Property

Ronald Benton Brown*
# Real Property: 1991 Survey of Florida Law

**Ronald Benton Brown**

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## I. Introduction

This survey focuses on the decisions of the Florida Supreme Court which will be of interest to Florida real property lawyers and real estate professionals. Included are three cases from other courts which the author thinks are worthy of attention. The time frame covered by this survey is October 1, 1990 to August 1, 1991.

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II. FLORIDA SUPREME COURT

A. Real Estate Sales Contracts—Liquidated Damages


The buyers signed a contract to buy a residence. When they were unable to obtain financing for the purchase, they sued for the return of their ten percent deposit. The sellers counterclaimed, asserting that the deposit represented liquidated damages. The sellers prevailed in the circuit court and that decision was affirmed by the Fourth District Court of Appeal in a decision which was in direct conflict with an earlier decision of the Third District Court of Appeal, Cortes v. Adair.

The question before the supreme court was whether the deposit forfeiture clause was valid. Liquidated damages clauses are valid in Florida if they meet the two part test established in Hyman v. Cohen. The test requires that,

1. the damages must not be readily ascertainable at the time of the drawing of the contract; and
2. the amount must not be so grossly disproportionate to any reasonably expected damages as to indicate that it was chosen to induce performance rather than to liquidate damages.

The first part of the test was not an issue in this case.

An amount chosen for the purpose of preventing a party from breaching would, by definition, be a penalty. Thus the second part of the test is a method of determining if the parties actually intended to create a penalty clause, regardless of what it is labeled, rather than a liquidated damages clause. If intended as a penalty, the clause would

1. 573 So. 2d 326 (Fla. 1991).
2. Daniel and Catherine Lefemine were the buyers.
3. Judith W. Baron was the seller.
4. The real estate broker, S & N Kurash, Inc., cross-claimed against the seller for one-half of whatever the seller might recover. The broker’s right to recover was not discussed by the supreme court.
5. 556 So. 2d 1160 (Fla. 4th Dist. Ct. App. 1990).
7. 73 So. 2d 393 (Fla. 1954).
not be enforceable. This case illustrates that part two of the test is not the only way to determine whether the parties had an impermissible intent.

The amount involved here would not, per se, have made this clause fail the test. In dicta, the supreme court agreed with the district and circuit courts that the loss of ten percent of the purchase price was neither unconscionable nor so grossly disproportionate to the amount of damages which might reasonably flow from a breach of the sales contract as to show it was intended only to induce full performance. However, there was another factor to consider in this case. The contract provided that upon default,

> the deposit(s) . . . may be retained or recovered by or for the account of Seller as liquidated damages . . . and in full settlement of any claims; whereupon all parties shall be relieved of all obligations under the Contract; or Seller, at his option, may proceed at law or in equity to enforce his rights under the contract.\(^9\)

Florida courts had previously invalidated lease provisions which gave lessors similar options to keep security deposits or seek actual damages.\(^{11}\) Those precedents had first been applied to a real estate sales contract by the third district in the case providing the conflict here, *Cortes v. Adair*.\(^{12}\)

The supreme court interpreted those precedents “to mean that the existence of the option reflects that the parties did not have the mutual intention to stipulate to a fixed amount as their liquidated damages in the event of breach.”\(^{13}\) In a true liquidated damages situation, the buyer takes the risk that the seller’s provable actual damages might be lower than the liquidated amount, and the seller takes the risk that his provable actual damages might be higher than the liquidated amount. However, the addition of the option here changed the very nature of

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9. In this case the deposit was $38,500. 573 So. 2d at 327.
10. Id. at 327-28.
11. Kanter v. Safran, 68 So. 2d 553 (Fla. 1953); Glynn v. Roberson, 58 So. 2d 676 (Fla. 1952); Stenor, Inc. v. Lester, 58 So. 2d 673 (Fla. 1951); Pappas v. Deringer, 145 So. 2d 770 (Fla. 3d Dist. Ct. App. 1962).
12. 494 So. 2d 523 (Fla. 3d Dist. Ct. App. 1986). The supreme court clarified this point by noting that although the contract in *Hutchison v. Tompkins*, 259 So. 2d 129 (Fla. 1970), also gave the seller the option of retaining the deposit as liquidated damages, that case did not deal with that issue. *Lefemine*, 573 So. 2d at 329.
13. 573 So. 2d at 329.
the clause. With the option, the clause merely provided a minimum liability for the breaching buyer, shifting the risk from the seller to the buyer so that the seller might be able to prove higher actual damages. Consequently, the court concluded that the deposit forfeiture clause here was not intended to be a liquidated damages clause and so, apparently for it is unstated, this clause must have been intended as a penalty clause.

