627 of the *Florida Statutes*.\textsuperscript{1125} Section 627.782(8) authorizes the department to promulgate a rule requiring its licensees to provide relevant information for use in setting rates.\textsuperscript{1126} Based on this authority, the department adopted Rule 4-186.013 of the *Florida Administrative Code*, which requires all licensees under chapter 626 to provide statistical data for use in setting rates.\textsuperscript{1127} However, section 626.8417(4)(a) of the *Florida Statutes* provides that lawyers who are in good standing are exempt from licensure requirements under chapter 626.\textsuperscript{1128} Therefore, since lawyers are not "licensees" of the department, they are not subject to the department's reporting requirements authorized by section 627.782(8) and required by Rule 4-186.013.\textsuperscript{1129} Keys challenged the statute arguing that it violated the constitutional guarantee of equal protection of the law.\textsuperscript{1130} Keys maintained the statute made an arbitrary distinction between lawyers and nonlawyers who sell title insurance.\textsuperscript{1131} The trial court declared the statute unconstitutional as a violation of the right to equal protection of the law.\textsuperscript{1132}

The appellate court held that the statute was constitutional because it serves a legitimate governmental purpose and the legislature had valid reasons to exclude lawyers from the reporting requirement.\textsuperscript{1133} First, an equal protection challenge to a statute that does not involve a fundamental right or a suspect classification is evaluated by the rational basis test.\textsuperscript{1134} A proper application of the test requires consideration of two distinct issues, whether the statute serves a legitimate governmental purpose and whether it was reasonable for the legislators to believe that the challenged classification would promote the purpose.\textsuperscript{1135} There is no doubt that the first requirement is met in that the statute serves a legitimate purpose in enabling the
Department of Insurance to make informed decisions regarding the premium rates for title insurance.\textsuperscript{1136} Second, the legislature had valid reasons to exclude lawyers from the reporting requirement.\textsuperscript{1137} Some of these reasons include: 1) that the inclusion of lawyers would make the reporting requirement more difficult because it is difficult to identify those Bar members who sell title insurance; 2) that the information provided by the lawyers would not be as accurate because many lawyers who sell title insurance do it as part of a broader legal practice; and 3) the expense information provided may not be limited to that involved in selling title insurance.\textsuperscript{1138}

XXVI. TRUTH IN LENDING

\textit{Essex Home Mortgage Servicing Corp. v. Fritz.}\textsuperscript{1139} The issue here was whether the trial court properly awarded damages to the Fritzes for each interest rate change that occurred during the term of the loan.\textsuperscript{1140}

This case involved an original variable rate loan from Essex’s predecessor in interest, Financial Security Savings and Loan Association, for the purchase of the Fritzes’ residence.\textsuperscript{1141} The Fritzes were provided with a truth in lending disclosure statement for variable rate mortgages which advised them that interest rates may increase when the index increased.\textsuperscript{1142} In actuality, the interest rates could also increase in the second year even if the index decreased because of the effect of the interest rate discount applicable to only the first year.\textsuperscript{1143} The Fritzes defaulted on the loan and Essex sued for foreclosure with the Fritzes countersuing for damages under the Truth in Lending Act (“TILA”) for statutory damages.\textsuperscript{1144} The trial court entered a final judgment in foreclosure against the Fritzes, but awarded a set off in the amount of $22,000, finding that the original lender had “‘misstated the effect of the index on the APR of the variable rate loan,’ and that ‘[e]ach successive change in the interest rate resulted in a new transaction and an additional violation.’”\textsuperscript{1145}