The court's conclusion makes sense. A penalty clause is one which "is designed to deter a party from breaching his contract and to punish him in the event the deterrent is ineffective." Since this clause was not intended to fix the amount of the damages, what other purpose might it have had other than to deter the buyers from breaching and to punish them if they did breach? Because penalty clauses are unenforceable in Florida, this seller will have to prove her actual damages.

It is important to note that the court expressly limited its opinion to the facts of this case. It stated:

"[w]e express no opinion with respect to whether the same result would occur if the Uniform Commercial Code were applicable to this transaction, nor do we imply that a liquidated damages clause which merely provided the option of pursuing equitable remedies would be unenforceable."

But there is no readily apparent reason to think the outcome would be different under the UCC.

15. 573 So. 2d at 330 n.5.
16. U.C.C. § 2-718 (1991) provides:
   Liquidation of Limitation of Damages; Deposits.
   (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

U.C.C. § 2A-504 (1991) provides:
   Liquidation of Damages.
   (1) Damages payable by either party for default, or any other act or omission . . . , may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.
B. Attorney's Fees

The court decided four cases involving attorney's fees. The first was Stockman v. Downs. Justice Grimes wrote the opinion for an unanimous court which included Chief Justice Shaw and Justices Overton, McDonald, Barkett and Kogan. The court was presented with the following certified question:

MAY A PREVAILING PARTY RECOVER AttORNEY'S FEES AUTHORIZED IN A STATUTE OR CONTRACT BY A MOTION FILED WITHIN A REASONABLE TIME AFTER ENTRY OF A FINAL JUDGMENT, WHICH MOTION RAISES THE ISSUE OF THAT PARTY'S ENTITLEMENT TO ATTORNEY'S FEES FOR THE FIRST TIME?

The question was answered in the negative.

The prospective buyer of real estate signed a purchase contract which included a clause providing that the prevailing party in any litigation arising out of the contract would be entitled to recover all costs, including attorney's fees. When that prospective buyer sued the sellers for fraud and breach of contract, the complaint included a claim for attorney's fees based upon that provision. The defendant-sellers raised affirmative defenses, but did not make a claim for attorney's fees until after the court had entered the final judgment in their favor based upon a jury verdict. The court had retained jurisdiction for the taxing of costs and the award of attorney's fees, but the court ruled that it was too late for the defendant-sellers to claim attorney's fees.

Florida case law had distinguished between claims for attorney's fees based upon contract and statute. When the claim was based upon contract, it had to be specifically pled or it would be waived. However, it had not seemed necessary to plead a claim for attorney's fees based upon statute. Two recent supreme court cases had held it proper for a party to file a post-judgment motion for attorney's fees based upon contract. However, those cases were distinguishable because the prevailing parties in both cases had pled their claims for attorney's fees in their complaints, although they waited to enter their proof until after

17. 573 So. 2d 835 (Fla. 1991).
The court held that a party to litigation is entitled to notice that the opponent is going to seek attorney's fees. Important decisions about the course of the litigation, including decisions to pursue the litigation or to settle, cannot be made properly without knowing whether the opposing party is going to ask for attorney's fees. Therefore, to allow the matter to be brought up for the first time in a post-judgment motion is unfair. Consequently, the court ruled that a party must plead a claim for attorney's fees whether that claim is based upon contract or upon a statute.\textsuperscript{19} While the holding with respect to attorney's fees under a statute is clearly obiter dictum, it behooves the prudent attorney to plead a claim for attorney's fees, whatever the source.

It is odd that the court would base its conclusion upon the need to protect a litigant from unfair surprise. It seems likely that the only surprise in this case was the one suffered by the successful defendants. The court mentions no evidence that the plaintiff was caught by surprise. Nor does the court mention any evidence on the record that the plaintiff would have been prejudiced in any way. In fact, the court demonstrates that the plaintiff was well aware of the provision because she made a claim for attorney's fees in her own complaint.

The court did note that there is an exception to the rule. A party may waive its objection to its opponent's failure to plead a claim for attorney's fees. Such waiver may be express or it may be implied from the party's conduct which recognizes or acquiesces to the claim. Two examples of implied acquiescence were provided. One example was where the claim for attorney's fees had been raised in the pretrial conference and the plaintiff's pretrial statement listed defendant's attorney's fees claim as an issue. The second example was where the parties had stipulated during trial that the question of attorney's fees would be heard subsequent to the final hearing. The record in this case revealed neither implied nor express acquiescence.

\textit{Insurance Company of North America v. Acousti Engineering Company of Florida}\textsuperscript{20} involved the consolidated review of three con-
The Florida Arbitration Code, in Florida Statutes section 682.11, states: "Unless otherwise provided in the agreement or provision for arbitration, the arbitrator's and umpire's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." Apparently there was no contractual provision for attorney's fees. The prevailing parties sought them under the statute which provides for the award of attorney's fees in successful actions against insurers.

In a per curiam opinion, the supreme court concluded that section 682.11 does not prohibit a successful party to an arbitration from recovering attorney's fees for the attorney's services during the arbitration if those are provided for by contract or statute. Furthermore, the attorney's fees recoverable under section 627.428 does include attorney's fees incurred during arbitration. However, section 682.11 does prohibit the arbitrator from making the award of attorney's fees. That award must be made by a court. In reaching these conclusions, the court explicitly adopted the reasoning of the opinion of the Second District Court of Appeal in Fewox v. McMerit Construction Co.

The supreme court also issued two opinions dealing with the award of attorney's fees in the probate of a decedent's estate. However, these were still subject to revision by the court at the time that this article was written and so their discussion will have to await next year's survey.

C. Real Estate Purchase Options


24. 556 So. 2d 419 (Fla. 2d Dist. Ct. App. 1989). The unanimous en banc opinion was written by Judge Ryder.
26. 581 So. 2d 147 (Fla. 1991).
curred. Chief Justice Shaw and Justice McDonald dissented without opinion.

The lessee had exercised his option to purchase the leased property, but then the parties disagreed about purchase price and the buyer sought specific performance. The option had only specified that the price would be not less than $200,000. The court apparently concluded that the price was to be the fair market value, although how it came to this conclusion is left a mystery. But that still left open the question of whether the fair market value was to be the value of the fee simple absolute or the fee encumbered by the existing lease. There was expert testimony that the freehold encumbered by the lease had a market value of only $275,000, but the value of the unencumbered fee would be $1,684,000.

The trial court had solved the question by “mechanically” applying the doctrine of merger.\(^27\) Apparently, the logic was that the lease would be extinguished upon the conveyance to the buyer if merger occurred and so the buyer was acquiring, and should pay for, a fee simple which was not subject to a lease. The supreme court criticized that approach by indicating that whether equity would allow merger depended upon what would best serve justice and the intent of the parties. The supreme court reviewed the two district court precedents\(^28\) and went to great efforts to reconcile its conclusion with those cases.

The court indicated that the role of the merger doctrine is only to help interpret an ambiguous option term. It can be used because it helps reveal the intent of the parties based upon whether the parties intended for merger to occur. But this author sincerely doubts whether these parties, or most parties to options, have any idea, let alone intentions, about the phenomenon of merger. It is hardly likely parties who were sophisticated enough about real estate law to consider the possibility of merger would have signed an option worded like the one in \textit{Lassiter}.

In the end, the supreme court decided it was “unnecessary to determine whether merger should occur or not”\(^29\) because this option clause was not ambiguous. The option was for the purchase of the “fee title” as might be distinguished from a fee subject to an existing lease. Because the option was for the purchase of the “fee title,” the purchase

\(^{27}\) Id. at 148.
\(^{29}\) \textit{Lassiter}, 581 So. 2d at 149.
price should be the value of the unencumbered fee simple; i.e., $1,684,000.

However, the court went on to state that the result would have been the same even if the doctrine of merger had been applied. The court states that “the term ‘fee title’ expresses an implied intent to merge.” If the court was stating that henceforth it will be implied as a matter of law from such a term that the parties intended a merger, then so be it. The court has the power to make such pronouncements, but the policy which would justify such a pronouncement should be articulated because it is certainly not apparent. Furthermore, to suggest this term reveals the parties’ state of mind regarding merger is surely a judicial fantasy.

This author agrees with Justice Grimes’ concurrence. He stated, “I do not think the doctrine of merger has much to do with the outcome of this case” because it involved a simple matter of contract interpretation. He pointed out that the purchase price should be controlled by the intent of the parties and that the words used by the parties should be used to determine that intent. He proceeded to suggest a general rule which would accomplish the important public purpose of eliminating the confusion produced by poor drafting: “[I]n the absence of specific language to the contrary in the lease, I would hold that the option price would always be computed as if the property were unencumbered by the lease . . . .”