\begin{enumerate}
\item \textsuperscript{1136} Keys Title & Abstract Co., 741 So. 2d at 602.
\item \textsuperscript{1137} Id.
\item \textsuperscript{1138} Id. at 603.
\item \textsuperscript{1139} 740 So. 2d 1224 (Fla. 4th Dist. Ct. App. 1999).
\item \textsuperscript{1140} Id. at 1225.
\item \textsuperscript{1141} Id.
\item \textsuperscript{1142} Id.
\item \textsuperscript{1143} Id.
\item \textsuperscript{1144} Fritz, 740 So. 2d at 1225.
\item \textsuperscript{1145} Id.
\end{enumerate}
The appellate court held that the trial court erred in awarding statutory damages for each interest rate change that occurred during the term of the loan.\textsuperscript{1146} It based this on the fact that the TILA states at Title 15 of the \textit{United States Code} section 1640(a)(2) that if a lender fails to comply with the requirements of TILA, the lender is liable to the borrower for statutory damages equal to twice the amount financed, but not less than $200 and not more than $2000.\textsuperscript{1147} Further, section 1640(g) limits statutory damages in cases of multiple failures to disclose to a single recovery unless the lender continues to fail to disclose after recovery has been granted.\textsuperscript{1148} This case did not involve post-recovery disclosure violations.\textsuperscript{1149} Further, there were no subsequent rate changes that constituted new transactions.\textsuperscript{1150} "[A]fter the first rate change, the statement that 'the interest rate may increase if the index increased' would be correct because the previous year's interest rate would no longer be a discounted rate."\textsuperscript{1151} Further, increases in interest rates are not considered new transactions when a creditor, as was done in this case, gives prior disclosure that rates are subject to change.\textsuperscript{1152} Therefore, the Fritzes' total recovery was limited to $2000.\textsuperscript{1153}

\textbf{XXVII. UTILITY FRANCHISES}

\textit{Central Waterworks, Inc. v. Town of Century.}\textsuperscript{1154} The issue here was who has the right to provide water to the Department of Juvenile Justice ("DJJ") when one party has an exclusive franchise agreement and the other has been given the right to purchase its water from others.\textsuperscript{1155} In this case, Central Waterworks was granted an exclusive franchise in 1966 to provide water within a certain geographic location.\textsuperscript{1156} In 1996, the town leased land for the DJJ which provided that it could purchase water from the town.\textsuperscript{1157}

\textsuperscript{1146.} \textit{Id.}
\textsuperscript{1147.} \textit{Id.}
\textsuperscript{1149.} \textit{Fritz, 740 So. 2d at 1225.}
\textsuperscript{1150.} \textit{Id.}
\textsuperscript{1151.} \textit{Id. at 1226.}
\textsuperscript{1152.} \textit{Id.; see Key Sav. Bank, F.S.B. v. Dean, 695 So. 2d 808, 810 (Fla. 4th Dist. Ct. App. 1997).}
\textsuperscript{1153.} \textit{Fritz, 740 So. 2d at 1227.}
\textsuperscript{1154.} \textit{754 So. 2d 814 (Fla. 1st Dist. Ct. App. 2000).}
\textsuperscript{1155.} \textit{Id. at 816.}
\textsuperscript{1156.} \textit{Id.}
\textsuperscript{1157.} \textit{Id.}
The court began by restating that a franchise constitutes a private property right. If the franchisee has the ability to meet its obligations and provide the service proscribed, the franchisee's right can only be alienated by consent, unless full compensation is paid. The first thing the court looked at was the element of consent by Central. The appellate court found that the trial court did not base its determination on this issue on competent, substantial evidence, and therefore, was incorrect in its decision for the town.

The appellate court further found that the trial court erred when it ruled in regards to sections 958.41(14), (16), and (19) of the *Florida Statutes*. The trial court interpreted the statute so that it authorized the DJJ to contract with whomever it chooses and to ignore Central's franchise rights. The appellate court stated this was a misinterpretation of the statute and that it merely provided that the siting of juvenile facilities was to be given priority by other affected governmental agencies and that such provisions did not authorize the abrogation of Central's vested franchise rights in the manner determined by the trial court.

Finally, the appellate court determined that the trial court erred in its application of law. The appellate court, following *City of Mount Dora v. JJ's Mobile Homes, Inc.*, stated:

> When each of two public service entities, whether governmental or private, has a legal basis for the claim of a right to provide similar services in the same territory, and each has the present ability to do so promptly and efficiently, the entity with the earlier acquired legal right has the exclusive legal right to provide service in that territory without interference from the entity with the later acquired right.

Therefore, the appellate court reversed and remanded the case.

1158. Id.
1159. *Cent. Waterworks, Inc.*, 754 So. 2d at 816.
1160. Id.
1161. Id. at 816–17.
1162. Id. at 817.
1163. Id.
1164. *Cent. Waterworks, Inc.*, 754 So. 2d at 817.
1165. Id.
1167. *Cent. Waterworks, Inc.*, 754 So. 2d at 817.
1168. Id.
XXVIII. CONCLUSION

The foregoing survey presents selected cases and legislation of significance to real estate professionals. Florida real estate law is not static, and there seems to be no consistent pattern to its development. The Florida courts and the legislature are actively involved in its continuing evolution. We hope that this survey proves interesting and useful to professionals who may ponder what will happen next.