D. Mortgage Foreclosure

*Haven Federal Savings & Loan Ass’n v. Kirian.* Justice McDonald wrote the unanimous opinion in which Chief Justice Shaw and Justices Overton, Barkett, Grimes and Kogan concurred.

The court held unconstitutional that part of Florida Statute section 702.01 which required the severance of all counterclaims in a mortgage foreclosure action. In this case, the mortgagor had asserted both affirmative defenses and counterclaims. These were based upon allegations that the lender concealed the serious financial troubles of

30. *Id.* at 148.
31. *Id.* at 149.
32. *Id.* (emphasis added).
33. 579 So. 2d 730 (Fla. 1991).
34. Justice Harding did not participate.
35. *Fla. Stat.* § 702.01 (1987). This section has not been modified by the legislature in the period between its enactment in 1987 and the present.
the development, and its own financial involvement in the development, from potential buyers to whom it was providing mortgage financing.

In the circuit court, the lender successfully moved to sever the counterclaims based upon the mandate in section 702.01 that “the court shall sever for separate trial all counterclaims . . .” in mortgage foreclosures. The lender then convinced the trial court to strike the affirmative defenses because they were based upon the same grounds as the stricken counterclaims and, because the court had eliminated all the defenses, to grant summary judgment in the lender’s favor. The First District Court of Appeal reversed, holding the statute unconstitutional to the extent that it conflicted with the Rules of Civil Procedure, a conclusion requiring review by the supreme court under article V, section 3(b)(1) of the Florida Constitution. The supreme court affirmed.

Matters of substantive law are within the province of the Florida legislature, but matters of judicial practice and procedure are within the exclusive realm of the supreme court. In exercising its power, the court had adopted the Florida Rules of Civil Procedure. Rule 1.270(b), in contrast to the statute’s mandatory language, allows a judge to sever counterclaims in order to further convenience or to avoid prejudice.

The court distinguished this case from VanBibber v. Hartford Accident & Indemnity Insurance Co. where it examined the statute which prohibited the joinder of insurance companies in suits against their insureds. In VanBibber, the court had found the statute was based upon a clear legislative intent and policy to create substantive rights. Consequently, the statute prohibiting joinder was not an unconstitutional attempt by the legislature to regulate procedure. However, the legislative history behind the mandatory severance provision did not reveal a similar clear legislative intent to create substantive rights. The House Commerce Committee had reported that it was but one of a number of amendments which were designed “to create a simple, equitable, and inexpensive method by which a mortgage lender could enforce an assignment of rents contract.” Absent the legislative intent to create a substantive right, the court apparently concluded that this

37. 439 So. 2d 880 (Fla. 1983).
38. E.g., the substantive right to foreclose mortgages undelayed by counterclaims.
39. Kirian, 579 So. 2d at 733 n.1.
was simply a part of "the machinery of the judicial process . . . ."\textsuperscript{40} As such, the legislature's mandatory rule was unconstitutional.

Furthermore, the supreme court found that the trial court had erred in striking the affirmative defenses merely because the grounds for those defenses were the same as the grounds for the counterclaims. The court pointed out that "counterclaims and affirmative defenses are separate and distinct terms."\textsuperscript{41} So a rule allowing or requiring the severance of a counterclaim should not be applied to affirmative defenses. Further, "[a] court cannot grant summary judgment where a defendant asserts legally sufficient affirmative defenses that have not been rebutted."\textsuperscript{42} Of course, it may be argued that this is merely \textit{obiter dictum}, but it is so completely sensible that it should be followed.

If the trial court had stricken the affirmative defense because it was based upon inappropriate grounds, that would have been one thing, but there was no such ruling. Nor could there have been because fraud and misrepresentation are appropriate affirmative defenses to an action in equity such as foreclosure. It almost seems that the trial court based its ruling on a misguided election of remedies theory, i.e., the mortgagor was required to choose between using fraud and misrepresentation as a defense or as a counterclaim, and having used it as a counterclaim, it was precluded from using it as a defense. Whatever the justification for the trial court's ruling, it is hoped that this precedent will prevent similar rulings.

E. \textit{Homestead}

\textit{City National Bank of Florida v. Tescher.}\textsuperscript{43} Justice Harding wrote the unanimous opinion in which Chief Justice Shaw and Justices Overton, McDonald, Barkett, Grimes and Kogan concurred.

Article X, section 4(c) of the Florida Constitution provides that "homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child." In this case, the decedent owned homestead property and was survived by a spouse, though not by a minor child. Read literally, as was argued on behalf of one of

\begin{itemize}
  \item \textsuperscript{40} \textit{Id.} at 732 (quoting \textit{In re} Fla. Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).
  \item \textsuperscript{41} \textit{Id.} at 733.
  \item \textsuperscript{42} \textit{Id.}
  \item \textsuperscript{43} 578 So. 2d 701 (Fla. 1991).
\end{itemize}
decendent's adult children, the constitution would seem to prohibit homestead property from being devised to anyone except the spouse, and the homestead in this case had not been devised to the spouse. Since the spouse, in this case the husband, had previously renounced his rights to the decedent's estate, under the laws of intestate succession, the property would be inherited by the decedent's two adult children.

The supreme court disagreed. It concluded that the husband's valid waiver of all rights to homestead in an antenuptial agreement was the legal equivalent, at least for purposes of this constitutional provision, of his having died first. Applying this legal fiction, the decedent was survived by neither spouse nor minor children. Consequently, the prohibition from devising the property was inapplicable. As the will had a valid residuary clause, the home could pass by it to the residuary legates.

The court looked to the historical purpose of the homestead provision. It was designed to preserve the family by protecting a) surviving spouses and b) surviving minor children from the loss of the family's homestead by restraining the decedent's ability to transfer it. However, restraints on alienation, particularly alienation by devise, should be narrowly construed. Decedent's death left no one who was entitled to the provision's protection. Its interpretation should be narrowed so that it would not be applied in this inappropriate situation. The court adopted this legal fiction to simplify the narrowing process.

F. Mechanics' Liens

Stresscon v. Madiedo. Justice Harding wrote the opinion in which Chief Justice Shaw and Justices McDonald, Barkett, Grimes and Kogan concurred. Justice Overton dissented without opinion.

Florida Statute section 713.16(2) provided that when a payment was to be made by the owner to a construction contractor, the owner could make a written demand for a written statement of the account made under oath from any person who might claim a mechanics' lien.

44. Technically, mechanics' liens have been replaced by construction liens in Florida. 1990 Fla. Laws ch. 90-109, § 1; see FLA. STAT. § 713.001 (Supp. 1990).
45. 581 So. 2d 158 (Fla. 1991).
46. FLA. STAT. § 713.16(2) (1987). Section 713.16(2) was unchanged as of the time this article was written, although Florida Laws chapter 90-109 transformed the topic into "Construction Lien Law." FLA. STAT. § 713.001 (Supp. 1990).
Failure to provide the statement, or making a false or fraudulent statement, would cause the loss of the lien. In this case, a sub-contractor had received a letter demanding a written statement of its account and had sent a timely and accurate statement, but the statement had not been under oath. The sub-contractor attempted to cure this oversight by filing an affidavit that the statement was accurate in the foreclosure action. The trial court was unimpressed and had granted summary judgment against the sub-sub-contractor and the Third District Court of Appeal affirmed, certifying the following question to the supreme court:

MAY THE FAILURE TO NOTARIZE AN OTHERWISE TIMELY AND ACCURATE STATEMENT OF ACCOUNT UNDER SUBSECTION 713.16(2), FLORIDA STATUTES (1987), BE CURED BY VERIFICATION AFTER THE FACT, SO LONG AS THERE IS NO PREJUDICE TO THE OPPOSING PARTY?

The supreme court agreed with the district court and answered the question in the negative.

The court decided this was a simple matter of statutory interpretation. The court had previously pointed out that mechanics' liens are purely statutory creatures and, consequently, strict compliance with the statute's requirements is "a prerequisite for a person seeking affirmative relief under the statute."47 The statute required that a lienor would lose the lien if it failed to provide a written statement under oath within thirty days of demand. When that had not occurred, the lien was lost. This section simply does not allow for cure or for accepting for substantial compliance, even where that does not prejudice another party, as do some other sections.

G. Landlord and Tenant

Fitzgerald v. Cestari.48 Justice Ehrlich wrote the opinion for an unanimous court. A seven year-old-child was injured when she ran through a sliding glass door of the house which her parents were leasing. The door was not made of safety glass and was not marked by decals so it would be visible when closed. The trial court granted the

47. 581 So. 2d at 160 (quoting with approval Gonas v. Home Elec. of Dade County, Inc., 537 So. 2d 590 (Fla. 3d Dist. Ct. App. 1988)).
48. 569 So. 2d 1258 (Fla. 1990).
landlord’s motion for summary judgment which was supported by affidavits that the glass was in the door when the lessors purchased the house, that the glass was not marked as to type, and that the type of glass was not readily discoverable.

The complaint alleged two separate grounds of liability. The first was that the lessors “were negligent for failing to ascertain that the door was not made of safety glass and for failing to conform their premises to the Southern Standard Building Code which requires safety glass be used in sliding glass doors.”49 The supreme court acknowledged that a landlord does have a duty to reasonably inspect residential premises before the tenant moves in and does have a continuing duty to exercise reasonable care to repair dangerous conditions of which it has notice. However, the landlord does not have a duty to have an expert determine if an unmarked glass door is made of the type of glass required by the building code. Furthermore, the landlords could not be held liable for failure to repair a defect of which they did not have notice.

The court does not discuss the question of whether the landlords could have been held strictly liable for leasing residential premises in a defective or dangerous condition.50 Nor does it suggest what might be the effect of leasing residential premises which are in violation of the building code. It merely indicated the issue would not be discussed as the claim was not raised in the trial court that liability should be based upon the code violation.51

The second claimed basis for liability was the landlord’s failure to place decals on the sliding glass doors. The supreme court concluded that the landlords did not have a duty to place decals or the like on the glass doors visible because they did not constitute “the type of ‘dangerous condition’ which a landlord is in a better position than the tenant to guard against.” If a warning of the presence of the closed sliding glass door is needed, the tenants in possession of the premises have that responsibility.

49. Fitzgerald, 569 So. 2d at 1260.
51. Fitzgerald, 569 So. 2d at 1260 n.2.
III. INTERESTING OPINIONS FROM OTHER COURTS

A. Seller’s Duties to Buyer: Florida Third District Court of Appeal

_Futura Realty v. Lone Star Building Centers, Inc._ 52 This case involved a per curiam opinion by Judges Nesbitt, Baskin and Jorgenson. The buyer of real property claimed a) that the seller had committed fraud by failing to reveal pollution problems and also that b) the seller and a prior owner were strictly liable for the harm to the site caused by the use of ultrahazardous chemicals. The trial court granted summary judgment for the defendants and the district court affirmed.

The Florida Supreme Court had imposed on the seller the duty to disclose facts which would materially affect the value of the property which were not readily observable and were not known to the purchaser in _Johnson v. Davis._ 53 The supreme court had held that the seller’s duty “is equally applicable to all forms of real property, new and used.” 54 However, the third district ignored the plain meaning of that statement and found that “when read in context, as it must be, [that statement] clearly applies solely to the sale of homes.” 55 The district court based its conclusion on how it divined the supreme court might approach a nonresidential case, but without any articulated analysis.

It is possible to distinguish between residential and commercial transactions on a number of theories: equitable, economic or moral. In a commercial transaction, the parties might be assumed to be of equal bargaining power and to operate at arm’s length rather than the unequal positions of developer and home buyer. But disparity in bargaining power was not considered a factor by the supreme court in _Davis_ and, in fact, did not appear to exist in that case which involved individual sellers rather than a developer.

Nor can economics be seen as supporting the district court’s posi-

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53. 480 So. 2d 625 (Fla. 1985).
54. _Id._ at 629.
55. _Futura Realty_, 578 So. 2d at 364. The reference to context might possibly be to the fact that the supreme court in _Johnson v. Davis_ only discussed the sale of homes, for that was what the case concerned. Consequently, when articulating the rule, the supreme court phrased it as “where the seller of a home knows of facts materially affecting the value of the property . . . .” 480 So. 2d at 629. However, the district court opinion did not specify that it was this language upon which it relied in making its decision.
It might be argued that the cost of repairing latent defects can efficiently be passed on to the customers of the buyer's business while a home buyer has no similar efficient mechanism to spread its similar costs. However, that would ignore the fact that this ruling will probably increase the cost of every commercial real estate purchase by requiring buyers to expend money looking for latent defects about which the seller already is aware. Certainly it would be more efficient to require the seller to reveal facts within its knowledge rather than to require every commercial buyer to engage in an extensive and expensive search for latent defects. Moreover, it is not an efficient mechanism for spreading the cost to buyer's business customers. The buyer’s search for latent defects will often fail to disclose existing problems because, being latent, the problems may not be discovered. The only beneficiaries of this policy are professional inspectors.

It may be possible to justify the district court's position on the basis of a philosophy which favors leaving the common law undisturbed. The departure from the common law in Davis seems to be based on moral philosophy rather than economics; i.e., that it is good or right to protect consumers and that sellers who fail to reveal what they know about latent defects are behaving wrongfully. But if the point is to encourage correct behavior, it is irrational to allow conduct by commercial sellers which would be considered blameworthy by residential sellers. What possible benefit could there be to society from the existence of a “double standard” in this area? It should also be noted that consumers are no less able, in general, to hire inspectors to discover latent defects than are buyers of commercial property.

It may be arguable that it is the nature of commercial property which makes the commercial sale distinguishable from a residential sale. Perhaps there is something about commercial property that makes it more likely that a latent defect will remain undiscovered by the diligent inspection of a prudent buyer. However, there is nothing evident in this case to suggest anything that might provide the basis for a reasoned distinction as a matter of law. This author concludes that the district court has erred in failing to apply the principle of Davis v. Johnson to the sale of a commercial property. It has been reported that the buyers have sought review by the Florida Supreme Court based upon the claim that the decision in this case conflicts with the decisions of other districts.66 It will be interesting to see whether the supreme

court agrees with this author when the court considers the issue, whether in this or some other case.

On the second issue, the district court seems to have fared better. Under the common law of Florida, a landowner has a duty not to permit ultrahazardous activity which causes harm to a neighbor's land. In this case, the plaintiff sought to have the scope of the landowner's duty expanded to protect subsequent owners of the same land. The court reasoned that a subsequent owner can protect itself from the harm by carefully inspecting the property before acquiring it and by providing for the possibility of such harm, or risk of it, in the negotiations over the price. That distinguishes the subsequent owner from the otherwise defenseless neighbor whom the strict liability rule evolved to protect. Of course, the court's reasoning on this issue would make more sense if the seller were required, based upon Davis v. Johnson to reveal the existence of latent defects, particularly hazardous defects, such as existed in this case.

B. Arbitration: Florida Fifth District Court of Appeal

Laniewicz v. Rutenberg Construction Co. Judge Sharp wrote the opinion in which Judges Cobb and Gorshon concurred.

The buyers of a new house sued the seller/builder for damages arising from construction defects in the home. The sales contract included a provision that: "[a]ll claims or disputes between the Buyer and Seller arising out of this agreement shall be decided by arbitration . . . ." Accordingly, the matter was referred to arbitration.

The arbitrator decided that there were construction defects which were the fault of the builder. But because the defects had not been fixed over the two year period and because the defects could most economically be fixed if the builder took the house back, the arbitrator decided that the sale should be rescinded. The buyers objected. That was not the relief which they had sought, but the circuit court confirmed the arbitration award.

The District Court of Appeal reversed on two grounds. First, re-
scission is an equitable remedy and, as such, it is available only where the remedy at law; i.e., monetary damages, would be inadequate. Of course, the claimant had not bothered to enter evidence on that point because it was not an element of the relief sought. Second, rescission is a remedy which a party may elect. But here, neither party had elected rescission. Consequently, the arbitrator had no basis for awarding it. Consequently, the circuit court should not have confirmed the award.

Thus far, the discussion reveals nothing remarkable about this case. However, the court goes on to comment that, "we are essentially reviewing an arbitrator's award which finds that the arbitration contract should be rescinded."61 That introduced an interesting question. Can an arbitrator make such an award? It may be argued that an arbitrator ordering rescission of the contract containing the arbitration clause would eliminate the contractual authority of the arbitrator, eliminating the effect of the arbitration award. Completing the circle, that would eliminate the rescission award, leaving the contract in effect. The court posited, in dictum, that “[w]e are hesitant to say that under no circumstances could an arbitrator determine that a contract should be rescinded . . . .”62 but it is unclear that this is even the point which the court is addressing and the court did not provide any more on the point.

There is little doubt that under the Federal Arbitration Act63 rescission based upon fraud in the inducement is a question which can be decided by arbitrators based upon the logic that the arbitration clause is a separate contract.64 Florida courts have followed similar logic, drawing the distinction between the arbitrable claim that the overall contract was subject to rescission65 and the claim that the arbitration clause was the product of fraudulent inducement which must be de-

61. Id. at 204.
62. Id.
65. Shearson/Lehman Bros. v. Ordonez, 497 So. 2d 703 (Fla. 4th Dist. Ct. App. 1986); Post Tensioned Eng’g Corp. v. Fairways Plaza Assocs., 412 So. 2d 871, 874 n.3 (Fla. 3d Dist. Ct. App. 1982).
Of course, since the obligation to arbitrate is contractual, the scope of the arbitration can be limited by the contract. In this case, there was no hint that the parties intended to limit the type of relief which the arbitrator could award. But the problem here was that the way the clause was drafted left it open, at least arguably, to different interpretations. If the parties really intended that "[a]ll claims or disputes arising out of this agreement" were to be decided by arbitration, then logically they must have intended that the arbitration clause survive the extinguishment of the contract by its merger into the deed at the closing. Similarly, they also must have intended that the arbitration clause survive any rescission of the contract of sale because the parties intended that the arbitration clause be an independent agreement.

Such matters should be considered when an attorney is drafting an arbitration clause. The attorney should be careful to indicate clearly that the arbitration clause is intended to (or not to) include the possibility of an arbitration award of rescission and that it is intended to (or not to) survive the closing of a real estate sale. Of course, similar consideration in drafting of all the other clauses, e.g., attorney’s fees clauses, is also appropriate.

C. RICO: United States Court of Appeals for the Eleventh Circuit

*United States v. One Single Family Residence.*67 Circuit Judge Hatchett wrote the opinion for the panel, which also included Judges Clark and Dubina, affirming the decision of District Judge Lenore Carrero Nesbitt.

Two brothers purchased a vacant lot with plans to build a house there and sell it for a profit. When the federal government filed a forfeiture complaint68 alleging that the lot had been bought and improved with drug proceeds, brother Gary claimed that he was an innocent owner and his investment was comprised of funds from legitimate sources. The government showed that brother Curtis had "very few reported legitimate sources of income or employment, a bad credit rating,

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67. 933 F.2d 976 (11th Cir. 1991).
and a reputation as a drug smuggler.” Consequently, the government contended, Gary's knowledge of the illegal source of his brother's share deprived Gary of his innocent owner status under the statute, leaving him defenseless in the forfeiture action.

The Court of Appeals framed the issue as follows: “[W]hether a property owner who is aware that a co-owner has purchased and improved the real property with drug proceeds may qualify as an innocent owner whose interest in the property is exempt from forfeiture under 21 U.S.C. § 881(a)(6)?” And the Court of Appeals answered the question in the negative. It was uncontested that there was a substantial connection between the property and Curtis' involvement with the drug trade. The burden of proof was on Gary to prove a) that he lacked actual knowledge that his co-owner's investment was made with tainted funds and b) that his own investment was made with money from entirely legitimate sources in order to qualify as an “innocent owner.” Gary did not carry his burden and, consequently, lost his land.

The court rejected the rationale of United States v. Premises Known as 2639 Meeting House Road which concluded that Congress had not intended to deprive legitimate investors of their property. The court decided to classify people as falling into one of only two possible categories, innocent or wrongdoer. “If one is an innocent owner, no amount of that person's or entity's funds are forfeitable . . . . On the other hand, if one is a wrongdoer, the full value of the real property is forfeitable because some of the funds invested are traceable as the statute dictates . . . .” Thus it appears that a form of the doctrine of caveat emptor, which is becoming so outmoded in other areas of law, is alive and well in RICO law.

The court did, however, recognize that RICO has some limits. Forfeiture is unavailable against a co-owner who learns about the illegal sources of his co-owner after having made the investment, but only if he makes every reasonable effort possible to withdraw from the co-ownership after learning of the problem. Moreover, the burden of

69. One Single Family Residence, 933 F.2d at 978.
71. One Single Family Residence, 933 F.2d at 981-82.
72. Id. at 982 n.5.
73. This is the “Calero-Toledo dicta.” United States v. One Single Family Residence, 683 F. Supp. 783 (S.D. Fla. 1988), interpreted language in Calero-Toledo v. Peterson Yacht Leasing Co., 416 U.S. 663, 689 (1974), to require an “innocent owner” claimant to have done everything reasonably possible to prevent illegal use of his property.
proof is on the co-owner who is claiming to be innocent of any knowledge of the connection to the tainted money. Failure to carry that burden will mean the loss of the property. The moral of this case, for those who had not heard it before, is to be very careful with whom you get involved. Big Brother is watching you, and it is just possible that Big Brother is going to seize your land.

IV. CONCLUSION

These cases illustrate that real estate law is neither for the faint-of-heart nor the ill-informed. Real estate lawyers cannot rely upon the law remaining static, but the basic skills of drafting, of contract interpretation and of statutory interpretation are still at the crux of the most important disputes. The critical time for the modern real estate lawyer to exercise those skills is before any document is drafted, whether that document be a real estate purchase option, a real estate purchase contract, a will, an affidavit or a complaint.